

PRISONS AND DISASTERS

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DEDICATION PAGE

This Doctoral thesis is dedicated to the memory of my beautiful mother, Sherry Lea Savilonis, who always encouraged me to grow and further my education.

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ABSTRACT

Prisons are not prepared to respond to and recover from disasters. Prisoners are a vulnerable subset of our population, often underrepresented, poor, or a member of a marginalized group. Prisoners require protection during disasters, as they do not have the capability or freedom to make independent decisions to protect themselves. However, they seem to be a forgotten subset of our population when it comes to emergency management. In fact, pets have received far superior treatment and care than prisoners during disasters. With the majority of prisons across the country facing limited funding, staffing shortages, and a lack of resources, emergency management planning has fallen to the side. Without some form of Federal oversight or guidance, correctional facilities across the country will remain unprepared to respond to and recover from disasters, failing at their duty to protect prisoners, as well as the public.

Key Words: Prisons; Disasters; Emergency Management

INTRODUCTION AND BACKGROUND

The magnitude of disasters is not always predictable. Several disasters throughout the world have exceeded planning models, simulations, and assumptions; some no notice events providing little or no warning that they are about to occur (e.g. 9/11 Attacks, Indian Ocean Tsunami, 2004; Hurricane Katrina, 2005; Fukushima Nuclear Disaster, 2011). As a result, emergency management professionals throughout the world are planning, calculating, and drawing up scenarios that could occur in an effort to prepare for and respond to the next big (or small) disaster. Officials have planned for everything from school shootings to space weather events. However, there is one highly plausible factor that has not been planned for: which is disasters affecting prisons.

Prisons are not prepared to respond to and recover from natural and manmade disasters. However, prisons must take appropriate actions to save lives and safeguard their at risk populations during disasters, because they are legally responsible for the welfare of prisoners. Disasters can lead to a violation of prisoners' constitutional and statutory rights and pose several types of injury (physical, emotional, mental, health), as well as public safety risks. There is a broad spectrum of concerns when responding to and recovering from disasters at prisons. Specific concerns include the standards of care for prisoners, the dispersion of prisoners, records management, and staffing shortages. Other problems include shortfalls in the resources required to continue essential functions at correctional facilities and the resources necessary to carry out protective action decisions (i.e. decisions made in a timely manner to protect public health and safety) during the response and recovery phases. These concerns are especially significant because many prisons throughout the nation house thousands of prisoners, which can make the emergency response and recovery process much more challenging.

This study seeks to better understand why prisons are unprepared, it demonstrates why prisons should be included in emergency preparedness planning, and it identifies what policy and planning recommendations, as well as corrective actions need to be made to ensure prisons are integrated into the emergency management process. This study is a descriptive mixed methods design that uses the Advocacy Worldview framework (Creswell, 2009). This framework was selected, because the issue of prisons being unprepared to respond to and recover from disasters is intertwined with politics and organizational agendas, concluding with recommendations for reform. Existing laws, policies, and other governmental documents were reviewed to determine their applicability to correctional facilities and to identify ambiguities in the laws. Additionally, a survey was designed, and used, to identify the needs and challenges facing prison systems during disasters and whether prisons would be receptive to applying for and receiving appropriated grant funding to implement Federal policy or guidance on this issue. Several key informant informational interviews were conducted with senior government officials within the fields of emergency management, corrections, and public health. These interviews provided valuable information, helping to shape recommendations, while better understanding organization behaviors and attitudes towards this issue. The findings from this research confirm that the existing structures in place do not include prisons in emergency management efforts, and that reform is necessary for ensuring prisons are prepared to respond to and recover from disasters so prisoners' rights, and public safety, is protected. Several recommendations can be drawn from the findings, which include policy reform and providing dedicated grant funding. Additional research is required to better assess the needs and capabilities of correctional facilities across the country, and to further build out the specific guidance and program criteria contained in the recommendations.

This thesis is comprised of three publishable papers tailored for inclusion in the Journal of Emergency Management (JEM). The Journal of Emergency Management is a peer-reviewed journal that focuses on Emergency Planning and Response, Risk Management, Disaster Recovery, and Business Continuity. The journal is edited and reviewed by international emergency management subject matter experts. The first paper focuses on why prisons are unprepared to respond to and recover from disasters. It discusses why prisons are not prepared for disasters, the severity of this issue, and the need for further research. The second paper discusses the trends and results of a survey conducted of senior prison officials assessing the needs of prison capabilities during disasters, answering the question: Is policy reform necessary and appropriate for ensuring correctional facilities are better prepared to respond to and recover from disasters? The third paper provides specific recommendations for improving disaster preparedness in prisons, ending with a call for action.

PAPER 1: UNDERSTANDING WHY PRISONS ARE UNPREPARED TO RESPOND TO AND RECOVER FROM DISASTERS

Introduction

“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.”¹

Prisons² are not prepared to respond to and recover from natural and manmade disasters. Disasters affecting prisons can include communicable disease outbreaks, cyber attacks, earthquakes, exposure to hazardous materials, floods, hurricanes, prison riots, power outages, and wild fires. These hazards, combined with the general lack of preparedness in prisons, leaves prison populations, and the public at risk, as disasters affecting, prisons can result in serious and unintended consequences.

There is a broad spectrum of concerns when responding to and recovering from disasters at prisons. Specific concerns, which include both short-term and long-term impacts, are the standards of care for prisoners, the dispersion of prisoners, records management, and staffing shortages. Other concerns include shortfalls in resources required to continue critical operations at correctional facilities and resources necessary to carry out protective action decisions during the response and recovery phases. These concerns are especially significant because many prisons throughout the nation house thousands of prisoners, which can make the response and recovery process much more challenging.

¹ This was a quote from a Federal official interviewed as part of this research, who was part of the response and recovery during Hurricane Katrina.

² For the purpose of this paper, a prison is defined as a facility that houses a person who is under the care and custody of the Federal, State, or County government, and includes jails, correctional facilities, and state hospitals. In some cases, a facility may be contracted out to a private entity that has been granted the same authority as the government.

The number of individuals housed in correctional facilities throughout the nation is significant. In 2011, there were 1,500,000 prisoners held in over 3,300 Federal, State and County jails throughout the United States (BJS, 2011). In the same year, there were 242 Federal disaster declarations signed by the President of the United States (FEMA, 2011).³ Each of these disasters occurred in a State or County where a prison was located, several which affected prison populations. Furthermore, the National Sheriff's Association reports that in the United States, a jail is evacuated every six to seven weeks (National Sheriff's Association, 2008). With over 3,300 correctional facilities geographically dispersed throughout the United States, some located in areas with a high probability of a natural disaster occurring (e.g. earthquake, fire, flood, hurricane), assuming that a facility will not be affected by a disaster is a costly assumption to make.

Issue

The implications of this issue are quite significant. Prisons are legally responsible for the welfare of prisoners. Prisons are required to uphold statutory and case laws that protect prisoners' rights. During disasters, prisons need to take action to protect prisoners from preventable harm, so their rights are not violated. However this is not being done. The reason for this lack of preparedness is a result of the Federal government not having a policy or guidance in place that prisons can reference when planning for emergencies.⁴ Without some form of Federal oversight or enforcement, correctional facilities across the country will remain

³ The Governor's request for a Federal disaster declaration occurs when a disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the local governments, and that Federal assistance is necessary damage. The damage is so significant, that County and State governments are eligible to receive Federal reimbursement for costs associated with response and recovery (FEMA, 2012).

⁴ The National Institute for Corrections has issued checklists and other general guidance documents; however, these are not easily made available to prisons across the nation (many do not know they even exist), and are not required or enforceable (NIC, 2013).

unprepared to respond to and recover from disasters, failing at their duty to protect prisoners, as well as the public.

The recommendations by emergency management and law enforcement officials on how best to address this topic varies, as many recommendations have been formed on poor assumptions and are contrary to current statutory and case laws. To quote a Federal official who was interviewed as part of this research, his recommendation was to write into law that prisoners are left in their cells during a disaster, regardless of the outcome.⁵ Despite the varying attitudes of officials, the Federal government is still responsible for “coordinating the government’s role in preparing for, preventing, mitigating the effects of, responding to and recovering from all domestic disasters” (FEMA, 2012). In other words, the government is responsible for reducing and mitigating hazards that threaten society, which includes those who are incarcerated. Securing our Nation’s prisons during disasters is a mission critical task that must be addressed by the Federal government.

The purpose of this paper is to discuss why prisons are not prepared for disasters, the severity of this issue, and the need for further research. Further research will assist researchers in providing recommendations on how prisons can be integrated into the emergency planning process.

Statement of Problem

There have been a number of disasters where correctional facilities have been severely impacted. Examples include the Galveston County Correctional Facility during Hurricane Ike (ACLU, 2009); the Ohio State Penitentiary, which suffered from a large fire (History, 2012); the Orleans Parish Prison during Hurricane Katrina (ACLU, 2006); the Pennsylvania State

⁵ To quote this official directly, he said the government “should just leave them to die.”

Correctional Institute, which suffered from a large prison riot (NY Times, 1989); and the Vermont State Hospital during Hurricane Irene (Huffington Post, 2012; Anonymous Interview, 2012). These facilities suffered damage and encountered a wide range of problems when managing the prison population.

Several investigations and studies concluded that the facilities affected by these disasters were not prepared. Many had no emergency plans in place for responding to and recovering from a disaster, nor were prison officials properly trained to manage the incident (American Civil Liberties Union, 2006; American Civil Liberties Union, 2007; Texas Civil Rights Project, 2009; CWSL, 2010). For many facilities, the failure to plan created a disaster in itself; correctional facilities suffered staffing shortages, as staff were unable to (or chose not to) report to work (American Civil Liberties Union, 2006; American Civil Liberties Union, 2007; Texas Civil Rights Project, 2009; CWSL, 2010). Prisons encountered legal issues when evacuating prisoners, especially across State borders as records were destroyed and States were unable to determine out how the sentencing would be upheld under other State laws and authorities, and notification to Consulate General Offices as required by Federal law failed to occur. Prisoners did not know why they were being held for prolonged periods of time when they had not even been charged with a crime. Others were forgotten about in the State jails they were evacuated to since there was no system in place to track where prisoners were transported to; and the receiving jails did not obtain proper documentation (e.g. legal documentation, personal identification, family information, medical records) to go along with prisoners received (Metzger, 2007). These issues resulted in some prisoners serving more time than their sentence required, resulting in several lawsuits filed by prisoners for false imprisonment (California Western School of Law, n.d.; Anonymous Interview, 2012; American Civil Liberties Union,

2006; American Civil Liberties Union, 2007; Texas Civil Rights Project, 2009; FEMA, 2013; Department of State, 2010). Prisoners also suffered physical, emotional, and mental injuries, and there were reports of sexual assaults occurring during prison evacuations (American Civil Liberties Union, 2006; American Civil Liberties Union, 2007; Scharf, 2006; Texas Civil Rights Project, 2009; CWSL, 2010). Others failed to receive adequate medical care. Prisoners escaped from their cells; some never accounted for (American Civil Liberties Union, 2006; American Civil Liberties Union, 2007; Texas Civil Rights Project, 2009; CWSL, 2010). The challenges these facilities encountered demonstrate what can go wrong in the absence of a Federal policy specific to securing prison populations during disasters.

There are several reasons for the inadequate response to disasters within prisons in the United States. The reasons for the inadequate response have been continuously repeated and not corrected (American Civil Liberties Union, 2006; American Civil Liberties Union, 2007; Texas Civil Rights Project, 2009; CWSL, 2010). These include prison staff not being properly trained on disaster response and recovery, facilities not having emergency plans or continuity of operations plans in place or plans that were easily accessible or recently updated, and facilities not exercising (i.e. practicing) for a disaster. Another reason for the inadequate response is due to a lack of resources and redundant critical systems in place at correctional facilities, like generators and pumps. Furthermore, an additional reason for the inadequate response is due to a lack of communication among the various agencies that have a role in protective action decision-making and emergency response during disasters. While some prison staff should be held directly responsible for the actions taken during these disasters, prison systems, as a whole, have not been incorporated into emergency planning efforts, which places the failure on government.

