



**SAINT LOUIS UNIVERSITY SCHOOL OF LAW**  
Legal Studies Research Paper Series

No. 2021-07

COVID-19, Courts, and the 'Realities of Prison Administration.' Part II:  
The Realities of Litigation

Chad Flanders  
*Saint Louis University School of Law*

*Saint Louis U. Legal Studies Research Paper Series*

**COVID-19, COURTS, AND THE “REALITIES OF PRISON ADMINISTRATION.”  
PART II: THE REALITIES OF LITIGATION**

*Chad Flanders\**

*Abstract*

*Lawsuits challenging prisons and jails for not doing enough to stop the spread of COVID-19 among inmates have faced mixed results in the courts: wins at the district court level are almost always followed by losses (in the form of stays of any orders to improve conditions) at the appeals court level or at the Supreme Court. This short article tries to explain why this is happening, and makes three comparisons between how district courts and appeals courts have analyzed these lawsuits. First, district courts and appeals courts tend to emphasize different facts in their decisions. District courts focus more on the severity of COVID-19 and the heightened risk of its spread in correctional facilities; appeals courts tend to emphasize more the enormous managerial problems correctional officials face in the day-to-day running of prisons during a rampant and hard-to-control pandemic. Second, when it comes to the constitutional test of whether correctional officials have shown “deliberate indifference” to the spread of COVID-19 in prisons and jails, district courts look more at the objective harm suffered by inmates, where appeals courts fix on the lack of subjective culpability on the part of correctional officials. Finally, and most fundamentally, district courts seem to work with a picture that prioritizes the constitutional standards for prisons and jails—about which judges are the experts—while appeals courts frame their opinions with an eye to the expertise of those who have the job of running prisons and jails and deferring to them. The article concludes by positing that real reform at the level of prison management is more likely to come from the legislative and executive branches than as the result of court orders.*

**Introduction**

COVID-19 has ravaged the United States, and almost nowhere else has this been felt more acutely than in the nation’s prisons and jails.<sup>1</sup> One retired

---

\* Thanks to Fred Rottnek to conversations and guidance, and to Preethi Raja for excellent and timely research assistance.

<sup>1</sup> See generally National Commission on COVID-19 and Criminal Justice, *Covid-19 and the US Criminal Justice System: Evidence for Public Health Measures to Reduce Risk*, October 2020. For an excellent overview, to which I am much indebted, see Sharon

corrections official characterized the situation in prisons as like the one facing the passengers in a cruise ship, as the perfect “petri dish” for the spread of the disease.<sup>2</sup> Indeed, the situation seemed far worse for those in jails and prisons compared to those stuck on cruise ships, especially during the early days of the pandemic. Those incarcerated in crowded prisons and jails could not social distance at all, could not get adequate protective equipment, and were not furnished with hygiene products; officials in prison also could not, or did not, follow the recommended guidelines for preventing the spread of COVID-19. Worse, jails and prisons are not self-contained, and staff, administrators and released inmates can easily end up spreading COVID-19 into the general population.<sup>3</sup>

The outbreak of COVID-19 in prisons and jails is not all that surprising. Conditions in jails and prisons have always been bad: they were filthy, crowded places before the pandemic, and they were that way after the pandemic as well. If anything, COVID-19 put a spotlight on the ongoing outrage that is the American penal system.<sup>4</sup> But some were hopeful at least that *this* time, the response might be different: that government officials and the general population would see the need to act quickly to prevent prisons and jails from becoming “super-spreaders.”

This paper focuses on one means that various parties have used to try to improve prison and jail conditions in the wake of the COVID-19 pandemic and to force change when it was not immediately forthcoming: class-action

---

Dolovich, *Mass Incarceration, Meet COVID-19*, The University of Chicago Law Review Online (Nov. 16, 2020). <https://lawreviewblog.uchicago.edu/2020/11/16/covid-dolovich/> (hereinafter Dolovich, *Mass Incarceration*); Roni Caryn Rabin, *Prisons Are Covid-19 Hotbeds. When Should Inmates Get the Vaccine?* N.Y. TIMES (Dec. 2, 2020) <https://www.nytimes.com/2020/11/30/health/coronavirus-vaccine-prisons.html>. (“People held in confinement are uniquely vulnerable to the virus.”).

<sup>2</sup> Chris Francescani and Luke Barr, *Fearing outbreaks and riots, nation’s prison and jail wardens scramble to respond to coronavirus threat*, ABC News (March 19, 2020), available at <https://abcnews.go.com/Health/fearing-outbreaks-riots-nations-prison-jail-wardens-scramble/story?id=69676840>.

<sup>3</sup> Flanders, *Treat Prisoners with Dignity*, PITTSBURGH POST-GAZETTE (April 7, 2020, 11:00 PM). <https://www.post-gazette.com/opinion/2020/04/08/Treat-prisoners-with-dignity/stories/202004080032>; *Maney v. Brown*, 464 F. Supp. 3d 1191, 1199 (D. Or. 2020) (“Prisons are more dangerous than other congregate settings, like cruise ships, because they are not closed systems, and “staff and visitors travel from the facilities back to their home”).

<sup>4</sup> See Flanders, *Do Prisoners Have a Right to Soap?* NULR OF NOTE (June 24, 2020)

litigation.<sup>5</sup> While some prosecutors<sup>6</sup> and other government officials have (admirably) taken proactive measures to reduce the risk of a COVID-19 outbreak within jail and prison walls, not all of them have, and some of those efforts have been halting and half-hearted. Accordingly, lawsuits have been filed to force the change that has not been coming, or coming only grudgingly, from correctional institutions.<sup>7</sup> Those suits ask that prisoners be released, or transferred to safer prisons; they ask that inmates be socially distanced, be given soap, and that prison officials themselves follow the CDC (Center for Disease Control) guidelines; they have asked that facilities should be cleaned, and that they should stay clean.<sup>8</sup> The lawsuits have been based, when possible, on visits to the prisons by various experts, who interview inmates, guards, and wardens. Behind these suits is the constitutional requirement that conditions in prisons cannot amount to “cruel and unusual punishment.”

Even though we are in the early phases of the COVID-19 litigation, we can discern a familiar pattern to the litigation: plaintiffs will win victories in the form of injunctive relief at the district level, but then, almost automatically, the appeals court (including the Supreme Court, in some cases) will stay that injunction, putting a pause on any change the prison would have to make. This pattern has asserted itself again and again, with some variation, across the country.<sup>9</sup> Nor can this difference be chalked up to district courts getting it right and appeals courts getting it wrong or vice versa. The gap between them is more complicated, and it requires looking at the dialogue between the district courts and appeals courts across three levels.

