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The Federal Rules of Inmate Appeals

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THE FEDERAL RULES OF INMATE APPEALS

Catherine T. Struve*

ABSTRACT

The Federal Rules of Appellate Procedure turn fifty in 2018. During the rules' half-century of existence, the number of federal appeals by self-represented, incarcerated litigants has grown dramatically. This article surveys ways in which the procedure for inmate appeals has evolved over the past fifty years, and examines the challenges of designing procedures with confined litigants in mind. In the initial decades under the Appellate Rules, the most visible developments concerning the procedure for inmate appeals arose from the interplay between court decisions and the federal rulemaking process. But, as court dockets swelled, the circuits also developed local case management practices that significantly affect inmate appeals. And, in the 1990s, Congress enacted legislation that produced major changes in inmate litigation, including inmate appeals. In the coming years, the most notable new driver of change in the procedure for inmate appeals may be the advent of opportunities for electronic court filing within prisons. That nascent development illustrates the ways in which the particulars of procedure in inmate appeals are shaped by systems in prisons, jails, and other facilities—and underscores the salience of local court practices and institutional partnerships.

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The Federal Rules of Appellate Procedure turn fifty in 2018. During the rules' half-century of existence, the number of people incarcerated in the United States shot upwards, and with the growing prison population came corresponding growth in federal lawsuits by inmates—both lawsuits challenging confinement itself and lawsuits challenging the conditions of that confinement. As a result, the number of federal appeals by self-represented, incarcerated litigants has increased dramatically. From the first discussions of the proposed Appellate Rules, the appellate procedures for inmate litigation presented distinctive issues that received attention from the rulemakers—and, later, from the Supreme Court, the courts of appeals, and Congress.

Surprisingly, academics generally have not shared that interest. Though a few notes and articles have examined the rules governing the timeliness of

inmate filings,¹ the nature of statutory constraints on inmate appeals,² or the permission required when inmates seek to appeal the denial of their requests for postconviction review,³ this article appears to be the first to provide an overview of the procedural features distinctive to inmate appeals in federal court.⁴ Moreover, this article appears to be the first to describe and assess initiatives for electronic filing by incarcerated litigants.⁵

In the parts that follow, I survey ways in which the procedure for inmate appeals has evolved over the past fifty years, and I examine the challenges of

1. Three publications have focused on aspects of the “prison mailbox rule” (which I discuss in Part I of this article). See Sara A. Harris, *Pettibone v. Pennsylvania Board of Probation and Parole: The Commonwealth Court of Pennsylvania Extends the “Prisoner Mailbox Rule” to Pro Se Administrative Appeals Filed with the Board of Probation and Parole*, 11 WIDENER J. PUB. L. 329, 329–30 (2002); Courtenay Canedy, Comment, *The Prison Mailbox Rule and Passively Represented Prisoners*, 16 GEO. MASON L. REV. 773, 787 (2009); Eric D. Kelderman, Note, *Fairness in Habeas Petition Filings for Pro Se Prisoners: The Propriety of the Eighth Circuit’s Holding in Nichols v. Bowersox*, 33 CREIGHTON L. REV. 359, 402 (2000).

2. Two publications address the application, to appeals, of the Prison Litigation Reform Act (“PLRA”)’s limits on attorney fees. See Maxwell Murtaugh, Note, *The PLRA’s Dividing Language: Statutory Interpretation and Applying the Attorney’s Fees Cap at the Appellate Level*, 59 ST. LOUIS U. L.J. 219, 224 (2014); Peter Shakro, Note, *Inmates Who Cried Wolf: The Dangers of Applying the PLRA’s Limit on Appellate Attorney’s Fees in Prisoner Deprivation of Rights Claims*, 92 WASH. U. L. REV. 169, 176–78 (2014). I address other aspects of the PLRA in Part II.B.

3. Some articles address the certificates of appealability (“COAs”) required of inmate appellants in habeas or § 2255 appeals—a topic that I treat in Part II.B.1. See, e.g., Christopher Q. Cutler, *Friendly Habeas Reform—Reconsidering a District Court’s Threshold Role in the Appellate Habeas Process*, 43 WILLAMETTE L. REV. 281, 359 (2007); David Goodwin, *An Appealing Choice: An Analysis of and a Proposal for Certificates of Appealability in “Procedural” Habeas Appeals*, 68 N.Y.U. ANN. SURV. AM. L. 791, 796 (2013); Ryan Hagglund, *Review and Vacatur of Certificates of Appealability Issued After the Denial of Habeas Corpus Petitions*, 72 U. CHI. L. REV. 989, 990 (2005); Jonah J. Horwitz, *Certifiable: Certificates of Appealability, Habeas Corpus, and the Perils of Self-Judging*, 17 ROGER WILLIAMS U. L. REV. 695, 699 (2012); Margaret A. Upshaw, Comment, *The Unappealing State of Certificates of Appealability*, 82 U. CHI. L. REV. 1609, 1611 (2015).

4. For an excellent treatise that includes a segment on appellate procedure, see JOHN BOSTON & DANIEL E. MANVILLE, *PRISONERS’ SELF-HELP LITIGATION MANUAL* 752–66 (4th ed. 2010). Empirical work concerning habeas appeals and concerning inmate litigation in the district courts provides useful context for my analysis. See generally Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 FED. SENT’G REP. 308 (2012); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) [hereinafter Schlanger, *Inmate Litigation*]; Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015) [hereinafter Schlanger, *Adulthood*]. And Part II.A draws upon the work of Professor Marin Levy concerning circuit case management practices. See generally Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315 (2011).

5. A search in WestlawNext’s “JLR” database for (“electronic filing” “e-filing” “efiling”) /s (prison! inmate correctional jail incarcerat!) yielded a few results that briefly mentioned the topic, but yielded no articles that focused on it.

designing procedures for use by confined litigants. Part I observes that, in the initial decades under the Appellate Rules, the most visible developments concerning the procedure for inmate appeals arose from the interplay between court decisions and the federal rulemaking process. Part II.A notes the subtler but no less important effect of the circuits' creation, from the 1970s forward, of case management practices designed to address the courts' burgeoning dockets. In the 1990s, as I recount in Part II.B, Congress enacted legislation that produced major changes in inmate litigation, including inmate appeals. In the coming years, the most notable new driver of change in the procedure for inmate appeals may be the advent of opportunities for electronic court filing within prisons. That nascent development, which I discuss in Part III, illustrates the ways in which the particulars of procedure in inmate appeals are shaped by systems in prisons, jails, and other facilities—and underscores the salience of local court practices and institutional partnerships.

Local variation—among prisons and jails and across time when an inmate is transferred among institutions—will pose challenges for national rules that seek to account for the particulars of inmate filing. As the national rules adapt to changing practices in courts, prisons, and jails, the flexible approach embedded in the original Appellate Rules will retain continuing importance.

I. COURT-RULEMAKER DIALOGUES DURING THE EARLY YEARS

The Appellate Rules were created during the 1960s—a decade when the rights of prisoners were the subject of close attention both inside and outside the courts. That attention, I will argue in Part I.A, affected the drafting of provisions in the Appellate Rules that shaped the procedures for inmate appeals. The evidence I review in Part I.A suggests that the drafters of the original Appellate Rules sought, in a number of ways, to promote the goal of equal access to appellate justice for poor and incarcerated litigants. Meanwhile, the Warren Court era saw the start of a rise in inmate litigation that continued during the ensuing decades. The Appellate Rules' first quarter-century in existence witnessed not only inmate litigation's growth in scope and salience but also the adoption, first by the Court and then by the rulemakers, of filing provisions tailored specifically to the circumstances of inmate litigants (what I will call the “prison mailbox rule”). Part I.B recounts the development of the prison mailbox rule (and notes debate over the boundaries of its coverage).

A. *The Original Appellate Rules and the Goal of Equal Access*

It is well known that that the drafters of the original Appellate Rules sought to bring uniformity to practice in the federal courts of appeals. Less attention has been given to the contributions those drafters made in areas of practice affecting inmate filers. As originally adopted, the text of the Appellate Rules explicitly addressed inmate appeals in Title VI, which covered habeas proceedings (Rules 22 and 23)⁶ and proceedings in forma pauperis (Rule 24).⁷ The adoption of that Title was an innovation, given that—at the time—the Civil and Criminal Rules addressed in forma pauperis filings only glancingly and given that the national rules governing habeas and § 2255 proceedings had not yet been promulgated. Interestingly, both state-prisoner habeas cases and appeals in forma pauperis were envisioned as falling within the general provisions for “appeals as of right” (Rules 3 and 4)⁸—even though statutes already imposed some constraints on the “right” of the appellant to proceed in such cases. That classification, I will argue below, may have reflected not merely existing practice but also the Warren Court’s perspective on the process to be accorded to poor and incarcerated litigants.

The early- and mid-1960s were a time when the Supreme Court, the executive branch, and Congress all took measures to improve the treatment of poor defendants in the criminal justice system. One contemporary commentator highlighted

a sequence of six decisions rendered on successive opinion days [in] 1963 [that] significantly expanded the rights under the fourteenth amendment of impoverished persons accused or convicted of crime. Of the six cases, three—*Lynnum v. Illinois*, *Gideon v. Wainwright* and *Bush v. Texas*—involved pretrial or trial stages, and three—*Draper v. Washington*, *Lane v. Brown*, and *Douglas v. California*—involved appeal.⁹

Draper and *Lane* addressed the right of indigent defendants to have transcripts for purposes of direct appeals or appeals from the denial of

6. See FED. R. APP. P. 22 (1967) (last amended in 2009); *id.* 23 (1967) (last amended in 1998).

7. See *id.* 24 (1967) (last amended in 2013).

8. See *id.* 3 (1967) (last amended in 1998); *id.* 4 (1967) (last amended in 2017).

9. Harold W. Solomon, “*This New Fetish for Indigency*”: *Justice and Poverty in an Affluent Society*, 66 COLUM. L. REV. 248, 248 (1966) (footnotes omitted).

postconviction review,¹⁰ while *Douglas* struck down a state's pre-screening practice for limiting appointment of appellate counsel.¹¹

Meanwhile, in 1961, Attorney General Robert F. Kennedy had appointed a committee "to study the system of federal criminal justice with the purpose of identifying problems faced by persons of limited means charged with federal crimes and problems created for the system of federal justice by the presence of such persons in its courts."¹² That committee—the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (also called the Allen Committee because it was chaired by Professor Francis Allen)¹³—issued a report in 1963 that made recommendations on a number of topics, including "appeals procedure, representation of appellants on appeal, and provision of trial transcripts for impoverished defendants seeking appellate review of their convictions."¹⁴ The Report in turn played a role in Congress's enactment of the Criminal Justice Act of 1964,¹⁵ which required each district to adopt a plan for providing representation to indigent defendants, and each circuit to adopt plans for providing representation to such defendants on appeal.¹⁶ For its part, the Department of Justice took action "suggested by the Allen Committee to improve [the DOJ's] own use of discretionary prosecutorial powers."¹⁷

Unsurprisingly, this concern for indigent litigants—and particularly for indigent criminal defendants—also surfaced in the rulemaking process, and I will argue that it underpinned a number of facets of the new Appellate Rules. To set the stage, I first review, in Part I.A.1, the landscape of habeas and in forma pauperis appeals at the time that the rules were drafted.

10. See *Draper v. Washington*, 372 U.S. 487, 498–500 (1963); *Lane v. Brown*, 372 U.S. 477, 480–81 (1963). Both *Draper* and *Lane* built on precedents from the preceding decade. See *Draper*, 372 U.S. at 488–89 (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956), and *Eskridge v. Wash. State Bd. of Prison Terms & Paroles*, 357 U.S. 214, 216 (1958)); *Lane*, 372 U.S. at 483–84 (same); see also Solomon, *supra* note 9, at 249 (discussing *Draper* and *Lane*).

11. See *Douglas v. California*, 372 U.S. 353, 355, 357–58 (1963); see also Solomon, *supra* note 9, at 249 (discussing *Douglas*).

12. ATTORNEY GEN.'S COMM. ON POVERTY & THE ADMIN. OF FED. CRIMINAL JUSTICE, REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 1 (1963) [hereinafter ALLEN COMMITTEE REPORT].

13. See Geoffrey T. Cheshire, *A History of the Criminal Justice Act of 1964*, FED. LAW., Mar. 2013, at 46, 52, https://cjastudy.fd.org/sites/default/files/public-resources/History%20of%20the%20Criminal%20Justice%20Act%20of%201964_0.pdf (noting that the Committee "was dubbed the 'Allen Committee' after its chair, University of Michigan Law School Professor Francis A. Allen").

14. ALLEN COMMITTEE REPORT, *supra* note 12, at 4.

15. See Solomon, *supra* note 9, at 249–50.

16. See Criminal Justice Act of 1964, Pub. L. No. 88-455, § 2, 78 Stat. 552, 552–54.

17. Solomon, *supra* note 9, at 250.

1. Habeas and In Forma Pauperis Appeals in the Late 1960s

At the time of the adoption of the Appellate Rules, there were two overlapping classes of litigants whose right to take an “appeal as of right” might be thought to be qualified rather than absolute. State prisoners were required to obtain a “certificate of probable cause” in order to appeal a judgment denying habeas relief.¹⁸ As the Supreme Court would later state, “Congress established the requirement that a prisoner obtain a certificate of probable cause to appeal in order to prevent frivolous appeals from delaying the States’ ability to impose sentences, including death sentences.”¹⁹ And litigants too poor to pay the filing fee could appeal only if they qualified to proceed in forma pauperis (i.e., as a poor person).²⁰ By the time of the drafting of the Appellate Rules, the judicial debate over the in forma pauperis statute highlighted the question whether and how appeals by poor persons should be pre-screened for possible merit. In *Coppedge v. United States*, the Supreme Court cautioned against imposing a screening procedure that would subject criminal appeals by poor persons to a standard different than that applied to appeals by other litigants.²¹ And in *Nowakowski v. Maroney*, the Court ruled that the district court’s provision of a certificate of probable cause qualified a habeas petitioner to take the appeal in forma pauperis.²²

The statute governing appeals in forma pauperis appeared to give discretion to the courts concerning whether to permit the appeal to proceed in forma pauperis, and it seemed to make available to the courts a pre-screening mechanism for sifting out unfounded appeals by poor litigants. The relevant statute—28 U.S.C. § 1915(a)—empowered a court to authorize an appeal “without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security

18. As of 1968—and until 1996—the relevant portion of 28 U.S.C. § 2253 stated:

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

28 U.S.C. § 2253 (1994), amended by Pub. L. No. 104-132, § 102, 110 Stat. 1214, 1217–18 (1996). No such requirement applied, at the time, to appeals by federal prisoners seeking relief under 28 U.S.C. § 2255. *Id.* § 2255 (later amended in 1996 and 2008).

19. *Barefoot v. Estelle*, 463 U.S. 880, 892 (1983).

20. See *infra* text accompanying notes 23–27.

21. See *infra* text accompanying notes 37–38 (discussing *Coppedge v. United States*, 369 U.S. 438 (1962)).

22. See *infra* text accompanying notes 47–49 (discussing *Nowakowski v. Maroney*, 386 U.S. 542 (1967)).

therefor.”²³ The affidavit was to “state the nature of the . . . appeal and [the] affiant’s belief that he [wa]s entitled to redress.”²⁴ However, the statute provided that poor person status on appeal was unavailable “if the trial court certifie[d] in writing that [the appeal wa]s not taken in good faith.”²⁵ As the Allen Committee observed, “[t]he concept of ‘good faith’ in this context is not self-defining; and the interpretation of the statute has proved to be a continuing source of difficulty.”²⁶ As of the mid-1950s, the Committee reported, “the statutory language was widely understood as conferring on the lower federal courts authority to deny leave to appeal whenever the issues presented were thought not to afford a substantial possibility of reversal”²⁷

In a series of late-1950s criminal cases, the Supreme Court altered that understanding.²⁸ In *Ellis v. United States*, the Court held that

[t]he good-faith test must not be converted into a requirement of a preliminary showing of any particular degree of merit. Unless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant . . . , the request of an indigent for leave to appeal *in forma pauperis* must be allowed.²⁹

Soon thereafter, the Court built on *Ellis* in *Coppedge*, which addressed both the substantive and procedural aspects of § 1915’s framework.³⁰ The *Coppedge* Court explicitly focused its analysis on the application of § 1915(a) in direct criminal appeals.³¹ The statutory and rule framework, the Court stressed, provided the criminal defendant with an appeal as of right,³² and the appeal concerned the weighty question of the defendant’s liberty.³³ In this context, the Court ruled, “good faith” entailed an objective test that asked whether the appeal sought “review of any issue not frivolous.”³⁴ The district court’s ruling on this question was “entitled to weight,” but was not dispositive.³⁵ The would-be appellant who had received a not-in-good-faith

23. 28 U.S.C. § 1915(a) (1994) (last amended in 1996).

24. *Id.*

25. *Id.*

26. ALLEN COMMITTEE REPORT, *supra* note 12, at 97.

27. *Id.*

28. *See id.*

29. *Ellis v. United States*, 356 U.S. 674, 674–75 (1958) (per curiam).

30. *See Coppedge v. United States*, 369 U.S. 438 (1962).

31. *See id.* at 441, 444, 447.

32. *See id.* at 441.

33. *See id.* at 448–49.

34. *Id.* at 445.

35. *Id.* at 446.

ruling from the district court could seek in forma pauperis status directly from the court of appeals, and the court of appeals was to grant that status— notwithstanding the district court’s contrary certification—if the defendant presented it with “any issue” that was “not clearly frivolous.”³⁶

The *Coppedge* Court explained its ruling in terms that strongly cautioned against applying summary procedures to appeals in forma pauperis that would not apply to paid appeals. Anti-discrimination principles, the Court indicated, created a “duty to assure to the greatest degree possible, within the statutory framework for appeals created by Congress, equal treatment for every litigant before the bar.”³⁷ Equal treatment required that summary process be used for rich and poor alike—or for neither:

If it were the practice of a Court of Appeals to screen the paid appeals on its docket for frivolity, without hearing oral argument, reviewing a record of the trial proceedings or considering full briefs, paupers could, of course, be bound by the same rules. But, if the practice of the Court of Appeals is to defer rulings on motions to dismiss paid appeals until the court has had the benefit of hearing argument and considering briefs and an adequate record, we hold it must no less accord the poor person the same procedural rights.³⁸

The *Coppedge* Court’s ruling left untouched the procedural framework set by the statute, but strove to interpret the statute’s substantive test in a way that would ensure equal treatment of poor and non-poor litigants.

Two concurring Justices would have gone further to eliminate any distinctive treatment of in forma pauperis appeals. Justices Stewart and Brennan concurred in the majority opinion but wrote separately to suggest to the courts of appeals that in forma pauperis screening was not worthwhile in criminal appeals.³⁹ The concurring Justices recognized that paying litigants were subject to a “built-in pecuniary brake upon frivolous appeals” and that this brake by definition did not affect indigent appellants.⁴⁰ To stand in for that pecuniary brake, the statute allowed for early screening of indigent appeals—but did not, in their view, set a different merits standard for the dismissal of such an appeal: § 1915, they explained, “provides at most a device for advance screening of appeals which, if paid, would upon motion

36. *See id.* The Court also ruled that where “the face of the . . . application” did not allow assessment of the application’s merit, the court of appeals must appoint counsel and ensure access to an adequate record. *See id.*

37. *Id.* at 446–47.

38. *Id.* at 448.

39. *Id.* at 458 (Stewart, J., concurring).

40. *Id.* at 455.

be dismissed before argument as frivolous.”⁴¹ Arguing that such advance screening would raise due process concerns if it were too stringent, and would often result in duplication of effort, Justices Stewart and Brennan suggested that the courts of appeals might be well advised to dispense with such screening altogether, at least in criminal appeals: “[E]ach Court of Appeals might well consider whether its task could not be more expeditiously and responsibly performed by simply granting applications to appeal from criminal convictions in forma pauperis as a matter of course, and appointing counsel to brief and argue each case on the merits.”⁴²

By contrast, the two dissenting Justices in *Coppedge* castigated the majority for ignoring the statute’s mandate to treat such appeals more stringently. “[F]or all practical purposes,” they complained, the Court had “repeal[ed] § 1915(a)] by placing the burden on the Government to sustain [a district court certification of lack of good faith] rather than on the indigent to overturn it.”⁴³ Any inequality produced by in forma pauperis screening was intended by Congress,⁴⁴ they argued, and such inequality raised no constitutional problem.⁴⁵

Although the Court’s ruling in *Coppedge* articulated the process and standard for direct criminal appeals in forma pauperis, the Court’s reasoning left open the possibility that a different test might apply in civil cases.⁴⁶ And

41. *Id.*

42. *Id.* at 458. The concurring Justices noted that

[t]he Government would then be free in any case to file before argument a motion to dismiss the appeal as frivolous, as every appellee is always free to do. In the absence of such a motion an appeal which after argument appeared clearly without merit could be expeditiously disposed of by summary affirmance, in the secure knowledge that all the issues had been fully canvassed.

Id.

43. *Id.* at 458–59 (Clark, J., dissenting).

44. *Id.* at 459 (“In the case of paid appeals Congress has not provided for a determination by the trial court of whether the issues warrant further review, and to treat nonpaid appeals like paid appeals is to ignore such a provision in the statute governing indigent appeals.”).

