FIVE PROPOSALS TO REDUCE TAXATION OF JUDICIAL RESOURCES AND EXPEDITE JUSTICE IN *PRO SE* PRISONER CIVIL RIGHTS LITIGATION

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On July 31, 2018 in the Denver County Jail, Diana Sanchez gave birth alone in her cell.[1] She said she had been calling for help for about five hours.[2] Video footage of her labor—recorded because she was under medical monitoring for her pregnancy—was released to the press in 2019.[3] Sanchez later filed suit against the city, the jail and its contracted provider of healthcare, and other defendants, claiming violation of her civil rights under 42 U.S.C. § 1983.[4] The complaint alleges:

> Ms. Sanchez was forced to deliver Baby J.S.M. on a cold, hard bench, feet away from a toilet, in a jail cell at the Denver County Jail, all alone and with no medical supervision or treatment. Ms. Sanchez had to endure this horrific experience despite the fact that multiple Denver Health nurses and Denver jail staff knew that: (1) she had been in active labor for hours, (2) she was days away from her due date, and (3) her water had broken hours before.[5]

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1. Complaint at 1, Sanchez v. City of Denver, (D. Colo. Aug. 28, 2019) (No. 1:19-cv-02437) https://localtvkdvr.files.wordpress.com/2019/08/1-complaint.pdf.

2. Mariel Padilla, *Woman Gave Birth in Denver Jail Cell Alone, Lawsuit Says*, N.Y. TIMES (Sept. 1, 2019), https://www.nytimes.com/2019/09/01/us/diana-sanchez-birth-denver-jail.html.

3. Jordan Culver, *'They Took No Action': Colorado Woman Files Lawsuit After Prison Video Shows Her Giving Birth Alone in Jail*, USA TODAY (Aug. 29, 2019, 9:55 PM, updated Sept. 3, 2019, 11:18 AM), https://www.usatoday.com/story/news/nation/2019/08/29/colorado-woman-who-gave-birth-alone-jail-cell-files-federal-lawsuit/2156850001/.

4. Padilla, *supra* note 2; Culver, *supra* note 3.

5. Complaint, *supra* note 1, at 2.

Although other women who have given birth in jail cells alone have brought suit and lost under § 1983,[6] the outcome of Diana Sanchez's case is yet to be determined.[7]

In 1871, an Act of the United States Congress, later codified as 42 U.S.C. § 1983,[8] created the right to a legal or equitable remedy for any person who is deprived of his or her rights by a state actor—a person acting under color of state law.[9] Section 1983, entitled "A civil action for deprivation of rights" states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.[10]

The purpose of the Civil Rights Act of 1871, also called "the Third Enforcement Act or the Second Ku Klux Klan Act" was "to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States."[11] More specifically, Congress wanted "to protect African Americans from Klan violence during [the United States post-Civil War] Reconstruction . . . ."[12] Because state courts could favor state actors and deny relief to those deprived of a constitutional right by a state actor, Congress created the right to sue in a federal district court, where impartiality was more likely.[13]

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6. Webb v. Jessamine Cty. Fiscal Ct., 802 F. Supp. 2d 870, 885 (E.D. Ky. 2011) ("Plaintiff's 42 U.S.C. § 1983 Claims Against . . . Defendants . . . Fail."); Terry v. Cty of Milwaukee, 357 F. Supp. 3d 732, 738 (E.D. Wis. 2019) ("Plaintiff . . . brings this action pursuant to 42 U.S.C. § 1983, alleging that her constitutional rights were violated when she was ignored while she gave birth in a cell.").

7. Sanchez v. City of Denver, No. .1:19-cv-02437 (D. Colo.) COURT LISTENER (updated Jan. 31, 2020, 4:38 PM MST), https://www.courtlistener.com/docket/16129090/sanchez-v-city-and-county-of-denver-colorado/.

8. Civil Rights Act of 1871, ch. 22, §1, 17 Stat. 13 (codified as 42 U.S.C. § 1983)); *History of the Federal Judiciary: Timeline: The Jurisdiction of the Federal Courts: Civil Rights Act of 1871*, FEDERAL JUDICIAL CENTER,https://www.fjc.gov/history/timeline/civil-rights-act-1871. (last visited Oct. 28, 2019).

9. 42 U.S.C. § 1983 (approved Oct. 9, 2019); Civil Rights Act §1; *History of the Federal Judiciary, supra* note 8; Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 484 (1982), http://scholarship.law.cornell.edu/clr/vol67/iss3/2 ("Section 1983 was first enacted as section 1 of the Civil Rights Act of 1871, which attempted to deal with widespread legal abuses and physical violence, often backed by the Ku Klux Klan, against Southern Blacks and their white supporters.").

10. § 1983.

11. *History of the Federal Judiciary, supra* note 8.

12. *Id.*

13. *Id.*

In 1961, when "[f]aced with the vivid scene of a family rousted out of bed in the middle of the night and made to stand naked in their living room while 13 police officers ransacked their home," the U.S. Supreme Court "held that Section 1983 was available for the vindication of federal rights, even if the conduct violated state law for which a state remedy existed."[14] Not long after its decision in *Monroe v. Pape*,[15] the Court extended the § 1983 cause of action "beyond the arrest context in order to examine unconstitutional prison conditions."

"In order to prevail on a civil rights action under § 1983, a plaintiff must show that he or she was deprived of a federal right by a person acting under color of state law."[16] "A person acts under color of state law when he acts with authority possessed by virtue of his employment with the state"[17] to do "some action that would be otherwise forbidden."[18] Police officers act under color of law when they act with authority they possess—or claim to possess—because of their employment,[19] not when they act merely as a private citizen.[20] Abuse of state-granted power is color of law action in some cases.[21] Potential plaintiffs include all people deprived of rights by police officers, prison guards, and sometimes public school[22] and other state officials.[23] Many § 1983 actions are filed by *pro se*—self-represented—prisoner plaintiffs.[24] All facilities in the United States

14. Brett Dignam, *Denying Access to Justice During a Carceral Crisis*, *in* 2 IMPACT: COLLECTED ESSAYS ON EXPANDING ACCESS TO JUSTICE 50, 53 (New York Law School Impact Center for Public Interest Law, 2016), http://digitalcommons.nyls.edu/impact_center/13.

15. Monroe v. Pape, 365 U.S. 167 (1961).

16. Griffin v. City of Opa-Locka, 261 F.3d 1295, 1303 (11th Cir. 2001) (citing Almand v. DeKalb Cty., 103 F.3d 1510, 1513 (11th Cir 1997), *cert. denied*, 522 U.S. 966 (1997)).

17. *Id.*

18. *Color of Law*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION, Lexis (2012).

19. United States v. House, 684 F.3d 1173, 1200 (11th Cir. 2012); Williams v. United States, 341 U.S. 97, 100 (1951).

20. Carr v. Bd. of Regents, 249 F. App'x 146, 148 (11th Cir. 2007) (citing Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989)) ("States and state officials acting in their official capacities cannot be sued for money damages under § 1983 because they are not considered to be 'persons' for the purposes of the statute."). *See also Will*, 491 U.S. at 71 (citing Brandon v. Holt, 469 U.S. 464, 471 (1985)) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . As such, it is no different from a suit against the State itself. . . . We hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983.").

21. United States v. Classic, 313 U.S. 299, 326 (1941) ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."); *Griffin*, 261 F.3d at 1303 ("[A] defendant in a § 1983 suit acts under color of law when he abuses the position given to him by the State.").

22. *Carr*, 249 F. App'x at 150; Howlett v. Rose, 496 U.S. 356, 360 (1990).

23. *See generally* Wood v. Strickland, 420 U.S. 308 (1975); *Howlett*, 496 U.S. 356; Lawton v. Nightingale, 345 F. Supp. 683 (N.D. Ohio 1972). For more information about the prison situations which may result in actions under § 1983, *see generally* U.S. DEPT. OF JUSTICE: BUREAU OF JUSTICE STATISTICS, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION (Dec. 1994), https://www.bjs.gov/content/pub/pdf/CCOPAJ.PDF.

