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## Prisoners and Pleading

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## PRISONERS AND PLEADING

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### ABSTRACT

*Last year, prisoners filed nearly 27,000 civil rights actions in federal court. More than 92 percent of those actions were filed pro se. Pro se prisoners frequently use—and in many districts are required to use—standardized complaint forms provided by the federal judiciary. These standard forms were created in the 1970s at the recommendation of a committee of federal judges seeking to more effectively manage prisoner litigation and reduce its burdens on the federal courts. Although complaint forms have been in use for nearly forty years and are now commonplace in almost every federal district, no one, until now, has recognized the extent to which these forms may diverge from or misrepresent the law.*

*In this paper, we collect and analyze every form complaint used by the federal district courts. Our results indicate that, while form complaints can be helpful to pro se prisoners and the courts, many impose requirements that are inconsistent with governing law. First, many complaints direct prisoners to plead facts that the law does not require them to plead. Second, many complaints prohibit or discourage prisoners from pleading facts necessary to survive a motion to dismiss. Third, some complaints require plaintiffs to plead legal conclusions, using language that may confuse unsophisticated prisoners and cause them to make inadvertent but significant legal errors.*

*These flaws can impose serious unintended consequences on prisoners, including unwarranted dismissal of their complaints. They can also impose additional work on judges and court staff who must reconcile discrepancies between the court-provided forms and governing law. To address the concerns raised by our study, we provide a model form complaint that*

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*accurately reflects governing law and helps courts more efficiently review pro se prisoner complaints and recognize potentially meritorious claims.*

## INTRODUCTION

Courts have long struggled with the challenge of prisoner litigation. The volume of federal civil rights actions filed by prisoners regarding the conditions of their confinement is enormous.<sup>1</sup> Last year, prisoners filed more than 27,000 civil rights and prison conditions cases in federal district courts, accounting for nearly 10 percent of the district courts' civil docket.<sup>2</sup>

More than 92 percent of prisoner actions are brought pro se.<sup>3</sup> Cases involving pro se parties present unique challenges to the courts, whether or not the pro se litigant is imprisoned. Parties not trained in the law must navigate an unfamiliar system to bring or defend against claims, often against a represented opposing party whose counsel knows the lay of the land.<sup>4</sup> Opposing counsel must negotiate directly with the unrepresented party. Court administrators must fit anomalous filings into established protocols. And judges must find the balance between remaining neutral arbiters and giving the required solicitude to pro se litigants' potentially

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1. The majority of cases filed by prisoners are civil rights actions brought under 42 U.S.C. § 1983 or are federal post-conviction actions brought under 28 U.S.C. §§ 2254 and 2255. Prisoners also file a significant number of claims under the Americans with Disabilities Act and the Religious Land Use and Institutionalized Persons Act. This article focuses on federal civil rights actions by state prisoners under § 1983 and its analog for federal prisoners under the cause of action established by *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

2. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl. C-2 (2015). Federal judicial statistics tables have separate categories for prisoner civil rights claims and for prison conditions claims. *Id.* Last year, prisoners filed 18,474 civil rights cases and 9,762 conditions of confinement cases. *Id.* Both types of suits are brought as civil actions under § 1983. *See generally McCarthy v. Bronson*, 500 U.S. 136 (1991) (describing challenges to “conditions of confinement” as claims involving unconstitutional conduct by prison officials that would be properly brought as civil rights claims under 42 U.S.C. § 1983). According to the Administrative Office of the U.S. Courts, “pro se litigation comprises more than a quarter of the federal Judiciary’s civil caseload, and two-thirds of all pro se litigation is initiated by prisoners.” *Judicial Conference Approves Prisoner Case Filing and Judge Assistance Pilot Programs*, ADMIN. OFFICE OF THE U.S. COURTS (Sept. 13, 2016), <http://www.uscourts.gov/news/2016/09/13/judicial-conference-approves-prisoner-case-filing-and-judge-assistance-pilot>.

3. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl. C-13 (2014). This number may include habeas corpus petitions, because the statistical tables for pro se prisoner petitions do not distinguish between civil rights claims and habeas corpus claims. This high rate of pro se litigation may be caused, in part, by the Prison Litigation Reform Act’s significant disincentives to retained counsel. The Act presumptively denies an attorney’s fee award, limits a fee award to 150% of the judgment, and requires that an attorney’s rate be capped at 150% of that established by statute for court-appointed counsel. 42 U.S.C. § 1997e(d) (2012).

4. A 2011 survey of sixty-one chief judges of federal district courts reported that their major concerns with pro se litigation included “pro se litigants’ lack of knowledge about legal decisions or other information that would help their cases,” and “pro se litigants’ failure to understand the legal consequences of their actions or inactions (e.g., failure to plead statute of limitation, failure to respond to requests for admissions).” DONNA STIENSTRA, JARED BATAILLON, & JASON A. CANTONE, FED. JUDICIAL 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) [hereinafter ASSISTANCE TO PRO SE LITIGANTS].

meritorious claims.<sup>5</sup> The greatest difficulty is often in simply discerning what those claims are.<sup>6</sup> The extra time judges spend doing so further taxes court resources. Meritorious claims risk being overlooked simply because of poor drafting.

These burdens are almost always compounded in prisoner litigation. The fact of incarceration raises additional hurdles for pro se plaintiffs. Many prisons have drastically curtailed or eliminated their law libraries, removing resources that could help prisoners navigate the legal system.<sup>7</sup> Even where such resources are available, they are often still inaccessible to prisoners, whose literacy and language skill levels fall well below those of the general population.<sup>8</sup> Prisoners also suffer from a higher-than-average rate of intellectual and mental disabilities.<sup>9</sup>

Pro se prisoner litigation is notoriously described as frivolous and a burden on the federal courts.<sup>10</sup> Every prisoner faces the challenge of competing for judicial attention against the many thousands of complaints filed by fellow inmates. Inmate civil rights claims often receive no more

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5. Any document filed by a pro se litigant 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.’” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). This creates a “dilemma” for judges between the competing goals of “assur[ing] that mere procedural technicalities do not trip up the unwary litigant” and ensuring that “both the represented and unrepresented must follow the same procedural rules.” Robert Bacharach & Lyn Entzeroth, *Judicial Advocacy in Pro Se Litigation: A Return to Neutrality*, 42 IND. L. REV. 19, 20 (2009).

6. ASSISTANCE TO PRO SE LITIGANTS, *supra* note 4, at vii.

7. After the Supreme Court’s decision in *Lewis v. Casey*, 518 U.S. 343 (1996), which limited the scope of a prisoner’s constitutional right of access to the courts, Arizona eliminated thirty-four prison law libraries, and Idaho officials sold the contents of multiple prison law libraries on eBay for one hundred dollars plus shipping. Evan R. Seamone, *Fahrenheit 451 on Cell Block D: A Bar Examination to Safeguard America’s Jailhouse Lawyers from the Post-Lewis Blaze Consuming Their Law Libraries*, 24 YALE L. & POL’Y REV. 91, 91–92 (2006).

8. Prisoners often function at two to three grade levels below the level actually completed in school. Fourteen percent of prisoners did not complete the eighth grade. Jessica Feierman, “*The Power of the Pen*”: *Jailhouse Lawyers, Literacy, and Civic Engagement*, 41 HARV. C.R.-C.L. L. REV. 369, 372 (2006). The average reading level of many state prisoners has been calculated as equal to that of a sixth grader; their language skills are equal to those who have completed fourth grade. Thomas C. O’Byrant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299, 310 & n.75 (2006).

9. See Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 442–43 (1993) (describing educational and intelligence limitations of prison populations, including that the average IQ of prisoners may be as low as eighty, that 70 percent of prisoners have not completed high school, that the rate of mental illness and developmental disability is three to ten times higher in prison than in the general population, and that prisoner literacy levels are quite low); DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, U.S. DEP’T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006), <http://www.bjs.gov/content/pub/pdf/mhppji.pdf> (finding that more than half of prison and jail inmates suffered from some form of mental illness).

10. See *infra* note 31 and accompanying text.

than an “hour of judge time, from filing to disposition.”<sup>11</sup> As Justice Robert Jackson wrote in 1953, it “must prejudice the occasional meritorious application to be buried in a flood of worthless ones” and “[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.”<sup>12</sup>

But ensuring that pro se prisoners can file complaints, and ensuring that those complaints are meaningfully reviewed, is important. “[P]ro se inmate-initiated civil rights litigation has historically accounted for many of the important improvements in prison conditions during the last three decades.”<sup>13</sup> Many cases that established groundbreaking prison reforms or identified important constitutional principles—such as *Johnson v. California*’s successful challenge to double-celling prisoners based on race and *Estelle v. Gamble*’s recognition that the Eighth Amendment’s prohibition of cruel or unusual punishment applies to deliberate indifference to prisoners’ medical needs—began as pro se complaints.<sup>14</sup> But, as Justice Jackson recognized, if the potential merit of a prisoner’s claim is not readily apparent on the face of his complaint, it likely will not be discovered.

In an early effort to address these issues, a committee of federal judges took on the task of making recommendations for “the more effective handling” of pro se prisoner litigation<sup>15</sup> while also ensuring the ability “to give prompt relief to meritorious prisoner cases.”<sup>16</sup> The committee’s response included a model form complaint to be used by prisoners filing civil rights cases.<sup>17</sup> The committee believed that providing a standardized pleading form would help direct pro se prisoner plaintiffs to the legally

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11. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1589 (2003).

12. *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

13. Roger Roots, *Of Prisoners and Plaintiffs’ Lawyers: A Tale of Two Litigation Reform Efforts*, 38 WILLAMETTE L. REV. 210, 221 (2002).

14. *Johnson v. California*, 543 U.S. 499, 515 (2005); *Estelle v. Gamble*, 429 U.S. 97, 99 (1976).

15. FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS, at viii (1980) [hereinafter 1980 REPORT].

16. *Id.* at xi, 2; see also FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS: TENTATIVE REPORT 12 (1976) [hereinafter 1976 REPORT].

17. This Article focuses specifically on complaints alleging violations of a prisoner’s civil rights based on the conditions of the prisoner’s confinement, or the mistreatment a prisoner experiences while incarcerated. Those claims are governed by 42 U.S.C. § 1983 if the prisoner is in state or local prison or jail. For federal prisoners, civil rights claims are governed by the cause of action recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Section 1983 actions are much more common than *Bivens* claims, most likely because the vast majority of prisoners are incarcerated in state institutions, and because *Bivens* provides a narrower cause of action than § 1983. See generally *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (describing the limited scope of *Bivens*). This Article does not focus on habeas corpus claims, which challenge the validity of the prisoner’s underlying criminal conviction or sentence or the legality of the prisoner’s incarceration.

relevant aspects of their claims and, by instructing prisoners to state their case “as briefly as possible,” reduce the risk of relevant allegations getting lost in a sea of unnecessary information.<sup>18</sup>

The form complaint has been very popular with courts. Today, ninety-two of the ninety-four federal districts use a variation of it.<sup>19</sup> Form complaints are widely regarded by judges, court personnel, and academics as a helpful and important access-to-justice reform.<sup>20</sup> But despite the forms’ prevalence and the enormous volume of pro se prisoner litigation that employs them, there has not been a systemic academic review of the districts’ complaint forms since their adoption.

This Article undertakes that task. We examined every form complaint for pro se prisoners used by the federal district courts. Our research found that, although well-intentioned, the form complaints employed in many districts may actually impede the proper and efficient review of prisoner claims and exacerbate other burdens that are unique to prisoner litigation. For example, the Prison Litigation Reform Act,<sup>21</sup> which (like form complaints) seeks to streamline prisoner litigation, imposes additional procedures for filing prisoner civil rights claims and on the courts that must review them, and disincentives for lawyers to take such cases.

The form complaints’ problematic aspects fall into three categories. First, numerous form complaints require pro se prisoner plaintiffs to plead information the law does not require them to plead. For example, 77 percent of form complaints require prisoners to answer a series of questions about whether they have exhausted their administrative remedies, even though the Supreme Court has explicitly held that exhaustion is not a pleading requirement.<sup>22</sup> More than 85 percent of form complaints require inmates to provide information about other lawsuits they have filed, although that also

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18. See 1980 REPORT, *supra* note 15, at 12, 46–47, 54–57. See also 1976 REPORT, *supra* note 16, at 47 (providing sample form complaint directing plaintiffs to plead their facts “as briefly as possible”).

19. Only two districts, the District of the Northern Marianas Islands and the District of Massachusetts, do not appear to have form complaints for prisoner civil rights claims. However, those two districts account for a very small number of pro se prisoner civil rights actions. See *infra* note 73 and accompanying text.

20. A recent survey of the clerks of court and chief judges of federal district courts found that standardized forms are perceived by the courts as one of the most helpful tools for managing pro se litigation. ASSISTANCE TO PRO SE LITIGANTS, *supra* note 4, at vi, viii, 16, 33; see also Tracey I. Levy, Comment, *Mandatory Disclosure: A Methodology for Reducing the Burden of Pro Se Prisoner Litigation*, 57 ALB. L. REV. 487, 513 (1993) (“Standardized pro se complaint forms for prisoners asserting § 1983 claims help to clarify complaints.”).

21. Prison Litigation Reform Act, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (1996).

22. See *infra* notes 82, 98–100 and accompanying text.

is not required.<sup>23</sup>

Second, form complaints may impede plaintiffs from pleading sufficient facts to make out their claim. Seventy-three percent of current form complaints instruct prisoners to state the facts “briefly” or “as briefly as possible,” and discourage them from providing detailed factual allegations.<sup>24</sup> Some go a step further by discouraging or limiting prisoners from including additional pages if the space provided on the complaint form is not sufficient. Others limit the number of attachments a plaintiff can include or prohibit attachments altogether, even though courts regularly consider documents attached to a complaint when evaluating a complaint’s sufficiency and attached documents can clarify a pro se plaintiff’s allegations.<sup>25</sup> Finally, many forms prohibit prisoners from referring to any cases or legal authority, which also can help illuminate a pro se plaintiff’s allegations. Notably, these restrictions apply almost exclusively to prisoner litigation.

At the time the original form complaint was developed—in the era of notice pleading—the courts’ concern was that many prisoner complaints were too long and hard to decipher, with facts giving rise to a claim getting lost in a sea of irrelevant information.<sup>26</sup> But today, the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*<sup>27</sup> and *Ashcroft v. Iqbal*<sup>28</sup> have tightened pleading standards to require that a plaintiff plead sufficient facts to establish a plausible, rather than a possible, entitlement to relief.<sup>29</sup> A plaintiff who tries to state facts “as briefly as possible” may be more likely to produce the kind of conclusory allegations that *Twombly* and *Iqbal* found insufficient. In their wake, a complaint that errs on the side of omitting facts for the sake of brevity may be more susceptible to dismissal than one that errs on the side of including too much detail. Pro se prisoners who dutifully follow the form’s instructions may find that they have not given enough detail to state a plausible claim, and judges may be left to puzzle over an

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23. See *infra* notes 83–85 and accompanying text.

24. See *infra* notes 87, 148 and accompanying text.

25. See *infra* notes 88–91, 175 and accompanying text.

26. See *infra* notes 35–45 and accompanying text.

27. 550 U.S. 544 (2007).

28. 556 U.S. 662 (2009).

29. There is an argument that *Twombly* and *Iqbal* should not apply to pro se prisoners; rather, pro se complaints should be governed by the Supreme Court’s more lenient standard from *Erickson v. Pardus*, a case that was decided after *Twombly*. *Erickson v. Pardus*, 551 U.S. 89 (2007). There, in evaluating the sufficiency of a pro se prisoner’s complaint, the Court stated: “Specific facts are not necessary; the statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Id.* at 93 (quoting *Twombly*, 550 U.S. at 555). However, most district courts continue to apply *Twombly*’s and *Iqbal*’s heightened pleading standard to prisoner’s claims without challenge.



unnecessarily lacking complaint.

Third, some complaints use technical legal terms that may confuse unsophisticated prisoner litigants and lead to unintentional pleading errors. For example, some complaints direct plaintiffs to indicate whether they are suing defendants in their official or individual capacities, often by checking a box, even though the plaintiff may not understand the difference or realize that selecting “official capacity” immunizes many defendants from damages liability. Other complaints ask plaintiffs to identify whether and how defendants were acting “under color of state law.”<sup>30</sup> An inadvertent error by a plaintiff who fails to understand these terms could cause the plaintiff to unintentionally negate claims against certain defendants. Facts pleaded in the complaint may lead to a different conclusions than the plaintiff’s answers to these questions, which the court must then reconcile.

Prisoner litigation already faces skepticism from commentators, politicians, and the public, many of whom believe that most, if not all, of it is frivolous or a waste of courts’ time.<sup>31</sup> Some commentators believe that pro se litigants—prisoner and non-prisoner alike—receive too much assistance from the courts and gain an unfair advantage.<sup>32</sup> And yet, pro se civil rights complaints remain an important vehicle through which courts

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30. Under § 1983, a plaintiff may only sue defendants who act “under color” of state law. 42 U.S.C. § 1983 (2012).

31. See Jon O. Newman, *Pro Se Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 519 (1996) (describing the common perception of pro se prisoner litigation as frivolous); Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 937–38 (1990) (describing judicial perception of pro se prisoner litigation as largely frivolous); FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING CIVIL RIGHTS CASES: TENTATIVE REPORT NO. 2, at 7 (1977) [hereinafter 1977 REPORT] (“It is generally agreed that most prisoner rights cases are frivolous and ought to be dismissed even under the most liberal definition of frivolity.”). In 1995, Congress enacted the Prison Litigation Reform Act (PLRA) to try to reduce what it perceived as a high volume of frivolous prisoner lawsuits that were clogging the courts with meritless claims. Introducing an early version of the PLRA, Senator Orrin Hatch described the Act’s purpose as “bring[ing] relief to a civil justice system overburdened by frivolous prisoner lawsuits. Jailhouse lawyers with little else to do are tying our courts in knots with an endless flood of frivolous litigation.” 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Orrin Hatch).

32. Michael Correll, *Finding the Limits of Equitable Liberality: Reconsidering the Liberal Construction of Pro Se Appellate Briefs*, 35 VT. L. REV. 863, 864–65 (2011) (asserting that the judicial rule providing for liberal construction of pro se pleadings exempts pro se litigants from rules applicable to counseled litigants, gives them “a special access to the courts and, arguably, a better standard of review than that enjoyed by their represented counterparts,” all of which gives pro se litigants a “unique preferred status” in the courts); 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, 1548 (2005) (“Some lawyers and judges even express concerns that pro se litigants are using their status to gain an unfair advantage over represented parties, who are required to ‘play by the rules.’”); Bacharach & Entzeroth, *supra* note 5, at 19 (arguing that the role of judicial neutrality has “derailed” in favor of rules that show favoritism toward pro se litigants).

ensure equal justice under law. The forms created to assist plaintiffs in bringing those claims must correctly reflect governing law and must not subject pro se plaintiffs to burdens not imposed on others that may cause meritorious claims to be improperly or prematurely dismissed.

