
COMMENT

ILLIBERAL CONSTRUCTION OF PRO SE PLEADINGS

RORY K. SCHNEIDER[†]

INTRODUCTION.....	586
I. PRO SE LITIGATION AND LIBERAL CONSTRUCTION	589
A. <i>The Right to Proceed Pro Se</i>	590
B. <i>The Federal Pro Se Docket</i>	591
1. Evidence of a Burgeoning Caseload	591
2. Reasons Litigants Represent Themselves.....	593
3. Challenges Facing Pro Se Litigants	597
C. <i>Liberal Construction</i>	600
1. The Method by Which Courts Liberally Construe Pro Se Complaints	601
2. The Theory Behind Liberal Construction.....	604
II. PLAUSIBILITY AND PRO SE PLEADINGS	607
A. <i>Ashcroft v. Iqbal</i>	608
1. Background and Prior History	608
2. The Supreme Court's Two-Pronged Approach.....	609
B. <i>Iqbal's Impact on Pro Se Pleadings</i>	612
1. The Minimal Assurance Provided Pro Se Litigants by <i>Erickson v. Pardus</i>	613
2. <i>Iqbal's</i> Exceptional Hostility Toward Pro Se Complaints	617
3. Explanations for the Disproportionate Increase in Pro Se Dismissals.....	619

[†] Comments Editor, *University of Pennsylvania Law Review*, Volume 159. J.D. Candidate, 2011, University of Pennsylvania Law School; B.A., 2008, The George Washington University. In loving memory of Barbara Ledet, for whose unconditional support I will forever be grateful.

a. <i>Necessarily Conclusory Allegations</i>	619
b. <i>Biased Plausibility</i>	622
III. REFASHIONING LIBERAL CONSTRUCTION IN A POST-PLAUSIBILITY ERA.....	625
A. <i>Restraining Judicial Authority to Carve Complaints</i>	625
B. <i>Making Inferences Transparent to Assist with Complaint Amendments</i>	628
C. <i>Addressing Concerns Related to Neutrality, Caseload, and Abuse</i>	630
CONCLUSION.....	632

INTRODUCTION

Both the right to proceed pro se and liberal pleading standards reflect the modern civil legal system's emphasis on protecting access to courts.¹ Self-representation has firm roots in the notion that all individuals, no matter their status or wealth, are entitled to air grievances for which they may be entitled to relief.² Access, then, must not be contingent upon retaining counsel, lest the entitlement become a mere privilege denied to certain segments of society. Similarly, because pleading is the gateway by which litigants access federal courts, the drafters of the Federal Rules of Civil Procedure purposefully eschewed strict sufficiency standards.³ In their place, the drafters instituted a regime in which a complaint quite easily entitled its author to discovery in order to prevent dismissal of cases before litigants have had an adequate opportunity to demonstrate their merit.⁴

Far from just articulating a common systemic value, though, the right to prosecute one's own case without assistance of counsel in fact

¹ See, e.g., *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008) ("Few issues . . . are more significant than pleading standards, which are the key that opens access to 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, 1546 (2005) (noting that "[o]pen access to the courts for all citizens" is one of the principles upon which the right to prosecute one's own case is founded).

² See Swank, *supra* note 1, at 1546 (discussing the importance of self-representation to the fundamental precept of equality before the law).

³ See *Proceedings of the Institute on Federal Rules* (1938) (statement of Edgar Tolman), reprinted in *RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES* 301-13 (William W. Dawson ed., 1938).

⁴ See Mark Herrmann, James M. Beck & Stephen B. Burbank, Debate, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?* 158 U. PA. L. REV. PENNUMBRA 141, 148 (2009), <http://pennumbra.com/debates/pdfs/PlausibleDenial.pdf> (Burbank, Rebuttal) (asserting that the drafters of the Federal Rules objected to a technical pleading regime because it would "too often cut[] off adjudication on the merits").

depends significantly upon liberal pleading standards.⁵ The ability to file a “short and plain statement of the claim”⁶ mitigates the impact that the choice to proceed pro se has on litigants’ access to discovery by reducing the number of technicalities and requirements the satisfaction of which demands legal expertise. However, recognizing that transsubstantive pleading standards do not sufficiently account for the capability differential between represented and unrepresented litigants, the Supreme Court fashioned a rule of special solicitude for pro se pleadings.⁷ Accordingly, “*pro se* complaint[s], ‘however inartfully pleaded,’ [are] held to ‘less stringent standards than formal pleadings drafted by lawyers.’”⁸

Notably, however, the Court granted such leniency, or “liberal construction,” to pro se pleadings against the backdrop of *Conley v. Gibson*’s undemanding “no set of facts” standard.⁹ The Court’s failure to explain how pro se pleadings are to be liberally construed¹⁰ indicates its belief that the standard was already lenient enough to render a detailed

⁵ Cf. Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 976-77 (1937) (commenting that liberal pleading rules were necessary to mitigate information asymmetries between plaintiffs and defendants that often led to premature dismissal of suits). Notably, in no suits are such information asymmetries more apparent than those in which pro se litigants sue represented adversaries. These types of suits comprise the vast majority in which pro se litigants appear. Cf. Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 323 (showing that the majority of pro se cases involve unrepresented plaintiffs who sue governmental defendants).

⁶ FED. R. CIV. P. 8(a).

⁷ See Robert Bacharach & Lyn Entzerth, *Judicial Advocacy in Pro Se Litigation: A Return to Neutrality*, 42 IND. L. REV. 19, 22-26 (2009) (noting that courts created ways to ensure that meritorious pro se suits would not be dismissed simply because the litigants lacked legal knowledge and experience, one of which was liberal construction).

⁸ *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (quoting *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam)).

⁹ See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (“[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.”), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561-63 (2007). This standard epitomized the notice-pleading regime envisioned by the drafters of the Federal Rules, who emphasized discovery as the stage at which a claim’s true merit would come to light, rather than pleading. See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990 (2003) (“With merits determination as the goal, the Federal Rules create a new procedural system that massively deemphasizes the role of pleadings.”).

¹⁰ See Bacharach & Entzerth, *supra* note 7, at 29-30 (asserting that because the Supreme Court never defined the “degree of relaxation” afforded pro se pleadings in comparison to the liberal notice pleading standard applicable to all litigants, lower courts adopted different iterations of the rule).

articulation of the practice unnecessary to prevent premature dismissal of meritorious cases. However, with *Bell Atlantic Corp. v. Twombly*¹¹ and *Ashcroft v. Iqbal*¹² retiring the “no set of facts” standard and ratifying the means by which lower courts dismissed more disfavored cases under *Conley*,¹³ liberal construction as presently practiced is not—if it ever was—sufficient to protect pro se litigants’ access to courts.

The new plausibility standard¹⁴ with which courts now determine the adequacy of complaints disproportionately harms pro se litigants.¹⁵ First, the Supreme Court’s instruction that “conclusory” facts not be presumed true when determining a claim’s plausibility¹⁶ will affect those who (1) lack the resources to develop facts before discovery, (2) bring claims requiring them to plead information exclusively within the opposition’s possession, or (3) rely on forms in drafting complaints. Pro se litigants typify the parties who demonstrate all three behaviors. Second, determining whether the remaining allegations permit a plausible inference of wrongdoing, as per the Supreme Court’s instruction,¹⁷ is a wildly subjective endeavor. Courts are likely—no doubt unintentionally—to draw inferences that disfavor pro se litigants because their “judicial common sense” judgments of what is plausible result from a

¹¹ 550 U.S. 544 (2007).

¹² 129 S. Ct. 1937 (2009).

¹³ See generally Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 435-37 (1986) (explaining how the reemergence of fact pleading resulted from lower courts’ refusals to accept conclusory allegations as sufficient under the Federal Rules in particular categories of suits).

¹⁴ See *Twombly*, 550 U.S. at 570 (requiring a complaint to allege “enough facts to state a claim to relief that is plausible on its face”).

¹⁵ See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 615 (2010) (observing a substantially greater increase in the rate of dismissal of pro se suits than represented suits post-*Iqbal*).

¹⁶ See *Iqbal*, 129 S. Ct. at 1951 (“[T]he allegations are conclusory and not entitled to be assumed true.”); Hatamyar, *supra* note 15, at 579 (“*Iqbal* invites judges to . . . eliminate from consideration all the complaint’s conclusory allegations . . .”). The parsing of a complaint into conclusory and nonconclusory factual allegations disregards the Federal Rules’ express disavowal of fact pleading, along with their requirement that all facts be presumed true when determining the adequacy of a complaint. See, e.g., Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 115 (2009) (noting that the drafters of the Federal Rules rejected fact pleading because of the impossibility of distinguishing between conclusions and facts); Hatamyar, *supra* note 15, at 563 (discussing courts’ obligations to credit as true all factual allegations in a complaint).

¹⁷ See *Iqbal*, 129 S. Ct. at 1950 (“When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”).

drastically different set of background experiences and values.¹⁸ The admixture of these two steps portends serious trouble for pro se litigants, who, even before the plausibility standard, did not fare well despite the leeway afforded their complaints.¹⁹

Accordingly, this Comment reevaluates the effectiveness of liberal construction as a bulwark against premature dismissal of pro se complaints. Part I discusses pro se litigation generally. It documents the rise of the federal pro se docket, the reasons individuals choose to proceed pro se, and the unique challenges they face as a result of that choice. Because courts established liberal construction in response to those challenges, Part I ends by considering how this leniency operates in practice. Part II examines in detail the new plausibility standard articulated by the Supreme Court in *Iqbal*. Particularly, it dissects the Court's two-pronged approach to demonstrate how each step is uniquely hostile to pro se litigants. This hostility explains the disproportionate impact that the decision has had and will continue to have on their complaints. Part III suggests a way to reinvigorate the leeway afforded pro se litigants and bring self-representation closer to epitomizing our system's goal of providing equal court access. Specifically, Part III advocates for (1) limiting disregard of "conclusory" factual allegations in pro se pleadings and (2) increasing transparency with respect to the inferences drawn against pro se litigants.

I. PRO SE LITIGATION AND LIBERAL CONSTRUCTION

To evaluate liberal construction effectively, it is vital to understand the origins and characteristics of pro se litigation generally. Recounting the roots from which the right to proceed pro se developed and the current prevalence of pro se cases in federal court demonstrates the importance of maintaining formidable protections against early dismissal. Moreover, dispelling common assumptions about why individuals proceed pro se shows that their rate of dismissal may be disproportionately greater than the rate at which they file unmeritorious claims. Thus, liberal construction has earned a reevaluation to ensure that it properly accomplishes the goals for which it was originally established.

¹⁸ Cf. Burbank, *supra* note 16, at 118 (suggesting that reliance on "judicial experience and common sense," *Iqbal*, 129 S. Ct. at 1950, invites "cognitive illiberalism," a phenomenon that negatively affects classes of disfavored litigants).

¹⁹ See Hatamyar, *supra* note 15, at 615 (noting that, under *Conley*, courts dismissed sixty-seven percent of pro se cases).

A. *The Right to Proceed Pro Se*

Like many elements of the American legal system, the ability to civilly prosecute one's own case has its origins in British common law.²⁰ Historically, these ties were so strong, in fact, that "[t]he Founders believed that self-representation was a basic right of a free people."²¹ As such, our early legal regimes heavily guarded the ability to proceed pro se; their commitment demonstrates both egalitarian and democratic ideals.

