

ARIZONA JOURNAL OF ENVIRONMENTAL LAW & POLICY

VOLUME 11

SUMMER 2021

ISSUE 3

CRUEL, UNUSUAL, AND TOXIC:

THE ENVIRONMENTAL IMPLICATIONS OF MASS INCARCERATION IN THE UNITED STATES

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This note examines the environmental issues associated with mass incarceration. It will first discuss mass incarceration and environmental injustices generally. Then it will assert that, due to the increased demand for prison facilities, mass incarceration led to an era of building prisons on the cheapest, easiest to obtain sites: toxic waste sites and environmentally compromised locations across the country. It will examine the statistics and recent studies from organizations working to improve prison conditions. This note will assert that mass incarceration is, in its own way, a form of environmental injustice that may even be subject to Eighth Amendment constraints. To support this conclusion, it will first highlight the statistics on prisoners who have experienced health issues as a result of environmentally unsafe conditions. During this discussion, it will question Eighth Amendment implications; namely, whether asbestos, arsenic, and other toxic chemical exposure constitutes cruel and unusual punishment. Next, it will examine the communities surrounding prisons and discuss how existing case law does not require prisons to conduct an environmental impact study prior to the construction of a prison. It will highlight the vast amount of pollution caused by prisons in recent years by examining specific prisons that have contaminated their surroundings, specifically in low-income and rural areas. Finally, it will discuss possible solutions to this problem and the difficulties in achieving those solutions.

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* J.D. Candidate, University of Arizona James E. Rogers College of Law, Class of 2022. I would like to thank Professor Joy Herr-Cardillo for your feedback, encouragement, and guidance while writing this note. Thank you to the Arizona Journal of Environmental Law and Policy, especially the Executive Board, for your feedback, edits, and for making the publication of this note possible. Endless thanks to my husband for being my sounding board and encourager throughout this process—and for always challenging me to see the people behind the story. Finally, thank you to my parents for your never-ending support and for teaching me, through your words and actions, to listen to the voiceless and stand up in the face of injustice.

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I. Introduction

Over the last fifty years, the United States has seen an unprecedented rise in prison population. This increase was primarily due to the period of mass incarceration sparked by the “War on Drugs” platform implemented by American presidents in the mid-to-late 1900s. The side effects of mass incarceration are pervasive and extremely damaging. Some are more obvious—the disproportionate punishment of poor, minority communities and perpetuation of poverty, mental illness, and substance use disorders—while others are just now being discovered.¹ Recently, two major studies discovered that prisons and jails are rife with environmental issues, from toxic water and air within the facilities to the pollution they cause in the surrounding communities.² As this note will discuss in more detail below, the massive increase in prison population required that prisons be built quickly and cheaply. In many cases, contaminated, toxic land became the affordable home for many prisons across the country.

These environmental issues are just another example of the insidious environmental injustices lying just below the surface in our country. While environmental injustice may not always make headlines or gain as much attention as other forms of injustice, it is just as egregious.³ Today, low income and minority communities are seeing the effects of mass incarceration in more ways than just sentencing disparities, higher conviction rates, and higher prison populations.⁴ As this note will explain, both prisons and jails built on toxic waste sites, old mines, or even former nuclear test sites pose dangerous threats to both inmate populations and the surrounding communities. It will also consider whether subjecting prisoners to dangerous, sometimes life-threatening environmental conditions beyond their control constitutes “cruel and unusual

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¹ See generally *Investigation Reveals Environmental Dangers in America's Toxic Prisons*, EQUAL JUST. INITIATIVE, <https://eji.org/news/investigation-reveals-environmental-dangers-in-toxic-prisons> (last visited Oct. 1, 2020).

² *Id.*

³ *Id.*

⁴ *Id.*; See also André Douglas Pond Cummings, “All Eyes on Me”: America's War on Drugs and the Prison-Industrial Complex, 15 J. GENDER RACE & JUST. 417, 418 (2012).

punishments” that are prohibited by the Eighth Amendment.⁵ For the purposes of this discussion, both prisons and jails will be analyzed under the lens of environmental injustices. It is helpful, though, to note the difference between the two. Jails are typically locally operated facilities that hold inmates in the short-term, whether that be inmates awaiting trial or sentencing or those sentenced to a term of less than one year.⁶ Prisons, in contrast, are longer-term facilities run by the federal or state government that typically “holds felons and persons with sentences of more than one year.”⁷ Both types of facilities have been found to have environmental issues, which shows that an inmate’s exposure to toxicity may begin before they are even formally sentenced. Even when a defendant is detained before trial, they could already be exposed to hazardous environments.

As a whole, this note will examine one startling issue: today, being arrested does not mean just being taken from your family, faced with years in prison, and any of the other crippling effects of long-term imprisonment—it also means you may be faced with blood toxicity, mesothelioma, cancer, or even death.

II. A History of Mass Incarceration, Generally: A System of Injustice

The Mass Incarceration era of American history is one that not only changed the criminal justice system irrevocably but also came with dangerous and unforeseen effects that continue to plague prison populations today. Before those effects can be discussed in full, we must first understand the history of mass incarceration in the United States and what it looks like today.

Though the United States makes up only about 5% of the global population, the country comprises nearly 20% of the world’s prison population, with over 2.3 million people incarcerated across the country.⁸ It has not always been this way; in 1969, President Nixon initiated the “War on Drugs” when he named drug abuse a “serious national threat” and called for anti-drug legislation at both the state and federal level.⁹ Two years later, President Nixon increased the conflict by declaring illegal drugs “public enemy number one.”¹⁰ As Nixon waged war on illegal drugs across the country, incarceration rates began to rise at an unprecedented rate.¹¹ The hard-fought War on Drugs began the phenomenon known today as mass incarceration, a period of skyrocketing incarceration numbers that disproportionately impacted minority communities across the country.¹²

President Reagan continued and compounded the War on Drugs. In 1986, President Reagan launched an assault on illegal drugs when he signed the Anti-Drug Abuse Act, allocating \$1.7 billion dollars towards his self-titled drug war.¹³ Primarily, the Act had glaringly obvious

⁵ U.S. CONST. AMEND. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

⁶ *What is the Difference Between Jails and Prisons*, BUREAU OF JUST. STAT., <https://www.bjs.gov/index.cfm?ty=qa&iid=322> (last visited Jan 31, 2020).

⁷ *Id.*

⁸ Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 *Am. Crim. L. Rev.* 1580.

⁹ *Timeline: America’s War on Drugs*, NATIONAL PUBLIC RADIO, <https://www.npr.org/templates/story/story.php?storyId=9252490> (last visited Oct. 1, 2020).

¹⁰ *Id.*

¹¹ Cummings, *supra* note 4, at 418.