45. *See id.* at 460. As the dissenters saw it, “disparity in the burden of showing frivolity” did not “den[y] equal justice as between paid and nonpaid appeals.” *Id.* Although “Congress has set up a special procedure which subjects every nonpaid appeal to an examination to determine if further briefing and oral argument are necessary,” while “[s]uch an examination in the case of paid appeals is left to the initiative of the court or the Government,” the difference did not “give rise to a discrimination of constitutional proportions.” *Id.*

46. The *Coppedge* Court repeatedly alluded to the fact that the case involved a direct criminal appeal. *See id.* at 441, 444, 447. The Court at one point noted legislative history suggesting that the district judge’s ruling on good faith might warrant deference. A member of the Senate Judiciary Committee, discussing the “good faith” provision in 1910, had noted the trial

Coppedge—involving as it did a direct criminal appeal by a federal defendant—did not address how § 1915’s “good faith” test fit with the habeas statute’s requirement of a certificate of probable cause. The Court answered the latter question in its 1967 decision in *Nowakowski v. Maroney*.⁴⁷ Nowakowski, a state prisoner, had obtained from the district court a certificate of probable cause to appeal the denial of his federal habeas petition, but the court of appeals had denied him leave to appeal in forma pauperis.⁴⁸ In a brief per curiam opinion, the Court vacated and remanded, holding that “when a district judge grants [a certificate of probable cause], the court of appeals must grant an appeal *in forma pauperis* (assuming the requisite showing of poverty), and proceed to a disposition of the appeal in accord with its ordinary procedure.”⁴⁹

The 1960s, then, saw active debate, among federal judges, as to the stringency with which habeas and in forma pauperis appeals should be pre-screened. The Warren Court’s decisions could well be read to express a strong concern for equal treatment of poor litigants, especially in the criminal context. And the Appellate Rules Committee, in drafting the new Appellate Rules, was well aware both of those decisions⁵⁰ and of the adoption of the 1964 Criminal Justice Act.⁵¹ As I argue below, the Appellate Rules Committee’s work product reflected similar concern for the appellate rights of indigent litigants.

2. New Rules for Habeas and In Forma Pauperis Appeals

Even apart from the backdrop of the Warren Court decisions, the adoption of Title VI of the original Appellate Rules would have been notable. At the

judge’s ability “to judge whether it is a case proceeding captiously, or viciously, or with prejudice, or from any other improper motive, or whether the litigant is proceeding in good faith.” *Id.* at 445 n.8. But, the Court asserted, this Senator “was discussing primarily civil suits.” *Id.*

47. 386 U.S. 542, 542–43 (1967) (per curiam).

48. *See id.*

49. *Id.* at 543.

50. *See, e.g.*, ADVISORY COMM. ON APPELLATE RULES, MINUTES OF THE MAY 1963 MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES 23 (1963) [hereinafter MAY 1963 MINUTES], http://www.uscourts.gov/sites/default/files/fr_import/AP05-1963-min.pdf (noting a Committee member’s suggestion concerning a way that the draft rule on in forma pauperis appeals could “meet the points raised in *Coppedge* and other cases”).

51. *See, e.g.*, ADVISORY COMM. ON APPELLATE RULES, MINUTES OF THE NOVEMBER 1964 MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES 14 (1964) [hereinafter NOVEMBER 1964 MINUTES], http://www.uscourts.gov/sites/default/files/fr_import/AP11-1964-min.pdf (noting the Committee Chair’s suggestion “that the Committee should re-examine [proposed Rule 24] in the light of the new Criminal Justice Act and plans formulated under it”).

time, the sets of national rules did not do much to address procedure in habeas or § 2255 cases,⁵² and neither the Civil nor the Criminal Rules contained much in the way of discussion of requests to proceed in forma pauperis.⁵³ Beyond the adoption of a special title devoted to the topic of habeas and in forma pauperis appeals, the Appellate Rules also made a number of innovations in procedures for habeas cases and cases involving indigent litigants.

In the late 1960s, procedural uncertainty combined with docket trends to make clear the need for the adoption of rules governing the procedures for postconviction review. Although habeas and § 2255 proceedings, then as now, were viewed as civil in nature,⁵⁴ Civil Rule 81 significantly, though somewhat indeterminately, limited the application of the Civil Rules in postconviction review proceedings.⁵⁵ In 1969, the Supreme Court—while authorizing the judicial development of procedures to govern discovery practice in habeas cases—expressed its “view that the rule-making machinery should be invoked to formulate rules of practice with respect to federal habeas

52. See *infra* notes 54–59 and accompanying text.

53. See *infra* notes 65–70 and accompanying text.

54. See, e.g., U.S. DIST. CT. R. § 2254 CASES 11(b) (“Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules.”); U.S. DIST. CT. R. § 2255 CASES 11(b) (“Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules.”); *Bowles v. Russell*, 551 U.S. 205, 208–09 (2007) (applying Appellate Rule 4(a) and 28 U.S.C. § 2107 to an appeal by a habeas petitioner); *Fay v. Noia*, 372 U.S. 391, 423–24 (1963) (noting “the traditional characterization of the writ of habeas corpus as an original . . . civil remedy for the enforcement of the right to personal liberty, rather than as a stage of the state criminal proceedings or as an appeal therefrom” (citation omitted)), *limited on other grounds by* *Wainwright v. Sykes*, 433 U.S. 72, 87–88 (1977), *and overruled on other grounds by* *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *United States v. Hayman*, 342 U.S. 205, 209 n.4 (1952) (“Appeals from orders denying motions under Section 2255 are governed by the civil rules applicable to appeals from final judgments in habeas corpus actions.”); see also *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1155 & n.3 (1970) [hereinafter *Habeas Developments*].

55. Prior to its amendment in 1968, Rule 81(a)(2) provided:

In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in the statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: . . . habeas corpus

FED. R. CIV. P. 81(a)(2) (1966) (Rule 81 has been amended multiple times since then most recently in 2009). The Rule further provided that the statutory requirements “relating to certification of probable cause in certain appeals in habeas corpus cases remain in force.” *Id.* See generally *Habeas Developments*, *supra* note 54, at 1155–58 (discussing the interpretation of Civil Rule 81(a)(2)).

corpus and § 2255 proceedings, on a comprehensive basis.”⁵⁶ The rulemakers took up this assignment, drafting sets of rules governing § 2254 and § 2255 proceedings. The Supreme Court promulgated those rules in 1976, and Congress—after passing legislation to temporarily suspend them from taking effect—enacted them into law (with some modifications) in 1977.⁵⁷

Thus, when the Appellate Rules were being drafted, there were no sets of national rules that systematically treated habeas and § 2255 proceedings. The Civil Rules that governed appeal procedure did expressly apply to habeas and § 2255 proceedings,⁵⁸ but those rules included no distinctive portions tailored for such proceedings, other than a proviso ensuring that the rules did not supersede the statutory requirement for a certificate of probable cause.⁵⁹

The new Appellate Rules treated habeas appeals (though not § 2255 appeals) in much greater detail. Rule 22(a) specified where to file an original habeas application (typically in the district court) and how to seek court of appeals review (preferably by appeal). Rule 22(b) addressed in some detail the procedure for seeking the statutorily-required certificate of probable cause, and stated that only the petitioner, and not the government, needed such a certificate in order to appeal.⁶⁰ Rule 23—which was modeled very closely on a U.S. Supreme Court Rule⁶¹—addressed the custody of prisoners

56. *Harris v. Nelson*, 394 U.S. 286, 300 n.7 (1969). In *Harris*, the majority held “that Rule 33 of the Federal Rules of Civil Procedure is not applicable to habeas corpus proceedings and that 28 U.S.C. § 2246 does not authorize interrogatories except in limited circumstances,” but it also held “that, in appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a prima facie case for relief, may use or authorize the use of suitable discovery procedures, including interrogatories.” *Id.* at 290.

57. See Charles Alan Wright, *Procedure for Habeas Corpus*, 77 F.R.D. 227, 227–28 (1978).

58. Prior to the 1968 amendments, Civil Rule 81(a)(2) provided in part: “In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in the statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: . . . habeas corpus . . .” FED. R. CIV. P. 81(a)(2) (1966) (amended 2009).

59. See *supra* note 55 (quoting FED. R. CIV. P. 81(a)(2) (1966) (later amended in 2009)).

60. This provision was added at the suggestion of Professor Charles Alan Wright (who was then a member of the Standing Committee on Rules of Practice and Procedure). See ADVISORY COMM. ON APPELLATE RULES, MINUTES OF THE JULY MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES 2 (1966), http://www.uscourts.gov/sites/default/files/fr_import/AP07-1966-min.pdf. The 1967 Committee Note to Rule 22(b) acknowledged that the statutory text seemed to require the certificate no matter which side sought to appeal, but the Note relied on legislative history and caselaw in four circuits to support the Rule’s specification that the government side need not obtain a certificate in order to appeal. FED. R. APP. P. 22(b) advisory committee’s note to 1967 amendment.

61. The 1967 Committee Note to Rule 23 stated simply: “The rule is the same as Supreme Court Rule 49, as amended on June 12, 1967, effective October 2, 1967.” FED. R. APP. P. 23 advisory committee’s note to 1967 amendment; see also MAY 1963

during appellate review of habeas proceedings. It imposed controls over the transfer of a prisoner during the pendency of such a proceeding,⁶² and it set default rules governing release or custody of a prisoner pending review of lower-court orders granting⁶³ or denying⁶⁴ release.

As for petitions to proceed in forma pauperis, the late-1960s national rules likewise had relatively little to say. As amended in 1966, Civil Rule 73(g) provided that an appeal would be docketed upon the court of appeals' clerk's receipt "of the record on appeal and, unless the appellant is authorized to proceed without prepayment of fees, of the docket fee fixed by the Judicial Conference of the United States."⁶⁵ Prior to the 1966 amendments, Civil Rule 75(m) provided that "[u]pon leave to proceed in forma pauperis, the district court may by order specify some different and more economical manner by which the record on appeal may be prepared and settled, to the end that the appellant may be enabled to present his case to the appellate court."⁶⁶ As for the Criminal Rules, Criminal Rule 17 required court issuance of subpoenas to witnesses whose testimony was necessary and whose fees the defendant could not pay.⁶⁷ Criminal Rule 32(a)(2) required the trial court, "[a]fter

MINUTES, *supra* note 50, at 25 ("Professor Ward stated that this was the Supreme Court Rule on habeas corpus which was promulgated by the Supreme Court and is binding on the courts of appeals and the district courts by its own force. The Committee agreed that this rule should be included in the Appellate Rules . . .").

62. See FED. R. APP. P. 23(a) (1967). Rule 23 has since been amended twice, most recently in 1998.

63. See *id.* 23(c).

64. See *id.* 23(b).

65. FED. R. CIV. P. 73(g) (1966) (abrogated 1967).

66. *Id.* 75(m) (1948) (abrogated 1966). This provision was deleted in 1966 because the 1966 amendments to Civil Rule 75 made "the former designation-copy method of preparing the record on appeal . . . obsolete." *Id.* advisory committee's notes to 1966 amendment.

67. This provision's evolution showed the influence of the Allen Committee. As of the early 1960s, Rule 17(b) applied to "indigent" defendants and required the supporting affidavit to be shared with the government. See FED. R. CRIM. P. 17(b) (1946) (last amended in 2002). Amendments in 1966 changed the requirement from indigence to a showing "that the defendant is financially unable to pay the fees of the witness," and provided that the application would be *ex parte*. See *id.* (1966). The 1966 Committee Note explained:

Criticism has been directed at the requirement that an indigent defendant disclose in advance the theory of his defense in order to obtain the issuance of a subpoena at government expense while the government and defendants able to pay may have subpoenas issued in blank without any disclosure. See Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice (1963) p. 27. The Attorney General's Committee also urged that the standard of financial inability to pay be substituted for that of indigency. *Id.* at 40-41.

Id. advisory committee's note to 1966 amendment.

imposing sentence in a case which has gone to trial on a plea of not guilty, [to] advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal *in forma pauperis*.”⁶⁸ Interestingly, the requirement that the court mention the right to seek leave to appeal *in forma pauperis* was added in 1966,⁶⁹ and there is reason to think that it was suggested to the Criminal Rules Committee by the Appellate Rules Committee.⁷⁰

68. *Id.* 32(a)(2) (1966). Criminal Rule 32 has been amended multiple times since then, most recently in 2011.

69. The 1966 Committee Note explained:

The court is required to advise the defendant of his right to appeal in all cases which have gone to trial after plea of not guilty because situations arise in which a defendant represented by counsel at the trial is not adequately advised by such counsel of his right to appeal. . . . Because indigent defendants are most likely to be without effective assistance of counsel at this point in the proceedings, it is also provided that defendants be notified of the right of a person without funds to apply for leave to appeal *in forma pauperis*.

Id. advisory committee’s note to 1966 amendment. Prior to 1966, the provision requiring trial-court advice to the convicted defendant was located in Criminal Rule 37(a)(2), which stated in part that “[w]hen a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal” *Id.* 37(a)(2) (1948) (repealed 1968). It appears likely that the Appellate Rules Committee provided input to the Criminal Rules Committee in connection with the formulation of the 1966 amendment. *See* MAY 1963 MINUTES, *supra* note 50, at 23 (noting the Appellate Rules Committee’s approval of a provision concerning *in forma pauperis* criminal appeals that “will be included in the Criminal Rules for the District Courts, and may also be included in the Appellate Rules”).

70. The minutes of an August 1963 Appellate Rules Committee meeting state in part:

The last two sentences of [what then was proposed Appellate Rule] 4(d) were made a separate paragraph of the subdivision, and the paragraph will read as follows:

“When a court after trial imposes sentence upon a defendant, the judge shall advise the defendant of his right to appeal and of the procedure for seeking leave to appeal *in forma pauperis* if he is without funds, and if he so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant. A judgment or order is entered within the meaning of this subdivision when it is noted in the criminal docket.”

The Committee agreed to include these two sentences in the Appellate Rules, and to recommend that the Criminal Rules Committee include the identical provisions in their rules on this subject.

Appellate Rule 24 included significant detail on applications to proceed in forma pauperis in the courts of appeals. In articulating the process for seeking leave to appeal in forma pauperis from a district court,⁷¹ new Rule 24(a) responded to a critique that the Allen Committee had leveled at prior practice. If the district court denied leave to appeal in forma pauperis, the Allen Committee had reported, the statute directed the district court “to certify in writing that the appeal is not taken in good faith,” but did not require the district court to explain that certification.⁷² Noting that “at least one circuit requires a written statement of reasons whenever the district judge gives a ‘bad faith’ certification, and the same practice is followed by some district judges throughout the country,” the Allen Committee urged “that so long as the screening procedures are retained, the memorandum requirement should be made general.”⁷³ Doing so, the Allen Committee had argued, would promote “careful consideration of these decisions in the district courts and would provide a sounder basis for subsequent decisions in the courts of appeals.”⁷⁴

Thus, it seems possible that new Rule 24(a)’s directive that “[i]f the motion is denied, the district court shall state in writing the reasons for the denial,” might have owed its origin to the Allen Committee’s recommendations. The Committee Note to Rule 24(a), however, did not cite the Allen Committee Report; instead, it merely noted that the new written-reason requirement had “no counterpart in present circuit rules, but it has been imposed by decision in at least two circuits.”⁷⁵ And, indeed, the Appellate Rules Committee’s discussion of this topic, as reflected in the minutes of a meeting that occurred a few months after the issuance of the Allen Committee Report, did not mention the Allen Committee; Appellate Rules Committee members’ stated rationale for the requirement was that requiring the district

71. Initially, the Appellate Rules Committee considered promulgating a separate rule specifically for criminal in forma pauperis appeals. Late in the process, the Committee decided instead to treat both civil and criminal appeals in a single rule. See ADVISORY COMM. ON APPELLATE RULES, MINUTES OF THE MAY MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES 19 (1965) [hereinafter MAY 1965 MINUTES] (“A suggestion was made by the Reporter that Rule 24 [concerning ‘Appeals in Forma Pauperis in Criminal Cases’] be stricken and that Rule 23 cover the entire subject of pauperis appeals. The Committee approved the suggestion as the most practical solution.”).

72. ALLEN COMMITTEE REPORT, *supra* note 12, at 100.

73. *Id.*; see also *id.* at 120 n.48 (citing United States *ex rel.* Breedlove v. Dowd, 269 F.2d 693 (7th Cir. 1959)).

74. *Id.* at 100.

75. FED. R. APP. P. 24(a) advisory committee’s note to 1967 adoption (citing Ragan v. Cox, 305 F.2d 58 (10th Cir. 1962), and *Breedlove*, 269 F.2d at 693). One of these cases—*Breedlove*—had also been cited by the Allen Committee Report. See *supra* note 73.

court to provide its reasons would help the court of appeals when it considered whether to grant in forma pauperis status.⁷⁶

The second paragraph of Rule 24(a) adopted a presumption that a would-be appellant who had been granted in forma pauperis status in the district court could proceed in forma pauperis on appeal, unless the district court ruled otherwise (and stated its reasons in writing).⁷⁷ This provision appears to have arisen from suggestions by Professor Charles Alan Wright and Judge Richard T. Rives. Concerning a comment submitted by Professor Wright, the Committee's November 1964 minutes stated:

It was suggested that a separate motion for leave to appeal in forma pauperis and a new supporting affidavit is unnecessary and that the procedure for the further screening of appeals is cumbersome. On motion of Judge Rives, the Committee voted to follow the practice in the Sixth Circuit which authorizes a party to proceed on appeal in forma pauperis without additional leave, if he has been initially granted such leave "in a cause in the district court[.]"⁷⁸

Rule 24(b) addressed applications to proceed in forma pauperis when petitioning in the court of appeals for review of agency decisions. Rule 24(c) authorized in forma pauperis appellants to file typewritten papers and to seek permission to use the original record (so that they would not have to reproduce any portions of it).⁷⁹ And Form 4 in the Appendix of Forms provided a brief (roughly five-question) affidavit that illustrated how an applicant seeking in forma pauperis status should attest to "his inability to

76. See MAY 1963 MINUTES, *supra* note 50, at 22–23 ("Should the trial court be required to state the reasons for denying the application for leave to appeal *in forma pauperis*? Several of the judges expressed approval of such a requirement as being helpful to the court of appeals in acting on the application.").

77. The paragraph provided:

[A] party who has been permitted to proceed in an action in the district court *in forma pauperis*, or who has been permitted to proceed there as one who is financially unable to obtain an adequate defense in a criminal case, may proceed on appeal *in forma pauperis* without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.

FED. R. APP. P. 24(a) (1968) (last amended in 2002).

78. NOVEMBER 1964 MINUTES, *supra* note 51, at 14. For further details concerning the drafting of the resulting provision, see MAY 1965 MINUTES, *supra* note 71, at 18–19.

79. FED. R. APP. P. 32(a) (1968) (last amended 2016) (permitting in forma pauperis litigants—but presumptively not others—to submit "[c]arbon copies of briefs and appendices").

pay fees and costs or to give security therefor, his belief that he is entitled to redress, and a statement of the issues which he intends to present on appeal.”⁸⁰

3. The Treatment of “Appeals as of Right”

The prevailing mood of concern that prisoners and indigent litigants be accorded access to courts might help to explain a puzzle concerning the Appellate Rules’ classification of habeas and in forma pauperis appeals. The original Appellate Rules, like the current rules, treated “appeals as of right” in Rules 3 (“Appeal as of Right—How Taken”) and 4 (“Appeal as of Right—When Taken”). The rulemakers plainly intended those provisions to encompass habeas appeals and appeals in forma pauperis, even though—especially in the case of habeas appeals—one might have argued that calling the appeal “as of right” was not completely accurate. In drafting Appellate Rules 3 and 4, the rulemakers also stressed the importance of applying those rules flexibly in the cases of indigents and inmates.

The drafters of the Appellate Rules intended that habeas appeals, like § 2255 appeals, were to be treated under Rule 4 as appeals of right. Rule 3(d), in fact, referred specifically to the treatment of the notice of appeal “in criminal cases, habeas corpus proceedings, or proceedings under 28 U.S.C. § 2255.”⁸¹ Though Rule 5 now generally governs permissive appeals,⁸² the original Rule 5 was much narrower, and made clear that it was designed specifically for interlocutory appeals under 28 U.S.C. § 1292(b).⁸³

80. *Id.* 24(a) (1968) (last amended in 2002).

81. *Id.* 3(d) (1968) (last amended in 1998), *in* 43 F.R.D. 61, 69 (1968).

82. Rule 5’s current breadth stems from amendments in 1998. The 1998 Committee Note refers to the 1992 enactment of 28 U.S.C. § 1292(e), which authorized the promulgation of rules providing for interlocutory appeals. The Committee Note explains that Rule 5’s amendment was “prompted by the possibility of new rules authorizing additional interlocutory appeals. Rather than add a separate rule governing each such appeal, the Committee believes it is preferable to amend Rule 5 so that it will govern all such appeals.” *Id.* 5 advisory committee’s note to 1998 amendment. And the Committee Note listed the then-extant avenues of appeal to which the Committee expected the amended Rule to apply:

This new Rule 5 is intended to govern all discretionary appeals from district-court orders, judgments, or decrees. At this time that includes interlocutory appeals under 28 U.S.C. § 1292(b), (c)(1), and (d)(1) & (2). If additional interlocutory appeals are authorized under § 1292(e), the new Rule is intended to govern them if the appeals are discretionary.