24. Richard H. Frankel & Alistair E. Newbern, *Prisoners and Pleading*, 94 WASH. U. L. REV. 899, 901 n. 2 (2016) (quoting *Judicial Conference Approves Prisoner Case Filing and Judge Assistance Pilot Programs*, ADMIN. OFFICE OF THE U.S. CTS. (Sept. 13, 2016),

utilized in the incarceration or detention of people "accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law[,] . . . parole, probation, [or] pretrial release,"[25] must uphold the non-freedom rights of prisoners. In *Brown v. Plata*,[26] the U.S. Supreme Court stated:

> As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.[27]

When a state prison or jail fails to acknowledge the basic rights of the people it houses, inmates may challenge the conditions of their confinement by suing under § 1983.[28] State inmates can generally sue their corrections officials for rights violations under § 1983.[29] While federal inmates cannot sue their prison nor its guards, who are *federal* officials, under § 1983, they can sue *state* officials who may have been involved in their arrest or pre-sentencing detainment.[30]

Since the U.S. Supreme Court decision allowing inmates to sue their corrections officials, a legal battlefield has resulted on which prisoners have fought for compensation for their lost rights, and Congress, courts, and state actors have pushed back, limiting prisoners' suits under the Act. Because of this, filing a civil action for the deprivation of rights has become increasingly difficult for pro se prisoner plaintiffs. Before 1977, some prisons prevented inmates from accessing legal materials; then the Supreme Court ruled that prisoners have a right to access legal materials.[31] In 1996, under the Prison Litigation Reform Act ("PLRA"), Congress required inmates who file suit under § 1983 to pay the full filing fees and court costs through a payment plan, even if they were eligible to file without paying

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https://www.uscourts.gov/news/2016/09/13/judicial-conference-approves-prisoner-case-filing-and-judge-assistance-pilot); John Gramlich, *America's Incarceration Rate is at a Two-Decade Low*, PEW RESEARCH CTR. (May 2, 2018), https://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low/ ("At the end of 2016, there were about 2.2 million people behind bars in the U.S., including 1.5 million under the jurisdiction of federal and state prisons and roughly 741,000 in the custody of locally run jails. That amounts to a nationwide incarceration rate of 860 prison or jail inmates for every 100,000 adults ages 18 and older.").

25. 28 U.S.C. § 1915(h) (2020); 42 U.S.C. § 1997e(h) (2020) (Both statutes have identical wording.).

26. Brown v. Plata, 563 U.S. 493 (2011).

27. *Id.* at 510.

28. Dignam, *supra* note 14.

29. *See generally* Bounds v. Smith, 430 U.S. 817 (1977).

30. Banks v. FDIC, 374 F. App'x 532, 534-35 (5th Cir. 2010).

31. *Bounds*, 430 U.S. at 828 ("[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."). The type and purpose of research which is required to be available to prisoners was further refined in Lewis v. Casey, 518 U.S. 343, 360 (1996) which did not overrule *Bounds*.

in full.[32] Inmates could no longer—and still cannot—avoid legal fees to the same extent impoverished non-incarcerated people may avoid paying fees; yet inmates are increasingly impoverished.[33] Prisoner plaintiffs today must plead with greater specificity the facts of their case than inmates before 2007.[34] If a prisoner fails to plead sufficiently, the state actor defendant does not even need to respond to the complaint; the complaint may be dismissed *sua sponte* by the courts.[35]

Despite the new limits on filings, courts continue to flood with litigation by pro se plaintiffs.[36] Court dockets remain taxed by *pro se* prisoner civil rights actions because complaints by *pro se* prisoner civil rights plaintiffs are often very difficult to read and far longer than complaints by non-prisoner plaintiffs.

The aim of this article is that of the very Federal Civil Rules: "[T]o secure the just, speedy, and inexpensive determination of every action and proceeding."[37] The five solutions herein proposed—although none of them entirely new suggestions—include: (1) prisoner civil rights mediation, (2) permissive ghostwriting, (3) modified McKenzie Friends, (4) page limits, and (5) component requirements.

THE SYMPTOMS OF THE PROBLEM

Pro se prisoner litigation tends to encumber courts' dockets.[38] Legislative measures indicate that prisoners form a particularly sizable class of *pro se* plaintiffs. Major developments in laws regulating § 1983 litigation, including the PLRA,[39] affect only incarcerated plaintiffs.[40] With regard to the U.S. population, a disproportionately large percentage of civil rights actions in federal courts are filed by *pro se* prisoners. In 2016, "[a]ccording to the Administrative Office of the U.S. Courts, 'pro se litigation comprise[d] more than a quarter of the federal Judiciary's

32. *Compare* 28 U.S.C. § 1915(b)(1) (1996) ("[I]f a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee."), *with* 28 U.S.C. § 1915 (1995).

33. Tara O'Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AM. ACTION FORUM (June 30, 2020), https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states/.

34. Neris v. Vivoni, 249 F. Supp. 2d 146, 148 (D.P.R. 2003).

35. Wiggins v. Donio, 245 F. App'x 190, 191 (3d Cir. 2007).

36. *See* Donna Stienstra, Jared Bataillon, & Jason A. Cantone, *Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Court and Chief Judges*, FED. JUDICIAL CTR. vii-viii (2011) (explaining the methods judges use to manage *pro se* cases and, at times, help *pro se* litigants); Frankel, *supra* note 25, at 901-02 (describing the administrative challenges created by *pro se* litigants but not by represented litigants); Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 306-07 n. 7 (2002), https://ir.lawnet.fordham.edu/ulj/vol30/iss1/19.

37. Fed. R. Civ. P. 1 (2019).

38. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1574 (2003), https://repository.law.umich.edu/articles/1296 ("[T]here is a reality that underlies state and local officials' feeling that they are overwhelmed by lawsuits over a huge range of issues: they are. Indeed, individual inmate civil rights litigation itself covers a far wider range of topics than most federal civil rights litigation.").

39. *See* Greig v. Goord, 169 F.3d 165166 (2d Cir. 1999).

40. *Id.* at 167.

civil caseload, and two-thirds of all pro se litigation [was] initiated by prisoners.'"[41] This means that *pro se* prisoners file approximately 17-18% of federal civil cases, while less than one percent of U.S. adults are incarcerated.[42]

The U.S. Supreme Court has acknowledged the burden of *pro se* litigation and the problems created for *pro se* complaints with merit by those without. "Justice Robert Jackson wrote in 1953, it 'must prejudice the occasional meritorious application to be buried in a *flood* of worthless ones' . . . '[h]e who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.'"[43]

After a § 1983 claim is filed, the court must read and rule on each complaint.[44] Judges and clerks spend significant time deciphering the claims and determining the merits of all complaints, but *pro se* prisoner complaints often take longer than those drafted by attorneys.

> Court personnel reviewing pro se pleadings are charged with the responsibility of deciphering why the submission was filed, what the litigant is seeking, and what claims she may be making. *This task is particularly difficult because the submission may be rambling and illogical, if not completely illegible*. While it is not uncommon to encounter completely frivolous, if not delusional, pro se complaints, it is essential and fundamental that the court reviews each complaint for any possible claim. This, again, is a task requiring extensive time and patience.[45]

"The greatest difficulty is often in simply discerning what [*pro se* litigants' meritorious] claims are. The extra time judges spend doing so . . . taxes court resources. Meritorious claims risk being overlooked simply because of poor drafting."[46] Courts receive so many complaints that "if the potential merit of a prisoner's claim is not readily apparent on the face of his complaint, it likely will not be discovered."[47]

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41. Frankel, *supra* note 25, at 901 n.2 (quoting *Judicial Conference Approves Prisoner Case Filing and Judge Assistance Pilot Programs*, ADMIN. OFF. OF THE U.S. CTS. (2016), http://www.uscourts.gov/news/2016/09/13/judicial-conference-approves-prisoner-case-filing-andjudge-assistance-pilot).

