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MANAGING PRO SE PRISONER LITIGATION

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Prisoner litigation proceeds along two distinct tracks. On the first and predominant track, prisoners are pro se; their litigation is processed according to exceptional and largely extrajudicial procedures; and they almost always lose. On the second and much rarer track, prisoners obtain counsel—often through appointment; their cases receive serious consideration; and success is much more likely. Federal judges, magistrates, and staff attorneys play important roles in shaping prisoner civil rights litigation by assigning cases to these tracks.

Perhaps so few prisoner civil rights cases are counseled and robustly adjudicated because most claims lack merit, or instead, perhaps so few prisoner civil rights claims succeed because so few prisoners are afforded counsel and receive the benefits of a fulsome adjudication.

This essay analyzes over a decade of data on federal prisoner civil rights cases and suggests that the latter explanation is, at least in large part, correct. It compares, for the first time, success rates in prisoner civil rights cases across districts and circuits and across years with widely varying representation rates; it also employs a novel method to identify prisoner civil rights appeals in which counsel was appointed. Together, these analyses suggest that lawyering—and the serious engagement by courts that comes along with it—really matters. When more prisoner litigants are represented and fully heard, it seems, more of them win.

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INTRODUCTION

A prisoner claiming a violation of his civil rights in federal court—asserting a claim of medical deliberate indifference or failure to protect from violence—will end up on one of two procedural tracks.[1] In a small percentage of cases, he will be represented by counsel, often because the court appoints him a lawyer. His case will be litigated vigorously and adjudicated by a judge, either Article I or Article III. There is a reasonable chance that he will win. The vast majority of prisoner civil rights cases end up, though, on the second track. In such a case, the prisoner will be left to his own devices. Litigation is likely to be much less robust and adjudication will largely be handled, often in summary fashion, by a staff attorney employed by the clerk of court. A prisoner proceeding pro se is almost certain to lose.

Because most prisoner litigants are indigent, courts determine to a substantial degree how many and which cases are placed on each of these tracks, and different jurisdictions strike very different balances. But little attention has been paid to the ramifications of these decisions. In assigning a case to one of these two tracks, are courts merely detecting its (lack of) merit? Call this the screening hypothesis. Or are they simultaneously impacting whether the case's potential merit will be realized (by a lawyer) and recognized (by a judge)?[2] Call this the lawyering hypothesis.[3]

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1. This essay is concerned with civil rights cases, challenging the conditions of incarceration, as opposed to criminal appeals or habeas petitions that contest prisoners' convictions and sentences. These cases primarily raise constitutional claims, though they may also raise statutory claims, particularly in the arenas of disability rights and religious liberty. This essay also focuses exclusively on litigation in federal court; although prisoners do bring civil rights claims in state courts, and some are more receptive to their claims than are the federal courts, data regarding state court litigation is even more difficult to come by. *See* Kathrina Szymborski Wolfkot, *Using State Constitutional Protections to Improve Life Behind Bars*, STATE CT. REP. (Feb. 15, 2023), https://statecourtreport.org/our-work/analysis-opinion/using-state-constitutional-protections-improve-life-behind-bars.

2. The latter hypothesis is a litigation analogue of Heisenberg's uncertainty principle: deciding how to measure the merits of a case affects the merits of the case.

3. In other contexts, there is robust evidence for the proposition—unsurprising and reassuring to attorneys who sell their labor at staggering hourly rates—that lawyering impacts case outcomes. *See* D. James Greiner, Ellen Lee Degnan, Thomas Ferriss & Roseanna Sommers, *Using Random Assignment to Measure Court Accessibility for Low-Income Divorce Seekers*, PROCS. NAT'L ACAD. SCIS., MAR. 31, 2021, 2–3 (finding that among low-income individuals seeking divorce, those

As Professor Margo Schlanger explained in her foundational study of prisoner litigation two decades ago, the small fraction of prisoner civil rights plaintiffs represented by counsel fare dramatically better for some combination of two possible reasons: "lawyers add value, or lawyers (or the judges or other court personnel who sometimes appoint them) are good screeners of cases."[4] Prisoner civil rights litigation might have an exceptionally high failure rate because an unusual percentage of these cases lack merit or because an unusual percentage of them lack counsel. As Professor Schlanger observed then, "without data there is really no way to know which effect dominates—the depression of success rates because lawyers are not available, or the absence of lawyers because the cases are not very good cases."[5]

Courts have generally endorsed the screening hypothesis. In Jones v. Bock, the Supreme Court described what it saw as the "flood of nonmeritorious claims" in prisoner cases, suggesting that this deluge could "submerge and effectively preclude consideration of the allegations with merit."[6] When the Eastern District of New York implemented a dedicated magistrate judgeship for handling pro se cases, its rationale was similar: "prompt and effective screening," it hoped, would allow the court to "direct greater attention to those pro se cases involving potentially meritorious claims."[7] In this view, the task of a court is to strain the rare cases with merit from the torrent. The risk is that too many lost-cause cases will cloud the waters, not

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randomly assigned lawyers were far more likely to file for and obtain a divorce); Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Courts*, 164 U. PA. L. REV. 1, 54–59 (2015) (explaining a multiple regression analysis which demonstrated that "at every stage in immigration court proceedings, representation was associated with dramatically more successful case outcomes for immigrant respondents."); D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 903 (2013) (concluding that randomized offers of full representation to legal aid clients facing eviction significantly increased retention of housing and receipt of rent waivers).

4. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1610–11 (2003).

5. *Id.* at 1613–14*; see also id*. at 1612 n.169 ("[T]he Administrative Office pro se variable distinguishes only between counseled and uncounseled plaintiffs and does not code whether counsel was appointed . . . ."); *id.* at 1614 n.173 (noting Judge Posner's position at the time in support of "market testing of inmate cases").

6. Jones v. Bock, 549 U.S. 199, 203 (2007).

7. Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J. L. ETHICS & PUB. POL'Y 475, 495–96 (2002).

that some potential winners may be swept away. But in response to a survey conducted by the Federal Judicial Center (FJC), a sample of the federal district courts' chief judges identified the primary challenge in adjudicating pro se prisoner cases not as "see[ing] many frivolous cases" but instead as "find[ing] it difficult to discern the merits."[8]

Accepting Professor Judith Resnik's invitation to take quantitative stock of federal court adjudication, this essay suggests that courts should take the lawyering hypothesis more seriously.[9] It considers what happens when more cases are litigated by counsel and thoroughly considered by judges. If the screening hypothesis is correct, we should expect to see success rates in counseled cases drop as weaker cases are added to that track, both because they will more likely be lost and because the time and energy required to adjudicate them will distract from efforts to fairly resolve the stronger ones. If the lawyering hypothesis is correct, however, we should not expect to see such an effect because the additional counseled cases will benefit from the improved chances of success that lawyering—and the robust adjudication that accompanies it—bring. This essay presents empirical evidence that placement of cases on the counseled track leads to improved outcomes in those cases. This finding calls into question both courts' justifications for appointing counsel in so few cases and the structure of the two-track system of prisoner case management.

The remainder proceeds as follows. Part I offers additional background on the process by which prisoner civil rights cases are assigned to tracks by the federal courts: it discusses the troubling prevalence of pro se litigation, the impacts of the Prison Litigation Reform Act, the adjudication of pro se prisoner cases by staff attorneys rather than judges, and practices regarding appointment of counsel. Part II examines, for the first time, empirical evidence across districts and circuits and across time to investigate whether the screening or lawyering hypothesis is more compelling. It also presents a novel method for identifying appeals in which counsel was appointed to represent pro se prisoners and uses this approach to evaluate whether appointment of counsel results in higher rates of success. These analyses strongly suggest that the lawyering hypothesis is correct, at

8. DONNA STIENSTRA, JARED BATAILLON & JASON A. CANTONE, ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES 24–25 (2011).

9. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982) (identifying the problematic lack of empirical evidence as to whether judicial case management in fact has its purported effects).

least at the current margins. Finally, the essay concludes by noting potential implications and avenues for further research.

I. MANAGEMENT OF PRISONER LITIGATION

A. Making a Federal Case Out of Pro Se Prisoner Litigation

As Professor Resnik has powerfully demonstrated, pro se prisoners' self-advocacy—and their work on each other's behalves as jailhouse lawyers or "writ writers"—was central to the right-claiming that transformed the Eighth Amendment from a doctrinal dead letter into a field of dramatic contestation, characterized first by expansion and then retrenchment.[10] But these "remarkable prisoners who imagined that they were rights-holders when the world told that them that they were not" did so with the technical assistance of appointed counsel.[11]

In the flagship prisoners' rights cases, judges received and "devoted sustained attention to dozens of same-sounding and disturbing complaints" and consolidated the cases; the lawyers they appointed "reconfigure[d]" them to raise not only individual claims of mistreatment but also affirmative, class-wide claims.[12] The judges who appointed counsel expressly intended for such reconfiguration to occur; as Judge William Wayne Justice of the Eastern District of Texas put it:

> In most class action litigation . . . the plaintiffs provide the impetus for maintaining the proceeding as a class action. In contrast, the decision in *Ruiz* to classify and consolidate the representative petitions that became the basis on which the case was litigated was my own.

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10. *See generally* Judith Resnik, *The Puzzles of Prisoners and Rights: An Essay in Honor of Frank Johnson*, 71 ALA. L. REV. 665 (2020) (explaining the shifting history "of prisoners as rights-holders and of courts as protectors of those rights").

11. *Id.* at 671; *see id.* at 672 (explaining that Judge Frank Johnson of the Middle District of Alabama appointed lawyers for Jerry Lee Pugh in Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), and Worley James in James v. Wallace, 406 F. Supp 318 (M.D. Ala. 1976)).

12. *Id.* at 676; *see also id.* at 674 n.47 (describing the role played by Professor George Taylor, appointed to represent Worley James, in converting individual healthcare claims into class claims "focused on a right to rehabilitation"); *id.* at 680–81 (citing three other early instances of federal judges in Arkansas appointing lawyers to represent pro se prisoners in consolidated cases).

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> . . . The prisoners had . . . no earthly idea of how to present their contentions in a legally significant way. To allow them to present their grievances in a halting and semi-literate fashion may have offered them some formal right of participation, but that participation would have been, and indeed, was, a nullity.[13]

These were among the first of many judicial decisions on whether to deem the cases incarcerated people filed worthy of robust litigation—or not.[14] This form of judicial case construction still occurs today in federal courts across the country; attorneys are appointed to orchestrate—and generally to negotiate—a resolution to a glut of related but uncoordinated pro se complaints.[15]

This essay focuses not on the injunctive relief, class action context, but instead on the far more voluminous individual damages docket. Here, too, courts are in the business of sorting through and transforming cases, assigning them to tracks. On one track, they grant motions for appointment of counsel to litigate professionally a small subset of privileged cases. The impacts are profound—immune defendants are dropped, allegations are redrafted to state claims on which relief can be granted, Westlaw searches reveal helpful precedent across the country, motions are typeset, depositions are

13. William Wayne Justice, *The Origins of Ruiz v. Estelle*, 43 STAN. L. REV. 1, 1, 10 (1990); *see also id.* at 9 ("If I was an activist judge in the initial phases of the case, that activism really came from a straightforward commitment to the traditional goals of adjudication, in a situation in which the necessary balance of forces that underlies the traditional concept of adjudication did not exist.").

14. In these instances, courts were using their case-management authority to "overcome some of the advantages that repeat players enjoy and so work to level the playing field for one-shot litigants." Bloom & Hershkoff, *supra* note 7, at 505.