Safeguarding the accuracy and clarity of prisoner form complaints is especially important because many of the other reforms designed to help pro se litigants do not reach prisoners. Programs like self-service kiosks at courthouses, interactive online tools with fill-in-the-blank templates that include guided help, or more personal assistance from pro bono clinics and clerk's offices have been touted as helpful resources.<sup>33</sup> But prisoners who cannot travel to the courthouse to use the kiosk, who have no access to the internet, and who generally cannot call a court clerk or attend a clinic, cannot access those resources.<sup>34</sup> As a result, it is that much more important to make sure that the few resources pro se prisoner litigants receive—and particularly those provided by the courts themselves—do not exert unintended negative consequences.

Part I of the Article examines the development of the model form complaint in the 1970s. Part II describes our research in reviewing all of the federal districts' form complaints and synthesizes our results. Part III elaborates on how certain aspects of form complaints are inconsistent with current law or create unique adversities for pro se prisoners. Part IV offers proposals for reform, including a revised model form complaint that correctly reflects governing law and reduces unintended hurdles for prisoners and courts alike. We hope these revisions will restore the model complaint to fulfilling its original purpose of assisting pro se prisoners in bringing potentially meritorious claims while easing the burden of prisoner litigation on the federal judiciary.

## I. HISTORY AND DEVELOPMENT OF THE PRISONER FORM COMPLAINT

The original model form complaint was created as part of the federal judiciary's response to the rise in prison litigation volume starting in the 1960s. In the early 1970s, the Federal Judicial Center convened a committee of federal judges "to study the handling of prisoner cases in federal courts

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33. See *infra* note 77 and accompanying text.

34. Some federal prisoners may soon have the opportunity to use self-service kiosks for e-filing documents. A one-year pilot program will allow prisoners in select jurisdictions to file pleadings electronically as do other litigants in federal court. See Kimberly Strawbridge Robinson, *Prison E-Filing Kiosks Will Help Prisoners, Courts*, 85 U.S.L.W. 372 (Sept. 15, 2016). However, these kiosks merely allow prisoners to electronically file pleadings that they have already produced. It does not provide them with templates or guidance on what pleadings to file or on how to prepare them. *Id.*

and to propose procedures for the more effective handling of these cases.”<sup>35</sup> The committee’s charge was finding “methods of alleviating the burden in the district courts in which approximately one out of every seven civil cases filed is from a prisoner seeking various forms of relief.”<sup>36</sup> The committee’s twin aims in creating the model form complaint were to improve court efficiency in handling prisoner cases so as to reduce resource burdens on the judiciary and to improve the judiciary’s ability to find the potentially meritorious needles in the growing haystack of prisoner claims.<sup>37</sup> The committee emphasized that the “best possible system for identifying the meritorious case must be developed.”<sup>38</sup>

Describing prisoner litigation’s strain on judicial resources, the committee found that “most [prisoner complaints] contain a large variety of allegations that are hard to separate and to evaluate; and commonly the allegations are contained in a long, often illegible, handwritten letter from the inmate.”<sup>39</sup> As a result, the committee concluded, it was hard for judges to understand the nature of prisoners’ complaints,<sup>40</sup> not because the plaintiff pleaded insufficient facts, but because judges had trouble “deciphering” the facts that were included.<sup>41</sup> Still today, many commentators and judges believe that pro se complaints often contain unhelpful allegations, legal conclusions, and pontifications that obscure the discrete factual allegations that could form the basis for a viable claim. A 2011 survey of sixty-one chief judges of federal district courts reported that the judges’ number one concern for pro se cases was “pleadings or submissions that are unnecessary, illegible, or cannot be understood.”<sup>42</sup>

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35. The committee produced three reports: a “Tentative Report” in January 1976, a “Tentative Report No. 2” in 1977, and a final report in 1980. 1980 REPORT, *supra* note 15, at vii; 1977 REPORT, *supra* note 31, at i; 1976 REPORT, *supra* note 16, at 6.

36. 1980 REPORT, *supra* note 15, at vii, 2; 1977 REPORT, *supra* note 31, at ii; *see also* 1976 REPORT, *supra* note 16, at 11 (describing the rising volume of prisoner cases).

37. The committee prioritized “increas[ing] the capacity to give prompt relief to meritorious prisoner cases,” explaining that because of the high volume of cases, “it is difficult to ensure that the meritorious complaint will not be overlooked.” 1980 REPORT, *supra* note 15, at x, 2, 7, 11.

38. 1976 REPORT, *supra* note 16, at 12.

39. 1980 REPORT, *supra* note 15, at 12; 1977 REPORT, *supra* note 31, at 8–9. *See also* 1976 REPORT, *supra* note 16, at 14.

40. 1980 REPORT, *supra* note 15, at 12; 1976 REPORT, *supra* note 16, at 26.

41. 1976 Report, *supra* note 16, at 14.

42. ASSISTANCE TO PRO SE LITIGANTS, *supra* note 4, at vii, 21; *see also*, Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 475, 483 (2002) (“Moreover, the legally untrained face special difficulties in navigating and carrying out the arcane requirements of pleading and instead ‘often submit awkward and confusing complaints.’” (quoting Stephen M. Feldman, *Indigents in the Federal Courts: The in Forma Pauperis Statute—Equality and Frivolity*, 54 FORDHAM L. REV. 413, 419 (1985))); *id.* at 513 (describing pro se complaints as “difficult to decipher” (quoting Kim Mueller, *Inmate’s Civil Rights Cases and the federal*

To address these concerns, the committee issued several recommendations, including that “[e]ach district court having a substantial caseload of prisoner complaints should promulgate local rules adopting a complaint form to be used for all 1983 actions.”<sup>43</sup> The committee created a model complaint form for district courts to use in developing their own form pleadings.<sup>44</sup> The committee concluded that use of a form complaint would provide structure to pleadings that “would otherwise be vague, verbose and incomprehensible,” and would thus enable judges to determine if the complaint could withstand a motion to dismiss.<sup>45</sup>

#### A. *The Committee’s Model Complaint*

The committee’s model complaint form begins with a page of instructions that includes several items of note.<sup>46</sup> First, it begins with an emphatic directive that the complaint form be used: “The clerk will not file your complaint unless it conforms to these instructions and to these forms.”<sup>47</sup> Second, it requires that the prisoner “sign and declare under penalty of perjury that the facts are correct,”<sup>48</sup> mandating a verified complaint.<sup>49</sup> Third, it states that, if the prisoner needs additional space to

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*Courts: Insights Derived from a Field Research Project in the Eastern District of California*, 28 CREIGHTON L. REV. 1255, 1280 (1995)); Levy, *supra* note 20, at 488 (criticizing prisoner complaints as “lengthy and difficult to analyze”); *id.* at 505 (asserting that “the clarity of [pro se prisoner] complaints themselves can cause serious problems for court clerks and government attorneys”); Wayne T. Westling & Patricia Rasmussen, *Prisoners’ Access to the Courts: Legal Requirements and Practical Realities*, 16 LOY. U. CHI. L.J. 273, 309 (1985) (“Even an otherwise meritorious claim can become lost in a tangle of facts, extraneous material, unsupported assertions, and fallacious arguments.”); Michael J. Mueller, Note, *Abusive Pro Se Plaintiffs in the Federal Courts: Proposals for Judicial Control*, 18 U. MICH. J.L. REFORM 93, 102 (1984) (“Even where complaints are filed in good faith, they are often rambling, duplicative and hopelessly general.”); Donald H. Zeigler & Michele G. Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in Federal Courts*, 47 N.Y.U. L. REV. 157, 182 (1972) (describing how prisoners often plead in generalities, resort to hyperbole, and write complaints that are “rambling and conclusory”).

43. 1976 REPORT, *supra* note 16, at 28; accord 1977 REPORT, *supra* note 31, at 43 (“Each district court having a substantial case load of prisoner complaints should adopt by local rule a complaint form and also such other forms as are helpful in processing conditions-of-confinement cases. This is particularly important in this field of litigation where most plaintiff-prisoners are proceeding pro se.”); 1980 REPORT, *supra* note 15, at 45 (stating the same as the 1977 Report).

44. 1980 REPORT, *supra* note 15, at 89–92; 1977 REPORT, *supra* note 31, at 82–85; 1976 REPORT, *supra* note 16, at 44–49.

45. 1980 REPORT, *supra* note 15, at 46, 54–55; see also 1977 REPORT, *supra* note 31, at 51.

46. 1976 REPORT, *supra* note 16, at 44–49. The 1980 complaint is only four pages long, including instructions. 1980 REPORT, *supra* note 15, at 89–92. The difference seems to be based on the use of a smaller typeface and because the 1980 complaint provides less blank space for prisoners to use when filling in the various sections of the complaint. Otherwise, the complaints are identical.

47. 1980 REPORT, *supra* note 15, at 89.

48. *Id.*

49. The Federal Rules of Civil Procedure do not require a verified pleading except in derivative

answer a question, he “may use the reverse side of the form or an additional blank page.” Fourth, it instructs that the complaint “SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.”<sup>50</sup>

Section I of the model complaint is devoted to the prisoner’s prior lawsuits. It asks if the prisoner has “begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment,” providing boxes for the prisoner to check yes or no.<sup>51</sup> The form asks the prisoner to state the parties, court, docket number, assigned judge, and disposition of any prior suits. It appears that the committee thought this information important to ensure that all of a prisoner’s actions be assigned to a single judge, which “discourages judge-shopping and increases efficiency in processing repetitive complaints.”<sup>52</sup>

Section II addresses exhaustion of administrative remedies. The form asks if the prison where the plaintiff is incarcerated has a grievance procedure and, if so, whether the plaintiff filed a grievance regarding the facts giving rise to the complaint.<sup>53</sup> The form asks what steps the prisoner took through the grievance system and what outcome resulted.<sup>54</sup> If the prisoner did not file a grievance, the form directs him to explain why not.<sup>55</sup> If the prison has no grievance procedure, the form asks if the plaintiff complained to prison authorities and what result, if any, was achieved.<sup>56</sup>

At the time the committee drafted the model complaint, exhaustion of administrative remedies was not required as a precondition to filing a § 1983 civil rights claim.<sup>57</sup> Exhaustion did not become mandatory until passage of the PLRA in 1996.<sup>58</sup> The committee included questions about exhaustion to

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actions by shareholders, depositions to perpetuate testimony, and temporary restraining orders. FED. R. CIV. P. 23.1, 27(a)(1), 65(b). It may be that adding this requirement to civil rights actions is seen as analogous to the statutory requirement of 28 U.S.C. § 2242 (2012) that applications for a writ of habeas corpus be verified by the petitioner.

50. 1980 REPORT, *supra* note 15, at 89.

51. *Id.* at 90.

52. *Id.* at 53; *see also* 1977 REPORT, *supra* note 31, at 49 (same).

53. 1976 Report, *supra* note 16, at 46.

54. *Id.*

55. *Id.* at 47.

56. 1980 Report, *supra* note 15, at 91.

57. *See, e.g., id.* at 55–56 (“A series of brief, often *per curiam*, Supreme Court decisions indicate that such procedures need not be exhausted prior the filing of a complaint under 42 U.S.C. § 1983.”).

58. 42 U.S.C. § 1997e(a) (2012). Between 1980 and the enactment of the PLRA, Congress adopted a hybrid exhaustion requirement. Under the Civil Rights of Institutionalized Persons Act (CRIPA), enacted in 1980, Congress authorized the Attorney General to establish a set of minimum standards for state grievance systems. Congress also provided that if a state correctional institution adopted a grievance system satisfying those standards, the district court had discretion to stay any litigation by a prisoner at that institution so that the prisoner could exhaust administrative remedies. 42 U.S.C. § 1997e (1994) (repealed); *see also* Eisenberg, *supra* note 9, at 467 (describing exhaustion procedures under

benefit the plaintiff and court. The committee explained that “a question relating to grievance procedures is appropriate because it may alert the inmate to this extra judicial method of resolving his complaint and because the inmate may have used the grievance procedure, and the administrative record, if available, may be helpful to the federal court.”<sup>59</sup>

Section III details the parties to the action. It asks the plaintiff to provide her name and address and the name, position, and place of employment of each defendant.<sup>60</sup> Section IV is devoted to the plaintiff’s statement of the claim. It directs the plaintiff to “[s]tate here as briefly as possible the facts of your case.”<sup>61</sup> It directs the plaintiff to describe how each defendant was involved and give “names . . . dates, and places” of other actors and events.<sup>62</sup> It orders the plaintiff not to “give any legal arguments or cite any cases or statutes.”<sup>63</sup> Finally, it directs the plaintiff to use “as much space as you need” and to “[a]ttach extra sheet if necessary.”<sup>64</sup> The form then provides six blank lines for the plaintiff to describe the facts of the claim.<sup>65</sup>

Section V, titled “Relief,” asks the plaintiff to “[s]tate briefly exactly what you want the court to do for you,” and instructs the plaintiff to “[m]ake no legal arguments” and to “[c]ite no cases or statutes.”<sup>66</sup> Four more blank lines are provided.<sup>67</sup> The end of the form requires the plaintiff to sign, date, and verify the complaint.<sup>68</sup>

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CRIPA). However, only a few states obtained certification under this regime. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 49 (1990); Eisenberg, *supra* note 9, at 467–68.

59. *Id.* at 56; 1977 REPORT, *supra* note 31, at 52–53 (replacing “extra judicial” with “nonjudicial”); 1976 REPORT, *supra* note 16, at 31 (same).

60. 1976 REPORT, *supra* note 16, at 47.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* By using the singular “sheet” rather than the plural “sheets,” the drafters may have created an unintentional ambiguity as to whether a prisoner is limited to a single additional sheet or whether the prisoner may attach as many extra sheets as necessary. Notably, a number of current form complaints perpetuate that ambiguity by using the same language rather than simply changing “sheet” to “sheets.” See, e.g., Form Complaint (D. Me.); Form Complaint (D.R.I.).

65. 1980 REPORT, *supra* note 15, at 92. The original iteration of the model form provided twelve lines. 1976 REPORT, *supra* note 16, at 47–48.

66. 1976 REPORT, *supra* note 16, at 48.

67. 1980 REPORT, *supra* note 15, at 92 (emphasis omitted). Again, the number of lines was reduced from the earlier version, which provided twelve. 1976 REPORT, *supra* note 16, at 48.

68. 1976 REPORT, *supra* note 16, at 49.

### B. Adoption of the Model Complaint

The model form complaint was popular. By 1993, more than half the federal district courts had adopted a version of it.<sup>69</sup> Following the enactment of the PLRA in 1996, the Federal Judicial Center (FJC) emphasized the value of “well-designed” form complaints in evaluating prisoner litigation.<sup>70</sup> Notably, the FJC’s report stated that “courts should review forms developed before the PLRA to ensure that they reflect the statute’s procedural requirements.”<sup>71</sup> The form complaints it referenced as examples, however, substantially mirrored the original model form complaint from the 1970s.<sup>72</sup>

Since the PLRA’s enactment, form complaints have become nearly universal. Ninety-two of the ninety-four federal districts—nearly 98 percent—use pro se form complaints, most of which closely resemble the original model.<sup>73</sup> In 2015, the Administrative Office of the U.S. Courts created a series of illustrative example forms for pro se litigants,<sup>74</sup> following the repeal of Rule 84 of the Federal Rules of Civil Procedure and the removal of the Appendix of Forms from the civil rule.<sup>75</sup> Among those forms is a sample complaint form for pro se prisoner civil rights claims.<sup>76</sup> That form complaint also substantially mirrors the original model form created nearly forty years ago.

The widespread adoption of prisoner form complaints is not surprising. Scholars, practitioners, court employees, and pro se advocates have touted

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69. Levy, *supra* note 20, at 505 n.127.

70. Fed. Judicial Ctr., Resource Guide for Managing Prisoner Civil Rights Litigation: With Special Emphasis on the Prison Litigation Reform Act 7 (1996) (“Well-designed forms and instructions both assist the court and provide prisoners with important information about court rules and procedures governing the filing and prosecution of civil cases in the district.”).

71. *Id.*

72. *Id.* at 107–116.

73. The two districts that do not have a form prisoner complaint are the Districts of Massachusetts and the Northern Marianas Islands. However, these two districts account for a very small fraction of the pro se prisoner complaints that are filed every year. For the twelve month period ending June 30, 2015, only fifty-seven prisoner civil rights complaints were filed in the District of Massachusetts, and only one prisoner civil rights complaint was filed in the District of the Northern Marianas Islands. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl. C-3 (2015).

74. *Pro Se Forms*, UNITED STATES COURTS, <http://www.uscourts.gov/forms/pro-se-forms> (last visited Dec. 17, 2016).

75. Rule 84, which created a standard appendix of model forms, was repealed because it was determined to be “no longer necessary.” FED. R. CIV. P. 84 advisory committee’s note to 2015 amendment. The Advisory Committee explained that now “there are many alternative sources of forms, including the website of the Administrative Office of the United States Courts, the websites of many district courts,” and other sources. *Id.*

76. The form was most recently updated in December 2016. See *Complaint for Violation of Civil Rights (Prisoner)*, ADMIN. OFFICE OF THE U.S. COURTS (2016), <http://www.uscourts.gov/forms/pro-se-forms/complaint-violation-civil-rights-prisoner> [hereinafter AO 2016 Form Complaint].

standardized, fill-in-the-blank forms as an easy way to help pro se litigants and courts and have advocated for expanded use of standardized forms in all types of cases as a way of increasing access to justice.<sup>77</sup>

## II. RESEARCH RESULTS

Despite the acclaim given to these form complaints, no one has conducted a comprehensive examination of the forms now in use to see if they fulfill their intended purpose. This Article fills that gap. We have collected and reviewed form complaints from each of the ninety-two federal districts we identified as providing them. We collected form complaints by visiting court websites, contacting district court clerks' offices directly, and by searching PACER for sample form complaints from various districts. We then read each form and analyzed it with attention to the criteria we describe below.

Our examination indicates that, while there are many ways in which the federal forms assist pro se prisoners in filing effective complaints and the courts in reviewing them, there are other ways in which the forms are inconsistent with governing law or impose unique or unwarranted pleading burdens not present in other litigation.

To be sure, we do not think that form complaints should be discarded. Form complaints are valuable to courts and prisoner plaintiffs in several ways. They tend to provide clear, straightforward instructions.<sup>78</sup> They often apprise prisoners of the risks of filing a nonmeritorious lawsuit, including that, if their case is dismissed, they may accrue "strikes" under the PLRA that can adversely affect their ability to file future lawsuits.<sup>79</sup> They may inform prisoners that any action challenging their conviction or sentence must be brought as a habeas corpus petition or face dismissal.<sup>80</sup> They strongly advise prisoners to focus on the specific facts of what happened, to include names, dates and events, and to identify exactly what relief they

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77. See Rochelle Klempner, *The Case for Court-Based Document Assembly Programs: A Review of the New York State Court System's "DIY" Forms*, 41 FORDHAM URB. L.J. 1189, 1214 (2014) (describing the New York court system's adoption of a "Do it Yourself" program of offering standardized forms to pro se litigants and stating that the program has "assisted hundreds of thousands of unrepresented litigants over the past few years"); Swank, *supra* note 32, at 1554 (stating that pro se litigants who file the correct paperwork reduce the burdens of the courts adjudicating their claims).

