
CHAPTER FOUR

CONDITIONS OF CONFINEMENT, COVID-19, AND THE CDC

Michael Williams was a seventy-year-old diabetic serving a life sentence in Louisiana State Penitentiary, the country's largest maximum-security prison, for a crime he said he did not commit.¹ He knew he was dying from the novel coronavirus as he struggled to breathe alone in his cell for days.² He said as much to his family, who, along with his lawyer, begged the penitentiary on Williams's behalf to have him moved to a hospital to receive adequate care — or any care at all.³ But the officials they reached either didn't hear or wouldn't listen, insisting first that Williams didn't have the virus and then that his condition was improving regardless.⁴ Soon, he was rushed to the hospital, where he went into cardiac arrest. Michael Williams passed shortly thereafter.⁵

COVID-19 has ravaged the United States, with the death toll recently topping 500,000.⁶ Even amid this widespread, unyielding infection, America's prisons and jails feel some of the virus's most salient effects.⁷ Overcrowded and largely unsanitary in their normal operation, prisons, jails, and detention centers were in many ways sitting ducks.⁸ When the virus inevitably penetrated their walls, it spread rapidly in conditions that made social distancing a virtual impossibility.⁹ Those inside, often drawn from communities with poorer health outcomes to start with,¹⁰ likely recognized the great, perhaps unconstitutional risk

¹ See Anat Rubin, Tim Golden & Richard A. Webster, *Inside the U.S.'s Largest Maximum-Security Prison, COVID-19 Raged. Outside, Officials Called Their Fight a Success*, PROPUBLICA (June 24, 2020, 4:45 PM), <https://www.propublica.org/article/inside-the-uss-largest-maximum-security-prison-covid-19-raged> [https://perma.cc/T84A-LPCP].

² See *id.*

³ See *id.*

⁴ See *id.*

⁵ *Id.*

⁶ See Heather Hollingsworth & Tammy Webber, *US Tops 500,000 Virus Deaths, Matching the Toll of 3 Wars*, AP NEWS (Feb. 22, 2021), <https://apnews.com/article/us-over-500k-coronavirus-deaths-4ffa86c709f6a843de9cfo711e7215cf> [https://perma.cc/7MG2-48QR].

⁷ See C.J. Ciaramella, *8 of the Top 10 Biggest U.S. Coronavirus Hotspots Are Prisons and Jails*, REASON (Apr. 29, 2020, 3:30 PM), <https://reason.com/2020/04/29/8-of-the-top-10-biggest-u-s-coronavirus-hotspots-are-prisons-and-jails> [https://perma.cc/F56Q-67QX]; Timothy Williams & Danielle Ivory, *Chicago's Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars*, N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html> [https://perma.cc/88CN-NJBS].

⁸ See Brandy F. Henry, *Social Distancing and Incarceration: Policy and Management Strategies to Reduce COVID-19 Transmission and Promote Health Equity Through Decarceration*, 47 HEALTH EDUC. & BEHAV. 536, 536 (2020).

⁹ See *id.*

¹⁰ *Id.* at 536–37.

imposed on anyone set to weather the pandemic while incarcerated. Fairly quickly, and en masse, those incarcerated took to the courts.¹¹

As a result, a smorgasbord of litigation sprung up in state and federal courts asking, via most conceivable causes of action, for any conceivable relief.¹² Yet plaintiffs bumped up against an existing area of doctrine that was far from hospitable to their claims. Putting to one side the incredible procedural barriers an incarcerated plaintiff faces when bringing any claim,¹³ once at the merits stage, plaintiffs suing under the Constitution for better public health conditions in prisons must meet exacting Eighth and Fourteenth Amendment standards.¹⁴

When constitutional plaintiffs got to the merits stage, a notable trend emerged: courts deferred in various ways to informal guidelines issued by the Centers for Disease Control and Prevention (CDC).¹⁵ District court decisions granting and denying relief afforded the CDC's proclamations special legal significance, allowing them to guide the application of discrete legal tests. While some consideration of CDC guidelines is not new for prison litigation¹⁶ — especially given public health deficiencies in prisons that allow diseases like tuberculosis and HIV/AIDS to fester¹⁷ — the ubiquity of these guidelines in current litigation is a notable development.

This Chapter will assess this development in two sections. Section A surveys recent cases in the Eighth Amendment and Fourteenth Amendment conditions of confinement sphere to show that courts are giving excessive deference to CDC guidance and sometimes ceding the constitutional inquiry to the CDC altogether. Section B then argues that this level of deference is inappropriate given established principles of administrative and constitutional law. The CDC's guidance represents the most informal of agency actions — it was promulgated with little

¹¹ See Burton Bentley II, *The Growing Litigation Battle over COVID-19 in the Nation's Prisons and Jails*, LAW.COM (Aug. 25, 2020, 6:00 PM), <https://www.law.com/2020/08/25/the-growing-litigation-battle-over-covid-19-in-the-nations-prisons-and-jails> [<https://perma.cc/LG63-WCLE>].

¹² See *Special Collection: COVID-19 (Novel Coronavirus)*, UNIV. MICH. L. SCH. C.R. LITIG. CLEARINGHOUSE, <https://clearinghouse.net/results.php?searchSpecialCollection=62> [<https://perma.cc/DME7-SVHQ>].

¹³ See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1627–33 (2003).

¹⁴ See Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 373, 387–95 (1995); see also Rosalie Berger Levinson, *Kingsley Breathes New Life into Substantive Due Process as a Check on Abuse of Government Power*, 93 NOTRE DAME L. REV. 357, 359–60 (2017) (explaining that the Court will reject substantive due process claims that fall under the Eighth Amendment constitutional guarantee).

¹⁵ See *infra* section A, pp. 2235–46.

¹⁶ See, e.g., *Edison v. United States*, 822 F.3d 510, 513–15 (9th Cir. 2016) (relying on a CDC report on coccidioidomycosis to rule on a claim regarding “Valley Fever” in prisons); *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997) (referencing compliance with CDC guidance on tuberculosis to note that deliberate indifference had not been established).

¹⁷ See Scott Burris, *Prisons, Law and Public Health: The Case for a Coordinated Response to Epidemic Disease Behind Bars*, 47 U. MIA. L. REV. 291, 294–301 (1992).

process and involves details of prison administration outside the CDC's expertise. Administrative law instructs courts to provide this sort of agency action little to no deference. Here, courts have done the opposite. Further, by inserting the CDC into constitutional cases, courts are abdicating a duty that is fundamentally theirs: to answer questions about what our society is willing to accept in the name of punishment. In fact, courts are deferring to CDC guidance which itself seems to subjugate the best public health advice to penological interests of incarceration. This results in a double deference of sorts: courts defer to the CDC which in turn defers to prison officials. Both public health and constitutional rights get lost along the way.

A. Constitutional Deference to the CDC

In order to establish an Eighth Amendment violation based on conditions of confinement, individuals incarcerated postconviction must show "deliberate indifference" to some basic need.¹⁸ Most relevant here, where plaintiffs want to claim a violation based on an institution's response to COVID-19, they typically must show that the state was deliberately indifferent to a "serious" medical need¹⁹ or that the state failed to address a substantial risk of future harm.²⁰ In either case, this liability standard has two components: one objective, requiring that the deprivation be a serious one,²¹ and one subjective, essentially a mens rea element requiring criminal recklessness in the postconviction context.²² The Supreme Court derived this standard from the Eighth Amendment in an oft-criticized line of cases beginning with *Estelle v. Gamble*²³ in 1976.²⁴ But despite lingering concerns over the deliberate indifference inquiry,²⁵ postconviction plaintiffs must address these twin hurdles. Further, defendants can defeat these claims by showing that they responded reasonably to the harm or risk of harm.²⁶

The landscape gets more confused for pretrial detainees. As they have not been convicted of any charge, the Eighth Amendment's ban

¹⁸ See Gutterman, *supra* note 14, at 386.

¹⁹ *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

²⁰ See *Helling v. McKinney*, 509 U.S. 25, 35–37 (1993).

²¹ See Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 364 tbl.1 (2018).

²² See *id.*; *Farmer v. Brennan*, 511 U.S. 825, 837–40 (1994); see also Jason D. Sanabria, Note, *Farmer v. Brennan: Do Prisoners Have Any Rights Left Under the Eighth Amendment?*, 16 WHITTIER L. REV. 1113, 1115 (1995) (referring to the deliberate indifference definition alternatively as "subjective recklessness").