15. *See, e.g.*, Order Staying Case at 1–2, Gumm v. Jacobs, No. 15-CV-41 (M.D. Ga. Sept. 30, 2016), ECF No. 65 (staying eleven separate prisoner cases alleging due process violations stemming from placement in the Georgia Department of Corrections' most restrictive solitary confinement unit because they "rely on similar legal principles and facts [and therefore] could be expedited by streamlined schedules, and possibly consolidated discovery"); Order at 1–2, Gumm v. Jacobs, No. 15-cv-41 (M.D. Ga. Oct. 27, 2016), ECF No. 66 (appointing two attorneys from the Southern Center for Human Rights to represent one of the pro se prisoner plaintiffs to permit effective discovery, "sharpen the issues," and "allow Plaintiff to present the merits of his case"). The author was counsel for the eventual plaintiff class in this case but was not involved at the time of the cited orders.

conducted, filing deadlines are met, experts are retained, oral arguments occur, and on and on.[16]

But these cases are the exceptions. The overwhelming majority of prisoner civil rights cases end up on the other track, remaining uncounseled throughout their pendency.[17] Of the roughly 342,000 prisoner civil rights cases terminated from 2008 to 2020—comprising about a tenth of *all* civil cases—about 93% were litigated pro se.[18] In

16. All of these lawyerly functions are important, and it is difficult to know which deficits faced by incarcerated pro se plaintiffs are most damaging to their cases. According to the chief judges surveyed by the FJC, however, inability to conduct effective discovery due to "lack [of] mobility and access" is particularly consequential and a primary reason that pro se prisoner litigants have a greater need for counsel that pro se non-prisoner litigants. STIENSTRA ET AL., *supra* note 8, at vii. Practices vary, but the same surveys report that discovery is less common in prisoner cases. *Id.* at 21 (reporting that 22% of chief judges surveyed reported that discovery occurred in most or all pro se prisoner cases and 48% reported that it occurred in the occasional case).

17. One might argue that the percentage of cases litigated pro se overstates the share of litigation that occurs pro se because counseled litigation generally involves much more activity and is much more likely to involve meaningful consideration. An average pro se docket will be fairly sparse, whereas the docket for a statewide prison conditions class action may well contain thousands of filings and millions of pages of evidence in the record. *See, e.g.*, Docket, Braggs v. Hamm, No. 14-cv-601 (M.D. Ala.) (reflecting 3,846 entries in docket of statewide prisoner class action regarding disability accommodations and mental and medical healthcare between June 2014 and October 2022, including hundreds of orders and motions). But the percentage of cases is an important metric for two reasons. First, pro se dockets are relatively sparse at least in part *because* plaintiffs' lawyers are not involved. Second, although counseled cases are likelier to produce lengthy, published opinions, each case, no matter how brief, produces decisional law of some kind, if only at the screening stage. For example, the vast majority of caselaw on the Prison Litigation Reform Act's (PLRA's) exhaustion requirement is articulated in pro se cases.

18. Prisoner civil rights cases are those identified with Nature of Suit Codes 550 ("Prisoner—Civil Rights") and 555 ("Prisoner—Prison Condition"); this excludes other civil litigation filed by incarcerated people to collaterally challenge their criminal convictions and sentences, identified with Nature of Suit Codes 510–540, and claims filed by civil detainees, identified with Nature of Suit Code 560. These representation rates do not appear to vary markedly by the race of the plaintiff; Black prisoners are represented at slightly lower rates than White and Hispanic prisoners, and Asian prisoners at slightly higher rates, but all fall between 7% and 9%. Race was predicted based on the plaintiff's last name using the "rethnicity" package in R; the likelihood of the last name belonging to someone White, Black, Hispanic, or Asian was calculated and the category with the highest likelihood was assigned. (Roughly the same results obtain when plaintiff-race probabilities are summed instead; in fact, the representation rates that result all fall between 7% and 8%.) Of course, this sort of estimation is probabilistic and therefore highly imperfect, and it ignores other racial and ethnic categories and multi-racial identities. On the

no other major category of cases does pro se litigation so predominate. Across all non-prisoner cases litigated in federal court during the same time period, only about 9% were litigated by a pro se plaintiff. In non-prisoner civil rights cases, the category with the second-highest rate of pro se litigation, the figure is still only 26%.[19]

When pro se litigation overwhelmingly predominates in a particular substantive arena, there are at least two related concerns for the fair and efficient administration of justice beyond the deleterious impacts on the pro se litigants themselves. The first is that, even apart from the volume, handling the cases is burdensome for adjudicators; pro se cases are *annoying* to courts used to considering arguments and evidence offered by lawyers.[20] Pro se prisoner litigation, which often involves handwritten filings, is even more bothersome than that brought by people with access to word processing software and printers.[21] Of course, to the extent that lawyers prolong litigation otherwise easily dismissed, especially at screening, increased rates of representation may mean that courts spend more time—albeit much more productively—adjudicating prisoner civil rights cases. However, increased rates of settlement—and even voluntary dismissal—facilitated by counsel may cut in the other direction.

The second result is the creation of bad—in the sense of anti-plaintiff and in the sense of poorly articulated—law. This occurs

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scale of a large population (i.e., all prisoner civil rights plaintiffs in federal court over a decade and a half), however, such an approach offers a meaningful way to check for clear disparities. To validate this method, the race of each person on a roster of over 45,000 prisoners incarcerated in Illinois prisons in 2015 was predicted based on last name. Omitting the 93 people whose reported race did not match one of the categories predicted, 57% were identified by the Illinois Department of Corrections as Black, 29% were White, 13% were Hispanic, and 1% were Asian. The race predictions produced by the "rethnicity" package were generally excellent, identifying 54% as Black, 30% as White, 13% as Hispanic, and 3% as Asian.

19. Non-prisoner civil rights cases are those identified with Nature of Suit Codes 440–448, including claims under § 1983 except those related to incarceration (but including police misconduct cases), as well as claims brought under a variety of statutory provisions related to voting, employment, housing, disabilities, and education. For a comparison of the pro se rates in other categories of litigation, albeit from a somewhat different period of years, *see* Mitchell Levy, Note, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1840 tbl.2D (2018).

20. JEFRI WOOD, PRO SE CASE MANAGEMENT FOR NONPRISONER CIVIL LITIGATION 1 (2016).

21. *See* STIENSTRA ET AL., *supra* note 8, at vi–vii (noting that both chief clerks and chief judges frequently indicated in survey responses that pro se filings were difficult to read). Notably, it is the same correctional defendants that prisoners sue who are denying them access to computers. *Id.* at 19.

partially because adjudicators are incentivized to engage in rapid, aggressive case management to terminate burdensome cases quickly. It also occurs because it is difficult for pro se litigants, unlike lawyers, to build evidentiary records and to coordinate legal theories and act strategically within and across jurisdictions.[22] The glut of decisions in pro se cases means that important arguments are often first raised inartfully, without adequate factual support, and decided unfavorably, only to undermine future efforts to shift doctrine. Even though these decisions are often not precedential, courts nonetheless rely on their factual assessments and legal conclusions.[23] Moreover, as Professor Joanna Schwartz explains, pro se litigation undermines the development of civil rights law because a range of existing doctrines make individual civil rights plaintiffs reliant on those who have come before.[24] Pro se litigants' failures compound. One illustrative example arises continually: even a sophisticated and well-substantiated challenge by a prisoners' rights attorney to the availability of a jail's grievance process for purposes of administrative exhaustion (a mixed question of law and fact) is likely to face an uphill battle when the judge hearing the case has previously dismissed dozens of complaints by pro se detainees at that same jail for failure to exhaust.

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22. In pro se prisoner civil rights litigation, claims are often adjudicated without the benefit of depositions a lawyer would be able to pay for and ably conduct and without the input of experts the lawyer would be able to hire. *See id.* at 21 (noting that 78% of the judges surveyed indicated that discovery was present in no, few, or occasional cases brought by prisoner pro se litigants).

23. *See* Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1638–45 (2020) (discussing the dangers of federal district courts using case law—including opinions from other district courts—as an authoritative source to "fill in facts about the world" because it can "ossify such facts against change and encourage extrapolation of past findings to new circumstances"); Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153, 165–71 (2012) (discussing how inartful opinions with mistaken understandings of the law can unintentionally and surreptitiously gain influence through their use as "copy-paste precedent").

24. Pro se litigation produces less clearly established law for purposes of qualified immunity and fewer prior findings on which to rely in establishing persistent or widespread policies or customs for purposes of municipal liability. The failure of lawsuits brought previously by prisoners in similar circumstances also makes it harder, she notes, to show standing to obtain injunctive relief; relatedly, class certification is harder to obtain. Joanna C. Schwartz, *Civil Rights Without Representation*, 64 WM. & MARY L. REV. 641, 694–700 (2023). In addition, at the most basic level, failed pro se litigation makes it harder for the next litigant to demonstrate subjective deliberate indifference.

B. The Prison Litigation Reform Act

Some of the procedural hurdles prisoner civil rights litigants face, and some of the obstacles they encounter in seeking representation, are the direct products of Congressional policymaking. In 1996, Congress passed, and President Clinton signed, the Prison Litigation Reform Act (PLRA), reshaping the trajectory of prisoner civil rights litigation in the federal courts. The PLRA directed judges to engage in more aggressive case management than was previously required—or even previously permitted. It requires sua sponte, pre-answer review and dismissal if a complaint fails to state a claim or seeks monetary relief from an immune defendant.[25] For example, a prisoner who is confused by the distinction between individual and official capacities and sues a guard in the wrong one may have his complaint dismissed regardless of the potential merits of the claim. He might not be afforded the opportunity to make a simple amendment, as would any other plaintiff. But of course, courts retain considerable discretion in determining how forgivingly to screen complaints.

Crucially, the PLRA also disincentivizes lawyers from representing prisoners in damages actions, capping the attorney's fee awards otherwise available under § 1988 at 150% of the judgment.[26] Repealing this provision would undoubtedly shift the market for legal services encountered by prisoner plaintiffs, making it substantially easier for incarcerated people with low-value claims to retain counsel. Yet courts retain and continue to exercise their authority—and also their considerable soft power—to appoint pro bono counsel to represent pro se prisoner litigants.[27] As the following analyses demonstrate, they exercise this power to widely varying degrees.

As Professor Schlanger has shown, the PLRA did negatively impact both the volume of prisoner filings and the success of the cases that were already filed.[28] But its legislative strictures are accompanied by crabbed case management practices and a doctrinal attitude of

25. 28 U.S.C. § 1915A. *See also* Katherine A. Macfarlane, *Procedural Animus*, 71 ALA. L. REV. 1185, 1209–10 (2020) (observing that this "marks a departure from the common law's adversarial tradition" in which defendants must raise their own affirmative defenses or waive them).

26. 42 U.S.C. § 1997e(d).

27. 28 U.S.C. § 1915(e).

28. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1663–64 (2003) (exploring the effects of the PLRA on prisoner civil rights litigation).

harshness.[29] This may reflect judicial internalization of the PLRA's anti-prisoner animus,[30] or it may have an independent origin in the prosecutorial backgrounds of many federal judges, general societal hostility to people accused and convicted of crimes, or quotidian frustration of legal elites asked to decipher the handwritten allegations of those who almost never share their educational and class privilege.

Whatever the explanation, judges—and, as discussed below, magistrates and staff attorneys—have tremendous influence over which prisoner claims are adjudicated, how fully, and to what end. Far from passive arbiters, they do not just decide but actively determine what claims have a chance at life. To a striking degree, their choices in this respect are not dictated by the PLRA. They engage in managerial judging within a wide landscape of discretion.

C. Pro Se Law Clerks

Prisoners without lawyers get different judges, too. As Professor Katherine Macfarlane has recounted, pro se prisoner civil rights cases in the federal district and circuit courts are adjudicated by "shadow judges"—that is, the court employees alternately referred to as pro se law clerks or staff attorneys.[31] Although the scope of their

29. On the doctrinal front, *see* Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. 301, 302–04 (2022) (describing courts' "dispositional favoritism" against prisoner plaintiffs as a tilt in "prison law's moral center of gravity," even beyond "the construction of defendant-friendly doctrinal standards for deciding prisoners' claims and the deferential posture with which federal courts tend to approach defendants' assertions in individual cases").