First, a fundamental precept of American law is that financial status should neither determine access to courts nor substantially alter the outcomes of cases.²² Individuals who are unable to afford attorneys should not be denied a forum in which to air their grievances.²³ To ensure that they are not, any party to a case has long been able to proceed without a lawyer. Importantly, however, considerable "anti-lawyer sentiment" also firmly ingrained the right to self-representation into the American system.²⁴ This sentiment emphasizes that self-representation safeguards were not solely intended to protect the poor's access to courts; they also empowered citizens of all types to have their own voices heard, rather than speaking exclusively through their lawyers.

The Sixth Amendment protects the constitutional right to represent oneself as a criminal defendant.²⁵ By contrast, however, the

²⁰ See Nina Ingwer VanWormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 987 (2007) (tracing the right to represent oneself in federal court to medieval England, and to the Magna Carta in particular).

²¹ *Faretta v. California*, 422 U.S. 806, 830 n.39 (1975).

²² See Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 374-75 (2005) (noting that the "American legal ideal is that both the wealthy and the pauper could have access to the courts and could be treated equally with the resulting decisions being as fair as possible").

²³ See *id.* at 375 ("The development of pro se rights in the United States has been tied to the rights of indigents to have access to the courts.").

²⁴ See, e.g., *Faretta*, 422 U.S. at 826-27 (discussing American colonists' fervent distrust of lawyers as responsible for their insistence on maintaining the right to proceed pro se); Jona Goldschmidt, *Cases and Materials on Pro Se Litigation and Related Issues*, THE PRO SE LAW CENTER (May 1-4, 1997), <http://www.pro-selaw.org/cases.asp> (providing references to research pertaining to the anti-lawyer sentiment from which the right to self-representation emerged).

²⁵ See *Faretta*, 422 U.S. at 819 ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. . . . [T]he right to self-representation . . . is thus necessarily implied by the structure of the Amendment."). So firm are the historical roots from which the right to defend oneself from criminal prosecution arose that in sixteenth- and seventeenth-century England, felony defendants were actually required, not just

Supreme Court has not deemed the right to proceed pro se as a civil litigant to be constitutionally guaranteed, despite its longstanding recognition in the Anglo-American legal tradition.²⁶ Nevertheless, Congress codified the right to proceed pro se in federal civil suits by statute, even prior to the ratification of the Sixth Amendment. The Judiciary Act of 1789, the right's earliest statutory expression, pronounced "[t]hat in all the courts of the United States, the parties may plead and manage their own causes *personally* or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively."²⁷ And Congress has, up to the present, continually codified the statutory right to proceed pro se in the United States Code using substantially similar language.²⁸

B. *The Federal Pro Se Docket*

1. Evidence of a Burgeoning Caseload

Although pro se litigation has been welcomed since the country's founding, federal courts have recently experienced a staggering in-

entitled, to proceed without a lawyer, despite the earlier recognition of a right to counsel in misdemeanor prosecutions and civil cases. See *id.* at 823 ("By common law of that time, it was not representation by counsel but self-representation that was the practice . . ."). The tradition carried over into colonial America as well: "[E]ven where counsel was permitted, the general practice continued to be self-representation [in criminal cases]." *Id.* at 828.

²⁶ See Swank, *supra* note 1, at 1547 ("Whatever right there is to proceed pro se in criminal cases . . . has not been extended by the Supreme Court to civil cases."); Van-Wormer, *supra* note 20, at 986-87 (noting that, although criminal defendants' right to refuse counsel is protected by the Sixth Amendment of the Constitution, the guarantee "does not extend to civil litigants"). Nonetheless, considerable debate has focused upon whether there is a constitutional right to self-representation in civil cases, despite its nonrecognition thus far by the Supreme Court. See, e.g., Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 484-85 (2002) (suggesting that the right to self-representation is constitutionally guaranteed); Candice K. Lee, Note, *Access Denied: Limitations on Pro Se Litigants' Access to Courts in the Eighth Circuit*, 36 U.C. DAVIS L. REV. 1261, 1265 (2003) (commenting that courts have split on whether civil litigants have a constitutional right to proceed self-represented). Some states, though, have definitively afforded constitutional protection to civil litigants' right to self-representation. See, e.g., GA. CONST. art. I, § 1, para. XII ("No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state."); MICH. CONST. art. I, § 13 ("A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney.").

²⁷ Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92 (emphasis added).

²⁸ See 28 U.S.C. § 1654 (2006) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . .").

crease in the proportion of pro se cases on their dockets.²⁹ The trend is restricted neither to particular courts nor to certain types of suits. Rather, it has taken hold in both district and appellate courts, in cases involving prisoners and nonprisoners, and in claims ranging from civil rights to social security.³⁰

Presently, pro se litigants appear in approximately thirty-seven percent of all federal court cases.³¹ Specifically, in 2008, there were over 70,000 pro se cases in federal district court, as compared to approximately 200,000 represented cases.³² Unsurprisingly, prisoners account for a significant part of the federal pro se docket. However, nonprisoners still appeared pro se in a significant number of district court cases in 2008—over 20,000, in fact.³³ Thus, statistics belie the notion that the increase in pro se litigation can solely be attributed to prisoners' incessant filing of habeas corpus petitions and claims under 42 U.S.C. § 1983.³⁴

²⁹ See Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 440-41 (2009) (describing the “inexorably rising tide of pro se litigation” in American courts); see also VanWormer, *supra* note 20, at 988-91 (presenting data on the recent rise of pro se litigation in both state and federal courts).

³⁰ See Landsman, *supra* note 29, at 442 (asserting that, aside from civil rights claims, common claims pursued pro se also involved contract, labor, social security, and tort law).

³¹ Swank, *supra* note 22, at 377 (citing Tiffany Buxton, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 112 (2002)).

³² See JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 78 tbl.S-23 (2008) (reporting that 70,948 pro se cases were heard in district courts in the twelve months preceding September 30, 2008, compared to 196,309 non-pro se cases).

³³ *Id.*

³⁴ In fact, two relatively recent statutory developments, the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.), and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28 and 42 U.S.C.), have severely limited prisoners' ability to institute abusive litigation. The PLRA, for example, requires prisoners to exhaust administrative remedies before filing civil actions and pay court filing fees in full, thereby reducing the portion of the pro se docket consisting of prisoner complaints. See 28 U.S.C. § 1915(b)(1) (2006) (imposing full filing fees on prisoner litigants); 42 U.S.C. § 1997e(a) (2006) (codifying an administrative exhaustion requirement); Rosenbloom, *supra* note 5, at 322 (concluding that the sharp decrease in “[t]he number of inmate-filed cases . . . following the enactment of the PLRA” demonstrates the enactment's profound effect on pro se litigation). Even more strictly, AEDPA forbids prisoners from reinstating previously adjudicated habeas claims. 28 U.S.C. § 2244(b)(1). It also prohibits successive habeas petitions containing claims not previously adjudicated absent approval from the relevant court of appeals and either (1) a basis in a new constitutional rule made retroactive on collateral review by the Supreme Court or (2) a showing that the factual predicate for the claim both could not

Moreover, the number of pro se appeals in federal court has similarly increased in recent years to comprise a significant portion of the federal appellate docket. For example, “nonprisoner pro se litigants consistently accounted for approximately thirteen to fourteen percent of all civil federal appeals filed annually between 1997 and 2004.”³⁵ From 2007 to 2008, though, federal courts of appeals experienced an eight percent increase in the number of civil pro se appeals, resulting in almost 20,000 in total.³⁶ As a result, approximately sixty-two percent of all civil appeals are presently pursued pro se, with approximately 14.5 percent involving nonprisoner pro se parties.³⁷

Clearly, then, pro se litigation shows no sign of subsiding. It will only continue to grow as part of the federal docket, warranting an evaluation of the reasons individuals choose to proceed pro se. Without understanding the underlying causes of the rising tide of pro se litigation, meaningful accommodations for self-represented litigants will continue to evade courts.

2. Reasons Litigants Represent Themselves

Demonstrating that the leniency granted to pro se pleadings is insufficient to protect meritorious claims from premature dismissal requires first dispelling the notion that pro se claims virtually always lack merit. If they did, courts would appropriately dismiss them at rates substantially higher than complaints submitted by counseled parties. But the well-documented reasons individuals choose to proceed pro se, which largely do not relate to the merits of their claims, undercut the veracity of that belief.³⁸ In fact, “scholars and pro se litigants

have been developed previously and provides clear and convincing evidence that a reasonable factfinder would not have found the defendant guilty. 28 U.S.C. § 2244(b)(2)–(3). Despite these influential developments in prisoner litigation, the pro se docket continues to grow.

³⁵ VanWormer, *supra* note 20, at 989.

³⁶ See DUFF, *supra* note 32, at 45 tbl.S-4 (indicating an 8.2 percent increase from 2007 to 2008 in civil pro se appeals).

³⁷ See *id.* (showing that of the 31,454 total civil appeals in 2008, 4595 involved nonprisoners acting pro se).

³⁸ This is not to deny that a lack of legal expertise often leads litigants to believe they have claims when they, in fact, do not. It does, however, suggest that perhaps the number of unmeritorious pro se filings is not as high as many assert, and perhaps not high enough to explain the grossly disproportionate rate at which they are dismissed. Indeed, the high rate of dismissal of pro se cases cuts against the certainty that pro se claims lack merit because, without any discovery, it is difficult to discern the likelihood that a claim would have been successful—precisely the reason that drafters of the Federal Rules instituted a weak pleading regime in the first place.

themselves have identified several rational, well-considered reasons for deciding to do so.”³⁹

The assumption that a vast majority of pro se suits lack merit is primarily based upon a conception of the legal market as an accurate filter for unmeritorious cases; good claims attract representation, while bad ones do not.⁴⁰ Under this theory, “the fact that no lawyer is willing to take on an action for damages suggests that someone knowledgeable about the law has looked at the matter and concluded that the plaintiff is unlikely to prevail.”⁴¹ However, this argument does not accurately capture the reasons that individuals forego representation, as it assumes that lawyers always accept “good” cases presented to them and that any litigant would accept representation if made available.⁴² Neither of these assumptions holds water.

First, the most prevalent reason individuals choose to prosecute their own cases is inability to afford counsel.⁴³ Certainly, the use of contingent fees mitigates to some extent the impact that lack of re-

³⁹ VanWormer, *supra* note 20, at 991.

⁴⁰ See, e.g., Merritt v. Faulkner, 823 F.2d 1150, 1155 (7th Cir. 1987) (per curiam) (Posner, J., concurring) (arguing against the appointment of counsel in a pro se suit for damages because the self-represented litigant could have hired an attorney on a contingent-fee basis, and concluding from his failure to do so that the claim lacked merit). For a fuller critique of this argument, see generally Robin Paul Malloy, *Framing the Market: Representations of Meaning and Value in Law, Markets, and Culture*, 51 BUFF. L. REV. 1 (2003).

⁴¹ Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 867 (2008).