²³ 429 U.S. 97.

²⁴ See, e.g., Schlanger, *supra* note 21, at 369–85.

²⁵ See, e.g., Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 890 (2009); John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 456–58 (2017).

²⁶ See *Farmer*, 511 U.S. at 844.

on cruel and unusual *punishment* does not govern.²⁷ Instead, these plaintiffs bring substantive due process claims under the Fifth and Fourteenth Amendments.²⁸ Yet even with this formal difference, courts still disagree over exactly what standard governs in cases coming out of jails or civil detention centers.²⁹ A consensus says that due process for pretrial detainees should be at least as protective as the Eighth Amendment is for postconviction detainees.³⁰ Fairly recently, in *Kingsley v. Hendrickson*,³¹ the Supreme Court skirted the edges of this issue, holding that in the excessive force context, pretrial detainees only need to show that an officer's use of force was objectively unreasonable.³² If plaintiffs do so, the officer's subjective intent is irrelevant for constitutional purposes.³³ Still, courts of appeals have differed in their application of *Kingsley*, with some limiting the holding to excessive force and applying the Eighth Amendment deliberate indifference standard to pretrial conditions.³⁴ Others have held that *Kingsley* does extend past the use of force, and thus plaintiffs in these circuits need only establish that actions were "objectively unreasonable" to make out a due process claim.³⁵

Wrinkles aside, this is the general landscape with which COVID-19-era plaintiffs have to contend. Complaints about administrators' failures to prevent massive spread of a deadly virus are factually diverse, face numerous barriers even in bringing a suit,³⁶ and seek different sorts of relief.³⁷ But at the merits stage, many will boil down to a conditions

²⁷ See *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16 (1979).

²⁸ See Levinson, *supra* note 14, at 359–60.

²⁹ See *id.* at 373–77.

³⁰ See, e.g., *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (holding due process rights for a plaintiff who was shot by police and hospitalized were "at least as great as the Eighth Amendment protections available to a convicted prisoner"); see also Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009, 1012 (2013) (noting that the Court has "twice avoided deciding whether 'at least as great' means 'greater than' or 'equal to'").

³¹ 135 S. Ct. 2466 (2015).

³² *Id.* at 2472–73.

³³ *Id.* at 2476–77.

³⁴ See, e.g., *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Dang ex rel. Dang v. Sheriff, Seminole Cnty. Fla.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017); *Alderson v. Concordia Parish Corr. Facility*, 848 F.3d 415, 419 n.4 (5th Cir. 2017) (per curiam); see also David M. Shapiro, *The Cutting Edge of Prison Litigation*, 1 UCLA CRIM. JUST. L. REV. 95, 103 (2017) (acknowledging *Kingsley*'s limited holding but arguing that its reasoning suggests a need to reexamine lower courts' application of the subjective standard to pretrial detainees).

³⁵ See, e.g., *McCann v. Ogle County*, 909 F.3d 881, 886 (7th Cir. 2018); *Darnell v. Pineiro*, 849 F.3d 17, 33–35 (2d Cir. 2017); *Castro v. County of L.A.*, 833 F.3d 1060, 1069–70 (9th Cir. 2016) (en banc).

³⁶ Cf. Schlanger, *supra* note 13, at 1627–33 (listing barriers to suit by incarcerated plaintiffs).

³⁷ Notably, COVID-19 means that conditions of confinement claims have essentially collapsed with claims for habeas relief, given the possibility that no carceral setting can adequately provide for the conditions necessary to prevent the rapid spread of the virus, making release the only tenable

of confinement claim.³⁸ To make out this claim in a COVID-specific setting, all plaintiffs need to show that COVID represents a sufficiently serious harm or threat of harm.³⁹ Eighth Amendment claims require a showing of deliberate indifference to this harm.⁴⁰ Due process claims will sometimes impose this same burden, or sometimes require only a showing of objective unreasonableness.⁴¹

In theory, there are many ways to make these requisite showings. But in practice, during the COVID-19 pandemic it has been very difficult to approach these cases without drawing on guidance published by the CDC.⁴² Ubiquitous since the pandemic began, the CDC is charged with, among other things, studying, preventing, and mitigating the spread of disease in America.⁴³ A virus that has stopped the nation in its tracks certainly falls under this umbrella. And the judiciary has taken notice of the CDC's relative expertise. As the agency has published informal guidelines aimed specifically at managing the disease in carceral settings,⁴⁴ these guidelines have become touchstones of COVID prison litigation. In conditions of confinement litigation in particular, the CDC's guidance receives considerable deference from courts wrestling with the constitutional adequacy of current prison administration. Taking each element of a conditions of confinement claim in turn, one can understand the near-constitutional significance courts have afforded CDC guidance over the course of the pandemic so far.

I. Objective Element. — As noted, the objective element of this kind of Eighth or Fourteenth Amendment violation is the presence of a serious medical need, or a risk of serious harm.⁴⁵ Courts will typically assess whether a medical condition or risk complained of is sufficiently serious

relief. See Lee Kovarsky, Essay, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 71, 78–81 (2020).

³⁸ See Brandon Garrett, *Constitutional Criminal Procedure Post-COVID*, HARV. L. REV. BLOG (May 19, 2020), <https://blog.harvardlawreview.org/constitutional-criminal-procedure-post-covid> [<https://perma.cc/44X5-MHL5>].

³⁹ See, e.g., *Banks v. Booth*, 459 F. Supp. 3d 143, 153 (D.D.C. 2020) (“Now that the Court has determined the standards under the due process clause and the Eighth Amendment, the Court will assess whether or not Plaintiffs have shown a likelihood of success in proving that they have been exposed to an unreasonable risk of damage to their health.”).

⁴⁰ See, e.g., *Swain v. Junior*, 958 F.3d 1081, 1088–89 (11th Cir. 2020).

⁴¹ See, e.g., *Mays v. Dart*, 974 F.3d 810, 819 & n.1 (7th Cir. 2020).

⁴² See *infra* sections A.1–A.2, pp. 2237–46.

⁴³ *About CDC 24-7: Mission, Role and Pledge*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/about/organization/mission.htm> [<https://perma.cc/H8CM-CPKX>] [hereinafter *CDC Mission*].

⁴⁴ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> [<https://perma.cc/C5K9-TNKT>] [hereinafter *CDC Guidance*].

⁴⁵ See Philip M. Genty, *Confusing Punishment with Custodial Care: The Troublesome Legacy of Estelle v. Gamble*, 21 VT. L. REV. 379, 380–81, 381 n.4 (1996).

to warrant relief under the Constitution.⁴⁶ During COVID-19, CDC guidance dominates this inquiry.⁴⁷ In addition to guidance on how to mitigate the spread of COVID-19, the CDC has designated certain populations as especially susceptible to serious harm should they contract COVID-19.⁴⁸ This includes, for example, older individuals and people with medical conditions like cancer, chronic kidney disease, or type 2 diabetes.⁴⁹ The CDC's website also separates out conditions that "*might*" put someone at "increased risk for severe illness."⁵⁰ Notably, some courts have asserted that due to ongoing uncertainty, and the seemingly indiscriminate nature of the virus's devastation, a heightened risk of contracting COVID in detention constitutes a generally applicable risk of serious harm.⁵¹ Further, data has backed up the idea that simply existing in crowded, poorly ventilated, largely unsanitary prisons and jails during the pandemic does put one at heightened risk of contracting COVID.⁵² But several deciding courts have required a more particularized showing beyond the general risk all people face when up against the virus while incarcerated.⁵³ For those courts, the CDC's designations

⁴⁶ See Gutterman, *supra* note 14, at 387–95.