78. However, even clear and simple instructions may be inaccessible to the average prisoner. See Klempner, *supra* note 77, at 1196 (noting that non-incarcerated pro se litigants frequently complain that standardized forms are difficult to understand and fill out correctly "due to confusing and complex language").

79. See *infra* note 226 and accompanying text.

80. See *infra* note 217 and accompanying text.



seek. These instructions may help prisoners recognize the consequences of filing suit, and may help make their complaints more “decipherable” than the “verbose” and “unintelligible” narrative complaints that the committee designed the forms to address.<sup>81</sup> But the forms’ problematic aspects should not go overlooked or uncorrected. If form complaints are going to be employed by the courts, they must be properly drafted.

We identified three primary areas of concern: (1) forms that require prisoners to plead facts or issues that the law does not require them to plead; (2) forms that hinder prisoners from pleading sufficient facts about the nature of their claim so as to make it more difficult to withstand a motion to dismiss; and (3) forms that require prisoners to understand legal language or to draw legal conclusions based on terminology that they may not understand. Pro se prisoners may suffer significant adverse consequences as a result, including premature dismissal of potentially meritorious claims. Courts may face the additional burden of reconciling misdirected pleadings with governing law. We have summarized our results below.

ISSUE	NUMBER OF DISTRICTS	PERCENTAGE OF DISTRICTS
Prisoners must plead exhaustion of administrative remedies	71	77%
Prisoners must plead prior litigation history	78	85%
Prisoners are instructed to plead facts “briefly” or “as briefly as possible”	67	73%
Prisoners must not cite legal authority	67	73%
Prisoners are discouraged or limited from using additional pages in the complaint, or are given ambiguous instructions about using additional sheets	24	26%
Prisoners are forbidden or limited in including attachments or exhibits	9	10%
Prisoners must plead whether defendant acted under color of state law	16	17%
Prisoners must plead whether defendant is sued in an individual or official capacity	14	16%

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81. See *supra* notes 36–39 and accompanying text.

*A. Pleading Facts that the Law Does Not Require Plaintiffs to Plead*

Most common among these factors are requirements that prisoner plaintiffs plead facts the law does not require. In particular, form complaints require plaintiffs to plead facts related to the PLRA-created affirmative defenses of administrative exhaustion and the three-strikes bar. Seventy-one complaints—77 percent—require prisoners to plead facts regarding exhaustion of administrative remedies.<sup>82</sup> Seventy-eight complaints—nearly 85 percent—ask for prisoners’ prior litigation history.<sup>83</sup> Some ask for all prior litigation filed while the prisoner was incarcerated;<sup>84</sup> others ask only for prior litigation related to the facts of the present lawsuit.<sup>85</sup> Additionally, a small number of form complaints require prisoners to provide documentation of administrative grievances filed or prior lawsuits.<sup>86</sup>

*B. Impeding Plaintiffs from Pleading Facts Sufficient to Survive a Motion to Dismiss*

A significant number of form complaints impose restrictions that make it more difficult for prisoners to plead a factually sufficient complaint by

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82. The sample form recently released by the Administrative Office of the U.S. Courts also asks about exhaustion. *See* AO 2016 Form Complaint, *supra* note 76, at 6–8.

83. The Administrative Office’s Form Complaint does likewise. *See id.* at 9–10.

84. *See, e.g.*, Form Complaint (E.D.N.C.), <http://www.nced.uscourts.gov/pdfs/forms/prisonerCivilRightsComplaintPackage.pdf>; Form Complaint (E.D. Tex.), at 2, [http://www.txed.uscourts.gov/cgi-bin/view\\_document.cgi?document=25225](http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=25225); Form Complaint (N.D. Miss.), at 2, [http://www.msnd.uscourts.gov/sites/msnd/files/5a\\_complaints\\_1983\\_prisoner\\_final.pdf](http://www.msnd.uscourts.gov/sites/msnd/files/5a_complaints_1983_prisoner_final.pdf).

85. *See, e.g.*, Form Complaint (W.D. Pa.), <http://www.pawd.uscourts.gov/sites/pawd/files/prisonercivilrights.pdf>; Form Complaint (W.D. Ky.), at 3, [http://www.kywd.uscourts.gov/sites/kywd/files/forms/1983\\_Prisoner\\_Packet\\_2.pdf](http://www.kywd.uscourts.gov/sites/kywd/files/forms/1983_Prisoner_Packet_2.pdf); Form Complaint (E.D. Ark.), <http://www.are.uscourts.gov/sites/ared/files/42usc1983.pdf>.

86. *See, e.g.*, Form Complaint (W.D.N.Y.), at 4, <http://www.nywd.uscourts.gov/sites/default/files/PrisonerComplaintForm.pdf>; Form Complaint (W.D. La.), at 2, [http://www.lawd.uscourts.gov/sites/default/files/UPLOADS/LAWD\\_Civil\\_Rights\\_Complaint\\_Prisoner\\_0.pdf](http://www.lawd.uscourts.gov/sites/default/files/UPLOADS/LAWD_Civil_Rights_Complaint_Prisoner_0.pdf) (requiring inmates to attach copies to the prison’s responses to the inmate’s grievances and the resulting dispositions); Form Complaint (N.D. Tex.); Form Complaint (E.D. KY.); Form Complaint (S.D. Ill.), at 4, <http://www.ilsd.uscourts.gov/Forms/PrisonerCivilRightsComplaint.pdf>; Form Complaint (D. Minn.), at 5, <http://www.mnd.uscourts.gov/Pro-Se/ProSeForms/ProSe-Civil-Rights-Complaint.pdf> (requiring inmate plaintiffs to attach the prison’s disposition of the inmate’s grievance); Form Complaint (W.D. Mo.), [http://www.mow.uscourts.gov/district/pro\\_se\\_fillable\\_forms/Pro%20Se/Fillable\\_Pro\\_Se\\_Complaint\\_Form\\_Prisoner.pdf](http://www.mow.uscourts.gov/district/pro_se_fillable_forms/Pro%20Se/Fillable_Pro_Se_Complaint_Form_Prisoner.pdf) (asking inmates to attach grievance dispositions); Form Complaint (C.D. Cal.), at 2, <http://court.cacd.uscourts.gov/CACD/Forms.nsf/Forms> (open “Pro Se Packets” and follow link 4, “Prisoner Civil Rights Packet”); Form Complaint (W.D. Wash.), at 3, <http://www.wawd.uscourts.gov/sites/wawd/files/1983CivilRightsComplaintRev4-8-2013.pdf> (requiring inmates to attach the final disposition on the grievance); Form Complaint (D.N.M.), at 4, <http://www.nmd.uscourts.gov/sites/nmd/files/forms/PrisonerCivilComplaintForm.pdf>; *see also* Form Complaint (E.D.N.C.), *supra* note 84 (requiring inmates to attach a sworn affidavit attesting that all administrative remedies have been exhausted).

restricting the plaintiff's allegations. Sixty-seven complaints—73 percent—direct prisoner plaintiffs to limit their allegations to a “brief” description of facts or to state the facts “as briefly as possible.”<sup>87</sup> As explained below, in light of the changes to pleading standards following *Iqbal* and *Twombly*, this instruction may cause plaintiffs to plead the kind of conclusory allegations that the Supreme Court has found inadequate.

Relatedly, in some cases, prisoners may want to attach documentation to their complaints to bolster or clarify the substance of the wrongs they claim. These attachments may include grievances, prison responses to grievances, or other documentation. Five complaints prohibit prisoners from attaching additional documents.<sup>88</sup> Two permit exhibits but discourage prisoners from using them.<sup>89</sup> Two complaints place a page limit on the number of attachments that can be included.<sup>90</sup> By contrast—and perhaps recognizing the clarity additional documentation can bring to pro se allegations—the complaints used in a few districts encourage plaintiffs to provide supporting documentation.<sup>91</sup>

Of course, the forms necessarily can only provide a limited amount of space for prisoners to describe their factual allegations. However, while a number of forms expressly permit prisoners to add additional pages if they run out of space, five restrict plaintiffs from exceeding the space provided.<sup>92</sup> Eight complaints place a limit on the number of pages the plaintiff can

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87. The Administrative Office's new form complaint also directs plaintiffs to state the facts “as briefly as possible,” but allows attachment of additional pages if needed. AO 2016 Form Complaint, *supra* note 76, at 4.

88. Form Complaint (E.D.N.C.), *supra* note 84 (prohibiting attachments unless instructed by court); Form Complaint (E.D. La.), <http://www.laed.uscourts.gov/sites/default/files/forms/1983.pdf> (prohibiting attachments); Form Complaint (M.D. La.), <http://www.lamd.uscourts.gov/sites/default/files/forms/1983COMPLAINTFORM-REVISED2014.pdf> (prohibiting attachments); Form Complaint (S.D. Iowa), <http://www.iasd.uscourts.gov/sites/default/files/forms/Prisoner%201983%20Civil%20Rights%20Complaint%20Packet%209-19-2013.pdf> (prohibiting attachments); Form Complaint (D. Ariz.), at 2, <http://www.azd.uscourts.gov/sites/default/files/forms/Civil%20Rights%20Complaint%20instructions-form.pdf> (prohibiting attachments but also informing inmates that information from attachments should be paraphrased in the complaint).

89. Form Complaint (E.D. Wis.), <http://www.wied.uscourts.gov/sites/wied/files/documents/forms/Civil%20Right%20Complaint%20and%20Guide%20-%20Prisoner.pdf> (encouraging plaintiffs to limit themselves to the space provided but allowing them to submit additional sheets or documents).

90. The District of Idaho limits prisoners to 25 pages of exhibits. Form Complaint (D. Idaho), [https://www.id.uscourts.gov/Content\\_Fetcher/index.cfm/Prisoner\\_Complaint\\_Form\\_860.pdf?Content\\_ID=860](https://www.id.uscourts.gov/Content_Fetcher/index.cfm/Prisoner_Complaint_Form_860.pdf?Content_ID=860).

91. *See, e.g.*, Form Complaint (S.D. Ill.), *supra* note 86, at 5 (instructing plaintiffs that when describing the facts of the claim, “You should also attach any relevant, supporting documentation.”).

92. *See infra* note 172 and accompanying text. Some variation exists in the way that the complaints prohibit or discourage the use of additional sheets. Some expressly prohibit additional sheets. Others use language that strongly discourages the use of additional sheets.

attach.<sup>93</sup> Seven additional complaints use ambiguous language to imply that a prisoner may only attach one extra page.<sup>94</sup> Four complaints that allow additional pages are ambiguous as to whether they can be used only for raising additional claims or naming additional defendants or can include additional facts regarding the plaintiff's claims.<sup>95</sup> Some complaints do not specify whether additional pages are allowed or prohibited.<sup>96</sup>

Finally, sixty-seven complaints direct plaintiffs not to include any legal argument or citation in their allegations.<sup>97</sup>

### C. Using Legal Terminology

A relatively small number of complaints require pro se prisoners to understand and draw conclusions from legal terminology. Sixteen complaints direct the prisoner to indicate whether the defendants were acting "under color of law" and, if so, to explain how. Fifteen complaints direct the prisoner to indicate whether the defendants are being sued in their individual capacity or their official capacity. Finally, four complaints contain short statements of legal principles that are likely intended to provide helpful guidance to prisoners, but in fact may not be fully accurate or are potentially misleading when applied to certain causes of action.

We discuss the implications of these results in the following Part.

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93. For example, the Middle District of Pennsylvania restricts plaintiffs to three additional sheets. Form Complaint (M.D. Pa.), at 2, <http://www.pamd.uscourts.gov/sites/default/files/complain.pdf>. The Western District of Texas form states that the entire complaint, including attachments and additional sheets, cannot exceed 20 pages. Form Complaint (W.D. Tex.). The Middle District of Alabama, the District of Kansas and the Northern District of Oklahoma each allow only two additional sheets for providing additional factual allegations relating to the plaintiff's claims. Form Complaint (M.D. Ala.), <http://www.almd.uscourts.gov/forms/inmate-1983-complaint-instruction-sheet>; Form Complaint (D. Kan.), <http://www.ksd.uscourts.gov/complaint-civil-rights-421983/>; Form Complaint (N.D. Okla.), at 2, <https://www.oknd.uscourts.gov/prisoner> (follow "Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 (PR-01)" hyperlink). See *infra* note 155 and accompanying text.

94. See, e.g., Form Complaint (D. Me.) (stating that prisoners may attach "extra sheet" if necessary); Form Complaint (D.R.I.) ("Attach an extra sheet if necessary."); Form Complaint (D.N.J.), <http://www.njd.uscourts.gov/sites/njd/files/forms/DNJ-ProSe-006.pdf> ("Attach a separate sheet if necessary."); Form Complaint (D. Neb.) (same); Form Complaint (S.D. Iowa), *supra* note 88 ("Attach an extra sheet, if necessary . . ."). The form for the District Court for the District of Columbia states in one place that "[i]f you need additional space to answer a question, you may use an additional blank page," but also states later on the form that prisoners may "[a]ttach extra sheets, if necessary." Form Complaint (D.D.C.), <http://www.dcd.uscourts.gov/sites/dcd/files/CompCivilRights42use1983.pdf>.

95. See *infra* note 178 and accompanying text.

96. See, e.g., Form Complaint (N.D. Cal.), [http://www.cand.uscourts.gov/filelibrary/30/Complaint\\_under\\_Civil\\_Rights\\_Act-42-USC-1983-P.pdf](http://www.cand.uscourts.gov/filelibrary/30/Complaint_under_Civil_Rights_Act-42-USC-1983-P.pdf); Form Complaint (D. Nev.), <http://www.nvd.uscourts.gov/Files/42.1983%20Civil%20Rights%20Complaint.pdf>.

97. See *infra* Part. III.B.4.

### III. CONSEQUENCES FOR PRO SE PRISONER PLAINTIFFS

By requiring pro se prisoners to plead facts that the law does not require them to plead, restricting pro se prisoners from providing detailed factual allegations, and directing pro se prisoners to plead legal conclusions, many form complaints impose a heightened pleading standard not faced by other litigants. The consequences of these impediments may be significant and can include the expenditure of judicial resources on reconciling the complaint with the law, improper or premature dismissal of the lawsuit, imposition of financial or other sanctions, and accrual of “strikes” under the Prison Litigation Reform Act that could bar a prisoner from filing any future civil lawsuits. This part discusses the consequences stemming from each of the three categories identified above.

#### *A. Requiring Plaintiffs to Plead Facts That the Law Does Not Require*

Most form complaints require prisoner plaintiffs to plead facts that the law does not require them to plead. These facts are often the basis for affirmative defenses under the PLRA. Specifically, many complaints require plaintiffs to plead facts regarding (a) whether they have exhausted their administrative remedies, and (b) their prior litigation history. Because each requirement presents different implications for prisoners, each is discussed separately.

##### *1. Pleading Exhaustion of Administrative Remedies*

###### *a. Requiring Pro Se Prisoners to Plead Exhaustion Risks Premature Dismissal of their Complaints*

Seventy-one of the ninety-two complaints require prisoners to provide information about whether they exhausted administrative remedies before filing. The sample form complaint that the Administrative Office of the U.S. Courts recently released also requires prisoners to plead facts about exhaustion.<sup>98</sup> Typically, the complaints ask if there is a grievance procedure at the correctional institution, whether the prisoner filed a grievance, whether the prisoner appealed the grievance through all available levels, whether the grievance process has been completed, and the result.<sup>99</sup> They also typically ask the prisoner to explain why he did not exhaust his

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98. See 2016 AO Form Complaint, *supra* note 76, at 6–8.

99. See, e.g., Form Complaint (M.D. Pa.), *supra* note 93, at 2.

remedies if he did not follow all the steps of an available grievance process.<sup>100</sup>

The law is settled, however, that exhaustion of administrative remedies is not part of the prisoner's prima facie case and need not be pleaded. Rather, it is an affirmative defense and the defendant's obligation—on penalty of waiver—to raise and prove.<sup>101</sup> In 2007, the Supreme Court in *Jones v. Bock* held that exhaustion is an affirmative defense and that prisoners do not have to plead facts regarding exhaustion in their complaints.<sup>102</sup> Before *Jones*, the circuits had split on whether exhaustion was an affirmative defense.<sup>103</sup> But the forms asking about exhaustion do not come only from circuits that treated administrative exhaustion as a pleading requirement pre-*Jones*.<sup>104</sup> Moreover, ten years after *Jones* was decided, 77 percent of form complaints still require prisoners to plead exhaustion. These forms are wrong on the law, and the error they include may cause unintended negative consequences for prisoner plaintiffs and the courts.

First, requiring prisoners to plead facts about exhaustion creates a risk that complaints that might otherwise be heard on the merits will end up being dismissed on exhaustion grounds. Exhaustion, like other affirmative defenses, can be waived by a defendant.<sup>105</sup> Thus, if a defendant does not raise exhaustion, the plaintiff's action can proceed even if the plaintiff failed to exhaust administrative remedies.<sup>106</sup> Requiring a plaintiff to plead exhaustion makes that defense part of the plaintiff's complaint and requires the court to resolve how that information should be considered.

Second, the plaintiff may have arguments to defeat an administrative exhaustion defense that are not reflected by checking a box “yes” or “no.” Because the PLRA only requires exhaustion of “available” administrative remedies, a prisoner is not required to exhaust when the prison acts in a way

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100. See, e.g., *id.*; Form Complaint (D. Or.), at 8–9, <https://www.ord.uscourts.gov/index.php/component/phocadownload/category/9-habeas-corpus-and-prisoner-civil-rights?download=24:prisoner-civil-rights-complaint;1976REPORT>, *supra* note 16, at 47.

101. FED. R. CIV. P. 8(b); see also *Jones v. Bock*, 549 U.S. 199, 215–16 (2007).

102. *Bock*, 549 U.S. at 215–16.

103. *Id.* at 204 & n.2 (describing circuit split).

104. See, e.g., Form Complaint (D. Vt.); Form Complaint (M.D. Pa.), *supra* note 93, at 2; Form Complaint (E.D.N.C.), *supra* note 84, at 8; Form Complaint (N.D. Ind.), at 4, <http://www.innd.uscourts.gov/sites/innd/files/PrCmplnt.pdf>; Form Complaint (D. Minn.), *supra* note 86, at 5; Form Complaint (E.D. Cal.), at 3–5, <http://www.caed.uscourts.gov/caednew/assets/File/Prisoner%20PACket.pdf>.

105. See, e.g., *Johnson v. Testman*, 380 F.3d 691, 695 (2d Cir. 2004) (holding that the PLRA's exhaustion requirement “is waivable”).