⁴² See, e.g., Swank, *supra* note 22, at 378 (“[C]ommon belief is that all pro se civil litigants want counsel to represent them and that no person would choose to be pro se.” (internal quotation marks omitted) (footnotes omitted)). The assumption that anyone intending to prosecute a claim desires counsel reflects, in a more refined manner, the saying that “one who is his own lawyer has a fool for a client.” *Faretta v. California*, 422 U.S. 806, 852 (1975) (Blackmun, J., dissenting). Yet the myriad reasons why individuals choose to proceed pro se in civil suits show that they may not be foolish for doing so and certainly cannot be blamed for the decision, as it often results from their insolvency. See VanWormer, *supra* note 20, at 991-92 (rejecting the joke as inaccurate in light of why individuals represent themselves). Indeed, even in the criminal context—where the stakes are higher—the saying’s accuracy has been called into question by a study that demonstrates that, in fact, “pro se felony defendants in state courts are convicted at rates equivalent to or lower than the conviction rates of represented felony defendants.” Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 423 (2007).

⁴³ See Paul D. Healey, *In Search of the Delicate Balance: Legal and Ethical Questions in Assisting the Pro Se Patron*, 90 LAW LIBR. J. 129, 133 (1998) (“Ultimately, the predominant reason for self-representation may be simple economics.”); Swank, *supra* note 22, at 378 (asserting that a majority of the public attributes the increase in pro se appearances to the high cost of attorneys).

sources should have on acquiring counsel. However, contingent fees do not effectively assist many claims that pro se litigants pursue, such as those for injunctive relief against civil rights abuses.⁴⁴ Additionally, the contingent-fee structure still requires attorneys to front large sums of money to prosecute claims, which they will not do if the projected reward is too little (or nothing at all), despite a significant likelihood of success.⁴⁵ Furthermore, there may not exist an accessible legal market in which a litigant can shop her claims, either because of geographical remoteness⁴⁶ or incarceration.⁴⁷ Thus, proponents of the efficient-legal-market hypothesis ignore influential factors in lawyers' decisions regarding whether to represent prospective clients, which relate less to their claims' merit or likelihood of success and more to external factors.

Furthermore, a significant number of pro se litigants in fact have funds to retain counsel, demonstrating that there are other, noneco-

⁴⁴ See Rosenbloom, *supra* note 5, at 321, 326-27 (asserting that civil rights cases are most frequently pursued pro se and that approximately thirty percent of examined pro se cases sought a form of equitable relief). Although attorneys' fees would presumably be available if these types of suits are "successful," the Supreme Court has limited the ability of civil rights attorneys to receive attorneys' fees under 42 U.S.C. § 1988. See, e.g., *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 598 (2001) (holding that attorneys cannot collect fees under the "catalyst theory," in which defendants voluntarily change their conduct in the way requested by plaintiffs); see also generally 42 U.S.C. § 1988 (2006). As a result, attorneys are nevertheless discouraged from pursuing such suits. See Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1089-92 (2007) (arguing that the Court's holding in *Buckhannon* discourages civil rights claims).

⁴⁵ See Lee, *supra* note 26, at 1280-81 (doubting the market's capacity to provide representation when the expected profit is too insignificant to attract counsel); Swank, *supra* note 22, at 380 (noting that where little or no profit motive exists, as where a potential client is a defendant or has an unprofitable case, the market will not provide representation). In addition to not fully accounting for lawyers' calculus in accepting cases, the contingent-fee structure may cause parties to forego representation because the substantial portion of an award that goes to the attorney may prevent even successful plaintiffs from being made whole. If a party feels confident in the strength of her suit, then, she may choose to proceed without counsel in order to be more fully compensated for the injuries suffered.

⁴⁶ See PATRICIA A. GARCIA, *LITIGANTS WITHOUT LAWYERS: COURTS AND LAWYERS MEETING THE CHALLENGES OF SELF-REPRESENTATION* 8 (2002) (asserting that some litigants "point to problems finding a lawyer" as a reason why they did not obtain counsel); Frances H. Thompson, *Access to Justice in Idaho*, 29 FORDHAM URB. L.J. 1313, 1315 (2002) (asserting that in certain rural locations, even if an individual wishes to hire an attorney, she may not be able to find one).

⁴⁷ See, e.g., McMahon, *supra* note 41, at 867 (excluding prisoners from the assertion that the legal market adequately determines meritorious cases because they have "virtually no opportunity to search for counsel").

nomic reasons for their decisions to proceed pro se.⁴⁸ For example, pro se litigants have asserted that their distrust of lawyers or the legal system in general drove them to forego representation.⁴⁹ Unlike these skeptical individuals, others who choose to prosecute claims without counsel seem to possess a more idealistic vision of our legal system. They believe that courts will come to the “right” or “just” result regardless of their status as unrepresented litigants, a concept from which self-representation itself originated.⁵⁰ There are numerous other factors, unrelated to merit, resulting in more litigants opting to not hire counsel, including increased literacy rates, a heightened sense of individualism, and the belief that litigation is simple enough to navigate on one’s own.⁵¹ However, one remaining factor is particularly strong in demonstrating that many pro se suits do indeed have merit: consulted counsel often advise litigants to proceed unrepresented because they believe certain cases are easy enough for the litigants to pursue without assistance.⁵²

Thus, we should not assume that most pro se suits have been reviewed by lawyers who deemed them unworthy. Rather, many of the reasons individuals choose to act without assistance of counsel may

⁴⁸ See, e.g., *Bauer v. Comm’r*, 97 F.3d 45, 49-50 (4th Cir. 1996) (acknowledging that a pro se litigant had the funds and ability to obtain counsel and was therefore not entitled to “preferential treatment”); *Landsman*, *supra* note 29, at 444-45 (emphasizing the presence among pro se litigants of “individuals who can afford counsel but choose not to hire a lawyer”); *Swank*, *supra* note 22, at 378 (citing a survey in which almost half of the pro se litigants “implied that they had the necessary funds to hire an attorney, but chose not to”); *Spencer G. Park, Note, Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821, 831 (1997) (“[T]he overwhelming majority of pro se litigants, 72%, were not legally ‘indigent’ . . .”).

⁴⁹ See *Jona Goldschmidt, The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 36 (2002) (discussing “anti-lawyer sentiment” as a reason for increased pro se litigation); *Eric J.R. Nichols, Note, Preserving Pro Se Representation in an Age of Rule 11 Sanctions*, 67 TEX. L. REV. 351, 380 (1988) (placing distrust of the legal system among the reasons why litigants choose to proceed pro se). It seems, then, that the antilawyer sentiment partially responsible for solidifying self-representation as an element of the Anglo-American legal tradition has not dissipated, but rather continues to nurture its growth.

⁵⁰ See *Swank*, *supra* note 22, at 379 (presenting noneconomic reasons for which some litigants choose to represent themselves); see also *supra* Section I.A (discussing the foundations upon which the right to self-representation rests, including the notion that the retention of counsel should not substantially alter outcomes).

⁵¹ See *Swank*, *supra* note 22, at 378-79 (listing factors that in recent years have contributed to the growing inclination toward pro se litigation).

⁵² See, e.g., *Thompson*, *supra* note 46, at 1316 (asserting that thirty-one percent of pro se litigants in Idaho consulted counsel, and many were advised not to obtain representation because “their case [wa]s simple enough for them to handle themselves”).

be largely unrelated to the validity of their claims, calling into question the presumption of reduced merit that informally attaches to pro se complaints.

3. Challenges Facing Pro Se Litigants

If more pro se litigants have potentially valid grievances than commonly believed, there must be other factors, aside from frivolity, that explain the grossly disproportionate rate at which their claims are dismissed. These factors, consisting of the unique challenges faced by litigants proceeding pro se, manifest at the pleading stage of litigation to render their complaints more vulnerable to dismissal for failure to state a claim.⁵³

First, there exists significant bias against pro se litigants in the court system: “Pro se litigants are regularly perceived in a negative manner; they are ‘most often attacked for the judicial inefficiencies many judges, attorneys, and observers believe they create.’”⁵⁴ As a result, they are thought to be pests responsible for “clogging” up the court system.⁵⁵ However, the evidence largely disproves these assessments. Indeed, studies have shown that cases with only represented parties consumed more time than⁵⁶ and settled at essentially the same rate as their pro se counterparts.⁵⁷ Aside from a sense that their claims

⁵³ See Rosenbloom, *supra* note 5, at 308-09 (discussing the methods by which overburdened courts summarily dispose of pro se cases).

⁵⁴ Swank, *supra* note 22, at 384 (quoting Buxton, *supra* note 31, at 114).

⁵⁵ See JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 121 (1998) (quoting judges who expressed distaste for pro se litigants).

⁵⁶ Rosenbloom, *supra* note 5, at 358-59.

⁵⁷ See, e.g., Buxton, *supra* note 31, at 145-46 (citing a study which found that civil pro se claims settled at a rate “virtually identical” to that of cases with represented parties); Rosenbloom, *supra* note 5, at 358-59 (noting that cases longest on the docket involved represented parties). The lighter burden that pro se suits impose upon courts in comparison to counseled suits reflects not only pro se litigants’ unfamiliarity with available litigation tactics but also the less complex nature of the claims that pro se litigants pursue. Accordingly, pro se suits are particularly good candidates for the sort of limited, court-supervised discovery that many commentators and the *Iqbal* minority have suggested as more appropriate than stringent pleading requirements. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1961-62 (2009) (Breyer, J., dissenting) (“[A] trial court, responsible for managing a case, . . . can structure discovery . . . Neither the briefs nor the Court’s opinion provides convincing grounds for finding these alternative case-management tools inadequate . . .” (citation omitted)); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 30 (2009) (“[A] better approach might be to permit judges to identify those cases where additional facts are needed to support the needed inference and reserve judgment on the motion to dismiss until after limited, focused discovery on that issue can occur.”). The discovery costs would not be

lack merit, the perception that pro se suits are more burdensome emanates in part from the fact that the time required to evaluate a submission drafted by counsel is less than the time required to evaluate a document of comparable length and substance drafted by a pro se litigant. However, submissions drafted by counsel are typically longer and greater in number than those drafted by pro se litigants,⁵⁸ thereby negating much of the perceived inefficiency on a case-by-case basis. Thus, pro se litigants do not overwhelmingly inhibit efficient court practice more than others, but the belief that they do certainly heightens the likelihood that their suits are improperly dismissed.

In addition, pro se litigants often lack a sufficient understanding of procedural and substantive law to initiate a lawsuit properly.⁵⁹ Procedural deficiencies, such as failure to file on time, are less problematic when evaluating the effectiveness of the leeway given pro se litigants because special treatment on procedural requirements has been, for the most part, emphatically denied.⁶⁰ As to substantive matters, however, the knowledge differential is precisely the reason for affording pro se litigants special deference at the pleading stage of litigation. First,

crushing and would most likely be less than the costs in time and effort to courts evaluating pro se complaints, which are significant in light of the accommodations to which they are entitled. See Buxton, *supra* note 31, at 117 (acknowledging the “extensive time and effort already expended by court clerks and . . . judges in assisting pro se litigants”).

⁵⁸ See, e.g., Rosenbloom, *supra* note 5, at 359 (noting that “counseled cases generally consisted of 50% more docket entries than non-counseled cases”).