Hurricane Katrina serves as an excellent model for what can go wrong in the absence of planning at a correctional facility. During Hurricane Katrina, the Orleans Parish Prison evacuated over 6,500 prisoners post disaster. The emergency plans in place at the prison were ambiguous, inadequate, and impractical; and the decisions made by prison officials only exacerbated the problem. As a result, several issues were encountered when responding to and recovering from the disaster affecting Orleans Parish Prison. Prisoners were abandoned in their cells by prison guards, some left up to their neck in sewerage tainted water. Those who were not able to escape were eventually evacuated days after the storm passed, only to be left on highway overpasses, many unrestrained and unsegregated, for days with the public, which included women and children. Prisoners normally segregated within the confines of the prison were housed together, where prisoner-on-prisoner violence erupted. Prior to the evacuation of the prison, over 600 prisoners managed to escape from Orleans Parish, 260 of which were sexual offenders, some never accounted for (Scharf, 2006). Furthermore, evacuees from Louisiana that were registered as sexual offenders, or had warrants out for their arrest, were evacuated, along with members of the public, to other States, like the Commonwealth of Massachusetts. For example, the receiving officials at Otis Air National Guard in Massachusetts had no prior knowledge on evacuees' records. The Air Base received individuals with warrants out for their arrests, as well as registered sexual offenders (Anonymous Interview, 2012). The failure to properly communicate the evacuee information created significant challenges at Otis, as the Air Base was unprepared to house individuals with criminal records separately from the public. Prisoners' records were also lost during the Hurricane (e.g. records, like legal documents,

medical records, and prisoner identification, were stored in basements, which were flooded out). Without records, many prisoners served more time than what their sentence required.⁶

Vulnerable Populations Require Additional Protection during Disasters

Prisoners are a vulnerable subset of our population,⁷ often underrepresented, poor, or a member of a marginalized group (Shay, 2013). Prisoners require protection during disasters, as they do not have the capability or freedom to make independent decisions to protect themselves.

Prisoners, even though under the care and custody of the government, are still members of society. However, they seem to be a forgotten subset of our population when it comes to emergency management. Despite the fact that 95% of prisoners currently incarcerated will return to society (ACA, 2002),⁸ our nation continues to treat prisoners as less than human (Schalnger and Shay, 2007; ACLU, 2006; ACLU, 2007). Pets have received far superior treatment and care than prisoners. During Hurricane Ike, prisoners were left in their cells at the County jail and suffered greatly, but the local animal shelters were evacuated far ahead of the storm (Texas Civil Rights Project, 2009). The inadequate treatment is perhaps because many officials do not understand the rights' prisoners retain, the statutory requirements that have been enacted for protecting their rights, and the resources that have been developed to prepare for and recover from disasters.

Legal Rights of Prisoners

Case law and statutes have been enacted to protect the rights of individuals, which include those who are incarcerated. Prisoners do not retain all of their rights, however, they do

⁶ See for example *Waganfeald v. Gusman*, 2012.

⁷ The term “vulnerable populations” is interchangeable with the term “special populations”, which FEMA defines as institutionalized persons, the elderly and disabled, or those who speak languages other than English (FEMA State and Local Guide (SLG) 101 - Guide for All-Hazard Emergency Operations Planning, 1996.)

⁸ One of the goals of incarceration is to rehabilitate individuals so they can return among society.

retain some. These rights include the right to medical care, which gives individuals the right to access and receive adequate medical care, the right to freedom from racial discrimination, which protects individuals and vulnerable groups from discriminatory acts, and the right to due process and access to the courts, which gives prisoners the right to obtain legal resources to file a claim. Prisoners also retain the right to go before the courts (certain requirements must be first met) and the right to seek damages (monetary, or an injunction), the right to equal protection, which ensures the rights of all individuals are equally protected, and the right to be free from cruel and unusual punishment, which prohibits excessive force or torture.

All of these rights are applicable to prisoners. However, in the interest of safety and security, some of these rights may be limited during disasters (Lehmann, 1994; *Waganfeald v. Gusman*, 2012). If prisons have not pre-identified circumstances where rights could be limited during a disaster, as well as methods for addressing these circumstances, prisoners' rights may unnecessarily be violated.

Constitutional Requirements

Prisoners retain rights under the Constitution. The courts have determined that certain prison conditions, as well as actions taken by prison staff, will lead to a violation of these rights. Constitutional Amendments that ensure the protection of prisoners' rights include the 8th and 14th Amendments. The 8th Amendment, as applied to prisoners⁹ states that cruel and unusual punishments shall not be inflicted. By law, prisoners are required to have basic necessities, many of which serve as the foundation for human survival under Maslow's Hierarchy of Needs, and include food, shelter, medicine, medical care, security, and clean housing under this

⁹ The 8th Amendment states that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

amendment (Maslow, 1943). The 14th Amendment as applied to prisoners¹⁰ prohibits correctional facilities, and the government, from sentencing prisoners without following due process. It also prohibits the deprivation of prisoners' rights, even under undue circumstances. Furthermore, it requires equal protection of the law and procedural fairness. Disasters are likely to produce a scenario where prisoners are deprived of their rights granted under the 8th and 14th Amendments.

The phrase "cruel and unusual punishments" is a significant statement that applies to this research. The term cruel and unusual was not defined at the time the 8th Amendment was passed. However, the Supreme Court defined the term in 1972 in *Furman v. Georgia*. Justice Brennan, writing for the court, described cruel and unusual punishments as "degrading, inflicted in arbitrary fashion, clearly rejected throughout society, and patently unnecessary." Prisoners are not to be subject to cruel and unusual punishment and several cases demonstrate that Courts will, and have, ruled in favor of prisoners who have filed suits for violation of this right. Under the 8th Amendment, prisoners have the right to be free from inhumane conditions, and during disasters, correctional facilities must take action to ensure that minimum standards of living are upheld.

The Constitution does not require a comfortable prison, but it requires a safe and humane prison. Prison officials must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care and must take reasonable measures to guarantee the safety of the inmates (*Blackmon v. Garza*, 2012).

¹⁰ The 14th Amendment states all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Prisoners are required to have certain basic necessities, but when a disaster occurs at a correctional facility, those are necessities prisoners are likely to go without (CWSL, 2010). The Courts have determined that minimum standards of living do exist for prisoners and have established a two-part test for determining if these minimum standards have not been upheld. The test first looks to see if prisoners were deprived of minimal civilized measures of life's necessities and the second test looks to see if prison officials were deliberately indifferent to prisoner health and safety.¹¹

Despite the constitutional requirements in place, our society has treated prison populations differently than other vulnerable populations during disasters, often depriving them of these rights. Prisoners are human beings and members of our society. They are mothers, fathers, sisters, brothers, children, grandparents, athletes, politicians, military members, and actors. While some of those who have been incarcerated have committed violent crimes, many have not (BJS, 2011). Some have not even been convicted, and for those that have, have been for drug offenses or public-order crimes,¹² not violent crimes. In 2011, approximately 48% of the Federal prison population was incarcerated for drug offenses, while 35% were incarcerated for public-order crimes (BJS, 2011). However, prisoners are often lumped together as a population who has committed horrific crimes, and as a result, are seen as less than human. During Hurricane Ike, Galveston County, located in Texas, evacuated the public, but did not consider those housed in the county jail, “the county decided to evacuate the island to alleviate the suffering of the people, but it did not consider the human being in the jail people” (Texas Civil Rights Project, 2009). The actions taken during this and other disasters demonstrate the

¹¹ See for example *Woods v. Edwards*, 1995.

¹² About 1 in every 50 adults in the U.S. was supervised in the community on probation or parole while about 1 in every 107 adults was incarcerated in prison or jail (BJS, 2011).

disregard society has for prisoners. However, society, and the government, has a shared responsibility to protect this vulnerable subset of our population.

There is a variation in opinion by officials on how best to address this issue. Prisoners need protection, as they are still members of society. Through discussions held with various emergency management, law enforcement, and corrections officials as part of this study, several have suggested that cruel and unusual punishments be allowed during disasters in an effort to manage prison populations. Some have even suggested that the term “emergency” waive institutional standards. For example, in *Waganfeald v. Gusman*, two individuals lost their case because a higher court agreed with the claim made by prison officials that the term emergency waived institutional standards during Hurricane Katrina (*Waganfeald v. Gusman*, 2012).¹³ Other officials have argued that a disaster declaration should immediately grant a State or the Federal government the legal authority to expedite capital punishment for those awaiting death row, even if an appeal is waiting. Others have suggested prisoners just be left to die during a disaster, while others have suggested prisons open their doors and release prisoners into the general public. However, these recommendations are patently contrary to current case and statutory laws. As Justice Stewart stated in *Furman v. Georgia*, “the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed” (*Furman v. Georgia*, 1972). Despite desires otherwise, facilities cannot waive certain institutional standards based upon their own interpretation of the term emergency. Using an emergency to allow cruel and unusual punishments, up to leaving prisoners to die, as seen during Hurricane Katrina, is allowing the penalty to be wantonly and freakishly imposed. Moreover, as Sharona Hoffman states in

¹³ The decision by the 5th U.S. Circuit Court of Appeals still stands.

Preparing for Disaster: Protecting the Most Vulnerable in Emergencies, “Many complicated ethical decisions could in fact be avoided with appropriate response preparations.” Allowing officials to entertain this discussion as part of the dialogue for addressing this problem would be a major violation of civil rights, and is a major failure of our government. There are always alternatives, and certainly more ethical decisions that could be made regarding response preparations for prisons.

There are many cases where the courts have set rules around minimal rights of prisoners. These rules require prisons to be responsible for actions taken and for staff to be aware of circumstances that could arise where rights are violated. Disasters present conditions for prisoners’ rights to be violated, creating circumstances where individuals may suffer physical, emotional, or mental health injuries. Examples include but are not limited to overcrowding due to poor evacuation planning, prisoners being left to drown in sewerage-tainted waters due to not having enough staff to assist in moving prisoners and prisoners being exposed to extreme heat.¹⁴ Other examples also include prisoner-on-prisoner violence occurring due to poor evacuation planning, a lack of food and water due to a scarcity in resources, and a lack of care being provided to those prisoners in need of medical attention.

Courts have required facilities to uphold minimum standards of living at all times, even during scenarios that would likely unfold during disasters. Courts have required institutions to “provide fans, ice water, and daily showers when the heat index is 90 degrees or above” (*Gates v. Cook*, 2004). Courts prohibit overcrowding in prisons, which can lead to inadequate medical care and treatment, as well as staffing shortages and a host of other problems (*Brown v. Plata*, 2011). The Courts have also held that prolonged confinement of prisoners can threaten the

¹⁴ As seen during Hurricane Katrina and the Texas Hutchins County Jail heat wave of 2012.

health and safety of prisoners (*Hutto v. Finney*, 1978), especially if more than one prisoner is being held in the same cell, which can lead to overcrowded, unclean, and unsanitary conditions that are mentally and emotionally traumatic, in addition to being physically uncomfortable.

These conditions can all be hazardous to a prisoner's health (*Madison*, 2006).

Currently, there are several cases before the courts that have been filed by prisoners for violation of their rights during disasters. Some of these cases have been unsuccessful or dismissed due to the rigorous requirements prisoners face when filing claims, which include demonstrating physical injury, proving deliberate indifference, and needing to meet individual institutional standards.¹⁵

Statutory Requirements

Federal, State, and local governments have a duty and obligation to protect prisoners by rules established. There are policies, acts, and directives that protect the rights of prisoners during disasters, which include but are not limited to the Americans with Disabilities Act, the Civil Rights Act, the Robert T. Stafford Act, the Post Katrina Emergency Management Reform Act, and National Preparedness Goal. These policies, acts, and directives only touch upon this issue, lacking the critical information and guidance specific to managing this subset of the population. However, prison populations require specific guidance because they are considered a special case while they are under the custody and care of the government. Title 18 U.S.C. 921 §4002, charges the Bureau of Prisons with ensuring Federal prisoners, under the care of another entity,¹⁶ are provided suitable living conditions, care, safekeeping, subsistence, and protection.

¹⁵ For example, see *Frye v. Orleans Parish Prison*, 2007; *Kennedy v. Gusman*, 2007; *Lloyd v. Gusman*, 2007; *Allan v. Gusman*, 2007.

¹⁶ The Federal government will contract out care of Federal prisoners and detainees to State, County, and private facilities.

The law, while specific to Federal prisoners, does require State and other non-Federal facilities to meet these standards.

