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The Prison Discovery Crisis

ABSTRACT. For incarcerated people litigating pro se, the civil discovery process is vitally important. When imprisoned litigants lack meaningful access to discovery, their cases become swearing contests they are bound to lose, and wrongdoing in prison goes unaddressed. Yet for these same plaintiffs, civil discovery is defunct. The vast majority of incarcerated plaintiffs, including those with promising or meritorious claims, are unable to navigate either to or through litigation's discovery phase. Part diagnosis and part treatment, this Article is the first to explore in depth how the discovery process fails those pursuing civil-rights claims against their jailers, revealing both a crisis in prison litigation and a failure of our procedural regime.

Relying on both case research and extensive interviews with federal judges, staff attorneys, prison-rights lawyers, formerly incarcerated people, and prison officials, the Article chronicles prison discovery's written and unwritten rules and their failures. It begins with the Federal Rules of Civil Procedure, which map awkwardly or not at all onto prison litigation. It then discusses the much broader amalgam of practical impediments to evidence gathering in prison. These include information asymmetries, resource disparities, and hostility between prison defendants — who create and control most of the evidence relevant to incarcerated people's claims — and plaintiffs.

The Article then scrutinizes the dockets and filings of two hundred recent federal cases arising out of two prisons in two quite different districts: Angola in the Middle District of Louisiana and Menard Correctional Center in the Southern District of Illinois. This research reveals differences between the districts' case-management decisions and cultures, resulting in startling disparities in prison litigants' discovery prospects. Incarcerated litigants' current chances of evidencing and vindicating claims may be largely contingent on the district in which their prison sits — what some incarcerated people call "justice by jurisdiction." Arguing that this situation is both untenable and preventable, the Article suggests multiple concrete avenues for reform.

AUTHOR. Law Clerk, U.S. Court of Appeals for the Eighth Circuit. The views expressed in this piece are my own and do not reflect those of my employer. I am deeply grateful to the formerly incarcerated people, prison officials, judges, and others who agreed to talk with me for this project. For feedback on drafts, I am indebted to Maureen Carroll, Nathan Cummings, Nora Freeman Engstrom, Brianne Holland-Stergar, Amalia Kessler, Margo Schlanger, Joanna Schwartz, David Sklansky, Joshua Stein, and Sergio Valente. For helpful conversations, I want to thank Haller Jackson, Emma Kaufman, Alan Lepp, Martin Martinez, Debbie Mukamal, Norm Spaulding, Robert Weisberg, and Samuel Weiss. Thanks too to the Deborah L. Rhode Center Fellows and those at the Ninth Annual Civil Procedure Workshop at U.C. Law San Francisco for feedback; to Tom

Bruton, Clerk of Court for the U.S. District Court for the Northern District of Illinois, who helped me access case filings; and to Jessica Boutchie and others at the *Yale Law Journal* for their contributions to this piece. Any errors are my own.

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"I can't fight what I can't see, and I can't see what you won't show me."

—Kimberly Haven, former jailhouse lawyer[1]

INTRODUCTION

On May 17, 2017, Willie Berry, Jr. sued Nicholas Sanders, a prison guard at Louisiana State Penitentiary (commonly known as Angola). According to Berry's neatly handwritten complaint, Sanders was called to Berry's cell on July 12, 2016, to "manage a minutes-earlier unruly conflict" between Berry and a nurse named Tequila Parker.[2] Berry had spilled a cup of water on Parker's leg after a pill envelope she tried to hand him slipped to the floor.[3]

Sanders arrived and demanded that Berry strip.[4] As Berry did so, Sanders sprayed his naked body with "burning chemicals" for three to four seconds.[5] And while Berry gagged and writhed on the ground, Sanders yelled: "Bitch, I'm going to make you feel fire, for throwing a cup of water at my baby!"[6] Berry yelled for Sanders to activate his body camera, which Angola required guards to use during "serious incidents."[7] Sanders did not.

Five hours passed before Berry could wash the chemicals off his body and get into new clothes.[8] Cleaned up, Berry had finally returned to his cell when Sanders came for a second visit.[9] This time, it was "to confer."[10]

"[T]hat was my baby you got into it with, and I had to show out . . . for her," Sanders said.[11] Then, he made an offer: he would sneak Berry additional food trays and tone down a disciplinary report he was writing about the incident.[12]

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1. Telephone Interview with Kimberly Haven (July 16, 2024) (on file with author). Kimberly Haven is now a nationally recognized policy strategist and consultant advancing justice and equity reform.
2. Complaint at 11, Berry v. Sanders, No. 17-cv-00318 (M.D. La. May 17, 2017), ECF No. 1 [hereinafter *Berry* Complaint].
3. Trial Transcript at 55, *Berry*, No. 17-cv-00318 (M.D. La. June 2, 2022), ECF No. 145.
4. Berry v. Sanders, No. 17-cv-00318, 2019 WL 577434, at *2 (M.D. La. Jan. 16, 2019).
5. *Id.*
6. *Berry* Complaint, *supra* note 2, at 12.
7. *Id.* at 10.
8. *Id.* at 13-14.
9. *Id.* at 14.
10. *Id.*
11. *Id.* at 14-15.
12. *Id.* at 15.

The catch? Berry would just have to agree not to file a prison grievance about what had happened.[13]

Berry declined.[14] His burns remained painful enough the next day that he returned to the doctor, who prescribed pain medication.[15] And two weeks later, he filed a grievance against Sanders.[16] Months passed without a response.[17]

Then, around 11:00 AM on October 13, 2016, Sanders returned to Berry's cell, having gotten word of Berry's grievance.[18] Sanders ordered Berry to be "restrained for a cell inspection," and once Berry was handcuffed to his cell's bars, Sanders entered and punched him repeatedly.[19] Sanders made no official record of the incident.[20]

Two months later, Berry filed his complaint pro se.[21] He alleged excessive force, retaliation, and denial of equal protection in violation of the First, Eighth, and Fourteenth Amendments.[22] He added some state tort claims, and, in addition to damages, he sought an injunction to force the prison to have "all stationary cameras, that are already fixated on the walls of the Camp J lockdown units, able[] to record, just as other cameras do throughout most of LSP's units."[23]

Berry's case was first dismissed because he had not paid a $4.47 filing fee.[24] After prison bank records proved his indigence, the court let him proceed.[25] Berry then survived Sanders's motion to dismiss his complaint for failure to state a claim.[26] Discovery began, and a few months in, Sanders filed a summary-judgment motion.[27] The two sides relied on competing affidavits. Sanders claimed that Berry flung a "clear liquid substance on the nurse"; that Sanders arrived and

13. *Id.*

14. *Id.*

15. *Id.* at 15-16.

16. *Id.* at 17-18.

17. *Id.*

18. *Id.* at 18.

19. *Id.*

20. *Id.* at 18-19.

21. *Id.* at 21-22.

22. *Id.*

23. *Id.* at 21-23.

24. Ruling and Order at 1-2, Berry v. Sanders, No. 17-cv-00318 (M.D. La. Aug. 11, 2017), ECF No. 5.

25. Berry v. Sanders, No. 17-cv-00318, 2018 WL 1089273, at *2 (M.D. La. Feb. 27, 2018).

26. Berry v. Sanders, No. 17-cv-00318, 2019 WL 577434, at *3-5 (M.D. La. Jan. 16, 2019); Berry v. Sanders, No. 17-cv-00318, 2019 WL 573417, at *1 (M.D. La. Feb. 12, 2019).

27. Defendant's Motion for Summary Judgment at 1, *Berry*, No. 17-cv-00318 (M.D. La. June 12, 2019), ECF No. 42.

ordered Berry to come to the bars to be restrained, which Berry refused to do; that after repeated warnings and profanity-laden refusals, Sanders sprayed Berry with "only enough chemical agent to gain [Berry's] compliance and restrain" him, offered Berry a shower and a clean jumpsuit, and notified doctors that Berry needed to be seen.[28] Sanders denied visiting Berry at all on October 13, 2016.[29] Contrarily, Berry repeated his own account and provided a supporting affidavit from someone four cells over who had heard the altercations.[30] Noting the dispute, the judge denied summary judgment.[31] The case was bound for trial.

In discovery, Berry was an unusually capable prison litigant. He received answers to interrogatories and got the prison to produce his disciplinary report, medical records, some prison policies, and logbooks from the days in which Sanders allegedly visited his cell; Sanders's lawyer also deposed him.[32] Though Berry requested it, no video-surveillance evidence existed; if any cameras were recording, the prison's policy was to delete footage after thirty days.[33]

The documents Berry received were mostly unremarkable. Unsurprisingly, medical records confirmed Berry's injuries in July and October but revealed

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28. Berry v. Sanders, No. 17-cv-00318, 2020 WL 1034627, at *3 (M.D. La. Feb. 14, 2020).

29. *Id.*

30. Plaintiff's Statement of Disputed Material Facts at 1-3, *Berry*, No. 17-cv-00318 (M.D. La. June 24, 2019), ECF No. 43-2; Declaration of Richard Keller at 2-7, *Berry*, No. 17-cv-00318 (M.D. La. Mar. 26, 2017), ECF No. 43-3.

31. Berry v. Sanders, No. 17-cv-00318, 2020 WL 1033654, at *1 (M.D. La. Mar. 3, 2020).

32. *See* Answers to Plaintiff's First Set of Interrogatories to Defendants at 1-4, *Berry*, No. 17-cv-00318 (M.D. La. June 10, 2019), ECF No. 40 (answering Berry's interrogatories); Answers to Plaintiff's Requests for Production of Documents/Records to Defendants, Exhibit 5 at 2-3, *Berry*, No. 17-cv-00318 (M.D. La. June 10, 2019), ECF No. 39-5 (providing the disciplinary report); Answers to Plaintiff's Requests for Production of Documents/Records to Defendants, Exhibit 4 at 2-201, *Berry*, No. 17-cv-00318 (M.D. La. June 10, 2019), ECF No. 39-4 [hereinafter *Berry* Answer to Production Request, Exhibit 4] (providing medical records); Answers to Plaintiff's Requests for Production of Documents/Records to Defendants, Exhibit 4 at 2-5, *Berry*, No. 17-cv-00318 (M.D. La. Mar. 22, 2019), ECF No. 31-4 (providing prison policies regarding security body cameras); Answers to Plaintiff's Requests for Production of Documents/Records to Defendants, Exhibit 1 at 2-17, *Berry*, No. 17-cv-00318 (M.D. La. June 10, 2019), ECF No. 39-1 (providing prison policies on the use of force); Notice of Compliance, Attachment at 2-26, *Berry*, No. 17-cv-00318 (M.D. La. May 13, 2019), ECF No. 37-1 [hereinafter *Berry* Notice of Compliance, Attachment] (providing logbooks); Order at 1, *Berry*, No. 17-cv-00318 (M.D. La. Sept. 27, 2019), ECF No. 44 [hereinafter *Berry* Order] (allowing Sanders's lawyer to depose Berry).

33. Answers to Plaintiff's Requests for Production of Documents/Records to Defendants at 3, *Berry*, No. 17-cv-00318 (M.D. La. Mar. 22, 2019), ECF No. 31 [hereinafter *Berry* Answers to Plaintiff's Requests for Production of Documents/Records to Defendants].

nothing about who caused them.[34] And unsurprisingly, Sanders's disciplinary report supported Sanders's story, while Berry's affidavit and deposition testimony supported his own.

But two records—actually, the *same* record produced two times during discovery—let slip a disturbing discrepancy. Twice, the prison produced notarized copies of logbook pages reporting who had visited Berry's cell block on October 13, 2016: once in June 2018, in response to a court order that the prison produce its internal records related to Berry's grievance,[35] and again in March 2019, in response to Berry's independent discovery request that the defendant produce the same logbooks.[36] Each time, the prison's production bore a notarized claim to be "TRUE AND CORRECT copies of the originals that are maintained at Louisiana State Penitentiary."[37] The two are produced below.

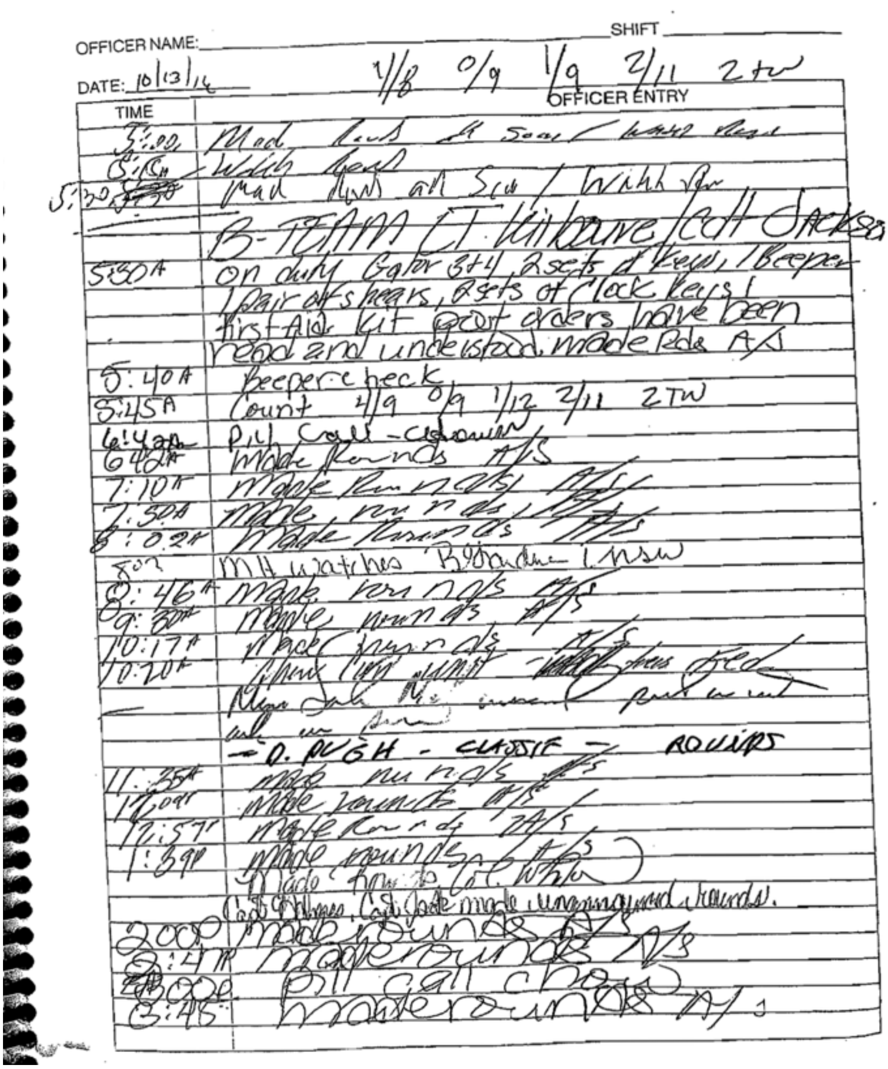
34. *See generally Berry* Answer to Production Request, Exhibit 4, *supra* note 32 (noting in several places that the plaintiff had been in an altercation with "security," but not recording any names).

35. Notice of Compliance at 1, *Berry*, No. 17-cv-00318 (M.D. La. May 13, 2019), ECF No. 37 [hereinafter *Berry* Notice of Compliance]; *Berry* Notice of Compliance, Attachment, *supra* note 32, at 19, 21.

36. Answers to Plaintiff's Requests for Production of Documents/Records to Defendants, Exhibit 1 at 1, *Berry*, No. 17-cv-00318 (M.D. La. May 17, 2017), ECF No. 31-1 [hereinafter *Berry* Answers to Plaintiff's Requests for Production of Documents/Records to Defendants, Exhibit 1]. Though this production was filed earlier in the lawsuit, it was notarized later in time; the other copy had been produced during the prelawsuit grievance process, and, despite its later filing, was notarized at an earlier period of the lawsuit for production as a mandatory initial disclosure. *Berry* Notice of Compliance, *supra* note 35, at 1 (listing a certification-of-service date of May 13, 2019); *Berry* Notice of Compliance, Attachment, *supra* note 32, at 1 (listing a notarization date of June 15, 2018).

37. *Berry* Answers to Plaintiff's Requests for Production of Documents/Records to Defendants, Exhibit 1, *supra* note 36, at 1 (claiming to be "TRUE AND CORRECT"); *Berry* Notice of Compliance, Attachment, *supra* note 32, at 1 (same).

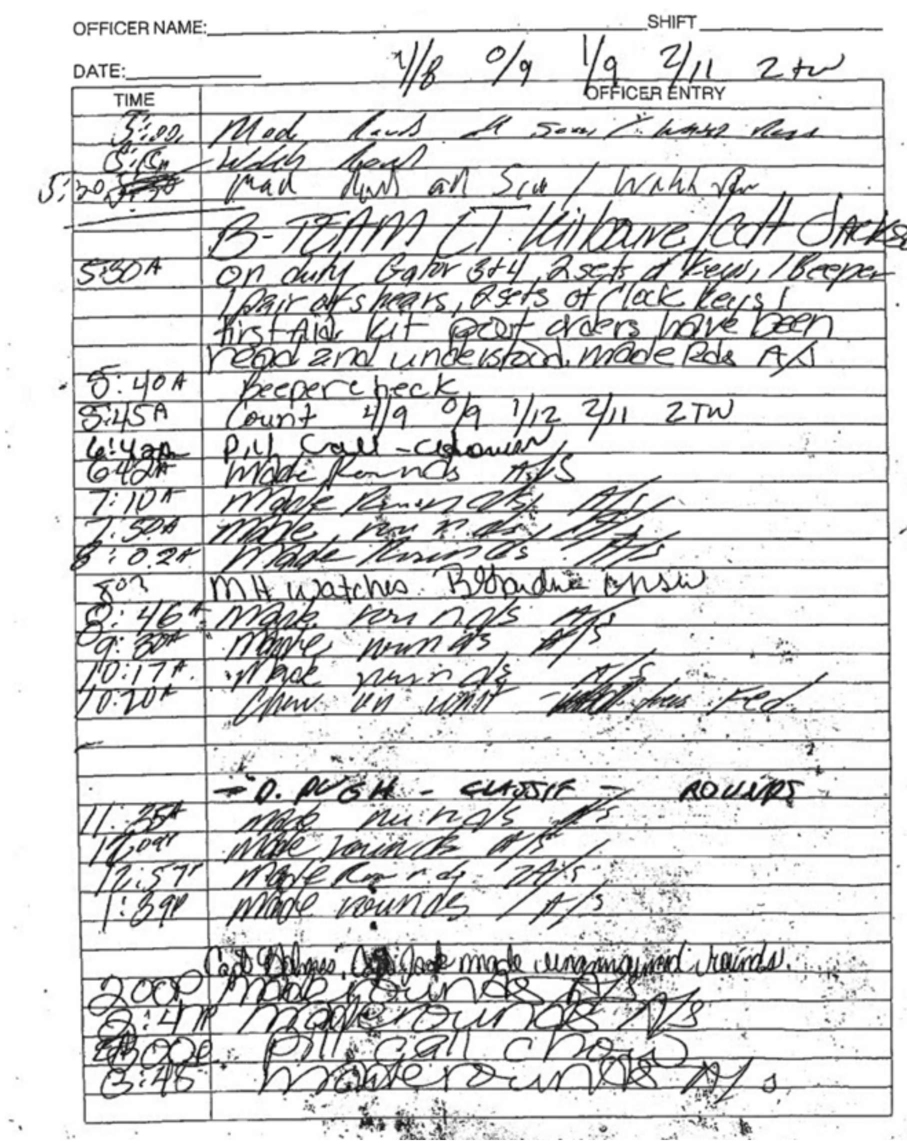
FIGURE 1. EARLIER COPY[38]


OFFICER NAME:
SHIFT
DATE: 10/13/16
1/8 0/9 1/9 2/11 2tw
OFFICER ENTRY
TIME

B-TEAM
5:30A On duty Gator 3+4, 2 sets of Keys, 1 Beeper 1 pair of shears, 2 sets of Clock keys 1 First Aid kit post orders have been read and understood. Made Rds A/S
5:40A Beeper check
5:45A Count 2/9 0/9 1/12 2/11 2TW
6:42A Made Rounds A/S
7:10A Made Rounds A/S
7:50A Made rounds A/S
8:02A Made Rounds A/S
MH watches
8:46A Made rounds A/S
9:30A Made rounds A/S
10:17A Made rounds A/S
D. PUGH - CLASSIF - ROUNDS
11:35A Made rounds A/S
1:39P Made rounds A/S
Made rounds
made unannounced rounds.
2000 Made rounds A/S
Made rounds A/S
Pill call
Made rounds A/S

38. *Berry* Notice of Compliance, Attachment, *supra* note 32, at 21.

FIGURE 2. LATER COPY[39]



Do you catch the differences? Berry did. The first copy of the log bears the date; the second does not. More ominously, the first log bears an (admittedly

39. *Berry* Answers to Plaintiff's Requests for Production of Documents/Records to Defendants, Exhibit 1, *supra* note 36, at 39.

illegible) entry between 10:20 AM and 11:35 AM; that entry has disappeared in the second log. In other words, an entry relaying something that occurred in Berry's unit, at the exact hour he alleged Sanders beat him up, had been erased between when the prison produced the logbook in June 2018 and in March 2019—while the prison's guard faced civil liability. Both logbooks bore official seals claiming to be true records.

Berry lost the trial. He showed the jury the logbooks' discrepancies, but, as the court noted in rejecting his request for a new trial, "the jury's verdict was essentially a credibility determination . . . and the jury found Defendant's testimony and evidence more credible than Plaintiff's."[40] This result did not keep the court from expressing "grave concerns regarding the LDPSC's conduct," noting that it "potentially impacts hundreds of prison litigation cases spread across all sections of this Court."[41] The court, in its earlier ruling addressing the logbook discrepancy, had noted that "such records are introduced as evidence on a near-daily basis in this District" and that "to protect the integrity of the judicial process . . . additional inquiry is required."[42] Accordingly, the court ordered the Louisiana Department of Corrections to preserve and turn over the official logbook, which the judge would review in camera.[43] Berry's case, however, was finished.[44]

* * *

Civil discovery is vitally important for incarcerated plaintiffs.[45] Without it, their cases become "swearing contest[s]" that they are bound to lose, up against

40. Berry v. Sanders, No. 17-cv-00318 , 2022 WL 16825208, at *1 (M.D. La. Oct. 7, 2022).

41. *Id.* at *2.

42. Order to Preserve Evidence at 1-2, *Berry*, No. 17-cv-00318 (M.D. La. June 3, 2022), ECF No. 127 [hereinafter *Berry* Order to Preserve Evidence].

43. *Id.* at 2.

44. On appeal, the Fifth Circuit affirmed. Berry v. Sanders, No. 22-30698, 2023 WL 5165579, at *1 (5th Cir. Aug. 11, 2023) (per curiam). Berry represented himself. It is unclear whether anything came of the district judge's in camera review of the logbooks.

45. In recent years, scholars have often used the term "prisoner" to refer to people who are presently incarcerated. *See, e.g.*, Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 525 (2021); Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 301, 302 n.2 (2022). I am sympathetic to this choice. As Paul Wright has written, a too-sanitized use of language around prisons can "hide[] the daily brutality and dehumanization of the police state . . . . We should make no mistake about it: people are forced into cages at gun point and kept there upon pain of death should they try to leave. What are they if not prisoners?" Paul Wright, *Language Matters: Why We Use the Words We Do*, PRISON LEGAL NEWS, Nov. 2021, at 18, 18. Nonetheless, some hear terms like "prisoner" as ignoring the humanity of those navigating carceral contexts. *See, e.g.*, Blair Hickman, *Inmate. Prisoner. Other. Discussed.*, MARSHALL PROJECT (Apr. 3, 2015, 7:15 AM EDT), https://www

"both judges and juries [who] tend to find convicted criminals unappealing and unbelievable witnesses."[46] Discovery provides the means to scale this credibility wall. And discovery tools—from interrogatories to requests for production to depositions to expert reports—are vital disinfectants in prison, where casual brutality and cruelty frequently go unchallenged. Ensuring that incarcerated litigants have meaningful access to these information-forcing tools is necessary both for helping plaintiffs prove their claims and for exposing, addressing, and deterring systemic problems in a prison system rife with them.[47]

But does discovery work for imprisoned plaintiffs? Few sources address the question, and those that do paint a dire picture. Take William Bennett Turner's 1979 article in the *Harvard Law Review*, which announced the damning results of his study about prison suits under 42 U.S.C. § 1983:

> In discovery, answers to interrogatories were obtained in only three [of 664] pro se cases; requests for admissions were answered in only one such case. Pro se litigants failed to obtain production of any documents and did not take any depositions. A medical examination was obtained in one D. Vt. case with an appointed attorney and in no other case.[48]

Nor, apparently, has the situation improved much in the decades since. A 1997 study by the American Bar Association (ABA) revealed that of twenty district judges surveyed, "*twelve* said that 50% or more of the prisoners whose complaints survive motions to dismiss and/or for summary judgment cannot adequately process their lawsuits through the discovery stage," and "significant qualifications" attended the responses of four of the eight judges who responded

.themarshallproject.org/2015/04/03/inmate-prisoner-other-discussed [https://perma.cc/8WK6-UDFD]. Additionally, numerous formerly incarcerated people I interviewed for this Article described feeling demeaned or flattened by the word "prisoner," and encouraged me to use person-first language. Out of respect for them, I try to do so in this piece.

46. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1615 (2003).

47. A rich literature demonstrates that the tort system's information-forcing role is among its primary benefits. *See, e.g.*, Nora Freeman Engstrom, David Freeman Engstrom, Jonah B. Gelbach, Austin Peters & Aaron Schaffer-Neitz, *Secrecy by Stipulation*, 74 DUKE L.J. 99, 161 (2024); Nora Freeman Engstrom & Michael D. Green, *Tort Theory and Restatements: Of Immanence and Lizard Lips*, 14 J. TORT L. 333, 335 n.5 (2021); Assaf Jacob & Roy Shapira, *An Information-Production Theory of Liability Rules*, 89 U. CHI. L. REV. 1113, 1147-48 (2022); Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 696-706 (2007); *cf.* Shon Hopwood, *How Atrocious Prisons Conditions Make Us All Less Safe*, BRENNAN CTR. FOR JUST. (Aug. 9, 2021), https://www.brennancenter.org/our-work/analysis-opinion/how-atrocious-prisons-conditions-make-us-all-less-safe [https://perma.cc/4JWL-D7TZ] ("[T]he worst of prison abuses occur behind closed doors, away from public view.").

48. William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 624-25 (1979).

differently.[49] Though these responses were not enough to support conclusions "with any level of precision," the ABA study's conclusion was unsurprisingly dour: "[T]he feedback received from the judges surveyed during this project suggests that there are a potentially large number of prisoners who cannot litigate, with any realistic chance of success, even meritorious claims through certain complex stages of the litigation process, unless they receive at least limited assistance."[50] It is thus no wonder that by 2011, in a survey of chief judges of U.S. district courts, 30.5% claimed that discovery occurred in few or none of their cases involving incarcerated plaintiffs, while 47.5% claimed that it occurred only in the "occasional case."[51] The survey was silent on the quality of discovery occurring for the lucky minority.

Berry's case provides a glimpse of that lucky minority—an exception that proves the rule. An unusually adept pro se plaintiff, Berry got *some* discovery. He collected and presented concrete evidence that the prison had tampered with its logbooks—evidence implicating the legitimacy of "hundreds" of prison-litigation cases in Louisiana.[52]

But his success ended there. The prison had overwritten the surveillance footage of Berry's incident.[53] According to Berry, Sanders intentionally avoided recording body-cam footage of their interaction.[54] And though Sanders deposed Berry,[55] Berry had no chance to depose Sanders, Parker, other officers, or medical officials to plumb their stories for inconsistencies. Furthermore, even faced with contradictory logbooks, a mixture of security and resource restrictions and a lack of know-how likely kept Berry from pushing further and inquiring into prison policies concerning recordkeeping. Worst of all, the evidence Berry

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49. Lynn S. Branham, Am. Bar Ass'n Crim. Just. Section, NCJ 169029, Limiting the Burdens of *Pro Se* Inmate Litigation: A Technical-Assistance Manual for Courts, Correctional Officials, and Attorneys General 124 (May 1997) (emphasis added), https://www.ojp.gov/pdffiles1/Digitization/169029NCJRS.pdf [https://perma.cc/X4X6-BQ73]. Of the eight judges who felt that fifty percent or more incarcerated plaintiffs in their district had adequate access to discovery, two said so because they received counsel at the discovery stage in their districts, and two said so because the district effected mandatory disclosures. *Id.* at 124-25.

50. *Id.* at 125.

51. Donna Stienstra, Jared Bataillon & Jason A. Cantone, *Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Court and Chief Judges*, Fed. Jud. Ctr. 22 tbl.18 (2011), https://www.govinfo.gov/content/pkg/GOVPUB-JU7-PURL-gp073052/pdf/GOVPUB-JU7-PURL-gp073052.pdf [https://perma.cc/LU42-2ES5].

52. *Berry* Order to Preserve Evidence, *supra* note 42, at 1.

53. *See supra* note 33 and accompanying text.

54. *See Berry* Complaint, *supra* note 2, at 14.

55. *See Berry* Order, *supra* note 32, at 1.

received had largely been curated by the prison: official records parroting Sanders's account.

Berry's limited success in uncovering the altered logbook, though astonishing, thus meant little in a system profoundly antithetical to evidence gathering. The rarity of even this limited success lays the problem bare: for every Berry, there are dozens of imprisoned plaintiffs who never make it *close* to meaningful discovery.[56] In turn, abusive prison practices go uncovered and unaddressed, and plaintiffs' actionable harms go unremedied.

Though some practice guides, court filings, and bar- or court-produced studies bear on the discovery crisis facing prison litigants,[57] this is the first law-review article to focus on diagnosing, studying, and addressing it. The Article proceeds in four Parts.

Part I explores the written rules governing prison litigation, including the scant few bearing on discovery. It begins by surveying the impoverished legal options available to those who wish to resist the harsh conditions of their confinement in federal court. The barriers are twofold: many of prison's indignities simply lie outside the scope of federal causes of action, and for those few who *can* locate a cognizable claim, the Prison Litigation Reform Act (PLRA)—a 1996 law aimed at stemming frivolous prison litigation—makes its vindication nearly impossible, imposing procedural hurdles at litigation's earliest phases.[58] Most incarcerated plaintiffs' claims thus fail before discovery even begins. For the few cases that emerge, effective discovery is of vital importance: having survived the PLRA's hurdles, *these* are the cases that everyone agrees could well be nonfrivolous—ample reason they be properly evidenced and heard. For these cases, discovery promises fairness, exposure, and regulation sorely needed in the carceral context. But written, prison-specific discovery rules are few, far between, and

56. *See infra* Section III.B.2; *see also* Schlanger, *supra* note 46, at 1574-76 (discussing the prevalence of federally actionable claims incarcerated people have due to the prison setting); Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. Pa. J. Const. L. 139, 140 (2008) ("The PLRA's obstacles to meritorious lawsuits are undermining the rule of law in our prisons and jails, granting the government near-impunity to violate the rights of prisoners without fear of consequences.").

57. *See, e.g.*, John Boston & Daniel E. Manville, Prisoners' Self-Help Litigation Manual 677-99 (4th ed. 2010); Stienstra et al., *supra* note 51, at 21-25; Branham, *supra* note 49, at 124-25; Brief of Former Jailhouse Lawyers as Amici Curiae at 14-22, Herrera v. Cleveland, 8 F.4th 493 (7th Cir. 2021) (No. 20-2076).

58. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, sec. 803(d), § 7, 110 Stat. 1321-66, 1321-71 to 1321-73 (1996) (codified as amended at 42 U.S.C. § 1997e). For more on how the Prison Litigation Reform Act (PLRA) affects prison litigation, see *infra* Part I. Though frivolous claims are not uncommon in prison litigation, Margo Schlanger has pointed out that the PLRA's proponents' claims of rampant frivolous litigation were simply "not true." Schlanger, *supra* note 46, at 1692.

unhelpful. Part I focuses on the most consequential one: incarcerated plaintiffs are exempted entirely from mandatory initial disclosures, leaving defendants unidentified (and thus dismissed), claims unpursued, and unmoored plaintiffs' discovery requests overbroad and confused. Local rules impose further limitations that exacerbate these problems.

Part II turns to the unwritten rules that cement discovery's failures for those plaintiffs who do access the process, relying on case research and dozens of interviews with formerly incarcerated people, federal magistrate and district judges, staff attorneys, civil-rights lawyers, and prison officials.[59] This Part begins by outlining the predictable evidentiary needs undergirding most incarcerated plaintiffs' claims. These needs are not inherently harder to fulfill in the prison context; the problem instead lies in the practical constraints hindering the process. Security concerns make a significant share of relevant evidence simply undiscoverable. And since prisons control the creation and storage of most evidence — surveillance footage, written incident reports, and the like — negligence or ill will can mean the disappearance of (or the failure ever to produce) vital information. Resource restrictions make valuable discovery tools like depositions and expert reports inaccessible to imprisoned litigants, shutting off any real hope of poking holes in a defendant's story or proving a doctor's indifference to a medical condition. And hostility between incarcerated people and their jailers breeds distrust, foot-dragging, and credible allegations of spoliation. Together, these difficulties are different in both degree and kind from those faced by other pro se litigants and civil-rights plaintiffs. The Article thus draws the unavoidable conclusion that the aspirationally transsubstantive Federal Rules of Civil Procedure wholly disserve prison litigation. Without unique intervention, no meaningful opportunity exists for incarcerated plaintiffs to evidence their claims. Through this lens, the Article contributes to ongoing efforts to distinguish law in theory from law in practice[60] and joins a mounting chorus of

59. I agreed to keep each interview participant anonymous, unless the interviewee specifically requested to be named. When quoting from an interview, I indicate as much without naming the source. To avoid exposing incarcerated interviewees to retaliation, I spoke only to formerly incarcerated individuals.

60. For a comprehensive overview of the law-and-society movement, see generally Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986), which surveys the movement's theoretical underpinnings, as well as its benefits and drawbacks; Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 LAW & SOC'Y REV. 409 (1998), which surveys the history of the movement; and Austin Sarat, *From Movement to Mentality, from Paradigm to Perspective, from Action to Performance: Law and Society at Mid-Life*, 39 LAW & SOC. INQUIRY 217 (2014) (reviewing KITTY CALAVITA, INVITATION TO LAW & SOCIETY: AN INTRODUCTION TO THE STUDY OF REAL LAW (2010)), which documents the institutionalization of the law-and-society movement.

scholars critiquing the modes of transsubstantivity propounded in the Federal Rules.[61]

Part III focuses on two prisons in different federal districts: Angola in the Middle District of Louisiana and Menard Correctional Center in the Southern District of Illinois. In a quasi-empirical, quasi-descriptive study, I scrutinize the dockets and filings in two hundred cases—the first fifty cases from each prison filed in 2016 and 2022—to see whether discovery occurred, and, if so, whether different courts' approaches to the process made any meaningful difference in the litigation's prospects or outcomes.