The first level simply deals with the facts themselves, and which ones to emphasize, and how—at least as an initial matter—important any set of facts is. How appeals courts and district courts see the facts are the subject of Part

---

<sup>5</sup> See, e.g., Margo Schlanger, *Special Collection COVID-19 Coronavirus*, CIVIL RIGHTS LITIGATION CLEARINGHOUSE (database tracking of all COVID-19 class-action litigation) at <https://clearinghouse.net/results.php?searchSpecialCollection=62>

<sup>6</sup> Chad Flanders & Stephen Galoob, *Progressive Prosecution in a Pandemic*, 110 J. CRIMINAL L. & CRIMINOLOGY 685 (2020).

<sup>7</sup> See, *State Advocacy News: Reform Responses to COVID-19*, THE SENTENCING PROJECT (Apr. 6, 2020) at <https://www.sentencingproject.org/news/state-advocacy-news-reform-responses-covid-19/>

<sup>8</sup> See, e.g., *Swain v. Junior*, 958 F.3d 1081, 1086 (11th Cir. 2020) (“Among other deficiencies, the class action complaint alleged that the inmates . . . did not have enough soap or towels to wash their hands properly, waited days for medical attention, were ‘denied basic hygienic supplies’ like laundry detergent and cleaning materials, and were forced to sleep only two feet apart.”).

<sup>9</sup> Dolovich, *Mass Incarceration* (summarizing the recent course of prison class-action litigation involving COVID-19 related complaints).

I of the paper. District courts and courts of appeals seem to agree on many of the most basic facts about COVID-19, but not on all, and even on the facts they agree on they will differ on why those facts matter.

This gets us to the second level or the level of legal argument, where at least some of the difference in emphasis matters. It is the legal arguments where, perhaps most obviously, the district courts and the courts of appeals get their different impressions of the facts—they are looking for different things because their understanding of the law primes them to look in different places. The district courts seem to focus most of their attention on the risks of prisoners' getting sick and dying of COVID-19. But the appeals courts, by contrast, seem more impressed with the difficulties of prison administration. Their differing understandings of what the law requires leads them to find some facts more salient than others. I take up the legal analysis of the facts of COVID-19 in prisons and jails in Part II of the paper.

But at a higher level still we can see differences between the district and appeals courts—at the level almost of philosophy. The philosophy informs the courts' view of the law even if it is not fully articulated, so the legal arguments will in some way, if only implicitly, be part of a larger philosophical argument about the nature of prisons and jails and their relationship to the judicial system. It is at this level that we might fully appreciate the differences that exist between the district courts and the courts of appeals. In Part III, I try to articulate those contrasting philosophies.

## I.

All district courts begin their decisions on COVID-19 in prison with the simple fact of the enormous and unprecedented nature of the COVID-19 pandemic, even when the facts acknowledged are depressingly familiar.<sup>10</sup> From the beginning, the district courts and the appeals court diverge because the enormity of the pandemic cuts in at least two ways: one way emphasizes the lethality of the virus, the other its unpredictability. One way focuses on the deaths and the illness that we know have happened and will happen; the other focuses instead on how much we don't know, how unprepared we were, and how many contingencies there are in dealing with COVID-19.

Start with the fact that the COVID-19 pandemic is indeed serious, and how this basic fact gets refracted in district court opinions regarding prison conditions. For the COVID-19 virus, as we have come to understand its

---

<sup>10</sup> See, e.g., *Mays v. Dart*, 974 F.3d 810, 814 (7th Cir. 2020).

nature, presents a special danger because it is transmitted so easily. We can get it simply by being in groups of people and breathing their air.<sup>11</sup> Accordingly, we should take measures to distance ourselves from people, and when we cannot do this entirely, we have to wear masks or other protective equipment, wash our hands, and keep our spaces clean.

But all of this, the district courts almost universally go on to explain, is made all the worse when trying to control the spread of the virus in correctional institutions.<sup>12</sup> In the best of times, prisons and jails are not clean, have mold and dirt, insects and rats. They are also overcrowded, with prisoners sharing rooms meant to house far fewer people. These are conditions where COVID-19 can flourish. Prisons and jails, in short, were never good at providing reasonably hygienic conditions for their inmates, and COVID-19 seemed to hit them exactly where they were most vulnerable.<sup>13</sup>

A final fact that district courts emphasize are the types of people that prisons house. Many of them are elderly. Many of them have medical issues, either ones that they had before entering prison, or ones acquired after being housed in a prison. And this, as we all now know, makes things even more deadly when it comes to COVID-19.<sup>14</sup> Relatedly, medical care in jails and prisons tends to be less than ideal—this *is* a condition of prisons, that then worsens by a prison population that have a higher need for care, even in the best of times.

But do appeals courts disagree with any of the above, when they rule against the district courts? They do not deny that the possibility of an outbreak in prison is real, and that prisons house vulnerable populations who not only may be more likely to get sick; they are also more likely to die. Appeals courts, no less than district courts, will start their rulings with what can seem to be almost boilerplate about the pandemic, and its seriousness. But from there, the emphasis will shift, in two notable ways.

The first is that where district courts will emphasize how serious and indeed overwhelming the COVID-19 crisis is, the appeals courts will instead focus on how unpredictable, how changing the nature of the pandemic is.<sup>15</sup>

---

<sup>11</sup> See, e.g., *Ahlman v. Barnes*, 445 F. Supp. 3d 671, 679. (C.D. Cal. 2020).

<sup>12</sup> *Id.* (COVID-19 is “particularly dangerous in jails and prisons”).

<sup>13</sup> Dolovich, *Mass Incarceration* (“Carceral institutions are simply not conducive to limiting the spread of a highly contagious airborne virus.”).

<sup>14</sup> *Ahlman*, 445 F. Supp. at 679 (C.D. Cal. 2020) (“COVID-19 is particularly dangerous to people who are older or have certain health conditions and disabilities, including diabetes, lung disease, heart disease, and compromised immune systems.”)