¹² *Id.*

¹³ NATIONAL PUBLIC RADIO, *supra* note 9.

disparities in crack and powder cocaine sentencing guidelines.¹⁴ After President Reagan adopted the Anti-Drug Abuse Act, “fourteen states implemented sentencing disparities between crack and powder cocaine in their criminal codes.”¹⁵ Crack, the cheaper, more accessible form of cocaine, was possessed mainly by lower income, minority communities and came with harsher sentences and longer prison terms.¹⁶ Powder cocaine, on the other hand, was the businessman’s drug and the sentencing guidelines were much more lenient.¹⁷

The Anti-Drug Abuse Act not only essentially criminalized drug addiction by repeatedly punishing non-violent drug offenders, it also implemented mandatory minimum penalties that targeted minority communities and African Americans in particular.¹⁸ In addition, Nancy Reagan began her personal vendetta against illegal drugs by sensationalizing her “Just Say No” campaign, encouraging youth across America to say no to drugs and stigmatizing drug users as criminals.¹⁹ The more the President and First Lady attacked illegal drugs, the more American prisons began to fill with inmates, developing populations of primarily minorities and repeat drug offenders. As prisons populated, the disparate impact of this wave of mass incarceration became clear. Prior to the Fair Sentencing Act in 2010, the sentencing disparity between crack and powder cocaine varied among states and federal guidelines, but reached as high as 100-to-1.²⁰

As the War on Drugs raged on, disproportionately targeting lower income communities of color, prisons continued to fill to their capacity with a constant influx of new inmates. Both state and federal governments responded to the skyrocketing incarceration rates by passing legislation like the 1994 Crime Bill, which incentivized states to pass more tough-on-crime laws and build more prisons.²¹ Politicians on both sides came out in support of the Crime Bill, making the War on Drugs more than a partisan issue.²² Prison facilities reached their maximum capacity at unprecedented rates and more facilities were needed every year to house the influx of inmates.

Today, the results of the War on Drugs are painfully apparent. According to the Prison Policy Initiative, “over the last three decades of the 20th century, the United States engaged in an unprecedented prison-building boom that has given our nation the highest incarceration rate in the world.”²³ In the last fifty years, since President Nixon began the War on Drugs, the number of

¹⁴ *Id.* “The bill also creates mandatory minimum penalties for drug offenses, which are increasingly criticized for promoting significant racial disparities in the prison population because of the differences in sentencing for crack and powder cocaine. Possession of crack, which is cheaper, results in a harsher sentence; the majority of crack users are lower income.”

¹⁵ Nicole D. Porter & Valerie Wright, *Cracked Justice*, THE SENTENCING PROJECT, March 2011 at 6.

¹⁶ NATIONAL PUBLIC RADIO, *supra* note 9.

¹⁷ *Id.*

¹⁸ James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 101, 114 (quoting Nixon’s campaign advisor that the goal was to “devise a system” that secretly acknowledges that the issue is “blacks.”).

¹⁹ NATIONAL PUBLIC RADIO, *supra* note 9.

²⁰ Porter & Wright, *supra* note 15, at 1 (discussing the Fair Sentencing Act’s intent to address the 100-to-1 disparity that punished defendants with five grams of crack cocaine (also known as cocaine base) with the same five-year mandatory minimum penalty imposed on powder cocaine defendants with 100 times that amount).

²¹ Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU. June 4, 2019, <https://www.aclu.org/blog/smart-justice/mass-incarceration/how-1994-crime-bill-fed-mass-incarceration-crisis> (last visited July 14, 2021).

²² Porter & Wright, *supra* note 15, at 2.

²³ Peter Wagner, *Tracking State Prison Growth in 50 States*, PRISON POLICY INITIATIVE, May 24, 2014, <https://www.prisonpolicy.org/reports/overtime.html> (last visited Oct. 1, 2020).

prisons has increased over 700% in the United States.²⁴ Though incarceration rates today are finally starting to level out, the damage has been done.²⁵ The racial disparities of mass incarceration are also glaringly apparent; according to the NAACP, though only 32 percent of the United States population is represented by African Americans and Hispanics, these groups make up 56 percent of the United States' incarcerated population.²⁶

III. Mass Incarceration, an Environmental Injustice

Mass incarceration is a multi-faceted injustice facing minority communities across the United States. Though the War on Drugs clearly targeted and disproportionately affected African American and Latinx populations, it also came with more silent and insidious injustices that were not quite as apparent at the very beginning.²⁷ In recent years, it has become increasingly clear that mass incarceration has also done its part in perpetuating environmental injustices across the country. Environmental injustices are described as “the disproportionate exposure of communities of color and the poor to pollution, and its concomitant effects on health and environment,” along with “unequal environmental protection and environmental quality provided through laws, regulations, governmental programs, enforcement, and policies.”²⁸ These injustices are frequent and pervasive, leading to increased health problems and pollution in minority communities.²⁹

Prisons built in the mass incarceration era are no exception. According to Earth Island Journal, “[t]his legacy of environmental injustice extends to the siting of prisons.”³⁰ Mass incarceration directly contributes to environmental injustices that “impacts the health of prisoners, prison-adjacent communities, and local ecosystems from coast to coast.”³¹ As the War on Drugs reached its peak, prisons across the country filled to their maximum occupancy, sparking a pressing need for new prison facilities to be built as quickly and affordably—and opening the door for yet another arm of environmental injustice.³² The most time-efficient option was to use land that had no other use, with the lowest price tag. This led to a rapid rise in prisons “built on some of the least desirable and most contaminated land in the country,” ranging from old mines, former nuclear power plants, areas designated as Superfund cleanup sites due to their toxicity, and

²⁴ EQUAL JUST. INITIATIVE, *supra* note 1.

²⁵ Leipold, *supra* note 8, at 1588 (referencing the recent downward turn in incarceration rates—but notes that the U.S. still leads the world in prison population).

²⁶ *Criminal Justice Fact Sheet*, NAACP, <https://www.naacp.org/criminal-justice-fact-sheet/> (last visited Oct. 1, 2020).

²⁷ See generally *America's Toxic Prisons*, EARTH ISLAND JOURNAL, <https://earthisland.org/journal/americas-toxic-prisons/> (last visited Oct. 1, 2020).

²⁸ Juliana Mantaay, *Mapping Environmental Injustices*, 110 ENVTL HEALTH PERSPECTIVES 161, 161.

²⁹ *Id.*; see also R. She Diaz, *Getting to the Root of Environmental Injustice*, 29 Geo. Envtl. L. Rev. 767, 767, noting that “in the United States, poor people and people of color experience higher cancer rates, asthma rates, mortality rates and overall poorer health than their affluent and white counterparts” due in part to environmental injustices.

³⁰ *America's Toxic Prisons*, EARTH ISLAND JOURNAL, <https://earthisland.org/journal/americas-toxic-prisons/> (last visited Oct. 1, 2020).

