

## Shadow Judges: Staff Attorney Adjudication of Prisoner Claims

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## ABSTRACT

*Prisoners bring over twenty percent of the civil cases filed in federal district courts, predominantly seeking redress for violations of their civil rights, or release from prison under habeas corpus. Because most prisoners (around ninety-three percent) proceed pro se in their federal civil litigation, they are already at a disadvantage. The deck is stacked against prisoner plaintiffs in other systemic ways. Local rules, general orders, and even district courts' job postings suggest that when a plaintiff is a pro se prisoner the plaintiff is denied an Article III judge. Judicial tasks that must be performed in prisoners' cases, from administration to adjudication, are delegated to nonjudicial staff. As a result, in the very same federal courthouse, prisoners' cases are decided by a court employee who works as part of the court's "pro se staff," while all other plaintiffs' cases are decided by an Article III judge (or at least a magistrate judge, if they consent). The Supreme Court's 2015 *Wellness International Network v. Sharif* decision drew attention to delegation of Article III claims to non-Article III judges in the bankruptcy realm. In that case, the Court rigorously considered the impact of the structural error caused by delegation to judges who do not enjoy fixed salaries or life tenure. But delegation of the judicial power in the prisoner litigation context is still hiding in plain sight.*

*This Article is the first to investigate the scope of the delegation to pro se staff and to consider corresponding separation of powers concerns. Local procedure that delegates this deciding judicial power to pro se staff has gone too far. Local procedure crafts rules for prisoner litigation that conflict with federal law, effectively denying access to an Article III judge. When federal courts overreach in this manner, their rulemaking exceeds the limited rulemaking authority Congress has delegated to the judiciary. This local procedure also violates federal policy, which generally disfavors allowing nonjudicial actors to perform judicial tasks.*

*This Article concludes with recommendations about how to solve the delegation problem. The strongest solution would be to eliminate the local procedures in question and the pro se staff they create. Congress would be required to address the issue directly and nationwide by creating, or not, additional procedure for prisoner litigation. A more moderate approach would publicize the identity of pro se staff as well as the nature of the work the staff undertakes and would allow for a review procedure similar to that afforded to litigants who proceed in front of magistrate judges. Either proposal would bring pro se staff out of the shadows of federal litigation.*

## INTRODUCTION

Imagine two plaintiffs, one incarcerated and one free. Each plaintiff files a complaint on the same day in the same federal district court. Each complaint alleges a procedural due process claim clearly arising under federal law and unquestionably appropriate for federal jurisdiction. Do these two plaintiffs, one incarcerated and one free, have an equal chance at having the claims in their complaints decided by a federal judge?

The instinctual answer may be “of course.” The only real choice with respect to who decides the fate of a particular civil claim in federal court is the decision to either consent to magistrate judge adjudication or to accept the default federal court adjudicator assignment: an Article III district judge.<sup>1</sup> However, the research undertaken in connection with this Article suggests that complaints alleging the same kind of claim, filed on the same day in the same federal district court, may not be decided by the same type of adjudicator.

Imagine that the plaintiffs in question each file a complaint in the District of Arizona. If the case is brought by a prisoner, it is automatically assigned to “the Staff Attorneys’ Office.”<sup>2</sup> The Staff Attorneys’ Office “administer[s]” all civil cases brought by prisoners.<sup>3</sup> There is no local rule that assigns a non-prisoner’s complaint, alleging the same claim as the prisoner’s complaint, to a Staff Attorneys’ Office.

Of course, administration by the Staff Attorneys’ Office may not mean adjudication by the Staff Attorneys’ Office. Yet a position description advertising a staff attorney opening in the District of Arizona explains that the person selected for the position “will perform substantive review, research, and writing in prisoner civil rights and habeas corpus cases.”<sup>4</sup> This position description suggests that staff attorneys assigned to prisoners’ civil cases are reaching the merits of prisoner claims.

Still, this practice may be only slightly different from what occurs in federal judges’ chambers around the country: a nonjudicial actor, typically a law clerk, makes a recommendation in a particular case, sometimes a procedural recommendation implicating a hearing date,

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<sup>1</sup> See 28 U.S.C. § 636 (2012) (describing when magistrate judges may decide claims brought in federal district courts).

<sup>2</sup> D. ARIZ. L.R. CIV. 16.2(b)(2)(A).

<sup>3</sup> *Id.*

<sup>4</sup> Job Posting, *Pro Se Staff Attorney—Phoenix or Tucson*, U.S. DIST. COURT FOR THE DIST. OF ARIZ., [http://agency.governmentjobs.com/azduscourts/job\\_bulletin.cfm?JobID=787543](http://agency.governmentjobs.com/azduscourts/job_bulletin.cfm?JobID=787543) (last visited Oct. 14, 2016).

and sometimes a recommendation that reaches the case's merits. So long as a judge ultimately endorses the recommendation, there is no real difference between how a prisoner's procedural due process claim and a non-prisoner's procedural due process claim will be adjudicated. That is, even if the prisoner's complaint is originally assigned to a Staff Attorneys' Office, any staff attorney recommendation will later be endorsed or rejected by a judge. As a result, if this is true, then the staff attorney and his or her work product is effectively supervised by a judge.

In reality, staff attorneys may not be directly supervised by judges. For example, the District of Arizona position description states that the staff attorney ultimately hired "will be supervised by the Senior Staff Attorney."<sup>5</sup> At the time this Article was written, the senior staff attorney in the District of Arizona was James McKay. McKay is a respected federal court employee who, in addition to his role as senior staff attorney, sits on the Ninth Circuit Pro Se Committee and the District of Arizona's Local Rules Advisory Committee.<sup>6</sup> But he is not a judge.

If staff attorneys are reaching the merits of prisoners' claims and are not directly supervised by judges, then a prisoner's civil case in the District of Arizona is effectively administered by the Staff Attorneys' Office. The staff attorney assigned to the prisoner's case is not limited to typically administrative decisions and will reach the merits of the prisoner's claims. The staff attorney will be supervised by a senior staff attorney, as opposed to a judge. This creates the possibility that adjudication of a complaint filed on the same day in the same federal district court will be *less* likely to be decided by a judge *if* the complaint is filed by a prisoner.

Returning to the two litigants with the same claim, one imprisoned and one free: How else do they differ? A non-prisoner plaintiff who wishes to challenge the assignment of his or her case to a magistrate judge has very specific procedural mechanisms through which he or she may do so.<sup>7</sup> Federal law is also very protective of a party's right to

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<sup>5</sup> *Id.*

<sup>6</sup> *Presenter Biographies*, U.S. DIST. COURT FOR THE DIST. OF ARIZ., <http://www.azd.uscourts.gov/sites/default/files/documents/%5BB%5D%20Presenter%20Biographies.pdf> (last visited Oct. 14, 2016). I met Mr. McKay when I worked as a law clerk in the District of Arizona. However, this Article is based on independent research, not my experiences as a law clerk.

<sup>7</sup> 28 U.S.C. § 636(c)(2) (describing how parties will be notified if a magistrate judge is "designated to exercise civil jurisdiction" and how the parties will be advised "that they are free to withhold consent without adverse substantive consequences").

challenge assignment to a magistrate judge. If a court rule refers a civil matter to a magistrate judge, there must also be “procedures to protect the voluntariness of the parties’ consent” to that referral.<sup>8</sup> Magistrate judges’ findings are subject to review by a district court judge *de novo*.<sup>9</sup> That is, any magistrate judge decision is potentially subject to an additional round of scrutiny by an Article III judge.

By contrast, a prisoner whose case is assigned to nonjudicial court staff has no procedure through which he or she can challenge the assignment. There is no federal law or District of Arizona local rule requiring the creation of procedures that would protect a prisoner’s right to consent to or reject assignment to nonjudicial court staff. Nor is there a federal law or District of Arizona local rule describing how a decision made by nonjudicial court staff can trigger the kind of *de novo* review a non-prisoner plaintiff is entitled to receive.

But how will a prisoner know that his or her case has been assigned to a staff attorney? To know that this kind of assignment occurs in the District of Arizona, the prisoner would have to be aware of the existence and understand the purpose of local rules of civil procedure. To know exactly what staff attorneys are doing, and who supervises their work, the prisoner would need to locate and search federal court job databases and other obscure district court online material. It is not a stretch to state that most prisoners will not be able to locate that same information.

The two hypothetical plaintiffs introduced in this section filed a complaint on the same day in the same federal district court and alleged the same claim. However, if one of them is incarcerated, there is a chance that the incarcerated plaintiff’s claim will not be adjudicated by a federal judge. These two plaintiffs’ cases will potentially be resolved in very different ways. Incarcerated plaintiffs are important players in federal litigation. Over twenty percent of the civil cases filed in federal court last year were brought by prisoners,<sup>10</sup> making prisoner cases the second most prevalent category of federal civil cases.<sup>11</sup> In nearly all

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<sup>8</sup> *Id.*

<sup>9</sup> 28 U.S.C. § 636(b)(1).

<sup>10</sup> U.S. COURTS, TABLE C-13—CIVIL PRO SE AND NON PRO SE FILINGS (Sept. 30, 2014), <http://www.uscourts.gov/statistics/table/c-13/judicial-business/2014/09/30> [hereinafter TABLE C-13].

<sup>11</sup> See U.S. COURTS, TABLE C-2—CIVIL STATISTICAL TABLES FOR THE FEDERAL JUDICIARY (June 30, 2015), <http://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2015/06/30> [hereinafter TABLE C-2] (listing cases that constitute “prisoner petitions”); see also Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1211–15 (2015). The Administrative

such cases, the prisoners represented themselves.<sup>12</sup> This Article confronts the role of district courts' pro se staff. It shines a light on the issues created by the delegation of one-fifth of the federal civil docket to nonjudicial staff.

Not only are prisoner cases a significant portion of the federal civil docket, these cases might be the most important cases filed in federal courts. After all, federal prisoner litigation has been a catalyst for social change. Prisoner civil rights actions have forced the country to acknowledge the dire conditions in state prisons, where overcrowding has caused medical care crises and even inmate death.<sup>13</sup> Prisoner civil rights actions involving the denial of medical care have triggered frank discussions about the necessity of sex reassignment surgery.<sup>14</sup> A prisoner civil rights action arising out of conditions in the infamous Angola prison provided a forum to consider exactly what temperature death row inmates' cells should be kept at during miserably steamy Louisiana summers.<sup>15</sup> When prisoners bring habeas corpus petitions, their litigation has the ability to cure a state's constitutional error and the illegal incarceration it caused. If the Supreme Court decides that a decision in a habeas corpus case should be applied retroactively, all inmates with similar claims might be freed.

Prisoner litigation involves exciting and important claims that implicate individual liberties and, in the case of habeas corpus petitions, freedom itself. Still, the federal courts do not welcome prisoner litigation. In response to a recent survey conducted by the Federal Judicial Center, the federal district courts' chief judges characterized pro se prisoner cases as matters in which judges "find it difficult to discern the merits," "encounter procedural or logistical problems," or "have to deal with irrational litigants who make demands the court cannot meet."<sup>16</sup> These confessions suggest that pro se prisoner cases are met with preconceived, and generally negative, notions of their worth.

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Office of the U.S. Courts compiles statistics about "prisoner petitions," a category which includes prisoners' civil rights actions and habeas corpus petitions.

<sup>12</sup> TABLE C-13, *supra* note 10 (indicating that ninety-three percent of such cases were brought pro se).

<sup>13</sup> *Brown v. Plata*, 563 U.S. 493, 501 (2011).

<sup>14</sup> *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1195 (N.D. Cal. 2015).

<sup>15</sup> *Ball v. LeBlanc*, 792 F.3d 584, 589 (5th Cir. 2015).

<sup>16</sup> DONNA STIENSTRA ET AL., FED. JUDICIAL CTR., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES 24–25 (2011), [http://www.fjc.gov/public/pdf.nsf/lookup/proseusdc.pdf/\\$file/proseusdc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/proseusdc.pdf/$file/proseusdc.pdf) [hereinafter JUDICIAL SURVEY].

Yet the district judges who are concerned about pro se prisoner litigation are often not the federal actors who actually deal with pro se prisoner litigation. Instead, like the District of Arizona, most federal district courts<sup>17</sup> assign management of pro se prisoner cases to pro se staff—attorneys known as pro se law clerks or pro se staff attorneys.