42. John Gramlich, *America's Incarceration Rate is at a Two-Decade Low*, PEW RESEARCH CENTER (May 2, 2018), https://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low/ ("At the end of 2016, there were about 2.2 million people behind bars in the U.S., including 1.5 million under the jurisdiction of federal and state prisons and roughly 741,000 in the custody of locally run jails. That amounts to a nationwide incarceration rate of 860 prison or jail inmates for every 100,000 adults ages 18 and older.").

43. Frankel, *supra* note 25, at 903 (quoting Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring)) (emphasis added).

44. Rosenbloom, *supra* note 37, at 308 ("[I]t is essential and fundamental that the court reviews each complaint for any possible claim.").

45. *Id.* at 308-09 (citing McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999)) (emphasis added).

46. Frankel, *supra* note 25, at 902.

47. *Id.* at 903.

Pro se prisoner § 1983 complaints may be—and often are—dismissed under Rule 12(b)(6).[48] Many are dismissed on procedural grounds or because they are frivolous.[49] If a *pro se* prisoner complaint is not summarily dismissed, the court must spend significant time explaining legal procedure to the *pro se* plaintiff.[50] If the court does not spend time explaining procedures, the self-represented litigant will likely violate court rules or "waste time with pointless and sometimes incoherent arguments."[51] If the court does spend the time to teach *pro se* plaintiffs procedure, judicial resources are further taxed[52] and the cost often levied upon other cases for which the judge has less time.

Consequently, courts today are flooded by the volume of writing by *pro se* prisoners that must be read and analyzed.

PAST AND PRESENT REMEDIES

Many efforts have been made by Congress and the federal court system to reduce the case management and adjudicative burdens of *pro se* prisoner actions filed in federal district courts. Some attempts to reduce the flood of complaints have been found unconstitutional by the U.S. Supreme Court. Others have been allowed. Still others are being tested or remain untested.

A Failed Remedy

In response to the burden on courts and prison officials created by the volume of civil rights prison condition litigation,[53] some prison officials in the 1970s prevented prisoners from accessing the courts by increasing the difficulty of filing

48. 42 U.S.C.USC § 1997e(c)(1) (2019).

49. Crawford-El v. Britton, 523 U.S. 574, 596 (1998) ("Arguably . . . many [civil rights actions filed by prison inmates] are plainly frivolous and some may be motivated more by a desire to obtain a 'holiday in court,' than by a realistic expectation of tangible relief."); S*ee also* Berry v. Kerik, 366 F.3d 85, 88 (2d Cir. 2003) ("Since the appeal is frivolous, it must be dismissed[.]").

50. *See generally* Stienstra, *supra* note 37 (explaining the methods judges use to manage *pro se* cases and, at times, help *pro se* litigants); Frankel, *supra* note 25, at 901-02 (describing the administrative challenges created by *pro se* litigants but not by represented litigants); Rosenbloom, *supra* note 37, at 306-07 n. 7.

51. David Luban, *Self-Representation, Access to Justice, and the Quality of Counsel: A Comment on Rabeea Assy's Injustice in Person: The Right of Self-Representation,* 17 JERUSALEM REV. OF LEGAL STUD. 46-63 (GEO. U. L. CTR., 2018) ("The problem with self-representation is that it is usually *ineffective* for the self-represented litigant, and it is *inefficient* for the courts, which have to deal with litigants who don't know procedure, violate rules, and waste time with pointless and sometimes incoherent arguments. Furthermore, pro se litigants not only waste the court's time, they waste their adversaries' time and money, and impose opportunity costs on other litigants by clogging up the courts – so an unlimited right of self-representation may inflict collateral damage beyond wasting judges' time and trying their patience.").

52. Frankel, *supra* note 25, at 901-02 (describing the administrative challenges created by *pro se* litigants but not by represented litigants); *See generally* Stienstra, *supra* note 37 (explaining the methods judges use to manage *pro se* cases and, at times, help *pro se* litigants).

53. Dignam, *supra* note 14, at 54 ("[I]ndividual and systemic litigation was successfully brought to challenge a broad range of prison conditions, but criticisms of the effect on federal court dockets began to mount.").

complaints or by disallowing altogether court filing by prisoners.[54] The U.S. Supreme Court held, however, that prisoners "retain right of access to the courts."[55] Similarly, prison officials tried to stem the flood of prison condition litigation by denying prisoners access to information and materials required to file civil rights complaints.[56] The U.S. Supreme Court held that prisoners have a right to access legal research and materials related to their cases.[57]

Statutory Remedies

In 1994, Congress enacted the PLRA with the intent to reduce frivolous litigation by prisoners about prison conditions.[58]

First, the PLRA greatly reduces the likelihood that a prisoner will be able to retain counsel.[59] It disincentivizes attorneys from accepting prisoner cases by "presumptively den[ying] an attorney's fee award" paid by the opposing party.[60] Where evidence of the opposing party's bad faith overcomes the presumption, the PLRA limits the fee award to "150% of the judgment, and requires that an attorney's rate be capped at 150% of that established by statute for court-appointed counsel."[61] A prisoner may hire an attorney with the agreement to pay whatever he can afford.[62] Also, "[t]he court may request an attorney to represent any person

54. Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (abrogated on other grounds (whether prisons can withhold good behavior credits from prisoners) (stating that prisoners have the right to file in courts and could not be prevented from doing so) (citing Younger v. Gilmore, 404 U.S. 15 (1971), *aff'g* Gilmore v. Lynch, 319 F. Supp. 105 (ND Cal. 1970); Johnson v. Avery, 393 U.S. 483 (1969); Ex parte Hull, 312 U.S. 546 (1941)).

55. *Id.*

56. Brown v. Sielaff, 363 F. Supp. 703, 704 (W.D. Pa. 1973).

57. *The Jailed Pro Se Defendant and the Right to Prepare a Defense*, 86 YALE L.J. 292, 298-300 (1976) ("[C]ourts have become more specific in defining the requisite assistance for prisoners who are not represented by counsel. . . Federal courts have determined, *inter alia*, the number and types of volumes that should be contained in prison law libraries, the hours that such libraries should be open, the amount of legal research materials that may be stored in cells, the necessary supply of clerical materials, whether access to legal research materials must be granted to prisoners in segregation and in hospitals, and whether instruction in the use of legal materials must be provided. . . . [T]he clear result of *Gilmore* and its progeny has been to guarantee that the convicted prisoner not represented by counsel, unlike the unconvicted pro se detainee, will be provided with the collateral aids necessary to prepare adequately for a court appearance."). *See also* Rizzo v. Zubrik, 391 F. Supp. 1058, 1060 (S.D.N.Y. 1975) (discussing what legal materials the state must provide to prisoners); *See generally* John Matosky, *Illiterate Inmates and the Right of Meaningful Access to the Courts*, 7 B.U. PUB. INT. L.J. 295 (1998); Bounds v. Smith, 430 U.S. 817, 823 (1977); Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996).

58. Dignam, *supra* note 14, at 54 ("Republican politicians incorporated a proposal to stop frivolous prison litigation into their 'Contract with America' in 1994. Congress finally passed the PLRA, which specifically targeted Section 1983 prison conditions cases."); PUB. L. 104-134, 110 STAT. 1321.

59. 42 U.S.C. § 1997e(d)(1) (2019).

60. Frankel, *supra* note 25, at 901 n. 3 (citing § 1997e(d) (2012)).

61. *Id.*; § 1997e(d)(2) (2019).