³¹ *Id.*

³² *Id.*

landfills.³³ The pollutants found in and around the prisons have led to increasing amounts of inmate illness, contaminated water sources, and even air-born fungi.³⁴

Paul Wright, the executive director of the Human Rights Defense Center, summarized the issue in a striking way: though most people think of corporations as the cause of toxicity or pollution and consider the government as the solution, “the prison ecology issue turns that whole thing on its head.”³⁵ Here, the reverse is true: the government chose to build facilities on toxic waste sites or allowed them to become sources of toxic waste, “and it is literally holding people at gunpoint at these sites and exposing them.”³⁶ Recent studies show that the toxic impact of American prisons “extends far beyond any individual prison, or any specific region in the United States.”³⁷ Though some prisons provide particularly horrifying examples, mass incarceration impacts prisoner health, low-income, rural prison-adjacent communities, and local ecosystems from coast to coast.³⁸

A. Prisons Built on Toxic Sites

The United States is littered with sites abandoned by the industrial decline of the 1970s.³⁹ In many of these locations, prisons were used to fill the gaps in the land, occupying areas “left degraded by industrial activities and offering often-unfulfilled promises of employment to impoverished communities.”⁴⁰ The toxicity of these waste sites leads to clear cases of pollution, affecting not only the living conditions but the overall health of inmates. In an attempt to “recycle” land that has already been devastated, prisons are built on toxic and hazardous land because “the construction of a prison may be seen as [the land’s] only ‘acceptable’ use.”⁴¹

Nearly 600 federal and state prisons are located within three miles of a Superfund site.⁴² These areas are defined by the Environmental Protection Agency (EPA) as contaminated sites that exist due to hazardous waste that is dumped, left out in the open, or otherwise improperly managed, and include manufacturing facilities, processing plants, landfills, and mining sites.⁴³ The land within and around Superfund sites is recognized as the “nation’s worst toxic waste sites.”⁴⁴ Of the

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *America’s Toxic Prisons: The Environmental Injustices of Mass Incarceration*, PRISON LEGAL NEWS, <https://www.prisonlegalnews.org/news/2018/apr/2/americas-toxic-prisons-environmental-injustices-mass-incarceration/> (last visited Jan. 31, 2020).

³⁸ *Id.*

³⁹ EARTH ISLAND JOURNAL, *supra* note 30.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See generally Investigation Reveals Environmental Dangers in America’s Toxic Prisons*, EQUAL JUST. INITIATIVE, <https://eji.org/news/investigation-reveals-environmental-dangers-in-toxic-prisons/#:~:text=Prisons%20are%20also%20a%20source,detention%20centers%20across%20the%20nation> (last visited Oct. 1, 2020).

⁴³ *What is a Superfund Site?*, U.S. ENVTL PROT. AGENCY <https://www.epa.gov/superfund/what-superfund> (last visited Oct 1., 2020).

⁴⁴ *Nothing Super About Superfund Sites*, FORBES MAGAZINE, <https://www.forbes.com/2010/04/28/superfunds-environment-pollution-toxic-opinions-contributors-robert-h-weiss.html#2d2bdf647db8> (last visited Oct 1, 2020).

600 prisons identified within ten miles of sites listed on the National Priorities List, more than 100 are just one mile from the toxic site.⁴⁵

The side effects from living so close to a Superfund site can be dangerous and possibly deadly. These sites may contain extremely hazardous chemicals, such as Polycyclic Aromatic Hydrocarbons (PAHs) and dioxin, that have “no respect for industrial-site boundaries” and seep into both the air and water surrounding the sites.⁴⁶ Superfund areas may also contain “highly carcinogenic chemicals used to weatherproof telephone poles, railroad ties and other industrial products saturate people's soil, homes, water, pillows, air and everything in between.”⁴⁷ Exposure to these chemicals can lead to cancer, birth defects, and other possibly fatal diseases.⁴⁸

The impact of these issues is not merely theoretical; prisons across the country are being exposed for their dangerous living conditions. The effects are broad and unpredictable, but it is clear that these toxic sites are creating an extremely hazardous environment. The proposed dangers, too, are also manifested in many facilities; two recent reports have chronicled multiple instances of toxic sites contributing to pollution, carcinogens, and even death at prisons across the country.

These hazards are not region specific. For example, New York’s Rikers Island jail complex is built on a known toxic waste landfill site. The complex, housed on a 400 acre island across from La Guardia Airport, is New York City’s principal jail complex and one of the largest jails in the world.⁴⁹ Ten jails, “including facilities for women and adolescents, as well as an infirmary [and] power plant. . .” make up the complex; on average, the facility houses nearly 10,000 inmates daily and over 77,000 people a year.⁵⁰ At the complex, the toxic land experiences frequent methane gas explosions, not only putting the inmates at risk from the blasts, but also exposing them to slow poisoning from the methane in both the soil and the air.⁵¹

Further, a study from the Abolitionist Law Center found that a Pennsylvania prison built on top of one of the largest coal preparation plants in the world led to high percentages of illness among inmates.⁵² Federal Correctional Institution Fayette in La Belle, Pennsylvania is built on a piece of the former coal plant, where more than 40 millions tons of coal refuse and ash contaminate the land around the prison.⁵³ Coal ash is more toxic than unburned coal waste and contains higher concentrations of heavy metals and minerals, like mercury, lead, and arsenic.⁵⁴ At La Belle and other “unlined sites,” these chemicals can contaminate both the local water and air so severely that environmental experts say “the risks posed by such reclamation efforts outweigh the so-called

⁴⁵ EQUAL JUST. INITIATIVE, *supra* note 1; *see also* Environmental Protection Agency’s National Priorities List, which carefully tracks sites hazardous enough to warrant a cleanup.

⁴⁶ FORBES MAGAZINE, *supra* note 44.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Daniel Trotta, *New York City Council Votes to Close Infamous Riker Island Jails*, REUTERS, October 17, 2019, <https://www.reuters.com/article/us-new-york-rikers/new-york-city-council-votes-to-close-infamous-rikers-island-jails-idUSKBN1WW2ZW> (last visited March 08, 2021).

⁵⁰ Michael Schwirtz, *What is Rikers Island?*, THE NEW YORK TIMES, April 5, 2017, <https://www.nytimes.com/2017/04/05/nyregion/rikers-island-prison-new-york.html> (last visited March 08, 2021).

⁵¹ EARTH ISLAND J., *supra* note 30.

⁵² EQUAL JUST. INITIATIVE, *supra* note 1.

⁵³ Dustin S. McDaniel, et. al., *No Escape: Exposure to Toxic Coal Waste at State Correctional Institution Fayette*, ABOLITIONIST L. CENTER at 5.

⁵⁴ EARTH ISLAND J., *supra* note 30.

benefits.”⁵⁵ Prior to the completion of the prison, La Belle residents complained that the fugitive dust was making them sick, but the Department of Environmental Protection merely issued fines and allowed the construction to go forward. As a result, “more than 80 percent of inmates at FCI Fayette have suffered from exposure to coal ash, including respiratory, throat, and sinus conditions, gastrointestinal problems, and adverse skin conditions.”⁵⁶

On the West Coast, similar illnesses resulted in California prisons built on or near superfund sites. In Lancaster, over 3,500 prisoners at a California state prison were infected with valley fever after breathing in dust particles contaminated by a fungus found in the soil around the prison.⁵⁷ The symptoms of valley fever caused by the fungus present like the common flu, and the illness often goes undetected.⁵⁸ If left untreated, it can be fatal—as was the case in California.⁵⁹ Over fifty inmates at the Lancaster prison died from valley fever caused by contaminated soil that was left untreated.⁶⁰ In Northern California, Folsom State Prison was forced to remove 17,000 cubic yards of soil from the property that was contaminated by toxic waste, namely old scrap metal and drum storage from a former industrial manufacturing area.⁶¹

Farther south, three facilities in Victorville, California (FCI Victorville Medium I, Medium II, and United States Penitentiary-Victorville) are housed on a former Air Force Weapons Storage Area (WSA). The WSA was built “on a part of the base near where munitions were kept and where investigators from the Air Force Safety Center suspect nuclear weapons were maintained and stored.”⁶² Inmates in these three facilities are exposed to possible radiation poisoning and other hazards associated with nuclear emissions.⁶³

Some toxic risks are more obvious than others, but the lesser-known hazardous sites pose just as great of a risk with a lower probability of notice. For example, the Prison Ecology Project discovered a prison in Tacoma, Washington adjacent to a Superfund site on the Tacoma Tar Pits.⁶⁴ The area is designated a volcanic hazard zone and poses drastic risks to inmates housed nearby.⁶⁵ Whether it be the noticeable poisoning from coal ash or the quieter toll of slow, gradual radiation poisoning, prisoners across the country are being poisoned by their surroundings, simply because the land was vacant and affordable.