The Federal government provides prisons with Federal tax dollars to supplement expenses incurred at State and County facilities (as well as private non-profit facilities) for housing Federal detainees. As part of receiving grants or subsidies, these facilities are expected to adhere to Federal standards. However, a recent report published by the Office of Inspector General found that many inspections of non-Federal facilities do not meet the standards required for housing Federal detainees or criminals. This shortcoming is a failure on the individual facilities inspected, but more so on the Federal government, for not ensuring standards are upheld and enforced. These facilities are supposed to provide “safe, secure, and humane conditions” (DOJ, 2013). The facilities that were audited and inspected by the United States Marshals Service reportedly only took two hours, even though the standard for inspection by the Bureau of Prisons is based on the recommendations made by the American Correctional Association (ACA). Per the report, Audit of the U.S. Department of Justice’s Oversight of Non-Federal Detention Facility Inspections, if an Inspector followed the recommendations made by ACA, it would take approximately 3 days to thoroughly inspect a facility. The report published by the Office of Inspector General also stated that risk-based assessments were not incorporated into the inspections. Furthermore, the inadequacies identified during the inspections had no resolution; the facilities did not have to take any sort of corrective action. The United States Marshal’s Office argued that the reason the deficiencies were never corrected was because the Federal government “cannot tell state and local governments to take corrective action” (DOJ, 2013). The report stated the Department of Justice responded to this finding, by stating these inadequacies risk safety and security of Federal prisoners and detainees. Under this law,

facilities that contract with the Federal government must meet the same standards as Federal facilities. This provides a window of opportunity for the Federal government to integrate non-Federal facilities into the emergency planning process, especially through appropriated grant funding.

Providing grant funding is a great mechanism for ensuring programmatic compliance. However, there are still many limitations. Entities that apply for, and receive Federal preparedness grants, must meet certain requirements, like having a Threat and Hazard Identification Risk Assessment (THIRA) and adopting the National Incident Management System (FEMA, 2013). However, the auditing process to ensure compliance with these requirements is quite time consuming, and many Federal, State, and local entities do not have the resources, time, or personnel to effectively review the status of all applicants to ensure compliance (Anonymous Interview, 2012).

Regardless, under the Post Katrina Emergency Management Reform Act (PKEMRA), during a disaster the government must be able to rapidly provide resources (e.g. food, water, medicine, shelter and housing, medical care) necessary to save lives and protect property. This means that under PKEMRA, the government has a legal responsibility for protecting society, including those who are incarcerated, and that prisoners have the right to receive basic necessities for survival (Post Katrina Emergency Management Reform Act, 2006).

Gaps in the Law

Prisons have long been assumed to be self-sufficient and unlikely to suffer damages during disasters. As a result, prisons have not been included in emergency management efforts

at the Federal, State, or County level¹⁷ despite reports demonstrating the need for inclusion (Texas Civil Rights Project, 2009; ACLU, 2006; ACLU, 2007; CWSL, 2010). The responsibility for planning is placed on each individual facility. However, the Federal government offers no incentives for prisons to adopt and implement emergency management practices. There are Federal laws and policies, specific to emergency management that can be applied to prisons, but, many of these are ambiguous, arbitrary, broad, and do not clearly define the populations they protect or how the laws are to be implemented.

There are a few documents that prisons can reference when planning for a disaster affecting a prison.¹⁸ However, many facilities are not even aware these document exist, as they have not been made easily available and are deeply buried within the Internet. These documents are also not required or enforceable, and many are outdated, lacking in critical information needed for effectively planning for and responding to a disaster at a prison. Despite these efforts, there is still no uniform Federal policy or set of standards specific to protecting prisons as a whole community.¹⁹

Lack of Integration

Prisons have not been included in emergency preparedness activities. This lack of integration during a time where the Federal government places emergency management at the forefront of government priorities is a major failure. Prisons have long been assumed to be self-

¹⁷ With the exception facilities throughout the Nation, most prisons do not have comprehensive emergency management plans in place.

¹⁸ The Department of Justice has published a document to guide juvenile facilities in preparing for, responding to, and recovering from emergencies; the Department of Health and Human Services published a checklist on influenza planning for correctional facilities; and the National Institute of Corrections has issued general guidance documents prisons can reference.

¹⁹ Guidance specific to other populations includes, but is not limited to seniors, schools, and animals. See for example, Guide for developing High Quality Emergency Operations Plans for Houses of Worship (DHS, 2013) and the Pets Act (Pets Act, 2006).

sufficient and unlikely to suffer damage during disasters (Navizet, 2011). Furthermore, there are few prisoner rights' advocates within the Federal government. As Pamela R. Metzger stated in *Doing Katrina Time*, "No one ever got elected by voting for more money for criminal defense" (Metzger, 2007). A Federal official advocating for additional protective measures for prisoners during disasters would likely receive a negative response, and a lack of support, both publically, and internal to the government.

The Bureau of Prisons (BOP), which falls under the Department of Justice, is only responsible for Federal prisons. The BOP does not regulate State, County, or local facilities, which make up the majority of jails across the country. Since the BOP does not have much authority outside the Federal prison system,²⁰ it is very difficult to integrate these other facilities in emergency planning efforts.

There is also the misconception that correctional facilities will be handled by another agency. An official interviewed as part of this research said, "Nobody cares here. Inmates are another agency's problem." Which Agency that *is* responsible for addressing this problem, has not been identified. Is it the responsibility of Department of Justice, U.S. Attorney's Office, Bureau of Prisons, United States Federal Marshals Service, or FEMA? Nobody at the Federal level seems to be able to identify whose responsibility it is to integrate prisons into the planning process. No agency wants to take responsibility of this problem. No agency recognizes this as an issue facing society.

²⁰ The exception to this rule is when the Department of Justice contracts with private, State, County, and local facilities to provide care and housing to Federal detainees and criminals. However, this exception does provide a window of opportunity for integrating non-Federal facilities into the emergency planning process, as these facilities are already required to meet the same standards as Federal facilities (DOJ, 2013).

Federal Policy that Dissuades Planning

Current Federal policies actually deter prisons from implementing emergency management practices. The most disconcerting policy that deters prisons is the Prison Litigation Reform Act. In 1996, Congress passed the Prison Litigation Reform Act (PLRA), which addresses how prisoners file civil suits in Federal court. The Act, which was inserted into an appropriations bill, was passed and signed by President Clinton in an effort to reduce the number of frivolous lawsuits filed by prisoners. At the time of the bill, 26 per 1,000 prisoners were filing suits (Schlanger and Shay, 2007). This number may not seem high, but at the time the bill was signed, there were approximately 1.5 million prisoners in prison, which meant that prisoners filed approximately 39,000 cases (BJS, 1996). Since the PLRA has been in effect, the number of cases has dropped to 11 per 1,000 prisoners (Schlanger and Shay, 2007). The significant decrease in number of cases filed does not mean that PLRA has been effective. In fact, it has created such a rigorous process for prisoners filing claims that many legitimate claims are never heard, claims that have a striking similarity to ones that could or have occurred during disasters.

This Act requires prisoners to take certain steps before a suit can be filed; furthermore, it reduces the number of cases that can be filed by setting certain criteria and standards that must be met for a suit to be considered lawful. This reform has made the process much more rigorous for prisoners filing complaints; however, it does not prohibit cases pertaining to civil rights violations from going before the Court. PLRA requires facilities to establish individual administrative grievance processes that prisoners must adhere to before filing suits in Federal court. This exhaustion process is so demanding that even cases most capable of succeeding will not get resolved by the individual facilities or heard by the Courts. Under PLRA, a prisoner who suffered a physical, emotional, or mental health injury during a disaster requires judicial review,

Judicial review is based on an inmate's capability to comply with the prison's own internal, administrative rules-regardless of the merits of the claim. The PLRA exhaustion process requirement undermines external accountability. Still, more perversely, it actually undermines internal accountability, as well, by encouraging prisons to come up with high procedural hurdles, and to refuse to consider the merits of serious grievances, in order to best preserve a defense of non-exhaustion (Schlanger and Shay, 2007).

The administrative process is not standardized across the nation, which means that prisoners are subject to the standards set by each facility or jurisdiction. The period for which a prisoner files a complaint varies some facilities have a deadline of only a few days from which the Act occurred. If prisoners are displaced, as seen during Hurricane Katrina, they may not be able to meet the deadline for filing a complaint. The Courts have held that regardless of the claim, prisoners MUST meet the internal deadlines for the facilities (Schlanger and Shay, 2007).

As Schlanger said before the Subcommittee on Crime, Terrorism, and Homeland Security in 2007, "Can anyone reasonably expect a governmental agency to resist this kind of incentive to avoid merits consideration of grievances?" If correctional facilities do not establish emergency management procedures and have established a rigorous exhaustion process, they will not be held accountable by the Federal government for their actions or inactions during disasters because the complaints prisoners file are very unlikely to make it to the Courts. If the complaints do make it past the exhaustion process, prisoners will still have a number of obstacles to overcome under PLRA. Prisoners filing suit in Federal court must meet all of the requirements set for the by the Prison Litigation Reform Act, including the physical injury requirement.

The physical injury provision presents a huge hurdle for prisoners filing claims following disasters. First, and foremost, the courts have not determined what constitutes a physical injury violation. As Giovanna Shay clearly demonstrates in her article Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act, the

courts have held even “serious physical symptoms insufficient to allow the award of damages because of the PLRA’s physical injury provision” (Shay, 2007). Even sexual assault may not be seen as a physical injury violation by the courts (Golden, 2006). For example, during Hurricane Katrina, prisoners who were normally segregated, were evacuated from the Orleans Parish Prison and held for days in open confinement. Men, women, and juveniles were placed under the same make shift jail (e.g. a pop up tent, busses), with reports that sexual harassment and prisoner-on-prisoner violence occurred. The lack of emergency planning led to the poor evacuation of the Orleans Parish Prison. This failure was a result of poor leadership and management at the prison. Without the proper training and protocols in place for evacuating a facility like the Orleans Parish Prison, physical injury is likely to occur. However, it remains unclear how the courts will determine what constitutes a physical injury violation during a disaster because the term “physical injury” has yet to be defined.

Secondly, prisoners cannot file a claim for damages for mental or emotional injury that occurred during a disaster unless they can demonstrate that they also suffered a physical injury. During disasters, emotional and mental health injuries are common, so much that the Department of Health and Human Services, as well as the American Red Cross, has resources and teams they deploy to assist individuals mentally or emotionally affected by a disaster.²¹ Several reports show that emotional and mental health injury is common during disasters. Disasters can cause individuals to go into shock, leaving them in an overemotional state that can include high levels of “post-traumatic stress disorder, anxiety, guilt, depression, and a loss of faith” (Babbel, 2010). According to the ACLU, the Courts are split over the argument that a mental or emotional health

²¹ The American Psychological Association defines trauma as "an emotional response to a terrible event like an accident, rape or natural disaster" (American Psychological Association, 2013)

injury in the absence of a physical injury is a constitutional rights violation (ACLU, 2008).

However, prisoners do retain the right to complain about prison conditions and make their concerns known about the treatment they receive, which provides prisoners with the opportunity to address potential violations.

Other Obstacles

Prisoners face several other obstacles when bringing a claim against an institution. These hurdles include social obstacles (lack of funding required to file a claim, representation), proving deliberate indifference, Federal statutes, and State laws. Prisoners do not always have the monetary resources to file suit, and organizations that represent prisoners are very selective when it comes to litigation, as they are often small, non-profit organizations also with limited resources. Additionally, those prisoners who do not need to meet the requirements of PLRA (those filing in State courts, those who have since been released, those that have not been convicted) face many of the same obstacles under PLRA. Prisoners must show that there was deliberate indifference by the officials the lawsuit is against (i.e. the official willingly and knowingly caused harm to a prisoner). Prisoners must overcome 42 U.S.C Section 1983, also known as the Qualified Immunity Defense Law, which protects officials from being held liable for the violation of prisoners constitutional rights. In other words, a prisoner cannot sue an official unless there is deliberate indifference, which can be quite difficult to prove.

Conclusion

Prisons are not only susceptible to disasters, but are unprepared to respond to and recover from them. This problem is a Federal issue that requires Federal attention. Every institution is at risk if the Federal government does not address this issue. Correctional facilities, like other governmental entities, are working on restricted budgets and have little to no funding available to

voluntarily implement emergency management practices. With the majority of prisons across the country facing the same challenges (limited funding, staffing shortages, lack of resources) as other facilities that provide care (e.g. hospitals, schools, nursing homes), emergency management has, and will continue to, fall to the side.

Emergency management practices are needed within prison systems. During disasters, prisons have a legal responsibility to protect prisoners and staff, as well as society from those who have been incarcerated. Prisons need some form of guidance, or policy reform from the Federal government to plan for, respond to, and recover from disasters. The Federal government may want to consider issuing policy or guidance on protecting and securing prison populations during disasters, and providing appropriated grant funding to facilities as a method for programmatic implementation and compliance. The Federal government has issued policy and provided guidance on protecting other vulnerable populations during disasters, including children, the elderly, individuals with access and functional needs, even pets. If our nation does not plan to manage prison populations during disasters, prisoners' rights will be violated and public safety jeopardized, especially if prisoners are released without accountability or controls.