⁵⁹ See VanWormer, *supra* note 20, at 993 (“[T]he self-represented ‘are more likely to . . . have problems understanding and applying the procedural and substantive law pertaining to their claim’ in the initial stages of litigation.” (footnote omitted) (quoting Buxton, *supra* note 31, at 114)).

⁶⁰ See, e.g., Pomales v. Celulares Telefónica, Inc., 342 F.3d 44, 49 n.4 (1st Cir. 2003) (“[P]ro se status did not absolve [plaintiff] of the need to comply with . . . the district court’s procedural rules.”); Creative Gifts, Inc. v. UFO, 235 F.3d 540, 549 (10th Cir. 2000) (“Although pro se litigants get the benefit of more generous treatment in some respects, they must nonetheless follow the same rules of procedure that govern other litigants.” (citation omitted)); Edwards v. INS, 59 F.3d 5, 8 (2d Cir. 1995) (“[P]ro se litigants generally are required to inform themselves regarding procedural rules and to comply with them.”). The distinction between treatment of procedural and substantive deficiencies is not hard and fast. A small subset of federal courts have

rel[ie]d] upon the Supreme Court’s rationale in *Haines v. Kerner* to fashion a relaxed set of *pro se* standards for procedural conformity, particularly when dealing with summary judgment proceedings, compliance with discovery rules, the imposition of sanctions, and the introduction of evidence. A greater number of courts, however, take a more traditional approach and extend . . . pleading leniency only to the substantive issues raised, while continuing to strictly enforce compliance with procedural requirements by pro se litigants.

Buxton, *supra* note 31, at 118 (footnotes omitted).

many pro se litigants have difficulty clearly conveying allegations in a complaint due to their lack of legal-writing training.⁶¹ Thus, even if the conduct from which a grievance arose satisfies each element of a claim, illogical or unclear submissions could still result in dismissal.⁶² Similarly, a mistaken or incomplete understanding of the law can result in a pro se litigant pleading the wrong cause of action or, alternatively, not pleading an available one.⁶³

Furthermore, individuals choosing to proceed pro se because they cannot afford legal counsel will often lack the resources to uncover facts prior to filing their complaints.⁶⁴ Consequently, these complaints will frequently be thin on details and therefore require that courts draw more inferences in evaluating motions to dismiss. In fact, even those who have resources are likely to rely upon standardized forms in drafting complaints and treat them as exemplary pleadings, which is precisely why they are appended to the Federal Rules of Civil Procedure.⁶⁵ Those who do will inevitably conclude that a complaint should be light on facts and will forego pre-filing discovery to support their allegations.⁶⁶ These conclusions could very well have proven fatal to complaints under not only the plausibility standard but even under the earlier *Conley* standard as implemented by certain district courts.⁶⁷

Accordingly, nonrobust liberal construction may prevent recognition of meritorious claims by not accounting for the unique challenges

⁶¹ See Nichols, *supra* note 49, at 351 (acknowledging that some pro se litigants draft illogical and rambling pleadings that are difficult to decipher).

⁶² See Wayne T. Westling & Patricia Rasmussen, *Prisoners' Access to the Courts: Legal Requirements and Practical Realities*, 16 LOY. U. CHI. L.J. 273, 309 (1985) (emphasizing that poor presentation can lose a case with merit).

⁶³ See Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 678 (1988) (noting that flexible construction of pro se pleadings is meant to combat dismissal where a cause of action exists but the complaint fails to say the "magic words").

⁶⁴ See Donald H. Zeigler & Michele G. Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 203-04 (1972) (noting that pro se plaintiffs are "almost totally unaware of the . . . value and techniques of pre-trial discovery and investigation").

⁶⁵ See VanWormer, *supra* note 20, at 992 (listing the availability of legal forms as one of the factors responsible for pro se litigants' belief that they can successfully prosecute their cases without representation).

⁶⁶ See, e.g., FED. R. CIV. P. Form 11 (demonstrating the brief and general elements that must be included in a complaint alleging negligence); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 576 (2007) (Stevens, J., dissenting) (discussing the "bare allegation[s]" included in Form 9 of the Federal Rules).

⁶⁷ See *infra* notes 89-91 and accompanying text (discussing district courts' tendency to stray from the liberal pleading regime established under *Conley*).

that pro se litigants face. Therefore, liberal construction must be evaluated as actually practiced by courts to determine whether it effectively overcomes the barriers between pro se litigants and court access.

C. Liberal Construction

In recognition of the abnormally high potential for meritorious pro se complaints to be dismissed, the Supreme Court relaxed pleading standards for pro se litigants to ensure that they receive their “day in court.”⁶⁸ In *Haines v. Kerner*, the Court held that judges should liberally construe pro se pleadings.⁶⁹ It further stated that

allegations such as those asserted by [the pro se] petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the *pro se* complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁷⁰

Despite consistently affirming its holding, though, the Court has failed to flesh out precisely how relaxed a standard lower courts should apply.⁷¹ Consequently, district courts apply different degrees of relaxation, thereby rendering pleading leniency less reliable at preventing dismissal of pro se complaints.⁷² Nevertheless, one can discern some unifying principles, both specific and general, from the jurisprudence concerning pro se pleadings.

⁶⁸ See Edward M. Holt, *How to Treat “Fools”: Exploring the Duties Owed to Pro Se Litigants in Civil Cases*, 25 J. LEGAL PROF. 167, 168-69 (2001) (asserting that the Supreme Court responded to the potential for unfair dismissal of pro se cases by requiring judges to liberally construe pro se litigants’ complaints).

⁶⁹ 404 U.S. 519, 520-21 (1972) (per curiam). The Court has reaffirmed the lenient standard in cases following its initial pronouncement in *Haines*. See, e.g., *Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1158 (2008) (“Even in the formal litigation context, *pro se* litigants are held to a lesser pleading standard than other parties.”); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (“The handwritten *pro se* document is to be liberally construed.”).

⁷⁰ *Haines*, 404 U.S. at 520-21 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

⁷¹ See Bacharach & Entzeroth, *supra* note 7, at 29 (asserting that the Court “did not define the degree of relaxation” applicable to pro se complaints).

⁷² See *id.* at 29-30 (“Not surprisingly, federal courts take varying approaches regarding ‘how liberal’ the construction of pro se pleadings should be.”); Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 971-72 (1990) (concluding that lower courts have frequently ignored or given only “superficial acknowledgment” to the requirement that pro se pleadings be liberally construed).

1. The Method by Which Courts Liberally Construe Pro Se Complaints

It is difficult to survey all of the ways by which lower courts operationalize liberal construction because of the vague terms in which the Supreme Court articulated its directive.⁷³ Nevertheless, two general lower court techniques are clear: (1) disregard as much as possible pro se litigants' use of incomprehensible language and incorrect grammar in setting forth allegations and (2) intuit from their allegations the appropriate legal claims or procedural devices that pro se litigants would have expressly invoked had they been counseled.⁷⁴ However, there are obvious limits upon the extent to which courts will

⁷³ Indeed, lower court opinions often give only cursory mention of the method by which they implement liberal construction in a "standard of review" section without specific explanation of how it is given effect when particular allegations are evaluated. *See, e.g.,* *Proctor v. Applegate*, 661 F. Supp. 2d 743, 759-60 (E.D. Mich. 2009) (acknowledging the liberal construction afforded a pro se complaint in its "standard of review" section, but failing to make further mention of the doctrine in discussion, despite concluding that many of the asserted claims should be dismissed).

⁷⁴ *See, e.g.,* *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (describing liberal construction as requiring the court to read the pleadings to state a valid claim if reasonable, despite, among other things, a pro se litigant's "confusion of various legal theories" and "poor syntax and sentence construction"). That both of these concessions would be misguided and unfair to the opposition if a pro se complaint were drafted with the aid of counsel—albeit undisclosed—explains courts' strong disapproval of the practice that has come to be known as "ghostwriting." *See, e.g.,* *Delso v. Trs. for the Ret. Plan for the Hourly Emps. of Merck & Co., No. 04-3009*, 2007 WL 766349, at *16-17 (D.N.J. Mar. 6, 2007) (concluding that a lawyer's informal assistance to a pro se litigant in drafting a court document violated the lawyer's ethical obligations because it provided the litigant undue advantage in light of the leeway afforded pro se litigants). Permitting limited-scope representations, or "unbundled" legal services, is one oft-suggested way to deal with the undue advantage gained when lawyers assist in drafting documents submitted pro se without disclosing their participation to the court. *See, e.g.,* Michael W. Loudenslager, *Giving Up the Ghost: A Proposal for Dealing with Attorney "Ghostwriting" of Pro Se Litigants' Court Documents Through Explicit Rules Requiring Disclosure and Allowing Limited Appearance for Such Attorneys*, 92 MARQ. L. REV. 103, 105 (2008). Allowing limited assistance in this fashion could curtail the extra effort demanded of courts when considering pro se complaints drafted with the assistance of counsel because the complaints would be less difficult to decipher. It would also thereby allay concerns over less meritorious complaints surviving motions to dismiss merely because of the leeway afforded to them. *See* Jeffrey P. Justman, Note, *Capturing the Ghost: Expanding Federal Rule of Civil Procedure 11 to Solve Procedural Concerns with Ghostwriting*, 92 MINN. L. REV. 1246, 1287 (2008) (recommending an amendment to Federal Rule of Civil Procedure 11 that would allow for limited-scope representation and suggesting that such an amendment would make representation more accessible to pro se litigants).

liberally construe pro se complaints—one of which is the dilution of factual allegations needed to state a claim.⁷⁵

Disparity in the writing capabilities of pro se litigants and represented parties can lead to different rulings on motions to dismiss even when the plaintiffs' grievances arise from identical factual circumstances.⁷⁶ This is because the style in which allegations are presented affects their clarity, which, in turn, influences whether judges can discern cognizable legal claims from them. A complaint drafted by a lawyer will likely set forth in neutral language the necessary allegations to state a claim effectively—time, place, specific sequence of events—and end with a prayer for relief. By contrast, if the complaint is drafted without assistance of counsel, it will likely be tainted by emotional language, legal jargon, tangents, and less direct or incomprehensible assertions of fact.⁷⁷ Accordingly, courts attempt to mitigate the impact that pro se litigants' "inartful" drafting may have on the adequacy of their complaints with the first form of liberal construction: to the extent possible, pro se allegations should be read only for substance, disregarding poor style, vocabulary, syntax, superfluties, and the like.⁷⁸ Courts, then, must discern from the allegations the factual scenario that the plaintiff intended to allege.⁷⁹

A complaint that references laws under which the allegations provide no relief may also be subject to dismissal. Presumably, such dismis-

⁷⁵ See, e.g., *Hall*, 935 F.2d at 1110 (noting that liberal construction does not prevent pro se litigants from having to allege sufficient facts to state a claim).

⁷⁶ See Westling & Rasmussen, *supra* note 62, at 309 ("There is no doubt that a good case can be lost by poor presentation. . . . Even an otherwise meritorious claim can become lost in a tangle of facts, extraneous material, unsupported assertions, and fallacious arguments."); Zeigler & Hermann, *supra* note 64, at 181-82 (acknowledging the negative effect that pro se litigants' "inability to communicate effectively in writing" can have on their complaints, often leading to dismissal for being "rambling and conclusory").