The results are startling. In 2016, plaintiffs' cases went to discovery in about three-quarters of cases in the Southern District of Illinois but under one-fifth of cases in the Middle District of Louisiana. Plaintiffs settled or won almost half of the cases they brought in the Southern District of Illinois but none in the Middle District of Louisiana. The districts' differences extend to case-management decisions, with discrepancies in decisions to open or close; when and whether to impose initial-disclosure obligations; how to interact with incarcerated litigants confused by the process; and when and whether to recruit counsel in complex cases. The same trends extended to 2022, with discovery, settlement, and counsel recruitment skewed significantly toward Menard plaintiffs. In illuminating the districts' differences, Part III draws descriptive accounts from cases forming the basis of the study.

Part IV argues that the discovery problems discussed in Part II, paired with the wildly inconsistent outcomes in the districts surveyed in Part III, together are cause for both pessimism and optimism. First, the lack of standardization and amalgam of restrictions on evidence gathering show a deep and obvious need for reform. It should not be that evidence related to wrongdoing in prison goes discovered or hidden, and a meritorious claim rises or falls, based on the district in which a person does time. Indeed, the results add fodder to scholars' longstanding observations of randomness and arbitrariness in judicial decision-making—a situation antithetical to our "national desire for equal treatment in

61. *E.g.*, Joshua M. Koppel, Comment, *Tailoring Discovery: Using Nontranssubstantive Rules to Reduce Waste and Abuse*, 161 U. PA. L. REV. 243, 256-63 (2012) (discussing transsubstantivity's merits and demerits and arguing for tailored discovery rules); Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 456-57 (2014) ("The blow that employment discrimination and civil rights claims have taken at the hands of procedural law lays bare any pretense that procedural rules operate in a neutral fashion."). *See generally* Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377 (2010) (tracing the history of the Federal Rules of Civil Procedure and weighing their advantages and disadvantages).

adjudication."[62] Nonetheless, the cases from the Southern District of Illinois provide unique insight into a district whose approach and outcomes constitute a profound—and surprisingly positive—outlier in prison litigation. They imply that, even considering the PLRA's restrictions on prison litigation, there are healthy and effective ways to expand incarcerated plaintiffs' access to the discovery process.

Part IV ends by suggesting avenues for reform. First, courts should, where resources permit, be far more open to recruiting counsel for imprisoned plaintiffs embarking upon discovery. Second, courts should standardize the discovery process in prison litigation, creating certain tailored discovery rules for imprisoned litigants' claims. Third, judges should intervene through telephonic status conferences to advise plaintiffs on the process and ensure that they are not floundering or getting the runaround. Fourth, courts should take creative approaches to widening the availability of discovery tools, including making use of new technology to broaden incarcerated litigants' access to oral depositions. And finally, there should be efforts both in and out of court to police the creation, storage, and disclosure of evidence. This includes spoliation sanctions or curative measures when prisons overwrite surveillance footage after someone has filed a grievance implicating that footage. It also means devising standardized protocols for flagging evidence that poses security risks, along with safe procedures to handle that evidence's production and use. These admittedly incomplete proposals mark the start of a long-needed confrontation with our prison discovery crisis.

I. THE WRITTEN RULES OF PRISON LITIGATION

Litigation is profoundly valuable in prison. Courts are perhaps the only institutions positioned to uncover and punish abuse in carceral contexts, where prison officials exercise complete and otherwise-unchecked control over incarcerated people's lives.[63] And litigating provides incarcerated people with a

62. Andrew I. Schoenholtz, Jaya Ramji-Nogales & Philio G. Shrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 302 (2007); *see also* Avital Mentovich, J.J. Prescott & Orna Rabinovich-Einy, *Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality*, 71 ALA. L. REV. 893, 895 (2020) (discussing growing research "cast[ing] significant doubt on the ability of human decision makers to achieve . . . impartiality by uncovering persistent disparities in judicial decisions"); Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1189 & n.3 (2018) (discussing judges' harsher punishments for Black over white defendants).

63. *See* Hernandez D. Stroud, *Judicial Interventions for Inhumane Prison and Jail Conditions*, BRENNAN CTR. FOR JUST. (Oct. 24, 2023), https://www.brennancenter.org/our-work/research-reports/judicial-interventions-inhumane-prison-and-jail-conditions [https://perma.cc/V6HG-DEEC] (discussing litigation improving prison conditions); WILBERT RIDEAU, IN

"means of survival" and "a source of pride" in a systematically demeaning place.[64] It is sometimes the only way to vindicate one's rights against wrongdoing, and through trials, it can be a way to connect with a public otherwise oblivious to prison life.[65] Intuitively, then, incarcerated people should have access to courts. But as explained below, written rules shape prison litigation, including discovery, to prevent such an opportunity.

A. Broad Barriers

Prison litigation is notoriously inaccessible. As of 2019, incarcerated people represented themselves in approximately 95% of the civil-rights cases they brought in federal court.[66] About 80% of those cases were dismissed before trial.[67] Most of these pretrial dismissals occurred before discovery began.[68]

THE PLACE OF JUSTICE: A STORY OF PUNISHMENT AND DELIVERANCE 227 (2010) (discussing federal courts' role in improving prison life in the 1970s and 1980s). For an accounting of the expansion of courts' roles in defining and protecting incarcerated peoples' rights, see generally Judith Resnik, *The Puzzles of Prisoners and Rights: An Essay in Honor of Frank Johnson*, 71 ALA. L. REV. 665 (2020).

64. Driver & Kaufman, *supra* note 45, at 521 (discussing ALBERT WOODFOX, SOLITARY: UNBROKEN BY FOUR DECADES IN SOLITARY CONFINEMENT. MY STORY OF TRANSFORMATION AND HOPE. 24, 169 (2019)).

65. *E.g.*, Andre Jacobs, *I Taught Myself How to Read in Prison. Then I Sued the System and Won*, MARSHALL PROJECT (May 24, 2019), https://www.themarshallproject.org/2019/05/24/i-taught-myself-how-to-read-in-prison-then-i-sued-the-system-and-won [https://perma.cc/EK23-9EBR].

66. Judiciary Data & Analysis Off., *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, ADMIN. OFF. U.S. CTS. (Feb. 11, 2021), https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019 [https://perma.cc/X7QG-3M74]; *see* Mark D. Gough & Emily S. Taylor Poppe, *(Un)Changing Rates of Pro Se Litigation in Federal Court*, 45 LAW & SOC. INQUIRY 567, 577 (2020).

67. Margo Schlanger, Prison and Jail Civil Rights/Conditions Cases: Longitudinal Statistics, 1970–2021, at 5 tbl.C (Apr. 16, 2022) (unpublished manuscript), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1344&context=law_econ_current [https://perma.cc/L8F8-REWD]. These data likely overestimate the number of trials, which the Administrative Office defines to include any contested hearing in which evidence is introduced—a category reaching more broadly than merits trials. *See* Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2139-40 (2018). Relevant here, evidentiary hearings on the PLRA's exhaustion defense would likely count as "trials" within the meaning of these data. *See infra* note 119.

68. *See* Schlanger, *supra* note 67, at 13 tbl.H. The pretrial-dismissal figures include dismissal on the pleadings, for administrative exhaustion, or for plaintiffs' inability to pay the filing fee after running afoul of the PLRA's three-strikes provision—all of which tend to occur before discovery. *Cf.* Stienstra et al., *supra* note 51, at 21 ("While discovery is relatively common in both non-prisoner and prisoner pro se cases, it is present more often in non-prisoner cases.").

Somewhere between 6% and 13% of cases settled.[69] Only 0.5% of cases actually saw trial, and of that tiny sum, incarcerated plaintiffs won trials only 12% of the time[70]—about one-third of a typical plaintiff's win rate in federal court.[71]

These stark numbers are no accident. For one, dominant interpretations of the Constitution significantly limit which affronts people in prison can even litigate in federal court. Challenges to the general amalgam of prison life's indignities—bugs in food, toxins in drinking water, deadly failures to follow building codes—run headfirst into a wall.[72] And even cognizable constitutional and other federal claims—violations of the Eighth Amendment's ban on cruel and unusual punishment, for example—impose liability standards that are extremely difficult to plead and prove.[73] Incarcerated people frequently make the understandable mistake of filing cases bemoaning their degradation, to no avail.[74]

Compounding the problem, incarcerated people have no per se right to a well-stocked law library,[75] and it is "extremely difficult" to show that their access to legal materials is so inadequate as to foreclose meaningful access to the courts.[76] But imprisoned plaintiffs need legal materials more than most. As their

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69. Schlanger, *supra* note 67, at 6 tbl.C. Table C lists separate percentages of cases in 2021 coded as "settled" (6.4%) and coded as voluntarily dismissed (6.4%). *Id.*

70. *Id.* Trials are uncommon across the board. *See* Richard L. Jolly, Valerie P. Hans & Robert S. Peck, *The Civil Jury: Reviving an American Institution*, CIV. JUST. RSCH. INITIATIVE 4 (Sept. 2021), https://civiljusticeinitiative.org/wp-content/uploads/2021/09/CJRI_The-Civil-Jury-Reviving-an-American-Institution.pdf [https://perma.cc/C4W2-8Y82] (noting that in 2019, about 0.5% of federal civil cases were resolved by jury trial); Engstrom, *supra* note 67, at 2131 (noting the consistent decline in trial rates in the United States); *Table C-4—U.S. District Courts—Civil Federal Judicial Caseload Statistics*, ADMIN. OFF. U.S. CTS. (Mar. 31, 2023), https://www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2023/03/31 [https://perma.cc/A2U7-7JWH] (showing a 0.7% trial rate for all civil cases, and about a 0.8% trial rate for prison civil-rights cases concerning prison conditions).

71. Alexandra D. Lahav & Peter Siegelman, *The Curious Incident of the Falling Win Rate: Individual vs. System-Level Justification and the Rule of Law*, 52 U.C. DAVIS L. REV. 1371, 1373, 1403 (2019) (noting a general plaintiff win rate of about 30% in 2017 and claiming that "[p]risoner cases . . . have consistently been much less successful than other types of cases").

72. *See* Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385, 1389-90, 1399, 1423-24 (2022) (compiling cases).

73. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 847 (1994) (noting that to show a prison official's deliberate indifference in violation of the Eighth Amendment, a plaintiff must show that the official knew about a "substantial risk of serious harm" but disregarded it).

74. *See, e.g.*, Order of Dismissal at 1, Clark v. Leblanc, No. 16-cv-00466 (M.D. La. Jan. 12, 2018), ECF No. 18 (dismissing as frivolous the plaintiff's claim that he was left in a dirty, dark cell with violent offenders, shackled for hours, denied toilet paper for days, and denied food in keeping with his religious beliefs).

75. *See* Lewis v. Casey, 518 U.S. 343, 351 (1996).

76. Christopher E. Smith, Brown v. Plata*, The Roberts Court, and the Future of Conservative Perspectives on Rights Behind Bars*, 46 AKRON L. REV. 519, 536 (2013).

claims are typically brought under Section 1983,[77] they're up against the complex doctrines of sovereign and qualified immunity.[78]

Statutory law presents additional hurdles. Passed in 1996, the PLRA aimed to stem a tide of (presumed) frivolous litigation brought by those in prison.[79] Its wild success in so doing has spawned countless critiques and cries for reform.[80] Because others have analyzed the PLRA's labyrinthine provisions and how they fuel the bleak outlook for prison litigants,[81] this Article does not give an exhaustive account. However, some important provisions bear mentioning.[82]

The PLRA affects prison litigation well before a case even gets to court. Its administrative-exhaustion requirement mandates dismissal of a plaintiff's case

77. Section 1983 actions are limited to suits brought against state officials, so those in federal prison must instead seek relief through *Bivens* actions. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395-97 (1971).

78. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1814 (2018); Marcus R. Nemeth, *How Was* That *Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers*, 60 B.C. L. REV. 989, 1011 (2019). These doctrines can make litigation difficult for civil-rights plaintiffs both in and out of prison. *See* Joanna C. Schwartz, *Civil Rights Without Representation*, 64 WM. & MARY L. REV. 641, 661 (2023) [hereinafter Schwartz, *Civil Rights Without Representation*] (pointing out that in civil-rights litigation, "it is more difficult to get information from the government, more difficult to prove a legal violation and overcome qualified immunity, more difficult to get to a jury, and more difficult to win").

79. Schlanger, *supra* note 46, at 1692.

80. *See, e.g., No Equal Justice: The Prison Litigation Reform Act in the United States*, HUM. RTS. WATCH 4 (2009), https://www.hrw.org/reports/uso609web.pdf [https://perma.cc/DY82-JHT8]; Nicole Einbinder & Hannah Beckler, *The Myth of Frivolous Prisoner Lawsuits: How a Clinton-Era Law, the PLRA, Hollowed Out the Eighth Amendment*, BUS. INSIDER (Dec. 20, 2024, 9:21 AM ET), https://www.businessinsider.com/plra-frivolous-prisoner-lawsuits-requirements-weaken-eighth-amendment-rights-2024-12 [https://perma.cc/QWS7-MF5S]; Allison M. Freedman, *Rethinking the PLRA: The Resiliency of Injunctive Practice and Why It's Not Enough*, 32 STAN. L. & POL'Y REV. 317, 356-60 (2021); Tiffany Yang, *The Prison Pleading Trap*, 64 B.C. L. REV. 1145, 1183-97 (2023); Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html [https://perma.cc/C5FD-9HD6]; Melissa Benerofe, Note, *Collaterally Attacking the Prison Litigation Reform Act's Application to Meritorious Prisoner Civil Litigation*, 90 FORDHAM L. REV. 141, 172-76 (2021).

81. Schlanger, *supra* note 46, at 1692. *See generally* John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429 (2001) (arguing that the PLRA undermines incarcerated people's access to justice by imposing restrictive measures that limit their ability to challenge unconstitutional prison conditions, effectively diminishing the enforcement of their constitutional rights and reshaping the judicial landscape in favor of institutional power).

82. This overview of the PLRA's impositions owes much to Margo Schlanger's work.

if they have not exhausted their prison's grievance process.[83] This means a would-be plaintiff must spend months filing a grievance within the prison and appealing the prison's responses to the highest level—without any missteps—before filing a federal lawsuit.[84] Missteps, of course, are common.

Things only worsen in court. For one, even incarcerated litigants proceeding in forma pauperis must shoulder a $350 filing fee, mulcted in monthly chunks from their prison bank account.[85] If an imprisoned plaintiff has had three prior actions dismissed as "frivolous" or "malicious," or simply for failure to state a claim, he must pay the full filing fee plus other expenses up front or face dismissal.[86] Damages for "mental or emotional injury" are off limits unless the plaintiff has shown a concomitant physical injury or suffered certain sexual abuse.[87] And attorneys' fees and rates are capped.[88] So even those with meritorious claims face the prospect of either no damages or, at best, meager damages and no lawyers willing to bite.[89] The PLRA also streamlines procedure in ways that harm plaintiffs: judges can dismiss a complaint without ever docketing the case or notifying

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83. 42 U.S.C. § 1997e(a) (2018).

84. For critiques of the exhaustion requirement, see Boston, *supra* note 81, at 430-31, which criticizes the rule as a form of "litigant stripping"; Schlanger, *supra* note 46, at 1627-28; and Yang, *supra* note 80, at 1149-53.

85. 28 U.S.C. § 1914(a) (2018) (setting the filing fee at $350 for non-habeas cases); *see also id.* § 1915(b)(1)-(2) (refusing to exempt most incarcerated litigants from filing fees, but allowing these fees to be paid in increments of 20% of either the litigant's monthly income or the average six-month balance in their account, whichever is greater). Incarcerated individuals are exempted from the preliminary payment if they submit an affidavit and certified copy of their prison bank-account statements showing an inability to pay. *See id.* § 1915(a)(1)-(2).

86. *Id.* § 1915(g). Plaintiffs in imminent physical danger are exempted from this provision. *See id.* The filing fee is currently $460. *See U.S. Court of Federal Claims Schedule of Fees*, ADMIN. OFF. OF THE U.S. CTS. (Dec. 1, 2023), https://www.uscfc.uscourts.gov/sites/cfc/files/fee_schedule.pdf [https://perma.cc/G7ML-2EC8] (listing a $405 complaint-filing fee); *District Court Miscellaneous Fee Schedule*, ADMIN. OFF. U.S. CTS., https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule [https://perma.cc/J2EY-B5ZJ] (noting a $55 administrative fee for filing a civil action, suit, or proceeding in district court).

87. 42 U.S.C. § 1997e(e) (2018); 28 U.S.C. § 1346(b)(2) (2018). For further discussion of this provision, see Schlanger, *supra* note 46, at 1630.

88. 42 U.S.C. § 1997e(d)(2)-(3) (2018).

89. *See* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 167-68 (2015) (noting the median damages of all incarcerated plaintiffs' victories in 2012 was $4,185); *see also* Schlanger, *supra* note 46, at 1631 (highlighting that attorneys' fees in PLRA lawsuits were capped at $169.50 per hour in 2003); *Just the Facts: Trends in Pro Se Civil Litigation from 2000-2019*, ADMIN. OFF. U.S. CTS. (Feb. 11, 2021), https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019 [https://perma.cc/2LGW-4MP7] (showing the comparatively high pro se rate for incarcerated civil-rights plaintiffs versus other civil-rights plaintiffs).

the plaintiff,[90] and a defendant's failure to respond to a complaint does not result in default.[91] (Instead, the judge gets to decide whether the claim merits an answer.[92])

The result is, by design, a hostile and unnavigable thicket. Scant few prison litigants emerge from even the very beginning stages of a lawsuit with a live claim.[93] But some do. And those lucky exceptions face what appears to be a coast cleared, with most explicit obstacles to the claim's survival surmounted. Indeed, by this point, proponents of the PLRA should *welcome* these cases' thorough airing: having weathered the statute's strict attempts to screen frivolous prison litigation, these are the cases that the system says may well be meritorious.

B. Discovery's Promise

As in all civil litigation, discovery in prison litigation helps ensure fair and accurate outcomes, combats information asymmetries, promotes efficiency (by "nudg[ing] the parties toward settlement"), and regulates through forcing information disclosure.[94] But discovery's value goes further for the few incarcerated people who make it far enough to use it.

For one, individual plaintiffs benefit. By making it possible to collect evidence to corroborate their allegations, discovery can help incarcerated litigants scale the unique credibility challenges they face from juries, courts, and defendants. Discovery also weakens a profound information asymmetry that exists

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90. *See* Schlanger, *supra* note 46, at 1629-30.

91. *See* 42 U.S.C. § 1997e(g) (2018).

92. *Id.*

93. *See* Anna Gunderson, *Ideology, Disadvantage, and Federal District Court Inmate Civil Rights Filings: The Troubling Effects of Pro Se Status*, 18 J. EMPIRICAL LEGAL STUD. 603, 623 (2021) (analyzing federal filing data to conclude that "the pro se status of the plaintiff significantly and negatively influences the likelihood of a favorable or likely favorable judgment and positively and significantly influences the likelihood that an inmate's case will be dismissed"); *see also* Schwartz, *Civil Rights Without Representation*, *supra* note 78, at 678 tbl.1 (showing a survey of comparatively worse dispositions for pro se civil-rights litigants in five federal districts).

94. *See* Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71, 89-95 (2020); *see also* Zachary D. Clopton & Aziz Z. Huq, *The Necessary and Proper Stewardship of Judicial Data*, 76 STAN. L. REV. 893, 898 (2024) (noting that the voluminous amount of federal judicial records—including filings, transcripts of hearings, and the like—"would permit a multitude of insights were it collected and made accessible"). Nor is typical prison discovery all that expensive. Telephone Interview with Prison Official #1 (June 28, 2024) (on file with author); Telephone Interview with Prison Official #2 (Aug. 20, 2024) (on file with author). For an accounting and critique of the "complete domination of scholarly [discovery] debates by costs," see Zambrano, *supra*, at 87-88.

between prison plaintiffs and defendants.[95] In the process, discovery can afford dignity and voice to incarcerated litigants stuck in a system antithetical to those things.[96]

Beyond individuals, discovery also plays a regulatory and information-forcing role that prisons badly need.[97] Among the tort system's main values is that plaintiffs can, through discovery, "pry incriminating information" from defendants and motivate regulatory change.[98] Prison is no different: revealing a prison's secrets, including widespread wrongdoing, is vital to motivating policy reform.[99] Moreover, the promise of sunlight serves as an important deterrent to prisons and officials.[100] And the more evidence of wrongdoing in prison, the more judges may change their views about the general frivolity of imprisoned plaintiffs' claims. That can slowly change an institutional culture too oriented toward deference to prison defendants. It can also broaden public attention to the conditions incarcerated people experience. Indeed, by providing both "incremental relief through litigation" and surfacing evidence of prison's indignities

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95. *See infra* Section II.B.1.

96. *See* Seth Katsuya Endo, *Discovery Dark Matter*, 101 TEX. L. REV. 1021, 1030-31 (2023) (discussing how discovery "amplif[ies] the litigant's voice and sense of dignity").

97. For the regulatory and information-forcing ability of private litigation in civil-rights contexts, see SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 217-30 (2010). *See also* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 844-45 (2012) (describing police departments that use lawsuit information to find errant officers and otherwise improve their operations).

98. Engstrom & Green, *supra* note 47, at 335 n.5.

99. *See, e.g.*, Joseph Neff & Alysia Santo, *New York Prisons Bill Would Make It Easier to Fire Abusive Guards*, N.Y. TIMES (Feb. 9, 2024), https://www.nytimes.com/2024/02/09/nyregion/ny-prison-guards-abuse-firing.html [https://perma.cc/ZH3B-WTCJ] (describing a New York bill filed in response to abuse in prisons uncovered by the Marshall Project investigation); Alysia Santo, Joseph Neff & Tom Meagher, *Guards Brutally Beat Prisoners and Lied About It. They Weren't Fired.*, N.Y. TIMES (May 25, 2023), https://www.nytimes.com/2023/05/19/nyregion/ny-prison-guards-brutality-fired.html [https://perma.cc/U77E-QQL3] (discussing disciplinary records obtained by the Marshall Project that unearthed rampant abuse); Margie Mason & Robin McDowell, *Prison Work Assignments Used to Lure and Rape Female Inmates. Guards Sometimes Walk Free*, AP NEWS (Oct. 31, 2024, 11:36 PM EDT), https://apnews.com/article/prison-rape-women-inmates-guards-001a816334d8745fd29557f02b2f0e5a [https://perma.cc/EE52-BC86] (reporting "systemic sexual violence and coverups from New York to Florida to California" prisons, relying in part on "thousands of pages of court filings"); *Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Governmental Affs.*, 117th Cong. 2, 9, 18 (2022) (relying in part on court filings to report rampant sexual abuse in federal prisons across the country).

100. *See* Zambrano, *supra* note 94, at 120; Paul Stancil, *Discovery and the Social Benefits of Private Litigation*, 71 VAND. L. REV. 2171, 2180 n.29 (2018) (noting the possible deterrent value of the "*threat* of discovery").

for the public, discovery adds value to both individual litigants' claims and to larger, more radical abolitionist projects.[101] Should discovery function in prison litigation, then, it promises varied and potentially significant benefits.

C. The Scant Written Rules of Prison Discovery

Against this backdrop, incarcerated plaintiffs face a discovery process that, on paper, largely resembles that for any other litigant. The Federal Rules of Civil Procedure[102] entitle imprisoned plaintiffs to all the same general discovery tools as other civil litigants. Only a handful of discovery provisions in the Federal Rules single out incarcerated people. Most of those Rules are benign — requiring, for example, leave of court to depose incarcerated people orally or in writing.[103] But one Rule effects a unique setback for incarcerated litigants.

In typical civil litigation, Rule 26(a)(1) imposes mandatory initial disclosures on the parties.[104] It requires each party to disclose to the other, at the outset of a suit, information about those "likely to have discoverable information"; copies (or descriptions) of "all documents, electronically stored information, and tangible things" that the party "may use to support its claims or defenses"; computations related to damages; and insurance information.[105] In other words, Rule 26(a)(1) requires parties to disclose information important to the opposing party's claims. But under the Rule, unrepresented incarcerated litigants are shut out from these mandatory initial disclosures.[106]

The purported justification for this exemption, which was written into the Rule in 2000, was to reduce discovery costs.[107] That justification is dubious.

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101. *See* Molly Petchenik, *Abolitionist Prison Litigation*, 133 YALE L.J.F. 1, 2, 6 (2023) (noting the tension between "expansive goals" of abolitionism and "efforts to improve present prison conditions" through litigation).

102. Incarcerated people also file claims in state court, though federal courts are likely the locus of civil-rights litigation. *See* Alison Brill, Note, *Rights Without Remedy: The Myth of State Court Accessibility After the Prison Litigation Reform Act*, 30 CARDOZO L. REV. 645, 676 (2008) ("[P]risoners never relied on state courts to award broad remedies in prison reform litigation."); *see also* Schlanger, *supra* note 46, at 1634-36 (discussing a possible uptick in state cases after the PLRA's passage).

103. FED. R. CIV. P. 30(a)(2)(B); FED. R. CIV. P. 31(a)(2)(B).

104. FED. R. CIV. P. 26(a)(1).

105. FED. R. CIV. P. 26(a)(1)(A)(i)-(iv).

106. FED. R. CIV. P. 26(a)(1)(B)(iv). Those who have filed habeas petitions are also not entitled to initial disclosures. FED. R. CIV. P. 26(a)(1)(B)(iii).

107. *See* FED. R. CIV. P. 26 advisory committee's note to 2000 amendment. The contested addition of these exemptions in 2000 — a product of the Advisory Committee on Civil Rules's "discovery project" — was geared to "reduce the costs of discovery, to increase its efficiency, to restore

Rule 26(a)(1) disclosures can *reduce* costs, "free[ing]" parties "of the obligation to serve and respond to written discovery requests" down the road.[108] And judges may "allow[] for a reasonable implementation" of the requirement where cost concerns arise.[109] Moreover, leaving incarcerated plaintiffs without initial disclosures makes matters worse: in the dark from the get-go, unguided plaintiffs mistakenly issue overbroad discovery requests that bog down the parties and court.[110] Whatever the motivations, the result is that pro se prison litigants, as a class, are denied an entitlement to court-imposed discovery at the outset of their claims. With neither prison-specific guardrails nor mandatory initial disclosures, the Federal Rules thus leave incarcerated litigants to fend for themselves.

Nationwide, some federal district courts have adopted rules and practices to fill the gap.[111] A small number of courts use local rules to impose prison-specific mandatory initial disclosures in the Federal Rules' stead.[112] Other districts stick to the status quo.[113] In others still—including the two surveyed in Part III—some judges impose mandatory disclosures despite district-wide exemption.[114]

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uniformity of practice, and to encourage the judiciary to participate more actively in case management." Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civ. Rules to Anthony J. Scirica, Chair, Comm. on Rules of Prac. & Proc. 3 (May 11, 1999), https://www.uscourts.gov/sites/default/files/fr_import/CV05-1999.pdf [https://perma.cc/RQ5M-279D].

108. *See* Michael Lynn & Andrew Hurwitz, *Point-Counterpoint: Rethinking Mandatory Disclosure*, 100 JUDICATURE, no. 2, 2016, at 14, 16, 18.

109. Mariangela Seale & Sarah Finch, *A Preliminary Review of the Mandatory Initial Discovery Pilot Program*, 48 BENCH & BAR, no. 8, 2018, at 5, 6 (finding that a pilot program imposing an expansive version of Rule 26(a)(1) disclosures "has not been as disruptive to the early stages of litigation as anticipated").

110. *See infra* notes 145-148 and accompanying text.

111. For an exhaustive accounting of courts' approaches to pro se litigants, including incarcerated litigants, see Andrew Hammond, *The Federal Rules of Pro Se Procedure*, 90 FORDHAM L. REV. 2689, 2729-75 (2022).

112. *E.g.*, E.D.N.Y. LOC. CIV. R. 33.2; E.D.N.Y. PLAINTIFF'S LOC. CIV. R. 33.2 INTERROGATORIES & REQUEST FOR PROD. OF DOCUMENTS 2-5 (2012).

113. *See, e.g.*, Williams v. Barteau, No. 08-CV-546, 2010 WL 1135956, at *1 n.4 (E.D. Cal. Mar. 22, 2010) (noting that the incarcerated plaintiff was not entitled to initial disclosures under the rule); Wagoner v. Dahlstrom, No. 18-CV-00211, 2021 WL 11709383, at *1 (D. Alaska Dec. 16, 2021) (heeding the exemption); Jefferson v. Gilbert, No. 19-CV-5121, 2020 WL 1862598, at *2 (W.D. Wash. Apr. 14, 2020) (same).

114. *E.g.*, Hicks v. Lumpkin, No. 19-CV-261, 2021 WL 5037589, at *1 (S.D. Tex. June 14, 2021) (ordering "limited disclosures" notwithstanding Rule 26(a)(1)(B)(iv)'s bar); Thompson v. Gonzales, No. 15-CV-301, 2016 WL 5404436, at *2 (E.D. Cal. Sept. 27, 2016) (noting that the defendant had to produce initial disclosures because the magistrate judge had so ordered, "despite the fact that this case is exempt" under Rule 26(a)(1)(B)(iv)). Other courts flirt with

Beyond initial disclosures, courts have taken scattershot steps to regulate prison discovery. Some districts put prison cases on an expedited "prisoner pro se track," shortening the discovery period.[115] Others exempt incarcerated litigants from scheduling conferences,[116] or remove entirely the parties' duty to confer before filing discovery motions.[117] And some, seemingly seeking to ensure compliance with discovery rules, require that discovery be filed on the docket as opposed to remaining solely between the parties.[118]

It all amounts to, at most, a fragmentary patchwork—one that does little to shepherd prison discovery.

II. THE UNWRITTEN RULES OF PRISON DISCOVERY

Absent guardrails in the written rules, those seeking to understand prison discovery must look to the unwritten practices and behaviors shaping evidence gathering for incarcerated plaintiffs. Unfortunately, doing so reveals profound dysfunction.

This Part delineates those unwritten "rules." First, it provides an overview of the discovery at stake: the (surprisingly predictable) forms of evidence plaintiffs must obtain to pursue typical claims. It then recounts in detail the reasons why this discovery, unexceptional outside of prisons, is nonetheless often out of reach from inside them.

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similar ideas but abandon them. *See* General Order No. 09-16 at 1-2, *In re* Mandatory Pretrial Discovery in Pro Se Prisoner 42 U.S.C. § 1983 Cases (W.D. Wash. Oct. 31, 2016), https://www.wawd.uscourts.gov/sites/wawd/files/10-31-2016GOreMandatoryPretrialDiscovery1983.pdf [https://perma.cc/VKB9-LAX4] (establishing a one-year pilot project imposing mandatory initial disclosures for pro se prison litigation); Telephone Call with Court Clerk, U.S. Dist. Ct. for the W. Dist. of Wash. (Jan. 15, 2025) (confirming the court abandoned the project after its one-year expiry). Other courts have reported that mandatory-disclosure obligations went unheeded in a significant number of prison cases. Branham, *supra* note 49, at 184-91. For more on courts' similar measures, see *infra* notes 248-259 and accompanying text.

115. D. ARIZ. LRCIV 16.2(b)(2).

116. D. HAW. LR 99.16.2; E.D. PA. L. CIV. R. 16.2(I). The Federal Rules track this approach, suggesting jurisdictions "may want to" use local rules to exempt unrepresented incarcerated litigants from scheduling conferences given their "impractic[ality]." FED. R. CIV. P. 26 advisory committee's note to 1993 amendment.

117. D. COLO. LCIVR 7.1(b); *see also* N.D. FLA. LOC. R. 7.1(B) (exempting pro se prisoners from the duty to confer); N.D.N.Y. L.R. 7.1(a)(2) (same). The Federal Rules imply that the duty to confer can be at least postponed in these cases. *See* FED. R. CIV. P. 26(f)(1).

118. Nelson v. Gleason, No. 14-CV-870A, 2017 WL 2984430, at *3 (W.D.N.Y. July 13, 2017) (explaining the requirement as a way of "ensur[ing] that discovery is provided to pro se inmate litigants and for the Court to be aware of what was (and was not) produced, given the unequal means" between the parties).

A. The Evidence Sought

Most incarcerated plaintiffs' actual evidentiary needs are somewhat predictable. This is true for both stages of prison litigation: exhaustion and the merits.

For claims pitted against evidenced exhaustion challenges[119] — assertions that the plaintiff did not properly exhaust the prison's grievance process before filing a lawsuit — the evidence tends to be rote. Defendants rely on a plaintiff's grievances, the prison's responses, and grievance policies and affidavits explaining why the plaintiff's relevant filings (if any) were deficient.[120] On the other side, successful plaintiffs tend to provide their own records of grievances (which can contradict the prison's account), plus affidavits explaining whatever defect exists in the defendant's documentation.[121] On paper, it's relatively straightforward.

Merits discovery is often similarly predictable. Prison lawsuits frequently look alike because prison environments tend to breed similar complaints. (To name a few: excessive force, failure to protect incarcerated people from attacks or dangerous living conditions, retaliation for filing lawsuits or grievances, indifferent medical care, and restrictions on religious exercise.) And prisons create, in largely similar ways, much of the relevant evidence in these cases.[122] Take, for example, an excessive-force claim. Officials at the prison — perhaps the defendant himself — will have created an incident report and likely added the episode to the

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119. The exhaustion defense is usually resolved by a judge in a preliminary summary-judgment motion or at an evidentiary hearing. *See, e.g.*, Albino v. Baca, 747 F.3d 1162, 1170 (9th Cir. 2014) (concluding that the exhaustion defense should be decided via a summary-judgment motion); Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008) (same); Lee v. Willey, 789 F.3d 673, 678 (6th Cir. 2015) (finding a bench trial appropriate for the exhaustion defense); Messa v. Goord, 652 F.3d 305, 309 (2d Cir. 2011) (same); Bryant v. Rich, 530 F.3d 1368, 1376 (11th Cir. 2008) (treating exhaustion as a Rule 12(b) motion, while noting that the "parties [must] have sufficient opportunity to develop a record").

120. *See* Palmer v. Watson, No. 20-CV-00660, 2021 WL 4355384, at *2-3 (S.D. Ind. Sept. 24, 2021) (granting summary judgment for the prison on exhaustion, relying on the official's affidavit and the prison's record of the plaintiff's filed grievances); Tucker v. Nash, No. 22-CV-1286, 2023 WL 3506460, at *3 (E.D. Va. May 17, 2023) (granting summary judgment, relying on the affidavit of "a responsible [jail] official with personal knowledge . . . averring that he had reviewed the grievance file" and found no filed grievances).