Though this method of case assignment is often dismissed as a simple and reasonable staffing arrangement, it is really much more. By giving pro se staff judicial tasks, the federal district courts are in fact delegating away the judicial power in the majority of prisoner civil cases. And, because pro se prisoner cases represent such a large percentage of the federal civil docket, this phenomenon represents a significant reassignment of Article III duties.

This Article examines the issues raised by delegation of judicial tasks to federal district courts' pro se staff. Following this introduction, Part I describes exactly how prisoner litigation is delegated to nonjudicial staff. It examines how pro se staff administers prisoners' cases in the Ninth Circuit, and notes how the staff may also be acting as the cases' adjudicators.<sup>18</sup> Part II highlights the disdain lobbed at prisoners' civil litigation and argues that focusing on the kind of claims that prisoners bring, and not prisoners themselves, supports the conclusion that prisoners' civil litigation is worthy of a federal forum and a federal judge.

Part III offers a way to analyze the delegation to pro se staff described in Part I. It characterizes the delegation as a procedure that creates a separation of powers concern. This part demonstrates that the local procedure district courts are using to delegate judicial tasks to nonjudicial actors is inconsistent with procedure Congress has already developed for prisoner litigation. By creating local procedure that is inconsistent with federal law, district courts have exceeded the limited rulemaking authority Congress has delegated to the federal courts. This overreach creates a structural error of significant dimension.

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<sup>17</sup> *Id.* at 12 (reporting that eighty-six of the ninety district courts that responded to a survey inquiry about the use of pro se staff have such staff).

<sup>18</sup> The research conducted in connection with this Article attempted to mimic, wherever possible, the kind of research an actual litigant might undertake when searching for information about pro se staff and/or local procedure. I chose not to survey district courts about their pro se staff and pro se staff procedure as I perceived some reluctance to divulge exactly what responsibilities pro se staff have. Of course, as a law professor and former federal law clerk, I have information that a litigant without those experiences does not have. Still, I decided that documenting and analyzing the information actually available to the public, as opposed to analyzing information a court might provide to a law professor, would be ultimately more interesting and insightful.

Of course, this Article rests on the premise that prisoner plaintiffs are treated differently—and, in most cases, much worse—than parties who are not incarcerated. While disparate treatment may suggest a possible Equal Protection challenge, it is likely to fail. No court has found that pro se civil litigants, or even the narrower category of prisoner plaintiffs, are a suspect class.<sup>19</sup> Similarly, several courts have addressed whether the limits placed on prisoners' civil litigation burden prisoners' fundamental right to access the courts.<sup>20</sup> However, the consensus is that the right to access the courts is narrow and not impermissibly burdened when legislation limits prisoners' ability to litigate as effectively as possible.<sup>21</sup> What is left in the Equal Protection context is an argument that the local procedures described herein fail a rational basis test.<sup>22</sup> It is difficult to imagine a successful Equal Protection challenge premised on a rational basis argument in this context. Alternatively, characterizing delegation to pro se staff as a structural error offers an untested and innovative way to challenge how prisoner cases are treated.

After highlighting the potential for structural error caused by delegation to pro se staff, Part IV of this Article contends that delegation of judicial tasks to pro se staff violates a robust federal

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<sup>19</sup> See, e.g., *Durham v. Lappin*, 346 F. App'x 330, 333 (10th Cir. 2009); *Jones v. Feliciano*, No. 09-3210-SAC, 2009 WL 3473404, at \*4 (D. Kan. Oct. 27, 2009); *Cushenberry v. Fed. Med. Ctr.*, 530 F. Supp. 2d 908, 913 (E.D. Ky. 2008).

<sup>20</sup> See, e.g., *Roller v. Gunn*, 107 F.3d 227, 232 (4th Cir. 1997); *Hampton v. Hobbs*, 106 F.3d 1281, 1288 (6th Cir. 1997); *Morrison v. Davis*, 88 F. Supp. 2d 799, 804–05 (S.D. Ohio 2000), *amended in part by* 195 F. Supp. 2d 1019 (S.D. Ohio 2001); *Zehner v. Trigg*, 952 F. Supp. 1318, 1332 (S.D. Ind. 1997), *aff'd*, 133 F.3d 459 (7th Cir. 1997).

<sup>21</sup> *Boivin v. Black*, 225 F.3d 36, 42–43 (1st Cir. 2000); see also David C. Fathi, *The Prison Litigation Reform Act: A Threat to Civil Rights*, 24 FED. SENT'G REP. 260, 261–62 (“Courts have consistently rejected equal protection challenges to the PLRA’s limitations on damages and attorney fees.”).

<sup>22</sup> See *Johnson v. Daley*, 339 F.3d 582, 585–86 (7th Cir. 2003) (“Legislation that does not burden a suspect class or affect fundamental rights satisfies the equal-protection requirement if the legislature could think the rule rationally related to any legitimate goal of government. Prisoners are not a suspect class; conviction of crime justifies the imposition of many burdens.”); see also *Imprisoned Citizens Union v. Shapp*, 11 F. Supp. 2d 586, 602 (E.D. Pa. 1998) (holding that applying PLRA’s provision limiting prisoners’ access to prospective relief in a way that other plaintiffs’ access to such relief was not limited did not unconstitutionally burden inmates’ fundamental right to access the courts because limitations imposed by the PLRA do not close courthouse doors, but instead limit “the form and type of relief inmates may be awarded”). See generally Peter Hobart, *The Prison Litigation Reform Act: Striking the Balance Between Law and Order*, 44 VILL. L. REV. 981, 993 (1999) (“Because courts do not regard the PLRA as burdening a fundamental right and do not regard inmates as a suspect class, rational basis review is generally employed. Several courts have held that the PLRA meets the low level test rational basis principle.”).

policy that forbids delegation of judicial tasks to nonjudicial actors. Part V offers solutions to the pro se staff problem, including: the elimination of local rulemaking that targets prisoner litigation, as well as a more moderate approach that would require making the existence of and responsibilities assigned to pro se staff public and subject to meaningful review.

The Article concludes by noting that the rigorous scrutiny that accompanies delegation of Article III work to bankruptcy and magistrate judges is also necessary in the context of prisoner litigation. Delegation of Article III claims to bankruptcy judges reached the Supreme Court in 2015's *Wellness International Network, Ltd., v. Sharif*<sup>23</sup> decision, and received rigorous scrutiny in both the thoughtful majority and dissenting opinions. Delegation of the judicial power in cases in which the plaintiffs happen to be prisoners are deserving of the same attention.

## I

### WHO DECIDES PRISONER CASES?

Prisoner litigation represents a significant portion—almost twenty percent—of the federal district courts' civil docket.<sup>24</sup> Before analyzing the potential constitutional consequences of the assignment of cases to nonjudicial court staff, this Article first describes the history and influence of the court employees known as pro se staff. It also explains why the work pro se staff does is materially different from the work done by elbow law clerks.

#### *A. The Creation and Expansion of Pro Se Staff Duties*

In 1975, a federal pilot program established “pro se law clerk” positions, which allowed district courts flooded with pro se prisoner cases to hire attorneys and assign them exclusively to pro se prisoner cases.<sup>25</sup> Today, most federal district courts employ pro se law clerks,<sup>26</sup> who are sometimes identified as pro se staff attorneys. Certain districts have created specific places within a given courthouse in which the pro

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<sup>23</sup> 135 S. Ct. 1932, 1939 (2015).

<sup>24</sup> TABLE C-13, *supra* note 10.

<sup>25</sup> *Pro Se Law Clerks: A Valuable Court Resource*, U.S. COURTS (Apr. 26, 2011, 1:03 PM), <http://content.govdelivery.com/accounts/USFEDCOURTS/bulletins/695a6> (last visited Oct. 14, 2016).

<sup>26</sup> JUDICIAL SURVEY, *supra* note 16, at 12.

se staff toils, known as Pro Se Offices; there, attorneys work alongside other pro se staff on pro se cases.<sup>27</sup>

The work done by pro se staff is not well understood. The assumption is that they “represent[] people who don’t have attorneys.”<sup>28</sup> They do not. Pro se staff works *for the courts* on cases involving the unrepresented.<sup>29</sup> The staff has specialized knowledge in pro se litigation and is well-versed in the law the pro se cases raise. The cases sent to pro se staff are not assigned randomly. By creating a separate path for pro se cases’ adjudication, the district courts may have created de facto pro se courts that do not operate as Article III courts typically do.<sup>30</sup>

Pro se staff has the potential to make a tremendous impact on the outcome of pro se litigation. In the 12-month period ending September 30, 2014, prisoners filed 60,675 civil cases in federal district courts, a number that represents twenty-one percent of all civil cases filed.<sup>31</sup> Over ninety-three percent of the prisoner-brought cases were pro se.<sup>32</sup> Therefore, when prisoner-brought cases are assigned to pro se staff, the staff in question is tasked with responsibility for nineteen percent of the federal district courts’ civil docket.<sup>33</sup>

Moreover, even if pro se staff are not exclusively assigned to prisoner cases,<sup>34</sup> but instead handle all pro se civil cases, the staff will still spend most of its time on prisoner pro se filings as prisoner cases represent seventy percent of the total pro se civil docket.<sup>35</sup> In the Ninth Circuit, 18,194 pro se civil cases were filed in the 12-month period ending on September 30, 2014.<sup>36</sup> Nearly 13,000 of those pro se cases were brought by prisoners.<sup>37</sup>

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<sup>27</sup> Geoffrey Donald Petis, *Evening Out A Stacked Deck: A Suggestion for Improving Judicial Economy and Promoting Prisoner Access to Justice*, 43 NEW ENG. L. REV. 571, 585–86 (2009).

<sup>28</sup> *Pro Se Law Clerks: A Valuable Court Resource*, THE THIRD BRANCH: NEWSLETTER OF THE FED. COURTS (U.S. Courts, Wash. D.C.), Apr. 2011, at 4–5.

<sup>29</sup> *Id.*

<sup>30</sup> Petis, *supra* note 27, at 586 (2009).

<sup>31</sup> TABLE C-13, *supra* note 10.

<sup>32</sup> *Id.* (explaining that of 60,675 prisoner civil cases, 56,751 were brought pro se).

<sup>33</sup> See Moore, *supra* note 11, at 1215 (stating that prisoner-brought cases are “the second most prevalent [civil] case type” in federal district courts).

<sup>34</sup> JUDICIAL SURVEY, *supra* note 16, at 13 (stating that pro se law clerk positions were created to assist courts with prisoner cases, but as of 2011, seventy-one percent of the districts give pro se law clerks both prisoner and non-prisoner pro se cases).

<sup>35</sup> TABLE C-13, *supra* note 10.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

### B. Pro Se Staff and the Risk of Shadow Judging

It is difficult to determine exactly what pro se staff are doing; however, there are numerous suggestions, hidden in sources as disparate as local rules of civil procedure and district court job descriptions that pro se staff have assumed arguably judicial tasks. Still, exactly what pro se staff does is hard to pinpoint, a fact that only makes pro se staff delegation more difficult to challenge.

It is important to first note that some of the procedure that assigns cases and judicial tasks to pro se staff is formal and some is informal. The more formal procedural mechanisms include local rules of civil procedure and general orders. For example, in the District of Arizona, a local rule sends habeas corpus petitions and prisoner civil rights actions to the District's Pro Se Office, which administers the cases.<sup>38</sup> In the District of Nebraska, a general order describes the "Responsibilities of the Pro Se Law Clerks."<sup>39</sup> This order explains that "[t]he pro se law clerks' responsibilities are conterminous with the pro se docket," which includes all pro se prisoner cases.<sup>40</sup> The pro se law clerks' responsibilities include "address[ing] any non-trial related motions that may be pending at the time of the pretrial conference."<sup>41</sup> The District of Colorado's local rules refer to a "judicial officer designated by the Chief Judge" who "shall review the pleadings of a prisoner . . . to determine whether the pleadings should be dismissed summarily" for several reasons, including "challenging prison conditions" or "asserting claims pertinent to his or her conviction or sentence."<sup>42</sup>

However, formal local procedure does not often reveal the full extent of what pro se staff does, only hinting at the scope of the staff's duties. A review of local rules and general orders in each district court within the Ninth Circuit uncovered only one district, the District of Arizona, which formally mentioned the existence of pro se staff.<sup>43</sup>

Yet other sources, such as employment position descriptions, externship information, local rules committee rosters, and state of the court reports revealed that there are pro se staff attorneys or pro se law

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<sup>38</sup> D. ARIZ. L.R. CIV. 16.2(b)(2)(A).