In order to resolve this issue, further research is required. The Federal government needs to better understand why this problem exists and what the most effective and practical methods are for addressing it. Identifying the needs and challenges facing prison systems during disasters, and if prisons would be receptive to Federal policy on this issue, would allow the Federal government to develop a policy that can be easily adopted and implemented throughout the Nation.

“The failure to complete evacuations led to preventable deaths, great suffering, and further delays in relief.”²²

²² This is a quote from the Final Report of the Select Bipartisan Committee to Investigate the preparation for and Response to Hurricane Katrina (U.S House of Representatives, 2006)

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PAPER 2: ASSESSING THE NEEDS OF PRISON CAPABILITIES DURING DISASTERS

Introduction

Prisons¹ are not prepared to respond to and recover from natural and manmade disasters. Disasters affecting prisons can include communicable disease outbreaks, cyber attacks, earthquakes, exposure to hazardous materials, floods, hurricanes, prison riots, power outages, and wild fires. These, as well as other hazards, combined with the general lack of preparedness in prisons, leaves prison populations and the public at risk, as disasters affecting prisons can result in serious and unintended consequences.

The implications of this issue are quite significant. Prisons are legally responsible for the welfare of prisoners. Prisons are required to uphold statutory and case laws that protect prisoners' rights. During disasters, prisons need to take action to protect prisoners, as well as the public, from preventable harm. However, this is not being done. The reason for this lack of preparedness is a result of the Federal government not having a policy or guidance in place that prisons can reference when planning for emergencies.² Without some form of Federal oversight or enforcement, correctional facilities across the country will remain unprepared to respond to and recover from disasters, failing at their duty to protect prisoners, as well as the public.

The recommendations by emergency management and law enforcement officials on how best to address this topic vary. Many of the recommendations made by officials interviewed as

¹ For the purpose of this paper, a prison is defined as a facility that houses a person who is under the care and custody of the Federal, State, or County government, and includes jails, correctional facilities, and state hospitals. In some cases, a facility may be contracted out to a private entity that has been granted the same authority as the government.

² The National Institute for Corrections has issued checklists and other general guidance documents; however, these are not easily made available to prisons across the nation (many do not know they even exist), and are not required or enforceable (NIC, 2013).

part of a larger study suggest that that some of the recommendations have been based on faulty assumptions and are contrary to current statutory and case laws. To quote a Federal official who was interviewed as part of this research, his recommendation was to write into law that prisoners are left in their cells during a disaster, regardless of the outcome.³ Despite the varying attitudes of officials, and ambiguities in current policies, the Federal government is responsible for coordinating the government's role in "preparing for, preventing, mitigating the effects of, responding to and recovering from all domestic disasters (FEMA, 2012)," including in prisons.

There have been a number of disasters where facilities were severely impacted. Examples include the Galveston County Correctional Facility during Hurricane Ike (Texas Civil Rights Project, 2009); the Ohio State Penitentiary, which suffered from a large fire (History, 2012); the Orleans Parish Prison during Hurricane Katrina (ACLU, 2006); the Pennsylvania State Correctional Institute, which suffered from a large prison riot (New York Times, 1989); and the Vermont State Hospital during Hurricane Irene (Huffington Post, 2012; Anonymous Interview, 2012). The challenges these facilities encountered demonstrate what can go wrong in the absence of a Federal policy specific to securing prison populations during disasters.

Several investigations and studies concluded that the facilities affected by these disasters were not prepared. Many had no emergency plans in place for responding to and recovering from a disaster, nor were prison officials properly trained to manage the incident (American Civil Liberties Union, 2006; American Civil Liberties Union, 2007; Texas Civil Rights Project, 2009; CWSL, 2010). For many facilities, the failure to plan created a disaster in itself; correctional facilities suffered staffing shortages, as staff were unable to or chose not to report to work (American Civil Liberties Union, 2006; American Civil Liberties Union, 2007; Texas Civil

³ To quote this official directly, he said the government "should just leave them to die."

Rights Project, 2009; CWSL, 2010). Prisons encountered legal issues when evacuating prisoners, especially across State borders, as records were destroyed and States were unable to determine how sentencing would be upheld under other State laws and authorities, and notification to Consulate General Offices as required by Federal Law failed to occur. This resulted in some prisoners serving more time than their sentence required, resulting in several lawsuits being filed by prisons for false imprisonment, (California Western School of Law, n.d.; Federal Official, 2012; ACLU, 2006; ACLU, 2007, Department of State, 2010; Texas Civil Rights Project, 2009). Prisoners suffered physical, emotional, and mental injury, and there were reports of sexual assault occurring during the evacuation of the prison (American Civil Liberties Union, 2006; American Civil Liberties Union, 2007; Scharf, 2006; Texas Civil Rights Project, 2009; CWSL, 2010). Others failed to receive adequate medical care. Prisoners escaped from their cells; some were never accounted for (American Civil Liberties Union, 2006; American Civil Liberties Union, 2007; Texas Civil Rights Project, 2009; CWSL, 2010).

These failures have been seen in prisons that have been affected by disasters throughout the United States. The reasons for the inadequate response have been continuously repeated and not corrected (American Civil Liberties Union, 2006; American Civil Liberties Union, 2007; Texas Civil Rights Project, 2009; CWSL, 2010). These include prison staff not being properly trained on disaster response and recovery, facilities not having emergency plans or continuity of operations plans in place or plans that were easily accessible or recently updated, facilities not having standard operating procedures, and facilities not exercising (i.e. practicing) for a disaster. Another reason for inadequate response is a result in a lack of resources and redundant critical systems in place at correctional facilities, like generators and pumps. Furthermore, an additional reason for the inadequate response is due to a lack of communication among the various agencies

that have a role in protective action decision-making and emergency response during disasters on prisons and disasters. While some prison staff should be held directly responsible for the actions taken during these disasters, prison systems, as a whole, have not been incorporated into emergency planning efforts, which places the failure on government.

Prison systems as a whole have not been incorporated into emergency planning efforts, which places the failure on government. The Federal government needs to better understand the underlying reasons to why this problem exists and what are the most effective and practical methods are for addressing it. To determine if policy reform is necessary and appropriate, a survey was conducted of State and County Correctional facilities throughout New England.⁴ The purpose of the survey was to identify the needs and challenges facing prison systems during disasters, and whether prisons would be receptive to applying for and receiving appropriated grant funding to implement Federal policy or guidance on this issue.

The Federal government has not identified the challenges and needs facing prisons, the ambiguities in existing policies specific to prisons and disasters, the legal requirements for protecting prisoners during disasters, and why Federal policy for protecting prisoners are necessary for improving social welfare. The findings from this survey provide researchers with a basic framework for conducting further studies.

Design

This study aims to answer the following question: Is policy reform necessary and appropriate for ensuring correctional facilities are better prepared to respond to and recover from

⁴ Federal, Private, and local facilities did not participate in this survey. Federal facilities fall under the Bureau of Prisons, which has established their own emergency management program and do not have the same needs as State and County facilities. Private facilities were not surveyed, as there were no private facilities in New England. Local facilities were not included, as they do not meet the definition of a prison for this paper.

disasters? In order to answer this question, a web-based survey was designed to identify the needs and challenges facing prison systems. This study focused on State and County correctional facilities located in Region I of the Federal Emergency Management Agency (FEMA), which serves the six New England States. FEMA Region I was selected as the study site because it has a diversity of facilities in terms of jurisdiction, security levels, and populations served. It also has piloted many successful programs that have since been implemented throughout the nation.⁵ Because of Region I's experience with pilot programs, it would make for an ideal Region to test new ideas, and would be more likely to participate in a pilot program if the Federal government wanted to explore this issue further.

At the time the survey was conducted, there were 112 correctional facilities in FEMA Region I that met the definition of a State or County correctional facility. The survey was sent to facilities in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.⁶ The participants that received the survey were individuals that had a direct role in operations at each facility (e.g. the Superintendent, Warden, Director). The reason for selecting an individual with a direct role in operations was because they would be the most knowledgeable of emergency management practices within each facility, and would have a direct role in disaster response. Access to these individuals was obtained through State and County official government websites. The survey was sent by email to the 112 officials. The email contained an explanation of the survey and a link to a Survey Monkey online survey, which served as the host site for the survey. The survey included a list of 24 open and closed ended questions. The survey was designed to understand if the Federal government should establish guidance and

⁵ Successful programs that have been piloted in FEMA Region I include the Student Tools for Emergency Planning Program and Secrets of Survival Program.

⁶ Federal, local, and private facilities were not surveyed.

provide appropriated grant funding for preparing prisons for disasters.⁷ The survey asked questions related to the facilities' level of preparedness, experience with disasters, challenges encountered responding to disasters, and need for assistance with emergency planning.

Results

Response Rate

The response rate for this survey was nine percent (9%). Ten of the 112 State and County facilities that were contacted participated in the survey. The results from this survey are not statistically significant, but are suggestive, and several conclusions can be drawn.

Facilities Surveyed

To obtain a general demographic understanding throughout facilities in New England, correctional facilities were asked a) if they house prisoners or detainees for the Federal Bureau of Prisons, b) the population served at their facility, and c) the security level of their institution. In order to ensure anonymity of the facilities being surveyed, specific demographic questions were not asked.⁸

The findings confirm that the majority of non-Federal facilities house Federal prisoners or detainees. The percentage of Federal prisoners or detainees that are housed at State and County facilities for the Federal Bureau of Prisons is 71%. Currently, non-Federal facilities are not required to have an emergency management program in place, nor do they have to comply with current Federal guidance on jail emergencies. However, facilities that do house prisoners or detainees for the Federal government, do have a legal responsibility to protect those prisoners or detainees and are required to provide "safe, secure, and humane conditions" (DOJ, 2013), even

⁷ Appropriated funding would be made available for preparedness, planning, and mitigation allocations.

⁸ Facilities were not asked if they are a State or County facility, if they serve male or female prisoners only, or what ethnicities and religions the facility was comprised of.

during disasters. This requirement provides the Federal government with an opportunity to incorporate emergency planning into State and County facilities, by requiring facilities to be adequately prepared to respond to and recover from disasters, ensuring prisoners are “provided safe, secure, and humane conditions” at all times.

Prison characteristics are quite diverse, something that would need to be considered in emergency planning efforts. The security levels for facilities that responded included pre-release (20% of respondents), minimum level (20% of respondents), medium level (20% of respondents), and maximum level (40% of respondents). The majority of respondents (71%) indicated that they serve more than one type of population, including juvenile populations, pre-trial detainees, common criminals, criminally insane, sexual offenders, and alcohol and substance abusers.⁹

Table 1: Facilities Surveyed

	Percent
Federal Prisoners or Detainees	
Federal	71%
Non-Federal	29%
Security Level	
Pre-Release	20%
Minimum	20%
Medium	20%
Maximum	40%
Population Served	
Juvenile	29%
Pre-trial	71%
Common Criminals	71%
Criminally Insane	0%
Sexual Offenders	71%
Alcohol and Substance Abusers	71%

⁹Juvenile populations are individuals under the age of 18, or will not be tried as an adult; pre-trial detainees have not yet convicted; common criminals have been found guilty of a crime; criminally insane have been determined not responsible for the crime committed due to mental health problems; sexual offenders have been found guilty of committing a sex crime; and alcohol and substance abusers have been found guilty of committing a drug crime.

Experience with Disasters

State and County prisons confirmed that they are susceptible to natural and man-made disasters. All of the respondents said their facility had been affected by a disaster at some point in time. Disasters that affected these facilities included blizzards, tropical storms, weather related ice storms, power outages, flooding, hurricanes, microbursts, fires, labor strife, and communicable disease outbreaks.

Many of the respondents encountered challenges when responding to a disaster. Challenges included housing prisoners, feeding prisoners, transportation of prisoners, relocation of prisoners to other facilities, staffing shortages, security issues, and providing medical needs for prisoners.

Emergency Management Departments

Emergency Management Departments are responsible for planning for and responding to disasters. During disasters, emergency management departments coordinate resources, and provide leadership to assist in life saving, life sustaining, and protecting property missions. Only a small percentage of facilities surveyed have emergency management departments, and even fewer have full time staff dedicated to disaster preparedness.

The majority of the respondents do not have emergency management departments; only 29% have established an emergency management department at their facility. For the facilities that did have an emergency management department, none had employees dedicated full-time to disaster preparedness. All of the positions that staffed the emergency management department had other, full-time responsibilities; emergency management was just one component of their job description. Facilities that lack an emergency management department or staff dedicated to planning and preparedness will not be prepared to respond to and recover from a disaster.