⁴⁷ See, e.g., Basank v. Decker, 449 F. Supp. 3d 205, 211–12 (S.D.N.Y. 2020) (citing to CDC guidance to take judicial notice of those at heightened risk from COVID-19); C.G.B. v. Wolf, 464 F. Supp. 3d 174, 204 n.25 (D.D.C. 2020) ("Plaintiffs allege that hypercoagulability . . . is a common side effect of the hormone replacement therapy prescribed to transgender women and that hypercoagulability raises the likelihood of serious complications from COVID-19. Yet, the CDC does not identify hypercoagulability as a risk factor for complications from COVID-19."); Jones v. Wolf, 467 F. Supp. 3d 74, 93 (W.D.N.Y. 2020) ("This Court finds that those petitioners who have the COVID-19 vulnerabilities identified by the CDC have demonstrated a likelihood of succeeding on their claim . . ."); Yeury J.S. v. Decker, No. 20-cv-5071, 2020 U.S. Dist. LEXIS 83899, at *22–23 (D.N.J. May 11, 2020) ("Petitioner has a serious heart condition which has been expressly recognized by the CDC as placing him at higher risk for serious illness from COVID-19."); Barbecho v. Decker, No. 20-cv-2821, 2020 U.S. Dist. LEXIS 66163, at *7 (S.D.N.Y. April 15, 2020) (holding that petitioners "easily" met the serious medical need test because they had exacerbating medical conditions recognized by the CDC); Thakker v. Doll, 451 F. Supp. 3d 358, 368–69 & 368 n.13 (M.D. Pa. 2020) (noting that petitioners are members of high-risk groups recognized by the CDC); Gomes v. U.S. Dep't of Homeland Sec., 460 F. Supp. 3d 132, 148–49 (D.N.H. 2020) (holding that "COVID-19 poses an objectively serious health risk for detainees with high-risk conditions" recognized by the CDC, *id.* at 149); Barco v. Price, 457 F. Supp. 3d 1088, 1099–100 (D.N.M. 2020) (relying on CDC guidance to conclude that a plaintiff's hypertension does not place him at higher risk for serious illness from COVID-19).

⁴⁸ *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [<https://perma.cc/ZTB6-ED7D>].

⁴⁹ *Id.*

⁵⁰ *Id.* (emphasis added).

⁵¹ See, e.g., Gayle v. Meade, No. 20-cv-21553, 2020 WL 3041326, at *18 (S.D. Fla. June 6, 2020) ("[A]lthough experts agree that the most vulnerable demographics are the elderly or those with underlying medical conditions, COVID-19 attacks all age groups indiscriminately and it is impossible to determine who will succumb to the illness.")

⁵² See, e.g., Brendan Saloner et al., Research Letter, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 J. AM. MED. ASS'N 602, 602–03 (2020).

⁵³ See, e.g., cases cited *supra* note 47.

have proved to be touchstones for evaluating whether or not plaintiffs claiming constitutional violations have established a substantial risk of serious harm or a serious unmet medical need.

Generally, plaintiffs with underlying health conditions on the CDC's list have been successful in establishing the objective prong of a conditions of confinement claim. For example, the District Court for the Southern District of New York found that a subset of civil immigration detainees who had conditions recognized by the CDC as increasing the risk of devastating results upon contraction of COVID-19 could "easily" satisfy the objective element of their due process claims.⁵⁴ The court's analysis of this showing began and ended with reference to the CDC's high-risk determinations.⁵⁵ Because the government did not contest that these plaintiffs suffered from conditions recognized by then-current CDC guidelines, "[p]etitioners therefore [had] a serious medical need."⁵⁶ This sort of reasoning has echoed across a plethora of cases and courts.⁵⁷ In *Jones v. Wolf*,⁵⁸ the court described itself as "trained in the law, not medicine" to explain why the court would defer to guidance from experts, "including many government experts," to determine whether plaintiffs faced a risk of serious harm from a detention center's allegedly deficient handling of the pandemic.⁵⁹ And while the court did cite to declarations from parties' medical experts to take judicial notice of the fact that older patients and those with underlying conditions were at heightened risk should they contract COVID, the bulk of its analysis focused on what the CDC had said on the issue.⁶⁰ Most tellingly, it ultimately held that "those petitioners who have the COVID-19 vulnerabilities identified by the CDC have demonstrated a likelihood of succeeding on their claim."⁶¹ The court drew the line, then, wherever the CDC had drawn it first.

Further, some courts have explicitly declined to recognize a significant harm where the CDC did not list a particular medical condition or membership in a particular population as increasing risk of severe ill-

⁵⁴ *Barbecho v. Decker*, No. 20-cv-2821, 2020 U.S. Dist. LEXIS 66163, at *7 (S.D.N.Y. Apr. 15, 2020).

⁵⁵ *Id.* at *7–8.

⁵⁶ *Id.* at *7.

⁵⁷ *See, e.g., Vides v. Wolf*, No. 20-cv-06293, 2020 WL 3969368, at *11 (W.D.N.Y. July 14, 2020) ("Courts that have found that petitioners suffer from a serious medical need for purposes of the deliberate indifference analysis in the context of the COVID-19 pandemic have done so only for detainees suffering from conditions recognized by the CDC as placing individuals at higher risk."); *Kevin M.A. v. Decker*, 457 F. Supp. 3d 445, 456 (D.N.J. 2020); *Shank v. Corizon Inc.*, No. 19-cv-04638, 2020 U.S. Dist. LEXIS 173836, at *8–10 (D. Ariz. Sept. 2, 2020).

⁵⁸ 467 F. Supp. 3d 74 (W.D.N.Y. 2020).

⁵⁹ *Id.* at 86.

⁶⁰ *See id.* at 86–88.

⁶¹ *Id.* at 93.

ness from COVID. In *Malam v. Adducci*,⁶² a federal district court in Michigan viewed a statement from petitioner's medical expert, an epidemiologist "with over a decade of experience in providing, improving, and leading health services for incarcerated people,"⁶³ with marked suspicion because it did not reference CDC guidance to claim that certain conditions increased the risk of severe COVID-19 complications.⁶⁴ Dr. Homer Venters had concluded that a plaintiff's underlying medical conditions, including chronic gastritis, a peptic ulcer, gastroesophageal reflux, and a history of hospitalizations, put her at serious risk should she contract the virus.⁶⁵ However, the court found this statement alone completely insufficient without cited support from the CDC.⁶⁶ Similarly, in *Barbecho v. Decker*,⁶⁷ while the court acknowledged that plaintiffs with chronic medical conditions not listed by the CDC to increase risk of severe illness from COVID might face serious harm, it still found the record was unclear as to the objective prong without on-point CDC guidance to establish increased risk.⁶⁸

Thus, while courts may not be ceding this objective inquiry entirely to the CDC, in considering the relevance of exacerbating factors courts have afforded the agency's guidelines considerable deference. And at least for some plaintiffs, the ability to establish this objective prong of their constitutional claim hinged entirely on whether the CDC's informal guidance was on their side.

2. *Subjective Element.* — The CDC's guidance has also heavily factored in for courts assessing the subjective element of a conditions of confinement claim.⁶⁹ Again, the exact test varies in some circuits depending on whether the claim is for a due process violation or an Eighth

⁶² 459 F. Supp. 3d 867 (E.D. Mich. 2020).

⁶³ *Id.* at 876.

⁶⁴ *See id.* at 877–78. The court's analysis of plaintiffs' medical conditions technically occurs in earnest in the discussion of irreparable harm, but the court said the inquiry is essentially the same as serious harm under the Due Process Clause. *Id.* at 882.

⁶⁵ *Id.* at 877.

⁶⁶ *Id.* at 877–78. The court asserted: "Absent guidance from the CDC or another public health source . . . Plaintiffs must provide more than this conclusory statement that Plaintiff Rodríguez Salabarría is at increased risk from these conditions." *Id.* at 878.

⁶⁷ No. 20-cv-2821, 2020 U.S. Dist. LEXIS 66163 (S.D.N.Y. Apr. 15, 2020).

⁶⁸ *Id.* at *8–9 ("With respect to Petitioners Diaz, Olaya Lugo, Molina, and Garcia Alejo, it is less clear on the record whether they have serious medical needs . . . [T]heir specific medical conditions do not appear in the CDC guidance defining groups at higher risk for severe illness from COVID-19.")

⁶⁹ *See, e.g.,* Barnes v. Ahlman, 140 S. Ct. 2620, 2623 (2020) (Sotomayor, J., dissenting from the grant of stay); Valentine v. Collier, 140 S. Ct. 1598, 1600 n.2 (2020) (Sotomayor, J., statement respecting the denial of application to vacate stay); Swain v. Junior, 958 F.3d 1081, 1085–90 (11th Cir. 2020) (per curiam); Mays v. Dart, 974 F.3d 810, 823 (7th Cir. 2020); Plata v. Newsom, 445 F. Supp. 3d 557, 565 (N.D. Cal. 2020); Chunn v. Edge, 465 F. Supp. 3d 168, 204–05 (E.D.N.Y. 2020); Lucero-Gonzalez v. Kline, 464 F. Supp. 3d 1078, 1092–93 (D. Ariz. 2020); Charest v. Ivey, No. 20-cv-0214,

Amendment violation.⁷⁰ Some courts do not require as stringent of a mens rea showing when the detention at issue is civil or pretrial, whereas postconviction claimants always need to make out deliberate indifference — that officials both knew of and disregarded a substantial risk of harm.⁷¹ Despite these differences, in both scenarios courts have focused in on the CDC’s guidelines in their analysis of this element, in particular guidelines that the agency issued to specifically address COVID-19 in prisons and jails.