<sup>15</sup> *Swain*, 958 F.3d at 1090 (emphasizing need of prison officials to act “with dispatch”

This relates to the second shift of emphasis: whereas the district courts highlighted how prisons and jails were in many ways uniquely suited to the easy spread of COVID-19, appeals courts will hit at something else about prisons, viz., how hard they are to manage, how under-resourced they are, how difficult it is to deal with large numbers of people and relatedly, how little courts know about what to do in these situations.<sup>16</sup> Appeals courts will emphasize the need for “flexibility” in how prisons respond to the virus.<sup>17</sup> The phrase “perfect storm” has been used more than once by appeals courts to describe the spread of COVID-19 in penal institutions.<sup>18</sup> Appeals courts, more than district courts, are impressed with just how hard it is to deal with COVID-19, for everyone of course, but for prisons and jails especially.<sup>19</sup>

## II.

The different ways district courts and appeals courts can be attributed to looking at things from different points of view. To put it crudely, but mostly accurately, the district courts are looking at things from the point of view of the inmate, particularly the inmate who has high susceptibility to COVID-19 and even dying from it. From this point of view, the real problem is that this prisoner could get sick, and possibly die, from COVID-19. Appellate courts, by contrast, are looking at things from the perspective of prison administration, and the people who are charged with the challenging day-to-day management of the prison. From this point of view, what COVID-19 represents is not in the first instance a medical problem—as it is for those who are incarcerated—but a problem of prison administration, and a very

---

so they can “respond to this unprecedented pandemic” and “rapidly evolving circumstances”)

<sup>16</sup> District courts note this point as well, but almost always qualify it. *See, e.g., Mays v. Dart*, 453 F. Supp. 3d 1074, 1083–84 (N.D. Ill. 2020) (“Operating the Jail, even under normal circumstances, is a very challenging task that occupies a large, full-time staff of policymakers, subject matter experts, and front-line correctional officers, medical and mental health workers, counselors, and others. And these are not normal circumstances.”). *But see id.* (“This does not mean, however, that constitutional protections fall by the wayside.”). The appeals court in *Mays* nonetheless faulted the district court for not taking the job of the corrections officials seriously enough. *See Mays*, 974, F.3d at 810 (district court did not discuss “in a meaningful way” the considerable deference owed to prison officials).

<sup>17</sup> *Swain v. Junior*, 961 F.3d 1276, 1293 (11th Cir. 2020) (“Perhaps especially in the prison context, government officials have a keen interest in maintaining the necessary flexibility to react quickly in response to new information about the virus.”).

<sup>18</sup> *Id.* at 1289 (“We simply cannot conclude that, when faced with a perfect storm of a contagious virus and the space constraints inherent in a correctional facility, the defendants here acted unreasonably by ‘doing their best.’”); *Valentine v. Collier*, 978 F.3d 154, 158 (5th Cir. 2020).

<sup>19</sup> *See, e.g., Swain*, 961 F.3d at 1280 (“[P]rison officials are faced with the unenviable (and often thankless) task of maintaining institutional order and security while simultaneously taking proper care of the individuals in their custody.”).

difficult one at that.

This difference in perspective is formed by two things. The first is that district court judges are required to collect and look closely at the testimony provided by the plaintiffs about prison conditions and about health risks; they will hear also from medical experts on the dangers of not taking effective steps to combat the spread of COVID-19. This will take place over days.<sup>20</sup> The judge will also hear from prison officials, but for obvious reasons, this testimony may be less engaging and will invariably be self-serving. Overall, district court judges may be more impressed by the magnitude and the urgency of the problem of COVID-19 rather than the inability of prison administrators to deal with it. Or rather, they may be impressed by the urgency of the problem even more because prison administrators have not been able to get an effective handle on it. The second and more elaborate reason for the difference in perspective is how district courts and appellate courts interpret the relevant legal standards, a point which will require much more elaboration.

#### A.

The challenges brought by plaintiffs against correctional facilities raise any number of legal challenges, but the main one—the one which seems to pull all the other claims under it—is that COVID-19 in prisons and jails, and the lack of an adequate administrative response, amounts to cruel and unusual punishment, in violation of the Constitution. The legal analysis of whether prison conditions amount to cruel and unusual punishment consists of two steps. The first step is that the prison conditions be objectively unreasonable, that is, objectively bad. And at this step there is little disagreement between district courts and appellate courts; indeed, the defendants usually concede the point.<sup>21</sup> They all agree that COVID-19 is serious, represents a huge risk to prison populations, and is especially risky to vulnerable populations who are incarcerated. This should not be too surprising. After all, it is true.<sup>22</sup>

---

<sup>20</sup> For an example of this, but not in the context of COVID-19, see *Atkins v. Parker*, 972 F.3d 734, 739 (6th Cir. 2020) (explaining that it was appealing to the district court’s factual findings as the “district court presided over a four-day bench trial in this case (and we have not).”

<sup>21</sup> See, e.g., *Valentine v. Collier*, 455 F. Supp. 3d 308, 321–22 (S.D. Tex. 2020) (“Defendants do not dispute that COVID-19 poses a substantial risk of serious harm to Plaintiffs.”); *Swain*, 961 F.3d at 1285 (test requires proof of objective harm but “defendants seem to agree—wisely, we think—that the risk of COVID-19 satisfies this requirement.”).

<sup>22</sup> See, e.g., *Money v. Pritzker*, 453 F. Supp. 3d 1103, 1131 (N.D. Ill. 2020) (“[N]obody contests the serious risk that COVID-19 poses to all inmates and prison staff.”).

The second step is subjective, now meaning that the prison administrators, or those who had the power to do something about those objectively bad conditions, responded to them with “deliberate indifference.”<sup>23</sup> Although much ink has been spilled (and more ink will be spilled, below) on the nature of deliberate indifference, what deliberate indifference means in the context of COVID-19 is *the* disagreement in almost every lawsuit that has been brought. District courts will primarily find deliberate indifference; they will then be quickly reversed by appeals courts, who say that the district courts have misapplied or misunderstood what “deliberate indifference” means. But what *is* “deliberate indifference”?

To begin with, deliberate indifference standard is not one of simple negligence, even criminal negligence. It is not the fact that corrections officials failed to act in the way a reasonable correctional official would. They must do *worse* than that. They must have acted in a way that showed they consciously disregarded the nature of the problem: that they were aware of their actions, and aware it was not enough.<sup>24</sup> Put this way, it becomes clearer how the deliberate indifference standard is not objective, but subjective. It is more about the attitude that correctional officials take toward the problem than whether they live up to a given standard.<sup>25</sup> And when we see the test for deliberate indifference this way, it is a game changer, at least in the hands of the appeals courts.<sup>26</sup> It means that the standard is not about meeting any goal, or living up to any set of guidelines, or even following through on your own advice. It is a matter, more generally, of whether you have looked at the problem, understood what the problem involves, and done basically nothing.<sup>27</sup>

Thus, when district courts look at rising deaths and infections as showing

---

<sup>23</sup> *Farmer v. Brennan*, 511 U.S. 825, 830 (1994) (“In a suit such as petitioner’s, insofar as it seeks injunctive relief to prevent a substantial risk of serious injury from ripening into actual harm, ‘the *subjective factor, deliberate indifference, should be determined in light of the prison authorities’ current attitudes and conduct,*’ their attitudes and conduct at the time the suit is brought and persisting thereafter”) (emphasis added; citations omitted).