121. *E.g.*, Aaron v. Surguy, No. 20-CV-03290, 2021 WL 5386568, at *2 (S.D. Ind. Nov. 17, 2021) (denying summary judgment where the plaintiff submitted his grievance forms related to the incident, disproving affidavits from a "grievance specialist" at the prison); Vinson-Jackson v. Perry, No. 21-CV-10766, 2024 WL 1130248, at *3-4 (E.D. Mich. Feb. 15, 2024) (granting summary judgment where the plaintiff's affidavit claiming he filed a grievance was not specific enough), *report and recommendation adopted*, No. 21-CV-10766, 2024 WL 1120366 (E.D. Mich. Mar. 13, 2024).

122. For more on prisons' control of the evidence in these cases, see *infra* notes 135-138 and accompanying text.

would-be plaintiff's disciplinary record.[123] That plaintiff will have filed a grievance that is logged into the prison's system. His medical records will be updated to reflect his injuries. Prison logbooks will show which guard was in the area. Surveillance video or body-cam footage may show the incident. And copies of prison policies will detail the guidelines governing use of force. Much of this should be compiled and maintained in an incarcerated person's file, which includes information pertaining to their "sentence, detainer, participation in . . . programs . . . , classification data, parole information, mail, visits, property, conduct, work, release processing, and general correspondence," as well as disciplinary reports, grievances, and other information.[124] And this should exist in similar forms at most, if not all, American prisons.

Evidence needs beyond a prison's recordkeeping will also be shaped by the prison environment. In that same excessive-force case, a plaintiff can write a declaration or affidavit telling their story and seek statements from other incarcerated people who saw what happened.[125] The guard can do the same, producing competing affidavits from officials on the scene or medical personnel who treated the plaintiff.[126] And in theory, the plaintiff can file interrogatories or depose prison officials and ask about the incident.[127]

The same is true of other prison litigation. In a medical deliberate-indifference claim, relevant evidence will be found in an incarcerated person's medical records, grievances, depositions of the physician and plaintiff, and expert reports opining on the care he received (or didn't).[128] For a failure-to-protect claim, it

123. Officers draft incident reports after problematic events involving the incarcerated population, including use-of-force incidents. *See, e.g.*, Lott v. Scott, No. 12-cv-02471, 2014 WL 4199172, at *8 (D.S.C. Aug. 21, 2014).

124. 28 C.F.R. § 513.40 (2024); *see* Alesha Monteiro, *Policy Explainer on the California Department of Corrections and Rehabilitation Controlled Substance Distribution Regulation*, ESSIE JUST. GRP. 1 (2022), https://essiejusticegroup.org/wp-content/uploads/2022/08/CA_Policy_Memo_CS_english_interactive3.pdf [https://perma.cc/V9P8-N6PK] (discussing "C-Files," California's term for such files); Campbell v. Williamson, 783 F. Supp. 1161, 1164-65 (N.D. Ill. 1992) (discussing the disciplinary report in the plaintiff's file); Bell v. Stadler, 111 F. Supp. 2d 796, 798 (W.D. La. June 15, 2000) (discussing the photos in the plaintiff's file); Chestnut v. McClendon, No. 11-cv-305, 2012 WL 5497899, at *2 (N.D. Fla. Oct. 24, 2012) (discussing the grievances in the plaintiff's file); Paine v. Baker, 595 F.2d 197, 200 (4th Cir. 1979) (discussing the plaintiff's right of access to—and the accuracy of—his file in parole proceedings).

125. *E.g.*, Declaration of Richard Keller, *supra* note 30, at 2-6.

126. *E.g.*, Schultz v. Doher, 335 F. Supp. 3d 177, 180 (D. Mass. 2018) (discussing affidavits from officers and unsworn statements from nurses who treated the plaintiff in an excessive-force case).

127. For restrictions on depositions, see *infra* notes 173-181 and accompanying text.

128. *E.g.*, Ruiz v. Strow, No. 24-1172, 2024 WL 4719622, at *2 (7th Cir. Nov. 8, 2024) (discussing deposition testimony from a dental expert in a deliberate-indifference case); *see also infra* notes

will be found in an incarcerated person's "enemy list,"[129] past incident reports involving the attacker, and the types of reports and affidavits useful for excessive-force claims. For a retaliation claim, plaintiffs will need records related to the retaliatory act—a confinement order, evidence of excessive force, records detailing a person's transfer to another unit—paired with other relevant affidavits, grievances, and disciplinary records.[130] For a free-exercise claim, evidence will include affidavits and materials describing a plaintiff's religious practices, plus copies of the prison policies burdening them.[131]

Assuming an incarcerated litigant makes it to discovery, then, the evidence she *should* receive—however serious the claim—is usually predictable. Much of it, however, ends up out of reach, swallowed by a process whose practices turn out to be fundamentally antithetical to proper evidence gathering.

B. Practical Impediments

Those involved in prison litigation—plaintiffs, defendants, and judges—all foster legitimate concerns related to the provision of evidence. Worries stem from security, efficiency, and profound distrust between the parties. Understandably, these concerns sometimes justify treating prison discovery differently. But as explained below, our system's current treatment of the process is heavily balanced toward protecting prisons and court resources at the expense of adequate provisions for incarcerated plaintiffs.

The contributions to the problem fall into several interrelated categories. First, plaintiffs suffer an unusual informational disadvantage by virtue of their incarceration. Second, incarcerated plaintiffs lack resources to conduct otherwise possible or effective discovery. And finally, a stark hostility governs plaintiffs'

247, 249 and accompanying text (discussing mandatory initial disclosures in the Middle District of Louisiana and Southern District of Illinois, both of which included medical records).

129. In other words, a list the prison keeps of an incarcerated person's enemies. *See* Cockcroft v. Kirkland, 548 F. Supp. 2d 767, 776 (N.D. Cal. 2008); Montague v. Conroy, No. 03-cv-3191, 2005 WL 5545697, at *2 (D. Md. June 17, 2005), *aff'd*, 199 F. App'x 210 (4th Cir. 2006).

130. Retaliation claims are somewhat harder to generalize. *E.g.*, Bibbs v. Early, 541 F.3d 267, 273 (5th Cir. 2008) (denying summary judgment where the plaintiff used his own declaration and affidavits from other incarcerated people to corroborate a claim that officers turned on a "purge fan" in his cell for four nights, forcing him to sleep in twenty-degree temperatures, because he filed a grievance); Gill v. Calescibetta, No. 00-CV-1553, 2009 WL 890661, at *10 (N.D.N.Y. Mar. 31, 2009) (denying summary judgment where the plaintiff showed evidence of the close proximity between his grievance and his removal from his prison job, to prove the latter was retaliation for the former, and getting an affidavit from a prison doctor to combat a guard's defense that the removal was for the plaintiff's health).

131. Most carceral free-exercise claims are brought under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2018).

relationships with defendants. These impediments combine to hinder incarcerated plaintiffs' evidence gathering in unique ways.

1. *Information Asymmetries*

An information asymmetry fatally infects pro se prison litigation, such that even those with meritorious claims must proceed with "neither the knowledge nor the resources to conduct discovery and move their cases to trial."[132] That informational deficit is shaped by the prison environment.

For starters, incarcerated plaintiffs lack information about how to litigate. Courts occasionally step into the void to help, but they often stumble. Take the U.S. District Court for the District of Columbia, which provides pro se prison plaintiffs with a handbook containing just two sentences guiding them on discovery:

> The discovery period is the time frame allowed by the court for both plaintiff and defendant to discover facts and gather evidence to be presented at trial to prove the litigant's case. Discovery does not occur in every case and will not begin until the judge enters a scheduling order.[133]

It is hard to imagine this helping a plaintiff.[134]

Information asymmetries extend deeper than knowledge about how to conduct litigation. They are baked into the structure of prison itself. Since "eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State,"[135] almost all evidence related to an incarcerated litigant's civil-rights claim is housed and controlled by the prison. This control can breed abuse. For example, imprisoned people frequently allege that they have been transferred to another prison in retaliation for filing a grievance.[136] Their belongings—including witness declarations, past grievances, and other files they

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132. Turner, *supra* note 48, at 625.

133. *Pro Se Prisoner Handbook: Instructions for Filing a Civil Action on Your Own Behalf*, U.S. DIST. CT. FOR D.C. 10 (2021), https://www.dcd.uscourts.gov/sites/dcd/files/ProSePRISONERManual_2021.pdf [https://perma.cc/2BKM-9SWJ]. The handbook later provides short definitions for some discovery-related "common legal terms," but it provides no guidance on how or when to make use of them. *See id.* at 12-15.

134. Other courts provide more detailed accounts, though whether they help is still unclear. *See, e.g.*, *Pro Se Prisoner Handbook: A Simple Guide to Filing an Action While Incarcerated*, U.S. DIST. CT. FOR THE W. DIST. OF KY. 10-11 (2013), https://www.kywd.uscourts.gov/sites/kywd/files/court_docs/Pro_Se_Prisoner_Handbook_0.pdf [https://perma.cc/E8QR-CDAJ].

135. Presier v. Rodriguez, 411 U.S. 475, 492 (1973).

136. *See* Brief of Former Jailhouse Lawyers as Amici Curiae, *supra* note 57, at 17-18.

have collected for potential litigation — often go missing in transit.[137] Also lost is access to witnesses at their last prison or the ability to "catch[] a glimpse of a name plate" to identify a defendant.[138]

Then, consider the myriad things incarcerated people simply do not, or cannot, know. The security-infused, closed information environment means that details as fundamental as the last names or contact information of would-be defendants can be out of reach.[139] Service of process, the most basic prerequisite to litigation, sometimes fails because a plaintiff is unable to specify enough about a defendant's identity to guide the process server.[140] When potential witnesses have left the prison or simply live in a faraway cell block, contacting them fails just the same.[141] This is all the more frustrating when one considers that the prison likely has much of this information in its possession; it is aware of who is implicated in a plaintiff's complaint from records of the contemporaneous grievances that person has filed.[142] If this were not enough, incarcerated litigants also

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137. *E.g.*, Jackson v. Whalen, 568 F. App'x 85, 86 (3d Cir. 2014) (per curiam) (granting no relief for a plaintiff who alleged "that his seventeen legal books, reconsideration brief, and unfiled civil complaint were missing" after his transfer); Jordan v. Horn, 165 F. App'x 979, 981 (3d Cir. 2006) (granting no relief for a plaintiff who alleged losing legal property in his transfer); Brownell v. Krom, 446 F.3d 305, 307 (2d Cir. 2006) (reversing the district court's grant of summary judgment on exhaustion grounds in a case where the plaintiff alleged that his legal documents had gone missing during his transfer).

138. Brief of Former Jailhouse Lawyers as Amici Curiae, *supra* note 57, at 18; *see also* Schwartz, *Civil Rights Without Representation*, *supra* note 78, at 672-73 (quoting an unrepresented prison plaintiff's account of discovery difficulties, including the possibility that "witnesses could conceivably have been shipped to any of [an]other 100 units").

139. *See* Brief of Former Jailhouse Lawyers as Amici Curiae, *supra* note 57, at 14-16.

140. Districts differ on how to serve process in prison litigation. Some districts use the U.S. Marshals Service. *See, e.g.*, Jones v. Davis, No. CV-19-08055, 2021 WL 6197903, at *1 (D. Ariz. Dec. 29, 2021). Other districts have abandoned that tack, including the Central District of Illinois, which determined that "service of process on prisoner civil rights cases was being put on the back burner with the Marshal's Office." *Service of Process in Prisoner Cases*, U.S. DIST. CT. FOR THE CENT. DIST. OF ILL. [1], https://www.ilcd.uscourts.gov/sites/ilcd/files/forms/SERVICE%20OF%20PROCESS.pdf [https://perma.cc/X9PK-HWX5].

141. *E.g.*, Bernard v. Kibbel, No. 17-cv-331, 2021 WL 1927516, at *1-2 (W.D. Wis. May 13, 2021) (refusing to provide contact information of a nurse who treated the plaintiff after she left the job); Schwartz, *Civil Rights Without Representation*, *supra* note 78, at 672-73 (discussing the difficulty of contacting witnesses in mental-health units). One formerly incarcerated person I interviewed described difficulties contacting witnesses even within their own prison, often needing to communicate with those in separate areas through intermediaries like incarcerated people working in the kitchen. Interview with Formerly Incarcerated Litigant #4 (June 29, 2024) (on file with author).

142. *E.g.*, ILL. ADMIN. CODE tit. 20, § 504.810(c) (2025) (requiring that prison grievances include information about "what happened, when, where and the name of each person who is the subject of or who is otherwise involved in the complaint"); *Policy Directive: Prisoner/Parolee*

lack information on prison policies, the layout of their environment, and seemingly innocuous logistical details like how medical appointments are scheduled and by whom.[143]

Put differently, imprisoned plaintiffs entering discovery often lack knowledge of *what evidence they even ought to seek*. And without mandatory initial disclosures,[144] they are even further in the dark. The result? When they *do* ask for evidence, incarcerated plaintiffs resort to "crudely drafted and overly broad discovery requests," unaware of what information exists or where it is housed.[145] In a reversal of the efficiency concerns justifying the Rule 26(a)(1) exemption, prison defendants sometimes *complain* about the lack of mandatory initial disclosures, arguing that it has bred "virtually unregulated discovery in *pro se* prisoner cases."[146] And federal judges with whom I spoke broadly complained about the unregulated nature of prison discovery.[147] Plaintiffs ask for too much — often for lack of knowing better or because they have yet to receive anything at all.[148]

Grievances, MICH. DEP'T OF CORR. 4 (Oct. 21, 2024), https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Policy-Directives/PDs-03-General-Operations/PD-0302-Programs-for-Offenders/03-02-130-Prisoner-Parolee-Grievances-effective-03-18-19.pdf?rev=446014aa6252426e8d4d6f396357c8c7 [https://perma.cc/F6XK-F77G] ("Dates, times, places, and names of all those involved in the issue being grieved are to be included.").

143. *E.g.*, Easley v. Tritt, No. 17-cv-930, 2020 WL 836695, at *8-9 (M.D. Pa. Feb. 20, 2020) (allowing the plaintiff access to some, but not all, prison policies); St. John v. Arnista, No. 05-CV-120, 2007 WL 3355385, at *6 (D. Conn. Nov. 9, 2007) (describing how the plaintiff figured out the doctor's appointment-scheduling process by eavesdropping on nurses).

144. *See supra* notes 105-114 and accompanying text.

145. Branham, *supra* note 49, at 184; *see also* Mercaldo v. Wetzel, No. 13-CV-1139, 2016 WL 5851958, at *4 (M.D. Pa. Oct. 6, 2016) ("As often happens in cases of this kind, Mercaldo has propounded vastly overbroad discovery requests . . . ."); Stilley v. Garland, No. 21-60022, 2022 WL 1568363, at *3 (5th Cir. 2022) (noting that the plaintiff's "[discovery] request did not give the district court an idea of the sought-after discovery material and 'its likely relevance'" (quoting Enplanar, Inc. v. Marsh, 11 F.3d 1284, 1292 (5th Cir. 1994))); Ritter v. Reinke, No. 13-cv-00509, 2017 WL 1138136, at *4 (D. Idaho Mar. 27, 2017) (finding that the plaintiff's discovery requests were not "narrowly tailored" to his claim).

146. Bell v. Caruso, No. 07-cv-876, 2008 WL 2566754, at *1 (W.D. Mich. June 25, 2008) (staying discovery pending the resolution of dispositive motions, pointing to the plaintiff's "burdensome" discovery requests).

147. Telephone Interview with Federal Judge #4 (Apr. 3, 2024) (on file with author); Telephone Interview with Federal Judge #5 (Apr. 29, 2024) (on file with author).

148. Judges occasionally narrow incarcerated plaintiffs' requests into something feasible. *E.g.*, Manriquez v. Huchins, No. 09-cv-00456, 2011 WL 3290165, at *8-9 (E.D. Cal. July 27, 2011); Pangborn v. Baudino, No. CV 15-6812, 2018 WL 6265055, at *4 (C.D. Cal. Sept. 27, 2018) ("[P]laintiff is entitled to significantly narrowed categories of documents within the morass of what he broadly seeks."); Cramer v. Bohinski, No. 22-CV-583, 2023 WL 5672177, at *2 (M.D. Pa. Sept. 1, 2023) (narrowing the plaintiff's broad discovery request to "reconcile the interests of inmate-plaintiff and corrections officials by rejecting broadly framed requests").

This dearth of information is not an accident. Sometimes it is justified, as when evidence seems just too dangerous to share with the prison population. For example, providing incarcerated people with detailed blueprints of their prison—its vents, ducts, ins and outs—"obviously" runs a risk of revealing means of escape.[149] Similarly, if an investigative report includes information from (or about) confidential informants, it is likely off limits.[150] Incarcerated people's own files can also house relevant information that is nonetheless too risky to share. For example, a former judge interviewed for this Article noted that prison gangs with nefarious intent sometimes had prison litigants file discovery requests for parts of their files that contained other incarcerated people's (and prison guards') personal information.[151] Other cases espouse fear that plaintiffs could study doctors' "candid" evaluations of their mental health, found in their medical records, and use them to manipulate those doctors into different courses of treatment.[152]

In theory, then, savvy use of discovery can pose security concerns for prisons worthy of a judge's consideration when ruling on a motion to compel. In turn, prisons frequently raise security concerns to justify not providing otherwise-discoverable information. They do so in a few ways. Prison defendants sometimes claim so-called "official information privilege"—or "government privilege," "self-critical analysis" privilege, or "deliberative process privilege"—to keep prison documents confidential.[153] More often, defendants simply appeal to

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149. Gilton v. Scott, No. 19-CV-00441, 2019 WL 6824852, at *2 (W.D. La. Nov. 21, 2019); *see also Manriquez*, 2011 WL 3290165, at *20 (admitting that the prison blueprints the plaintiff sought "could be relevant and potentially admissible at trial," but declining the plaintiff's motion to compel because "the security risk . . . greatly outweighs any potential benefit"); Mikko v. Smock, No. 10-12845, 2012 WL 5830218, at *3 (E.D. Mich. Nov. 16, 2012) (denying the plaintiff's motion to compel blueprints of the prison's air-circulation system).

150. *See* Mendoza v. Miller, 779 F.2d 1287, 1298-99 (7th Cir. 1985) (finding no due-process violation, assuming that the information in the reports is appropriately deemed "reliable" by the judge after reviewing it in camera). Indeed, after in camera review, the court can even decide that the information's sensitivity justifies a refusal to share it even under seal, for attorneys' eyes only. *Id.*; *see also* Martinez v. Cathey, No. CVF-026619, 2006 WL 224400, at *5 (E.D. Cal. Jan. 30, 2006) (collecting cases).

151. Telephone Interview with Federal Judge #1 (Apr. 20, 2023) (on file with author).

152. *See* Mercaldo v. Wetzel, No. 13-CV-1139, 2016 WL 5851958, at *6 (M.D. Pa. Oct. 6, 2016) (denying the plaintiff's motion to compel mental-health records to keep him from studying the evaluations of his psychiatric state); Easley v. Tritt, No. 17-cv-930, 2020 WL 836695, at *15 (M.D. Pa. Feb. 20, 2020) (citing *Mercaldo* to justify concern over the use of civil litigation to obtain mental-health records, but granting access to "any non-privileged portion of [the plaintiff's] mental health record" from a narrow, specified time period).

153. *See, e.g.*, Harris v. Quillen, No. 17-CV-01370, 2020 WL 4251069, at *2-5 (E.D. Cal. June 5, 2020) (denying a prison's claim of "official information privilege" and granting an incarcerated

safety and security as the reason for denying incarcerated plaintiffs' discovery requests.[154]

But defendants do not always stop with justified security objections. Instead, in what one judge I spoke to called a "Pavlovian response" to discovery requests,[155] prison defendants are prone to flights of imaginative fancy, seeing security risks where there are none. Plaintiffs hoping to contact officials or medical personnel for possible testimony will be met with "blanket" and "unspecified" safety concerns.[156] Prison defendants have raised those same vague objections, without explanation, against requests for incident reports; records of whether the defendant was disciplined for the incident about which the plaintiff has sued him; a defendant's job description; a photograph of an injury the defendant received; an opportunity to view video of the incident at issue; copies of a plaintiff's own medical records; and general prison policies.[157]

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pro se plaintiff's motion to compel reports related to the investigation of an excessive-force incident); Hagan v. Dolphin, No. 13-CV-2731, 2015 WL 1499702, at *3 (M.D. Pa. Apr. 1, 2015) (calling the privilege "a governmental privilege"); Starkey v. Hernandez, No. 17-CV-01158, 2018 WL 6075809, at *3 (S.D. Cal. Nov. 21, 2018) (finding that the privilege applied because a prison guard's employment records are "regarded as confidential" and would create "various security risks" if disclosed). Sometimes, prison officials even raise a "critical self-analysis" privilege with varying degrees of success. *See Manriquez*, 2011 WL 3290165, at *24-26.

154. *See, e.g.*, Stringfellow v. Perry, 869 F.2d 1140, 1143 (8th Cir. 1989) (finding no abuse of discretion in a district court's denial of discovery requests over security concerns); Melendez v. Steberger, No. 20-CV-02635, 2022 WL 2239959, at *2 (E.D. Pa. June 22, 2022) (rejecting most of a prison's "broad allegations" that disclosing its policies in discovery would implicate security concerns).

155. Telephone Interview with Federal Judge #4, *supra* note 147.

156. *See, e.g.*, Rogers v. Giurbino, 288 F.R.D. 469, 483 (S.D. Cal. 2012) (criticizing a prison's "blanket" safety-concern assertions about providing the names of individuals involved with the plaintiff's case); Bernard v. Kibbel, No. 17-cv-331, 2021 WL 1927516, at *1 (W.D. Wis. May 13, 2021) (noting, in denying without prejudice the plaintiff's motion to compel a nurse's contact information "due to unspecified safety concerns," that the plaintiff could subpoena the nurse at trial if the plaintiff survived summary judgment); Campbell v. Harris, No. 11-CV-00021, 2011 WL 2971192, at *2 (E.D. Ark. July 22, 2011) ("[I]t is unclear what security concerns prevent Defendants from providing Plaintiff with the *name of the prison officer* who decided the order in which the barracks were called to the dining hall.").

157. *See, e.g.*, *Campbell*, 2011 WL 2971192, at *1 n.1 (criticizing the defendants' "blanket objections"); Washington v. Alexander, No. S-05-0525, 2008 WL 4456529, at *2 & n.4 (E.D. Cal. Sept. 30, 2008) (overruling the defendant's security objection to producing the plaintiff's job description); DeBauche v. James, No. 13-CV-553, 2015 WL 4394467, at *7 (W.D. Wis. July 16, 2015) (noting that the defendants' "confidential[ity]" concerns "do not explain the security reasons" behind their denial of the plaintiff's discovery requests); Warner v. Cate, No. 12-CV-01146, 2016 WL 7210111, at *5 (E.D. Cal. Dec. 12, 2016) (denying the defendants' blanket security objection to records related to any defendant's "disciplinary proceedings for the misconduct alleged in th[e] lawsuit"); Turner v. Rataczak, No. 13-CV-48, 2014 WL 834721, at *3 (W.D. Wis. Mar. 4, 2014) (criticizing the defendant's "blanket" objection to providing a photograph of the defendant's injury).

Prisons even routinely refuse to provide photographs of an incarcerated litigant's cell—typically sought to support allegations that it is filthy, covered in feces or blood, or otherwise uninhabitable—since the photographs could "enable[] the prisoner to study structural details of the cell."[158] One federal judge I spoke with noted that this objection is disturbingly common.[159] That judge also pointed out the absurdity of refusing an incarcerated plaintiff a photo of his own cell: "He . . . *lives* in it!"[160]

Unfortunately, heeding the Supreme Court's demand that they "accord[] wide-ranging deference" to prisons' efforts "to preserve internal order and discipline and to maintain institutional security," courts often take prison defendants at their word.[161] So prison defendants' improper invocations of security are rarely caught or stopped. Frustratingly, in crediting defendants' concerns, courts frequently reason that in lieu of evidence, a plaintiff can always testify to confirm their allegations.[162] The result is a "he said, she said" contest, which, as noted, unrepresented, imprisoned litigants tend to lose.[163]

A separate problem deepens the informational dearth: defendants frequently claim that evidence an incarcerated plaintiff seeks simply does not exist. The most common example involves footage from guards' body cams or surveillance cameras stationed throughout the prison. Most prisons' policies mandate that surveillance cameras record parts of the prison or that officers use body cameras when conducting cell extractions or using force.[164] But prisons also often allow

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158. Rosa-Diaz v. Harry, No. 17-CV-2215, 2018 WL 6322967, at *4 (M.D. Pa. Dec. 4, 2018); *see also* Denton v. Thrasher, No. 18-CV-05017, 2019 WL 11779202, at *1 (W.D. Wash. Aug. 30, 2019) (denying the plaintiff's request to inspect and photograph cells in the defendant's correctional facility); Easley v. Tritt, No. 17-CV-930, 2020 WL 836695, at *4 (M.D. Pa. Feb. 20, 2020) (agreeing with the defendants' security-related and other objections to providing the plaintiff with a photograph of his cell).

159. Telephone Interview with Federal Judge #4, *supra* note 147.

160. *Id.*

161. Whitley v. Albers, 475 U.S. 312, 321-22 (1986) (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)).

162. *E.g.*, Manriquez v. Huchins, No. 09-CV-004560, 2011 WL 3290165, at *20 (E.D. Cal. July 27, 2011) ("Plaintiff has an alternate means of presenting the evidence at trial as he, or his witnesses, can testify to the size of the cell, vent placement, and the windows, or lack thereof.").

163. *E.g.*, Berry v. Sanders, No. 17-cv-00318, 2022 WL 16825208, at *1 (M.D. La. Oct. 7, 2022) (delivering a jury verdict in favor of the defendant over a pro se plaintiff after a two-day trial).

164. *See* Andrew Welsh-Huggins, *Prison Systems Adding Body-Worn Cameras to Security Plans*, AP NEWS (Oct. 29, 2021, 1:27 PM EST), https://apnews.com/article/business-prisons-violence-ohio-california-c5380b608fcebe0af82d6729205f31d0 [https://perma.cc/X7XP-XFYS]; *see also* Nicholas Bogel-Burroughs, *In a First, Ohio Moves to Put Body Cameras on Guards in Every Prison*, N.Y. TIMES (Jan. 14, 2022), https://www.nytimes.com/2022/01/14/us/ohio-prison-body-cams.html [https://perma.cc/PH7N-3CJU] (describing how several states are moving

surveillance footage to be automatically overwritten, usually every month.[165] And body-cam footage is frequently nowhere to be found when a plaintiff asks for it. Indeed, even when videos still exist, multiple cases show defendants taking steps to interfere with or avoid sharing them.[166]

In sum, in prison litigation the defendant controls nearly all the evidence, and the plaintiff lacks the informational means to mount an independent evidentiary challenge. In no other kind of litigation are plaintiffs so likely to seek probative evidence that they are prohibited from even *seeing*. And unlike trade-secret disputes — where attorneys'-eyes-only orders are common routes around similar problems[167] — incarcerated plaintiffs almost never have an attorney. Their eyes are the only ones. These information asymmetries alone thus fuel an unparalleled crisis compared with discovery in other types of litigation.

2. *Resource Restrictions*

Incarcerated people litigating pro se also have few, if any, resources with which to litigate. Those financial constraints place further, unique impositions on discovery, effectively eliminating certain types of evidence from their cases.

For starters, incarcerated plaintiffs lacking resources cannot always effectively comply with defendants' discovery requests or court-imposed discovery deadlines. Copying documents and using postage to send motions can cost money,[168] and incarcerated litigants' failure to pay can result in dismissal.[169] These plaintiffs are mostly relegated to filing by mail instead of e-filing, as their access to computers is severely restricted and local rules often require them to

toward using body cameras in prisons and jails in response to criticism that prison guards are "regularly" involved in violent encounters).

165. *See, e.g.*, *Budget Change Proposal: Statewide Implementation of Fixed Video Surveillance*, CAL. DEP'T OF CORR. & REHAB. [4] (May 14, 2021), https://bcp.dof.ca.gov/2122/FY2122_ORG5225_BCP4756.pdf [https://perma.cc/P5YG-3KMN] (seeking to implement new and improved video technologies that, "[u]nlike older video surveillance technologies used" at the California Department of Corrections, can be stored for "at least 90 days"); *Berry* Answers to Plaintiff's Requests for Production of Documents/Records to Defendants, *supra* note 33, at 2 (describing how the defendant was unable to locate evidence requested by the plaintiff).

166. *See infra* note 461 and accompanying text.

167. *See* Centurion Indus., Inc. v. Warren Steurer & Assocs., 665 F.2d 323, 326-27 (10th Cir. 1981) (lauding the lower court's issuance of a "carefully fashioned protective order to guard against improper disclosure of the [trade] secrets").

168. *See, e.g.*, Manriquez v. Huchins, No. 09-CV-004560, 2011 WL 3290165, at *33, 36 (E.D. Cal. July 27, 2011) (awarding $16.80 and $6.24 to the plaintiff, who itemized the costs of filing two different motions to compel).

169. *See, e.g.*, Jones v. Blanas, 393 F.3d 918, 930-31 (9th Cir. 2004) (reversing the district court's dismissal where the plaintiff was unable to comply with discovery timelines due to a lack of "resources").

take the paper route.[170] Prisons may restrict access to writing materials (in cases, for example, of mental-health concerns), or limit means of contact between those in the prison population, frustrating plaintiffs' ability to gather affidavits to support their claims.[171] Prisons or jails may also limit the amount of physical space for a plaintiff's storage of legal materials.[172]

But the most glaring casualty of these plaintiffs' lack of resources is the loss of typical discovery methods. Foremost among them are depositions. Oral depositions are highly prized discovery tools, "incomparably preferable to written interrogatories as a vehicle for seeking out useful evidence."[173] They allow unmitigated interaction with a witness or the defendant himself, rather than rote prepared answers to interrogatories drafted by lawyers.[174] This benefit is especially important for incarcerated people litigating pro se, whose limited number of interrogatories are often quelled with objections. As one formerly incarcerated person relayed to me, unlike one-and-done interrogatories, oral depositions allow plaintiffs to hone questions in real time in response to objections, molding and reframing them until the deponent must answer.[175] Additionally, when a conspiracy of silence exists among multiple defendants or witnesses — a common problem in retaliation and excessive-force cases — oral depositions can frustrate a coordinated response and surface differences between officials' stories.[176]

Oral depositions are, on paper, available to pro se prison litigants. The only restriction imposed by the Federal Rules is the obligation to seek the court's leave before deposing other incarcerated witnesses.[177] But in reality, oral depositions are almost always unavailable to incarcerated plaintiffs. Courts view them as "highly disruptive of prison administration," due to both the number of prison

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170. *See* FED. R. CIV. P. 5 advisory committee's notes to 2018 amendment, subdivision d ("It is not yet possible to rely on an assumption that *pro se* litigants are generally able to seize the advantages of electronic filing."); *Representing Yourself (Pro Se Litigant)*, U.S. DIST. CT. FOR E. DIST. CAL., https://www.caed.uscourts.gov/caednew/index.cfm/cmecf-e-filing/representing-yourself-pro-se-litigant [https://perma.cc/8XRD-B7TY] ("Any person appearing pro se may not utilize electronic filing except with the permission of the assigned judge.").

171. *See, e.g.*, Schwartz, *Civil Rights Without Representation*, *supra* note 78, at 672-73 (noting a prisoner's inability to get affidavits from witnesses in a mental-health unit).

172. Telephone Interview with Formerly Incarcerated Litigant #6 (July 3, 2024) (on file with author); *see also* Long v. Collins, 917 F.2d 3, 3 (5th Cir. 1990) (mounting an unsuccessful challenge to a prison regulation limiting storage space in cells).

173. Hendricks v. Coughlin, 114 F.3d 390, 394 (2d Cir. 1997).

174. *See id.*

175. Telephone Interview with Percy Levy, Formerly Incarcerated Litigant #5 (July 1, 2024) (on file with author).

176. For more on conspiracies of silence, see *infra* notes 205-213 and accompanying text.

177. *See* FED. R. CIV. P. 30(a)(2)(B).

lawsuits and the potential security risks.[178] Courts especially frown upon incarcerated plaintiffs deposing prison officials, noting the "problems with security and maintaining staff authority" that could result.[179] Since judges have "broad discretion" to rule upon plaintiffs' requests for oral depositions under Rule 30, they can, and do, almost always prohibit them.[180] In doing so, they typically claim that written depositions or, for the defendant, interrogatories are sufficient.[181]

Experts are similarly inaccessible. For certain claims—prime among them medical deliberate indifference—expert reports are invaluable.[182] Nonetheless, incarcerated plaintiffs can only use them if they can afford to; courts stress that these plaintiffs bear "sole responsibility" for "lack[ing] the financial resources to pay an expert."[183] And of course, expert reports are far too expensive for incarcerated plaintiffs to fund.

Creative solutions to aid incarcerated people who can "hardly expect to procure" their own expert report—by, say, using the catchall exception to the hearsay rule to admit a substantially similar expert report produced in a different case—

178. Bell v. Godinez, No. 92 C 8447, 1995 WL 519970, at *2 (N.D. Ill. Aug. 30, 1995).

179. Muhammad v. Bunts, No. 03-cv-228, 2006 WL 8442090, at *4 (N.D. W. Va. Oct. 2, 2006); *see also* Read v. Kwiatkowski, No. 15-CV-6475, 2017 WL 1180953, at *1 (W.D.N.Y. Mar. 29, 2017) ("[P]rison order and security concerns . . . weigh against plaintiff's request to conduct oral depositions." (quoting Whiteside v. Thalheimer, No. 13-cv-408, 2015 WL 2376001, at *2 (S.D. Ohio May 18, 2015))).

180. Though this authority is not explicit in the Rules, courts have found it. *See, e.g.*, Lewis v. Mason, No. 19-cv-1504, 2020 WL 3128297, at *2 (M.D. Pa. June 12, 2020).

181. *See, e.g.*, McKeithan v. Jones, 212 F. App'x 129, 131 (3d Cir. 2007) (per curiam); Hoglan v. Robinson, No. 15-cv-00694, 2017 WL 8683568, at *1-2 (W.D. Va. Nov. 15, 2017); Moore v. Morgan, No. 16-cv-655, 2018 WL 6841362, at *2 (S.D. Ohio Oct. 11, 2018); Pressley v. Pa. Dep't of Corr., No. CV-08-2131, 2011 WL 13277239, at *2 (M.D. Pa. Jan. 27, 2011). Even in the exceptionally rare circumstances when courts grant incarcerated litigants' requests to take oral depositions, they cannot shoulder costs of transcribing or arranging them, since "federal courts are not authorized to waive or pay" fees on behalf of poor litigants. Malik v. Lavalley, 994 F.2d 90, 90 (2d Cir. 1993) (per curiam).

182. *See* Pennewell v. Parish, 923 F.3d 486, 491-92 (7th Cir. 2019) (finding expert testimony essential to proving a medical deliberate-indifference claim).