These guidelines are technically published as interim guidance, first making an appearance on the CDC’s website in March 2020, with periodic updates since.⁷² Their stated purpose is “to ensure continuation of essential public services and protection of the health and safety of incarcerated and detained persons, staff, and visitors.”⁷³ The CDC separated guidance into three categories: measures for operational preparedness, for prevention, and for management.⁷⁴ The recommendations cover hallmarks of COVID prevention, like personal protective equipment (PPE) and social distancing, as well as considerations unique to a carceral setting, like implementing “lawful alternatives to in-person court appearances,” and “release quarantine[s].”⁷⁵ Many of these recommendations are phrased exactly as such — prefaced with language like “consider” or “ask.”⁷⁶ Crucially, the guidelines are also littered with feasibility carve-outs, directing certain measures to be taken only “if possible” or if “security concerns permit.”⁷⁷ A notice printed in bold type qualifies the guidelines as a whole: “The guidance may need to be adapted based on individual facilities’ physical space, staffing, population, operations, and other resources and conditions.”⁷⁸

Compliance or noncompliance with these CDC guidelines, though not always dispositive, has captured the attention of courts working out the subjective element of conditions of confinement.⁷⁹ Though CDC

2020 U.S. Dist. LEXIS 120376, at *55 (S.D. Ala. July 6, 2020); *Wragg v. Ortiz*, 462 F. Supp. 3d 476, 509 (D.N.J. 2020).

⁷⁰ *See supra* p. 2236.

⁷¹ *See id.*

⁷² *CDC Guidance*, *supra* note 44.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *See, e.g., Massey v. Wetzel*, No. 20-cv-00722, 2020 U.S. Dist. LEXIS 168455, at *9 (W.D. Pa. Sept. 15, 2020) (“Superintendent Estock’s testimony establishes that the institution has, in good faith, taken all reasonable and appropriate measures to implement the protocols mandated by the Pennsylvania Department of Corrections (‘DOC’) in accordance with the guidelines have [sic] been promulgated by the Center for Disease Control (‘CDC’).”); *Criswell v. Boudreaux*, No. 20-cv-01048, 2020 U.S. Dist. LEXIS 160570, at *57–58 (E.D. Cal. Sept. 2, 2020) (“The court is not persuaded by

guidelines have not received universal deference, this section will show that, generally, they seem to have assumed status as a benchmark of quasi-constitutional reasonableness.⁸⁰ Whereas noncompliance creates a weak presumption of unreasonableness, as explained more below, compliance with CDC guidelines seems to paint an institution's response to the pandemic as at least presumptively reasonable. Note, a reasonable response will insulate a defendant from both Eighth Amendment and Fourteenth Amendment claims.⁸¹ This presumption was on display in a district court case in Arizona, where the court concluded, "[u]pon . . . comparison between [the CDC] Guidelines and those implemented by [the] defendants," that the measures taken were not objectively unreasonable under the Fourteenth Amendment.⁸² Because there were no clear gaps between the CDC's guidelines and the detention center's plan for COVID intervention, the Fourteenth Amendment was satisfied.⁸³ The rest of this section shows how courts have substituted the question of reasonableness for one of CDC compliance, and then have used the forgiving language of the CDC guidance itself to move the goal posts even farther in favor of prison officials and institutional defendants.

(a) *Noncompliance as a (Weak) Presumption of Unreasonableness.* — Lack of compliance with CDC guidelines, especially where material, can go a way toward showing that an institution's response has been unreasonable. Take *Fruihat v. United States Immigration & Customs Enforcement*,⁸⁴ where petitioners were likely to succeed on the merits of objective unreasonableness based on the U.S. Immigration and

defendant's argument, in large part because he has completely failed to address . . . how social distancing and testing are not reasonable and available here, especially in light of the CDC Guidelines recommending that testing and social distancing measures be taken in correctional facilities to abate the risks of COVID-19."); *Halladene v. Decker*, No. 20-cv-2883, 2020 U.S. Dist. LEXIS 159285, at *2 (S.D.N.Y. Sept. 1, 2020) ("Moreover, Petitioner was unlikely to prove that Respondents were providing inadequate medical care through deliberate indifference to his medical needs, because Respondents reasonably relied on existing CDC guidance in not applying additional safety protocols to Petitioner . . .").

⁸⁰ See, e.g., *Carranza v. Reams*, No. 20-cv-00977, 2020 U.S. Dist. LEXIS 82299, at *40 (D. Colo. May 11, 2020) ("[D]efendant testified that inmates in the Jail who are symptomatic or test positive for COVID-19 are isolated for 14 days, and that such a practice is consistent with the CDC guidelines. Plaintiffs argue in their reply that this practice is unreasonable because it focuses only on symptomatic inmates. Plaintiffs, however, do not explain how the current procedure is inconsistent with the CDC guidelines or otherwise unreasonable.")

⁸¹ See Gutterman, *supra* note 14, at 397.

⁸² *Lucero-Gonzalez v. Kline*, 464 F. Supp. 3d 1078, 1092 (D. Ariz. 2020).

⁸³ *Id.* at 1092–93.

⁸⁴ 445 F. Supp. 3d 709 (C.D. Cal. 2020).

Customs Enforcement's (ICE) failure to adopt and implement key aspects of the CDC's guidelines.⁸⁵ There, plaintiffs raised serious questions about reasonableness by pointing out that the facilities where they were detained failed to incorporate certain aspects of the CDC guidelines and implemented policies "incommensurable with others."⁸⁶ In this way, the distance between what the facility did and planned to do, and what the CDC suggested they do, made the facility's response seem unreasonable to the court.

Reasoning like this may seem like a boon for incarcerated plaintiffs — in an area of law that is often convoluted and defendant-friendly,⁸⁷ there is at least a clear presumption to work with to establish that what the state is doing does not adequately protect health and safety. But even if courts uniformly hewed to this mold, there are two relevant caveats. First, the nature of the CDC guidelines sometimes leaves compliance in the eyes of the beholder. Courts have pointed to the sweeping feasibility carve-outs within CDC guidelines to suggest that what may look like noncompliance actually just falls within exceptions the CDC itself made.⁸⁸ Social distancing has been a particularly contentious issue along these lines. Some courts characterize adequate social distancing as an indisputable centerpiece of the CDC's strategy to combat COVID,⁸⁹ while others hold that the inability to meaningfully social distance is just one consequence of unique capacities across different facilities.⁹⁰ So, while plaintiffs who can show noncompliance with CDC guidelines are generally better off than those who cannot, defendants and courts have leaned on the flexibility inherent in the CDC's recommendations to fend off claims to this effect.

Second, even if courts will find noncompliance, and even if this noncompliance is considered unreasonable, this doesn't necessarily establish

⁸⁵ *Id.* at 744–45. Complicating the analysis in this case is the fact that technically ICE had incorporated CDC guidelines into its mandatory policy for detention centers, such that failure to abide by CDC guidelines also meant failure to abide by the agency's own mandatory procedures. *Id.* at 744. However, as other courts have recognized, failure to abide by an agency's own policies is not the same thing as a constitutional violation, but rather speaks to an administrative law doctrine that is separable from a due process violation. *See* C.G.B. v. Wolf, 464 F. Supp. 3d 174, 224 (D.D.C. 2020) (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)).

⁸⁶ *Fraihat*, 445 F. Supp. 3d at 745.

⁸⁷ *See* Schlanger, *supra* note 21, at 421–22.

⁸⁸ *See, e.g.,* Mays v. Dart, 453 F. Supp. 3d 1074, 1095 (N.D. Ill. 2020) (noting that aspects of a sheriff's COVID-19 plan were not objectively unreasonable because, although they conflicted with CDC guidance, the same guidance provided for flexibility and feasibility depending on facility capacity).

⁸⁹ *See, e.g.,* Torres v. Milusnic, 472 F. Supp. 3d 713, 736 (C.D. Cal. 2020) ("The CDC's own guidelines, however, provide that social distancing is a cornerstone of reducing transmission of respiratory disease. The BOP's multiphase plan does not include measures for meaningful social distancing." (internal quotation marks omitted) (footnote omitted)).