<sup>39</sup> *In Re: Definition of the Pro Se Docket, Responsibilities of the Pro Se Law Clerks, and Management of the Pro Se Docket*, General Order No. 201302 (D. Neb. 2013), [http://www.ned.uscourts.gov/internetDocs/pom/orders/GO\\_2013-02.pdf](http://www.ned.uscourts.gov/internetDocs/pom/orders/GO_2013-02.pdf).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> D.C. COLO. L. CIV. R. 8.1(a), (b).

<sup>43</sup> See *infra* Table 2.

clerks in the District of Alaska; the Central, Eastern and Southern Districts of California; and the Western District of Washington.<sup>44</sup> Though difficult to locate, these sources were generally more specific about what pro se staff actually does than local rules or general orders. These informal sources provide ways to infer what a district court's local procedure is.

For example, a position description announcing an opening in the Western District of Washington explained that a pro se law clerk “provides assistance on prisoner cases including reviewing complaints and petitions, conducting necessary research and preparing recommendations and non-dispositive orders for the court’s approval.”<sup>45</sup> In the District of Nevada, a State of the Court report explained that pro se staff attorneys “draft orders regarding post-service issues: matters relating to discovery, case management, and disposition of the case.”<sup>46</sup> In the Northern District of California, an “opportunity announcement” described the kind of work externs working in the Pro Se Department would complete.<sup>47</sup> The externs do not work for judges, but instead “assist the Pro Se Department staff attorneys in managing prisoner habeas corpus and civil rights cases for the court,” and “research and draft proposed procedural and dispositive orders in prisoners’ cases challenging their convictions and conditions of confinement.”<sup>48</sup> In the District of Arizona, a position description explained that pro se staff attorneys are supervised “by the Senior Staff Attorney,” not judges, and “perform substantive review, research, and writing in prisoner civil rights and habeas corpus cases.”<sup>49</sup> According to these sources, pro se staff working in the district courts located within the Ninth Circuit are arguably drafting orders and managing cases

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<sup>44</sup> See *infra* Table 2.

<sup>45</sup> See *infra* Table 2.

<sup>46</sup> See *infra* Table 2.

<sup>47</sup> See *infra* Table 2.

<sup>48</sup> See *infra* Table 2.

<sup>49</sup> See *infra* Table 2.

Table 1. Identification of Pro Se Staff in Ninth Circuit District Courts: Local Rules, General Orders, and/or Court Directories<sup>50</sup>

District	Local Rule	General Order	Court Directory
Alaska	n/a	n/a	n/a
Arizona	Local Rule 16.2 <sup>51</sup>	General Order 14-3	n/a
California Central	n/a	n/a	n/a
California Eastern	n/a	n/a	n/a
California Northern	n/a	n/a	n/a
California Southern	n/a	n/a	n/a
Guam	n/a	n/a	n/a
Hawaii	n/a	n/a	n/a
Idaho	n/a	n/a	n/a
Montana	n/a	n/a	n/a
Nevada	n/a	n/a	n/a
Northern Mariana Islands	n/a	n/a	n/a
Oregon	n/a	n/a	n/a
Washington Eastern	n/a	n/a	n/a
Washington Western	n/a	n/a	n/a

District courts outside of the Ninth Circuit also have procedures that suggest that pro se staff perform judicial tasks. There, as in the Ninth Circuit, the best sources for determining what tasks pro se staff are actually performing are not formal local rules or general orders but rather hard to locate sources such as job postings on federal job search Web sites.

For example, the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York make no mention of pro se law clerks. However, the Southern District of New York's Web site includes a link to a department identified as the district's "Pro Se Intake Unit."<sup>52</sup> That unit reviews all pro se filings to determine

<sup>50</sup> I used the following search terms to locate mentions of pro se staff in local rules, general orders, and court directories: "staff attorney," "pro se," and "law clerk."

<sup>51</sup> D. ARIZ. L.R. CIV. 16.2(b)(2)(A). The District of Arizona's local rule regarding "Differentiated Case Management" "screens cases for complexity," and creates different tracks for cases depending upon their perceived complexity. Pro se habeas corpus petitions and civil rights actions brought by prisoners are assigned to a "Prisoner Pro Se Track." *Id.* The Clerk of Court assigns cases to this track based on the "nature of suit," and the cases "are administered by the District's Prisoner Pro Se Office." *Id.*

<sup>52</sup> *Representing Yourself in Federal Court (Pro Se)*, U.S. DIST. COURT FOR THE S. DIST. OF N.Y., [http://www.nysd.uscourts.gov/courtrules\\_prose.php?prose=office](http://www.nysd.uscourts.gov/courtrules_prose.php?prose=office) (last visited Oct. 14, 2016).

“compliance with the Federal Rules of Civil Procedure” before docketing them.<sup>53</sup>

Similar to district courts’ job postings in the Ninth Circuit, job postings outside of the Ninth Circuit are also revealing. The pro se staff attorney hired in the Northern District of Texas will “review[] motions to proceed in forma pauperis; screen[] prisoner petitions and motions, motions to vacate sentence, and civil rights complaints; and assist[] judges who preside over [certain] cases . . . with all aspects of prisoner case management.”<sup>54</sup>

A job posting for a part-time pro se law clerk in the Western District of Virginia explains that a pro se law clerk “provide[s] legal advice and assistance to the Court in connections [sic] with prisoner petitions and complaints” and lists representative job duties as follows:

- Performs substantive screening after filing of all prisoner and inmate petitions and motions, including state habeas corpus petitions, motions to vacate sentence, and civil rights complaints. Drafts appropriate recommendations and orders for the Court’s signature.
- Reviews all complaints, petitions, and pleadings that have been filed to determine issues involved and basis for relief.
- Performs research, as required, to assist the Court in preparing opinions.
- Maintains liaison between the Court and litigants. Corresponds with other officials, such as U.S. Attorney, as required.
- Reviews the docket of pending prisoner and inmate litigation to assure the proper progress of such cases and advises the Court of those cases where action by the Court is appropriate.
- Compiles statistics and prepares periodic reports, as required, which reflect the status and flow of cases. Identifies problem areas, makes recommendations, and offer [sic] solutions, as required.
- Keeps abreast of changes in the law to aid the Court in adjusting to new legislation in the pro-se area.
- Provides information, guidance, and advice to judges, magistrates, and other personnel working in the pro-se area. Advises appropriate personnel on the status of particular cases.<sup>55</sup>

In the Eastern District of Louisiana, a job posting explains that a pro se law clerk:

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<sup>53</sup> *Id.*

<sup>54</sup> Career Opportunity, *Pro Se Staff Attorney #16-02*, U.S. DIST. COURT FOR THE N. DIST. OF TEX. (Oct. 21, 2015) (on file with author).

<sup>55</sup> Position Announcement, *Pro Se Law Clerk Part-Time/Temporary*, U.S. DIST. COURT FOR THE W. DIST. OF VA. (Oct. 2, 2015) (on file with author).

- Performs substantive screening after filing of all prisoner and inmate petitions and motions, including state habeas corpus petitions, motions to vacate sentence, and civil rights complaints.
- Drafts appropriate recommendations and orders for the Court's signature.
- Reviews all complaints, petitions, and pleadings that have been filed to determine eligibility to proceed in forma pauperis, issues involved and basis for relief.
- Performs research, as required, to assist the Court in preparing opinions.
- Maintains liaison between the Court and litigants. Corresponds with other officials, such as U.S. Attorney, as required.
- Evaluates present procedures to determine new innovations for increasing the effectiveness in handling complaints, petitions, and pleadings.
- Reviews the docket of pending prisoner and inmate litigation to assure the proper progress of such cases and advises the Court of those cases where action by the Court is appropriate.”
- Compiles statistics and prepares periodic reports, as required, that reflect the status and flow of cases. Identifies problem areas, makes recommendations, and offers solutions, as required by the Court, Administrative Office, and other officials.
- Keeps abreast of changes in the law to aid the Court in adjusting to new legislation in the pro se area.
- Provides information, guidance, and advice to judges, magistrate judges, and other personnel working in the pro se area. Advises appropriate personnel on the status of particular cases.<sup>56</sup>

A white paper prepared at the request of the Federal Bar Association confirms that pro se staff across the country are engaging in judicial tasks: “District Judges and Magistrate Judges rely on the court’s pro se law clerks and other supporting staff to help process the intake of prisoner cases, initially screen the petitions and other papers, and make recommendations regarding dismissal.”<sup>57</sup>

The most problematic inference arising out of the sources identified above is that pro se staff are acting as judges. To the extent the job descriptions are subject to other interpretations, it is difficult to confirm the truth. This much is true: pro se staff are working on a significant

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<sup>56</sup> Notice of Position Vacancy, *Pro Se Law Clerk (Staff Attorney)*, U.S. DIST. COURT FOR THE E. DIST. OF LA. (Oct. 26, 2015) (on file with author).

<sup>57</sup> PETER G. MCCABE, A GUIDE TO THE FEDERAL MAGISTRATE JUDGE SYSTEM 54 (2014).

portion of the federal civil docket in ways that at least suggest improper delegation of judicial duties.

### *C. Pro Se Staff Are Not Elbow Law Clerks*

The work done by pro se staff should not be dismissed on the grounds that it is similar to the work done by elbow law clerks. Elbow law clerks are clerks who work for one judge in that judge's chambers. Elbow law clerks draft opinions while sitting at a desk located only steps away from the judge who ultimately places his or her name on the documents originally drafted by the elbow law clerk. In the district courts, elbow law clerks are exposed to judges' entire dockets—from securities actions to drug sentencing hearings. If they remain in their judges' chambers for only one year, presumably, no one type of case becomes routine.

The district court staff at issue in this Article are not assigned to a particular judge or chambers. Their writing impacts a limited type of plaintiff (the unrepresented) in a limited category of case (most often, prisoner civil rights or habeas petitions). Even the simple fact of where a pro se staff member sits creates greater opportunity for delegation. There is less interaction with the judge—both social and professional. Judicial supervision decreases. What increases is the chance that pro se staff, who toil for years on one kind of case, will become frustrated with the typical party who brings that kind of case. Delegation of prisoner litigation to pro se staff is unlike the assignment of duties to elbow law clerks because it is not as closely supervised by judges and is vulnerable to the plaintiff-specific fatigue and cynicism.<sup>58</sup>

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<sup>58</sup> Others have eloquently highlighted the federal court reality that elbow law clerks draft a significant portion of judicial opinions. In 2014, the Marquette Law Review published a symposium issue titled “Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks,” the first “devoted to the institution of the judicial clerk.” Chad Oldfather & Todd C. Peppers, *Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks*, 98 MARQ. L. REV. 1, 6–7 (2014). The symposium addressed important issues, including “how law clerks are selected, ‘who’ law clerks are, what job duties law clerks are assigned, and whether law clerks exercise inappropriate levels of influence over the judicial decision-making process.” *Id.* at 7. The symposium mentioned the role of staff attorneys, but only in the appellate courts. See David R. Stras, *Secret Agents: Using Law Clerks Effectively*, 98 MARQ. L. REV. 151, 173 (2014); see also Stephen L. Wasby, *The World of Law Clerks: Tasks, Utilization, Reliance, and Influence*, 98 MARQ. L. REV. 111, 113–14 (2014). Pro se staff in the district courts remain at the periphery of federal court scholarship.

## II

## PRISONER LITIGATION DESERVES JUDICIAL ATTENTION

Prisoner litigation should receive at least the same amount of judicial attention all other cases filed in federal court receive. Not only does prisoner litigation represent a significant portion of the federal civil docket, it has the ability to effect significant social change. For example, a 2011 case involving civil rights violations arising out of, *inter alia*, failure to provide adequate medical care to prisoners, resulted in an order to relieve extreme overcrowding in California state prisons by releasing a significant portion of the state's prison population.<sup>59</sup> A recent prisoner civil rights action in the Northern District of California granted the prisoner-plaintiff's motion for a preliminary injunction and ordered a California state prison to provide the plaintiff with sex reassignment surgery.<sup>60</sup> In 2015, the Fifth Circuit held that prisoner civil rights claims brought by death row inmates incarcerated in Louisiana's infamous Angola prison supported a finding of Eighth Amendment violations due to a failure to provide the inmates with air conditioning.<sup>61</sup> The prisoner litigation at issue in this Article also implicates habeas corpus petitions, whose importance cannot be overstated. A writ of habeas corpus guarantees "the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."<sup>62</sup>

Prisoner-brought cases in the federal district courts, and in particular those involving prisoner-brought habeas petitions and civil rights claims, are arguably being delegated to non-Article III actors in ways that raise the same kind of concerns as those described in Part III.<sup>63</sup> Yet delegation of prisoner cases is not an issue being litigated in the Supreme Court, nor is it the subject of academic scrutiny. This may be because the delegation is difficult to confirm.<sup>64</sup> Alternatively, delegation of the judicial power in prisoner-brought cases may simply

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<sup>59</sup> *Brown v. Plata*, 563 U.S. 493, 501 (2011) (explaining that at the time of trial, "California's correctional facilities held some 156,000 persons . . . nearly double the number that California's prisons were designed to hold, and California [had] been ordered to reduce its prison population to 137.5% of design capacity," resulting in a required population reduction "as high as 46,000 persons").