183. Williams v. Kort, No. CV-02-2320, 2007 WL 2071886, at *2 (M.D. Pa. July 19, 2007); *see also* Snider v. Gilmore, No. 18-cv-00735, 2020 WL 5912805, at *2 (W.D. Pa. Oct. 6, 2020) (explaining that civil plaintiffs proceeding in forma pauperis must finance their own expert witnesses and denying the plaintiff's motion to appoint one); Chapman v. United States, 353 F. App'x 911, 914 (5th Cir. 2009) (per curiam) (affirming summary judgment for the government in a Federal Tort Claims Act case in part because the plaintiff did not file an expert report).

are possible.[184] And in some cases, courts recruit counsel to make depositions and expert reports possible.[185] Once a lawyer is involved, district courts have cash reserves to fund costs the lawyer incurs for the litigation, including for depositions and experts.[186] But most courts do not go to these lengths, leaving experts and expert reports out of reach.[187]

The upshot is that depositions and expert reports—two of the most valuable discovery tools available to civil litigants, and two tools essential to scaling the unique informational and legal barriers that exist for prison civil-rights claims—are unaffordable. And after security concerns and resource restrictions strip most discoverable evidence from incarcerated people's claims, plaintiffs face yet another hurdle: uncooperative defendants.

3. Hostility Effects

In its report on pro se prison litigation, the ABA stressed that "[o]ne of the most critical variables that will affect which discovery devices work best will be the willingness of the defendants to cooperate during the discovery process."[188] But a unique hostility suffuses prison litigation—a hostility over and above that faced by other pro se litigants[189]—that makes any such cooperation elusive.

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184. *See* Muhammad v. Crews, No. 14-CV-379, 2016 WL 3360501, at *10 (N.D. Fla. June 15, 2016) (using the catchall hearsay exception to admit a similar expert report from another incarcerated litigant's religious-liberty claim).

185. *See infra* note 268 and accompanying text; *see also* Robinson v. United States, 462 F. App'x 885, 886 (11th Cir. 2012) (noting that district court "appointed pro bono counsel" because plaintiff "had difficulty obtaining a medical expert to oppose the government's summary judgment motion").

186. *See Regulations Governing the Prepayment and Reimbursement of Expenses in Pro Bono Cases*, U.S. DIST. CT. FOR THE N. DIST. OF ILL. 6-7 (May 19, 2022), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_legal/newrules/dcf_e.pdf [https://perma.cc/W83C-JZQR]. Most federal districts reimburse recruited pro bono attorneys for costs, ranging from $1,000 to $30,000. Aaron Littman, *Managing Pro Se Prisoner Litigation*, 43 REV. LITIG. 43, 59 (2023).

187. *See* Berg v. Prison Health Servs., 376 F. App'x 723, 724 (9th Cir. 2010); Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991) (noting, in rejecting a medical deliberate-indifference claim, that recruiting counsel for indigent civil litigants is limited to "exceptional circumstances"); Steffey v. Orman, 461 F.3d 1218, 1223-24 (10th Cir. 2006) (articulating a "fundamental unfairness" standard for appointing counsel in a due-process claim by an incarcerated person). For more on recruitment of counsel, see *infra* notes 395-406 and accompanying text.

188. Branham, *supra* note 49, at 188.

189. All pro se litigants suffer what Victor D. Quintanilla and others call a "signaling effect" of pro se status—a subconscious bias lawyers harbor against pro se litigants that infects how they value those litigants' claims. *See* Victor D. Quintanilla, Rachel A. Allen & Edward R. Hirt, *The Signaling Effect of Pro Se Status*, 42 LAW & SOC. INQUIRY 1091, 1114-19 (2017); *see also* Victor

Unsurprisingly, because both incarcerated people and guards live together in a stressful, potentially violent environment, distrust permeates their interactions. Indeed, dialogue between them is so "difficult and rare" that "meaningful negotiations between prisoners acting pro se and states' attorneys are practically impossible."[190]

This hostility impacts litigation in several ways. First, it means that many prison defendants and state attorneys will be uncooperative during discovery. "[C]orrectional officials and Attorneys General often resist what the courts consider proper discovery requests."[191] Recalcitrance is common. For example, when New York began requiring mandatory disclosures from prisons in response to use-of-force claims, they abided by the rule in only twenty-seven out of 194 cases—a small fraction of the pro se claims by incarcerated people in the district.[192] And as the Seventh Circuit noted in a 1990 case, "Our impression . . . is that prisoners appearing *pro se* get the runaround" from the government, seeking information as basic as that needed to serve process.[193]

Multiple people I interviewed explained dynamics in which prisons and prison defendants refused to come to the table to negotiate settlements or to cooperate in discovery or the litigation process more broadly.[194] On the other hand, some reported foot-dragging by the state attorneys *regardless* of whether the prison itself was cooperative.[195] Several judges bemoaned high turnover in state attorney-general offices, such that right when a defendant's lawyer had developed a rapport with a plaintiff, that lawyer would leave and be replaced.[196]

D. Quintanilla, *Doing Unrepresented Status: The Social Construction and Production of Pro Se Persons*, 69 DEPAUL L. REV. 543, 547-56 (2020) (discussing experiments demonstrating the "signaling effect" by showing that legal actors perceive pro se claims as less meritorious).

190. Schlanger, *supra* note 46, at 1621 (quoting Turner, *supra* note 48, at 637).

191. Branham, *supra* note 49, at 184.

192. *Id.* at 187.

193. Sellers v. United States, 902 F.2d 598, 602 (7th Cir. 1990) (discussing the failure to give information to a plaintiff with which he could serve process); *see also* Gross v. Lunduski, 304 F.R.D. 136, 152 (W.D.N.Y. 2014) (voicing skepticism of the defendant's claim that responding to the plaintiff's discovery requests would be unduly burdensome).

194. *See* Telephone Interview with Federal Judge #5, *supra* note 147; Telephone Interview with Federal Judge #6 (Apr. 30, 2024) (on file with author). *But see* Telephone Interview with Federal Judge #7 (Oct. 3, 2024) (on file with author) (suggesting that discovery disputes were rare in the judge's district).

195. Telephone Interview with Federal Judge #4, *supra* note 147; Interview with Federal Judge #3 (Apr. 17, 2024) (on file with author); Interview with Formerly Incarcerated Litigant #7 (July 10, 2024) (on file with author).

196. Telephone Interview with Federal Judge #4, *supra* note 195; Telephone Interview with Federal Judge #5, *supra* note 147.

Whatever the cause, the result is delay,[197] from indefinitely postponing addressing an incarcerated person's grievances (thus lengthening the exhaustion process and potentially interfering with statutes of limitations for resultant federal claims[198]), to ignoring requests for production or interrogatories.[199]

Second, hostile defendants sometimes refuse to produce or preserve evidence altogether.[200] As noted, prisons will routinely fail to flag surveillance tapes before they are overwritten, including after someone in prison has filed a grievance concerning an incident that would have appeared on the tape.[201] Some officers intentionally turn off their body cameras before engaging in hostile use of force or delete footage after the fact.[202] Some officers intentionally move incarcerated

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197. *See* Jones v. Davis, No. CV-19-08055, 2021 WL 6197903, at *1 (D. Ariz. Dec. 29, 2021) (noting the "runaround" incarcerated plaintiffs get when "seek[ing] information through channels regarding their litigation"); Bustillo v. Hawk, No. 97-WM-445, 1998 WL 299980, at *5 (D. Colo. May 28, 1998) ("BOP officials have done everything possible to delay this case from being resolved on its merits."); Graham v. Runnels, No. CIV S-07-2291, 2010 WL 3835759, at *5 (E.D. Cal. Sept. 30, 2010) (noting that "a blanket restriction upon access to information that could prove highly relevant to plaintiff" was "not justifiable"); Fosselman v. Gibbs, No. CV 06-00375, 2010 WL 1446661, at *1-2 (N.D. Cal. Apr. 7, 2010) (imposing sanctions for a prison's failure to respond to multiple discovery requests); Baker v. Moore, No. 12-cv-00126, 2016 WL 796504, at *1 (E.D. Cal. Mar. 1, 2016) (noting the defendant's noncompliance with a court-ordered discovery motion).

198. *E.g.*, Grayer v. Butler, No. 18-49, 2020 WL 1124365, at *1-4 (M.D. La. Feb. 19, 2020) (dismissing an incarcerated plaintiff's § 1983 suit for failure to exhaust where the plaintiff claimed to have filed a grievance multiple times without the prison responding).

199. LaBounty v. Coughlin, 137 F.3d 68, 71-72 (2d Cir. 1998) (vacating summary judgment because the plaintiff was prejudiced by the defendants' nonresponsiveness during discovery); Dean v. Barber, 951 F.2d 1210, 1213-14 (11th Cir. 1992) (same); Abdul-Wadood v. Duckworth, 860 F.2d 280, 282-83 (7th Cir. 1988) (same).

200. *E.g.*, *LaBounty*, 137 F.3d at 71-72 (noting nonresponsiveness to the plaintiff's requests for production until a judge demanded an explanation).

201. Bernard v. Kibble, No. 17-cv-331, 2021 WL 826710, at *1-2 (W.D. Wis. Mar. 4, 2021) (noting that a prison's failure to preserve footage once on notice could support sanctions for spoliation); Wall v. Rasnick, 42 F.4th 214, 221-22 (4th Cir. 2022) (finding that a magistrate judge should have conducted a fuller spoliation inquiry where footage was not preserved); Kounelis v. Sherrer, 529 F. Supp. 2d 503, 520 (D.N.J. 2008) (finding spoliation when the defendants were at fault for the loss of footage); Muhammad v. Mathena, No. 14-cv-00529, 2016 WL 8116155, at *8 (W.D. Va. Dec. 12, 2016) (same). For ways to combat this problem, see *infra* notes 448-467 and accompanying text.

202. Brenda Cain, *Video Shows Cuyahoga County Jail Guard Turn Off Body Cam, Pummel Mentally Ill Inmate*, CLEVELAND.COM (June 7, 2019, 6:03 AM), https://www.cleveland.com/metro/2019/06/cuyahoga-county-jail-guard-turns-off-body-cam-pummels-mentally-ill-inmatethe-wake-up.html [https://perma.cc/UTK8-WE84]; JD Mireles, *POV: NY Prisons Are in Crisis. Body Cams Won't Help*, FASTCOMPANY (July 21, 2023), https://www.fastcompany.com/90926365/pov-ny-prisons-are-in-crisis-body-cams-wont-help [https://perma.cc/N8D9-G6VB] (noting that officers turn off body cams to avoid repercussions for engaging

people to unsurveilled areas before harming them.[203] And some incarcerated people allege that they have been transferred to another prison in order to hinder their or others' litigation prospects.[204]

Even available evidence can be manipulated. A "unique bond of camaraderie" understandably eventuates between guards—a recipe for an "us" versus "them" mentality.[205] The result? A "long-established code of silence can flourish and overshadow common sense and common decency."[206] So, after the ensuing carnage of an attack on a prisoner, "[g]uards often work in groups to conceal violent assaults by lying to investigators and on official reports."[207] Some will even turn the tables after employing excessive force, accusing the plaintiff of being the assailant.[208] Other prison officials—including medical personnel—repeatedly lie,

in excessive force); Guirlando v. Ouachita Cnty. Jail, No. 21-cv-01015, 2021 WL 3698885, at *8 (W.D. Ark. June 30, 2021) (finding that a plaintiff's allegation that an officer turned off his body camera before beating him was sufficient to state claims for failure to protect and retaliation); William McLennan, *Prison Officers 'Ignoring' Body-Worn Video Camera Rules*, BBC (May 22, 2019), https://www.bbc.com/news/uk-england-48337690 [https://perma.cc/QKM8-862U] (reporting on a similar problem in U.K. prisons).

203. *See* John O'Connor, *Illinois Prison Guard Gets 20 Years for Inmate Beating Death*, AP NEWS (Mar. 16, 2023, 6:05 PM EST), https://apnews.com/article/prison-beating-guard-sentencing-illinois-5303b0aa40bf3b883d07ef62c688426d [https://perma.cc/588N-4UBF] (describing officers moving an incarcerated man to the "segregation unit vestibule where there were no security cameras" before beating him to death).

204. *See* Brief of Former Jailhouse Lawyers as Amici Curiae, *supra* note 57, at 17-18; *see also* Telephone Interview with Formerly Incarcerated Litigant #4 (June 29, 2024) (on file with author) (noting that prisons will transfer those succeeding in their claims to discourage litigation); Silva v. Di Vittorio, 658 F.3d 1090, 1103-04 (9th Cir. 2011) (discussing an incarcerated plaintiff's allegation that the defendants "repeatedly transferred [him] between different prison facilities in order to hinder his ability to litigate his pending civil lawsuits").

205. Kathleen M. Dennehy & Kelly A. Nantel, *Improving Prison Safety: Breaking the Code of Silence*, 22 WASH. U. J.L. & POL'Y 175, 176 (2006) (discussing this dynamic).

206. *Id.*

207. Alysia Santo & Joseph Neff, *We Spent Two Years Investigating Abuse by Prison Guards in New York. Here Are Five Takeaways.*, MARSHALL PROJECT (May 22, 2023, 5:01 AM EDT), https://www.themarshallproject.org/2023/05/22/new-york-prison-corrections-officer-discipline-findings [https://perma.cc/42TS-YYX6].

208. Joseph Neff, Alysia Santo & Tom Meagher, *How a 'Blue Wall' Inside New York State Prisons Protects Abusive Guards*, MARSHALL PROJECT (May 22, 2023, 5:00 AM EDT), https://www.themarshallproject.org/2023/05/22/new-york-prison-corrections-officer-abuse-cover-up [https://perma.cc/HPJ3-Z3QQ] (discussing officers' accusations against incarcerated people who were assaulted). Outside of prison, this practice is called cover charging. *See* Jonah Newman, *Chicago Police Use 'Cover Charges' to Justify Excessive Force*, CHI. REP. (Oct. 23, 2018), https://www.chicagoreporter.com/chicago-police-use-cover-charges-to-justify-excessive-force [https://perma.cc/FP69-RQYK].

even "doubl[ing]-down" when called out by a court, driven "at least in part out of animus" for plaintiffs.[209] This leads to untold manners of cruelty.[210]

Hostility also has profound discovery effects. A code of silence means fabricated records, perjury, and spoliation.[211] In the words of one formerly incarcerated person I spoke to, in some prisons "most of what gets produced is a lie."[212] It helps keep "what goes on behind the prison walls . . . hidden from public knowledge."[213] And it prevents incarcerated plaintiffs from credibly proving allegations of wrongdoing.

Third, hostility does not just cause discovery misfeasance in prison. It also produces a wider sense of distrust, preventing any rapport or collaboration that might move prison litigation along. As a judge relayed to me, "There's no good will between any of these people"; one party distrusts even "an innocuous request" from the other.[214]

The hostility is no one's fault. Nor, generally, are the information asymmetries and resource restrictions hindering incarcerated plaintiffs. Rather, these

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209. *See, e.g.*, Littler v. Martinez, No. 16-cv-00472, 2019 WL 1043256, at *1-2 (S.D. Ind. Mar. 5, 2019). For more on this case, see *infra* notes 469-490 and accompanying text.

210. *E.g.*, Sam Stanton, *California Prison Guard Sentenced in 'Code of Silence' Cover-Up Involving Inmate Death*, San Luis Obispo Trib. (Mar. 18, 2024, 2:11 PM), https://www.sanluisobispo.com/news/california/article286690050.html [https://perma.cc/5UX3-K4J2] (discussing guards' cover-up of an incident that led to an incarcerated person's death); Investigations Div., *The Department of Corrections' Internal Affairs Unit Failed to Adequately Investigate Abuse Allegations*, N.J. Off. of the State Comptroller 11-13 (June 6, 2024), https://www.nj.gov/comptroller/news/docs/DOCSIDReport.pdf [https://perma.cc/8US2-6NQE] (reporting two incidents in which corrections officers used unprovoked force on incarcerated people—including punching one repeatedly in the head—in the presence of other officers, with no recourse).

211. *See* Bobby Allyn, *Jeffrey Epstein's Prison Guards Are Indicted on Federal Charges*, NPR (Nov. 19, 2019, 11:32 AM ET), https://www.npr.org/2019/11/19/780794931/prosecutors-charge-correctional-officers-who-guarded-jeffrey-epstein-before-his- [https://perma.cc/99PR-T8YZ] (noting that officers fabricated records to conceal their failure to supervise Jeffrey Epstein while he committed suicide); Jan Ransom & Ainara Tiefenthäler, *New York City Set to Pay a Record $28 Million to Settle Rikers Island Suit*, N.Y. Times (Apr. 6, 2024), https://www.nytimes.com/2024/04/06/nyregion/nyc-rikers-negligence-lawsuit.html [https://perma.cc/E96W-2NGE] (noting that multiple of the "more than half a dozen correction officers" who watched a detainee hang himself for almost eight minutes without intervening had faced prior disciplinary actions for "lying on official records" and engaging in excessive force).

212. Zoom Interview with Formerly Incarcerated Litigant #11 (Aug. 18, 2024) (on file with author).

213. Dennehy & Nantel, *supra* note 205, at 176.

214. Telephone Interview with Federal Judge #6, *supra* note 194.

problems are baked into the carceral system itself. And they threaten to make discovery, at base, untenably toothless for anyone litigating from prison.[215]

III. STORIES FROM TWO PRISONS

In the above discussion, I have attempted to provide a comprehensive overview of the numerous unique facets of prison life and litigation that systematically undercut the discovery process: virtually nonexistent written discovery rules; a security-infused environment in which evidence is almost entirely under the defendant's or her employer's control; few resources for plaintiffs to speak of; and hostility impacting litigation at every step. How do individual courts operate within this dismal framework? And does any meaningful space remain for functional discovery in prison litigation?

To answer these questions, this Part zooms in. It uses a quasi-empirical study of two hundred cases brought by incarcerated people in two different prisons to explore at a more granular level how discovery is playing out for incarcerated litigants. It documents how frequently plaintiffs' cases went to discovery, how discovery proceeded, and how often those cases resulted in wins or losses. It then provides a detailed account of the discovery issues appearing in individual cases, as well as courts' differing approaches to handling them.

The ensuing discussion comes with caveats. Any attempt to put a gloss on a system as complex as prison litigation—with its myriad possibilities for different legal strategies, judicial approaches, laws, litigants' behaviors, and so on—will come up short.[216] Indeed, this study is trained solely on discovery; it is not meant to be an authoritative account of prison litigation in the two districts writ large. However, I have done my best to give a thorough descriptive account of how prison discovery actually plays out in two specific federal districts and to compare the different outcomes and approaches—an important means of assessing the real prospects and wisdom of reform.[217]

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215. *See* Stienstra et al., *supra* note 51, at 21-22 (reporting that discovery "is present more often in non-prisoner cases" and that discovery is undertaken only occasionally or not at all in 78% of pro se prison cases).

216. *See* Harry T. Edwards & Linda Elliott, *Beware of Numbers (and Unsupported Claims of Judicial Bias)*, 80 WASH. U. L.Q. 723, 733 (2002) (discussing this difficulty across the civil-justice system).

217. *See* Deborah R. Hensler, *Researching Civil Justice: Problems and Pitfalls*, 51 LAW & CONTEMP. PROBS., no. 3, 1988, at 55, 62-63 (defending the importance of systematic qualitative research in drawing and defending conclusions about the civil-justice system).

A. Methodology

I chose to study cases coming from Menard Correctional Center in the Southern District of Illinois and Louisiana State Penitentiary—"Angola"—in the Middle District of Louisiana.

Why Menard and Angola? First, the similarities. Both are maximum-security prisons, and both have large prison populations—Menard, the largest in Illinois, houses about 1,900, while Angola houses about 6,000.[218] Both sit in relatively small federal districts.[219] And the makeup of their benches is similar: at the beginning of the time period relevant to my study, all three district judges in the Middle District of Louisiana were Obama appointees, while four of the five district judges in the Southern District of Illinois were Obama or Clinton appointees.[220]

Now for the differences. Angola is a notorious prison. Built on a former slave plantation,[221] the prison is infamous for its "reputation [of] penal brutality and violence."[222] Those imprisoned there are forced to labor in fields for little or no money—doing agricultural work that supports "a dizzying array of products found in most American kitchens, from Frosted Flakes cereal . . . to Gold Medal

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218. *See Menard Correctional Center: Facility Data*, ILL. DEP'T CORR., https://idoc.illinois.gov/facilities/allfacilities/facility.menard-correctional-center.html [https://perma.cc/639W-5ASR] (noting a population of 1,925 as of June 30, 2024); Jeffrey Goldberg, Sam Price-Waldman & Kasia Cieplak-Mayr von Baldegg, *Angola for Life*, ATLANTIC (Sept. 9, 2015), https://www.theatlantic.com/video/index/404305/angola-prison-documentary [https://perma.cc/NJX6-7A22] (finding the 2015 prison population to be around 6,000).

219. The Southern District of Illinois has five district judges and three magistrate judges. *Chambers*, U.S. DIST. CT. FOR S. DIST. ILL., https://www.ilsd.uscourts.gov/chambers [https://perma.cc/X9VN-WKTN]. The Middle District of Louisiana has three district judges and three magistrate judges. *Judge Biographies*, U.S. DIST. CT. FOR MIDDLE DIST. LA., https://www.lamd.uscourts.gov/content/judge-biographies [https://perma.cc/L7AZ-4LK5].

220. *See Judge Biographies*, *supra* note 219; *Chambers*, *supra* note 219; *Herndon, David R.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/herndon-david-r [https://perma.cc/RH5G-C5JL]; *Reagan, Michael Joseph*, FED. JUD. CTR., https://www.fjc.gov/node/1391266 [https://perma.cc/3G4X-V9MH]. Regardless, the Presidents who appointed these judges may not matter for my study. *See* Gunderson, *supra* note 93, at 620 ("[I]deology is not a significant predictor of prisoner civil rights or prison condition case outcomes . . . .").

221. David Oshinsky, *The View from Inside*, N.Y. TIMES (June 11, 2010), https://www.nytimes.com/2010/06/13/books/review/Oshinsky-t.html [https://perma.cc/7KKM-K6JK] (reviewing RIDEAU, *supra* note 63).

222. Ed Pilkington, *Louisiana Ordered to Remove Teens from 'Intolerable' Conditions at State Prison*, GUARDIAN (Sept. 11, 2023), https://www.theguardian.com/us-news/2023/sep/11/louisiana-angola-prison-teens-conditions [https://perma.cc/3UCW-KQGV].

flour, Coca-Cola and Riceland rice"[223]—and the prison hosts an annual "Prison Rodeo" in which the public pays to watch the incarcerated population compete in life-threatening bull-riding.[224] Menard is less well known, but cruel conditions and violence surface there as well.[225]

These similarities and differences seemed promising for drawing comparisons relevant to this project. The small district sizes suggested somewhat-similar caseloads.[226] And the shared maximum-security classification hinted that similar

223. Robin McDowell & Margie Mason, *Angola Prisoners Are Part of a Hidden Workforce Linked to Hundreds of Popular Food Brands*, WAFB9 (Jan. 30, 2024, 10:00 AM EST), https://www.wafb.com/2024/01/30/angola-prisoners-are-part-hidden-workforce-linked-hundreds-popular-food-brands [https://perma.cc/38QC-LGXL].

224. As advertised on its website, the event includes the chance to see "[i]nexperienced inmates sit on top of a 2,000-pound Brahma bull" and to watch "[f]our inmate cowboys sit at a table in the middle of the arena, playing a friendly game of poker" while "a wild bull is released with the sole purpose of unseating the poker players." *Schedule of Events*, ANGOLA PRISON RODEO (2024), https://of472fe.netsolhost.com/events [https://perma.cc/KZY2-4356].

225. *E.g.*, David M. Reutter, *Class Certified in "Orange Crush" Shakedown Lawsuit by Illinois Prisoners*, PRISON LEGAL NEWS (Nov. 30, 2022), https://www.prisonlegalnews.org/news/2022/nov/30/class-certified-orange-crush-shakedown-lawsuit-illinois-prisoners [https://perma.cc/23HH-RYBC] (describing a class action against the state Department of Corrections for a tactical team's widespread sexual assault and excessive force against incarcerated people during massive cell raids in 2014); Christie Thompson & Joe Shapiro, *The Deadly Consequences of Solitary with a Cellmate*, MARSHALL PROJECT (Mar. 24, 2016, 7:00 AM), https://www.themarshallproject.org/2016/03/24/the-deadly-consequences-of-solitary-with-a-cellmate [https://perma.cc/V9QM-BV4S] (describing, within hours of two people being forced to share a cell in solitary confinement, one murdering his cellmate); *see also* John O'Connor, *A Private Prison Health Care Company Accused of Substandard Care Is Awarded New Contract in Illinois*, AP NEWS (Jan. 26, 2024, 7:40 PM EST), https://apnews.com/article/prisons-health-care-federal-court-contract-illinois-9c2846221107 74e80a9de37cf727189d [https://perma.cc/CVL6-EDAQ] (discussing a new contract awarded to Menard's healthcare operator despite "numerous multimillion-dollar lawsuits that accuse the company of delayed or shoddy health care").

226. Ultimately, the Southern District of Illinois handled a higher caseload in the years I chose for the study. As of March 31, 2016, the Middle District of Louisiana reported 967 pending civil claims, 911 new filings, and 807 cases terminated; the Southern District of Illinois had 3,281 pending cases, 1,470 new filings, and 4,346 cases terminated. *Table C-1. U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Period Ending March 31, 2016*, U.S. CTS. [2], https://www.uscourts.gov/sites/default/files/data_tables/fjcs_c1_0331.2016.pdf [https://perma.cc/SG57-W2ZL]. As of March 31, 2022, the Middle District of Louisiana reported 1,029 pending civil cases, 1,031 cases terminated over the previous year, and 795 new filings; the Southern District of Illinois had 2,581 cases pending, 1,468 cases terminated over the year, and 2,095 new filings. *Table C—U.S. District Courts—Civil Federal Judicial Caseload Statistics (March 31, 2022)*, U.S. CTS., https://www.uscourts.gov/data-news/data-tables/2022/03/31/federal-judicial-caseload-statistics/c [https://perma.cc/96CX-6XQA]. This discrepancy may have been fueled by multidistrict litigation (MDL) in the Southern District of Illinois, which could inflate the number of filed cases consolidated before the

evidence—and attendant security concerns—might surface. Though neither prison's location afforded a lens into case management in more well-resourced or larger districts, I was able to speak with federal judges in such districts to get a sense for the extent to which their approaches differed. I assumed—rightly or wrongly—that Angola's unique reputation for brutality might correlate with more meritorious claims of rights violations, which could mean more cases with discovery to research. Finally, the prisons' distinct locations would contribute to a richer descriptive account of how prison life and litigation look in different parts of the country.

To start, I found the first fifty civil-rights cases incarcerated people filed in 2016 out of each prison. The eight-year remove helped ensure that cases would be both closed and shielded from any unique effects the COVID-19 pandemic may have had on prisons and prison litigation. I found cases through the CourtLink feature on LexisNexis.[227] After organizing the results by date of filing, I made note of the following: the length of the litigation; what type of claim the plaintiff brought; how the case was resolved; whether a lawyer was recruited; whether discovery occurred at the exhaustion or merits stages; what types of discovery, if any, the parties sought; what discovery disputes occurred; and what discovery-management tools different district and magistrate judges employed.[228]

To get a sense for whether discovery in these cases changed during or after COVID, I then duplicated the study for more recent cases, looking at the first fifty cases brought from each prison in 2022. Unlike the 2016 cases, the 2022 set's recency necessarily meant an incomplete picture, with many cases still ongoing. Accordingly, I discuss this set separately, reflecting on differences from and similarities to the empirical and descriptive observations I drew from the 2016 set.

To be sure, this method of research has its shortcomings. Lexis may not have turned up every case. Additionally, given that most discovery shared between the parties is not filed on the docket, my window into how discovery proceeded was limited to the documents attached to summary-judgment motions, minute entries summarizing status hearings at which discovery disputes were resolved,

transferee judge. *See* Phil Goldberg, *MDL Judge's Orders Should Spur New Rule Calling for the Early Vetting of Claims*, LAW.COM (Apr. 5, 2024), https://www.law.com/2024/04/05/mdl-judges-orders-should-spur-new-rule-calling-for-the-early-vetting-of-claims [https://perma.cc/H32D-3533] (noting that an herbicide-related MDL in the Southern District of Illinois dating to 2021 currently comprises about 5,000 claims).

227. I searched the dockets and filings of cases in each district filed after January 1, 2016, and January 1, 2022, that included the word "Menard" or "Angola," respectively. I limited the search to cases coded on PACER as "Prisoner—Civil Rights (555)" and "Prisoner—Other (550)," and further limited the results by selecting, under "Cause," cases involving "Civil Rights."

228. I accessed the dockets and filings of these cases with the permission of the Clerk of Court of the Northern District of Illinois.

and the contents of filed motions to compel.[229] There are also multiple prisons in each district, and plaintiffs were often transferred while their litigation was pending—meaning that some cases I counted were originally filed, or eventually completed, in other prisons. Nonetheless, though it is far from a comprehensive account, this study offers meaningful insight into different districts' approaches to discovery.[230]

B. Litigation from Angola and Menard in 2016

Discovery's prevalence, appearance, and management differed substantially between Angola and Menard. After briefly sharing tallies betraying the districts' stark differences in 2016, I zero in and provide a descriptive account of the districts' varying approaches to managing the discovery process.

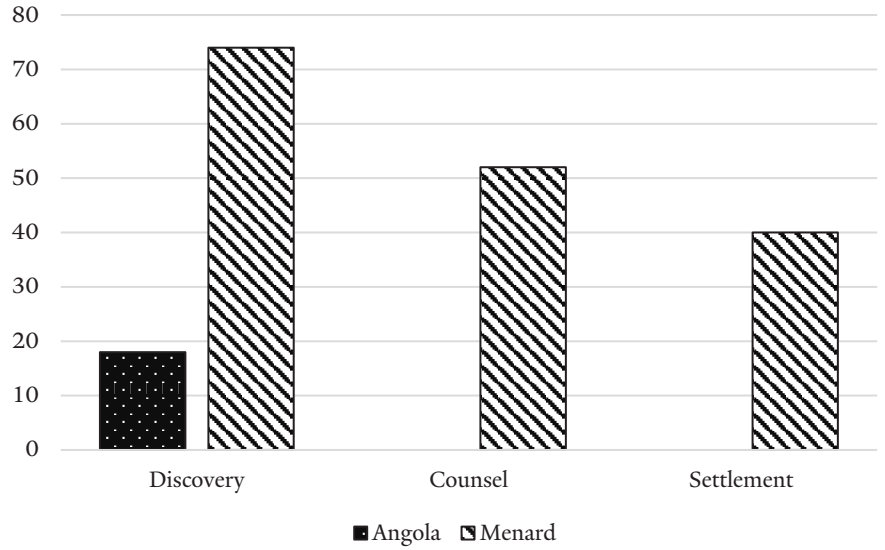
1. The Numbers

To start, a bird's-eye view of outcomes in the first fifty prison cases filed in each district in 2016 reveals profound disparities.

229. For a discussion of the difficulties of accessing data from federal cases, including filings and discovery, see Clopton & Huq, *supra* note 94, at 901-18.

230. All replication materials are available at the *Yale Law Journal*'s Dataverse at the following link: https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/UVIQQY.

FIGURE 3. 2016 CASES SEEING DISCOVERY, RECRUITMENT OF COUNSEL, AND SETTLEMENT (%)



Discovery occurred in some form[231] in 18% of cases filed out of Angola and 74% of cases filed out of Menard—over four times as often. Not a *single* plaintiff

231. Here, discovery is defined broadly. Cases in which defendants complied with court-imposed initial disclosures, without any other evidence exchange between the parties, are counted. Two of the ten Angola cases reported as seeing discovery fell into this category, while every Menard case that saw discovery went further. *See* Notice of Compliance at 1-2, Flowers v. Dupont, No. 16-cv-00263 (M.D. La. Dec. 6, 2016), ECF No. 9; Magistrate Judge's Report and Recommendation at 7, *Flowers*, No. 16-cv-00263 (M.D. La. Sept. 10, 2018), ECF No. 26 [hereinafter *Flowers* Magistrate Judge's Report and Recommendation]; Ruling at 1, *Flowers*, No. 16-cv-00263 (M.D. La. Sept. 27, 2018), ECF No. 27; Notice of Compliance at 1-2, Thibodeaux v. Singh, No. 16-cv-00493 (M.D. La. Mar. 15, 2017), ECF No. 13; Magistrate Judge's Report and Recommendation at 2, *Thibodeaux*, No. 16-cv-00493 (M.D. La. Jan. 23, 2018), ECF No. 20 [hereinafter *Thibodeaux* Magistrate Judge's Report and Recommendation]; Opinion at 1, *Thibodeaux*, No. 16-cv-00493 (M.D. La. Feb. 7, 2018), ECF No. 22. Three Menard cases received evidentiary hearings in which the court heard testimony from the plaintiff before dismissing the case for failure to exhaust. Memorandum and Order at 1, Johnson v. Lashbrook, No. 16-cv-00637 (S.D. Ill. Sept. 29, 2017), ECF No. 53 (granting summary judgment); Memorandum and Order at 1-2, English v. Butler, No. 16-cv-00395 (S.D. Ill. Mar. 27, 2018), ECF No. 73 (granting summary judgment and describing the evidentiary hearing on exhaustion); Memorandum & Order at 1, Jose-Nicolas v. Butler, No. 16-cv-00402 (S.D. Ill. July 6, 2017), ECF No. 54 (granting summary judgment and describing the evidentiary hearing). These

in the Angola set received a lawyer, while lawyers were recruited for plaintiffs 52% of the time at Menard. The Angola set saw no victories either, while 40% of Menard plaintiffs' cases settled.[232] These numbers are surprising on both extremes. Menard's numbers appear unusually high, while Angola's appear unusually low.[233]

Meaningful differences also emerged between the specific types of case dispositions and the length it took to reach them. At Angola, cases on average reached a disposition in 335 days; at Menard, cases on average took 1,034 days to resolve — about three times longer. Table 1 shows the breakdown of these cases' dispositions.

cases were counted toward the total. Finally, in two Angola cases, defendants attached evidence to exhaustion summary-judgment motions and won those motions without any evidentiary showing from the plaintiff. *See* Statement of Undisputed Material Facts at 1-2, Otero v. Smith, No. 16-cv-00044 (M.D. La. July 15, 2016), ECF No. 16-3; Magistrate Judge's Report and Recommendation at 5, *Otero*, No. 16-cv-00044 (M.D. La. Jan. 4, 2017), ECF No. 17 [hereinafter *Otero* Magistrate Judge's Report and Recommendation] (noting no evidentiary showing from the plaintiff); Ruling and Order at 2, *Otero*, No. 16-cv-00044 (M.D. La. Jan. 31, 2017), ECF No. 18; Memorandum in Support of Motion for Summary Judgment at 1-7, Seward v. Rowe, No. 16-cv-00173 (M.D. La. July 6, 2016), ECF No. 10-2; Magistrate Judge's Report and Recommendation at 4, *Seward,* No. 16-cv-00173 (M.D. La. Sept. 20, 2016), ECF No. 11; Ruling at 1, *Seward,* No. 16-cv-00173 (M.D. La. Nov. 22, 2016), ECF No. 12. Because these cases lacked any indication that evidence had been shared with the plaintiff before the defendant filed the motion, I opted to exclude them from the totals. This may have resulted in a very slight undercounting of the cases seeing some form of discovery.