62. § 1997e(d)(1).

unable to afford counsel[,]" if the complaint has sufficient merit, and the defendant is not immune to suit.[63]

The PLRA requires all prisoner civil rights plaintiffs to pay the full filing fee for each case they file,[64] even though indigent non-incarcerated persons are not required to pay filing fees in full.[65] This financial requirement is more challenging for today's prisoners than for prisoners when the PLRA became law. When the PLRA was enacted in 1994, the filing fee for a civil rights case in federal court was about $120.[66] Today, the filing fee for a civil rights case in federal court is between $350 and $450.[67] Despite this cost increase over the last twenty-five years, state prisoner wages have decreased over the last 20 years,[68] and wages of federal prisoners have not changed.[69] In addition to court fees, prisoners must pay for litigation-related expenses, including "paper, pens, copies, carbon paper, [and] mail,"[70] and basic hygiene necessities like "soap, shampoo, razors, [and] deodorant."[71]

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63. 28 U.S.C. § 1915(e)(1) (2019); Maclin v. Freake, 650 F.2d 885, 887 (7th Cir. 1981). *S*); *See also* Cooper v. A. Sargenti Co., 877 F.2d 170, 172 (2d Cir. 1989).

64. 28 U.S.C. § 1915(b)(1).

65. In Bell-Boston v. Nativity Homeless Shelter, Civil Action No. 09 0257 (D.C. Jan. 27, 2009), the plaintiff—a homeless woman, not an inmate—filed *in forma pauperis*. Also, the limits on filing *in forma pauperis* in § 1915 which require later repayment by an inmate do not require repayment by a non-inmate.

66. 28 U.S.C. § 1914 (1986) ("The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $120 except that on application for a writ of habeas corpus the filing fee shall be $5.").

67. 28 U.S.C. § 1914 (approved August 23, 2019); *Fee Schedule: Amended Electronic Public Access Fee Schedule*, U.S. DIST. CT. FOR THE N. DIST. OF OHIO (2016), https://www.ohnd.uscourts.gov/fee-schedule (The fee for a new civil case is $402 plus a $52 Administrative Fee.); Siluk v. Merwin, 783 F.3d 421, 423 (3d Cir. 2015) (Plaintiff incurred filing fees of $350 and $455.); *A Pro Se Guide to Filing Your Lawsuit in Federal Court*, U.S. DIST. CT. OF WASH., https://www.wawd.uscourts.gov/sites/wawd/files/ProSeManual4_8_2013wforms.pdf (2015).

68. *See generally* Wendy Sawyer, *How Much Do Incarcerated People Earn in Each SEachSeachtate?* PRISON POLICY INITIATIVE (Apr. 10, 2017) https://www.prisonpolicy.org/blog/2017/04/10/wages/ (providing some synthesis of available data, even though data about the earnings of state prisoners is challenging to find—especially in the aggregate).

69. In 1993, the federal minimum wage was $4.25 per hour. *Prisoner Labor: Perspectives on Paying the Federal Minimum Wage*, U.S. GEN. ACCT. OFF., REP. TO THE HONORABLE HARRY REID, U.S. SEN. 1, 4 (May 1993), https://www.gao.gov/assets/220/217999.pdf. "Most [federal] inmates [were] assigned to maintenance rather than prison industries jobs." *Id.* at 3. The Bureau of Prisons paid prisoners in maintenance jobs "12 to 40 cents an hour; outstanding work could result in a bonus of up to one-half an inmate's monthly pay." *Id.* at 5. Prisoners in industrial jobs earned "23 cents to $1.15 an hour with up to 40 additional cents an hour on the basis of work considered outstanding and length of time employed." *Id.* Today, "only 8% of work-eligible inmates participate in the [nationwide federal prison industrial] program where they typically earn between 23¢ [and] $1.15 per hour." FED. BUREAU OF PRISONS, *UNICOR Program Details*, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp (last visited. Sept. 29, 2019). The other 92% of work-eligible federal inmates earn between 12 and 40 cents per hour in prison maintenance jobs. FED. BUREAU OF PRISONS, *Custody & Care: Work Programs*, https://www.bop.gov/inmates/custody_and_care/work_programs.jsp (last visited Jan. 19, 2020).

70. *Siluk*, 783 F.3d at 424.

71. *Id.*

Prisoners who cannot pay the full filing fee at the time they file a complaint in federal court may request permission from the court to file *in forma pauperis* and "pursue litigation without *pre-paying* [full] fees and costs."[72] To file *in forma pauperis*, a prisoner must qualify as indigent.[73] If the court approves a prisoner's petition to file a case *in forma pauperis*, the prisoner will pay part of the filing fee when he files and the rest in installments of 20% of each month's income.[74]

A prisoner is barred from filing civil rights complaints *in forma pauperis* after three strikes; a strike is a dismissal of a complaint because the complaint is "frivolous [or] malicious, or fails to state a claim upon which relief may be granted."[75] Once a prisoner is barred from filing civil rights complaints *in forma pauperis*, the prisoner will be required to pay the full fee at the time of filing for every § 1983 case filed while an inmate.[76] Thereafter—for the rest of the prisoner's life, if he remains in prison or is re-incarcerated—a prisoner will only be permitted to file *in forma pauperis* if the prisoner is in "imminent danger of serious physical injury."[77]

Under the PLRA, prisoner grievances about prison conditions may not be heard by federal courts until the prisoner has tried to resolve the issue through every permissible means at the prison where he is housed, which is known as exhausting administrative remedies and appeals.[78] Exhaustion requirements only apply to inmates because persons released from prison can no longer receive prison remedies.[79] Prison administrations may set rigorous processes for inmate complaints.[80] If an inmate fails to complete any step of the grievance process or to specifically—with sufficient detail—plead in his complaint that he has exhausted his administrative remedies, his complaint will be dismissed for failure to exhaust administrative remedies.[81] In some circuits, "a dismissal by reason of a remediable

72. *Id.* at 424-25 (explaining § 1915) (emphasis added). *See also* § 1915(a)(1)-(2) (2019) ("A prisoner seeking to bring a civil action . . . without prepayment of fees . . . shall submit a certified copy of the trust fund account statement . . . for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.").

73. *Siluk*, 783 F.3d at 424-25 (explaining § 1915).

74. § 1915(b)(1); *but see* §§ 1915(b)(4),(2).

75. § 1915(g).

76. *Id.*

77. *Id. See also* Dignam, *supra* note 14 ("The "three strikes" provision also bars prisoners who have had three frivolous cases dismissed from filing in forma pauperis unless the prisoner is under imminent danger of serious physical injury.").

78. 42 U.S.C. § 1997e(a) (2019).

79. *See* Greig v. Goord, 169 F.3d 165, 166-67 (2d Cir. 1999) (holding that litigants who file actions concerning prison conditions after release from confinement do not need to satisfy administrative remedy exhaustion requirements).

80. *See generally* LEGAL ASSISTANCE TO INSTITUTIONALIZED PERS. PROJECT, PRISONERS' GUIDE TO THE INMATE COMPLAINT REVIEW SYSTEM, (rev.2015), https://law.wisc.edu/fjr/laip/pro_se_inmate_complaints_manual_2015.pdf (providing a guide to the Wisconsin Inmate Complaint Review System).

81. Frankel, *supra* note 25, at 919-922 (discussing the disadvantage that the PLRA's exhaustion requirement presents to *pro se* prisoners and ways *pro se* prisoners may fail to plead exhaustion).

failure to exhaust [does] not count as a strike;" in others, a dismissal for failure to exhaust counts as one of a prisoner's three strikes to bar filing *in forma pauperis*.[82]

In civil cases by non-prisoners, defendants must file a responsive pleading, such as an answer, with the court within a specified period of time.[83] Under the PLRA, however, color of law defendants in § 1983 actions brought by prisoners may choose not to reply at all and not face consequentially a default judgment.[84] The court will evaluate the prisoner plaintiff's complaint and decide whether to require an answer from the color of law defendant,[85] or dismiss the complaint because the court finds it "frivolous, malicious, fail[ing] to state a claim upon which relief can be granted, or seek[ing] monetary relief from a defendant who is immune from such relief."[86] If the court requires an answer, "[n]o relief shall be granted to the plaintiff unless a reply has been filed;" a prisoner plaintiff in a civil rights action can never acquire a default judgment.[87]

In summary, the PLRA effectively removed part of the economic incentive for attorneys to accept prisoner civil rights cases, required filing fees and exhaustion of administrative remedies, and relieved color of law defendants of the obligation to respond to prisoners' § 1983 complaints.