106. See, e.g., *Handberry v. Thompson*, 446 F.3d 335, 342–43 (2d Cir. 2006); *Anderson v. XYZ Correctional Health Servs., Inc.*, 407 F.3d 674, 679–80 (4th Cir. 2005); *Smith v. Mensinger*, 293 F.3d 641, 647 n.3 (3d Cir. 2002); *Randolph v. Rogers*, 253 F.3d 342, 347 n.11 (8th Cir. 2001).

to make administrative remedies unavailable.<sup>107</sup> Failure to exhaust may indicate that the prisoner was impeded or prevented from filing a grievance or that grievance procedures were not otherwise “available” within the meaning of the PLRA.<sup>108</sup> Thus, an unsophisticated plaintiff may answer “no” and be held to that verified statement even if administrative remedies were not “available.” If such facts are presented outside of the complaint, the court must resolve that discrepancy.

Third, merely having such questions on the complaint form may affect how a court interprets the complaint. A prisoner who does not know whether an administrative remedy was “available” or who simply may not understand what the complaint is asking may end up leaving the question blank. Some district courts have treated the failure to answer as the equivalent of answering “no,” resulting in a conclusion that the prisoner failed to exhaust and dismissal of the claim.<sup>109</sup> An equivalent silence in a complaint that does not ask about exhaustion would not lead to the same result.

Finally, there are several ways in which a seemingly simple question about exhaustion may be misconstrued. In one of the few cases addressing this issue, the Second Circuit noted three ways in which one pro se form could cause error: (1) the form asks only whether there is a grievance procedure, not whether the procedure is applicable to the subject of the plaintiff’s claims; (2) the form asks if there is a grievance procedure “in the institution,” which may confuse a prisoner who has been transferred from a prison without a grievance procedure to one that does have a procedure in

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107. *See, e.g., Dole v. Chandler*, 438 F.3d 804, 809–12 (7th Cir. 2006) (finding that failure to exhaust is excusable if prison officials engage in affirmative misconduct that impedes the completion of the grievance process); *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) (“We believe that a remedy that prison officials prevent a prisoner from ‘utiliz[ing]’ is not an ‘available’ remedy” under the PLRA); *Marr v. Fields*, No. 1:07-cv-494, 2008 WL 828788, at \*6 (W.D. Mich. Mar. 27, 2008) (refusing to dismiss action where plaintiff alleged this prison officials told him that his claim could not be grieved).

108. *See Chandler*, 438 F.3d at 809–12; *Miller*, 247 F.3d at 740; *Marr*, 2008 WL 828788, at \*6. Some complaints have different wording but carry the same risk. Some complaints ask simply if the prisoner exhausted administrative remedies. The prisoner might answer no and have the complaint dismissed, but the reason may be because no administrative remedies were available.

109. *See, e.g., Ghee v. Ramos*, No. 13 Civ. 632(RWS), 2013 WL 7018543, at \*1–2 (S.D.N.Y. Dec. 4, 2013) (dismissing prisoner’s complaint for failure to exhaust where he left blank the question regarding his appeal efforts and failed to allege “further actions taken . . . to appeal his initial grievance or comply with the remaining requirements under the [grievance program]”); *Antrobus v. Warden of GRVC*, No. 11 Civ. 5128(JMF), 2012 WL 1900542, at \*3 (S.D.N.Y. May 25, 2012) (treating prisoner’s nonresponsive answer regarding his appeal efforts on form complaint as “a concession that he did not attempt to appeal the decision at all”). *But see Groenow v. Williams*, No. 13 Civ. 3961(PAC)(JLC), 2014 WL 941276, at \*3 (S.D.N.Y. Mar. 11, 2014) (“Where a prisoner indicates that he has taken *some* steps toward exhaustion, district courts will not normally infer from his silence as to any remaining steps that he has not fully exhausted.”).

place; and (3) the form does not allow a prisoner to say that he does not know if a grievance procedure exists. Error on any one of these factors could cause a prisoner to unknowingly—and incorrectly—plead himself out of court.<sup>110</sup> The court is left to determine the proper interpretation of a prisoner's answer to a form's ambiguous question.

Additionally, prisoners risk improper dismissal by not having copies of their grievances and administrative decisions, which some districts require prisoners to attach to their complaints.<sup>111</sup> This requirement is troubling, not just because it goes beyond what the law requires, but also because there are any number of reasons why prisoners might not have the required documentation to show exhaustion. Photocopies cost money that many prisoners do not have. Prisoners have limited space in their cells to store legal papers.<sup>112</sup> Documents easily can get lost when prisoners are transferred to another cell or another institution or be destroyed by other inmates.<sup>113</sup> Although a district court judge may choose to overlook a plaintiff's failure to attach supporting documentation, that judge would be within his or her authority to reject the complaint for non-compliance and dismiss the action.<sup>114</sup> Alternatively, the prisoner's case may never reach the court

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110. *Snider v. Melindez*, 199 F.3d 108, 114 n.3 (2d Cir. 1999). The court noted, “[w]e do not mean to suggest by these observations that such forms and questionnaires have no utility. They may usefully guide the court’s inquiry as to whether the prisoner has fulfilled the prerequisites to suit; however, a plaintiff’s answers cannot by themselves establish the existence of an administrative remedy.” *Id.*

111. Form Complaint (W.D.N.Y.), *supra* note 86, at 4; Form Complaint (W.D. La.), *supra* note 86, at 2 (requiring copies of grievance responses and dispositions); Form Complaint (N.D. Miss.), *supra* note 84, at 4 (requiring prisoners to attach copies of all grievances and dispositions); Form Complaint (E.D. Ky.) (requiring prisoners to submit a copy of each grievance and the response to the grievance); Form Complaint (S.D. Ill.), *supra* note 86, at 4 (directing plaintiff to attach any grievance response and dispositions or to explain why such documents were not attached to the complaint); Form Complaint (D. Minn.), *supra* note 86, at 5 (instructing plaintiffs to “[a]ttach a copy of the decision or disposition received from the prison grievance procedure”); Form Complaint (C.D. Cal.), *supra* note 86, at 2 (asking plaintiff to attach copies of grievance decisions); Form Complaint (W.D. Wash.), *supra* note 86, at 3 (requiring prisoner to attach a copy of the final decision on the grievance); Form Complaint (D.N.M.), *supra* note 86, at 4 (requiring plaintiff to attach “proof of exhaustion”); *see also* Form Complaint (E.D.N.C.), *supra* note 84 (requiring that the plaintiff file a sworn affidavit that all administrative remedies have been exhausted).

112. *See, e.g.*, *Thompson v. DEA*, 492 F.3d 428, 435 (D.C. Cir. 2007) (noting that prisoners “often lack the ability to gather and store” numerous legal pleadings); *Andrews v. King*, 398 F.3d 1113, 1119 n.9 (9th Cir. 2005) (“In his current facility, [the prisoner] represents that he is permitted only six cubic feet of possessions—and that this not enough space to maintain comprehensive files.”).

113. *See, e.g.*, *Bell v. Johnson*, 308 F.3d 594, 604 (6th Cir. 2002) (addressing prisoner’s claim that prison guards unlawfully retaliated against him by seizing and destroying his legal papers); *see also* *Woods v. Carey*, No. CIV S-04-1225 LKK GGH P, 2007 WL 2688819, at \*1–2 (E.D. Cal. Sept. 13, 2007) (acknowledging prisoner’s claim that he was unable to file a timely appeal of his administrative grievance because he lacked access to his legal papers).

114. *See, e.g.*, *Daily v. Municipality of Adams Cty.*, 117 F. App’x 669 (10th Cir. 2004) (affirming dismissal of plaintiff’s complaint for failure to use the complaint form and for failing to provide all the information that the form required).



because the additional burden of supplying documentation may itself deter prisoners from filing suit.

This argument is not simply that a case that will ultimately be dismissed should be dismissed more slowly. As the Supreme Court held in *Jones*, the PLRA does not authorize or justify a departure from normal practices under the Federal Rules of Civil Procedure, which require that a defendant raise all affirmative defenses.<sup>115</sup> The wisdom of this rule is evident in this context. Defendants have “superior access to prison administrative records in comparison to prisoners”<sup>116</sup> and know the procedures available in their institutions. Requiring defendants to raise an exhaustion issue ensures that the prisoner plaintiff is on notice of, and can respond to, the precise defects that the defendants assert. It also allows the courts to decide affirmative defenses on a record created by both parties.

*b. Requiring Prisoners to Plead Exhaustion Risks Improper Accrual of PLRA Strikes.*

For a prisoner plaintiff, the cost of dismissal on the pleadings is more than simply the end of his case. It can also impair or prevent that prisoner from filing any future cases. Under the PLRA’s three-strikes rule, a prisoner who has filed three prior actions or appeals that have been “dismissed on the grounds that” they are “frivolous, malicious, or fail[] to state a claim upon which relief may be granted” is prohibited from proceeding *in forma pauperis* (IFP) in any future lawsuit, unless the prisoner is in imminent danger of serious bodily injury.<sup>117</sup> Because most prisoners are indigent and

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115. *Jones v. Bock*, 549 U.S. 199, 214 (2007). In other contexts, courts have expressed concern about district courts raising defenses sua sponte that a defendant has chosen to waive or may choose to waive. *See, e.g., Barrera v. Young*, 794 F.2d 1264, 1269 (7th Cir. 1986) (“If a state authorizes its Attorney General to surrender the protection of some principle of law on behalf of the state, no principle of federal law interferes. To the contrary, if the federal court refused to accept the waiver, explicit or implicit, by the state through its Attorney General, this would be a meddlesome intrusion into the state’s internal allocation of governmental authority.”).

116. *Andrews*, 398 F.3d at 1119 (citing *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003)).

117. 28 U.S.C. § 1915(g) (2012). Although the statute provides an exception where the prisoner is in “imminent danger of serious bodily injury,” that provision has been construed narrowly. “Imminent danger” must be present “as of the time the prisoner’s complaint is filed,” and “a prisoner’s allegation that he faced danger in the past is insufficient to allow him to proceed I.F.P.” *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 310 (3d Cir. 2001) (en banc). Moreover, the exception has been construed to apply only to particularly acute injuries, as injuries that linger for a longer period of time not found to be “imminent.” *See, e.g., Ball v. Famiglio*, 726 F.3d 448, 468 (3d Cir. 2013) (“Moreover, even if poor care for her past injuries, her eyesight, or her arthritis may prove detrimental to Ball’s health over time, they do not represent ‘imminent dangers’ which are ‘about to occur at any moment or are impending.’” (citing *Abdul-Akbar*, 239 F.3d at 315)). Furthermore, many prisoner civil rights claims, such as due process and First Amendment claims, ordinarily do not involve a risk of bodily injury.

cannot afford to pay the \$400.00 district court filing fee up front, barring a prisoner from proceeding IFP is tantamount to barring that prisoner from court altogether. Courts considering a prisoner's IFP application must review the disposition of prior actions to determine whether three strikes have been collected.

Notably, PLRA strikes are tied to dismissals, not to grants of summary judgment. In other words, a dismissal for failure to state a claim counts as a strike,<sup>118</sup> but an order granting summary judgment in favor of defendants ordinarily does not.<sup>119</sup> That distinction is important when considered in relation to the form complaint. Because affirmative defenses such as exhaustion are ordinarily raised and proved by the defendant, they are typically resolved at the summary judgment stage after the parties have an opportunity to submit evidence showing that the plaintiff exhausted or failed to exhaust administrative remedies.<sup>120</sup> There is a narrow exception, however, that allows affirmative defenses like exhaustion to be resolved on a motion to dismiss if the affirmative defense is clear on the face of the complaint.<sup>121</sup> In other words, exhaustion may be resolved on the pleadings only if the plaintiff includes facts that demonstrate a failure to exhaust. In prisoner cases, where the court reviews a complaint to determine if it is frivolous, malicious, or fails to state a claim before defendants are served, exhaustion may be resolved on the complaint alone, without a responsive pleading. Several circuits have held that such a dismissal counts as a strike for PLRA purposes, particularly if the dismissal is with prejudice.<sup>122</sup>

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118. 28 U.S.C. § 1915(g); *see also* *Ball*, 726 F.3d at 460 (concluding that an action is a strike where it is dismissed for failure to state a claim).

119. *See, e.g.,* *Tolbert v. Stevenson*, 635 F.3d 646, 654–55 (4th Cir. 2011) (stating that order granting summary judgment is not a strike). *But cf.* *Blakely v. Wards*, 738 F.3d 607, 613 (4th Cir. 2013) (en banc) (finding that a ruling on summary judgment can be a strike if the court states that the action, on summary judgment, was dismissed as frivolous, malicious or for failure to state a claim).

120. *See, e.g.,* *Ball*, 726 F.3d at 460 (quoting *Thompson v. DEA*, 492 F.3d 428, 438 (D.C. Cir. 2007)) (noting that in the majority of cases, exhaustion will not be resolved at the motion to dismiss stage but at some later stage of the litigation); *Groenow v. Williams*, No. 13 Civ. 3961(PAC)(JLC), 2014 WL 941276, at \*3 (S.D.N.Y. Mar. 11, 2014) (noting that “a motion for summary judgment is normally the proper vehicle to address a plaintiff’s failure to exhaust”).

121. *Ball*, 726 F.3d at 459; *Thompson*, 492 F.3d at 438. *See also* *Jones v. Bock*, 549 U.S. 199, 215 (2007) (explaining that whether a court can grant a motion to dismiss on the ground of an affirmative defense depends on whether the plaintiff pleads facts showing that the affirmative defense applies).

122. *See* *Ball*, 726 F.3d at 459–60; *Thompson*, 492 F.3d at 438; *Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1213 (10th Cir. 2003); *Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998) (counting dismissal for failure to exhaust as a strike because “[a] claim that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted”); *see also* *Owens v. Isaac*, 487 F.3d 561, 563 (8th Cir. 2007) (per curiam) (finding that a dismissal for failure to exhaust was not a strike where the dismissal was without prejudice); *Snider v. Melindez*, 199 F.3d 108, 111 (2d Cir. 1999) (stating that the three strikes rule “was intended to apply to nonmeritorious suits dismissed with prejudice, not suits dismissed without prejudice for failure to comply with a procedural

Thus, requiring prisoners to plead exhaustion in the complaint, which might then cause exhaustion to be addressed at the dismissal or screening stage rather than at summary judgment, puts them at risk of accruing strikes that otherwise would not accrue.<sup>123</sup> For example, in *Ball v. Famiglio*, the plaintiff Dawn Ball had filed a prior lawsuit claiming civil rights violations by prison employees and officials at a Pennsylvania state prison. She filed that prior action in the Middle District of Pennsylvania using the prisoner form complaint required by the Middle District's Local Rules.<sup>124</sup> The form asked her to indicate (1) whether she filed a grievance and (2) whether that grievance process had been completed.<sup>125</sup> Ball checked "yes" for the first question and "no" for the second question.<sup>126</sup> This effectively made the exhaustion affirmative defense part of Ball's complaint. Thus, when the district court found that she had not exhausted her administrative remedies, it dismissed her action for failure to state a claim.<sup>127</sup>

When Ball filed a subsequent civil rights lawsuit and appeal, the Third Circuit found that she was ineligible to proceed IFP because the prior dismissal was her third strike.<sup>128</sup> But had it not been for the form complaint's requirement that she plead exhaustion, her claim would not have been subject to dismissal for failure to state a claim.<sup>129</sup> Instead, exhaustion would have been addressed, as it normally is, at summary judgment, and Ball would not have accrued a strike.

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prerequisite," such as exhaustion, and holding that the plaintiff's prior dismissal without prejudice for failure to exhaust was not a strike).

123. The PLRA requires courts to pre-screen complaints even prior to considering a defendant's motion to dismiss. The statute states that the court "shall review" a prisoner complaint, either before docketing or "as soon as practicable" after docketing and shall either identify the prisoner's cognizable claims or dismiss the complaint if it is frivolous, malicious, fails to state a claim, or seeks monetary relief from a defendant that is immune from such relief. 28 U.S.C. § 1915A. See also, Broc Gullett, Note, *Eliminating Standard Pleading Forms That Require Prisoners to Allege Their Exhaustion of Administrative Remedies*, 2015 MICH. ST. L. REV. 1179 (arguing that requiring prisoners to plead exhaustion is inconsistent with *Jones v. Bock* and causes prisoners to improperly accrue PLRA strikes).

124. See MIDDLE DIST. PA. LOCAL R. 4.7(A) (2014). In the interest of full disclosure, one co-author served as court-appointed *Amicus Curiae* on Ms. Ball's behalf before the Third Circuit. For another article that discusses Ms. Ball's case, see Gullett, *supra* note 123, at 1200–03.

125. See Form Complaint (M.D. Pa.), *supra* note 93, at 2; *Ball*, 726 F.3d at 466.

126. Complaint at 1, *Ball v. SCI-Muncy*, No. 1:08-cv-00391-YK-LQ (M.D. Pa. Mar. 6, 2008).

127. *Ball*, 726 F.3d at 466. Failure to exhaust administrative remedies is not an independent ground for a strike under the PLRA. 28 U.S.C. § 1915(g).

128. See *id.*

129. Of course, it is always possible that a complaint is wrongly dismissed for failure to exhaust could end up being dismissed on other grounds. In that case, the action would constitute a strike even if the plaintiff would not have been required to plead exhaustion. See *Groenow v. Williams*, No. 13 Civ. 3961(PAC)(JLC), 2014 WL 941276, at \*1 (S.D.N.Y. Mar. 11, 2014) (recommending that the district court deny the defendant's motion to dismiss for failure to exhaust but also recommending that the court grant the defendant's motion to dismiss for failure to state a claim on the merits).

Requiring prisoner plaintiffs to plead exhaustion is contrary to governing law and imposes risks that prisoners will have their complaints prematurely dismissed and receive a PLRA strike that they would not otherwise receive. It also puts courts in the position of deciding exhaustion on an incomplete and one-sided record or ignoring an issue raised by the plaintiff's complaint.

## 2. *Prior Litigation History*

Seventy-eight form complaints, as well as the Administrative Office's recently created sample form, require prisoners to provide some information about prior lawsuits they have filed. Courts have good reasons for being interested in a prisoner plaintiff's prior litigation history. Identifying prior lawsuits, their current status, and the judges to whom they are assigned, can help ensure that cases involving the same prisoners or issues are heard by a single judge.<sup>130</sup> It also can help courts determine whether a prisoner has collected three strikes and is barred from proceeding *in forma pauperis*.<sup>131</sup> But including prior litigation history as a pleading requirement is improper and may cause prisoners, through inadvertence or mistake, to suffer sanctions or to have potentially meritorious claims dismissed for errors in completing this portion of the form.

Requiring prisoners to plead facts about their prior litigation in their complaint is inconsistent with federal pleading rules. The Supreme Court has repeatedly held that rules requiring plaintiffs to plead facts beyond a "short and plain statement" of the claim run afoul of Rule 8 of the Federal Rules of Civil Procedure.<sup>132</sup> More importantly, the prevailing view is that

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130. This appears to be the rationale for why prior litigation history was included in the original model form complaint recommended by the FJC committee in the 1970s. *See supra* note 52 and accompanying text.