232. Suspicious of the stark figures from Angola, I glanced beyond the fifty Angola cases I surveyed and superficially reviewed the next fifty filed in 2016. In that additional set, two settled, the rate of cases going to discovery remained around 20%, and one lawyer was appointed. For the cases that settled, see Joint Motion to Dismiss with Prejudice at 1, Diggins v. Turner, No. 16-cv-00579 (M.D. La. Sept. 10, 2021), ECF No. 91; Joint Motion to Dismiss with Prejudice at 1, Montana v. Vannoy, No. 16-cv-00766 (M.D. La. Jan. 23, 2019), ECF No. 40. For the case in which a lawyer was appointed, see Order at 1, *Montana*, No. 16-cv-00766 (M.D. La. Oct. 31, 2018), ECF No. 38.

233. Recall that in 2021, national statistics showed about a 13.4% win rate for prison civil-rights claims in federal district courts. Schlanger, *supra* note 67, at 6.

TABLE 1. 2016 DISPOSITIONS (%)

Outcome	Angola	Menard
Dismissal, 3 Strikes	24	4
Dismissal, In Forma Pauperis/Filing Fee	14	2
Dismissal, Deficiencies	10	2
Dismissal, Failure to Prosecute	0	2
Voluntary Dismissal	6	0
Dismissal, Failure to State a Claim	22	18
Dismissal, Summary Judgment	20	22
Dismissal, Sanctions	0	4
Settlement	0	40
Trial	2	6
Other	2	0

One striking aspect of these numbers is the comparative prevalence of dismissals unrelated to the merits (and thus discovery-less). Dismissal under the PLRA's three-strikes provision,[234] dismissal for simple deficiencies in a complaint (such as failure to check a box or provide a signature), dismissal for failure to prove in forma pauperis status or pay the partial filing fee, dismissals for failure to prosecute, and voluntary dismissals (typically on account of inability to pay) constituted 54% of Angola's case dispositions and only 10% of Menard's.

Comparing the two sets' summary-judgment numbers also betrays a hidden divide. Of both prisons' summary-judgment dismissals, a minority (three) were on exhaustion grounds and the rest (seven in Angola and eight in Menard) were on the merits. And while the two districts each *granted* about the same number of defendants' motions for summary judgment, Angola only *denied* one in a single case (which went to trial). Alternatively, almost the entirety of the 46% of Menard's cases resulting in settlement or trial did so some time after the defendant's summary-judgment motion was denied.[235] In other words, judges in the Middle District of Illinois denied defendants' summary-judgment motions

234. *See* 28 U.S.C. § 1915(g) (2018).

235. In one case, the defendants chose not to pursue summary judgment, as they could not do so "in good faith," and instead settled the case before trial. *See* Notice Regarding Summary Judgement at 1-2, Miller v. Boone, No. 16-cv-00585 (S.D. Ill. Dec. 28, 2017), ECF No. 38.

about two-thirds of the time, while judges in the Southern District of Louisiana denied them about one-tenth of the time.

As for trials, incarcerated plaintiffs were represented in all three at Menard and none at Angola. Regardless, none of those four plaintiffs wound up victorious. One *did* win a jury verdict ($25,000 to someone incarcerated at Menard whose surgery to repair his torn meniscus was delayed for two years), but the judge tossed it out on a motion for judgment notwithstanding the verdict.[236]

What do these figures tell us? On their face, they show an obvious and profound difference in incarcerated litigants' chances of discovery, representation, and success depending on the prison in which they are incarcerated. In a coincidence, they also appear to reveal that the Southern District of Illinois is an unusual, positive outlier; both interviews and case-disposition figures show that outcomes for incarcerated plaintiffs in most districts look far more like those out of Angola than Menard.[237]

The data also offer some clues for those interested in reforming prison litigation. For one, while the Angola set saw dismissals of more than half of its cases on PLRA-related grounds, almost no cases were dismissed on that basis out of Menard. This suggests that judges' hands are not so tightly tied by the statute's byzantine restrictions.[238] Judges were also clearly amenable to recruiting counsel in Menard plaintiffs' cases. And scrutinizing the settlement figures brings recruited counsel's vital role into focus. Menard plaintiffs who were successful in negotiating a settlement almost always did so with counsel's aid: of the twenty who settled their claims, only one remained unrepresented while nineteen had, at some earlier point, received a lawyer.[239]

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236. *See* Order at 6, Howell v. Wexford Health Sources, Inc., No. 16-cv-00160 (S.D. Ill. Oct. 9, 2019), ECF No. 167.

237. Interview with Federal Judge #7, *supra* note 194; Zoom Interview with Formerly Incarcerated Litigant #11, *supra* note 212. For the typical bleak statistics on incarcerated litigants, see *supra* notes 66-71 and accompanying text.

238. This comports with arguments other scholars have made. *See* Littman, *supra* note 186, at 54 (noting that judges, magistrate judges, and staff attorneys "actively determine what [plaintiffs'] claims have a chance at life," and that those choices are "[t]o a striking degree . . . not dictated by the PLRA").

239. Response to Order to Show Cause at 1, West v. Bebout, No. 16-cv-00414 (S.D. Ill. July 20, 2020), ECF No. 103. In one of the nineteen counseled cases that settled, the plaintiff found representation without the court's involvement. *See* Notice of Appearance, Johnson v. Harner, 16-cv-00398 (S.D. Ill. Feb. 24, 2017), ECF No. 23. In another, after the plaintiff survived a summary-judgment motion, his pro se case was consolidated with an earlier lawsuit of his for which the court had sua sponte appointed counsel. *See* Memorandum and Order at 1, 13, McKinley v. Atchinson, No. 16-cv-00661 (S.D. Ill. Sept. 30, 2019), ECF No. 215 (denying in part the defendants' motion for summary judgment); Memorandum and Order at 2-3, *Atchinson*, No. 16-cv-00661 (S.D. Ill. Nov. 15, 2019), ECF No. 219 (consolidating the cases);

Finally, if unsurprisingly, successful discovery is correlated with successful outcomes. The next Section zooms in further, taking a more detailed account of the roles discovery itself is playing in incarcerated litigants' cases, along with the tools both districts are using to shape the process.

2. Discovery Management and Trends

Case-management practices in Louisiana and Illinois[240] aligned and differed in significant ways. At the broadest level, in almost every case out of each district that made it to discovery, district judges referred the case to a magistrate judge.[241] (Accordingly, the term "judge" as used in this Section largely means magistrates.[242]) Some Louisiana judges required all discovery requests and motions to be filed on the docket.[243] Illinois judges did not do this, asking instead that parties only inform the court of discovery problems in motions to compel.[244] Telephonic status conferences were also more common in the Illinois set. As an imperfect metric, take one case from each set that went to trial. The plaintiff at

see also Memorandum and Order at 1-2, McKinley v. Schoenbeck, No. 14-cv-01137 (S.D. Ill. Apr. 19, 2018), ECF No. 139 (appointing an attorney sua sponte in the earlier case). The plaintiff and his counsel separately resisted consolidating the cases. *See* Defendants' Response to Plaintiff's Motion to Consolidate at 1-2, 7, *Schoenbeck*, No. 14-cv-01137 (S.D. Ill. Apr. 5, 2019), ECF No. 194 (explaining that the plaintiff "by his undersigned counsel" objected to consolidation); Response to Defendats' [sic] Second Motion to Consolidate at 1-2, *Atchinson*, No. 16-cv-00661 (S.D. Ill. Oct. 24, 2019), ECF No. 218 (raising concerns, in a pro se filing by the plaintiff, about the implications for consolidation on the plaintiff's right to appeal a decision in one of the cases). The case settled after consolidation. Stipulation of Dismissal with Prejudice at 1, *Schoenbeck*, No. 14-cv-01137 (S.D. Ill. Dec. 27, 2022), ECF No. 288; Order Dismissing Case, *Schoenbeck*, No. 14-cv-01137 (S.D. Ill. Jan. 3, 2023), ECF No. 289. For orders lacking pincites in this footnote and the footnotes that follow, the order appeared only in text on the docket, without an accompanying document.

240. For convenience, I refer to the Middle District of Louisiana and the Southern District of Illinois by the states in which they sit.

241. In both districts, referral was an option but not a requirement. *See* M.D. La. Loc. Civ. R. 72(b); SDIL-LR 72.1(c).

242. Additionally, staff attorneys often screen and draft resolutions to incarcerated litigants' filed motions. *See* Katherine A. Macfarlane, *Shadow Judges: Staff Attorney Adjudication of Prisoner Claims*, 95 Or. L. Rev. 97, 107-12 (2016) (describing this trend).

243. *E.g.*, Order at 2, Robinson v. Hall, No. 16-cv-00350 (M.D. La. Sept. 7, 2016), ECF No. 5. Some courts have taken this approach to maintain oversight of discovery in prison cases, to see "what was (and was not) produced," and, in doing so, to ensure that defendants adequately respond to plaintiffs' discovery requests. Nelson v. Gleason, No. 14-cv-870, 2017 WL 2984430, at *3 (W.D.N.Y. July 13, 2017).

244. *E.g.*, Order Denying Motion for Discovery, Miller v. Boone, No. 16-cv-00585 (S.D. Ill. Oct. 20, 2016), ECF No. 19; Order, Lisle v. Butler, No. 16-cv-00421 (S.D. Ill. Jan. 24, 2018), ECF No. 63 (opting to handle discovery disputes via call with counsel and by motion when unrepresented).

Angola—Mr. Bacon—did not have a telephonic or video hearing docketed with the judge until after he survived summary judgment, almost two years into the litigation,[245] while the plaintiff at Menard—Mr. Howell—was teleconferenced in to discuss ongoing discovery numerous times beforehand.[246]

Though neither district had local rules mandating initial disclosures in prison litigation, some magistrate judges in Louisiana and Illinois required them anyway. The content of those disclosure mandates differed. Louisiana judges demanded disclosure to both the court and plaintiff of "all medical records, administrative remedy proceedings, disciplinary proceedings, unusual occurrence reports and all other documents pertinent to the issues in this case."[247] In Illinois, some judges got more detailed and case-specific, demanding defendants disclose things like: "[c]orrespondence with the chaplain (religion claims only)"; "[s]hakedown slips (when property is at issue)"; "[r]eports and/or statements of persons with knowledge of the incidents"; "[n]ames of persons with knowledge of the incidents"; and "[t]he identity of the John Doe defendants or . . . information which would assist in the identification of the John Does."[248] Plaintiffs, too, were required to share information about what they knew that might help identify John Does, a description of their injuries, their medical records, and a list of potential witnesses.[249] Neither party was required to demonstrate compliance to the court.[250]

When they occurred, defendants' disclosures appeared to provide helpful, if incomplete, information.[251] Their contents often appeared as exhibits to summary-judgment motions and in trial.[252] They helped clarify the issue of

245. Order at 1, Bacon v. Zeringue, No. 16-cv-00220 (M.D. La. Mar. 29, 2018), ECF No. 65.

246. Order, Howell v. Butler, No. 16-cv-00160 (S.D. Ill. Dec. 20, 2016), ECF No. 55 (setting a status conference); Notice of Hearing, *Howell*, No. 16-cv-00160 (S.D. Ill. Feb. 27, 2018), ECF No. 70 (same); Order, *Howell*, No. 16-cv-00160 (S.D. Ill. Nov. 1, 2018), ECF No. 91 (setting a discovery-dispute conference); Order, *Howell*, No. 16-cv-00160 (S.D. Ill. Apr. 9, 2019), ECF No. 115 (setting a motion hearing).

247. Order at 1, Davis v. Singh, No. 16-cv-00552 (M.D. La. Oct. 26, 2016), ECF No. 4.

248. *E.g.*, Trial Practice and Schedule at 1-3, Johnson v. Sanders, No. 16-cv-00093 (S.D. Ill. July 19, 2016), ECF No. 20.

249. *Id.* at 1.

250. *See id.*

251. *E.g.*, Order at 1, Tasby v. Cain, No. 16-cv-00277 (M.D. La. Sept. 1, 2017), ECF No. 119 (noting that 900 pages of prison documents were produced); Notice of Compliance at 1, Robinson v. Hall, No. 16-cv-00350 (M.D. La. Nov. 4, 2016), ECF No. 22 (detailing disclosures of conduct records, rap sheets, administrative-remedy procedures, medical and mental-health records, an investigative report, and more).

252. *E.g.*, Notice of Compliance with Court Order (RD 23), Exhibit 1, Graves v. Cain, No. 16-cv-00292 (M.D. La. May 17, 2019), ECF No. 33-1; Defendants' Motion for Summary Judgment,

exhaustion and identify defendants.[253] And plaintiffs seemed to flounder without them. In one Menard case that lacked disclosures, for example, a lawyer whom the judge eventually recruited for the plaintiff had to move to reopen discovery after realizing that the plaintiff had taken none.[254] Defendants unsuccessfully opposed the motion, arguing that "[a]lthough Plaintiff failed to conduct discovery while he was proceeding *pro se*, Defendants should not be punished for Plaintiff's failure to litigate the case."[255] Defendants also sometimes refused to produce disclosures.[256] In one Menard case, defendants' refusal to do so garnered sanctions.[257]

Beyond disclosures, some judges in both districts reduced the number of interrogatories and requests for production incarcerated plaintiffs and defendants were entitled to take. Louisiana judges allowed for ten interrogatories, five requests for production, and ten requests for admission.[258] In Illinois, judges allowed for fifteen interrogatories, fifteen requests for production, and ten requests for admission.[259] Occasionally, plaintiffs asked for that number to be increased; at least one judge partially relented.[260] Plaintiffs also frequently made untimely discovery requests, asking for production before an answer had been filed, or filing a motion to compel instead of seeking discovery first.[261]

Exhibit 10, *Graves*, No. 16-cv-00292 (Oct. 27, 2020), ECF No. 79-10; Magistrate Judge's Report and Recommendation at 5, *Tasby*, No. 16-cv-00277 (Sept. 12, 2017), ECF No. 125 [hereinafter *Tasby* Magistrate Judge's Report and Recommendation].

253. *E.g.*, Magistrate Judge's Report and Recommendation at 9, *Graves*, No. 16-cv-00292 (S.D. Ill. Jan. 20, 2021), ECF No. 85; Order, Hoskins v. Dilday, No. 16-cv-00334 (S.D. Ill. Mar. 13, 2017), ECF No. 106 [hereinafter *Hoskins* Order].

254. Motion to Reopen Discovery at 1, Basemore v. Brookman, No. 16-cv-00562 (S.D. Ill. Sept. 24, 2018), ECF No. 48 [hereinafter *Basemore* Motion to Reopen Discovery].

255. Response to Plaintiff's Motion to Reopen Discovery at 3, *Basemore*, No. 16-cv-00562 (S.D. Ill. July 25, 2018), ECF No. 52; *see also* Order at 4, Clay v. Butler, No. 16-cv-00612 (S.D. Ill. Dec. 13, 2018), ECF No. 54 (granting summary judgment for the defendants where the plaintiff got no disclosures and did not initiate any discovery).

256. *E.g.*, Order Granting in Part and Denying in Part Motion to Stay Discovery, Linton v. Godinez, No. 16-cv-00492 (S.D. Ill. Mar. 21, 2017), ECF No. 24.

257. Memorandum and Order at 5-6, 25, Peters v. Butler, No. 16-cv-382 (S.D. Ill. Mar. 16, 2021), ECF No. 320 [hereinafter *Peters* Memorandum and Order].

258. *See* Order at 2, *Graves*, No. 16-cv-00292 (M.D. La. Jan. 29, 2019), ECF No. 23.

259. *See* Trial Practice Schedule at 4, McKinley v. Atchinson, No. 16-cv-00661 (S.D. Ill. Jan. 19, 2017), ECF No. 26.

260. Order Granting in Part and Denying in Part Motion for Enlargement of Interrogatories, *Atchinson*, No. 16-cv-00661 (S.D. Ill. Feb. 15, 2017), ECF No. 34.

261. *E.g.*, Plaintiff Motion for Discovery at 1-2, Miller v. Boone, No. 16-cv-00585 (S.D. Ill. Sept. 20, 2016), ECF No. 12; Order Denying Motion to Compel, *Miller*, No. 16-cv-00585 (S.D. Ill. June 20, 2017), ECF No. 31; Order Denying Motion to Produce, West v. Bebout, No. 16-cv-00414 (S.D. Ill. June 8, 2018), ECF No. 79.

In both districts, disclosures, interrogatories, and requests for production were often not enough to overcome summary judgment. Instead, plaintiffs' own sworn accounts of what happened (or the lack thereof) often proved decisive—especially where, as in many excessive-force cases, surveillance footage was missing. Successful plaintiffs, in other words, provided their own side of the story, either via sworn declaration or testimony during a defendant-initiated deposition.[262]

On this vital evidence, the districts differed—a downstream effect of both defendants' discovery practices and an apparent lack of guidance to incarcerated plaintiffs. Of the Angola plaintiffs whose cases were dismissed at summary judgment—including those in which the plaintiff had actively pursued discovery—a staggering 50% (or five of the ten summary-judgment dismissals) lost at least in part because they relied on the account they gave in their unverified complaint.[263] So, while Louisiana courts were amenable to denying summary judgment when competing affidavits were present,[264] it appears that no one effectively explained the importance of the sworn statement or verified complaint to

262. *E.g.*, Magistrate Judge's Report and Recommendation at 8-9, Bacon v. Zeringue, No. 16-cv-00220 (M.D. La. Jan. 19, 2018), ECF No. 60 [hereinafter *Bacon* Magistrate Judge's Report and Recommendation] (acknowledging the plaintiff's sworn account of a force incident in recommending a denial of summary judgment); Memorandum and Order at 4, Williams v. Ochs, No. 16-cv-00519 (S.D. Ill. Apr. 1, 2020), ECF No. 77 [hereinafter *Williams* Memorandum and Order].

263. Ruling and Order at 2, *Graves*, No. 16-cv-00292 (M.D. La. Apr. 19, 2021), ECF No. 88 (granting summary judgment "[b]ecause Plaintiff's opposition merely relies on his unverified complaint rather than citing to admissible evidence that disputes Defendants' claims"); Magistrate Judge's Report and Recommendation at 6 n.3, McGill v. McCain, No. 16-cv-00202 (M.D. La. Sept. 16, 2016), ECF No. 50; Magistrate Judge's Report and Recommendation at 6 n.39, Robinson v. Hall, No. 16-cv-00350 (M.D. La. Apr. 16, 2019), ECF No. 65 [hereinafter *Robinson* Magistrate Judge's Report and Recommendation]; *Flowers* Magistrate Judge's Report and Recommendation, *supra* note 231, at 7 (granting summary judgment based on the defendants' "unrefuted affidavit . . . in the absence of any response by Plaintiff," including "any evidentiary showing whatever that calls into question the factual assertions contained in Defendant's affidavit," refusing to consider the plaintiff's complaint in doing so); *Thibodeaux* Magistrate Judge's Report and Recommendation, *supra* note 231, at 12 (granting summary judgment because the plaintiff did not oppose the defendants' motion, "fail[ed] to designate specific evidence in the record . . . to create a genuine issue," and "fail[ed] to produce supporting evidence on his own behalf"); *see also Otero* Magistrate Judge's Report and Recommendation, *supra* note 231, at 5 (granting summary judgment on exhaustion, in part because the motion was unopposed and the plaintiff could not merely rely on the complaint's allegations).

264. *Bacon* Magistrate Judge's Report and Recommendation, *supra* note 262, at 9 (denying summary judgment in an excessive-force case where both parties submitted affidavits, because "[t]he court has been presented with two conflicting accounts of the complained of occurrence").

the plaintiffs.[265] Further, Angola plaintiffs in the case set do not appear to have been deposed by prison defendants regularly—another means of securing sworn testimony. This stands in stark contrast to Menard, where defendants deposed plaintiffs in almost every case that made it to merits discovery, and judges frequently pointed to plaintiffs' deposition testimony in finding disputes of material fact sufficient to take a case to trial.[266]

Louisiana courts did not recruit lawyers for any of the plaintiffs' claims in the set, including those resembling cases that received lawyers in Illinois.[267] Illinois courts, to the contrary, were surprisingly receptive. Lawyers were recruited in about 70% of the medical deliberate-indifference claims in the set—a likely byproduct of Seventh Circuit case law, which has telegraphed that some medical deliberate-indifference cases need representation.[268] But courts went much further than that. They invariably recruited counsel after plaintiffs survived summary judgment and before trial.[269] Many also recruited lawyers before summary

265. *Robinson* Magistrate Judge's Report and Recommendation, *supra* note 263, at 6 (granting summary judgment, in an excessive-force case, for the defendant based solely on the defendant's affidavit because the plaintiff provided "no competent summary judgment evidence").

266. *E.g.*, *Williams* Memorandum and Order, *supra* note 262, at 4; Report and Recommendation at 9, Moore v. Hill, No. 16-cv-00261 (S.D. Ill. Aug. 15, 2018), ECF No. 64; Report and Recommendation at 6-11, Davis v. Butler, No. 16-cv-00410 (S.D. Ill. Aug. 23, 2018), ECF No. 67; Memorandum and Order at 8-9, Lisle v. Butler, No. 16-cv-00422 (S.D. Ill. Mar. 18, 2020), ECF No. 163. In an interview, one judge in a different district echoed this conclusion, relaying that in virtually every prison case that saw discovery, the plaintiff was deposed. Interview with Federal Judge #3, *supra* note 195.

267. *Compare* Complaint at 3-5, *McGill*, No. 16-cv-00202 (M.D. La. Feb. 1, 2016), ECF No. 1 (arguing that the plaintiff had severe back pain and was prescribed the wrong medication, forced to walk for miles in a field, and eventually put in maximum-security lockdown when he stopped walking), *and* Ruling and Order at 3, *McGill*, No. 16-cv-00202 (M.D. La. May 3, 2016), ECF No. 22 (refusing to recruit a lawyer for this plaintiff), *with* Memorandum and Order at 2-4, Jones v. Wexford Health Sources, Inc., No. 16-cv-00068 (S.D. Ill. Mar. 16, 2016), ECF No. 12 (explaining that the plaintiff alleged that doctors did not properly treat his swollen knee), *and* Memorandum and Order at 3, *Jones*, No. 16-cv-00068 (S.D. Ill. Aug. 8, 2017), ECF No. 73 (recruiting a lawyer before discovery for this plaintiff).

268. Pennewell v. Parish, 923 F.3d 486, 492 (7th Cir. 2019) (finding that an unrepresented incarcerated plaintiff was prejudiced because without a lawyer, he "did not procure a medical expert" and "failed to take depositions of any defendant or witness," which were essential to show medical deliberate indifference). *But cf.* Dorsey v. Varga, 55 F.4th 1094, 1105 (7th Cir. 2022) (finding no abuse of discretion in declining to recruit counsel). The Fifth Circuit appears to be less generous. *E.g.*, Williams v. Martin, 570 F. App'x 361, 363 (5th Cir. 2014) (finding no abuse of discretion in a lawyerless case involving deliberate indifference that went to trial).

269. *See, e.g.*, Minute Entry, Daniels v. Butler, No. 16-cv-00101 (S.D. Ill. Mar. 27, 2018), ECF No. 60; Memorandum and Order at 3, *Davis*, No. 16-cv-00410 (S.D. Ill. Sept. 19, 2018), ECF No. 68; Order Recruiting Counsel at 2, Basemore v. Brookman, No. 16-cv-00562 (S.D. Ill. June 25, 2018), ECF No. 44 [hereinafter *Basemore* Order Recruiting Counsel].

judgment.[270] For example, some plaintiffs received lawyers after informing the court that English was their second language.[271] In two cases, judges recruited lawyers when it became apparent that the plaintiff was not receiving timely responses to discovery requests.[272] One judge justified recruitment in part due to the fact that security concerns "may prevent Defendants from divulging [evidence] without a protective order."[273] In one case, a judge recruited a lawyer because the plaintiff was burdening the court with improper filings.[274] And one plaintiff received a lawyer after informing the court that his vision had deteriorated.[275]

Discovery changed significantly after counsel's recruitment. Lawyers frequently moved to reopen discovery that had closed because the plaintiff requested either no discovery or not enough;[276] they deposed defendants and filed written discovery the plaintiff had not;[277] and they pressed for disclosure of

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270. *E.g.*, Order at 1, Johnson v. Sanders, No. 16-cv-00093 (S.D. Ill. Mar. 28, 2018), ECF No. 67; Memorandum and Order at 1, Merritt v. Miner, No. 16-cv-00536 (S.D. Ill. June 14, 2019), ECF No. 120 [hereinafter *Merritt* Memorandum and Order].

271. *E.g.*, Memorandum and Order at 2, Salgado v. Siddiqui, No. 16-cv-00268 (S.D. Ill. Dec. 4, 2017), ECF No. 38; Memorandum and Order at 2, Gomez v. Reihert, No. 16-cv-00291 (S.D. Ill. Apr. 7, 2017), ECF No. 32 [hereinafter *Gomez* Memorandum and Order]; Memorandum and Order at 2, Jose-Nicolas v. Butler, No. 16-cv-00402 (S.D. Ill. May 26, 2016), ECF No. 10.

272. Memorandum and Order at 1, Murithi v. Gleckler, No. 16-cv-00152 (S.D. Ill. June 28, 2017), ECF No. 43 [hereinafter *Murithi* Memorandum and Order] (recruiting counsel because "[p]laintiff is having trouble receiving timely and meaningful discovery responses to his requests, to which Defendants inexplicably took 5 months to respond"); *see also* Memorandum and Order at 1, Baker v. Butler, No. 16-cv-00404 (S.D. Ill. Jan. 27, 2017), ECF No. 44 (recruiting counsel due to the plaintiff's difficulties in the discovery process).

273. *Murithi* Memorandum and Order, *supra* note 272, at 1.

274. Order at 2, Lisle v. Dunbar, No. 16-cv-00421 (S.D. Ill. Aug. 16, 2017), ECF No. 54.

275. *Merritt* Memorandum and Order, *supra* note 270, at 1-2.

276. *Basemore* Motion to Reopen Discovery, *supra* note 254, at 1; Motion for Partial Re-Opening of Discovery at 2, Miller v. Boone, No. 16-cv-00585 (S.D. Ill. May 29, 2018), ECF No. 51; Order Granting in Part Motion for Discovery to Be Re-Opened, *Miller*, No. 16-cv-00585 (S.D. Ill. June 14, 2018), ECF No. 53; *Peters* Memorandum and Order, *supra* note 257, at 10-12; Agreed Motion for a 90-Day Extension of the Trial Date and to Reopen Discovery for 60 Days to Allow Plaintiff to Engage in Limited Discovery at 2, Williams v. Ochs, No. 16-cv-00519 (S.D. Ill. Dec. 31, 2018), ECF No. 60 (asking to reopen discovery because, "had [plaintiff] understood the nature of the discovery process," he would have sought necessary documents); Agreed Motion for Discovery and Dispositive Motions at 2, *Williams*, No. 16-cv-00519 (S.D. Ill. Apr. 11, 2019), ECF No. 67 (requesting, with the agreement of the defense, a further extension of discovery).

277. *E.g.*, *Peters* Memorandum and Order, *supra* note 257, at 5; Joint Motion to Extend Close of Fact Discovery and for Continuance at 2, McClanahan v. Butler, No. 16-cv-00340 (S.D. Ill. Feb. 22, 2019), ECF No. 109; Plaintiffs' Request for Production of Documents Directed to Defendant at 1-4, Jones v. Wexford Health Sources, Inc., No. 16-cv-00068 (S.D. Ill. Oct. 6, 2017), ECF No. 82.

evidence that security concerns otherwise prohibited sharing with the plaintiff.[278] As a telling indication of incarcerated plaintiffs' discovery difficulties, a magistrate judge I spoke to from another district said, "I don't know a single lawyer [recruited after denial of summary judgment] who will take a case to trial without reopening discovery."[279]

Illinois courts were also open to appointing experts. In one case, a plaintiff with tooth decay protested the doctors' refusal to give him mitigating dental care until he agreed to the drastic remedy of having his teeth pulled.[280] The judge enjoined the dentists from doing so, noting that their refusal even to clean his teeth unless he agreed to have all of them extracted was "textbook deliberate indifference."[281] The judge then hired an independent dental expert to opine on whether any of his teeth could be saved; the plaintiff was responsible for one-third of the cost, and the two defendants split the remainder.[282]

Other trends mirrored the problems discussed in Part II. To start, individual litigants' capacities differed significantly. Many—particularly those who made it far in their litigation—were either practiced litigators or had help.[283] Others expressed understandable confusion.[284] Plaintiffs frequently had difficulty identifying defendants;[285] that failure occasionally resulted in dismissal of their

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278. *E.g.*, Motion for Entry of Agreed Protective Order at 1, *McClanahan*, No. 16-cv-00340 (S.D. Ill. May 19, 2017), ECF No. 62 [hereinafter *McClanahan* Motion for Entry of Agreed Protective Order]; Protective Order at 1, *McClanahan*, No. 16-cv-00340 (S.D. Ill. May 23, 2017), ECF No. 63 [hereinafter *McClanahan* Protective Order]; Protective Order—Documents and Photographs at 1-4, Davis v. Butler, No. 16-cv-00410 (S.D. Ill. July 23, 2019), ECF No. 126 [hereinafter *Davis* Protective Order—Documents and Photographs].

279. Telephone Interview with Federal Judge #6, *supra* note 194.

280. *See* Memorandum and Order at 1, Tidwell v. Asselmeier, No. 16-cv-00041 (S.D. Ill. Feb. 16, 2016), ECF No. 8.

281. Report and Recommendation at 6, *Tidwell*, No. 16-cv-00041 (S.D. Ill. May 16, 2016), ECF No. 50; Memorandum and Order at 5, *Tidwell*, No. 16-cv-00041 (S.D. Ill. June 16, 2016), ECF No. 66 (adopting the magistrate judge's report and recommendation).

282. Order Directing Rule 706 Expert's Scope of Inquiry at 1-3, *Tidwell*, No. 16-cv-00041 (S.D. Ill. Apr. 9, 2018), ECF No. 160; Order Pursuant to FRE 706(c)(2), *Tidwell*, No. 16-cv-00041 (S.D. Ill. May 24, 2018), ECF No. 168.

283. *See, e.g.*, Order Denying Motion for Recruitment of Counsel, Goings v. Baldwin, No. 16-cv-00489 (S.D. Ill. Jan. 22, 2018), ECF No. 128 (noting that the plaintiff is a former attorney); *Gomez* Memorandum and Order, *supra* note 271, at 2 (stating that the plaintiff received assistance from other incarcerated people in drafting pleadings).

284. *See, e.g.*, Motion for Leave to Depose Incarcerated Witnesses, Recruitment, Appointment of Counsel at 1-3, Moore v. Hill, No. 16-cv-00261 (S.D. Ill. Nov. 20, 2017), ECF No. 47.

285. *See, e.g.*, *Peters* Memorandum and Order, *supra* note 257, at 4-7; Memorandum and Order at 1-2, Baker v. Butler, No. 16-cv-00404 (S.D. Ill. Jan. 27, 2017), ECF No. 43; Order at 1, Miller v. Boone, No. 16-cv-00585 (S.D. Ill. Jan. 10, 2019), ECF No. 70; Motion to Amend and

claims.[286] Plaintiffs sometimes resorted to crude physical descriptions to try and locate defendants. One described a possible defendant to the court: "I'll get her name in the future, but, for the record she's about four feet tall, troll looking, acne pocked face, bikerish looking."[287]

Defendants frequently exhibited "extreme delay" in responding to discovery requests,[288] foot-dragging long enough to earn sanctions.[289] At Menard, they habitually raised the exhaustion defense, only to retract it when the judge asked them to prove it at a hearing or in a dispositive motion.[290] They responded to interrogatories with boilerplate objections of vagueness.[291] They sought dismissal for silly reasons, like a plaintiff's failure to update his address after being

Supplement (F.C.R. Rule 15) at 1, LaVergne v. Vaughn, No. 16-cv-00400 (M.D. La. Sept. 30, 2016), ECF No. 12.

286. *See, e.g.*, *Tasby* Magistrate Judge's Report and Recommendation, *supra* note 252, at 3 n.2; *Hoskins* Order, *supra* note 253 (reversing, on reconsideration, the previous dismissal for failure to identify defendants).

287. Court Update and Notice (Dental) at 3, *Tidwell*, No. 16-cv-00041 (S.D. Ill. Feb. 24, 2016), ECF No. 22.

288. *See, e.g.*, Motion to Extend Discovery Deadline, Vacate the Trial Date, and for Leave to Disclose Expert Witnesses at 1, Basemore v. Brookman, No. 16-cv-00562 (S.D. Ill. Dec. 14, 2018), ECF No. 66.

289. *Peters* Memorandum and Order, *supra* note 257, at 5-6, 25-26; Plaintiff's Motion to Compel Defendants', and Sanction Them for Willful Disregarding This Court [sic] Orders at 1-3, McKinley v. Atchinson, No. 16-cv-00661 (S.D. Ill. July 28, 2017), ECF No. 86; Order, *Atchinson*, No. 16-cv-00661 (S.D. Ill. Aug. 1, 2017), ECF No. 88; Minute Entry, *Atchinson*, No. 16-cv-00661 (S.D. Ill. Aug. 18, 2017), ECF No. 93; Order Granting Motion for Subpoena Forms at 1, *Miller*, No. 16-cv-00585 (S.D. Ill. May 18, 2017), ECF No. 28. *But see* Order at 1-2, Faison v. Butler, No. 16-cv-00598 (S.D. Ill. Nov. 8, 2018), ECF No. 74 (declining to award sanctions).

290. *See, e.g.*, Motion to Withdraw Defendants' Affirmative Defense at 1-2, Goings v. Baldwin, No. 16-cv-00489 (S.D. Ill. Jan. 3, 2018), ECF No. 120; Memorandum and Order at 5, *Goings*, No. 16-cv-00489 (S.D. Ill. Dec. 6, 2017), ECF No. 112 (demanding dispositive motions by January 4); Order, Richard v. Ill. Dep't of Corr., No. 16-cv-00069 (S.D. Ill. Feb. 15, 2017), ECF No. 40; Motion to Withdraw Affirmative Defense at 1, Williams v. Cooper, No. 16-cv-00519 (S.D. Ill. Oct. 31, 2016), ECF No. 17.