Influenza Specialty Care Units

Influenza Specialty Care Units (ISCUs) are designated facilities that provide for the treatment and care of individuals that have been diagnosed with a communicable disease during a pandemic. ISCUs provide an overflow for hospitals during widespread communicable disease outbreaks, and assist in containing and treating the illness. Many communities have established ISCUs to allow for this overflow, as hospitals do not have the capability to meet the needs during a pandemic. Many hospitals have written into their surge capacity plans that they will use wards intended for prisoners to provide care for members of the public in the event of a pandemic, and many communities have dedicated the use of schools or other public facilities for ISCUs (e.g. using a gymnasium as an ISCU). If hospitals are at surge capacity, and a highly communicable disease is circulating around correctional facilities, hospitals, as well as community ISCUs, may not be able to safely and securely admit and segregate prisoners from the public.

When asked if facilities have an Influenza Specialty Care Unit (ISCU),¹⁰ none of the respondents reported having one. If correctional facilities do not have ISCUs established on-site, caring for prisoners during a pandemic would create significant challenges, as this could accelerate the spread of disease affecting both prisoners and staff. Without quarantine procedures, or social distancing in place, prison staff and officers will be put at risk for contracting the disease, which could cause staffing shortages, presenting a multitude of other concerns. Additionally, if a prisoner needs hospital level care and hospitals are at surge capacity, the public could be put at risk if prisoners are being cared for amongst the public. These results indicate that correctional facilities are not prepared for a pandemic and have not been included in

¹⁰ An Influenza Specialty Care Unit is an alternate care facility that can provide hospital level care, which can be setup during a communicable disease outbreak. ISCUs can help contain the spread of a communicable disease and provide alternate care if hospitals are at surge capacity (completely full).

pandemic planning,¹¹ despite the fact that communicable disease outbreaks are common among correctional facilities.

Policy, Trainings and Other Resources

Policy, trainings, and other resources assist organizations with preparing for and responding to disasters. The majority of respondents surveyed were in favor of the Federal government issuing policy, providing appropriated grant funding, and offering training for emergency preparedness efforts at correctional facilities. More than half (57%) report their staff does not receive training through FEMA and 86% said it would be helpful to have a course specific to managing prisoners during disasters, which could be offered through FEMA's Independent Study Program or the National Institute of Corrections. The Independent Study Program offered through FEMA's Emergency Management Institute serves as a gateway for training facilities nationwide at no cost. The majority of those surveyed would find it helpful if an online training program specific to emergency management for correctional facilities was developed.

Providing appropriated grant funding to State and local entities is a mechanism that agencies like FEMA or the Department of Justice, can use to require entities to comply with specific policies and guidance.¹² All of those surveyed reported if FEMA developed policy and provided appropriated grant funding to implement policy, they would apply for funding. When asked what would be most valuable for assisting in emergency preparedness efforts, all

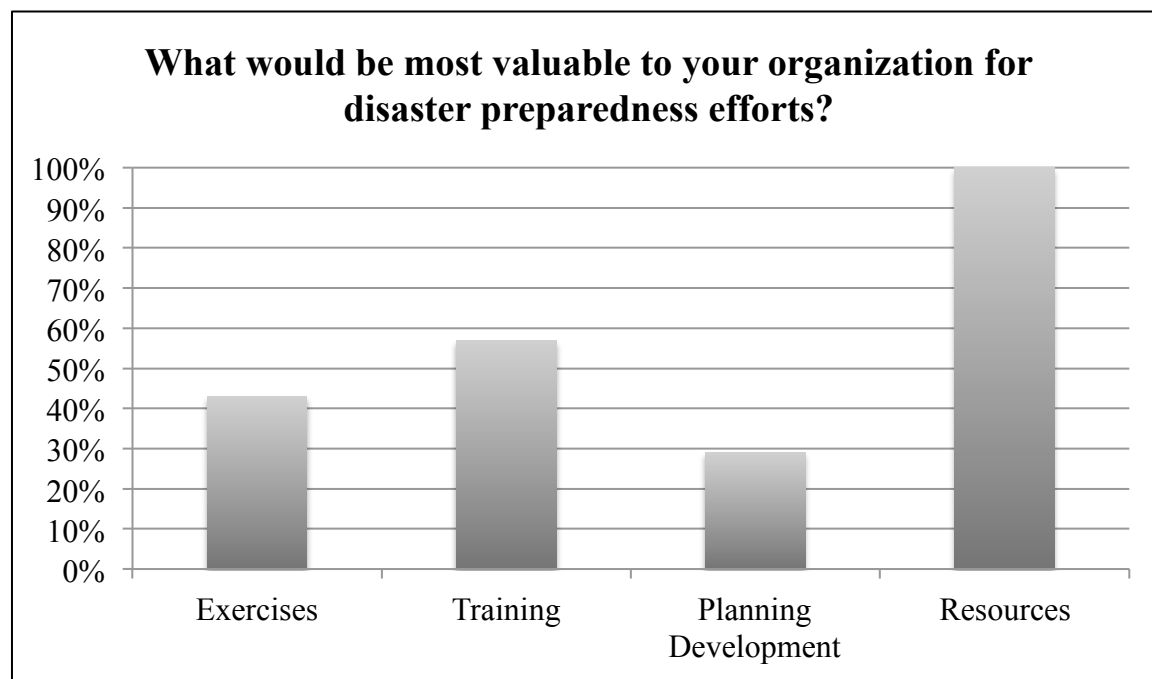
¹¹ The Center for Communicable Disease Control (CDC) has issued a checklist for prisons to reference when planning for a pandemic. However, it is deeply buried within their website, and when interviewing a Federal official responsible for pandemic planning at correctional facilities, as part of this research, he was unaware this checklist existed.

¹² FEMA is not a regulatory agency, but in order to receive grant funding through FEMA, entities must comply with certain regulations and requirements of the Funding Opportunity Announcement (FOAs)..

respondents cited the need for resources (e.g. generators, cots, water). In addition, facilities reported that conducting exercises (43%), training (57%), and planning (29%) would be most useful.

It should be noted here that State and local governments have been making significant cuts to public services over the past several years, including at correctional facilities. However, Congress has appropriated millions of dollars to Federal agencies to distribute to State and local organizations for emergency preparedness efforts (Congressional Research Service, 2012). Creating an avenue for correctional facilities to apply for appropriated grant funding would allow each facility to receive the resources needed to more fully prepare for disasters and meet the Federal government's legal obligations to protect prisoners.

Table 2: What would be most valuable to your organization for preparedness efforts?



Caveats

The survey yielded a low response rate. This is very likely due to the sensitivity of the

issue being studied. There are several potential reasons for the low response rate. One reason could also be a result of needing to obtain additional research approvals. The Commonwealth of Massachusetts required an additional research proposal and approval to be obtained before correctional facilities within Massachusetts could be contacted.¹³ The additional approval, which was obtained, resulted in a delay in Massachusetts' facilities responding to the survey. At least 17 facilities were unable to participate in the survey because the survey closed by the time the approval was obtained.¹⁴ In addition to the low response rate, several respondents skipped follow-on questions that were open-ended. Skipping these questions affected the results of the survey, as researchers were not able to fully understand the reason for selecting certain answers provided on the close-ended questions.

Furthermore, surveying individuals that were responsible for operations at each facility may question the validity of the data. These individuals are legally responsible for the wellbeing of prisoners, and may not have been forthright with their answers. Personal correspondence from officials at several State and County facilities stated they were hesitant to participate in the survey because of the sensitive nature of the topic, and because they viewed it as being connected to a potential for a security breach. Equally important, facilities will not likely disclose that they are inadequately prepared for a disaster because this would be admitting to negligence. Acknowledging this negligence would make the facility liable for not upholding minimum standards of living, depriving prisoners of their basic rights, or for being deliberately

¹³ Obtaining an additional approval was unforeseen, and would have been conducted before distributing the survey if it had been expected.

¹⁴ Per 103 CMR 180: RESEARCH AND EVALUATION, the Massachusetts Department of Corrections requires social science research to submit an application to conduct outside social science research. All department managers, employees, and correctional institutions cannot participate in any outside research that has not been approved by the Massachusetts Department of Corrections.

indifferent during a disaster. Even though the survey was anonymous, some facilities may not have wanted to go on record for failing to take appropriate steps for preparing for a disaster.

Additionally, some observational errors also question the validity of the data. For example, 100% of the respondents stated they have an emergency operations plan in place, however, only 29% of the respondents stated their facility has an emergency management department, with no facilities having full-time staff dedicated to emergency planning. If facilities do not have the staff to carry out critical services¹⁵ in an emergency management department, like maintaining an operations plan, it questions how adequate the plans really are, and if they exist at all. Additionally, another reason for the low response rate could be a result of this issue not being on correctional facilities' agendas, particularly those facilities that do not have an emergency management department.

Discussion

Correctional facilities are often reticent to speak about internal operations and security for obvious reasons. This institutional culture presents a significant challenge when asking officials about emergency preparedness measures in place at their facility. However, a lot can be learned from the results of this exploratory survey.

The results of this survey suggest that the majority of correctional facilities have been affected by a disaster of some kind, and will encounter issues or challenges when responding to or recovering from a disaster. It also suggests that the majority of correctional facilities are in need of critical resources, as well assistance in planning and training, for disaster response and recovery.

¹⁵ Critical services include planning, training, and exercising.

In my professional experience, this data indicates that there is an overall lack of preparedness in place at correctional facilities. Emergency preparedness is not a priority for correctional facilities, and with the lack of resources available to assist them in emergency preparedness, any efforts will likely fall to the side. Many of the challenges these facilities encountered could have been avoided with adequate planning, training, and resources in place. Furthermore, the responses suggest a lack of knowledge on existing guidance made available through the National Institute of Corrections, indicating that facilities have not been included in emergency planning efforts. This is a significant concern, as existing research has already confirmed that inclusion is necessary, as prisons are susceptible to disasters (ACLU, 2006; ACLU, 2007; Texas Civil Rights Project, 2009; CWSL, n.d.). These results demonstrate a need for the Federal government to reform existing guidance and consider drafting a policy that addresses these issues and concerns.

Further Research

Further research will need to be conducted. Additional research will need to incorporate the challenges and limitations encountered with conducting this survey. Addressing these challenges when designing a follow-on survey will allow for a greater response rate. These challenges notwithstanding, a larger scale survey needs to be developed and expanded to verify whether the responses from this survey are common across the country. A second survey should address the following:

Participation

The implications of responding to the first survey were unexpected and need to be considered before conducting another survey. A second survey needs to focus on methods for increasing participation.

Researchers should consider notifying State and County Correctional Administrations of the intent to conduct the survey, asking if additional approvals need to be obtained before sending it out to each individual facility. This would ensure that additional Institutional Review Board (IRB) approvals could be obtained before sending the survey, which would allow for a greater response.

The survey should be sent through a third party.¹⁶ Having a third party send the survey on behalf of the Federal Emergency Management Agency, Department of Justice, or other Federal agency involved in the research, would alleviate the concerns facilities have about recording institutional inadequacies. Even though the survey would be anonymous, participants may be more likely to participate knowing a third party would not hold an institution liable for their answers.

Consideration should also be given to which individuals at each institution receive the survey. Identifying the most appropriate person would ensure the answers provided are forthright and accurate.

Population Sample

The population sample for a second survey should be widened to include all correctional facilities throughout the Nation. Increasing the sample size would allow researchers to ask facilities to further define their level of jurisdiction (e.g. Federal, County, State, private) and geographic location (Northeast, Northwest, Southeast, Southwest, Mideast, Midwest; or by State), which would allow policymakers to understand if prisons across the nation are

¹⁶ Third parties include but are not limited to, the International Association of Emergency Managers (IAEM), the American Correctional Association (ACA), or the National Sheriffs' Association.

unprepared, or if it is endemic to a Region or State. This would also allow the researcher to study the issues around preparedness by facility type.

Disaster Preparedness

This exploratory survey confirmed that the design was good, but a second survey would need to ensure that all questions are answered. The second survey should include the same questions around the facility, specifically asking whether the facility has an emergency management department and if the staff at the facility have a role in disaster response. In addition, a larger survey also needs to ask if the facility has been affected by a disaster, what kind of disaster, and what challenges (if any) the facility encountered. Finally, a new survey should include questions on staff training (include the link to the National Institute of Corrections and FEMA's Independent Study Program).