Id.

83. The text of original Rule 5 specified its application to “[a]n appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b).” *Id.* 5(a) (1968) (last amended

Why might the drafters of the original rules have classed habeas appeals with appeals as of right? One possible answer is that they simply carried forward the then-extant practice, which used a notice of appeal, not a petition for permission to appeal, as the vehicle for commencing an appeal from a judgment in a habeas case.⁸⁴ Or perhaps the members of the Appellate Rules Committee did not see the certificate-of-probable-cause requirement as a significant barrier to most habeas appeals. In remarks delivered a few weeks before the Supreme Court's promulgation of the Appellate Rules,⁸⁵ then-Judge Harry Blackmun observed that there was "[n]o uniformly accepted definition of probable cause"; he suggested that the closest approximation might be that the statute "demands something of possible substance before the applicant is legally entitled to his certificate."⁸⁶ Though Judge Blackmun's formulation seems to have been less stringent than those applied by some of his colleagues around the country, it would be more than a decade and a half before the Supreme Court endorsed "the weight of opinion in the Courts of Appeals that a certificate of probable cause requires petitioner to make a 'substantial showing of the denial of [a] federal right.'"⁸⁷

The Committee Note to the original Rule 3 stressed the "mandatory and jurisdictional" nature of the deadline for taking an appeal,⁸⁸ but the Note also stressed that filings by pro se inmates should be treated with appropriate flexibility. To illustrate the proposition that "decisions under the present rules which dispense with literal compliance in cases in which it cannot fairly be

in 1998). And the Rule's original title was "Appeals by Permission Under 28 U.S.C. § 1292(b)." *Id.* Rule 5 has been amended multiple times since then, most recently in 2016.

84. For a reference to the filing of notices of appeal in habeas cases, see, for example, AUGUST 1963 MINUTES, *supra* note 70, at 2 ("Judge Rives suggested that [draft Appellate Rule] 3(a) include language to cover the situation where the notice of appeal is presented to a district judge or to a single judge of the court of appeals, mainly in criminal and habeas corpus appeals.").

85. The remarks were delivered at the Eighth Circuit Judicial Conference in September 1967. See Harry A. Blackmun, Judge, Eighth Circuit Court of Appeals, Allowance of in Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases, Remarks at the Eighth Circuit Judicial Conference (Sept. 18, 1967), in 43 F.R.D. 343, 343 n.1 (1968). The Supreme Court promulgated the Appellate Rules on December 4, 1967. See 43 F.R.D. 61, 67 (U.S. 1968).

86. Blackmun, *supra* note 85, at 360.

87. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

88. More recently, the Supreme Court has held that statutory appeal deadlines are jurisdictional. See *Bowles v. Russell*, 551 U.S. 205, 213 (2007). In the wake of *Bowles*, it is clear that the deadlines for taking a civil appeal—which are set by 28 U.S.C. § 2107 as well as by Appellate Rule 4(a)—are jurisdictional. See generally 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3950.1 (4th ed. 2008), Westlaw (database updated April 2017). By contrast, a federal criminal defendant's direct-appeal deadline is set by Appellate Rule 4(b) but not by statute, and the courts of appeals accordingly have held (in light of *Bowles's* reasoning) that that deadline is mandatory but not jurisdictional. See generally *id.* § 3950.8 & n.63.

exacted should control interpretation of these rules,” the Committee Note first cited *Fallen v. United States*⁸⁹ for its holding that a “notice of appeal by a prisoner, in the form of a letter delivered, well within the time fixed for appeal, to prison authorities for mailing to the clerk of the district court [was] timely filed notwithstanding that it was received by the clerk after expiration of the time for appeal,” on the ground that “the appellant ‘did all he could’ to effect timely filing.”⁹⁰ After citing three other decisions—two of which involved notices of appeal misdirected by pro se inmates⁹¹—the Note observed that the Supreme Court’s opinion in *Coppedge v. United States* had cited “[e]arlier cases evidencing ‘a liberal view of papers filed by indigent and incarcerated defendants.’”⁹²

The inclusion of these citations in the Committee Note reflected a deliberate choice by the Committee. Moreover, the Committee’s discussion of the Note indicated an expectation that the principles reflected in the Note would stand in for more explicit Rule text directing liberal treatment of attempts to file a notice of appeal. At the May 1965 meeting, during discussion of proposed Appellate Rule 3, Professor Ward (the Committee’s Reporter) “stated the Committee had tried to include in the proposed rule provisions which would persuade the courts of appeals to treat the ‘good faith’ attempt to appeal as an appeal itself,” and he reminded the Committee that “at its last meeting [it] asked the Reporter to draw up a Note citing the recent liberal decisions in lieu of the present Note.”⁹³ Now that the Note discussed those decisions, the Reporter suggested, the Committee could

89. 378 U.S. 139 (1964).

90. FED. R. APP. P. 3 advisory committee’s note to original Appellate Rule 3 (1968) (quoting *Fallen*, 378 U.S. at 144), in 43 F.R.D. 61, 126 (1968).

91. The Committee Note cited *Richey v. Wilkins*, 335 F.2d 1 (2d Cir. 1964) for the proposition that a “notice filed in the court of appeals by a prisoner without assistance of counsel” sufficed, and *Riffle v. United States*, 299 F.2d 802 (5th Cir. 1962) for the proposition that a “letter of [a] prisoner to [a] judge of [the] court of appeals” sufficed. FED. R. APP. P. 3 advisory committee’s note to original Appellate Rule 3 (1968), in 43 F.R.D. 61, 126 (1968).

92. FED. R. APP. P. 3 advisory committee’s note to original Appellate Rule 3 (1968) (quoting *Coppedge v. United States*, 369 U.S. 438, 442 n.5 (1962)), in 43 F.R.D. 61, 126 (1968).

93. MAY 1965 MINUTES, *supra* note 71, at 2.

delete some of the draft Rule language in reliance on the Note discussion; and the Committee acceded to this proposal.⁹⁴

The drafters of the original Appellate Rules, then, were well aware of Warren Court precedent that stressed the value of equal access to appellate justice for indigent and incarcerated litigants; and I have noted here some evidence that such concern underpinned both the inmate- and indigent-specific provisions and more general provisions in the rules. But the rules did not yet spell out any special provisions addressing methods of filing by inmate litigants; that question would be addressed some two decades later, initially in a decision by the Rehnquist Court, and then in new provisions developed responsively by the rulemakers.

In the meantime, both the number of incarcerated people and the number of inmate lawsuits swelled. As Fred Cheesman and his coauthors have observed,

[T]he number of habeas corpus petitions filed nationally grew at a very slow rate from 1941 until 1962, as did the national state-prisoner population. Habeas corpus petitions then rose sharply (in response to U.S. Supreme Court decisions broadening the authority of federal courts to review state court convictions) until 1970.⁹⁵

94. The May 1965 Minutes state:

The Reporter presented a revised draft of a general Note, but stated that so much of the rule itself, particularly lines 11–20 of subdivision (a) in the Preliminary Draft, suggests generous handling. Therefore, the Reporter suggested that lines 11–20 be eliminated but that the rest of the rule remain as stated, referring the reader to the general Note which makes the same point and cites specific cases. The Committee, upon motion of Judge Barnes, approved deletion of lines 11–20, and approval of the general Note.

Id. It appears—based on a comparison of the version of Appellate Rule 3(a) that was published for comment in March of 1964 and the version of Appellate Rule 3(a) as adopted effective 1968—that the lines that were deleted read:

If a defendant in a criminal case or an applicant in a habeas corpus proceeding or in a proceeding under 28 U.S.C. § 2255 shall present the notice of appeal to the court of appeals or to a judge of the court of appeals or to a judge of the district court, the notice shall be transmitted to the clerk of the district court and shall be considered to have been filed in that court on the date on which it was thus presented.

Compare Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., *Preliminary Draft of Proposed Federal Rules of Appellate Procedure*, 34 F.R.D. 263, 272 (1964), with FED. R. APP. P. 3(a) (1968), in 43 F.R.D. 61, 68 (1968) (last amended in 1998).

95. Fred Cheesman, II et al., *A Tale of Two Laws: The U.S. Congress Confronts Habeas Corpus Petitions and Section 1983 Lawsuits*, 22 LAW & POL'Y 89, 92 (2000).

After a hiatus during the 1970s,⁹⁶ “the number of habeas corpus petitions filed by state prisoners . . . increased markedly” after 1981 “as state prison populations experienced nearly exponential growth.”⁹⁷ A similar story unfolded outside of habeas: “Between 1972 and 1996, the number of state prisoner § 1983 lawsuits filed in U.S. district courts increased by 1,153 percent . . . , while state prison population increased by 517 percent”⁹⁸

B. *The Prison Mailbox Rule*

The text of the original Appellate Rules, then, addressed inmate filings in Title VI—concerning habeas and in forma pauperis appeals—but did not articulate any special rules concerning the logistics of inmate filings. This is not because the Committee was unaware that inmate filings might call for special flexibility, but rather because the Committee relegated the discussion of that issue to the Committee Notes. As practice developed, however—and as a new textualism began to take hold among judges—the failure to address this issue in Rule text took on new salience.

In this section, I first discuss the principle that was implicit in the original Rule 3, and to which the Committee adverted in that Rule’s Committee Note. That principle—which I will term the implicit prison mailbox rule—grew out of a case, *Fallen v. United States*, that was quite closely intertwined with the work of the Appellate Rules Committee. As I discuss in Part I.B.1, the Supreme Court in *Fallen* held that an inmate’s delivery of a notice of appeal to prison authorities sufficed as filing for purposes of a direct criminal appeal; and the Appellate Rules Committee intended to build this holding into the understanding of the new Appellate Rule 3. In Part I.B.2, I turn to the debate over whether the rule in *Fallen* should be extended beyond the context of direct criminal appeals. In the 1988 decision in *Houston v. Lack*, a closely-divided Court did extend the *Fallen* rule—over a vigorous dissent that argued the change was a matter for rulemaking rather than judicial decision. *Houston*, in turn, prompted rulemaking action both by the Supreme Court itself (which adopted a new Supreme Court Rule)⁹⁹ and by the Appellate Rules Committee—which adopted new Appellate Rule 4(c) and amended Appellate Rule 25(a).¹⁰⁰ Those new rules gave textual sanction to the prison

96. *Id.* (stating that “the number of habeas corpus petitions leveled off or declined very slightly [during the 1970s] as state courts focused on improving their capacity to apply appropriate constitutional standards to criminal cases”).

97. *Id.*

98. *Id.* at 94.

99. *See infra* note 162 and accompanying text.

100. *See infra* note 167 and accompanying text.

mailbox rule. But both *Houston* itself and the new rules that followed in its wake left some questions unaddressed. In Part I.B.3, I note that—in particular—the rules and Supreme Court caselaw did not specifically address the potential problem of delay by prison authorities in *delivering* mail to an inmate. That problem, Part I.B.3 notes, can be mitigated in some circuits by circuit caselaw applying the prison mailbox rule to incoming as well as outgoing mail; in other circuits, the best tools for addressing the problem lie in rule provisions that apply generally to all filers, inmate and non-inmate alike.

1. *Fallen v. United States* and the Implicit Prison Mailbox Rule

I mentioned in a prior section that the Appellate Rules Committee had cited the *Fallen* case in the Committee Note to Rule 3, to illustrate the intended liberality with which that Rule should be construed.¹⁰¹ In fact, the connection between *Fallen* and the Appellate Rules is even closer than this citation indicates. Judge Richard T. Rives, a Fifth Circuit judge noted for his commitment to civil rights, dissented from the Fifth Circuit's dismissal of *Fallen*'s appeal—a dissent the thrust of which the Supreme Court went on to adopt. During the same time period, Judge Rives was serving as a member of the Appellate Rules Committee, and he participated actively in the formulation of the rules that I discussed, in the prior section, concerning appeals by inmate litigants.

By the time, in 1962, that he considered *Fallen*'s appeal, circumstances and principle had thrust Judge Rives into the center of the federal judiciary's implementation of civil rights in the South. In 1956, Judge Rives wrote for the panel majority on the three-judge district court that held segregated bus service in Montgomery, Alabama to be unconstitutional.¹⁰² Over the years that followed, Judge Rives and three of his Fifth Circuit colleagues became legendary for their decisions on desegregation.¹⁰³ For this work, Judge Rives and his wife faced obloquy and abuse—including threatening telephone calls;

101. See *supra* note 90 and accompanying text.

102. See *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala.), *aff'd*, 352 U.S. 903 (1956) (mem.), and *aff'd sub nom. Owen v. Browder*, 352 U.S. 903 (1956) (mem.).

103. For a chronicle of their work, see generally JACK BASS, UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE SUPREME COURT'S BROWN DECISION INTO A REVOLUTION FOR EQUALITY (1981). See Obituary, *Richard T. Rives, Judge on Court that Helped Integrate the South*, N.Y. TIMES (Oct. 30, 1982), <http://www.nytimes.com/1982/10/30/obituaries/richard-t-rives-judge-on-court-that-helped-integrate-the-south.html> (recalling Judge Rives as one “whose landmark legal decisions helped desegregate the South”).

ostracism in their church; and the defacing of their son's gravestone.¹⁰⁴ Undeterred, Judge Rives went on to author further pathmarking civil rights decisions—such as those in 1959 and 1962 implementing the prohibition on race discrimination in jury selection.¹⁰⁵ Thus, it seems fair to infer that, when Chief Justice Earl Warren (sometime in 1960 or 1961) appointed Judge Rives as a member of the original Appellate Rules Committee,¹⁰⁶ the Chief Justice knew that he was selecting a strong voice for civil rights and the rights of criminal defendants. Judge Rives' 1962 dissent in *Fallen* was in keeping with his prior work in this regard.

Floyd Charles Fallen, a wheelchair-bound paraplegic,¹⁰⁷ was confined under guard in a Florida hospital until the day after his sentencing, when he was transferred to a federal penitentiary in Georgia.¹⁰⁸ His court-appointed trial lawyer had declined to represent him in connection with his appeal.¹⁰⁹ Fallen later explained that, due to the transfer and his medical condition, he was unable to write his pro se notice of appeal until eight days after he was sentenced.¹¹⁰ The district court received Fallen's notice of appeal fourteen days after the entry of judgment—four days later than the deadline then set by Criminal Rule 37.¹¹¹ Stressing the jurisdictional nature of the deadline, the Fifth Circuit panel majority dismissed Fallen's appeal.¹¹² Judge Rives, in dissent, decried the dismissal as “a gross injustice, and one not consonant with the law.”¹¹³ Judge Rives would have found the appeal timely on two grounds. One was a concern—grounded in the Sixth Amendment—that the

104. See BASS, *supra* note 103, at 79–80.

105. See *United States ex rel. Seals v. Wiman*, 304 F.2d 53, 55 (5th Cir. 1962); *United States ex rel. Goldsby v. Harpole*, 263 F.2d 71, 82, 84 (5th Cir. 1959); see also *Obituary*, *supra* note 103 (quoting Professor Harvey Couch as stating that these “landmark decisions” were “[t]he thing that [Judge Rives] will be remembered for”).

106. The initial meeting of the Appellate Rules Committee, in 1960, included only a handful of Committee members, not including Judge Rives. See ADVISORY COMM. ON APPELLATE RULES, MINUTES OF THE JULY 1960 MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES 1 (1960), http://www.uscourts.gov/sites/default/files/fr_import/AP07-1960-min.pdf. By the second meeting, in November 1961, the roster of Committee members included Judge Rives. See ADVISORY COMM. ON APPELLATE RULES, MINUTES OF THE NOVEMBER 1961 MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES 1 (1961), http://www.uscourts.gov/sites/default/files/fr_import/AP11-1961-min.pdf.

107. See *Fallen v. United States*, 306 F.2d 697, 700 n.2, 703 (5th Cir. 1962), *rev'd*, 378 U.S. 139 (1964).

108. See *id.* at 699 n.1.

109. See *id.* at 698.

110. See *id.* at 700.

111. See *id.* at 701.

112. See *id.* at 702–03.

113. See *id.* at 703 (Rives, J., dissenting).

trial court had failed to advise Fallen of the deadline for filing his notice of appeal and that Fallen's trial counsel had failed to assist him in filing his notice of appeal.¹¹⁴ The other was the view that, under the circumstances, Fallen had taken reasonable steps to file his pro se notice of appeal within the deadline. The evidence, in Judge Rives' view, justified a finding that

on January 23, eight days after sentence, Fallen signed the two letters and turned them over to the prison authorities for mailing. At that time, clearly, he attempted to appeal. If the Government had not, on the day after he was sentenced, moved him from the place of trial [in Florida] to the federal penitentiary in Atlanta, his attempted appeal would have been filed within 10 days after entry of the judgment of conviction. Further, if the prison authorities had promptly mailed Fallen's letters, then, in due course of mail they would have reached the Clerk's Office before the expiration of the 10th day.¹¹⁵

In reversing, the Supreme Court adopted the thrust of Judge Rives' view concerning the efficacy of Fallen's filing. Writing for a unanimous Court, Chief Justice Warren began by emphasizing "that the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances."¹¹⁶ After reviewing in detail the challenges that Fallen faced in filing his notice of appeal, the Court concluded: "Since petitioner did all he could under the circumstances, we decline to read the Rules so rigidly as to bar a determination of his appeal on the merits."¹¹⁷

Four concurring Justices would have gone beyond the specific circumstance to articulate a general rule for pro se federal criminal appeals. They would have held "that for purposes of [Criminal] Rule 37(a)(2), a defendant incarcerated in a federal prison and acting without the aid of counsel files his notice of appeal in time, if, within the 10-day period provided by the Rule, he delivers such notice to the prison authorities for forwarding to the clerk of the District Court."¹¹⁸ To the concurring Justices, "in such a case the jailer is in effect the clerk of the District Court within the meaning of Rule 37."¹¹⁹

It seems likely that the Appellate Rules Committee closely followed the progress of the *Fallen* case. Less than a year after the Court adopted Judge

114. *See id.* at 705–06.

115. *See id.* at 704.

116. *Fallen v. United States*, 378 U.S. 139, 142 (1964).

117. *Id.* at 144.

118. *Id.* (Stewart, J., concurring).

119. *Id.*

Rives' approach in *Fallen*, the Committee gave the case prominent treatment in the Committee Note to Appellate Rule 3. New Appellate Rules 3 and 4, the Committee Note explained, carried forward (with some changes) the appeal provisions in the Civil and Criminal Rules, "and decisions under the present rules which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules."¹²⁰ First among the "[i]llustrative decisions" noted by the Committee was *Fallen*. To the Committee, then, *Fallen*'s holding—that a prisoner who "did all he could" to effect timely filing" by delivering the notice of appeal to prison authorities "well within the time fixed for appeal" had made a timely filing—was implicit in the new Appellate Rules 3 and 4. But as the Warren Court era receded and textualist interpretation found new footing in the federal courts, would the Committee's understanding prevail? That question would be answered in the 1988 case of *Houston v. Lack*.

2. *Houston v. Lack* and the Explicit Prison Mailbox Rule

Unlike Floyd Charles Fallen, who sought to take a direct appeal from his judgment of conviction, Prentiss Houston was a state prisoner seeking federal habeas relief (a civil remedy). So when Houston delivered his pro se notice of appeal to prison authorities three days before his appeal deadline ran out—but the notice was not stamped "filed" by the district clerk until the day after the deadline—one question was whether the *Fallen* rule should extend beyond the context of criminal appeals. Another question was whether the plight of one such as Houston was better addressed in a rule specific to inmates or through some more generally applicable equitable provision. And a third question was whether the adjustment, if one were needed, should be accomplished via rule interpretation or rule amendment. In *Houston*, a closely-divided Court adopted for inmate filers the rule proposed by the *Fallen* concurrence—and it did so as a matter of interpreting Appellate Rules 3 and 4. *Houston*, in turn, triggered rulemaking both by the Court itself and by the Appellate Rules Committee, and the resulting rules adopted and extended the *Houston* holding.