B. Prisons Built on Seemingly Benign Lands

Even prison facilities that appear to be built on benign lands have experienced toxicity and harmful exposure.⁶⁶ Though Superfund and other toxic sites are a clear cause for alarm, there are other more silent dangers that often go unnoticed. Recent studies have proven that “life-

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² John E. Dannenberg, *Prison Drinking Water and Wastewater Pollution Threaten Environmental Safety Nationwide*, PRISON LEGAL NEWS 1, 1 (Nov. 15, 2007).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

threatening exposure isn't always tied to a particular, site specific source of pollution."⁶⁷ Due to the rural location of many prison facilities, water contamination and pesticide exposure may be a hazard that goes unaddressed due to the insidious nature of the contamination.⁶⁸ Further, the extreme heat and poor ventilation at some prison facilities leave prisoners at risk for heat sickness or even heat stroke.⁶⁹

Climate change only serves to compound these issues. Prisons that already subject prisoners to intense heat are experiencing growing fatality rates as the weather gets increasingly warmer.⁷⁰ Texas prisons, for example, are experiencing the impacts of climate change firsthand. In the summer of 2011, "10 prisoners died of heat stroke in state-operated prison units"—raising the in-custody hyperthermia death rate in Texas prisons to a total of twenty-two.⁷¹ By 2017, as yearly temperature averages continued to rise, 79 of the state's 108 prison units still lacked air-conditioning—even as the state faced summer temperatures over 100 degrees.⁷²

C. Toxic Prisons and the Eighth Amendment: Are Toxic Conditions Cruel and Unusual?

These hazardous conditions may have constitutional implications. Amendment VIII of the United States Constitution protects inmates from "cruel and unusual punishments."⁷³ Though Eighth Amendment challenges usually center on the nature of charges, cruel and unusual punishment can extend to far more than the length of a charge. Courts have extended the Eighth Amendment to prison conditions, noting that "the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment."⁷⁴ Dangerous prison conditions may implicate cruel and unusual punishment in the ways otherwise Constitutional sentences are administered and executed.⁷⁵ Unfortunately, the death penalty is not limited to capital punishment—there are multiple ways to put someone to death, including hazardous and toxic prison conditions.⁷⁶ If the Eighth Amendment was designed to protect the rights of prisoners, it must also protect the conditions in which they are forced to live. Georgetown Law Professor Sharon Dolovich sums it up best:

If the prohibition on cruel punishment is to mean anything in a society where incarceration is the most common penalty for criminal acts, it must also limit what the state can do to prisoners over the course of their incarceration. . . . [In] the existing system, the crime determines only the length of the prison sentence, not the conditions under which that sentence will be served. Indeed, any harm prisoners suffer at the hands of the state while incarcerated is typically wholly unrelated to their original offense.⁷⁷

⁶⁷ EARTH ISLAND J. *supra* note 30.

⁶⁸ Dannenberg, *supra* note 62 at 1.

⁶⁹ EARTH ISLAND J. *supra* note 30.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ U.S. CONST. amend. VIII.

⁷⁴ *Helling v. McKinney*, 509 U.S. 25, 31 (1993).

⁷⁵ Sharon Dolovich, *Cruelty Prison Conditions, and the Eighth Amendment*, 84 NYU L. REV. 881 (2009).

⁷⁶ *Id.* at 882.

⁷⁷ *Id.* at 881.

When applying the Eighth Amendment to the administration of sentences, Courts require that prison conditions must not violate “evolving standards of decency that mark the progress of a maturing society.”⁷⁸ In light of this reasoning, it seems likely that toxic and often deadly prison conditions may constitute cruel and unusual punishment. Whether it is excessive heat, tainted water, or poisoning from superfund sites, prisoners at these facilities may face a death penalty they never expected; their very environment may sentence them to a long, painful death, even if they were convicted of a crime that does not come with a capital or life sentence.

Fortunately, prisoners do not have to wait until they are on their deathbed to seek relief when prison conditions violate the Eighth Amendment. For example, in 1993, a prisoner brought a civil rights action against prison officials that alleged an Eighth Amendment violation from his exposure to environmental tobacco smoke (ETS).⁷⁹ The Supreme Court held that prisoners could make an Eighth Amendment claim based upon both a future harm to health and a present harm.⁸⁰ The Court recognized that environmental harm caused by tobacco smoke was a sufficient cause of action for a cruel and unusual punishment claim against prison officials.⁸¹

An Eighth Amendment claim on prison conditions must satisfy both an objective and subjective prong.⁸² Though the Eighth Amendment “does not mandate comfortable prisons,” it clearly does not permit inhumane conditions.⁸³ By prohibiting inhumane prison environments, the Eighth Amendment requires prison officials to provide humane conditions and ensure that inmates have a subjective access to “adequate food, clothing, shelter, and medical care.”⁸⁴ Further, prison officials must take objectively “reasonable measures” to ensure the safety of the inmates in their facilities.⁸⁵

In recent years, increasing numbers of prisoners have brought claims against prison officials for Eighth Amendment violations due to hazardous or unhealthy prison conditions. Existing case law establishes that the Eighth Amendment ensures an inmate’s “right to be free from exposure to extremely dangerous temperatures without adequate remedial measures.”⁸⁶ Further, courts have held that merely providing inmates with ice or water is not an adequately remedial measure that would overcome an Eighth Amendment violation.⁸⁷ If the water provided to inmates is undrinkable, courts have held that the water is also a sufficient cause of action for a cruel and unusual punishment claim.⁸⁸ The increasing litigation on this topic proves that the judicial system is gaining sympathy for inmates who are subjected to unhealthy and unsafe conditions—but even when the courts rule in the inmates’ favor, as discussed below, prison officials are often determined to make any victories as difficult as possible.

⁷⁸ *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)).

⁷⁹ *McKinney*, 509 U.S. at 25.

⁸⁰ *Id.* at 33.

⁸¹ *Id.* at 35.

⁸² *Id.* at 30.

⁸³ *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Yates v. Collier*, 868 F.3d 354, 360 (5th Cir. 2017) (quoting *Hinojosa v. Livingston*, 807 F.3d 657, 669 (5th Cir. 2015)).

⁸⁷ *Id.*

⁸⁸ *See Davis v. Williams*, 216 F. Supp.3d 900, 906 (N.D. Ill. 2016) (holding that tainted water, insect infestation, and poor ventilation were all sufficient harms to survive a motion to dismiss).