131. As one district court opined,

The information in Section IV of the complaint [regarding prior lawsuits] is useful to the court in enforcing the 'three strikes' provision of 28 U.S.C. § 1915(g). The information on the form also assists the court in determining whether the action is related to or should be considered in connection with another action, or whether a holding in another action affects the current action. Further, since prisoner plaintiffs generally proceed pro se, the information helps the court determine their litigation experience and familiarity with the legal terrain of the current action. Requiring disclosure of previously filed cases on the complaint form relieves the court of the time-consuming task of combing the dockets of state and federal courts to identify cases previously filed by the plaintiff. This administrative benefit would be lost if plaintiffs were relieved of the obligation of identifying all previously filed cases.

*Snell v. Tucker*, No. 3:13cv563/LAC/EMT, 2014 WL 866505, at \*2 (N.D. Fla. Mar. 5, 2014) (citation omitted).

132. *See, e.g.,* *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993) (holding that courts cannot impose a heightened pleading requirement for § 1983 actions because such a requirement is inconsistent with Fed. R. Civ. P. 8(a)); *see also* *Jones v. Bock*,

the PLRA's three-strikes rule is not a pleading requirement and does not require prisoners to demonstrate in their complaint that they are not barred by the three-strikes rule.<sup>133</sup>

The risk of a pro se plaintiff mistakenly stating her litigation history outweighs the administrative benefit of this requirement today. When the model complaint was first developed in the 1970s, there was no electronic filing or PACER.<sup>134</sup> At that time, having the prisoner identify his or her prior cases could save a court a substantial amount of time that would otherwise be spent combing through paper records to see if that prisoner had other pending cases. Now, that function can be performed in a matter of seconds through a simple PACER search. In fact, many courts already search PACER or a national three-strikes database when they receive a prisoner case to assess the prisoner's accuracy in identifying his or her prior litigation history.<sup>135</sup>

When prisoners have failed to provide their full litigation history, or have omitted particular details, courts have imposed a variety of sanctions,

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549 U.S. 199, 212–16 (2007) (finding that under Rule 8, prisoners do not have to plead exhaustion and that the PLRA did not alter standard pleading rules). The Seventh Circuit on several occasions has noted, without directly addressing the issue, that local rules requiring plaintiffs to use form complaints may be in tension with Rule 8. *See, e.g.,* *Myles v. United States*, 416 F.3d 551, 553–54 (7th Cir. 2005) (“Whether mandatory forms are consistent with Fed. R. Civ. P. 8 is a subject we need not explore.”); *Skenandore v. Litscher*, 221 F.3d 1339 (7th Cir. 2000) (unpublished table decision) (“Although we recognize that there may be tension between the requirements of Rule 8(a) and Local Rule 12.02 [requiring form complaints], we have no occasion in this case to resolve this question.”).

133. *Thompson v. DEA*, 492 F.3d 428, 434 (D.C. Cir. 2007) (“IFP prisoners need not plead compliance with section 1915(g) . . . .”); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005) (footnote omitted) (“Congress did not require prisoners to declare that § 1915(g) does not bar their request to proceed *IFP*. Had Congress intended to require prisoners to affirmatively show that they were not subject to the three strikes provision, we have no doubt that it would have included that requirement in the list of requirements prisoners must address in order to obtain *IFP* status.”).

134. PACER, which stands for Public Access to Court Electronic Records, allows anyone to access records from a case in federal court electronically. *See* PUBLIC ACCESS TO COURT ELECTRONIC RECORDS, [www.pacer.gov](http://www.pacer.gov) (last visited Sept. 4, 2016).

135. *See, e.g.,* *Hoskins v. Dart*, 633 F.3d 541, 543 (7th Cir. 2011) (per curiam) (noting that the district court discovered the plaintiff's omission of his litigation history when it “screened” his current complaints); *Redmon v. Lake Cty. Sheriff's Office*, 414 F. App'x 221, 224 (11th Cir. 2011) (noting that the district court issued an order to show cause directing the plaintiff to show why he omitted his litigation history and identified a prior case in the U.S. District Court for the District of Colorado that the plaintiff had not listed in his complaint); *Mann v. Churchwell*, No. 5:13cv175-WS, 2014 WL 84695 at \*2 (N.D. Fla. Jan. 9, 2014) (stating that an independent review of the plaintiff's litigation history by the clerk of court revealed cases that the plaintiff had not identified); *Myrick v. Martin*, No. 3:14cv77/LAC/EMT, 2014 WL 1744156, at \*2 (N.D. Fla. May 1, 2014) (same); *see also* *Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1173 (7th Cir. 2010) (stating that courts “can take judicial notice of prior proceedings in a case involving the same litigant” whether or not that case is identified by the parties). In a recent survey of chief judges of federal district courts, almost half of the responding judges reported that they use a “national three-strikes database” in prisoner cases. *See* ASSISTANCE TO PRO SE LITIGANTS, *supra* note 4, at 29.

including dismissal of the action.<sup>136</sup> Courts also have revoked a plaintiff's *in forma pauperis* status upon finding that the plaintiff misrepresented his or her prior litigation history.<sup>137</sup> Although this is not technically a dismissal of the action, if the plaintiff is indigent and cannot afford the filing fee, it operates as such as a practical matter. The sanction of dismissal appears to be imposed most often when a court finds that the prisoner purposely omitted information from his or her litigation history.<sup>138</sup> Of course, intentional omissions or violations of pleading requirements should not be condoned. At the same time, the penalties imposed demonstrate how a pleading requirement that was originally intended to aid the court in consolidating cases before a single judge has turned into a procedural basis for dismissing an action.

Not every prisoner who fails to plead a full litigation history does so deliberately. Some prisoners err because they misunderstand what the form is asking. For example, the Eleventh Circuit affirmed a district court's dismissal of a prisoner's complaint for failing to provide information of a prior lawsuit where the prisoner stated that he misunderstood the form to be asking only about prior lawsuits involving the same facts as the present suit—an instruction implied by many form complaints—and promptly provided information about the prior action once he learned that he had not complied with the form's requirements.<sup>139</sup> This susceptibility to misunderstanding instructions is heightened by the fact that most prisoners have lower-than-average education levels and reading abilities and higher-than-average rates of intellectual disability and mental illness.<sup>140</sup> In other

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136. See, e.g., *Hoskins*, 663 F.3d at 543; *Redmon*, 414 F. App'x at 224–26; *Greer v. Schriro*, 255 F. App'x 285 (9th Cir. 2007); *Hood v. Tompkins*, 197 F. App'x 818 (11th Cir. 2006); *Daily v. Municipality of Adams Cty.*, 117 F. App'x 669 (10th Cir. 2004).

137. See, e.g., *Harris v. City of New York*, 607 F.3d 18, 23 (2d Cir. 2010) (“As an initial matter, we note Harris's ‘Prisoner Complaint’ forms misrepresented how many strike suits he had filed prior to bringing the instant action. Harris should not benefit from his own misleading submissions . . . .”); *Cruz v. Zwart*, No. 9:13-CV-1287, 2014 WL 4771664, at \*6 (N.D.N.Y. Sept. 24, 2014) (“In my view, in the absence of any explanation for his conduct, and given his lengthy litigation history within the circuit, plaintiff's unabashed misstatement to this court concerning his prior litigation history in this and other actions was made in bad faith and warrants revocation of IFP status.”); *Jackson v. Goord*, No. 06-CV-6172, 2014 WL 458018, at \*3 (W.D.N.Y. Feb. 4, 2014) (finding revocation of the plaintiff's IFP status and dismissal of the action warranted where the plaintiff “misrepresented his prior litigation history to the Court, hampering the Court's ability to evaluate his IFP application”); see also *Waters v. Camacho*, No. 11-CV-3263(JGK), 2012 WL 1117172, at \*1 (S.D.N.Y. Apr. 2, 2012) (revoking the plaintiff's IFP status, but expressly declining to dismiss the action, based on the plaintiff's misrepresentation to the court regarding his finances).

138. See *Harris*, 607 F.3d at 23; *Cruz*, 2014 WL 4771664, at \*6; *Jackson*, 2014 WL 458018, at \*3; *Waters*, 2012 WL 1117172, at \*1.

139. *Redmon*, 414 F. App'x at 224–26.

140. See *supra* note 9 and accompanying text.

cases, courts have dismissed actions or affirmed district court dismissals without making an express finding that the plaintiff intentionally misrepresented his or her litigation history.<sup>141</sup>

Prisoners may also make mistakes because they do not have documentation of their prior lawsuits or access to PACER. It is for this reason that courts have recognized prisoners should not bear the burden of pleading that they do not have three strikes. Defendants simply have better access to court records.<sup>142</sup>

Additionally, there may be room for disagreement about whether an omission is innocent or intentional.<sup>143</sup> A district court may, rightly or wrongly, not credit a prisoner's explanation that the omission was innocent. But once that finding is made, a prisoner may have little recourse. The prisoner may not be able to afford the expense and time of an appeal, and the courts of appeals review a district court's finding of intentional misconduct deferentially.<sup>144</sup> In short, even if dismissal is an appropriate sanction for intentional misrepresentation, this pleading requirement creates a risk of uncorrectable error.

Finally, requiring prisoners to plead litigation history while also requiring them to verify their complaint under the penalty of perjury imposes a double burden on prisoners. The federal rules do not require a verified complaint,<sup>145</sup> yet most form complaints do. A prisoner who misstates his litigation history faces not only sanctions in his case but also can be subjected to perjury charges. Some courts also have pointed to the fact that a plaintiff's misstatement about prior litigation history was made under penalty of perjury to justify dismissing the plaintiff's complaint as a punishment.<sup>146</sup>

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141. See, e.g., *Hood*, 197 F. App'x at 819; *Daily*, 117 F. App'x at 672.

142. See *supra* note 112 and accompanying text.

143. See, e.g., *Still v. Crawford*, 105 F. App'x 128, 130 (8th Cir. 2004) (disagreeing with the district court's view that the prisoner's failure to fill out the litigation history section of the form complaint was intentional where the prisoner simultaneously submitted an application to proceed IFP that listed eleven prior cases the prisoner had filed).

144. See, e.g., *Hudson v. Fuller*, 59 F. App'x 855, 857 (7th Cir. 2003) ("The factual finding that a misrepresentation occurred [regarding financial eligibility for IFP status] is reviewed for clear error, and the managerial decision to dismiss the suit as a sanction is reviewed for abuse of discretion."); *Hood*, 197 F. App'x at 819 (finding no abuse of discretion in the district court's decision to dismiss the complaint for omitting prior litigation from the form complaint); cf. *Still*, 105 F. App'x at 129 (reviewing for abuse of discretion and reversing the district court's decision that the prisoner's failure to fill out the litigation history section of the form complaint was intentional where the prisoner simultaneously submitted an application to proceed IFP that listed eleven prior cases the prisoner had filed).

145. See *supra* note 49 and accompanying text.

146. See, e.g., *Fanning v. Jones*, No. 13-00541-KD-B, 2014 WL 31796, at \*1 (S.D. Ala. Jan. 6, 2014) (citation omitted) ("Section 1915(e)(2)(B)(i) provides that an action shall be dismissed if the action is found to be malicious. An action is deemed malicious under § 1915(e)(2)(B)(i) when a prisoner

No other class of litigants faces this requirement. Although there are reasons that a presiding judge would want to know the prisoner's litigation history, there is a legitimate question whether district courts can create heightened pleading standards for one group of plaintiffs because it is administratively useful. Presumably, it is always administratively convenient to learn facts relating to affirmative defenses at the earliest possible stage. But the federal rules steadfastly do not require litigants to plead facts relating to statutes of limitations, qualified immunity, *res judicata*, and other affirmative defenses. Courts should question whether the forms they use alter these rules for one group of plaintiffs.

### *B. Constraints on Pleading*

We also examined form complaints to see whether and how they enabled prisoners to adequately plead all of the relevant facts of their claim. We found that form complaints may discourage pro se prisoners from pleading sufficient facts in several ways. First, more than 70 percent of complaint forms instruct prisoners to state the facts of their claim "briefly" or "as briefly as possible," or otherwise signal they should not provide detailed allegations. We also found that a number of forms limit or discourage plaintiffs from including additional pages of allegations if the form does not provide enough space. A smaller but still significant number prohibit, limit, or discourage plaintiffs from attaching documentation to support their allegations. Finally, 73 percent of complaints instruct prisoners not to make any legal argument or provide any legal citation, which could make it harder for a judge assessing a complaint to discern the relevance of the plaintiff's factual allegations.

These constraints were designed with the well-intentioned purpose of focusing prisoners' overly verbose pro se complaints that included too much irrelevant information. At the time the limitations were imposed, courts could rely on the low bar of notice pleading and the special solicitude afforded pro se litigants to recognize and allow potentially meritorious actions to proceed past a motion to dismiss even if they pleaded only minimal facts. However, to the extent that courts now apply *Twombly* and *Iqbal*'s more restrictive pleading standard to pro se complaints,<sup>147</sup> forms that

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plaintiff affirmatively misrepresents his prior litigation history on a complaint form requiring disclosure of such history and signs it under penalty of perjury. Such a misrepresentation 'constitutes abuse of the judicial process warranting dismissal of the case without prejudice.'").

147. There is some debate as to whether pro se complaints are governed by *Twombly* and *Iqbal*. See *supra* note 29.



require brevity run the risk of harming plaintiffs by encouraging them to leave out facts that might be necessary to move allegations over the line of plausibility.

It is difficult to determine the optimal way for a standard form to guide a pro se litigant in pleading the factual and legal basis of his claim. A plaintiff whose factual recitation pleads too few facts risks dismissal for failing to establish plausibility. A plaintiff who is given no direction to plead concisely may fill the form with irrelevant information that causes the relevant facts to be lost. However, after *Twombly* and *Iqbal*, we believe that it is more important to err on the side of instructing prisoners to provide detailed relevant facts rather than on prioritizing brevity. Further, we believe that allowing a pro se plaintiff to cite a case she believes mirrors her own may help the court determine the relevance of otherwise ambiguous facts.

### 1. *Limiting Allegations to a Brief Statement of Facts*

Sixty-seven of the ninety-two form complaints—73 percent—direct pro se prisoners to state the facts of their claim “briefly.” Many instruct prisoners to state the facts “as briefly as possible.”<sup>148</sup> It is understandable that the forms include this instruction. As might be expected from a group of judges convened to lessen the burden of pro se prisoner litigation on the federal courts, the committee that drafted the model form was concerned with containing lengthy allegations.<sup>149</sup> Similarly, the sentiment among commentators, both at the time the committee was drafting its model complaint and today, is that prisoner pro se complaints contain mostly unhelpful or irrelevant allegations that make it difficult for a court to discover any legitimate claims that happen to be buried within.<sup>150</sup> The form complaints are designed to address that problem, and many courts believe that form complaints have proven “extremely helpful . . . in clarifying pleadings often almost hopefully confused and unintelligible.”<sup>151</sup> One commentator suggests that courts should rigorously require that prisoners limit themselves to the space provided on the form complaint and that a

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148. See, e.g., Form Complaint (M.D. Pa.), *supra* note 93, at 2; see also AO 2016 Form Complaint, *supra* note 76, at 5.

149. See *supra* notes 35-45 and accompanying text.

150. *Id.*

151. Brock v. Carroll, 107 F.3d 241, 246 (4th Cir. 1997) (Phillips, J., concurring and dissenting) (alteration in original) (quoting Serna v. O'Donnell, 70 F.R.D. 618, 620 (W.D. Mo. 1976)); see also ASSISTANCE TO PRO SE LITIGANTS, *supra* note 4, at 37–38 (finding that both district court clerks and chief judges identified “standardized forms” as among “the most effective measures for handling pro se cases”).

complaint should be rejected if it goes beyond the allotted space.<sup>152</sup>

However, it is important to keep in mind that the committee was drafting its model form at a high point for liberal rules of notice pleading, particularly for pro se plaintiffs. At that time, a complaint's sufficiency was governed by *Conley v. Gibson*,<sup>153</sup> which established the rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>154</sup> Courts interpreted pro se complaints liberally and often were willing to give the plaintiff the benefit of the doubt regarding borderline allegations or to assume the existence of facts missing from the complaint consistent with the plaintiff's theory of liability.<sup>155</sup> Emblematic of this period is *Gordon v. Leeke*, in which the Fourth Circuit emphasized that district courts must look at any "set of facts which the plaintiff might be able to prove" in addition to the facts actually alleged in determining whether to grant or deny a motion to dismiss. The court held that the district court properly refused to dismiss the plaintiff's case as originally drafted because "[i]t was theoretically possible that Gordon could prove thereunder a state of facts which would entitle him to recover, although it was certain that the precise basis for recovery was not alleged."<sup>156</sup>

But courts may no longer indulge plaintiffs who fail to include facts to support a necessary element of the plaintiffs' cause of action. In *Bell Atlantic Corp. v. Twombly*, the Supreme Court put *Conley*'s liberal pleading standard in "retirement."<sup>157</sup> The Court required pleading enough facts with enough specificity to push the plaintiff's claim for relief from merely "conceivable" to "plausible."<sup>158</sup> Two years later, in *Ashcroft v. Iqbal*, the Court went further and held that all complaints must allege sufficiently specific facts to show a plausible claim for relief and that district courts are

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152. Levy, *supra* note 20, at 513. Again, this imposes a restriction on prisoner plaintiffs not faced by any other group of litigants.

153. 355 U.S. 41 (1957).

154. *Id.* at 45–46.

155. See, e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561–62 (2007) (describing how the lower court of appeals had found that a plaintiff stated a claim because of the possibility that the plaintiff may uncover direct evidence of conspiracy at a later stage, even if no evidence of direct conspiracy was pleaded in the complaint); see also Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U.L. REV. 553, 558–68 (2010) (describing the "exceedingly low" threshold for sufficiency under *Conley* and identifying various ways in which courts interpreted complaints favorably to plaintiffs).

156. 574 F.2d 1147, 1151 (4th Cir. 1978).

157. *Twombly*, 550 U.S. at 563.

158. *Id.* at 570.

free to reject any allegation that is overly general or conclusory.<sup>159</sup>

Although the Court did not hold that it was creating a heightened pleading standard or that it was requiring greater specificity in pleading, it effectively did so, as courts and commentators have recognized.<sup>160</sup> It is commonly understood that plaintiffs must now provide “an extensive factual presentation” to demonstrate the plausibility of their claim.<sup>161</sup> Consequently, a complaint that omits facts necessary to the underlying claim may be more susceptible to dismissal than a complaint that is somewhat rambling.

Some data exist to support this point. There has been a spate of recent research addressing dismissal rates pre- and post-*Twombly* and *Iqbal*. Most of the studies indicate that dismissal rates have climbed substantially, particularly for civil rights complaints, although a few reach different, or less stark, conclusions.<sup>162</sup> The effect appears to be even more dramatic for

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159. 556 U.S. 662, 677–79 (2009); see also *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 999 (9th Cir. 2014) (affirming dismissal because plaintiffs failed “to do ‘something more’ to ‘render their allegations plausible within the meaning of *Iqbal* and *Twombly*’” (quoting *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013))).