<sup>24</sup> “Deliberate indifference is the conscious or reckless disregard of the consequences of one’s acts or omissions. It entails something more than negligence but is satisfied by something less than acts or omission for the very purpose of causing harm or with knowledge that harm will result.” *Gantt v. City of Los Angeles*, 717 F.3d 702, 708 (9th Cir. 2013).

<sup>25</sup> *Valentine*, 978 F.3d at 163. (“But the Eighth Amendment inquiry concerns TDCJ’s state of mind, not the scope of the injury.”)

<sup>26</sup> For a historical overview of the importance of this point, see Sharon, Dolovich, *Eighth Amendment Prison Conditions*, in *THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT*, 148-154 (Meghan J. Ryan & William W. Berry III, eds., 2020).

<sup>27</sup> *E.g., Rosario v. Brawn*, 670 F.3d 816, 821 (7th Cir. 2012) (deliberate indifference requires a showing “approaching total unconcern for the prisoner’s welfare.”).

“deliberate indifference,” the appeals courts will repeatedly say this is missing the point. They are right about this—at least to an extent. It certainly would be a problem if a district court took it as per se evidence of deliberate indifference if a prison or jail was not able to decrease or even eliminate the spread of infections of deaths due to COVID-19.<sup>28</sup> The constitutional test does not require certain results; it requires a certain attitude towards those results, viz., one that is not deliberately indifferent to them.<sup>29</sup> Appeals courts are right about this in another, and more ordinary way: sometimes, even when we are trying our hardest, the spread of COVID-19 can outpace our best efforts. We should not hold prison administrators to a standard higher than everyone else.

And it would also be a problem if a district court saw the failure to follow CDC guidelines to the letter as per se evidence of deliberate indifference.<sup>30</sup> The CDC guidelines, however wise, do not dictate what is cruel and unusual. Only the Constitution can do that. Failing to live up to some objective standard—of results, or of conduct—cannot by itself show deliberate indifference. Maybe the prison and jail administrators were trying, but the disease was just moving too fast. Such things happen even outside of the correctional context, and it does not automatically mean that those trying to deal with the problem were deliberately indifferent to it. We cannot, as one appeals court put it, let the failure to live up to some *objective* metrics to mean that the prison or jail was *subjectively* indifferent and “collapse” the distinction between objective and subjective.<sup>31</sup>

---

<sup>28</sup> As the Fifth Circuit accused the district court of doing. *Swain*, 958 F.3d at 1089. (“The district court treated the increase in COVID-19 infections as proof that the defendants deliberately disregarded an intolerable risk. In doing so, it likely violated the admonition that resultant harm does not establish a liable state of mind”); *see also Swain*, 961 F.3d at 1287. (“First, and most obviously, the district court erred in relying on the increased rate of infection.”).

<sup>29</sup> *Valentine v. Collier*, No. 4:20-CV-1115, 2020 WL 5797881, at \*29 (S.D. Tex. Sept. 29, 2020) (noting that the fact of increased deaths does not mean officials were deliberately indifferent).

<sup>30</sup> *See, e.g., Ahlman*, 445 F. Supp. 3d at 691 (“An institution that is aware of the CDC Guidelines and able to implement them but fails to do so demonstrates that it is unwilling to do what it can to abate the risk of the spread of infection. In other words, failure to comply demonstrates deliberate indifference toward the health and safety of the inmates”); *Wilson v. Williams*, 455 F. Supp. 3d 467, 478–79 (N.D. Ohio, 2020) (“Elkton has altogether failed to separate its inmates at least six feet apart, despite clear CDC guidance for some time that such measures are necessary to stop the spread and save lives.”).

<sup>31</sup> *Swain*, 958 F.3d at 1089 (“In conducting its deliberate indifference inquiry, the district court incorrectly collapsed the subjective and objective components.”); *Valentine v. Collier*, 956 F.3d 797, 802 (5th Cir. 2020) (“[T]he district court thus collapsed the objective and subjective components of the Eighth Amendment inquiry established in *Farmer*, treating inadequate measures as dispositive of the Defendants’ mental state.”).

## B.

If district courts repeatedly risk conflating the subjective and the objective, there is a risk on the other side, too: that the appeals courts will dispense with any kind of standard at all. When the appeals courts look to see whether prison officials and administrators have been deliberately indifferent to the problem of the spread of COVID-19, they are mainly looking to see whether they have basically ignored the problem. If they have done anything, whether they have done enough, this will probably suffice. They are doing their “best,” as more than one appeals courts will explain.<sup>32</sup> However, one gets the impression again and again that just throwing anything at COVID-19 is sufficient, because it shows that the officials are not willfully ignoring the problem they have in front of them.<sup>33</sup> They are doing something, and this fact means that they are not reckless: they are not turning to look at the problem that COVID-19 presents and then simply walking away.<sup>34</sup> In one case, it was considered damning to the plaintiffs’ side that one of the plaintiffs’ attorneys conceded that the jail was trying their “very, very best.”<sup>35</sup>

But it is almost certain, too, that the something that they are doing is not enough in most every case, even if they are trying very hard—again, we need only look at the metrics. We can look at the rising case counts and deaths; we can look at the various CDC recommendations and the prison’s ability to comply; and we can look at the promises that the officials themselves have made and have not lived up to, or simply never did that much to meet. Appeals courts can also agree that most officials could have done more.<sup>36</sup> But none of this ultimately matters, because deliberate indifference is not simply about living up or down to a standard, it is about whether you are doing something or nothing at all, whether you are at least not disregarding

---

<sup>32</sup> See, e.g., *Swain*, 961 F.3d at 1288 (“First, with respect to social distancing in particular, as the court-commissioned expert report summarized, the defendants ‘d[id] their best.’”).

<sup>33</sup> *Ahlman v. Barnes*, No. 20-55568, 2020 WL 3547960, at \*9 (9th Cir. June 17, 2020) (Nelson, J., concurring in part and dissenting in part) (“W]here a prison took steps to mitigate the risk of infection by increasing internal safety procedures, it could not have consciously ‘disregarded the risk’ to inmate health and safety, even if the measures sometimes fall short of the CDC guidelines.”).

<sup>34</sup> *Wilson*, 961 F.3d at 843. (“[A]n official will likely not be found to be deliberately indifferent if they took some action, even if that action was inadequate.”)

