PLAUSIBLY ILLIBERAL: SUA SPONTE DISMISSALS OF PRO SE COMPLAINTS UNDER THE PRISON LITIGATION REFORM ACT

*Pierce Edlich**

Over a quarter of civil litigants file suit in federal court without an attorney. Most unrepresented litigants are in prison, and many of their cases raise complex, delicate constitutional questions. The number of unrepresented litigants in federal courts rose steadily until the 1990s, when Congress passed the Prison Litigation Reform Act (PLRA) of 1995 to limit the burden of frivolous inmate litigation on federal courts. Since 1996, the PLRA has defined courts' procedural obligations for inmate and in forma pauperis (IFP) suits, often filed pro se. The PLRA requires that courts screen and dismiss sua sponte cases that are frivolous, malicious, or fail to state a claim. Congress did not define these terms.

The U.S. Supreme Court has given this last standard, failure to state a claim, a different meaning since Congress passed the PLRA. The Court evolved pleading doctrine from Conley v. Gibson*'s notice pleading to* Bell Atlantic Corporation v. Twombly *and* Ashcroft v. Iqbal*'s plausibility pleading. Although pleading doctrine has changed, the Court has consistently required that lower courts liberally construe pro se pleadings. The Court has neither defined the failure to state a claim under the PLRA, nor defined liberal construction.*

Missing definitions and vague guidance converge at the PLRA's screening stage. While most circuit courts appear to give simple "lip service" to liberal construction and apply a standard plausibility analysis, the U.S. Court of Appeals for the Second Circuit appears to take a more liberal approach to screening. This Note explores the varying approaches that courts have taken when liberally construing pro se complaints. It advocates for applying Erickson v. Pardus*'s pleading standard to screening dismissals under the PLRA and applying the Second Circuit's approach to liberal construction.*

* J.D. Candidate, 2025, Fordham University School of Law; B.A., 2020, University of Virginia. Thank you to the Office of Pro Se Litigation of the U.S. District Court for the Southern District of New York for inspiring this Note topic. Thanks to Max Kaufman and other members of the *Fordham Law Review* for your thoughtful editing and feedback.

INTRODUCTION

William Erickson suffered from hepatitis C,[1] a viral infection that can cause chronic illness, serious liver damage, and death.[2] Following a liver biopsy that confirmed his need for treatment, Erickson began taking three pills twice a day and injecting a shot once a week.[3] Treatment can cure hepatitis C in most people within eight to twelve weeks,[4] and Erickson was

1. *See* Erickson v. Pardus, 551 U.S. 89, 89 (2007) (per curiam).
2. *See Hepatitis C Basics*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hepatitis-c/about/index.html [https://perma.cc/56HC-Y4H8] (last visited Nov. 14, 2024).
3. *See* Complaint at 4, *Erickson*, 551 U.S. 89 (No. 05-405).
4. *See Hepatitis C Basics*, *supra* note 2.

to perform his routine for a year.[5] Shortly after he began treatment, however, Erickson's medication was taken from him, not to be returned for eighteen months.[6] As his infection went untreated, Erickson was at risk of serious liver damage and possible death.[7]

Erickson was in prison.[8] State prison officials had found a syringe that was allegedly modified for illegal drug use in a communal trash can.[9] Other inmates also injected medication, and Erickson assured the prison officials that the syringe was not his.[10] Unconvinced, the officials found him guilty of possession of drug paraphernalia in violation of the Colorado Code of Penal Discipline.[11] Because Erickson allegedly took illegal drugs during his treatment, he would have to wait a full year, followed by an additional six-month drug education class, to be eligible again for his life-saving treatment.[12] Erickson sued prison officials for violations of his Eighth and Fourteenth Amendment protections against cruel and unusual punishment.[13]

Erickson filed his case pro se, or unrepresented, and without help from an attorney.[14] At the time, courts at every level of the federal judiciary had routinely held that pro se complaints must be construed liberally.[15] In Erickson's case, the district court stated that "his pleadings have been construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers."[16] Yet, relying on a report and recommendation of a magistrate judge, the court granted the defendants' motion to dismiss.[17] The court applied a "close reading" of Erickson's complaint and determined that hepatitis C, not Erickson's lack of treatment, was the cause of his harm.[18] The U.S. Court of Appeals for the Tenth Circuit affirmed, deeming Erickson's allegations "conclusory."[19] In response, the U.S. Supreme Court granted review and vacated the appellate court's judgment, reaffirming

5. *See Erickson*, 551 U.S. at 90.
6. *See id.* at 93.
7. *See Hepatitis C Basics*, *supra* note 2 (noting that hepatitis C may result in complications including liver damage or death).
8. *See Erickson*, 551 U.S. at 89.
9. *See id.* at 91.
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.* at 89.
14. *See id.* at 94. Throughout this Note, "unrepresented" is used to characterize a litigant without an attorney. *See* Fern A. Fisher, *Access to Justice in Time of Crisis*, 86 REV. JURÍDICA U. P.R. 809, 809–10 (2017) (arguing that "pro se litigant" is esoteric and "self-represented litigant" implies that the litigant wanted to appear in court without an attorney and is as capable as a trained lawyer).
15. *See, e.g.*, Haines v. Kerner, 404 U.S. 519, 520–21 (1972) (per curiam); Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991); Gass v. United States, No. 99-B-393, 2000 WL 1358705, at *2 (D. Colo. Aug. 2), *judgment entered*, No. 99-B-393, 2000 WL 1358708 (D. Colo. Aug. 16, 2000), *aff'd*, 4 F. App'x 565 (10th Cir. 2001).
16. Erickson v. Pardus, No. 05-CV-00405, 2006 WL 650131, at *4 (D. Colo. Mar. 13), *aff'd*, 198 F. App'x 694 (10th Cir. 2006), *vacated*, 551 U.S. 89 (2007).
17. *See id.* at *1.
18. *Id.* at *7.
19. *See Erickson*, 551 U.S. at 90.

federal courts' obligation to liberally construe pro se complaints.[20] The Court did not define, however, the degree or method by which courts must give special deference to pro se complaints.[21] This has allowed lower courts to adopt varying, inconsistent ways of construing the thousands of complaints that unrepresented litigants file in federal courts every year.[22]

Although Erickson's suit potentially raised a life-and-death issue, a decade earlier, Congress focused on more frivolous claims: bad haircuts, chunky peanut butter, pizza parties,[23] Game Boys,[24] and Converse shoes.[25] According to members of Congress, each of these was the subject of inmates' lawsuits that were clogging federal courts.[26] In response, Congress enacted the Prison Litigation Reform Act (PLRA) of 1995[27] to stop the flood of frivolous cases filed by people in prison.[28] The PLRA instituted procedural requirements, including judicial screening of civil complaints filed by inmates, and non-inmates who apply for in forma pauperis (IFP) status, to relieve them of prepayment of court fees.[29] The PLRA not only mandates sua sponte dismissal of frivolous complaints but also of those that fail to state a claim.[30] Like William Erickson, most inmates and low-income people who are at risk of sua sponte dismissal under this statute lack the benefit of an attorney and file their cases in federal court on their own.[31]

This Note explores how courts have applied the PLRA's screening dismissal standard while purporting to abide by their obligation to liberally construe pro se complaints. It argues that, by equating the screening dismissal standard with the interpretation of Federal Rule of Civil Procedure 12(b)(6) in *Bell Atlantic Corporation v. Twombly*[32] and *Ashcroft v. Iqbal*,[33] a majority of courts often fail to liberally construe pro se complaints as directed in *Erickson v. Pardus*.[34] This Note proposes that courts should

20. *See id.* at 94.

21. *See id.* at 89–94.

22. *See* Robert Bacharach & Lyn Entzeroth, *Judicial Advocacy in Pro Se Litigation: A Return to Neutrality*, 42 IND. L. REV. 19, 29–30 (2009) (concluding that "federal courts take varying approaches regarding 'how liberal' the construction of pro se pleadings should be").

23. *See* 141 CONG. REC. 26,548 (1995) (statement of Sen. Robert J. Dole).

24. *See id.* at 27,045 (statement of Sen. Jon Kyl).

25. *See id.* at 26,553 (statement of Sen. Orrin G. Hatch).

26. *See id.* at 26,548 (statement of Sen. Robert J. Dole) ("These legal claims may sound farfetched, almost funny, but unfortunately, prisoner litigation does not operate in a vacuum. Frivolous lawsuits filed by prisoners tie up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens.").

27. Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

28. *See infra* Part I.B.1.

29. *See infra* Part I.B.2.

30. *See infra* Part I.B.2.

31. *See infra* Part I.A.1. It is unclear whether Erickson's complaint was initially screened under the PLRA, but it was assigned to a magistrate judge and dismissed pursuant to the defendants' motion to dismiss, rather than sua sponte by the court. Erickson v. Pardus, No. 05-CV-00405, 2006 WL 650131, at *1 (D. Colo. Mar. 13, 2006).

32. 550 U.S. 544 (2007).

33. 556 U.S. 662 (2009).

34. 551 U.S. 89 (2007).

screen pro se complaints under *Erickson*'s pleading standard and follow the approach of the U.S. Court of Appeals for the Second Circuit, which appears to apply a more lenient pleading standard at the screening stage.[35] Pro se screening warrants a lower pleading standard because courts are required by Supreme Court precedent to liberally construe pro se complaints; sua sponte dismissals are anti-adversarial and potentially screen out meritorious complaints; the PLRA and liberal construction were established during the *Conley v. Gibson*[36] era; and the PLRA's legislative history focuses on frivolous cases rather than those that fail to state a claim.

Part I provides an overview of pro se litigation and the PLRA, analyzing the statute's screening provisions. It also traces the Supreme Court's evolution of pleading doctrine from *Conley* to *Twombly* and *Iqbal*, followed by a discussion of the Court's liberal construction mandate that it established in *Haines v. Kerner*[37] and reaffirmed in *Erickson*. Part II analyzes the Supreme Court's lack of guidance in defining the screening standard and lower courts' divergent applications of liberal construction and sua sponte dismissals. In particular, Part II contrasts the approaches of the U.S. Courts of Appeals for the Eleventh and Second Circuits. Part III advocates for courts to apply *Erickson*'s pleading standard and take specific steps to liberally construe pro se pleadings, as demonstrated in the Second Circuit.

I. PRO SE LITIGATION, THE PRISON LITIGATION REFORM ACT, AND STATING A CLAIM

This part introduces pro se litigation, the PLRA, and dismissals under Rule 12(b)(6). Part I.A provides an overview of pro se litigation in federal courts. Part I.B analyzes the PLRA's legislative history and its screening provisions. Part I.C introduces Rule 12(b)(6) and federal courts' obligation to liberally construe pro se complaints.

A. The People and Challenges of Pro Se Litigation

In the United States, any person can enter federal court and seek a remedy for a violation of federal law.[38] Federal district courts hear all kinds of grievances, from whether James Joyce's *Ulysses* is obscene[39] to a Food Lion customer's slip and fall on a "smushed grape."[40] Typically, litigation is adversarial and participatory, with each side represented by counsel.[41] To

35. *See infra* Part III.
36. 355 U.S. 41 (1957).
37. 404 U.S. 519 (1972) (per curiam).
38. *See* Andrew Hammond, *The Federal Rules of Pro Se Procedure*, 90 FORDHAM L. REV. 2689, 2699 (2022) (collecting and analyzing every pro se-specific rule in the federal district courts).
39. *See* United States v. One Book Called 'Ulysses,' 5 F. Supp. 182, 183 (S.D.N.Y. 1933).
40. *See* White v. Delhaize America, Inc., No. 3:12-CV-00122, 2012 WL 1999638, at *1 (E.D. Va. June 1, 2012).
41. *See* Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491, 1494 (2016) ("Court litigation is adversarial and participatory, with each side, through counsel, presenting its positions and reasoning concerning the relevant law. The

secure the best outcome for their clients, lawyers conduct legal research, synthesize arguments, interpret the law, and present solutions.[42] Every year, however, thousands of people bring cases without the help of a lawyer.[43] They assert a variety of claims but often allege police misconduct, employment discrimination, and the wrongful denial of disability benefits.[44] This section introduces unrepresented litigants and the management of their cases in federal courts. Part I.A.1 briefly recounts the history of American pro se litigation and the characteristics of unrepresented litigants. Part I.A.2 discusses the challenges that litigants and the courts face in pro se litigation.

1. Pro Se Cases and the People Who File Them

Unlike in criminal cases,[45] the federal judiciary is not required to appoint counsel for civil litigants, who may instead pursue their cases unrepresented.[46] Since the First Congress passed the Judiciary Act of 1789,[47] litigants have had the right to file their cases without a lawyer in federal courts.[48] In the 1970s, judges began to discuss the increase of pro se cases in federal courts.[49] A decade later, judges and court staff reported a "tidal wave of [pro se] lawsuits,"[50] leaving some to wonder whether "judges' time and the adversary process would be better served if an attorney reviewed the pleadings."[51]

In the 1990s, Congress passed the PLRA in response to concerns that pro se filings were straining court resources.[52] Today, unrepresented litigants continue to constitute a substantial portion of federal courts' civil dockets. In the twelve-month period ending September 30, 2023, unrepresented litigants filed 85,517 civil cases, accounting for approximately 25 percent of

system relies on this adversarial crucible, with testimony under oath, to sharpen the legal issues to be decided by the judge.").

42. *See* Bethany R. Henderson, *Asking the Lost Question: What Is the Purpose of Law School?*, 53 J. LEGAL EDUC. 48, 59 (2003).