30. Professor Macfarlane has argued that the PLRA codifies "procedural animus" towards prisoners. *Procedural Animus*, *supra* note 25, at 1206 ("The [PLRA] . . . arose out of a legislative history in which senators openly conveyed their hatred for prisoners and their claims. Courts have interpreted the PLRA in a way that signals their own disdain for prisoners and sets their cases apart from those brought by other civil rights plaintiffs."); *see id.* at 1215 (quoting 141 CONG. REC. 26,553 (1995) ("[Senator] Kyl . . . stated that 'suing has [become] recreational activity for long-term residents of our prisons.'"); *id.* at 1217 (quoting 141 CONG. REC. 26, 553 (1995)) ("Senator Hatch referred to prisoners' litigation as a 'ridiculous waste of the taxpayers' money.' Forcing the states to defend prisoner lawsuits constituted 'another kind of crime.'").

31. Katherine A. Macfarlane, *Shadow Judges: Staff Attorney Adjudication of Prisoner Claims*, 95 OR. L. REV. 97, 98 (2016). Professor Macfarlane reveals the mosaic of formal and informal rulemaking that delegates management of prisoner cases to pro se law clerks and argues that this violates Federal Rule of Civil Procedure 83's requirement of consistency with federal statutes governing the adjudication of prisoner claims. *Id.* at 118–23 (citing 28 U.S.C. § 1915A(a) and 42 U.S.C. § 1997e(c)(1)).

work varies between courts and is not clearly delineated, job postings for these positions "suggest[] that staff attorneys assigned to prisoners' civil cases are reaching the merits of [their] claims,"[32] despite the fact that they are generally supervised by court administrators, not judges.[33] In many instances, pro se law clerks are drafting dispositive orders.[34]

Unlike with assignment to a magistrate judge, the prisoner plaintiff need not consent to assignment to a staff attorney; he may not even know that his case is being handled by a staff attorney, and he cannot challenge the assignment.[35] Unlike judges themselves and their chambers law clerks, who work closely with their judges on all sorts of cases, pro se law clerks are consigned to a separate courthouse office where they and their colleagues "toil for years on one kind of case" and may develop "plaintiff-specific fatigue and cynicism."[36] Perhaps unsurprisingly, chief judges report that the measure "most

32. *Shadow Judges*, *supra* note 31, at 99–100. Pro se law clerk positions were first created through a pilot program in 1975; now, most courts employ them. *Id.* at 105. Initially, they were created to handle only prisoner cases; now, most handle other pro se cases as well, but their dockets are still composed primarily of prisoner cases. *Id.* at 106, 106 n.34; Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 47 (2007). A survey of chief judges reported that assignment to a pro se law clerk occurred in 87% of prisoner pro se cases and 41% of non-prisoner pro se cases. STIENSTRA ET AL., *supra* note 8, at 30.

33. *Shadow Judges*, *supra* note 31, at 112.

34. *Id.* at 107–08, 111.

35. *Id.* at 101. Professor Macfarlane argues that absent such consent, delegation to pro se law clerks violates Article III just like adjudication by a bankruptcy judge. *Id.* at 123–28. Unlike bankruptcy judges, however, pro se law clerks do not sign their own orders.

36. *Id.* at 112. *See also id.* at 133 (arguing that "[s]egregating" pro se prisoner cases in the pro se law clerk's office "will often hurt the prisoners" because the staff attorneys "develop routine practices that do not distinguish between claims that are meritless and those that are meritorious"); *cf.* Bloom & Hershkoff, *supra* note 7, at 501, 501 n.125–26 (first quoting Christopher E. Smith, *Judicial Lobbying and Court Reform: U.S. Magistrate Judges and the Judicial Improvements Act of 1990*, 14 U. ARK. LITTLE ROCK L. J. 163, 196 (1992); then quoting CARROLL SERON, THE ROLE OF MAGISTRATES: NINE CASE STUDIES 112 (1985)) ("The specialist's steady diet of routine matters may . . . tend toward 'routinized decision making' (with the attendant 'risk of burnout or stultification inherent in a severely limited docket') . . . ."). To address burnout, some districts "rotate staff to give them a break from these cases." STIENSTRA ET AL., *supra* note 8, at 13. For more on the risks (and benefits) of specialization in appellate staff attorney offices, see WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS 110–13 (2013); Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2412 n.131 (2014).

effective in helping themselves and their staff handle the pro se caseload" is assignment of these cases to others—namely, pro se law clerks.[37]

More has been written about the work of pro se law clerks at the courts of appeals, including by members of the bench. A former chief judge of the Ninth Circuit explained that screening cases are "process[ed]" by the pro se clerks; the judges' review occurs entirely through oral presentation.[38] The opinion in a screening case is "presented as a final draft" by the clerk who wrote it to a panel of judges; the panel devotes "five or ten minutes" to consideration of each one and hears about 50 such cases per day.[39] The former chief judge put it bluntly: "After you decide a few dozen such cases on a screening calendar, your eyes glaze over, your mind wanders, and the urge to say O.K. to whatever is put in front of you becomes almost irresistible."[40] In some cases, this will mean that no one—neither the pro se clerk nor any judge on the panel—has actually so much as read the record in the case being decided.[41] As a former chief judge of the Seventh Circuit acknowledged, dispositions presented to a screening panel are generally "rubber stamp[ed]," leaving the pro se law clerks who draft them with tremendous "juridical influence."[42]

This state of affairs is all the more concerning because the initial decision to place a case on the screening track, rather than to assign counsel, is made by the same pro se law clerks who will then

37. STIENSTRA ET AL., *supra* note 8, at viii.

38. Pether, *supra* note 32, at 12.

39. *Id.* at 11 (quoting Letter from Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit, to Judge Samuel A. Alito, Jr., Chairman, Advisory Comm. on Appellate Rules 5 (Jan. 16, 2004)).

40. *Id.* at 12–13 (quoting Alex Kozinski, *The Appearance of Propriety*, LEGAL AFFS., Jan.–Feb. 2005, at 19). Judge Posner described the attitude of judges screening pro se cases as one of "downright indifference"; he believes they are "distracted, preoccupied, or uninterested . . . ." Katherine A. Macfarlane, *Posner Tackles the Pro Se Prisoner Problem: A Book Review of* Reforming the Federal Judiciary, 83 MO. L. REV. 113, 122 (2018) (quoting RICHARD A. POSNER, REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISING ITS ORAL ARGUMENTS 31 (2017)).

41. Pether, *supra* note 32, at 15.

42. *Shadow Judges*, *supra* note 31, at 118 (quoting RICHARD A. POSNER, REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISING ITS ORAL ARGUMENTS 6 (2017)).

adjudicate it.[43] But this is not to suggest that clerks' own disfavor towards incarcerated parties is necessarily driving outcomes; instead, it is possible that they internalize judges' perceptions of these litigants as "troublesome or vexatious"[44]—"losers and pests."[45] Undoubtedly, it is easier for a pro se law clerk to swim with the tide; recommending that a prisoner win in a close case is certain to lead to extended discussion during a long day of screenings and likely to lead to more work and perhaps to frustration for the clerk, the judges, or both.[46]

D. Appointment of Counsel

Prisoner civil rights cases are predominantly litigated pro se because most prisoners are indigent.[47] Public funding is generally not available; Congress has banned the use of Legal Services Corporation funds to represent incarcerated people.[48] As previously discussed, the PLRA makes it difficult for lawyers to obtain meaningful fees when they prevail. Prisoners sometimes retain private counsel, generally on

43. Pether, *supra* note 32, at 19 (quoting THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 164 (1994)) ("It amounts to a self-fulfilling or self-denying prophecy. A staff attorney first determines that there is no issue in an appeal worthy of serious consideration, i.e., full judicial consideration, second recommends against oral argument, and third drafts a per curiam opinion incorporating the prior reasoning."). This decision is often made not "based on some independent evaluation of [lack of] complexity," but rather because the case falls in one of the categories "which federal appellate judges find distasteful, or irksome." *Id.* at 27. Indeed, prisoner cases are often highly complex. *Id.* at 56.

44. *Id.* at 54.

45. *Shadow Judges*, *supra* note 31, at 118 (quoting RICHARD A. POSNER, REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISING ITS ORAL ARGUMENTS 270 (2017)).

46. *See* Pether, *supra* note 32, at 57 (observing that screening judges may foster an atmosphere of discouragement toward pro se litigants). Lois Bloom and Helen Hershkoff raised a similar concern with respect to magistrate judges: that because they—like staff attorneys—are "dependent on the district judges for their appointment" and career advancement, they are "more risk-averse and less likely than Article III judges to be innovative or to break new ground in their approach to legal issues." Bloom & Hershkoff, *supra* note 7, at 504.

47. According to the author's analysis of Federal Judicial Center data, see *infra* Part II, about 57% of prisoner civil rights plaintiffs are granted leave to proceed in forma pauperis (although for prisoners alone, this permits merely post-payment, rather than non-payment, of filing fees), as compared to 14% of non-prisoner civil rights plaintiffs. *See* 28 U.S.C. § 1915(b).

48. 42 U.S.C. § 2996f(b)(3).

contingency, though lawyers with specialties in the Eighth Amendment and related doctrine are hard to come by in many regions.[49] Because prisoner cases are often logistically difficult and time-consuming to litigate, and because juries' unfriendliness to incarcerated people often results in modest damages awards even upon proof of liability, judicially appointed counsel represent a significant proportion of the lawyers working on prisoner civil rights plaintiffs' behalves—at the courts of appeals, a full third of the lawyers representing prisoner civil rights plaintiffs are court-appointed.[50]

Districts—and circuits—have markedly different approaches to appointment of pro bono counsel.[51] Of course, the availability of pro bono counsel is not entirely within the control of the court, but a variety of programmatic decisions have a substantial impact.[52] As Professor Andrew Hammond has demonstrated in his comprehensive review of civil pro bono programs in the federal district courts, these programs (which do not exist, or are not formalized, in every jurisdiction) vary considerably with respect to the composition of the pool, selection from it, universe of cases assigned, and availability of cost reimbursement.[53] In some, like the District of Connecticut's and

49. *Cf.* Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1557–59 (2020) (stating the same in regard to civil rights plaintiffs generally).

50. The statistic is derived from the author's analysis of Federal Judicial Center data, see *infra* Part II. *See also* Katherine A. Macfarlane, *Procedural Animus*, 71 ALA. L. REV. 1185, 1212, 112 n.237 (2020) (describing the challenges of "finding a way to meet with a client face-to-face," especially given the remote location of many prisons and the disincentive for a "§ 1983 expert" to take on a case with an attorney's fee cap).

51. Although no accounting exists of the rate at which pro se prisoner civil rights litigants seek appointment of counsel, such motions are ubiquitous, and generally denied, even when they offer extensive support for the request. *See, e.g.*, *Civil Rights Without Representation*, *supra* note 24, at 664–74 (describing the repeatedly rejected efforts of two incarcerated plaintiffs to obtain appointment of counsel in cases that eventually drew the attention of the Supreme Court).

52. Although federal courts cannot compel a lawyer to accept an appointment pro bono, they have unbounded discretion to "request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1). Judges employ strategies to encourage lawyers to take on pro se clients pro bono including offering "public recognition," sending thank you letters, recruiting through legal newsletters and law firm meetings, and very occasionally awarding credit toward pro bono requirements or continuing legal education credits. STIENSTRA ET AL., *supra* note 8, at 6 tbl.4.