<sup>35</sup> *Marlowe v. LeBlanc*, 810 F. App’x 302, 305 (5th Cir. 2020) (“Plaintiffs’ own counsel conceded at the April 7 evidentiary hearing that “everyone here is trying their very, very best to make sure that nobody gets sick at [RCC].”).

<sup>36</sup> *Valentine*, 978 F.3d at 158. (“As judges, our conscribed role is not to assess whether prison officials could have done more to contain the virus—no doubt they could have.”)

the problem and instead addressing it, however imperfectly and however ineffectively.<sup>37</sup> The key thing is that they are not ignoring it.<sup>38</sup> What would be decisive evidence, on this view, would be an admission that the administrators themselves believed that what they were doing was not enough.<sup>39</sup> But that never happens.

The point being made (if only implicitly) by the district courts is that we do not need officials to admit they believe that what they are doing is not enough when their actions *show* that. We can infer from what they are not doing—compared to what they could be doing—that they are being reckless, given their awareness of the magnitude of the problem.<sup>40</sup> Doing *something* is just not the same as being *reasonable*.<sup>41</sup>

In other words, to make the officials' awareness of the problem paramount, and have it be enough that they are aware of the problem and are doing *something*—anything—is to make the subjective part of the test swallow up the deliberate indifference test entirely.<sup>42</sup> It must still be possible to have it be the case that officials are 1) aware of the problem, 2) do something about it, 3) but those same officials are *also* aware that what they are doing is nowhere near enough.<sup>43</sup> This, for the district courts, could allow

---

<sup>37</sup> *Wilson*, 961 F.3d at 844. (“In contrast, here the BOP has not turned a blind eye or deaf ear to a known problem that would indicate such a lack of concern for petitioners’ welfare.”)

<sup>38</sup> *Valentine*, 978 F.3d at 164. (‘Here, even recognizing that COVID-19 poses a greater risk than tuberculosis, any argument that TDCJ ‘evinced] a wanton disregard for any serious medical needs is dispelled by the affirmative steps it took to contain the virus.’”)

<sup>39</sup> *Valentine*, 956 F.3d at 802. (“Though the district court cited the Defendants’ general awareness of the dangers posed by COVID-19, it cited no evidence that they subjectively believe the measures they are taking are inadequate.”); *Marlowe v. LeBlanc*, 810 F. App’x at 305 (“Even assuming that Plaintiffs’ testimony somehow satisfies *Farmer*’s objective requirement, the district court cited no evidence establishing that Defendants subjectively believed that the measures they were (and continue) taking were inadequate.”); *Swain*, 958 F.3d at 1089 (“ While perhaps impossible for the defendants to implement social distancing measures effectively in all situations at Metro West’s current population level, the district court cited no evidence to establish that the defendants subjectively believed the measures they were taking were inadequate”).

<sup>40</sup> *Valentine v. Collier*, No. 20A70, 2020 WL 6704453, at \*4 (U.S. Nov. 16, 2020) (Sotomayor, J., dissenting) (“But merely taking affirmative steps is not sufficient when officials know that those steps are sorely inadequate and leave inmates exposed to substantial risks.”).

<sup>41</sup> *Id.* (“To be sure, the ‘Eighth Amendment does not mandate perfect implementation,’ but it also does not set a bar so low that any response by officials will satisfy it. Given the evidence in the record, there is no basis to overturn the District Court’s finding of deliberate indifference.”) (citation omitted).

<sup>42</sup> *Valentine*, 2020 WL 5797881, at \*30. (“Designing a policy and implementing some of the measures therein does not automatically satisfy Defendants’ constitutional obligations, especially in the face of an unprecedented public health crisis.”)

<sup>43</sup> As Justice Sotomayor commented in her opinion on the *Valentine* case:

an inference of deliberate indifference: officials are taking steps, sure, but those are steps that they know are not enough to adequately deal with the problem. A district court is surely within its rights, moreover, to disbelieve the self-serving testimony of a prison warden who says that they are “doing all they can” or “doing their very best.”

The problem is that the appeals courts seem to end with the fact that prisons and jails have done something, and that itself pretty much shows that they cannot be “indifferent” to the problem. This goes too far too quickly. Taking some measures to aid prisoners, as Michael Dorf has spelled out, does not rule out that one is *still* deliberately indifferent.<sup>44</sup> In fact, what district courts seem to be doing a lot of the time is making an inference to recklessness from the fact that administrators know how bad the problem is and are doing something but are not doing what they know they *need* to do to solve the problem.<sup>45</sup>

So why do appeals courts reverse district courts on precisely this point? Here, finally, we get to the legal wrinkle that drives many, if not these cases, which is that the usual order of deference—the idea that higher courts should defer to lower courts especially when it comes to factual determinations<sup>46</sup>—

---

The District Court found that respondents “were well aware of the shortcomings” in their response “and nevertheless chose to stay the course, even after a number of inmates died.” Respondent Collier even admitted that prison officials ““were not doing everything [they] should have been.... Thin[g]s like restricting, isolating, PPE access, cleaning supplies.”” To be sure, the “Eighth Amendment does not mandate perfect implementation,” but it also does not set a bar so low that any response by officials will satisfy it. Given the evidence in the record, there is no basis to overturn the District Court’s finding of deliberate indifference.

*Valentine*, 2020 WL 6704453, at \*4 (Sotomayor, J., dissenting) (citations omitted).

<sup>44</sup> Michael Dorf, *Deliberate Indifference*, DORF ON LAW (August 10, 2020), <http://www.dorfonlaw.org/2020/08/deliberate-indifference.html>

<sup>45</sup> *Ahlman*, 445 F. Supp. 3d at 691. (“It is not enough for Defendants to nominally comply with some portions of the Guidelines sometimes so that they can claim “we are testing” and “we are providing soap”—they must fully and consistently comply so that the compliance is an effective tool to abate the spread of infection.”). Note that what the district courts are finding is recklessness, and not what Sharon Dolovich calls “constructive knowledge.” See Dolovich, *Eighth Amendment Prison Conditions*, in *THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT* 142 (Meghan J. Ryan & William W. Berry III, eds., 2020).