In the oral argument of Houston's case before the U.S. Supreme Court, a prominent issue was whether a prison mailbox rule was needed, or whether inmates' filing difficulties could be addressed by means of generally applicable provisions already in the Appellate Rules. In some circumstances, a would-be appellant could move under Appellate Rule 4(a)(5) for an extension of the time to file an appeal; but the deadline for such a motion was

120. FED. R. APP. P. 3 advisory committee's note to the 1967 Rule.

thirty days after the expiration of the underlying appeal time. And no one had noticed the timeliness issue in Houston's case until the court of appeals raised it sua sponte "13 days after the time had expired to request an extension [under Rule] 4(a)(5)."¹²¹ Counsel for the Warden argued that the Court should refuse to recognize a special rule for inmate filings, and that any extreme cases of hardship could be addressed by allowing the district court to reopen the judgment under Civil Rule 60(b) in order to re-start the appeal time.¹²² In any event, the Warden argued, if the Court wished to adopt a special rule for inmate filings, the proper way to do it was via rulemaking rather than court decision.¹²³

The core theories of the majority and dissenting opinions in *Houston* likely were already taking shape when the Justices met in Conference. Justice Blackmun's handwritten notes suggest that Justice Brennan—who would go on to write for the majority—argued that the Court should adopt the position taken by the *Fallen* concurrence.¹²⁴ (It was not surprising that Justice Brennan should take this view, as he had joined that concurrence.¹²⁵) "[O]nly a pro se prisoner is forced t[o] do this" i.e., to deliver his notice of appeal to the prison authorities for filing by mail—and prison authorities had a "tendency to be

121. *Houston v. Lack*, 487 U.S. 266, 269 (1988). As Houston's counsel noted at oral argument, although the district court had received Houston's notice of appeal within the thirty-day time period (after the appeal deadline) for seeking an extension under Rule 4(a)(5), a 1979 amendment to Rule 4(a)(5) had changed the rule so that it required an actual motion. Houston's counsel argued, though, that the Court should carry forward prior practice under the pre-1979 version of Rule 4(a)(5), and hold that Houston's notice of appeal met any requirement for a motion. As she explained: "prior to 1979 every single time that a pro se inmate's notice of appeal occurred in that second thirty days, . . . it was interpreted to be a motion for an extension of time . . ." Oral Argument at 19:30, *Houston v. Lack*, 487 U.S. 266 (1988) (No. 87-5428), <http://www.oyez.org/cases/1987/87-5428> [hereinafter *Houston* Oral Argument].

122. See *Houston* Oral Argument, *supra* note 121, at 30:22 (arguing that "the Rule 60 argument . . . would have [been] available to the Petitioner if . . . such an extraordinary thing had happened as the prison authorities deliberately interfered with his right to file an appeal"). The Court did not take the Warden up on this suggestion, and later precedents cast doubt on the availability of this solution, at least in most instances. See WRIGHT ET AL., *supra* note 88, § 3950.6 & nn.41–42.

123. See *Houston* Oral Argument, *supra* note 121, at 45:30 ("We submit to you that any other rules that the Court might develop concerning . . . individuals in the Petitioner's situation should come through the rulemaking process, not through judicial decision.").

124. The top line of Justice Blackmun's conference notes for Justice Brennan reads: "PS in *Fallen*." Conference Notes, Harry Blackmun, Justice, U.S. Supreme Court (Apr. 22, 1988) [hereinafter Conference Notes], in Papers of Harry A. Blackmun, Library of Congress, box 508, folder 7 (*Houston v. Lack*, No. 87-5428), in D.C. (copy on file with author) [hereinafter Blackmun Papers].

125. See *Fallen v. United States*, 378 U.S. 139, 144 (1964) (Stewart, J., concurring).

dilatory.”¹²⁶ Justice Scalia, in contrast, objected that the text of the rules could not encompass a prison mailbox principle: “filing means filing.”¹²⁷

Ultimately, the Court split 5–4 in *Houston*, and the reasoning of the *Fallen* concurrence became the *Houston* majority’s holding. Justice Brennan, writing for the Court, interpreted Appellate Rules 3 and 4 to support the conclusion “that petitioner . . . filed his notice within the requisite 30-day period when, three days before the deadline, he delivered the notice to prison authorities for forwarding to the District Court.”¹²⁸ The *Houston* Court cast its reasoning in terms that appeared to apply to all pro se inmate litigants:

The situation of prisoners seeking to appeal without the aid of counsel is unique. Such prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the court clerk receives and stamps their notices of appeal before the 30-day deadline.¹²⁹

Inmates, the Court explained, could not “personally travel to the courthouse to see that the notice is stamped ‘filed’ or to establish the date on which the court received the notice.”¹³⁰ And while non-incarcerated litigants could hand mail directly to the carrier, and then call the court to check on receipt, and resort to in-person filing at the last moment if the mailed document is lost, “[p]ro se prisoners cannot take any of these precautions; nor, by definition, do they have lawyers who can take these precautions for them.”¹³¹ Moreover, “the pro se prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay.”¹³²

In the *Houston* Court’s view, this reading not only served the important policy concerns noted above but also comported with the statutory and Rule text. Although civil appeals like *Houston*’s—unlike direct criminal appeals like *Fallen*’s—were subject to a statutory filing deadline, the relevant statute did not “define when a notice of appeal has been ‘filed’ or designate the person with whom it must be filed.”¹³³ The Appellate Rules did “specify that the notice should be filed ‘with the clerk of the district court,’”¹³⁴ but so long

126. Conference Notes, *supra* note 124.

127. *Id.*

128. *Houston v. Lack*, 487 U.S. 266, 270 (1988).

129. *Id.* at 270–71.

130. *Id.* at 271.

131. *Id.*

132. *Id.*

133. *Id.* at 272 (citing 28 U.S.C. § 2107 (1982)).

134. *Id.*

as the notice was on its way to the district clerk,¹³⁵ the Court saw no impediment to holding that the time of filing occurred prior to receipt by the clerk.¹³⁶ As the Court pointed out, one of its own rules provided (subject to certain requirements) that attorney filings were complete upon mailing rather than receipt.¹³⁷

Justice Scalia, writing for himself and three other dissenters, subjected this reading to a withering critique. The Court's holding, the dissenters complained, "obliterates the line between textual construction and textual enactment."¹³⁸ Not only was it implausible to interpret filing to mean mailing, but it was worse, they argued, for the same word in the same Rule to mean different things in different types of cases: "interpreting it to mean 'delivered to the clerk or, if you are a prisoner, delivered to your warden' is no more acceptable than any of an infinite number of variants"¹³⁹ While the dissenters conceded that the prison mailbox rule adopted by the Court was "a good one," they maintained that it should be adopted via "an amendment of the Rules."¹⁴⁰

In fact, one might critique some aspects of both the majority and the dissenting opinions in *Houston*. Behind the scenes, at least one of the Justices in the majority seems to have expressed some qualms with the Court's reading of the Rule text. Notes that Justice Blackmun jotted down a couple of days prior to the *Houston* oral argument suggest Justice Blackmun's inclination to follow the view of the *Fallen* concurrence that the jailer was equivalent to the clerk of court.¹⁴¹ But, after listing some arguments in support of that position, he concluded the page of notes by saying: "This may b[e] a stretch, however."¹⁴² On a draft of Justice Brennan's opinion for the Court—circulated a few days before the issuance of the decision—the margin next to

135. *Cf. Wilder v. Chairman of Cent. Classification Bd.*, 926 F.2d 367, 370 (4th Cir. 1991) ("[T]he filing rule established by *Houston* does not apply when a prisoner gives a notice of appeal to prison authorities for delivery to an entity other than a federal court.").

136. *Houston*, 487 U.S. at 273.

137. *See id.* (citing SUP. CT. R. 28.2 (current version at SUP. CT. R. 29.2)).

138. *Id.* at 277 (Scalia, J., dissenting).

139. *Id.*

140. *Id.* at 284.

141. *See* handwritten page of notes in Justice Blackmun's writing, dated "25 April 88," in Blackmun Papers, *supra* note 124. The notes state in part: "PS conc: jailer = clerk o ct." The notes then appear to list other possible options—remanding for a determination of when the court actually received *Houston*'s notice ("Cd RR +@ whe notice actually rec'd on ti"); or holding that *Houston*'s notice of appeal counted as a timely motion for extension of appeal time under Appellate Rule 4(a)(5) ("cd @ as a mtm for extension"). The notes then express a preference for adopting the *Fallen* concurrence's approach rather than employing either of the other options: "But I wd follow PS[.]"

142. *Id.*

the paragraph explaining how an inmate's filing could occur at a moment prior to the clerk's receipt of the notice contained a wry comment in Justice Blackmun's handwriting: "[A]mazing how we can arrive at results."¹⁴³

On the other hand, one might also take issue with the dissent's view that it was anathema to interpret Rules 3 and 4 flexibly when circumstances warranted. "The rationale of today's decision," the dissent commented disapprovingly, "is that any of various theoretically possible meanings of 'filed with the clerk' may be adopted—even one as remote as 'addressed to the clerk and given to the warden'—depending upon what equity requires."¹⁴⁴ Quoting a dissent from an earlier case in which the Court had recognized "unique circumstances" that then justified relaxing the requirement for a timely notice of appeal, the *Houston* dissenters asserted: "Changes in rules whose inflexibility has turned out to work hardship should be effected by the process of amendment, not by *ad hoc* relaxations by this Court in particular cases."¹⁴⁵

But, in fact, as the history noted above makes clear, those who framed original Appellate Rules 3 and 4 intended exactly that: The rulemakers cited *Fallen* prominently as an example of their directive (in the Committee Note) that courts should "dispense with literal compliance in cases in which it cannot fairly be exacted."¹⁴⁶ Unsurprisingly, Houston's counsel had invoked this Committee Note both in her brief¹⁴⁷ and, prominently, in her oral argument.¹⁴⁸ Yet neither the majority nor the dissenting opinions mentioned

143. Marked copy of first draft of Justice Brennan's Opinion in *Houston v. Lack* (circulated May 19, 1988), in Blackmun Papers, *supra* note 124.

144. *Houston*, 487 U.S. at 280–81 (Scalia, J., dissenting).

145. *Id.* at 283 (quoting *Thompson v. Immigration & Naturalization Serv.*, 375 U.S. 384, 390 (1964) (Clark, J., dissenting)). Much later, the Court would hold that the "unique circumstances" doctrine it had recognized in cases such as *Thompson* cannot be used to forgive noncompliance with a deadline that is jurisdictional in nature. See *Bowles v. Russell*, 551 U.S. 205, 214 (2007) ("Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the 'unique circumstances' doctrine is illegitimate."). Houston's lawyer had offered the "unique circumstances" doctrine as an alternative ground for ruling in Houston's favor; the *Houston* majority did not need to reach that argument. See *Houston*, 487 U.S. at 276 n.4. The *Houston* dissenters would have taken the opportunity to overrule *Harris* and *Thompson* as applied to jurisdictional deadlines. See *id.* at 282 (Scalia, J., dissenting).

146. See *supra* note 120 and accompanying text.

147. See Brief for the Petitioner at 2, *Houston v. Lack*, 487 U.S. 266 (1988) (No. 87-5428), 1987 WL 880908, at *10–11.

148. The first question that Houston's counsel received was from Chief Justice Rehnquist, who asked whether *Fallen* involved a direct appeal. *Houston* Oral Argument, *supra* note 121, at 2:37. To rebut the implication of this question (i.e., that *Fallen* should be confined to direct criminal appeals), Houston's counsel observed that relevant language from *Fallen* "was quoted

the Note. Perhaps the majority felt no need to adduce further support for its holding. The dissenters' failure to grapple with the Note cannot be explained as an application of textualist interpretive principles. Though Justice Scalia would, some years later, disclaim reliance on Committee Notes as he had already disclaimed reliance on statutory legislative history, he had not yet reached that view.¹⁴⁹ Indeed, the *Houston* dissent itself relied on the 1979 Committee Note to Appellate Rule 4(a)(5).¹⁵⁰

In any event, while the Court split sharply in *Houston* over the proper interpretation of existing Appellate Rules 3 and 4, the decision made clear that all of the Justices supported, as a policy matter, the idea of a special filing rule for inmates. It was, thus, unsurprising that rulemaking on two levels followed in *Houston*'s wake. Roughly a year and a half after deciding *Houston*, the Court adopted, in its Rule 29.2, a codification of the *Houston* principle.¹⁵¹ A few years thereafter, amendments to Appellate Rules 4 and 25 codified the prison mailbox rule for notices of appeal and for filings in the courts of appeals.¹⁵² These developments permit a comparison of the decisional and rulemaking modes. *Houston* provided the impetus for the rule changes, and it is impossible to tell whether the rule changes would have resulted without such a nudge from the Court. But the rulemakers, in turn, provided distinctive value by incorporating information gathered from stakeholders in a deliberative, iterative process.

Soon after the *Houston* decision, the Chair of the Standing Committee—Judge Joseph Weis—asked all of the advisory committees to consider amending the national rules to provide generally for a “mailbox” filing rule.¹⁵³ Judge Weis's proposal appears to have been motivated not only by the ruling

by the Advisory Committee . . . particularly under Rule 3 . . . in conjunction with four other cases, one of which was a civil case.” *Id.* at 2:41.

149. By 1995, Justice Scalia had concluded that it was improper to rely on Committee Notes to show the rulemakers' intent: “I have previously acquiesced in . . . , and indeed myself engaged in . . . , similar use of the Advisory Committee Notes. More mature consideration has persuaded me that is wrong.” *Tome v. United States*, 513 U.S. 150, 167 (1995) (Scalia, J., concurring in part and concurring in the judgment). See generally Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1163–64 (2002) (discussing the evolution of Justice Scalia's techniques for interpreting the rules).

150. See *Houston*, 487 U.S. at 283 (Scalia, J., dissenting).

151. See SUP. CT. R. 29.2.

152. See FED. R. APP. P. 4, 25.

153. See ADVISORY COMM. ON APPELLATE RULES, MINUTES OF THE MEETING ON OCTOBER 26, 1989, at 5 (1989) [hereinafter OCTOBER 1989 MINUTES], http://www.uscourts.gov/sites/default/files/fr_import/AP10-1989-min.pdf (“The proposal that Judge Weis asked all of the Advisory Committees to consider suggested fundamental rethinking of the concept of ‘filing.’”).

in *Houston* but—more generally—by the Supreme Court’s then-recent adoption of a mailbox rule for attorney filings in the Court:

The proposal noted that the Supreme Court recently redefined the term “filing” so that a document is deemed timely filed if it is deposited in a United States post office or mailbox within the time allowed for filing, so long as a member of the Supreme Court bar files a notarized statement detailing the mailing and stating that to the attorney’s knowledge the mailing took place on a particular date within the permitted time. The suggestion was to use a similar approach in all the rules and, in addition, to permit proof of transmission by means even more expeditious than the U.S. mail. With regard to the particular problem of prisoner filings, it was further suggested that delivery to a custodial official within the time allowed for filing shall be deemed timely filing.¹⁵⁴

The idea of adopting a general “mailbox” filing rule appears to have attracted little enthusiasm. No such rule made its way into the Civil or Criminal Rules, and though the Appellate Rules already included a “mailbox” rule for briefs, the Appellate Rules Committee quickly decided not to expand that into a more general “mailbox” filing rule.¹⁵⁵

However, the Appellate Rules Committee decided to move forward with a rule specific to inmate filers. The Committee’s initially stated rationale was somewhat cryptic: the minutes reflect that the Committee “favor[ed] adoption of a rule governing the filing of papers by prisoners believing that a rule would ease the administrative problems.”¹⁵⁶ The minutes leave unclear whether the Committee was concerned with administrative problems faced by inmates, or with administrative problems caused by a perceived difference between the existing Rule text and the principle enunciated in *Houston*. At a later meeting, one Committee member would voice the latter concern.¹⁵⁷

The rulemaking response to *Houston* illustrated an institutional advantage to the rulemaking process: during the drafting of new Appellate Rules 4(c)

154. *Id.* at 5–6.

155. *See id.* at 6 (“The Committee did not favor a general mailbox rule, although it did think that the current mailbox provision in Fed. R. App. P. 25(a) for filing briefs should be retained.”). Appellate Rule 25(a)’s mailbox filing rule for briefs provided a model for Bankruptcy Rule 8011(a)(2)(B), which sets a similar mailbox filing rule for briefs filed in appeals from a bankruptcy court to a district court or bankruptcy appellate panel. *See* FED. R. BANKR. P. 8011(a)(2)(B).

156. *See* OCTOBER 1989 MINUTES, *supra* note 153, at 6.

157. *See* ADVISORY COMM. ON FED. RULES OF APPELLATE PROCEDURE, MINUTES OF THE OCTOBER 23, 1990 MEETING OF THE ADVISORY COMMITTEE ON FEDERAL RULES OF APPELLATE PROCEDURE 17 (1990) [hereinafter OCTOBER 1990 MINUTES], http://www.uscourts.gov/sites/default/files/fr_import/AP10-1990-min.pdf.

and 25(a), the Committee or its members took the opportunity to consult a number of relevant stakeholders—the federal Bureau of Prisons, other federal agencies,¹⁵⁸ state prison officials, and the circuit clerks.¹⁵⁹ Those inquiries produced details concerning federal Bureau of Prisons policy, as well as observations concerning the diversity of practices in state correctional institutions.¹⁶⁰ And the Department of Justice ultimately expressed its support for the proposed new rules.¹⁶¹

While the Appellate Rules Committee undertook this broad research, it also took care to give attention to the Supreme Court’s corresponding rule. Shortly after the Appellate Rules Committee had begun considering possible rulemaking responses to *Houston v. Lack*, the Supreme Court adopted amendments to its own rules that included, in Rule 29.2, a version of the prison mailbox rule.¹⁶² By April 1991, the Appellate Rules Committee was considering a revised draft rule proposal that “closely track[ed] the language in the Supreme Court’s Rule 29.2.”¹⁶³ So, for example, though a prior Appellate Rules Committee draft would have limited the prison mailbox rule to pro se inmates, the new draft dropped that limitation in deference to the broader approach taken by the Supreme Court’s rule.¹⁶⁴

The Committee also decided to broaden the new rules’ application beyond the holding in *Houston* in two further ways. First, the Committee decided to extend the prison mailbox rule not only to the filing of notices of appeal but also to all filings in the courts of appeals.¹⁶⁵ Second, the Committee decided these new rules should encompass inmates in institutions other than prisons

158. See ADVISORY COMM. ON FED. RULES OF APPELLATE PROCEDURE, MINUTES OF THE APRIL 17, 1991, MEETING OF THE ADVISORY COMMITTEE ON FEDERAL RULES OF APPELLATE PROCEDURE 26 (1991) [hereinafter APRIL 1991 MINUTES], http://www.uscourts.gov/sites/default/files/fr_import/AP04-1991-min.pdf (reporting that a DOJ representative expressed the Department’s wish to consult INS and HHS for their views on the proposed inmate-mailbox rule).

159. See OCTOBER 1990 MINUTES, *supra* note 157, at 16–17 (noting that the Committee’s prior Chair, Judge Jon O. Newman, had “contacted Mr. Michael Quinlan of the Bureau of Prisons and several state prison officials to inquire whether there is anything that the committee needs to know about mail collection in the prisons”); *id.* at 18 (“Mr. St. Vrain [the Eighth Circuit Clerk] was asked to consult with his fellow clerks about their experience with prisoner filings and the Justice Department was asked to consult with prisons about their experience.”).

160. See *id.* at 17 (“The federal prison . . . policy requires a collection box for legal mail and further requires that the mail be collected and date stamped each day. The state prisons have a variety of practices.”).

161. See APRIL 1991 MINUTES, *supra* note 158, at 25–26.

162. See SUP. CT. R. 29.2.

163. See APRIL 1991 MINUTES, *supra* note 158, at 26.

164. *Id.*

165. *Id.*

and jails—including, for example, those confined in mental hospitals¹⁶⁶ or held by the immigration authorities. The new Rule 4(c) and revised Rule 25(a) took effect December 1, 1993.¹⁶⁷

The implicit prison mailbox rule of *Fallen* and the original Committee Note to Appellate Rule 3 had officially evolved into the explicit inmate-mailbox rule that is now found, as amended, in Appellate Rules 4(c) and 25(a)(2)(C). These rules address the distinctive difficulties that inmates may face with respect to the timing of their outgoing mail to the court. But they do not address the question of possible institutional delays in the processing of incoming inmate mail. I take up that question in the next section.

3. A Prison Mailbox Rule for Incoming Mail?

Houston addressed one specific issue—the timeliness of an inmate’s notice of appeal. The Appellate Rules Committee tackled, by rulemaking, the additional question of how to date other filings made by inmates in the courts of appeals. In due course, the Criminal Rules Committee adopted provisions in the rules for habeas and § 2255 proceedings that mirrored the Appellate Rules’ inmate-filing provisions.¹⁶⁸ Though no similar provisions were adopted in the Civil or Criminal Rules, the courts have applied *Houston* to district-court filings not expressly covered by any national inmate-filing rules. But all of these developments addressed an institution’s delay in processing *outgoing* mail. What of prison delay in providing an inmate with *incoming* mail?¹⁶⁹ Where an inmate’s deadline runs from entry of a court order or judgment, or where the deadline runs from service (and the service

166. See OCTOBER 1989 MINUTES, *supra* note 153, at 6–7.

167. See FED. R. APP. P. 4(c), 25(a) (1993), in 147 F.R.D. 287, 301–02, 311–12 (1993).

168. More recently, similar prison mailbox provisions have been added to the rules for bankruptcy appeals to a district court or bankruptcy appellate panel. See FED. R. BANKR. P. 8002(c), 8011(a)(2)(C).

169. A somewhat related question concerns the adequacy of legal notice sent by the government to an incarcerated litigant. In *Dusenbery v. United States*, 534 U.S. 161 (2002), a closely divided Court rejected an inmate’s due process objection, which was grounded in the inmate’s claim that he never received a civil forfeiture notice sent by the federal government to him by certified mail at the federal prison in which he was incarcerated. The majority held that the method of notice was reasonable under the circumstances. See *id.* at 170. The dissenting Justices, relying partly on *Houston*, argued that

[a] prisoner receives his mail only through the combined good offices of two bureaucracies which he can neither monitor nor control: The postal service must move the mail from the sender to the prison, and the prison must then move the mail from the prison gates to the prisoner’s hands. That the first system can be relied upon does not imply that the second is acceptable.