1. Wallace Pack Unit: A Toxic Case Study

The Wallace Pack Unit in Texas is a prime example of the environmental hazards found in America's prisons. The facility, a Type I geriatric facility, has faced numerous lawsuits for its dangerous living conditions.⁸⁹ At the unit, prisoners unknowingly drank thousands of gallons of arsenic-tainted water for more than 10 years.⁹⁰ The inmates were also exposed to unbearable heat, leading to sicknesses that left the mostly elderly and disabled inmates extremely vulnerable.⁹¹

In 2014, the Texas Civil Rights Project and the University of Texas School of Law Civil Rights Clinic filed suit on behalf of the Wallace Pack Unit prisoners, alleging unsafe living conditions due to excessive heat.⁹² As part of their claim, prisoners alleged that the high temperatures in the unit constituted cruel and unusual punishment under the Eighth Amendment.⁹³ According to the suit, summer temperatures would reach over one hundred degrees inside the facility.⁹⁴ The heat was often unbearable; the metal beds and walls were so hot during the summer that prisoners could not lay on their beds due to the insufferable heat; one inmate compared it to "touching the hood of a car that [sat] in the sun on a 130-degree day."⁹⁵ The inmates would often wet their sheets and the cement floor, lay in the water, and blow a fan under the sheet in an attempt to lower their body temperature.⁹⁶ The high temperatures came with a price; in the last twenty-five years, twenty or more inmates died as a result of excessive heat at the unit.⁹⁷

The suit didn't seek damages, instead the prisoners asked that the facility be kept at eighty-eight degrees year round.⁹⁸ In 2017, a district court judge ruled in favor of the inmates, recognizing that the excessive temperatures were sufficient to show an Eighth Amendment violation and ordering that the facility be cooled to a safer temperature.⁹⁹ The court noted, though, that the prison facility need not be lowered to a comfortable temperature, but instead a level that reduces a "significant risk of harm to an acceptable one."¹⁰⁰

Unfortunately, the extreme heat was just one of the hazards at the unit. As part of their suit, prisoners also requested an emergency injunction to protect the inmates from unsafe drinking water. According to the second complaint, prisoners were encouraged to drink copious amounts of water to cope with the heat, especially during the summer months.¹⁰¹ The policy at the prison

⁸⁹ EARTH ISLAND J., *supra* note 30.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Texas Inmates Sue Over Lack of Airconditioning*, CNN, <https://www.cnn.com/2014/06/20/justice/texas-prison-heat-lawsuit/index.html> (last visited Nov. 14, 2020).

⁹³ *Yates*, 868 F.3d at 358.

⁹⁴ *Id.*

⁹⁵ EARTH ISLAND J., *supra* note 30.

⁹⁶ EARTH ISLAND J., *supra* note 30.

⁹⁷ *Yates*, 868 F.3d at 358.

⁹⁸ CNN, *supra* note 92.

⁹⁹ *Texas Judge Orders Prison to Cool Down*, CABLE NEWS NETWORK, <https://www.cnn.com/2017/07/19/us/texas-prison-heat-lawsuit/index.html> (last visited Nov. 14, 2020).

¹⁰⁰ *Cole v. Collier*, 2017 WL 3049540, at 45 (S.D. Tex., 2017).

¹⁰¹ Panagioti Tsolkas, *Is Texas Poisoning Prisoners with Contaminated Water?*, PRISON LEGAL NEWS, Aug. 31, 2015, <https://www.prisonlegalnews.org/news/2015/aug/31/texas-poisoning-prisoners-contaminated-water/> (last visited Nov. 14, 2020).

was to recommend that the inmates drink at least two gallons of water a day.¹⁰² The issue? The water the prisoners were encouraged to drink in order to survive the deadly heat was tainted with arsenic, a known carcinogen.¹⁰³ The inmates alleged that the water would run brown and many inmates became ill after drinking it.¹⁰⁴ According to a 2014 Consumer Confidence Report (“CCR”), the arsenic levels in the public water system at the unit “were more than double the maximum contaminant levels (MCLs) deemed safe for consumption” (10 parts per billion (ppb) is the MCL for arsenic, and the CCR detected 23 ppb in the unit’s water).¹⁰⁵ Another report by the Texas Commission on Environmental Quality in 2009 found that the unit’s wells contained at least four times the MCL for arsenic.¹⁰⁶ According to the CCR report, “runoff from agriculture, electronic and glass production wastes. . . and erosion of natural deposits” were likely the cause of the tainted water.¹⁰⁷ The contamination from these sources posed a risk of skin damage, circulatory issues, and an increased risk of cancer.¹⁰⁸ A district court judge issued a preliminary injunction ordering the Wallace Pack unit to find an alternative water source because the current arsenic-tainted water “violates contemporary standards of decency.”¹⁰⁹ Though the inmates were victorious, the state made clear its intentions to appeal the injunction both on the heat and tainted water grounds.¹¹⁰ According to prison officials, they believe that the conditions at the Wallace Pack Unit are safe for the inmates and that the prison did everything in its power to provide prisoners with sufficient means to cope with the heat.¹¹¹

IV. Prisons as Sources of Environmental Pollution

The environmental issues stemming from mass incarceration extend far past the boundaries of prison walls. Prison facilities across the country are also arising as sources of environmental pollution, creating toxic conditions and damaging ecosystems in the surrounding communities.¹¹² Prison-based environmental injustices extend to the siting of prisons, which are often located in or near low-income communities.¹¹³ According to a study by Prison Legal News, prisons across the country often commit sewage and sanitation violations with little to no repercussions.¹¹⁴ Panagioti Tsolkas, head of the Prison Ecology Project, compares the environmental impact of prisons to that

¹⁰² EARTH ISLAND J., *supra* note 30.

¹⁰³ *Id.*

¹⁰⁴ Tsolkas, *supra* note 101.

¹⁰⁵ *Id.*; See also TEXAS COMM’N ON ENV’T QUALITY, *2014 Annual Drinking Water Quality Report TDCJ W Pack Unit* at 22.

¹⁰⁶ Tsolkas, *supra* note 101.

¹⁰⁷ *Id.*

¹⁰⁸ TEXAS COMM’N ON ENV’T QUALITY, *2014 Annual Drinking Water Quality Report TDCJ W Pack Unit* at 22.

¹⁰⁹ Gabrielle Banks, *Federal Judge: State Must Provide Water Without Arsenic to Inmates*, HOUSTON CHRONICLE, June 26, 2016, <https://www.houstonchronicle.com/news/houston-texas/houston/article/Federal-judge-State-must-provide-water-without-8316481.php> (last visited Nov 14, 2020).

¹¹⁰ *Id.*

¹¹¹ CNN, *supra* note 92.

¹¹² Dannenberg, *supra* note 62 at 1.

¹¹³ PRISON LEGAL NEWS, *supra* note 37.