<sup>46</sup> See, e.g., *Wilson*, 961 F.3d at 837. (stating that abuse of discretion “is a highly deferential standard, and the ‘district court’s determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard.’”) (citations omitted).

just does not exist in the COVID-19 prison cases.<sup>47</sup> In fact, it gets flipped.<sup>48</sup> It is as if the appeals courts just decide to skip a level when looking at the facts, going past what the district court said and focusing instead on the correctional officials' representations of the truth.<sup>49</sup> They get the benefit of the doubt, and appeals courts willingly give them that benefit.<sup>50</sup> Appeals courts take prison officials at their word when they say that they are doing their best and trying their hardest and not ignoring the problem. District courts and their determinations are no longer treated with the deference they almost uniformly get in any other factual dispute that is appealed.<sup>51</sup> District courts are not deferred to in their factual finding that we can infer a mental state (recklessness) from the circumstances.<sup>52</sup> Moreover, this deference cannot simply be chalked up to legal errors that the district courts have made. Rather, the deference here goes deeper, because it is not just part of a legal framework. It derives from a larger understanding of the place of prisons in the legal universe, and the relationship of courts to prison.

But before analyzing that relationship, we should emphasize once more how consequential the deferential stance of appeals courts is toward prison administration and administrators, especially if it is the case, as one district court noted that “[no] bright line divides a reasonable response from one that is deliberately indifferent in violation of the Eighth Amendment.”<sup>53</sup> For when we have evidence of policies announced and then not followed through on, lies by prison officials, text and emails that show the officials are more worried about appearing good to the court than stopping the spread of

---

<sup>47</sup> Or if the appeals court does defer, the Supreme Court acts as a backstop. *Compare Ahlman*, 2020 WL 3547960, at \*4. (finding that “Defendants have fallen far short of making a strong showing that the findings here were clearly erroneous”) with *Barnes v. Ahlman*, 140 S. Ct. 2620, 207 L. Ed. 2d 1150 (2020) (granting stay of district court opinion).

<sup>48</sup> See the excellent discussion of this phenomena (to which I am indebted) in Dolovitch, *Forms of Deference in Prison Law*, 24 Fed.Sent.R. 245, 254-55 (2012).

<sup>49</sup> *Valentine*, 2020 WL 6704453, at \*4. (Sotomayor, J., dissenting) (“Rather than contending with these facts, the Fifth Circuit sidestepped the clear-error standard by claiming that its review was not “fact-specific.” But the Fifth Circuit’s analysis makes clear that it substituted its own view of the facts for that of the District Court.”) (citation omitted).

<sup>50</sup> Thus, “in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.” *Bell*, 441 U.S. at 548, 99 S.Ct. 1861 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

<sup>51</sup> *Cameron v. Bouchard*, 815 F. App’x 978, 988 (6th Cir. 2020) (Cole, J., dissenting) (“It is not generally the role of an appellate court to resolve the discrepancies in the parties’ factual accounts; that is the district court’s job. We also do not re-weigh the evidence.”).

<sup>52</sup> For a good discussion of this point see Dolovitch, *Mass Incarceration*, using examples from many of the cases discussed *supra*.

<sup>53</sup> *Plata v. Newsom*, 445 F. Supp. 3d 557, 568 (N.D. Cal. 2020)

COVID-19, we can make one of two inferences.<sup>54</sup> We can infer from these inconsistencies, deceptions, and falsehoods to an awareness of the problem and a recklessness as to following through to take measures to solving the problem.<sup>55</sup> Or we can overlook them, and credit the officials for what they say they are trying to do, rather than what they do, and try to explain away some of their more glaring contradictions. Either conclusion is, in theory, compatible with the law and the facts. The appeals court is not wrong in holding that a showing of deliberate indifference is indeed hard to make.<sup>56</sup> But neither are district courts wrong in making the legal finding that the seriousness of the problem plus the failure to take it seriously enough permits an inference of deliberate indifference. What tips the balance for the appeals courts is a theory of (extreme) deference to prison officials rather than district courts and *that* is what needs to be teased out.

### III.

I have been contrasting the perspective many district courts have taken on COVID-19 litigation with that taken by appeals courts. District courts have been relatively pro-plaintiff. They have ordered prison administrators to do more in trying to stop the spread of COVID-19. Appeals courts have instead (mostly) sided with those administrators, and stayed injunctions that have required them to do more. But in trying to tease out two contrasting visions of courts and prisons, we should caution that such a simple district court/appeals court dichotomy will no longer do—if it ever did. The two “worldviews,” if we can call them that, are pitched at the level of philosophy. They do not belong to one level or court or another, or even to the court system contrasted with the executive or the legislative branches. They are—as the clumsy term “worldview” suggests—ways of looking at the world, and the place of courts and prisons in it. The point here is try to take the 100,000-foot view, something we have been slowly building up to. What are the

---

<sup>54</sup> See especially *Valentine*, 2020 WL 5797881, at \*4. (section on “credibility of defendants” listing failures to disclose COVID-19 test results to the court, dissembling to the court about the accuracy of the numbers, and the prison’s practice of making changes only right before hearings and in response to them); see also *id.* (citing instances where the prison misrepresented facts to the court); *Cameron v. Bouchard*, 815 F. App’x 978, 986 (6th Cir. 2020) (plaintiffs alleging that jail only adopted preventative measures in response to litigation and then discontinued them after a court-ordered inspection).

<sup>55</sup> *Cameron v. Bouchard*, 462 F. Supp. 3d 746, 776–77 (E.D. Mich.), on reconsideration, No. CV 20-10949, 2020 WL 2615740 (E.D. Mich. May 22, 2020), and vacated, 815 F. App’x 978 (6th Cir. 2020) (concerns about credibility of defendants who had “not been inside the housing areas for weeks before the evidentiary hearing”).

<sup>56</sup> *Swain*, 961 F.3d at 1285 (“As applied in the prison context, the deliberate-indifference standard sets an appropriately high bar.”)

philosophies within which a certain view of the facts make sense, and a certain legal framework seems most justified?

*The pro-inmate outlook.* One of the more philosophically loaded passages in the prisoners' rights context is the one from *DeShaney v. Winnebago*, from which one can glean much of the pro-prisoner outlook.<sup>57</sup> When incarcerated, prisoners enter into a position of dependence on the government. As a consequence, the state has a positive obligation to give them what they need because absent the government, they have no way to get it: they are behind bars, separated from the market, and separated from the charity of others.<sup>58</sup> If government does not house them, feed them, and care for them, they cannot live, let alone stay healthy.<sup>59</sup> As the government continues to incarcerate people in prisons and jails, the government therefore has affirmative responsibilities, responsibilities it would not have if it did not incarcerate at all. The situation is especially precarious when inmates are confined within the facility's walls, unable to evade an infectious disease.<sup>60</sup> Spelling out the government's affirmative obligations to those whom it incarcerates—but one that seems especially salient in the context of COVID-19—is one half of the pro-prisoner picture.