Id. at 179 (Ginsburg, J., dissenting).

is complete upon mailing), a prison's delay in providing mail to an inmate could cause the inmate to miss the deadline.

In this section, I consider the extent to which the rules and caselaw address this issue, and I note the rulemakers' consideration—but decision not to proceed with—additional rule amendments directed toward the issue. To provide a framework for this discussion, I first survey provisions in the rules that provide avenues for relief for an inmate who belatedly received a decision that the inmate wishes to appeal or a document served in connection with an appeal. I then review rulemakers' and courts' consideration of ways to supplement those avenues for relief by applying the teachings of *Houston* to the context of late-arriving inmate mail. I conclude that current law addresses many, but not all, of the difficulties that inmates may incur as a result of such delays.

Under the current rules, an inmate who wishes to take a civil appeal and who does not timely receive notice of the judgment has two potential avenues for relief. Suppose that the district court sends notice of the entry of the judgment to a self-represented inmate, but that that notice reaches the inmate beyond the time for taking an appeal from the judgment.¹⁷⁰ If the inmate learns of the judgment shortly after the time for appeal has run out, the inmate could move in the district court for an extension of appeal time under Appellate Rule 4(a)(5). The late arrival of the notice of entry of judgment should constitute “good cause” that would justify the district court in granting such a motion—but only if the inmate moves under Rule 4(a)(5) within thirty days after the expiration of the appeal deadline.¹⁷¹

If the inmate learns of the judgment too late to move under Appellate Rule 4(a)(5), then Appellate Rule 4(a)(6)—added in 1991—could still provide relief. By definition, in this scenario the inmate would meet Rule 4(a)(6)(A)'s requirement concerning late notice.¹⁷² The inmate's motion deadline under Rule 4(a)(6) is two-fold: the motion must be made within fourteen days after the inmate receives notice of the entry under Civil Rule 77(d),¹⁷³ and the

170. In most cases, the relevant deadline would be thirty days from entry of the judgment. See FED. R. APP. P. 4(a)(1)(A). In cases to which certain federal government entities are parties (an example would be a proceeding under 28 U.S.C. § 2255), the relevant deadline would be sixty days from entry of the judgment. See *id.* 4(a)(1)(B).

171. See *supra* note 121.

172. Appellate Rule 4(a)(6)(A) requires a court finding “that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry.” FED. R. APP. P. 4(a)(6)(A).

173. *Id.* 4(a)(6)(B). Notice under Civil Rule 77(d) must be served (by the district clerk or a party) under Civil Rule 5(b). See FED. R. CIV. P. 77(d)(1). Civil Rule 5(b) sets a range of allowable methods of service. See *id.* 5(b).

motion must also be filed no later than 180 days after entry of the judgment.¹⁷⁴ Assuming that the movant meets those deadlines, relief is available if “the court finds that no party would be prejudiced.”¹⁷⁵

A criminal defendant who receives notice of the entry of a criminal judgment too late to file the notice of appeal within the deadline set by Appellate Rule 4(b)(1)(A)¹⁷⁶ could seek an extension, so long as only a short time has passed. Rule 4(b)(4) provides that

[u]pon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).¹⁷⁷

Rule 4(b) contains no analogue to Rule 4(a)(6)’s provision concerning late notice of the entry of judgment; one explanation for the difference may be that, as to many judgments that are subject to Rule 4(b)(1)(A)’s appeal deadline, the Criminal Rules already provide safeguards for the criminal defendant. As to convictions (after a not guilty plea) and sentences, the district judge must advise the defendant of the defendant’s right to appeal¹⁷⁸ and the right to seek in forma pauperis status on appeal,¹⁷⁹ and the district clerk must file the notice of appeal for the defendant if the defendant requests it.¹⁸⁰ Another distinction¹⁸¹ between civil and criminal appeals is that while civil appeal deadlines are jurisdictional (and thus not subject to equitable exceptions), Appellate Rule 4(b)(1)(A)’s deadline for appeals by criminal

174. FED. R. APP. P. 4(a)(6)(B).

175. *Id.* 4(a)(6)(C).

176. *Id.* 4(b)(1)(A) (“In a criminal case, a defendant’s notice of appeal must be filed . . . within 14 days after the later of: (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government’s notice of appeal.”).

177. *Id.* 4(b)(4).

178. *See* FED. R. CRIM. P. 32(j)(1)(A) (“If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction.”); *id.* 32(j)(1)(B) (“After sentencing—regardless of the defendant’s plea—the court must advise the defendant of any right to appeal the sentence.”).

179. *See id.* 32(j)(1)(C).

180. *See id.* 32(j)(2) (“If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant’s behalf.”).

181. A further distinction is that an inmate seeking direct review of a federal criminal judgment is entitled to the assistance of counsel, and counsel’s failure to file a timely notice of appeal for the inmate would constitute ineffective assistance of counsel. That in turn would justify collateral relief in the event that the inmate did not manage to timely file a notice of appeal from the judgment of conviction. *See* WRIGHT ET AL., *supra* note 88, § 3950.8 & n.59.

defendants is regarded as nonjurisdictional¹⁸² (such that equitable considerations—like a prison’s delay in delivering notice of entry of a judgment—might appropriately be taken into account when applying the deadline).

As to appellate deadlines that run from service of a document rather than from entry of a judgment, Appellate Rule 26(b) authorizes the court of appeals to extend those deadlines “for good cause,”¹⁸³ and an institution’s delay in delivering the document to the inmate should presumably qualify as good cause. Rule 26(b) expressly excludes from this extension provision the deadline for filing a notice of appeal;¹⁸⁴ thus, Rule 4’s provisions (noted above) rather than Rule 26(b) apply to appeal deadlines. Rule 26(b) also excludes from its extension provision the deadline for filing a petition for review of agency action.¹⁸⁵ Rule 15, which governs the filing of such petitions, includes no provision for extensions of time; it states merely that the petition must be filed “within the time prescribed by law.”¹⁸⁶

In sum, Appellate Rule 4(a)(6)’s reopening provision, the extension provisions in Appellate Rules 4(a)(5) and 4(b)(4), and additional protections in the Criminal Rules help to mitigate the most significant potential hardship that could result from prison delay in delivering mail. And Appellate Rule 26(b) authorizes the court of appeals to extend many other deadlines for “good cause.” But relief under those provisions is not guaranteed, and the rules do not provide similar relief for an inmate who petitions a court of appeals for review of an agency action.

The Appellate Rules Committee has periodically considered the problem that arises when an inmate fails to receive notice of a court decision in time to comply with the deadline for seeking review of that decision. The Committee received a suggestion that it consider the problem in relation to reports by magistrate judges,¹⁸⁷ and it turned to this topic in the early 1990s. Judge Dolores Sloviter, who made the suggestion, had noted “a surprising

182. *See supra* note 88 (discussing this distinction between civil and criminal appeal deadlines).

183. FED. R. APP. P. 26(b).

184. *Id.* 26(b)(1).

185. *Id.* 26(b)(2).

186. *Id.* 15(a).

187. *See* ADVISORY COMM. ON FED. RULES OF APPELLATE PROCEDURE, MEETING OF THE ADVISORY COMMITTEE ON THE FEDERAL RULES OF APPELLATE PROCEDURE 13 (1986), http://www.uscourts.gov/sites/default/files/fr_import/AP12-1986-min.pdf.

dearth of precedent” concerning “the recurring problem of service of legal mail on pro se prisoners.”¹⁸⁸

The Committee’s then-reporter, Carol Ann Mooney, observed that the problem Judge Sloviter had pointed out was “the converse of the one the Committee addressed with the proposed amendments based upon *Houston v. Lack*.”¹⁸⁹ As Professor Mooney noted:

Prisoners are at a distinct disadvantage whenever they must act within a certain time after being served because service may be accomplished by mailing. Prisoners have no control over their whereabouts; transfers can delay their mail delivery. Even without delays caused by transfers, prisoners have no control over when prison officials actually deliver their mail.¹⁹⁰

Additionally, mail entering prisons may be delayed by security screening procedures.¹⁹¹ But, Professor Mooney suggested, the solution to the specific problem identified by Judge Sloviter (concerning untimely receipt of magistrates’ reports and recommendations) might lie outside the purview of the Appellate Rules Committee.¹⁹²

Nonetheless, responding to “some sentiment that the Committee should try to address the general problem of service on institutionalized persons,” Professor Mooney prepared proposed amendments that would have made service on an inmate complete upon receipt (rather than mailing)¹⁹³ and that

188. *Grandison v. Moore*, 786 F.2d 146, 149 (3d Cir. 1986). *Grandison* involved a prisoner who filed his objections to a magistrate judge’s report and recommendation late because he did not timely receive the report and recommendation (the mailing was sent to a facility to which he had been temporarily transferred, but reached that facility only after he had already been transferred back). *See id.* at 148. The court of appeals held that the then-ten-day limit for filing objections was not jurisdictional, and that the district court had abused its discretion in rejecting the inmate’s objections on timeliness grounds. *See id.* at 148–49.

189. Memorandum from Carol Ann Mooney, Reporter, Advisory Comm. on Appellate Rules, to Kenneth F. Ripple, Chair, Advisory Comm. on Appellate Rules 2 (Oct. 5, 1992), in ADVISORY COMM. ON APPELLATE RULES, AGENDA: MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES 182, 183 (1992) [hereinafter Mooney 1992 Memorandum], http://www.uscourts.gov/sites/default/files/fr_import/AP1992-10.pdf.

190. *Id.* at 1.

191. *See* Memorandum from Carol Ann Mooney, Reporter, Advisory Comm. on Appellate Rules, to Kenneth F. Ripple, Chair, Advisory Comm. on Appellate Rules 1 (Mar. 25, 1993), in ADVISORY COMM. ON APPELLATE RULES, TENTATIVE AGENDA: MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES 131, 131 (1993) [hereinafter Mooney 1993 Memorandum], http://www.uscourts.gov/sites/default/files/fr_import/AP1993-04.pdf.

192. *See* Mooney 1992 Memorandum, *supra* note 189, at 183.

193. *See* Mooney 1993 Memorandum, *supra* note 191, at 2, 4 (sketching an addition to Appellate Rule 25(c) to state that “[s]ervice on an inmate confined in an institution is not complete, however, until the copy is delivered to the inmate”).

would have provided a mechanism for an inmate to show timeliness (of an apparently late filing) where the inmate's deadline ran from service.¹⁹⁴ The Committee sent the drafts, for review and comment, "to the Chief Judges of the circuits, to the Committee of Staff Attorneys, and to the Advisory Committee of Defenders."¹⁹⁵ The Committee of Defenders did not respond to the inquiry;¹⁹⁶ the Staff Attorneys who responded voiced concern that the proposals would be difficult to administer;¹⁹⁷ and the appellate judges who responded were divided roughly evenly in support of and opposition to the proposals.¹⁹⁸ Professor Mooney explained: "Those who oppose the amendments generally do so because they believe that current authority and procedures allow them to adequately protect an inmate's interests and that the proposed amendments will create delay and uncertainty."¹⁹⁹ In addition, opponents noted that "there is no mechanism for knowing when an inmate receives a document so both the court and opposing parties will not know when to expect responsive pleadings."²⁰⁰ In April 1994, after discussing this input, the Appellate Rules Committee voted unanimously to abandon the proposed amendments.²⁰¹

As the discussion earlier in this Part illustrates, rulemaking is one avenue for addressing the logistical difficulties faced by inmates; caselaw is another such avenue. The Third Circuit's precedential caselaw and nonprecedential decisions in some other circuits extend *Houston's* principle to incoming

194. *See id.* at 5 (sketching a possible new Appellate Rule 26(d) to state that "[w]henver an inmate confined in an institution is required or permitted to act within a prescribed period after service of paper upon the inmate, timely action may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date the inmate received the paper").

195. ADVISORY COMM. ON FED. RULES APPELLATE PROCEDURE, MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON THE FEDERAL RULES OF APPELLATE PROCEDURE 22 (1994) [hereinafter APRIL 1994 MINUTES], http://www.uscourts.gov/sites/default/files/fr_import/ap4-25.pdf.

196. *See* Memorandum from Carol Ann Mooney, Reporter, Advisory Comm. on Appellate Rules, to James K. Logan, Chair, Advisory Comm. on Appellate Rules 9 (Mar. 24, 1994), in ADVISORY COMM. ON APPELLATE RULES, TENTATIVE AGENDA: MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES 57, 65 (1994), http://www.uscourts.gov/sites/default/files/fr_import/AP1994-04.pdf [hereinafter Mooney 1994 Memorandum] (misdated "March 24, 1993").

197. *See id.* at 7 ("Staff attorneys from seven circuits provided responses. They generally oppose the draft amendments because they do not provide a way of knowing when, or whether, service has occurred.")

198. *See id.* at 4 ("Of the seven circuits: three oppose the amendments; three support them; and the sixth circuit judges split rather evenly . . .").

199. *See id.*

200. *See id.*

201. *See* APRIL 1994 MINUTES, *supra* note 195, at 22–23.

inmate mail so as to protect inmates from delays in receiving notice of entry of judgments that they wish to appeal. The pathmarking case in the Third Circuit is *United States v. Grana*.²⁰² As the *Grana* court explained:

The teaching of *Houston* is that prison delay beyond the litigant's control cannot fairly be used in computing time for appeal. We perceive no difference between delay in transmitting the prisoner's papers to the court and transmitting the court's final judgment to him so that he may prepare his appeal.²⁰³

Though subsequent decisions exhibited some inconsistency in applying *Grana*,²⁰⁴ the Third Circuit has clarified that *Grana*'s rule continues to govern at least some instances when the inmate's late receipt of notice of entry is attributable to prison delay—but that *Grana* is inapplicable if the late receipt stems from fault by actors other than the prison (such as the clerk's office or the mail service).²⁰⁵

Grana was a criminal appeal, and whether *Grana* governs the date of entry of judgment against an inmate in a civil case is unclear. The Third Circuit has applied *Grana* to determine the date of “entry” of an order denying a postjudgment motion within the meaning of Civil Rule 59(e)—an inquiry that determined whether the postjudgment motion was timely, and eligible to toll the time to appeal the underlying judgment, under Appellate Rule 4(a)(4).²⁰⁶ But in *Baker v. United States*, the Third Circuit refused to apply *Grana* to determine the date of “entry” of a civil judgment within the meaning of

202. 864 F.2d 312, 312 (3d Cir. 1989).

203. *Id.* at 316.

204. See WRIGHT ET AL., *supra* note 88, § 3950.12 (discussing, inter alia, *United States v. Fiorelli*, 337 F.3d 282 (3d Cir. 2003), and *Poole v. Family Court*, 368 F.3d 263 (3d Cir. 2004)).

205. *Grana*'s applicability depends “on the nature of the alleged delay.” *Long v. Atl. City Police Dep't*, 670 F.3d 436, 443 (3d Cir. 2012). The *Long* court reconciled *Fiorelli*—which had followed *Grana*—and *Poole*—which had refused to follow *Grana*—thus:

In *Fiorelli*, the delay in the prisoner's receipt of the order was allegedly the result of the prison's handling of the mail. It was, in other words a classic prison delay case, after the manner of *Grana*. In *Poole*, by contrast, the delay allegedly was caused by the clerk's office and did not stem from actions or omissions by prison officials.

Id. at 443.

206. See *United States v. Fiorelli*, 337 F.3d 282, 289 (3d Cir. 2003) (“We see no reason why *Grana*'s exclusion of prison delays from the time limits of jurisdictionally sensitive filings should not apply to motions for reconsideration. The timeliness of a motion under either Civil Rule 59 or 60 is critical to appellate jurisdiction.”).

Appellate Rule 4(a)(6) and 28 U.S.C. § 2107²⁰⁷—an inquiry that (as noted above) determines whether the would-be appellant is eligible to have the appeal time reopened after late receipt of the notice of entry. In refusing to extend *Grana* to this context, the court of appeals relied both on the fact that the deadlines for civil appeals are statutory and, thus, jurisdictional,²⁰⁸ and also on the fact that Rule 4(a)(6) and § 2107 refer to *both* entry and receipt—making it inappropriate, in the court’s view, to read “entry” to encompass the idea of actual receipt.²⁰⁹

Baker’s reasoning brings into question whether *Grana* would govern the question of when a civil judgment was “entered” for purposes of Appellate Rule 4(a)(1) and 28 U.S.C. § 2107(a). Rule 4(a)(1) and § 2107(a) refer only to “entry” and not to “receipt,” thus permitting the argument that one of the *Baker* court’s rationales does not apply. But the *Baker* court’s concern about the jurisdictional nature of statutory appeal deadlines would apply equally to Rule 4(a)(1) and § 2107(a). One possible response would be that § 2107(a) does not define “entry”; such an argument would recall the *Houston* Court’s reliance on the fact that § 2107 did not define “filing.”²¹⁰ But the definition of the statutory term “entry” might be less flexible now than the definition of “filing” was in 1988, given the 1991 addition of § 2107(c), with its use of both the term “receipt” and the term “entry.”²¹¹ Perhaps ironically, the rule and statute amendments designed to mitigate problems stemming from late receipt may have helped to close off additional flexibility in the treatment of late-arriving inmate mail.

So far, the Third Circuit’s approach seems to have gained little traction in other circuits. Two courts have adopted or considered a similar approach in nonprecedential opinions,²¹² but two other circuits have rejected the *Grana*

207. See *Baker v. United States*, 670 F.3d 448, 459–60 (3d Cir. 2012). The term used in § 2107(c) was “entry,” while the operative term used in Rule 4(a)(6)(B) was “entered”; but that difference seems immaterial to the court’s analysis.

208. See *id.* at 457.

209. See *id.* at 460.

210. *Houston v. Lack*, 487 U.S. 266, 272 (1988).

211. 28 U.S.C. § 2107(c) (2012).

212. See *Bingham v. District of Columbia*, No. 95-7096, 1996 WL 103739, at *1 (D.C. Cir. Jan. 18, 1996) (adopting *Grana*’s approach in the context of determining the date of entry of a civil judgment for purposes of determining whether a postjudgment motion was timely within the meaning of Appellate Rule 4(a)(4)); see also *Brown v. Riverside Corr. Facility*, No. 90-1097, 1992 WL 102504, at *2 (6th Cir. Apr. 29, 1992) (“[E]ven adopting *Grana*’s application of the Supreme Court’s reasoning in *Houston*, the facts of this case preclude salvaging the notice of appeal [because] . . . [e]xcluding the delay attributable to the prison authorities, a total of six days, Brown’s notice of appeal was filed twenty days after the thirty-day filing period had expired . . .”).

approach in precedential decisions in civil appeals. In *Jenkins v. Burtzloff*, the Tenth Circuit relied in part on the fact that the Civil and Appellate Rules define “entry” in a fashion that does not encompass late receipt by an inmate,²¹³ and in part on the view that reading “entry” to encompass such a late receipt would run counter to § 2107’s “plain meaning” and would cause “absurd” results when a judgment was received by multiple parties on different dates.²¹⁴ In *Wilder v. Chairman of Central Classification Board*, the Fourth Circuit (in an alternative holding) refused to apply *Grana* to a civil case because the deadline for civil appeals is typically thirty days and the *Wilder* court viewed *Grana* as resting on the exigencies created by the shorter (then, ten-day) deadline for a criminal defendant’s appeal.²¹⁵

The Appellate Rules Committee, which periodically monitors circuit splits concerning the Appellate Rules, recently considered whether to study the question of a reverse-mailbox rule for inmates.²¹⁶ At the Committee’s fall 2016 meeting a representative of the Department of Justice reported that the Bureau of Prisons had expressed two concerns when consulted about the possibility of a reverse-mailbox rule for inmates: “First, it would be difficult to track and provide evidence of when an inmate actually receives notice of the district court’s entry of judgment. Second, a prisoner’s assertion of a delay could be burdensome to prison staff.”²¹⁷ And a committee member pointed out that *Grana* predated the Supreme Court’s decision in *Bowles v. Russell* (which held statutory appeal deadlines to be jurisdictional and not susceptible to equitable exceptions).²¹⁸ Thus, while it is currently unclear whether the

213. See *Jenkins v. Burtzloff*, 69 F.3d 460, 461–62 (10th Cir. 1995) (“[Appellate] Rule 4(a)(7) defines entry, providing that a judgment or order is ‘entered’ under Rule 4(a) when entered in compliance with [Civil] Rules 58 and 79(a). Rule 79(a), in turn, provides that the clerk shall keep a book in which all ‘orders, verdicts, and judgments shall be entered.’ The Supreme Court has interpreted the Rules to provide that entry means entry on the docket.”).