53. *See* Andrew Hammond, *The Federal Rules of Pro Se Procedure*, 90 FORDHAM L. REV. 2689 app. B at 2755–75 (2022) (providing a chart of the pro bono programs in each U.S. district court); *see also* STIENSTRA ET AL., *supra* note 8, at v (observing that "[m]ore than half of the districts appoint counsel to represent a pro se litigant for the full case or in limited circumstances . . . .").

the Northern District of Illinois's, participation on an assignment wheel is mandatory; in most others, it is purely voluntary.[54] Several, like the District of Colorado, specifically allow law school clinics to participate.[55] Some districts permit a lawyer to decline appointment for any reason, some strictly limit the permissible bases for declining, and a handful simply circulate cases to a list of volunteers who have the option to affirmatively accept them. Certain districts, including several of the Districts of California, the Western District of Louisiana, and the Eastern District of Pennsylvania, specifically prioritize prisoner cases to the exclusion of some or all others; other districts' programs can involve any civil case with pro se litigants.[56] Caps on reimbursable expenses vary from as low as $1,000 to as high as $30,000.[57]

Courts can substantially incentivize the participation of pro bono counsel, particularly with respect to junior attorneys with limited federal court experience. Some courts of appeals guarantee an attorney willing to take on a case pro bono (often, an associate at a firm) the opportunity to deliver oral argument; others do not.[58] Representation at the appellate level may matter less, but under-representation there is an easier problem to fix: there are far fewer cases, the cases are time-limited, and pro bono appointment is of interest to many. Cases that have survived summary judgment and are likely to proceed to jury trial are likewise attractive targets for appointment, given the scarcity of opportunities to develop civil trial skills.

Despite the importance of court involvement in securing counsel for prisoner litigants, "only a few" of the chief judges responding to an FJC survey on pro se litigants "mentioned lack of counsel or difficulty appointing counsel" when asked to identify special issues pro se cases present for judges.[59] The authors of the report themselves observed that many of the "substantive and procedural problems" these judges identified as common in pro se

54. Hammond, *supra* note 53, at 2757–58, 2761.

55. *Id.* at 2757.

56. *Id.* at 2756–57, 2763–64, 2769–70. The Eastern District of Pennsylvania's pro bono program involves three panels—for prisoner civil rights cases, employment cases, and social security cases. Although panel members for the latter two kinds of cases are free to decline, attorneys may decline assignment to a prisoner civil rights case only due to a conflict of interest or the belief that the case would not withstand a motion to dismiss. *Id.* at 2770.

57. *Id.* at 2755, 2759, 2762–63.

58. *See, e.g.*, 9TH CIR. GEN. ORDER 3.7 (guaranteeing oral argument in any case involving appointment of pro bono counsel).

59. STIENSTRA ET AL., *supra* note 8, at vii.

cases "could be cured by counsel," and the authors could "only speculate as to why few judges identified lack of counsel as a problem."[60]

Increasing the frequency of appointment in prisoner civil rights cases would likely benefit the fair and efficient administration of justice in several ways. First, of course, it is much easier to adjudicate a case when it has been properly presented by an attorney. Moreover, increased availability of counsel might serve as a "filter for frivolous cases," both because lawyers may discourage clients from pursuing unmeritorious claims and arguments and because lawyers who have financial and reputational incentives to prevail (and thus to take meritorious cases) will signal a lawsuit's weakness by their refusal of representation.[61] Now, by contrast, the fact that a prisoner bringing a civil rights claim is unrepresented reveals very little about the merits of his case.[62]

II. EMPIRICS OF PRISONER LITIGATION

A. Queries

To test the relative validity of the screening and lawyering hypotheses, this Part analyzes Federal Judicial Center data covering all cases terminated in federal court from 2008 to 2020.[63] As explained above, if the screening hypothesis is correct, we would expect to see

60. *Id.* at 26.

61. *See* Bloom & Hershkoff, *supra* note 7, at 507–08 (explaining how filing fees and representation by counsel have important gatekeeping functions). For a discussion of the "signaling effect" of representation, see Victor D. Quintanilla, *Doing Unrepresented Status: The Social Construction and Production of Pro Se Persons*, 69 DEPAUL L. REV. 543, 547–56 (2020); *see also* Victor D. Quintanilla, Rachel A. Allen & Edward R. Hirt, *The Signaling Effect of* Pro Se *Status*, 42 LAW & SOC. INQUIRY 1091 (2017). Ordinarily, we presume that lawyers' financial incentives will ensure that they screen cases for merit. That presumption breaks down in the context of the PLRA's caps on attorneys' fees and damages, however. Very few lawyers routinely consider requests for representation in prisoner civil rights cases; a district's pro bono program is likely to include far more attorneys than regularly practice in this arena.

62. *See Civil Rights Without Representation*, *supra* note 24, at 650–51 (observing that several common grounds for dismissal in pro se cases do not reflect negatively on the merits of the cases being dismissed).

63. This dataset and the corresponding codebook are available online. *See Civil Cases Filed, Terminated, and Pending from SY 1988 to Present*, FED. JUD. CTR., https://www.fjc.gov/research/idb/civil-cases-filed-terminated-and-pending-sy-1988-present (June 30, 2022).

that as representation and appointment rates increase, success rates in counseled cases will decrease, because the cases in which lawyers are newly involved are substantially weaker. If the lawyering hypothesis is correct, by contrast, we would expect success rates in counseled cases to remain the same.[64]

Without randomly assigning attorneys to prisoner plaintiffs,[65] it is impossible to alter representation and appointment rates and so to robustly prove causation. Instead, analyses comparing non-prisoner and prisoner civil rights cases, and comparing prisoner civil rights cases at multiple stages of litigation across jurisdictions (both districts and circuits) with dramatically varying representation and appointment rates, offer imperfect insight into the validity of these competing hypotheses.[66]

In comparing across districts and circuits, however, a problem immediately arises: the pools of cases, and to some extent the standards under which they are adjudicated,[67] are different.[68] The

64. One might suggest that our concern should be with error rate rather than success rate, but this raises both a practical and a definitional issue. It is impossible to determine the merit of any particular case, much less all those in the FJC dataset, outside of the context of the adjudication that occurred. And as Professor Schwartz puts it in assessing the impact of pro se litigation on outcomes in police misconduct litigation in several district courts, if "pro se cases were meritorious but unsuccessful because the plaintiffs did not have lawyers' assistance, the system is not working as it should." *Civil Rights Without Representation*, *supra* note 24, at 678. In an arena of litigation (unlike, for example, divorce proceedings) where defendants are almost always represented but plaintiffs generally are not, it seems fair to define as erroneous an outcome in which a plaintiff would have won but for lack of counsel, and to define as meritorious a case that a plaintiff would win if represented.

65. As discussed in the Conclusion, such an experimental approach would be illuminating.

66. This approach roughly parallels that taken by Professors Stewart Schwab and Theodore Eisenberg in assessing the impact of appointed counsel in prisoner civil rights cases in several federal districts, albeit now with much broader coverage and many more observations. *See* Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 773–74 (1988) (comparing success rates in counseled and appointed-counsel cases across three districts with widely varying prisoner representation rates over a one-year period).

67. Some circuits, for example, are notoriously friendlier to prisoner civil rights plaintiffs than others. The degree of this variation, however, is limited by the Supreme Court's superintendence of doctrine.

68. It is also possible that jurisdictions vary not only in terms of the independent variables in these analyses—how many lawyers represent prisoner civil rights plaintiffs (whether due to differential availability, willingness, or appointment process)—but also in terms of lawyer quality. If the lawyers who represent prisoners

proportion of prisoner civil rights cases with merit may be substantially higher in one jurisdiction than another, whether due to differential levels of deprivation and abuse in prisons and jails, differential willingness of incarcerated people to pay filing fees or risk retaliation, differential precedent, or sundry other factors. If so, and if there is a strong relationship between the strength of cases and favorability of courts on the one hand and representation and appointment rates on the other hand, it could be that prisoner plaintiffs' likelihood of success appears to be determined by the latter but is in fact determined by the former. It is, of course, impossible to directly measure, and therefore impossible to control for, merit.

Two further analyses, however, help to address these concerns about differences by jurisdiction in the proportion of cases having merit. First, in analyzing success rates in counseled cases across districts with very different representation rates, both the pools of all prisoner civil rights cases and the much smaller pools of those that go to trial are considered, since the pools of cases permitted to proceed past summary judgment and to trial are likely to vary much less dramatically by district than are the pools of all cases filed.[69] Similar results obtain. Second, in addition to analyzing success rates in counseled cases across circuits with widely varying appointment rates, nationwide variation in all appellate cases across time is also considered. Though there are reasons to imagine that some circuits may see more meritorious appeals than others, the same is not true across years. Again, the results are similar.

Some additional comments regarding the advantages and shortcomings of analyzing appellate case data are warranted. The primary advantage is that, due to a quirk of the FJC data discussed in detail in the following section, it permits consideration not just of representation but of appointment of counsel specifically. Unfortunately, the FJC's trial-level case data indicate whether parties are pro se at the termination of the litigation but do not reflect whether counsel was appointed, transforming a litigant who was initially pro se into a represented one.[70]

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in one district are *better* than those in another, this will cause exogenous and unaccounted-for variation in success rates.

69. This approach should control for differences in prisoner friendliness between districts because such judicial and doctrinal attitudes will be reflected in summary judgment decisions.

70. Schlanger, *supra* note 4, at 1613 n.169. Collection of appointment-of-counsel data or extraction of such data from dockets using natural language processing would be very valuable.

The benefits of looking at appointment rates are twofold. First, this inquiry focuses squarely on the managerial role of courts, and less on the dynamics of legal markets. Second, it focuses on the purportedly marginal cases—these are prisoner plaintiffs who would be unrepresented but for appointment of counsel. In the strongest cases, it will presumably be easiest to find counsel; if one lawyer declines, another attorney will be next in line. By contrast, cases for which counsel cannot be retained are likely to be less strong. If the screening hypothesis is correct, then, one would expect strong evidence from this analysis: success rates in appointed-counsel cases should dive markedly as appointment rates increase, and they should be below success rates in retained-counsel cases.

A significant shortcoming of looking at the appellate level is that the assistance of an attorney may make less of a difference than at the trial level. At the very least, what an attorney appointed at the appellate stage can do to advance an incarcerated client's case is much more limited: the record is closed, so the attorney is unable to improve the pleadings or gather and introduce additional evidence. It is too late to preserve issues for appellate review, and the standard of review may be quite deferential. Conversely, however, it may be that excellent lawyers are more willing to accept appointment to appellate rather than trial-level cases, both because the litigation will be circumscribed and because the career benefits of an argument before a federal court of appeals exceed those afforded by pro bono representation in a district court.

B. Methodology

To conduct the analyses below, the annual FJC civil and appellate datasets from 2008 to 2020 were separately merged, and the subsets of those cases coded as prisoner civil rights cases were selected.[71] The analyses presented in sections C and D were conducted

71. These datasets, and the corresponding codebooks, are available online. *See Civil Cases Filed, Terminated, and Pending from SY 1988 to Present*, *supra* note 63; *Appellate Cases Filed, Terminated, and Pending from FY 2008 to Present*, FED. JUD. CTR., https://www.fjc.gov/research/idb/appellate-cases-filed-terminated-and-pending-fy-2008-present (June 30, 2022). Following the approach used by Professor Schlanger, all of the nearly 8,000 cases filed by a single vexatious litigant, Dale Maisano, were dropped from the dataset. *See* Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html. All of these cases were

using these data. Because analysis of the appellate data in section E was substantially more involved, and because choices made in the course of it bear on the weight of this essay's findings, detailed discussion of that portion of the methodology follows.