Policy

A second survey should include questions on existing policies, like the Prison Litigation Reform Act and Post Katrina Emergency Management Reform Act, as well as questions on the guidance put out by the National Institute of Corrections and the Department of Health and Human Services. This should explore facilities' level of knowledge and experience with these policies, as well as potential ambiguities and inadequacies in existing policies. These concerns are important to address because the National Institute for Corrections has developed guidance and some training for correctional facilities. However, the information is deeply buried within their website, which, according to interviews with prison officials, many facilities are not even aware exists. These guidance documents are not enforceable and the content is outdated. Furthermore, these documents do not establish national standards, and many focus on emergency managements it relates to terrorist threats, not all hazards. Equally important, with no resources

available to assist facilities with planning and preparedness efforts, these guides serve no valuable purpose. Furthermore, current policies are ambiguous and contradict planning efforts, which can be confusing to correctional facilities. The ambiguities and inadequacies need to be clearly noted before policymakers will consider recommendations.

Conclusion

In this first exploration of disaster preparedness in prisons to date, the findings suggest that prisons need assistance from the Federal government in preparing for and responding to disasters. This study shows that prisons have been affected by disasters, and have encountered significant problems when responding to and recovering from them. This study also indicates that facilities would likely comply with Federal policy if the government made resources available to assist with policy implementation.

There are currently 1.5 million individuals housed in prison systems who will need care, and to be appropriately secured, during a disaster. This research, while exploratory in nature, does find that a need exists for the Federal government to further address this issue, as every institution across the country will remain unprepared and at risk if the Federal government does not take some form of corrective action. Correctional facilities are working on restricted budgets and have little to no funding available to voluntarily implement an effective emergency management program. With the majority of prisons across the country facing many of the same challenges (e.g. limited funding, staffing shortages, lack of resources) as other facilities that provide care (e.g. hospitals, schools, nursing homes), emergency management has, and will continue to, fall to the side. It is imperative that all facilities across the nation are held to the same emergency preparedness standards.

Next Steps

Additional research is essential to further explore this issue, determining the necessary steps for ensuring prisons systems are prepared to respond to and recover from natural and manmade disasters. A follow-up survey needs to be conducted, and existing laws and policies specific to this issue should be reviewed to make recommendations for policy development and a national training program must be considered. A National policy and training program should be implemented so all local, County, State, Federal, and Private facilities are held to the same standards. These steps would ensure correctional facilities throughout the Nation are prepared to respond to and recover from a disaster.

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PAPER 3: RECOMMENDATIONS FOR IMPROVING DISASTER PREPAREDNESS IN PRISONS

Introduction

Prisons¹ are not prepared to respond to and recover from natural and manmade disasters. Disasters affecting prisons can include communicable disease outbreaks, cyber attacks, earthquakes, exposure to hazardous materials, floods, hurricanes, prison riots, power outages, and wild fires. These, as well as other hazards, combined with the general lack of preparedness in place at prisons, leaves prison populations and the public at risk, as disasters affecting prisons can result in serious and unintended consequences.

The implications of this issue are quite significant. Prisons are legally responsible for the welfare of prisoners. Prisons are required to uphold statutory and case laws that protect prisoners' rights. During disasters, prisons need to take action to protect prisoners, as well as the public, from preventable harm. However, this is not being done. Existing research has demonstrated the reason for the lack of preparedness in place at prisons is a result of the Federal government not having a uniform policy or guidance document that prisons can utilize when planning for emergencies (ACLU, 2006; ACLU, 2007; Texas Civil Rights Project, 2009; CWSL, n.d.).² Furthermore, correctional facilities do not have the capabilities for implementing an effective emergency management program, as many facilities are working off reduced budgets, are understaffed, and have been excluded from planning, training, and exercises that focus on

¹ For the purpose of this paper, a prison is defined as a facility that houses a person who is under the care and custody of the Federal, State, or County government, and includes jails, correctional facilities, and state hospitals. In some cases, a facility may be contracted out to a private entity that has been granted the same authority as the government.

² The National Institute for Corrections has issued checklists and other general guidance documents; however, these are not easily made available to prisons across the nation (many do not know they even exist), and are not required or enforceable.

disaster response and recovery (ACLU, 2006; ACLU, 2007; Texas Civil Rights Project, 2009; CWSL, n.d.).³

The recommendations by emergency management and law enforcement officials on how best to address this topic vary. Many of the recommendations made by officials interviewed as part of this study suggest that some of the conclusions have been based on faulty assumptions and are contrary to current statutory and case laws. To quote a Federal official who was interviewed as part of this research, his recommendation was to write into law that prisoners are left in their cells during a disaster, regardless of the outcome.⁴ Despite the varying attitudes of officials, and ambiguities in current policies, the Federal government is responsible for “coordinating the government’s role in preparing for, preventing, mitigating the effects of, responding to and recovering from all domestic disasters” (FEMA, 2012).

Securing our Nation’s prisons during disasters is a mission critical task that must be addressed by the Federal government. Without some form of Federal oversight or guidance, correctional facilities across the country will remain unprepared to respond to and recover from disasters, failing at their duty to protect prisoners, as well as the public.

Recommendations

Several tasks must be accomplished to ensure prisons are prepared to respond to and recover from disasters. The responsibility for effecting change lies with the Federal government,

³ The exception to this statement is correctional facilities that fall within a 10-mile radius of nuclear power plants, which are required to plan for disasters affecting the power plant. However, the funding facilities receive to implement preparedness efforts vary across the Nation. Furthermore, there is still no guidance for correctional facilities on how to plan for a nuclear accident; the only statement in the current guidance is that “correctional facilities should be addressed in off-site response organizations plans and procedures” (FEMA, 2013).

⁴ To quote this official directly, he said the government “should just leave them to die.”

as this is a national issue. Every institution across the nation will remain at risk if the Federal government does not take action to resolve this issue.

Amend the Prison Litigation Reform Act

The Prison Litigation Reform Act (PLRA) addresses how prisoners file civil suits in Federal court. The Act was passed and signed by President Clinton in an effort to reduce the number of frivolous lawsuits filed by prisoners. Since PLRA has been in effect, the number of cases filed has significantly dropped. However, the significant decrease in the number of cases filed does not mean that PLRA has been effective. In fact, an unintended consequence of the Prison Litigation Reform Act is an obstruction to needed reform and enhancement of emergency measures to protect the health and welfare of prisoners during disasters. PLRA has created such a rigorous process for prisoners filing claims that many legitimate claims are never heard, including claims that have a striking similarity to ones that could, or have occurred, during disasters.

The Act requires prisoners to take certain steps before a suit can be filed. Furthermore, it reduces the number of cases that can be filed by setting certain criteria and standards that must be met for a suit to be considered lawful. In order to file a claim, the courts have held that a prisoner must exhaust all administrative processes. PLRA has created a very rigorous process for prisoners filing claims for different types of injury sustained. Under PLRA, a prisoner who suffered emotional or mental health injury during a disaster must also demonstrate that physical injury was sustained. If emotional or mental injury was sustained, but not a physical injury, the case will be dismissed. PLRA effectively disincentivises the protection of prisoners during disasters, as the physical injury requirement presents a huge hurdle for prisoners filing claims, claims which will unlikely make it to the courts. Several elements of PLRA must be amended to

remove the disincentives that it creates, in order to ensure prisoners are protected during future disasters.

First, PLRA must be amended so that prisoners do not need to demonstrate physical injury in order to file a claim for mental and or emotional health injury during a disaster. During disasters, emotional and mental health injuries are common, so much so, that the Department of Health and Human Services, as well as the American Red Cross, have resources and teams they deploy to assist individuals mentally or emotionally affected by a disaster.⁵

Several reports show that emotional and mental health injury is common during disasters. Disasters can cause individuals to go into shock, leaving them in an overemotional state that can include high levels of “post-traumatic stress disorder, anxiety, guilt, depression, and a loss of faith” (Babbel, 2010). According to the ACLU, the Courts are split over the argument that a mental or emotional health injury in the absence of a physical injury is a constitutional rights violation (ACLU, 2008). Amending PLRA so prisoners do not need to demonstrate physical injury in order to file a claim for mental or emotional injury would only allow prisoners to file suit and receive awards (or an injunction relief) for these other types of injury sustained during a disaster. It would also rectify this ambiguity in the law; ensuring prisoners are protected in the event of a disaster by placing less responsibility on the prisoner for demonstrating deliberate indifference, and more responsibility on the prison to take protective action.

Second, the term “physical injury” must be further defined. This will allow prisoners the opportunity to file a suit for physical injury. This will also prevent the Courts from interpreting what constitutes an injury. To date, the courts have not determined what constitutes a physical

⁵ The American Psychological Association defines trauma as "an emotional response to a terrible event like an accident, rape or natural disaster."

injury violation. As Giovanna Shay clearly demonstrates in her article Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act, the courts have held even “serious physical symptoms insufficient to allow the award of damages because of the PLRA’s physical injury provision” (Shay and Kalb, 2007). Even sexual assault may not be seen as a physical injury violation by the courts (Golden, 2006). Physical injury will occur during disasters; however, it remains unclear how the courts will determine what constitutes a physical injury violation during a disaster. Defining “physical injury” will prevent the variation in Courts interpretation of what constitutes an injury, and hold all facilities to the same standards.

Third, PLRA must be amended so that prisoners do not need to adhere to the administrative exhaustion process if physical injury is eminent. This will allow prisoners to file claims leading up to natural hazard events (e.g. heat wave, hurricane, pandemic). Prisoners that require additional protection would be allowed to receive that protection in advance of a known natural hazard event. For example, facilities that have prisoners with access and functional needs (e.g. a quadriplegic prisoner) would have to implement the same or similar protective action decision as other members of the public confined to hospitals, nursing homes, and rehabilitation facilities (e.g. move those individuals in advance of a known natural disaster that is going to impact the area).

Fourth, PLRA must be amended so the administrative remedies exhaustion process allows prisoners the opportunity to file suit, even if institutional deadlines are not met. Prisoners must retain the right to access the courts. This right is guaranteed,⁶ however, disasters may prevent prisoners from meeting institutional deadlines required for filing a claim. Under the

⁶ Under, 42 USC Sec 1983 Civil Action for Deprivation of Rights, prisoners are guaranteed the right to access the court.

current Federal structure, the most defensible cases have been dismissed because prisoners were not able to meet deadlines established by their institution (Schlanger and Shay, 2007).⁷

Amending PLRA to ensure that prisoners retain access to the courts would allow prisoners who have suffered a mental, emotional, or physical injury to file a claim even if the deadline has been missed due to the significant events of the disaster.

Revise the Post Katrina Emergency Management Reform Act

The Post Katrina Emergency Management Reform Act (PKEMRA) was passed following the inadequate response to following Hurricane Katrina, which devastated the Gulf Coast in 2006. PKEMRA addresses many deficiencies that were identified during the response and recovery of Hurricane Katrina, including increasing national capabilities; planning for special populations, like the elderly, as well as pets; developing long-term recovery strategies; and giving FEMA more authority (PKEMRA, 2006; Pets Evacuation and Transportation Standards Act, 2006). Following its devastation, Federal efforts have been made to ensure populations that were greatly affected during Katrina will be protected in the event of another disaster.⁸

PKEMRA does list categories of other special populations, including the elderly, individuals with pets, and individuals with disabilities (PKEMRA, 2006). Throughout PKEMRA, there is absolutely no mention of prisons or prisoners. PKEMRA must be amended to ensure prisons and prisoners are protected during future disasters. The lack in reference to prisons or prisoners is a huge gap within the law, as this population was severely neglected during Hurricane Katrina (ACLU, 2006; ACLU, 2007).

⁷ See *Washington v. Texas Department of Criminal Justice*, 2006 as an example.

⁸ An example of an action taken to protect a specific population is the creation of the Pets Evacuation and Transportation Standards Act of 2006, which requires States that receive financial assistance from the Federal government to plan for accommodating individuals and their pets, or service animals, during disasters. This Act was drafted, and signed into law after Hurricane Katrina devastated the Gulf Coast.

PKEMRA must be amended to include provisions for preparing prisons and protecting prisoners during disasters. During Hurricane Katrina, the Orleans Parish Prison evacuated over 6,500 prisoners post-disaster. The emergency plans in place at the prison were ambiguous, inadequate, and impractical. Furthermore, the decisions made by prison officials only exacerbated the problem. Following landfall, prisoners were initially abandoned in their cells by prison guards,⁹ some left up to their neck in sewerage tainted water. Those who were not able to escape were eventually evacuated days after the storm passed, only to be left on highway overpasses, many unrestrained and unsegregated, for days with the public, which included women and children. Prisoners normally segregated within the confines of the prison were housed together, where prisoner-on-prisoner violence erupted. Over 600 prisoners managed to escape from Orleans Parish, 260 of which were sexual offenders (Scharf, 2006). Furthermore, evacuees from Louisiana who were registered as sexual offenders, or had warrants out for their arrest, were evacuated, along with members of the public, to Otis Air National Guard in Massachusetts. The receiving officials at Otis had no prior knowledge on evacuees' records (Anonymous Interview, 2012). Prisoners' records were lost during the Hurricane (records were stored in basements, which were flooded out). Without records, many prisoners served more time than what their sentence required.¹⁰ Amending PKEMRA to include provisions for preparing prisons and protecting prisoners would ensure these failures are not repeated.