43. *See infra* Part I.A.1.

44. *See* Hammond, *supra* note 38, at 2698 n.50 (noting that claims under § 1983, Title VII of the Civil Rights Act, and the Social Security Act are three of the most common federal question claims of unrepresented litigants).

45. *See* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (holding that the Sixth and Fourteenth Amendments of the U.S. Constitution guarantee a right to counsel for a person charged with a felony).

46. *See, e.g.*, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25 (1981) (recognizing a right to counsel only in criminal cases where a litigant may lose their physical liberty, and not in a parental termination hearing).

47. Ch. 20, 1 Stat. 73 (1789).

48. *See* Hammond, *supra* note 38, at 2696.

49. *See id.* at 2700 (noting that, unlike in the 1970s, in the 1960s there was little discussion of pro se cases in publications written by and for judges).

50. *Id.* at 2701 (quoting Frederick B. Lacey, *Holding the Center Together*, 24 JUDGES' J. 29, 29 (1985)).

51. *Id.* (quoting Collins T. Fitzpatrick, *Depleting the Currency of the Federal Judiciary*, 68 A.B.A. J. 1236, 1240 (1982)).

52. *See id.* at 2701–02; *see also infra* Part I.B.1.

all civil filings across federal district courts.[53] Some district courts have even higher percentages of pro se filings, making up over 30 percent of their civil docket.[54]

Although linked by their lack of an attorney, unrepresented litigants are a heterogeneous group.[55] A majority of them are people in prison asserting constitutional or civil rights claims.[56] Inmates file petitions pro se approximately nine out of ten times.[57] Inmates often file habeas corpus petitions challenging their custody by the government, as well as 42 U.S.C. § 1983 claims for denial of medical care, physical abuse, and improper placement in administrative segregation.[58] Between 2022 and 2023, approximately 54 percent of pro se cases were inmate petitions.[59] Therefore, although inmates make up a significant portion of unrepresented litigants in federal district courts, the notion that unrepresented plaintiffs are all disgruntled inmates is untrue.[60] Non-inmate, unrepresented litigants often file social security appeals and civil rights claims based on employment discrimination.[61] From inmates to non-inmates, thousands of pro se cases are filed in federal district courts every year, "not by large corporations, federal or state governments, or well-resourced lawyers, but by the people themselves."[62]

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53. ADMIN. OFF. OF THE U.S. CTS., TABLE C-13: U.S. DISTRICT COURTS–CIVIL PRO SE AND NON-PRO SE FILINGS, BY DISTRICT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2023 (2023), https://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2023.pdf [https://perma.cc/6SU6-4U96] (author's calculation).

54. *See* Hammond, *supra* note 38, at 2691. For example, in the twelve-month period ending September 30, 2023, pro se cases comprised over 33 percent of all civil cases filed in the U.S. Court of Appeals for the Tenth Circuit. *See* ADMIN. OFF. OF THE U.S. CTS., *supra* note 53 (author's calculation).

55. *See id.* at 2691–92 (noting that unrepresented litigants may be inmates, frequent frivolous filers, or even retain counsel later on in litigation).

56. Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 479 (2002) (analyzing the U.S. District Court for the Eastern District of New York's decision to designate a special magistrate judge to oversee pro se cases in 2001).

57. ADMIN. OFF. OF THE U.S. CTS., *supra* note 53 (author's calculation). In the twelve-month period ending September 30, 2023, inmates filed 50,353 cases, 46,109 of which were filed pro se. *Id.*

58. Bloom & Hershkoff, *supra* note 56, at 479–80.

59. ADMIN. OFF. OF THE U.S. CTS., *supra* note 53 (author's calculation).

60. *See* Michael Correll, *Finding the Limits of Equitable Liberality: Reconsidering the Liberal Construction of Pro Se Appellate Briefs*, 35 VT. L. REV. 863, 871 (2011); *see also* Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J.L. PUB. POL'Y 331, 335 n.13 (2016) (citing Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 989 nn.30–31 (2007)) (reporting that, between 1997 and 2004, "non-prisoner pro se litigants accounted for approximately 13% to 14% of all civil federal appeals annually").

61. Bloom & Hershkoff, *supra* note 56, at 481 (attributing an increase of non-inmate pro se litigation to the Americans with Disabilities Act and fluctuations in the employment market).

62. Hammond, *supra* note 38, at 2695.

The primary reason that litigants represent themselves is that they cannot afford an attorney.[63] To obtain counsel, a litigant must pay a retainer and hourly fees for representation that can "drag on for months or even years."[64] According to one estimate, the median price for a plaintiff's attorney in a federal civil case is $15,000.[65] In addition to attorney's fees, litigants must also pay court fees; the cost of filing a lawsuit in federal court is currently $402.[66] If a litigant is unable to pay these fees, they may apply for IFP status by submitting an affidavit showing the nature of their action and a statement of their assets.[67] If a court grants an IFP application, the litigant does not have to pay the fee.[68] Unrepresented litigants, particularly inmates, frequently apply for IFP status.[69] As described below, unrepresented litigants face unique challenges in addition to the high cost of litigation.

2. A Two-Way Problem: Pro Se Challenges for Litigants and the Courts

Unrepresented litigants face significant challenges in pursuing justice in court because of bias and their lack of legal experience. First, there is evidence of considerable bias against unrepresented litigants. Judges have described them as "'pest[s],' 'nut[s],' 'an increasing problem,' and 'clogging

63. *See* Rory K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 594 (2011) (arguing the "most prevalent reason" litigants file pro se is their inability to afford an attorney); *see also* Bloom & Hershkoff, *supra* note 56, at 482 ("[T]oday the literature emphasizes expense as a barrier to meaningful justice."). *But see* Correll, *supra* note 60, at 873 (noting studies that have found unrepresented litigants reported being able to afford counsel); Drew A. 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, 1547 (2005) (attributing pro se litigation to many reasons other than costs of counsel, including increased literacy rates, an anti-lawyer sentiment, and mistrust of the legal system).

64. Paul D. Healey, *In Search of the Delicate Balance: Legal and Ethical Questions in Assisting the* Pro Se *Patron*, 90 L. LIBR. J. 129, 133 (1998) (concluding that, for many people, obtaining counsel is not an option).

65. *See* Emery G. Lee III, *Law Without Lawyers: Access to Civil Justice and the Cost of Legal Services*, 69 U. MIAMI L. REV. 499, 501–02 (2015); *see also* Healey, *supra* note 64, at 133 (noting that legal fees often include an hourly rate over $100 and thousands of dollars in retainer fees).

66. Hammond, *supra* note 38, at 2705 (adding the $350 filing fee, required by 28 U.S.C. § 1914, and the $52 administrative fee).

67. 28 U.S.C. § 1915(d). Since 1892, indigent people have been able to proceed IFP. *See* Stephen M. Feldman, *Indigents in the Federal Courts: The In Forma Pauperis Statute—Equality and Frivolity*, 54 FORDHAM L. REV. 413, 413 (1985).

68. 28 U.S.C. § 1915(d).

69. *See* B. Patrick Costello, Jr., *"Imminent Danger" Within 28 U.S.C. § 1915(g) of the Prison Litigation Reform Act: Are Congress and Courts Being Realistic?*, 29 J. LEGIS. 1, 1 (2002) (noting that 95 percent of inmate-initiated suits are filed IFP and creating an inference that a large percentage of pro se inmates file IFP). There is some evidence that non-inmate, unrepresented litigants do not apply for IFP status as frequently. *See* Spencer G. Park, Note, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821, 823 (1997) (conducting a statistical study of one year of filings in the U.S. District Court of Northern California in San Francisco and concluding 70 percent of non-inmate, unrepresented litigants did not apply to proceed IFP).

our judicial system.'"[70] Judges often display indifference to the needs of unrepresented litigants, and, instead, attack them for procedural and substantive inefficiencies.[71]

Although all unrepresented litigants are at risk of bias, "[p]ro se prisoner litigation is notoriously described as frivolous and a burden on the federal courts."[72] This bias may be reflected in the relatively brief review that judges give to inmate civil rights claims, which "often receive no more than an 'hour of judge time, from filing to disposition.'"[73] Some empirical evidence shows that judges evaluate unrepresented litigants as having less meritorious cases than represented litigants with identical case content.[74] Many pro se complaints, however, have led to groundbreaking reform, including challenging double-celling inmates based on race and applying the Eighth Amendment to inmates' medical needs.[75]

Second, unrepresented plaintiffs typically are not attorneys. Litigants without counsel or any legal training lack an understanding of the procedural and substantive law necessary to properly initiate a lawsuit.[76] Although one side represents themselves, they often face a party with counsel who is more

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70. *See* Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 381 (2002) (quoting JONA GOLDSCHMIDT, BARRY MAHONEY, HARVEY SOLOMON & JOAN GREEN, MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 53 (1998)). After his resignation from the U.S. Court of Appeals for the Seventh Circuit, Judge Richard A. Posner told the *New York Times* that "judges regard [unrepresented and indigent litigants] as kind of trash not worth the time of a federal judge." Rachel Brown, Jade Ford, Sahrula Kubie, Katrin Marquez, Bennett Ostdiek & Abbe R. Gluck, *Is Unpublished Unequal?: An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 CORNELL L. REV. 1, 53 (2021) (quoting Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html [https://perma.cc/HD9P-BVE5]).

71. *See* Schneider, *supra* note 63, at 597 (citing Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 384 (2005)) (noting that unrepresented litigants are regularly attacked for creating judicial inefficiencies).

72. Richard H. Frankel & Alistair Newbern, *Prisoners and Pleading*, 94 WASH. U. L. REV. 899, 902 (2017). In 1953, Justice Robert H. Jackson compared finding a meritorious civil rights claim to finding a needle in a haystack, stating that "[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." *Id.* at 903 (quoting Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring)).

73. *Id.* (quoting Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1589 (2003)); *see also* Schneider, *supra* note 63, at 598 (arguing that although there is a perception that pro se pleadings are more burdensome to review, submissions drafted by counsel are typically longer and greater in number).

74. *See* Kathryn M. Kroeper, Victor D. Quintanilla, Michael Frisby, Nedim Yel, Amy G. Applegate, Steven J. Sherman & Mary C. Murphy, *Underestimating the Unrepresented: Cognitive Biases Disadvantage Pro Se Litigants in Family Law Cases*, 26 PSYCH. PUB. POL'Y & L. 198, 203 (2020) (assessing the procedural preferences of 139 civil court judges in family law disputes).

75. *See* Frankel & Newbern, *supra* note 72, at 903 (first citing Johnson v. California, 543 U.S. 499, 515 (2005); and then citing Estelle v. Gamble, 429 U.S. 97, 99 (1976)).

76. *See* Schneider, *supra* note 63, at 598; *see also* CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), https://bjs.ojp.gov/content/pub/pdf/ecp.pdf [https://perma.cc/NYC2-TCYC] (reporting that 68 percent of state inmates did not receive a high school diploma).

familiar with the lay of the land.[77] These burdens are compounded in inmate litigation where unrepresented plaintiffs must resort to prison law libraries,[78] which have been drastically diminished or eliminated.[79] People in prison also experience a higher-than-average rate of intellectual disabilities, and their literacy and language skill levels are significantly lower than those of the general population.[80] Unrepresented litigants are "almost unanimously ill equipped to encounter the complexities of the judicial system."[81]

The challenges of pro se litigation are a "two-way problem."[82] Because of their relative lack of legal education and experience, many unrepresented litigants struggle to clearly convey their allegations in a complaint.[83] As a result, pro se pleadings "tend to be lengthy, legally naive, and confusing."[84] Often, the greatest difficulty for judges is determining what an unrepresented litigant's meritorious claims are.[85] Therefore, pro se cases may require additional time and patience from the court relative to cases represented by counsel.[86] This makes it difficult for courts to fulfill their duty to construe all causes of action fairly encompassed by the facts,[87] and they may overlook meritorious pro se claims.[88] Judges also struggle to reconcile their

77. *See* Frankel & Newbern, *supra* note 72, at 901.

78. *See id.* at 902. Commentators and courts have criticized prison law libraries as insufficient replacements to legal representation since the Supreme Court first endorsed them in *Younger v. Gilmore*, 404 U.S. 15 (1971). For example, one district court compared providing legal materials in law libraries to "furnishing medical services through books like: 'Brain Surgery Self-Taught,' or 'How to Remove Your Own Appendix.'" Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 GEO. L. J. 1171, 1176 (2013) (quoting Falzerano v. Collier, 535 F. Supp. 800, 803 (D.N.J. 1982)).

79. *See* Frankel & Newbern, *supra* note 72, at 902 n.7 (citing the Supreme Court's limiting of inmates' law library access in *Lewis v. Casey*, 518 U.S. 343 (1996), and Arizona's subsequent closure of thirty-four prison libraries).

80. *See id.* at 902 n.8 (noting that 14 percent of inmates did not complete the eighth grade, and the average reading level of state inmates is equal to that of a sixth grader).

81. Rosenbloom, *supra* note 70, at 306.

82. Sela, *supra* note 60, at 338.

83. *See* Schneider, *supra* note 63, at 598. A survey of sixty-one chief judges of federal district courts reported that their major concerns with pro se litigation included the litigants' lack of knowledge of legal decisions and failure to understand legal consequences of their actions or inactions. DONNA STIENSTRA, JARED BATAILLON & JASON A. CANTONE, FED. JUD. CTR., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES, at vii (2011), https://www.fjc.gov/sites/default/files/2012/ProSeUSDC.pdf [https://perma.cc/M2KD-JDM9].