⁹⁰ *Plata v. Newsom*, 445 F. Supp. 3d 557, 565 (N.D. Cal. 2020).

deliberate indifference. Rather, although courts continue to center compliance with CDC guidelines in their deliberate indifference analysis, they seem to want to see especially serious noncompliance before inferring the requisite subjective intent.⁹¹ Where exactly the threshold is between an unreasonable failure to comply with CDC guidance and a deliberately indifferent one is hard to say. This, of course, tracks with the doctrinal priors — deliberate indifference is just a higher standard than is required for some Fourteenth Amendment claims, and its exact requirements are always opaque, verging on arbitrary.⁹²

(b) *Compliance as a (Strong) Presumption of Reasonableness.* — As opposed to noncompliance, a clearer line exists when claimants try to push for more protections than the CDC’s guidelines suggest. Courts have almost universally looked with skepticism on the idea that the Constitution requires more than the CDC guidelines suggest. In *Valentine v. Collier*,⁹³ the Fifth Circuit admonished a lower court for requiring a Texas state prison to go beyond CDC guidelines.⁹⁴ While the state had taken some measures in compliance with CDC recommendations, the district court had asked it to go further, mandating that it provide, for example, “alcohol-based sanitizer and additional paper products.”⁹⁵ The district court found that failure to take these steps, in addition to other inadequacies, constituted deliberate indifference to a serious harm.⁹⁶ The Fifth Circuit, on the other hand, in staying the lower court’s injunction pending appeal, took particular issue with the idea of requiring steps that supplemented the CDC’s recommendations. It asserted: “Plaintiffs have cited no precedent holding that the CDC’s recommendations are insufficient to satisfy the Eighth Amendment.”⁹⁷

The court went on to analyze the subjective deliberate indifference prong, placing seemingly dispositive weight on the government’s compliance with “guidance from the CDC and medical professionals.”⁹⁸ The Fifth Circuit thus implied that there is at least a presumption that CDC guidelines mark a relevant constitutional boundary. Then, those who suggest that the Constitution requires more need to rebut this presumption. The plaintiffs in *Valentine* subsequently applied to the Supreme Court to vacate the Fifth Circuit’s stay, but the Court denied this application.⁹⁹ In a statement criticizing the Fifth Circuit’s analysis, Justice Sotomayor, joined by Justice Ginsburg, highlighted the Fifth Circuit’s

⁹¹ See, e.g., *Chunn v. Edge*, 465 F. Supp. 3d 168, 204–06 (E.D.N.Y. 2020).

⁹² See Schlanger, *supra* note 21, at 421–22.

⁹³ 956 F.3d 797 (5th Cir. 2020) (per curiam).

⁹⁴ See *id.* at 802.

⁹⁵ *Id.*

⁹⁶ See *id.* at 801–02.

⁹⁷ *Id.* at 802.

⁹⁸ *Id.*

⁹⁹ *Valentine v. Collier*, 140 S. Ct. 1598, 1598 (2020) (mem.).

faulting of the lower court for requiring more than the CDC guidelines.¹⁰⁰ However, Justice Sotomayor did not reject the framing of Eighth Amendment compliance around the CDC's informal guidance. Rather, she argued that the guidelines themselves note that procedures should be adjusted based on the particular circumstances of a given prison, and that presumably this could involve ratcheting up expectations as well as ratcheting them down.¹⁰¹ Thus, even here, the idea remains that CDC guidelines are in some way authoritative as to the Eighth Amendment.

Chunn v. Edge,¹⁰² a district court decision denying a preliminary injunction, employed a similar presumption to the Fifth Circuit.¹⁰³ The *Chunn* court split its deliberate indifference analysis into three categories: deficiencies in a detention center's COVID-19 plan generally, failures to comply with CDC guidance in particular, and failures to implement measures not required by the CDC.¹⁰⁴ As the court would not find deliberate indifference even where plaintiffs had shown *noncompliance* with CDC guidelines, noting that these gaps in compliance did not themselves establish the requisite mens rea,¹⁰⁵ it is not surprising that the court declined to find deliberate indifference in light of officials' failure to take *additional* measures. Yet the court was especially dismissive of the idea that failure to take steps above and beyond those recommended by the CDC could rise to deliberate indifference to a significant harm.¹⁰⁶ The court suggested that, where measures outside those endorsed by the CDC were at issue, such as cleaning shared items between every use or daily temperature checks for all those incarcerated, it could not even hold that officials were aware of potential risks, let alone that they disregarded them.¹⁰⁷

Finally, in *Barnes v. Ahlman*,¹⁰⁸ a sheriff asked the Supreme Court to stay an injunction issued against him by a Ninth Circuit district court and maintained against him pending appeal by the Ninth Circuit itself.¹⁰⁹ The sheriff took issue with the extent to which the injunction

¹⁰⁰ *Id.* at 1600 n.2 (Sotomayor, J., statement respecting the denial of application to vacate stay).

¹⁰¹ *Id.*

¹⁰² 465 F. Supp. 3d 168 (E.D.N.Y. 2020).

¹⁰³ *See id.* at 172.

¹⁰⁴ *Id.* at 202–06.

¹⁰⁵ *Id.* at 204–05.

¹⁰⁶ *Id.* at 205–06 (“As discussed above, the CDC has not called for those practices, and petitioners have not demonstrated that respondent’s failure to adopt those specific approaches falls below any standard of care.” *Id.* at 205.).

¹⁰⁷ *See id.* at 205.

¹⁰⁸ 140 S. Ct. 2620 (2020) (mem.).

¹⁰⁹ *See* Emergency Application for Stay of Injunctive Relief Pending Appeal of Denial of Stay Application in the United States Court of Appeals for the Ninth Circuit at 1, *Barnes*, 140 S. Ct. 2620 (No. 20A19).

required him to go further than CDC guidelines suggested.¹¹⁰ Further, he argued that the Ninth Circuit's opinion had instigated a circuit split as to the constitutionality of injunctions exceeding the CDC's guidelines.¹¹¹ In this way, the question, put squarely to the Court, was whether the CDC's guidelines marked a relevant constitutional boundary. The Court responded by granting the stay.¹¹²

* * *

The above attempts to show that courts are deferring to CDC guidelines in their constitutional analyses and some have all but conflated constitutional standards with CDC compliance. Others specifically reserve independent judgment but nonetheless give great weight to the recommendations of this administrative agency. One way or another, courts are affording informal guidance published by the CDC a fair amount of constitutional significance. The rest of this Chapter argues that this level of deference undermines values inherent in both administrative and constitutional law doctrine.

B. Administrative and Constitutional Law on Deference

Since the onset of the pandemic, the CDC has achieved a special place in the American psyche. But courts, litigants, and the public should still remember that the CDC is, at bottom, an administrative agency. Usually, without a virus coursing through the population, the CDC probably would not garner much attention.¹¹³ A small agency under the purview of the Department of Health and Human Services, the CDC is made up mostly of scientists.¹¹⁴ It generally doesn't take on the sort of sweeping or controversial administrative actions that catapult an agency into public consciousness. COVID-19 has put the CDC in an unusual position of centrality, albeit one that the agency was created to assume should the occasion present itself.¹¹⁵ In its current posture, the CDC has attempted to respond to a challenging, constantly developing situation, publishing guidance for how to combat the pandemic in a broad range of contexts, from nursing homes, colleges and universities,

¹¹⁰ *Id.* at 6–7.

¹¹¹ *Id.* at 7.

¹¹² *Barnes*, 140 S. Ct. at 2620. Justice Sotomayor published a dissenting opinion, which Justice Ginsburg joined. Justices Breyer and Kagan also voted not to grant the stay.

¹¹³ See Denver Nicks, *The CDC Has Less Power than You Think, and Likes It that Way*, TIME (Oct. 17, 2014, 1:12 PM), <https://time.com/3516827/cdc-constitution-quarantine> [<https://perma.cc/XZ7P-NHM3>].