<sup>60</sup> *Norsworthy*, 87 F. Supp. 3d 1164, 1195 (N.D. Cal. 2015).

<sup>61</sup> *Ball*, 792 F.3d 584, 589 (5th Cir. 2015) (upholding district court's holding that failure to provide air conditioning on death row constituted an Eighth Amendment violation, but remanding for further consideration of the scope of injunctive relief).

<sup>62</sup> *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

<sup>63</sup> See *infra* Part III.

<sup>64</sup> See *infra* Part III.

be of little interest. After all, when prisoner-brought federal cases receive attention, it is usually to decry their perceived lack of merit. This Part confronts the criticisms aimed at prisoner litigation and argues that prisoner-brought cases are precisely the kind deserving of Article III judicial attention.

### *A. How Prisoner-Brought Cases Are Perceived*

It is difficult to address prisoner-brought cases without running into an avalanche of ill will lobbed at prisoners' attempts to seek justice through civil litigation.<sup>65</sup> The most common objections are that there are too many prisoner-brought cases<sup>66</sup> and that they are all frivolous.

What makes a claim "frivolous" is typically left unsaid.<sup>67</sup> However, that a prisoner-brought claim is more likely to be dismissed before trial has been cited as evidence of prisoner claims' lack of merit. For example, evidence that only three percent of lawsuits filed by inmates in federal court reached trial was enough to support one court's conclusion that "a large portion of prisoner litigation . . . is without merit."<sup>68</sup>

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<sup>65</sup> See, e.g., Note: *Resolving Prisoners' Grievances Out of Court: 42 U.S.C. § 1997e*, 104 HARV. L. REV. 1309, 1309–10 (1991) ("Members of the federal judiciary . . . have repeatedly indicated that most, if not all, prisoner petitions are frivolous."). The academic approach is generally forgiving. But see Gail L. Bakaitis DeWolf, *Protecting the Courts from the Barrage of Frivolous Prisoner Litigation: A Look at Judicial Remedies and Ohio's Proposed Legislative Remedy*, 57 OHIO ST. L.J. 257, 257 (1996) ("[M]ost filings by prisoners are frivolous."); see also Barbara Palmer, *The "Bermuda Triangle?" the Cert Pool and Its Influence over the Supreme Court's Agenda*, 18 CONST. COMMENT. 105, 109 (2001) (describing the majority of cases that make it into the Supreme Court's cert pool as vastly "frivolous," particularly those filed in forma pauperis by prisoners," which are "not worthy of the Court's time").

<sup>66</sup> See, e.g., *Johnson v. Daley*, 339 F.3d 582, 598 (7th Cir. 2003) (Ripple, J., concurring) (federal courts have been "overburdened by meritless lawsuits brought by prisoners"); *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 312 (3d Cir. 2001) (describing "the heavy volume of frivolous prisoner litigation in the federal courts"); *In re Perry*, 223 B.R. 167, 169 (B.A.P. 8th Cir. 1998) (prisoners flood the courts with prisoners' rights litigation); *Nicholas v. Tucker*, 114 F.3d 17, 20 (2d Cir. 1997) ("[F]ederal courts spend an inordinate amount of time on prisoner lawsuits, only a very small percentage of which have any merit.").

<sup>67</sup> Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 437 (1993).

<sup>68</sup> *Tucker v. Branker*, 142 F.3d 1294, 1301 (D.C. Cir. 1998) (assessing the rational basis underlying the PLRA for purposes of Equal Protection challenge). Several authors have challenged the conclusion that dismissal before trial speaks to a claim's frivolousness. See Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1295–96 (1998) (stating that because the Supreme Court has "narrow[ed] the definition of rights and raises the procedural hurdles for relief, prisoners are bound to lose more cases," and as a result, unsuccessful claims are not necessarily "unworthy," but simply "unsuccessful").

Another critique aimed at prisoner-brought cases is the lack of opportunity cost related to bringing them.<sup>69</sup> That is, prisoners have nothing better to do, so the risk of spending their endless free time on pointless suits is high. Even when the Supreme Court mentions its commitment to the fair treatment of prisoner-brought cases, it qualifies its message, reminding us of the cases' categorical lack of merit.<sup>70</sup>

### B. Reclassifying Prisoner-Brought Cases

A metric that looks beyond the antagonism<sup>71</sup> with which the judiciary approaches prisoner litigation is needed. Classifying prisoner litigation within the greater framework of the work that federal courts do is one way to consider whether they are a good use of Article III time. Doing away with generalizations about the merits of prisoners and prisoner litigation creates the opportunity to look to the essence of the claims that prisoners bring.

A preliminary question, then, is what should Article III judges be doing with their time?<sup>72</sup> In 1990, reducing the federal caseload was a

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<sup>69</sup> *Tucker*, 142 F.3d at 1301; *see also* *Roller v. Gunn*, 107 F.3d 227, 234 (4th Cir. 1997) (explaining that prisoners “often have free time on their hands that other litigants do not possess,” and, as a result, “the federal courts have observed that prisoner litigation has assumed something of the nature of a ‘recreational activity’” and that “there has been a far greater opportunity for abuse of the federal judicial system in the prison setting”). This particular line of attack is perplexing when applied to prison condition claims, which, in this Author’s experience, (1) requires prisoners to prioritize civil litigation over efforts that might lead to overturning their criminal conviction, (2) gives a prison custodian notice that he or she is a named defendant with personal exposure in a civil suit, and (3) requires access to paper, pen, mail, and, in some instances, a law library. The opportunity costs are potentially quite high, assuming that prisoners’ civil rights complaints can be written and filed despite prisons’ increasingly frequent use of solitary confinement and lockdowns for both punitive and non-punitive reasons.

<sup>70</sup> *Jones v. Bock*, 549 U.S. 199, 203 (2007). The *Jones* proclamation that most prisoner-brought conditions of confinement claims mostly “have no merit” is oft-cited. *See, e.g.*, *Crayton v. Graffeo*, 10 F. Supp. 3d 888, 892 (N.D. Ill. 2014); *McLean v. United States*, 566 F.3d 391, 402 (4th Cir. 2009); *Muhammad v. Stanford*, No. 7:11CV00610, 2012 WL 112199, at \*1 n.5 (W.D. Va. Jan. 12, 2012); *Brown v. Austin*, No. 05 CIV. 9443 (PKC), 2009 WL 613316, at \*3 (S.D.N.Y. Mar. 4, 2009). Of course, prisoner-brought cases may be plentiful because prison condition violations are also plentiful. And they may be more likely to fail pretrial because incarcerated pro se parties cannot adequately prosecute their claims, regardless of the claims’ merits.

<sup>71</sup> *See* Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You’re Out of Court—It May Be Effective, but Is It Constitutional?*, 70 TEMP. L. REV. 471, 496 (1997) (“[G]iven the extreme number of prisoner civil rights petitions, even the judiciary can become antagonistic towards this class of litigants, and therefore less likely to exert much effort to find the next . . . proverbial needle in the haystack.”).

<sup>72</sup> Exactly what Article III judges should be doing “is a painful but critical question.” Daniel J. Meltzer, *The Judiciary’s Bicentennial*, 56 U. CHI. L. REV. 423, 433 (1989).

serious concern, just as it remains twenty-five years later.<sup>73</sup> Professors Chemerinsky and Kramer proposed reducing the federal caseload by determining the “ideal” scope of federal jurisdiction, and narrowing the category of cases that needed to be heard in federal court accordingly.<sup>74</sup> Acknowledging that appointment of additional federal judges was unlikely, they ranked the cases most and least worthy of Article III attention.<sup>75</sup> To reduce the federal caseload, the scope of federal jurisdiction had to shrink.<sup>76</sup> What they developed was a “minimal” model of federal jurisdiction, which included cases “whose resolution in federal courts should be uncontroversial.”<sup>77</sup>

Chemerinsky and Kramer prioritized four categories of cases that should unequivocally be decided in federal courts: cases involving separation of powers, cases by or against the United States, cases by or against foreign governments, and cases implicating disputes between state governments.<sup>78</sup> Also included in the category of cases that deserve federal jurisdictional priority were cases in which state prisoners challenged their custody through habeas corpus.<sup>79</sup> The authors explained that because the federal remedy exists to “prevent mistakes in the state courts,” providing a remedy through federal review must necessarily mean that the review occur in federal courts.<sup>80</sup>

The authors debated whether cases involving individual constitutional rights were as worthy of federal jurisdiction as the other categories of cases.<sup>81</sup> These cases include prisoners’ section 1983 actions.<sup>82</sup> Section 1983 is the vehicle through which a prisoner can, for

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<sup>73</sup> Moore, *supra* note 11, at 1179–80 (summarizing the concern about “increases” in the federal caseload voiced by the American Bar Association, Congress, and the Advisory Committee on Civil Rules). Moore rejects the assumption that the federal caseload has increased through a revealing and exhaustive review of the Administrative Office of the United States Courts’ data. She concludes that “since 1986, instead of an ‘explosion’ of the civil docket, we have seen the opposite—if not quite an implosion, at least stagnation.” *Id.* at 1180.

<sup>74</sup> See Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 74 (1990).

<sup>75</sup> *Id.* at 75.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 77.

<sup>78</sup> *Id.* at 88–89.

<sup>79</sup> *Id.* at 89.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 91–92.

<sup>82</sup> See 42 U.S.C. § 1983 (2012); *Montano v. Hedgepeth*, 120 F.3d 844, 848 (8th Cir. 1997) (“A bulwark for individual liberties, 42 U.S.C. § 1983 provides legal redress to individuals who suffer violations of their federal rights at the hands of any ‘person’ who acts ‘under color’ of state law.”); *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 134 (3d Cir.

example, sue anyone who “caused a violation of the prisoner’s Eighth Amendment rights while acting under color of state law.”<sup>83</sup> Professor Chemerinsky deemed individual constitutional rights cases as “among the nation’s most important litigation,” and concluded that federal jurisdiction over such cases was necessary.<sup>84</sup> Professor Kramer instead sought to categorize such cases as deserving of the option of a federal forum, that is, that they should enjoy “permissive” federal jurisdiction.<sup>85</sup> Cases involving “nonconstitutional federal questions” were ranked as less important than the previously-described cases, but were ranked of greater importance than diversity cases, which were deemed least in need of federal jurisdiction.<sup>86</sup> As a result, under the Chemerinsky/Kramer sorting, both prisoner-brought habeas petitions and those involving section 1983 civil rights claims deserve federal jurisdiction. In the case of habeas petitions, federal jurisdiction is necessary.

Other scholars who have suggested ways in which to reduce the federal caseload have similarly attacked diversity jurisdiction. A year before the Chemerinsky/Kramer proposal, Professor Meltzer suggested that it was time to consider curtailing diversity jurisdiction.<sup>87</sup> However, his reduction proposal did not compromise federal jurisdiction over prisoner-brought claims. He argued that if federal jurisdiction were to be limited, Article III’s reduced capacity should be reserved, at least in part, to protect constitutional and federal statutory rights most likely to be brought by “disfavored” plaintiffs.<sup>88</sup> Disfavored or unpopular plaintiffs include “prisoners or people who have interactions with police that give rise to misconduct claims”; in other words, those whose claims are viewed suspiciously as soon as they are filed.<sup>89</sup>

Neither the Chemerinsky/Kramer nor the Meltzer proposal expressly states that reserving federal jurisdiction for certain cases means reserving Article III attention for the same. However, it is fair to read this inference into their proposals. In a more recent article, Professor

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1985) *aff’d*, 482 U.S. 656 (1987) (stating that section 1983 encompasses a broad range of actions sounding in tort, including injuries under color of state law to a person or his property and infringements of individual liberties).

<sup>83</sup> *Berry v. Peterman*, 604 F.3d 435, 439 (7th Cir. 2010).

<sup>84</sup> See Chemerinsky & Kramer, *supra* note 74, at 91.