84. PETER G. MCCABE, A GUIDE TO THE FEDERAL MAGISTRATE JUDGES SYSTEM 53 (2014), https://www.fedbar.org/minnesota-chapter/wp-content/uploads/sites/54/2021/12/A-Guide-to-the-Federal-Magistrate-Judges-System.pdf [https://perma.cc/45L9-NMGA].

85. Frankel & Newbern, *supra* note 72, at 902.

86. Rosenbloom, *supra* note 70, at 309.

87. *See* Bacharach & Entzeroth, *supra* note 22, at 33.

88. Frankel & Newbern, *supra* note 72, at 902.

constitutional duty to provide a meaningful hearing with their ethical duty to remain impartial.[89] As a result, the represented party typically wins.[90]

One way federal courts address the unique challenges posed by pro se pleadings is to manage pro se cases with designated pro se staff.[91] In 1975, a federal pilot program first established pro se staff positions to manage an increase in inmate petitions.[92] Today, pro se staff also handle non-inmate cases, and some districts maintain pro se offices where "attorneys work alongside other pro se staff on pro se cases."[93] In some districts, magistrate judges manage the pro se program and supervise pro se attorneys.[94] Pro se staff do not represent litigants; they work for the courts.[95] From the outside looking in, it is difficult to determine what exactly pro se staff do across the federal district courts,[96] though local rules of civil procedure and district court job descriptions shed some light on the job responsibilities of pro se staff.[97]

In many district courts, pro se clerks "conduct an initial screening of prisoner cases and prepare a draft order for the district judge assigned to the case if there is any basis warranting dismissal prior to service or if further action is required by the [unrepresented] litigant."[98] Pro se staff often also screen complaints of pro se plaintiffs who are not inmates and are seeking to proceed IFP.[99] For example, the local rules of civil procedure for the U.S. District Court for the District of Colorado govern review of IFP and inmate pleadings.[100] The rule refers to a "judicial officer designated by the Chief Judge" who reviews IFP and inmate pleadings "to determine whether the pleadings should be dismissed summarily" prior to assignment to a judge and summons.[101]

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89. *See* Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 37 (2002); *see also* Bacharach & Entzeroth, *supra* note 22, at 31 (arguing that courts' use of ad hoc rules to interpret an unrepresented litigant's pleadings, like characterizing § 1983 suits as habeas petitions or advising litigants how to comply with rules, softens the distinction between advocacy and neutrality).

90. *See* Goldschmidt, *supra* note 89.

91. Federal courts also manage pro se cases by issuing standardized complaint forms. *See* Frankel & Newbern, *supra* note 72, at 899 (concluding that pro se forms may hinder unrepresented litigants by requiring plaintiffs to plead unnecessary information, discouraging them from pleading necessary facts, and requiring them to plead legal conclusions).

92. *See* Katherine A. Macfarlane, *Shadow Judges: Staff Attorney Adjudication of Prisoner Claims*, 95 OR. L. REV. 97, 105 (2016).

93. *Id.* at 106.

94. *See* MCCABE, *supra* note 84, at 54.

95. *See* MacFarlane, *supra* note 92, at 106.

96. *See id.* at 107.

97. *See id.* at 107–08.

98. JUD. CONF. OF THE UNITED STATES, COMM. ON CT. ADMIN. AND CASE MGMT., CIVIL LITIGATION MANAGEMENT MANUAL THIRD EDITION 129 (2022), https://www.fjc.gov/sites/default/files/materials/29/Civil_Litigation_Management_Manual_Third_Edition.pdf [https://perma.cc/8YJ7-N6JW].

99. *Id.* at 131.

100. *See* D. COLO. LOC. CIV. R. 8.1(a)–(b).

101. *Id.*

One commentator argued that district courts deny unrepresented litigants access to an Article III judge by delegating review of pro se complaints to pro se staff, violating federal law and policy.[102] This screening "tends to occur under the radar of reported decisions or even fully reasoned written opinions."[103] As described below, this process, often performed by pro se staff, is governed by federal statute.

B. The Prison Litigation Reform Act

This section explores the PLRA and its provisions governing district courts' screening of IFP and inmate pleadings, often filed by unrepresented litigants.[104] In a non-inmate case where a plaintiff pays the requisite fees, a plaintiff "can cause [a] complaint to be filed and served regardless of the nature, validity, or truth of the allegations."[105] If the defendant believes that the complaint is meritless, malicious, or false, they may file a motion for the court to dismiss the case "with possible costs, or even sanctions."[106] Under the PLRA, however, a district court must review an inmate or IFP complaint, preferably before docketing or service, and dismiss the action without any responsive pleading.[107] Therefore, this screening determination is extremely important to an unrepresented litigant who is in prison or unable to pay court fees.[108]

Part I.B.1 provides a brief overview of the PLRA's legislative history, which is dominated by concerns of frivolous inmate petitions. Part I.B.2 introduces the screening statutes created or amended by the PLRA in 1996, which district courts often apply to pro se cases.

1. Legislative History of the PLRA

In 1996, Congress enacted the PLRA, significantly altering how federal courts process both inmate and non-inmate filings.[109] As its name suggests, however, the PLRA primarily addresses inmate litigation.[110] Prior to the

102. MacFarlane, *supra* note 92, at 105–07 (describing pro se staff as a shadow judiciary).

103. Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1217 (2014).

104. *See generally*, Rosenbloom, *supra* note 70, at 322, 324 (conducting a study in which inmates filed over 53 percent of pro se cases and 94.9 percent of unrepresented plaintiffs applied for IFP).

105. Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 437 (1993) (analyzing federal court involvement in inmate civil rights litigation).

106. *Id.*

107. *See infra* Part I.B.2.

108. *See* Eisenberg, *supra* note 105, at 437 (arguing that a court's threshold determination is "extremely important" to an indigent inmate who files a civil rights action).

109. *See* 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, 977 (2000).

110. *See* Katherine A. Macfarlane, *Procedural Animus*, 71 ALA. L. REV. 1185, 1216 (2020) (arguing that inmates are the "clear target" of the PLRA).

PLRA, inmate litigation was governed by judge-made law.[111] During the civil rights movement, Chief Justice Earl Warren's Supreme Court "paved the way for prisoners to bring lawsuits for the first time, and with that, opened the 'floodgates' of prison litigation as we know it today."[112] Inmates' suits increased from 6,600 in 1975 to 39,000 in 1994.[113] Inmates were thirty-five times more likely to file a civil suit than non-inmates.[114]

Congress passed the PLRA primarily to restrict and discourage inmate litigation.[115] Led by Senator Robert J. Dole, who quipped that "prisons should be prisons, not law firms,"[116] Republican Party advocates sought to "address the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners."[117] Congress did not define what "frivolous" meant, but "the bottom line is that a case is legally 'frivolous' if there is absolutely no chance that the plaintiff can obtain any judicial relief through the action."[118]

Proponents of the PLRA argued that frivolous inmate litigation is a "crushing burden" that "makes it difficult for the courts to consider meritorious claims."[119] They cited examples of frivolous claims, including a death row inmate who sued because guards took his Game Boy away and an inmate alleging cruel and unusual punishment for being served chunky

111. *See* Mariah L. Passarelli, *Broken Gate?: A Study of the PLRA Exhaustion Requirement: Past, Present, and Future*, 47 CRIM. L. BULL. 95, 99 (2011).

112. *Id.* A combination of judicial activism, abrogation of the idea that benefits given to people in prison were privileges not giving rise to constitutional issues, and deplorable prison conditions opened the doors of federal courts to inmates seeking legal redress. Eisenberg, *supra* note 105, at 425.

113. Anh Nguyen, Comment, *The Fight for Creamy Peanut Butter: Why Examining Congressional Intent May Rectify the Problems of the Prison Litigation Reform Act*, 36 SW. U. L. REV. 145, 149 (2007) (citing 141 CONG. REC. 27,042 (1995) (statement of Sen. Orrin G. Hatch)).

114. Passarelli, *supra* note 111, at 100.

115. *See* Willa Payne & Matt Luton, *A Relocation of Prisoner Identity*, 10 N.Y. CITY L. REV. 299, 302 (2006); *see also* Cutter v. Wilkinson, 544 U.S. 709, 726 (2005) ("The procedures mandated by the [PLRA] . . . are designed to inhibit frivolous filings."); Passarelli, *supra* note 111, at 95 ("[T]he [PLRA] was intended to perform a gate-keeping function, permitting the most meritorious inmates' claims to reach federal court, while screening frivolous matters during the course of preliminary administrative procedures."); Lois Bloom, *Implementation of the Prison Litigation Reform Act*, 17 TOURO L. REV. 587, 591 (2001) ("The purpose of the PLRA is clear: to deter inmates from filing civil rights cases in the federal courts.").

116. Passarelli, *supra* note 111, at 101 (citing Eugene J. Kuzinski, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361, 361 (1998)).

117. 141 CONG. REC. 26,548 (1995) (statement of Sen. Robert J. Dole). Senator Jon Kyl noted the idea for the PLRA came from Arizona Attorney General Grant Woods and an Arizona law that had cut prison litigation in half. 141 CONG. REC. 27,044 (1995) (statement of Sen. Jon Kyl).

118. *See* Eisenberg, *supra* note 105, at 437–38 (explaining that some of inmates' claims that appear frivolous are a result of the arcane and pervasive rules that regulate every aspect of inmates' lives); *see also* Preiser v. Rodriguez, 411 U.S. 475, 492 (1973) (noting that, while a private citizen may have a dispute with their landlord, employer, tailor, neighbor, or banker, an inmate has disputes with the state).

119. 141 CONG. REC. 26,553 (1995) (statement of Sen. Orrin G. Hatch).

instead of creamy peanut butter.[120] In hindsight, the frivolousness of inmate litigation was likely exaggerated, as frivolous inmate cases "represent[ed] just one-third of the total number of inmate cases in federal district courts."[121] Opponents of the PLRA, including then–Democratic Party Senators Joseph R. Biden, Jr. and Edward M. Kennedy, suggested that the increase in inmate litigation was a result of "deteriorating prison conditions, rather than prisoners' propensity for litigation."[122] Senator Biden "worried that 'in an effort to curb frivolous prisoner lawsuits, [the PLRA] place[d] too many roadblocks to meritorious prison lawsuits.'"[123]

Apart from muted concerns of Senate Democrats, Congress paid "scant attention" to the PLRA.[124] The Senate Judiciary Committee held only one hearing on the PLRA and did not issue a report explaining the proposal.[125] Buried deep in an appropriations bill, the PLRA passed swiftly through Congress, and President William ("Bill") J. Clinton signed it into law on April 26, 1996.[126] The PLRA was not subject to any rigorous debate, but it fundamentally altered the landscape of inmate and IFP litigation.[127]

To prevent frivolous cases and preserve judicial resources, the PLRA established several procedural hurdles for unrepresented litigants,[128] including a judicial screening requirement.[129] As discussed below, the

120. *See* Nguyen, *supra* note 113, at 150 (citing 141 CONG. REC. 27,042 (1995)) (statement of Sen. Orrin G. Hatch). The Congressional Record includes two "Top 10 List[s]" of purportedly frivolous lawsuits, one for suits filed in Arizona and one for suits filed across the country. 141 CONG. REC. 27,045 (1995).

121. Passarelli, *supra* note 111, at 100; *see also*, Cindy Chen, *The Prison Litigation Reform Act of 1995: Doing Away with More Than Just Crunchy Peanut Butter*, 78 ST. JOHN'S L. REV. 203, 213–14 (2004) (citing Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520–22 (1996)) (noting that even the most widely cited examples of frivolous cases, including the crunchy peanut butter case, were mischaracterizations of meritorious claims about inmates' rights).

122. Passarelli, *supra* note 111, at 101 (quoting Chen, *supra* note 121, at 210). Also, annual increases in inmates' federal civil rights filings coincided with a growing incarceration population. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1586–87 (2003).

123. Melissa Benerofe, Note, *Collaterally Attacking the Prison Litigation Reform Act's Application to Meritorious Prisoner Civil Litigation*, 90 FORDHAM L. REV. 141, 154 (2021) (quoting 141 CONG. REC. 27,044 (1995) (statement of Sen. Joseph R. Biden, Jr.)).

124. Julie M. Riewe, Note, *The Least Among Us: Unconstitutional Changes in Prison Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117, 119 (1997) (arguing that the PLRA erected unconstitutional barriers to inmate access to federal courts).

125. *See id.* (quoting 142 CONG. REC. S2296 (daily ed. Mar. 19, 1996) (statement of Sen. Edward M. Kennedy)); *see also* Susan H. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1277 (1998) ("The legislative process leading to the passage of the PLRA was characterized by haste and lack of any real debate.").

126. *See* Riewe, *supra* note 124, at 119.

127. *See id*.

128. *See* Zachary, *supra* note 109, at 980 n.12 (collecting sources). The PLRA also restricts the remedies available to inmates to reduce the federal judiciary's control over state prisons. Jennifer Winslow, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1655, 1660–61 (2002).

129. *See infra* Part I.B.2. The PLRA includes four provisions meant to curtail frivolous inmate litigation. In addition to judicial screening, the PLRA requires that (1) an inmate must exhaust administrative remedies before filing in court; (2) inmates whose claims are dismissed

PLRA requires that courts dismiss actions that are not only frivolous or malicious but also those that fail to state a claim. The PLRA does not define frivolous, malicious, or failure to state a claim, and the legislative history is "silent on this precise point."[130]

2. The Screening Statutes of the PLRA: 28 U.S.C. §§ 1915(e)(2), 1915(A)(b) and 42 U.S.C. § 1997e(c)

The PLRA created three provisions that require courts to screen inmate and IFP filings sua sponte—or on its own and without hearing from the parties.[131] Prior to the PLRA, screening was defined by 28 U.S.C. § 1915(d), the IFP statute governing cases filed without prepayment of fees.[132] Section 1915(d) permitted courts to dismiss IFP cases sua sponte "if the allegation of poverty [was] untrue, or if [the court was] satisfied that the action [was] frivolous or malicious."[133] The three screening statutes created by the PLRA are discussed in turn, each of which uses "virtually identical language" to identify the actions a court must dismiss sua sponte.[134]

First, the PLRA amended § 1915(d) to create 28 U.S.C. § 1915(e), which applies to all IFP litigants.[135] Section 1915(e) requires that a court dismiss a case sua sponte where "(A) the allegation of poverty is untrue; or (B) the action or appeal—(i) is frivolous or malicious; (ii) *fails to state a claim* on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief."[136] Section 1915(e) expanded the grounds for dismissal from simply actions that were frivolous or malicious to also those that "fail[] to state a claim."[137] Further, the new statute is not

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on three occasions, also known as three strikes, may not be granted IFP status; and (3) inmates must establish that they suffered physical injury before recovering for emotional or mental injury. *See* Passarelli, *supra* note 111 (analyzing the effect of the PLRA's exhaustion requirement); *see also* Matthew A. Shapiro, *Delegating Procedure*, 118 COLUM. L. REV. 983, 1024 (2018) ("Given the limited financial resources of most prisoners, [three strikes are] tantamount to *permanently* revoking a prisoner's power to prosecute claims in federal court.").

130. Zachary, *supra* note 109, at 980.

131. *Sua Sponte*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("[w]ithout prompting or suggestion; on its own motion").

132. *See* Zachary, *supra* note 109, at 978 (citing 28 U.S.C. § 1915(d)).

133. *Id.* (quoting 28 U.S.C. § 1915(d)).

134. *Id.* at 980. There is a "longstanding interpretive principle" that "[w]hen a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" Taggart v. Lorenzen, 139 S. Ct. 1795, 1801 (2019) (quoting Hall v. Hall, 138 S. Ct. 1118, 1128 (2018)); *see also* Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

135. *See, e.g.*, Lopez v. Smith, 203 F.3d 1122, 1126 n.7 (9th Cir. 2000) (stating § 1915(e) applies to all IFP complaints). Some courts have held that fee paid actions filed by non-inmates must be screened under § 1915(e). *See* Zachary, *supra* note 109, at 985 (first citing McGore v. Wrigglesworth, 114 F.3d 601, 608–09 (6th Cir. 1997), *overruled on other grounds by* Jones v. Bock, 549 U.S. 199, 127 (2007); then citing Rowe v. Shake, 196 F.3d 778, 783 (7th Cir. 1999); and then citing In re Prison Litigation Reform Act, 105 F.3d 1131, 1134 (6th Cir. 1997)).

136. 28 U.S.C. § 1915(e)(2) (emphasis added).

137. *Compare* 28 U.S.C. § 1915(e)(2), *with* 28 U.S.C. § 1915(d).

discretionary, like the old statute, and instead mandates that courts dismiss inadequate actions.[138]

Second, the PLRA created 28 U.S.C. § 1915A, which requires that a "court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing" inmate complaints in a civil action against a governmental entity, officer, or employee.[139] Under § 1915A, a court must dismiss a case sua sponte "if the complaint is frivolous, malicious, or *fails to state a claim* upon which relief may be granted; or seeks monetary relief from a defendant who is immune from such relief."[140]

Third, the PLRA created 42 U.S.C. § 1997(e), aimed at inmate litigation with respect to "prison conditions under section 1983."[141] Section 1997(e) requires a court to dismiss sua sponte any such action that "is frivolous, malicious, *fails to state a claim* upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief."[142]

The PLRA has had an "undeniable" impact on litigation as both a deterrent and barrier to having one's case heard in federal court.[143] Inmate civil rights filings fell from almost 40,000 in 1996 to just 14,993 in 2005.[144] Further, the number of cases that have survived beyond initial filing has decreased significantly following the PLRA.[145]

The next section analyzes the Supreme Court's interpretation of failure to state a claim, an undefined phrase in the PLRA, in the context of a motion to dismiss.

C. Pleading Standards, Liberal Construction, and Their Empirical Effects

Adopted in 1938, the Federal Rules of Civil Procedure established a modern pleading standard with Rules 8 and 12.[146] First, Rule 8 establishes the factual detail required of pleadings: only a "short and plain statement of the claim showing that the pleader is entitled to relief."[147] Second, Rule 12 asks whether the facts alleged may support a legal claim.[148] In particular, upon a defendant's Rule 12(b)(6) motion, a court may dismiss a complaint

138. *Compare* 28 U.S.C. § 1915(e)(2) (saying the court "shall dismiss" the case), *with* 28 U.S.C. § 1915(d) (saying the court "may dismiss" the case).

139. *See* 28 U.S.C. § 1915A(a).

140. *Id.* (emphasis added).

141. 42 U.S.C. § 1997e(c)(1).

142. *Id.* (emphasis added).

143. Passarelli, *supra* note 111, at 102.

144. *Id.*; *see also* Bloom, *supra* note 115, at 592 (noting that pro se inmate civil rights cases in the U.S. District Court for the Southern District of New York decreased from 1,017 in 1995 to 504 in 1997).

145. *See* Passarelli, *supra* note 111, at 102–03.

146. *See* Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2125 (2015) (stating that the Federal Rules of Civil Procedure created "modern pleading rules, seeking to eradicate technical, claim-specific pleading that had dominated legal practice for decades").

147. FED. R. CIV. P. 8(a)(2).

148. *See Reinert*, *supra* note 146, at 2125.

where it "fail[s] to state a claim upon which relief can be granted."[149] This section describes the evolution of pleading doctrine, courts' obligation to liberally construe pro se complaints, and the empirical effects of an evolving Rule 12(b)(6) standard. Part I.C.1 analyzes the standard under *Conley* and its retirement by *Twombly* and *Iqbal*. Part I.C.2 introduces the Court's mandate to liberally construct, or give greater deference to, pro se plaintiffs in *Haines* during the *Conley* era, which the Court reaffirmed in *Erickson*. Part I.C.3 details the empirical effects of *Twombly* and *Iqbal*, particularly on pro se complaints.

1. Construing Rule 12(b)(6): *Conley*, *Twombly*, and *Iqbal*

In 1957, *Conley* defined the pleading necessary to survive a Rule 12(b)(6) motion.[150] The case was brought by African American railway workers, alleging that their union discriminated against them in violation of the Railway Labor Act.[151] The defendants argued that the plaintiffs failed to support their allegations of discrimination with specific facts.[152] The Court ruled in favor of the plaintiffs, establishing a "notice pleading" regime.[153] *Conley* held 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 [their] claim which would entitle [them] to relief."[154] Echoing Rule 8, the court required only a "short and plain statement,"[155] rejecting the idea that pleading is a "game of skill in which one misstep . . . may be decisive."[156] A litigant satisfied the *Conley* standard if they provided a defendant with fair notice of a claim.[157] Notice pleading would remain the standard, with some modifications by lower courts, for fifty years.[158]

Twombly and *Iqbal* replaced the *Conley* notice-pleading standard with a more demanding "plausibility pleading" standard.[159] In 2007, *Twombly* involved a putative class action on behalf of telephone and internet users against regional phone and internet service monopolies.[160] The Court

149. FED. R. CIV. P. 12(b)(6).
150. *See* Conley v. Gibson, 355 U.S. 41, 41 (1957).
151. 45 U.S.C. § 151; *see Conley*, 355 U.S. at 42–43.
152. *See Conley*, 355 U.S. at 47.
153. *See id.* at 47–48.
154. *See id.* at 45–46 (emphasis added).
155. *See id.* at 47.
156. *See id.* at 48.
157. *See id.* at 47.
158. *See* Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767, 1771 (2014). Between *Conley* and *Twombly*, some lower courts instituted heightened pleading standards for particular types of cases, but most circuits had abandoned this practice by 2007. *See id.* at 1771 n.28.
159. *See* Anthony Gambol, Note, *The* Twombly *Standard and Affirmative Defenses: What Is Good for the Goose Is Not Always Good for the Gander*, 79 FORDHAM L. REV. 2173, 2181–82 (2011) (evaluating whether *Twombly*'s plausibility pleading standard applies to affirmative defenses).
160. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 550 (2007).

introduced three changes to the *Conley* pleading standard.[161] First, the Court "retire[d]" *Conley*'s "no set of facts" language[162] and required that a litigant supports their claim "by showing *any set of facts* consistent with the allegations in the complaint."[163] Second, the Court established a plausibility inquiry, requiring that a complaint allege "enough facts to state a claim to relief that is plausible on its face."[164] Third, the Court reasoned that burdensome discovery warranted a plausibility pleading standard to prevent settlements of claims of dubious merit.[165] Initially, courts applied *Twombly* inconsistently: sometimes they treated plausibility pleading as limited to cases with high discovery costs,[166] whereas other times they applied *Twombly* to all civil actions.[167]

In 2009, *Iqbal* confirmed that *Twombly* applied to all civil cases and elucidated the plausibility analysis.[168] In *Iqbal*, a Pakistani citizen, Javaid Iqbal, sued former Attorney General John Ashcroft and former FBI Director Robert S. Mueller, III, alleging violations of his First and Fifth Amendment rights.[169] The Court articulated a two-step process in evaluating the sufficiency of Iqbal's complaint. First, a court must not consider "threadbare recitals of a cause of action's elements, supported by mere conclusory statements."[170] Therefore, when a court decides on a motion to dismiss, it must only accept as true all factual allegations but not legal conclusions.[171] Second, courts must conduct a merits-based analysis at the pleading stage, using their "judicial experience and common sense."[172] Despite the changes of *Twombly* and *Iqbal*, the Supreme Court denied that it was attempting to institute a heightened pleading standard.[173]

Although the Court has developed its pleading standard, its precedent for liberally construing pro se pleadings has remained consistent. The next section charts the Court's adoption of liberal construction during the *Conley* era and its reaffirmation of liberal construction following *Twombly*.

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161. *See* Reinert, *supra* note 146, at 2127 ("*Twombly* introduced three notable changes to pleading jurisprudence.").

162. *Twombly*, 550 U.S. at 564.

163. *Id.* at 563 (emphasis added).

164. *Id.* at 570.

165. *Id.* at 558–59.

166. *See* Reinert, *supra* note 146, at 2127 (citing Tackett v. M & G Polymers, USA, LLC, 561 F.3d 478, 488–89 (6th Cir. 2009)).

167. *See id.* (first citing Abdullahi v. Pfizer, Inc., 562 F.3d 163, 172 n.6 (2d Cir. 2009); and then citing Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 434 n.2 (6th Cir. 2008)).

168. *See* Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009).

169. *Id.* at 662.

170. *Id.* at 663.

171. *See id.* at 664.

172. *Id.* at 679.

173. *See* Reinert, *supra* note 146, at 2128 (first citing *Iqbal*, 556 U.S. at 681; and then citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). For example, *Twombly* stated "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

2. Liberal Construction of Pro Se Pleadings

Since the proliferation of pro se litigation in the 1970s, the Supreme Court has required that trial courts liberally construe pro se complaints. *Haines* established the liberal construction rule in 1972.[174] Plaintiff Francis Haines, an inmate proceeding IFP,[175] alleged that he was subject to civil rights violations because of his solitary confinement.[176] The district court granted the defendants' Rule 12(b)(6) motion to dismiss the complaint for failure to state a claim, and the Second Circuit affirmed.[177] The Supreme Court reversed, applying the *Conley* pleading standard and determining that it was doubtful that Haines could prove "no set of facts in support of his claim."[178] The *Haines* Court, however, prefaced its application of *Conley* by stating, "[W]e hold [pro se complaints] to less stringent standards than formal pleadings drafted by lawyers."[179] *Haines* did not explain its reasoning for liberal construction, how courts should liberally construe pleadings, or the authority that it relied on.[180] Subsequent cases, however, articulated the reason for liberal construction as being "that unrepresented parties are more likely to be tripped up by legal technicalities and should not be punished for their lack of sophistication."[181] Also, as later noted by Justice John Paul Stevens, liberal construction helps courts judge a case on the merits "through pleadings, affidavits, and possibly an evidentiary hearing" instead of only relying on a complaint that is "inartfully drawn, unclear, and equivocal."[182]

Just weeks after the Supreme Court substantially altered pleading doctrine in *Twombly*, it also reaffirmed its requirement to liberally construe pro se complaints. In *Erickson*, William Erickson, an inmate proceeding pro se and IFP, sued Colorado state prison officials for allegedly violating his Eighth and Fourteenth Amendment rights.[183] Erickson alleged that he had hepatitis C, which required a life-saving treatment program that officials commenced but then terminated.[184] Affirming the district court's decision, the Tenth Circuit granted the defendants' motion to dismiss, deeming the plaintiff's

174. *See* Haines v. Kerner, 404 U.S. 519, 520–21 (1972) (per curiam).

175. *See* Haines v. Kerner, 427 F.2d 71, 72 (7th Cir. 1970), *vacated*, 404 U.S. 519 (1972) (per curiam).

176. *See Haines*, 404 U.S. at 519–20.

177. *See id.* at 520.

178. *Id.* at 520–21 (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)).

179. *Id.* at 520.

180. *See id.* at 521.

181. Sepehr Shahshahani, *When Hard Cases Make Bad Law: A Theory of How Case Facts Affect Judge-Made Law* (manuscript at 42) (on file with author) (first citing Hughes v. Rowe, 449 U.S. 5, 15 (1980); then citing Jourdan v. Jabe, 951 F.2d 108, 110 (6th Cir. 1991); and then citing Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)).

182. Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 971 (1990) (quoting Estelle v. Gamble, 429 U.S. 97, 112 (1976) (Stevens, J., dissenting)). Professor Douglas A. Blaze also notes that liberal construction of civil rights cases is even more compelling because of the societal value of the interests at stake. *See id.*

183. *See* Erickson v. Pardus, 551 U.S. 89, 89–90 (2007) (per curiam).

184. *See id.*

allegations "conclusory" under *Twombly*.[185] The Supreme Court granted review, citing a "stark" departure from the pleading standard mandated by the Federal Rules of Civil Procedure.[186]

In vacating the appellate court's decision, the Court first emphasized the liberal pleading standards set forth by Rule 8, as applied to litigants with and without counsel.[187] Then, echoing *Haines*, the Court stated that the appellate court's departure from a liberal pleading standard was "even more pronounced" because the plaintiff was unrepresented.[188] The Court ruled that "a document filed *pro se* is 'to be liberally construed,' and 'a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'"[189] The Court further cited to Rule 8(f), which provided that "[a]ll pleadings shall be so construed as to do substantial justice."[190]

In *Twombly* and *Iqbal*, the Court claimed that it was not creating a heightened pleading standard,[191] and the Court has cited its liberal construction obligation since the 1970s.[192] Empirical evidence, however, indicates that plausibility pleading increased the likelihood that courts dismiss complaints, particularly those filed by unrepresented litigants.

3. Empirical Effects of *Twombly* and *Iqbal*

Since *Twombly* and *Iqbal*, many scholars have tried to measure their effect on pleading doctrine.[193] There is, anecdotally, "overwhelming agreement" that the two cases significantly affected pleading doctrine.[194] Most empirical

185. *See id.* at 90. For example, the Tenth Circuit held that Erickson made only "conclusory allegations" that he had suffered a cognizable harm from having his hepatitis C medication taken away. *Id.* at 92–93 (quoting Erickson v. Pardus, 198 F. App'x 694, 698 (10th Cir. 2006), *judgment vacated*, 551 U.S. 89 (2007)).

186. *Id.* at 90. Both lower courts recited their obligation to liberally construe an unrepresented litigant's pleading, but they both dismissed the plaintiff's complaint. *See Erickson*, 198 F. App'x at 696; Erickson v. Pardus, No. 05-CV-00405, 2006 WL 650131 (D. Colo. Mar. 13, 2006); *see also* Schneider, *supra* note 63, at 614 (stating that the lower courts "paid lip service to the special solicitude afforded pro se pleadings").

187. *See Erickson*, 551 U.S. at 94. The *Erickson* 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.'" *Id.* at 93 (first citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); and then quoting Conley v. Gibson, 355 U.S. 41, 47, 78 (1957)). *But see* Schneider, *supra* note 63, at 613–16 (arguing that *Erickson* did not actually rely on liberal construction in holding Erickson's complaint was adequate as the complaint satisfied *Twombly*'s plausibility standard).

188. *Erickson*, 551 U.S. at 94.

189. *Id.*

190. *Id.* (citing FED. R. CIV. P. 8(f) (2006) (amended 2007)). Rule 8(f) is now Rule 8(e) and mandates that "[p]leadings must be construed so as to do justice." FED. R. CIV. P. 8(e).

191. *See supra* note 173 and accompanying text.

192. *See* Simmons v. United States, 142 S. Ct. 23, 24 (2021) (noting the Court's "longstanding instruction that *pro se* filings must be 'liberally construed'" (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976))).

193. *See* Reinert, *supra* note 146, at 2129 ("[N]umerous scholars have attempted to measure their effects on pleading doctrine and practice.").

194. *Id.* For examples of the anecdotal arguments cited by Professor Alexander A. Reinert, see Roger G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v.

studies have found that *Twombly* and *Iqbal* increased the likelihood that a court will grant a motion to dismiss,[195] especially for pro se complaints.[196] Although many studies exclude pro se plaintiffs, two studies have shown significant increases in dismissal rates of pro se cases. First, a study by Professor Patricia Hatamyar Moore found that courts granted Rule 12(b)(6) motions against pro se plaintiffs 67 percent of the time under *Conley* and 85 percent of the time under *Iqbal*.[197] Second, a study by Professor Alexander A. Reinert found that courts dismissed pro se inmate cases, under Rule 12(b)(6) or Rule 12(c), 15 percent more often in 2010 than in 2006.[198] Professor Reinert found that dismissals of civil rights and employment discrimination cases rose significantly after *Iqbal*, and repercussions were worse for individuals compared to corporations.[199]

Despite the Supreme Court's mandate that lower courts liberally construe pro se complaints, there is some empirical evidence that pro se complaints are still disproportionately dismissed. For example, in Professor Moore's first study, she found that "the disparity between the pro se dismissal rate and the counseled dismissal rate increased after *Iqbal* from 30 percent to 38 percent."[200] In her follow-up study, Professor Moore found that courts were over twice as likely to dismiss a pro se complaint in a civil rights case when compared to a represented party's complaint.[201]

Iqbal, 85 NOTRE DAME L. REV. 849, 849–50 (2010) (arguing that *Iqbal* created a problematic "thick screening model" that screens out both meritless and weak claims, instead of merely meritless suits); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 520 (2010) (examining *Twombly* and *Iqbal*'s disproportionate impact on civil rights and employment discrimination cases).

195. *See* Jonah B. Gelbach, *Locking the Doors to Discovery?: Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2338 (2012) (reporting that *Twombly* and *Iqbal* negatively affected between 15 and 20 percent of plaintiffs facing Rule 12(b)(6) motions to dismiss); Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1011 (finding an increased rate at which district courts granted Rule 12(b)(6) motions to dismiss in Title VII cases after *Twombly*). *But see* JOE S. CECIL, GEORGE W. CORT, MARGARET S. WILLIAMS & JARED J. BATAILLON, MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*, at vii (2011), https://www.uscourts.gov/sites/default/files/motioniqbal_1.pdf [https://perma.cc/94UU-HEMK] (excluding inmate and pro se cases and finding an increase in civil rights dismissals that was statistically insignificant); William H. J. Hubbard, *Testing for Change in Procedural Standards, with Application to* Bell Atlantic v. Twombly, 42 J. LEGAL STUD. 35, 40, 62 (2013) (excluding pro se and IFP cases and concluding that *Twombly* did not significantly change dismissal rates).

196. *See* Frankel & Newbern, *supra* note 72, at 932–33.

197. *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 615 (2010). The author, now Professor Moore, performed a follow-up study published two years later, finding dismissals increased from 46 percent under *Conley* to 61 percent post-*Iqbal*. *See* Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal*'s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 614 (2012) (excluding pro se cases not decided on a Rule 12(b)(6) motion).

198. *See* Reinert, *supra* note 146, at 2147.

199. *See id.* at 2122.

200. Frankel & Newbern, *supra* note 72, at 933 (citing Schneider, *supra* note 63, at 618).

201. *See* Moore, *supra* note 197, at 623.

No study, however, has measured the effect of *Iqbal* and *Twombly* on dismissal rates of pro se complaints under the PLRA.[202] Professor Moore's study explicitly "excluded sua sponte reviews of prisoners' complaints under the [PLRA]."[203] Professor Reinert's study only included cases in which a defendant had made a Rule 12(b)(6) or Rule 12(c) motion.[204] Because a significant number of unrepresented litigants are in prison or file IFP, a large number of pro se cases were likely excluded from both studies.[205]

The next part looks at the challenge of liberal construction in the context of screening dismissals, analyzing the Supreme Court's lack of guidance and variations among the circuits.

II. VAGUE RULES AND VARYING APPROACHES TO PRO SE SCREENING

Since *Twombly* and *Iqbal*, courts have generally failed to reconcile the tension between their obligations to (1) liberally construe pro se complaints and (2) dismiss sua sponte complaints that fail to state a claim at the screening stage. The Supreme Court has not articulated the screening dismissal standard since 1989, when it differentiated frivolousness under § 1915(d) from a Rule 12(b)(6) failure to state a claim.[206] The majority of circuit courts have held that, when considering whether to dismiss sua sponte a complaint for failure to state a claim pursuant to a screening statute, a district court must use the same standard it employs under Rule 12(b)(6).[207] As exemplified by cases in the Eleventh Circuit, these decisions tend to apply *Twombly* and *Iqbal*'s heightened pleading standard while purporting to

202. In 2002, prior to *Twombly* and *Iqbal*, Professor Jonathan Rosenbloom conducted a study on the effect of the PLRA on pro se litigation in the U.S. District Court for the Southern District of New York. Rosenbloom, *supra* note 70. The study found that inmate-filed cases sharply decreased following the enactment of the PLRA. *Id.* at 322.

203. Hatamyar, *supra* note 197, at 585 (reasoning that "[a]lthough the courts purport to use the 12(b)(6) standards—whether under *Conley*, *Twombly*, or *Iqbal*—in screening these cases to determine whether the complaint states a claim for relief, there appeared to be some inconsistency in application").

204. *See* Reinert, *supra* note 146, at 2138–39. Professor Reinert told the author of this Note that "[t]he article only looked at cases in which a Rule 12(b)(6) or Rule 12(c) motion had been made." Email from Alexander A. Reinert, Professor of Litig. & Advoc., Benjamin N. Cardozo Sch. of L., to author (Oct. 10, 2023, 12:16 PM) (on file with author).

205. *See* Frankel & Newbern, *supra* note 72, at 933 n.164 (noting that Professor Moore's study "is probably not a fully accurate benchmark for pro se prisoner complaints").

206. *See infra* Part II.A. The Court has more recently interpreted other requirements of the PLRA. *See, e.g.*, Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1724 (2020) (analyzing the PLRA's three-strikes provision in § 1915(g)); Bruce v. Samuels, 577 U.S. 82, 84 (2016) (analyzing the PLRA's filing-fee provision in § 1915(b)); Jones v. Bock, 549 U.S. 199, 199–201 (2007) (analyzing the PLRA's exhaustion requirement in § 1997e(a) with reference to the screening standard); Miller v. French, 530 U.S. 327, 331 (2000) (analyzing the PLRA's automatic stay provision in 18 U.S.C. § 3626); Martin v. Hadix, 527 U.S. 343, 352 (1999) (analyzing the PLRA's attorney fees provisions in § 1997e(d)(3)).

207. *See infra* note 233 and accompanying text; *see also* Zachary, *supra* note 109, at 980–81 (arguing that "rather than create entirely new tools, Congress simply took a standard defense [in Rule 12(b)(6)] and mandated its application at an earlier point in those actions").

liberally construe pleadings.[208] On the other hand, the Second Circuit has not equated the screening dismissal standard with Rule 12(b)(6), and instead appears to prioritize its obligation to liberally construe pro se complaints.[209] Part II.A introduces the Supreme Court's last articulation of a screening dismissal's standard in 1989. Part II.B analyzes the majority approach, using the Eleventh Circuit as an example, of treating a sua sponte screening dismissal as equivalent to Rule 12(b)(6). Part II.C analyzes the Second Circuit's approach, applying a more liberal standard than its sister circuits.

A. The Supreme Court's Lack of Guidance in Neitzke

The Supreme Court has not yet defined the meaning of failure to state a claim under the PLRA's screening statutes. The Court last interpreted a screening statute's grounds for dismissal in *Neitzke v. Williams*.[210] The Court decided *Neitzke* prior to the PLRA, when § 1915(d) governed IFP screening and allowed for the dismissal of only frivolous or malicious complaints.[211] Specifically, the Court evaluated when a court may dismiss a complaint sua sponte for frivolousness.[212] In *Neitzke*, an unrepresented inmate filed a motion to proceed IFP and a complaint in the U.S. District Court for the Southern District of Indiana.[213] The plaintiff, Harry Williams, Sr., alleged that prison doctors refused to treat his brain tumor.[214] He further alleged that he was transferred to a less desirable cell house because he refused to do garment manufacturing work due to his medical condition.[215] Williams asserted violations of his rights under the Eighth Amendment for denial of medical treatment and his rights under the Fourteenth Amendment for his transfer without a hearing.[216]

The district court dismissed Williams's complaint sua sponte under § 1915(d), finding the complaint frivolous because it failed to state a claim under Rule 12(b)(6).[217] On appeal, the U.S. Court of Appeals for the Seventh Circuit ruled that the district court incorrectly equated the dismissal standard of frivolousness under § 1915(d) with failure to state a claim under Rule 12(b)(6).[218] It held that the § 1915(d) test was less stringent than that of Rule

208. *See infra* Part II.B; *see also* Frankel & Newbern, *supra* note 72, at 905 n.29 (noting that "most district courts" apply the "heightened pleading standard" of *Twombly* and *Iqbal* "without challenge"); Bacharach & Entzeroth, *supra* note 22, at 30 n.55 ("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." (citing Eisenberg, *supra* note 105, at 443)).

209. *See infra* Part II.C.

210. 490 U.S. 319 (1989).

211. *See supra* Part I.B.2.

212. *See Neitzke*, 490 U.S. at 324–31.

213. *See id.* at 320–21.

214. *See id.* at 321.

215. *See id.*

216. *See id.*

217. *See id.*

218. *See id.* at 322.

12(b)(6), and warranted dismissal only if a plaintiff "cannot make any rational argument in law or fact which would entitle him or her to relief."[219] Applying this standard, the appellate court reversed and remanded the denial of Williams's Eighth Amendment claims against two of the defendants.[220]

The Supreme Court then affirmed the Seventh Circuit's decision, holding that frivolousness under § 1915(d) and failure to state a claim under Rule 12(b)(6) are separate standards.[221] The Court defined a frivolous claim as "lack[ing] an arguable basis either in law or in fact."[222] As justification, the Court first evaluated the purposes behind each standard.[223] The Court cited, with approval, *Conley*'s liberal pleading standard and noted that Rule 12(b)(6) "streamlines litigation by dispensing with needless discovery and factfinding."[224] On the other hand, the Court reasoned that § 1915(d) was meant to discourage waste of judicial and private resources on baseless lawsuits that paying litigants would not initiate because of the costs of bringing suit.[225] Second, the Court assessed the overall purpose of § 1915(d): "to assure equality of consideration for all litigants."[226] The Court emphasized the procedural protections that Rule 12(b)(6) affords a plaintiff, including notice of a defendant's legal theory and an opportunity to clarify a plaintiff's factual allegations.[227] The Court also stated that this adversarial process "crystallizes the pertinent issues and facilitates appellate review of a trial court dismissal by creating a more complete record of the case."[228] In contrast, the Court stated that, although sua sponte dismissals may be necessary to "shield defendants from vexatious lawsuits," they involve "no such procedural protections."[229]

Since Congress passed the PLRA and, more recently, the Court adopted plausibility pleading in *Twombly* and *Iqbal*, the Court has not defined the PLRA's screening statutes' grounds for dismissal.[230] The Supreme Court's lack of guidance is compounded by its mandate that courts liberally construe pro se pleadings, without defining what liberal construction requires.[231]

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219. Williams v. Faulkner, 837 F.2d 304, 307 (7th Cir. 1988), *aff'd sub nom.* Neitzke v. Williams, 490 U.S. 319 (1989).

220. *See Neitzke*, 490 U.S. at 323–24.

221. *See id.* at 324–31.

222. *Id.* at 325.

223. *See id.* at 326–28.

224. *Id.* at 326–27.

225. *See id.* at 327.

226. *Id.* at 329 (citing Coppedge v. United States, 369 U.S. 438, 447 (1962)).

227. *See id.* at 329–30.

228. *Id.* at 330.

229. *Id.*

230. Of course, Congress originally failed to define its terms in the PLRA. *See supra* note 118 and accompanying text. The *Neitzke* Court noted Congress' vague guidance in § 1915(d): "The brevity of § 1915(d) and the generality of its terms have left the judiciary with the not inconsiderable tasks of fashioning the procedures by which the statute operates and of giving content to § 1915(d)'s indefinite adjectives." *Neitzke*, 490 U.S. at 324–25.

231. *See* Bacharach & Entzeroth, *supra* note 22, at 29 (noting that the *Haines* Court did not define the degree of relaxed pleading for pro se plaintiffs compared to Rule 8); *see also* Schneider, *supra* note 63, at 600 ("Despite consistently affirming its holding . . . the Court has failed to flesh out precisely how relaxed a standard lower courts should apply.").

Without clear guidance from the Court, lower courts have been left to "define, apply, or even ignore the rule of liberal construction."[232] Courts have struggled to apply a mixture of liberal construction and plausibility pleading when fulfilling their statutory duty under the PLRA. The next section describes the majority of courts' position, which explicitly equates a PLRA failure to state a claim with Rule 12(b)(6), applying the heightened pleading standard of *Twombly* and *Iqbal*.

B. The Majority View As Practiced in the Eleventh Circuit

Most circuit courts to have considered the question have equated the screening dismissal standard with that of Rule 12(b)(6), including the U.S. Courts of Appeals for the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits.[233] Still, in their boilerplate language, these courts purport to liberally construe pro se pleadings.[234]

The Eleventh Circuit equates the screening dismissal standard with the Rule 12(b)(6) standard, often giving brief "lip service"[235] to its obligation to liberally construe pro se pleadings. For example, in *Leonard v. Monroe County*,[236] plaintiff Stephen Leonard brought a § 1983 civil rights action against the county, prison officers, prison doctors, and the state department of health.[237] At the time of filing, Leonard was a state inmate proceeding pro se and IFP,[238] and he alleged denial of access to the courts, retaliation for his filing of grievances, and deliberate indifference to a serious medical need.[239] Leonard stated in his complaint that, in response to Leonard's filing "multiple grievances," prison officials allegedly "refus[ed] to mail out legal mail under time deadlines" and "place[d] [Leonard] in administrative confinement for [twelve] days without writing [him] a disciplinary report for any

232. Petition for a Writ of Certiorari at 17, Chawla v. Heffernan, 583 U.S. 874 (2017) (No. 17-266).

233. *See* Elansari v. Univ. of Pa., 779 F. App'x 1006, 1008 (3d Cir. 2019); Coleman v. Lab. & Indus. Rev. Comm'n of Wis., 860 F.3d 461, 468 (7th Cir. 2017); Thomas v. The Salvation Army S. Territory, 841 F.3d 632, 637 (4th Cir. 2016); Stringer v. Doe, 503 F. App'x 888, 890 (11th Cir. 2013); Watison v. Carter, 668 F.3d 1108, 1112 (9th Cir. 2012); Johnson v. Murray, 420 F. App'x 327, 327 (5th Cir. 2011); Hill v. Lappin, 630 F.3d 468, 471 (6th Cir. 2010); Kay v. Bemis, 500 F.3d 1214, 1217 (10th Cir. 2007).

234. *See, e.g.*, *Thomas*, 841 F.3d at 637 (maintaining that the U.S. Court of Appeals for the Fourth Circuit construes pro se complaints liberally but that the pleadings must state a plausible claim for relief); *Kay*, 500 F.3d at 1218 (noting that in the Tenth Circuit although liberal treatment is required, it "is not without limits"); *Stringer*, 503 F. App'x at 890 ("*Pro se* pleadings are construed liberally."); *see also* Correll, *supra* note 60, at 885 ("[A]ll twelve jurisdictions embrace the liberal construction of pro se complaints.").

235. *See* Schneider, *supra* note 63, at 606 (asserting that lower courts fail to liberally construe pro se complaints, despite claiming to do so, as indicated by high dismissal rates).

236. 789 F. App'x 848 (2019).

237. *See id.* at 849.

238. *See* Leonard v. Monroe Cnty., No. 18-CV-10139, 2018 WL 10497901 (S.D. Fla. Sept. 6, 2018), *report and recommendation adopted*, No. 18-CV-10139, 2018 WL 10497906 (S.D. Fla. Nov. 27, 2018), *aff'd*, 789 F. App'x 848 (11th Cir. 2019).

239. *See Leonard*, 789 F. App'x at 849–50.

infraction."[240] The magistrate judge issued a report and recommendation that Leonard's complaint be dismissed for failure to state a claim under § 1915(e)(2)(B)(ii).[241] The district court considered Leonard's objections to the report and adopted the magistrate judge's recommendations to dismiss Leonard's complaint.[242]

Upon review, the Eleventh Circuit affirmed that it applies the same standard to dismissals under both § 1915(e)(2)(B)(ii) and Rule 12(b)(6).[243] In a footnote, the court stated, "We construe liberally *pro se* pleadings."[244] In fact, this is the court's only mention of a liberal pleading standard,[245] as the court did not elaborate on how it liberally construed Leonard's complaint.[246] Instead, the court applied *Twombly* and *Iqbal* to Leonard's complaint, requiring facts creating a "reasonable inference that the defendant is liable."[247] The court required that facts "raise a right to relief above the speculative level"[248] and that a cause of action is not "supported by mere conclusory statements."[249] In evaluating Leonard's claims, the court held that he alleged "no facts supporting his conclusory allegation[s]."[250] Regarding Leonard's retaliation claim, the court found "no factual allegations that would allow a reasonable inference that a causal connection existed between [Leonard's] protected speech and his placement in administrative confinement."[251] This is despite the fact that Leonard named the officers, provided copies of his grievances, and included dates of the events.[252] The Eleventh Circuit affirmed the dismissal of Leonard's complaint pursuant to § 1915(e)(2)(B)(ii).[253]

Courts in the Eleventh Circuit often condition their liberal construction of pro se complaints and dismiss complaints they view as "shotgun" pleadings. For example, in *Murphy v. Miami Dade Corrections and Rehabilitation Center*,[254] plaintiff Javar Murphy, an incarcerated individual proceeding pro se and applying for IFP, filed a complaint against a prison nurse and an officer.[255] Murphy alleged that "a nurse revealed [Murphy's] HIV status to an officer, who announced it to his unit, which caused Murphy harassment."[256] In his complaint, Murphy named the nurse and officer, gave

240. Complaint at 3, *Leonard*, 789 F. App'x 848 (No. 18-CV-10139).
241. *See Leonard*, 789 F. App'x at 850.
242. *See id.*
243. *See id.* ("In reviewing a dismissal under section 1915(e)(2)(B)(ii), we apply the same standard that applies to dismissals under Fed. R. Civ. P. 12(b)(6).").
244. *Id.* at 849 n.1.
245. *See id.* at 849–51.
246. *See id.*
247. *Id.* at 850 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).
248. *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
249. *Id.* (quoting *Iqbal*, 556 U.S. at 678).
250. *Id.*
251. *Id.* at 851.
252. Complaint at 3, *Leonard*, 789 F. App'x 848 (No. 18-CV-10139).
253. *See Leonard*, 789 F. App'x at 851.
254. No. 21-CV-20595, 2021 WL 616952 (S.D. Fla. Feb. 17, 2021).
255. *See id.* at *1.
256. William J. Rold, *Prisoner Litigation Notes*, LGBT L. NOTES, Mar. 2021, at 31–32.

dates and times of the disclosure, and detailed the harassment.[257] The U.S. District Court for the Southern District of Florida reviewed Murphy's complaint pursuant to § 1915(e)(2)(B)(i)–(iii).[258] After citing the pleading requirements of *Twombly* and *Iqbal*, the court cited to the Second Circuit in identifying its obligation to liberally construe a pro se complaint "to raise the strongest arguments that [it] suggest[s]."[259] The court also stated, however, that it is not required to "rewrite an otherwise deficient pleading"[260] nor "abandon its neutral role and begin creating arguments for a party, even an unrepresented one."[261] The court then warned against the Eleventh Circuit's prohibition of a shotgun pleading, where courts must "sift through rambling and often incomprehensible allegations in an attempt to separate the meritorious claims from the unmeritorious."[262]

The court found that Murphy committed a shotgun pleading because he did not "separate into a different count each cause of action or claim for relief,"[263] and "in deference to [Murphy's] pro se status,"[264] the court gave him one chance to replead.[265] The only indication of *Murphy*'s liberal construction to the plaintiff is the court's affording Murphy an opportunity to file an amended complaint.[266] Despite the court's judgment that Murphy's allegations were conclusory, "the crux of [Murphy's] complaint [was] not difficult to ascertain."[267] Murphy included names, dates, and an explanation of his harassment caused by a nurse and a prison official.[268] Instead of evaluating the facts of Murphy's complaint, the court, without analysis, dismissed them as conclusory and chastised Murphy for filing an unorganized complaint.[269]

As shown in the above cases, the Eleventh Circuit applies *Twombly* and *Iqbal*'s plausibility pleading standard to dismiss sua sponte pro se cases. This is common practice among the majority of circuit courts, which often accompany their recitations of liberal construction with a "warning that indulgence should not shade into advocacy."[270]

257. *See id.*
258. *See Murphy*, 2021 WL 616952, at *1.
259. *Id.* at *2 (citing Graham v. Henderson, 89 F.3d 75, 79 (2d Cir. 1996)).
260. *Id.* (quoting Campbell v. Air Jam. Ltd., 760 F.3d 1165, 1169 (11th Cir. 2014)).
261. *Id.* (quoting Sims v. Hastings, 375 F. Supp. 2d 715, 718 (N.D. Ill. 2005)).
262. *Id.*
263. *Id.*
264. *Id.* at *3.
265. *See id.*
266. *See id.*
267. Rold, *supra* note 256.
268. *See id.* at 32.
269. *See Murphy*, 2021 WL 616952, at *1–4.
270. *See* Shahshahani, *supra* note 181, at 43. For example, the Tenth Circuit stated, "[B]ecause [plaintiff] appears pro se, we must construe his arguments liberally; this rule of liberal construction stops, however, at the point at which we begin to serve as his advocate." United States v. Pinson, 584 F.3d 972, 975 (10th Cir. 2009).

C. The Second Circuit as an Outlier

This section addresses the Second Circuit's approach to the screening dismissal standard, which the circuit has not equated to that of Rule 12(b)(6). There are varying articulations of the Second Circuit's screening standard, with some decisions explicitly treating screening review as a threshold determination with a lower pleading standard[271] and others purporting to more strictly apply a plausibility analysis.[272] In applying the more liberal approach, the Second Circuit has stated that its screening review is limited to "threshold issues" and is not indicative of whether the complaint could survive a motion to dismiss for failure to state a claim.[273] Whether ruling on a motion or acting sua sponte, the Second Circuit has reminded district courts that they must liberally construe the pleadings of unrepresented litigants "[o]n occasions too numerous to count."[274] The Second Circuit has stated that, even after *Twombly*, "dismissal of a *pro se* claim as insufficiently pleaded is appropriate only in the most unsustainable of cases."[275] Courts in the Second Circuit must apply a particularly liberal standard when a pro se plaintiff alleges their "civil rights have been violated,"[276] which is a common claim among pro se inmates.[277] In liberally construing pro se complaints, the Second Circuit has stated that it is the circuit's "well-worn precedent" to prevent unrepresented litigants from forfeiting their rights because of their lack of legal training.[278] The Second Circuit does not only make general assertions that a pro se complaint must be liberally construed in its boilerplate language, but, as described below, it also requires that district courts employ certain tactics to facilitate liberal construction.

First, the Second Circuit requires a court to interpret an unrepresented litigant's pleadings "to raise the strongest arguments that they *suggest*."[279] This requires a court to "draw the most favorable inferences that a pro se complaint supports" but not "invent factual allegations that [the unrepresented litigant] has not pled."[280] For example, in *Smith v. Levine*,[281]

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271. *See, e.g.*, McFadden v. Noeth, 827 F. App'x 20, 30 (2d Cir. 2020) (looking for a "colorable claim" rather than performing a plausibility analysis); Boykin v. KeyCorp, 521 F.3d 202, 216 (2d Cir. 2008) (finding a "plausible allegation of disparate treatment" because the complaint gave defendant notice and "the grounds upon which it rests").

272. *See, e.g.*, Fowlkes v. Ironworkers Loc. 40, 790 F.3d 378, 387 (2d Cir. 2015) (concluding a pro se complaint must state a plausible claim for relief on its face); Grabauskas v. C.I.A., 354 F. App'x 576, 576 (2d Cir. 2009) (concluding the same).

273. *See McFadden*, 827 F. App'x. at 30.

274. Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 191 (2d Cir. 2008) (citing McEachin v. McGuinnis, 357 F.3d 197, 200 (2d Cir. 2004)).

275. *Fowlkes*, 790 F.3d at 387 (quoting *Boykin*, 521 F.3d at 216); *see* Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009) (applying a plausibility standard but citing *Erickson*, 551 U.S. 89 (2007), affirming its obligation to liberally construe pro se complaints even after *Twombly*).

276. *See Sealed Plaintiff*, 537 F.3d at 191.

277. *See supra* notes 56, 61 and accompanying text.

278. *See* McLeod v. Jewish Guild for the Blind, 864 F.3d 154, 156–58 (2d Cir. 2017).

279. *Fowlkes*, 790 F.3d at 387 (quoting Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 477 (2d Cir. 2006)).

280. Chavis v. Chappius, 618 F.3d 162, 170 (2d Cir. 2010).

281. 510 F. App'x 17 (2d Cir. 2013).

the district court dismissed plaintiff Julio Smith's complaint against prison officials at Great Meadow Correctional Facility, where Smith was formerly imprisoned.[282] Smith alleged that the defendants, C.F. Kelly and James Levine, transferred him to a different prison in retaliation for exercising his First Amendment rights.[283] Kelly and Levine's involvement in Smith's transfer appeared limited: Smith alleged that Kelly instructed guards to place him under investigation one day prior to his transfer, and he alleged Levine physically removed him from his cell and placed him on a bus to a different prison.[284] The Second Circuit noted that these allegations "may not contain the specificity desired in all contexts."[285] Considering that Smith was unrepresented, however, the court found the allegations were sufficient to "suggest" Kelly and Levine's direct involvement in the alleged retaliation.[286] The court held it was an error for the district court to dismiss Kelly and Levine from the lawsuit.[287]

Second, if an unrepresented litigant pleads facts that entitle them to relief, the Second Circuit will not dismiss the litigant if they incorrectly identify the statute or rule of law that provides relief.[288] For example, in *Thompson v. Choinski*,[289] an unrepresented incarcerated individual, Sala-Thiel Thompson, filed a petition for a writ of habeas corpus regarding his conviction, access to a law library and kosher food, and allegations of unconstitutional conditions of confinement.[290] The district court dismissed Thompson's entire petition because, among other reasons, Thompson should have filed a civil rights action rather than a petition for a writ of habeas corpus.[291] The Second Circuit vacated the district court's decision regarding the conditions of Thompson's confinement.[292] The court stated that "if the facts alleged entitled him to relief the court should have treated the claims as properly pleaded, or at least given the petitioner leave to file an amended pleading."[293]

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282. *See id.* at 19.
283. *See id.* at 18.
284. *See id.* at 20.
285. *Id.*
286. *Id.*
287. *Id.*
288. *See* Thompson v. Choinski, 525 F.3d 205, 209 (2d Cir. 2008); *see also* Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 97, 125 (2007) (commenting that, prior to *Twombly*, the Second Circuit noted that plaintiffs, especially unrepresented litigants, were not required to plead legal theories or claims). Other circuits purport to apply a similar rule. *See, e.g.*, Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) ("[I]f 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 . . . .").
289. 525 F.3d 205 (2d Cir. 2008).
290. *See id.* at 206.
291. *See id.* at 208.
292. *See id.* at 211.
293. *Id.* at 210. The Second Circuit holds that a court should not dismiss a pro se complaint without granting leave to amend at least once "when a liberal reading of the complaint gives any indication that a valid claim might be stated." Chavis v. Chappius, 618 F.3d 162, 170 (2d Cir. 2010) (quoting Branum v. Clark, 927 F.2d 698, 705 (2d Cir. 1991)). The extent that

Thus, even if an unrepresented litigant misidentifies their cause of action, their complaint should be liberally construed to allege the correct rule of law.[294]

Third, the Second Circuit generally disfavors sua sponte dismissals of pro se complaints.[295] The court has "long held" that preservice dismissal is a "draconian" measure that "should only be taken in rare circumstances."[296] For example, in *McFadden v. Noeth*,[297] plaintiff Reginald McFadden, an incarcerated individual proceeding pro se, alleged multiple claims, including that prison doctors denied him hepatitis C treatment.[298] The district court dismissed four of McFadden's claims sua sponte under §§ 1915A and 1915(e)(2)(B).[299] On review, the Second Circuit lamented that "[w]here a *colorable claim* is made out, dismissal is improper prior to service of process and the defendants' answer."[300] The court then analyzed all four dismissed claims, finding a "colorable claim" for each and reversing the order as to their sua sponte dismissals.[301] In opposition to the practice of sua sponte dismissals under the screening statutes, the court stated, "It is . . . well-established law of this circuit that *sua sponte* dismissal of a *pro se* complaint prior to service of process on defendant is strongly disfavored" because "[s]uch untimely dismissal deprives us of the benefit of defendant's answering papers."[302]

III. A DIFFERENT APPROACH TO PLRA SCREENING DISMISSALS

Part III argues that, when evaluating a pro se complaint at the screening stage, courts should apply a more lenient standard than is currently applied in most circuit courts. Congress and the Supreme Court have failed to define key terms that govern federal pro se procedure. Congress did not define "fails to state a claim" in the PLRA,[303] and *Haines* did not define its "less stringent standard[]" for pro se complaints.[304] As a result of this vague guidance, lower courts vary in their review of pro se complaints at the

courts grant leave to amend is relevant to liberal construction but beyond the scope of this Note.

294. *See id.* at 210 n.4.

295. *See* McFadden v. Noeth, 827 F. App'x 20, 26 (2d Cir. 2020). The *Neitzke* Court left open whether sua sponte dismissals under Rule 12(b)(6), as opposed to § 1915(d), were permissible. Neitzke v. Williams, 490 U.S. 319, 329 n.8 (1989). As a result, there is a "clear circuit split" whether sua sponte dismissal prior to service of process is proper under Rule 12(b)(6). *See* E. Donald Elliott, Twombly *in Context: Why Federal Rule of Civil Procedure 4(b) Is Unconstitutional*, 64 FLA. L. REV. 895, 959 (2012).

296. *McFadden*, 827 F. App'x at 26 (citing Benitez v. Wolff, 907 F.2d 1293, 1295 (2d Cir. 1990)).

297. 827 F. App'x 20 (2d Cir. 2020).

298. *See id.* at 24.

299. *See id.* at 23.

300. *See id.* at 26 (citing *Benitez*, 907 F.2d at 1295).

301. *See id.* at 27–30.

302. *Id.* at 26 (citing Robles v. Coughlin, 725 F.2d 12, 15 (2d Cir. 1983) (per curiam)).

303. *See supra* note 130 and accompanying text.

304. *See supra* notes 179–80 and accompanying text.

screening stage, with some appearing to pay simple "lip service" to liberal construction[305] and others prioritizing liberal construction over sua sponte dismissal.[306] This Part argues that all district courts should apply *Erickson* when screening pro se complaints and take steps to liberally construe complaints, as displayed in the Second Circuit. First, Part III.A addresses the reasons for applying a more liberal screening standard to unrepresented litigants, particularly at the screening stage. Second, Part III.B defines the proposed standard.

A. Reasons for Greater Leniency at the Screening Stage

Courts should apply a more lenient standard than is currently applied in most circuits when screening pro se complaints for four primary reasons: (1) courts are obligated to liberally construe pro se complaints; (2) sua sponte dismissals are anti-adversarial, particularly when applied to unrepresented litigants; (3) Congress passed the PLRA and the Supreme Court established liberal construction when *Conley* governed Rule 12(b)(6) motions to dismiss; and (4) the PLRA's legislative history focuses on frivolousness, not failure to state a claim.

First, courts are obligated by Supreme Court precedent to liberally construe pro se complaints at both the screening and motion to dismiss stages.[307] Since *Haines*, the Supreme Court has required that lower courts hold pro se complaints to a more lenient standard than pleadings drafted by lawyers.[308] Yet, it appears that courts, as exemplified by the Eleventh Circuit, may not take their obligation to liberally construe pro se complaints seriously.[309]

Pro se pleadings are particularly vulnerable under the heightened plausibility pleading standard,[310] and there is empirical evidence that pro se complaints were disproportionately affected by *Twombly* and *Iqbal*.[311] Both cases did not address the pleading standard for unrepresented litigants, unlike *Erickson*, which cited *Conley*'s notice standard in reaffirming lower courts' obligation of liberal construction.[312] Until the Supreme Court holds otherwise, liberal construction warrants more than "lip service" and actual, substantive deference to unrepresented litigants.

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305. *See supra* Part II.B.
306. *See supra* Part II.C.
307. *See supra* Part I.C.2.
308. *See supra* note 192 and accompanying text.
309. *See supra* notes 235–70 and accompanying text; *see also* Frankel & Newbern, *supra* note 72, at 905 n.29 ("[M]ost district courts continue to apply *Twombly* and *Iqbal*'s heightened pleading standard to prisoner's claims without challenge.").
310. Schneider, *supra* note 63, at 619–24 (arguing that plausibility pleading is "uniquely poised to disproportionately impact pro se pleadings" because unrepresented litigants make conclusory allegations and that forcing judges to rely on their judicial experience and common sense is subject to bias).
311. *See supra* notes 200–01 and accompanying text.
312. *See* Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam) (citing *Twombly* and *Conley* in stating that a pleading only needs to give fair notice).

Second, sua sponte dismissals are anti-adversarial and create a risk of dismissing meritorious claims, particularly in pro se litigation. In *Neitzke*, the Supreme Court raised concerns about sua sponte dismissals under § 1915(d), noting that, although Rule 12(b)(6) affords a plaintiff procedural protections and promotes an adversarial process, sua sponte dismissals provide no such protections.[313] The Second Circuit has expressed similar concerns over sua sponte dismissals of pro se complaints.[314] Other commentators have argued that courts' liberal construction of pro se pleadings is anti-adversarial as the judge abandons their neutral role in favor of advocacy.[315] The sua sponte dismissal of any complaint prior to service, however, is inherently anti-adversarial as the court shields defendants from litigation through unilateral judgments.[316] Sua sponte dismissals deprive the plaintiff and the court of the benefit of responsive pleadings.[317]

The negative effects of sua sponte dismissals are exacerbated in the context of pro se litigation and plausibility pleading. Particularly for unrepresented litigants, *Twombly* and *Iqbal* are notoriously complex, and dismissing complaints sua sponte for failure to state a claim without input from both parties "creates an unnecessary risk of error."[318] As noted by Justice Stevens, liberal construction enables courts to decide cases on the merits rather than in reliance on poorly drafted complaints.[319] Unrepresented litigants typically lack any legal training and face challenges, like judicial bias, when navigating federal courts.[320] Pro se cases should not be dismissed before service and responsive pleading because of a litigant's lack of legal sophistication.[321] One commentator on the PLRA concluded that, by prioritizing sua sponte dismissals, "[t]he PLRA drafters seem[ed] to favor the risk that substantial claims [would] be kept out of court over the risk that non-substantial claims [would] be let in."[322] Further, depending on a district court's procedural rules and the extent of judicial supervision, a court's pro se staff attorneys may act as shadow judges dismissing pro se complaints prior to service,[323] particularly if decisions are unreported or without a fully reasoned written opinion.[324]

313. *See supra* notes 226–28 and accompanying text.
314. *See supra* notes 295–302 and accompanying text.
315. *See* Bacharach & Entzeroth, *supra* note 22, at 31.
316. *See* Macfarlane, *supra* note 110, at 1210 (arguing that the PLRA's sua sponte dismissal provisions are a departure from the common law's adversarial tradition); *see also supra* note 295 (explaining that there is a circuit split over whether sua sponte dismissals under Rule 12(b)(6) are valid).
317. *See supra* note 302 and accompanying text.
318. Reinert, *supra* note 103, at 1217.
319. *See supra* note 182 and accompanying text.
320. *See supra* notes 70–81 and accompanying text.
321. *See supra* note 181 and accompanying text; *see also* Macfarlane, *supra* note 110, at 1187 ("Justice burdened by onerous process can also be justice denied.").
322. Herman, *supra* note 125, at 1284.
323. *See supra* note 103 and accompanying text; *see also* Schlanger, *supra* note 122, at 1696 ("[J]udges and other court personnel often prove not to be good screeners of inmate cases, because they lose interest in the buried needles.").
324. *See supra* note 103 and accompanying text.