Remedies in the federal court system

The federal court system has also made rules and rulings to unencumber its judges and clerks. First, the federal court system has instituted judicial law clerks who focus solely on determining the merit of *pro se* complaints; *pro se* law clerks are authorized by the PLRA but work in the U.S. Courts system. Second, state and federal courts must both hear § 1983 suits. Third, the U.S. Supreme Court consistently raises the requirements of successful civil complaints.

Federal district courts have jurisdiction over claims under § 1983 because it is a federal law.[88] State courts must hear cases involving questions of federal law if the federal law provides as much; section 1983 is a law for which state court jurisdiction is provided.[89] When hearing § 1983 claims, state courts must apply federal law first.[90] In *Howlett v. Rose*, a state court had allowed a state law defense

82. Snider v. Melindez, 199 F.3d 108, 115 (2d Cir. 1999).

83. FED. R. CIV. P. 8(b).

84. 42 U.S.C. § 1997e(g) (2019).

85. *Id.*; Dignam, *supra* note 14, at 54 ("Addressing concerns about the large number of frivolous federal lawsuits filed by prisoners, the PLRA contained initial screening provisions that allow federal courts to dismiss civil actions filed by prisoners before requiring the state to respond.").

86. § 1997e(c)(1).

87. § 1997e(g).

88. U.S. CONST. art. III, § 2.

89. U.S. CONST. art. III, § 2; 28 U.S.C. § 1331 (2019); Howlett v. Rose, 496 U.S. 356, 358 (1990) ("State courts as well as federal courts have jurisdiction over § 1983 cases."); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 157-59 (1953); Howlett, 496 U.S. at 372-73 (quoting Mondou v. N.Y., New Haven & Hartford R.R. (*Second Emp'rs' Liab. Cases*), 223 U.S. 1, 59 (1912)) ("'The existence of the jurisdiction created an implication of duty to exercise it,' which could not be overcome by disagreement with the policy of the federal act.").

90. Heck v. Humphrey, 512 U.S. 477, 488 n.9 (1994) ("State courts are bound to apply federal rules in determining the preclusive effect of federal-court decisions on issues of federal law.").

to a § 1983 claim,[91] but the U.S. Supreme Court held that a defense may only be admitted against a federal claim in state court if that defense would be admitted against the federal claim in federal court.[92] This ruling enabled the prisoner civil rights plaintiff to choose between a state and a federal courts with greater probability of a similar outcome in either venue, which has shifted some of the burden from federal courts to state courts.

In 1902, the Well-Pleaded Complaint Rule, also known as the Motley Rule, began to require the source of federal jurisdiction to be obvious on the face of the complaint.[93] Because of this rule, a *pro se* prisoner plaintiff may not merely say he was harmed by a guard; he must state that a federal statute grants him a cause of action.

In 1957, the U.S. Supreme Court decided *Conley v. Gibson*, 355 U.S. 41. The *Conley* standard was a low bar to pass, requiring only "'a short and plain statement of the claim' that . . . give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[94] Under *Conley*, a complaint could not be "dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief."[95] Under the era of this pleading standard, the PLRA was passed.

In 2007 and 2009, the Supreme Court raised the requirements of a successful complaint from the *Conley* standard to what has become known as the Twiqbal standard.[96]

In *Twombly*, the Court dismissed a class action complaint because it lacked "enough facts to state a claim [for] relief that is plausible on its face."[97] Under the Twiqbal standard, a complaint must not only be "conceivable", but "plausible" as well.[98] A claim is plausible if it "has been stated adequately" and has been "supported by showing any set of facts consistent with the allegations in the complaint."[99] In other words, a court must think that there are both enough facts,

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Howlett, 496 U.S. at 372 (applying § 1983, a state court must "treat federal law as the law of the land").

91. Howlett, 496 U.S. at 358-60.

92. *See Id.* at 375-76 ("The elements of, and the defenses to, a federal cause of action are defined by federal law.").

93. *See* Louisville & Nashville R.N. R. Co. v. Mottley, 211 U.S. 149, 152 (1908) ("[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution."). *See generally* Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597 (1987) (providing further information about how the well-pleaded complaint rule affects *pro se* litigants).

94. Conley v. Gibson, 355 U.S. 41, 47 (1957) (quoting FED. R. CIV. P.8(a)(2)).

95. *Id.* at 45-46.

96. Dubbed Twiqbal because of opinions *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which formed the new pleading standard.

97. *Twombly*, 550 U.S. at 570.

98. *See id.*

99. *Id.* at 563. *See also Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

and that the facts are demonstrated well enough in the complaint, or the complaint will be dismissed. Legal conclusions—"[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements"—are not counted as factual allegations. [100] They "can provide the framework of a complaint," but legal conclusions "must be *supported by* factual allegations." [101]

The Twiqbal pleading standard makes *pro se* prisoner complaints far less likely to succeed.[102] Because their income is smaller, but the expense of mailings and phone calls is the same or greater than that of non-incarcerated persons,[103] prisoners face a disproportionately large financial burden in obtaining factual data necessary to meet the pleading requirements. Although the *Twombly* and *Iqbal* decisions were not specifically intended to make prisoner pleading more cumbersome, *pro se* prisoner claims under § 1983 are 30% more likely to fail under the *Twombly* and *Iqbal* pleading standard.[104] After *Twombly* and *Iqbal*, dismissal of *pro se* prisoner complaints for factual insufficiency and failure to state a claim increased by about 15% for each reason. [105]

> There is an argument that Twombly and Iqbal should not apply to pro se prisoners; rather, pro se complaints should be governed by the Supreme Court's more lenient standard from *Erickson v. Pardus*, a case that was decided after Twombly. There, in evaluating the sufficiency of a pro se prisoner's complaint, the Court stated: "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."' However, most district courts continue to apply Twombly's and Iqbal's heightened pleading standard to prisoner's claims without challenge.[106]

100. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

101. *Iqbal*, 556 U.S. at 678-79 (2009) (emphasis added).

102. Frankel, *supra* note 25, at 933.

103. *See* Wendy Sawyer, *How Much do Incarcerated People Earn in Each State?* PRISON POLICY INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/ (providing information on the wages of prisoners in different states and various work positions); *UNICOR: Program Details*, FED. BUREAU OF PRISONS , https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp (last visited Sept. 29, 2019) (providing information about the typical wage of a prisoner in the UNICOR program); *Custody & Care: Work Programs*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/work_programs.jsp. (last visited Jan. 19, 2020) (providing information on the hourly wages of prisoners).

104. Frankel, *supra* note 25, at 933.

105. *Id. See generally* Stephen R. Brown, *Reconstructing Pleading: Twombly, Iqbal, and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. 1265 (2010).

106. Frankel, *supra* note 25, at 905 n.29 (citations omitted) (quoting Erickson v. Pardus, 551 U.S. 89, 93 (2007) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007))).

Summary of Enacted Measures to Reduce the Flood of Prisoner Litigation on the Courts

Many measures have been enacted in the law and the federal court system to reduce the courts' burden of managing the volume of and deciding on every prisoner civil rights complaint. The Prison Litigation Reform Act enforced filing fees, required exhaustion of administrative remedies, disincentivized attorneys accepting § 1983 suits, and ended the requirement that state actor defendants respond to prisoner complaints. The federal court system added a screening step by *pro se* law clerks for complaints by unrepresented prisoners and increased pleading requirements. The difficulties and consequences of filing a federal civil rights complaint should prevent all frivolous and malicious petitions by prisoners and reduce the flood of *pro se* prisoner civil litigation in the courts to a manageable stream.

Why then do courts remain overtaxed by *pro se* prisoner litigation?[107]

THE PROBLEM

Due to the measures taken to reduce the flood of *pro se* prisoner litigation, the number of *pro se* prisoner § 1983 complaints are at an all-time low.[108] Yet, the resources of federal courts remain taxed by *pro se* prisoner petitions.[109] This is because the number of prisoner petitions is not—and possibly was not—the problem.[110] The problem is the disorganization, illegibility, and length of many *pro se* prisoner civil rights petitions.