<sup>85</sup> *Id.* at 91.

<sup>86</sup> *Id.* at 92–93.

<sup>87</sup> Meltzer, *supra* note 72, at 434.

<sup>88</sup> *Id.* at 433.

<sup>89</sup> Julie Davies, *Federal Civil Rights Practice in the 1990’s: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 262 (1997).

Williams has categorized prisoner-brought cases as “petitions that legitimately seek to enforce constitutional and statutory protections of fundamental liberties.”<sup>90</sup> That is, he gives prisoner-brought cases a heightened status in the same way that Chemerinsky and Kramer did. He contends that because of the claims such cases involve, they should *not* be relegated to non-Article III court staff, including “magistrates, agency judges, staff attorneys, permanent law clerks, or other shadow judiciary personnel.”<sup>91</sup>

Seen through this lens, prisoner-brought cases, though disdained by federal judges, are worthy of both federal jurisdiction and Article III judicial attention.

### III

#### CONSTITUTIONAL PROBLEMS CAUSED BY THE DELEGATION OF PRISONER CASES TO PRO SE STAFF

It is not enough to label the transfer of responsibilities from Article III judges to pro se staff as delegation to successfully challenge the practice. This Article goes further and questions the constitutionality of the transfer of judicial power to pro se staff on a very specific ground. The delegation, which is authorized by local procedure, is an improper use of the federal courts’ *rulemaking* power. In other words, the local procedure governing pro se prisoners’ civil litigation goes beyond the limited rulemaking authority Congress has given the federal courts. As explained above, district courts delegate pro se cases to pro se staff through local rules, general orders, or informal practices. Each category of district court procedure arguably constitutes an improper and overbroad use of courts’ limited rulemaking power. This Article presents a new application of the doctrine that when federal courts make rules, they may act only within the limited authority delegated to them by Congress.<sup>92</sup>

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<sup>90</sup> Victor Williams, *A Constitutional Charge and a Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary: A Preliminary Blueprint for Remodeling Our National Houses of Justice and Establishing a Separate System of Federal Criminal Courts*, 37 WM. & MARY L. REV. 535, 661 (1996).

<sup>91</sup> *Id.*

<sup>92</sup> Scholarship in this area has focused almost exclusively on the impact of the Federal Rules of Civil Procedure, which apply in all federal district courts. *See, e.g.*, David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927 (2011); Leslie M. Kelleher, *Taking “Substantive Rights” (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47 (1998); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992). The scholars that have addressed the problem of overbroad local rulemaking have focused on the local

Congress has delegated its rulemaking authority to the district courts, but only for the purpose of creating local rules of procedure.<sup>93</sup> Local rules may create a separation of powers issue when they conflict with Congress's judgment about procedure.<sup>94</sup> This principle is embodied in Federal Rule of Civil Procedure 83's (Rule 83) requirement that local rules be consistent with federal statutes.<sup>95</sup> As explained below, there are federal statutes that expressly provide for judicial decision-making in prisoner cases. Yet the district courts have taken it upon themselves to delegate to pro se staff tasks that Congress had already assigned to judges. The district courts are not empowered to create procedure that conflicts so directly with Congressional rulemaking.

The procedure that delegates judicial power to pro se staff arguably violates Rule 83's consistency principle in three different ways. First, the procedure is inconsistent with the Rules Governing Section 2254 Cases in the United States District Courts (the 2254 Rules).<sup>96</sup> In habeas corpus cases, pro se staff have assumed duties that the 2254 Rules expressly leave to judges. The default adjudicator in section 2254 cases is a district court judge; a magistrate judge may take over a district court judge's duties, but only within the limits authorized by 28 U.S.C. § 636.<sup>97</sup> The 2254 Rules do not grant any adjudicatory power to pro se staff.

Indeed, the 2254 Rules are clear that the initial screening of a 2254 habeas corpus petition is to be performed by a judge.<sup>98</sup> They also provide that it is a "judge" who must, if the petition is not dismissed, "order the respondent to file an answer, motion, or other response

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rules and procedure enacted following the Civil Justice Reform Act of 1990 (CJRA). *See, e.g.,* Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677, 683–84 (2002).

<sup>93</sup> *See* Linda J. Rusch, *Separation of Powers Analysis As A Method for Determining the Validity of Federal District Courts' Exercise of Local Rulemaking Power: Application to Local Rules Mandating Alternative Dispute Resolution*, 23 CONN. L. REV. 483, 487 (1991); *see also* Steven Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information*, 14 LOY. L.A. L. REV. 213, 216 (1981).

<sup>94</sup> Rusch, *supra* note 93, at 497.

<sup>95</sup> FED. R. CIV. P. 83(a)(1).

<sup>96</sup> The 2254 Rules were promulgated pursuant to 28 U.S.C. § 2072 (2012). *Beaird v. Joslin*, No. 3:05-CV-1833KBH, 2006 WL 2473338, at \*3 (N.D. Tex. Aug. 11, 2006) *report and recommendation adopted*, No. 3:05CV1833 K, 2006 WL 2459378 (N.D. Tex. Aug. 22, 2006). "A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075." FED. R. CIV. P. 83(a)(1).

<sup>97</sup> R. GOVERNING SEC. 2254 CASES IN THE U.S. DIST. CTS. 10.

<sup>98</sup> *Id.* at R. 4.

within a fixed time, or to take other action the judge may order.”<sup>99</sup> By creating local procedure that delegates judicial tasks to nonjudicial pro se staff, district courts have acted inconsistently with federal law.

Second, when local procedure gives pro se staff the responsibility to screen pro se prisoner complaints after the complaints are filed, that procedure also conflicts with federal law. 28 U.S.C. § 1915A requires that “[w]hen a prisoner seeks redress from a government defendant in a civil action,” the complaint be screened “by the Court.”<sup>100</sup> Screening requires “[t]he court” to “review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.”<sup>101</sup>

While “the court” might include anyone working in the district court who acts at the district court’s general behest, cases interpreting section 1915A are clear that screening is a judicial task. The default adjudicator at the screening stage is a district court judge. A recent District of Nevada case criticizing a magistrate judge’s entry of an order dismissing a complaint under section 1915A illustrates this point. Absent party consent, the magistrate judge only had authority to enter a report and recommendation.<sup>102</sup> The district court reviewed the magistrate judge’s screening order and found it to be analogous to an order entered after “motions to dismiss for failure to state a claim” because the screening order would have the same impact on the case’s ultimate disposition.<sup>103</sup> The court explained that a screening order either terminates a plaintiff’s claim or “forces the plaintiff to replead” and, without party consent, screening could not be delegated to a magistrate judge.<sup>104</sup> Therefore, delegating the screening to pro se staff is inconsistent with what Congress envisioned would occur in the screening process.

Third, for the same reasons, when local procedure assigns screening to pro se staff, it is inconsistent with the Prison Litigation Reform Act.

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<sup>99</sup> *Id.*

<sup>100</sup> *Sudler v. Danberg*, 635 F. Supp. 2d 356, 358 (D. Del. 2009); *see also Elder v. Swarthout*, No. 2:14-CV-0892 DAD P, 2015 WL 4730370, at \*1 (E.D. Cal. Aug. 10, 2015) *report and recommendation adopted*, No. 2:14-CV-0892 WBS DAD, 2015 WL 5286717 (E.D. Cal. Sept. 9, 2015) (explaining that the court “is required to screen all actions brought by prisoners who seek any form of relief, including habeas relief, from a governmental entity or officer or employee of a governmental entity”).

<sup>101</sup> 28 U.S.C. § 1915A(a) (2012).

<sup>102</sup> *Dollar v. Gutierrez*, 111 F. Supp. 3d 1114, 1118 (D. Nev. 2015).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

The Act requires that in prisoner civil rights actions a *court* “shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 . . . by a prisoner . . . if *the court* is satisfied that 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.”<sup>105</sup> It further “requires *the Court* to screen the plaintiff’s complaint for the purpose of identifying claims subject to immediate dismissal.”<sup>106</sup>

There is no suggestion that the “court” mentioned in any of the prisoner-specific federal rules or statutes means anyone that works for the Court. Therefore, the local procedure that delegates the initial screening of habeas corpus petitions and prisoner civil rights actions to pro se staff conflicts with congressional intent.<sup>107</sup> This kind of local procedure is rulemaking that federal courts are not empowered to undertake.

The structural error created by an overbroad use of the federal courts’ rulemaking authority is no less severe if it occurs within formal or informal local procedure. Local rules of civil procedure must comply with Rule 83.<sup>108</sup> Rule 83 requires that local rules be adopted and amended according to the process it sets forth.<sup>109</sup> Rule 83 also governs

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<sup>105</sup> 42 U.S.C. § 1997e(c)(1) (2012) (emphasis added).

<sup>106</sup> *Hunter v. Augusta Richmond Cty. Sheriff’s Dep’t*, No. CV 106-58, 2006 WL 1982937, at \*1 (S.D. Ga. July 12, 2006) (emphasis added); *see also* *Davis v. Jersey City Police Dep’t*, No. CIV. 15-1880 KM MAR, 2015 WL 1268311, at \*1 (D.N.J. Mar. 18, 2015) (“Under the Prison Litigation Reform Act . . . district courts must screen complaints in those civil actions in which a prisoner . . . brings a claim with respect to prison conditions.”); *Adkins v. Shinn*, No. CIV. 14-00156 LEK, 2014 WL 3726143, at \*1 (D. Haw. July 24, 2014) (“Federal courts must screen all civil actions brought by prisoners seeking redress from a governmental entity, officer, or employee, and dismiss a claim or complaint if it is frivolous, malicious, fails to state a claim, or seeks monetary relief from a defendant who is immune from such relief.”); *Castano v. Nebraska Dep’t of Corr. Servs.*, No. 4:98CV3007, 1999 WL 1442028, at \*1 (D. Neb. June 11, 1999) (“Under 1997e(c)(1), a district court must screen prisoner complaints and dismiss those that fail to state a claim, are frivolous or malicious or seek monetary relief from a defendant immune from such relief.”).

<sup>107</sup> Even if local procedure does not conflict with the plain meaning or legislative intent of rules or statutes, at least one scholar has suggested that it may still violate the consistency principle. In this way, a local rule would conflict with Congress’s purpose if it “allows a district court to make a judgment about procedure which Congress should make.” *See* Rusch, *supra* note 93, at 502–03.

<sup>108</sup> FED. R. CIV. P. 83(a)(1) (describing the notice and opportunity for comment required for new or amended rules, the proportion of district judges in a district that must approve of a new or amended rule, when new rules or amendments take effect, and to whom new rules or amendments must be furnished).

<sup>109</sup> *Id.*

the content of local rules.<sup>110</sup> A local rule may only govern the district court's practice.<sup>111</sup> Moreover, Rule 83 expressly provides that local rules must be consistent with, but not duplicative of, federal statutes.<sup>112</sup> Rule 83's consistency principle, and its limit on the scope of a federal court's rulemaking authority, applies with equal force to procedure not contained within local rules. Rule 83 controls the scope of so-called "local-local" rules, a shorthand label for a judge's own rules of practice.<sup>113</sup> An individual judge, just like the district as a whole, may only regulate procedure consistent with federal law.<sup>114</sup>

The Advisory Committee notes suggest that Rule 83 is also meant to govern the "multiple directives" employed by district courts to "control practice," including judges' individual rules of practice, as well as "internal operating procedures" and standing orders.<sup>115</sup> As the Eleventh Circuit has stated, if the purpose of local procedure is to "control practice in a district court," then the label affixed to the procedure in question should not guide its analysis; rather, any such practice must still follow Rule 83.<sup>116</sup> That is, what a district court cannot do by local rule it also cannot do by way of a procedural device labeled something other than a local rule. As a result, the local rules,

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* ("A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075 . . ."). Rule 83's notion that a district court may prescribe rules for the conduct of its business has been described as a restatement of the district courts' inherent power. Flanders, *supra* note 93, at 213 n.2. The same inherent power has been described as a power that is *not* governed by "rule or statute," but instead by "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962). *But see* *G. Heileman Brewing Co., Inc., v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989) (citing both *Link*, 370 U.S. at 629–30 and FED. R. CIV. P. 83 as support for the existence of a court's inherent power to exercise discretion even when the federal rules do not authorize or describe "a particular judicial procedure"). District courts' power over practice and procedure has also been traced to "the grant of judicial power in article III," which purportedly includes the inherent power to regulate practice and procedure. Rusch, *supra* note 93, at 487 (distinguishing the inherent procedural power from the courts' "fundamental" powers related to the exercise of judicial power, powers "necessary to the exercise of all others," "essential powers implied by the Constitution," and "powers belonging to a court merely because it is a court").