Third, when Congress passed the PLRA, the standard for failure to state a claim under Rule 12(b)(6) was governed by *Conley* rather than *Twombly* and *Iqbal*.[325] By the time Senator Dole proposed the PLRA in 1995, *Conley*'s "no set of facts" notice standard had governed pleading doctrine for almost forty years.[326] Over a decade after Congress passed the PLRA, *Twombly* and *Iqbal* instituted a plausibility pleading standard.[327] There is broad empirical consensus that the shift from notice to plausibility pleading made it more difficult for a plaintiff to survive a motion to dismiss, particularly for unrepresented plaintiffs.[328] Although the meaning of failure to state a claim under Rule 12(b)(6) has evolved, most courts apply *Twombly* and *Iqbal* when screening pro se complaints because "the relevant statutory language tracks the language in Rule 12(b)(6)."[329] The same courts fail to address that *Twombly* and *Iqbal* changed the meaning of Rule 12(b)(6) that Congress had in mind when writing the PLRA's statutory language.[330] Here, Congress transplanted "fail to state a claim" from Rule 12(b)(6), bringing with it the "old soil" of the notice pleading standard.[331]

Just as Congress passed the PLRA during the *Conley* era, the Court also established the liberal construction doctrine with *Conley* in mind. *Haines* was decided when *Conley* governed pleading,[332] so the case is derived from the notice pleading standard.[333] Some have defined liberal construction as "simply an exaggerated version of the *Conley* 'no set of facts' standard."[334] In stating courts' obligation to give deference to unrepresented litigants, the Court has often cited to *Conley*.[335] For example, in the Court's reaffirmation of liberal construction in *Erickson*, it cited *Conley*, stating that a pleading only needs to provide fair notice.[336] In Justice Antonin Scalia's 2003 concurring opinion in *Castro v. United States*,[337] he adopted this theory, stating that "'[l]iberal construction' of pro se pleadings is merely an *embellishment* of the notice-pleading standard set forth in the Federal Rules

325. Congress enacted the PLRA in 1996. *See* 28 U.S.C. § 1915. The Court decided *Twombly* and *Iqbal* in 2007 and 2009, respectively. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

326. *See supra* notes 153–59 and accompanying text.

327. *See supra* notes 159–72 and accompanying text.

328. *See supra* notes 195–201 and accompanying text.

329. Hill v. Lappin, 630 F.3d 468, 471 (6th Cir. 2010).

330. *See* Taggart v. Lorenzen, 139 S. Ct. 1795, 1801 (2019); *supra* note 134 and accompanying text.

331. *See supra* note 134 and accompanying text.

332. The Court decided *Conley v. Gibson* in 1957, see 355 U.S. 41 (1957), and *Haines v. Kerner* in 1972, see 404 U.S. 519 (1972).

333. *See* Correll, *supra* note 60, at 886 (arguing that *Haines* largely just reiterated the *Conley* pleading standard).

334. *See* Schneider, *supra* note 63, at 604 (citing *Conley*, 355 U.S. at 45–46).

335. *See id.* at 608 (first citing Hughes v. Rowe, 449 U.S. 5, 5, 9–10 (1980); and then citing *Haines*, 404 U.S. at 520).

336. See Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam) (citing *Twombly* and *Conley* in stating that a pleading only needs to give fair notice).

337. 540 U.S. 375 (2003) (Scalia, J., concurring in part and concurring in judgment).

of Civil Procedure."[338] At least one commentator has concluded that, even after *Twombly* and *Iqbal*, liberal construction is "an exaggerated form of transsubstantive notice pleading."[339]

Fourth, the PLRA's legislative history indicates Congress was primarily, if not exclusively, concerned with frivolous inmate litigation rather than complaints that failed to state a claim. Congress enacted the PLRA to deter inmates from filing frivolous claims and clogging federal court dockets.[340] The legislative history is silent on discussing failure to state a claim[341] but is full of concerns over frivolous cases.[342] Proponents of the PLRA cited to purportedly inconsequential cases about peanut butter and tennis shoes.[343] They did not, for example, discuss inmates' complaints that alleged retaliation for filing prison grievances[344] or harassment by prison guards because of an inmate's HIV status.[345] Although some courts have concluded that Congress included failure to state a claim in the PLRA to overrule *Neitzke*,[346] "nothing in the legislative history of the statute indicates that Congress was aware of the real meaning of the change."[347] Absent from the dialogue regarding frivolous inmate suits was any significant discussion of how the PLRA would potentially prevent meritorious claims from being dismissed sua sponte.[348]

B. Changing Courts' Approach to Screening Dismissals

When screening pro se complaints under the PLRA, federal courts should both apply *Erickson*'s pleading standard and take specific steps to liberally construe the pleadings, as demonstrated in the Second Circuit. The Court decided *Erickson* shortly after *Twombly*, grounding its decision in Rule 8 and *Conley*'s notice standard.[349] First, *Erickson* pointed to Rule 8(a)(2)'s

338. *See* Schneider, *supra* note 63, at 604 (citing *Castro*, 540 U.S. at 386 (Scalia, J., concurring in part and concurring in judgment)).

339. *Id.* at 604 (concluding that liberal construction depends on "lower courts' adherence to a simplified pleading regime").

340. *See supra* notes 115–20 and accompanying text.

341. *See supra* note 130 and accompanying text.

342. *See supra* notes 115–20 and accompanying text.

343. *See* Nguyen, *supra* note 113, at 150 (citing 141 CONG. REC. 27,042 (1995) (statement of Sen. Orrin G. Hatch)).

344. *See* Leonard v. Monroe Cnty., 789 F. App'x 848 (11th Cir. 2019).

345. *See* Murphy v. Miami Dade Corr. & Rehab. Ctr., No. 21-CV-20595, 2021 WL 616952 (S.D. Fla. Feb. 17, 2021).

346. *See, e.g.*, Lopez v. Smith, 203 F.3d 1122, 1126–27 (9th Cir. 2000) ("[I]t is clear that Congress intended that the PLRA overrule [Neitzke] . . . ."); *see also* Reinert, *supra* note 103, at 1215 ("Congress legislated to conflate meritless and frivolous litigation in the same way rejected by the Court in *Neitzke*.").

347. Mitchell v. Farcass, 112 F.3d 1483, 1491 (11th Cir. 1997) (Lay, J., concurring). The PLRA was not "precisely crafted to accomplish [Congress'] goals," and its provisions "bear many signs of the haste with which they were passed," including failure to define key terms, provisions that conflicted with preexisting law, and even naming the act the Prison Litigation Reform Act of 1995 when it was actually passed in 1996. Herman, *supra* note 125, at 1231, 1277.

348. Winslow, *supra* note 128, at 1666–67.

349. *See supra* notes 183–90 and accompanying text.

requirement that a pleader makes "only a short and plain statement" of their claim for relief.[350] Then, *Erickson* stated, "[s]pecific 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.'"[351] At least one commentator has recognized the argument that pro se complaints should not be evaluated under *Twombly* and *Iqbal*; "rather, pro se complaints should be governed by the Supreme Court's more lenient standard in *Erickson*."[352] This commentator did not differentiate between interpretation of pro se complaints at the screening stage versus complaints at the responsive pleading stage.[353] As indicated by the previous section, however, the reasons for courts to apply *Erickson* to pro se complaints are even stronger when screening under the PLRA, which invites courts to treat complaints "more summarily than any other type of litigation: dismissal may be sua sponte, replies might not be required, default judgments are precluded, and sua sponte dismissal may be predicated on the failure to state a claim."[354]

To comply with *Erickson* and give more than lip service to liberal construction, courts should take specific measures to liberally construe pro se complaints, as exemplified in the Second Circuit. A court should interpret pro se complaints to "raise the strongest argument that they *suggest*."[355] Under the Court's doctrine of liberal construction, that a pro se complaint is "lengthy, legally naïve, and confusing"[356] is not an excuse for its sua sponte dismissal. A court that cites its obligation to liberally construe pro se complaints and then refuses to sift through a pro se complaint fails to fulfill its obligation.[357] Sifting is liberal construction. Relatedly, courts should not penalize an unrepresented plaintiff for citing an incorrect statute or case; instead, courts should infer from the plaintiff's alleged facts the particular cause of action that they are attempting to pursue.[358] As the Supreme Court recognized in *Neitzke*, and as the Second Circuit has held, courts should apply *Erickson* and liberal construction in a general attempt to avoid sua sponte dismissals.[359]

If the Eleventh Circuit had applied *Erickson* and fulfilled its obligation to liberally construe Javar Murphy's complaint, it likely would not have dismissed his complaint sua sponte.[360] Under *Erickson*, the court would

350. Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam) (quoting FED. R. CIV. P. 8(a)(2)).

351. *Id.* (first citing Twombly v. Bell Atl. Corp., 550 U.S. 540, 555 (2007); and then quoting Conley v. Gibson, 355 U.S. 41, 47, 78 (1957)); *see also supra* notes 187–90 and accompanying text.

352. *See* Frankel & Newbern, *supra* note 72, at 905 n.29.

353. *See id.*

354. Herman, *supra* note 125, at 1279.

355. Fowlkes v. Ironworkers Local 40, 790 F.3d 378, 387 (citing Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006)).

356. MCCABE, *supra* note 84.

357. *See supra* notes 259–62 and accompanying text.

358. *See supra* notes 288–94 and accompanying text.

359. *See supra* notes 229, 295–302 and accompanying text.

360. *See* Murphy v. Miami Dade Corr. & Rehab. Ctr., No. 21-CV-20595, 2021 WL 616952 (S.D. Fla. Feb. 17, 2021).

determine whether Murphy's complaint gave the defendants fair notice of his claims and the grounds upon which they rested.[361] The court did not have to "creat[e]" arguments for Murphy,[362] but instead simply had to recognize that Murphy's claims provided notice of who he was suing and why. In his complaint, Murphy named the defendants, gave dates and times underlying his allegations, and stated facts indicating harassment.[363] The court held that Murphy "fail[ed] to specify in detail the circumstances surrounding [his] claim for relief."[364] This analysis is contrary to the rule that "[s]pecific facts are not necessary"[365] and that Murphy actually provided details of his claim, including the comments that prison officials made in harassing him.[366]

Further, in fulfilling its obligation of liberal construction, the court would not have focused on the organization of Murphy's complaint, such as requiring "clarity" and separating his causes of action into different counts.[367] Instead, the court would have interpreted the alleged facts as forming the strongest cause of action that they suggested.[368] The Supreme Court established liberal construction because unrepresented litigants, like Murphy, are expected to file imperfect and unorganized complaints.[369] Although it is not their job to "rewrite" a deficient pleading,[370] all courts must construe pleadings "so as to do justice."[371] For screening pro se complaints under the PLRA, *Erickson* and liberal construction promote justice for unrepresented litigants.

CONCLUSION

Since 1996, the PLRA has required federal courts to screen and dismiss inmate and IFP cases that fail to state a claim. During this review, courts have had to balance their obligations to dismiss sua sponte and liberally construe pro se complaints. As a result of vague guidelines from Congress and the Court, lower courts have adopted varying approaches to screening dismissals, as exemplified in the Eleventh and Second Circuits.

Although many commentators have analyzed the PLRA and pro se litigation generally, more empirical research is needed to evaluate the number of pro se cases dismissed sua sponte under the PLRA. Until

361. *See* Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam) (first citing Twombly v. Bell Atl. Corp., 550 U.S. 540, 555 (2007); and then quoting Conley v. Gibson, 355 U.S. 41, 47, 78 (1957)).

362. *Murphy*, 2021 WL 616952, at *2 (quoting Sims v. Hastings, 375 F. Supp. 2d 715, 718 (N.D. Ill. 2005)).

363. *See supra* notes 256–59 and accompanying text.

364. *Murphy*, 2021 WL 616952, at *3.

365. *Erickson*, 551 U.S. at 93 (fist citing *Twombly*, 550 U.S. at 555; and then quoting *Conley*, 355 U.S. at 47, 78).

366. *See supra* notes 256–59 and accompanying text.

367. *Murphy*, 2021 WL 616952, at *3.

368. *See supra* notes 279–87 and accompanying text.

369. *See supra* notes 181–82 and accompanying text.

370. *Murphy*, 2021 WL 616952, at *2 (quoting Campbell v. Air Jam. Ltd., 760 F.3d 1165, 1169 (11th Cir. 2014)).

371. FED. R. CIV. P. 8(e).

Congress amends the PLRA to define its terms or the Supreme Court clarifies its liberal construction doctrine, lower courts should apply *Erickson*'s pleading standard to unrepresented litigants and abide by their obligation of liberal construction.