Pro se prisoner complaints are frequently difficult to read.[111] Because *pro se* prisoners are often not permitted to use word processing and would have to pay for typewriter ribbon[112]—or for computer terminal time if word processing is

107. Stienstra, et al., *supra* note 37, at viii ("[P]roblems remain: for the clerks, the weight of these cases on their staff; for the judges, the difficulty of discerning the substance of the cases."). S*ee also* Schlanger, *supra* note 39, at 1574 ("[T]here is a reality that underlies state and local officials' feeling that they are overwhelmed by lawsuits over a huge range of issues: they are. Indeed, individual inmate civil rights litigation itself covers a far wider range of topics than most federal civil rights litigation.").

108. Dignam, *supra* note 14.

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110. *See* Schlanger, *supra* note 39, at 1575-78 (arguing that despite inmates filing more civil rights cases in federal court than non-inmates, when state and federal filings are combined the per capita filing rate between inmates and non-inmates is "comparable").

111. Stienstra, et al., *supra* note 37, at vii; Rosenbloom, *supra* note 37, at 308 (citing McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994))).

112. U.S. DEP'T OF JUSTICE: FED. BUREAU OF PRISONS, INMATE ADMISSION & ORIENTATION HANDBOOK 11, (2014), https://www.bop.gov/locations/institutions/gil/GIL_aohandbook.pdf; Christopher Zoukis, *Word Processors for Prisoners?*, FREEBIRD PUBLISHERS (Nov. 10, 2014), https://www.freebirdpublishers.com/single-post/2014/11/10/Word-Processors-for-Prisoners. *See* Faust v.

allowed[113]—a large percentage of *pro se* prisoner civil rights complaints are handwritten. Handwritten complaints are often illegible.[114] Other complaints lack punctuation at the ends of sentences or have dozens of misspelled words.[115] Still others lack a common writing structure;[116] sometimes a quotation of law runs into a sentence about the writer's perception of his or her experience.[117] Overall, courts struggle with "discerning the substance of the cases."[118]

In addition to illegibility, many *pro se* complaints are excessively long—fifty, one hundred, or more pages.[119] If justice is to be served in a system that currently allows *pro se* prisoner complaints of any length, judges and clerks must spend much time reading complaints in their entirety.[120]

Parke, 1996 U.S. Dist. LEXIS 18010, at *13 (N.D. Ind. Oct. 3, 1996) (holding that prisoners are not entitled to typewriter use and therefore must pay if they wish to use a typewriter).

113. U.S. DEP'T OF JUSTICE: FED. BUREAU OF PRISONS, *supra* note 11, at 11.

114. Holness v. Wetzel, 2013 U.S. Dist. LEXIS 150166, at *10-13 (M.D. Pa. Sept. 27, 2013) (collecting cases dismissed for illegibility). *See also* Broadie v. Strohota, 2008 U.S. Dist. LEXIS 13562, at *5 n.1 (E.D. Wis. Feb. 13, 2008) ("Plaintiff may have alleged that defendant Strahota was personally involved in sending him to segregation. However, because plaintiff's handwriting is nearly illegible, this is unclear."); Garcia v. Gonzalez, 2009 U.S. Dist. LEXIS 53551, at *8-9 (E.D.N.Y. June 19, 2009) (citing the plaintiff's complaint and noting that much of it is illegible).

115. Gayton v. Romero, 2012 U.S. Dist. LEXIS 200125, at *17 n.6 (D.N.M. Feb. 8, 2012) (describing communications from a *pro se* prisoner litigant as "contain[ing] a number of misspelling and typographical errors" to the point that the opinion omitted "[sic]" for readability purposes).

116. Stienstra, et al., *supra* note 37, at vii ("One-half to two-thirds of the 61 chief judges who responded to the survey reported that [one of] five major issues or conditions . . . present in most or all pro se cases [is] pleadings or submissions that are unnecessary, illegible, or cannot be understood . . . .").

117. Nero v. Ives, 2014 U.S. Dist. LEXIS 92754, *10-11 (C.D. Cal. May 27, 2014) ("Plaintiff's lengthy, repetitive Complaint, simply put, is incomprehensible. It contains many pages of material unrelated to any claim. Some parts of it are nonsense such as a section asserting that the U.S. Bureau of Prisons is a foreign state. The Complaint does not contain a short and plain statement of Plaintiff's claims sufficient to provide each defendant with notice of their alleged wrongful acts. It does not separately state each claim but rather jumbles together separate incidents and alleged injuries without identifying the rights that would entitle him to relief. It lists statutes without any explanation of their relevance or reference to alleged injuries. As stated presently, the allegations and claims in the Complaint are vague, conclusory and lack sufficient particularity to put each individual on notice of the claim against him." (citations omitted)).

118. Stienstra, et al., *supra* note 37, at viii.

119. *See e.g.*, Nero v. Ives, 2014 U.S. Dist. LEXIS 92754, at *10 (C.D. Cal. May 27, 2014) (stating plaintiff's complaint was many pages long); Telfair v. Tandy, 797 F. Supp. 2d 508, 513 n.6 (D.N.J. 2011) (stating plaintiff filed 1136 pages *pro se* in the trial court and "The entirety of Plaintiff's submissions made with the Court of Appeals during less than two months is four hundred sixty one pages."); Oneal v. U.S. Fed. Prob., 2006 U.S. Dist. LEXIS 16608, at *1-2 (D.N.J. Mar. 22, 2006) (describing *pro se* plaintiff's complaint as "approximately 50 pages of mostly-illegible handwriting and exhibits"); Taylor v. Gibson, 529 F.2d 709, 711 (5th Cir. 1976) (describing *pro se* complaint as a "lengthy ninety-seven paragraph[s]"); Darling v. L.A. Cty. Sheriff's Dep't, 2012 U.S. Dist. LEXIS 199268, at *37 (C.D. Cal. Apr. 30, 2012) (describing *pro se* plaintiff's complaint as "very long").

120. Rosenbloom, *supra* note 32, at 308 ("[I]t is essential and fundamental that the court reviews each complaint for any possible claim.").

PROPOSED SOLUTIONS

At least four solutions to alleviate some of the burden of *pro se* prisoner civil rights litigation management on courts have already been proposed or tested in small samples: (1) mediation, (2) permissive ghostwriting, (3) McKenzie Friends, and (4) component requirements. Page limits may also help and be easiest to implement.

Mediation

Mediation is the process of negotiations between adverse parties through a neutral third party, the mediator, who helps parties communicate their goals and reach an agreement.[121] By definition, mediation is voluntary, and any suggested settlement by the mediator does not bind the parties.[122] Historically, a few courts have required *pro se* plaintiffs to *attempt* resolution by mediation.[123] Courts had concerns about *pro se* litigants being unduly influenced by settlement negotiations or pressing the mediator for legal advice.[124] However, some courts today have introduced mediation for non-prisoner *pro se* litigants.[125] In 2018, the U.S. District Court for the Eastern District of Michigan began a pro bono program in which attorneys mediate certain civil rights lawsuits by *pro se* prisoners.[126] Although the program is only one year underway, its results may lead more courts to add mediation to the toolbox of *pro se* prisoner civil rights adjudication.

Permissive Ghostwriting

Ghostwriting is one person writing for another who claims the writing as his own. Judges and clerks cannot fill in the blanks of a *pro se* prisoner's civil rights complaint so that his complaint meets the factual plea burdens of *Twiqbal*.[127] Instead, they attempt to balance educating *pro se* litigants about court procedures with letting the litigant litigate—and fail to litigate—his case.[128]

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121. *Mediation*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012).

122. *Id.*

123. Jefri Wood, *Pro Se Case Management for Nonprisoner Civil Litigation*, FED. JUDICIAL CTR. 48 (2016),) https://www.fjc.gov/sites/default/files/2017/Pro_Se_Case_ManagementforNonprisoner Civil_Litigation.pdf.

124. *Id.* at 47-48.