<sup>113</sup> Megan M. La Belle, *The Local Rules of Patent Procedure*, 47 ARIZ. ST. L.J. 63, 66 (2015) ("Standing orders, sometimes referred to as 'local-local rules,' are issued by individual judges as opposed to the district court as a whole.").

<sup>114</sup> FED. R. CIV. P. 83(b) (stating that a judge's individual rules must also be consistent with the judge's district's local rules).

<sup>115</sup> FED. R. CIV. P. 83 advisory committee's note to 1995 amendment.

<sup>116</sup> *See* *Brown v. Crawford Cty.*, 960 F.2d 1002, 1009 (11th Cir. 1992).

general orders, and hidden procedure described above must all be consistent with federal laws. When local procedure is inconsistent with federal laws, no matter what form the procedure takes, it creates a separation of powers problem.

#### IV

#### POLICY PROBLEMS CAUSED BY THE DELEGATION OF PRISONER CASES TO PRO SE STAFF

Local procedure that delegates judicial tasks to pro se staff does more than create separation of powers problems. It also violates an identifiable federal policy that disfavors delegation of judicial tasks to actors who are not Article III judges. This policy is present in several Supreme Court cases addressing the constitutionality of the delegation of Article III's judicial power to bankruptcy judges, who do not enjoy life tenure or fixed compensation. It also appears in the criticism aimed at delegation of the authorship of appellate opinions to law clerks and staff attorneys. Finally, the policy is enforced in reported cases that reviewed proceedings in which district court law clerks acted as proxies for Article III judges during pretrial hearings and trial. There, the delegation was overwhelmingly condemned.

##### *A. Claims That Cannot Be Delegated*

Delegation of Article III power has received significant scrutiny in bankruptcy cases, which may include some claims that do not require Article III adjudication, alongside claims that do require Article III adjudication. If Congress creates legislation that vests the Article III judicial power over Article III claims in non-Article III actors, the delegation may create a structural error.

Article III vests the federal judicial power in certain courts<sup>117</sup> and also determines who may sit on those courts.<sup>118</sup> In addition, Article III provides that the judicial power may only be exercised by those who

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<sup>117</sup> U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

<sup>118</sup> *Id.* (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”); *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (“The ‘good Behaviour’ Clause guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment,” whereas “[t]he Compensation Clause guarantees Art. III judges a fixed and irreducible compensation for their services”).

enjoy life tenure and fixed compensation.<sup>119</sup> These judicial qualifications are meant to ensure judicial branch independence and permit judges to be free from the pressure that might otherwise be exerted on them by the remaining branches.<sup>120</sup> In addition, the requirements protect litigants by providing a forum and an adjudicator “free from potential domination” by others.<sup>121</sup> Still, the right to an Article III judge with life tenure and a fixed salary is not absolute.<sup>122</sup> Congress may, in some instances, delegate certain decision-making to non-Article III judges without creating constitutional problems.<sup>123</sup>

The modern doctrine regarding delegation of the judicial power to judges who do not enjoy life tenure and fixed compensation begins with *United States v. Will*, decided in 1980.<sup>124</sup> There, the Supreme Court struck down a law through which Congress repealed previous legislation giving federal judges cost-of-living pay increases.<sup>125</sup> In finding a Compensation Clause violation, the Court emphasized that the Clause is aimed at promoting judicial independence.<sup>126</sup>

Moreover, the Court traced the roots of the Compensation Clause to Hamilton’s concern for protecting judicial pay<sup>127</sup> and the Act of Settlement of 1701, which sought to “correct abuses prevalent under the reign of the Stuart Kings” by, *inter alia*, giving judges “ascertained and established” salaries.<sup>128</sup> Though colonial judges originally enjoyed salary protection and life tenure, by 1761 they served at the pleasure of the King.<sup>129</sup> This “interference” would lead the Framers to ensure that “both the tenure and the compensation of judges would be protected from one of the evils that had brought on the Revolution.”<sup>130</sup> Since *Will*, cases addressing Article III judicial power delegation have emphasized the importance of judicial independence.

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<sup>119</sup> *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 582 (1985).

<sup>120</sup> *N. Pipeline Const. Co.*, 458 U.S. at 59.

<sup>121</sup> *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848 (1986) (quoting *United States v. Will*, 449 U.S. 200, 218 (1980)).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 847.

<sup>124</sup> 449 U.S. 200 (1980).

<sup>125</sup> Jonathan L. Entin & Erik M. Jensen, *Taxation, Compensation, and Judicial Independence*, 56 CASE W. RES. L. REV. 965, 976 (2006).

<sup>126</sup> *Will*, 449 U.S. at 218.

<sup>127</sup> *Id.* (“In the general course of human nature, a power over a man’s subsistence amounts to a power over his will.”).

<sup>128</sup> *Id.* (quoting 12 & 13 Will. III, ch. 2, § III, cl. 7 (1701)).

<sup>129</sup> *Id.* at 219.

<sup>130</sup> *Id.*; Entin & Jensen, *supra* note 125, at 977.

Delegation issues have arisen frequently in bankruptcy cases. In 1982's *Northern Pipeline v. Marathon* decision,<sup>131</sup> the Court addressed whether Congress, through the Bankruptcy Act of 1978, had conferred Article III's judicial power to bankruptcy judges who did not enjoy life tenure or salary security.<sup>132</sup> The bankruptcy judges received jurisdiction "over all matters related to those arising under the bankruptcy laws," a delegation that violated Article III by giving the bankruptcy judges power that only Article III judges could enjoy.<sup>133</sup>

The delegation of Article III's judicial power to judges with periodical appointments compromised judicial independence.<sup>134</sup> The Court emphasized that this cannot be allowed: "our Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary."<sup>135</sup> It saw no need to create courts and judges outside of Article III's purview for matters "related to those arising under the bankruptcy laws,"<sup>136</sup> including the appellant's "right to recover contract damages to augment its estate."<sup>137</sup> The Court also rejected the argument that Congress could create courts with judges not subject to Article III's constraints simply because there was a need for such courts to adjudicate claims arising under specialized legislation.<sup>138</sup>

Following *Northern Pipeline*, Congress limited its delegation of Article III power to bankruptcy judges.<sup>139</sup> The scope of bankruptcy judges' power depended on whether the subject matter of a claim in front of a bankruptcy judge was "core" or "non-core" to a bankruptcy proceeding.<sup>140</sup> Distinguishing between these two categories proved difficult.<sup>141</sup> However, in non-core matters, bankruptcy judges could only conduct hearings and submit proposed findings of fact to district courts to review the findings *de novo* following a party's objection.<sup>142</sup>

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<sup>131</sup> 458 U.S. 50 (1982).

<sup>132</sup> *Id.* at 52, 53, 60.

<sup>133</sup> *Id.* at 76.

<sup>134</sup> *Id.* at 58.

<sup>135</sup> *Id.* at 60.

<sup>136</sup> *Id.* at 76.

<sup>137</sup> *Id.* at 71.

<sup>138</sup> *Id.* at 72–73.

<sup>139</sup> Robin Kar, *What Can Bankruptcy Law Tell Us About Article III and Vice Versa?*, 60 MONT. L. REV. 415, 435 (1999).

<sup>140</sup> G. Marcus Cole & Todd J. Zywicki, *Anna Nicole Smith Goes Shopping: The New Forum-Shopping Problem in Bankruptcy*, 2010 UTAH L. REV. 511, 518 (2010).

<sup>141</sup> *See id.*

<sup>142</sup> Kar, *supra* note 139, at 435–36.

*Stern v. Marshall*, a 2011 decision, addressed whether a bankruptcy judge could render a final judgment in a “core” proceeding involving a common law tort counterclaim.<sup>143</sup> The Court held that, although legislation permitted a bankruptcy judge to do so, the Constitution did not.<sup>144</sup> Constitutionally, a bankruptcy judge improperly exercises the judicial power by entering final judgment on a state common law tort claim.<sup>145</sup> The Court emphasized the importance of keeping the judicial power with those who, through life tenure and fixed compensation, would render decisions without concern about “currying favor with Congress or the Executive.”<sup>146</sup> The integrity of the judiciary would be jeopardized, the Court explained, if Congress could confer judicial power on non-Article III actors.<sup>147</sup>

*Stern* prohibited Congress from altering who wields Article III judicial power by forbidding Congress from assigning away any claim brought within federal jurisdiction “made of ‘the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.’”<sup>148</sup> This category is commonly understood to mean claims that were the subject of suit “at the common law, or in equity, or in admiralty.”<sup>149</sup> Article III judges in Article III courts must decide them.<sup>150</sup>

Such matters include “the mundane as well as the glamorous, matters of common law and statute as well as constitutional law.”<sup>151</sup> The Court resoundingly refused to give weight to the argument that its holding, which would limit the work bankruptcy judges could do, would delay bankruptcy and render it more costly.<sup>152</sup> Instead, it noted that there is no constitutional pass given to a law or procedure that is “efficient, convenient, and useful in facilitating functions of government.”<sup>153</sup>

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<sup>143</sup> *Stern v. Marshall*, 564 U.S. 462, 469 (2011).

<sup>144</sup> *Id.* at 485.

<sup>145</sup> *Id.* at 487.

<sup>146</sup> *Id.* at 494.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*; see also *Murray’s Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 284 (1855) (stating that Congress cannot “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination”).

<sup>150</sup> *Stern*, 564 U.S. at 494 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86–87 (1982)).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 506.

<sup>153</sup> *Id.* (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)).

The *Stern* position that efficiency concerns should not win out over structural ones was eviscerated in *Wellness International Network Limited v. Sharif*.<sup>154</sup> In 2015, just four years after *Stern*, *Wellness International* also addressed the constitutionality of delegation to bankruptcy judges. However, *Stern* notwithstanding, in response to a constitutional challenge, *Wellness* paid homage to efficiency and convenience, stating that “without the distinguished service” of bankruptcy and magistrate judges, “the work of the federal court system would grind nearly to a halt.”<sup>155</sup> Departing from *Stern*, the Court held that “Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge,” no matter if the claim is one that the Constitution gives litigants the right to be adjudicated by an Article III judge.<sup>156</sup> Moreover, the consent need not be express, but can be implied.<sup>157</sup> Therefore, had the *Stern* parties consented to the bankruptcy judge’s entry of a final judgment in the claim at issue, the *Wellness International* decision would have endorsed it.<sup>158</sup>

Central to the Court’s latest bankruptcy delegation pronouncement is the notion that bankruptcy judges provide “able assistance” to Article III judges.<sup>159</sup> Congress *could* “rest the full share of the Judiciary’s labor” on individuals who qualify for bankruptcy judgeships, but has not because, according to the Court, to do so “would require a substantial increase in the number of district judgeships.”<sup>160</sup>

Chief Justice Roberts’ dissent emphasized that party consent is no cure for a constitutional violation; a party, he wrote, “has no authority to compromise the structural separation of powers or agree to an exercise of judicial power outside Article III.”<sup>161</sup> Echoing his majority opinion in *Stern*, Roberts again noted that “practical considerations of efficiency and convenience cannot trump the structural protections of the Constitution,” even if the Congressional incursion into Article III

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<sup>154</sup> 135 S. Ct. 1932, 1939 (2015).

<sup>155</sup> *Id.* at 1938–39.

<sup>156</sup> *Id.* at 1939.

<sup>157</sup> *Id.* at 1947.

<sup>158</sup> Chief Justice Roberts’ dissent argues that the majority could have avoided the question of whether “private parties may consent to an Article III violation.” *Id.* at 1950 (Roberts, J., dissenting) (noting that the claim at issue in *Wellness International* stemmed from the bankruptcy itself, and therefore was not the type of claim that required Article III adjudication).

<sup>159</sup> *Id.* at 1946.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 1954 (Roberts, J., dissenting).

is “de minimis.”<sup>162</sup> Nevertheless, *Wellness International*’s majority opinion is the law: consent can in fact cure a structural constitutional violation.<sup>163</sup>

*Wellness International* ultimately permitted a structural error to be cured through party consent. However, its careful development of a party consent standard demonstrates commitment to the policy that Article III judicial power should generally remain with Article III judges.

### *B. Opinions That Cannot Be Delegated*

Much attention has been devoted to delegation of appellate opinion writing, which also raises concerns about improper delegation of the Article III power. These concerns are anchored in institutionalized notions of who should be responsible for certain tasks.