160. See, e.g., *McCauley v. City of Chicago*, 671 F.3d 611, 616–17 (7th Cir. 2011) (citations omitted) (explaining that “[w]e have interpreted *Twombly* and *Iqbal* to require the plaintiff to ‘provide some specific facts’ to support the legal claims asserted in the complaint” and that “the plaintiff must give enough details about the subject-matter of the case to present a story that holds together” (quoting *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010)); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (recognizing that “pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading” as a result of *Iqbal*); 5 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 1216 (3d ed. 2016) (“[I]t is likely that the plausibility pleading standard may have transformed the complaint’s function from the limited role of providing notice of the claim to a more demanding standard through which plaintiffs must give notice through an extensive factual presentation of their complaints’ plausibility. Although relatively few in number, several cases already have indicated that courts have begun to demand greater factual presentation from plaintiffs in order to surpass the heightened hurdle of a Rule 12(b)(6) motion to dismiss, particularly in cases involving complex substantive issues.”); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2118 (2015) (surveying existing scholarship and concluding that “[a]lmost all commentators agree that *Iqbal* and *Twombly* mark a break from the liberal pleading doctrine enunciated in 1957 by *Conley v. Gibson*”); A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 196 (2010) (describing how certain complaints may now need “additional supporting facts to be believed” following *Iqbal*); Rory K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 612 (2011) (asserting that *Iqbal* “drastically altered federal pleading practice”); see also *Starr v. Baca*, 652 F.3d 1202, 1221 (9th Cir. 2011) (Trott, J., dissenting) (“The days of pleading conclusions without factual support accompanied by the wishful hope of finding something juicy during discovery are over.”).

161. WRIGHT ET AL., *supra* note 160.

162. For a detailed discussion of the various empirical studies of dismissal rates before and after *Twombly* and *Iqbal*, see Reinert, *supra* note 160, at 2129–38. Some commentators have concluded that the dismissal rate has not changed in a statistically significant way, and others have suggested that all studies of dismissal rates are methodologically flawed and that few conclusions can be drawn from them. *Id.* In the wake of the controversy surrounding *Iqbal*, The Federal Judicial Center conducted its own study. While that study found a more limited effect on dismissal rates than some other studies, it

pro se prisoner complaints. While many of these studies either exclude pro se complaints entirely or do not control for them, two studies that controlled for pro se plaintiffs and pro se prisoner plaintiffs showed significant increases in dismissal rates, especially for pro se prisoner civil rights claims. One study that specifically examined pro se prisoner cases found that dismissal rates for factual insufficiency jumped 15 percent from 2006 to 2010.<sup>163</sup> Another study that examined pro se complaints generally similarly found that the rate courts dismissed pro se complaints for failure to state a claim increased from 67 percent under the *Conley* standard to 85 percent after *Iqbal*.<sup>164</sup> This is a much higher rate increase than for complaints generally.<sup>165</sup> Additionally, while the rate of dismissal for pro se complaints has always been higher than the rate of dismissal for counseled complaints, the disparity between the pro se dismissal rate and the counseled dismissal rate increased after *Iqbal* from 30 percent to 38 percent.<sup>166</sup> Moreover, civil rights claims have had the most marked increase in dismissal rates of any type of claim.<sup>167</sup> Thus, pro se prisoners filing civil rights claims are likely

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expressly excluded all pro se complaints. See JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER IQBAL: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 6 n.10 (2011).

163. Reinert, *supra* note 160, at 2147–51. It also found that pro se civil rights claims in general saw their dismissal rate increase from 85% to 92%. *Id.* Moreover, the study found that dismissal rates increased irrespective of whether the plaintiff had previously sought to amend the complaint to add more detailed factual allegations. *Id.* at 2148.

164. Hatamyar, *supra* note 155, at 615. Even though Professor Hatamyar’s study includes pro se complaints, it also is probably not a fully accurate benchmark for pro se prisoner complaints. In this study, Professor Hatamyar excluded all cases that were reviewed by a district court *sua sponte* (i.e. without the filing of a motion to dismiss by a defendant) as required by the PLRA as well as all complaints that were submitted with an application to proceed IFP. *Id.* at 585. Because most pro se prisoners are indigent and seek IFP status, a significant number of pro se prisoner complaints likely were excluded from the study. Although some of the increase in dismissals were dismissals with leave to amend, pro se parties in general may be less likely than represented parties to file an amended pleading. Pro se prisoners may encounter even greater difficulty in filing amended pleadings if they have limited ability to obtain paper, pens, postage, and photocopies.

165. *Id.* at 598–99, 615. Professor Hatamyar’s study shows that the rate that motions to dismiss were granted in some form (either granted without leave to amend, granted with leave to amend, or granted in part and denied in part) increased from 73% before *Twombly* and *Iqbal* to 82% after *Iqbal*. *Id.* at 598–99.

166. Schneider, *supra* note 160, at 618.

167. See, e.g., Patricia Hatamyar Moore, *An Updated Study of Iqbal’s Impact on 12(B)(6) Motions*, 46 U. RICH. L. REV. 603, 605 (2012) (noting that the author’s study found that “constitutional civil rights cases in particular were dismissed at a higher rate post-*Iqbal* than pre-*Twombly*); Hatamyar, *supra* note 155, at 556 (“Moreover, in the largest category of cases in which 12(b)(6) motions were filed—constitutional civil rights cases—motions to dismiss were granted at a higher rate (53%) than in all other cases combined (49%), and the rate 12(b)(6) motions were granted in those cases increased from *Conley* (50%) to *Twombly* (55%) to *Iqbal* (60%).”); see also Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1815 (2008) (conducting an initial study of dismissal rates after *Twombly* and

to be among the parties most affected by *Iqbal* and *Twombly*.

Most form complaints do not reflect the new realities of pleading. Instead, they continue to instruct pro se prisoners to state the facts as briefly as possible. But what is generally assumed to constitute sufficient pleading based on the instructions of many form complaints may no longer be adequate to survive a motion to dismiss and may leave a court to deal with artificially and unhelpfully minimal pleadings.

Given the change in the legal landscape, it is important to reassess the instructions contained in prisoner form complaints to make sure they do not hinder plaintiffs from submitting a well-pleaded complaint. In conducting that assessment, it is valuable to consider that some districts already provide instructions that are more consistent with post-*Iqbal* pleading realities. A number of districts' form complaints do not instruct pro se prisoners to state their facts "as briefly as possible" but instead encourage them to give specific and detailed descriptions of their claims. For example, the District of New Hampshire's form complaint directs plaintiffs to "[s]tate, with specificity, the facts and circumstances that gave rise to the violations or deprivations alleged."<sup>168</sup> Similarly, several complaints instruct plaintiffs to "[i]nclude all facts you consider important."<sup>169</sup> These forms encourage plaintiffs to be specific and to focus on what is important while also reducing the risk that the plaintiff will omit facts that are relevant or necessary to their claims.

We think this approach is more appropriate for a post-*Iqbal* world. In our model complaint, we provide similar pleading instructions that we believe encourage plaintiffs to provide factual detail without encouraging them to overwhelm the court with pages of irrelevant information. We attempt to do this by instructing plaintiffs to focus on pleading specific facts – the who, what, where, and when – of what happened and to identify what each defendant did or failed to do.<sup>170</sup> In doing so, we adapted language that several districts already use in their form complaints. We hope that these

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concluding that while the case generally had little impact on dismissal rates, "[t]he rate of dismissal in civil rights cases has spiked in the four months since *Twombly*" was decided); *cf.* Reinert, *supra* note 160, at 2146–47 (finding that the dismissal rate for pro se civil rights complaints increased only 7 percent, from 85 percent to 92 percent, but that the dismissal rate for counseled civil rights complaints increased 19 percent, from 47 percent to 66 percent).

168. Form Complaint (D.N.H.), at 5, <http://www.nhd.uscourts.gov/sites/default/files/pdf/ProSeGuide.pdf>.

169. *See, e.g.*, Form Complaint (C.D. Cal.), *supra* note 86, at 5; Form Complaint (S.D. Cal.), at 3, [https://www.casd.uscourts.gov/Attorneys/Lists/Forms/Attachments/60/Complaint\\_Civil%20Rights%20Act%2042USC1983.pdf](https://www.casd.uscourts.gov/Attorneys/Lists/Forms/Attachments/60/Complaint_Civil%20Rights%20Act%2042USC1983.pdf); Form Complaint (D. Mont.), at 6, [http://www.mtd.uscourts.gov/sites/mtt/files/Prisoner\\_Complaint.pdf](http://www.mtd.uscourts.gov/sites/mtt/files/Prisoner_Complaint.pdf); Form Complaint (D. Nev.), *supra* note 96, at 4.

170. *See* Appendix, *infra*.

instructions enable plaintiffs to tell their story, but to focus on facts that will be helpful for the court rather than on vague, rambling, and difficult-to-decipher allegations.

## 2. *Limiting Space for Factual Allegations*

Form complaints may also limit pro se plaintiffs from including necessary facts by restricting the amount of space provided to plead their claims. Form complaints vary widely in the amount of space they allow for a prisoner's factual allegations, from just a few lines to a full page or more. Ones that provide only a few lines to describe the entire factual basis of the claim may not give plaintiffs sufficient space. In the words of one district court: "It would be unfair to allow a Plaintiff to file a pro se Complaint on the standard form, which provides minimal room for elaboration on the factual issues, and then dismiss Plaintiff's Complaint under Rule 8 for failure to provide more factual allegations."<sup>171</sup>

While a complaint form necessarily cannot provide an unlimited amount of space, many forms protect the plaintiff's ability to provide detailed facts by allowing allow plaintiffs to write on the back of the form or to attach additional pages. However, five complaints prohibit or discourage prisoners from attaching additional sheets.<sup>172</sup> Eight complaints allow additional pages but place a limit on the number a plaintiff may include,<sup>173</sup> and several others

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171. *Felder v. Del. Cty. Office of Servs. for the Aging*, No. 08-4182, 2009 WL 2278514, at \*3 (E.D. Pa. July 28, 2009).

172. For example, the Central District of Illinois form complaint instructions state, in all caps: "THE COURT URGES YOU TO USE ONLY THE SPACE PROVIDED" and that "[u]nrelated claims should be raised in a separate civil action." Form Complaint (C.D. Ill.), at 5, [http://www.ilcd.uscourts.gov/sites/ilcd/files/forms/1983%20COMPLAINT\\_TNR.pdf](http://www.ilcd.uscourts.gov/sites/ilcd/files/forms/1983%20COMPLAINT_TNR.pdf). The Middle District of Georgia warns plaintiffs that their complaints must be "simple, concise, and direct," and instructs plaintiffs that the court will inform them if additional information is needed. *See also* Form Complaint (S.D. Iowa), *supra* note 88 ("If you need more space to answer a question, use the back side of this form or an extra blank page. However, if you keep your answer to the point, extra space should not be needed."); Form Complaint (E.D. Tex.), *supra* note 84, at 4 ("Attach extra pages if necessary, but remember that your complaint must be stated briefly and concisely. IF YOU VIOLATE THIS RULE, THE COURT MAY STRIKE YOUR COMPLAINT.").

173. The District of Kansas and the Northern District of Oklahoma, for example, permit pro se plaintiffs to attach "up to two additional pages (8 1/2" x 11") to explain any allegation or to list additional supporting facts." Form Complaint (D. Kan.), *supra* note 93, at 3; Form Complaint (N.D. Okla.), *supra* note 93, at 2; Form Complaint (E.D. Okla.). The Middle District of Alabama similarly limits prisoners to two additional pages. Form Complaint (M.D. Ala.), *supra* note 93. The Middle District of Pennsylvania restrict plaintiffs to three additional sheets. Form Complaint (M.D. Pa.), *supra* note 93, at 2. The Northern District of Florida prohibits prisoners from submitting more than five additional sheets absent "extraordinary circumstances." Form Complaint (N.D. Fla.), at 5, <http://www.flnd.uscourts.gov/file/97/download?token=006Em5XH>. The Southern District of Alabama similarly limits plaintiffs to five additional sheets. Form Complaint (S.D. Ala.). The Western District of Louisiana, by local rule, limits prisoner plaintiffs to five additional typewritten sheets or ten additional

do not specify one way or the other whether additional sheets are allowed. Of those that allow additional pages, four are ambiguous as to whether additional sheets may only be used for describing new claims or new defendants rather than for providing additional facts about a particular claim, and seven others are written ambiguously to suggest that a plaintiff can attach only one additional sheet.<sup>174</sup> Thus, some complaints that do not prohibit additional sheets may give pro se prisoners the impression that they do. There is, of course, no restriction on the length of complaints filed by plaintiffs not using the pro se prisoner form.

While prohibiting, discouraging, or limiting additional sheets may have been a sensible piece of advice in the *Conley* era, such restrictions may no longer serve their intended purpose in the new pleading era of *Twombly* and *Iqbal*. A requirement to be brief, while generally good advice, could now prove harmful to pro se prisoners and courts.

### 3. *Form Complaints that Prohibit or Restrict Plaintiffs from Attaching Documentary Evidence*

A small but significant number of form complaints prohibit prisoners from attaching documents to their complaints or limit the number of pages

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hand-written sheets. W. DIST. LA. LOCAL R. 3.2. (2016). The District of Arizona limits prisoners to fifteen additional sheets. Form Complaint (D. Ariz.), *supra* note 88, at 1. The Western District of Texas form states that the entire complaint, including attachments and additional sheets, cannot exceed 20 pages. Form Complaint (W.D. Tex.). The Southern District of Iowa, the District of Nebraska, the District of Rhode Island, the District of Maine, the District of Vermont, and the District of New Jersey imply that only one extra sheet may be included by instructing, “[a]ttach an extra sheet, if necessary.” Form Complaint (S.D. Iowa), *supra* note 88, at 4; Form Complaint (D. Neb.), *supra* note 94; Form Complaint (D.R.I.), *supra* note 94; Form Complaint (D. Me.), *supra* note 94; Form Complaint (D. Vt.), *supra* note 104; Form Complaint (D.N.J.), *supra* note 94, at 5. Similarly, the Southern District of Florida form implies that only one extra sheet is permitted, stating: “If you need more space than is provided on the form, attach an additional blank page to the complaint.” (S.D. Fla.), <http://www.flsd.uscourts.gov/wp-content/uploads/2013/05/Complaint-Under-the-Civil-Rights-Act-42-USC-19832.pdf>.

174. For example, the Central District of California’s form complaint, in the section where it directs the plaintiff to identify his or her claim, states: “If there is more than one claim, describe the additional claim(s) on another attached piece of paper . . .,” implying that additional sheets are only for additional claims. Form Complaint (C.D. Cal.), *supra* note 86, at 5. However, on the first page of the instructions for the form complaint, the instructions state: “If you need additional space to answer a question, you must use the reverse side of the form or an additional blank page.” *Id.* at 1. The District of Montana’s form complaint contains a similar discrepancy between what is stated on the complaint itself and what is stated in the instructions page. Form Complaint (D. Mont.), *supra* note 169, at 2, 6. The Western District of New York form states: “If you have additional claims, use the above format and set them out on additional sheets of paper,” suggesting that additional paper is only allowed for submitting additional claims. Form Complaint (W.D.N.Y.), *supra* note 86, at 6. The District of Nevada provides two lines at the end of the complaint designated as “Additional space, if needed” for the entire complaint. It is not clear whether the plaintiff is permitted to go beyond the two lines provided. Form Complaint (D. Nev.), *supra* note 96, at 9.

of documents that can be attached. Five complaints prohibit attached documents altogether, two more permit exhibits but discourage prisoners from using them, and two complaints place a page limit on the number of documents that can be included.<sup>175</sup> Prohibiting prisoners from including attachments treats prisoners differently from other litigants and is inconsistent with governing law. It is a general rule of pleading that a court evaluating the sufficiency of the complaint can consider not just the complaint itself but also documents attached to the complaint or incorporated by reference.<sup>176</sup> Federal Rule of Civil Procedure 10(c) establishes that “[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.”<sup>177</sup> This Rule applies with equal force to all complaints, but is contradicted by these forms.

Moreover, prohibiting attachments may run counter to the goal of producing complaints that are easier to understand. If complaints are poorly written because the pro se plaintiff is not trained in the law, is not aware of which facts are important, and cannot communicate effectively in writing, then attaching documents can be a benefit rather than a detriment. Outside documents can supply essential facts that provide courts with the clarity and concreteness that is missing from the plaintiff’s allegations. There are numerous examples, both in the prisoner context and outside it, where a poorly drafted complaint was rescued from dismissal because the plaintiff attached documents that provided essential facts or context.<sup>178</sup> Thus, prohibiting prisoners from attaching documents may cause potentially

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175. See *supra* notes 92–94 and accompanying text.

176. See, e.g., *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55 (1st Cir. 2012); *Samuels v. Air Transp. Local 504*, 992 F.2d 12, 15 (2d Cir. 1993); 2 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 12.34[2] (3d ed. 2016) (“In deciding whether to dismiss, the court may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the judge may take judicial notice.”).

177. FED. R. CIV. P. 10(c).

178. See, e.g., *Streater v. Hemet Valley Hospital*, 956 F.2d 1168 at \*1 (9th Cir. 1992) (unpublished table decision) (reversing dismissal for failure to plead the basis for federal jurisdiction where “[o]ne of the attachments [to the complaint], a letter from the EEOC, states that Streater’s claims before the EEOC were ‘filed under Title VII and EPA [the Equal pay provision of the Fair Labor Standards Act]’”); *Judkins v. Beech Aircraft Corp.*, 745 F.2d 1330, 1332 (11th Cir. 1984) (finding that plaintiff’s filing of his charge of discrimination that he filed with the EEOC provided sufficient factual information to state a claim for discrimination); *Hernandez v. Cate*, 918 F. Supp. 2d 987 (C.D. Cal. 2013) (relying on form complaint plus attached documents in holding that the inmate stated a claim); *Barnes v. Ross*, 926 F. Supp. 2d 499 (S.D.N.Y. 2013) (looking at the plaintiff’s complaint and attached documents in finding that the plaintiff stated a claim under the Equal Protection Clause); *Vogelfang v. Capra*, 889 F. Supp. 2d 489 (S.D.N.Y. 2012) (relying on complaint and attached documents in determining that some of the prisoner’s claims survived a motion to dismiss); see also *Page v. Ark. Dep’t of Corr.*, 222 F.3d 453, 454–55 (8th Cir. 2000) (finding the EEOC charge that pro se plaintiff attached to her letter to the court was the “substantial equivalent of a complaint” and provided sufficient factual detail regarding the plaintiff’s discrimination claim to survive a motion to dismiss).



meritorious claims to be misunderstood or dismissed.

To be sure, just as allowing plaintiffs unlimited space for factual allegations without any cautionary instructions creates the risk that pro se prisoners will provide too much information, allowing pro se prisoners to provide unlimited pages of exhibits without cautionary instructions creates the risk that prisoners will attach reams of paper, causing the most relevant exhibits to get buried in the morass. However, we think that, on balance, it is better to encourage exhibits than discourage them. At best, exhibits may clarify or enhance an otherwise deficient complaint. At worst, exhibits may be ignored, but will not affirmatively damage the prisoner's claim.