125. *Id.* at 48.

126. Conversation with Adam Wenner, Detroit, MI, (Aug. 29, 2019); *Federal Court Launches Early Mediation Program for Pro Se Prisoner Civil Rights Cases*, LEGALNEWS (June 21, 2018,), http://www.legalnews.com/Washtenaw/1460640/; Nicole Wilmet, *U.S. District Court for Eastern Michigan Launches Pilot Mediation Program for Pro Se Prisoners*, JUST COURT ADR (Aug. 27, 2018), http://blog.aboutrsi.org/2018/pilot-program/u-s-district-court-for-eastern-michigan-launches-pilot-mediation-program-for-pro-se-prisoners/.

127. Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 309-321 (2010).

128. Luban, *supra* note 5252, at 10 ("From the point of view of the court, [self-representation is] a mess. If the judge aids the pro se litigant, there goes procedural fairness. If the judge doesn't, there goes substantive justice.").

However, there is another potential source of ghostwriting for prisoners. Commonly referred to as Jailhouse Lawyers,[129] inmates with substantial knowledge of the law are, at least in some states, permitted to help other inmates write complaints.[130] One of the limitations placed upon Jailhouse Lawyers is that these inmates are not permitted to receive compensation for their legal assistance.[131] However, a prison could—albeit likely has a reason not to—allow a buddy system, wherein prisoners with better writing skills could draft complaints based on the wishes of the prisoner-plaintiff. Clearer, more readable complaints would likely result.

McKenzie Friends and Legal Technicians

Thirdly, McKenzie Friends is a British system which "permit[s] pro se litigants to bring along non-lawyer helpers . . . . [who] may be highly knowledgeable and skilled repeat-players in specialized corners of the law. [It is for some] a genuine low-cost alternative to both unaided self-representation and . . . lawyering-up."[132] In the case of *pro se* prisoners, McKenzie Friends could be implemented in the United States to allow former inmates to assist current inmates in the preparation of legal documents. In order to be permitted to assist inmates with legal writing, former inmates would need to meet certain criteria, such as successful rehabilitation from criminal behaviors, only convicted of (or perhaps even only charged with) crimes that do not involve violent behavior or conspiracy, and other criteria that a prison or legislature could set. While former inmates would likely be barred from compensation on public policy grounds, some may volunteer for such a task out of an altruistic desire to help others, out of pride in their own writing skills, or out of a personal sense of justice.

Presently, the Washington State Bar Association allows non-lawyers to serve as legal technicians to "advise and assist people going through divorce, child custody, and other family law matters in Washington."[133] Washington recently capped this experimental program; anyone who has begun or completed the Washington training may serve as a legal technician there, but no new students are now accepted and no other licensure routes presently exist.[134] Citing Washington's initiative,[135] the California Bar considered reforming their regulations in 2019 to

129. *See* Gilmore v. Lynch, 319 F. Supp.105, 112 (N.D. Cal 1970); *see also* Faust v. Parke, 1996 U.S. Dist. LEXIS 18010 (N.D. Ind. Oct. 3, 1996).

130. .*Gilmore*, 319 F. Supp. at 107 n.1.

131. *Id*. at 107 n.3 (Some state statutes allow "[o]ne inmate [to] assist another inmate in the preparation of legal documents, but may not receive remuneration . . .").

132. Luban, *supra* note 52, at 12-13.

133. *Limited License Legal Technicians*, WASH. STATE BAR ASS'N (Oct. 23, 2020), https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians.

134. Lyle Moran, *Washington Supreme Court Sunsets Limited License Program for Nonlawyers*, ABA JOURNAL (June 8, 2020, 3:35 PM), https://www.abajournal.com/news/article/washington-supreme-court-decides-to-sunset-pioneering-limited-license-program.

135. Justice Lee Edmon & Randall Difuntorum, *Open Session Agenda Item 701 July 2019* at 1212-11, THE STATE BAR OF CAL. (July 11, 2019), http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000024450.pdf.

authorize non-lawyers "to provide specified legal advice and services as an exemption to [unauthorized practice of law] with appropriate regulation;" importantly, the delivery system need not be technology-driven.[136] The California Bar's proposed purpose was "public protection and increasing access to legal services through innovation."[137] Consideration of this program continued in February 2020,[138] and no public decision has yet been announced. California's consideration of non-lawyer legal technicians is a long-standing vision in its state bar.[139] Although the California Bar's current proposed change makes no mention of provision of legal services to prisoners or other inmates, the potential shift to allow non-lawyers to provide legal assistance may open a door for non-lawyers to help prisoners with their suits.

The adaptation of McKenzie Friends suggested here is unlikely to be implemented in the United States because of the public perception of risks of allowing non-prisoners with a criminal history into prisons as volunteers or employees. Another factor making the implementation unlikely is that "[t]he bar fights relentlessly . . . unauthorized practice of law."[140] However, there may yet be hope.

Component Requirements

Even where courts, bars, or legislatures are not prepared to use mediation or allow non-lawyers to assist prisoners, courts can streamline the process of reviewing *pro se* prisoner complaints by requiring specific components in each complaint. Prisoner complaints would likely increase in readability and legal sufficiency because specific components already are necessary to survive dismissal or to prevail. Such components include the desired results of the case, the factual allegations, and the citation to the law, or at least the name of a common law cause of action.

Although adjudicating a greater number of complaints—because more survive dismissal or summary judgment—*may* take up more judicial time, the complaints that survive will be clearer than those dismissed. A court that understands the prisoner's purpose for filing a lawsuit can suggest the best steps through which the suit may proceed, including a mediation process. The burden is

136. *Id*. at 11-12.

137. *Id.*

138. *See generally* Randall Difuntorum, *Strategic Planning Presentation and Discussion Panel I: Expanding Access Through Licensing Nonattorneys: Limited License Legal Technician (LLLT) Programs and Other Nonattorney Law-Related Services*, THE STATE BAR OF CAL. (Jan. 22, 2020), http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025577.pdfhttp://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025577.pdf.

139. *State Bar Consideration of Non-Lawyer Provision of Legal Services through a Limited License Program* at 3, THE STATE BAR OF CAL. (Dec. 4, 2019), http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025243.pdf; *see generally* Randall Difuntorum, *History of the State Bar's Consideration of a Regulatory Program to License Nonlawyer Paraprofessionals to Provide Legal Services*, THE STATE BAR OF CAL. (Jan. 23, 2020), http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025776.pdf.

140. Luban, *supra* note 47, at 13.

also lessened because successive complaints will be filed less frequently. *Pro se* prisoners with valid claims which have been dismissed because complaints lacked sufficient elements sometimes file successive complaints; requiring the elements which make the complaint sufficient the first time will reduce the duplicated filings of complaints. Also, complaints which survive summary judgment also use, rather than waste, the courts' initial time invested in reviewing them.

If courts define required components, prisons too could require the complainant (the inmate) include the components in the complaint within the prison's administrative system. The prison would better be able to respond to the complaint in-house. If a complaint looked similar in the prison's administrative system as in the court, the court's holding would define for future problems whether the prison must acquiesce, or whether they may deny the prisoner his desired result. This could reduce the prison condition complaints courts received.

The biggest challenge of requiring specific components in complaints is educating prisoners about the components. Requiring components without teaching prisoners about them would be a barrier between prisoners and the courts, which the Supreme Court has expressly rejected. Courts would need to work with prisons to teach prisoners basic legal definitions of procedural words by in-person or online courses. Such educational measures might increase inmates' awareness of their ability to file lawsuits and therefore increase the number of suits filed. However, if prisoners understand what should be in a complaint, complaints likely will become shorter merely because prisoners no longer need to throw "everything but the kitchen sink" into their complaint in hopes of avoiding dismissal. Requiring components and educating prisoners about them would streamline the process for the courts and the prisoners who file.

Many federal courts require prisoner complaints to be completed with or on a particular form.[141] Richard H. Frankel and Alistair E. Newbern in a 2017 law review article entitled *Prisoners and Pleading* "collect[ed] and analyze[d] every form complaint used by the federal district courts." [142] Their analysis

> indicate[d] that, while form complaints can be helpful to pro se prisoners and the courts, many impose requirements that are inconsistent with governing law. First, many complaints direct prisoners to plead facts that the law does not require them to plead. Second, many complaints prohibit or discourage prisoners from pleading facts necessary to survive a motion to dismiss. Third, some complaints require plaintiffs to plead legal conclusions, using language that may confuse unsophisticated prisoners and cause them to make inadvertent but significant legal errors.[143]

With recent technological advancements, some online platforms may offer a better way to both (1) educate *pro se* prisoners about the necessary elements of a

141. Frankel, *supra* note 25, at 899; U.S. DIST. COURT FOR THE DIST. OF MINN., PRISONER CIVIL RIGHTS FEDERAL LITIGATION GUIDEBOOK 13 (2015,), https://www.mnd.uscourts.gov/Pro-Se/PrisonerCivilRightsLitigGuide.pdf.

142. Frankel, *supra* note 25, at 899.

143. *Id.*

complaint and (2) require those elements.[144] Because the right to use computers or tablets has not been secured to prisoners,[145] the U.S. Courts system or the Federal Bureau of Prisons would have to increase prisoner access to computers or tablets before implementing an online prisoner complaint system.

These proposed solutions to reduce the judicial burden of *pro se* prisoner civil rights cases—mediation, permissive ghostwriting, an adapted McKenzie Friends, and component requirements with education—may be difficult to implement in their inception. The simplest solution to implement is likely page limits.

Page Limits

Courts regularly limit the number of pages a party may submit to them, both in the party's initial petition and in later motions to the court. The U.S. District Court for the Northern District of Ohio limits most pleadings to twenty pages in length and most motions to fifteen pages.[146] Judge Chhabria of the U.S. Dist. Ct. for the Northern District of Cali. limits complaints to fifteen pages.[147] Judge Chhabria has varying page limits for other documents filed with the court in cases assigned to him.[148] The U.S. Patent and Trademark Office sets a page limit on certain documents filed in its proceedings.[149] The Federal Rules of Appellate Procedure Rule 35 provide that a petition for hearing or for rehearing En Banc must not exceed 3900 words if typed on a computer or fifteen pages if handwritten or typewritten.[150] The West Virginia Judiciary requires complaints filed by facsimile and all motions to be less than twenty pages in length unless a party follows court procedures to arrange for a longer page allowance.[151] Page limits are not enforced, however, on *pro se* prisoner complaints under § 1983, even where a judge generally limits the number of pages in a complaint.[152]

144. Form creation software, such as https://www.google.com/forms/about/ and https://www.surveymonkey.com, allow forms to be custom-designed with information provided before each question. These forms are not suggested as the best choices, merely as ones that are more advanced in flexibility than most paper-based forms. As they are presently used by the public, these forms may create data-privacy concerns that could be better addressed via a business contract for such form software, but this goes beyond the scope of this article.

145. U.S. DEP'T OF JUSTICE: FED. BUREAU OF PRISONS, *supra* note 113, at 12. *See* Zoukis, *supra* note 113. *See also* Faust v. Parke, 1996 U.S. Dist. LEXIS 18010 at *13 (N.D. Ind. Oct. 3, 1996).

146. N.D. OHIO CIV. R. 7.1.

147. U.S. DIST. COURT N. DIST. OF CAL., STANDING ORDER FOR CIVIL CASES BEFORE JUDGE VINCE CHHABRIA, at 9 (2019), https://www.cand.uscourts.gov/filelibrary/1410/Chhabria-Civil-Standing-Order-rev-d-2019-10-07.pdf.

148. *See generally id.*

149. U.S. PATENT AND TRADEMARK OFFICE, *USPTO Image File Wrapper Petition Decisions 0725* 502-07, 533-37, 557-60, 570-73, 578-82 https://bulkdata.uspto.gov/data/patent/ifw/petition/decisions/USPTOIFWPetitionDecisions0725.pdf.

150. FED. R. APP. P. 35(b)(2).

151. WEST VIRGINIA JUDICIARY, *Trial Court Rules 12.03(c)* (last accessed Oct. 31, 2019) http://www.courtswv.gov/legal-community/court-rules/trial-court/chapter-1.html#rule12; WEST VIRGINIA JUDICIARY, *Trial Court Rules 22.01* (last accessed Oct. 31, 2019), http://www.courtswv.gov/legal-community/court-rules/trial-court/chapter-2.html#rule22.

152. *Id.*

Setting a page limit on all initial *pro se* prisoner § 1983 petitions would allow the court more time to read and decipher each page of the complaint. A page limit of fifteen or twenty pages, not including any supplemental documents required by the court, would not substantially burden *pro se* prisoners because most arguments can be made, and most stories told, in fifteen to twenty pages. If most complaints of fifteen to twenty pages could not succeed, courts such as the U.S. District Court for the Northern District of Ohio and Judge Chhabria would not set the limit at fifteen or twenty pages. Furthermore, if a particular *pro se* prisoner needs more pages to express his complaint, he may submit fifteen to twenty pages and then ask the judge assigned to his case to allow him to file more pages, which is the protocol for non-prisoner plaintiffs seeking higher page limits in some courts.[153] Because a *pro se* prisoner may not be able to afford extra stamps or envelopes for the request, a *pro se* prisoner should be allowed to request a higher page limit at the time he files a complaint. Judges who consistently deny such requests[154] can consider the pages submitted before granting or denying the request. A *pro se* prisoner's complaint should only be fifteen or twenty pages, however, until permission is granted.

Courts can further eliminate any prejudice to *pro se* prisoners that may result from page limits on civil rights complaints by allowing *pro se* prisoners to write only the citation to the law under which the *pro se* prisoner plaintiff brings suit to satisfy the *Mottley* rule. The citation could simply include the title and U.S. Code Service section numbers of the law. For example, a *pro se* prisoner would only need to write: "42 USC 1983 Civil Action for Deprivation of Rights." If a non-prisoner plaintiff's complaint with a citation to the law but not the language of the law might be dismissed for failure to state a claim, courts could require only *citation* to the law in *pro se* prisoners' complaints, along with a sufficient pleading of facts to make a claim for deprivation of rights plausible. Allowing a *pro se* prisoner complaint to proceed if the prisoner provides only accurate *citation* to the law would not cause any new burden for a court managing the case. Even when *pro se* plaintiffs accurately quote an entire law, courts look the law up anyway out of diligence. A *pro se* prisoner should not be *prevented* from writing the entire relevant portions of the law on his complaint,[155] but a page limitation should be enforced against him regardless of whether he writes out the law, and only waived in situations where the judge believes a longer page limit is necessary.

CONCLUSION

Section 1983 created the right to a legal or equitable remedy for any person, including an inmate, who is deprived of a right by a state actor—a person acting under color of state law. Many § 1983 actions are filed by self-represented prisoner plaintiffs. Although Congress imposed new barriers to prisoner litigation when it

153. U.S. DIST. COURT N. DIST. OF CAL., *supra* note 149, at 9-10.

154. *Id.*

155. Frankel, *supra* note 25, at 938-939 (arguing against prohibiting legal argument and quotations by prisoners but simultaneously supposing that the prohibition will include prohibition of citation to legal authority).

enacted the PLRA and the Supreme Court raised the pleading standard under Twiqbal, courts' dockets remain flooded by the volume of *pro se* prisoner civil rights actions because those complaints are often very difficult to read and sometimes far longer than complaints by non-prisoner plaintiffs.

Whether by action of the Court or of the Congress, the flood of lengthy, difficult to read *pro se* prisoner civil rights complaints on federal district courts' dockets must be distilled to a readable volume so that non-frivolous suits may be found and heard without overtaxing judicial resources and justice may be rendered expediently. The five solutions herein presented are (1) mediation, (2) permissive ghostwriting, (3) modified McKenzie Friends, (4) component requirements, and (5) page limits.