Amend the Robert T. Stafford Act

The Robert T. Stafford Act identifies the authorities for disaster response activities. The Stafford Act is arbitrary, ambiguous, and broad in many of its definitions, descriptions, and

⁹ There were significant staffing shortages at the prison (staff did not report, either choosing to be with the family, or were physically unable to report to the facility).

¹⁰ See for example, *Waganfeald v. Gusman*, 2012.

examples. Throughout the Stafford Act, there is absolutely no mention of protecting prisons or prisoners.¹¹ In order to ensure prisons are included in disaster response activities, several amendments must be made to the Stafford Act.

First, it must be amended to include prisons in the definition of public¹² and private non-profit facilities¹³ under *Sec.102 Definitions 42 U.S.C. 5122*. The Stafford Act was amended following Hurricane Katrina to include public and private non-profit facilities, which explicitly includes custodial care facilities for the aged and disabled (Robert T. Stafford Act, 2013), as well as facilities that provide essential services of a governmental nature to the public, which include museums, zoos, and performing arts facilities. It also includes facilities that provide health and safety services of a governmental nature. One could interpret this to mean prisons, however, it is ambiguous, and the other listed facilities have little if no similarity to prisons. With this gap in the law, it is easy to understand why prisons have continued to be disregarded in all phases of emergency management at the National level, as they have not been listed in the Stafford Act.

Correctional facilities must be explicitly listed in the Stafford Act, as they are public and private non-profit facilities that provide health and safety services of a governmental nature. Including prisons will ensure efforts to protect prison populations will occur during disasters throughout the nation.

Congress must also amend the Robert T. Stafford Act to include prisons as an entity that receives essential services during a disaster. The Stafford Act allows Federal agencies to provide

¹¹ The only reference to prisons within the Robert T. Stafford Act is in reference to using prisoners to perform eligible work to repair, restore, and replace damaged facilities (Robert T. Stafford Act, 2013).

¹² A public facility is defined as a facility that is owned or operated by the government (Robert T. Stafford Act, 2013).

¹³ A private non-profit facility is defined as a facility that provides essential services of a governmental nature (Robert T. Stafford Act, 2013).

services during a disaster to entities meeting immediate threats to life safety or property. Under *Sec. 403 Essential Assistance 42 U.S.C. 5170b*, the Stafford Act describes the work that can be performed, and includes the provision of care, rescue, and essential services to individuals with pets and service animals. The law, the way it is written, could be interpreted to read that the Federal government places animal welfare above those who are incarcerated, which is exactly what happened during Hurricane Ike, which succeeded Hurricane Katrina. During Hurricane Ike, pets in the local shelter were evacuated but the prison population was not and, as a result, many prisoners suffered casualties (Texas Civil Rights Project, 2009).

To ensure prisons are provided essential services during a disaster, Congress must revise the Robert T. Stafford Act under *Sec. 403 Essential Assistance 42 U.S.C. 5170b (3) (J)* as follows:

- (J) provision of rescue, care, and shelter to essential needs-
 - (iii) to individuals under the care and custody of a public or private non-profit facility; and,
 - (iv) jails, prisons, and correctional facilities.

This will mandate that these individuals and facilities receive services essential to saving lives and protecting and preserving property or public health and safety during a disaster.

Issue Federal Policy or Guidance

In addition to the amendments that must be made to the Prison Litigation Reform Act, Post Katrina Emergency Management Reform Act, and the Robert T. Stafford Act, Federal policy or guidance must be enacted to protect prisons and prisoners during disasters. Prisons need a policy or guidance document that unifies elements of existing policies, directives, acts, and other documents, which can then be used specifically for planning for and responding to disasters affecting prisons. In order to accomplish this, a Presidential Directive, or Letter of Instruction (LOI) directing the Department of Homeland Security (DHS) and the Department of

Justice (DOJ) should be drafted, tasking these two entities with the responsibility of drafting Federal policy or guidance for preparing prisons for disasters. The reason for the partnership is to ensure that both disciplines, emergency management and corrections, is addressed.

Presidential Policy Directive 8 (PPD 8) and the Post Katrina Emergency Management Reform Act (PKEMRA) support the recommendation that DHS work with DOJ on establishing policy for protecting prisoners during disasters. Under PPD 8, the Secretary of Homeland Security is “responsible for coordinating the domestic all-hazards preparedness efforts of all executive departments and agencies, in consultation with State, local, tribal, and territorial governments, nongovernmental organizations, private-sector partners, and the public; and for developing the national preparedness goal” (PPD 8, 2011).

DHS should task the Federal Emergency Management Agency (FEMA) as the DHS agency responsible for working with the Department of Justice for drafting policy or guidance, and for providing grant funding so entities can implement guidance. Congress has designated FEMA as being responsible for coordinating the Government’s role in “preparing for, preventing, mitigating the effects of, responding to, and recovering from all domestic disasters” (FEMA, 2012).

FEMA should serve as the lead Agency because the Post Katrina Emergency Management Reform Act (PKEMRA) states that the primary mission of FEMA is “to reduce the loss of life and property and to protect the Nation from all hazards, including natural disasters, acts of terrorism, and other man-made disasters” (PKEMRA, 2006). FEMA is to accomplish this by leading and supporting the Nation in a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation. PKEMRA states that FEMA is responsible for collaborating with other Federal, State, local agencies, as well as the

non-profit and private sector, in developing a national emergency management system (PKEMRA, 2006). This statement places responsibility on the Federal level for providing resources that can assist in saving lives and protecting the public health and safety. PKEMRA also states that a method for meeting these requirements is to provide funding, training, exercises, technical assistance, planning, and other assistance to build national capabilities. As a requirement, FEMA must:

Develop and coordinate the implementation of a risk-based, all-hazards strategy for preparedness that builds those common capabilities necessary to respond to natural disasters, acts of terrorism, and other man-made disasters while also building the unique capabilities necessary to respond to specific types of incidents that pose the greatest risk to our Nation (PKEMRA, 2006).

FEMA has successfully collaborated with other Agencies to prepare populations for disasters. In addition, FEMA has supported or assisted in building national capabilities and established policy and guidance on several existing programs outside of its jurisdiction.¹⁴

The requirements in PKEMRA support recommendations for assigning FEMA with the primary responsibility of addressing this issue. New policy must serve as a guiding doctrine that contains the legal requirements, planning standards, guidance, and training requirements for correctional facilities. Rules promulgated by the Federal government will be binding,

¹⁴ An example of a program where FEMA has been directed to develop policy and guidance outside its authority is the Radiological Emergency Preparedness Program (REP). Following the Three Mile Island Nuclear Power Plant accident in 1979, President Carter assigned FEMA with the responsibility for planning to protect the public within 10 and 50 miles of commercial nuclear power plants. As a result, FEMA coauthored the Radiological Emergency Preparedness Program Manual with the Nuclear Regulatory Commission (the NRC regulates nuclear plants); and is currently in the process of revising NUREG-0654 FEMA REP-1, which is the criterion for preparation and evaluation of radiological emergency response plans and preparedness in support of nuclear power plants. These documents assist State and local governments in developing radiological emergency preparedness activities within 10 and 50 miles of commercial nuclear power facilities. Participation in offsite radiological emergency planning and preparedness is voluntary; however, if OROs do not participate, the power plants are still responsible for implementing these standards.

establishing standards of conduct for correctional officers and staff and holding them accountable for their actions. Policy must also establish which institutional standards can be waived once the President of the United States has declared a Major Disaster Declaration or Emergency Declaration, or what authority a correctional facility has once a Governor has declared a State of Emergency.¹⁵

Implementing policy or guidance is the most cost-effective method for addressing this issue. The Federal government will incur costs associated with drafting and implementing a national policy or guidance document. However, the alternative options for correctional facilities are litigation or settling claims outside of court, both potentially costing millions annually. For example, in 2011, the New York Department of Corrections paid \$15.4 million in claims filed by prisoners (Wills, 2013).

The planning involved in developing effective guidance is a low cost approach and the cost to the Federal government, as well as the public, is outweighed by the benefits at all levels. The costs overtime would ultimately become inconsequential given the benefits. Existing literature has already demonstrated that planning is cost effective, saving time and money (Red Cross, 2013; FEMA, 2008). According to the Multi Hazard Mitigation Council, every \$1.00 spent on mitigation efforts saves \$4.00 in future costs (Multi Hazard Mitigation Council, 2005). Planning for any agency or organization is a process, but does not need to be so overwhelming that it cannot be achieved. As quoted by J. Bryson, the author of *Strategic Planning for Public and Non-Profit Organizations*, strategic planning “is most needed where it is least likely to work.”¹⁶

¹⁵ For example, in *Waganfeald v. Gusman*, the Appeals Court found that the term “emergency” waived institutional standards at the Orleans Parish Prison (*Waganfeald v. Gusman*, 2012).

¹⁶ *Strategic Planning for Public and Nonprofit Organizations*, 3rd Edition, Bryson

There are several benefits, as well as costs, to developing a national policy. Benefits of a national policy include the added protection of prisoners' civil rights and civil liberties; health and safety of the prison population, and public, protected; facilities better prepared to respond to and recovery from disasters; lawsuits minimized. The potential areas of costs include time (that of the government, correctional facilities, and staff responsible for implementing policy); money (appropriated fund through Federal and State taxpayers' dollars); and resources required for implementing policy requirements.

The policy or guidance document that DOJ and FEMA draft should include a specific set of criteria. The recommendations below provide a basic framework for developing a policy for preparing correctional facilities for disasters.

Legal Requirements

Several legal criteria must be considered when developing a national policy. Criteria should include how disasters could affect prisoners' constitutional requirements, how disasters could affect statutory requirements specific to prisons (e.g. PLRA), and how disaster declarations could influence institutional standards.¹⁷.

Planning Requirements

Several planning factors should be considered when developing a national policy. Criteria should include the need for having an emergency operations plans, as well as continuity of operations plans in place at each facility. These plans should include the findings from a Threat and Hazard Identification Risk Analysis (THIRA). Plans should address staffing needs;

¹⁷ See *Waganfeald v. Gusman*, 2012.

shelter needs; evacuation needs;¹⁸ transportation needs; communications;¹⁹ resource needs; logistics; and long-term recovery strategies. Planning requirements should also address the requirement for establishing standard operating procedures, as well as memorandums of understanding with other entities. Additionally, planning requirements should consider whether plans, memorandums of understanding, and standard operating procedures will be required to be reviewed and updated on a set schedule in order to receive appropriated grant funding.

Training Requirements

Frequency of training and type of training need to be considered when developing a national policy. Training requirements should include both on-line training requirements offered through FEMA's Independent Study Program and the National Institute of Corrections Website, and training that would be held onsite at each facility. Consideration should also be given to whether employees will need to participate in training for facilities to receive appropriated grant funding.

Exercise Requirements

Exercise frequency and exercise type (e.g. virtual, tabletop, full-scale) should be considered when developing a national policy. Consideration should be given to whether facilities need to exercise their plans on a set schedule (e.g. annually, biennially) in order to receive appropriated grant funding.

¹⁸ An evacuation time estimate study that should be conducted to determine decision points for mobilize appropriate resources and moving prisoners.

¹⁹ Consideration should also be given to notification of consulate general offices. When considering notification of foreign national prisoner transfer to consulate general offices, criteria needs to reference Consular Notification and Access (Department of State, 2010), as well as the 1963 Vienna Convention on Consular Notifications.

Dedicate Funds

Federal funding must be made available to correctional facilities for preparing for, responding to, and recovering from natural and manmade disasters. The United States House of Representatives and United States Senate must include, and pass, in the Homeland Security Appropriations Bill, money to be made available to correctional facilities to implement requirements set forth by rules (to be) promulgated.

Correctional facilities have little, if no funding available to voluntarily implement emergency management practices. One method that has been proven effective for obtaining organizational compliance as it relates to emergency management is through grant funding. Providing Federal grant dollars to correctional facilities will ensure facilities comply with, and implement national policy or guidance. As part of a larger study conducted, those surveyed reported that if FEMA developed policy and provided funding to implement policy, they would apply for funding. Congress has appropriated millions of dollars to Federal agencies to distribute to State and local organizations for emergency preparedness efforts (Congressional Research Service, 2012). Creating an avenue for correctional facilities to apply for appropriated grant funding, through a Funding Opportunity Announcement, with agencies like FEMA, or the Department of Justice, would allow facilities to receive the resources needed to more fully prepare for disasters and meet the Federal government's legal obligations to protect prisoners. Earmarked funding provided through an appropriations bill for planning and preparedness activities at correctional facilities would ensure dedicated funds, and not competitive funds, are available to correctional facilities to come into compliance with policy or guidance. After a specific time (i.e. Five Years), funding could be sunset into an Emergency Management Performance Grant (EMPG).