214. See *id.* at 462.

215. *Wilder v. Chairman of Cent. Classification Bd.*, 926 F.2d 367, 371 (4th Cir. 1991). As an alternative ground, the court noted the fact that the would-be appellant had dated his notice of appeal “nine days after the issuance of the judgment and order,” showing that he must have received notice of the judgment by that point. *Id.*

216. See Memorandum from Gregory E. Maggs, Reporter, Advisory Comm. on Rules of Appellate Procedure, to Advisory Comm. on Appellate Rules 3 (Sept. 25, 2016), in ADVISORY COMM. ON APPELLATE RULES, AGENDA FOR FALL 2016 MEETING OF ADVISORY COMMITTEE ON APPELLATE RULES 163, 165 (2016), http://www.uscourts.gov/sites/default/files/2016-10-appellate-agenda-book_0.pdf (noting that “[a] circuit split currently exists on the issue of whether the period for filing a notice of appeal may be extended if prison officials delay in notifying an inmate of the entry of a judgment or appealable decision”).

217. See ADVISORY COMM. ON FED. RULES APPELLATE PROCEDURE, MINUTES OF THE FALL 2016 MEETING OF THE ADVISORY COMMITTEE ON THE FEDERAL RULES OF APPELLATE PROCEDURE 8 (2016), http://www.uscourts.gov/sites/default/files/fall_2016_appellate_rules_committee_meeting_minutes_0.pdf.

218. See *id.*; see also *Bowles v. Russell*, 551 U.S. 205, 214–15 (2007).

Committee will decide to study the matter further, it seems likely that the concerns expressed during the Committee's prior consideration of the topic are likely to recur, supplemented now by the Court's modern emphasis on the jurisdictional nature of statutory appeal deadlines.

* * *

The Appellate Rules, then, accomplished significant advances in the procedures for inmate appeals, and the *Houston* decision and its aftermath further developed the distinctive treatment of such appeals. But the Appellate Rules and their interpretation tell only part of the story. To sketch a more complete picture, the next Part surveys local circuit case management practices and national changes implemented by Congress through legislation.

II. DOCKET MANAGEMENT IN THE COURTS AND IN CONGRESS

If the 1960s saw a flurry of work designed to promote court access, the following decades witnessed a burgeoning federal docket. Efforts to manage that docket ensued, both in the courts and in Congress—and, as I summarize here, those efforts profoundly affected inmate appeals. In Part II.A, I discuss case management practices adopted by the circuits themselves. In Part II.B, I recount two pieces of 1990s legislation designed to stem the tide of inmate appeals. These developments share at least one broad characteristic: they transformed the processing of inmate appeals without placing more than a light mark on the Appellate Rules themselves. For inmate appeals, at any rate, the Appellate Rules cannot be regarded as a comprehensive guide to actual practice.

A. Circuits' Approaches to Case Management

Measures to handle a rising appellate caseload began to take shape even before the adoption of the Appellate Rules, and they took firm root thereafter. In this Part, drawing on the work of Professor Marin Levy, I summarize the development of those measures and note the ways in which they currently affect the processing of pro se inmate appeals.

As Professor Levy recounts, “Between 1950 and 1978, the annual filings per judge in the federal courts of appeals nearly doubled Without the ability to increase their ranks or limit their jurisdiction, appellate judges had only one way to respond to their burgeoning caseload: adopt practices

designed to increase judicial efficiency.”²¹⁹ By the mid-1970s, a panel appointed to study the federal courts of appeals reported:

[W]hat might once have been considered basic ingredients of the appellate process—oral argument, written opinions, a conference of the judges—are absent in great numbers of cases. For example, in several circuits one-half of all appeals are being decided without any oral argument. . . . Opinion writing practices have changed no less dramatically. A signed opinion is no longer the norm, even for cases decided after hearing or submission. . . . Of greater significance is the extent to which decisions are rendered without any indication of the reasoning impelling the result.²²⁰

Related to the decline in oral argument were innovations in appeal screening: “[C]ourts of appeals began to develop screening processes, whereby either staff or the judges themselves reviewed cases to determine whether they could be disposed of without oral argument.”²²¹ And a need for screening meant a need for staff:

[C]ourts of appeals began to receive funding for staff clerks . . . to review certain classes of cases. In 1982, Congress officially authorized the creation of staff attorney offices, which were designed to review pro se prisoner cases. As appellate filings continued to grow, the number and role of staff attorneys expanded.²²²

The circuits also “began to adopt mediation or conference programs to help parties either settle their cases or narrow the range of issues on appeal.”²²³

These trends have continued to the present day, and (with the exception of mediation programs²²⁴) these case management measures significantly affect pro se inmate appeals. A 1980s study of the Third, Fifth, Sixth, and Ninth Circuits found “that appeals decided without argument are likely to arise out of civil rights cases, prisoner petitions, Social Security appeals, and pro se

219. Levy, *supra* note 4, at 321–22 (footnotes omitted).

220. Roman L. Hruska et al., *Commission on Revision of the Federal Court Appellate System Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 247 (1975).

221. Levy, *supra* note 4, at 322.

222. *Id.* at 323 (footnotes omitted).

223. *Id.* at 323–24.

224. See, e.g., LAURAL HOOPER ET AL., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 16 (2d ed. 2011) (“Generally, in all of the circuits, pro se, prisoner rights, social security, 28 U.S.C. § 2255 (federal custody), and habeas corpus cases are not eligible for settlement or mediation conferences.”).

appeals in general.”²²⁵ More recent studies, likewise, confirm that pro se inmate appeals tend to be decided without oral argument in at least a number of circuits.²²⁶ A late-1970s study found a “disproportionately low rate of publication of opinions for some types of litigation, such as prisoners’ petitions, Social Security cases, and appeals in forma pauperis.”²²⁷ A study of twelve circuits (the Federal Circuit was excluded) found that among cases decided on the merits in fiscal year 1997 by a court of appeals, the likelihood of a published opinion was only twenty-three percent—but that proportion rose to thirty-two percent if only “[c]ases with counsel” were considered.²²⁸ Recent studies also confirm the continuing prominent role of staff attorneys in processing pro se inmate appeals (though the details of staff attorneys’ roles vary across circuits).²²⁹

The Appellate Rules tell the reader little to nothing about these docket management measures. Appellate Rule 34(a)(2) provides the formal structure for decisions to dispense with oral argument, but sets only a relatively abstract standard.²³⁰ Appellate Rule 32.1 bars courts from restricting the citation of unpublished opinions,²³¹ but does not require or set standards for the publication of opinions or affect the precedential status (usually, none) of unpublished opinions. The processing of inmate appeals, then, is shaped not only by the national rules but also by local circuit practices. And superimposed on both those frameworks are requirements that Congress has set by statute—a topic to which I turn in the next section.

225. Joe S. Cecil & Donna Stienstra, *Deciding Cases Without Argument: An Examination of Four Courts of Appeals*, in FED. JUDICIAL CTR., *MANAGING APPEALS IN FEDERAL COURTS* 397, 428 (Michael Tonry & Robert A. Katzmann eds., 1988).

226. Professor Levy reports that oral argument is typically not employed for pro se appeals in the First, Third, Fourth, and D.C. Circuits, but that “[i]n the Second Circuit, some pro se appeals do receive argument.” Levy, *supra* note 4, at 380. Based on a study of practices in all thirteen circuits, Federal Judicial Center researchers report that “[c]ase characteristics that are likely to favor oral argument include presence of counsel, novel issues, complex issues, extensive records, and numerous parties.” HOOPER ET AL., *supra* note 224, at 18.

227. William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, in FED. JUDICIAL CTR., *supra* note 225, at 455, 485–86.

228. COMM’N ON STRUCTURAL ALTS. FOR THE FED. COURTS OF APPEALS, FINAL REPORT 22–23 (1998), <http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf>.

229. See HOOPER ET AL., *supra* note 224, at 39; Levy, *supra* note 4, at 380 (summarizing variation in the ways in which the First, Second, Third, and D.C. Circuits use staff attorneys in connection with pro se appeals).

230. See FED. R. APP. P. 34(a)(2).

231. See *id.* 32.1(a).

B. Legislating Docket Control

The circuits' management techniques transformed the processing of prose inmate appeals, but did not restrict their numbers. Professor Margo Schlanger describes the trends in inmate civil rights filings thus:

A steep increase in prisoner civil rights litigation combined in the 1970s with a steep increase in incarcerated population. The filing rate slowly declined in the 1980s, but the increase in jail and prison population nonetheless pushed up raw filings. Then, as in the 1970s, the 1990s saw an increase in both jail and prison population *and* filings rates, until 1995.²³²

The number of state-prisoner habeas petitions, likewise, rose significantly during the 1980s and early 1990s.²³³ In the mid-1990s, Congress responded to the increase in inmate filings in federal court by enacting two landmark bills—the Prison Litigation Reform Act (“PLRA”) and the Antiterrorism and Effective Death Penalty Act (“AEDPA”).²³⁴

Inmate appeals from final judgments in civil cases are treated as “appeals as of right” governed by Appellate Rule 4.²³⁵ But a significant segment of such appeals—namely, those brought by prisoners seeking postconviction habeas or § 2255 relief—are in actuality appeals by permission.²³⁶ In Part II.B.1, I review the nature of the permission requirement in such appeals, and summarize the extent to which the Appellate Rules take account of that requirement. As Part II.B.1 recounts, this requirement of permission originated in state-prisoner cases, and was extended to federal prisoners by AEDPA.²³⁷

AEDPA arose from concerns that the federal courts had exercised their habeas corpus jurisdiction in a way that interfered unduly with state criminal justice systems, and that (assertedly) a large proportion of state and federal

232. Schlanger, *Adulthood*, *supra* note 4, at 156.

233. *See supra* notes 96–98 and accompanying text.

234. *See Schlanger, Inmate Litigation*, *supra* note 4, at 1578 (noting that proponents of the PLRA asserted “that inmate suits had skyrocketed and were deluging both courts and state and local governments”).

235. Appellate Rule 4 is titled “Appeal as of Right—When Taken.” FED. R. APP. P. 4.

236. *See* 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 35.4 (7th ed. 2017); Goodwin, *supra* note 3, at 795–96.

237. Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, § 102, 110 Stat. 1214, 1217–18. The summary that follows focuses on Title I of AEDPA, which addressed “Habeas Corpus Reform.” Other titles of the Act addressed victims’ rights, terrorism prohibitions, and other topics.

prisoners' petitions for postconviction review were meritless.²³⁸ AEDPA sets a statute of limitations for state-prisoner habeas petitions²³⁹ and for federal-prisoner proceedings under 28 U.S.C. § 2255.²⁴⁰ It requires screening by the courts of appeals for "second or successive" habeas or § 2255 proceedings, under a newly-heightened standard.²⁴¹ It modifies the requirement that state prisoners exhaust state remedies before seeking federal habeas.²⁴² It narrows the availability of federal habeas relief as to state-prisoner claims that have been "adjudicated on the merits in State court proceedings."²⁴³ It revises the standard for federal-court deference to state-court factual findings.²⁴⁴ It diminishes the availability of federal evidentiary hearings for state prisoners.²⁴⁵ It bars the grant of federal habeas relief to state prisoners on the ground of "ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings."²⁴⁶ It creates a procedure that (in states that opt in and qualify) would "fast-track" habeas review for state prisoners who had been sentenced to death.²⁴⁷ And, as I discuss in Part II.B.1 below, it revises and extends the requirement of court permission for habeas appeals.²⁴⁸

The other significant piece of 1990s legislation is the Prison Litigation Reform Act of 1995 ("PLRA"), which imposes constraints on inmate litigation outside of the habeas context. As one commentator recounted: "The PLRA sought to address two perceived evils: the burden on the federal court system created by the tremendous number of prisoner lawsuits, many of which were frivolous, and the micromanagement of prisons by liberal federal

238. The Conference Committee Report explained: "This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.).

239. See 28 U.S.C. § 2244(d) (2012).

240. *Id.* § 2255(f).

241. *Id.* § 2244(b) (setting procedure for state prisoners); *id.* § 2255(h) (providing that the § 2244 procedure also applies to federal prisoners); see also 1 HERTZ & LIEBMAN, *supra* note 236, § 3.2 (noting that "AEDPA altered both the procedures and standards for filing successive habeas corpus petitions").

242. See 28 U.S.C. § 2254(b) (2012).

243. *Id.* § 2254(d).

244. *Id.* § 2254(e)(1).

245. *Id.* § 2254(e)(2).

246. *Id.* § 2254(i).

247. See *id.* §§ 2261–2266.

248. See discussion *supra* Part I.A, discussing 28 U.S.C. § 2253 and Appellate Rule 22. The Act also included some provisions concerning the appointment of counsel for state and federal prisoners on collateral review. See § 2254(h) (state prisoners); *id.* § 2255(g) (federal prisoners); see also 1 HERTZ & LIEBMAN, *supra* note 236, § 12.3 n.61 (stating that § 2254(h) codified prior practice concerning appointment of counsel for state prisoners seeking federal habeas relief).

district judges.”²⁴⁹ To address the latter issue, the PLRA sets a number of limits on institutional-reform lawsuits targeting prisons.²⁵⁰ To address the former issue, the PLRA mandates a number of strictures on prisoner suits.²⁵¹ It requires inmates challenging prison conditions to exhaust administrative grievance procedures.²⁵² It provides for early trial-court screening of prison-condition suits and requires dismissal if “the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.”²⁵³ It limits the award of attorney fees for successful prisoner suits.²⁵⁴ It bars inmate lawsuits “for mental or emotional injury suffered while in custody without a prior showing of physical injury”²⁵⁵ or (as later amended) a prior showing of a sexual act.²⁵⁶ And, as I discuss in Part II.B.2, it imposes special constraints in inmate lawsuits in forma pauperis.

1. Postconviction Review and Certificates of Appealability

I noted in Part I.A.1 that, at the time of the adoption of the Appellate Rules, state prisoners were required to obtain a “certificate of probable cause” in order to appeal a judgment denying habeas relief; but no such requirement applied to appeals by federal prisoners seeking relief under 28 U.S.C. § 2255.²⁵⁷ In AEDPA, Congress transmuted the “certificate of probable

249. *Developments in the Law: The Law of Prisons*, 115 HARV. L. REV. 1838, 1853 (2002).

250. *See, e.g.*, 18 U.S.C. § 3626(a) (2012) (setting limits on injunctive relief in “any civil action with respect to prison conditions”); *id.* § 3626(b) (providing for presumptive termination of such injunctive relief absent specified conditions). The limit on attorney fees, discussed in note 254 *infra* and accompanying text, also seems designed to affect institutional-reform litigation.

251. *See* 42 U.S.C. § 1997e(h) (2012) (defining “prisoner”). The PLRA also provides for remote electronic participation of inmates in hearings affecting their cases. *See id.* § 1997e(f).

252. *See id.* § 1997e(a).

253. *Id.* § 1997e(c)(1). The PLRA also authorizes the defendant to hold off on responding to an inmate complaint unless and until the court requires a reply based on the court’s finding “that the plaintiff has a reasonable opportunity to prevail on the merits.” *Id.* § 1997e(g).

254. *See id.* § 1997e(d).

255. *See id.* § 1997e(e).

256. This change was made as part of the Violence Against Women Act of 2013. *See* Pub. L. No. 113-4, § 1101, 127 Stat. 54, 134 (2013).

257. As of 1968—and until 1996—the relevant portion of 28 U.S.C. § 2253 stated: “An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.” 28 U.S.C. § 2253 (1994) (later amended in 1996).

cause” requirement into a requirement for a “certificate of appealability” (“COA”), and extended the COA requirement to § 2255 petitioners.²⁵⁸

Both of these changes appear to have been motivated by a dim view concerning the merit of habeas and § 2255 filings. A House Judiciary Committee Report explained the extension of the certificate requirement to § 2255 appeals thus: “Since federal prisoners, like state prisoners, generate a high volume of meritless applications for collateral relief, it is appropriate to require that appeals of habeas corpus petitions meet a threshold probable cause standard before such an appeal will be heard by an appellate panel.”²⁵⁹

The House Judiciary Committee Report also indicated an intent to codify the Supreme Court’s 1983 interpretation of the prior probable-cause test, but to require that test’s application issue by issue:

The bill also strengthens the certificate of probable cause requirement by providing . . . that a certificate may issue only on a substantial showing of the denial of a federal right. The bill thus enacts the standard of *Barefoot v. Estelle* . . . (1983). The bill also requires that the certificate indicate which specific issue or issues satisfy this standard.²⁶⁰

The Supreme Court has confirmed that AEDPA “codified [the] standard, announced in *Barefoot v. Estelle* . . . , for determining what constitutes the requisite showing.”²⁶¹

Another potential narrowing (compared to prior law) concerns the type of right which, if potentially denied, can be the basis for appeal. “Supplanting the prior ‘probable cause’ regime, AEDPA purported to adopt, but instead altered, a key component of the previous standard, replacing the word ‘federal’ with the word ‘constitutional.’”²⁶² Some lower courts have taken the statute’s reference to “a substantial showing of the denial of a *constitutional* right”²⁶³ to exclude the possibility of COAs for denials of federal statutory or

258. AEDPA also made conforming amendments to Appellate Rule 22. *See* Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, § 103, 110 Stat. 1214, 1218.

259. H.R. REP. NO. 104-23, at 9 (1995) (accompanied H.R. 729, 104th Cong. (1995)).

260. *Id.*

261. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

262. Goodwin, *supra* note 3, at 796.

263. 28 U.S.C. § 2253(c)(2) (2012) (emphasis added).

treaty rights.²⁶⁴ Though that interpretation may not be free from doubt,²⁶⁵ support for it might be found in the Supreme Court’s “due note for the [statute’s] substitution of the word ‘constitutional’” for the prior certificate-of-probable-cause standard’s “federal.”²⁶⁶

The COA requirement sets a high hurdle for habeas and § 2255 petitioners who seek appellate review. Professor Nancy King, based on a study of appeals in “approximately 6.5 percent of the non-capital habeas cases commenced in federal district courts in 2003 and 2004 by state prisoners,” reports that “[m]ore than 92 percent of all COA rulings were denials.”²⁶⁷

2. The PLRA’s Constraints on Inmate Appeals

I noted in Part I.A.1 the earlier debate concerning the incentives of indigent litigants. Congress, long before, had required something in the way of screening in order to offset a concern that one who was not required to front the costs of his appeal might bring the appeal regardless of its merit.²⁶⁸ In the 1960s, however, the Court had directed lower courts not to apply that screening too rigorously, lest they deprive indigent appellants of equal access to justice.²⁶⁹ In the PLRA, Congress took a very different view, imposing on indigent prisoners²⁷⁰ additional strictures, most of which do not apply to other indigent litigants.²⁷¹

264. See, e.g., *United States v. Doe*, 810 F.3d 132, 145 (3d Cir. 2015).

265. The leading treatise states:

The as yet unresolved question is whether section 2253(c) permits the issuance of a certificate of appealability on a claim of a violation of a federal statute or federal treaty as did the pre-AEDPA standard for certificates of probable cause to appeal. The lower federal courts are divided on this issue.

HERTZ & LIEBMAN, *supra* note 236, § 35.4.

266. *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

267. King, *supra* note 4, at 308 (footnote omitted).

268. See *supra* note 19 and accompanying text.

269. See *supra* note 38 and accompanying text.

270. The statute defines prisoner to mean “any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.” 28 U.S.C. § 1915(h) (2012).

271. Section 1915(e)(2) is drafted in terms that do not appear to be limited to inmate litigants. For a case applying § 1915(e)(2) to a non-prisoner case, see, for example, *Newsome v. EEOC*, 301 F.3d 227, 231 (5th Cir. 2002). See also *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (“[A]lthough the PLRA was intended to cut down on the volume of prisoner lawsuits, . . . section 1915(e) applies to all in forma pauperis complaints, not just those filed by prisoners.”).

Those strictures require closer examination of both the inmate's resources and the merits of the inmate's contentions. In addition to the financial disclosures required of other in forma pauperis applicants, the PLRA requires inmates to "submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined."²⁷² While other in forma pauperis litigants are still authorized to proceed "without prepayment of fees,"²⁷³ the PLRA directs the court to collect the filing fee for a prisoner's civil action or appeal via instalments—an initial withdrawal of (roughly speaking) one-fifth of the average contents of or average monthly deposits to the inmate's institutional account,²⁷⁴ followed by periodic monthly payments of one-fifth of the prior month's deposits to the account.²⁷⁵

The PLRA's financial provisions affect both inmate litigants and the institutions that house them. Although the PLRA specifies that the payment requirement will not bar the progress of an inmate's action or appeal for lack of funds,²⁷⁶ the effect on an inmate's institutional account can be significant, especially because this requirement has been interpreted to entail the stacking of simultaneous withdrawals for multiple actions and appeals.²⁷⁷ And, from

272. 28 U.S.C. § 1915(a)(2).

273. *Id.* § 1915(a)(1).

274. Section 1915(b)(1) provides:

Notwithstanding [§ 1915(a)], if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

Id. § 1915(b)(1).

275. *See id.* § 1915(b)(2) ("After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account."). Section 1915(f) sets a similar mechanism for withdrawing from the prisoner's institutional account amounts to pay any costs imposed on the prisoner at the end of a lawsuit.

276. *See id.* § 1915(b)(4) ("In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.")