In the context of appellate opinion writing, the concern over who writes important decisions intersects with concerns about litigants’ increased reliance on decisions that were marked as unpublished. In 1964, the Judicial Conference decided that “only opinions of ‘general precedential value’” would be published.<sup>164</sup> In 2006, the Federal Rules of Appellate Procedure were amended to permit citation of unpublished opinions.<sup>165</sup> As a result of the rule change, “circuit courts can no longer forbid lawyers to cite back to the[] decisions they have made but

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<sup>162</sup> *Id.* at 1959.

<sup>163</sup> *Wellness International* addressed, but did not ultimately turn on, the distinction between public and private rights. *See id.* at 1957–67 (2015) (Roberts, J. dissenting). The public rights doctrine allows Congress to establish legislative courts and administrative agencies to adjudicate cases involving “public rights.” *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67 (1982). Although the distinction between “public rights” and “private rights” has not been well-defined, it is clear that a public right arises “between the government and others.” *Id.* at 69. Traditionally, private rights—generally speaking, matters between two private parties—must be adjudicated by an Article III judge. *Id.* at 69–70. The claims at issue in this Article (habeas and civil rights) avoid the public versus private rights distinction because they are not being pulled between legislative and Article III courts. Instead, they are claims arguably adjudicated by nonjudicial staff working within an Article III court.

<sup>164</sup> Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 414–15 (2013).

<sup>165</sup> Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 2–5 (2007). Pether does not challenge the assumption that staff attorney and law clerk work is second-rate. Instead, her article tackles the “discriminatory origins” of what she refers to as “institutionalized unpublication.” *Id.* at 7.

designated ‘not for publication,’ nor sanction them if they do.”<sup>166</sup> Given the way all opinions are now in fact published, at a minimum, in some kind of electronic format, describing them as published or not is a distinction that makes little sense.

Still, there was significant judicial opposition to the seemingly innocuous change to the appellate rules.<sup>167</sup> One explanation for the outsized reaction is the judicial perception that unpublished opinions lack importance. In theory, unpublished opinions do not create new law; instead, they represent decisions in routine matters and therefore merely affirm preexisting precedent.<sup>168</sup> But why worry about permitting citation to another kind of carefully drafted judicial writing? Perhaps because the unpublished decisions did not actually represent judicial writing. Refocused this way, the resistance to unpublished opinions begins to look like a resistance to opinions written by individuals who are not Article III judges.

Many of the judges who opposed the new citation rule believed that unpublished appellate opinions were authored “predominantly [by] recently-graduated corps of judicial clerks and staff attorneys,” individuals who are not meaningfully supervised.<sup>169</sup> These opinion authors were described as “kids that are just out of law school.”<sup>170</sup> Their work was understood to be “sloppy or wrong.”<sup>171</sup> One author has suggested that “[c]lerks and staff attorneys are more likely than judges to make factually or legally wrong findings because they have missed or misinterpreted something where a more thoroughly trained or more experienced person might not have done.”<sup>172</sup> This statement’s accuracy is not the point.<sup>173</sup> The perception is that citable appellate opinions should be written by Article III judges because Article III judges are more likely to get the law right.

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<sup>166</sup> *Id.* at 8–9.

<sup>167</sup> FED. R. APP. P. 32.1(d).

<sup>168</sup> Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 111 (2000).

<sup>169</sup> Pether, *supra* note 165, at 10.

<sup>170</sup> *Id.* at 6.

<sup>171</sup> *Id.* at 17.

<sup>172</sup> *Id.* at 39–40.

<sup>173</sup> For example, under different circumstances, including access to the paths that privilege opens up, many staff attorneys might have become Article III judges.

### C. Tasks That Cannot Be Delegated

Like the resistance to giving increased stature to appellate opinions authored by law clerks and staff attorneys, there is significant discomfort when law clerks take on typically judicial tasks at the district court level. Judges should be presiding over cases, not their law clerks. Writing in 1981, Wade McCree, an esteemed former federal trial and appellate judge, and then Solicitor General, warned against increasing the number of law clerks working for federal judges.<sup>174</sup> He worried that an increase in the number of law clerks would encourage an increase in the “critical aspects” of judicial work delegated to the new law clerks.<sup>175</sup> Honing in on the Article III implications of such a practice, he also warned that “excessive delegation poses a threat to the traditional institutional structure of the judicial office.”<sup>176</sup> Judge Posner has summarized the problem with over-delegation to law clerks: a law clerk cannot try a case for a judge because such delegation would convert law clerks into judges.<sup>177</sup>

There are several reported examples of law clerk conduct that too closely resembled judicial action. A law clerk cannot rule on whether a victim’s testimony can be read back to the jury, nor can he or she preside over the readback.<sup>178</sup> Such an error is so significant that it renders the trial in which it occurs unfair.<sup>179</sup> At least one court has criticized a judge’s decision to allow a law clerk to “settle” issues

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<sup>174</sup> Wade H. McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 787 (1981).

<sup>175</sup> *Id.* at 789.

<sup>176</sup> *Id.*

<sup>177</sup> *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1046 (7th Cir. 1984) (Posner, J., dissenting). Posner noted that if “Congress abolished all Article III judgeships as they fell vacant till only one Article III judge was left, and it then authorized a thousand law clerks to assist that judge in discharging his burdensome duties. There would no longer be an independent federal judiciary; the clerks would be the judges.” *Id.* at 1052.

<sup>178</sup> Parker B. Potter, Jr., *Law Clerks Gone Wild*, 34 SEATTLE U. L. REV. 173, 184–85 (2010) (citing *Riley v. Deeds*, 56 F.3d 1117, 1120 (9th Cir. 1995)).

<sup>179</sup> *Riley v. Deeds*, 56 F.3d 1117, 1118 (9th Cir. 1995) (suggesting that such an error is structural and will result in the granting of a habeas corpus petition). The court refused to review such an error for abuse of discretion because the standard “presupposes the trial judge exercised some judicial discretion in the matter under review” and that in the underlying criminal case, the “judge was not present when the jury requested that the testimony be read back, nor does the record reflect he was consulted about the matter;” instead, the “law clerk made the decision to grant the jury’s request to read back the testimony.” *Id.* at 1120.

involving jury instructions.<sup>180</sup> A law clerk also may not preside over a final pretrial conference<sup>181</sup> or handle peremptory challenges.<sup>182</sup>

Courts have often rejected losing parties' arguments that a decision should be reversed because law clerks were acting as *de facto* judges on the grounds that the allegations were untrue.<sup>183</sup> Still, courts have noted that if such allegations were true, they would constitute examples of improperly shifting Article III power away from Article III judges.<sup>184</sup>

## V

### RECOMMENDATIONS

There are different ways to solve the problems identified in this Article. The first option is the most sweeping: the elimination of all formal and informal local procedure that assigns judicial tasks to nonjudicial actors in prisoner litigation. Each district courts' local procedure is already subject to potential abrogation by the relevant circuit judicial council.<sup>185</sup> The judicial councils could, if they so desired, amend or abrogate the problematic local procedure.

Congress, which has already legislated the issue of *who* must take certain adjudicative action in prisoner civil rights and habeas cases,

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<sup>180</sup> *United States v. Sloan*, 811 F.2d 1359, 1361 n.2 (10th Cir. 1987) (explaining that "instructions were settled with a law clerk and not the judge," even though "the *judge* must resolve all the issues pertaining to the instructions, for it is the sole responsibility of the *judge* to see to it that the jury is correctly instructed upon the law"). However, *Sloan* does not define exactly what settling entails, and it may encompass the type of law clerk activity—researching applicable law and drafting the final jury instructions—that today would be unlikely to raise eyebrows.

<sup>181</sup> *Sanders v. Union Pac. R.R. Co.*, 193 F.3d 1080, 1082 (9th Cir. 1999) (Tashima, J., concurring) ("[A] pretrial conference is a judicial proceeding and a judicial proceeding can be conducted only by a judicial officer.").

<sup>182</sup> *See United States v. Visinaiz*, 428 F.3d 1300, 1313 n.4 (10th Cir. 2005) ("[R]eliance on law clerks or other court personnel to handle the peremptory challenges with the attorneys is generally considered improper.").

<sup>183</sup> *Potter*, *supra* note 178, at 207–09.

<sup>184</sup> *See, e.g., United States v. Keiser*, No. 305-CR-80, 2006 WL 3751452, at \*3 (D.N.D. Dec. 19, 2006) (rejecting pro se defendant's claims "that law clerks frequently act as *de facto* judges, that judges inappropriately delegate non-delegable duties to their law clerks and that law clerks have usurped the duties of Article III judges," but noting that "each of these complaints, if real, would constitute a serious abuse of the law clerk system and would be grounds for grave concern").

<sup>185</sup> 28 U.S.C. § 2071 (2012). However, given the prevalence of local rules that arguably conflict or duplicate the Federal Rules of Civil Procedure, it is unclear whether judicial councils are engaging in meaningful review of local rules. *See* Walter W. Heiser, *A Critical Review of the Local Rules of the United States District Court for the Southern District of California*, 33 SAN DIEGO L. REV. 555, 556 (1996).

would be the branch left to decide whether additional amendments to already-existing federal law are needed. Congress could choose to amend the Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act to delegate pre-pleading motion review of prisoner complaints and other judicial responsibilities to pro se staff. Though the measures Congress has adopted by no means help prisoners,<sup>186</sup> the legislation that controls prisoner civil rights and habeas litigation was subject to rigorous public debate.<sup>187</sup> This far-reaching solution would cure the structural error created by local procedure that conflicts with federal law. It would eliminate practices that exceed federal courts' rulemaking authority. Any new practices, if legislatively created, would also be subject to the rigorous debate most federal legislation receives.

However, eliminating local procedure that assigns judicial tasks to nonjudicial actors might also create a workload crisis in the federal district courts. Many of the tasks performed by staff attorneys would be reassigned to district and magistrate judges. The Supreme Court has recently warned that even structural errors should not be resolved by rulings that create chaos and overburden the federal judiciary.

In *Wellness International*, the Supreme Court acknowledged that delegation of Article III claims to a non-Article III judge created a separation of powers problem.<sup>188</sup> However, instead of invalidating the legislation that created the separation of powers issue, the Court created a way to cure the structural error. The Court was informed by its concern that if the delegation at issue were prohibited, "the work of the federal court system would grind nearly to a halt."<sup>189</sup> That is, the large volume of claims decided by bankruptcy judges would need to be decided by Article III judges. As a result, it announced that the structural error could be cured if the parties knowingly and voluntarily

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<sup>186</sup> See Katherine A. Macfarlane, *Adversarial No More: How Sua Sponte Assertion of Affirmative Defenses to Habeas Wreaks Havoc on the Rules of Civil Procedure*, 91 OR. L. REV. 177, 182–83 (2012) (describing how the Antiterrorism and Effective Death Penalty Act made the chances of having a habeas petition granted infinitesimal); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1563 (2003) (stating that, as a result of federal litigation aimed at prisoner civil rights' claims, even "constitutionally meritorious cases [were] . . . made more difficult both to bring and to win").

<sup>187</sup> See, e.g., *Goncalves v. Reno*, 144 F.3d 110, 131 (1st Cir. 1998) (describing the debates and reports surrounding the passage of AEDPA); *Hall v. McCoy*, 89 F. Supp. 2d 742, 745 n.4 (W.D. Va. 2000) (describing the debates and reports surrounding the passage of the PLRA).

<sup>188</sup> 135 S. Ct. 1932, 1939 (2015).

<sup>189</sup> *Id.* at 1938–39.

consented to the practice<sup>190</sup> through express or implied consent.<sup>191</sup> The Court avoided a ruling that would have required “a substantial increase in the number of district judgeships.”<sup>192</sup>

Therefore, a less drastic solution to the problems identified in this Article would permit delegation of judicial tasks to nonjudicial actors if parties consented to the delegation. This would avoid a workload crisis resulting from the reassignment of tasks currently performed by pro se staff. Moreover, this solution would simply require district courts to employ procedures already used in other contexts. District courts are familiar with procedures that require party consent because they must create and enforce such procedures when magistrate judges assume adjudicative responsibilities in lieu of district judges.<sup>193</sup> The same party consent procedures could be adopted whenever staff attorneys take on arguably judicial tasks. The procedures already in place that allow parties to object to magistrate judge findings could also be used in the context of pro se staff adjudication.