¹¹⁴ Dannenberg, *supra* note 62 at 1.

of toxic factories, noting that prisons are just factories “full of people who can’t leave.”¹¹⁵ Prisons function as industrial warehouses that essentially operate as large factories through prison labor and services on their property from sewage management to power plants.¹¹⁶ The factory-like nature of prisons is leading to increased pollution through industrial activities, prison programs, and local power generation.¹¹⁷

Certain prisons across the country commit notably egregious sanitation violations. In California, at least eight of the thirty three state prisons have been cited for water pollution over the last twenty years.¹¹⁸ Folsom State Prison, located in Northern California, was fined \$700,000 for a spill that leaked over 700,000 gallons of sewage into the American River.¹¹⁹ Note that Folsom is the same prison mentioned above that, around the same time, was forced to remove 17,000 cubic yards of contaminated soil from the property.¹²⁰

Folsom is just one example; under-maintained, overcrowded prisons and jails nationwide are silently polluting their local communities because prisons themselves are often ignored by environmental agencies. These facilities leak pollutants like wastewater both inside of prisons and outside in local water supplies like rivers, streams, and water tables.¹²¹ Many prisons are successfully violating the Safe Drinking Water Act, Clean Air Act, and Clean Water Act—and don’t seem to be stopping any time soon. The following paragraphs highlight three major environmental violations from American prisons.

A. Safe Drinking Water Act Violations

The Safe Drinking Water Act was designed to “protect the quality of drinking water” in the United States and focuses primarily on “all waters actually or potentially designed for drinking use.”¹²² Unfortunately, due to unmonitored prison conditions, many prisons have violated the act by contaminating the drinkable water in the surrounding communities.¹²³ For example, California Men’s Colony (“CMC”) state prison in Southern California spilled over 220,000 gallons of raw sewage into local water sources in 2004, including Morro Bay, a protected wildlife sanctuary.¹²⁴ The prison employed a “World-War II vintage wastewater system” that, coupled with the fact that prisoners were known to flush large objects like blankets down the toilet, led to the spill; the facility was fined over \$600,000. The CMC was responsible for one quarter of the city’s 450 documented spills in five years, leaking sewage into local water sources like the Chorro Creek, a prominent nearby water source.¹²⁵ By the time the facility finally upgraded their wastewater system, over

¹¹⁵ Linda Poon, *How Mass Incarceration Takes a Toll on the Environment*, BLOOMBERG. July 30, 2015, <https://www.bloomberg.com/news/articles/2015-07-30/how-mass-incarceration-takes-a-toll-on-the-environment-nearby-communities-and-prisoners> (last visited July 23, 2021).

¹¹⁶ *Id.*

¹¹⁷ EQUAL JUST. INITIATIVE, *supra* note 42.

¹¹⁸ *Id.*

¹¹⁹ Dannenberg, *supra* note 62, at 1.

¹²⁰ EARTH ISLAND J., *supra* note 30.

¹²¹ Dannenberg, *supra* note 62, at 1.

¹²² 42 U.S.C. § 300 et. seq.; *see also Summary of the Safe Drinking Water Act*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-safe-drinking-water-act> (last accessed Jan. 31, 2021).

¹²³ Dannenberg, *supra* note 62, at 1.

¹²⁴ *Id.*

¹²⁵ *Id.*

250,000 gallons of sewage had already leaked into the local water sources, contaminating local drinking water in blatant violation of the Safe Drinking Water Act.

B. Clean Air Act Violations

The Clean Air Act (CAA) is a federal law that regulates air emissions from mobile and stationary sources.¹²⁶ The CAA was designed to protect communities from air pollution caused by growing metropolitan and urban areas. According to the Act, “urbanization, industrial development, and the increasing use of motor vehicles” led to hazardous air pollution. Though the states are primarily responsible for controlling and limiting air pollution, the CAA was designed to develop cooperative federal, state, and local programs to “prevent and control air pollution.”¹²⁷

While the CAA itself was an important step towards environmental protections in the United States, prisons across the country are not held accountable for repeated violations of the Act. According to the EPA’s database, hundreds of complaints have been filed against prisons across the country for CAA violations.¹²⁸ The most common violations are related to chlorofluorocarbons (CFCs), which are most often used to recharge air conditioning units and are now known to deplete the ozone.¹²⁹ As air conditioning units are repaired, the CFCs leak into the air and pollute both the air inside the prisons and in the surrounding communities.¹³⁰ Further, prisons pollute the local air quality from traffic in and out of the facilities, from visitors to diesel trucks bringing supplies.¹³¹ Data from the EPA shows that 92 informal actions and 51 formal actions were brought against prisons, jails, and detention centers across the country under the CAA during the past five years.¹³² For example, in parts of California’s Central Valley, an area whose poor air quality already struggles to meet state standards for ozone levels and particulate matter, the prison industry is yet one more source of air pollution heaped upon an overburdened community.¹³³

C. Clean Water Act Violations

Prisons have also violated the Clean Water Act. The Clean Water Act (CWA), passed in 1972, established a basic structure for regulating both discharges of pollutants into waters and the standards of waters in the United States.¹³⁴ The basis of the legislation began in 1948 as the Federal Water Pollution Control Act, but was then expanded to the CWA in 1972.¹³⁵ Through the CWA,

¹²⁶ *Summary of the Clean Air Act*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-clean-air-act> (last visited Nov. 15, 2020).

¹²⁷ 42 U.S.C. § 7401.

¹²⁸ *Id.*

¹²⁹ *Ecology of a Police State*, PRISON ECOLOGY PROJECT (2015), <http://pielc.org/wp-content/uploads/2015/03/Ecology-of-Police-State-panel-packet.pdf> (last visited Jan. 31, 2021).

¹³⁰ *Id.*

¹³¹ PRISON LEGAL NEWS, *supra* note 37.

¹³² EQUAL JUST. INITIATIVE, *supra* note 1.

¹³³ PRISON LEGAL NEWS, *supra* note 37.

¹³⁴ U.S. ENVTL. PROT. AGENCY, *SUPRA* NOTE 126.

¹³⁵ *Id.*

the EPA implemented policies like wastewater standards and developed “national water quality criteria recommendations for pollutants in surface waters.”¹³⁶

Since 2012, federal and state agencies have brought over 130 informal actions and 28 formal actions against prisons and jails under the Clean Water Act, resulting in over \$556,000 in fines.¹³⁷ For example, in 2014, the Black Warrior Riverkeeper settled a water pollution lawsuit against the operator of an Alabama prison.¹³⁸ The suit raised claims under the CWA, alleging that the sewage treatment plant at Donaldson Correctional Facility had routinely discharged pollutants into Big Branch, a tributary of the Black Warrior River, for over twenty years.¹³⁹ The suit further alleged that “overcrowding at [Donaldson], which was designed for 700 prisoners and now houses almost 1,500” also played a factor in the pollution.¹⁴⁰ Black Warrior Riverkeeper attempted to compel the Alabama Department of Environmental Management (ADEM) to action through the notice of suit they sent to the correctional facility in 2004.¹⁴¹ The facility attempted to fix the pollution, but found only a temporary solution to the problem. In 2009, the sewage plant at Donaldson once again “began discharging improperly treated sewage to Big Branch” and the Black Warrior Riverkeeper filed suit under the CWA.¹⁴² The parties settled for nearly \$300,000 and Alabama Utility Services was both required to fix the sewage issue and establish a Supplemental Environment Project to clean the polluted river.¹⁴³

D. The Failure of Environmental Impact Assessments

Prison and jail-based environmental issues are regulated by a “complicated combination of local, state and federal regulatory agencies, such as local water boards and air pollution boards, as well as pesticide, hazardous waste and toxic control agencies.”¹⁴⁴ The EPA is the only agency with nationwide oversight of prisons and, to ensure compliance with federal environmental laws, conducts “on-site monitoring of prisons and jails, responds to public tips and complaints, and encourages self-disclosure of violations.”¹⁴⁵

One of these methods includes the production of Environmental Impact Assessments. An Environmental Impact Assessment is a government report that discusses the “impact of a proposed project on its surrounding environment”; these assessments are required by the National Environmental Policy Act for projects that “significantly [affect] the quality of the human environment.”¹⁴⁶ These statements may help avoid some of the statutory environmental violations before a prison facility is even built, or may shed light on the impact of a prison facility that

¹³⁶ *Id.*

¹³⁷ EQUAL JUST. INITIATIVE, *supra* note 1.