¹¹⁴ *Id.*

¹¹⁵ See Livia Gershon, *The Origins of the CDC*, JSTOR DAILY (May 22, 2020), <https://daily.jstor.org/the-origins-of-the-cdc/> [<https://perma.cc/DB6K-TQVU>].

summer camps, and amusement parks, to, of course, prisons, jails, and detention centers.¹¹⁶

As agency actions go, these guidelines are informal.¹¹⁷ They are published on the CDC's website.¹¹⁸ Many sets were promulgated quickly, without much process, though have been updated periodically since.¹¹⁹ They provide some reference to underlying data but do not explain the CDC's reasoning behind each suggestion.¹²⁰ The guidelines also do not purport to bind anyone.¹²¹ These guidelines were not meant to set policy but to guide those who might set policy, and to help individual citizens understand best practices in a tumultuous time.¹²² But as the first section of this Chapter laid out, it is not clear courts received this message. True, courts are not treating noncompliance with the CDC's prison guidelines as illegal in itself. And yet, the way many courts are importing CDC guidelines into Eighth and Fourteenth Amendment analysis imbues the guidelines with more legal significance than the guidelines claim for themselves. This effect may be inevitable in the chaotic environment of a pandemic, where there are only so many sources of comprehensive, trustworthy information.

Even so, this section argues that this sort of reliance is inappropriate for several reasons. First, foundational principles of administrative law assert that courts should afford the most deference to administrative actions that undergo significant process and that squarely implicate an agency's expertise. But the CDC's prison guidelines were promulgated without process, and deal more in prison administration than public health specifically. Second, the ultimate question courts need to ask is not, "What does public health require?" but, "What does the Eighth Amendment's prohibition on cruel and unusual punishment require?" This inquiry is informed, but not defined, by public health realities. When courts equate constitutional compliance with CDC compliance, they conflate these two separate inquiries and abdicate their own duty to serve as a constitutional backstop. Further, by deferring to these particular CDC guidelines, which themselves seem to subjugate public health to the broad discretion of prison administrators, courts create an

¹¹⁶ See *Guidance Documents*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/communication/guidance-list.html?Sort=Date%3A%3Adesc&Search=business> [<https://perma.cc/D5XG-SK5X>] (search "business" in search field to narrow results).

¹¹⁷ See Alfred C. Aman, Jr., *Informal Agency Actions and U.S. Administrative Law — Informal Procedure in a Global Era*, 42 AM. J. COMP. L. 665, 665–66 (Supp. 1994).

¹¹⁸ See *CDC Guidance*, *supra* note 44.

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² See, e.g., *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> [<https://perma.cc/DC56-HADW>].

undesirable situation wherein the ultimate arbiters of cruel and unusual punishment are, in reality, prison officials themselves.

I. Administrative Law Concerns. — Courts are giving CDC guidelines substantial if not conclusive weight in determining constitutional outcomes. Most typically, when courts look to, and possibly defer to, agency actions, it is in the context of administrative law, an area of doctrine that centrally concerns when agency decisionmaking should influence courts and how much.¹²³ Administrative law tells courts how to treat administrative actions and documents, making it relevant where courts are considering CDC guidance. Although courts here are not directly reviewing the CDC's guidelines, the constitutional setting does not entirely nullify the significance of administrative law principles in assessing when judicial deference is appropriate and when it is not. Rather, reference to administrative law and the values undergirding it suggests that the CDC's guidelines are not the sort of administrative action that should marshal the level of judicial respect on display in the swath of cases surveyed above.

Administrative law erects a hierarchy of administrative actions that get more or less judicial deference. Atop this hierarchy are legislative rules, enacted within an agency's statutorily delegated authority, binding on those they govern, and subject to somewhat extensive notice and comment procedures under section 553 of the Administrative Procedure Act.¹²⁴ Courts still review these types of agency actions, but with a generally high standard of deference.¹²⁵ Meanwhile less formal actions, which can be undertaken without much process, will often be subject to more exacting judicial scrutiny after the fact.¹²⁶ Interpretive rules, policy statements, and the like are the prototypical types of informal agency actions.¹²⁷ These actions do not purport to bind parties in and of themselves, but articulate principles that will affect the way in which an agency uses or applies its binding authority in the future.¹²⁸ Courts will often review them under the lesser standard of deference articulated in

¹²³ See Robert A. Anthony, *Which Agency Interpretations Should Get Judicial Deference? — A Preliminary Inquiry*, 40 ADMIN. L. REV. 121, 121–22 (1988); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 809 (2002).

¹²⁴ See, e.g., *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (“Only ‘legislative rules’ have the force and effect of law. A ‘legislative rule’ is one the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act.” (citation omitted)).

¹²⁵ Cf. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (“[A]ny ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.”).

¹²⁶ Cf. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that agency interpretations and opinions are “not controlling upon the courts,” although they may offer guidance).

¹²⁷ See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like: Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1315, 1317 (1992).

¹²⁸ *Id.* at 1314–15, 1356–58.

*Skidmore v. Swift & Co.*¹²⁹ *Skidmore* instructs courts to defer to informal agency actions only to the extent that the action and the reasoning behind it possess the power to persuade.¹³⁰

Here, the CDC's guidelines seem even more informal than this lowest rung of administrative action. They were promulgated largely without discernible procedural safeguards — one day in March they appeared on the agency's website.¹³¹ The agency provided almost no context describing its reasoning in adopting each specific measure, and even less in rejecting alternatives.¹³² Further, the guidelines do not say anything about the CDC's own policies, but rather reach out and address other agencies — those in charge of prisons, jails, and detention centers.¹³³ And even this they do only conditionally.¹³⁴ In this way, the guidelines are incredibly informal, even more so than administrative actions that usually earn that designation. At the most, administrative law might afford these guidelines a form of *Skidmore* deference, though even this standard may be too high.

Not only do these features place the guidelines outside the sort of actions normally accorded *Skidmore* deference, they also illustrate the fact that the CDC is to a large extent operating outside the core of its expertise. Expertise is usually a reason for judicial restraint in the prison context in particular; courts in the Eighth Amendment sphere are often reluctant to issue broad injunctive relief because, they assert, they are not in the business of prison administration.¹³⁵ And yet, neither is the CDC. But the guidance the CDC issued for health and safety inside prisons cannot be a product solely of their health- and science-based expertise. By distinguishing between public health best practices applicable to the general public and those applicable to prisons, the CDC is unavoidably dealing with prison administration. The Supreme Court has suggested that where an agency acts outside of its expertise, no deference — rather than *Skidmore* deference — is appropriate.¹³⁶

Although, again, the CDC's guidelines are not squarely up for review in these prison condition cases, it would be odd for them to take on

¹²⁹ 323 U.S. 134.

¹³⁰ *Id.* at 140.

¹³¹ See *CDC Guidance*, *supra* note 44.

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ See Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 807–08, 873–74, 906 (1990).

¹³⁶ See *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). This point is also implied by jurisprudence on the level of deference to be accorded when agencies share responsibility for the administration of a statute. See, e.g., *Grand Canyon Tr. v. Fed. Aviation Admin.*, 290 F.3d 339, 342 (D.C. Cir. 2002) (holding that the FAA was owed “no deference” to its interpretation of a statute because that statute was “addressed to all federal agencies and Congress did not entrust administration of [that statute] to the FAA alone”).

heightened significance in a constitutional setting that would not be afforded them if reviewed directly. Thus, to the extent that courts want to give weight to administrative guidance documents in their Eighth Amendment calculus, administrative law principles of deference would have courts calibrate depending on the agency action at issue. Here, that would mean assessing the CDC's guidelines with, at most, something akin to a *Skidmore* brand of deference. And yet, courts analyzing the COVID confinement issues have given these guidelines significantly more deference than what would be appropriate under *Skidmore*.¹³⁷ *Skidmore* instructs courts to accord the guidelines weight based only on their power to persuade.¹³⁸ But in many cases, it does not appear that courts are assessing the guidelines at all, let alone evaluating their persuasive heft. Instead, courts seem to take the guidance at face value, failing to probe beyond the surface.

2. *Constitutional Concerns.* — In addition to the tensions with traditional notions of administrative law deference, courts' treatment of the CDC's guidelines also runs counter to established constitutional precedent. This section lays out two such tensions. First, courts, not administrative agencies, are the designated arbiters of constitutional questions. When courts give CDC guidance near-dispositive weight in the constitutional balance, they surrender this role. Second, the nature of these specific guidelines gives special cause for constitutional concern. The CDC's prison guidance is itself very deferent to prison administrators and their preferred balance between public health and penological ends. So, courts' deference to the CDC ends up looking like deference to prison administrators themselves. This scheme significantly and impermissibly weakens Eighth and Fourteenth Amendment guarantees.