⁷⁷ See Zeigler & Hermann, *supra* note 64, at 182 n.91 (discussing the "emotional distortions" in many pro se pleadings, as well as their tendency to "slip into an imitation of legal jargon copied from other sources").

For example, a civil rights complaint . . . may begin in flamboyant, legal-sounding rhetoric with a series of broad generalizations about civil and human rights. At some point the complainant may state conclusorily that he was "brutally beaten by the guard" and then, with renewed vigor, launch into frenzied attacks on prison conditions in general.

Id. at 182.

⁷⁸ See, e.g., *Hall*, 935 F.2d at 1110 (listing "poor syntax and sentence construction" as two flaws that should be overlooked in evaluating the sufficiency of pro se complaints).

⁷⁹ See, e.g., *Ayres v. Ellis*, No. 09-4247, 2009 WL 3681892, at *1 (D.N.J. Nov. 4, 2009) (quoting a pro se complaint's unclear factual averments and extracting from them the facts that the pro se litigant "meant to allege").

sal is proper when a reasonably competent lawyer drafts the complaint because the lawyer would have invoked a different law had one been more advantageous to the client's case. However, that same presumption is less tenable with respect to complaints drafted by pro se litigants because of the challenges faced by laypersons in comprehending legal doctrines and recognizing available legal theories upon which to base claims. Acknowledging that pro se litigants frequently have a flawed or incomplete understanding of the law, courts have supplemented their disregard for stylistic deficiencies with a more "activist" form of liberal construction: to the extent possible, courts should restructure a complaint to invoke the most appropriate legal bases suggested by the allegations.⁸⁰ For example, one plaintiff who asserted that the parole commission's disregard of its own process regulations was unfair had his complaint interpreted as a procedural due process claim.⁸¹ Thus, courts may construe a complaint to invoke the substantive law under which the allegations have the best chance of stating a claim, even if the plaintiff has asserted violations under an inapplicable law or failed to expressly assert any particular legal claim whatsoever.⁸²

Beyond simply targeting challenges pro se litigants face, the two techniques by which courts liberally construe pro se complaints seek to extract what the litigants would have presented had they retained

⁸⁰ See, e.g., *Weixel v. Bd. of Educ.*, 287 F.3d 138, 145-46 (2d Cir. 2002) (construing a pro se complaint to make the best arguments that the allegations suggest); *Franklin v. Rose*, 765 F.2d 82, 85 (6th Cir. 1985) (providing a pro se petition for habeas corpus an "active interpretation" to "encompass any allegation stating federal relief" (quoting *White v. Wyrick*, 530 F.2d 818, 819 (8th Cir. 1976) (per curiam))).

⁸¹ See *Lee v. Rios*, No. 08-5330, 2010 WL 22328, at *4 (6th Cir. Jan. 6, 2010) ("Thus, this Court should construe his argument that he was 'deprived . . . of the fundamental fairness in the parole voting process' as an assertion that the Commission violated his right to procedural due process." (omission in original) (citation omitted)).

⁸² See, e.g., *Martin v. Overton*, 391 F.3d 710, 713 (6th Cir. 2004) (construing a civil rights claim to be instead a habeas petition because that was the only viable claim based upon the allegations set forth in the complaint). Judge Bacharach and Professor Entzerth take issue with the judicial practice of reading into pro se complaints claims "fairly [but perhaps not explicitly] raised." Bacharach & Entzerth, *supra* note 7, at 32-41. To illustrate the flaws in such an approach, they point to how it conflicts with the statutory schemes created by the PLRA and AEDPA. *Id.* at 35-41. For example, if a judge reads into a pro se complaint a claim as to which the plaintiff did not exhaust administrative remedies, the practice may lead to dismissal of the entire action under the PLRA. *Id.* at 34. In addition, if a judge construes a civil rights complaint as a habeas petition that ultimately fails, the pro se litigant then faces nearly insurmountable hurdles under AEDPA to filing a successive petition for habeas relief. *Id.* at 37. To the authors, these pitfalls suggest that activist approaches toward pro se litigants should be constrained because they often punish intended beneficiaries. See *id.* at 41 ("With this intangible loss of a judge's neutrality, the courts may be creating unintended penalties for the litigants who the courts are paradoxically trying to help.").

counsel.⁸³ However, the Supreme Court has never stated that these techniques are correct. Indeed, the language with which it articulated the leniency afforded to pro se pleadings hints at an alternative—albeit significantly broader—theory behind liberal construction. Just what that theory is, and whether it is viable, is the topic of the following subsection.

2. The Theory Behind Liberal Construction

Despite its failure to expressly set forth a coherent theory pursuant to which lower courts should liberally construe pro se complaints, the Supreme Court has provided them a modicum of guidance on the general meaning of liberal construction. The best description one can discern is that liberal construction is simply an exaggerated version of the *Conley* “no set of facts” standard.⁸⁴ In fact, each pronouncement of the relaxed pleading standard is accompanied by the *Conley* Court’s instruction not to dismiss a claim unless it is “beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief.”⁸⁵ Justice Scalia confirmed this understanding when he asserted that “[l]iberal construction of pro se pleadings is merely an embellishment of the notice-pleading standard set forth in the Federal Rules of Civil Procedure.”⁸⁶

As an exaggerated form of transsubstantive notice pleading,⁸⁷ then, liberal construction’s efficacy as a less stringent standard largely depends upon lower courts’ adherence to a simplified pleading regime. At least in theory, because plaintiffs could easily surpass the

⁸³ See *id.* at 43-44 (suggesting that a pro se litigant’s intent should be the hallmark of the leeway granted her complaint).

⁸⁴ See Bradlow, *supra* note 63, at 681-82 (discussing development of the *Haines* approach in relation to *Conley* and concluding that the “ultimate result is a less stringent interpretation of what is itself a very lax standard”); see also *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (articulating the “no set of facts” standard).

⁸⁵ See, e.g., *Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980) (per curiam) (observing that “it is settled law that the allegations of [a pro se] complaint . . . are held to ‘less stringent standards’” and noting that such complaints “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” (citations omitted) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam))).

⁸⁶ *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment).

⁸⁷ See Fairman, *supra* note 9, at 988 (describing notice pleading as a touchstone of the Federal Rules, merely requiring that a “plaintiff provide a short and plain statement of a claim sufficient to put the defendant on notice” in order to survive a motion to dismiss).

threshold to discovery, the Court appears to have believed liberal construction did not need to take such a robust form. Lower courts followed the Supreme Court's lead by focusing less on liberalizing the actual standard of sufficiency and more on mitigating the effect of pro se litigants' reduced capacity to draft understandable and legally accurate complaints.⁸⁸ However, pre-*Twombly*, those lower courts demonstrated a propensity to stray from the liberal standard the drafters of the Federal Rules envisioned.⁸⁹ Most significantly, district courts deciding Rule 12(b)(6) motions appropriated the ability to parse a complaint's factual allegations into "conclusory" averments that should be disregarded and other statements entitled to consideration as true.⁹⁰ Additionally, courts often insisted that plaintiffs plead facts in support of their claims in order to survive a motion to dismiss.⁹¹ That these devices ran contrary to notice pleading is demonstrated by the Supreme Court's consistent reversal of lower court decisions displaying their use.⁹²

⁸⁸ See *supra* subsection I.C.1 (discussing the ways by which lower courts implement liberal construction in practice).

⁸⁹ See Hatamyar, *supra* note 15, at 567-68 (noting that lower courts often disregarded the Supreme Court's explicit instructions to apply lenient notice pleading standards, instead insisting on heightened pleading requirements, particularly in civil rights cases).

⁹⁰ See Marcus, *supra* note 13, at 466-71 (discussing courts' tendency to label some factual allegations conclusory and thereby require more supporting evidence for them to be sufficient).

⁹¹ See Fairman, *supra* note 9, at 1011-59 (documenting lower courts' insistence that complaints contain greater factual specificity in various fields of law, including anti-trust, environmental, and civil rights).

⁹² See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002) (reversing a lower court ruling that employment discrimination complaints must allege "specific facts establishing a prima facie case of discrimination" and holding that they must only present "a short and plain statement of the claim showing that the pleader is entitled to relief" (citation omitted)). Notably, however, the Court's recent rulings in *Twombly* and *Iqbal* have called the continuing vitality of *Swierkiewicz* into question. See, e.g., *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) ("We have to conclude . . . that because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*."); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 18 (2010) (declaring that, as a result of the similarities between the new motion to dismiss and the motion for summary judgment, *Swierkiewicz* "effectively may be dead"). Nevertheless, in neither case did the Supreme Court specifically overturn its decision in *Swierkiewicz*. See Thomas, *supra*, at 36 (acknowledging that "*Iqbal* and *Twombly* did not expressly overrule *Swierkiewicz*"). In fact, the Court cited it approvingly in *Twombly*, which together with other commonalities between the two cases—among them, endorsement of a fair-notice principle in Rule 8(a)—suggest that *Swierkiewicz* is still good law. Compare *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (asserting that Rule 8(a)(2) only re-

Thus, lacking a cohesive articulation of a more liberal standard by which to judge the sufficiency of pro se allegations—and ostensibly relying upon generally liberal pleading to ensure its efficacy—liberal construction did not compensate for the historical end run around notice pleading.⁹³ And certainly, the challenges confronting pro se litigants could only have exacerbated their vulnerability to the devices lower courts used to dismiss more complaints, despite judicial efforts to overlook them.⁹⁴ Approximately sixty-seven percent of pro se complaints were dismissed under *Conley*,⁹⁵ clear evidence of this reality. These statistics show that the mantra “dismissal of a *pro se* claim as insufficiently pleaded is appropriate only in the *most unsustainable* of cases”⁹⁶ may be mere lip service.

This reality, though, has been significantly altered by the sea change in pleading practice inspired by *Twombly* and *Iqbal*. Since the decisions retired *Conley*’s “no set of facts” standard,⁹⁷ upon which liberal construction relied, the practice too may have earned its retirement. As the following discussion shows, *Conley* provided a superior—albeit flawed—background standard for liberal construction to protect pro se litigants as compared to the new plausibility standard.

quires “a short and plain statement” to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests” (citation omitted), *with Swierkiewicz*, 534 U.S. at 514 (noting that the complaint satisfies the requirements of Rule 8(a) because it gives fair notice to the defendant).

⁹³ See Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 443 (1993) (concluding from a review of reported district court and court of appeals decisions that many courts have applied stringent pleading standards to pro se complaints).

⁹⁴ See Section II.B for a more in-depth explanation of how the conflagration of challenges facing pro se litigants post-*Iqbal* renders liberal construction an ineffective bulwark against improper dismissals for failure to state a claim.

⁹⁵ Hatamyar, *supra* note 15, at 615.

⁹⁶ *Boykin v. KeyCorp*, 521 F.3d 202, 216 (2d Cir. 2008) (emphasis added). Interestingly, the complaint in *Boykin* was quite similar to the one dismissed in *Iqbal*. In *Boykin*, an African American woman alleged that a lender denied her home-equity loan application on account of her race, sex, and neighborhood. *Id.* at 206. In her complaint, she did not state specific factual allegations to support the claim of discriminatory motive, instead alleging it generally based upon “information and belief.” *Id.* at 214 (citation omitted). The Second Circuit reversed the dismissal of the complaint for failure to state a claim, noting that the general averment was sufficient for Rule 8(a) purposes. *Id.* at 215. Whether the same decision would have resulted after *Iqbal* is unclear; however, the court’s strong emphasis on the leeway granted pro se complaints, even under *Twombly*, lends hope for more robust liberal construction of the sort proposed herein.