¹³⁸ U.S. ENVTL. PROT. AGENCY, *supra* note 126.

¹³⁹ David Reutter, *\$266,653 Judgment in Lawsuit Challenging Alabama Prison’s Improper Sewage Discharge*, PRISON LEGAL NEWS, June 3, 2015, <https://www.prisonlegalnews.org/news/2015/jun/3/266653-judgment-lawsuit-challenging-alabama-prisons-improper-sewage-discharge/> (last visited Jan. 31, 2021).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ PRISON LEGAL NEWS, *supra* note 37.

¹⁴⁵ *Id.*

¹⁴⁶ *What is an Environmental Impact Statement?* U.S. ENVTL. PROT. AGENCY, https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/teaching-legal-docs--what-is-an-environmental-impact-statement/ (last visited Jan. 31, 2021).

changes owners—but they are only useful when they are actually required. There is little clarity on what exactly qualifies as a *significant effect* on the environment, and judges have been hesitant to require prison facilities to prepare an Environmental Impact Assessment, even when members of the surrounding communities request it.¹⁴⁷

For example, Alabama residents brought an action in opposition of the construction of a state prison in their community. The St. Clair County residents also sought to enjoin Alabama's acquisition of the prison site and the Alabama Water Improvement Commission's issuance of a National Pollutant Discharge Elimination System (NPDES) permit for the proposed prison without preparing environmental impact statements.¹⁴⁸ The 5th Circuit held that “the State's acquisition of the proposed prison site and the Commission's proceedings with respect to the NPDES permit did not constitute federal action and thus did not necessitate an environmental impact statement.”¹⁴⁹ The state was not required to conduct an environmental impact report and was allowed to acquire the prison with little to no consideration of the environmental impact it would have on the surrounding community.¹⁵⁰

This was not the only time the federal courts left prisons exempt from conducting environmental impact assessments.¹⁵¹ In 1986, the Eighth Circuit held that an environmental impact statement was not required for the proposed prison conversion, and the Prison Bureau was only required to consider reasonable alternatives to conversion and was not required to study remote and speculative possibilities.¹⁵²

It must be noted that environmental impact assessments do not have to take prisoners into account.¹⁵³ This standard implies that egregious environmental issues do not matter if they only affect prison populations. In 2015, an Environmental Impact Report for a controversial proposed prison in Letcher County, Kentucky, gave a detailed analysis of the environmental impact the facility would have on the surrounding community, but failed to assess the impact the environment may have on the over 1,2000 inmates that would be housed in the facility.¹⁵⁴ This failure was dangerous because it could lead to an increasing number of prisons like those discussed above, sitting on toxic sites and slowly poisoning inmates over time. When environmental impact assessments are not conducted, there is a risk that a prison may contaminate the surrounding community. When they do exist, and fail to include prisoners themselves in the assessment, they risk subjecting men and women to toxic, poisonous environments that could change their sentence from a handful of months or years to a capital punishment—all without notice from the agencies designed to protect citizens from such dangerous situations.

V. The Injustices of Toxicity: Is There a Solution?

It is well-known that overcrowded prisons come with vast, well-documented civil and human rights issues; unfortunately, though, until the last few years, very little thought was given

¹⁴⁷ *Citizens for a Better St. Clair County v. James*, 648 F.2d 246, 248 (5th Cir. 1981).

¹⁴⁸ *Id.* at 247.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Olmsted Citizens for a Better Cmty. v. United States*, 793 F.2d 201, 203 (8th Cir. 1986).

¹⁵² *Id.*

¹⁵³ Dannenberg, *supra* note 62 at 1.

¹⁵⁴ PRISON LEGAL NEWS, *supra* note 37.

to the connections between mass incarceration and the environmental injustices that arise when prisons are built on toxic land or when the facilities themselves become a source of toxicity.¹⁵⁵ Even though more voices are emerging on the issue, still today many toxic and unsafe prison conditions go unnoticed. In Indiana, serious environmental contamination problems were identified in the Marion County Community Corrections Center.¹⁵⁶ A report from the Indiana Department of Corrections discovered that human feces were leaking from toilets into latrines and that leaking water and sewage from the building was being “diverted into open gutters.”¹⁵⁷ Moreover, the report found that “serious mold contamination in the heating, ventilation and air-conditioning system,” which is often a source of Legionnaires’ Disease, a severe form of pneumonia.¹⁵⁸ Fecal-oral contamination was promoted by requiring the prisoners, who had no washer or dryer, to wash their soiled clothing in restroom sinks.¹⁵⁹

According to Prison Legal News, Indiana State Representative Mike Murphy “called the report ‘devastating’ and something worthy of interest to Human Rights Watch.” Representative Murphy noted that “in a normal situation, a health department would come in, shut [the prison down]immediately and transfer these people to a safe environment.” he added. Unfortunately, that did not happen here; Prison Legal News notes that the “irony” of Representative Murphy’s concern “is that apparently, “ ‘devastating[ly] [ab]normal’ health conditions are tolerable if it is prisoners who are impacted.” Further, Kenneth Falk, the legal director for the American Civil Liberties Union (ACLU), after seeing the prison facility firsthand, called the prison “absolutely horrendous” and alleged constitutional violations. Most notably, Falk called the prison a “warehouse of human beings” and stated that the issues with the facility were glaringly obvious to anyone at the prison.¹⁶⁰

These glaringly obvious issues, as described by Falk, are just one example of the environmental injustices existing across prisons in the United States that often go unaddressed or unnoticed. The environmental injustices occurring within prison walls are rarely ever recognized and the environmental injustices stemming from prisons built in or near low-income communities often go untreated. After examining facilities like those in Texas, New York, Pennsylvania, and California, it is clear that many environmental hazards within prisons either have yet to be addressed or are just coming to light. Further, existing case law leaves no room for doubt that toxic prison sites may be a sufficient cause of action for an Eighth Amendment violation. Across the country, environmental injustice disproportionately affects minority and low-income communities—and the same injustices can be found within and around the prison walls. The War on Drugs led to a skyrocketing number of low-income and minority inmates, causing the populations within the prisons to look far different from the United States’ actual demographics.¹⁶¹ In these toxic prisons, American minority populations are disproportionately subjected to environmental injustices that make the air they breathe and water they drink unsafe and even deadly. Further, the surrounding communities are forced to breathe polluted air, drink unsafe water, and recreate in toxic rivers and creeks.

¹⁵⁵ Dannenberg, *supra* note 62, at 1.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Peter Wagner, *Tracking State Prison Growth in 50 States*, PRISON POLICY INITIATIVE, May 24, 2014, <https://www.prisonpolicy.org/reports/overtime.html> (last visited Oct. 1, 2020).

