

THE PRISON MAILBOX RULE AND PASSIVELY REPRESENTED PRISONERS

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INTRODUCTION

Convicted of murder and adamant of his innocence, a prisoner decides to file a notice of appeal within the legally allowable time period.¹ Unfamiliar with the legal process, the prisoner personally drafts the notice without counsel and hands it over to prison authorities to mail to the courthouse. For reasons beyond the prisoner's control, the notice arrives a day late. Given that the notice was transferred to prison authorities before the time period expired, is it to be dismissed as untimely?

The Supreme Court answered no in *Houston v. Lack*,² a case involving a prisoner proceeding pro se³—that is, without the representation of counsel. In an opinion by Justice Brennan, the Court applied the common law mailbox rule to the prisoner's notice of appeal and held that the notice of appeal was filed when given to prison authorities.⁴ However, the Supreme Court neither limited its holding to pro se prisoners nor indicated that its ruling also applied to represented prisoners.⁵ As a result, federal courts are now divided on whether the "prison mailbox rule" applies only to pro se prisoners or also to those represented by counsel.

This Comment addresses whether the Supreme Court's opinion in *Lack* supports an extension of the prison mailbox rule to represented prisoners, and concludes that, under certain circumstances, the extension is warranted.

Part I identifies the common law mailbox rule's many rationales followed by a close examination of the Supreme Court's extension of the rule to pro se prisoners in *Houston v. Lack*. Next, Part I discusses the resulting circuit split on the prison mailbox rule's application to represented prisoners and the jurisdictional issues at stake. Part II argues that Justice Bren-

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¹ In federal court, a criminal defendant has ten days to file a notice of appeal running from the entry of judgment. FED. R. APP. P. (4)(b)(1)(A)(i).

² 487 U.S. 266 (1988) (five to four decision).

³ *Id.* at 268-69.

⁴ *Id.* at 276.

⁵ *E.g.*, *Piacentini v. Levangie*, 998 F. Supp. 86, 89 (D. Mass. 1998) ("Nothing in the language of *Houston* precludes an extension of that reasoning beyond the facts and circumstances of that case.").

nan's majority opinion in *Lack* implicitly adopts the traditional rationales offered for the common law mailbox rule and analyzes under what circumstances, if any, *Lack* would support the prison mailbox rule's application to represented prisoners. Part III examines the policy considerations implicated by the prison mailbox rule and those identified by the Supreme Court in *Lack*.

I. BACKGROUND

In analyzing whether the prison mailbox rule applies to represented prisoners, it is important to understand the reasoning offered in support of the common law mailbox rule. This Part addresses that topic first and then looks at the facts and reasoning of the Supreme Court's decision in *Houston v. Lack*. The third section of this Part examines the arguments for and against extending the prison mailbox rule to prisoners represented by counsel, and the last section briefly addresses the federal courts' construction of Federal Rule of Appellate Procedure 4(c)(1) and the jurisdictional consequences of the prison mailbox rule.

A. *The Common Law Mailbox Rule: Origins and Rationale*

The King's Bench decision in *Adams v. Lindsell*⁶ is credited with creating the common law mailbox rule in English law. In *Lindsell*, the defendants misaddressed an offer of wool to the plaintiffs and as a result, the acceptance letter was sent later than the defendants expected.⁷ The defendants, assuming their letter had been addressed correctly and having not received an acceptance letter within the expected time frame, sold the wool to another person.⁸ The court rejected the argument that contracts were formed when the offeror received the acceptance letter—the receipt rule—because of its inherent uncertainty.⁹ If the receipt rule prevailed, “the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*.”¹⁰ Instead, the court espoused the mailbox rule out of necessity to provide the certainty that parties contracting at arms length needed.¹¹ The court viewed the time the offer was in transit as a continuing

⁶ (1818) 106 Eng. Rep. 250 (K.B.).

⁷ *Id.* at 250-51.

⁸ *Id.*

⁹ *Id.* at 251.

¹⁰ *Id.*

¹¹ Valerie Watnick, *The Electronic Formation of Contracts and the Common Law “Mailbox Rule”*, 56 BAYLOR L. REV. 175, 179 (2004).

offer and thus, “the contract is completed by the acceptance of [the offer] by the [plaintiff].”¹²

The holding in *Adams v. Lindsell* has been widely accepted by state courts,¹³ adopted into the Restatement (Second) of Contracts,¹⁴ and even cited by the United States Supreme Court.¹⁵ Nevertheless, there has been surprisingly little agreement about the proper rationale for the rule. For the purposes of the prison mailbox rule, four rationales are relevant. First, the drafters of the Restatement argue that “the offeree needs a dependable basis for his decision whether to accept.”¹⁶ In other words, the rule is intended to ensure the certainty and stability of the offeree’s obligations upon dispatch.¹⁷ However, this does not explain why the offeree’s obligations are preferred to the offeror’s. One reason, hinted in the Restatement comments, is to limit the offeror’s power of revocation.¹⁸ If acceptance were effective only on receipt, an in-transit acceptance could be nullified by a received revocation.¹⁹ Therefore, the mailbox rule is justified as a shield to the offeree’s reliance interests.²⁰

Second, case law and commentators espouse a risk allocation rationale to explain favoring the offeree. It starts from the premise that any law governing parties’ acceptance at arms length must place the risk of non-delivery on either the offeror or the offeree.²¹ Because the offeror, as “master of the offer,” has the ability to specify the manner and medium of accep-

¹² *Lindsell*, 106 Eng. Rep. at 251.

¹³ 2 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 6:32 & n.5 (Richard A. Lord, ed., 4th ed. 1991).

¹⁴ RESTATEMENT (SECOND) OF CONTRACTS § 63 & cmt. a (1981).

¹⁵ *Tayloe v. Merchs.’ Fire Ins. Co.*, 50 U.S. 390, 402 (1850); *Burton v. United States*, 202 U.S. 344, 384-86 (1906).

¹⁶ RESTATEMENT (SECOND) OF CONTRACTS § 63 cmt. a (1981).

¹⁷ JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 47, at 162 (4th ed. 2001).

¹⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 63 cmt. a (1981).

¹⁹ *Id.* cmt. c.

²⁰ E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.22, at 181 (2d ed. 1990) (“[A]llowing the offeror to revoke until the acceptance is received would aggravate the already vulnerable position of the offeree, which may have relied”); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 2.23, at 109-10 (5th ed. 2003) (“[The mailbox] rule has been defended on the ground that . . . the offeree, having dispatched an acceptance, should be able to rely on the existence of a contract and should be protected against an intervening revocation.”). Frustrated with finding any single coherent rationale, some legal commentators have concluded that the mailbox rule is simply an example of the old adage, “any rule at all is better than no rule.” ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 265 (3d ed. 2002); see also 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 3.26, at 450 (Joseph M. Perillo ed., rev. ed. 1993) (“[T]he mailbox rule is a rule of convenience.”); BRUCE W. FRIER & JAMES J. WHITE, THE MODERN LAW OF CONTRACTS 101 (2005) (“[A] better explanation may be just that some dispositive rule is needed”).

²¹ *Worms v. Burgess*, 620 P.2d 455, 457 (Okla. Civ. App. 1980); 1 CORBIN, *supra* note 20, § 3.24, at 440-41.

tance²² and chooses not to do so, the offeror should bear the risk of non-delivery.²³

The remaining two rationales—agency and control—are the two offered by the first American courts adopting the rule.²⁴ The agency argument dictates that by sending the offer in the mail, the post office has become a “common agent” of both parties.²⁵ The argument suggests that as an agent of both parties, the post office has the ability to make contracts on behalf of its principals. Therefore, pursuant to the post office’s agency authority, the contract is formed when the acceptance letter is deposited.²⁶ Courts tend to favor the agency argument because it necessarily satisfies the “meeting of the minds” requirement to contract formation.²⁷

Finally, courts have argued that by placing the acceptance letter in the mail, the offeree has lost control over it.²⁸ In the words of one English Lord, “[i]f a party does all that he can do, that is all that is called for. . . . How can he be responsible for that over which he has no control?”²⁹ Similar to the agency rationale, relinquishing control over the acceptance letter is viewed as an overt manifestation of assent satisfying the mutual assent predicate to contract formation.³⁰ In recognition of the control rationale, the Restatement rule states that the acceptance “completes the manifestation of mutual assent as soon as put out of the offeree’s possession.”³¹

²² *Household Fire & Carriage Accident Ins. Co. v. Grant*, (1879) 4 Exch. Div. 216 (“An offeror, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance.”); PERILLO, *supra* note 20, at 111.

²³ *Worms*, 620 P.2d at 457; FARNSWORTH, *supra* note 20, at 184; MURRAY, *supra* note 17, at 163.

²⁴ See, e.g., *Mactier’s Admrs. v. Frith*, 6 Wend. 103, 120 (N.Y. 1830) (“[A] letter written would not be an acceptance so long as it remained in the possession or under the control of the writer.”).

²⁵ *Lucas v. W. Union Tele. Co.*, 109 N.W. 191, 192 (Iowa 1906); *Household Fire & Carriage Accident Ins. Co.*, 4 Exch. Div. at 223-24 (“[T]he post office is the common agent of both parties.”).

²⁶ *Walrus Mfg. Co. v. New Amsterdam Cas. Co.*, 184 F. Supp. 214, 220-21 (S.D. Ill. 1960) (“When [the offeror] used the mail to send the contract . . . [the offeror] . . . authorized the U.S. Mail as its agent to receive the contract executed by [the offeree] after signature.”); *Lucas*, 109 N.W. at 192.

²⁷ *Morrison v. Thelke*, 155 So. 2d 889, 891-92 (Fla. Dist. Ct. App. 1963) (“[B]y treating the post office as the agency of both parties, the courts have managed to harmonize the legal notion that it is necessary that the minds of the parties meet with the equally well-established principle that a determination is ineffectual if it is not communicated either actually or by legal implication.” (quoting 12 AM. JUR. *Contracts* § 46 (1938))); CORBIN, *supra* note 20, § 3.24, at 439 (commenting that the reason “most often given” for the rule is the agency rationale).

²⁸ *Gibbs v. Am. Sav. & Loan Ass’n*, 266 Cal. Rptr. 517, 519 (Cal. Ct. App. 1990) (“[The mailbox] rule has long been interpreted to require that the acceptance be placed out of the control of the accepting party”); *Mactier’s Admrs.*, 6 Wend. at 120 (“[A] letter written would not be an acceptance so long as it remained in the possession or under the control of the writer.”).

²⁹ *Dunlop v. Higgins*, (1848) 9 Eng. Rep. 805, 812 (H.L.).

³⁰ *Thelke*, 155 So. 2d at 903 (“[T]he ‘overt act’ of depositing a written acceptance in the post represents the [offeree’s] assent”); MURRAY, *supra* note 17, at 162 (“[M]utual assent is manifested upon the ‘loss of control’ of the letter of acceptance once it is mailed.”).

³¹ RESTATEMENT (SECOND) OF CONTRACTS § 63 (1981).

B. *The Extension to Pro Se Prisoners*

The Supreme Court in *Houston v. Lack* confronted whether the common law mailbox rule should apply to a prisoner's notice of appeal. The facts of the case are fairly straightforward. After being indicted for first-degree murder, Prentiss Houston accepted a plea bargain whereby he pled guilty to second-degree murder.³² However, by accepting the plea bargain, Houston was ineligible for any sentence reduction program or any supervised or unsupervised release.³³ As a result, Houston claimed that neither his attorney nor the trial court judge adequately informed him of the ramifications of pleading guilty to second-degree murder.³⁴

While incarcerated in a Tennessee prison, Houston filed a pro se petition for a writ of habeas corpus in federal district court.³⁵ The court dismissed the motion on January 7, 1986 and pursuant to Federal Rule of Appellate Procedure 4(a)(1), Houston had until February 6, 1986 to file a notice of appeal.³⁶ On February 3, 1986 (three days before the deadline), Houston deposited his personally drafted notice of appeal with prison authorities for mailing.³⁷ Furthermore, Houston specifically asked the prison authorities to certify the date and time that the notice had been deposited in the mail.³⁸ The clerk of the district court received and stamped the notice of appeal on February 7, 1986, one day after the permissible period of appeal.³⁹ Neither the district court nor the respondent discovered that the appeal was defective until after the permissible period to request a filing extension had passed.⁴⁰ As a result, the appeal was dismissed as untimely.⁴¹

The Supreme Court granted certiorari and reversed.⁴² Justice Brennan's opinion for the Court is one-part statutory construction and one-part motivated by policy considerations.⁴³ First, Justice Brennan construed Federal Rules of Appellate Procedure 3(a) and 4(a)(1) to hold that a notice of

³² *Houston v. Lack*, 625 F. Supp. 786, 788 (W.D. Tenn. 1986), *aff'd*, 819 F.2d 819 (6th Cir. 1987), *rev'd*, 487 U.S. 266 (1988).

³³ *Id.*

³⁴ *Id.*

³⁵ *Houston v. Lack*, 487 U.S. 266, 268 (1988).

³⁶ *Id.* at 268-69.

³⁷ *Id.* at 268.

³⁸ *Id.*

³⁹ *Id.* at 268-69.

⁴⁰ *Id.* at 269. In fact, it was the Court of Appeals for the Sixth Circuit that first recognized the error. *Lack*, 487 U.S. at 269.

⁴¹ *Id.* The Sixth Circuit affirmed the district court's ruling without opinion. *Houston v. Lack*, 819 F.2d 289 (6th Cir. 1987) (unpublished table decision), *rev'd*, 487 U.S. 266 (1988).

⁴² *Lack*, 487 U.S. at 269.

⁴³ As Justice Brennan's majority opinion is based on an interpretation of the Federal Rules of Appellate Procedure, the prison mailbox rule is not a constitutional requirement leaving the states free to ignore it. *See, e.g., Adams v. LeMaster*, 223 F.3d 1177, 1182 n.4 (10th Cir. 2000).

appeal was “filed” at the moment it was delivered to prison authorities.⁴⁴ Second, Justice Brennan argued that, as compared to the normal civil litigant, the pro se prisoner’s position is fundamentally different and “unique.”⁴⁵ Specifically, Justice Brennan explained that a pro se prisoner’s position is unique because, *inter alia*, he lacks control over the filing process and can never be certain that the appeal was ever actually filed.⁴⁶ In short, Justice Brennan expanded on Justice Stewart’s brief concurring opinion in *Fallen v. United States*,⁴⁷ proposing that the Court adopt a mailbox rule for prisoners.⁴⁸

Five years after *Lack*, in 1993, the Supreme Court promulgated Federal Rule of Appellate Procedure 4(c) (“the Rule”).⁴⁹ Entitled “Appeal by an Inmate Confined in an Institution,” the Rule, in pertinent part, provides:

If an inmate confined in an institution files a notice of appeal in either a civil or criminal case, the notice is timely if it is deposited in the institution’s internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.⁵⁰

The accompanying Advisory Committee Note to Rule 4(c) states that the Rule “reflect[ed]” the Supreme Court’s decision in *Lack*.⁵¹ The federal circuits have understood the Rule as codifying *Lack*⁵² and sometimes refer back to the Supreme Court’s opinion to help solve interpretive problems.⁵³ As discussed below, this approach is one of the symptoms of the current circuit split.⁵⁴

⁴⁴ *Id.* at 272-75. Justice Brennan’s construction of the federal rules is beyond the scope of this Comment. However, his analysis is not without its critics. *See id.* at 277-81 (Scalia, J., dissenting).

⁴⁵ *Id.* at 270-72.

⁴⁶ *Id.* at 271-72. *See infra* Part III.B, for an in-depth discussion of Justice Brennan’s policy considerations.

⁴⁷ 378 U.S. 139 (1964).

⁴⁸ *Id.* at 144 (Stewart, J., concurring) (“[A] defendant incarcerated in a federal prison and acting without the aid of counsel files his notice of appeal in time, if . . . he delivers such notice to the prison authorities . . .”).

⁴⁹ *Nichols v. Bowersox*, 172 F.3d 1068, 1074 n.4 (8th Cir. 1999) (en banc), *partially abrogated by* *Riddle v. Kemna*, 523 F.3d 850, 856 (8th Cir. 2008) (en banc).

⁵⁰ FED. R. APP. P. (4)(c)(1). *See also* FED. R. APP. P. 25(a)(2)(C); SUP. CT. R. 29.2; *Grady v. United States*, 269 F.3d 913, 917-18 (8th Cir. 2001) (discussing the drafting history of the Rule).

⁵¹ FED. R. APP. P. 4(c) advisory committee’s note (“The amendment reflects that decision.”).

⁵² *Walker v. Jastremski*, 430 F.3d 560, 562 n.2 (2d Cir. 2005); *Bowersox*, 172 F.3d at 1074 n.4; *United States v. Moore*, 24 F.3d 624, 626 n.3 (4th Cir. 1994).

⁵³ *Moore*, 24 F.3d at 626 n.3 (“As the Advisory Committee intended the rule to be, in essence, a codification of *Houston*, we are confident that our interpretation of *Houston* is the correct one.” (citation omitted)).

⁵⁴ *See infra* Parts II.C-D.

C. *The Circuit Split*

The federal circuits agree the prison mailbox rule applies to pro se prisoners but they are divided on whether it extends to prisoners represented by counsel. The Fourth and Seventh Circuit Courts of Appeals argue in favor of extending the rule to represented prisoners on two grounds: first, their interpretation of the *Lack* holding and second, the plain meaning of Federal Rule 4(c)(1).⁵⁵ First, in *United States v. Moore*,⁵⁶ the Fourth Circuit found “little justification” in differentiating between represented and unrepresented prisoners because either way, the same concerns that motivated the Supreme Court in *Lack* are still present.⁵⁷ The court viewed *Lack* as resting on the principle that it would be “unfair to permit a prisoner’s freedom to ultimately hinge on either the diligence or the good faith of his custodians.”⁵⁸ From this perspective, whether represented or not, the prisoner’s freedom is subject to the possibly adverse incentives of the prison authorities as long as the prisoner mails the notice of appeal himself.⁵⁹ Lastly, if the Supreme Court thought prison authorities might delay mailing a prisoner’s appeal notice, prisoners might also be delayed from timely communicating with counsel.⁶⁰

Second, in *United States v. Craig*,⁶¹ Judge Frank Easterbrook felt compelled by the text of Rule 4(c)(1) to depart from prior circuit precedent holding that the prison mailbox rule did not apply to represented prisoners.⁶² For starters, Judge Easterbrook argued that the Rule’s text and title—“an inmate confined in an institution”—is most naturally read to include both represented and pro se prisoners.⁶³ Where Congress sought to impose

⁵⁵ *United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004) (Easterbrook, J.); *Moore*, 24 F.3d at 625-26.

⁵⁶ 24 F.3d 624 (4th Cir. 1994).

⁵⁷ *Id.* at 625.

⁵⁸ *Id.*; see also *Rutledge v. United States*, 230 F.3d 1041, 1052 (7th Cir. 2000) (“[*Houston v. Lack*] repeatedly stresses the possible unfairness of forcing prisoners to rely on prison authorities to deliver their legal papers in a timely manner.” (citing *Houston v. Lack*, 487 U.S. 266, 271, 273-76 (1988))); *Pettibone v. Pa. Bd. of Prob. & Parole*, 782 A.2d 605, 608 (Pa. Commw. Ct. 2001) (“At the heart of the ‘prisoner mailbox rule’ are the constitutional notions of due process and fundamental fairness.” (citing *Commonwealth v. Castro*, 766 A.2d 1283, 1286 (Pa. Super. Ct. 2001))).

⁵⁹ *Moore*, 24 F.3d at 625.

⁶⁰ *Id.* at 625-26.

⁶¹ 368 F.3d 738 (7th Cir. 2004) (Easterbrook, J.).

⁶² *Id.* at 740; accord *Moore*, 24 F.3d at 626 n.3.

⁶³ See *Craig*, 368 F.3d at 740 (“Respect for the text of Rule 4(c) means that represented prisoners can use the opportunity it creates”); *Moore*, 24 F.3d at 626 n.3 (“[Rule 4(c)(1)] clearly applies to criminal cases and does not distinguish between represented prisoners and those acting *pro se*.”). The Rule’s text is no accident either, as it was based on Supreme Court Rule 29.2 which also speaks of “an inmate confined in an institution.” SUP. CT. R. 29.2; see also FED. R. APP. P. 25(a)(2)(C) (“A paper filed by an inmate confined in an institution”).

additional limitations on the prison mailbox rule, it expressly did so.⁶⁴ In other words, it would be improper to read a limitation into a rule that itself expressly contemplates restrictions to its use.⁶⁵ In Judge Easterbrook's view, because the Rule is "neither incoherent nor absurd," effect should be given to its plain meaning.⁶⁶

In contrast, the Eighth Circuit in *Nichols v. Bowersox*,⁶⁷ the Fifth Circuit in *Cousin v. Lensing*,⁶⁸ and the Ninth Circuit in *Stillman v. LaMarque*⁶⁹ argued that the prison mailbox rule does not apply to those represented by counsel.⁷⁰ Those courts held that represented prisoners are in a fundamentally different position from pro se prisoners.⁷¹ Without an agent, pro se prisoners lack control over the filing process and have to depend on the prison mail system as a means to file legal documents.⁷² However, represented prisoners can forgo the prison mail system and have counsel file their documents for them.⁷³ Ultimately, courts have justified denying the prison mailbox rule to represented prisoners on a strict reading of the Supreme Court's decision in *Houston v. Lack*.⁷⁴

D. Statutory Construction and Its Jurisdictional Implications

The Advisory Committee Note to Rule 4(c)(1) states that "[t]he amendment [adding Rule 4(c)] reflects th[e] decision" of the Supreme Court in *Lack*.⁷⁵ This innocuous statement has given rise to competing interpretive approaches among the federal circuits. One approach advocates

⁶⁴ See FED. R. APP. P. 4(c)(1) (requiring, *inter alia*, use of the prison mail system if one is available).

⁶⁵ See *Craig*, 368 F.3d at 740.

⁶⁶ *Id.*

⁶⁷ 172 F.3d 1068 (8th Cir. 1999) (en banc), *partially abrogated by* *Riddle v. Kemna*, 523 F.3d 850, 856 (8th Cir. 2008) (en banc).

⁶⁸ 310 F.3d 843 (5th Cir. 2002).

⁶⁹ 319 F.3d 1199 (9th Cir. 2003).

⁷⁰ *Id.* at 2001 (citing *Saffold v. Newland*, 250 F.3d 1262, 1268 (9th Cir. 2001); *Rutledge v. United States*, 230 F.3d 1041, 1051-52 (7th Cir. 2000); *Turner v. Singletary*, 46 F. Supp. 2d 1238, 1239 (N.D. Fla. 1999)); *Lensing*, 310 F.3d at 847; *Bowersox*, 172 F.3d at 1074.

⁷¹ See *Lensing*, 310 F.3d at 847; *Rutledge*, 230 F.3d at 1051-52; *United States v. Kimberlin*, 898 F.2d 1262, 1265 (7th Cir. 1990) ("Represented prisoners have the same principal options as represented non-prisoners.").

⁷² *Lensing*, 310 F.3d at 847; *Rutledge*, 230 F.3d at 1052; *Bowersox*, 172 F.3d at 1074; *Kimberlin*, 898 F.2d at 1265.

⁷³ *Lensing*, 310 F.3d at 847; *Rutledge*, 230 F.3d at 1052; *Bowersox*, 172 F.3d at 1074; *Kimberlin*, 898 F.2d at 1265; see also *Morales-Rivera v. United States*, 184 F.3d 109, 110 (1st Cir. 1999) (per curiam) ("*Unlike represented prisoners or non-incarcerated convicts, pro se prisoners have no choice but to rely for filing upon prison and postal authorities over whom they exercise no control.*" (emphasis added)).

⁷⁴ See *Lensing*, 310 F.3d at 847; *Rutledge*, 230 F.3d at 1051-52.

⁷⁵ FED. R. APP. P. 4(c) advisory committee's note.

that the Federal Rules be construed according to congressional intent.⁷⁶ Federal circuits that favor not extending the rule to represented prisoners premise their argument on the intent behind Rule 4(c)(1).⁷⁷ Because Rule 4(c)(1) “reflects” the Supreme Court’s decision in *Lack* and the prisoner in *Lack* was proceeding without counsel, the limitation should be read into Rule 4(c)(1).⁷⁸ Construing the Rule as strictly codifying *Lack* allows the federal circuits to implicitly include the words *pro se* in the language of the Rule.⁷⁹ In effect, the Rule might as well read, “if a *pro se* inmate confined in an institution”

In response, judges such as Frank Easterbrook emphasize the supremacy of the Rule’s text. In Judge Easterbrook’s words, “[a] court ought not pencil ‘unrepresented’ or any extra word into the text of Rule 4(c), which as written is neither incoherent nor absurd.”⁸⁰ Put differently, the text of Rule 4(c)—“an inmate confined in an institution”—evinces no limitation on the term “inmate.”⁸¹ Thus, the application of the Rule depends solely on whether a litigant can fairly be said to be “an inmate.”⁸² Ultimately, the disagreement in construing Rule 4(c)(1) stems from differing approaches to statutory construction and the understanding of the Supreme Court’s ruling in *Lack*.

The controversy surrounding whether the prison mailbox rule applies to represented prisoners has direct implications for an appellate court’s jurisdiction. For example, a court interpreting Rule 4(c)(1) to apply to represented prisoners will not be divested of jurisdiction because the appeal, though received late, will be considered timely. Recently, the Supreme Court in *Bowles v. Russell*⁸³ reaffirmed the principle that the timeliness of

⁷⁶ *United Steel Workers v. Weber*, 443 U.S. 193, 201 (1979) (“It is a ‘familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.’” (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892))).

⁷⁷ See *Bowersox*, 172 F.3d at 1074 n.4; *United States v. Moore*, 24 F.3d 624, 626 n.3 (4th Cir. 1994).

⁷⁸ See *Bowersox*, 172 F.3d at 1074 n.4.

⁷⁹ See *id.* at 1074 & n.4.

⁸⁰ *United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004) (Easterbrook, J.); see also *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.”). It is doubtful that an individual would be considered “an inmate” but not “confined in an institution” within the meaning of the Rule.

⁸¹ See *Jones v. Blanas*, 393 F.3d 918, 926 (9th Cir. 2004) (“There is no express limitation of the rule’s application to prisoners”); *Craig*, 368 F.3d at 740; *Moore*, 24 F.3d at 626 n.4 (“The new rule . . . does not distinguish between represented prisoners and those acting *pro se*.”).

⁸² Indeed, one court has held that the term “inmate” is broad enough to encompass civil detainees. *Blanas*, 393 F.3d at 926.

⁸³ 127 S. Ct. 2360 (2007).

an appeal is “mandatory and jurisdictional.”⁸⁴ Therefore, a timely appeal is a matter of jurisdiction, and strict compliance is mandatory for a court to entertain an appeal.⁸⁵ If a notice of appeal is late, a court must dismiss it for lack of jurisdiction absent an extension or a showing of excusable neglect or good cause.⁸⁶

II. THE CONTROVERSY: EXTENDING THE RULE TO REPRESENTED PRISONERS

This Part discusses whether the prison mailbox rule should apply to represented prisoners. The first section argues that the Supreme Court in *Lack* appealed to the familiar common law mailbox rule’s justifications in extending the rule to pro se prisoners. The second section proposes that courts use the common law mailbox rule’s justifications as a touchstone in deciding whether to extend the rule to represented prisoners. Applying that framework, the third section concludes the prison mailbox rule should apply to represented prisoners in some circumstances. Finally, the fourth section offers a brief analysis on some common situations that will arise.

A. *Lack and the Common Law Mailbox Rule*

Though the Supreme Court in *Lack* never explicitly referred to the common law mailbox rule, Justice Brennan’s majority opinion appealed to the rule’s several justifications. In extending the mailbox rule to pro se prisoners, Justice Brennan rested his decision on the pro se prisoner’s “unique” situation.⁸⁷ As compared to other litigants, Justice Brennan explained that a prisoner lacks an agent, control over the filing process, or certainty that the appeal notice has actually been filed.⁸⁸ Furthermore, the pro se prisoner bears the entire risk of non-delivery.⁸⁹ In no uncertain terms, Justice Brennan approvingly espoused the familiar agency, control, risk allocation, and certainty justifications of the common law mailbox rule.⁹⁰

⁸⁴ *Id.* at 2363 (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982) (per curiam)).

⁸⁵ *Id.*; accord *United States v. Green*, 89 F.3d 657, 660 (9th Cir. 1996); *United States v. Roberts*, 749 F.2d 404, 407-08 (7th Cir. 1984) (“[T]he rules governing notice are mandatory, so that this court will not take jurisdiction where they have not been substantially complied with.”).

⁸⁶ See 28 U.S.C. § 2107 (2006); FED. R. APP. P. 4(a)(5)(A)(i)-(ii).

⁸⁷ *Houston v. Lack*, 487 U.S. 266, 270-71 (1988).

⁸⁸ *Id.*

⁸⁹ See *id.* at 271.

⁹⁰ See *supra* Part II.A for a discussion of the agency, control, risk allocation, and certainty justifications for the common law mailbox rule.

First, the majority endorsed the agency rationale by substituting the “common agency” of the post office for the jailer.⁹¹ Under the common law mailbox rule, the post office was said to act as a dual agent for both parties.⁹² Likewise, by operation of the prison mailbox rule, “the jailer is in effect the clerk of the District Court.”⁹³ In applying the agency rationale to the jailer, the Court retained the dual nature of the common agent because the jailer acts both as an agent of the court, by marking the time and date the notice was received, and also as an agent of the prisoner by mailing the appeal.⁹⁴

Second, the majority emphasized how little actual control the prisoner can exercise over the filing process.⁹⁵ The pro se prisoner, unlike other civil litigants, is deprived of the option to deliver the appeal and cannot even place the appeal notice directly into the mail system; instead, the prisoner has to rely on his captors.⁹⁶ Similar to contracting parties who have no control over the mail, the pro se prisoner has no control over prison authorities.⁹⁷ Arguably, the justification is even greater in the prison context because prison authorities “may have every incentive to delay” or thwart the prisoner’s efforts.⁹⁸ In similar instances, courts have not held ordinary civil litigants responsible for consequences outside of their control.⁹⁹ Accordingly, it would be inconsistent and unfair to do so for pro se prisoners.¹⁰⁰ As

⁹¹ *Lack*, 487 U.S. at 270.

⁹² See sources cited *supra* note 25.

⁹³ *Lack*, 487 U.S. at 270 (quoting *Fallen v. United States*, 378 U.S. 139, 144 (1964) (Stewart, J., concurring)); see also *United States v. Fiorelli*, 337 F.3d 282, 290 (3d Cir. 2003) (“[T]he prison mail room serves as a surrogate clerk’s office . . .”).

⁹⁴ See *Lack*, 487 U.S. at 270, 275.

⁹⁵ *Id.* at 271-74; see also *Saffold v. Newland*, 250 F.3d 1262, 1268 (9th Cir. 2000) (“[T]he conditions that led to the adoption of the mailbox rule are present; the prisoner is powerless and unable to control the time of delivery of documents to the court.” (citing *Lack*, 487 U.S. at 270-72)); *Piacentini v. Levangie*, 998 F. Supp. 86, 90 (D. Mass. 1998) (“[T]he circuit courts have recognized that the pro se prisoner litigant’s lack of control over the timely arrival of the complaint to the clerk of the district court is a central element of the ratio decidendi of *Houston*.”).