The other half is where the courts come in. Their job is to make sure that the government meets these obligations consistent with the requirements of the Constitution.<sup>61</sup> Now, those constitutional requirements may not be very demanding. At the limit, they only require that the government not treat those whom it incarcerates in a cruel and unusual manner. But those constraints

---

<sup>57</sup> *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) (“[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.”).

<sup>58</sup> *Swain*, 961 F.3d at 1295 (citations omitted) (“Because incarceration “strip[s] [detainees] of virtually every means of self-protection and foreclose[s] their access to outside aid,” the Constitution imposes affirmative obligations on jail officials . . .”).

<sup>59</sup> *Valentine v. Collier*, 140 S.Ct. 1598, 1601 (2020) (statement of Sotomayor, J.) (“[I]n this pandemic, where inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm”).

<sup>60</sup> *Wilson*, 961 F.3d at 845. (“[P]risoners have been placed in a deadly predicament: prevented by the fact of their confinement from taking recommended precautions, they are left exceptionally exposed to a deadly virus. This reality is particularly concerning for medically vulnerable inmates like those in the subclass.”)

<sup>61</sup> *Mays*, 453 F. Supp. 3d at 1084. (“Government officials in our country are bound by constitutional requirements even when they are dealing with difficult and unfamiliar challenges to public health and safety.”).

are not nothing.<sup>62</sup> They drive the government's responsibility to give prisoners what they need to live—to protect their health and their well-being. And courts, because they are the institutions that look after people's rights, are uniquely situated to interpret those rights, to spell out what the government has to do to make it so prisons are not cruel and unusual.<sup>63</sup> The Government has a higher stake in intervening and has to *give*, not *stay away*, in order to meet its Constitutional obligations.<sup>64</sup> Courts are there to spell out what, and how much, governments have to give.<sup>65</sup> That is where courts excel, that is where they are experts. Against this backdrop, arguments about lack of resources or judicial meddling, simply pale.<sup>66</sup>

*The pro-administrator outlook.* But we can now consider another contrasting view, one which starts by emphasizing the culpability of the persons who are incarcerated, and the fact that they are being punished. Punishment is best viewed not in terms of the responsibility of the government officials to provide, but of those who are being punished to suffer some deprivations. Understandably, individuals suffering from those deprivations do not like it, and prisoner administrators must deal with that

---

<sup>62</sup> “The Constitution ‘does not mandate comfortable prisons,’ but neither does it permit inhumane ones, and ... ‘the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.’ ” *Farmer*, 511 U.S. at 832. (citations omitted).

<sup>63</sup> *Brown v. Plata*, 563 U.S. 493, 511 (2011) (while “[c]ourts must be sensitive to the ... need for deference to experienced and expert prison administrators,” they “may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.”).

<sup>64</sup> The distinction was noted by Judge Ellison in a footnote to his decision in *Valentine*:

Critically, Plaintiffs claim not that the State is infringing upon their constitutional rights to combat a public health emergency, but rather that the State is infringing upon their constitutional rights precisely because it is *not* reasonably combatting a public health emergency within Pack Unit. Thus, Plaintiffs’ constitutional rights remain protected under the Eighth Amendment's deliberate indifference standard.

*Valentine*, 455 F. Supp. 3d at 328.

<sup>65</sup> *Valentine*, 2020 WL 5797881, at \*37. (“The injunction may be seen as micro-management of the state's conduct, or a burden to the government's budget, or as assuming a responsibility that should be left for the legislature. Against all that is the simple proposition that we must not treat with deliberate indifference those whom we have chosen to imprison”).

<sup>66</sup> *Wilson*, 961 F.3d at 849. (Cole, J., dissenting) (“And even if compliance with the order detracts from other functions, there is no higher and better use of BOP resources than to fulfill its legal and moral obligation to care for the lives of those in its custody.”); *Valentine*, 2020 WL 5797881, at \*37. (“The injunction may be seen as micro-management of the state's conduct, or a burden to the government's budget, or as assuming a responsibility that should be left for the legislature. Against all that is the simple proposition that we must not treat with deliberate indifference those whom we have chosen to imprison..”).

dissatisfaction. And perhaps more to the point, the regulation of prisoners is not regulation of people who have won awards for being good; they are being punished for violation of certain laws and are further marginalized for not following the rules. They are in prison to be separated from society, to be rehabilitated, and even to suffer and reflect on what they have done. It is hard work to deal with the variety of problems trying to house large numbers of law-disobeying people in one place, whatever the various reasons and explanations those who find themselves incarcerated may have for being there. This position animates, as well, arguments against the release of prisoners as a remedy for overcrowding: it is bad enough dealing with inmates inside prison; outside of prison, it's even worse.<sup>67</sup> It is why the prisoner administrators' task is so often described as “unenviable.”<sup>68</sup>

So even in the best of times, prisons are going to be an administrative nightmare. This is a foundational point for the pro-administrator outlook, and just as *DeShaney* was the key text for the pro-prisoner view, *Procunier v. Martinez* provides the basis for the opposite point of view.<sup>69</sup> Courts cannot simply dictate detailed prison procedures from above, as if there were obvious rules—even Constitutional rules—that we could spell out. Courts are at such a remove from what goes on in prisons, they can hardly sit in expert judgement on what prisons ought to be doing. Courts, as appeals courts are wont to say, are not equipped to dabble in the minutia of prison administration.<sup>70</sup> To be sure, there may be extreme cases, but they are marked by being extreme. In the run of the mill cases, where there are prisoner complaints that things are not going as they should, courts should stay out, and defer to what the prison administrators are saying. It is especially a

---

<sup>67</sup> *Wilson*, 961 F.3d at 845. (noting legitimate public safety issues with prisoner release).

<sup>68</sup> *Swain*, 961 F.3d at 1280; *Spain v. Procunier*, 600 F.2d 189, 193 (CA9 1979) (Kennedy, J.) (prison administrators have the “unenviable task of keeping dangerous men in safe custody under humane conditions”).

<sup>69</sup> *Procunier v. Martinez*, 416 U.S. 396, 404–05 (1974) (“[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. ... [C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.”). See also the important discussion of this passage in Sharon Dolovitch, *Forms of Deference in Prison Law*, 24 Fed.Sent.R. 245, 253 (2012).