⁹⁷ See, e.g., *Twombly*, 550 U.S. at 562-63 (holding that the “no set of facts” standard has earned its retirement and “is best forgotten”).

II. PLAUSIBILITY AND PRO SE PLEADINGS

In *Twombly*, the Supreme Court announced the new plausibility standard by which pleadings are to be judged: a complaint must allege “enough facts to state a claim to relief that is plausible on its face.”⁹⁸ A facially plausible complaint is one that “raise[s] a reasonable expectation that discovery will reveal evidence” of the alleged wrongdoing.⁹⁹ However, despite affirming the *Twombly* decision, *Iqbal* substantially bolstered plausibility as a device by which lower courts can dismiss weak, not just meritless, cases.¹⁰⁰ *Iqbal* is the focus of the

⁹⁸ *Id.* at 570. For an interesting account of the origins of plausibility, see Edward Brunet, *The Substantive Origins of “Plausible Pleadings”: An Introduction to the Symposium on Ashcroft v. Iqbal*, 14 LEWIS & CLARK L. REV. 1, 3-9 (2010). Professor Brunet traces the origins of the word “plausible” to antitrust litigation, in which the Court used the term substantively to evaluate whether a conspiracy claim made “economic sense.” *Id.* at 4. According to him, “[b]ecause of the prior substantive use of plausibility it seems highly questionable to re-use this term as a new procedural standard for assessing Rule 12(b)(6) motions to dismiss. . . . Plausibility as a standard to test pleadings seems confused and should be scrapped.” *Id.* at 14.

⁹⁹ *Twombly*, 550 U.S. at 556.

¹⁰⁰ See Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 852 (2010) (“*Iqbal* applies a thick screening model that aims to screen weak as well as meritless suits, whereas *Twombly* applies a thin screening model that aims to screen only truly meritless suits.”). This is certainly not the only significant change brought about by the Court’s decision in *Iqbal*. In addition to its ruling with respect to pleading standards, the *Iqbal* Court eliminated the possibility of supervisory liability in *Bivens* claims, which are made against federal officials for constitutional violations. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (refuting the petitioner’s contention that officials can be made liable under *Bivens* pursuant to a theory of supervisory liability and holding that “each Government official . . . is only liable for his or her own misconduct”); see also generally *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (providing a private remedy for violations of the Fourth Amendment by federal agents). This will no doubt cause shockwaves in lower courts, which, prior to *Iqbal*, acknowledged forms of supervisory liability in *Bivens* actions, despite the well-established precedent that such claims cannot be based upon respondeat superior. See, e.g., *Dalrymple v. Reno*, 334 F.3d 991, 995 (11th Cir. 2003) (discussing the standard for supervisory liability in a *Bivens* action); *Ruiz Rivera v. Riley*, 209 F.3d 24, 28-29 (1st Cir. 2000) (acknowledging that in *Bivens* actions, supervisory liability exists only when “there is subordinate liability” and “the supervisor’s action or inaction was affirmatively linked to the constitutional violation caused by the subordinate” (quoting *Aponte Matos v. Toledo-Dávila*, 135 F.3d 182, 192 (1st Cir. 1998)) (internal quotation marks omitted)); *White v. Downs*, No. 95-2177, 1997 WL 210858, at *4 (4th Cir. Apr. 30, 1997) (per curiam) (“Although there is no respondeat superior liability in *Bivens* actions, a supervisor c[an] be held liable for the acts of a subordinate” (citations omitted)). Whether the Court should even have decided the issue is questionable because both parties agreed on the availability of supervisory liability and the standard pursuant to which it should be judged, such that the question was not presented to the Court. See *Iqbal*, 129 S. Ct. at 1956-58 (Souter, J., dissenting) (asserting that the majority “*sua sponte* decide[d] the scope of supervisory liability” despite the parties’ agreement on the issue). The absence of full briefing and

inquiry here because the Court's two-pronged approach to plausibility analysis systematically exploits pro se litigants' vulnerabilities to dismiss their seemingly weak suits.

A. Ashcroft v. Iqbal

1. Background and Prior History

Following the September 11th terrorist attacks, federal authorities arrested and detained Javid Iqbal, a Pakistani citizen.¹⁰¹ After pleading guilty to charges of fraud in connection with identification documents, Iqbal was released from detention and subsequently removed to Pakistan.¹⁰² In May 2004, he commenced a suit in the Eastern District of New York against numerous federal officials, including former Attorney General John Ashcroft and current FBI Director Robert Mueller.¹⁰³

Iqbal's complaint concerned his seven-month confinement under highly restrictive conditions.¹⁰⁴ Iqbal alleged that federal authorities designated him a person "of high interest on account of his race, religion, or national origin" in violation of the First and Fifth Amendments.¹⁰⁵ Specifically, he alleged that the FBI, under Mueller's direction, arrested and detained "thousands of Arab Muslim men . . . as part of its investigation of the events of September 11."¹⁰⁶ He further alleged that, in discussions with Mueller, Ashcroft authorized a "policy of holding post-September 11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI."¹⁰⁷ Last, Iqbal averred that Mueller and Ashcroft "each knew of, condoned, and willfully and maliciously agreed to subject" him and others to harsh condi-

argument on the *Bivens* issue may undercut the precedential effect of the Court's elimination of supervisory liability. See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 305 & n.94 (9th ed. 2007) (noting that "decisions explained in a written opinion but rendered without full briefing and argument" are not entitled to as much weight as decisions that are "fully articulated").

¹⁰¹ See *Iqbal v. Hasty*, 490 F.3d 143, 147-49 (2d Cir. 2007) (recounting Iqbal's arrest by the FBI and INS, as well as his subsequent detention in the Metropolitan Detention Center), *rev'd sub nom. Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

¹⁰² See Burbank, *supra* note 16, at 114 (detailing the facts preceding Iqbal's complaint, including a guilty plea leading to his removal to Pakistan).

¹⁰³ *Iqbal*, 490 F.3d at 149; *Elmaghraby v. Ashcroft*, No. 04-01809, 2005 WL 2375202, at *1 (E.D.N.Y. Sept. 27, 2005).

¹⁰⁴ *Iqbal*, 129 S. Ct. at 1943-44.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (alteration in original) (quoting Iqbal's complaint).

tions “as a matter of policy, solely on account of [their] religion, race, and/or national origin and for no legitimate penological interest.”¹⁰⁸

Mueller and Ashcroft moved to dismiss the allegations against them for failure to state a claim.¹⁰⁹ Pre-*Twombly*, the district court denied their motion, invoking the *Conley* standard to assert that, accepting the allegations as true, it could not conclude that there was no set of facts that would entitle Iqbal to relief against Mueller and Ashcroft.¹¹⁰ The defendants then pursued an interlocutory appeal in the Court of Appeals for the Second Circuit, which affirmed the district court’s denial of the motion to dismiss in light of *Twombly*, decided just several months prior.¹¹¹

The Second Circuit held that Iqbal’s allegations against Ashcroft and Mueller satisfied the plausibility standard.¹¹² It interpreted *Twombly* as instituting “a flexible ‘plausibility standard’” that only demands further factual support for claims where the context alone does not render inferences of wrongdoing plausible.¹¹³ According to Judge Newman, no additional factual “amplification” was needed to render Iqbal’s claims against Ashcroft and Mueller plausible.¹¹⁴ The allegation that the defendants condoned and agreed to the discrimination was plausible “because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested . . . and designated ‘of high interest’ in the aftermath of 9/11.”¹¹⁵

2. The Supreme Court’s Two-Pronged Approach

The Supreme Court reversed the Second Circuit’s decision on the claims of discrimination against Ashcroft and Mueller in a five-to-four

¹⁰⁸ *Id.*

¹⁰⁹ *Elmaghraby v. Ashcroft*, No. 04-01809, 2005 WL 2375202, at *17 (E.D.N.Y. Sept. 27, 2005).

¹¹⁰ *Id.* at *29.

¹¹¹ *See Iqbal*, 129 S. Ct. at 1942 (describing the procedural history in the lower courts).

¹¹² *See Iqbal v. Hasty*, 490 F.3d 143, 177 (2d Cir. 2007) (“Applying the normal pleading rules . . . , even as supplemented by the plausibility standard, we have no doubt that the Plaintiff’s allegations . . . suffice to withstand a motion to dismiss.”), *rev’d sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

¹¹³ *See id.* at 157-58 (emphasizing that a pleader need only “amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*”).

¹¹⁴ *See id.* at 166 (“Plaintiff’s allegations . . . are entirely plausible, without allegations of additional subsidiary facts.”).

¹¹⁵ *Id.* at 175-76.

decision.¹¹⁶ Writing for the majority, Justice Kennedy held that Iqbal's complaint failed to adequately allege a plausible claim that the high-ranking officials acted for the purpose of discriminating on account of race, religion, or national origin.¹¹⁷ The two-step process by which the majority arrived at that conclusion, however, vastly expanded *Twombly* beyond what its author, Justice Souter, intended.¹¹⁸

First, the Court instructed lower courts considering a Rule 12(b)(6) motion to ignore allegations that are, in fact, conclusions and therefore not entitled to a presumption of truth.¹¹⁹ Despite attributing this maneuver to *Iqbal*'s plausibility predecessor, *Twombly*, Justice Kennedy extended its scope to include not only "legal conclusions" but also "threadbare" or "bald" *factual* allegations.¹²⁰ Thus, even factual averments or mixed statements of law and fact can be ignored in determining a complaint's plausibility if a judge deems them deficient of adequate specificity.¹²¹ Additionally, the Court eva-

¹¹⁶ *Iqbal*, 129 S. Ct. at 1954.

¹¹⁷ *See id.* at 1952 (holding that the complaint did not contain facts plausibly showing the petitioners' purposeful adoption of a discriminatory policy).

¹¹⁸ *See id.* at 1955 (Souter, J., dissenting) ("The majority then misapplies the pleading standard under *Bell Atlantic Corp. v. Twombly* to conclude that the complaint fails to state a claim." (citation omitted)); *see also* Burbank, *supra* note 16, at 115 (commenting that *Iqbal*'s "mischief" is likely a "major source of regret for the author of the *Twombly* decision").

¹¹⁹ *See Iqbal*, 129 S. Ct. at 1949 (majority opinion) (asserting that a court need not accept as true "mere conclusory statements"). Notably, the Court did not outright "cast aside the assumption-of-truth rule, which holds that a claimant's factual allegations are entitled to be believed and accepted at the pleading stage." A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 192 (2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). However, the Court's treatment of the allegations in *Iqbal*'s complaint does question the rule's vitality going forward. *Id.* Indeed, one commentator has characterized the plausibility inquiry as secondary to the first step at which certain allegations are ignored. *See* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1314 (2010) (asserting that the "'plausibility' inquiry is not in fact the primary inquiry at the pleadings phase" and suggesting that it "becomes irrelevant if a plaintiff provides nonconclusory allegations for each element of a claim for relief").