291. *See, e.g.*, Plaintiff's Motion to Compel app. A at 10-16, *Goings*, No. 16-cv-00489 (S.D. Ill. Apr. 10, 2018), ECF No. 146 [hereinafter *Goings* Plaintiff's Motion to Compel]; Hall's Responses to the Plaintiff's Requests for Admissions and Interrogatories at 1-9, Robinson v. Hall, No. 16-cv-00350 (M.D. La. Dec. 22, 2016), ECF No. 30 (objecting to almost every interrogatory on the grounds that it is "vague, ambiguous, overly broad, [and] unduly burdensome," including questions like "I was assigned to Jaguar Camp (c) 2 left tier cell # (13)").

transferred.[292] They claimed, sometimes suspiciously, that video and other evidence did not exist or had disappeared.[293]

Defendants also frequently raised security objections to plaintiffs' requests for information.[294] One plaintiff who alleged he had been strangled by a guard asked in an interrogatory whether the defendant had "ever reviewed any witness(es) statements to the strangulation incident involving Plaintiff? Yes or No."[295] The defendant objected on security grounds—a bizarre posture the judge quickly rejected.[296] When security grounds were reasonable, judges in Illinois issued protective orders, either limiting disclosure to the parties or, in most cases, for attorneys' eyes only.[297]

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292. Order, *Williams*, No. 16-cv-00519 (S.D. Ill. Jan. 8, 2018), ECF No. 32.

293. *See, e.g.*, Memorandum and Order at 1, Hoskins v. Dilday, No. 16-cv-00334 (S.D. Ill. May 21, 2018), ECF No. 143; Motion to Compel/Default Judgment and Motion for Appointment of Counsel app. D at 40, Merritt v. Minor, No. 16-cv-00536 (S.D. Ill. Aug. 7, 2017), ECF No. 40; Defendants' Response to Plaintiff's Motion for Default and Motion to Compel at 3, *Merritt*, No. 16-cv-00536 (S.D. Ill. Aug. 22, 2017), ECF No. 41 [hereinafter *Merritt* Defendants' Response to Plaintiff's Motion for Default and Motion to Compel] ("Defendants responded that no relevant video responsive to Plaintiff's request had been identified. Because no responsive video has been identified, it cannot be produced."); Request for Discovery (Amended) at 6, Graves v. Cain, No. 16-cv-00292 (M.D. La. Aug. 29, 2019), ECF No. 50; 2nd Notice of Noncompliance with Court Order (RD 23) at 1-2, *Graves*, No. 16-cv-00292 (M.D. La. Jan. 22, 2020), ECF No. 61; Third Notice of Noncompliance with Court Order (RD 23) at 1, *Graves*, No. 16-cv-00292 (M.D. La. Nov. 6, 2020), ECF No. 82 (insisting there are "time cards" in every dormitory that would have recorded defendants' presence, but the defendants claim they don't have them).

294. *See, e.g.*, *Merritt* Defendants' Response to Plaintiff's Motion for Default and Motion to Compel, *supra* note 293, at 2-3 (raising a concern about disclosing photographs of a cell house as well as internal-affairs interviews of staff and incarcerated people).

295. *Goings* Plaintiff's Motion to Compel, *supra* note 291, app. A at 13.

296. Order at 3, *Goings*, No. 16-cv-00489 (S.D. Ill. May 7, 2018), ECF No. 163.

297. *See, e.g.*, Agreed Protective Order at 1, Faison v. Butler, No. 16-cv-00598 (S.D. Ill. Aug. 19, 2019), ECF No. 98 (producing photographs only to the plaintiff's lawyer but not allowing the parties to see them); Agreed Protective Order at 1, Basemore v. Brookman, No. 16-cv-00562 (S.D. Ill. Jan. 10, 2019), ECF No. 75 (stating that confidential documents will be marked "for attorneys' eyes only" (emphasis omitted)); *Davis* Protective Order—Documents and Photographs, *supra* note 278, at 2-4 (ordering that certain documents, including photographs taken inside the prison, cannot be shared, and that other documents cannot be included in testimony); Defendants' Motion for Protective Order at 1, Peters v. Butler, No. 16-cv-00382 (S.D. Ill. Sept. 26, 2019), ECF No. 273 (seeking a protective order for training policies and confidential information concerning the "transfer coordinator office" for the Illinois Department of Corrections); Protective Order at 1-2, *Peters*, No. 16-cv-00382 (S.D. Ill. Oct. 3, 2019), ECF No. 277 (granting the motion); *McClanahan* Motion for Entry of Agreed Protective Order, *supra* note 278, at 1 (seeking a protective order for internal investigative materials, due to "concerns regarding the confidentiality of witness statements"); *McClanahan* Protective Order, *supra* note 278, at 1-5 (granting the motion).

Finally, and rarely, discovery abuses ended in sanctions. As noted above, defendants received sanctions for failing to produce initial disclosures and respond to appropriate discovery requests.[298] Two plaintiffs also received sanctions. One fondled himself during a deposition, so the judge dismissed his case.[299] Another was so frustrated by the defendants' boilerplate, legalistic objections to his interrogatories that he chose to return the favor. Here is a partial excerpt of his deposition:

> Q. Do you have any questions procedurally about this deposition before we get started?
> A. Plaintiff objects to this question as vague regarding defendant's use of the term "procedurally."
> . . .
> Q. Okay. Do you have any questions about how this deposition is going to proceed?
> A. Okay. Plaintiff objects to this question as vague regarding the defendant's use of the term 'proceed.' Subject to and without waiver of said objection, plaintiff does have questions about "procedurally."
> . . .
> Q. Okay. Mr. Tidwell, did you go to school as a child?
> A. After reasonable inquiry, plaintiff lacks the knowledge or information sufficient to admit or deny going to school as a child.
> Q. Okay. So you never went to a school?
> A. The question is vague and unclear concerning what "school" means.
> Q. You don't know what school is, Mr. Tidwell?
> A. Plaintiff also objects to the extent this question calls for a legal conclusion.[300]

The magistrate judge — Reona J. Daly — was called in and kindly warned him that defendants might pursue sanctions if he continued.[301] Tidwell continued, later saying "[s]ubject to and without waiver of said objection, plaintiff would like [District] Judge Staci M. Yandle to kiss his ass."[302] His case was dismissed.[303]

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298. *See supra* note 257 and accompanying text.

299. Memorandum and Order at 1-3, Lisle v. Butler, No. 16-cv-00421 (S.D. Ill. May 21, 2019), ECF No. 130.

300. Deposition of Cleother Tidwell at 3, 8, Tidwell v. Menard Corr. Ctr., No. 16-cv-00384 (S.D. Ill. May 23, 2019), ECF No. 103-1.

301. Order at 4, *Tidwell*, No. 16-cv-00384 (S.D. Ill. Nov. 18, 2020), ECF No. 116 [hereinafter *Tidwell* Order].

302. Deposition of Cleother Tidwell, *supra* note 300, at 6.

303. *Tidwell* Order, *supra* note 301, at 1.

Tidwell's antics were objectionable. But the frustration was not unfounded.

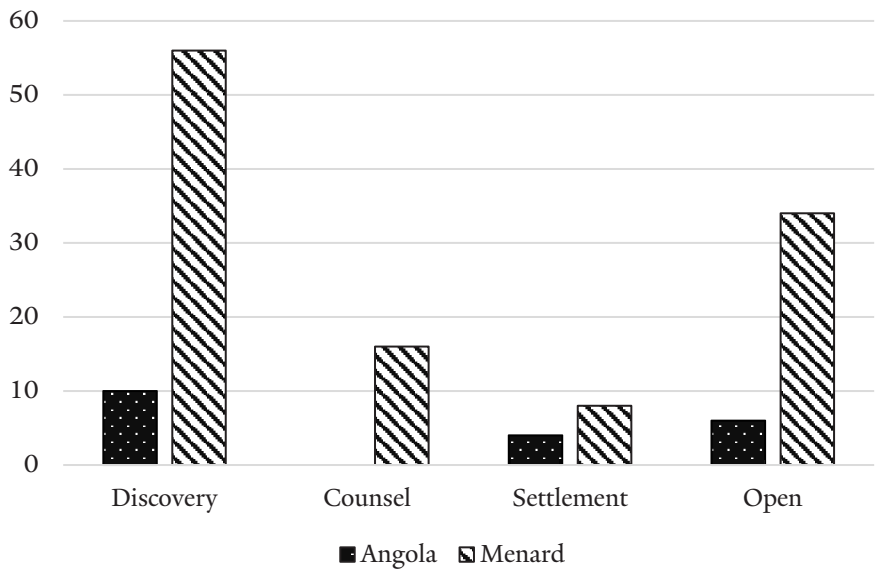
C. Litigation from Angola and Menard in 2022

More recent cases out of Angola and Menard present a similar, if incomplete, picture.

1. The Numbers

Of the first fifty suits from both prisons in 2022, three from Angola and seventeen from Menard—6% and 34%, respectively—remained open at the time of writing.[304] The large number of open cases prevents a full accounting of outcomes or discovery practices across the districts. Nonetheless, in both the completed cases and the tallies of open ones, similar disparities in discovery, the recruitment of counsel, and settlement or trial appear between the districts.

FIGURE 4. 2022 CASES SEEING DISCOVERY, RECRUITMENT OF COUNSEL, AND SETTLEMENT (%)



304. The figures and summaries below reflect the status of the 2022 cases as of March 10, 2025.

Discovery has occurred almost six times as often in Menard as it has in Angola—a spread similar to 2016. As in 2016, no lawyers have been recruited in the Angola set to date, despite some instances in Menard. At the time of writing, two Angola cases and four Menard cases have settled. And with three open cases left, Angola's set is all but completed while almost six times that number of Menard cases remain unresolved. Since longer-running cases are more likely to see discovery, recruitment of counsel, and settlement, Menard's tallies seem likely to climb closer to their 2016 levels over time.

TABLE 2. 2022 DISPOSITIONS (%)

Outcome	Angola	Menard[305]
Dismissal, 3 Strikes	12	0
Dismissal, In Forma Pauperis/Filing Fee	16	0
Dismissal, Deficiencies	24	0
Dismissal, Failure to Prosecute	4	10
Voluntary Dismissal	10	14
Dismissal, Failure to State a Claim	20	18
Dismissal, Summary Judgment	2	10
Dismissal, Sanctions	0	0
Settlement	4	8
Trial	0	2
Other	2	6
Open	6	34

Dispositions for the closed 2022 cases broadly mirror those in 2016. Dismissals unrelated to the merits—for failure to pay the filing fee, filing deficiencies, failure to prosecute, and voluntary dismissals—have quelled 64% of Angola's cases compared with 30% of Menard's.[306] In 2016, those values were 54% and

305. The Menard tallies involve one double-counted case, which partially settled but otherwise remained open as of March 2025. *See* Order at 2-3, Thompson v. Martin, No. 22-cv-00436 (S.D. Ill. May 26, 2023), ECF No. 67.

306. The 6% of Menard cases labeled "Other" are added to the 30% figure, as each of them involved immediate dismissal under a restricted filing order. *See infra* note 320 and accompanying text.

10%. Of Menard's 30% figure of nonmerits dismissals in 2022—an apparent uptick from 2016—almost one-third were dismissals for the plaintiff's failure to prosecute the claim, not for mistake or inability to pay.[307] The other nonmerits dismissals were mostly voluntary; of those, plaintiffs either sought dismissal to avoid paying the filing fee, or did so in response to the threat of dismissal on the merits.[308] For example, after one plaintiff's amended complaint was dismissed without prejudice at the Section 1915A screening stage,[309] he bowed out instead of amending a third time, "ask[ing] this court respectfully to . . . accept his apologies if this court feels he has wasted its time and resources."[310]

On the merits, dismissals for failure to state a claim (under Section 1915A or Rule 12(b)(6)) remained consistent at nearly 20% between the prisons across both 2016 and 2022. Only a few cases have passed summary judgment, with one

Contrarily, Angola's "Other" disposition in 2022 involved a case whose specific reason for termination was not reflected on the docket. *See generally* Morris v. Hooper, No. 22-cv-00301 (M.D. La.) (providing no information regarding the reason for termination). Similarly, the 2016 Angola case labeled as "Other" involved the partial grant of an arbitration award and was thus not considered a nonmerits dismissal. *See* Ruling and Order at 1, 7, Winn v. Cucci, No. 16-cv-00043 (M.D. La. June 12, 2018), ECF No. 14.

307. A typical reason for dismissal for failure to prosecute was a plaintiff leaving prison and abandoning the lawsuit. *E.g.*, Memorandum and Order at 1-2, German v. Jeffreys, No. 22-cv-01352 (S.D. Ill. Jan. 14, 2025), ECF No. 82.

308. *See* Plaintiffs' Motion to Voluntarily Dismiss with Prejudice at 1, Lee v. Gonzalez, No. 22-cv-00089 (S.D. Ill. July 17, 2024), ECF No. 99 (describing the plaintiff moving to dismiss voluntarily after the defendant moved for summary judgment); Motion to Withdraw Pursuant to 42 U.S.C. 1983 at 1-2, Castelan v. Willis, No. 22-cv-00434 (S.D. Ill. Feb. 15, 2023), ECF No. 14 (describing the plaintiff moving for voluntary dismissal after 28 U.S.C. § 1915A dismissal without prejudice); Motion to Voluntarily Dismiss Complaints at 1-2, Rhoades v. Wills, No. 22-cv-00635 (S.D. Ill. Nov. 28, 2022), ECF No. 38 (describing the plaintiff moving for voluntary dismissal after the court agreed not to collect the remainder of the filing fee); Motion to Withdraw at 1, Swan v. Unwin, No. 22-cv-01002 (S.D. Ill. May 19, 2022), ECF No. 6 (describing the plaintiff voluntarily dismissing after an order to show cause why his claim is not unexhausted); Motion for Dismissal of this Case 3-22-1364 DWD by Mr. Willie Williams AS6081 at 1-2, Williams v. Wills, No. 22-cv-01364 (S.D. Ill. July 12, 2022), ECF No. 5 (describing the plaintiff moving for voluntary dismissal after the court imposed a thirty-day deadline on the payment of the filing fee); Emergency Motion to the Court at 1, Plumlee v. Ill. Dep't of Corr., No. 22-cv-01652 (S.D. Ill. Apr. 19, 2023), ECF No. 21 (describing the plaintiff voluntarily dismissing after concluding that he does not know how to litigate without a lawyer).

309. The PLRA requires courts to screen plaintiffs' complaints "as soon as practicable," including before a case is docketed, and to dismiss if the complaint is "frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915A (2018).

310. Plaintiff's Motion to Dismiss Complaint at 1, Chairs v. Wills, No. 22-cv-01190 (S.D. Ill. Apr. 28, 2023), ECF No. 15.

going to trial (a loss for the plaintiff) and another settling before trial.[311] And in one Angola case that never saw summary judgment, the parties were slated to go to trial but settled a few weeks beforehand.[312] As more cases close, these merits-related figures are likely to rise.

The settlement data in this set both align with and deviate from the 2016 set. Recall that in 2016, nineteen of the twenty Menard plaintiffs whose cases settled enjoyed lawyers. Strikingly, of the four cases to have settled so far from the 2022 Menard set and the two from Angola, *none* of the plaintiffs were represented.[313] One Menard case and the two Angola cases had seen discovery,[314] while the others settled out quickly, either via mandatory mediation or on the defendants' initiative. Whether this disparity will bear out as more cases close remains unclear.

All told, even at this incomplete stage, the outcomes of cases playing out in each district appear largely to resemble their 2016 counterparts: discovery, lawyer recruitment, and settlement all continue to skew heavily toward Menard.

2. *Discovery Management and Trends*

But have things changed at the granular level? Small differences aside, the answer is no. For example, it does not appear that the COVID-19 pandemic has had a particularly significant effect on litigation in either prison, despite the new

311. *See, e.g.*, Order Granting Joint Motion to Dismiss, Poullard v. Hebert, No. 22-cv-00430 (M.D. La. Dec. 3, 2024), ECF No. 91 [hereinafter *Poullard* Order Granting Joint Motion to Dismiss]; Jury Verdict Form, Bartlett v. Brown, No. 22-cv-01792 (S.D. Ill. Nov. 13, 2024), ECF No. 105.

312. *See* Notice of Settlement at 1, Brujac v. Sharp, No. 22-cv-00061 (M.D. La. Feb. 20, 2025), ECF No. 111 [hereinafter *Brujac* Notice of Settlement].

313. *See id.*; *Poullard* Order Granting Joint Motion to Dismiss *supra* note 311; Minute Entry, Nije v. Jones, No. 22-cv-00050 (S.D. Ill. Jan. 30, 2024), ECF No. 56; Report of Mandatory Mediation at 1, Williams v. Choate, No. 22-cv-00149 (S.D. Ill. July 25, 2024), ECF No. 50 [hereinafter *Choate* Report of Mandatory Mediation]; Motion to Enforce Settlement at 4-5, Thompson v. Ill. Dep't of Corr., No. 22-cv-00436 (S.D. Ill. Feb. 13, 2023), ECF No. 55 (noting that the plaintiff settled with the prison early in litigation, releasing claims against the prison doctors); Report of Mandatory Mediation at 1, Ruiz v. Moore, No. 22-cv-01382 (S.D. Ill. Jan. 26, 2023), ECF No. 40 [hereinafter *Ruiz* Report of Mandatory Mediation]. A fifth Menard case has also reached a settlement, but as of March 10, 2025, it had not been finalized. *See* Order, Johnson v. Gomez, No. 22-cv-00860 (S.D. Ill. Feb. 25, 2025), ECF No. 75.

314. *See* Defendants' Response to Plaintiff's Motion to Compel, *Choate*, No. 22-cv-00149 (S.D. Ill. Jan. 10, 2024), ECF No. 35 [hereinafter *Choate* Defendants' Response to Plaintiff's Motion to Compel]; Order at 1-4, *Poullard*, No. 22-cv-00430 (M.D. La. Sept. 22, 2023), ECF No. 61 [hereinafter *Poullard* Order]; Order at 1, *Brujac*, No. 22-cv-00061 (M.D. La. Feb. 17, 2023), ECF No. 40.

potential claims. (Some allege too-close confinement with cellmates, delays in medical care chalked up to health precautions, and the like.[315])

Case management and discovery appear largely unchanged. Cases still regularly went to magistrate judges. Judges in both districts continued to require initial disclosures.[316] Judges in both districts continued to limit the number of interrogatories, requests for production, and requests for admission below what the Federal Rules typically allow, with Louisiana judges allowing fewer than Illinois judges.[317] Louisiana judges continued to require that discovery requests be filed on the docket, while Illinois judges still did not do so.[318] Illinois judges' scheduling orders still automatically granted defendants leave to depose plaintiffs, rather than requiring them to file a motion under Rule 30(a)(2).[319] The districts also continued to police frivolous litigation or otherwise-objectionable litigation conduct. Recall Mr. Tidwell, whose responses at his deposition earned him sanctions—by 2022, the Southern District of Illinois had labeled him a restricted filer, refusing to hear his claims unless he paid a $500 fee.[320]

Though much remains similar, some minor aspects of case management have changed. Status conferences with unrepresented plaintiffs were rare in

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315. *See, e.g.*, Complaint at 6, *Ruiz*, No. 22-cv-01382 (S.D. Ill. June 28, 2022) (stating that the plaintiff was forced to share a cell in close quarters), ECF No. 1; Memorandum and Order at 1, Robinson v. Rowland, No. 22-cv-01786 (S.D. Ill. Oct. 10, 2023), ECF No. 12 (describing poor COVID-19 treatment); Amended Complaint at 5, *Poullard*, No. 22-cv-00430 (M.D. La. Oct. 21, 2022), ECF No. 2 (stating that while the plaintiff was being treated for COVID-19 in the hospital, an enemy was moved into his cell block and attacked him upon return).

316. *E.g.*, Scheduling Order at 1, Ruffin v. Turner, No. 22-cv-00002 (M.D. La. Nov. 29, 2022), ECF No. 5 [hereinafter *Ruffin* Scheduling Order] (appearing unchanged from 2016 scheduling orders); Initial Scheduling and Discovery Order at 2, Duvall v. Siddiqui, No. 22-cv-00294 (S.D. Ill. June 29, 2023), ECF No. 54 [hereinafter *Duvall* Initial Scheduling and Discovery Order].

317. *Compare* Scheduling and Discovery Order at 1, Fox v. Brande, No. 22-cv-00299 (S.D. Ill. Aug. 10, 2023), ECF No. 110 [hereinafter *Fox* Scheduling and Discovery Order] (limiting the parties to fifteen interrogatories and requests for production and ten requests for admission), *and* Scheduling and Discovery Order at 1, Tapia v. Wexford Health Sources, Inc., No. 22-cv-01576 (S.D. Ill. Nov. 2, 2023), ECF No. 26 (same), *with Ruffin* Scheduling Order, *supra* note 316, at 2 (providing for ten interrogatories, five requests for production, and ten requests for admission), *and* Order at 2, Stevenson v. Johnson, No. 22-cv-00472 (M.D. La. Oct. 30, 2022), ECF No. 4 (same). So far, at least one Illinois judge has deviated upward on a plaintiff's request. *See* Order at 1, Clair v. Wexford Health Sources, Inc., No. 22-cv-00663 (S.D. Ill. May 14, 2024), ECF No. 80.

318. *See* Order at 2, *Brujac*, No. 22-cv-00061 (M.D. La. Aug. 31, 2022), ECF No. 7; SDIL-LR 26.1(b) (barring discovery requests from being filed on the docket).

319. *E.g.*, *Fox* Scheduling and Discovery Order, *supra* note 317, at 2; Scheduling and Discovery Order at 2, Williams v. Schoenbeck, No. 22-cv-00756 (S.D. Ill. Oct. 1, 2024), ECF No. 57.

320. *See* Memorandum and Order at 2, Tidwell v. Hellion, No. 22-cv-00005 (S.D. Ill. Jan. 4, 2022), ECF No. 12; *see also* Memorandum and Order at 2, Tidwell v. Mulholland, No. 22-cv-00313 (S.D. Ill. Apr. 5, 2022), ECF No. 10 (citing the filing restriction and closing Mr. Tidwell's case).

Angola in 2016, but they appear to have become rare in *both* districts in 2022.[321] In Illinois, the hyperspecific list of initial disclosures that some judges used in 2016 appears to have been replaced by something more closely resembling the generic list given in the Federal Rules.[322] Another apparent difference is that in Illinois, courts appear to be experimenting with early-stage mediation: they referred three nascent cases to settlement conferences, and one of those cases successfully settled.[323]

Lawyer recruitment, which remains exclusive to Menard, also looks largely the same. Angola plaintiffs' motions seeking counsel have been universally rejected so far, as in 2016 — even when bound for trial.[324] Contrarily, Illinois judges have already assigned lawyers to plaintiffs on request and sua sponte.[325] The

321. *See* Poullard v. Hebert, No. 22-cv-00430 (M.D. La.) (providing no teleconferences on the docket until a pretrial conference); *Brujac*, No. 22-cv-61 (M.D. La.) (same). The resistance to early-stage telephonic hearings in Menard is not universal. *See* Order Setting Status Conference, Brown v. Hasemeyer, No. 22-cv-01384 (S.D. Ill. Sept. 26, 2023), ECF No. 28 (setting a telephonic status conference after screening).

322. *See Duvall* Initial Scheduling and Discovery Order, *supra* note 316, at 2 (providing for basic initial disclosures, including incident reports, grievances, disciplinary tickets, a log of "interactions with staff," names of those with knowledge of the incident and their statements, and relevant medical records).

323. Report of Mandatory Mediation at 1, Macias v. Jeffreys, No. 22-cv-00904 (S.D. Ill. Oct. 19, 2023), ECF No. 45 (reporting an unsuccessful mandatory mediation in a case involving an unrepresented plaintiff and an alleged due-process violation during a disciplinary proceeding); *Ruiz* Report of Mandatory Mediation, *supra* note 313, at 1 (reporting a successful mediation of a case involving an uncounseled plaintiff being placed in too small of a cell with a cellmate during COVID-19); Report of Mandatory Mediation at 1, Brand v. Jeffreys, No. 22-cv-01463 (S.D. Ill. June 28, 2023), ECF No. 47 (reporting an unsuccessful mandatory mediation involving an uncounseled plaintiff in a case alleging excessive force).

324. *See* Order Regarding Motion to Appoint Counsel at 1, *Brujac*, No. 22-cv-00061 (M.D. La. Oct. 18, 2024), ECF No. 87 (denying recruitment for the second time, referring to the reasons provided in the initial denial); Order Regarding Motion to Appoint Counsel at 2, *Brujac*, No. 22-cv-00061 (M.D. La. Sept. 13, 2022), ECF No. 9 (refusing originally to recruit a lawyer because the plaintiff's excessive-force case was "neither factually nor legally complex," he would "benefit [from] Court-ordered discovery," and "it does not appear that any great skill will be needed to cross-examine the witnesses in connection with the issues in this case"); Order at 1, *Brujac*, No. 22-cv-00061 (M.D. La. Jan. 8, 2025), ECF No. 97 (setting a trial date). This case settled before trial, with the plaintiff still uncounseled. *Brujac* Notice of Settlement, *supra* note 312, at 1. In another open case, an Angola plaintiff *has* received representation; a law-school clinic picked up his case after he survived an interlocutory appeal of the denial of qualified immunity. *See* Ex Parte Motion to Enroll as Counsel for Plaintiff at 1-2, Stevenson v. Johnson, No. 22-cv-00472 (M.D. La. Dec. 9, 2024), ECF No. 46; Stevenson v. Tocé, 113 F.4th 494, 499-500 (5th Cir. 2024).

325. *See* Emergency Motion for Recruitment of Counsel with Cause at 1-4, Haywood v. Wexford Health Sources, Inc., No. 22-cv-00731 (S.D. Ill. Oct. 5, 2022), ECF No. 21; Memorandum and Order at 1-2, *Haywood*, No. 22-cv-00731 (S.D. Ill. Oct. 7, 2022), ECF No. 22 [hereinafter

reasons for their doing so have ranged from difficulties identifying defendants;[326] a plaintiff's difficulty communicating with the court;[327] a plaintiff's "long history of mental illness and learning disabilities" and "difficulty in obtaining his medical records";[328] and a plaintiff's "less than . . . high-school education."[329] In one case alleging First Amendment retaliation and conspiracy, the judge immediately appointed a lawyer because of the case's complexity and the fact that the plaintiff would "need witness statements from those working and living at Menard, which will be difficult for him to obtain [after having been transferred], and documents that will be deemed confidential."[330]

But Illinois courts have not been uniformly willing to recruit lawyers, even in similar circumstances. In one case, the plaintiff had no high-school education and had been confined to a special-treatment unit after repeated attempts at self-harm, including having recently set himself on fire and spent nine days in the ICU; after denying five motions to appoint counsel, the court finally relented and granted his sixth.[331] Numerous other cases remain uncounseled despite several motions seeking lawyers.[332] Judges have denied lawyers to plaintiffs facing

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Haywood Memorandum and Order] (assigning counsel); Order at 8, Thompson v. Martin, No. 22-cv-00436 (S.D. Ill. July 22, 2024), ECF No. 108 [hereinafter *Thompson* Order] (providing counsel sua sponte); Memorandum and Order at 4, Croom v. Doe #5, No. 22-cv-01244 (S.D. Ill. May 20, 2024), ECF No. 69 [hereinafter *Croom* Memorandum and Order] (same).

326. Memorandum & Order at 1, Thomas v. Wills, No. 22-cv-01105 (S.D. Ill. Apr. 12, 2023), ECF No. 32 [hereinafter *Thomas* Memorandum & Order]; *Croom* Memorandum and Order, *supra* note 325, at 4.

327. *Thompson* Order, *supra* note 325, at 7-8.

328. *Haywood* Memorandum and Order, *supra* note 325, at 2.

329. Order Granting Motions for Recruitment of Counsel, Lee v. Gonzalez, No. 22-cv-00089 (S.D. Ill. Aug. 17, 2023), ECF No. 80.

330. Memorandum and Order at 10-11, 17-18, Brown v. Hasemeyer, No. 22-cv-01384 (S.D. Ill. Aug. 23, 2023), ECF No. 18.

331. Order, Blackburn v. Sec. Staff, No. 22-cv-01713 (S.D. Ill. Oct. 19, 2023), ECF No. 51; Motion for Appointment of Counsel at 1-2, *Blackburn*, No. 22-cv-01713 (S.D. Ill. Oct. 7, 2024), ECF No. 84; Memorandum and Order at 2, *Blackburn,* No. 22-cv-01713 (S.D. Ill. Dec. 3, 2024), ECF No. 87.

332. *E.g.*, Order Denying Plaintiff's Motion for Recruitment of Counsel, Duvall v. Siddiqui, No. 22-cv-00294 (S.D. Ill. Feb. 23, 2022), ECF No. 6; Order Denying Second Motion to Appoint Counsel Without Prejudice, *Duvall*, No. 22-cv-00294 (S.D. Ill. Aug. 21, 2023), ECF No. 59; Order Denying Motion to Appoint Counsel, *Duvall*, No. 22-cv-00294 (S.D. Ill. June 5, 2024), ECF No. 76; Memorandum and Order at 2-3, Fox v. Brande, No. 22-cv-00299 (S.D. Ill. Oct. 28, 2022), ECF No. 57; Memorandum and Order at 2, *Fox*, No. 22-cv-00299 (S.D. Ill. Apr. 3, 2023), ECF No. 99; Order Denying Motion to Appoint Counsel and Amended Motion for Recruitment of Counsel, *Fox*, No. 22-cv-00299 (S.D. Ill. Nov. 29, 2023), ECF No. 123; Order Denying Motion to Appoint Counsel, *Fox*, No. 22-cv-00299 (S.D. Ill. July 17, 2024), ECF No. 137 [hereinafter *Fox* Order Denying Motion to Appoint Counsel]; Memorandum and Order at 3-5, *Fox*, No. 22-cv-00299 (S.D. Ill. Oct. 2, 2024), ECF No. 154.

steep hurdles. One had only an eighth-grade education, had been incarcerated since the age of fifteen, had "absolutely zero knowledge or expirience [sic] in criminal or civil law or litigation," and lived in a residential treatment unit within the prison due to severe mental illness.[333] One had been granted law-library access only once in the previous six months.[334] And one struggled with posttraumatic stress disorder, had "limited legal knowledge," and had "limited access to the law library and his legal materials."[335] In denying the lattermost plaintiff counsel, the court cited the difficulty of finding willing lawyers[336]—perhaps indicating a downward turn from 2016. In two of the cases that *did* receive counsel, at least one lawyer withdrew before an advocate stuck around for the plaintiff.[337]

For the represented and unrepresented alike, the question remains whether discovery has changed. With only a handful of cases seeing discovery at this point—let alone any surfacing on the docket—insights are elusive. But those few cases continue to show prison discovery's uses and abuses. For one, the types of evidence sought remain predictable. Plaintiffs have made declarations, secured affidavits from witnesses, and have been deposed.[338] In some cases, defendants

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333. Plaintiff's Renewed Motion for Appointment of Counsel and Memorandum of Law in Support at 3-8, Williams v. Choate, No. 22-cv-00149 (S.D. Ill. May 25, 2023), ECF No. 31; Order Denying Motion to Appoint Counsel, *Choate*, No. 22-cv-00149 (S.D. Ill. Dec. 7, 2023), ECF No. 32. With the help of a jailhouse lawyer, Williams did move to compel some discovery, including surveillance footage, but he did so without conferring with the defendants first. *See* Plaintiff Motion to "Seek Leave" to Compel Defendants to Produce the Following Documents Under Federal Rule of Procedures at 1-6, *Choate*, No. 22-cv-00149 (S.D. Ill. Dec. 27, 2023), ECF 34; *Choate* Defendants' Response to Plaintiff's Motion to Compel, *supra* note 314, at 1-2. The defendants claimed they had asked the prison for the video footage. Defendants' Response to Plaintiff's Request for Production Dated 2/28/23 at 5-7, *Choate*, No. 22-cv-00149 (Jan. 10, 2024), ECF No. 35-1. Ultimately, Williams was able to settle his case without a lawyer present. Defendants' Status Report at 1, *Choate*, No. 22-cv-00149 (S.D. Ill. Apr. 17, 2024), ECF No. 45; *Choate* Report of Mandatory Mediation, *supra* note 313, at 1.

334. Order, Clair v. Wexford Health Sources, Inc., No. 22-cv-00663 (S.D. Ill. Mar. 19, 2024), ECF No. 65.

335. *Fox* Order Denying Motion to Appoint Counsel, *supra* note 332.

336. *Id.*

337. *See* Order Granting Second Unopposed Motion for Extension of Time, Haywood v. Wexford Health Sources, Inc., No. 22-cv-00731 (S.D. Ill. Feb. 10, 2023), ECF No. 30; Plaintiff's Motion for Leave to File First Amended Complaint at 3, *Haywood*, No. 22-cv-00731 (S.D. Ill. Mar. 8, 2023), ECF No. 31; Defendants' Answer and Affirmative Defenses to Plaintiff's First Amended Complaint at 1, *Haywood*, No. 22-cv-00731 (S.D. Ill. Apr. 25, 2023), ECF No. 34; Summons in a Civil Action at 1, *Haywood*, No. 22-cv-00731 (S.D. Ill. May 10, 2023), ECF No. 35; Memorandum & Order at 1, Thomas v. Wills, No. 22-cv-01105 (S.D. Ill. May 3, 2023), ECF No. 36.

338. *E.g.*, Minute Entry, Fox v. Brande, No. 22-cv-00299 (Aug. 5, 2024), ECF No. 150 (granting the defendants' motion to depose the plaintiff); Order at 1, Brujac v. Sharp, No. 22-cv-00061 (M.D. La. June 6, 2023), ECF No. 74 (same); Videoconference Deposition of Robert Macias

have produced or been asked to produce personnel files, prison policies, logbooks, rosters, incident reports, and video.[339]

The parties' behavior during discovery has also remained similar. As in 2016, both plaintiffs and defendants sometimes failed to provide initial disclosures or dragged their feet in responding to discovery requests.[340] In one case, the plaintiff failed to provide his initial disclosures in time; in response to defendants' motion to compel, he explained: "I lack knowledge of civil law education" and

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at 1, Macias v. Jeffreys, No. 22-cv-904 (S.D. Ill. June 13, 2024), ECF No. 52-1 (deposing the plaintiff); Offender's Grievance at 1, *Thomas*, No. 22-cv-01105 (S.D. Ill. Aug. 1, 2024), ECF No. 74-4 (providing the declaration from a witness incarcerated at Menard); Declaration at 1, *Thomas*, No. 22-cv-01105 (S.D. Ill. Aug. 1, 2024), ECF No. 74-6 (same); Affidavit at 1, *Thomas*, No. 22-cv-01105 (S.D. Ill. Aug. 1, 2024), ECF No. 74-7 (providing the affidavit from a witness incarcerated at Menard).