The appellate dataset contains party names for first appellant and first appellee and indicates which of them were pro se and which of them prevailed. But it does not identify whether these parties were plaintiff or defendant below. To do so, the appellate dataset was merged with the civil trial-level dataset—which does identify plaintiffs and defendants—by district and district court case number, and the parties to the appeal were coded as plaintiff or defendant using an automated name-matching process.[72] Of the nearly 64,000 prisoner civil rights appeals in the dataset, 90% were reliably coded through this process.[73]

When matching failed, it was for several reasons, including because the plaintiff and defendants had the same name (possibly in fact or else due to a coding error), due to a change in the first-listed party, due to some miscellaneous error in coding of names, or because the underlying civil case was not resolved within the time period under consideration. Given the high match rate and the reasons for match failure, it is fair to assume that the unmatched appeals do not differ meaningfully from the matched appeals; moreover, unmatched appeals were similarly likely to be litigated pro se and similarly likely to succeed.

Once the parties to the appeal were identified as either plaintiff or defendant, it became possible to identify both the outcome of the litigation for the prisoner litigant and indicia of appointment of counsel.

Cases were coded using Outcome and Disposition Codes as wins for the prisoner plaintiff if the decision below was affirmed or reversed in his favor, even if only partially so; if an appeal by the

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dismissed quickly. *Id.* Omission of this particular plaintiff's litigation is reflected in the figures presented in the preceding analyses as well.

72. Note that case numbers could be repeated within districts, in the case of multiple divisions, such that name-matching was required not only to determine the roles of appellants and appellees but also to ensure that the correct trial-level and appellate case records were paired.

73. Matches were deemed reliable when the name of the plaintiff in the civil case matched the name of either the appellant or appellee but not both, and the name of the defendant matched the name of the other of the appellant or appellee but not both. In a very small number of cases, one party name matched but the other did not; in most of these instances, the appellant's and appellee's names were identical.

opposing party was dismissed; or if his opponent's appeal was terminated procedurally. They were coded as losses for the prisoner plaintiff if the decision below was affirmed or reversed entirely in the defendant's favor, if his own appeal was dismissed, or if his own appeal was terminated procedurally.[74] In other cases—if the only action taken by the court of appeals was to remand or the outcome was coded as "other"—the outcome was coded as unclear.

Two indicia of appointment of counsel were evaluated: first, a change in the prisoner's pro se status, from pro se at the outset of the appeal to not pro se at the termination of the appeal (such a prisoner litigant "got counsel," as opposed to a prisoner litigant who "had counsel" from the outset[75]), and second, the occurrence of oral argument[76] in a case with a prisoner who was coded as pro se throughout the appeal.

To confirm that a prisoner litigant changing from pro se status at the commencement of the appeal to represented status at the termination of the appeal reflected appointment of counsel, a 5% random sample of all such cases was pulled and the dockets for all sampled cases were reviewed manually.[77] Of these, 80% did indeed involve appointment of counsel.[78] In addition, 17% involved counsel retained rather than appointed by the court after the appeal began, although in at least half of these cases, the lawyers retained were specifically denominated as pro bono counsel employed by a prisoners' rights non-profit or employed by a small firm that does exclusively plaintiff-side civil rights litigation. The remainder, 3% of

74. Certificates of appealability, which apply to habeas corpus cases under Federal Rule of Appellate Procedure 22, should not be issued or denied in prisoner civil rights litigation. *See* FED. R. APP. P. 22 (requiring prisoners to request and obtain a certificate of appealability in order to challenge the denial of an application for a writ of habeas corpus). Because it is possible that an outcome in one of these cases was miscoded as stemming from denial of a certificate of appealability, however, this outcome is also coded as a loss for the prisoner plaintiff.

75. A prisoner litigant who has counsel at the time a notice of appeal is filed may have retained that lawyer at some point during the pendency of proceedings in the district court or for purposes of filing the appeal, or the lawyer may have been appointed by the district court and continued representation on appeal. The FJC data do not distinguish between these circumstances.

76. These appeals are identified with Disposition Code 1.

77. Because only one case from the Sixth Circuit and none from the Eighth Circuit were randomly pulled, a spot-check sample of five randomly selected cases from each of those circuits was added.

78. In many of these cases, a clinical professor and students were appointed. In others, attorneys at a firm were appointed; anecdotally, it appears that a handful of major firms routinely handle pro bono prisoner civil rights cases.

the total sample, were coding errors and involved a prisoner plaintiff who remained pro se throughout the appeal. Although this identification mechanism was imperfect, all got-counsel cases in all circuits were treated as appointed-counsel cases.

Likewise, to confirm that a case coded as argued despite also being coded as pro se throughout reflected appointment of counsel, a 5% random sample of all such cases was pulled and the dockets for all sampled cases were reviewed manually.[79] In this case, coding practice appeared to be highly consistent within most circuits but varied between them. In the D.C. Circuit and Third Circuit, this coding always indicated appointment of counsel to serve as amicus curia in support of the pro se prisoner litigant. In the Second Circuit, it was used irregularly; in some cases, counsel had been appointed, but in most, the prisoner remained pro se and no argument occurred. In the Fifth Circuit, the coding appeared always to be erroneous—in every sampled case, the prisoner remained pro se and no argument occurred. In all of the remaining circuits (Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh), all sampled cases with this coding were appointed-counsel cases, except that one Fourth Circuit case involved appointed amicus counsel and one Seventh Circuit case involved retained counsel from the outset. Therefore, all pro-se-but-argued cases from all circuits except the Second and Fifth were treated as appointed-counsel cases.[80]

The First Circuit was omitted entirely from the analysis because no cases were coded as got-counsel and only one was coded as pro-se-but-argued. Although lawyers have certainly been appointed to represent pro se prisoners by the First Circuit, it does not appear possible to identify these cases from the FJC dataset. Prisoner civil rights appeals in the First Circuit make up about 1% of all such cases across the nation.

In sum, outside the First Circuit, the coding process appears highly reliable in identifying cases in which a prisoner obtained

79. Because no cases from the Third or Fourth Circuits were randomly pulled, all of the pro-se-but-argued cases from these circuits (four and six, respectively) were checked manually. Additional cases from the D.C. and Second Circuits were also pulled to confirm coding practices in these circuits.

80. These cases in the Second and Fifth Circuit were treated as pro se. In the Fifth Circuit, this is straightforward and does not undermine comparisons between these categories. In the Second Circuit, however, the best approach would be to manually code all of the pro-se-but-argued cases. Because less than 20% of the sampled Second Circuit cases involved appointed counsel, these have all been treated for purposes of the present analysis as pro se cases.

counsel after an appeal began. The false positive rate was very low; few cases were coded as got-counsel inaccurately. Coding as got-counsel was a good, but imperfect, proxy for appointment of counsel, since a modest fraction of got-counsel cases actually involved counsel retained mid-appeal. The false negative rate—meaning the rate at which acquisitions/appointments of counsel were missed because FJC coding did not reflect them—is impossible to know, though the fact that no First Circuit cases are identifiable in this way is concerning and suggests that some additional sampling of pro se cases may be warranted.[81]

Finally, it is worth noting that this coding process could not distinguish between appointments occurring sua sponte and those the prisoner litigant sought by motion.[82] Both types of appointment appeared in the samples reviewed, but there is no way to differentiate between them across the dataset without individually reviewing all dockets.[83]

C. Outcomes

Pro se prisoner civil rights cases (meaning cases in which the prisoner plaintiff is pro se at termination) almost never result in victory. By contrast, counseled cases are much more likely to be successful.

A comparison of success rates in prisoner and non-prisoner civil rights cases is instructive. In non-prisoner civil rights cases, defendants are about 8 times more likely than plaintiffs to receive a

81. Ideally, dockets from a sufficiently large random sample of all prisoner civil rights cases in each circuit would be reviewed to identify whether there are any got-counsel cases not identified using the above approaches.

82. Sometimes, counsel is appointed by the court sua sponte, but only *after* a motion for appointment of counsel has already been denied. *See, e.g.*, Order at 1, Garrett v. Wexford Health, No. 17-03480 (3d Cir. Mar. 27, 2018) (denying motion for appointment of counsel for failure to demonstrate arguable merit as to exhaustion); Order at 1, Garrett v. Wexford Health, No. 17-03480 (3d Cir. Sept. 20, 2018) (appointing counsel without compensation to brief complex question of exhaustion law under the PLRA); *see also* Garrett v. Wexford Health, 938 F.3d 69 (3d Cir. 2019) (vacating dismissal for failure to exhaust), *cert. denied*, 140 S. Ct. 1611 (2020) (denying over the published dissent of Justice Thomas).

83. In all the sampled cases, appointed counsel submitted some briefing. In many cases briefing was done (or redone) entirely by appointed counsel, but in others, appointed counsel only filed supplemental briefing. In some cases, the court directed appointed counsel to brief specific issues, though leave was commonly given to brief other issues as well.

judgment exclusively in their favor.[84] In prisoner civil rights cases, defendants win outright 59 times for every victory by a plaintiff. This ratio goes up to 90 for pro se prisoner plaintiffs and drops to 8—the same as for all non-prisoner civil rights plaintiffs—for represented prisoner plaintiffs. Although non-prisoner civil rights plaintiffs are a bit more likely to prevail than prisoner plaintiffs both when represented and when proceeding pro se, the disparity between represented civil rights plaintiffs (incarcerated and not) and unrepresented plaintiffs is much more dramatic. This does not mean that if prisoners were represented as frequently as non-prisoners, they would prevail at similar rates; they would certainly not. But these figures nonetheless suggest that having counsel might have a profound impact, at the very least in the marginal case.

Table 1: Ratio of Civil Rights Cases Ending in Judgment Exclusively for Plaintiffs(s) to Cases Ending in Judgment Exclusively for Defendants(s)

	Represented Plaintiff(s)	*Pro Se Plaintiff(s)*
Non-Prisoner Plaintiff(s)	1:5[85]	1:72[86]
Prisoner Plaintiff(s)	1:8[87]	1:90[88]

A district-by-district analysis of rates of representation in prisoner civil rights cases and success rates in those cases further supports the lawyering hypothesis.[89] Rates of representation in

84. This analysis considers only those cases coded as terminating with a judgment in favor of either plaintiffs or defendants; it ignores cases coded as terminating with a judgment in favor of both parties or terminating otherwise, without a judgment in favor of either. It is for this reason that the results are presented as outcome ratios rather than success rates.

85. Amongst a universe of 335,281 non-prisoner civil rights cases litigated with representation.

86. Amongst a universe of 124,254 non-prisoner civil rights cases litigated pro se.

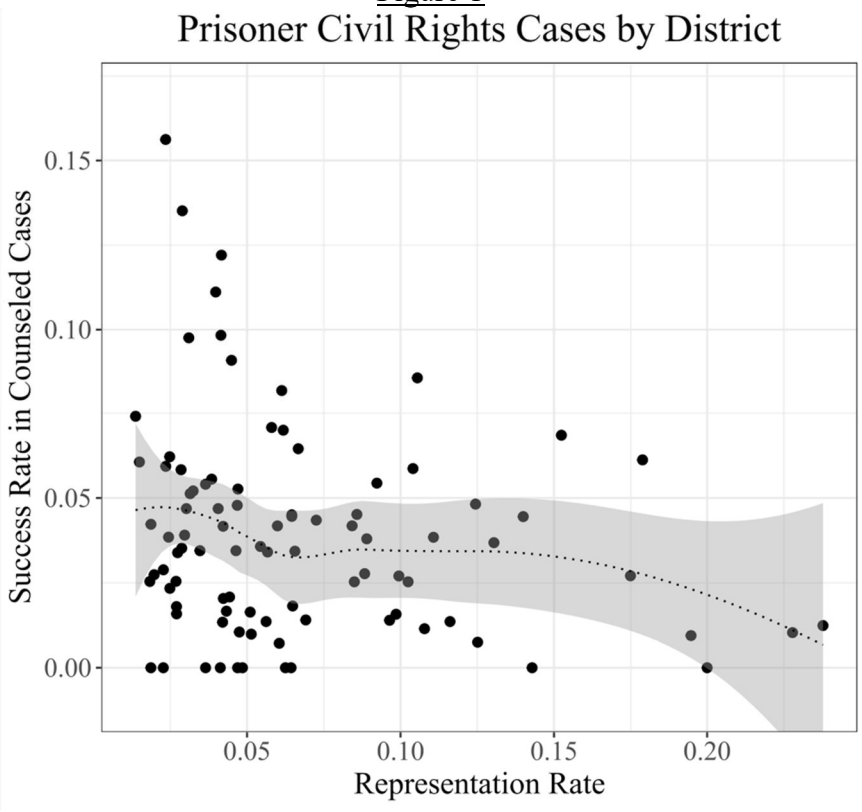
87. Amongst a universe of 25,109 prisoner civil rights cases litigated with representation.