<sup>70</sup> *Ahlman*, 2020 WL 3547960, at \*12. (Nelson, J., dissenting) (“Casting aside this admonition, the district court's injunction wades into the minutia of prison operations, going so far as to dictate the amount of hand soap and number of paper towels available to each prisoner. In effect, the district court seizes the role of prison management ...”).

problem when courts try to micromanage a problem that is rapidly evolving.<sup>71</sup> Prisons are no place for Constitutional idealism, and “hamstringing” the people on the ground who know better.<sup>72</sup> Here, the worry is giving prison administrators the power to say what the Eighth Amendment means (as it is on the pro-prisoner view); rather the worry is that shifting power from “public officials” to the “district court” in deciding how prisons should be run is a recipe for disaster.<sup>73</sup> Courts should not be, nor aspire to be, “super-wardens.”<sup>74</sup> It is this deference to the prison administrator’s *administrative* expertise that does not so much trump the constitutional claims of prisoners—although it arguably does just that—but to inform how a court should look at them.

### Conclusion

Prison administrators, appeals courts will say, should not be blamed for failing to do the “impossible” in combatting COVID-19.<sup>75</sup> By this, they mean at least partly much of what I have been emphasizing throughout this paper: that running prisons is very hard, even in the best of times, and prison administrators should be given some leeway in how they manage a rapidly emerging and changing crisis like COVID-19. But in another sense, the courts are meant to be taken much more literally. If prisons do not have the resources to follow CDC guidelines, or if there are legal barriers to doing so, then it simply cannot be deliberate indifference to fail to do the “impossible.” With resource limitations, this may not strictly speaking be correct.<sup>76</sup> And

---

<sup>71</sup> *Valentine*, 956 at 803. (“The harm to TDCJ is particularly acute because the district court’s order interferes with the rapidly changing and flexible system-wide approach that TDCJ has used to respond to the pandemic so far.”).

<sup>72</sup> *Swain*, 958 F.3d at 1090 (“The injunction hamstring MDCR officials with years of experience running correctional facilities, and the elected officials they report to, from acting with dispatch to respond to this unprecedented pandemic. They cannot respond to the rapidly evolving circumstances on the ground without first seeking “a permission slip from the district court.”) (citation omitted).

<sup>73</sup> *Swain*, 958 F.3d at 1090 (“In large measure, the injunction transfers the power to administer the Metro West facility in the midst of the pandemic from public officials to the district court.”).

<sup>74</sup> *Id.*

<sup>75</sup> *See, e.g., Swain*, 961 F.3d at 1287 (“Failing to do the ‘impossible’ doesn’t evince indifference, let alone deliberate indifference.”).

<sup>76</sup> *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 201 (8th Cir. 1974) (“Lack of funds is not an acceptable excuse for unconstitutional conditions of incarceration. An immediate answer, if the state cannot otherwise resolve the problem of overcrowding, will be to transfer or release some inmates.”); *Harris v. Thigpen*, 941 F.2d 1495, 1509 (11th Cir. 1991) (stating that “a lack of funds allocated to prisons by the state legislature ... will not excuse the failure of correctional systems to maintain a certain minimum level of medical service necessary to avoid the imposition of cruel and unusual punishment”).

even with legal barriers, there is a colorable argument that administrators should not be able to appeal to state and federal laws as to what is or is not “possible” in order to continue to run and operate prisons that are cruel and unusual.<sup>77</sup>

But at the same time, what counts as legally impossible is a function of what the Courts of Appeals say is legally impossible. And this applies to prison release as much as to other measures designed to reduce the spread of COVID-19 in prisons and jails. If appeals courts signal that some things are just too hard for prisons and jails to do, and that they will usually credit the testimony of prison officials over the judgments of district courts, then the appeals courts are *actively shaping* what is legally possible and not possible.<sup>78</sup> Indirectly, they will be setting the standard for what counts as being indifferent in the face of pandemic, because if the standard becomes doing something, then most every prison and jail will meet that standard. The boundaries of the legal imagination—what is possible and what is impossible—are set by the appeals courts and ultimately by the Supreme Court, which has consistently taken the side of prison administrators, when the appeals courts do not.<sup>79</sup> District courts will eventually learn to internalize these standards, and stop issuing orders that they know will be stayed, or reversed.<sup>80</sup>

What we may see, reflecting back on the response to the COVID-19 pandemic is that the positive action started from other places than the courts, and that prisons and jails that wanted to drag their feet, could. Policymakers and executive branch officials were the drivers in combatting COVID-19, not

---

<sup>77</sup> See *Swain*, 961 F.3d at 1298 (11th Cir. 2020) (Martin, J., dissenting) (“If contrary state law obligations precluded finding deliberate indifference, federal courts would be powerless to enjoin unconstitutional prison conditions wherever state legislatures act to withhold prison officials’ authority to remedy them. But this cannot be the rule.”).

<sup>78</sup> See Dolovich, *Mass Incarceration* (“In case after case, appeals courts granted stays of district court orders on grounds strongly suggesting a general lack of sympathy with plaintiffs’ arguments.”)

<sup>79</sup> See the excellent discussion of this in Brandon Garrett, *The Supreme Court’s COVID Cases Show That One Part of the Constitution Gets Extra Special Attention*, SLATE (Dec. 17, 2020, 11:37 AM), <https://slate.com/news-and-politics/2020/12/supreme-court-covid-cases-elevated-religion-constitution.html>.

<sup>80</sup> A good example of this is the recent district court decision in *Bevins v. Kauffman*, 2021 WL 322168, at \*5 (M.D. Pa. Feb. 1, 2021):

While the Court understands Plaintiff’s legitimate concerns regarding the COVID-19 pandemic, it agrees with the numerous courts throughout the nation that have concluded that similar allegations do not support a plausible inference that officials have demonstrated deliberate indifference to inmates’ Eighth Amendment rights.

lawyers and district court injunctions.<sup>81</sup> Of course, not all lawsuits have been unsuccessful. And some lawsuits, even if ultimately beaten back, may have prompted at least short-term change.<sup>82</sup> Even failed lawsuits can be useful in generating publicity and gathering information.<sup>83</sup> Those things can lead to changes as well, if only indirectly. But as the latest round of COVID-19 lawsuits have shown again, prison litigation is hard, and winning is even harder.

---

<sup>81</sup> *See, e.g.*, JOHN WITT, AMERICAN CONTAGIONS 125 (2020).

<sup>82</sup> *See, e.g.*, *Valentine*, 455 at 323. (noting that some measures in response to COVID-19 “were not implemented under after the commencement of this lawsuit, and some were not adopted until the day before this Court's evidentiary hearing.”).

<sup>83</sup> Although the lawsuits may obviously encourage prisons and jails to be less forthcoming with information, for fear of liability. *See, e.g.*, *Barnes v. Ahlman*, 140 S. Ct. 2620, 2622, 207 L. Ed. 2d 1150 (2020) (Sotomayor, J., dissenting). (“Notably, the Jail has since resisted respondents’ attempts to verify the Jail's compliance with the District Court's preliminary injunction.”).