339. *E.g.*, Proposed Pretrial Order, Exhibits 1-10, *Brujac*, No. 22-cv-00061 (M.D. La. Nov. 7, 2024), ECF Nos. 91-1 to 91-10 (attaching to a pretrial order unusual-occurrence reports, logbooks, and the plaintiff's deposition transcript); Defendant Omar Walker Responses to Plaintiff's Requests for Production of Documents at 2, *Brujac*, No. 22-cv-00061 (M.D. La. May 17, 2023), ECF No. 58 (sharing upon request body-camera footage on a compact disc but claiming a lack of possession of certain footage sought by the plaintiff); *Poullard* Order, *supra* note 314, at 1-4 (granting in part the plaintiff's motion to compel rosters from the date of the incident and ordering the defendant to file an affidavit averring whether he authored an incident report after a prison fight); Defendants' Motion to Submit Plaintiff's Discovery as an Exhibit to Defendants' Motion for a Protective Order at 1-2, Blackburn v. Sec. Staff, No. 22-cv-01713 (S.D. Ill. June 27, 2024), ECF No. 67 (moving "to submit Plaintiff's discovery as an exhibit to their Motion for a Protective Order"); Motion for Request of Production of Documents at 2-3, *Blackburn*, No. 22-cv-01713 (S.D. Ill. June 27, 2024), ECF No. 67-1 (seeking all "Photograph, Camera footage, Videotape of my Injury on 8-25-21"); Order, *Blackburn*, No. 22-cv-01713 (S.D. Ill. Apr. 19, 2024), ECF No. 58 (noting that the defendants sent a roster sheet to help identify the John Doe defendant); Plaintiff Leon Clair's Motion to Compel with Memorandum in Support Re: Production Request Directed to Defendant Dr. Steve Aldbidge at 11-22, *Clair*, No. 22-cv-00663 (S.D. Ill. Nov. 20, 2023), ECF No. 55 (moving for interrogatories, requests for production, and requests for admission seeking personnel records, disciplinary records, medical records, prison policies on dental care, information on possible indemnification of the defendants, and more); Memorandum and Order at 3-7, Croom v. Doe #6, No. 22-cv-01244 (S.D. Ill. Dec. 12, 2023), ECF No. 49 (ordering the defendants to explain why the video evidence that the plaintiff sought was not available).

340. *E.g.*, Order, West v. Wills, No. 22-cv-00242 (S.D. Ill. July 30, 2024), ECF No. 90 (stating that the plaintiff's failure to respond to a motion to compel results in dismissal); Order at 2-4, Britten v. Wills, No. 22-cv-00409 (S.D. Ill. June 28, 2023), ECF No. 55 (granting in part the plaintiff's motion to compel where the defendant failed to file any response to interrogatories); Order, *Clair*, No. 22-cv-00663 (S.D. Ill. Sept. 20, 2024), ECF No. 105 (noting the defendants' failure to respond to certain discovery requests filed by the plaintiff); Defendant's Motion to Withdraw Admissions at 1-2, *Haywood*, No. 22-cv-00731 (S.D. Ill. July 31, 2024), ECF No. 77 (acknowledging that the defendant's counsel accidentally failed to respond timely to the plaintiff's discovery requests); Order to Show Cause, *Croom*, No. 22-cv-01244 (S.D. Ill. Apr. 12, 2024), ECF No. 61 (noting the defendants' failure to comply with discovery orders from the court and threatening sanction or contempt).

"[d]ue to where Im Incarcerated Im on lockdown a lot therefore cannot access the law library in attempt to Gain Knowledge of civil law to help self litigate."[341] The judge gave him an extra week.[342]

Distrust continues to permeate the discovery process, too. In at least one instance, defendants gave contradictory accounts of whether video evidence existed.[343] And plaintiffs have voiced concern that defendants were mishandling evidence. One plaintiff alleged that after being placed in administrative segregation, his legal documents had been stolen; the judge issued an emergency injunction, forcing the defendant to produce surveillance footage of where the plaintiff's legal materials had been stored while he was sent away.[344]

Additionally, in an apparent change from 2016, a few proactive plaintiffs have turned to the courts to try to preempt potential misfeasance by prison defendants. For example, two Angola plaintiffs sought court orders to preserve video evidence early in the litigation, afraid the prison would delete it.[345] One even intentionally filed suit before completing the prison's grievance procedure, worried the prison would overwrite the footage before he could file his complaint.[346] The court recognized the "procedural quandary in which the plaintiff finds himself" but rejected his request.[347] Another Angola plaintiff asked to file all his legal documents with the court because he feared the defendants would take them from him; the judge declined, writing that "[t]he plaintiff is not entitled to use the Court docket for document storage."[348]

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341. Motion for Extension of Time to File Initial Disclosures at 1, German v. Jeffreys, No. 22-cv-01352 (S.D. Ill. Apr. 27, 2023), ECF No. 44.

342. Order Granting Motion for Extension of Time to File Plaintiff's Initial Disclosures, *German*, No. 22-cv-01352 (S.D. Ill. Apr. 28, 2023), ECF No. 46.

343. *Croom* Memorandum and Order, *supra* note 325, at 3-4 (noting that one prison official testified that no footage of cell extractions existed while another prison official filed a declaration saying there was such footage).

344. Brujac v. Sharpe, No. 22-cv-00061, 2023 WL 4041893, at *2 (M.D. La. May 22, 2023).

345. Motion for Order to Preserve Evidence and Produce Evidence at 1-2, LaVergne v. Vannoy, No. 22-cv-00470 (M.D. La. Sept. 14, 2023), ECF No. 27 (acknowledging that discovery was not open yet and asking the court to "order the video to be preserved" of the "Jaguar 1-L-tier" from 11:15 to 11:45 AM on September 13, 2023); Ruling and Order at 1, Reel v. La. State Penitentiary, No. 22-cv-00621 (M.D. La. Sept. 14, 2022), ECF No. 2 [hereinafter *Reel* Ruling and Order] (noting that the plaintiff requested that the court order the prison to preserve video footage).

346. *Reel* Ruling and Order, *supra* note 345, at 1.

347. *Id.* at 2.

348. Order at 1, Stevenson v. LeBlanc, No. 22-cv-00075 (M.D. La. Aug. 23, 2022), ECF No. 34.

Defendants have also continued to invoke security concerns, refusing to share certain evidence or requesting protective orders.[349] In one case, defendants accidentally disclosed sensitive documents in their initial disclosures—a two-page electronic communication containing certain incarcerated people's names, identification numbers, security status, and intelligence information.[350] The judge quickly ordered the plaintiff to return the unredacted document.[351] It appears he did so.[352]

Finally, vital discovery remains difficult to obtain. Consider the cases filed by Christopher Croom and Adrian Thomas. Thomas alleged that the morning of August 17, 2021, a tactical team conducted a "major shakedown" in the west cellhouse at Menard and led Thomas and others, handcuffed, to the prison chapel.[353] Thomas asked repeatedly to use the bathroom, informing officers that

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349. Defendants' Response to Plaintiff's Request for Production at 2, Fox v. Brande, No. 22-cv-00299 (S.D. Ill. Oct. 28, 2024), ECF No. 159-3 (raising security concerns about sharing the defendants' work histories); Protective Order at 2, Clair v. Wexford Health Sources, Inc., No. 22-cv-00663 (S.D. Ill. May 14, 2024), ECF No. 79 (entering a protective order for personnel documents, allowing the plaintiff to inspect the documents "at mutually agreed upon date and time in accordance with IDOC procedures and guidelines [so long as the plaintiff does not] photocopy or otherwise obtain copies of such documents"); Joint Motion for Protective Order at 1-3, Croom v. Doe, No. 22-cv-01244 (S.D. Ill. Aug. 13, 2024), ECF No. 77 (seeking a similar protective order for photographs and video that the plaintiff sought because they could show others who were not part of the lawsuit, "depictions of the layout of the facility, equipment within certain areas of the facility, and locking and/or opening mechanisms on gates and/or doors," as well as documents "related to other individuals in custody and staff at Menard"); Defendant's Motion for Protective Order at 1-2, Blackburn v. Sec. Staff, No. 22-cv-01713 (S.D. Ill. June 18, 2024), ECF No. 65 (seeking a protective order for the prison's policies on use of force, chemical agents, and emergency response because "possession of this information by Plaintiff, another offender, and/or the general public would create a threat of and/or facilitate a potential escape, riot, and/or similar disturbance with risk of serious bodily harm within the maximum-security correctional center by revealing vulnerable areas of mechanisms, access points, and/or the layout of the facility").

350. Motion Requesting Order Directing Plaintiff Return Un-Redacted Documents Included in Defendants' Initial Disclosures at 1-2, Johnson v. Gomez, No. 22-cv-00860 (S.D. Ill. May 10, 2024), ECF No. 61.

351. Order, *Johnson*, No. 22-cv-00860 (S.D. Ill. May 13, 2024), ECF No. 62.

352. Motion Requesting Order Directing Defendants Return Documents Included in Initial Disclosures and for the Court to Take Judicial Notice of Initial Disclosure at 2, *Johnson*, No. 22-cv-00860 (S.D. Ill. May 16, 2024), ECF No. 63. According to the plaintiff, some other information in that two-page document was valuable to his case; he mailed the unredacted document back but asked that the defendants return a redacted copy to him. *Id.* A few months later, the defendants claimed they had yet to receive the documents, but they nonetheless mailed the redacted versions to the plaintiff. Response to Plaintiff's Motion for Status at 2, *Johnson*, No. 22-cv-00860 (S.D. Ill. Aug. 5, 2024), ECF No. 65.

353. First Amended Complaint at 3-4, Thomas v. Wills, No. 22-cv-01105 (S.D. Ill. July 28, 2022), ECF No. 10.

he was on medication that required frequent restroom trips.[354] The tactical team commander told him that if he was "so worried" about his health he "should not have come to jail," that he should "move the fucking line and keep [his] mother fucking head down," and that he should be "grateful" he was "not getting [his] ass beat for raising [his] head up and yelling at the wardens."[355] After several minutes in which his pleas to multiple officers were met with scolding and, eventually, an order to stand and face the wall, Thomas urinated and defecated on himself.[356] The officers then "began laughing and calling [him] shitty and pissy boy."[357] He sat "in his bowel and fluids for hours" until allowed to return to his cell.[358]

Croom brought similar allegations arising from a different shakedown. According to Croom's complaint, after "several inmates became unruly and disruptive in the early morning hours," including one person setting a fire, "staff members dressed in tactical gear sprayed inmates with fire extinguishers and ma[c]e."[359] Croom was sprayed despite sitting on his cell's bed "in a gesture of being nondisruptive."[360] The cells had little ventilation, so Croom spent the next hour and a half "gasping for air and coughing" from some combination of smoke and pepper spray.[361] He was eventually handcuffed and taken to a different room, where he "could hear other inmates being assaulted by staff in other rooms, as there were no cameras in some of these rooms and [that] is where staff commonly assaults inmates in handcuffs."[362] Like Thomas, Croom was prohibited from relieving himself and, trapped in the room for over eight hours, ultimately urinated on himself and the floor.[363] Later, officers beat him, accusing him of having soiled himself intentionally.[364]

In both Thomas's and Croom's cases, identifying the defendants was nearly impossible. Croom described the John Does as best he could: one was a "short white male" who must have been working the "3rd shift" because the events involving him occurred around 3:00 to 4:00 in the morning; others were taller,

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354. *Id.* at 4.

355. *Id.*

356. *Id.* at 4-5.

357. *Id.* at 5.

358. *Id.*

359. Amended Complaint at 11, Croom v. Doe #6, No. 22-cv-01244 (S.D. Ill. Oct. 4, 2023), ECF No. 36.

360. *Id.*

361. *Id.* at 11-12.

362. *Id.* at 12.

363. *Id.*

364. *See id.* at 12-13.

also white, and might be captured on "camera footage from N-2 cellhouse."[365] The warden responded by sending Croom a redacted staff roster for the day of the shakedown that listed hundreds of names.[366] Informed of the dispute, the court held a hearing, after which it claimed that Croom had been "thwarted by the lack of proper record keeping on the part of the Illinois Department of Corrections":

> [I]f officer misconduct is alleged by an inmate, an officer has not [filled] out an incident report, and the officers involved cannot be physically described due to wearing masks and helmets, then the only way to determine who could have been involved, witnessed the incident, or refute[d] the allegation is by interviewing every staff member who was working that day. If a regional tactical team was present at the correctional facility, as it was in this case, then this would require an investigator to interview over 150 people. There is not a more efficient way to narrow down this large pool of people.[367]

The court ordered the warden to get affidavits from a slate of officers who, as testimony at the hearing and other discovery confirmed, had been involved in the cell extractions in Croom's cell block.[368] The court also demanded a brief from the defendant warden explaining why the officers had failed to videotape Croom's cell extraction, as an official had admitted at the hearing.[369]

Four months passed with no word from the warden. It was not until the court threatened sanctions or contempt that the warden's lawyer filed affidavits from the officers.[370] In one, an officer declared that he had used a handheld camera to record cell extractions that day—an apparent contradiction to the testimony at the hearing.[371] Faced with this combination of "discrepancies between testimony at the hearing and the recently submitted declarations, the existence of handheld video footage and other gallery video footage that has yet to be reviewed, and additional information that could be requested," the court sua sponte recruited a lawyer for Croom.[372]

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365. Croom v. Doe #6, No. 22-cv-1244, 2023 WL 8599716, at *2 (S.D. Ill. Dec. 12, 2023).

366. Motion to Compel/Motion Specifying Additional Steps to Identify Doe Defendants at 15-45, *Croom*, No. 22-cv-1244 (S.D. Ill. Oct. 4, 2023), ECF No. 37.

367. *Croom*, 2023 WL 8599716, at *3 & n.3.

368. *Id.* at *4.

369. *Id.* at *4; *Croom* Memorandum and Order, *supra* note 325, at 3-4.

370. *Croom* Memorandum and Order, *supra* note 325, at 1-2.

371. *Id.* at 3.

372. *Id.* at 4.

Thomas's case has fared similarly. He informed the court that he had received "a list of John [Does]" from the warden, but "it would be impossible for me to pick anyone out of this list."[373] In turn, the judge sua sponte recruited counsel.[374] Unfortunately, that did not make things much easier. In a September 2023 status report, Thomas's lawyer claimed that Menard's warden had sent a confusing list of "all employees who worked on August 17, 2021," not just those who formed the tact team, and that "[w]ithout question," Thomas "is at the mercy of Defendant . . . to identify all members of the Tact Team that interacted with [him]."[375] It appears that almost a year passed, including five status conferences, before the defendants were identified and served.[376]

IV. TAKING STOCK

Civil-rights litigation can look radically different depending on the district, court, city, or circuit in which it occurs. The factors contributing to the plaintiff-friendliness of any such "civil rights ecosystems" will be "multifaceted and their component parts . . . interdependent."[377] Driving forces may include circuit

373. Response to John Doe Scheduling Order at 1, Thomas v. Jeffreys, No. 22-cv-01105 (S.D. Ill. Mar. 13, 2023), ECF No. 30.

374. *Thomas* Memorandum & Order, *supra* note 326, at 1.

375. Status Report at 3, *Thomas*, No. 22-cv-01105 (S.D. Ill. Sept. 1, 2023), ECF No. 41.

376. *See* Minute Entry, *Thomas*, No. 22-cv-01105 (S.D. Ill. Oct. 19, 2023), ECF No. 47; Minute Entry, *Thomas*, No. 22-cv-01105 (S.D. Ill. Nov. 8, 2023), ECF No. 49; Minute Entry, *Thomas*, No. 22-cv-01105 (S.D. Ill. Dec. 14, 2023), ECF No. 54; Minute Entry, *Thomas*, No. 22-cv-01105 (S.D. Ill. Jan. 23, 2024), ECF No. 56; Minute Entry, *Thomas*, No. 22-cv-01105 (S.D. Ill. Apr. 23, 2024), ECF No. 61; Order for Service of Process, *Thomas*, No. 22-cv-01105 (S.D. Ill. July 8, 2024), ECF No. 66.

377. Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1543-44 (2020).

precedent,[378] plaintiffs' resources,[379] lawyers' availability,[380] and a district's "culture."[381]

The differences between the districts observed in Part III present a case in point. It is hard to pinpoint exactly what fueled the vast discrepancies in case management, discovery practices, and outcomes observed between the Southern District of Illinois and Middle District of Louisiana. Certainly, judges in Illinois found concrete ways to aid plaintiffs' access to discovery and litigation success. But their very willingness and ability to do so could reflect a culture well outside the norm in its openness to incarcerated litigants' claims. Changing the latter lies largely outside this Article's scope. But Part III's findings as to the districts' discovery practices provide some helpful clues for how prison discovery and its attendant benefits might nonetheless be amplified elsewhere. And the broader observations from both Parts II and III provide meaningful, if incomplete, insight into both the wisdom and potential means of reform.

This Article's final Part proceeds as follows. It begins by briefly touching on the implications for prison litigation suggested by Parts II and III and argues that change is both necessary and achievable. It then proposes fixes, drawing on the findings presented in Parts II and III.

A. The Need for Reform

The findings above show that discovery is in large part inaccessible to the few incarcerated people whose claims make it that far. It is even true of those lucky enough to be litigating in the Southern District of Illinois. As a class, incarcerated litigants are nearly entirely foreclosed from utilizing one of the most critical stages of litigation.

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378. *See supra* note 268 and accompanying text. Seventh Circuit law is not uniformly more friendly to incarcerated plaintiffs, however. For an example, see *infra* notes 400-407 and accompanying text.

379. Incarcerated people earned an estimated 41% less in income before prison than their free counterparts. Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), https://www.prisonpolicy.org/reports/income.html [https://perma.cc/FW8U-3AYN]. And Louisiana is the second-poorest state in the nation. *Census 2022: Poverty, Income and Health Insurance in Louisian*a, LA. BUDGET PROJECT 2 (Nov. 2023), https://investlouisiana.org/wp-content/uploads/2023/11/Census-2022-2023.pdf [https://perma.cc/C45N-MP66].

380. *See* Hammond, *supra* note 111, at 2761-62 (noting districts' pro bono policies, from volunteer efforts to forcing every bar member to enlist in a pro bono pool). The decision of whether a lawyer is needed in the first place may be tinged by a dearth of available ones. *See* Naranjo v. Thompson, 809 F.3d 793, 795 (5th Cir. 2015).

381. Telephone Interview with Federal Judge #6, *supra* note 194; Zoom Interview with Formerly Incarcerated Litigant #11, *supra* note 212; Interview with Federal Judge #3, *supra* note 195.

This Article's findings also cast a pall over prison-litigation reform efforts that exclusively target the PLRA. Of course, as noted above, the PLRA ends far more incarcerated plaintiffs' cases than discovery does.[382] But those rightly focusing reform efforts on the PLRA[383] may nonetheless be in for a rude awakening—the possibility that eliminating or altering the statute would simply leave more incarcerated people to navigate an impenetrable discovery process.[384]

Moreover, the discrepancies observed in Part III's study suggest a disturbing arbitrariness in how incarcerated litigants' cases are handled based on the district in which they are imprisoned—what some inside prison call "justice by jurisdiction" or "justice by geography."[385] Worse still, judicial culture in most districts is skewed against imprisoned plaintiffs.[386] For example, federal statistics suggest that the median length of prison litigation, from filing to dismissal, is *less* than the median length I observed in Angola.[387] As a rough metric—presumably, shorter cases means earlier dismissal and less discovery—this suggests the Middle District of Louisiana is closer to, or perhaps even *better* than, the norm. It is tempting, then, to see the system's capriciousness and inaccessibility as reason to deny altogether courts' role in protecting incarcerated people's rights.[388]

But there is also plenty of reason to focus attention on reforming prison litigation's later stages, and some cause for optimism. The findings from Menard, for example, imply that judges have surprising flexibility in shepherding prison cases—that is, despite the PLRA's statutory barriers, courts can drastically expand access to discovery for those litigating from prison.

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382. *See supra* Section I.A.

383. *See supra* note 80.

384. *Cf.* Adam Davidson, *Procedural Losses and the Pyrrhic Victory of Abolishing Qualified Immunity*, 99 WASH. U. L. REV. 1459, 1485-1509 (2022) (arguing that abolishing qualified immunity would do little to balance civil-rights claims toward plaintiffs).

385. These phrases come from Percy Levy, who spent time incarcerated in prisons in Washington and California and spoke with me for this project. Telephone Interview with Percy Levy, Formerly Incarcerated Litigant #5, *supra* note 175; Email from Percy Levy to author (Nov. 10, 2024) (on file with author). For a similar observation concerning civil-rights litigation more broadly, see Schwartz, *supra* note 377, at 1590-1600.

386. *See* Dolovich, *supra* note 45, at 302-04; *see also* Littman, *supra* note 186, at 68 (pointing out a 1:90 ratio of successful judgments for unrepresented incarcerated plaintiffs versus successful judgments for defendants).

387. In 2016, the median time from filing to disposition in prison civil-rights cases was 142 days. Schlanger, *supra* note 67, at 13. Angola's median was 193 days, and Menard's was 1,166.5.

388. *E.g.*, Schlanger, *supra* note 89, at 171 ("Litigation has receded as an oversight method in American corrections. It is vital that something take its place."); Littman, *supra* note 72, at 1393 (arguing that broader regulatory law can address prison harms "in ways that constitutional prison law does not").

And as Parts II and III suggest, courts *should* do so. For one, the findings from Menard support the conclusion that discovery helps incarcerated plaintiffs vindicate their claims. There was a strong correlation between the heightened discovery levels at Menard and its high settlement rates. And in both districts, deposition testimony, video evidence, and other discovery helped bring cases to trial.[389]

True, of the small number of trials observed—three from Menard and one from Angola—none ended in victories for plaintiffs. But to state the obvious, discovery does not turn every plaintiff's case into a winner. Good discovery may prove a defendant's case or reveal an ambiguous situation ultimately interpreted in favor of prison officials.[390] Indeed, defendants' decisions to take these four cases to trial may have reflected discovery showing plaintiffs' claims to be losers. And on the flip side, Menard's high settlement rate could reflect defendants' responses to discovery showing plaintiffs' likelihoods of success. Finally, surviving until trial does not necessarily equate to good discovery; it may merely reflect competing sworn accounts of an event, resulting in a hopeless credibility contest.[391] In sum, discovery likely helped distill these cases' merits, bringing defendants to the table in some cases and disproving plaintiffs' claims in others.

Evidence from Menard and Angola also affirms the information-forcing and dignitary promises of discovery in prison litigation. For example, discovery unearthed wrongdoing at both Menard and Angola, including violent behavior by tact teams and doctored prison records.[392] Such evidence could well lead to larger-scale accountability and attention.[393]

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389. *See supra* notes 266, 338-339 and accompanying text.

390. That said, one Menard trial *did* result in a jury verdict for the plaintiff. The judge reversed it because the plaintiff had not surfaced evidence of a policy or practice sufficient to establish *Monell* liability. Order at 3-6, Howell v. Wexford Health Sources, Inc., No. 16-cv-00160 (S.D. Ill. Oct. 9, 2019), ECF No. 167.

391. Indeed, one federal judge I spoke to claimed that prison litigation often felt "old school," with two competing accounts aired in trial testimony. Telephone Interview with Federal Judge #7, *supra* note 194.

392. *See supra* notes 37-42, 353-376 and accompanying text; *see also* Motion for Leave to File Second Amended Complaint, Exhibits 2, 4, and 5, Thomas v. Wills, No. 22-cv-01105 (S.D. Ill. Aug. 1, 2024), ECF Nos. 74-3, 74-5, 74-6 (providing three witnesses' declarations supporting the plaintiff's account of the tact team's behavior).

393. Indeed, similar allegations concerning behavior by a tact team at Menard and other Illinois prisons spurred a 2015 class-action lawsuit. *See* Ross v. Gossett, No. 15-cv-309, 2020 WL 1472072, at *2 (S.D. Ill. Mar. 26, 2020).

At both the litigant level and beyond, then, the data from Part III confirm that discovery reform is both possible and valuable. Though not the sole place to focus reform efforts,[394] discovery is a compelling place to start.

B. Ideas for Improvement

But how best to do so? This Section recommends five categories of reform that, while not meant to cure all of prison litigation's failures, provide potential first steps to address the issues surfaced above.

1. Counsel

The most important and loftiest reform is a dramatic expansion of access to legal aid.

As Part III has shown, recruited lawyers are vital for prison discovery. For one, lawyers know how to draft discovery requests, conduct depositions, and resolve disputes with opposing counsel. Tellingly, lawyers recruited after discovery's close frequently had to rescue plaintiffs' cases after learning the plaintiff had not utilized discovery at all.[395] Lawyers are also in a unique position to recognize, through discovery and conversations with a client, when wrongdoing is occurring on a systemic scale sufficient to justify broader class advocacy.[396] Further, lawyers enjoy credibility and access that incarcerated people do not. Defendants' lawyers will not only be more likely to talk with a fellow lawyer than with an imprisoned plaintiff, but it is also logistically easier to do so. A lawyer's involvement makes sharing sensitive evidence simpler, and lawyers streamline interactions with the court, reducing confusing or untimely filings. Lawyers also enjoy

394. *See* Driver & Kaufman, *supra* note 45, at 523 ("While drilling down on one issue [in the prison-law context] offers obvious benefits, it can conceal the scope of the problem.").

395. *See supra* notes 276–278 and accompanying text.

396. *See, e.g.*, Press Release, ACLU of Louisiana, Federal Court Rules That Medical Care at Angola Violates Eighth Amendment Prohibition on Cruel and Unusual Punishment (Apr. 1, 2021), https://www.aclu.org/press-releases/federal-court-rules-medical-care-angola-violates-eighth-amendment-prohibition-cruel [https://perma.cc/XB3Y-KNHG] (discussing the successful injunctive class action at Angola prompted by "multiple prisoners' reports of grossly inadequate medical care"); Press Release, Ctr. for Const. Rts., Hundreds of California Prisoners in Isolation to Join Class Action Lawsuit (June 2, 2014), https://ccrjustice.org/home/press-center/press-releases/hundreds-california-prisoners-isolation-join-class-action-lawsuit [https://perma.cc/5X6H-QSZ2] (describing the large class action challenging prolonged solitary confinement at Pelican Bay State Prison, in a case that "amend[ed] an earlier *pro se* lawsuit filed by Pelican Bay SHU prisoners Todd Ashker and Danny Troxell").

court-provided resources for discovery otherwise unavailable to incarcerated plaintiffs, suddenly making tools like depositions and expert reports possible.[397]

If the value of recruiting lawyers was in any doubt, it is made obvious by the ubiquity of incarcerated litigants' motions to recruit them[398] and the clear correlation between recruitment of counsel and successful discovery at Menard.[399] Indeed, the Menard statistics raise the question: is it all simply about the lawyers? Put differently, without lawyers for incarcerated plaintiffs' cases, would reforming discovery in prison litigation *even matter*?

Yes and no. On one hand, lawyers are, for all practical purposes, necessary for certain aspects of prison discovery—they are likely the only real means of accessing depositions, evidence seriously implicating prison security, and expert reports. But as discussed below, there are ways to expand dramatically access to discovery even for unrepresented plaintiffs in prison. Such expansion would matter a great deal in plaintiffs' cases.

And it would be necessary, since appointing lawyers for every incarcerated litigant's case is likely impossible. Sometimes, there are simply no lawyers willing to take a case. Consider *Naranjo v. Thompson*, a Fifth Circuit case involving an incarcerated man who challenged the conditions of his confinement at a private prison in Pecos, Texas.[400] In discovery, Naranjo asked for prison schematics and other documents, which, over security objections, the magistrate judge ordered the defendants to produce under seal.[401] Naranjo thus faced the "Kafkaesque" task of cross-examining a witness at an evidentiary hearing about a document he was *forbidden from seeing*.[402] The district court found that exceptional circumstances justified recruiting counsel, but none of the seven attorneys that practiced in Pecos accepted the appointment.[403] So Naranjo went lawyerless, and defendants won on summary judgment.[404] On appeal, the Fifth Circuit vacated the summary judgment, finding that the district court should have considered compelling a lawyer to take the case after determining that counsel was

397. *See supra* note 186 and accompanying text. Reformers might investigate more creative possibilities to expand access, like pairing medical and law students in clinics to generate free reports for imprisoned litigants.

398. *See id.* at 58 n.51 ("[S]uch motions are ubiquitous, and generally denied . . . .").

399. *See supra* Section III.B; *see also* Littman, *supra* note 186, at 80 (finding that incarcerated people's appeals won at higher rates with recruited counsel).

400. 809 F.3d 793, 795-97 (5th Cir. 2015).

401. *Id.* at 796-97.

402. *Id.* at 800 n.4.

403. *Id.* at 798.

404. *Id.*

necessary.[405] The Fifth is the only circuit to have such a rule; in other circuits—including the Seventh—judges cannot compel lawyers, even when none agree to take a case.[406] So, for judges in districts with a dearth of willing lawyers, recruiting counsel for everyone is not realistic.[407]

Of course, feasibility will differ by district. For some, it may be too expensive or burdensome to expand counsel recruitment or find volunteers.[408] But in other districts, at least some data suggest that judges do not have that much difficulty recruiting counsel for pro se litigants.[409] Nor, where it is infeasible, are full-scale recruitments the only option. Judges can secure counsel for limited purposes, take creative steps like spearheading collaborations with law-school clinics or projects,[410] or, as Colorado recently did, pilot projects that provide phone calls with lawyers to incarcerated people.[411]

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405. *Id.* at 801-07.

406. *See* Pruitt v. Mote, 503 F.3d 647, 653 (7th Cir. 2007) (noting that the discretionary authority to recruit a lawyer in prison cases "does not authorize the federal courts to make coercive appointments of counsel" (quoting Mallard v. U.S. Dist. Ct. for the S. Dist. of Iowa, 490 U.S. 296, 310 (1989))).

407. *See* Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 970-71 (2012) (arguing that due to scarce resources, courts should limit appointment of counsel broadly to criminal cases). Recruiting lawyers for everyone may not even be the wisest approach. One judge I spoke to claimed that bad lawyers occasionally made plaintiffs worse off. *See* Telephone Interview with Federal Judge #6, *supra* note 194. And even with good lawyers, plaintiffs sometimes don't know their luck; according to that same judge, courts sometimes recruit pro bono attorneys for incarcerated plaintiffs from some of the most prestigious and resourced law firms in the country, only to have the plaintiffs seek their withdrawal. *Id.* Indeed, one plaintiff in the 2022 case set from Menard sought the withdrawal of his recruited lawyer, citing his unresponsiveness and incompetence. *See* Motion to Terminate Counsel at 2, 5, 6, Brown v. Hasemeyer, No. 22-cv-01384 (S.D. Ill. Aug. 9, 2024), ECF No. 75.

408. *E.g.*, McCaa v. Hamilton, 959 F.3d 842, 845-46 (7th Cir. 2020) (describing the enormous difficulty of recruiting lawyers for pro se prison cases in the Eastern District of Wisconsin). Some recruited lawyers complain about pursuing what they feel are frivolous claims or traveling to and from the prisons housing their clients. *See* Katherine A. Macfarlane, *Procedural Animus*, 71 ALA. L. REV. 1185, 1212 & n.237 (2020) (discussing the costs for lawyers who travel long distances to meet with clients).

409. *See* Stienstra et al., *supra* note 51, at 26 (noting that "[f]ew chief judges mentioned lack of counsel or difficulties finding counsel" as issues hindering their pro se cases).

410. For an example, see *Prisoners' Rights Project*, N. ILL. U. COLL. L., https://www.niu.edu/law/academics/experiential-learning/prisoners-rights/index.shtml [https://perma.cc/NE3L-L92N].

411. Colorado has recently piloted an effort to allow incarcerated people twenty-minute phone calls with lawyers, after which the lawyer can decide whether to continue to represent the client. Michael Karlik, *The 20-Minute Lifeline: Colorado's Federal Court Eyes a New Program to Aid Those Behind Bars*, COLO. POL. (Aug. 12, 2023), https://www.coloradopolitics.com/courts

Given representation's undeniable and paramount value, courts should thus be as creative as possible in finding ways to connect more incarcerated plaintiffs with representation. But lawyers need not be the sole solution. Observations from Menard suggest that discovery can be markedly improved without counsel. In Menard, discovery exceeded that in Angola well before lawyers were recruited. Frequently, lawyers appeared only after a plaintiff had survived merits summary judgment; the plaintiffs had often already been deposed and received tailored documents, requests for production, and interrogatory responses.[412] And one of the twenty plaintiffs who settled his case in 2016 and all six of those who have settled their cases so far in the 2022 set—two from Angola and four from Menard—were unrepresented.[413] Drawing on lessons from Parts II and III, at least some access to discovery could thus be meaningfully improved without lawyers.

2. Tailoring and Standardization

The Federal Rules' transsubstantive approach to discovery does not work in prison litigation.[414] Prison cases and incarcerated litigants' needs are just too

/colorado-federal-court-eyes-new-program-to-aid-litigants-behind-bars/article_2b9909b4-2d60-11ee-aad7-c3e972974d95.html [https://perma.cc/S32T-LJ2Q].

412. *See, e.g.*, Memorandum and Order at 1, Basemore v. Brookman, No. 16-cv-00562 (S.D. Ill. Mar. 16, 2018), ECF No. 40 (denying the defendant's motion for summary judgment); *Basemore* Order Recruiting Counsel, *supra* note 269, at 1; Memorandum and Order at 2, 10, Davis v. Butler, No. 16-cv-00410 (S.D. Ill. Sept. 29, 2016), ECF No. 15 (determining that "portions of this action are subject to summary dismissal" and directing the magistrate judge to address a request for recruitment of counsel for plaintiff); Memorandum and Order at 8-9, Richard v. Ill. Dep't of Corr., No. 16-cv-00069 (S.D. Ill. Sept. 13, 2018), ECF No. 88 (denying the motion for summary judgment filed by one of the defendants and directing the magistrate judge to recruit counsel for the plaintiff); Memorandum and Order at 1, Daniels v. Butler, No. 16-cv-00101 (S.D. Ill. Feb. 28, 2018), ECF No. 56 (denying in part the motion for summary judgment of two of the defendants); Order at 1-2, *Daniels*, No. 16-cv-00101 (S.D. Ill. Mar. 28, 2018), ECF No. 62 (appointing counsel for the plaintiff); Order Adopting Report and Recommendation at 1-2, Moore v. Hill, 16-cv-00261 (S.D. Ill. Sept. 5, 2018), ECF No. 67 (denying in part the defendants' motion for summary judgment); Memorandum and Order at 2, *Moore*, 16-cv-00261 (S.D. Ill. Oct. 10, 2018), ECF No. 80 (appointing counsel for the plaintiff).