#### 4. *Prohibiting Legal Argument or Citation to Legal Authority*

Sixty-seven of the ninety-two complaint forms, or 73 percent, follow the model complaint form and instruct prisoners not to make legal argument or cite legal authority. This may reflect a concern that pro se prisoners will fill up their complaint with conclusory legal statements and will fail to provide the facts necessary for a court to assess the sufficiency of the complaint. However, by instructing prisoners not to include any legal argument or citation in their complaints, courts may unwittingly prevent prisoners from providing helpful insight as to the nature of their claims and how the included facts should be construed.

For example, a prisoner may allege that a guard destroyed his television set after he reported that he witnessed the guard assaulting another inmate. On the face of these allegations alone, the court might assume that the prisoner is making a due process claim for destruction of personal property or an Eighth Amendment claim on behalf of the assaulted inmate. Both are easily dismissed on the pleadings. However, if the plaintiff argues or cites a case to demonstrate that he believes these facts to state a claim of First Amendment retaliation, the nature of the allegations changes. The court may then conclude that reporting the assault and the destruction of the television set are related and that the plaintiff has pleaded a viable retaliation claim.

Several districts have modified their forms in ways that may help address this concern. For example, some forms provide a section instructing prisoners to describe their legal claim and to identify what rights they are asserting and a separate section instructing the prisoner to include factual allegations supporting that claim.<sup>179</sup> Such instructions enable plaintiffs to

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179. See, e.g., Form Complaint (E.D. Ky.), *supra* note 86; Form Complaint (E.D. Mich.), *supra* note 84, at 4–7; Form Complaint (D. Neb.), *supra* note 94; Form Complaint (S.D. Cal.), *supra* note 169, at 3; Form Complaint (D. Idaho), *supra* note 90, at 2; Form Complaint (D. Mont.), *supra* note 169, at 6;

articulate a legal argument or legal theory without running the risk that they will simply make legal arguments and fail to plead facts. Additionally, having separate sections for legal claims and factual allegations allows courts to continue to instruct plaintiffs not to substitute legal argument or case citation for a statement of their relevant facts. Our model complaint follows this approach by creating separate sections for plaintiffs to plead facts and to identify their legal claims.

### C. Pleading Legal Conclusions

The final aspect of form complaints that we examined is whether the forms require plaintiffs to understand legal terminology or to plead legal conclusions. Sixteen form complaints direct prisoners to indicate whether and how the defendants were acting “under color of law,” as required to state a claim under § 1983.<sup>180</sup> Fourteen form complaints direct the prisoner to indicate whether the defendants are being sued in their individual capacity or their official capacity.<sup>181</sup> Such questions carry potential risk for unsophisticated pro se plaintiffs while providing little, if any, benefit. Pro se prisoners may not understand the legal meaning of these or other legal terms, even if the form provides a definition, as some do.<sup>182</sup> Prisoners who do not understand what is being asked may leave that section of the form blank or may answer incorrectly, which can result in unintended concessions.

For example, § 1983 establishes that a plaintiff can raise a civil rights

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Form Complaint (D. Nev.), *supra* note 96, at 6; Form Complaint (D. Colo.), at 3–4, [http://www.cod.uscourts.gov/Portals/0/Documents/Forms/CivilForms/Prisoner\\_Complaint\\_Form.pdf](http://www.cod.uscourts.gov/Portals/0/Documents/Forms/CivilForms/Prisoner_Complaint_Form.pdf); Form Complaint (D. Kan.), *supra* note 93, at 3; Form Complaint (D.N.M.), *supra* note 86, at 2–3; Form Complaint (M.D. Ala.), *supra* note 93; Form Complaint (M.D. Fla.), at 5, <http://www.flmd.uscourts.gov/forms/Prisoner/PrisonerCivilRightsComplaint.pdf>; Form Complaint (N.D. Fla.), *supra* note 173, at 6–7; Form Complaint (D. Or.), *supra* note 100, at 3, 5.

180. *See, e.g.*, Form Complaint (D. Kan.), *supra* note 93, at 2; Form Complaint (D. Haw.), at 2, [http://www.hid.uscourts.gov/forms/1983\\_COMPLAINT\\_FORM\\_\(Rev\\_Jan\\_2008\).pdf](http://www.hid.uscourts.gov/forms/1983_COMPLAINT_FORM_(Rev_Jan_2008).pdf); Form Complaint (N.D. W. Va.), at 9, <http://www.wvnd.uscourts.gov/sites/wvnd/files/sites/wvnd/files/1983%20Packet%20State%20Civil%20Rights%20Complaint%2012-05-2013.pdf>.

181. *See, e.g.*, Form Complaint (W.D.N.Y.), *supra* note 86, at 2; Form Complaint (E.D.N.C.), *supra* note 84, at 3; Form Complaint (W.D. Mich.), at 2, <http://www.miwd.uscourts.gov/sites/miwd/files/cmpref.pdf>; Form Complaint (E.D. Ark.), *supra* note 85, at 5; Form Complaint (S.D. Cal.), *supra* note 169, at 2. The District of Puerto Rico asks this question on its complaint form for *Bivens* claims, but not for § 1983 claims. *Bivens* Form Complaint (D.P.R.), [http://www.prd.uscourts.gov/sites/default/files/documents/17/form\\_Bivens\\_28\\_USC\\_1331\\_REV\\_06\\_2006.pdf](http://www.prd.uscourts.gov/sites/default/files/documents/17/form_Bivens_28_USC_1331_REV_06_2006.pdf).

182. For example, the District of Hawaii’s form complaint provides a definition and explanation of state action and also describes the difference between individual capacity and official capacity lawsuits. Form Complaint (D. Haw.), *supra* note 180, at 2. The District of Idaho and the Western District of Kentucky similarly attempt to provide a distinction between individual and official capacity suits. Form Complaint (D. Idaho), *supra* note 90, at 2; Form Complaint (W.D. Ky.), *supra* note 85, at 2.

claim against someone acting “under color” of law.<sup>183</sup> In general, this means that there must be “state action” on the part of the defendant.<sup>184</sup> Whether a defendant is a state actor can be difficult to determine, and the state action doctrine has been criticized as hopelessly complex.<sup>185</sup> Thus, a pro se prisoner with no legal training may not know whether a particular defendant is a state actor, or may assume that a defendant is not a state actor when the doctrine actually would direct such a finding. A prisoner who answers “no” when asked if the defendants acted under color of law may be deemed to have conceded that those defendants are not state actors and the defendants may be dismissed from the case, even if the law would support treating them as state actors.<sup>186</sup> On the flip side, no benefit accrues to the prisoner or the court from a conclusory statement that the defendants were acting “under color” of law. Whether there is state action is a legal question. District courts are not required to accept legal conclusions in a complaint as true, but must make their own independent determination based on the facts alleged. Thus, even if a prisoner alleges there was state action, that does not end the court’s inquiry.

The same concerns arise when plaintiffs are asked to indicate whether they are suing the defendants in their individual capacity or their official capacity. Especially given that defendants must be state actors to be sued under § 1983, and because many § 1983 lawsuits arise out of conduct that defendants commit while on the job, pro se plaintiffs might reasonably think that they are suing defendants in their official capacities. But the terms’ legal meanings are more complex. The distinction between official capacity and individual capacity arises out of the fact that courts treat a suit against a state-level defendant in his or her official capacity as a suit against the State itself.<sup>187</sup> Because states have sovereign immunity from damages under the Eleventh Amendment, a plaintiff who checks “official capacity” on the form

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183. 42 U.S.C. § 1983 (2012).

184. *United States v. Price*, 383 U.S. 787, 794 n.7 (1966) (“In cases under § 1983, ‘under color’ of law has consistently been treated as the same thing as the ‘state action’ required under the Fourteenth Amendment.”).

185. *See, e.g.*, *Leshko v. Servis*, 423 F.3d 337, 338 (3d Cir. 2005) (describing state action jurisprudence as “labyrinthine”); Charles L. Black, Jr., *The Supreme Court, 1966 Term — Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 Harv. L. Rev. 69, 95 (1967) (describing the state action doctrine as a “conceptual disaster area”); *see also* *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O’Connor, J., dissenting) (“Unfortunately, our cases deciding when private action might be deemed that of the state have not been a model of consistency.”).

186. *See, e.g.*, *Bunch v. Craig*, 304 F. App’x 669, 670 (10th Cir. 2008) (affirming dismissal of pro se prisoner’s § 1983 claim for failure to state a claim and noting that “Mr. Bunch checked boxes on the complaint form saying that neither defendant was acting ‘under color of state law.’”).

187. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (“[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.”).

complaint will lose any opportunity to pursue damages claims against state officials, although that plaintiff may still obtain injunctive relief.<sup>188</sup> To obtain damages against a state defendant, that defendant must be sued in an individual capacity, because that means that the plaintiff is seeking to hold the defendant personally liable in damages.<sup>189</sup> Relatedly, a plaintiff who sues a municipal employee in an official capacity can recover damages, but only if the plaintiff meets the stringent standard of showing that a municipal “policy or custom” caused the violation.<sup>190</sup>

But it is far from clear that a pro se prisoner will understand these distinctions. Thus, asking plaintiffs to elect options stated in legal terminology provides little benefit to the court and may cause plaintiffs to make mistakes and lose out on the possibility of pursuing claims for damages.<sup>191</sup> The better practice is what the law already requires: for the court to rely on the plaintiff’s factual allegations instead of his legal conclusions to determine whether defendants acted under color of state law and rely on the types of relief the plaintiff requests to determine in what capacity the defendants are sued.<sup>192</sup>

Finally, a handful of form complaints appear to make statements of law or otherwise provide information to prisoners that is not legally correct. For example, the Northern District of Mississippi form complaint warns prisoners of the consequences of the PLRA’s three-strikes rule, stating that

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188. *See id.* at 165–67, 167 n.14.

189. *Id.* at 166.

190. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978).

191. *See, e.g., Trapp v. U.S. Marshals Serv.*, 139 F. App’x 12, 15 (10th Cir. 2005) (noting that the plaintiff, on his form complaint, “checked the box indicating he was suing each of the defendants in their official capacities,” but recognizing that he also intended to raise claims against the individual defendants in their individual capacities). Additionally, asking prisoners to plead whether each defendant is being sued in an individual capacity or an official capacity may be inconsistent with Fed. R. Civ. P. 9(a), which states that a pleading need not allege “a party’s capacity to sue or be sued,” except when necessary to establish the court’s jurisdiction.

192. If the defendant’s capacity is not designated, then the court must read the complaint as a whole to determine each defendant’s status. To be sure, there may be some small risk that a court will treat the suit as an official capacity suit even if the plaintiff seeks damages from individual defendants. *See, e.g., Colvin v. McDougall*, 62 F.3d 1316 (11th Cir. 1995) (reversing award of punitive damages against defendant where the complaint did not specify the defendant’s capacity and the court interpreted the complaint as an official capacity suit); *Lovelace v. O’Hara*, 985 F.2d 847 (6th Cir. 1993) (treating suit that did not expressly state whether defendant was sued in individual or official capacity as an official capacity suit only and reversing district court that allowed the plaintiff to amend the complaint to name the defendant in his individual capacity). More likely, however, is that courts can assess the defendant’s capacity based on whether or not the plaintiff requests damages.

Additionally, prisoners might not always be aware of the types of relief that they can request or that are available to them. A form complaint can aid prisoners in this respect by providing a short description of different kinds of remedies. Our model complaint form contains a “Relief” section that informs prisoners to inform the court if they are seeking money damages, if they are asking the defendants to do something or to stop doing something, or if they want both kinds of relief. *See Appendix, infra.*

a prisoner who collects three-strikes “*will be barred* from bringing any further civil action or appeal a judgment in a civil action or proceeding unless the prisoner is under imminent danger of serious physical injury.”<sup>193</sup> That statement is over-inclusive. The PLRA only bars prisoners with three-strikes from filing future IFP actions, but it places no restrictions on a prisoner’s ability to file civil actions if the prisoner is not IFP.<sup>194</sup> The District of Montana form complaint states that “[p]risoners may not maintain more than two civil actions in forma pauperis at one time, unless the prisoner shows that he or she is under imminent danger of serious physical injury.”<sup>195</sup> Although the District of Montana has a local rule to that effect, nothing in the PLRA or in the federal *in forma pauperis* statute<sup>196</sup> limits prisoners to two concurrent IFP actions.

#### IV. RECOMMENDATIONS AND MODEL FORM COMPLAINT

The form complaints used by federal district courts are designed with good intentions and with the important goal of helping pro se prisoners plead their claims so that courts may more easily identify potential merit.<sup>197</sup> Federal judges have emphasized that standardized forms, including form complaints, are among “the most effective measures for handling pro se cases.”<sup>198</sup> At the same time, as our empirical review of form complaints has shown, there are several ways in which form complaints are inconsistent with governing law and may thwart their intended goals. Reassessment is needed.

To address these concerns, we have developed a revised model complaint form, included as an appendix, which encompasses our recommendations.<sup>199</sup> Much of the language of our revised model complaint, and in particular the instructions about pleading, comes directly from form complaints currently in use, and our model form is annotated to show the

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193. Form Complaint (N.D. Miss.), *supra* note 84 (emphasis added).

194. 28 U.S.C. § 1915(g) (2012) (prohibiting prisoners with three strikes from bringing future civil actions under the federal *in forma pauperis* statute).

195. Form Complaint (D. Mont.), *supra* note 169, at 3.

196. 28 U.S.C. § 1915 (2012).

197. *See, e.g., Durham v. Lappin*, 346 F. App’x 330, 333 (10th Cir. 2009) (stating that prisoner form complaints and the local rules requiring their use are designed “for the prisoner’s own benefit,” and that they “advance[] the legitimate goal of providing guidance to pro se prisoners as to the legal requirements of a complaint”).

198. ASSISTANCE TO PRO SE LITIGANTS, *supra* note 4, at 37–38; *Brock v. Carroll*, 107 F.3d 241, 246 (4th Cir. 1997) (Phillips, J., concurring and dissenting) (stating that form complaints “have ‘proved extremely helpful . . . in clarifying pleadings often almost hopelessly confused and unintelligible.’” (quoting *Serna v. O’Donnell*, 70 F.R.D. 618, 620 (W.D. Mo. 1976) (alteration in original))).

199. *See* Appendix, *infra*.

proposed language's source and explain why it is included. We hope that the model form best serves the federal judiciary's original twin aims of helping the courts manage pro se prisoner litigation while also ensuring that potentially meritorious claims are not improperly dismissed or overlooked. We try to strike that balance in the following ways.

First, the model form does not include a requirement to plead facts related to administrative exhaustion. After *Jones*, such facts are definitively part of an affirmative defense and must be the defendant's burden. Although a substantial majority of form complaints require plaintiffs to plead facts about exhaustion, nearly 20 percent do not. Thus, it is possible to have a functional and effective form complaint that does not ask about exhaustion.<sup>200</sup> To that end, the Fifth Circuit has held that "a district court cannot by local rule sidestep *Jones* by requiring prisoners to affirmatively plead exhaustion" in their form complaints.<sup>201</sup> Courts in that circuit have refused to rely on statements regarding exhaustion that a plaintiff makes pursuant to the requirements of the form complaint.<sup>202</sup>

Second, the revised model form does not require a prisoner plaintiff to plead his litigation history in circumstances where a non-prisoner plaintiff would not be required to do so. Courts may obtain information to help them administer and process their cases by other means.<sup>203</sup> Courts can obtain this information quickly through PACER, or through use of the three strikes database.<sup>204</sup>

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200. A good example is the form complaint used by the U.S. District Court for the Western District of Kentucky, which instructs prisoners that exhaustion is required before filing suit, but says that prisoners do not have to provide information about exhaustion in the complaint. Form Complaint (W.D. Ky.), *supra* note 85.

201. *Carbe v. Lappin*, 492 F.3d 325, 328 (5th Cir. 2007).

202. *See, e.g., Perkins v. Collins*, 482 F. App'x 959, 960 (5th Cir. 2012) (per curiam) ("Here, the court relied on Perkins's response to Question III on a form complaint, which asked whether he had exhausted his administrative remedies. . . . Reliance on information elicited by such a form complaint effectively put the onus on Perkins to affirmatively plead and demonstrate exhaustion . . ."); *McDonald v. Cain*, 426 F. App'x 332, 333 (5th Cir. 2011) ("The prohibition against requiring prisoners to affirmatively plead exhaustion has been further interpreted by this court to encompass questions in 'form complaint[s]' issued by district courts that are designed to elicit 'information about [a prisoner's] exhaustion of administrative remedies.'" (quoting *Torns v. Miss. Dep't of Corrs.*, 301 F. App'x 386, 389 (5th Cir. 2008) (alterations in original))).

203. *See, e.g., Carbe*, 492 F.3d at 327–28 (describing the use of "*Spears* hearings" in courts within the Fifth Circuit as a way of collecting information relevant for determining whether a complaint should be dismissed before the defendants are served).

204. *See supra* note 135 and accompanying text. For example, the court could request litigation history information on the form but not treat it as part of the pleading—i.e. not rely on that information at the motion to dismiss stage. Courts may request such information in a civil docketing statement or case information sheet that might accompany the complaint. Such forms are not considered part of a pleading and are not relied on for evaluating the complaint's sufficiency. *See, e.g., Favors v. Coughlin*, 877 F.2d 219, 220 (2d Cir. 1989) (per curiam) ("The civil cover sheet, of course, is merely an

With respect to whether a form complaint places burdens on a prisoner's ability to plead sufficient facts to state a claim, we recommend several changes. First, we recommend that the form continue to direct the plaintiff toward pleading only relevant and specific facts, but not include language encouraging plaintiffs to state their facts "briefly." We have adopted a mix of language that several districts currently use that captures the need to provide detail while focusing the plaintiff on facts, as follows:

State only the facts of your claim below. Include all the facts you consider important.<sup>205</sup> Be as specific as possible.<sup>206</sup> Make sure to describe exactly what each defendant did or failed to do that caused the alleged wrong<sup>207</sup> and include any other facts that show why you believe what happened was wrong. You should include the names of all persons involved, when the events took place, where the events took place, what each person did or did not do, and a description of how you believe you were injured or how your rights were violated.<sup>208</sup>

If you need additional space, you may attach extra sheets. If you

administrative aid to the court clerk, and is therefore not typically considered part of a litigant's pleading papers."); S. DIST. FLA. LOCAL RULE 3.3 (2014) (stating that cover sheet is "solely for administrative purposes" and that "matters appearing only in the civil cover sheet have no legal effect in the action"); *see also* Wall v. Nat'l R.R. Passenger Corp., 718 F.2d 906, 909 (9th Cir. 1983) (noting that the civil docketing statement is just an administrative aid for the court in managing the case, and often is not served on the opposing party). But this approach also has drawbacks. It would add another form for the pro se prisoner to fill out, which may increase the opportunity for error or may cause some prisoners to decide not to file a lawsuit at all because of the added burden. And there always is the risk that courts will rely on the information in a cover sheet, even if it is not technically part of the pleading.