Presidential Policy Directive 8 (PPD 8) and the Post Katrina Emergency Management Reform Act allow the Federal government to make funding available through grant funding so entities, like correctional facilities, can adopt and implement emergency management practices in order to comply with Federal requirements. Providing grant funding is a cost-effective approach and serves as a road map to policy implementation. It would also ensure correctional facilities are all being held to the same standard.

National Critical Infrastructure Prioritization Program

Correctional facilities need to be added to the National Critical Infrastructure Prioritization Program list. The National Critical Infrastructure Prioritization Program (NCIPP) identifies nationally significant critical assets and systems in order to enhance decision making related to critical infrastructure protection (DHS, 2013). The reason for adding correctional facilities to the National Critical Infrastructure Prioritization Program list is because the “destruction or disruption could cause some combination of significant casualties, major economic losses, or widespread and long-term disruptions to national well-being and governance capacity” (DHS, 2013). Correctional facilities are not currently considered critical facilities. Adding these facilities to the list would allow them to be included in the Urban Area Security Initiative (UASI) and to apply for State Homeland Security Grants.

An assessment checklist should be established for correctional facilities, which would identify specific vulnerabilities and threats, as well as increase capabilities, including communications, information sharing, and access to resources (DHS, 2013).²⁰ Public Security Advisors (PSAs), which work for NCIPP, and are assigned to work with State Homeland

²⁰ Facilities should reference, or consider conducting, a Threat and Hazard Identification and Risk Assessment (THIRA), which identifies threats and hazards that could affect the facility. Conducting a THIRA is a requirement for an entity that receives a Federal preparedness grant (FEMA, 2013).

Security Offices, Emergency Management Agencies, and Fusion Centers, should work with these entities to further identify correctional facilities within each State that would be considered critical infrastructure.²¹ PSAs should also help States determine which facilities should be added to each State's Critical Facility Restoration lists and plans for electrical, water and sewerage services.

Emergency Management Assistance Compact

The Emergency Management Assistance Compact (EMAC) is a national system that State and U.S. territories enter into to support one another during a disaster. EMAC allows members to share resources and provide assistance during a disaster.²² The benefit to EMAC is that it allows members to support one another without waiting for Federal assistance. EMAC allows States to provide assistance at a lower cost than the Federal government, and allows resources to be rapidly mobilized and distributed without having to wait for the Federal government. EMAC has created a list of useful guidance documents for members, and has broken these documents out by topic. Examples include reference guides for Law Enforcement, National Guard, Animal Health Emergency, and Public Works; however, there are no references specific to corrections.²³

EMAC should create a resource document for corrections to reference when preparing for and responding to a disaster. A reference guide specific to corrections should address the need for States to develop a procedure for deploying officers, receiving officers, transporting prisoners

²¹ Correctional facilities added to the Critical Infrastructure list should be based on specific criteria, including the population(s) served, population counts, and hazard vulnerability assessments.

²² EMAC members include all 50 States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands (EMAC, 2013).

²³ The Law Enforcement Tips Document provides information on deploying law enforcement officials across State boundaries, but does not refer to corrections (EMAC, 2013).

specifically across State lines, consular notifications on foreign national detentions, and authorities.

Conclusion

The Federal government has the legal responsibility for ensuring prisons across the Nation are prepared for disasters. If correctional facilities continue to be excluded from emergency management efforts, prisons will remain unprepared to respond to and recover from disasters, failing at their duty to protect prisoners, and the public.

There are several actions the Federal government can take to ensure correctional facilities are better prepared to respond to and recover from disasters. The recommendations in this paper are the most practical, efficient, and effective methods for resolving this issue. However, additional research is still required to better assess the needs and capabilities of correctional facilities across the Country, and to further build out the specific guidance and program criteria contained in this document.

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APPENDICES

Consent Forms

Unsigned Consent Form

Northeastern University Unsigned Consent Form

Northeastern University, College of Professional Studies, Doctorate in Law and Policy

Name of Investigator: *Robert D. Pritchard, Principal Investigator; Melissa A. Savilonis, Student Researcher*

Title of Project: Managing Clients of the Criminal Justice System during Disasters

Request to Participate in Research

I would like to invite you to participate in a web-based online survey. The survey is part of a research study whose purpose is to determine if the Federal government should establish guidance and provide grant funding for Managing Clients of the Criminal Justice System during Disasters. This survey should take about 15 minutes to complete.

I am asking you to participate in this study because you are involved in the emergency management industry and/or criminal justice system and your feedback would add great value to the research being conducted.

You must be at least 18 years old to take this survey.

The decision to participate in this research project is voluntary. You do not have to participate and you can refuse to answer any question. Even if you begin the web-based online survey, you can stop at any time.

There are no foreseeable risks or discomforts to you for taking part in this study.

There are no direct benefits to you from participating in this study. However, your responses may help us learn more about what guidance should be drafted and if grant funds should be provided to correctional facilities for emergency management practices.

You will not be paid for your participation in this study.

Your part in this study will be handled in a confidential manner. Any reports or publications based on this research will use only group data and will not identify you, your facility or any individual as being affiliated with this project.

If you have any questions regarding electronic privacy, please feel free to contact Mark Nardone, IT Security Analyst via phone at 617-373-7901, or via email at privacy@neu.edu.

If you have any questions about this study, please feel free to contact, Melissa A. Savilonis, at 774-721-6574 or via email at savilonis.m@husky.neu.edu, the person mainly responsible for the research. You can also contact Dr. Robert D. Pritchard at r.pritchard@neu.edu, the Principal Investigator overseeing the research.

If you have any questions regarding your rights as a research participant, please contact

Nan C. Regina, Director, Human Subject Research Protection, 960 Renaissance Park,

Northeastern University, Boston, MA 02115. Tel: 617.373.7570, Email: irb@neu.edu. You may

call anonymously if you wish.

By clicking on the “yes” button below you are indicating that you consent to participate in this study. Please print out a copy of this consent form for your records.

Thank you for your time.

Melissa A. Savilonis

Initial Email

Hello,

My name is Melissa Savilonis and I am a Doctorate student at Northeastern University, researching emergency management practices for correctional facilities. You are receiving this email because I have identified you as an individual that works in the emergency management industry and/or criminal justice system.

I am conducting research on whether or not the Federal government should establish guidance on managing clients of the criminal justice system during disasters and provide grant funding to correctional facilities to meet said guidance.

The online survey can be accessed at the following link:

https://www.surveymonkey.com/s/Managing_Clients_of_the_Criminal_Justice_System_During_Disasters

The survey should take about 15 minutes to complete and your participation will be handled in a confidential manner.

If you have any questions, please respond to me at savilonis.m@husky.neu.edu or [774-721-6574](tel:774-721-6574).

Thank you for taking time out of your schedule to assist me with my research.

Sincerely,

Melissa A. Savilonis, LP.D (c)

Northeastern University

Follow-Up Email

Hello,

My name is Melissa Savilonis and I am a Doctorate student at Northeastern University, researching emergency management practices for correctional facilities. This is a reminder invitation to take part in a research study. If you have already completed the survey I sincerely appreciate your participation. You are receiving this email because I have identified you as an individual that works in the emergency management industry and/or criminal justice system.

I am conducting research on whether or not the Federal government should establish guidance on managing clients of the criminal justice system during disasters and provide grant funding to correctional facilities to meet said guidance.

The online survey can be accessed at the following link:

https://www.surveymonkey.com/s/Managing_Clients_of_the_Criminal_Justice_System_During_Disasters

The survey should take about 15 minutes to complete and your participation will be handled in a confidential manner.

If you have any questions, please respond to me at savilonis.m@husky.neu.edu or [774-721-6574](tel:774-721-6574).

Thank you for taking time out of your schedule to assist me with my research.

Sincerely,

Melissa A. Savilonis, LP.D (c)

Northeastern University

Letter of Consent

September 6, 2013

Regarding: Protecting Prisoners during Disasters, Northeastern University

Dear Professional:

Over the course of my research on emergency management planning in prisons, we spoke about the issue of protecting prison populations during disasters. During this conversation, we discussed matter pertinent to my study. I am requesting your permission to use the information we discussed for my research.

Your part in this study will be confidential. Only the researchers in this study will see the information about you. No reports or publications will use information that can identify you as being of this project in any way. Personal information will be kept in a locked file that only the researcher and investigator has access to.

Please check one of the following boxes and return to me at savilonis.m@husky.neu.edu.

- ☐ I give you permission to use the information discussed. You may include my name in reports or publications.
- ☐ I give you permission to use the information discussed, however you may **not** include my name in reports or publications. *In this case, a pseudonym or no name may be used, or a general title (e.g. government official) may be used.*
- ☐ I **do not** wish for you to use the information discussed. *Please be advised that if you decide to opt out from this study, all data on file will be removed and your name will not be published in any reports or publications. I will, to the best of my ability, remove all references to our conversation from published reports.*

If you have any problems or questions about this study, please feel free to me at savilonis.m@husky.neu.edu or 774-721-6574, as I am the person mainly responsible for the research. You can also contact Dr. Estrella-Luna, the Principal Investigator at 617-373-6472 or n.estrellaluna@neu.edu. If you have any questions about your rights in this research, you may contact Nan C. Regina, Director, Human Subject Research Protection, at 617.373.4588 or n.regina@neu.edu. You may call anonymously if you wish.

Melissa A. Savilonis

Northeastern University

Doctor of Law and Policy Program

APPROVED

NU IRB# 11-11-10
VALID 9-18-13
THROUGH 2-11-14

Survey: Managing Clients of the Criminal Justice System during Disasters

1) What security level is your facility?

- ☐ Pre-Release ☐ Minimum ☐ Medium ☐ Maximum/High
☐ Other _____

2) What population does your facility serve?

- ☐ Juvenile ☐ Convicted Criminals
☐ Sexual Offenders ☐ Alcohol and Substance Abusers
☐ Pre-Trial ☐ Criminally Insane
☐ Other _____

3) Does your facility house inmates for the Bureau of Prisons?

- ☐ Yes
☐ No

4) What is the average daily population of your facility within the past 12 months?

5) Is your facility currently at full capacity?

- ☐ Yes ☐ No

6) If the answer to the last question was no, how many cells/beds are currently available at your facility?

7) Does your facility have an emergency management department?

- ☐ Yes ☐ No

8) If the answer to the last question was yes, how many employees is part of the emergency management department?

9) Does your facility have a fire evacuation plan?

☐ Yes ☐ No

10) Does your facility have an emergency operations plan?

☐ Yes ☐ No

11) **If the answer to the last question was yes, does your facility exercise its emergency operations plan?**

☐ Yes ☐ No

12) **If the answer to the last question was yes, how often does your facility exercise its plan?**

☐ < Once a Year ☐ 1-5 Years ☐ Other _____

13) Does your facility have Letters of Agreement or Memorandums of Understanding in place with other facilities or providers for disaster response and recovery?

☐ Yes ☐ No

14) **If the answer to the last question was yes, what kind of agreements are in place and with whom?**

15) Does your facility have an Influenza Specialty Care Unit that can be utilized on site in the event of a pandemic?

☐ Yes ☐ No

16) Does your staff attend annual trainings for emergency preparedness, response, and recovery to a natural or man-made disaster at the facility?

☐ Yes ☐ No

17) Does your staff receive training through the Federal Emergency Management Agency?

☐ Yes ☐ No

18) Would it be helpful to have a course on disaster preparedness for managing clients of the criminal justice system during disasters, offered through the Federal Emergency Management Agency's Independent Study Program?

☐ Yes ☐ No

19) Has your facility ever been impacted by a natural or man-made disaster?

☐ Yes ☐ No

20) If the answer to the last question was yes, what type of disaster affected your facility?

21) If your facility has been affected by a disaster, were there any challenges managing clients?

22) What would be most valuable to your organization for disaster preparedness efforts:

☐ Exercises

☐ Training

☐ Planning Development

☐ Resources (PLEASE PROVIDE SPECIFICS, e.g. generators, cots, water):

☐ Other:

23) If FEMA established guidance and provided grant funding to your facility to adopt said guidance and come into compliance with, would your facility apply for funding?

☐ Yes ☐ No ☐ Other

24) Please provide any additional comments below:
