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## ARTICLES

### JUDICIAL ADVOCACY IN PRO SE LITIGATION: A RETURN TO NEUTRALITY

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In theory the law creates impersonal rules of behavior that courts apply in an identical fashion regardless of the litigant.<sup>1</sup> Ideally, the powerful and powerless can expect to follow the same rules of law and procedure in any courtroom. Through neutral rules of practice and procedure, the courts seek to assure an equal opportunity for a full and fair hearing to all parties. Of course, the world is not perfect and there are obvious variables ranging from the lawyers' abilities, to the financial wherewithal of the parties that might affect the process of litigation. Yet, courts could apply their rules in a similar fashion to all with the hope that such a system will produce a just result.

Somewhere this ideal of neutrality has derailed in favor of an incongruous, ad hoc set of rules applicable only to pro se litigants.<sup>2</sup> While courts arguably intended some of these rules to benefit the pro se litigant and to ease the disadvantage of proceeding without counsel, in practice, even benign rules have worked to disfavor or even punish the pro se litigant. The result is that ad hoc rules designed to protect pro se litigants are often doing just the opposite. This Article endeavors to (1) trace the set of rules that apply uniquely to pro se litigants, (2) explore how those rules derailed, and (3) suggest a path for restoration of the impersonal ideal that once underlay the legal fabric of American law.

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1. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) (discussing “desirability that the law furnish a clear guide for the conduct of individuals . . . and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments”); see also *La. ex rel. Francis v. Resweber*, 329 U.S. 459, 470 (1947) (Frankfurter, J., concurring) (stating that the problem before the Court “involve[d] the application of standards of fairness and justice broadly conceived . . . [N]ot the application of merely personal standards but the *impersonal standards* of society which alone *judges* as the Organs of Law are empowered to enforce” (emphasis added)).

2. See *infra* Part I.

## I. THE DILEMMA

The schism that has developed in the treatment of pro se litigation is the by-product of two conflicting goals used in the evaluation of pro se pleadings. The first objective involves the measures used to assess whether the pleading sufficiently states a claim for relief.<sup>3</sup> Part of this objective seeks to assure that mere procedural technicalities do not trip up the unwary litigant.<sup>4</sup> The second, somewhat incongruous goal, deals with the basic notion that both the represented and unrepresented must follow the same procedural rules.<sup>5</sup>

*A. Inconsistencies with the Liberalized Pleading Standard of  
the Federal Rules of Civil Procedure*

The first objective in the evaluation of pleadings is captured in the well-known terms of Federal Rule of Civil Procedure (Rule) 8(a)(2), which provides that a pleading setting out a claim for relief need only contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>6</sup> This liberal pleading requirement reflects a long-established policy move away from the technical or stylized pleading forms of earlier common law practice.<sup>7</sup> Under the Rules, the function of pleading a claim for relief<sup>8</sup> is to give sufficient notice to

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3. See *infra* notes 9-10 and accompanying text (discussing the notice element of Federal Rule of Civil Procedure 8).

4. See *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986) (noting that the Court had “rejected an approach that pleading [was] a game of skill in which one misstep [could] be decisive” (citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1968-69 (2007))); *Foman v. Davis*, 371 U.S. 178, 181 (1962) (stating that it is “entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of . . . mere technicalities”).

5. See, e.g., *Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994) (“[A]ppellant’s *pro se* status does not excuse the obligation of any litigant to comply with the fundamental requirements of the Federal Rules of Civil and Appellate Procedure.”); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (“Pro se litigants must follow the same rules of procedure that govern other litigants.”).

6. FED. R. CIV. P. 8(a)(2). For further discussion on Rule 8 pleading requirements, see CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 68 (6th ed. 2002).

7. The Rules arose out of an evolving American movement away from the formal rigidity of the common law pleading practice and toward a more simplified pleading system. See JACK FRIEDENTHAL ET AL., *CIVIL PROCEDURE* § 5.1 (4th ed. 2005); WRIGHT & KANE, *supra* note 6, §§ 66, 68. In accord with this movement, the Supreme Court promulgated the Rules in 1938. See FRIEDENTHAL ET AL., *supra*, § 5.7, at 267. Of particular note, Rule 8 simplified and liberalized the federal pleading standard, creating a process in which the primary function of the complaint is to give fair notice to the adverse party. See FRIEDENTHAL ET AL., *supra*, § 5.7; WRIGHT & KANE, *supra* note 6, § 68, at 471.

8. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002) (“The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus

the adverse party<sup>9</sup> even if the plaintiff fails to adequately identify the legal theory for relief or detail relevant facts.<sup>10</sup>

Over fifty years ago the Supreme Court in *Conley v. Gibson*<sup>11</sup> set out to create a broad, principled method for judges to use in assessing the facial validity of a complaint based on the language and purpose of the liberalized system of

litigation on the merits of a claim.”).

9. The Supreme Court initially addressed the function of a pleading in *Conley*, 355 U.S. at 47-48. The Court faced a challenge to the sufficiency of a complaint against a union by African-American railway workers who had alleged racial discrimination in violation of federal law. *Id.* at 42-43. In upholding the sufficiency of the complaint, the Court clarified that the plaintiffs need not set out specific or detailed facts to support a claim for relief. *Id.* at 47. Rule 8 simply required “‘a short and plain statement of the claim’ that [would] give the defendant fair notice of what the plaintiff’s claim [was] and the grounds upon which it rest[ed].” *Id.* The Court made clear that the plaintiff was not obligated to “detail the facts on which he base[d] his claim.” *Id.* In giving effect to these notice pleading requirements and the directive of Federal Rule of Civil Procedure 8(f), which requires construction of pleadings “to do substantial justice,” the Supreme Court made clear that “[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.” *Id.* at 48; accord Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 434 (1986) (noting that “*Conley v. Gibson* put the Supreme Court on record as clearly favoring the liberal view [of pleading]”); see also *infra* notes 11-29 and accompanying text.

10. See FRIEDENTHAL ET AL., *supra* note 7, § 5.7; WRIGHT & KANE, *supra* note 6, § 68, at 470-71, 473-74 (both noting that the Rules include techniques such as discovery and summary judgment to fill the roles of determining all the facts, narrowing the issues, and providing speedy disposition); see also *Swierkiewicz*, 534 U.S. at 511-12 (stating that Rule 8(a) requires that a Title VII plaintiff plead enough to provide notice of the claim, but need not allege a prima facie case); *United States v. N. Trust Co.*, 372 F.3d 886, 888 (7th Cir. 2004) (“Even with respect to elements of the plaintiff’s claim, complaints need not plead facts or legal theories.”); *Fontana v. Haskin*, 262 F.3d 871, 877 (9th Cir. 2001) (“Specific legal theories need not be pleaded so long as sufficient factual averments show that the claimant may be entitled to some relief.”); *Simonton v. Runyon*, 232 F.3d 33, 36-37 (2d Cir. 2000) (“[G]enerally a complaint that gives full notice of the circumstances giving rise to the plaintiff’s claim for relief need not also correctly plead the legal theory or theories and statutory basis supporting the claim.” (quoting *Marbury Mgmt., Inc. v. Kohn*, 629 F.2d 705, 712 n.4 (2d Cir. 1980))); *C&F Packing Co. v. IBP, Inc.*, 224 F.3d 1296, 1306 (Fed. Cir. 2000) (“A complaint need not specify the correct legal theory, or point to the right statute, to survive a motion to dismiss.”); *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 167 (5th Cir. 2000) (“The form of the complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim.” (quoting *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 604 (5th Cir. Nov. 1981))); *Williams v. Midwest Airlines*, 321 F. Supp. 2d 993, 994 (E.D. Wis. 2004) (“It is not necessary for a plaintiff to identify in the complaint the legal theories on which he intends to proceed.”).

11. 355 U.S. 41 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1968-69 (2007).

notice pleading.<sup>12</sup> The oft-quoted language of *Conley* provides: “[W]e follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>13</sup>

Following *Conley*, the conventional wisdom was that a pleading could pass muster as long as the claimant could prove any set of facts, consistent with the complaint, which might justify relief.<sup>14</sup> While this liberal standard of pleading interpretation theoretically prevented dismissal of a complaint due simply to defects in form or inartful pleading style, critics asserted that under this broad standard virtually any complaint or claim could survive a motion to dismiss.<sup>15</sup> Indeed, this liberal standard of pleading review would permit many implausible claims to survive a motion to dismiss.<sup>16</sup> Moreover, since the system allowed implausible claims to survive the pleading stage of litigation, the stated test rarely commanded the degree of obedience from the courts that one would have expected.<sup>17</sup>

Virtually from the start, courts devised inroads which would permit more careful scrutiny of claims regarded as implausible.<sup>18</sup> For example while federal

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12. *Id.* at 45-46.

13. *Id.*

14. *See, e.g.*, WRIGHT & KANE, *supra* note 6, § 68. As Professor Charles Wright observes, whether a plaintiff is pro se or represented by counsel, a complaint cannot be dismissed unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations. This rule, which has been stated literally thousands of times, precludes final dismissal for insufficiency of the complaint except in the extraordinary case in which the pleader makes allegations that show on the face of the complaint some insuperable bar to relief.

*Id.* at 474 (footnote omitted).

15. As the Court recently observed in *Twombly*, 127 S. Ct. at 1969, “a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard.” (citing *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989); *McGregor v. Indus. Excess Landfill, Inc.*, 856 F.2d 39, 42-43 (6th Cir. 1988); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984); *O’Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976)).

16. Only those claims that “beyond doubt . . . the plaintiff [could] prove no set of facts in support of his claim would entitle him to relief” could be dismissed. *Conley*, 355 U.S. at 45-46.

17. *See Car Carriers, Inc.*, 745 F.2d at 1106 (“*Conley* has never been interpreted literally.” (citing *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984))); *see also Twombly*, 127 S. Ct. at 1969 (stating that *Conley*’s “no set of facts” language has been questioned, criticized, and explained away”).

18. *See* Geoffrey C. Hazard, *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1672 (1998) (while noting Rule 8 and compliance with *Conley v. Gibson* appears to permit a litigant to simply state the parties’ names and a demand for judgment, in reality “plaintiffs in American litigation actually plead with the kind of specificity required elsewhere in the world. Doing so helps the judge understand what the case is about, and it incidentally helps the opposing side”); Marcus, *supra* note 9, at 462-65; *see also Ascon Props., Inc.*, 866 F.2d at 1155 (noting that *Conley*

courts acknowledged the extraordinarily liberal pleading standard articulated in *Conley*, federal courts also: (1) interjected a requirement that the claimant have a “‘reasonably founded hope that the [discovery] process [would] reveal relevant evidence’ to support [the] claim”;<sup>19</sup> (2) declined to assume facts not alleged;<sup>20</sup> (3) rejected allegations in a complaint that were regarded as “conclusory” or “conjectural”;<sup>21</sup> and (4) emphasized that Rule 8 requires “that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’”<sup>22</sup> The inconsistency between the language of *Conley* and the reality of practice proved transparent, as courts frequently gave lip-service to *Conley*’s sweeping language while creating more and more ways to restrict litigation regarded as implausible or frivolous.<sup>23</sup>

This phenomenon proved to be particularly pronounced in prisoner litigation,<sup>24</sup> where many ad hoc, unskilled claimants proceeded pro se and

“unfortunately provided conflicting guideposts” and stating that the Supreme Court had “elsewhere hinted that sometimes more particularity in pleading [could] be required”); *Car Carriers, Inc.*, 745 F.2d at 1106 (stating that “*Conley* has never been interpreted literally” (citing *Sutliff*, 727 F.2d at 654)).

19. *Twombly*, 127 S. Ct. at 1969 (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

20. See *Associated Gen. Contractors of Cal., Inc. v. Cal. Council of Carpenters*, 459 U.S. 519, 526 (1983) (“It is not . . . proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.”); see also *McGregor*, 856 F.2d at 43 (stating that “‘when a plaintiff . . . supplies facts to support his claim, we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim into a substantial one . . . . [W]hen a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist’” (quoting *O’Brien*, 544 F.2d at 546 n.3 (citations omitted))).

21. *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (recognizing the *Conley* pleading standard, but adding that “it is within the trial court’s power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff’s standing”); see also *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (stating that on review of the sufficiency of a complaint, the court is “not bound to accept as true a legal conclusion couched as a factual allegation”).

22. *Twombly*, 127 S. Ct. at 1959 (quoting FED. R. CIV. P. 8(a)(2)).

23. See *O’Brien*, 544 F.2d at 546 n.3 (“[W]hen a plaintiff under 42 U.S.C. § 1983 supplies facts to support his claim, we do not think that [*Conley*] imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional official action into a substantial one.”); see also *Butz v. Economou*, 438 U.S. 478, 507-08 (1978) (dictum) (suggesting that “[i]nsubstantial” cases can be dismissed despite “artful pleading”). But cf. Hazard, *supra* note 18, at 1672 (“Although Rule 8 permits a claimant to plead in vacuous terms, ordinarily plaintiffs in American litigation actually plead with the kind of specificity required elsewhere in the world.”); Marcus, *supra* note 9, at 434 (“Although *Conley v. Gibson* put the Supreme Court on record as clearly favoring the liberal view, the actual application of its admonition in subsequent cases was more problematic.”).

24. Prisoner litigation is a relatively recent phenomenon. See Brian Ostrom et al., *Congress*,

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*Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525, 1529-32 (2003); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 558-64 (2006) [hereinafter Schlanger, *Civil Rights Injunctions*]; see also Drew Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1539-46 (2005) (discussing a general rise of pro se litigation).

The rise of modern prisoner litigation can be traced to the general expansion of civil rights litigation that occurred during the 1960s and 1970s. See Ostrom et al., *supra*, at 1529-32; Schlanger, *Civil Rights Injunctions*, *supra*, at 558-61.

By the mid-1960s, federal courts provided remedies to prisoners seeking relief from unconstitutional prison conditions under 42 U.S.C. § 1983. See, e.g., *Cooper v. Pate*, 378 U.S. 546, 546 (1964) (per curiam) (holding that a prisoner had stated a claim for relief under 42 U.S.C. § 1983 when he had alleged denial of “permission to purchase certain religious publications and denied other privileges enjoyed by other prisoners”).

By 1973, the Court acknowledged “recent decisions upholding the right of state prisoners to bring federal civil rights actions to challenge the conditions of their confinement.” *Preiser v. Rodriguez*, 411 U.S. 475, 498 (1973). The cases that the *Rodriguez* court acknowledged were *Haines v. Kerner*, 404 U.S. 1519 (1972); *Wilwording v. Swenson*, 404 U.S. 249 (1971); *Houghton v. Shafer*, 392 U.S. 639 (1968); and *Cooper*, 378 U.S. 546. The Court found that such cases “establish that a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody.” *Rodriguez*, 411 U.S. at 499.

Some prisoner litigation involves class action suits brought against prison officials or other appropriate authorities for large-scale, systemic, and supervised injunctions against unconstitutional conditions of confinement. See Ostrom et al., *supra*, at 1527-28; Edward Rubin & Malcolm Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617, 618-19 (2003) (discussing role of court in creating prison reform policy); Schlanger, *Civil Rights Injunctions*, *supra*, at 558-69; see also *Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004) (class action brought by death row inmates housed in Unit 32-C at the Mississippi State Penitentiary, involving numerous allegations concerning unconstitutional living conditions on Death Row); *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001) (class action brought by disabled California prisoners who obtained system-wide injunctive relief for statutory violations); *Harris v. Angelina County*, 31 F.3d 331 (5th Cir. 1994) (affirming the district court injunction in a prisoner class action that imposed a cap on the number of prisoners as a remedy to unconstitutional conditions of confinement); *Knop v. Johnson*, 667 F. Supp. 467 (W.D. Mich. 1987) (class action prisoner suit in which the district court ordered the prison to provide inmates with adequate winter clothing and adequate access to lavatory facilities).

Other prison litigation involves a single prisoner, often proceeding pro se, seeking injunctive or monetary redress for individual grievances such as use of excessive force by prison officials, unconstitutional living conditions, risk of harm from other prisoners, and deliberate indifference to medical needs. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (stating that prison officials’ deliberate indifference to substantial risk of serious harm, including risk of harm from other prisoners, may violate the Eighth Amendment and is, therefore, actionable in a § 1983 proceeding); *Estelle v. Gamble*, 429 U.S. 97, 103-05 (1976) (stating that deliberate indifference to a prisoner’s medical needs may violate the Eighth Amendment and, therefore, is actionable in a §

frequently raised claims that courts deemed implausible or frivolous.<sup>25</sup> Rather than confront this disconnect between reality and the pleading ideal, avoidance became a particularly powerful incentive as courts struggled to confront a rapid rise in prisoner litigation.<sup>26</sup> The result was that many claims regarded as implausible, nonetheless, easily survived the conventional test for dismissal.<sup>27</sup>

With continued attention to implausible claims, the Supreme Court recently elevated the legal consequences of skepticism.<sup>28</sup> In doing so, the Supreme Court treated the fifty-year-old *Conley* standard as if it were but a relic<sup>29</sup> and held that

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1983 proceeding); see also *Porter v. Nussle*, 534 U.S. 516, 520 (2002) (involving an inmate's allegations of "a prolonged and sustained pattern of harassment and intimidation"); *Lenz v. Wade* 490 F.3d 991, 993-94 (8th Cir. 2007) (involving a prisoner's allegation of excessive force).

25. See *Ostrom et al.*, *supra* note 24, at 1539-40 (graphically illustrating and analyzing the large number of court dismissals).

26. While prisoner litigation expanded dramatically, many pro se prisoner claims were dismissed as frivolous. See Jon Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 519 (1996). By the mid-1990s, both types—class-action suits and suits raising individual prisoner claims—of prisoner litigation came under significant scrutiny and a great deal of criticism. See, e.g., Lynn Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn From It*, 86 CORNELL L. REV. 483, 520-26 (2001) (noting the mid-1990's responses of (1) state attorney generals, (2) Congress and (3) the Second Circuit); Newman, *supra*, at 520-26; *Ostrom et al.*, *supra* note 24, at 1525-27; Kermit Roosevelt III, *Exhaustion under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1771-73 (2003); Schlanger, *Civil Rights Injunctions*, *supra* note 24, at 589-602; Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1626-33 (2003) [hereinafter Schlanger, *Inmate Litigation*]; Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 18-20 (1997); see generally Michael Zachary, *Dismissal of Federal Actions and Appeals Under 28 U.S.C. §§ 1915(e)(2) and 1915a(b)*, 42 U.S.C. § 1997e(c) and *The Inherent Authority of the Federal Courts: (A) Procedures for Screening and Dismissing Cases; (B) Special Problems Posed By the "Delusional" or "Wholly Incredible" Complaint*, 43 N.Y.L. SCH. L. REV. 975 (1999-2000) (discussing statutory changes PLRA brought to prisoner litigation).

27. See *supra* notes 14-23 and accompanying text.

28. See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1969-74 (2007).

29. The Supreme Court observed, "[A] good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard." *Id.* at 1969. Joining these critics, the Court added:

To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.

to survive dismissal under Rule 12(b)(6), the plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.”<sup>30</sup>

*B. Equal Application of Procedural Rules and the Pro Se Litigant*

The schism in American law also found expression in conflicting modes of enforcement for procedural rules that were seemingly mandatory for all litigants. Virtually all judges paid lip-service to the notion that pro se litigants had to follow generally applicable procedural rules notwithstanding the litigant’s frequent lack of legal training, education, and/or resources.<sup>31</sup> However, the inflexibility of this view implicates identical treatment for both plausible and implausible claims. The problem is that pro se litigants often lack the knowledge or experience to discern differences in the requirements of various procedural rules, such as the variety of responses required for an answer to a motion to dismiss or a motion for summary judgment.<sup>32</sup> This lack of knowledge could result in dismissal of an otherwise meritorious claim. Skeptical of the rigidity in this approach, with identical treatment of counseled and uncounseled litigants, courts struggled to create ways for plausible inmate suits to survive despite procedural irregularities.

One such method involved the creation of ad hoc requirements for judges to advise litigants about the rules before enforcing them.<sup>33</sup> While some courts have

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*Id.*

30. *Id.* at 1974.

31. *See, e.g.,* Pomales v. Celulares Telefonica, Inc., 342 F.3d 44, 49 n.4 (1st Cir. 2003) (“[Plaintiff’s] temporary pro se status did not absolve her of the need to comply with the Federal Rules of Civil Procedure or the district court’s procedural rules.”); Creative Gifts, Inc. v. UFO, 235 F.3d 540, 549 (10th Cir. 2000) (“Although pro se litigants get the benefit of more generous treatment in some respects, they must nonetheless follow the same rules of procedure that govern other litigants.”); LoSacco v. City of Middletown, 71 F.3d 88, 92 (2d Cir. 1995) (“Although [pro se] litigants should be afforded latitude, they ‘generally are required to inform themselves regarding procedural rules and to comply with them.’” (quoting Edwards v. INS, 59 F.3d 5, 8 (2d Cir. 1995) (citation omitted))).

32. *See, e.g.,* Pierce v. City of Miami, 176 F. App’x 12, 14 (11th Cir. 2006) (noting that “although pro se litigants are still bound by rules of procedure, . . . they should not be held to the same level of knowledge as an attorney”); *In re* T.R. Acquisition Corp., No. 99-5013, 1999 WL 753335, at \*1 n.1 (2d Cir. Sept. 16, 1999) (noting that “[pro se] litigants . . . generally lack specific knowledge of . . . legal procedures”).

33. For example, Rule 56(c) requires a party to present evidence if the adversary’s motion for summary judgment would otherwise reflect the absence of a genuine issue of material fact. FED. R. CIV. P. 56(c). Nonetheless, “[t]he majority of circuits have held that a pro se litigant is entitled to notice of the consequences of a summary judgment motion and the requirements of the summary judgment rule.” *United States v. Ninety-Three (93) Firearms*, 2003 FED App. 0157P, at 20, 330 F.3d 414, 427 (6th Cir. 2003) (citing cases from the Second, Fourth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits) (footnote omitted).



declined to require such advice,<sup>34</sup> even those courts have devised ways of protecting pro se litigants from procedural mishaps.<sup>35</sup> For example, one court recognized the power to dismiss claims that violate Rule 8, but suggested that judges should not order dismissal of pro se complaints unless they have explained for a “lay person . . . what judges and lawyers mean when speaking of a short and plain statement consistent with Rule 8.”<sup>36</sup> In contrast, attorneys violating the rule do not receive the same judicial advice before their suits are dismissed.<sup>37</sup>

## II. REACTION TO THE SCHISMS AND INTERPRETATIVE CONFLICTS: EMERGENCE OF MULTIPLE APPROACHES TO PRO SE LITIGATION

The schisms in the approaches to dismissal and procedural compliance have coalesced in a multi-faceted blend in how judges approach pro se litigation. The liberality of the standard for dismissal would permit innumerable suits to proceed despite deep skepticism of their underlying merit. The recently-imposed test of plausibility<sup>38</sup> creates an opportunity for courts to impose their own beliefs about the merit of the underlying suit despite the superficial liberality of the standard for dismissal. The continuum between the flexibility of Rule 8 and the subjective ingredient of plausibility allows the courts to form ad hoc devices to impose their own beliefs in a system supposedly based on objectivity and uniformity.

Even worse, a forum predicated on blind justice has evolved into a system that reflects a keen eye for the persona of the litigant.<sup>39</sup> Certain rules govern pro se litigants, while other rules govern parties represented by lawyers.<sup>40</sup> Sometimes the pro se litigants are favored;<sup>41</sup> sometimes they are disfavored.<sup>42</sup> Moreover,

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34. See, e.g., *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1162 (10th Cir. 2007) (noting that “a district court may, without abusing its discretion, enter [an order dismissing a pro se complaint for failure to comply with Rule 8] without attention to *any particular procedures*”).

35. See, e.g., *id.* (noting that no particular warning must be given, but that a number of criteria should be considered before dismissing a pro se complaint).

36. *Id.* at 1163; see also Howard Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 441-44 (1993) (discussing a prisoner’s ability as a pro se plaintiff to draft viable complaints and the responses of the courts to liberally construe such pro se pleadings).

37. *Nasious*, 492 F.3d at 1163 n.5 (“[W]e expect counsel to know the pleading rules of the road without being given personal notice of them by the district court. Our concern here is with the [pro se] litigant unschooled in the law.”).

38. See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007); see also *supra* notes 29-30 and accompanying text.

39. See, e.g., Eisenberg, *supra* note 36, at 443-44 (discussing courts’ treatment of pro se prisoners); Marcus, *supra* note 9, at 477 (discussing the disproportionate treatment of pro se prisoners in court dismissals of their complaints).

40. See *supra* notes 36-37 and accompanying text.

41. See Schlanger, *Civil Rights Injunctions*, *supra* note 24, at 558-64 (discussing the

sometimes the pro se litigants are lawyers,<sup>43</sup> resulting in either foolish paternalism or unprincipled assessments of their legal ability.<sup>44</sup> The multiplicity of interpretative approaches and degrees of judicial intervention derive from the array of subjective standards applied to review of pleadings, which, in turn, evolve from judicial efforts to blend disparate tests, inconsistent approaches to procedural requirements, and varying attitudes towards pro se litigation.<sup>45</sup>

With increasing subjectivity, courts have placed their gloss on various procedural rules.<sup>46</sup> The opportunity to do so has resulted from the loosening of principle<sup>47</sup> and elevation of the judge's dual role as the guardian and gatekeeper

prisoners' pro se litigation success in creating institutional change of the early 1960s and 1970s); Swank, *supra* note 24, at 1552-53 (discussing a court based pro se assistance program).

42. Ostrom et al., *supra* note 24, at 1529-60 (noting the historical trends in treatment of pro se prisoner claims both before and after the enactment of the PLRA and the statistical analysis of case dismissals corresponding with those timelines); Schlanger, *Civil Rights Injunctions*, *supra* note 24, at 558-69; *see also* Swank, *supra* note 24, at 1548 (noting the negative anecdotal impressions of pro se litigants).

43. *See, e.g.,* Smith v. N.Y. Presbyterian Hosp., 254 F. App'x 68, 70 (2d Cir. 2007); Harbulak v. Suffolk County, 654 F.2d 194, 198 (2d Cir. 1981).

44. When an attorney appears pro se, some courts have decided whether to liberally construe the pleadings based on whether the litigant was practicing law at the time. *Compare* Harbulak, 654 F.2d at 198 (holding that because a pro se litigant was a practicing lawyer, he was not entitled to "the special consideration customarily" available to unrepresented parties), *with* N.Y. Presbyterian Hosp., 254 F. App'x at 70 (even though "licensed attorneys" need not be afforded special "pleading consideration" when they appear without legal representation, the plaintiff was entitled to treatment as a pro se litigant because she had "not practiced law for years" as a result of "psychiatric impairments"). When the party is not an attorney, some courts have still applied "a sliding scale of liberality" depending on the litigant's level of experience in the legal system. *E.g.,* Standley v. Dennison, No. 9:05-CV-1033 (GLS/GHL), 2007 WL 2406909, at \*7-8 (N.D.N.Y. Aug. 21, 2007); Holsey v. Bass, 519 F. Supp. 395, 407 n.27 (D. Md. 1981); *see also* Michael J. Mueller, Note, *Abusive Pro Se Plaintiffs in the Federal Courts: Proposals for Judicial Control*, 18 U. MICH. J.L. REFORM 93, 98 n.14 (1984) ("Some courts have adopted a 'sliding scale of liberality' that places experienced pro se litigants somewhere between the uninitiated and trained lawyers.").

45. Many legal scholars have written about the political, social and judicial reaction to the prisoner litigation of the 1960s and 1970s. *See generally* Branham, *supra* note 26, at 484-97; Ostrom et al., *supra* note 24, at 1525-32; Schlanger, *Civil Rights Injunctions*, *supra* note 24, at 550-612; Schlanger, *Inmate Litigation*, *supra* note 26, at 1590-1627; Zachary, *supra* note 26 (comparing throughout prisoner litigation pre-PLRA and post-PLRA).

46. *See infra* notes 55, 58 and accompanying text.

47. *See* Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. NAT'L ASSOC. ADMIN. L. JUDICIARY 97, 101 (2007) ("Case after case announces 'the hoary but still vigorous rule' that self-represented litigants are held to the same standard as attorneys - and then case after case, often the same cases, describes exceptions to that rule and the special treatment trial judges should accord to those without attorneys." (quoting Gamet v. Blanchard, 111 Cal. Rptr. 2d 439, 447 (Dist. Ct. App. 2001))).

of pro se litigation.<sup>48</sup>

A. *Haines v. Kerner: Enhanced Liberal Construction for Pro Se Pleadings*

The dual rule of the judge is manifest in how courts have treated an otherwise innocuous passage in the *Haines v. Kerner*<sup>49</sup> per curiam opinion issued thirty-six years ago.<sup>50</sup> In *Haines*, the Supreme Court applied the *Conley* pleading standard<sup>51</sup> for review of the viability of complaints in light of the litigant's pro se status.<sup>52</sup> In that context, the *Haines* Court stated:

Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>53</sup>

Although the *Haines* Court relaxed the pleading standard for the pro se plaintiff, the Court did not define the degree of relaxation in comparison to the pro se liberal notice pleading rules applicable to all litigants in Rule 8.<sup>54</sup> Not

48. For example, one cynic described the judge's choice of competing principles when a party appears pro se:

While the principles may govern the decisions in one sense, the facts drive the selection of the principles. One can almost predict the outcome, and the choice of articulated principles, from the annoyance level of the court. The more annoyed the court is with an unrepresented litigant, the more likely the invocation of precedent requiring impartiality, the application of similar rules, and a prohibition of playing advocate for the litigant. The more sympathetic the litigant, and the more the absence of counsel seems beyond the litigant's control, the more likely the court will be to articulate a need to provide additional assistance to avoid a miscarriage of justice.

Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2015 (1999).

49. 404 U.S. 519 (1972) (per curiam).

50. The passage from *Haines* is cited *infra* note 53.

51. The *Conley* pleading standard is set forth *supra* in the text accompanying note 13. It is important to remember that the *Conley* standard preceded the *Twombly* standard.

52. *Haines*, 404 U.S. at 520-21; *see also* *Estelle v. Gamble*, 429 U.S. 97, 112 (1976) (Stevens, J., dissenting) (stating that the test in *Haines* is "whether the Court can say with assurance on the basis of the complaint that, beyond any doubt, no set of facts could be proved that would entitle the plaintiff to relief").

53. *Haines*, 404 U.S. at 520-21 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

54. *See* *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam) (in a post-*Twombly* decision involving pro se prisoners, the Court noted that pro se pleadings must "be liberally construed" and are "held to less stringent standards than formal pleadings drafted by lawyers")

surprisingly, federal courts take varying approaches regarding “how liberal” the construction of pro se pleadings should be.<sup>55</sup>

With the deterioration in objective standards and the intensification of judges’ reliance on their own beliefs, the innocuous passage in *Haines* has become a mirror for courts to act on their own perceptions of the plausibility of the underlying litigation.<sup>56</sup> Ideally, under *Haines*, plausible claims proceed while

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(quoting *Estelle*, 429 U.S. at 106 (majority opinion))).

55. For example, the Tenth Circuit in *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991), opined:

A pro se litigant’s pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. We believe that this rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff’s failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.

*Id.* (citations omitted).

Perhaps echoing the policy of protection of prisoners and liberal construction of such pro se pleadings, the District Court for Massachusetts stated:

As a marginalized group, prisoners are especially apt to require judicial protection. The United States has both a strong commitment to human rights and a clear history of human rights violations against prisoners, making such protection particularly appropriate and necessary. In light of these legal and empirical factors, courts should read prisoner petitions generously, give them careful consideration, and resolve statutory ambiguities in prisoners’ favor.

*Kane v. Winn*, 319 F. Supp. 2d 162, 175 (D. Mass. 2004).

Some commentators have expressed concern that pro se pleadings actually are treated more harshly than other pleadings, apparently in an effort to clear court dockets of unwanted litigation involving pro se inmates. Professor Howard Eisenberg observes:

Although courts routinely pay lip service to the liberal construction of pro se pleadings, as required by the Supreme Court in *Kerner*, there is a nagging concern among those few independent persons who have reviewed prisoner cases that the district courts are actually applying very different criteria when trying to rid their docket of pesky prisoner litigation. One commentator, who reviewed only reported district and courts of appeal decisions, found that a significant number of courts have applied stringent pleading standards to pro se plaintiffs, ignoring the explicit directions of *Haines v. Kerner* or “giving its language only superficial acknowledgment.”

Eisenberg, *supra* note 36, at 443 (footnote omitted) (citing and quoting Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 971-72 (1990)).

56. One student commentator notes:

[The] limitation [in *Haines*] is read differently by each court in terms of how liberally, and to which pleadings the rule applies. This results in inconsistent treatment of pro se litigants in the lower courts. For example, some courts rely upon the Supreme Court’s rationale in *Haines* to fashion a relaxed set of pro se standards for procedural conformity, particularly when dealing with summary judgment proceedings, compliance

implausible ones do not. The trouble is that plausibility is inherently subjective and judges likely gauge “plausibility” differently based on their ideologies, attitudes, and experiences.

### *B. The Rise in Subjectivity*

Without objective standards to provide guidance, courts have chosen to decide for themselves which pro se cases are plausible and which are not.<sup>57</sup> Not surprisingly, judges have erected their own artifices to allow pro se cases to survive an infinite variety of procedural traps.<sup>58</sup>

Seeking to relieve pro se litigants of various procedural traps, courts have created new, unanticipated dangers. Tangibly, such relief has resulted in unintended consequences for the litigants chosen for favorable treatment.<sup>59</sup> Intangibly, judicial benevolence has resulted in a softening of the distinction between advocacy and neutrality.<sup>60</sup> For example, courts have utilized ad hoc rules to interpret or advance a pro se litigant’s perceived grievance, such as recharacterizing suits under 42 U.S.C. § 1983 as habeas petitions,<sup>61</sup> advising litigants how to comply with rules,<sup>62</sup> and warning litigants of the need to comply with procedural requirements.<sup>63</sup> With the emergence of these rules, courts frequently struggle to maintain their neutrality when called on to perform functions typically associated with advocacy.

Judicial efforts to forecast the effects of various constructions on the pro se litigant illustrate this loss in objectivity. Without legislative power, the judiciary is at a loss to predict these effects. Two examples arose in 1995 and 1996 with Congress’s enactment of the Prison Litigation Reform Act of 1995 (PLRA)<sup>64</sup> and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>65</sup> The two

with discovery rules, the imposition of sanctions, and the introduction of evidence. A greater number of courts . . . take a more traditional approach and extend this sort of pleading leniency only to the substantive issues raised, while continuing to strictly enforce compliance with procedural requirements by pro se litigants.

Tiffany Buxton, Note, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT’L L. 103, 117-18 (2002) (footnotes omitted).

57. See *supra* notes 47-48, 55 and accompanying text.

58. See, e.g., *McDonald v. Hall*, 610 F.2d 16, 20 (1st Cir. 1979) (Campbell, J., dissenting) (suggesting that the majority “ben[t] over backwards to excuse the omission of allegations of the basic facts needed to make out a possible claim”).

59. See *infra* notes 80-87 and accompanying text.

60. See *supra* notes 33-36 and accompanying text; see also *infra* notes 100-01, 115-22 and accompanying text.

61. See *infra* notes 102-08 and accompanying text.

62. See *supra* notes 33-37 and accompanying text.

63. See *infra* notes 115-22 and accompanying text.

64. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 101, 110 Stat. 1321 (1996).

65. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat.

laws brought to the surface the futility and danger of compensating for a party's lack of legal representation.

*C. The PLRA's Impact on Judicial Construction of Pro Se Complaints*

With the PLRA, Congress hoped to curtail the flood of inmate litigation.<sup>66</sup> In many ways, the PLRA reflected legislative frustration with the rise of prisoner litigation and the perceived intrusion of the federal judiciary in the operation of state prison systems.<sup>67</sup> That frustration is evident in the statutory hurdles facing inmates who seek judicial review of prison conditions. Two important components of this effort were (1) the requirement of administrative exhaustion of claims<sup>68</sup> and (2) restrictions on inmates' eligibility for pauper status.<sup>69</sup>

The PLRA requires inmates to exhaust available administrative remedies before suing under federal law based on conditions within the prison.<sup>70</sup> The exhaustion provision creates tension with twenty-four years of precedent, originating in *Haines v. Kerner*,<sup>71</sup> in which federal courts had struggled to identify the causes of action encompassed in many prisoner complaints.<sup>72</sup>

Federal courts have long discarded the ancient requirement for a litigant to identify his legal theories in the complaint.<sup>73</sup> As a result, even for parties

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1214 (1996).

66. See Newman, *supra* note 26, at 522.

67. See 141 Cong. Rec. S14, 413 (1995) (statement of Sen. Dole).

68. Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(a) (2000).

69. Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915(g) (2000).

70. 42 U.S.C. § 1997e(a) (2000).

71. 404 U.S. 519 (1972) (*per curiam*).

72. As noted earlier, often prisoner complaints involve inartful, mislabeled or muddled allegations and claims for relief. Often the litigants are poorly educated and are unable to craft a document like a lawyer. These defects often mean that the court has to wade through the pleading to discern what the allegations are, what claims for relief these allegations support, and sometimes even who the alleged defendants are. See, e.g., *Crooks v. Nix*, 872 F.2d 800, 801 (8th Cir. 1989) (employing liberal construction of pleading to discern relevant defendants and claims); *Haley v. Dormire*, 845 F.2d 1488, 1490 (8th Cir. 1988) (reversing dismissal of pro se prisoner complaint because when "read expansively" the complaints set forth sufficient claims for relief); *Massop v. Coughlin*, 770 F.2d 299, 301 (2d Cir. 1985) (*per curiam*) (although district court could not find a constitutional claim based on the allegations in the prisoner's complaint, Second Circuit remanded finding that applying liberal standard of review, prisoner set forth sufficient allegations that the prison guard intentionally injured him); *Marshall v. Brierley*, 461 F.2d 929, 930 (3rd Cir. 1972) (reviewing complaint filed by a prisoner with "only minimal literary skills" and finding sufficient grounds to allow complaint to go forward).

73. Judge Easterbrook explained, "A drafter who lacks a legal theory is likely to bungle the complaint (and the trial); you need a theory to decide which facts to allege and prove. But the complaint need not identify a legal theory, and specifying an incorrect theory is not fatal." *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992); see also *supra* notes 13-17 and accompanying text.

enjoying legal representation, the courts read into the complaint all causes of action fairly encompassed by the pleader's factual allegations.<sup>74</sup> This exercise often proves to be simple when the plaintiff enjoys legal representation,<sup>75</sup> but the process becomes far more problematic when the plaintiff lacks legal training or representation.<sup>76</sup> In the absence of such training or representation, litigants often try to express their claims without the ability to pinpoint the misdeeds that are actionable.

Deciphering these complaints frequently required courts to decide whether to err on the side of a narrow construction or a generous one. One option involved strict adherence to inartful and, perhaps, unintended language of the pro se complaint itself.<sup>77</sup> Another option was to construe the complaint to fairly encompass all claims fairly raised by the pro se litigant's pleading.<sup>78</sup>

Prior to 1996, courts had little reason to read complaints narrowly. With generous construction, courts could ferret out the viable claims, and if the courts proved overly generous in their construction, pro se litigants could drop any claims that they had not intended to insert. As a result, judges often interpreted pro se complaints to include whatever legal theories could be encompassed by the plaintiff's factual allegations.<sup>79</sup>

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74. Professors Wright and Miller state:

The federal rules, and the decisions construing them, evince a belief that when a party has a valid claim, he should recover on it regardless of his counsel's failure to perceive the true basis of the claim at the pleading stage, provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining a defense upon the merits.

5 CHARLES ALAN WRIGHT & ARTHUR MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1219, at 281-83 (3d ed. 2004) (footnote omitted).

75. See *supra* note 37 and accompanying text.

76. See *supra* note 32 and accompanying text.

77. In many cases, courts dismiss prisoner pleadings based on the failure of the prisoner to set out or adequately explain his claims and the court does not engage in an effort to create claims of relief for the plaintiff or to try to help the plaintiff in setting out his claims. See, e.g., *Richards v. Johnson*, 115 F. App'x 677 (5th Cir. 2004) (dismissing complaint where there was lack of specificity in claims and defendants); *McDonald v. Hall*, 610 F.2d 16 (1st Cir. 1979) (stating "[o]ur duty to be 'less stringent' with pro se complaints does not require us to conjure up unpled allegations").

78. In other cases, the courts appear to be more liberal in finding claims that may go forward in a § 1983 action. See, e.g., *Dillier v. Williams*, No. 93-56380, 1994 WL 10005, at \*1-2 (9th Cir. Jan. 13, 1994) (applying liberal pleading standard to inartful complaint, court found district court erred in dismissal of complaint); *Roundtree v. N.Y. Dep't of Corr.*, No. CV-94-3833 (CPS), 1995 WL 428654, at \*5 (E.D.N.Y. July 1, 1995) (noting that although inartfully pled, the plaintiff nonetheless stated a claim with respect to constitutional deprivation due to prison transfer decision); see also *Marshall v. Brierley*, 461 F.2d 929, 930 (3rd Cir. 1972) (reviewing complaint filed by a prisoner with "only minimal literary skills" and finding sufficient grounds to allow complaint to go forward).

79. See, e.g., *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994) ("Because Burgos is a pro

This type of construction seemed reasonable prior to 1996 and consistent with the judiciary's commitment to fairness and the elevation of substance over form. However, this liberal construction practice ultimately collided with the PLRA exhaustion requirement.<sup>80</sup> Indeed, with the passage of the PLRA, a court's commitment to generous construction often proved unfair to the very people it intended to help.

For example, until recently, some courts "generously" read legal claims into complaints only to dismiss the entire action if the plaintiff failed to exhaust even a single theory.<sup>81</sup> The anomaly was that the theory might have been unexhausted only because the pro se litigant had not intended to assert it in the litigation as a separate cause of action. Benign in purpose, proactive construction of pro se complaints has proved far from benign in result.

The same has often been true even in those courts that decline to dismiss the entire action when some of the claims were exhausted and some were not.<sup>82</sup> In addition to requiring administrative exhaustion, Congress intensified the requirements for pauper status for prisoners who had filed baseless lawsuits.<sup>83</sup> Congress did so by treating dismissals for "frivolousness" or "failure to state a valid claim" as "strikes."<sup>84</sup> A prisoner could accumulate three "strikes" without a penalty, but once the inmate obtained three "strikes," he could only gain pauper status upon a showing that he was in imminent risk of serious bodily harm.<sup>85</sup>

With the statutory change, courts have struggled to determine when a "strike" has taken place.<sup>86</sup> Some courts conclude that a "strike" occurs when a trial court

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se litigant, we read his supporting papers liberally, and will interpret them to raise the strongest arguments that they suggest."); *White v. Wyrick*, 530 F.2d 818, 819 (8th Cir. 1976) (per curiam) ("[W]e note that petitioner appears pro se and is entitled to have his pleadings interpreted liberally and his petition should be construed to encompass any allegation stating federal relief . . .").

80. The exhaustion requirement can be found at 42 U.S.C. § 1997e(a) (2000).

81. *See, e.g., Patel v. Fleming*, 415 F.3d 1105, 1109-11 (10th Cir. 2005) (dismissing prisoner's pro se complaint for failure to timely submit a written administrative remedy request even though plaintiff claimed he was late in submitting because of an attempt to intentionally resolve his second hand smoke damages); *Bey v. Johnson*, 2005 FED App. 0194P, 407 F.3d 801, 805-07 (6th Cir. 2005) (adopting the "total exhaustion rule" so that any and all available remedies must have been exhausted before a prisoner could bring any claims that were even remotely connected to potential administrative remedies), *vacated and remanded by* 127 S. Ct. 1212 (2007); *Graves v. Norris*, 218 F.3d 884, 885-86 (8th Cir. 2000) (per curiam) (dismissing the claim because "it is clear from the record that at least some of plaintiffs claims were unexhausted"). The Supreme Court ultimately rejected this approach. *Jones v. Bock*, 549 U.S. 199, 219 (2007) (concluding that "exhaustion is not *per se* inadequate . . . [L]eav[ing] it to the court below in the first instance to determine the sufficiency of the exhaustion in these cases").

82. *E.g., Ortiz v. McBride*, 380 F.3d 649, 651 (2d Cir. 2004) (observing Second Circuit conclusion that complete dismissal is not required under § 1997e).

83. Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915(g) (2000).

84. *Id.*

85. *Id.*

86. *See, e.g., Dubuc v. Johnson*, 314 F.3d 1205, 1209 (10th Cir. 2003) (discussing "the irony



dismisses even a single cause of action for frivolousness or failure to state a valid claim.<sup>87</sup> In these courts, deciphering a pro se party's complaint can often create hidden consequences extending far beyond the case itself. For example, a pro se party could, hypothetically, assert five claims, prevail on four, and suffer dismissal of one. The lone dismissal could forever jeopardize pauper status for the litigant even though he had prevailed in the suit. In these circumstances, the pro se litigant would suffer even without a hint of having abused his pauper status.

The danger is heightened by the treacherous task of deciding which claims were intended by the plaintiff and which were not. In the hypothetical situation, the pro se litigant might never have intended to assert the single cause of action that was dismissed. The courts, benign in purpose, might be forever penalizing the same litigants who were the intended beneficiaries of such judicial generosity.

#### *D. The AEDPA's Impact on Judicial Construction of Pro Se Petitions*

In 1996, Congress set out to limit habeas litigation.<sup>88</sup> Prior to 1996, federal

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that ascertaining whether a particular prisoner litigant has accumulated at least three strikes may require the use of more judicial resources than addressing the prisoner's claims on the merits").

87. See *Pointer v. Wilkinson*, 2007 FED App. 0363P, at 7, 502 F.3d 369, 377 (6th Cir. 2007) ("[W]e hold that where a complaint is dismissed in part without prejudice for failure to exhaust administrative remedies and in part with prejudice because 'it is frivolous, malicious, or fails to state a claim upon which relief may be granted,' the dismissal should be counted as a strike under 28 U.S.C. § 1915(g)."); *Comeaux v. Cockrell*, 72 F. App'x 54, 55 (5th Cir. 2003) (per curiam) ("The district court could dismiss part of [the plaintiff's] complaint as malicious, which counted as a strike under 28 U.S.C. § 1915(g), even though the case was ultimately dismissed for failure to comply with court orders."); *Faust v. Parke*, No. 96-3881, 1997 WL 284598, at \*3 (7th Cir. May 22, 1997) (stating that a dismissal "counts as a strike" under § 1915(g), notwithstanding the court's decision not to retain jurisdiction over a constructive fraud claim); *Eady v. Lappin*, No. 9:05-CV-0824, 2007 WL 1531879, at \*2 (N.D.N.Y. May 22, 2007) (adopting magistrate judge's finding that "a plaintiff might earn a strike because some of his claims were dismissed for frivolousness, maliciousness or failure to state a claim"); *Shaw v. Weeks*, No. 06-2024-B/V, 2006 WL 1049307, at \*6 n.13 (W.D. Tenn. Apr. 20, 2006) ("The fact that some of plaintiff's claims in this action have been dismissed for failure to exhaust does not preclude the imposition of a strike on the basis of claims that were dismissed for failure to state a claim or as frivolous."); *Luedtke v. Bertrand*, 32 F. Supp. 2d 1074, 1076 n.1 (E.D. Wis. 1999) (holding that dismissal of a corresponding state law claim, without prejudice, based on a lack of federal subject-matter jurisdiction, "does not, and should not, disqualify the case from being counted as a 'strike' for purposes of § 1915(g)").

88. See Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2244(d)(1)(A)-(D) (2000); see also *David v. Hall*, 318 F.3d 343, 346 (1st Cir. 2003) ("One of AEDPA's main purposes was to compel habeas petitions to be filed promptly after conviction and direct review, to limit the number, and to permit delayed or second petitions only in fairly narrow and explicitly defined circumstances."); *Miller v. N.J. Dep't of Corrs.*, 145 F.3d 616, 618 (3d Cir. 1998) (noting that Congress enacted AEDPA, "in relevant part to curb the abuse of the writ of habeas corpus").

courts could dismiss repetitious habeas filings on grounds that they involved an abuse of the writ.<sup>89</sup> Dismissal was generally not mandatory and courts had almost no guidance on how to exercise their discretion.<sup>90</sup> Through the AEDPA, Congress created a framework that left little room for successive habeas petitions and motions for vacatur of a sentence. One could only file a second or successive habeas petition or motion for vacatur of a sentence if he satisfied a narrow set of criteria and obtained advance authorization by the court of appeals.<sup>91</sup>

The result was an array of new legislative consequences when a prisoner had already filed a habeas petition or motion to vacate the sentence.<sup>92</sup> However, prior to passage of the AEDPA, the courts had accumulated twenty-three years of precedent on when a pleading should be interpreted as a habeas petition or motion to vacate the sentence. With this precedent in place, passage of the 1996 statute created a reminder of the dangers in the judiciary's proactive reading of pro se pleadings.

The anomaly is largely rooted in *Preiser v. Rodriguez*<sup>93</sup> in which the Supreme Court held that a writ of habeas corpus constituted the exclusive remedy when one challenged the fact or duration of confinement.<sup>94</sup> When an inmate asserted such a challenge through other means, such as a civil rights action brought pursuant to 42 U.S.C. § 1983, courts faced a dilemma.<sup>95</sup> One alternative was to take the inmate's filing fee and dismiss the action without reaching the merits.<sup>96</sup>

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89. See 28 U.S.C. § 2244(a) (1994).

90. See *id.* § 2244(a)-(b); RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS R. 9(b) (as amended to Feb. 1, 1995); see also *Kramer v. Butler*, 845 F.2d 1291, 1295 (5th Cir. 1988) (“[W]hether a habeas petition is dismissed as an abuse of the writ under Rule 9(b) is to a large extent discretionary rather than automatic or mandatory.”) (citation omitted).

91. See 28 U.S.C. §§ 2244(b)(3), 2255 (2000).

92. See *id.*

93. 411 U.S. 475 (1973).

94. See *id.* at 503 (Brennan, J., dissenting) (stating that under the majority's holding “habeas corpus is now considered the prisoner's exclusive remedy”).

95. The reason for the dilemma is this: an inmate files a 1983 action and he pays his filing fee. Unfortunately, he should have filed a habeas petition and he cannot proceed on his claim under 1983. So, at this point, the court dismisses the 1983 action, and the prisoner loses the filing fee, and he does not get a hearing on his claim. To avoid this harsh result, the court could convert or recharacterize the claim as a habeas action, and the court could now go ahead and hear the merits of his claim. As the Supreme Court noted in *Castro v. United States*, 540 U.S. 375, 381 (2003), “[f]ederal courts sometimes will ignore the legal label that a [pro se] litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category.”

96. See *infra* notes 105-10 and accompanying text; see also *Spillman v. Cully*, No. 08-CV-008M, 2008 WL 495512 (W.D.N.Y. Feb. 15, 2008) (finding § 1983 complaint should be recharacterized as a habeas petition and notifying plaintiff of intent to do so unless plaintiff advises the court otherwise); *Brown v. Guiney*, No. 06-CV-555, 2006 WL 1144499 (W.D.N.Y. April 25, 2006) (same). For cases in which courts decline to recharacterize § 1983 complaints as habeas petitions, see *Clay v. Smith*, No. CIV-08-85-W, 2008 WL 4533993 (W.D. Okla. Oct. 2, 2008);

Some courts saw this alternative as incompatible with *Haines* and routinely recharacterized such actions as habeas petitions.<sup>97</sup> The process appears to supply courts with a fair means to reach the merits of the claim, recognizing the pro se litigant's difficulties and the guidance offered in *Haines*.

The problem was that these courts could not anticipate legislative changes which would turn this benign process of recharacterization into a dangerous penalty for pro se litigants. For example, the AEDPA requires courts to address whether an action is "second or successive" even when the proponent has sought habeas relief or vacatur of the sentence prior to enactment of the law.<sup>98</sup> Courts frequently answered in the affirmative.<sup>99</sup> Thus, when a court recharacterized an action prior to 1996 as a habeas petition or motion for vacatur of a sentence, the litigant now needed the appellate court's permission before he could file another habeas petition.<sup>100</sup> Under the statute, this permission was available only in narrow circumstances.<sup>101</sup> Thus, recharacterization of pleadings frequently disadvantaged the same people that the courts had hoped to protect.

An example of the anomaly is the litigation brought by Sylvester Tolliver. In 1993, Mr. Tolliver was convicted of three criminal counts, including violation of 18 U.S.C. § 924(C)(1).<sup>102</sup> Only days after enactment of the 1996 habeas law, Mr. Tolliver filed a motion to dismiss one of the counts on which he was convicted.<sup>103</sup> Even before the court ruled, Mr. Tolliver objected to characterization of the motion as one filed under 28 U.S.C. § 2255.<sup>104</sup>

*Foster v. Berghuis*, No. 1:07-cv-950, 2008 WL 4426337 (W.D. Mich. Sept. 26, 2008); *Crow v. Quarterman*, No. G-07-0096, 2008 WL 3539738 (S.D. Tex. Aug. 13, 2008).

97. See, e.g., *Raineri v. United States*, 233 F.3d 96, 100 (1st Cir. 2000) (holding that "when a district court, acting sua sponte, converts a post-conviction motion filed under some other statute or rule into a section 2255 petition without notice and an opportunity to be heard . . . the recharacterized motion ordinarily will not count as a 'first' habeas petition sufficient to trigger AEDPA's gatekeeping requirements").

98. 28 U.S.C. § 2244(b) (2000).

99. E.g., *Cooper v. Calderon*, 274 F.3d 1270, 1272 (9th Cir. 2001) (per curiam); *Daniels v. United States*, 254 F.3d 1180, 1188 (10th Cir. 2001) (en banc); *Graham v. Johnson*, 168 F.3d 762, 781-83 (5th Cir. 1999); *In re Minarik*, 166 F.3d 591, 599-600 (3d Cir. 1999).

100. See *supra* notes 88-91 and accompanying text.

101. See 28 U.S.C. §§ 2244(b)(2), 2255 (2000).

102. Judgment in a Criminal Case, *United States v. Tolliver*, Case No. CR-92-20008-01 (W.D. La. Apr. 16, 1993).

103. Motion to Dismiss 18 U.S.C. 924(C), *Tolliver v. United States*, No. CR-92-20008-01 (W.D. La. May 20, 1996).

104. Mr. Tolliver wrote to the court clerk:

I'm writing in response to the Government's response to my *Motion to Dismiss 18 U.S.C. 924(C)(1)*. First, my motion wasn't suppose [sic] to be filed as a 2255 motion, because I sent a letter in dated 6-9-96 explaining that. So, please take this letter as an objection to my motion being filed under 28 U.S.C. 2255. Instead, this motion should be construed as a motion for a reduction of sentence Pursuant to 3582, *Not* a 2255. Also, I have other issues I plan to bring up in the future under Section 2255, and this

Nonetheless, the court treated the motion as one for vacatur of the sentence under 28 U.S.C. § 2255.<sup>105</sup> Mr. Tolliver later wanted to file a second motion under § 2255, and the federal appeals court denied leave.<sup>106</sup> In doing so, the court said that Mr. Tolliver could not file a second motion under § 2255 even though he had never intended to file one and his prior motion had addressed only one of three counts.<sup>107</sup> The federal appeals court reasoned that Mr. Tolliver's motion had to arise under § 2255 even though he called the document a "motion to dismiss."<sup>108</sup>

The court's effort to help Mr. Tolliver did him little good. If the document had been treated as a motion to dismiss, the court presumably would have denied relief.<sup>109</sup> However, such treatment would have allowed refile of the motion under its proper label, with inclusion of all grounds and counts that Mr. Tolliver wanted to address. The result, instead, involved an anomaly. As the First Circuit put it, by "striv[ing] to balance the scales of justice" through recharacterization, the court "preclud[ed] the pleader from any opportunity to litigate potentially meritorious constitutional claims."<sup>110</sup>

*Haines v. Kerner* did not create the anomaly. Instead, the anomaly arose from the courts' use of *Haines* as an equalizer in the litigation. The courts hoped not only to remove legal obstacles for inmates, but also to give them the benefit of strategic choices that presumably would have been made with legal representation.<sup>111</sup> One could only guess whether these predictions would have

motion has been used by several inmates and this is the first time it has been interpreted as a 2255, so please don't file it as such.

Letter from S. Tolliver to Court Clerk, *United States v. Tolliver*, No. CR-92-20008-01 (docketed July 15, 1996).

105. Judgment in a Criminal Case, *United States v. Tolliver*, Case No. CR-92-20008-01 (W.D. La. July 8, 1996).

106. *In re Tolliver*, 97 F.3d 89, 90 (5th Cir. 1996) (per curiam).

107. *Id.*; see *supra* notes 82-85 and accompanying text (discussing the three strikes rule as strictly applied).

108. *In re Tolliver*, 97 F.3d at 90.

109. See *Carlson Mktg. Group, Inc. v. Royal Indem. Co.*, No. 04-CV-3368, 2006 WL 2917173, at \*2-3 (D. Minn. Oct. 11, 2006) (stating that motions to strike documents, other than pleadings, would be denied because "there is no such thing"); *Zurich Am. Ins. Co. v. Pillsbury Co.*, 264 F. Supp. 2d 710, 711 (N.D. Ill. 2003) (denying a motion to dismiss under the specified state statute, as "[t]here is no such thing" under federal procedural law).

110. *Raineri v. United States*, 233 F.3d 96, 99 (1st Cir. 2000).

111. For example, although a pro se plaintiff may not know the correct language or style of a claim for relief that a lawyer would use, the court will construe the complaint so as to allow the complaint to go forward. *Marshall v. Brierley*, 461 F.2d 929, 930 (3rd Cir. 1972) (court reviewed complaint filed by a prisoner with "only minimal literary skills" and found sufficient grounds to allow complaint to go forward). Likewise in recharacterizing 1983 actions as habeas proceedings and advising the plaintiff of this action, the court is directing the plaintiff towards the correct legal action to pursue. See, e.g., *Spillman v. Cully*, No. 08-CV-008M, 2008 WL 495512 (W.D.N.Y. Feb. 15, 2008); *Brown v. Guiney*, No. 06-CV-55S, 2006 WL 1144499 (W.D.N.Y. April 25, 2006) (both finding § 1983 complaint should be recharacterized as a habeas petition and notifying plaintiff of

materialized if the inmates had been represented.

As a result, courts used assumptions to make their guesswork as meaningful as possible. Prior to 1996, the assumptions could help inmates, but not harm them.<sup>112</sup> Adoption of the AEDPA changed that legal landscape.<sup>113</sup> If courts had not sought to level the playing field, many pro se litigants would have been able to file future habeas petitions or motions to vacate a sentence without the need for judicial permission.<sup>114</sup> With the new legal consequences created by Congress, the judiciary's proactive effort to help pro se litigants created an unwanted, undeserved burden for them.<sup>115</sup>

The inequity is traceable to the judiciary's process of treating pleadings

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intent to do so unless plaintiff advises the court otherwise).

112. The reason it could not harm them is that the second and successive rules of habeas petitions were different pre-AEDPA and the plaintiffs would not have been adversely affected under the old rules. The consequences of the change in habeas rules in the AEDPA are discussed in *Castro v. United States*, 540 U.S. 375, 377 (2003), in which the Supreme Court stated:

Under a longstanding practice, a court sometimes treats as a request for habeas relief under 28 U.S.C. § 2255 a motion that a [pro se] federal prisoner has labeled differently. Such recharacterization can have serious consequences for the prisoner, for it subjects any subsequent motion under § 2255 to the restrictive conditions that federal law imposes upon a "second or successive" (but not upon a first) federal habeas motion. § 2255, ¶ 8. In light of these consequences, we hold that the court cannot so recharacterize a [pro se] litigant's motion as the litigant's first § 2255 motion *unless* the court informs the litigant of its intent to recharacterize, warns the litigant that the recharacterization will subject subsequent § 2255 motions to the law's "second or successive" restrictions, and provides the litigant with an opportunity to withdraw, or to amend, the filing. Where these things are not done, a recharacterized motion will not count as a § 2255 motion for purposes of applying § 2255's "second or successive" provision.

*Id.* As a result, when a court now wishes to recharacterize a complaint as a petition, it must advise the plaintiff. Unfortunately, this requirement does not help plaintiffs whose complaints were recharacterized prior to *Castro*.

113. See *United States v. Palmer*, 296 F.3d 1135, 1144 (D.C. Cir. 2002) ("The AEDPA significantly changed the landscape.").

114. See generally *Castro*, 540 U.S. 375.

115. The Second Circuit Court of Appeals explained:

[A] conversion, initially justified because it harmlessly assisted the prisoner-movant in dealing with legal technicalities, may result in a disastrous deprivation of a future opportunity to have a well-justified grievance adjudicated. The court's act of conversion which we approved under pre-AEDPA law because it was useful and harmless might, under AEDPA's new law, become extraordinarily harmful to a prisoner's rights. A prisoner convicted pursuant to unconstitutional proceedings might lose the right to have a single petition for habeas corpus adjudicated, solely by reason of a district court's having incorrectly recharacterized some prior motion as one brought under § 2255.

*Adams v. United States*, 155 F.3d 582, 583-84 (2d Cir. 1998) (per curiam) (footnote omitted).

based on what would have benefitted the pro se litigant rather than what he or she had actually intended. This methodology is traditionally aligned with advocacy rather than adjudication.<sup>116</sup>

Courts have struggled to avoid this inequity in various ways. For example, the Supreme Court has prohibited recharacterization of a pleading as an initial motion under 28 U.S.C. § 2255 in the absence of disclosure regarding the district court's intent.<sup>117</sup> The Court warned that recharacterization could render a subsequent motion "second or successive," so the litigant must be provided an opportunity to withdraw or to amend the filing.<sup>118</sup> Many courts have applied the same principle to disclosures and warnings to the litigant whenever a pleading is recharacterized as an initial habeas petition.<sup>119</sup> This practice avoids the anomaly for prisoners, like Mr. Tolliver, whose motions are recharacterized to their detriment. However, this practice further compromises the judiciary's role as an impartial arbiter, as the court becomes a counselor for the litigant and gives him an opportunity to amend or withdraw a pleading without any basis in either the Federal Rules of Civil or Criminal Procedure.<sup>120</sup>

When the district court fails to give the required warnings, a subsequent pleading will not be considered a "second or successive" motion under 28 U.S.C. § 2255.<sup>121</sup> This approach effectively disregards the congressional will for consideration of certain pleadings as second or successive.<sup>122</sup>

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116. Compare AMERICAN HERITAGE DICTIONARY 26 (4th ed. 2000) (defining "advocacy" as "[t]he act of pleading or arguing in favor of something, such as a cause, idea, or policy; active support"), with *id.* at 25 (defining "adjudicate" as "[t]o hear and settle (a case) by judicial procedure").

117. *Castro*, 540 U.S. at 383.

118. *Id.* (discussing the implications of a district court's characterization in light of 28 U.S.C. 2255 (2006)).

119. See, e.g., *Yellowbear v. Wyo. Attorney Gen.*, 525 F.3d 921, 924-25 (10th Cir. 2008) (requiring the *Castro* warnings before recharacterization as a habeas petition brought under 28 U.S.C. § 2254); *Martin v. Overton*, 2004 FED App. 0413P, 391 F.3d 710, 712-13 (6th Cir. 2004) (requiring disclosure and consent before the court can sua sponte convert a pleading to a habeas petition brought under 28 U.S.C. § 2254 (2000)); *Simon v. United States*, 359 F.3d 139, 145 (2d Cir. 2004) (requiring the same disclosure and warnings when a motion is converted to a habeas petition under 28 U.S.C. § 2241).

120. See FED. R. CIV. P. 15(a)(2) and 41(a)(2) (requiring court approval for amendments and voluntary dismissals in certain situations). Cf. RULES GOVERNING SECTION 2255 PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS R. 12 (stating that the Federal Rules of Civil and Criminal Procedure may be applied in actions involving 28 U.S.C. § 2255). The Supreme Court's procedure implicitly requires the district court to permit amendment or dismissal whenever a pleading is recharacterized as an initial motion under Section 2255. *Castro*, 540 U.S. at 303 (noting that the district court should "provide the litigant the opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has").

121. *Castro*, 540 U.S. at 377.

122. See *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1145 (10th Cir. 2004) (stating that the Tenth Circuit had never interpreted principles of liberal construction for pro se litigants to

A pleading is whatever it is, regardless of what the court does. The legislative consequences for the pleader should not depend on whether the judge decides to leave the pleading alone or treat it as something other than what the proponent said it was. With injection of the judge's action into a determination of legislative consequences, the judicial role changes from umpire to advocate. And with this change comes the unfortunate loss of the judge's neutrality.

### III. THE LESSONS LEARNED FROM THE PLRA AND AEDPA

With this intangible loss of a judge's neutrality, the courts may be creating unintended penalties for the litigants who the courts are paradoxically trying to help. The 1996 changes in the PLRA<sup>123</sup> and AEDPA<sup>124</sup> illustrate these dangers. The 1996 amendments governing pauper status,<sup>125</sup> exhaustion of administrative remedies,<sup>126</sup> and second and successive habeas petitions and motions under 28 U.S.C. § 2255<sup>127</sup> created new consequences for prior recipients of judicial paternalism. In bestowing these acts of paternalism, the courts may not have foreseen the changes ultimately taking place in 1996. Moreover, the courts currently engaging in judicial paternalism may not foresee future changes.

There is no definitive solution to the minefield of potential problems wrought by benevolence for pro se litigants. The futility is seen in the courts' current efforts to alleviate these problems through the invention of a requirement for warnings or a unilateral determination about the fairness of treating a petition or motion as second or successive once another court has engaged in recharacterization.<sup>128</sup>

The minefield of dilemmas results from the slippage in the courts' appreciation for the adversarial system. As the arbiters of the system, judges often view the ultimate objective as fairness.<sup>129</sup> The difficulty arises, however, from an occasional failure to distinguish between fairness of the process and fairness of individual results.<sup>130</sup> As judges frequently recognize, a pro se litigant

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ignore "congressionally established procedural rules").

123. See *supra* Part II.C.

124. See *supra* Part II.D.

125. See Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915(g) (2000).

126. See Prison Litigation Reform Act of 1995, 42 U.S.C. § 1915e(a) (2000).

127. See Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(b) (2000).

128. See, e.g., *United States v. Castro*, 540 U.S. 375 (2003).

129. See Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1646 (1985) [hereinafter Newman, *Rethinking Fairness*] ("Fairness is the fundamental concept that guides our thinking [as Judges] about substantive and procedural law.").

130. See, e.g., Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 515 (2002) ("[C]ourts and commentators are thus coming to recognize the authority, if not the responsibility, of a judge to depart from the ethical norms of adversarial justice in order to ensure a fair and accurate result and, in particular, to take an activist stance in cases involving unrepresented litigants."); Newman, *Rethinking Fairness*, *supra* note 129, at 1649 ("[A]lthough we scrupulously strive to achieve a fair

ordinarily lacks the knowledge and ability of his opposing attorney.<sup>131</sup> However, even when both sides are represented, the attorneys are often unequal in ability,<sup>132</sup> just as some witnesses, clients, and jurors are better than others.<sup>133</sup> As one federal appellate judge remarked:

Trials are not clinical investigations, performed under laboratory conditions. They are human confrontations, subject to all the normal risks of human error and with the risks compounded by the dramatic intensity of the event, the contentiousness of the adversary process, and the distortions that sometimes arise from disparity in talent and resources of the contending sides.<sup>134</sup>

The effort to equalize adversarial ability is a futile endeavor, but the hopelessness of the task is not the greatest danger. Instead, the greater danger is the loosening of the well-designed constraints on the role of the judiciary in the adversarial process. Judges are not advocates or advisors. When judges adopt these roles, they violate deeply embedded legal principles. For example, advocacy runs afoul of the judge's duty of impartiality.<sup>135</sup> Additionally, giving legal advice is prohibited by multiple canons of judicial conduct.<sup>136</sup> Finally,

outcome in the individual dispute, we rarely consider how to be fair to all who use or would like to use the litigation system.”).

131. See *supra* note 32 and accompanying text.

132. The Ninth Circuit Court of Appeals urged equal treatment for pro se litigants in ordinary civil cases, stating, “Trial courts generally do not intervene to save litigants from their choice of counsel, even when the lawyer loses the case because he fails to file opposing papers. A litigant who chooses *himself* as legal representative should be treated no differently.” *Jacobsen v. Filler*, 790 F.2d 1362, 1364-65 (9th Cir. 1986) (footnote omitted).

133. See Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 521 (2007) (“[T]he reality on the ground is that, even today, no two trials look exactly alike, not only because the particular facts of the dispute are different, but also because some degree of customization already happens.”).

134. Newman, *Rethinking Fairness*, *supra* note 129, at 1648.

135. See *Pruitt v. Mote*, 503 F.3d 647, 664 (7th Cir. 2007) (“[A] judge is constrained by a duty of impartiality, and whatever he might do to help an unrepresented litigant, he cannot be that individual’s advocate.”); see also MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2007) (“A judge shall perform the duties of judicial office impartially, competently, and diligently.”).

136. Judges are prohibited from practicing law. MODEL CODE OF JUDICIAL CONDUCT R. 3.10 (2007) (“A judge shall not practice law.”); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 5(F) (“A judge should not practice law.”). Giving legal advice is a basic characteristic of legal practice, as the Supreme Court noted: “Explaining the details of federal habeas procedure and calculating statutes of limitations are tasks normally and properly performed by trained counsel as a matter of course. Requiring district courts to advise a [pro se] litigant in such a manner would undermine district judges’ role as impartial decisionmakers.” *Pliler v. Ford*, 542 U.S. 225, 231 (2004); see also *In re Reynoso*, 477 F.3d 1117, 1125 (9th Cir. 2007) (remarking that under state law, the practice of law generally includes “legal advice”). Thus, a judge cannot ethically give legal advice to any of the parties, regardless of whether they are pro se. See Engler, *supra* note 48, at



warnings to litigants closely resemble the sort of “advisory opinions” prohibited in Article III of the United States Constitution.<sup>137</sup>

The courts’ attempts to advocate, counsel, and warn stem from an admirable objective—fairness. But the judge’s role in our system is to ensure fairness of the process rather than fairness to an individual case.<sup>138</sup> Otherwise, the judge’s task is one of futility because endless inequities exist in any case.

#### IV. PROPER INTERPRETATION AND THE DIMINISHED IMPORTANCE OF *HAINES V. KERNER*

To reverse the thirty-six year distortion of *Haines*, courts must understand the source. Many courts have afforded special treatment to equalize the legal resources available to litigants.<sup>139</sup> Equalization of resources would require participation of the judge as an advocate and advisor.<sup>140</sup> With this loss in neutrality, courts risk unintended problems for pro se litigants and the assumption of legislative roles.<sup>141</sup>

The key to construction of pro se pleadings involves an understanding of what the litigant has said.<sup>142</sup> When a litigant is unrepresented, he may be unable

1988 (“The rules primarily prohibit . . . court players from giving legal advice to unrepresented litigants.”).

137. See *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (“It is . . . familiar learning that no justiciable ‘controversy’ exists when parties . . . ask for an advisory opinion . . .”) (citation omitted); see also *Asahi Glass Co. v. Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 989-90 (N.D. Ill. 2003) (noting that federal courts cannot issue advisory opinions and that “judges are not authorized to issue legal advice”).

138. One commentator explains:

Justice is blind and employs scales to ensure procedural fairness, an ideal fundamental to the Constitution’s due process tradition. Procedure constrains judicial sight and provides criteria of relevance for what kinds of things Justitia might properly see. Like the mechanics of paired scales, procedure provides the mechanics for fair outcomes through the blind weighing of competing claims.

Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1, 27 (2007).

139. For example, in 2007, the American Bar Association approved a comment to accompany the *Model Code of Judicial Conduct*, which would allow judges “to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.” MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. 4 (2007). The *Reporter’s Explanation of Changes* noted that the comment was designed to “level[] the playing field” by ensuring a “fair hearing” but not “an unfair advantage” for pro se litigants. MODEL CODE OF JUDICIAL CONDUCT R. 2.2, reporter’s explanation of changes cmt. 4 (2007), available at [www.abanet.org/judiciaethics/mcjc-2007.pdf](http://www.abanet.org/judiciaethics/mcjc-2007.pdf).

140. See *supra* note 116 and accompanying text.

141. See *supra* notes 112-17 and accompanying text.

142. See *Laber v. Harvey*, 438 F.3d 404, 413 n.3 (4th Cir. 2006) (“In interpreting a pro se complaint, . . . our task is not to discern the unexpressed intent of the plaintiff, but what the words in the complaint mean.”).

to clearly express himself to a court. As a result, *Haines* required the courts to show some flexibility in their interpretation of a pro se litigant's pleadings.<sup>143</sup>

Courts have ample resources available to determine the pro se party's intent. For example, in the Fifth Circuit, courts conduct *Spears* hearings<sup>144</sup> to assist in screening prisoner complaints for frivolousness or failure to state a valid claim.<sup>145</sup> These proceedings can easily be modified to permit the judge to inquire into the pleader's intent.

Once the court learns the pleader's intent, the task of interpretation is complete. Further steps to help the pro se litigant involve advocacy and counsel rather than interpretation. Such steps are, therefore, inappropriate.

#### CONCLUSION

The morass of approaches to pro se litigation reflects a long-standing ambivalence over pleading standards and the judge's role in the adversarial process. As pleading standards softened, courts struggled with how to address fanciful suits brought by unrepresented parties. With this internal struggle, judges understandably hoped to relieve pro se litigants of endless procedural traps when the underlying claims appeared meritorious. In this setting, the Supreme Court innocuously noted the claimant's pro se status in *Haines v. Kerner*, and lower courts set out to use this phrase to vindicate an infinite set of views about how to assess pleading standards and how to help unrepresented parties navigate various procedural traps. These efforts proved not only futile, but also counter-productive. In the process, the courts compromised their own neutrality and limited role.

The recent sharpening of pleading standards should relieve judges of these conflicts. Judges no longer enjoy open license to devise their own ways of dealing with implausible suits by pro se litigants. The inevitable and long-overdue result is the judiciary's return to its traditional function as the neutral

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143. *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam) (noting that pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers").

144. So named because the hearings were established in *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985), *abrogated by* *Nietzke v. Williams*, 490 U.S. 319 (1989).

145. An example of the procedure is reflected in *Davis v. Scott*, 157 F.3d 1003 (5th Cir. 1998). There the appeals court held that the magistrate judge had acted within his discretion in developing and ultimately dismissing a prisoner's Eighth Amendment claims. *Id.* at 1005. The Fifth Circuit Court of Appeals went on to explain:

This is quite a different thing from saying that the magistrate judge has a duty to interrogate the pro se plaintiff in such a way as to exhaust conceivable causes of action. The magistrate judge has no such duty. Instead, the *Spears* procedure affords the plaintiff an opportunity to verbalize his complaints, in a manner of communication more comfortable to many prisoners. But the plaintiff remains the master of his complaint and is, in the end, the person responsible for articulating the facts that give rise to a cognizable claim.

*Id.* at 1005-06.

arbiter of fairness in the litigation process. Like everyone else, some pro se litigants will achieve fair results and others will not, but equality in treatment will at least ensure fairness in the process for everyone.