⁹⁶ *Lack*, 487 U.S. at 270-71.

⁹⁷ *Morales-Rivera v. United States*, 184 F.3d 109, 110 (1st Cir. 1999) (per curiam) (“Unlike represented prisoners or non-incarcerated convicts, *pro se* prisoners have no choice but to rely for filing upon prison and postal authorities over whom they exercise no control.”); *Tilley v. United States*, No. 5:03MC1, 2003 U.S. Dist. LEXIS 21667, at *6 n.2 (W.D.N.C. Oct. 24, 2003) (“The prisoner mailbox rule . . . rests on the notion that prisoners . . . are unable to take steps other litigants can take (i.e., phoning the courthouse and / or delivering their documents to the court if the mail goes awry) to monitor the processing of their notices of appeal . . .” (citing *Lack*, 487 U.S. at 270-71)).

⁹⁸ *Lack*, 487 U.S. at 271.

⁹⁹ *Id.* at 276. Specifically, the majority explains that, in an ordinary civil action, receipt of the notice of appeal by the clerk constitutes filing even though it has not been formally filed because the appellant has no control over delays between receipt and formal filing. *Id.*

¹⁰⁰ *Rutledge v. United States*, 230 F.3d 1041, 1052 (7th Cir. 2000) (“[*Houston v. Lack*] repeatedly stresses the possible unfairness of forcing prisoners to rely on prison authorities to deliver their legal papers in a timely manner.” (citing *Lack*, 487 U.S. at 271, 273-76)); *Lewis v. Richmond City Police*

a result, when the prisoner has put the appeal notice out of his possession by giving it to prison authorities, the notice is deemed filed.¹⁰¹

Next, without a prison mailbox rule, the prisoner bears the entire risk of non-delivery.¹⁰² In the majority's words, "[n]o matter how far in advance the *pro se* prisoner delivers his notice to the prison authorities, he can never be *sure* that it will ultimately get stamped 'filed' on time."¹⁰³ Stated somewhat differently, the prisoner has limited or no means to verify that either the prison authorities mailed the appeal notice or that the clerk of the court received it.¹⁰⁴ The only option available is to entrust the notice to the "vagaries of the mail," risking the possibility of non-delivery and abuse by prison authorities.¹⁰⁵ Consequently, like the common law mailbox rule, the prison mailbox rule shifts the risks inherent in filing appeal notices away from the weaker positioned party.¹⁰⁶

Finally, the majority emphasized that prison authorities have well-developed mail logs that record the date and time of receipt of the notice to be mailed.¹⁰⁷ Applying the common law mailbox rule to *pro se* prisoners would allow courts to apply a bright-line rule in calculating whether the appeal was filed within the allowable time period by simply consulting the mail logs.¹⁰⁸ A court could then identify with certainty the filing date of the notice and thus whether it has jurisdiction to hear the appeal.¹⁰⁹ Not only are courts able to reliably determine when an appeal notice was filed, but the prisoner can also be certain that the appeal was filed. Here, the prisoner's certainty mirrors the offeree's certainty in his legal obligations upon mailing the acceptance.

Properly understood, the inquiry into whether the prison mailbox rule should apply to represented prisoners necessarily involves whether the ex-

Dep't, 947 F.2d 733, 735 (4th Cir. 1991) (per curiam) ("Fundamentally, the rule in *Houston* is a rule of equal treatment . . ."); *Pettibone v. Pa. Bd. of Prob. & Parole*, 782 A.2d 605, 608 (Pa. Commw. Ct. 2001) (citing *Commonwealth v. Castro*, 766 A.2d 1283, 1286 (Pa. Super. Ct. 2001)).

¹⁰¹ *Lack*, 487 U.S. at 276.

¹⁰² *See id.* at 270-71.

¹⁰³ *Id.* at 271.

¹⁰⁴ *Id.* at 271-72 ("[T]he only information he [the prisoner] will likely have is the date he delivered the notice to . . . prison authorities and the date ultimately stamped on his notice."); *Lewis*, 947 F.2d at 735 ("Because [the prisoners] are acting *pro se*, they do not have an attorney who can monitor the process for them.")

¹⁰⁵ *Lack*, 487 U.S. at 271.

¹⁰⁶ *See id.* at 271-72. In the context of the common law mailbox rule, the weaker party would be the offeree, who is not the "master of the offer." See *supra* Part II.A, for a discussion of the risk allocation rationale for the common law mailbox rule.

¹⁰⁷ *Lack*, 487 U.S. at 275-76.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* ("[M]aking filing turn on the date the *pro se* prisoner delivers the notice to prison authorities for mailing is a bright-line rule, *not an uncertain one.*") (emphasis added); see also *Causey v. Cain*, 450 F.3d 601, 604 (5th Cir. 2006) ("[T]he *Houston* Court's rule minimizes disputes and uncertainty over when filing occurs . . .").

tension would offend the Court's decision in *Lack* and, by proxy, the underlying common law mailbox rule rationales.¹¹⁰

B. *The Prison Mailbox Rule and Represented Prisoners*

In discerning whether the prison mailbox rule should extend to represented prisoners, such an application must not offend the agency, loss of control, risk-allocation, and certainty concerns that justify the rule.¹¹¹ At first blush, the concerns identified in *Lack* do not appear to support an extension to represented prisoners.¹¹² A represented prisoner has control over the filing process and can be certain that the appeal has been filed through his lawyer, the prisoner's agent.¹¹³ A prisoner's access to a lawyer also significantly decreases the risk of non-delivery because the prisoner's agent can always confirm that the notice of appeal was received.¹¹⁴

However, the crucial assumption in finding that represented prisoners offend the underlying rationale of the rule is that the prisoner has access to counsel and can, in fact, communicate with representation.¹¹⁵ The situation confronting the Seventh Circuit in *Craig* acutely demonstrates that such an assumption is not necessarily sound.¹¹⁶ After judgment by the district court, the prisoner announced his intention not to appeal but then changed his mind and personally filed an appeal notice himself.¹¹⁷ The prisoner argued that he had acted pro se in filing the appeal because he feared he would not be able to reach counsel in time.¹¹⁸ Additionally, the prisoner was confused about whether he was even still represented by counsel after sentencing.¹¹⁹ The Fourth Circuit in *Moore* proposed that the prison mailbox rule should apply if the prisoner is acting pro se when mailing the appeal notice, even

¹¹⁰ See *Huizer v. Carey*, 273 F.3d 1220, 1223 n.3 (9th Cir. 2001) (Kozinski, J.) ("Our interpretation of *Houston* is consistent with other applications of the mailbox rule.").

¹¹¹ See *id.*

¹¹² See *United States v. Kimberlin*, 898 F.2d 1262, 1265 (7th Cir. 1990) ("Represented prisoners have the same principal options as represented non-prisoners.").

¹¹³ *Cousin v. Lensing*, 310 F.3d 843, 847 (5th Cir. 2002); see also *Rutledge v. United States*, 230 F.3d 1041, 1052 (7th Cir. 2000) ("[A] prisoner represented by counsel can have that attorney file whatever motions or notices the prisoner desires, and so does not need to rely on prison authorities.").

¹¹⁴ See *Rutledge*, 230 F.3d at 1052; *Lewis v. Richmond City Police Dep't*, 947 F.2d 733, 735 (4th Cir. 1991) (per curiam) ("Because [the prisoners] are acting *pro se*, they do not have an attorney who can monitor the process for them.").

¹¹⁵ See *United States v. Moore*, 24 F.3d 624, 625 (4th Cir. 1994) ("If, as we have supposed it is possible that prison officials could choose to delay a prisoner's attempt to communicate with the courts, it is just as possible that they could choose to delay his access to counsel.").

¹¹⁶ See *United States v. Craig*, 368 F.3d 738, 739-40 (7th Cir. 2004) (Easterbrook, J.).