88. Amongst a universe of 316,866 prisoner civil rights cases litigated pro se.

89. Here, unlike in the preceding discussion, success means a case terminating in judgment either exclusively *or partially* in favor of the prisoner plaintiff. As for race, Black and White prisoner civil rights plaintiffs have nearly identical rates of

prisoner civil rights cases, and of success in those cases, were calculated in each of the 94 district courts. As the chart below reflects,[90] increasing representation rates (even several-fold) do not appear to correlate with substantially lower success rates in counseled cases, except perhaps at the highest levels of representation, where data are sparse and confidence is low.

Figure 1



success when represented (2.9%)—and when pro se (0.4%). Hispanic prisoners have a similar if very slightly lower rate of success when pro se but a somewhat substantially higher rate of success when represented (3.8%). Asian prisoners appear to have the highest rates of success, both when represented (3.9%) and when pro se (0.5%).

90. Note that this chart excludes for visualization purposes the two outlier districts with the highest representation rates and that the trendline is based on unweighted values.

D. Trials

In most categories of federal civil litigation, pro se trials are extraordinarily rare. Across all non-prisoner, non-civil-rights trials, a plaintiff was pro se in only about 1.5% of cases.[91] In the arena of prisoner civil rights, things are radically different. From 2008 to 2020, just over 3,500 prisoner civil rights cases went to trial in the federal district courts.[92] In 62% of these cases, the plaintiff tried the case pro se.[93] This is true even though three-quarters of chief judges surveyed by the FJC understandably indicated that there is a "great need" for counsel at trial.[94]

Once pro se trials commence, judges are likely to exercise unusually tight control, directing proceedings more than they would if counsel were present.[95] The line between helping a pro se prisoner plaintiff to understand the basics of federal trial practice and inappropriately constraining the presentation of his case is a fine one. This leaves the fairness of the trial in the hands of the judge, who "must explain matters that would normally not require explanation and must point out rules and procedures that would normally not require pointing out."[96] Judges also mitigate or contribute to the particularly acute risk of anti-prisoner bias, such as through rulings related to the plaintiff's physical appearance in the courtroom.[97]

Of the prisoner civil rights cases tried pro se, the plaintiff prevailed fully or partially in 8%. Of those tried with counsel, the plaintiff

91. Non-prisoner, non-civil-rights cases include all civil cases other than those identified with Nature of Suit Codes 510–560 and 440–448.

92. This includes those cases identified with Disposition Codes 7 (judgment on jury verdict), 8 (judgment on directed verdict), and 9 (judgment on court trial).

93. Representation rates at trial do not vary dramatically by the race of the plaintiff.

94. STIENSTRA ET AL., *supra* note 8, at vii.

95. *See id.* (noting that judges have "more active personal involvement [in pro se cases] than in represented cases").

96. Bloom & Hershkoff, *supra* note 7, at 514–15 (quoting Oko v. Rogers, 466 N.E.2d 658, 661 (Ill. App. Ct. 1984)).

97. *Procedural Animus*, *supra* note 25, at 1212 n.237 (discussing the possibility that an incarcerated plaintiff may be handcuffed or dressed in prison garb in front of a jury). In one egregious example, a pro se prisoner litigant was transferred from the prison where he was normally housed to a county jail to facilitate his access to the courthouse, but prison officials "held back all of his trial materials"; he asked the judge to grant him a continuance and order the prison to transfer his papers to the jail, but this request was denied. *Civil Rights Without Representation*, *supra* note 24, at 694.

prevailed three times as often, in 24% of cases.[98] Of non-prisoner civil rights cases that went to trial, 8% were tried by pro se plaintiffs. Of these, the plaintiff prevailed fully or partially in 11%. Of those tried with counsel, the plaintiff was again three times as likely to prevail.

Table 2: Rates at Which Civil Rights Plaintiffs Prevailed Fully or Partially at Trial

	Represented Plaintiff(s)	*Pro Se Plaintiff(s)*
Non-Prisoner Plaintiff(s)	33% (of 8,584 trials)	11% (of 773 trials)
Prisoner Plaintiff(s)	24% (of 1,364 trials)	8% (of 2,211 trials)

As above, it is striking that whether a civil rights plaintiff was pro se appears to better predict his likelihood of success at trial than whether he was incarcerated.[99] This does not, again, mean that the 62% of prisoner plaintiffs unrepresented at trial would have won anywhere near a quarter of their cases with counsel, but it does give cause to investigate further whether prisoner civil rights trials would be won dramatically more often if representation were available.

Indeed, these results at trial are substantially stronger evidence than are the previous findings that representation causes—rather than merely reflects—a higher chance of winning in a subset of cases. When considering the entire universe of civil rights cases filed in federal court, it seems plausible that the pool of prisoner cases contains a much higher percentage of meritless cases. Assuming so, screening explains at least some of the disparities in overall outcomes. If so, part of the reason that many more prisoner cases remain pro se is that many more of them are aptly identified as losers.

But the pool of cases allowed to proceed to trial is different. Even if a much higher proportion of all prisoner civil rights cases than

98. The success rates of prisoner plaintiffs at trial do not vary substantially by race, except that Asian prisoner plaintiffs have markedly higher success rates whether they are represented or not. However, this may be an artifact due to the small number of trials in this category.

99. Given the general unfriendliness of many jurors to incarcerated people, their somewhat lower rates of success at trial even with representation are no surprise.

non-prisoner civil rights cases lack merit,[100] it is unlikely that a much higher proportion of those prisoner rights cases that make it past motions for summary judgment and to trial lack merit. Actually, the opposite is more probable. Given the disfavor courts generally display towards prisoner litigation and given their disinclination to supervise pro se trials, it seems fair to assume that judges deciding motions for summary judgment are more likely to permit marginal non-prisoner claims to proceed to trial. Although settlement is certainly a confounding factor and warrants more sustained attention,[101] it appears likely that at least part of the reason that prisoner civil rights plaintiffs are so much less likely than non-prisoner civil rights plaintiffs to prevail at trial is that they are much less likely to be represented.

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100. Non-prisoner civil rights cases are about twice as likely (2% versus 1%) as prisoner civil rights cases to go to trial.

101. It is clear, and unsurprising, that lawyers are more likely to settle both prisoner and non-prisoner civil rights cases than are pro se plaintiffs. *See* STIENSTRA ET AL., *supra* note 8, at 27 (reporting that settlement negotiations are identified by chief judges as among the few case events or proceedings with the greatest need for assistance of counsel). But the impact of settlement on the strength of the pool of unsettled cases that proceed to trial in each category is complex and hard to discern with confidence from existing data.

There is reason, however, to surmise that correctional defendants might be especially likely to let strong counseled prisoner cases go to trial. Given juries' penchant for finding liability but awarding paltry or nominal damages in prisoner civil rights cases, and given that such an award to a prisoner—unlike an award to another civil rights plaintiff—generally precludes any substantial award of attorney's fees, correctional defendants may be more likely than other civil rights defendants to refuse settlement and permit represented plaintiffs with winning cases to go to trial. *See* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 168 tbl.7 (2015) (calculating a median damages award of just $4,185 in fiscal year 2012 prisoner civil rights cases); 42 U.S.C. § 1988(b) (allowing fee-shifting in non-prisoner civil rights cases); 42 U.S.C. § 1997e (setting the PLRA fee cap); *see also* Eleanor Umphres, Note, *150% Wrong: The Prison Litigation Reform Act and Attorney's Fees*, 56 AM. CRIM. L. REV. 261 (2019) (discussing the impact of the PLRA fee cap); *Civil Rights Without Representation*, *supra* note 24, at 653–61, 701–02 (discussing the impacts of fee-shifting caselaw vis-à-vis settlement in civil rights cases).

As for weak cases that survive summary judgment, which are especially likely to be litigated pro se, correctional defendants may be unusually averse to settling to avoid incentivizing what they perceive to be a flood of meritless litigation from plaintiffs who are confined together and likely to learn the outcomes of each other's cases. By contrast, low-value settlements are attractive risk management tools to other civil rights defendants. However, prisoners whose access to food and family depends on having money in their inmate accounts may also be especially likely to accept paltry offers in such cases.

A district-by-district analysis of rates of representation in prisoner civil rights trials and success rates in those trials further supports the lawyering hypothesis. Rates of representation at prisoner civil rights trials, and of success in these trials, were calculated in the 52 districts which reported at least 10 total prisoner civil rights trials, with at least 5 counseled, during the study period. The 6 districts with the lowest rates of representation, the 6 with the highest rates of representation, and the 6 with closest to the median rates of representation were compared. The districts within each set were diverse in geography.

The results indicate that districts with dramatically higher rates of representation in prisoner civil rights trials do not see markedly lower rates of plaintiff success at such trials. The districts with the lowest representation rates[102] had a weighted average representation rate of 16% and a weighted average success rate at counseled trials of 24%. The districts with median representation rates[103] had a weighted average representation rate of 42%—over 2.5 times higher—but a nearly identical success rate in counseled trials, at 25%. The districts with the highest representation rates[104] had a weighted average representation rate of 74%—over 4.5 times higher than in the lowest category—but still had a similar (albeit slightly lower) success rate in counseled trials, at 21%.

To visualize the relationship between the representation rate in a district in prisoner civil rights trials and the success rate at such counseled trials, consider the chart below.[105] It shows that as representation rates at trial climb nearly seven-fold, from 12% to 81%, success rates fluctuate and bear no marked relationship to representation rates.

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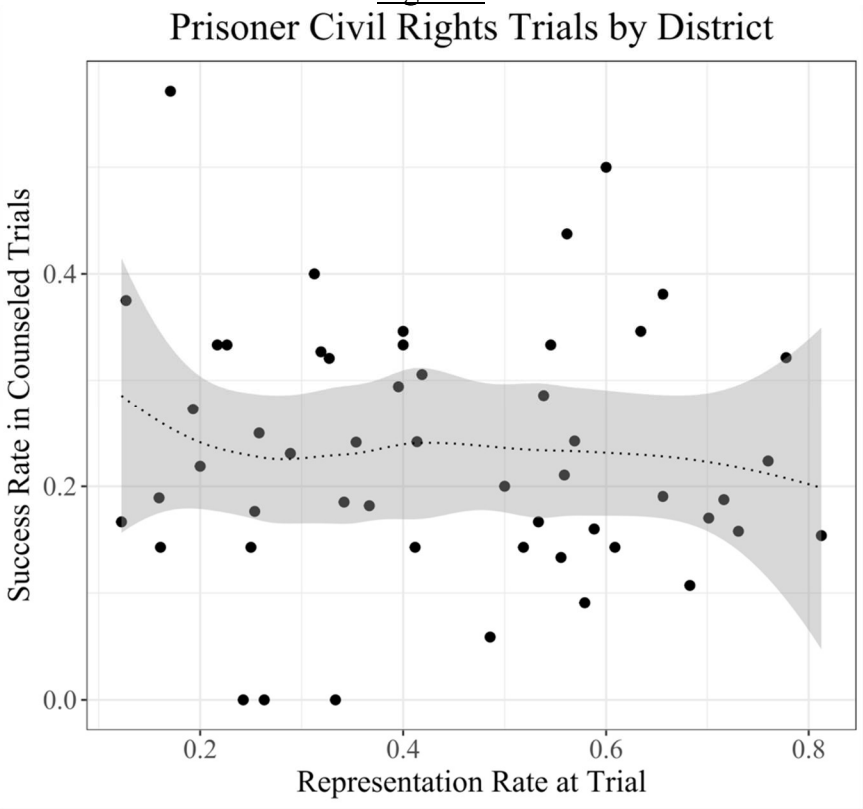
102. These districts were the Eastern District of Louisiana, Western District of Virginia, Eastern District of California, Middle District of Florida, Northern District of Texas, and Western District of Michigan. Between them, there were 586 prisoner civil rights trials.