205. Several form complaints currently in use utilize similar language. *See, e.g.*, Form Complaint (D. Colo.), *supra* note 179, at 4; Form Complaint (D. Kan.), *supra* note 93, at 3; Form Complaint (D. Mont.), *supra* note 169, at 6; Form Complaint (D. Nev.), *supra* note 96, at 6; Form Complaint (D.N.M.), *supra* note 86, at 3; Form Complaint (E.D. Okla.), at 2, <http://www.oked.uscourts.gov/sites/oked/files/forms/Pro%20Se%20Complaint.pdf>; Form Complaint (N.D. Okla.), *supra* note 93, at 2; Form Complaint (S.D. Cal.), *supra* note 169, at 3; Form Complaint (C.D. Cal.), *supra* note 86, at 5.

206. A number of form complaints direct plaintiffs to be specific. *See, e.g.*, Form Complaint (D. Ariz.), *supra* note 88, at 4 ("Be as specific as possible."); Form Complaint (D. Conn.), at 5, <http://www.ctd.uscourts.gov/sites/default/files/forms/Prisoner%20Civil%20Rights%20Complaint%20Rev%203-16-16.pdf> ("[B]e specific about dates, times, and the names of the people involved.").

207. *See, e.g.*, Form Complaint (S.D. Ind.), at 2, <http://www.insd.uscourts.gov/sites/insd/files/forms/Prisoner%20Complaint%20Form.pdf>; Form Complaint (E.D. Mo.), at 5, <http://www.moed.uscourts.gov/sites/default/files/moed-0036.pdf>; Form Complaint (D. Neb.); Form Complaint (S.D. Iowa), *supra* note 88, at 4; Form Complaint (D. Ariz.), *supra* note 88, at 3; Form Complaint (S.D. Cal.), *supra* note 169, at 3; Form Complaint (D. Haw.), *supra* note 180, at 5; Form Complaint (D. Nev.), *supra* note 96, at 6; Form Complaint (D. Utah), [http://www.utd.uscourts.gov/forms/civilrt\\_guide.pdf](http://www.utd.uscourts.gov/forms/civilrt_guide.pdf); Form Complaint (E.D. Tex.), *supra* note 84, at 4.

208. Several districts direct plaintiffs to describe the facts in this "who, what, where, when, how" format. *See, e.g.*, Form Complaint (W.D. Tex.), *supra* note 93, at 4; Form Complaint (E.D. Ky.); Form Complaint (D. Kan.), *supra* note 93, at 3.

wish to include any documents that support the facts of your claim, you may attach them to this completed form.<sup>209</sup> Please refer to specific documents whenever you rely on those documents to support your factual allegations.

Any claims that are not related to these events or to the injury you suffered should be raised in a separate civil action.

Second, like many form complaints currently in use, the proposed model form informs plaintiffs that they may attach additional sheets if they find they do not have sufficient space to describe their factual allegations. We recommend that all districts explicitly inform plaintiffs that they may use additional sheets if they need more space and clarify that (a) more than a single sheet may be provided, and (b) the additional sheets may be used for providing expanded information about a single claim rather than just for adding new claims or defendants.<sup>210</sup>

Third, we recommend that form complaints should neither prohibit nor discourage prisoners from attaching documents to their complaint, especially because such a restriction appears to be inconsistent with the law regarding pleading.<sup>211</sup> In many cases, attaching documents may promote clarity and may amplify the factual details of the plaintiff's claim, thus promoting the primary goals of the form complaint. The model form informs plaintiffs that they may attach documentation to support their claims. To mitigate against the risk that prisoners will submit mountains of paper for judges to sift through, the complaint instructs prisoners to provide citations or references to specific exhibits when they relate to the facts they allege in the complaint.

Fourth, the model form contains separate sections for plaintiffs to plead their factual allegations and to state the legal grounds for their claim. This gives plaintiffs an opportunity to cite cases or other legal authority that might help the court discern the relevance of the factual allegations without cluttering up the fact section with legal conclusions. As stated earlier, a number of forms already utilize these separate sections.<sup>212</sup>

Fifth, the proposed model form, unlike most current form complaints,

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209. See, e.g., Form Complaint (S.D. Ill.), *supra* note 86, at 5 (instructing plaintiffs that when describing the facts of the claim, “[y]ou should also attach any relevant, supporting documentation.”); see also JUSTICE & DIVERSITY CTR., BAR OF S.F., INSTRUCTIONS: WRITING AND FILING A COMPLAINT [www.cand.uscourts.gov/filelibrary/491/Complaint%20packet.pdf](http://www.cand.uscourts.gov/filelibrary/491/Complaint%20packet.pdf) (last visited Dec. 20, 2016) (“You may attach documents that support your claims to the end of this Complaint as exhibits.”).

210. See *infra* Appendix.

211. See *supra* notes 176–177 and accompanying text.

212. See *supra* note 179 and accompanying text.



does not require the prisoner to verify the complaint under the penalty of perjury. The Federal Rules of Civil Procedure do not require other plaintiffs to file verified complaints, except in special circumstances, and requiring prisoners to verify therefore places an extra burden on them that is not faced by most other litigants.<sup>213</sup> Mandating a verified complaint increases the risk that a pro se plaintiff will be sanctioned or face perjury charges if the complaint contains an error or a misstatement. Nor is verification necessary. The committee that drafted the original form complaint included the verification requirement as “a reasonable substitute for the sanction imposed on attorneys by Rule 11, Federal Rules of Civil Procedure.”<sup>214</sup> This is unnecessary, as Rule 11 has always applied to unrepresented parties, dating back to the Rule’s adoption in 1937.<sup>215</sup> The fact that pro se parties are subject to Rule 11 sanctions eliminates the need to also require them to verify their complaint. Our model form includes the Rule 11 standard instead of a requirement for verification.

Our model form does not ask plaintiffs to identify whether they are suing the defendants in their individual or official capacities or to explain how the defendants acted under color of state law. Courts may assess these questions more accurately and easily by looking to the nature of the plaintiffs’ allegations and their claims for relief rather than to their answers to these questions. Courts should consider whether the questions that their form complaints ask provide real value or instead create opportunities for mistake and confusion by unsophisticated pro se litigants.

Because the law is fluid and will continue to change, we believe that district courts should designate a staff person to periodically review their forms for compliance with governing law and to evaluate their effectiveness. To the extent that form complaints raise concerns, those concerns most likely are inadvertent and reflect how forms simply have not always kept up with changes in the law. Requiring regular review of form complaints will help ensure that, as the law evolves, form complaints evolve in corresponding fashion.

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213. See *supra* note 145.

214. 1976 Report, *supra* note 16, at 30.

215. See FED. R. CIV. P. 11(b) (1937), <http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-april-1937> (“A party who is not represented by an attorney shall sign the pleading and shall be subject to the obligations and penalties herein prescribed for attorneys.”). The current version of the rule also applies to “an attorney or unrepresented party.” FED. R. CIV. P. 11(b).

### CONCLUSION

Pro se prisoners face significant hurdles in seeking to vindicate civil rights violations they suffer while in prison, and federal judges face significant burdens in managing the large volume of pro se prisoner cases on their dockets. Standardized form complaints carry the potential to greatly assist both pro se plaintiffs and the courts in managing pro se prisoner litigation and in enabling potentially meritorious complaints to move beyond the motion to dismiss stage. As our systematic review of prisoner form complaints has shown, however, many of the form complaints currently used impose unnecessary burdens on prisoners and the courts that are inconsistent with governing law.

We recognize that what we suggest may only be a drop in the proverbial bucket. There are other, more significant, factors that contribute to the challenges of pro se prisoner litigation. Federally funded legal services are not available to prisoners and the resources of private or state-funded services are severely limited. Prison law libraries' resources have been dramatically reduced. The PLRA creates additional complexities not contemplated here. But the fact that those additional challenges exist provides all the more reason that courts should now ensure that the forms they provide perform their intended function of reducing burdens for pro se prisoners and judges. We hope that this Article and proposed model complaint will serve as a guide to district courts in creating forms that help, not hinder, pro se prisoners in pleading their claims and judges in more efficiently and effectively addressing prisoner litigation.

APPENDIX<sup>216</sup>

**MODEL FORM COMPLAINT FOR PRISONERS FILING CIVIL RIGHTS ACTIONS IN FEDERAL COURT**

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF \_\_\_\_\_**

_____ )	
_____ )	
_____ )	
(Include the full name and register number )	
of every plaintiff who is filing this )	Case No. _____
complaint.) )	
)	(Leave blank to be filled
)	by Clerk’s Office.)
Plaintiff(s). )	
)	
v. )	
)	
_____ )	
_____ )	
(Include the full name of every defendant )	
who is being sued. Do not use “et al.”) )	
)	
)	
Defendant(s) )	

*If the names of all parties do not fit in the space above, you may attach additional pages. Do not include addresses in this section.*

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216. The form complaints currently in use are created for and printed on 8.5x11 inch letter-sized paper. The print version of this article appears on smaller margins and so the model form complaint may appear unnaturally condensed. A full-size version of the model form complaint is available at <http://www.drexel.edu/~media/A69008C091854D35A248EC728C068DD1.ashx> (last visited July 19, 2017).

**Caution:**

1. **Do not use this form if you are challenging the validity of your criminal conviction or sentence. If you are challenging your conviction or sentence, you must file a petition for a writ of habeas corpus under 28 U.S.C. § 2254 or a motion to vacate, set aside, or correct a sentence under 28 U.S.C. § 2255. Separate forms are available for these filings. If you use this form to challenge your conviction or sentence, you risk having your claim dismissed.**<sup>217</sup>
2. **Under the Prison Litigation Reform Act, you are required to exhaust all remedies in your prison's grievance system that are available to you before filing suit. This generally means that you must file a grievance and, if it is denied, appeal it through all available levels of review. Your case may be dismissed if you fail to exhaust administrative remedies. However, you are not required to plead or show that you have exhausted your claim in this complaint.**<sup>218</sup>

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217. Several districts provide this warning. *See, e.g.*, Form Complaint (E.D. Va.); Form Complaint (W.D. Ky.), *supra* note 85, at 6; Form Complaint (E.D. Cal.), *supra* note 104, at 1; Form Complaint (N.D. Cal.), *supra* note 96, at 1. A complaint styled as a civil rights action that is a challenge to a criminal conviction or sentence may be dismissed for failure to state a claim and count as a strike under the PLRA. *See, e.g.*, *Padilla v. Enzor*, 279 F. App'x. 606, 610–12 (10th Cir. 2008) (explaining that a district court has discretion to dismiss civil rights claims challenging a conviction or sentence or to recharacterize the complaint as a habeas action). It is worth noting that the FJC committee originally considered “including instructions describing the distinction . . . between habeas corpus and § 1983” but decided not to because the committee did not feel that it was appropriate to give legal advice and worried that trying to distill the law into a single sentence could result in inaccuracies that would “be misleading to the inmate.” 1976 REPORT, *supra* note 16, at 29. To be sure, any attempt to synthesize a legal doctrine into one or two sentences inevitably carries risk of being not fully accurate, or of failing to encompass uncommon circumstances. However, we believe that in light of the subsequent passage of the PLRA and the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), prisoners and courts are better served by a warning of the consequences of filing a civil rights claim that is really a habeas claim.

218. *See, e.g.*, Form Complaint (W.D. Ky.), *supra* note 85. Although many form complaints warn plaintiffs that they must exhaust available administrative remedies, we chose the language used by the Western District of Kentucky because in addition to warning plaintiffs about the need for exhaustion, it also tells them that they are not required to plead exhaustion in the complaint. For the same reasons that we include a warning regarding claims challenging a conviction or sentence, we also include a warning that prisoners ordinarily must exhaust available remedies before filing suit. This provides the benefit of

3. **Review your case carefully before filing. If your case is dismissed, it may affect your ability to file future civil actions while incarcerated without prepaying the full filing fee. Under the Prison Litigation Reform Act, a prisoner who has had three or more civil actions or appeals dismissed as frivolous, malicious, or for failure to state a claim cannot file a new action without first paying the full filing fee, unless the prisoner is in imminent danger of serious bodily injury.<sup>219</sup> You must also certify that this action is supported by law and fact and is not being brought for an improper purpose, such as to harass, to cause undue delay, or to increase the cost of litigation.**

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informing a prisoner that he must exhaust administrative remedies without requiring a statement that he did so as part of the complaint. We also recognize that there are some situations in which a prisoner can pursue a claim even where the claim was not exhausted at the administrative level. *See supra* notes 107–108 and accompanying text. However, we believe that on balance, the warning is more likely to aid prisoners than to mislead them.

219. Many complaints warn plaintiffs about the consequences of accruing three strikes under the PLRA. *See, e.g.*, Form Complaint (N.D. W. Va.), *supra* note 180, at 2; Form Complaint (E.D. La.), *supra* note 88, at 5; Form Complaint (M.D. La.), *supra* note 88; Form Complaint (N.D. Miss.), *supra* note 84; Form Complaint (E.D. Ark.), *supra* note 85, at 3; Form Complaint (S.D. Iowa), *supra* note 88; Form Complaint (N.D. Cal.), *supra* note 96, at 2; Form Complaint (D. Mont.), *supra* note 169, at 3.

**I. PARTIES TO THIS CIVIL ACTION:**

Provide the information below for each plaintiff and defendant named in the complaint. You may attach additional pages if needed.

**Plaintiff(s)**

Name: \_\_\_\_\_  
 ID Number: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**Defendant(s)**

Name: \_\_\_\_\_  
 Job or Title (if known): \_\_\_\_\_  
 Employer (if known): \_\_\_\_\_  
 Address: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**II. STATEMENT OF FACTS:**

State only the facts of your claim below. Include all the facts you consider important.<sup>220</sup> Be as specific as possible.<sup>221</sup> Make sure to describe exactly what each defendant did or failed to do that caused the alleged wrongful action<sup>222</sup> and include any other facts that show why you believe what

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220. Several form complaints currently in use utilize similar language. *See, e.g.*, Form Complaint (D. Colo.), *supra* note 179, at 4; Form Complaint (D. Kan.), *supra* note 93, at 2; Form Complaint (D. Mont.), *supra* note 169, at 6; Form Complaint (D. Nev.), *supra* note 96, at 6; Form Complaint (D.N.M.), *supra* note 86, at 3; Form Complaint (E.D. Okla.), *supra* note 205, at 2; Form Complaint (N.D. Okla.), *supra* note 93, at 2; Form Complaint (S.D. Cal.), *supra* note 169, at 3; Form Complaint (C.D. Cal.), *supra* note 86, at 5.

221. A number of form complaints direct plaintiffs to be specific. *See, e.g.* Form Complaint (D. Ariz.), *supra* note 88, at 4 (“Be as specific as possible.”); Form Complaint (D. Conn.), *supra* note 206, at 5 (“[I]t is important to be specific about dates, times, and the names of the people involved.”).

222. *See, e.g.*, Form Complaint (S.D. Ind.), *supra* note 207, at 2; Form Complaint (E.D. Mo.), *supra* note 207, at 5; Form Complaint (D. Neb.); Form Complaint (S.D. Iowa), *supra* note 88, at 4; Form Complaint (D. Ariz.), *supra* note 88, at 3; Form Complaint (S.D. Cal.), *supra* note 169, at 3; Form Complaint (D. Haw.), *supra* note 180, at 5; Form Complaint (D. Nev.), *supra* note 96, at 6; Form Complaint (D. Utah), *supra* note 207; Form Complaint (E.D. Tex.), *supra* note 84, at 4.



### III. STATEMENT OF LEGAL CLAIM:<sup>225</sup>

You are not required to make legal argument or cite any cases or statutes in this complaint.<sup>226</sup> However, you may state what constitutional rights, statutes, or laws you believe were violated by these actions. You may cite cases or statutes if relevant.

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### IV. INJURY:

Describe with specificity what injury, harm, or damages you suffered as a result of the events you describe above.

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225. Many districts follow this format of separating the statement of facts from the statement of the cause of action. This format gives prisoners the opportunity to identify their legal claims if they wish, while still ensuring that the statement of facts does not get cluttered up with legal argument. *See, e.g.*, Form Complaint (D.P.R.), *supra* note 181; Form Complaint (E.D. Ky.); Form Complaint (E.D. Mich.), *supra* note 84, at 4–7; Form Complaint (D. Neb.); Form Complaint (S.D. Cal.), *supra* note 169, at 3; Form Complaint (D. Idaho), *supra* note 90, at 2; Form Complaint (D. Mont.), *supra* note 169, at 6; Form Complaint (D. Nev.), *supra* note 96, at 6; Form Complaint (D. Colo.), *supra* note 179, at 4; Form Complaint (D. Kan.), *supra* note 93, at 2; Form Complaint (D.N.M.), *supra* note 86, at 2–3; Form Complaint (M.D. Ala.), *supra* note 93; Form Complaint (M.D. Fla.), *supra* note 179, at 5; Form Complaint (N.D. Fla.), *supra* note 173, at 6–7.

226. A *pro se* prisoner's identification of the legal causes of action or rights violated is meant to help provide guidance for the district court reviewing the complaint. However, a *pro se* prisoner's misidentification of the relevant cause of action, or the prisoner's failure to identify a legal cause of action, should not affect the sufficiency of the complaint. That is because the sufficiency of the complaint is determined by the facts alleged and not by the legal labels attached to them. *See, e.g.*, *Castro v. United States*, 540 U.S. 375, 381–82 (2003) (citations omitted) (“Federal courts sometimes will ignore the legal label that a *pro se* litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category. They may do so in order to avoid an unnecessary dismissal, to avoid inappropriately stringent application of formal labeling requirements, or to create a better correspondence between the substance of a *pro se* motion's claim and its underlying legal basis.”).



**V. RELIEF:**

State exactly what you want the court to do for you. For example, you may be seeking money damages, you may want the court to order a defendant to do something or to stop doing something, or you may be seeking both kinds of relief.

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**VI. SIGNATURE**

By signing this complaint, you represent to the court that the facts alleged are true to the best of your knowledge and are supported by evidence, that those facts show a violation of law, and that you are not filing this complaint to harass another person or for any other improper purpose.<sup>227</sup>

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Signature of Plaintiff(s)

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Date of Signing

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227. This form complaint does not require prisoners to file a verified complaint, that is, to swear under the penalty of perjury that the information contained in the complaint is true. Requiring prisoners to verify their complaints places a burden on them that does not apply to other litigants and that risks them being threatened with perjury charges if the complaint contains an error. *See supra* notes 145–146 and accompanying text. At the same time, we recognize that a prisoner can sometimes benefit from filing a verified complaint. That is because a verified complaint can also be treated as an affidavit at later stages of the litigation, including at summary judgment. *See, e.g., Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991); *Williams v. Adams*, 935 F.2d 960, 961–62 (8th Cir. 1991).