(a) *Courts as Arbiters of the Eighth Amendment Inquiry.* — To the extent that some courts have completely collapsed the constitutional question with CDC compliance, they have directly contravened established precedent. A group of amici made this point regarding the objectively unreasonable test in a brief filed with the Seventh Circuit.¹³⁹ There, a sheriff appealed from a district court ruling that held his efforts to protect pretrial detainees under his care from the threat of COVID-19 were likely insufficient under the Fourteenth Amendment.¹⁴⁰ One of the sheriff's arguments to the Seventh Circuit was simple — because he had attempted to comply with CDC guidance, his conduct

¹³⁷ See *supra* section A, pp. 2235–46.

¹³⁸ See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

¹³⁹ Brief of Prison & Jail Law Scholars as Amici Curiae Supporting Plaintiffs-Appellees at 2–3, *Mays v. Dart*, 974 F.3d 810 (7th Cir. 2020) (No. 20–1792).

¹⁴⁰ *Mays*, 974 F.3d at 813, 817.

was constitutional.¹⁴¹ In his response to the pandemic, the sheriff chose to continue extensive use of group housing and double celling that made meaningful social distancing a complete impossibility.¹⁴² But because these policies did not necessarily contravene CDC guidance, he maintained that the district court should not have held them constitutionally unreasonable.¹⁴³

However, as amici forcefully argued, the sheriff's proposed standard contravenes established precedent.¹⁴⁴ Several courts have held that, in the conditions of confinement context, it is entirely inappropriate for courts to cede the constitutional question to administrative agencies or professional organizations.¹⁴⁵ Rather, courts can look to these organizations for guidance, and can afford due weight to the content of agency recommendations.¹⁴⁶ But, at bottom, judges need to be the ones setting constitutional minima.¹⁴⁷ This is especially the case when one refers back to the foundational terms of the Eighth Amendment. Though case law has added layer upon doctrinal layer to the question of whether something is "cruel and unusual punishment," the reference point in defining "cruel and unusual" is what a society at any given point is willing to tolerate.¹⁴⁸ But administrative agencies do not deal in questions of societal standards of decency. The concept is outside the purview of the CDC, and outside its expertise.¹⁴⁹ Whatever one thinks of the ability of courts to faithfully assess such standards, the fact remains that the inquiry is constitutionally vested with the judiciary.¹⁵⁰ Further, while the specific needs of the pandemic may temporarily override concerns about executive power for some,¹⁵¹ it is still worth noting that the CDC is a component part of the same executive branch that, at least for federal

¹⁴¹ Brief and Appendix of Defendant-Appellant Thomas J. Dart at 35–36, 44–45, *Mays*, 974 F.3d 810 (No. 20–1792).

¹⁴² Brief of Prison & Jail Law Scholars as Amici Curiae Supporting Plaintiffs-Appellees, *supra* note 139, at 1–2.

¹⁴³ Brief and Appendix of Defendant-Appellant Thomas J. Dart, *supra* note 141, at 35–36.

¹⁴⁴ Brief of Prison & Jail Law Scholars as Amici Curiae Supporting Plaintiffs-Appellees, *supra* note 139, at 6–8.

¹⁴⁵ See, e.g., *Brown v. Plata*, 563 U.S. 493, 539–40 (2011) (“[C]ourts must not confuse professional standards with constitutional requirements.”); *Rhodes v. Chapman*, 452 U.S. 337, 348 n.13 (1981) (declining to defer to professional standards that purported to increase, rather than decrease, the constitutional protections provided by the Eighth Amendment).

¹⁴⁶ See *Bell v. Wolfish*, 441 U.S. 520, 543 n.27 (1979) (“[W]hile the recommendations of these [professional organizations] may be instructive in certain cases, they simply do not establish the constitutional minima . . .”).

¹⁴⁷ *Id.*

¹⁴⁸ See *Rhodes*, 452 U.S. at 346–47.

¹⁴⁹ See *CDC Mission*, *supra* note 43.

¹⁵⁰ See *Rhodes*, 452 U.S. at 346–47.

¹⁵¹ See, e.g., Jeannie Suk Gersen, *Who's in Charge of the Response to the Coronavirus?*, NEW YORKER (Apr. 19, 2020), <https://www.newyorker.com/news/our-columnists/whos-in-charge-of-the-response-to-the-coronavirus> [https://perma.cc/F32U-YDL5].

prisons and detention centers, is in charge of confinement in the first place.¹⁵² So, lending the CDC's own guidance conclusive weight in constitutional analysis blunts the force of the Eighth Amendment as a check on federal executive power.¹⁵³

(b) *Turner v. Safley and CDC Guidance*. — Courts' deference to CDC guidance usually implicates not just one administrative agency, but two: the CDC, which has published the guidance, and the corrections and detention facilities that allegedly follow it. Though the body of law surrounding them can sometimes obscure this point,¹⁵⁴ prisons, jails, and detention centers are run by administrative agencies at the state and federal level.¹⁵⁵ Their internal policies, practices, and regulations are, naturally, administrative actions.¹⁵⁶ Many attribute an increased bureaucratization of prisons and jails in the past half century or so to the uptick in prisoners' rights litigation in the 1960s and 1970s.¹⁵⁷ Official policies, operating procedures, and professional guidelines proliferated in part because of their utility in mounting a defense to conditions of confinement claims. Institutional defendants could put forward these documents "as deserving of deference, because they were at least rational, and more aggressively, expert."¹⁵⁸

Whatever the specific incentives for adopting regulations, policies, and procedures to govern prison administration, the existence of these documents has occasioned some Supreme Court precedent for how to treat them, especially when they come up against constitutional rights.¹⁵⁹ The short of it is this: the Supreme Court has engaged in a sort of prison exceptionalism when it comes to assessing prison administration and the constitutional rights of those incarcerated.¹⁶⁰ Despite the fact that prison law exists within two structures — constitutional and administrative law — both of which deal heavily in deference and

¹⁵² See *Agencies*, FED. REG., <https://www.federalregister.gov/agencies> [<https://perma.cc/GX49-6CGK>] (listing both the CDC and agencies such as the Bureau of Prisons).

¹⁵³ Cf. W. Lindman, Comment, "Cruel and Unusual" Checks and Balances: *The Supreme Court Writes a Rubber Check*, 30 DUQ. L. REV. 937, 958 (1992) (similarly criticizing the Court's practice of defining Eighth Amendment limitations with reference to popularly enacted legislation).

¹⁵⁴ Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 330–32 (2010).

¹⁵⁵ *Id.* at 344–47.

¹⁵⁶ *Id.*

¹⁵⁷ See, e.g., Malcolm M. Feeley & Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature*, in COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS 12, 26 (John J. Dilulio, Jr., ed. 1990).

¹⁵⁸ Margo Schlanger, *Operationalizing Deterrence: Claims Management (In Hospitals, a Large Retailer, and Jails and Prisons)*, 2 J. TORT L. 1, 45 (2008).

¹⁵⁹ See *Turner v. Safley*, 482 U.S. 78, 89 (1987).

¹⁶⁰ See Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1301–02 (2006); James E. Robertson, *The Rehnquist Court and the "Turnerization" of Prisoners' Rights*, 10 N.Y.C. L. REV. 97, 97–98 (2006).

standards of scrutiny, the dictates of both are distorted when a plaintiff is incarcerated.¹⁶¹

To emphasize this point, it is worth describing how judicial review of what are essentially administrative actions would usually go in the context of prisons and jails. A key governing doctrine in this area is *Turner v. Safley*.¹⁶² There, plaintiffs challenged prison regulations restricting mail correspondence and marriage between incarcerated individuals as infringing on constitutional rights to freedom of expression and marriage, respectively.¹⁶³ Justice O'Connor's majority, in assessing these claims, held that policies that burden the constitutional rights of those incarcerated are valid as long as they are "reasonably related to legitimate penological interests."¹⁶⁴ The decision then announced a four-factor test that boils down to a significant level of deference to prison officials and administrators, even when fundamental constitutional rights are at stake.¹⁶⁵ The *Turner* standard thus deviates from the norms of constitutional law. *Turner* prescribes what is essentially a rational basis standard of review for nearly all constitutional violations, some of which would usually be subject to stricter scrutiny.¹⁶⁶ At the same time, and most notable for the purposes of this Chapter, the Court has specifically excepted two constitutional claims from *Turner*'s coverage: claims of racial discrimination and Eighth Amendment claims, finding these rights in need of more heightened scrutiny even in carceral settings.¹⁶⁷ So, as per explicit Supreme Court precedent, in the Eighth Amendment context courts should not be deferring to the judgment of prison administrators just because they might be acting in furtherance of legitimate penological interests.