277. *See Bruce v. Samuels*, 136 S. Ct. 627, 629 (2016) ("It is undisputed that the initial partial filing fee is to be assessed on a per-case basis, *i.e.*, each time the prisoner files a lawsuit. . . . We

the institution's perspective, the PLRA requires an investment of employee time to process the institutional account statements for each inmate litigant.²⁷⁸

The PLRA also sets new requirements concerning the screening of prisoners' lawsuits and appeals and imposes a "three-strikes" provision on inmates who file in forma pauperis actions or appeals. In a provision that appears to apply to inmates and non-inmates alike,²⁷⁹ the PLRA directs that

the court shall dismiss the case at any time if the court determines that—(A) the allegation of poverty is untrue; or (B) the action or appeal—(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.²⁸⁰

The PLRA imposes a screening requirement concerning all prisoner suits (regardless of whether they are brought in forma pauperis);²⁸¹ that provision directs the district court to promptly screen prisoner suits against government defendants and "identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief."²⁸² The PLRA's three-

hold that monthly installment payments, like the initial partial payment, are to be assessed on a per-case basis.").

278. See ADVISORY COMM. ON APPELLATE RULES, MINUTES OF FALL 2012 MEETING OF ADVISORY COMMITTEE ON APPELLATE RULES 15 (2012), http://www.uscourts.gov/sites/default/files/fr_import/appellate-minutes-09-2012.pdf ("A district judge member reported that . . . within his district, each prison has a designated person whose job it is to process the institutional-account statements.").

279. See *supra* note 271.

280. This directive applies "[n]otwithstanding any filing fee, or any portion thereof, that may have been paid." 28 U.S.C. § 1915(e)(2) (2012).

281. See, e.g., Carr v. Dvorin, 171 F.3d 115, 116 (2d Cir. 1999) (per curiam) ("The language of the statute does not distinguish between prisoners who proceed *in forma pauperis* and prisoners who pay the requisite filing fee.").

282. 28 U.S.C. § 1915A(b) (2012).

strikes provision applies to prisoner litigants proceeding in forma pauperis; it provides:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under [§ 1915] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.²⁸³

The PLRA's effect on inmate civil rights cases appears to have been dramatic. Professor Schlanger reports that “[a]fter a very steep decline in both filings and filing rates in 1996 and 1997, rates continued to shrink for another decade (although the increasing incarcerated population meant that the resulting number of filings increased a bit). Since 2007, filing rates, prison population, and filings have all plateaued.”²⁸⁴

* * *

Part I noted that the era that produced the original Appellate Rules was one in which all three branches of the federal government took steps to ensure equal access to the courts for indigent litigants, including inmates. The changes enacted by Congress in the mid-1990s were intended to and did alter that approach. In AEDPA, Congress somewhat tightened what it now termed the certificate of appealability requirement, and extended that requirement to federal prisoners seeking § 2255 relief. Post-AEDPA, no appeal in a postconviction review proceeding can be seen, strictly speaking, purely as an appeal as of right: rather, the inmate must seek permission to appeal by making “a substantial showing of the denial of a constitutional right.” The PLRA, likewise, reduced the extent to which inmate appeals in non-habeas civil cases could be viewed as appeals as of right. Not only do the PLRA's periodic payment requirements deliberately impose a financial bite on what may be a meager prison account, but the PLRA's screening requirement directs the court of appeals to proactively screen in forma pauperis appeals for lack of merit. And for prisoners who have incurred three “strikes,” the PLRA goes even further, actually barring appeals unless the prisoner faces “imminent danger of serious physical injury.”

It is clear that, now, a picture of the process for inmate appeals must encompass more than solely the Appellate Rules. It must take account of local

283. *Id.* § 1915(g).

284. Schlanger, *Adulthood*, *supra* note 4, at 156.

circuit case management practices and also of statutory constraints set by AEDPA and the PLRA. But a full account of the procedures for inmate appeals should also consider the impact of changing technology. In the next section, I turn to that topic.

III. TECHNOLOGY AND INSTITUTIONAL PARTNERSHIPS

I argued in Part I that, where inmate appeals were concerned, much of the “action” in the early years of the Appellate Rules occurred largely in a dialogue between the Supreme Court and the rulemakers—each of which instituted procedural innovations that helped to ensure that inmate litigants’ access to the appellate process approximated, insofar as possible, that of non-incarcerated litigants. Part II noted the increasing importance of local circuit case management practices and recounted Congress’s determination, in the mid-1990s, that the system was burdened by undue amounts of inmate access to both trial-court and appellate process. AEDPA and the PLRA, I observed, significantly constrained that access. In the past two decades, the courts have expended considerable effort working out the details of these two statutory schemes, and the rulemakers adopted modest changes both to adjust the Appellate Rules to the statutes²⁸⁵ and to clarify the operation of the prison mailbox rule.²⁸⁶

285. In 1998, Rule 22(b) was amended to recognize the extension of the COA requirement to § 2255 appeals and to clarify that “both district and circuit judges, as well as the circuit justice, may issue a certificate of appealability.” FED. R. APP. P. 22(b) advisory committee’s note to 1998 amendment. In 2009, Rule 22 was amended to conform to revisions to the habeas and § 2255 rules. Rule 11 of those rules, as amended, requires that the district court “issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” U.S. DIST. CT. R. § 2255 CASES 11; *see also* U.S. DIST. CT. R. § 2254 CASES 11. A 2002 amendment added the phrase “unless a statute provides otherwise” to Rule 24(a)(2)’s provision that “[i]f the district court grants the motion [to appeal in forma pauperis], the party may proceed on appeal without prepaying or giving security for fees and costs.” FED. R. APP. P. 24(a)(2). This change reflected the PLRA’s requirement “that prisoners who bring civil actions or appeals from civil actions must ‘pay the full amount of a filing fee,’” as well as the PLRA’s mandate that “[p]risoners who are unable to pay the full amount of the filing fee at the time that their actions or appeals are filed are generally required to pay part of the fee and then to pay the remainder of the fee in installments.” *Id.* advisory committee’s note to 2002 amendment. The 2002 amendments added a similar caveat (“unless . . . a statute provides otherwise”) to Rule 24(a)(3)’s presumption that one who was permitted to proceed in forma pauperis in the district court may continue in forma pauperis on appeal. The Committee Note explained: “The PLRA . . . provides that a prisoner who was permitted to proceed in forma pauperis in the district court and who wishes to continue to proceed in forma pauperis on appeal may not do so ‘automatically,’ but must seek permission.” *Id.* 24(a)(3) advisory committee’s note to 2002 amendment.

286. *See* FED. R. APP. P. 4(c) advisory committee’s note to 2016 amendment; *id.* 25(a)(2)(C) advisory committee’s note to 2016 amendment.

But I will suggest in Part III that in the future, one of the most significant drivers of change in the procedure for inmate appeals may be the availability of technology within prisons and other institutions. Parts III.A and III.B note that technological advances have spurred significant changes in how counsel prepare and file appellate papers, and recount rule amendments designed to accommodate those changes. New length limits depend on word count, and new filing provisions set electronic filing as the default requirement. Part III.C observes that, throughout this period of change, the rulemakers have been alert to the fact that such technological advances are the exception rather than the rule for inmate litigants. The result, for the moment, is a procedural framework that explicitly operates on two tracks—one for represented litigants, and another for pro se (frequently incarcerated) litigants. In Part III.C, I highlight examples of institutions that are making technology available to inmate litigants, and I suggest that, in the coming years, the nature of the federal appellate process for incarcerated pro se litigants will depend to a great extent on collaboration between individual courts and particular prisons and jails. Part III.D closes by examining how the current rules, and pending amendments to them, take account of these developments.

A. *Word Processing and the Overhaul of Length Limits*

The Appellate Rules—created initially in the age of typewriters—have evolved to take account of the computer era. During that evolution, the rulemakers have consistently been conscious of the fact that inmate litigants have little or no access to technologies widely used by lawyers. The rules’ provisions for the length limits of briefs and other documents illustrate this evolution.

The original Appellate Rules set length limits only for briefs and rehearing petitions,²⁸⁷ and the limits differed depending on whether the documents in question were printed or typewritten. Principal briefs were not to “not exceed 50 pages of standard typographic printing or 70 pages of printing by any other process of duplicating or copying”; the limits for reply briefs were one-half those for principal briefs.²⁸⁸ A Committee Note explained that these numbers reflected the assumption that “[f]ifty pages of standard typographic printing is the approximate equivalent of 70 pages of typewritten text.”²⁸⁹ Rehearing petitions were, presumptively, not to “exceed 10 pages of standard

287. *See id.* 28(g) (1967); *id.* 40(b) (1967) (last amended in 2016). Original Rule 28(g) was abrogated in 1998. *See* 1998 Committee Note to Rule 28(g).

288. *Id.* 28(g) (1967) (abrogated 1998).

289. *Id.* 28 advisory committee’s note to 1967 adoption.

typographic printing or 15 pages of printing by any other process of duplicating or copying.”²⁹⁰

Amendments in 1979 removed the distinction between typewritten and printed documents for purposes of length limits. For briefs in either format, the limits were presumptively fifty pages (for principal brief) and twenty-five pages (for the reply).²⁹¹ The Committee Note explained that the distinction between the two formats was being eliminated because “investigation . . . [had] disclosed that the number of words on the printed page is little if any larger than the number on a page typed in standard elite type.”²⁹² In amending Rule 40(b)’s length limit for rehearing petitions, the Committee chose to make the longer (15-page) limit uniformly applicable regardless of format.²⁹³

In the ensuing two decades, of course, word processing became widely available, and this led the rulemakers to become concerned that brief writers were exploiting the page limits by creatively using word processing features to get more words on each page.²⁹⁴ Accordingly, in 1998, the length limits for briefs were overhauled. The new approach used a two-tier system: it set type-volume limits (expressed in terms of word or line quantities) for briefs, but as an alternative it set a “safe harbor” page limit. Brief-writers who complied with that (now shortened) page limit need not count words or lines. The option of counting lines was designed to make the type-volume limits usable for those preparing type-written briefs.²⁹⁵

Notably, though, the new type-volume system was applied only to the length limits for briefs; other length limits were typically expressed in pages. In 1998, the rules were amended to add page limits for motion papers²⁹⁶ and rehearing en banc petitions.²⁹⁷ In 2002, the rules were amended to add page limits for papers filed in connection with requests for permission to appeal²⁹⁸ and for papers in connection with extraordinary writ proceedings.²⁹⁹ It appears that the rulemakers used page, rather than type-volume limits for

290. *Id.* 40(b) (1967) (last amended in 2016).

291. *See id.* 28(g) (1979) (abrogated 1998).

292. *Id.* advisory committee’s note to 1979 amendment.

293. *See id.* 40(b) advisory committee’s note to 1979 amendment.

294. *See* COMM. ON RULES OF PRACTICE & PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 7 (1997), http://www.uscourts.gov/sites/default/files/fr_import/ST9-1997.pdf.

295. *See* FED. R. APP. P. 32(a)(7) advisory committee’s note to 1998 amendment.

296. *See id.* 27(d)(2) (as amended in 1998).

297. *See id.* 35(b)(2) (as amended in 1998).

298. *See id.* 5(c) (as amended in 2002).

299. *See id.* 21(d) (2002) (last amended in 2016).

these other types of filings because they did not perceive the same risk of manipulation that had occasioned the use of type-volume limits for briefs.³⁰⁰

In 2016, the Appellate Rules' length limits were comprehensively overhauled,³⁰¹ in ways that differentiate between litigants who use computers and those who do not. Rules 5, 21, 27, 35, and 40—which previously set page limits—were amended to impose type-volume limits for documents “produced using a computer.” For “handwritten or typewritten” documents, the prior page limits in those rules continued unchanged. The introduction of the distinction between computer-produced and other documents was designed to protect pro se filers who lacked access to a computer: if the rulemakers had instead adopted the type-volume-limit-plus-safe-harbor approach that applies to briefs, it would have been necessary to shorten the relevant page limits.³⁰²

The design of the length limits in the Appellate Rules, then, reflects the rulemakers' awareness of the special circumstances of pro se litigants, including inmates. Those circumstances also play a prominent role in the Rules Committees' ongoing discussions concerning the treatment of electronic filing and service.

B. Electronic Filing and Service

The Appellate Rules, and the other national rules, are in the midst of an evolution to account for electronic filing and service. Pending amendments would set a nationwide presumption that represented litigants must file electronically. But pro se litigants, by contrast, could file electronically only with court permission (through order or local rule).

Currently, the rules largely defer to local circuit practices concerning electronic filing. Appellate Rule 25(a)(2)(D) authorizes each circuit to adopt a local rule permitting or requiring electronic filing, so long as any electronic filing requirement includes reasonable exceptions.³⁰³ Rule 25(c)(1) permits

300. See *id.* 35(b)(2) advisory committee's note to 1998 amendment.

301. The 2016 changes' most prominently discussed feature does not affect non-computer users; the amendments to Rules 28.1 and 32 shortened the word limits for briefs so as to reflect the pre-1998 page limits multiplied by 260 words per page. The line limits for briefs, however, did not change.

302. See COMM. ON RULES OF PRACTICE & PROCEDURE, MEETING OF JANUARY 9–10, 2014, at 6 (2014), <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/committee-rules-practice-and-procedure-january-2014>.

303. See FED. R. APP. P. 25(a)(2)(D) (“A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed.”). Rule 25(a)(2)(D) also defines an electronically filed paper as a “written paper” for purposes of the Appellate Rules.

electronic service “if the party being served consents in writing” (such consent is ordinarily required as a condition of registration in the federal courts’ Case Management / Electronic Case Filing system, or CM/ECF). Rule 25(c)(2) permits parties to use the court’s transmission equipment to make electronic service if authorized by local rule. Rule 25(c)(3) directs parties to serve other parties in “a manner at least as expeditious as the manner used to file the paper with the court,” when “reasonable” in light of relevant factors. Rule 25(c)(4) provides that “[s]ervice by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.” For purposes of computing time periods that run from the date of service, Rule 26(c) permits the addition of three extra days when the paper is not delivered on the date of service; so, for example, when service is by physical mail the recipient gets an extra three days for its response. Prior to 2016, electronic service was included among the types of service that triggered this “three-day rule”; in 2016, the rules were amended to eliminate the extra three days when a paper is served electronically.

As noted, Appellate Rule 25 leaves the treatment of electronic filing largely to local circuit rules. Currently, all thirteen circuits presumptively require that all attorneys file electronically,³⁰⁴ though most circuits have provisions permitting attorneys to seek an exemption from this requirement.³⁰⁵ The circuits vary somewhat in their treatment of electronic filing by pro se litigants, especially with respect to inmate filers.³⁰⁶ Some circuits do not allow pro se litigants to use the CM/ECF system.³⁰⁷ Some

304. See 1ST CIR. R. 25(a) (“Use of the electronic filing system is mandatory for all attorneys filing in this court, unless they are granted an exemption, and is voluntary for all non-incarcerated pro se litigants proceeding without counsel.”); 2D CIR. R. 25.1(b)(1)–(2); 3D CIR. R. 25.1(a); 4TH CIR. R. 25(a)(1); 5TH CIR. R. 25.2.1; 6TH CIR. R. 25(a)(1); 7TH CIR. R. 25(a); 8TH CIR. R. 25A(a); 9TH CIR. R. 25-5(a); 10TH CIR. R. 25.3; 11TH CIR. R. 25-3(a); D.C. CIR. R. 25(a), (b)(1); FED. CIR. R. 25(a)(1).

305. See 1ST CIR. R. 25(a); 2D CIR. R. 25.1(j)(1) (requiring “a showing of extreme hardship or exceptional circumstances”); 4TH CIR. R. 25(a)(1); 5TH CIR. R. 25.2.1; 6TH CIR. R. 25(a)(1); 7TH CIR. R. 25(c); 8TH CIR. R. 25A(a); 9TH CIR. R. 25-5(a); 10TH CIR. R. 25.3; 11TH CIR. R. 25-3(b); D.C. CIR. R. 25(c)(2); FED. CIR. R. 25(c)(1)(I). The Third Circuit does not appear to have a provision concerning attorney requests for exemptions.

306. The summary that follows omits a number of details for the sake of brevity. For example, circuit rules often have different requirements for the mode of filing specified documents, such as those that initiate a matter in the court of appeals.

307. See 6TH CIR. R. 25(b)(2)(A) (“The following must be filed in paper format: . . . A document filed by a party not represented by counsel.”); 7TH CIR. R. 25(b) (requiring that “documents submitted by unrepresented litigants who are not themselves lawyers” be filed in paper form); FED. CIR. R. 25(a)(1) (“Pro se parties must submit any documents in paper form . . .”); see also 11TH CIR. R. 25-3(a) (“Pro se litigants and attorneys who are exempt from

circuits permit (but do not require) pro se litigants to use CM/ECF,³⁰⁸ while in other circuits, pro se litigants can use CM/ECF if they obtain court permission;³⁰⁹ of these circuits, some distinguish between pro se inmate litigants and other pro se litigants.³¹⁰ In the Eighth Circuit, when a pro se litigant files in paper format, the Clerk's Office will scan an electronic copy of the filing and place it into CM/ECF—which removes the need for the pro se litigant to serve paper copies of the document on other parties (unless those other parties are not on CM/ECF themselves).³¹¹

In recent years, the Standing Committee's CM/ECF Subcommittee—i.e., a subcommittee of the parent rulemaking committee—set out to consider possible amendments to all five sets of national rules that would take account of technological progress. The alteration in the “three-day rule”—noted above—was one of the initial products of that consideration. More recently, the Committees have been considering possible amendments that—subject to certain exceptions—would make electronic filing a nationwide requirement and authorize electronic service irrespective of party consent. The specific needs of pro se prisoner cases have figured prominently in the Committees' discussions of this topic.

A proposal that the national rules be amended to presumptively require electronic filing for all litigants, even pro se litigants, met with controversy. Participants from the Criminal Rules Committee, in particular, expressed concern that such an approach would not be appropriate for the criminal or habeas rules. In the spring of 2015, the Criminal Rules Committee's reporters articulated three sets of concerns.³¹² First, they enumerated several challenges

electronic filing must be served by the filing party through the conventional means of service set forth in FRAP 25.”)

308. See 1ST CIR. R. 25(a); 3D CIR. R. 25.1(c); 8TH CIR. R. 25A(a); 9TH CIR. R. 25-5(a).

309. See 2D CIR. R. 25.1(b)(3) (“A pro se party who wishes to file electronically must seek permission from the court”); 4TH CIR. R. 25(a)(1) (“Pro se litigants are not required to file documents electronically but may be authorized to file electronically in a pending case”); 5TH CIR. R. 25.2.1; D.C. CIR. R. 25(c)(1) (“A party proceeding pro se must file documents in paper form with the clerk and must be served with documents in paper form unless the pro se party has been permitted to register as an ECF filer.”); U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, CM/ECF USER'S MANUAL § II.A.2, at 4 (7th ed. 2017), <https://www.ca10.uscourts.gov/sites/default/files/clerk/2017%20CMECF%20NextGen%20User%27s%20Manual.pdf>.

310. See 1ST CIR. R. 25(a) (permitting “non-incarcerated pro se litigants” to use electronic filing if they so choose); 5TH CIR. R. 25.2.1 (“Non-incarcerated pro se litigants may request the clerk's permission to register as a Filing User, in civil cases only, under such conditions as the clerk may authorize.”).

311. See 8TH CIR. R. 25B.

312. Memorandum from Sara Beale & Nancy King, Reporters, Criminal Rules Comm., to the Civil Rules Comm. 1–2 (Mar. 26, 2015), in ADVISORY COMM. ON CIVIL RULES, SUPPLEMENT

for which the CM/ECF system was not, they warned, yet ready. The CM/ECF system, they observed, had been “designed for use by attorneys, who are bound by rules of professional conduct and who have received a legal education.”³¹³ The concerns, they argued, are particularly acute in criminal and habeas or § 2255 cases. For example, inmates likely lack the ability “to file electronically or receive electronic confirmations. . . . Even if some do have email access at one time, they often move from facility to facility, and in and out of custody.”³¹⁴ And how would inmates “file case-initiating documents without credit card information”?³¹⁵ Second, requiring criminal defendants to show good cause in order to receive an exemption from electronic filing would run counter to “the constitutional obligation to provide court access to prisoners and those accused of crime.”³¹⁶ Third, permitting courts to opt out by local rule would force most districts to adopt new local rules.³¹⁷ A representative for the Department of Justice voiced similar concerns:

[T]he CM/ECF system is just not ready to handle all of the types of cases the Department sees, especially the Section 2255 cases. . . . [A]lthough many [inmates] have access to email, none have access to the internet. And there are tens of thousands of prisoners who are being held by the Marshal’s Service, mostly in county jails, not federal facilities, with no computer access.³¹⁸

In August 2016, the Appellate Rules Committee published for comment a proposed amendment to Appellate Rule 25 that would distinguish—for purposes of electronic filing—between represented litigants and pro se litigants. It would require represented litigants to “file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.”³¹⁹ Pro se litigants, by contrast, could “file electronically only if allowed by court order or by local rule”; a court could

TO THE AGENDA BOOK 11, 11–12 (2015), http://www.uscourts.gov/sites/default/files/cv2015-04-supplement_0.pdf.

313. *Id.* at 12.

314. *Id.* at 13.

315. *Id.*

316. *Id.*

317. *See id.* at 13–14.

318. ADVISORY COMM. ON CRIMINAL RULES, MINUTES MAR. 16–17 18 (2015) [hereinafter MARCH 2015 MINUTES], <http://www.uscourts.gov/sites/default/files/criminal-min-2015-03.pdf>.