103. These districts were the Southern District of Florida, Southern District of Illinois, District of Arizona, Western District of New York, Middle District of Pennsylvania, and Western District of Missouri. Between them, there were 549 prisoner civil rights trials.

104. These districts were District of Delaware, Southern District of Indiana, Northern District of Illinois, District of Oregon, District of Connecticut, and Eastern District of Michigan. Between them, there were 312 prisoner civil rights trials.

105. Note that the trendline displayed here is based on unweighted values.

Figure 2



For the reasons explained above, limiting the analysis to cases that went to trial substantially reduces the possible variation between districts in the strength of the cases filed. Any remaining variation in strength, whether produced by disparities at the filing or the settlement stage, is not likely sufficient to explain why prisoners are represented in the vast majority of trials in some districts and a small minority of trials in others. It is more likely that representation by counsel explains success at trial than that strength on the merits explains the involvement of an attorney.

E. Appeals

Pro se prisoners almost always lose on appeal, just as they almost always lose before the district court.[106] Overall, they succeed

106. Prisoner civil rights appeals are also much less likely than other civil rights appeals to result in published decisions. Non-prisoner civil rights appeals result in published opinions at a rate (17.4%) exceeding that of all civil appeals, whereas appellate decisions in prisoner civil rights cases are published only 3.5% of

in about 5% of their appeals. By contrast, prisoner civil rights plaintiffs who are pro se when a notice of appeal is filed but get counsel during the pendency of the appeal are ten times more likely to succeed—they win about 53% of the time.

Why is this?

The screening hypothesis suggests that the reason appointed-counsel appeals are so likely to succeed is that those doing the appointing are carefully identifying the strongest cases for appointment. In this view, there is a scarce supply of prisoner civil rights appeals that can be won; retained counsel select the best ones, pro se clerks find some remaining diamonds in the rough, and the rest are dealt with summarily. Though some of the prisoners with meritorious appeals who receive appointed counsel might lose without the assistance of counsel, many would still prevail; those whose appeals are not identified as warranting appointment of counsel would not benefit substantially from it. In this model, it is the strength of the appeal, more than the involvement of counsel, that dictates the outcome.

The lawyering hypothesis, by contrast, suggests that the reason appointed-counsel appeals are so likely to succeed is that the involvement of an attorney really matters. There is a plentiful supply of appeals in which a prisoner could prevail if competently represented. Reducing rates of appointment would mean that many prisoners would lose winnable appeals; increasing rates of appointment—at least at the existing margin—would mean that more prisoner litigants could enjoy the high success rates that counsel afford. In this model, it is the involvement of counsel, more than the strength of the appeal, that dictates the outcome.

Of course, there is no doubt that both screening and lawyering play some role at the appellate level. It seems certain that a pro se law clerk selecting cases in which to assign counsel will invariably choose a subset with higher-than-average odds of success (even absent

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the time. Rachel Brown et al., *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 CORNELL L. REV. 1, 58 fig.9 (2021). Professor Merritt McAlister has uncovered another ramification of pro se appellate litigation by prisoners: of the "missing" third tier of reasoned decisions issued by the federal courts of appeals in civil cases, but not included in commercial databases, about 86% involve prisoner litigants. Most of these are sentence- or conviction-related prisoner petitions; however, only about 12% involve civil rights or prison conditions claims. Merritt E. McAlister, *Bottom-Rung Appeals*, 91 FORDHAM L. REV. 1355, 1392–94 (2023).

representation).[107] And it seems clear that in nearly every case, an appointed attorney will be more competent at drafting appellate briefing than is an incarcerated client.[108] At the extremes, one hypothesis or the other plainly predominates—the best lawyer in the world could not win the weakest prisoner civil rights appeal, and the strongest appeal will succeed whether the prisoner is represented or not.

The interesting questions are at the margins. No circuit appoints counsel in more than 5% of pro se prisoner civil rights cases, but appointment rates nonetheless vary dramatically.[109]. In all but the D.C., Ninth, Second, and Seventh Circuits, counsel is appointed in less than 2% of these cases. The Fifth Circuit appoints counsel in 0.3% of cases, and the D.C. Circuit appoints counsel in 4.9% of cases, but in both circuits, prisoners with appointed counsel prevail equally as often: 45% or 46% of the time. What would happen to the success rate in appointed-counsel cases in the Fifth Circuit if its appointment rate increased, *sixteen-fold*, to match the D.C. Circuit's?

In investigating the strengths of these hypotheses, critical questions are: Do increased rates of appointment, across circuits or across time, appear to correlate with lower success rates in appointed-counsel cases, as the screening hypothesis would indicate? And do prisoners with appointed counsel have lower success rates than those with retained counsel, as the screening hypothesis would indicate?

As to the first question, the answer is no. Success rates in appointed-counsel cases do not appear to decline as appointment rates increase substantially.

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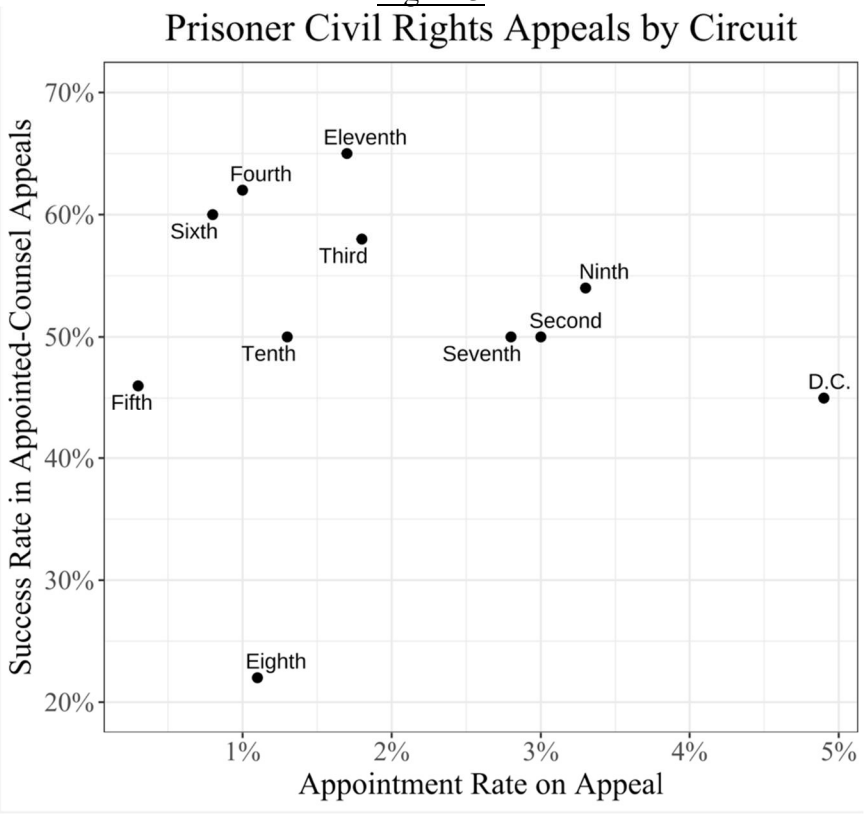
107. The Ninth Circuit Clerk's Office, for example, explains that "the court tries to ensure that only meritorious or otherwise deserving cases are selected for the program"; the only other factor it apparently considers is complexity. *Pro Bono Program: Handbook*, U.S. Ct. of Appeals for the Ninth Cir., 1, 3 (2019), https://cdn.ca9.uscourts.gov/datastore/uploads/probono/Pro%20Bono%20Program%20Handbook.pdf.

108. While some prisoners are better lawyers than some people with bar licenses, the appellate appointment processes employed by the courts of appeals likely ensure that only good lawyers—and often great lawyers—are assigned to these cases. Moreover, even the best jailhouse lawyer will not be permitted to present oral argument; this consigns all cases without bar-licensed counsel to the non-argument track and staff attorney processing.

109. As Table 1 of the Appendix shows, overall representation rates of prisoner plaintiffs on appeal also vary dramatically between the circuits, from a low of 1.2% in the Fifth Circuit, to a high of 7.6% in the D.C. Circuit. Across the circuits, about a third of appellate lawyers for prisoner civil rights plaintiffs are appointed rather than retained, though in two—the Ninth and D.C. Circuits—well more than half are appointed.

If the screening hypothesis predominates, we would expect success rates in appointed-counsel cases to vary likewise, with higher success rates—or relative success rates[110]—in circuits that are more "selective," assigning counsel in a smaller percentage of cases. Although some relationship cannot be conclusively disproven, it is possible to say—as is reflected in the chart below—that higher rates of appointment of counsel are not strongly negatively correlated with lower success rates in appointed-counsel cases.

Figure 3



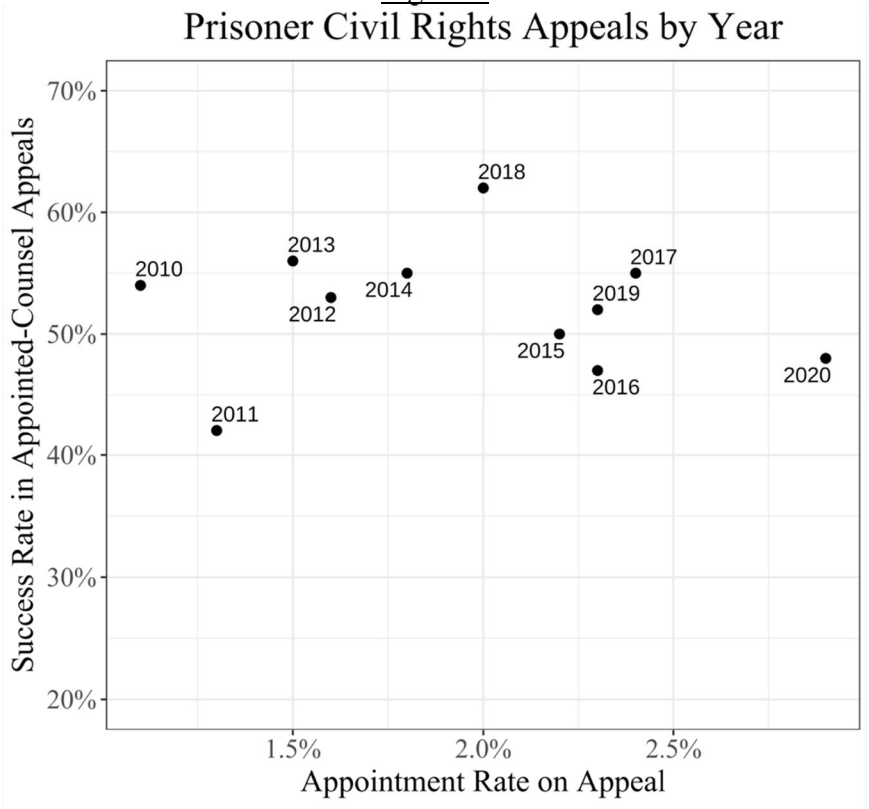
110. To adjust for differences between the circuits in the strength of the overall pool of cases or doctrinal (un)favorability, one might consider as the dependent variable success rates of appointed-counsel cases relative to success rates of pro se cases (success rate appointed counsel ÷ success rate pro se). Additionally, to account for the possibility that more of the strong cases are pulled from the pool before appointment occurs in circuits with higher rates of retained counsel, one might consider (had-counsel % + 0.5 * appointed-counsel %)—that is, the median percentile of appointed-counsel cases—as the independent variable. There are too few circuits to calculate meaningful significance statistics, but such manipulation of the variables under consideration still produces no apparent relationship.