¹²⁰ *Compare* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 (2007) (concluding that the complaint's "stray" allegations of illegal "agreement" were "merely legal conclusions"), *with Iqbal*, 129 S. Ct. at 1951 (dismissing repondent's allegations regarding petitioners' knowledge as "bare" and "conclusory").

¹²¹ *See Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 12 (2009) (statement of Stephen B. Burbank, Professor, University of Pennsylvania Law School), *available at* <http://judiciary.senate.gov/hearings/hearing.cfm?id=4189> (under "Witness Testimony") (noting that the Court claimed the power to "carve a complaint" by ignoring some allegations of fact and mixed allegations of law and fact as conclusory); Bone, *supra* note 100, at 860-61 (con-

luated each allegation in the complaint individually to determine if they were specific enough to warrant a presumption of truth.¹²² Again, this disregarded Justice Souter’s consideration of the *Twombly* complaint as a whole before concluding that its “general allegations of agreement were intended to be [legal] conclusions based on parallel conduct alleged elsewhere.”¹²³

Once a court has “weeded out” the allegations that can be ignored for the purposes of deciding a motion to dismiss,¹²⁴ it is instructed to determine if the remaining factual allegations “plausibly suggest an entitlement to relief.”¹²⁵ “[J]udicial experience and common sense” act as guides in considering whether, in light of competing inferences that can be drawn from the allegations, the plaintiff’s theory of wrongdoing is plausible.¹²⁶ Although this step in the analysis largely parallels the approach in *Twombly*, there is a significant difference that bears highlighting: courts have extensive experience with generic antitrust suits, but not claims of the sort put forth by *Javaid Iqbal*.¹²⁷

cluding that the *Iqbal* Court’s approach to differentiating between conclusory and nonconclusory facts is based upon the level of generality at which they are stated).

¹²² See *Iqbal*, 129 S. Ct. at 1951 (dismissing allegations as conclusory without discussion of other allegations to which they are related); see also Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 913 (2010) (“To Justice Kennedy, each allegation must stand or fall on its own . . .”).

¹²³ Bone, *supra* note 100, at 859; see also *Iqbal*, 129 S. Ct. at 1960 (Souter, J., dissenting) (suggesting that singling out certain allegations from a complaint as a whole is a “fallacy” inhering in the majority’s approach).

¹²⁴ *Iqbal*, 129 S. Ct. at 1953 (majority opinion).

¹²⁵ *Id.* at 1951.

¹²⁶ *Id.* at 1950; see also Burbank, *supra* note 16, at 118 (characterizing the Court’s analysis as a necessarily comparative one in which judges imagine, based on their predispositions, other possible explanations for the allegations included in a complaint). In evaluating motions to dismiss, courts are confined to reviewing facts in the complaint, documents referred to therein, and facts of which judicial notice is taken. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (“[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.”). Thus, courts’ consideration of competing inferences made from neither the plaintiff’s pleadings nor the defendant’s responses thereto—considered *sua sponte*, if you will—suggests that their analysis may extend beyond the proper scope of a Rule 12(b)(6) determination.

¹²⁷ See *Has the Supreme Court Limited Americans’ Access to Courts?*, *supra* note 121, at 12 (“*Twombly* involved assessing competing inferences in a well-trodden path of antitrust law, [but] in *Iqbal* the Court was at sea, subjecting the competing inferences, most of which were left to the [J]ustices’ imaginations, to an implicit comparative exercise.”); see also Bone, *supra* note 100, at 877 (characterizing *Iqbal*’s story as “unusual enough to suggest something fishy might be going on”).

This results in greater reliance upon values than experience, despite the latter being perhaps more prudent. If a judge finds an opposing inference of lawful conduct by a defendant significantly more plausible, she should dismiss the claim.¹²⁸

The Court proceeded to apply its novel two-pronged approach to Iqbal's allegations against Ashcroft and Mueller.¹²⁹ The Court excluded several critical averments included in the complaint, the most notable of which alleged that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to harsh conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin."¹³⁰ Thus, the Court considered only allegations asserting (1) that the pair agreed on the policy of restrictively detaining 9/11 suspects and (2) that the FBI implemented the policy under Mueller's direction. These, according to the Court, failed to "nudge" the claim of discriminatory purpose from "conceivable to plausible."¹³¹ Competing inferences of lawful intent rendered the alternative pressed by Iqbal implausible; defendants, in other words, more likely sought to keep Iqbal in secure conditions because he was a suspected terrorist, not because of his Pakistani origin.¹³²

B. Iqbal's Impact on *Pro Se* Pleadings

The Supreme Court drastically altered federal pleading practice by supplanting *Conley's* low-threshold, "no set of facts" standard with

¹²⁸ See, e.g., *Iqbal*, 129 S. Ct. at 1951-52 (concluding that, given more likely and obvious explanations for defendants' conduct, the allegations failed to raise a plausible inference of wrongdoing).

¹²⁹ Professor Spencer's analysis of the Court's treatment of Iqbal's supposedly "conclusory" allegations suggests that the plausibility inquiry does not even involve two distinct steps:

At bottom . . . the Court's rejection of certain factual allegations as "too conclusory" is really a statement that (1) the allegations are factual claims that assert the unexpected, particularly about certain kinds of defendants . . . ; (2) as such, the allegations require additional supporting facts to be believed; and (3) such facts are lacking in the claimant's statement of his claim.

Spencer, *supra* note 119, at 196. However, the initial step in Professor Spencer's deconstruction of *Iqbal's* approach involves a question of believability, or what many would term "plausibility."

¹³⁰ *Iqbal*, 129 S. Ct. at 1951 (internal quotation marks omitted).

¹³¹ *Id.* at 1952 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

¹³² See *id.* at 1951-52 (citing *Twombly*, 550 U.S. at 567) (emphasizing that a policy of targeting suspected terrorists and housing them in a restrictive environment is an "obvious alternative explanation," which only suggests disparate impact and not discriminatory purpose).

Iqbal's new plausibility standard.¹³³ The change demands that the Court's instruction to construe pro se complaints liberally similarly be reevaluated, if not concomitantly altered, because it is an elaboration of the now-retired standard.¹³⁴ Thus, the following section considers whether in theory liberal construction survives *Iqbal*, and whether in practice it accommodates the resulting change in pleading doctrine to protect meritorious pro se complaints from premature dismissal.¹³⁵

1. The Minimal Assurance Provided Pro Se Litigants by *Erickson v. Pardus*

On the heels of its decision in *Twombly*, the Supreme Court issued a per curiam opinion in *Erickson v. Pardus*, which involved a pro se complaint.¹³⁶ Although the Court reemphasized the special solicitude granted pro se pleadings—thereby confirming liberal construction's survival post-plausibility—the case provides little comfort that pro se litigants have adequate access to courts under the new pleading regime.¹³⁷

¹³³ Herrmann, Beck & Burbank, *supra* note 4, at 148 (Burbank, Rebuttal) (arguing that, rather than clarifying pleading standards, the recent pleading decisions “changed them”).

¹³⁴ Unfortunately, commentators have given this relatively glaring development only casual, passing consideration. See, e.g., Bacharach & Entzeroth, *supra* note 7, at 29-32 (noting that the new plausibility standard will change the extent to which courts liberally evaluate pro se complaints because it increases the subjectivity of the analysis).

¹³⁵ Scholars have similarly singled out other types of cases for reevaluation in light of *Twombly* and *Iqbal*, concluding that the new plausibility standard is so poor a fit for such cases that an entirely different standard is necessary. See, e.g., Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1041-50 (proposing a new pleading standard to replace plausibility for evaluating employment discrimination complaints).

¹³⁶ 551 U.S. 89 (2007) (per curiam). The acceptance of such an unremarkable case and the timing of its decision suggest that the Supreme Court sought to maintain, as one critic put it, “deniability”: the capacity to check excessive usages of plausibility to give the appearance of maintaining a consistent pleading doctrine. See Editorial, *The Devil in the Details*, 91 JUDICATURE 52, 54 (2007) (“More probably, *Twombly* is an exercise in strategic ambiguity that empowers the lower federal courts to tighten pleading . . . while preserving deniability . . . [by] correct[ing] perceived excesses (as in *Erickson*).”); Amy Howe, *More on Yesterday's Decision in No. 06-7317*, *Erickson v. Pardus*, SCOTUSBLOG (June 5, 2007, 5:10 PM), <http://www.scotusblog.com/2007/06/more-on-yesterdays-decision-in-no-06-7317-erickson-v-pardus> (suggesting that the Court's decision was meant to “counteract the impression” that *Twombly* heightened pleading standards).

¹³⁷ Whether plausibility analysis applied at all to pro se pleadings was in question in the wake of *Erickson*. See, e.g., Anthony Martinez, Case Note, *Plausibility Among the Circuits: An Empirical Survey of Bell Atlantic Corp. v. Twombly*, 61 ARK. L. REV. 763, 775 (2009) (“*Erickson* implies that the *Twombly* standard may not be applicable to a com-

William Erickson, a Colorado inmate, filed a pro se complaint against prison officials, alleging violations of his Eighth Amendment rights.¹³⁸ Specifically, Erickson, unaided by counsel, averred that

prison officials had diagnosed him as requiring treatment for hepatitis C; that he had been placed in an appropriate treatment program; that shortly after the program commenced the prison[] doctor removed him from the program in violation of the applicable protocol; that prison officials refused to recommence his treatment despite his eligibility; and that, in the meantime, he was suffering irreversible damage to his liver and risking possible death.¹³⁹

Nonetheless, the district court granted the defendants' Rule 12(b)(6) motion to dismiss because Erickson failed to allege adequately that the doctor's discontinuance of treatment caused the harm, rather than the hepatitis C.¹⁴⁰ The Court of Appeals for the Tenth Circuit agreed, further characterizing the allegations of independent harm as "conclusory" and therefore "insufficient to state a claim."¹⁴¹ Each court paid lip service to the special solicitude afforded pro se pleadings,¹⁴² but, alas, the leniency did not rescue Erickson's complaint in either venue.

The Supreme Court, however, did save the complaint, summarily reversing the lower court decisions because Erickson's allegations were not too conclusory to satisfy federal pleading requirements.¹⁴³ Despite having decided *Twombly* just two weeks earlier, though, the

plaint filed by a pro se plaintiff."). However, this seems to have been wishful thinking, because lower courts overwhelmingly cite the new standard when considering pro se complaints. See, e.g., *Severin v. Parish of Jefferson*, 357 F. App'x 601, 603 (5th Cir. 2009) (per curiam) (applying the plausibility standard to a pro se complaint); *Grabauskas v. CIA*, 354 F. App'x 576, 576-77 (2d Cir. 2009) (dismissing a pro se complaint for failing to raise a plausible inference of wrongdoing).

¹³⁸ See Complaint at 3, *Erickson v. Pardus*, 551 U.S. 89 (2007) (No. 05-0405) (per curiam), 2005 WL 5543460 (claiming that prison staff were deliberately indifferent to plaintiff's medical needs in violation of the Eighth Amendment).

¹³⁹ Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 636 (2007) (citing Complaint, *supra* note 138, at 3).

¹⁴⁰ See *Erickson v. Pardus*, 198 Fed. App'x 694, 698 (10th Cir. 2006) (recounting the basis for the district court's dismissal of the pro se complaint), *vacated*, *Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam).