¹¹⁷ *Id.* at 739.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

though technically represented by counsel “in a passive sense.”¹²⁰ In other words, if practical circumstances arise that make it impossible for a represented prisoner to obtain the benefits of counsel and the prisoner files the notice of appeal himself, the prisoner should benefit from the rule.

Further, the federal circuits in favor of extending the prison mailbox rule to represented prisoners argue that if it is plausible that prison officials could deny or delay access to the prison mail system, then it is equally plausible that prisoners could also be delayed in timely communicating with counsel.¹²¹ In such a situation, a represented prisoner is placed in substantially the same “unique” position as a prisoner proceeding pro se.¹²² The represented prisoner is not certain of the appeal’s delivery and wholly bears the risk of non-delivery. Moreover, the represented prisoner does not have any control over the filing process. The underlying rationales for the prison mailbox rule support an application of the rule in such a situation because, as the Fourth Circuit noted in *Moore*, “the same concerns [as in *Lack*] are present.”¹²³ The prison mailbox rule was founded on the “unique” and practical difficulties faced by a prisoner.¹²⁴ It was intended as a safeguard for prisoners against stringent procedural hurdles¹²⁵ and refusing to apply the rule when the factors emphasized in *Lack* are present would offend the “notions of due process and fundamental fairness” that lie at the rule’s core.¹²⁶

C. *A Proposed Compromise*

Neither *Lack* nor its underlying mailbox rule rationale would support an extension of the prison mailbox rule to represented prisoners in all situations. The Supreme Court’s decision in *Lack* underscored the proposition that the prison mailbox rule is applicable only where an inmate meets the agency, control, risk-allocation, and certainty concerns behind the rule.¹²⁷ However, the federal circuits have applied *Lack* in a rigid and absolute fashion; the prison mailbox rule must be either applied to only pro se prisoners or to all prisoners, represented and pro se alike.¹²⁸ This categorical

¹²⁰ *Moore*, 24 F.3d at 625.

¹²¹ *Id.*

¹²² *Id.* (“[W]hen a prisoner attempts to file a notice of appeal from prison he is acting ‘without the aid of counsel’ even if he is ‘represented’ in a passive sense. The same concerns [from *Lack*] are present in either case.”).

¹²³ *Id.*

¹²⁴ 36 GEO. L.J. ANN. REV. CRIM. PROC. 950 (2007).

¹²⁵ *See id.*

¹²⁶ *See* sources cited *supra* note 100.

¹²⁷ *See infra* Part II.B.

¹²⁸ *Compare Moore*, 24 F.3d at 626 (“We therefore hold that *Houston* governs all notices of appeal filed by prisoners in criminal proceedings, without regard to whether they are represented by counsel.”) (emphasis added), with *Nichols v. Bowersox*, 172 F.3d 1068, 1074 (8th Cir. 1999) (en banc) (“The

approach has the significant downside of being both under- or over-inclusive.¹²⁹ A rigid policy against extending the rule to represented prisoners would not include situations such as that in *Craig*, where the prisoner acted unaware of the fact that he was still represented by counsel.¹³⁰ Likewise, a rule in favor of extending the prison mailbox rule to represented prisoners would include circumstances where the prisoner had the full benefit of counsel. The simple fact that a prisoner is or is not represented by counsel should not be dispositive as to whether the prison mailbox rule should apply.

Instead, federal circuits should look to whether the prisoner was acting *pro se* at the time the notice was drafted and mailed. Courts should apply the prison mailbox rule if, at the time of filing, the represented prisoner was only represented by counsel “in the passive sense.”¹³¹ The Fourth Circuit in *Moore* employed the “passive” language to delineate between normal lawyer-client relations and situations where, though formally represented by counsel, the prisoner was actually acting *pro se*.¹³² Simply put, a “passively represented prisoner” is a prisoner who, though technically represented by counsel, is acting unaware or independent of that fact.

To determine whether a prisoner is passively represented, courts should be guided by the agency, control, risk allocation, and certainty concerns underlying the prison mailbox rule. The federal circuits have explicitly endorsed focusing on the principles discussed in *Lack* in deciding whether to extend the prison mailbox rule to other contexts. For example, in *Lewis v. Richmond City Police Department*,¹³³ the Fourth Circuit considered whether the prison mailbox rule applied to complaints filed pursuant to 42 U.S.C. § 1983.¹³⁴ In reaching its decision, the court first identified the concerns underlying the *Lack* decision and then applied them to an inmate’s filing of a section 1983 complaint.¹³⁵ In such a context, the court reasoned that, “[t]he concerns which prompted the Supreme Court’s ruling in *Houston v. Lack* are equally present in the case at hand” and as a result, the prison mailbox rule should be extended to cover section 1983 complaints.¹³⁶

prison mailbox rule traditionally and appropriately applies *only to pro se* inmates . . .”) (emphasis added), *partially abrogated by* *Riddle v. Kemna*, 523 F.3d 850, 856 (8th Cir. 2008) (en banc).

¹²⁹ See *Moore*, 24 F.3d at 626 (“[T]he Seventh Circuit apparently did not consider the possibility that even represented prisoners might be prevented from timely communicating with counsel.”).

¹³⁰ See *id.* at 625; *Bowersox*, 172 F.3d at 1074.

¹³¹ *Moore*, 24 F.3d at 625.

¹³² *Id.* (“[W]henver a prisoner attempts to file a notice of appeal from prison he is acting ‘without the aid of counsel,’ even if he is ‘represented’ *in a passive sense*.”) (emphasis added).

¹³³ 947 F.2d 733 (4th Cir. 1991) (per curiam).

¹³⁴ See *id.* at 734.

¹³⁵ *Id.* at 735-36.

¹³⁶ *Id.*; see also *Suik v. Taney County*, 316 F.3d 813, 815 (8th Cir. 2003); *Casanova v. Dubois*, 304 F.3d 75, 78-80 (1st Cir. 2002); *Cooper v. Brookshire*, 70 F.3d 377, 379-81 (5th Cir. 1995); *Dory v. Ryan*, 999 F.2d 679, 682 (2d Cir. 1993) (“[W]e see no reason why the [*Lack*] rationale should not apply

Sister circuits have reached similar conclusions and have extended the prison mailbox rule to civil complaints,¹³⁷ habeas corpus petitions filed pursuant to 28 U.S.C. §§ 2254¹³⁸ and 2255,¹³⁹ joint notices of appeal,¹⁴⁰ Federal Rule of Civil Procedure 50(b)¹⁴¹ and Rule 59(e) motions,¹⁴² discovery responses,¹⁴³ administrative appeals,¹⁴⁴ and objections to a magistrate's report.¹⁴⁵

Synthesizing the case law extending the prison mailbox rule, the accepted test for determining valid extensions of the prison mailbox rule is whether the concerns found in *Lack* are met in the specific context of the case. Yet the previous extensions have all been decided within the context of a pro se litigant and thus have failed to realize that represented prisoners can face the same difficulties under certain circumstances. The prison mailbox rule cannot simply be extended to represented prisoners as a category

here."); *Garvey v. Vaughn*, 993 F.2d 776, 780-83 (11th Cir. 1993); *Hamm v. Moore*, 984 F.2d 890, 892 (8th Cir. 1992) ("*Houston's* underlying policy . . . applies with equal force to section 1983 actions" (citing *Hostler v. Groves*, 912 F.2d 1158, 1160 (9th Cir. 1990))); *Piacentini v. Levangie*, 998 F. Supp. 86, 89-91 (D. Mass. 1998).

¹³⁷ *Richard v. Ray*, 290 F.3d 810, 812-13 (6th Cir. 2002) (per curiam) ("All justifications for applying the mailbox rule in *Houston v. Lack* are present in the instant case.>").