This raises a vital question: what is being done to fix these “glaringly obvious” injustices? While many organizations like Equal Justice Initiative and Prison Legal News work to bring awareness to the environmental issues associated with prisons, facilities built on toxic waste sites continue to pose threats to both the safety of the prisoners housed within them and the communities surrounding them. Even favorable rulings, like those in the Texas and Alabama cases discussed above, are met with slow, arduous changes that often do not significantly improve the problem.¹⁶² Further, even when toxic facilities are closed, environmental issues are not the reason for the closure.¹⁶³ In 2019, New York lawmakers voted to close Rikers Island Jail Complex (discussed above) by 2026.¹⁶⁴ While this is a victory in and of itself for those seeking to undo the harms caused by mass incarceration, little is being said about the hazardous environmental conditions of the jail facility.¹⁶⁵ Instead, the focus is overcrowding and the sheer size of the jail itself; press announcements about the closure cite the history of violence and moving away from the “failed policies of mass incarceration” as the motivations behind terminating the complex.¹⁶⁶ Moreover, all closures at this point are only theoretical; the proposed closure has been delayed until at least 2027 and may continue to be delayed moving forward.¹⁶⁷

Similarly, legislation passed to stop environmental injustices fails to address the issues in prisons. In 1994, President Bill Clinton signed Executive Order 12898, which was designed to address environmental injustices in minority populations and low-income communities.¹⁶⁸ Though this order seemed to bring some hope, the EPA, who was tasked with the responsibility of the Executive Order, does not apply these guidelines to prisoners because, even though the majority of American prisoners are from low-income communities and are people of color, the population data used by the EPA does not count prisoners.¹⁶⁹

To find a solution, we must begin at the heart of the issue. Prisons continue to be built across the country because of the age-old theory of supply and demand. Though incarceration rates no longer match those at the peak of the War on Drugs, the United States still has an annual incarceration rate of 2,510 per 100,000 adult U.S. residents.¹⁷⁰ Current calls for sentencing reform hope to change the pattern of mass incarceration in the United States, but change is hard-fought and comes slowly.¹⁷¹ In order to stop the environmental injustices in prisons, we must recognize the dangers associated with toxic lands and cease building prisons on these sites. According to Prison Legal News, there is a pattern in the United States of corporations who come in, “pillage

¹⁶² EARTH ISLAND J., *supra* note 30.

¹⁶³ Trotta, *supra* note 49.

¹⁶⁴ *Id.*

¹⁶⁵ Kimberly Gonzales, *A Timeline on the Closure of Rikers Island*, CITY & STATE NY, October 20, 2020, <https://www.cityandstateny.com/articles/policy/criminal-justice/timeline-closure-rikers-island.html> (last visited March 08, 2021).

¹⁶⁶ Trotta, *supra* note 49.

¹⁶⁷ Gonzales, *supra* note 165.

¹⁶⁸ *Summary of Executive Order 12898*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice> (last visited Jan. 31, 2021).

¹⁶⁹ Dannenberg, *supra* note 62, at 1.

¹⁷⁰ Laura Maruschak & Todd Minton, *Correctional Populations in the United States, 2017-2018*, BUREAU OF JUST. STAT., August 27, 2020.

¹⁷¹ *Sentencing Reform*, ACLU, <https://www.aclu.org/issues/smart-justice/sentencing-reform> (last visited Jan. 31, 2021).

the environment” through industries like mining or forestry and then, “when everything has been exhausted. . . trees have been cut down, every last grain of ore has been ripped from the soil, and everything has been contaminated and poisoned in the process,” the final solution is to build a prison.¹⁷² Until more awareness is brought to this pattern, prisons will continue to be built on these toxic sites—especially if they are not required to include prisoners in their environmental impact reports, or if they are not required to compile a report at all.

Positive changes are happening, albeit slowly. In 2019, prisoners from twenty-one federal prisons across the country, along with support from groups like the Abolitionist Law Center and the Campaign to Fight Toxic Prisons, won a lawsuit against the Federal Bureau of Prisons after the Bureau attempted to build a prison on top of a toxic site in Letcher County, Kentucky.¹⁷³ The proposed facility would have been built on a former coal mine, next to an active coal mine, and near a “coal sludge pond.”¹⁷⁴ After three years of opposition to the new facility, the plaintiffs won a favorable ruling, halting the construction of the prison facility due to the unsafe and toxic nature of the land.¹⁷⁵

Though there is still much work to be done in this area, there is hope to be found in situations like Letcher County. Continued attempts to give prisoners access to legal representation and raise awareness of the environmental injustices found in and around prison and jails are paving the way to protecting inmates from dangerous, toxic conditions.

VI. Conclusion

The environmental injustices stemming from mass incarceration, the War on Drugs, and sentencing disparities are still painfully present in our correctional systems. Mass incarceration is not only threatening the lives and well-being of minority communities across the country through disproportionate incarceration rates; inmates must also fear environmental threats such as being sent to a prison built on a toxic waste site, near a nuclear test site, a coal mine, or near land riddled with pesticides. Even land that may appear benign on its face may be toxic or hazardous in more insidious ways. Every day, prisoners in these facilities are forced to breathe air rife with carcinogens, drink contaminated water, or lay on a metal bed in a cell sitting at over one hundred degrees. Moreover, many prisons themselves are polluting surrounding communities by leaking harmful toxins into local air and water sources.

Though statistics show that incarceration rates are lowering, it will still take over 100 years (at the current rate) for African American prison populations to be equal to white populations—which means that the environmental injustices in American prisons are disproportionately affecting minority, and specifically African American, populations. In some rare cases, prisoners have won their fight for safe living conditions; but while voices are crying for reform, prisons still remain on dangerous, toxic sites, risking the health and well-being of inmates every single day.

¹⁷² PRISON LEGAL NEWS, *supra* note 37.

¹⁷³ Kimberly M.S. Cartier, *America's Toxic Prisons*, <https://theecologist.org/2020/nov/13/environmental-injustice-mass-incarceration-and-systemic-racism-us> (last visited Jan. 31, 2021).

¹⁷⁴ *Id.*

¹⁷⁵ MEDIA RELEASE: *Prisoners and Activists Stop New Prison on Coal Mine Site in Kentucky*, ABOLITIONIST L. CTR, <https://abolitionistlawcenter.org/2019/06/20/media-release-inmates-and-activists-stop-new-prison-on-coal-mine-site-in-kentucky/> (last visited Jan. 31, 2021).

There is hope for change, but for now these horrifying injustices persist. Inmates in these toxic facilities cannot trust the water that they drink or the air that they breathe.

Mass incarceration is not only affecting our country, our criminal justice system, and our slow progress towards racial reconciliation, but it is now also attacking our already wounded, changing environment. If we continue to sit idly by while our prison systems damage our populations and our environment, it will only continue to get worse. Patterns that go uncorrected often become impossible to overcome, and our prisons are currently caught in a pattern of subjecting prisoners to inhumane, dangerous treatment that likely implicates the Eighth Amendment. A prison sentence itself should not be a death threat, but to so many minority populations across the country, the location of the prison they are held in may turn their shorter sentence into capital punishment.