319. *See* COMM. ON RULES OF PRACTICE & PROCEDURES OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 283 (2016), http://www.uscourts.gov/sites/default/files/2016-08-preliminary_draft_of_rules_forms_published_for_public_comment_0.pdf.

require pro se litigants to file electronically by court order, “or by a local rule that includes reasonable exceptions.”³²⁰ Some public comments criticized this approach: those “comments argued that unrepresented parties generally should have the right to file electronically, which is much less expensive than filing non-electronically.”³²¹ The Appellate Rules Committee considered those concerns but concluded that they were outweighed by “concern[s] about possible difficulties that unrepresented parties might have in using electronic filing and about the difficulty of holding them accountable for abusing the filing system.”³²²

In October 2017, a package of proposed rule amendments—including the proposed amendments to Appellate Rule 25 and proposed e-filing amendments to the Bankruptcy, Civil, and Criminal Rules—was forwarded to the U.S. Supreme Court.³²³ The Bankruptcy, Civil, and Appellate proposals each contain similar provisions permitting pro se litigants to e-file only with court permission (by order or local rule) and permitting courts to require e-filing by pro se litigants only by order or via a local rule with “reasonable exceptions.”³²⁴ The Civil Rules Committee’s report explained that these features in the e-filing proposals were designed “to support programs in a few courts that have set up systems for pro se filing by prisoners.”³²⁵ The Criminal Rules proposal—like the other proposals—permits pro se litigants to e-file only by court permission; but it omits the provision authorizing courts to

320. *Id.* at 275.

321. Memorandum from Michael A. Chagares, Chair, Advisory Comm. on Appellate Rules, to David G. Campbell, Chair, Comm. on Rules of Practice & Procedure 17 (May 22, 2017), in COMM. ON RULES OF PRACTICE & PROCEDURE, AGENDA BOOK 79, 95 (2017) [hereinafter JUNE 2017 AGENDA BOOK], http://www.uscourts.gov/sites/default/files/2017-06-standing-agenda_book_0.pdf.

322. *Id.*

323. See Memorandum from Rebecca A. Womeldorf, Chief Counsel, Rules Comm., to Scott S. Harris, Clerk, U.S. Supreme Court 1 (Oct. 4, 2017), in *Transmittal of Proposed Amendments to the Federal Rules*, ADMIN. OFFICE OF THE U.S. COURTS (Mar. 3, 2017), http://www.uscourts.gov/sites/default/files/2017-10-04-Supreme-Court-Package_0.pdf [hereinafter *2017 Proposed Amendments Package*] (enclosing a memorandum summarizing the proposed Rule amendments that had been approved by the United States Judicial Conference in September 2017).

324. Memorandum from David A. Campbell, Chair, Comm. on Rules of Practice & Procedure, to Scott S. Harris, Clerk, U.S. Supreme Court 2–3 (Oct. 4, 2017), in *2017 Proposed Amendments Package*, *supra* note 323.

325. Memorandum from John D. Bates, Chair, Advisory Comm. on Civil Rules, to David G. Campbell, Chair, Comm. on Rules of Practice & Procedure (May 18, 2017), in JUNE 2017 AGENDA BOOK, *supra* note 321, at 415, 417.

require e-filing by pro se litigants.³²⁶ The accompanying Committee Note explains:

A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.³²⁷

If the Supreme Court approves the proposed amendments, they will be on track to take effect (absent contrary action by Congress) on December 1, 2018.

C. Local and Institutional Practices as the Driver of Change

How will the new national electronic filing rules fit with practice in correctional institutions across the country? To assess that question, I first sketch here a partial snapshot of that practice as it currently stands. The snapshot is only partial because this area of practice is challenging to research. And it is a snapshot that, quite likely, will change even during the time between this article's drafting and its publication. But, for the sake of discussion, I provide an overview of partnerships between state correctional institutions and seventeen federal district courts, as well as a description of a new pilot program that partners selected federal courts with federal Bureau of Prisons facilities. I focus here largely on district courts, not courts of appeals, because the district courts tend to be the initial locus of experimentation.

At least seventeen out of the ninety-four federal districts currently have electronic-filing initiatives for prisoners in state correctional institutions.³²⁸

326. See FED. R. CRIM. P. 49(b)(3) (JUDICIAL CONFERENCE OF THE U.S., Proposed Amendments 2017), in JUNE 2017 AGENDA BOOK, *supra* note 321, at 665, 670.

327. FED. R. CRIM. P. 49(b)(3) advisory committee's note to 2017 proposed amendment, in JUNE 2017 AGENDA BOOK, *supra* note 321, at 665, 667.

328. See generally *In re* Pilot Project for the Submission of Certain Prisoner Filings Through Elec. Mail, No. 17-04 (C.D. Cal. Mar. 10, 2017), <http://www.cacd.uscourts.gov/sites/default/files/general-orders/GO%2017-04.pdf>; Standing Order on Prisoner Elec. Filing Program, No. CTAO-16-21 (D. Conn. June 22, 2016), http://www.ctd.uscourts.gov/sites/default/files/general-ordes/16-21_%20%28EXT%29Standing%20Order%20On%20Prisoner%20Electronic%20Filing%20Program.pdf; *In re* Prisoner Elec. Filing Initiative, No. 16-35-1 (E.D. Wash. May 26, 2016), <http://www.waed.uscourts.gov/sites/default/files/general-ordes/16-35-1.pdf>; *In re* Procedural Rules for Elec. Submission of Prisoner Litig. Filed by Plaintiffs Incarcerated at Participating Penal

None of these initiatives is memorialized in a local rule; rather, they tend to be set out in a general order or standing order or in a manual of procedures. A number of the initiatives are not even district-wide; rather, they are limited (especially at first) to selected correctional institutions within the district. None of the programs extends to criminal cases; some cover all types of civil cases, some target habeas and civil rights cases, and some are limited to § 1983 cases.

With one exception, these programs do not permit the inmates themselves to file electronically. Rather, the inmate gives the filing to prison staff, who scan the document and email it to the court; court staff then file the document electronically in the CM/ECF system. (The exception is the District of Kansas procedure, which appears to contemplate that the inmate himself will scan and email the filing to the court.³²⁹)

Insts., Standing Order No. 3-1-16 (E.D. Cal. Mar. 1, 2016), <http://www.caed.uscourts.gov/caednew/assets/File/Standing%20Order%203-1-16.pdf>; *In re* Procedural Rules for Elec. Filing Program, No. 15-05 (C.D. Ill., S.D. Ill. Nov. 5, 2015), <http://www.ilcd.uscourts.gov/sites/ilcd/files/general-ordes/General%20Order%2015-05%20redacted.pdf>; *In re* Procedural Rules for Prisoner E-Filing Pilot Project, No. 300 (D. Idaho Sept. 18, 2015), https://www.id.uscourts.gov/Content_Fetcher/index.cfm/Procedural_Rules_for_Prisoner_E-Filing_2271.pdf?Content_ID=2271; *In re* The Prison Elec. Filing Pilot Project, No. 15-35-1 (E.D. Wash. Apr. 1, 2015), <http://www.waed.uscourts.gov/sites/default/files/general-ordes/15-35-1.pdf>; *In re* Elec. Submission of Prisoner § 1983 Documents, No. 2012-01 (D. Nev. Mar. 4, 2015), <http://www.nvd.uscourts.gov/Files/2012-01%202nd%20Amend%20General%20Order%20with%20Addendum.pdf>; *In re* Prisoner Elec. Filing Program (S.D. Ind. June 26, 2014), http://www.insd.uscourts.gov/sites/insd/files/general-ordes/PrisonerE-FilingOrder-Signed.6.26.14_5.pdf; *In re* Prisoner Elec. Filing Program, No. 2014-3 (N.D. Ind. Apr. 29, 2014), <http://www.innd.uscourts.gov/sites/innd/files/2014-3.pdf>; Procedures for the Prisoner Elec. Filing Program (W.D. Mo. Sept. 16, 2013), <http://www.mow.uscourts.gov/sites/mow/files/WDMOStandingOrderE-Filing.pdf>; *In re* Procedural Rules for Prisoner Elec. Filing Pilot Project, No. 2012-01 (M.D. La., W.D. La., E.D. La. Jan. 3, 2012), [http://www.lamd.uscourts.gov:8080/calendars/general_orders.nsf/05c593850e73d5f686256bb4007a513d/27f102fea8a6ded58625798200527894/\\$FILE/2012-01.pdf](http://www.lamd.uscourts.gov:8080/calendars/general_orders.nsf/05c593850e73d5f686256bb4007a513d/27f102fea8a6ded58625798200527894/$FILE/2012-01.pdf); U.S. DIST. COURT FOR THE E. & W. DIST. OF WIS., PRISONER E-FILING PROGRAM POLICIES AND PROCEDURES MANUAL (2017), http://www.wiwd.uscourts.gov/sites/default/files/Admin_Order_334.pdf; U.S. DIST. COURT FOR THE DIST. OF KAN., CIVIL CASES: ADMINISTRATIVE PROCEDURE FOR FILING, SIGNING, AND VERIFYING PLEADINGS AND PAPERS BY ELECTRONIC MEANS IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS § I.B (rev. ed. 2016) [hereinafter KANSAS ADMINISTRATIVE PROCEDURE], http://www.ksd.uscourts.gov/wp-content/uploads/local_rules/local_rules_mobile.pdf.

329. See KANSAS ADMINISTRATIVE PROCEDURE, *supra* note 328, § I.B.1–2 (“1. Prisoner litigants will scan pleadings in civil actions on a digital sender or similar equipment. 2. Once the document has been scanned, the prisoner will e-mail the pleading to the court at: ksd_clerks_topeka@ksd.uscourts.gov.”).

None of the programs provides for electronic delivery of notices or documents to the inmate himself. In some programs, prison staff receive the “notice of electronic filing” (“NEF”) and print and deliver it to the inmate. Some of these programs also provide that the staff will print the underlying documents and deliver them to the inmate; some contemplate printing the underlying documents only for court orders. In programs that do not provide for staff printing of documents filed in the case, the program contemplates that the inmate will instead receive hard copies of those documents by mail. (A common pattern is for correctional staff to print court orders for the inmate, but for third parties to serve their documents as hard copies by mail.)

A few programs explicitly address what happens if the inmate is transferred out of a participating facility. The District of Idaho’s procedures address the application of the prison-mailbox rule: “Where applicable, the ‘mailbox rule’ filing date will be the date the prisoner places the document into the hands of prison officials for e-filing.”³³⁰

Though descriptions of the particulars do not yet appear to be available, a recently-commenced pilot project will test a similar program in federal Bureau of Prisons facilities. A September 2016 news release describing the project’s approval by the U.S. Judicial Conference explains:

The one year joint pilot with the Bureau of Prisons (BOP) will provide pro se prisoners access to a digital kiosk in BOP facilities in order to file civil cases in the district and appellate courts participating in the pilot. The system will provide a one-way means for transmitting documents from the prisoner to the court, which would docket the filing in its Case Management/Electronic Case Files system. It is anticipated that up to 25 courts will participate in the pilot.³³¹

The kiosks’ scanners “will accommodate typed or hand-written documents”³³² and will transmit those documents “to a district court’s

330. *In re* Procedural Rules for Prisoner E-Filing Pilot Project, No. 300, at 2 (D. Idaho Sept. 18, 2015), https://www.id.uscourts.gov/Content_Fetcher/index.cfm/Procedural_Rules_for_Prisoner_E-Filing_2271.pdf?Content_ID=2271. Somewhat similarly, the District of Connecticut’s order provides: “Correctional staff will date-stamp each prisoner filing upon receipt, prior to scanning, signifying that the document was scanned for filing with the Clerk at a specific date and time. Documents shall be deemed filed with the Clerk on the date scanned, as shown by the date stamp.” *Standing Order on Prisoner Electronic Filing Program*, No. CTAO-16-21, at 1.

331. *Judicial Conference Approves Prisoner Case Filing and Judge Assistance Pilot Programs*, U.S. CTS. (Sept. 13, 2016), <http://www.uscourts.gov/news/2016/09/13/judicial-conference-approves-prisoner-case-filing-and-judge-assistance-pilot>.

332. *Id.*

dedicated email address.”³³³ But, “[f]or security reasons, prisoner eFiling will allow inmates only to transmit documents to the court, not to view court documents or receive court communications.”³³⁴

It is not all that surprising that these programs are starting with electronic programs for outgoing filings (by the inmate to the court), and that none of them provides for the inmate to receive electronic court notifications directly. Many inmates lack consistent access to the internet and to email. Some institutions, it appears, provide internet and email access as a reward for good conduct³³⁵—an arrangement that plainly would not provide a reliable means for inmates to receive direct electronic notice of docket entries. Most inmates likely have limited or no access to computers on which to draft their filings;³³⁶ and though one manufacturer has found a niche market selling typewriters to inmates, such items are too expensive for many inmates.³³⁷ Thus, for the foreseeable future many inmate filings will likely be handwritten or, if not handwritten, typed. For the moment, it seems likely that electronic filing programs for inmates will thus differ in key ways from full participation in the CM/ECF system.

333. *Court Operations and Case Management—Annual Report 2016*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/court-operations-and-case-management-annual-report-2016> (last visited Feb. 2, 2018).

334. *Id.*

335. See, e.g., *Testing Concepts to Reduce Violence and Use of Restricted Housing*, CORRECTIONAL NEWSFRONT, Oct.–Dec. 2016, at 86, <http://www.cor.pa.gov/About%20Us/Newsroom/Documents/Newsfront/2016%20Newsfronts/2016%20Correctional%20Newsfront%20-%20October%20to%20December%202016.pdf> (“On May 1, 2016, SCI Smithfield began examining the use of a mobile kiosk and personal tablet devices as an incentive for good behavior for inmates housed in the restricted housing unit . . .”).

336. At least one program may provide inmates with computer time for drafting court filings. A member of the Criminal Rules Committee reported in 2015 that there was a nascent pilot program involving collaboration with two institutions run by the state department of corrections. See MARCH 2015 MINUTES, *supra* note 318, at 19. The program “allow[s] prisoners to file electronically in Section 1983 cases,” though not in habeas proceedings. Prisoners receive allotments of time at computer stations where they can type their documents and file them—a development that the court appreciates because more than half its docket consists of prisoner cases, and the e-filing program “has cut down the many, many pages of hard to decipher handwriting.” *Id.*

337. See Daniel A. Gross, *A Prisoner’s Only Writing Machine*, NEW YORKER (July 20, 2017), <https://www.newyorker.com/books/page-turner/how-one-of-the-last-american-typewriter-companies-survives>.

D. National Rules that Accommodate Local and Institutional Variation

The pilot programs described in the preceding section should fit comfortably with the pending amendments to the electronic filing rules. The national rules, as revised by the pending amendments, would permit courts to adopt court orders or local rules authorizing electronic filing by pro se litigants—so the programs noted above should qualify under those provisions. Moreover, the programs noted above apply only in civil cases, so they would not be in tension with the Criminal Rules Committee’s choice to avoid authorizing local requirements for electronic filing by pro se litigants.

How will the developments noted in the preceding Part affect the time-of-filing questions that I discussed in Part I.B? I will argue, here, that the type of prisoner electronic filing programs that are currently most prevalent in federal courts may bring *Houston v. Lack* back into service for filings by inmates—because the prison mailbox rule codified in the Appellate Rules is not a perfect fit for those e-filing programs. As for the problems that can arise with *incoming* prisoner mail, the e-filing programs might provide better assurance that notice of court orders will timely reach inmate litigants—but better still would be a system that allows inmates themselves to view electronic versions of the docket in their case, at least in civil cases.³³⁸

338. Providing inmates with electronic access to the dockets in their criminal cases could raise more difficult issues. A concern would be that such access might facilitate efforts by some inmates to pressure other inmates to demonstrate that they had not cooperated with the government. See COMM. ON RULES OF PRACTICE & PROCEDURE, JUNE 2017 STANDING COMMITTEE—DRAFT MINUTES 15 (2017) (noting that the Criminal Rules Committee “has . . . formed a Cooperator Subcommittee, which continues to explore possible rules amendments to mitigate the risks that access to information in case files poses to cooperating witnesses”), in COMM. ON RULES OF PRACTICE & PROCEDURE, STANDING AGENDA BOOK (2018), <http://www.uscourts.gov/sites/default/files/2018-01-standing-agenda-book.pdf>.

Here it is useful to review the text of Appellate Rules 4(c)(1) and 25(a)(2)(C). As they currently stand, those Rules are materially similar to one another, so I will quote Rule 4(c)(1):

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).³³⁹

Rule 25(a)(2)(C) tracks Rule 4(c)(1) very closely, except that instead of defining when “the notice [of appeal] is timely,” Rule 25(a)(2)(C) defines when “[a] paper filed by an inmate is timely.” (Notices of appeal are filed in the district court, whereas Rule 25(a)(2)(C) governs filings made by an inmate in the court of appeals.)

Rules 4(c)(1) and 25(a)(2)(C) are designed for filings made in paper form and mailed from the facility in which the inmate is confined. It is hard to see how the terms of these Rules could be met by an electronic filing, given that “first-class postage” has no meaning in the electronic context. That, indeed, might be the reason why the pending amendment to Appellate Rule 25(a)(2)(C) (which would be re-numbered Appellate Rule 25(a)(2)(A)(iii)) would revise the phrase “[a] paper filed by an inmate” to read “[a] paper not filed electronically by an inmate.”

But though current Rules 4(c)(1) and 25(a)(2)(C) do not appear to govern the timeliness of electronic inmate filings—and the pending revision to Rule 25(a)(2) would underscore that inapplicability—that should not mean that the prison mailbox rule has no relevance to inmate e-filings. Recall that, in almost all of the extant inmate e-filing programs, the inmate delivers a paper copy of the filing to prison staff, who scan and email the document to the court. What if a prison staffer misplaces the document, or scans only blank pages,

339. FED. R. APP. P. 4(c)(1).

or emails the document to the wrong court? In any of those instances, the mishap would be out of the inmate's control. In the words of the *Fallen* Court, the inmate would have "d[one] all he could under the circumstances."³⁴⁰ For these filings, though the codified prison mailbox rule is inapplicable, courts should apply the underlying *Houston* rule to fill the gap.

As a practical matter, prisoner e-filing programs might alleviate some of the difficulties associated with incoming prisoner mail. We saw in Part I.B.3 that the codified prison mailbox rule does not cover incoming mail delays, and that courts have divided over whether to extend *Houston* to such delays. The delays themselves might be somewhat lessened by a system—such as some of those noted in Part III.C—that enlists prison staff to print electronically-conveyed court orders and notices and deliver them to the inmate. Whereas paper mail might be delayed in entering the prison because it must go through security screening, electronic notices and documents would encounter no such delay. Thus, the systems that feature institutional printing of court electronic notices could provide inmates more promptly with notice of court decisions in their cases. On the other hand, once the electronic notices are printed, the printed copies must make their way to the inmate litigant—and the reliability of that delivery depends on the institution's internal practices. There thus may continue to be some instances in which the notice's delivery is delayed due to circumstances outside the inmate's control. If new prison programs find a way to allow inmates to view, for themselves, the electronic dockets in their cases, this could further alleviate the problems that might arise concerning incoming inmate mail.

IV. CONCLUSION

As Part I recounted, the Appellate Rules advanced, in a number of ways, the goal of access to appellate justice for indigent and incarcerated litigants. Part II observed that, over the half-century of the Rules' existence, the framework that they set has been overlaid in important ways both by circuit case management practices and by legislation. In Part III I predicted that, going forward, the procedures in inmate appeals will additionally vary depending on the institution in which an inmate is incarcerated and the extent to which that institution enters into technological partnerships with the courts.

The developments in electronic filing show that the procedure for inmate appeals is subject not merely to local court variation but also to variation among correctional institutions. The process followed in an inmate's appeal

340. See *Fallen v. United States*, 378 U.S. 139, 144 (1964); see also *supra* text accompanying note 117.

may vary over time depending on the institution(s) among which the inmate might be transferred. Crafting national rules to accommodate these complexities will present an ongoing challenge.

Thus, while the rulemakers remain alert to the needs of inmate filers, the spirit and reasoning of the *Fallen* and *Houston* Courts will continue to be centrally important. To the extent that the specific inmate-filing provisions in the national sets of rules do not address electronically-submitted inmate filings, courts should consider adopting local rules to fill the gap,³⁴¹ and, in the absence of such rules, should carry forward *Houston*'s reasoning when applying the rules' filing provisions to materials submitted electronically by incarcerated litigants.³⁴²

I would like to close by setting this article's survey of appellate procedures in a broader context. Part II.B noted two central legislative changes—the PLRA and AEDPA—that have made it much harder for inmate litigants to succeed in bringing civil rights or habeas claims. This article does not address the wisdom of those changes, or assess the ways in which the applicable substantive and procedural doctrines erect barriers to relief for inmate litigants. Whether or not one agrees with the substantive judgments that Congress has made concerning inmate claims, all participants in the system should be able to agree on the basic value of access to appellate justice. An inmate should not lose the right to appellate review merely because he or she lacks the options available to a non-incarcerated litigant for timely filing a notice of appeal.

341. See *supra* notes 328–30 and accompanying text.

342. See *supra* pp. 27–28.