¹³⁸ *Noble v. Kelly*, 246 F.3d 93, 97-98 (2d Cir. 2001); *Morales-Rivera v. United States*, 184 F.3d 109, 110-11 (1st Cir. 1999) (per curiam) ("The[] considerations [in *Lack*] apply with equal force to § 2255 and § 2254 motions."); *Nichols v. Bowersox*, 172 F.3d 1068, 1077 (8th Cir. 1999) (en banc), partially abrogated by *Riddle v. Kemna*, 523 F.3d 850, 856 (8th Cir. 2008) (en banc); *Jones v. Bertrand*, 171 F.3d 499, 501-02 (7th Cir. 1999); *Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998) (per curiam); *Hoggro v. Boone*, 150 F.3d 1223, 1226 n.4 (10th Cir. 1998); *Burns v. Morton*, 134 F.3d 109, 112-13 (3d Cir. 1998) ("[T]he same concerns expressed by the Court in *Houston* pertain to filing a pro se prisoner's habeas petition.>").

¹³⁹ *Morales-Rivera v. United States*, 184 F.3d 109, 110-11 (1st Cir. 1999) (per curiam) ("The[] considerations [in *Lack*] apply with equal force to § 2255 and § 2254 motions."); *Moore v. United States*, 173 F.3d 1131, 1135-36 (8th Cir. 1999); *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam).

¹⁴⁰ *In re Flanagan*, 999 F.2d 753, 757-59 (3d Cir. 1993) ("[T]he *Houston* rationale is also controlling on a pro se prisoner's appeal to a district court from a final order of a bankruptcy court.>").

¹⁴¹ *Caldwell v. Amend*, 30 F.3d 1199, 1201-03 (9th Cir. 1994) ("[T]he policies underlying the Court's holding in *Houston* warrant a similar extension to the filing of a Rule 50(b) motion . . .").

¹⁴² *Edwards v. United States*, 266 F.3d 756, 758 (7th Cir. 2001) (per curiam); *Schroeder v. McDonald*, 55 F.3d 454, 459 (9th Cir. 1995); *Simmons v. Ghent*, 970 F.2d 392, 393 (7th Cir. 1992) (Posner, J.) (assuming that the prison mailbox rule applies to Rule 59(e) motions); *Smith v. Evans*, 853 F.2d 155, 161-62 (3d Cir. 1988) ("Although *Houston* concerned a late notice of appeal, its reasoning seems indistinguishable in the context of a Rule 59(e) motion . . .").

¹⁴³ *Faile v. Upjohn Co.*, 988 F.2d 985, 988-89 (9th Cir. 1993) (Reinhardt, J.) ("When we have declined to apply *Houston*, we have . . . looked to the presence or absence of the policy concerns underlying the Supreme Court's decision.>").

¹⁴⁴ *Pettibone v. Pa. Bd. of Prob. & Parole*, 782 A.2d 605, 608 (Pa. Commw. Ct. 2001) ("[T]he rationale of the U.S. Supreme Court in *Houston*, rooted in constitutional concepts of due process and fundamental fairness, has equal force here.>").

¹⁴⁵ *Scuba v. Brigano*, 527 F.3d 479, 484 (6th Cir. 2007); *Thompson v. Rasberry*, 993 F.2d 513, 515 (5th Cir. 1993) (per curiam); *Dunn v. White*, 880 F.2d 1188, 1190 (10th Cir. 1989) (per curiam).

because it would be over-inclusive. Instead, the test should be applied to determine whether the *Lack* concerns are met on a case-by-case basis to avoid including passively represented prisoners. A case-by-case determination has the virtue of satisfying the courts that emphasize the injustice of not extending the rule to represented prisoners and also those that argue *Lack* does not support an application to represented prisoners as a class.¹⁴⁶ By focusing on the prisoner's circumstances and disposition, courts can better decide whether the prisoner fits within the principles articulated in *Lack*.¹⁴⁷

D. *Some Common Scenarios*

By way of example, two categories pose no obstacles. First, passively represented prisoners—those who are unaware that they are actually represented by counsel—should always benefit from the prison mailbox rule.¹⁴⁸ By definition, a passively represented prisoner suffers from the same problems facing a pro se prisoner. In contrast, actively represented prisoners—those who carry on normal lawyer-client relations—have no need for the prison mailbox rule.¹⁴⁹ Indeed, an actively represented prisoner benefiting from the prison mailbox rule offends the rule's rationale because the underlying justifications are not present.¹⁵⁰

However, between these two poles lies a murkier gray area. For example, suppose a court informs the prisoner that counsel will be made available to him for the appellate process. Nevertheless, the prisoner ignores the court's advice and on his own initiative, files an appeal notice in the prison mail system. At first blush, the prisoner bore the entire risk of non-delivery and could not be certain that the appeal was actually delivered and filed. Neither did the prisoner have an agent or control over the filing process. However, the crucial fact is that the prisoner *could* have avoided his fate by

¹⁴⁶ Compare *United States v. Moore*, 24 F.3d 624, 625 (4th Cir. 1994) (arguing that when a prisoner is represented passively by counsel the concerns expressed in *Lack* are met and thus the prison mailbox rule should apply), with *Cousin v. Lensing*, 310 F.3d 843, 847 (5th Cir. 2002) (arguing that “the same rationale [offered in *Houston*] does not support application of the mailbox rule to prisoner litigants who are represented by counsel” because the agency, control, risk allocation, and certainty concerns are not present).

¹⁴⁷ *Houston v. Lack*, 487 U.S. 266, 270-71 (1988) (noting that “[t]he situation of prisoners seeking to appeal without the aid of counsel is unique” and then discussing the agency, control, risk-allocation, and certainty concerns that make it so).

¹⁴⁸ See *supra* Parts II.B-C.

¹⁴⁹ See *Cousin v. Lensing*, 310 F.3d 843, 847 (5th Cir. 2002); *United States v. Kimberlin*, 898 F.2d 1262, 1265 (7th Cir. 1990) (“Represented prisoners have the same principal options as represented non-prisoners.”).

¹⁵⁰ See *supra* notes 111-14 and accompanying text.

simply calling his lawyer.¹⁵¹ Absent some suggestion of fraud on the part of prison authorities,¹⁵² a prisoner so situated should not benefit from the prison mailbox rule. The rule itself is “rooted in constitutional concepts of due process and fundamental fairness.”¹⁵³ Consequently, it is difficult to argue that it is fundamentally unfair for a prisoner to have his appeal notice declared untimely when he knowingly forgoes the benefit of counsel. The simple fact of the matter is that the prisoner could have exercised control over the filing process but chose not to do so. In that respect, the prisoner’s position is fundamentally different from the passively represented and pro se prisoners who do not ever have the option of benefiting from counsel.

Courts will almost certainly encounter new wrinkles in addition to the three scenarios already discussed. In addressing new situations, courts should use the four cardinal concerns of *Lack* as guideposts. The mechanics of the inquiry may engage courts in line drawing where the factors do not unanimously point in one direction. However, the interdependence of the factors counsels against such a conclusion. The control, risk-allocation, and certainty factors are closely tied to the agency factor because a prisoner with access to an agent who has control over the appellate process can minimize the risks of the mail system and can be certain that the appeal was received.¹⁵⁴

The centrality of the agency factor is encapsulated in the phrasing of the central inquiry: whether *counsel* actively or passively represents the prisoner at the time of the mailing. A prisoner actively represented by counsel would almost always fail to raise the concerns at the heart of the control, certainty, and risk-allocation factors. Therefore, the interdependency of the factors tempers much of the misgivings about difficult line drawing. Notwithstanding the importance of the agency factor, courts should not downplay the other factors in the inquiry. As demonstrated above, the classic example of a passively represented prisoner technically has an agent but still should benefit from the rule.¹⁵⁵

¹⁵¹ See *United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004) (“As we said in *United States v. Kimberlin*, . . . a prisoner who has the assistance of counsel need only pick up the phone” (citation omitted)). To be clear, the Seventh Circuit in *Craig* departed from the holding of *Kimberlin* because it felt compelled by the text of Rule 4(c)(1) and not because it disproved of *Kimberlin*’s reasoning. *Id.*

¹⁵² See *United States v. Moore*, 24 F.3d 624, 625 (4th Cir. 1994).