And yet, the CDC guidelines at issue here are scattered with feasibility carve-outs that seem to be grounded in penological interests over and above public health.¹⁶⁸ As noted, nearly all recommendations in the CDC's guidance are qualified with phrases like "where possible" or "when feasible."¹⁶⁹ The CDC does not even stand by the necessity of

¹⁶¹ See Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENTENCING REP. 245, 254 (2012). It is not always entirely clear how much deference federal courts should give to state administrative agencies, see Ann Graham, *Chevron Lite: How Much Deference Should Courts Give to State Agency Interpretation?*, 68 LA. L. REV. 1105, 1105–06 (2008), making the analogy to administrative deference somewhat more complicated where state prison systems are concerned. However, given the focus of this Chapter on federal court deference to federal agency (i.e., CDC) action as applied by state agencies, these important questions largely fall beyond its scope.

¹⁶² 482 U.S. 78.

¹⁶³ *Id.* at 81–82.

¹⁶⁴ *Id.* at 89.

¹⁶⁵ See *id.* at 89–91.

¹⁶⁶ See Dolovich, *supra* note 161, at 254.

¹⁶⁷ See *Johnson v. California*, 543 U.S. 499, 510–11 (2005).

¹⁶⁸ See *CDC Guidance*, *supra* note 44.

¹⁶⁹ See *id.*

cornerstones of COVID prevention like social distancing that the agency forcefully advocates elsewhere. Rather, the guidelines allow these essential public health measures to be weakened where correctional realities, as judged by prison administrators, demand it.¹⁷⁰ The overriding motivation of such carve-outs simply cannot be public health. Instead, the guidelines preemptively bend health measures to the will of prison administrators.

Further, as section A showed, these feasibility carve-outs allow courts to avoid finding deliberate indifference or objective unreasonableness, even where there seems to be noncompliance. Despite the fact that compliance with CDC guidelines largely insulates defendants from an unfavorable ruling, these feasibility carve-outs help ensure that what looked like noncompliance does not inevitably work in favor of plaintiffs. But viewed through the lens of *Turner* and its exceptions, these carve-outs are doing even more; they are effectuating a roundabout application of *Turner* to Eighth (and Fourteenth) Amendment claims. Of course, courts are not directly asking whether administrative policies inside prisons, jails, and detention centers are closely related to a legitimate state interest.¹⁷¹ And, as the first section of this Chapter notes, they are explicitly analyzing these cases under a deliberate indifference (or objective unreasonableness) standard.¹⁷² Still, in deferring to CDC guidance without much probing of the content therein, courts are nevertheless importing *Turner*-like reasoning into the Eighth Amendment analysis. This is because the CDC's guidelines themselves seem to subordinate the best public health advice to what are likely alternative state interests that apply in a carceral setting.

To take a discrete example, the CDC's guidelines suggest that prisons provide incarcerated individuals and staff with hand sanitizer containing at least sixty percent alcohol.¹⁷³ However, the CDC immediately qualifies that this suggestion should be implemented only to the extent that security interests allow.¹⁷⁴ Thus, a facility remains in compliance with this guideline if it refrains from procuring and distributing alcohol-based sanitizer because it judges an interest in security to override this public health directive. More broadly, nearly all suggestions for social distancing protocol come with caveats like "where feasible."¹⁷⁵ While the guidelines suggest implementing some sort of social distancing strategies, "ideally" those that maintain six feet between all incarcerated or detained individuals, they also immediately note that "[s]trategies will

¹⁷⁰ *See id.*

¹⁷¹ *See supra* section A, pp. 2235–46.

¹⁷² *See supra* section A, pp. 2235–46.

¹⁷³ *See CDC Guidance, supra* note 44.

¹⁷⁴ *Id.*

¹⁷⁵ *See id.*

need to be tailored to the individual space in the facility and the needs of the population and staff. Not all strategies will be feasible in all facilities.¹⁷⁶ Thus, stringent social distancing, by the CDC's calculus, must cede to feasibility concerns as identified by each individual facility. Feasibility is somewhat vague but it seems certainly to encompass cost and security, two interests recognized under *Turner's* initial inquiry.¹⁷⁷

Further, feasibility probably implicates a penological interest in continued incarceration itself.¹⁷⁸ Outside of the CDC's detention-specific guidance, there appears to be a clear consensus that one of the best, if not the only way, to reduce the risk of COVID-19 in prisons is to get people out of prisons.¹⁷⁹ But the interim guidance does not mention release at all, except to suggest certain protocols for making sure the inherently transient population of prison and detention centers does not infect communities on the way out.¹⁸⁰ Where the guidance briefly touches on overcrowding, it does suggest coordination with local law enforcement to try and divert new arrivals either to different facilities or to available alternatives to incarceration, though again this advice is covered by the guidelines' overarching feasibility carve-out.¹⁸¹ Thus, the CDC's corrections-specific guidance seems to presuppose a legitimate need to keep people in these settings, and to preemptively bend public health advice to avoid interference with such interest. Whatever the empirical or normative merits of such a presumption, it is unavoidably deferential to the assertion of a state penological interest — the very interest in incarceration itself. Inherent in the CDC's guidelines, then, are comprehensive accommodations for countervailing state interests.

In this way, the CDC is itself deferring to corrections administrators in a similar fashion as courts would outside of the Eighth Amendment context. And, within Eighth Amendment analysis, courts are, in turn, deferring to the CDC. Thus, especially in the starkest cases where

¹⁷⁶ *Id.*

¹⁷⁷ See, e.g., *Kimberlin v. U.S. Dep't of Just.*, 318 F.3d 228, 233 (D.C. Cir. 2003) (holding that a ban on certain musical instruments was consistent with a goal of preserving funds); *Jones v. N.C. Prisoners' Lab. Union, Inc.*, 433 U.S. 119, 121 (1977) (holding that rules prohibiting members of a prison labor union from meeting or soliciting new membership were reasonably related to an interest in security).

¹⁷⁸ Though a prevailing form of punishment in the United States, incarceration, especially in its current form, is not the only option for assessing criminal penalties. See Dolovich, *supra* note 25, at 892.

¹⁷⁹ See, e.g., Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, U. CHI. L. REV. ONLINE (Nov. 16, 2020), <https://lawreviewblog.uchicago.edu/2020/11/16/covid-dolovich> [<https://perma.cc/PBE7-USAY>]; Lauren-Brooke Eisen & Ruth Sangree, *COVID-19 Is Turning Prison Terms into Death Sentences*, BRENNAN CTR. FOR JUST. (July 31, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/covid-19-turning-prison-terms-death-sentences> [<https://perma.cc/LC2A-AQ54>].

¹⁸⁰ See *CDC Guidance*, *supra* note 44.

¹⁸¹ See *id.*

courts are all but handing over the constitutional question to the CDC, the CDC's regard for prison administrators' feasibility, cost, security, and carceral concerns becomes the court's own. Further, even where the CDC's guidelines factor heavily into the analysis but do not carry dispositive weight, the reasoning baked into the guidelines factors heavily as well. That reasoning rests on a constitutional balancing act that is not permissible where the Eighth Amendment is concerned.

Where *Turner* reigns, constitutional rights go underenforced.¹⁸² The Court has been unwilling to sanction this fate for the Eighth Amendment, viewing its full-bodied enforcement, unlike that of its constitutional peers, as nonnegotiable.¹⁸³ Though courts during the COVID-19 pandemic may not have explicitly invoked *Turner*, their considerable reliance on CDC guidelines reaches the same result anyway.

Conclusion

This Chapter has attempted to accomplish two things: First, to demonstrate through a survey of extant case law that, during the COVID-19 pandemic, courts have relied extensively on CDC guidance in assessing constitutional conditions of confinement claims. This deference in some places completely collapsed the constitutional inquiry with the question of CDC compliance. Second, this Chapter sought to question the propriety of this level of deference, both from a constitutional and administrative law perspective. While the virus rages on, courts will be forced to continue reckoning with cases coming out of the disaster of mass incarceration during a global pandemic. And yet if the prevailing regime of deference continues, no one — not courts, the CDC, nor prison officials themselves — will be forced to reckon with the constitutional rights of those in custody, nor the state of a society that leaves them there without much reckoning at all.

¹⁸² Fallon, *supra* note 160, at 1301–02.

¹⁸³ *Johnson v. California*, 543 U.S. 499, 511 (2005).