413. *See supra* notes 239, 313 and accompanying text.

414. Indeed, as the PLRA demonstrates, transsubstantivity does not exist with respect to prison litigation to begin with. *See* Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 70-71 (2019) (pointing to the PLRA and many other contexts and noting that "the reality is that the transsubstantive ship has, for better or worse, sailed").

unique. However, most evidentiary needs *within* prison cases are predictable, meaning that standardization can serve the evidence-gathering process.[415]

Take initial disclosures. A list as vague as that in the Federal Rules—requiring parties to send "a copy . . . of all documents . . . that the disclosing party . . . may use to support its claims"—will leave imprisoned plaintiffs with no idea what to provide and prisons with an easy excuse for giving nothing at all.[416] What if, instead, judges either required or advised the parties to share more specific types of information? Judges in individual districts could meet to make a list of common evidence sought by claim type to include in a uniform scheduling order.[417] Courts could seek input from pro se clinics, prisons, and staff attorneys to create protocols concerning information to share immediately in different types of Section 1983 cases. These could include information pertinent to identifying defendants, agreements about information to redact (subject, on request, to in camera review by the judge), and the like. Indeed, some judges in the Southern District of Illinois did just this, directing disclosure of specific information to helpful effect.[418]

Of course, questions remain as to how cooperative the parties would be. Assuming recalcitrance on either side, judges could wield Rule 11 sanctions more liberally for failure to provide disclosures mandated by local rules—a practice seen in the Menard cases discussed in Part III.[419] Courts could likewise fashion

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415. I focus on case management in part because the judiciary remains both committed to case management as the means of resolving disputes and best positioned to do so. *See* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L. J. 669, 673 (2010) ("[T]he institutional judiciary's commitment to the case-management model has, if anything, increased over time."). As "managerial judging" grows in scope, embracing the practice for prison cases seems the practical suggestion for here and now. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 379-80 (1982) (diagnosing this trend); Samuel Issacharoff & Troy A. McKenzie, *Managerialism and Its Discontents*, 43 REV. LITIG. 1, 4 (2023) (noting that today's "reservoir of experiential command over the administration of litigation, in cases both large and small" amounts to "the staple of everyday life"). Finally, judges have always played a unique and powerful role in prison litigation, helping to define the scope and nature of incarcerated people's rights. *See, e.g.*, Judith Resnik, Hirsa Amin, Sophie Angelis, Megan Hauptman, Laura Kokotailo, Aseem Mehta & Madeline Silva, *Punishment in Prison: Constituting the "Normal" and the "Atypical" in Solitary and Other Forms of Confinement*, 115 NW. U. L. REV. 45, 53, 136-58 (2020) (describing lower courts' variation in applying standards applicable to claims challenging solitary confinement, noting that "judges—and the law they make—are always present in prisons").

416. FED. R. CIV. P. 26(a)(1)(A)(ii).

417. One court has found imposing additional disclosure requirements for defendants in prison cases inconsistent with Rule 26. Thompson v. Gonzales, No. 15-cv-301, 2016 WL 5404436, at *2-3 (E.D. Cal. Sept. 27, 2016). Other courts have not done so. *See supra* note 114 and accompanying text.

418. *See supra* notes 248-255 and accompanying text.

419. *See supra* notes 197, 298 and accompanying text.

unique relief for situations in which prisons fail to disclose mandated information in a timely fashion, including adverse instructions to a jury.

Courts could provide tailored discovery guidance or recommendations to prison litigants and lawyers for prison defendants. This would be a discovery checklist specific to constitutional claims, listing documents to seek, people from whom to obtain affidavits, and the like. Courts could issue this checklist to incarcerated litigants in a pro se handbook, provided upon filing. Prison litigation coordinators could play a more substantial role in providing the same. Prisons could institute courses to train would-be litigants about discovery. For state attorney-general offices with high turnover, an authority guiding new lawyers on the appropriate evidence to provide and seek could be of significant help in facilitating the process.

And as discussed in more depth below, districts could also facilitate meetings between judges and corrections officials, state attorneys general, formerly or presently incarcerated people, prison-rights lawyers, and scholars to better understand what evidence is normally actually available—what types of investigation files exist, what logbooks are kept, where cameras are located—that might be pertinent to incarcerated people's claims. All of this can build toward more consistent treatment of evidentiary issues in these cases.

3. Judicial Oversight

Judges' potential value in shepherding prison litigation goes beyond standardized case-management orders. They also can and ought to play a more active oversight role in this type of litigation for which the adversarial process, I have attempted to show, is inadequate. Judges can ensure that incarcerated litigants do not get lost in the process and that all parties know and follow the rules.

Judges could actively check in on the status of pending prison litigation. For example, courts could require the parties to meet briefly and confer at least once or twice during discovery.[420] Defendants' lawyers could issue written or oral status reports detailing discovery shared between the parties, outstanding discovery requests, and pending disputes. In turn, judges could hold telephonic status hearings to resolve conflicts and explain next steps.

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420. Some courts avoid this practice in prison litigation. *See* Rogers v. Giurbino, 288 F.R.D. 469, 478 (S.D. Cal. 2012) (waiving the meet-and-confer requirement due to an incarcerated plaintiff's difficulties); McMaster v. Spearman, No. 10-CV-01407, 2014 WL 508677, at *2-3 (E.D. Cal. Feb. 6, 2014) ("[I]n cases such as this, the parties were relieved of the meet and confer requirement . . . ."). But it is not clear why. Brief meetings should not be unduly inconvenient for the parties. Indeed, one judge told me the process was usually seamless, save one prison that made scheduling calls difficult. Telephone Interview with Federal Judge #5, *supra* note 147.

One judge I spoke to occasionally conducts "show-up" identification procedures to help plaintiffs name unidentified defendants.[421] In these procedures, the plaintiff joins a video conference, is shown anonymized photographs of every correctional official "who fit the description," and picks out the appropriate defendant.[422]

Judges can also implement more casual guidance. They can make a point of providing oral advice to incarcerated plaintiffs—and admonishments of defendants' counsel—during hearings, ensuring that plaintiffs are not floundering or being given the runaround. As one judge said to me, "You'd be surprised how good a twenty-minute phone call can be."[423]

This is not a common practice. Many judges relegate all discovery in pro se prison cases to written motions, keeping the difficulties at arm's length.[424] Indeed, one judge who had transitioned to using more telephone conferences admitted to me that, though they were "not sure why, there's a lot of resistance" from other judges to doing so.[425]

The written alternative, however, is poor. Steeped in legalese, orders and motions can only do so much for the plaintiffs who do not have sufficient experience or know-how to parse them. It's an easy way to make them feel powerless. In the same judge's words, "[P]aper is a very poor substitute for people."[426]

Instead, a preliminary telephonic status hearing provides a vital opportunity for a judge to explain what the parties each should be providing or seeking:

> *The disclosure order I gave says "people with knowledge related to claims or defenses"—that means witnesses, like your cellie, or the guy across the hall. Put him and everyone else who may have seen something on the list. And the government will have to do the same thing for you. So the burden is not just on you.*[427]

The same is true for ensuring that incarcerated litigants do not lose a case on technicalities:

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421. Telephone Interview with Federal Judge #6, *supra* note 194.

422. *Id.*

423. *Id.*

424. *See supra* notes 243-244 and accompanying text.

425. Telephone Interview with Federal Judge #6, *supra* note 194; *see also* Telephone Interview with Federal Judge #4, *supra* note 147 (noting judges' aversion to having teleconferences with unrepresented incarcerated plaintiffs).

426. Telephone Interview with Federal Judge #6, *supra* note 194.

427. This italicized quote and the one that follows are paraphrases of examples a judge gave me of things he typically describes to incarcerated plaintiffs in telephonic status hearings. Telephone Interview with Federal Judge #4, *supra* note 147.

> *The defendant has filed a motion for summary judgment. In your response, be sure not just to write down why they are wrong. You should point to specific documents that contradict their story. Any time you want to argue with what they say happened, make sure to write down where I can find a document that supports what you're saying, including page numbers.*[428]

Incarcerated litigants can also ask the judge questions. In one instance, a judge I spoke to discussed a plaintiff who, while pursuing a medical deliberate-indifference claim, expressed confusion and reluctance to sign a protective order.[429] That concern was alleviated when the judge explained that the Health Insurance Portability and Accountability Act protected the man's medical records, so the protective order would just prevent anybody outside of the parties from reading them.[430] In other situations, defendants raised concerns that could be quickly hashed out, like the plaintiff refusing to leave their cell for a deposition.[431]

Vitally, this kind of oral advice during hearings personalizes a litigation process that is profoundly impersonal. Incarcerated people face a cold set of constitutional and statutory barriers to courts ever hearing their complaints.[432] For those who make it far enough, a human voice explaining things is a nontrivial step away from that detached default.

These telephonic status conferences were common in the 2016 Menard cases; plaintiffs' success in the Southern District of Illinois indicates their value.[433] And outside that district, a subset of judges I spoke to make a point of conducting oral hearings. One judge sets aside an entire day each month to hold telephonic status hearings for only pro se litigants.[434] In his words, these days are "long" and "painful," but valuable.[435] The value is twofold. Setting aside more time for phone calls can streamline the rest of litigation. It is also valuable to the litigants. According to the judge, most pro se plaintiffs "want someone in authority to listen to them."[436] Incarcerated litigants, who the judge described as feeling like "the world is against them," got to hear a lineup of fellow plaintiffs during the

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428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *See supra* Section I.A.

433. *See supra* notes 245-246 and accompanying text (providing examples of a plaintiff who succeeded in the Menard cases after participating in a telephonic status conference and one who failed in the Angola cases without a status conference).

434. Telephone Interview with Federal Judge #4, *supra* note 147.

435. *Id.*

436. *Id.*

conferences, and this helped suggest that they "weren't alone."[437] The process bred a "comfort level" and a sense of "less isolation."[438] These are laudable goals.

4. Depositions

Depositions of both parties are vital to prison litigation. As the Menard cases show, depositions of plaintiffs were often the reason cases made it to trial.[439] And imprisoned plaintiffs' inability to conduct their own depositions is a profound disadvantage. There are ways to change this.

First, prisons could make provisions for inexpensive telephonic depositions. Allowing plaintiffs to conduct telephonic depositions would remove the security concerns associated with those conducted in person. Prisons could also provide cheap recording devices, whose recordings could be emailed to or otherwise shared with state attorneys to file with the court. The advent of artificial intelligence and improved computer-dictation software also makes it likely that prisons could cheaply or freely transcribe depositions, such that plaintiffs and prison defendants could simply read the computer-generated transcript and agree that it accurately reflects the conversation.[440] Doing so would reduce both the time and money risked in plaintiff-initiated depositions and would allow incarcerated litigants access to discovery tools nominally available to them. If all else fails, judges could simply recruit lawyers for the limited purpose of conducting such depositions, the costs of which could be reimbursed by court funds.[441]

It is reasonable to worry that making it easier for incarcerated people to conduct depositions would have negative effects. Most obviously, such depositions might be time-consuming and inconvenient for prison officials. But given that depositions occur only after a plaintiff has survived dismissal on the pleadings, and given that the Federal Rules allow parties in civil litigation to depose one another, it is unclear why prison guards should be treated any differently than other defendants. Because prison officials face frequent litigation, they might be deposed more than typical state defendants, which could put strains on the prison system. But whether and to what extent this burden comes to fruition should be the product of experimentation rather than written off as a fait

437. *Id.*

438. *Id.*

439. *See supra* note 266 and accompanying text.

440. *See ChatGPT and the Future of Transcription Services*, AICONTENTFY (Aug. 16, 2024), https://aicontentfy.com/en/blog/chatgpt-and-future-of-transcription-services [https://perma.cc/AM5G-7MCD].

441. *See* Hammond, *supra* note 111, at 2719 & n.218 (describing different districts' reimbursement of costs incurred by recruited pro bono attorneys).

accompli. The vanishingly few examples I found of incarcerated plaintiffs taking depositions showed the overblown nature of safety or administration concerns. As one magistrate judge noted in granting a plaintiff's motion to conduct a Zoom deposition, that plaintiff had deposed defendants and witnesses in the past "without issue," and "[n]one . . . resulted in threats or harm."[442]

5. Forcing Disclosure and Finding Footage

Finally, prison defendants' routine invocations of security concerns should not go untested.[443] And courts should take measures to prevent and police the disappearance of evidence—particularly, surveillance footage—relevant to plaintiffs' claims.[444] There are a few ways to improve these pervasive problems in prison discovery.

First, to inform their decisions on security disputes, judges, staff attorneys, and clerks should be better educated about the prison environment—a way of combating judges' differing, sometimes-selective understandings of what goes on inside prisons.[445] Second, judges should work to understand more fully the security implications of different types of documents relevant to prison litigation. Meetings between district and magistrate judges, corrections officials, prison-rights lawyers, formerly incarcerated people, and state attorneys could help judges determine what evidence to admit, redact, or protect from disclosure. Districts could produce prison-specific lists of items implicating security concerns and suggestions of remedies or redactions. This could streamline security-related discovery disputes by giving a default solution from which the parties could diverge if unique circumstances so required. Third, judges could adopt tools to deal with confidential information. Judges can review documents in camera to confirm security risks and can institute protective orders and recruit

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442. Order Granting Plaintiff's Motion for Court Order to Conduct Depositions at 2, Gevas v. Wexford Health Sources, Inc., No. 20-cv-50146 (N.D. Ill. Apr. 8, 2022), ECF No. 191. In another case, Gevas had deposed five officials, including the warden, without issue. *See* Plaintiff's Response to Defendants Ronald Skidmore, Nikki Malley, Kimberly Butler, and Richard Harrington's Statement of Undisputed Material Facts, Exhibits C, E, L, M, and N, Gevas v. Shearing, No. 14-cv-00134 (S.D. Ill. Dec. 12, 2016), ECF Nos. 345-3, 345-5, 345-12, 345-13, 345-14.

443. *See supra* notes 156-158 and accompanying text. For an example of judges in the Southern District of Illinois compelling disclosure of evidence the defendant tried to avoid sharing by invoking security, see *supra* notes 294-297 and accompanying text.

444. *See supra* notes 164-166 and accompanying text.

445. *See* Driver & Kaufman, *supra* note 45, at 547-48 (noting that the Supreme Court "selectively and inconsistently" invokes the idea of prison as a violent place versus simply an "uncomfortable but tolerable" place).

attorneys to review secure documents.[446] Prison's dangers should not keep relevant evidence unseen.

Beyond testing security objections, facilitating prison discovery must include forcing disclosure and punishing the lack thereof. Judges in the Menard cases, for example, were quick to do so, policing delay or refusal to provide evidence.[447]

Reforms are also necessary to ensure that evidence is preserved. Take surveillance footage, which prisons overwrite frequently and quickly.[448] To address the resource constraints behind these prison practices, state legislatures should fund improvements to prison video surveillance and video storage. Surveillance footage can provide helpful evidence for understanding what occurred, especially in cases involving use of force.[449] By taking better videos covering a larger area of the prison and storing them longer, prison surveillance systems would improve access to neutral evidence concerning plaintiffs' claims. This avenue of reform is perhaps the most likely to receive support from prison officials because video-surveillance systems help prisons ensure safety.[450] Numerous prison officials told me they desired more accessible surveillance footage, in part because they felt it would resolve meritless claims.[451] And given that constant supervision is already a fact of life in prison, fears of overpolicing and bias that typically

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446. *See, e.g.*, Gross v. Lunduski, 304 F.R.D. 136, 157 (W.D.N.Y. 2014); White v. Jindal, No. CV 13-15073, 2016 WL 1275401, at *2 (E.D. Mich. Apr. 1, 2016).

447. *See supra* notes 251-257, 288-293, 299-303 and accompanying text.

448. *See, e.g.*, *Budget Change Proposal: Statewide Implementation of Fixed Video Surveillance*, *supra* note 165, at [4] (seeking to implement new and improved video technologies that, "[u]nlike older video surveillance technologies used at [the California Department of Corrections and Rehabilitations], . . . will be stored for at least 90 days").

449. *See, e.g.*, Ransom & Tiefenthäler, *supra* note 211 (discussing a civil suit, which involved surveillance footage of guards watching a detained person hang himself, that settled for $28 million).

450. *See, e.g.*, *Budget Change Proposal: Statewide Correctional Video Surveillance Continuation*, CAL. DEP'T OF CORR. & REHAB. [6] (Jan. 10, 2022), https://bcp.dof.ca.gov/2223/FY2223_ORG5225_BCP5061.pdf [https://perma.cc/85T9-YXDC]; *On the Inside and Out: How Video Surveillance Is Essential to Prison Security*, SALIENT SYS., https://www.salientsys.com/about-salient/customer-stories/how-video-surveillance-is-essential-to-prison-security [https://perma.cc/62TU-T6YS] ("For prisons and correctional facilities, . . . advanced video surveillance . . . is a necessity that enables correctional facilities to stay safe and secure."); *Security Video System Standards for Correctional Facilities*, WASH. STATE DEP'T OF CORR. 3 (June 11, 2014), https://www.doc.wa.gov/about/business/capital-planning/docs/security-video-system-standards-correctional-facilities.pdf [https://perma.cc/DY2L-G9RE].

451. Telephone Interview with Prison Official #1, *supra* note 94; Telephone Interview with Prison Official #2, *supra* note 94.

attend increased surveillance appear less persuasive here.[452] Numerous formerly incarcerated people I interviewed for this Article echoed the desire for more video cameras.[453]

Even without improvements to video storage, there are means to police the disclosure of footage. Before 2015, incarcerated litigants had limited recourse in cases in which video had been overwritten before a discovery request.[454] But Rule 37(e), adopted in the 2015 amendment to the Federal Rules of Civil Procedure, treats the loss of "electronically stored information that should have been preserved in the anticipation or conduct of litigation" as damning.[455] If a party was on notice and "failed to take reasonable steps to preserve it," and the loss of the evidence prejudiced the other party, the court can respond by "order[ing] measures no greater than necessary to cure the prejudice."[456] If, on the other hand, the court finds the destruction intentional or in bad faith, it can "presume that the lost information was unfavorable" and give an adverse instruction, dismiss the case, or enter default judgment.[457]

Rule 37(e) represents a potentially powerful tool for incarcerated plaintiffs who have repeatedly requested videos of their attacks: in doing so, they may effectively argue that the prison was put on notice that they should prevent relevant footage from being destroyed. Some have argued along these lines and found success.[458] For example, courts increasingly appear willing to accept

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452. For pieces skeptical of increased surveillance regimes *outside* prison, see Andrew Guthrie Ferguson, *Persistent Surveillance*, 74 ALA. L. REV. 1, 4 (2022); Elizabeth E. Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. REV. ONLINE 19, 38 (2017); and Nicol Turner Lee & Caitlin Chin-Rothmann, *Police Surveillance and Facial Recognition: Why Data Privacy Is Imperative for Communities of Color*, BROOKINGS INST. (Apr. 12, 2022), https://www.brookings.edu/articles/police-surveillance-and-facial-recognition-why-data-privacy-is-an-imperative-for-communities-of-color [https://perma.cc/U9G5-VR8Q].

453. Telephone Interview with Percy Levy, Formerly Incarcerated Litigant #5, *supra* note 175; Zoom Interview with Formerly Incarcerated Litigant #11, *supra* note 212. One federal judge I interviewed noted that plaintiffs seek video footage "all the time." Interview with Federal Judge #4, *supra* note 147.

454. *E.g.*, Bracey v. Grondin, 712 F.3d 1012, 1015 (7th Cir. 2013) (describing a Wisconsin prison's policy limiting the preservation of recordings of officers' use of force against incarcerated people).

455. FED. R. CIV. P. 37(e).

456. FED. R. CIV. P. 37(e)(1).

457. FED. R. CIV. P. 37(e)(2).

458. *See, e.g.*, Johns v. Gwinn, 503 F. Supp. 3d 452, 466 (W.D. Va. 2020) (finding for the plaintiff and reducing the weight given to the defendants' testimony about what overwritten surveillance footage showed, since litigation was foreseeable after the plaintiff filed a grievance and complained about the incident); Barnes v. Harling, 368 F. Supp. 3d 573, 607 (W.D.N.Y. 2019) (noting precedent that the "duty to preserve may attach when an inmate . . . files grievances

arguments that a prison is on notice and must preserve video footage after an incarcerated person has filed a grievance.[459] In the absence of a showing of bad faith, at least one court has remedied prejudicial loss of video under Rule 37(e)(1).[460] And some courts have found evidence of bad faith in defendants' selective but incomplete preservation of video, a pattern of cases involving similar allegations, or other suspicious circumstances.[461]

Other courts, however, appear less receptive. Some reject plaintiffs' claims, even accepting a failure of the prison's duty to preserve, because the plaintiff failed to prove that the video's loss was prejudicial.[462] And some courts seem to

about the incident"); Bistrian v. Levi, 448 F. Supp. 3d 454, 471 (E.D. Pa. 2020) (noting that the "United States reasonably should have anticipated litigation" and preserved footage after a violent encounter between two incarcerated people, noting that such incidents "commonly lead[] to civil litigation"); Wall v. Rasnick, 42 F.4th 214, 222-23 (4th Cir. 2022) (citing and discussing Rule 37(e) in finding the magistrate judge erred in requiring the plaintiff to prove that the prison *intentionally* disposed of video recordings, noting that the Rule allows measures to cure the prejudice resulting from loss of evidence due simply to the failure to take reasonable preservation steps).

459. *See, e.g.*, Allen v. Richardson, No. 16-cv-410, 2019 WL 135683, at *2 (W.D. Wis. Jan. 8, 2019) (finding that the grievance put the prison on notice that "legal action was imminent," but finding neither prejudice nor bad faith sufficient for sanctions under Rule 37(e)(1)); Disedare v. Brumfield, No. CV 22-2680, 2024 WL 1526699, at *7 (E.D. La. Apr. 9, 2024) ("Other courts in this district . . . have found that the filing of an [Administrative Remedy Program request] is sufficient to trigger the duty to preserve.").

460. Falkins v. Goings, No. CV-21-1749, 2022 WL 17414295, at *4 (E.D. La. Dec. 5, 2022) (finding prejudice where the plaintiff alleged he was severely beaten in a prison office, and video showing him being escorted to and from that office disappeared, then ordering that the defendants be bound to their early—but later contradicted—stipulation that the plaintiff could walk before going into the office).

461. *E.g.*, *Disedare*, 2024 WL 1526699, at *13-14 (deferring judgment on Rule 37(e)(2) sanctions, but noting that there was evidence of bad faith where defendants had "selectively preserved," and past cases showed the same prison repeatedly failing to preserve video evidence); Franklin v. Stephenson, No. 20-CV-0576, 2022 WL 6225303, at *10 (D.N.M. Feb. 16, 2022) (finding bad faith where evidence from a hearing showed that the defendant gave "contradictory testimony" and equivocated about not preserving certain video footage), *report and recommendation adopted*, No. 20-CV-576, 2022 WL 6103342 (D.N.M. Oct. 7, 2022), *appeal dismissed sub nom.* Franklin v. Martinez, No. 22-2137, 2023 WL 4995037 (10th Cir. Aug. 3, 2023).

462. *E.g.*, *Allen*, 2019 WL 135683, at *2 (finding no prejudice because "Allen served no requests for documents or discovery related to the existence of a video, and neither party has suggested that there actually was video footage taken of the general area where the incident took place, much less that the video footage actually captured the incident or would have conclusively established that Allen should succeed on his claim"); Spears v. Tyler, No. 20-CV-894, 2021 WL 4845798, at *2 (E.D. Wis. Oct. 18, 2021) (finding no prejudice before the summary-judgment stage because the plaintiff had a photo of his black eye and the court could not foresee how additional video would help before trial); Mixon v. Pohlman, No. CV 20-1216, 2022 WL 2867091, at *1, *8-9 (E.D. La. July 21, 2022) (finding no prejudice where evidence suggested

stop once they find the plaintiff has not shown bad faith, ignoring the possibility of issuing the less extreme remedy the Rule affords for more innocent—but nevertheless prejudicial—destruction of electronic evidence.[463]

Whatever courts' approaches, it appears that, inch by inch, Rule 37(e) is surfacing in prison litigation. Indeed, in two cases observed in the 2022 set from Angola, plaintiffs appear to be catching on to Rule 37(e)'s potential: in one case, the plaintiff pointedly referenced having asked the prison to preserve footage in his grievance; in the other, the plaintiff sought court intervention to preserve video evidence *before* he had filed a grievance, afraid the exhaustion process would take long enough that the footage would be overwritten.[464] The latter approach, though unsuccessful, is understandable. As at least one court has observed, the short retention window some prisons employ before overwriting footage is "problematic" because "prisoners who are in the process of attempting to obtain relief using the jail's administrative remedies . . . are vulnerable to losing potentially important, if not dispositive, footage simply because they are following the prerequisites to filing a federal lawsuit."[465]

Of course, video evidence alone will not uncover the truth in every case. Videos can be murky, and they do not always resolve disputed accounts of an event.[466] But given that such footage represents a closer-to-neutral view of events in prison, videos are vital resources for ensuring fairness in the

that a detainee in jail, who died after four days due to severe medical problems, was not in medical distress during the period covered by the lost footage); Harvey v. Hall, No. 17-cv-00113, 2019 WL 1767568, at *7 (W.D. Va. Apr. 22, 2019) (finding no prejudice where the plaintiff could not point to evidence suggesting that a surveillance camera would have captured his hand being smashed in a food-tray slot).

463. *See, e.g.*, Dunn v. La. Dep't of Pub. Safety & Corr., No. CV-20-425, 2022 WL 2232189, at *2 (M.D. La. June 21, 2022) (ignoring Rule 37(e)(1) and denying relief entirely on the bad-faith prong of Rule 37(e)(2) where the plaintiff sought sanctions); Hamilton v. Orr, No. 21-199, 2022 WL 17254756, at *2 (M.D. La. Nov. 28, 2022) (reading the plaintiff's motion seeking adverse instruction and finding no evidence of the prison's bad faith, ignoring Rule 37(e)(1)'s prejudice prong); Ford v. Anderson County, 102 F.4th 292, 323-24 (5th Cir. 2024) (affirming the district court's denial of sanctions based solely on a lack of evidence of bad faith); Leonard v. St. Charles Cnty. Police Dep't, 59 F.4th 355, 364 (8th Cir. 2023) (affirming the denial of a Rule 37(e) motion for adverse instruction because there was insufficient evidence that "anyone deleted the video on purpose").

464. *See supra* notes 345-347 and accompanying text.

465. *Allen*, 2019 WL 135683, at *2.

466. *See* German Lopez, *The Failure of Police Body Cameras*, Vox (July 21, 2017, 10:00 AM EDT), https://www.vox.com/policy-and-politics/2017/7/21/15983842/police-body-cameras-failures [https://perma.cc/5PUS-93UK].

proceedings.[467] Courts' openness to claims under Rule 37(e) thus has outsize importance in making prison discovery fairer. Accordingly, when a plaintiff files a grievance about which surveillance footage would potentially be informative—excessive force in the prison yard, a failure to protect against an attack in the mess hall, or a failure to treat a visible medical episode—a prison defendant should be on notice to preserve the footage. Failure to do so should result in remedies under the Rule—either via Rule 37(e)(1) or (2). At the very least, a judge should take curative measures under Rule 37(e)(1) upon a finding of prejudice and instruct a jury that the defendants had a duty to preserve the evidence, they did not do so, and the video was relevant to the plaintiff's allegations.[468] Without the footage itself, these judicial responses would help prevent the evidence's disappearance from destroying an otherwise-litigable claim. Ideally, the Rule will incentivize prisons not to destroy the footage in the first place.

CONCLUSION

Having begun with Willie Berry's story, I end with Phillip Littler's.[469] When Littler, incarcerated at Wabash Valley Correctional Facility in Indiana, refused to submit to a strip search—the strip, he later claimed, was to "degrade" him for having filed a previous grievance—correctional officers sprayed him with a chemical agent, shot him in the face point-blank with a pepperball gun, and pummeled his head with their fists until he bled from nose and mouth.[470] Littler was taken to see Nurse P. Hagemeier who, he alleged, "attempted to wipe some dried blood that was caked into [his] mustache for a mere second and then immediately abandoned her effort when she realized that such would be a prolonged task to actually clean."[471]

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467. *See* Johns v. Gwinn, 503 F. Supp. 3d 452, 467 (W.D. Va. 2020) ("The significance of such video evidence to Plaintiff's claims can hardly be overstated. To litigants like Plaintiff with diminished credibility given their past convictions for crimes involving lying, cheating, or stealing, evidence providing an 'unbiased and dispassionate depiction of events' is uniquely valuable." (quoting Jenkins v. Woody, No. 15-CV-355, 2017 WL 362475, at *18 (E.D. Va. Jan. 21, 2017))).

468. *See* DR Distribs., LLC v. 21 Century Smoking, Inc., 513 F. Supp. 3d 839, 982 (N.D. Ill. 2021) (instituting similar curative measures under Rule 37(e)(1)).

469. David Gevas, currently incarcerated in Illinois, cited this case in a (successful) filing asking for leave to depose a prison official; his filing directed me to the case, and I am indebted to him. *See* Plaintiff Reply in Opposition to Defendants Joint Responses in Opposition to Plaintiff Motion for Court Order to Conduct Depositions as Agreed Upon at 2, Gevas v. Wexford Health Sources, Inc., No. 20-cv-50146 (N.D. Ill. Mar. 16, 2022), ECF No. 172.

470. Littler v. Martinez, No. 16-cv-00472, 2018 WL 4361636, at *3-5 (S.D. Ind. Sept. 13, 2018).

471. Littler v. Martinez, No. 16-cv-00472, 2018 WL 4591964, at *4 (S.D. Ind. Sept. 25, 2018).

Littler sued the officers and medical personnel pro se. He was an "exceedingly competent" litigant, and, with the court's help, he was able to navigate discovery.[472] After the judge sided with him on a motion to compel, the defendants produced emails concerning the incident.[473] In one, Captain Amanda Pirtle informed Assistant Superintendent Frankie Littlejohn that Littler was refusing to strip; Littlejohn responded: "There is no min distance for the pepperball, correct? I'm in the giving mood so . . . lets shoot him."[474] Pirtle responded, "I love that. lol."[475] This directly contradicted Littlejohn's sworn testimony, also produced during discovery, that as a supervisor, "the only order he issued was for Mr. Littler's cell to be inspected weekly."[476]

In another email, Major Dusty Russell represented that he would preserve surveillance footage that partially showed the pepperball gun shooting.[477] But "when Mr. Littler specifically asked for video evidence from the range camera during discovery, State Defendants' counsel informed Mr. Littler and the Court that no such video exists, as the range camera footage is only preserved for a limited period."[478] The video evidence Littler *was* able to receive showed officers standing to block the camera's view of his beating.[479]

Nurse Hagemeier, too, gave sworn statements. She claimed Littler had "minor injuries to his nose and lip," that she "cleaned the areas, made a visual assessment, and took the patient's vitals," and that he "made no complaints regarding being sprayed with chemical or being shot with a pepper spray gun."[480] In a second affidavit, she claimed that she "checked to see if [Littler's] pupils were reactive, which they were"—had they not been, she claimed, it would have been grounds for infirmary care.[481] And later, at a hearing to defend herself from being sanctioned for perjury, she claimed that when she asked Littler if he wanted ice, he said, "You can go to hell."[482]

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472. Littler v. Martinez, No. 16-cv-00472, 2019 WL 1043256, at *2 (S.D. Ind. Mar. 5, 2019) (quoting Transcript of Show Cause Hearing at 119, *Littler*, No. 16-cv-00472 (S.D. Ind. Dec. 17, 2018), ECF No. 235).

473. *Littler*, 2018 WL 4361636, at *2.

474. *Id.* at *4.

475. Littler v. Martinez, No. 16-cv-00472, 2020 WL 42776, at *13 (S.D. Ind. Jan. 3, 2020).

476. *Littler*, 2018 WL 4361636, at *2.

477. *Id.* at *6.

478. *Id.*

479. *Id.* at *7.

480. Littler v. Martinez, No. 16-cv-00472, 2018 WL 4591964, at *3 (S.D. Ind. Sept. 25, 2018).

481. Littler v. Martinez, No. 16-cv-00472, 2019 WL 1043256, at *7 (S.D. Ind. Mar. 5, 2019).

482. *Id.* at *8.

Shockingly, Littler's appointment with Hagemeier was caught on surveillance footage — "one of the few, if not only" times the judge adjudicating his case had seen such evidence in a prisoner civil-rights case.[483] Littler could be heard in the footage telling Hagemeier: "[F]or the record, they shot me in the face three times, [and] punched me in the head several times. I didn't resist."[484] The footage also showed his eyes swollen completely shut; checking his pupils would be impossible.[485] And he never said "go to hell."[486]

Judge Magnus-Stinson sanctioned the defendants and their lawyers, entering judgment in Littler's favor against all but one.[487] She paused, however, to note that it was only due to the "'perfect storm' of Mr. Littler's litigation skills and the existence of video evidence" that the "egregious misconduct in this case [was] uncovered."[488] She went on:

> [T]he Court very easily could have granted the State Defendants' motion for summary judgment based on their litany of false evidence. By way of understatement, the Court is disturbed by this prospect. The Court wonders in how many other actions such misconduct may have occurred.
>
> . . . [I]n almost every prisoner civil rights case, the State Defendants and their counsel know that the pro se plaintiff will only be able to rebut their evidence with his own lay testimony and whatever evidence they provide during discovery. Prisoners rarely are able to conduct depositions, and untestable or untested defense affidavits are almost always the foundation of a defense motion for summary judgment. Under these circumstances, it is paramount for the Court to be able to trust that the information and sworn statements provided by defendants are truthful. This case has shattered that trust.[489]

One other thing haunted Judge Magnus-Stinson. What would "deter parties" from the egregious falsehoods uncovered by Mr. Littler "when so many defendants know there will be no evidence other than the testimony of a pro se prisoner to contradict their" own?[490]

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483. *Id.* at *11.

484. *Id.* at *13 (second alteration in original).

485. *Id.* at *7.

486. *Id.* at *9.

487. *Id.* at *10; Littler v. Martinez, No. 16-cv-00472, 2020 WL 42776, at *21-22 (S.D. Ind. Jan. 3, 2020).

488. *Littler*, 2020 WL 42776, at *2.

489. *Id.* at *2-3.

490. *Littler*, 2019 WL 1043256, at *11.

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Discovery wins and loses cases. It is also among the most difficult stretches of litigation. The process is inaccessible for incarcerated people, especially those representing themselves. The inadequate mechanisms in place result in poorly litigated cases, inefficient use of court and prison resources, and, for many, no way to prove violations of their rights. These failures leave real harms unexposed and undeterred.

No single fix is perfect, nor does reform come without trade-offs. But evidence gathering in prison is broken. Those invested in imprisoned people's access to meaningful justice would do well to confront the realities of prison discovery and to search for ways forward.