¹⁵³ See sources cited *supra* note 100.

¹⁵⁴ *Lensing*, 310 F.3d at 847 (“A prisoner litigant who is represented by counsel is not incapable of controlling the filing of pleading. Instead, he has an agent through whom he can control the conduct of his action, including the filing of pleadings.”); *Rutledge v. United States*, 230 F.3d 1041, 1052 (7th Cir. 2000); *Kimberlin*, 898 F.2d at 1265.

¹⁵⁵ See *supra* Part II.B (discussing the facts of *United States v. Craig*).

III. POLICY CONSIDERATIONS AND IMPLICATIONS

This Part analyzes the policy consequences of extending the prison mailbox rule to passively represented prisoners. Broadly, of course, the prison mailbox rule is “a rule of equal treatment,” intended to ensure that pro se prisoners “are not disadvantaged by delays which other litigants might readily overcome.”¹⁵⁶ The simple premise is that a prisoner should have his day in court. Some might argue that the prison mailbox rule subverts the public’s interest in finality of judgments, but this is mistaken. As the Fourth Circuit wrote, “*Houston* [*v. Lack*] does not create an exception by which incarcerated litigants may avoid time restrictions. It does not subvert the policies—those of speedy resolution and repose—that underline the impositions of time limitations during which potential litigants may file suit.”¹⁵⁷ Intuitively, this makes sense because even with the benefit of the prison mailbox rule, a prisoner must still give the appeal notice to prison authorities within the allowable time period. Extending the prison mailbox rule to passively represented prisoners does not undermine either policy consideration. Indeed, it likely furthers the equal treatment policy by including a class of prisoners that rightly deserves the rule’s benefits.

In deciding to adopt the prison mailbox rule, the Supreme Court in *Lack* articulated several specific policy grounds for its decision.¹⁵⁸ First, the majority argued that the rule is easy to apply and will impose little administrative burden on the federal courts.¹⁵⁹ In previous cases, the Court had rejected applying the mailbox rule because of the inability to determine the filing date with certainty.¹⁶⁰ In the prison context, however, the “well-developed prison procedures for recording the date and time at which they receive papers for mailing” mitigate any concern about certainty.¹⁶¹ Moreover, the alternative—the receipt rule—would create several additional problems by requiring lower courts to decide whether delays by the post office constituted excusable neglect and whether the appeal notice was time-stamped by the clerk a few days after it was actually received.¹⁶²

¹⁵⁶ *Lewis v. Richmond City Police Dep’t*, 947 F.2d 733, 735 (4th Cir. 1991); *see also* *Rutledge v. United States*, 230 F.3d 1041, 1052 (7th Cir. 2000) (“[*Houston v. Lack*] repeatedly stresses the possible unfairness of forcing prisoners to rely on prison authorities to deliver their legal papers in a timely manner.”); *United States v. Moore*, 24 F.3d 624, 625 (4th Cir. 1994) (arguing that it would be “unfair to permit a prisoner’s freedom to ultimately hinge on either the diligence or the good faith of his custodians”); *Pettibone v. Pa. Bd. of Prob. & Parole*, 782 A.2d 605, 608 (Pa. Commw. Ct. 2001) (citing *Commonwealth v. Castro*, 766 A.2d 1283, 1286 (Pa. Super. Ct. 2001)).

¹⁵⁷ *Lewis*, 947 F.2d at 736.

¹⁵⁸ *Houston v. Lack*, 487 U.S. 266, 275-76 (1988).

¹⁵⁹ *Id.* at 275.

¹⁶⁰ *Id.* (citing *United States v. Lombardo*, 241 U.S. 73, 78 (1916)).

¹⁶¹ *Id.*

¹⁶² *Id.*

Additionally, the Supreme Court worried that if the prison mailbox rule was not adopted, prison authorities might have an incentive to delay.¹⁶³ This concern was exacerbated by the fact that the prison authorities would be the only party with access to some of the evidence needed by the prisoner to prove that his appeal was timely filed.¹⁶⁴ From the prisoner's perspective, he will only be able to "guess whether the prison authorities, the Postal Service, or the court clerk is to blame for any delay."¹⁶⁵ For a majority of the Court, the prisoner's vulnerable position favored adopting the prison mailbox rule.¹⁶⁶ Ultimately, the prison mailbox rule would allow federal courts to sidestep difficult questions involving delay and remove any adverse incentive for prison authorities to exploit a prisoner's situation.

Both of the policy considerations identified by the Supreme Court support an extension of the prison mailbox rule to passively represented prisoners. This conclusion follows logically from the fact that, for all intents and purposes, a passively represented prisoner who mails an appeal notice is acting *pro se* by definition. That being the case, the administrative and fairness policy grounds are necessarily present. However, the extension of the prison mailbox rule to passively represented prisoners does pose one new wrinkle: how is a court to determine if a prisoner is passively represented?

The answer is straightforward: "whenever a prisoner attempts to file a notice of appeal from prison he is acting 'without the aid of counsel,' even if he is 'represented' in a passive sense."¹⁶⁷ That is, a prisoner who mails an appeal notice with prison authorities is presumably acting *pro se* and therefore is entitled to the prison mailbox rule. Essentially, mailing court documents with prison authorities is *prima facie* evidence that a prisoner does not have an attorney at his disposal.

At this point, most inquiries will be at an end. For a court to continue, there must be some evidence that the prisoner had counsel at his disposal. If there is such evidence, a court must then consider whether the prisoner *knew* he had counsel available to him. If so, the prisoner has forfeited the benefit of the prison mailbox rule.¹⁶⁸ Probably the easiest way to prove knowledge would be a court record informing the prisoner of his right to counsel, but there are other potential sources of evidence. For example, prison guest logs showing that a prisoner has met with counsel might also be sufficient.¹⁶⁹ At any rate, the extension of the prison mailbox rule to pas-

¹⁶³ *Id.* at 271.

¹⁶⁴ *Lack*, 487 U.S. at 276.

¹⁶⁵ *Id.*

¹⁶⁶ *See id.* at 270-72.

¹⁶⁷ *United States v. Moore*, 24 F.3d 624, 625 (4th Cir. 1994).

¹⁶⁸ *See supra* Part II.D.

¹⁶⁹ For example, most prisons require guests (even attorneys) to "register upon entry into the institution . . ." AM. CORR. INST., STANDARDS FOR ADULTS CORRECTIONAL INSTITUTIONS 157 (4th ed. 2003). The comment for the recommendation reads, "[e]ach visitor should register his or her name,

sively represented prisoners will impose a slight cost on judicial economy by asking courts to engage in an additional step in the inquiry but, as shown above, the administrative impact is relatively modest given the structured nature of the inquiry.

CONCLUSION

To be clear, Congress has already supplied an answer to the problem of represented prisoners and the prison mailbox rule. Judge Easterbrook is right when he says that Rule 4(c)(1)'s text and title—"an inmate confined in an institution"—plainly applies to both represented and pro se prisoners alike. No longer does the prison mailbox rule depend on the Supreme Court's decision in *Houston v. Lack*, but if some federal courts continue to ignore Rule 4(c)(1)'s plain meaning, they ought to at least give a fair reading to the Supreme Court's decision in *Lack*. Under Justice Brennan's majority opinion, the prison mailbox rule applies to situations implicating the agency, control, risk allocation, and certainty concerns that motivated the Court's holding. Almost unanimously, the federal circuits use these concerns as a touchstone for extending the prison mailbox rule to other filings, but not so for represented prisoners. As long as the Supreme Court refuses to revisit its decision in *Lack*, courts interpreting *Lack* should, at the very least, acknowledge that passively represented prisoners are entitled to the prison mailbox rule's benefit. Whether the Supreme Court's decision can be fairly read to extend the rule further is a question for another day.

address, and relation to the inmate." *Id.* The American Correctional Institute also recommends that "[p]rovisions should be made for visits [by counsel] during normal institutional hours . . . and after-hours visits requested because of special circumstances." *Id.* at 75.