It does not, therefore, appear that those responsible for appointing counsel in the D.C., Ninth, Second, and Seventh Circuits are scraping the bottom of the barrel, "appointing counsel willy nilly" to cases that are not likely winnable.[111] To the extent that the marginal case up for assignment of counsel is weaker than the median case already assigned counsel, the difference is not large. This suggests that if more appointments were made, especially in the circuits that currently have low appointment rates, many more wins would result.

Analysis of variation in appellate appointment rates over time produces a similar result.[112] Between 2010 and 2020, the percentage of prisoner plaintiffs who were appointed counsel in the federal courts of appeals increased fairly steadily and quite dramatically, nearly tripling from 1.1% in 2010 to 2.9% in 2020.[113] But the success rates in these appointed-counsel cases fluctuated between a low of 42% in 2011, when 1.3% of prisoners got counsel on appeal, and a high of 62% in 2018, when 2.0% of prisoners got counsel. Across time, it does not appear that appointing counsel in more cases meant appointing counsel in weaker cases—and certainly not in dramatically weaker cases.[114] Within the range of appointment rates reported across the federal circuits and across the years, from close to 0% to close to 5%, success rates in appointed-counsel cases vary without clear correlation within the 40s, 50s, and low 60s.

111. Schwab & Eisenberg, *supra* note 66, at 773.
112. Again, omitting the First Circuit.
113. App. tbl.4.
114. *Id.*

Figure 4



This finding offers some reassurance that the preceding analysis is not undermined by differences between circuits. It is plausible that the prisoner civil rights appeals filed in one circuit are substantially stronger than in another circuit—perhaps because of differences in prison and jail conditions, in prisoners' aptitude as pro se litigants, in access to law libraries and legal assistance, and in the favorability of doctrine. If so, this variation might partially explain the substantial disparity in appointment rates. However, it is unlikely that the strength of prisoner civil rights appeals has increased consistently and dramatically over the course of a decade, as have appointment rates across the federal circuits. This, in turn, suggests that differences in the circuits' dockets and doctrines do not fully explain their divergent appointment practices.

As to the second question identified above: analysis of success rates of appointed versus retained lawyers in prisoner civil rights appeals likewise suggests that courts have not exhausted their supply of strong pro se appeals in which to appoint counsel. They have not yet reached a point of diminishing winnability.

Across the federal courts of appeals, and in all but one circuit—the Eighth[115]—prisoner plaintiffs who acquired counsel after the commencement of their appeals won at higher rates, sometimes substantially so, than prisoner plaintiffs who had counsel from the outset of their appeals.[116] In total, 53% of appointed-counsel appeals succeeded, as compared to 34% of had-counsel appeals.[117] This disparity is even more striking, and cuts more strongly against the screening hypothesis, because along one key metric, retained counsel enjoyed stronger litigation postures. Retained counsel were much more likely than appointed counsel to be in the enviable position of defending favorable decisions below: 27% of the had-counsel appeals involved defending a win in the district court, as compared to only 6% of the appointed-counsel appeals.[118]

The disparity in success rates becomes even starker once the small percentage of defensive appeals are set aside and plaintiff-initiated appeals are considered alone, apples to apples.[119] Prisoners with representation from the outset who initiate an appeal succeed a mere 17% of the time.[120] Pro se prisoners win 4% of the appeals they initiate and litigate without counsel.[121] Prisoners who initiate appeals pro se but then acquire counsel through appointment, though, prevail in over half (53%) of their appeals.[122]

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115. The low rates of success in both appointed-counsel and had-counsel prisoner civil rights cases in the Eighth Circuit are consistent with Professor McAlister's finding that, in a sample of its cases, "the presence of counsel seemed to make no difference [to opinion length], as all prisoners received perfunctory decisions: . . . the average word count for all prisoner appeals was only ninety-nine." McAlister, *supra* note 106, at 1409.

116. App. tbl.2.

117. *Id.*

118. *Id.*

119. Defensive appeals represent only about 1.5% of all appeals in prisoner civil rights cases (i.e., in over 98% of cases, it is the prisoner who is appealing an adverse ruling below), but—unsurprisingly—prisoners are much more likely to be represented in defending favorable decisions below. In the substantial majority (67%) of defensive appeals, the prisoner is represented throughout and was presumably represented in the district court. In about 8% of cases, counsel is obtained after the appeal begins. Strikingly, though, a full 25% of defensive appeals are litigated pro se.

120. By contrast, defensive had-counsel appeals have an 82% success rate.

121. Prisoners succeed in defending appeals as often when pro se as with retained counsel—83% of the time.

122. These prisoners win 60% of their defensive appeals. That the success rate on defensive appeals is lower in appointed-counsel cases than the very high and similar success rates in had-counsel and pro se cases suggests that when pro se clerks review the unusual prisoner civil rights appeals initiated by defendants, they are most

Why might the success rate in appointed-counsel appeals not merely match but markedly exceed that in appeals involving lawyers from the outset? There are three plausible explanations. First, damages are a complicating factor, perhaps a major one. It may be that lawyers seek out cases with a lower likelihood of success but higher expected damages, whereas appointments are made to cases with higher likelihoods of success despite lower expected damages. Because the PLRA caps fees at 150% of any monetary award (in most cases), a near-certain win in a case with nominal damages is worth nothing to a profit-motivated attorney.[123] Second, it may be that pro se clerks are better at identifying cases that could be won with counsel than are members of the plaintiff's bar. Third, it may be that the attorneys the federal courts of appeals appoint are better lawyers on average than are those who handle prisoner civil rights cases from the district courts through the appeals process.[124] Regardless, however, the fact that success rates in appointed-counsel appeals are much higher than in those with lawyers from the outset suggests that the courts of appeals are not left with slim pickings when considering which cases warrant appointment of counsel. Even if they were to appoint counsel in more, weaker cases, appointed counsel's success rates would remain more than respectable.

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likely to appoint counsel not to cases in which the prisoners' positions are strongest but to harder, closer cases. This makes sense—after all, correctional defendants, like prisoner plaintiffs, can and do file appeals that obviously lack merit and are not hard to defeat, as is reflected in the stunningly high success rate of pro se defensive appeals. The same is presumably not true for appeals from rulings adverse to prisoner plaintiffs; among these, it is fair to assume that the clerks attempt to identify the strongest cases for appointment. If, however, appointments are made to close cases across the board, the success rate of appointed counsel as compared to that of retained counsel (who are not eager for close cases) is even more impressive.

123. *See* 42 U.S.C. § 1997e(d)(3) ("No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under for payment of court-appointed counsel.").

124. This is entirely plausible. Among the cases sampled to confirm appointment of counsel was one in which the judges of the Fourth Circuit appointed Toby Heytens, former Supreme Court clerk, then-professor and director of the University of Virginia School of Law's Supreme Court Litigation Clinic, soon-to-be Solicitor General of Virginia, and recently confirmed member of the Fourth Circuit. Notice, Evans v. Kuplinski, 713 Fed. Appx. 167, 169 (4th Cir. 2017) (No. 16-06136), ECF No. 18.

CONCLUSION

The above analyses suggest that representation—and appointment of counsel—causes success in prisoner civil rights cases, but they do not permit a robust finding to that effect. Even assuming causation exists, it is not clear from these results whether it is lawyering alone that makes for better outcomes or also the other features that come along with the counseled litigation 'track,' such as intensive evaluation of the briefing and record by a judge rather than by a pro se law clerk.[125] But these findings do suggest that case management decisions may radically alter outcomes, and that if courts were to appoint counsel in many more cases, many more prisoners would likely win.

Whether the screening or the lawyering hypothesis has more explanatory power has major implications for who we think should be making appointment decisions and how much we think appointment practices matter. If the screening hypothesis predominates, subject-matter experts in the clerk's office may well be better than generalist judges at identifying winning cases, and they might reasonably retain this function. By the same token, because the strong cases have already been found and assigned counsel, there would be little benefit to altering appointment practices and increasing the incentives to serve. If, however, the lawyering hypothesis predominates, judges should probably be the ones choosing cases for serious adjudication; the choice of which cases to privilege should be understood as core jurisprudential activity. And efforts to increase appointment rates should be prioritized (and funded).[126]

Given the stakes, additional empirical evaluation of the impacts of appointment of counsel in trial- and appellate-level pro se prisoner civil rights cases is essential. This will likely require additional data. To the extent that a circuit court is willing to share data identifying those cases selected by the pro se clerks for potential appointment, a quasi-experimental analysis might investigate differences in outcomes between those cases in which appointment actually occurred and those in which a prisoner remained pro se. Even

125. Furthermore, to the extent that "lawyering" makes the difference, it is not clear what aspect of it matters: skill in research and writing are doubtless important, but so too may be the ability to present a properly formatted brief.

126. This is not to suggest that cost and efficiency tradeoffs do not exist, but rather to say that they should be confronted seriously by judicial administrators and legislators, rather than sidestepped based on the inaccurate presumption that giving pro se prisoners lawyers would be a waste.

more powerful, a thoughtful chief judge at either level could direct that appointment of counsel be randomized and the resulting outcomes studied.[127]

127. Appointments could be made randomly to a percentage of all prisoner civil rights cases or to a percentage of all cases that clear an initial and low screening bar. Ideally, in order to blind the judges deciding these cases, prisoner litigants would continue to be offered appointment of counsel based on the existing screening process, and a randomized sample of the remaining litigants—who would otherwise have proceeded pro se—would also be offered appointment of counsel, with no distinction evident to the district judge or the members of the appellate panel eventually hearing the case. The clerk's office would track and disclose who had received counsel based on random assignment only at the end of the study period. For additional relevant considerations, see generally D. James Greiner & Andrea Matthews, *Randomized Control Trials in the United States Legal Profession*, 12 ANN. REV. L. & SOC. SCI. 295 (2016) (collecting randomized control trials in the legal field and analyzing resistance within the profession to using those trials as knowledge-generating devices).

APPENDIX

Table 3: Representation and Success Rates of Prisoner Plaintiffs on Appeal by Circuit

Circuit (n)	*Success Rate Pro Se*	*Portion Cases Got Counsel*	*Success Rate Got Counsel*	*Portion Cases Had Counsel*	*Success Rate Had Counsel*
All (57,197)	5%	1.8%	53%	3.7%	34%
Second (4,003)	3%	3.0%	50%	3.9%	40%
Third (4,041)	7%	1.8%	58%	4.6%	46%
Fourth (6,710)	3%	1.0%	62%	1.6%	45%
Fifth (8,172)	5%	0.3%	46%	0.9%	17%
Sixth (5,231)	7%	0.8%	60%	3.4%	39%
Seventh (4,508)	5%	2.8%	50%	3.3%	42%
Eighth (4,101)	3%	1.1%	22%	0.4%	35%
Ninth (10,963)	6%	3.3%	54%	2.4%	50%
Tenth (2,524)	4%	1.3%	50%	3.0%	36%
Eleventh (6,271)	3%	1.7%	65%	2.3%	43%
D.C. (673)	3%	4.9%	45%	2.7%	44%

Table 4: Representation and Success Rates of Prisoner Plaintiffs on Appeal by Year

Year	*Portion Cases Got Counsel*	*Success Rate Got Counsel*
2010	1.1%	54%
2011	1.3%	42%
2012	1.6%	53%
2013	1.5%	56%
2014	1.8%	55%
2015	2.2%	50%
2016	2.3%	47%
2017	2.4%	55%
2018	2.0%	62%
2019	2.3%	52%
2020	2.9%	48%