District courts might also consider eliminating pro se staff positions. When prisoner cases are sent to special offices controlled by staff that hear only one type of case, there are risks that the individuals handling those cases develop routine practices that do not distinguish between claims that are meritless and those that are meritorious. A great deal of bias already surrounds prisoner litigation. Segregating prisoner cases by assigning them to decision makers who only hear prisoner cases will often hurt the prisoners, even if the practices enforced are arguably more efficient. The elimination of staff attorney positions would cause prisoner cases to be treated like other civil cases.

Pursuant to this proposal, federal district judges and law clerks would continue to manage and decide a diversified docket, but that docket would include prisoner cases. Unless certain cases, like prisoner cases, are carved out for disparate treatment, district judges hear cases across every possible subject area that federal jurisdiction reaches. Cases filed in federal court are presumptively assigned to district judges on a random basis. There are sound reasons for this practice. No case becomes too routine, no subject area more familiar or less exciting than another.

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<sup>190</sup> *Id.* at 1939.

<sup>191</sup> *Id.* at 1947.

<sup>192</sup> *Id.*

<sup>193</sup> *See* 28 U.S.C. § 636 (2012).

With respect to prisoners, if their cases are mixed in with all other cases district judges decide, as opposed to being singled out for special treatment and nonjudicial adjudication, it might be harder to make assumptions about the claims prisoners bring, and the kind of plaintiffs prisoners are. For example, a request for an extension caused by a delay in prison mail would be measured against other non-incarcerated parties' extension requests and those requests' reasonableness. The request would not be polluted by assumptions based on historical knowledge of a particular prison's mail delivery habits, or assumptions about that particular prison's inmate population. Prisoner cases and the issues that they give rise to would become less routine and arguably receive a less biased review.

The positions currently designated as pro se staff positions could be converted into law clerk positions. These law clerks would work inside a judge's chambers. Their status would be equal to that of the judge's elbow law clerks. As a result, the individuals conducting the research and drafting orders in prisoner cases would be closely supervised by judges.

At a minimum, staff attorney judging should be brought out of the shadows. There is no reason to treat delegation in prisoner cases any differently than the delegation that garnered attention in, for example, bankruptcy litigation. Delegation does not become inscrutable in cases in which the plaintiffs are incarcerated. In fact, this Article argues, the claims that prisoners are bringing are arguably some of the most important kinds of federal litigation, cases in which delegation to nonjudicial actors should be less, and not more, common.

If district courts assign adjudicative tasks to staff attorneys, that shift should only occur through procedures that are described in detail in local rules, which must be amended and adopted following public notice and opportunity for public comment.<sup>194</sup> Pro se staff duties should not be more detailed in difficult-to-locate position descriptions.

If the staff attorney position survives, staff attorneys themselves should be identified in district court directories. This would give some kind of notice about the volume of nonjudicial staff working on prisoner litigation. If staff attorneys are supervised by a senior staff attorney, that senior staff attorney should also be identified. No prisoner should struggle to determine who is deciding his or her claims.

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<sup>194</sup> FED. R. CIV. P. 83(a)(1).

## CONCLUSION

The recommendations reached in this Article may be criticized for disrupting the hierarchy of who does what in the federal courts. If pro se staff positions are eliminated, district judges and magistrate judges will need to take on the sometimes tedious work required to decide pro se prisoner litigation. District court work is already characterized as less prestigious than that assigned to appellate courts.<sup>195</sup> This Article also proposes that a practice that has largely been shielded from public scrutiny, perhaps purposefully so, needs to be made public. Both suggestions will assign prisoner litigation valued status—which federal courts are reluctant to give it.

But that is no reason to back away from the problem. At least one scholar has observed that when appellate courts delegate opinions involving asylum requests to non-Article III actors, the practice has “structurally subordinating effects” as the cases get “second-class treatment that is likely to produce injustice.”<sup>196</sup> The cases receiving lesser treatment “tend to be those which federal appellate judges find distasteful, or irksome,” including “postconviction appeals, appeals from pro se litigants, civil rights cases, including those brought by prisoners, and asylum and immigration appeals.”<sup>197</sup> District court practices should not be immune from the same scrutiny.

Moreover, there is a robust tradition of criticizing federal courts’ habit of justifying exactly which actor decides a given case by placing subjective value on the case itself. In other words, this Article is not the first to criticize widely held beliefs that some cases are not worthy of an Article III judge’s time. Professor Resnik has argued that referring to certain cases as “complex,” and therefore deserving of Article III attention, distinguishes them from comparatively “little cases,” which quickly become labeled routine and less worthy of “special skill or

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<sup>195</sup> See Pauline T. Kim et. al., *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J.L. & POL’Y 83, 89 (2009) (noting that district judges “work in a very different environment than court of appeals judges do” and that they are “the first responders in a judicial system open to a growing number of claimants”); see also Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REFORM 351, 396–97 (1995) (stating that district judges “deal with litigants, witnesses, and the whole range of actors who populate the trial process, while the circuit judge is rarely required to relate, on a personal level, with these actors” and “district judges are individual decision makers whereas circuit judges are collegial decision makers”).

<sup>196</sup> Pether, *supra* note 165, at 17.

<sup>197</sup> *Id.* at 27.

authority.”<sup>198</sup> Cases deemed trivial or small will be sent to “less visible, less well-resourced, and less prestigious” adjudicators.<sup>199</sup> Resnik draws comparisons between housekeeping, “the province for women during the nineteenth century,” which was consequently devalued, and “the activities of trial court judges,” which has been devalued and ignored as it “increasingly becom[es] the domain of Article I judges.”<sup>200</sup>

Prisoner litigation has been devalued, but unfairly so. That devaluation has protected the delegation described in this Article and shielded it from significant scrutiny despite the potential for structural error. A robust structural challenge based on rulemaking authority, however novel, offers a new way to reign in local procedure that punishes prisoners with second-class practices. The procedure analyzed in this Article targets a disfavored, voluminous category of federal civil litigation. Given its significant impact on both the prisoner’s wellbeing and on our justice system as a whole, there is even more reason to take a closer look.

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<sup>198</sup> Judith Resnik, *From “Cases” to “Litigation”*, 54 LAW & CONTEMP. PROBS. 5, 58 (1991).

<sup>199</sup> *Id.* at 59.

<sup>200</sup> Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 913–14 (1990).

Table 2. Miscellaneous Sources Identifying Pro Se Staff in Ninth Circuit District Courts<sup>201</sup>

District	Source	Staff Mention
Alaska	Representing Yourself in Alaska's Federal Court handbook <sup>202</sup>	The handbook is "the result of . . . many hours of work by dedicated professionals," including "Diane Smith, this Court's Pro Se Staff Attorney, who primarily drafted the handbook and compiled the materials included within it."
Arizona	Pro Se Staff Attorney Position Description <sup>203</sup>  Mediation Program Training Presenter Biographies <sup>204</sup>	"The staff attorney selected . . . will be supervised by the Senior Staff Attorney and will perform substantive review, research, and writing in prisoner civil rights and habeas corpus cases." James McKay is "the Senior Staff Attorney in the . . . District of Arizona . . . James has been a member of the Ninth Circuit Pro Se Committee for six years. He also serves on the District of Arizona Local Rules Advisory Committee."
California Central	Judicial Clerkships and Externships <sup>205</sup>	"Pro Se and Death Penalty Staff Attorney positions are usually full-time, career positions and become available only upon the departure of a staff attorney or through the allocation of new positions by the Administrative Office of the U.S. Courts."

<sup>201</sup> To locate mentions of pro se staff in, for example, the District of Arizona, I searched using the following terms: "District of Arizona staff attorney" and "District of Arizona pro se law clerk." Similar searches were conducted for each district.

<sup>202</sup> *Representing Yourself in Alaska's Federal Court (The Pro Se Handbook)*, U.S. DIST. COURT FOR THE DIST. OF ALASKA, [http://www.akd.uscourts.gov/sites/akd/files/prose\\_handbook\\_2012\\_0216.pdf](http://www.akd.uscourts.gov/sites/akd/files/prose_handbook_2012_0216.pdf) (last visited Oct. 14, 2016).

<sup>203</sup> Job Posting, *Pro Se Staff Attorney—Phoenix or Tucson*, U.S. DIST. COURT FOR THE DIST. OF ARIZ., [http://agency.governmentjobs.com/azduscourts/job\\_bulletin.cfm?JobID=787543](http://agency.governmentjobs.com/azduscourts/job_bulletin.cfm?JobID=787543) (last visited Oct. 14, 2016).

<sup>204</sup> *Presenter Biographies*, U.S. DIST. COURT FOR THE DIST. OF ARIZ., <http://www.azd.uscourts.gov/sites/default/files/documents/%5BB%5D%20Presenter%20Biographies.pdf> (last visited Feb. 10, 2016).

<sup>205</sup> *Judicial Clerkships and Externships*, U.S. DIST. COURT FOR THE CENT. DIST. OF CAL., <https://www.cacd.uscourts.gov/employment/judicial-clerkships-and-externships> (last Oct. 14, 2016).

District	Source	Staff Mention
California Eastern	Opportunity Announcement Pro Se Law Clerk <sup>206</sup>	“The incumbent will . . . support [U.S. Magistrate Judges Grosjean and Boone] by conducting extensive research and writing on writs of habeas corpus filed by prisoners.”
California Northern	Applying for Judicial Externships, Pro Se Department Information <sup>207</sup>	“Pro Se Department externs assist the Pro Se Department staff attorneys in managing prisoner habeas corpus and civil rights cases for the court.”
California Southern	Law Clerk/Extern Application Info, Pro Se Law Clerks <sup>208</sup>	“These [pro se law clerk] positions are usually full-time permanent positions and become available only upon the departure of the law clerk currently holding that position or through the allocation of new positions by the Administrative office of the U.S. Courts.”
Guam	n/a	
Hawaii	n/a	
Idaho	n/a	
Montana	District of Montana Local Rules Committee <sup>209</sup>	Pro Se Law Clerk identified as ex officio member of the court.
Nevada	United States District Court, District of Nevada, State of the Court 2001 <sup>210</sup>	“The pro se staff attorney section of the district now has a total of six lawyers, two of whom are assigned to the capital habeas corpus section.” “Between the Reno and Las Vegas

<sup>206</sup> *Pro Se Law Clerk Opportunity Announcement #2015-24*, U.S. DIST. COURT FOR THE E. DIST. OF CAL. [http://www.caed.uscourts.gov/caednew/assets/File/2015-24PSLC%20Fresno\(1\).pdf](http://www.caed.uscourts.gov/caednew/assets/File/2015-24PSLC%20Fresno(1).pdf) (last visited Oct. 14, 2016).

<sup>207</sup> *Applying for Judicial Externships*, U.S. DIST. COURT FOR THE N. DIST. OF CAL., <http://www.cand.uscourts.gov/externships> (last visited Oct. 14, 2016).

<sup>208</sup> *Law Clerk/Externship Application Info*, U.S. DIST. COURT FOR THE S. DIST. OF CAL., <https://www.casd.uscourts.gov/Job%20Listings/SitePages/LawClerkExternInfo.aspx> (last visited Oct. 14, 2016).

<sup>209</sup> *In re: Appointment of the Local Rules Committee*, Order (D. Mont. 2015), <http://www.mtd.uscourts.gov/sites/mtd/files/Order%20Appointing%20LR%20Committee.pdf>.

<sup>210</sup> *State of the Court 2001*, U.S. DIST. COURT FOR THE DIST. OF NEV. (2001) [http://www.nvd.uscourts.gov/Files/PN\\_Nevada\\_District\\_Report.pdf](http://www.nvd.uscourts.gov/Files/PN_Nevada_District_Report.pdf).

District	Source	Staff Mention
		offices in Calendar Year 2001, the staff attorneys generated approximately 900 orders regarding in forma pauperis status and content screening” and that “the Las Vegas and Reno staff attorneys also generated in excess of 800 draft orders regarding post-service issues: matters relating to discovery, case management, and disposition of the case.”
Northern Mariana Islands	n/a	
Oregon	n/a	
Washington Eastern	n/a	
Washington Western	Job opening, Job Details for Pro Se Law Clerk <sup>211</sup>	The Western District of Washington was hiring a law clerk to “provid[e] assistance on prisoner cases including reviewing complaints and petitions, conducting necessary research and preparing recommendations and non-dispositive orders for the court’s approval.”

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<sup>211</sup> Job Posting, *Job Details for Pro Se Law Clerk*, U.S. DIST. COURT FOR THE W. DIST. OF WASH. (on file with author).