¹⁴¹ See *id.* (explaining that Erickson's complaint included only conclusory allegations regarding an independent cognizable harm from the doctors removing him from treatment).

¹⁴² See, e.g., *id.* at 696 (noting that a "pro se litigant's pleadings are to be construed liberally" but that a court "is not required to assume the role of advocate" (internal quotation marks omitted) (citations omitted)).

¹⁴³ See *Erickson*, 551 U.S. at 93 (concluding that it was error for the Court of Appeals to dismiss the allegations of independent harm as conclusory).

Supreme Court made no mention of the plausibility standard.¹⁴⁴ Instead, the Court emphasized that the allegations satisfied Rule 8(a)(2) by giving “the defendant[s] fair notice of what the . . . claim is and the grounds upon which it rests.”¹⁴⁵ Notably, the Court did not rely upon Erickson’s pro se status to deem his complaint adequate, noting only that the departure from established rules of pleading was more pronounced because of the leniency to which that status entitled him.¹⁴⁶

Despite *Erickson*’s reaffirmation that lower courts must liberally construe pro se complaints,¹⁴⁷ the decision fails to allay concerns over liberal construction’s efficacy post-plausibility. This is because Erickson’s complaint, irrespective of the Court’s failure to so state, satisfied *Twombly*’s version of the plausibility standard.¹⁴⁸ Erickson raised a plausible inference of independent, cognizable harm by asserting that the prison doctor’s deliberate cessation of treatment endangered his life.¹⁴⁹ The opinion, then, does not demonstrate that an otherwise too thinly pleaded complaint could be rendered substantively sufficient by liberally construing it since Erickson’s pro se status did not influence the decision.¹⁵⁰ This shortcoming supports the notion that liberal construction only includes a set of devices to deal with challenges

¹⁴⁴ See Hatamyar, *supra* note 15, at 573 (“The [*Erickson*] Court did not even refer to the ‘plausibility’ standard . . .”); Ides, *supra* note 139, at 639 (noting that the *Erickson* Court only cited *Twombly* twice for propositions unrelated to plausibility).

¹⁴⁵ *Erickson*, 551 U.S. at 93 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Although the Court correctly deemed the complaint sufficient to survive a Rule 12(b)(6) motion, it confused the notice-giving requirements of 12(e) with the requirements of substantive sufficiency in 12(b)(6). See Burbank, *supra* note 16, at 114 (implying that notice is irrelevant under Rule 12(b)(6) and is properly considered under Rule 12(e)); Ides, *supra* note 139, at 637-38 (suggesting that a problem inheres in the Court’s emphasis on fair notice, rather than substantive sufficiency, which seems to undergird its decision).

¹⁴⁶ See *Erickson*, 551 U.S. at 94 (claiming that the departure from liberal pleading standards “is even more pronounced . . . because petitioner has been proceeding . . . without counsel,” but asserting that the allegations were sufficient irrespective of plaintiff’s pro se status).

¹⁴⁷ See *id.* (noting that “[a] document filed *pro se* is ‘to be liberally construed’” (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976))).

¹⁴⁸ See Editorial, *supra* note 136, at 54 (asserting that the lower court rulings in *Erickson* were out of line with *Twombly*). One could also argue that, by holding the complaint sufficient to survive a motion to dismiss, the Court implicitly acknowledged that Erickson met the *Twombly* standard because the Court espoused the belief that *Twombly* had not changed pleading requirements.

¹⁴⁹ See *Erickson*, 551 U.S. at 94 (analyzing the complaint’s assertion that the plaintiff’s removal from treatment “was endangering” his life).

¹⁵⁰ See *id.* (concluding that the allegations alone were sufficient to satisfy pleading requirements before mentioning liberal construction).

identified pre-plausibility and does not account for new issues arising after the modern standard's conception.

Moreover, the lower courts' excessive use of the "conclusory" label to disregard allegations in *Erickson*'s pro se complaint foreshadowed liberal construction's inefficacy after *Iqbal*.¹⁵¹ In *Iqbal*, the Supreme Court lent its imprimatur to such excesses by deeming certain allegations conclusory without offering a principled way by which to distinguish them from other acceptable allegations.¹⁵² Lower courts, then, will predictably increase their disregard, unprincipled as it may be, for conclusory averments to dismiss pro se complaints at a disproportionately higher rate than those drafted by counsel.¹⁵³ Even if the Supreme Court is not comfortable with such usages, its limited discretionary docket prevents it from effectively curtailing them. More probably, though, the Court expects these excesses to occur, but shirks responsibility for them by deciding cases like *Erickson*. Indeed, that the Court of Appeals for the Tenth Circuit so used the "conclusory" label prior to *Iqbal*, and with regard to an obviously sufficient complaint, presaged the turn for the worse borne out by the statistical evidence presented below.

Therefore, even if the Court accepted *Erickson* as a means to check perceived excesses resulting from *Twombly*, its per curiam opinion fails to breathe enough life into liberal construction to check these excesses with respect to pro se complaints. What remains of liberal construction is that courts should disregard unclear drafting and supplement more accurate legal bases than those explicitly invoked in determining whether or not pro se complaints suggest plausible entitlements to relief.¹⁵⁴ Unfortunately, though, this leniency fails to ensure that meritorious pro se suits proceed to discovery.

¹⁵¹ See *Ides*, *supra* note 139, at 638 (asserting that *Erickson* demonstrates lower courts' "overly fastidious and inappropriate insistence on the pleading of 'non-conclusory' facts").

¹⁵² See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1961 (2009) (Souter, J., dissenting) ("[T]he majority's holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory.>").

¹⁵³ See *infra* subsections II.B.2-3 (documenting and explaining the disproportionate increase in the dismissal rate of pro se complaints as compared to other complaints post-*Iqbal*).

¹⁵⁴ See *McMahon*, *supra* note 41, at 867-68 (hypothesizing that *Erickson* simply means that the plausibility standard should be less stringently applied to pro se complaints than complaints prepared by counsel).

2. *Iqbal*'s Exceptional Hostility Toward Pro Se Complaints

Recent evidence belies initial speculation that the new plausibility standard would not significantly increase the overall dismissal rate.¹⁵⁵ In fact, the most current evaluation of federal pleading practice demonstrates that the rate of dismissal increased by ten percent between *Conley* and *Iqbal*, rising from forty-six to fifty-six percent.¹⁵⁶ But, an increase in the rate of dismissal by itself would be less troublesome if relatively consistent between counseled and pro se litigants. However, initial evidence strongly suggests that the increase has not evenly affected both classes.

The rate at which pro se complaints are dismissed after *Iqbal* has increased by an even greater extent than the overall rate of dismissal.¹⁵⁷ The percentage of motions to dismiss for failure to state a claim "granted in all cases brought by pro se plaintiffs grew from *Conley*

¹⁵⁵ See, e.g., Kendall W. Hannon, Comment, *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) (concluding from an initial study of *Twombly* that the new plausibility standard had "almost no substantive impact," except in civil rights cases (emphasis in original)). Importantly, these speculations largely related only to *Twombly* and did not predict *Iqbal*'s strengthening of the plausibility standard. Nevertheless, even after *Iqbal*, some commentators refuse to acknowledge that the recent Supreme Court rulings ushered in a new era of pleading and insist that the decisions have not significantly altered how courts evaluate motions to dismiss for failure to state a claim. See, e.g., *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 21-23 (2009) (statement of Gregory G. Garre, Partner, Latham & Watkins LLP), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4189> (under "Witness Testimony") (concluding that *Twombly* and *Iqbal* have not led to "wholesale dismissal of claims"). Still, others occupy a more middle ground, declining to paint the new decisions as contrary to traditional pleading practice and attempting instead to reconcile the two. See, e.g., Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 474 (2010) ("Rather than decrying *Twombly* as a radical departure and seeking to overturn it, this Article instead emphasizes *Twombly*'s connection to prior law and suggests ways in which it can be tamed.").

¹⁵⁶ See Hatamyar, *supra* note 15, at 600 (asserting that *Iqbal* increased the rate of dismissal sufficiently to "reject the null hypothesis" that the ruling had no effect on 12(b)(6) motions).

¹⁵⁷ Readers should note that the study observed this difference despite excluding from its sample prisoner complaints reviewed under the PLRA and complaints submitted with an application to proceed in forma pauperis. See *id.* at 585. Although such an exclusion, the author notes, is necessary to make the study sound because slight inconsistencies may inhere in pleading standards for these claims and because the risk of bias is particularly acute, in practice these complaints are overwhelmingly filed by pro se litigants and are subject to an analysis similar to *Iqbal*'s. See Rosenbloom, *supra* note 5, at 322, 324-25 (noting that almost all pro se litigants proceed in forma pauperis and that a significant number are inmates). Accordingly, the actual discrepancy may be even more pronounced than that which the study observed.

(67%) . . . to *Iqbal* (85%).”¹⁵⁸ Thus, pro se complaints have experienced nearly a twenty percent hike in the rate at which they are dismissed, which is double that experienced by all suits generally. In addition to the increased rate of dismissal, a disparate impact exists between regimes. Whereas courts dismissed approximately thirty percent more pro se complaints than represented complaints under *Conley*, after *Iqbal*, the difference grew to approximately thirty-eight percent.¹⁵⁹ The two-pronged plausibility standard, then, is empirically less friendly to pro se complaints than it is to those drafted by counsel.

Also troubling is the effect that grants of dismissal have on pro se complaints. Two statistics are particularly worrisome: “[t]he relative risk of a 12(b)(6) motion to dismiss a pro se plaintiff’s complaint being granted *without leave to amend*, rather than denied, is over five times greater . . . than for a represented plaintiff,”¹⁶⁰ and “[t]he odds that a *pro se* plaintiff’s complaint would be *entirely dismissed* upon the grant of a 12(b)(6) motion were 3.48 times greater than a represented plaintiff’s.”¹⁶¹ Together with the grossly disproportionate dismissal rate of pro se suits exacerbated by *Iqbal*, these numbers illustrate that plausibility will prevent pro se litigants from accessing discovery more often than represented litigants. The greater-than-average number of claims asserted and defendants named by pro se litigants¹⁶² highlights the significance of this concentrated impact.

Thus, *Iqbal* appears to have emasculated liberal construction as the tool by which courts protect pro se litigants. Regardless of whether it was effective enough under the “no set of facts” standard, liberal construction now surely demands reinvigoration if pro se litigants with meritorious claims are to have a fair chance at accessing discovery.¹⁶³

¹⁵⁸ Hatamyar, *supra* note 15, at 615.

¹⁵⁹ *Id.* at 633 tbl.G.

¹⁶⁰ *Id.* at 621 (emphasis added).

¹⁶¹ *Id.* at 623-24.

¹⁶² See Rosenbloom, *supra* note 5, at 322-23 tbl.II (presenting data showing the greater incidence of multiple defendants in pro se cases).

¹⁶³ See Hatamyar, *supra* note 15, at 615 (detailing the increased rate at which pro se complaints are dismissed to conclude that “the boilerplate language that pro se plaintiffs’ complaints should be treated with leniency is not taken very seriously” (footnotes omitted)). For a similar suggestion that the new pleading practice established by *Iqbal* is out of step with normative policies underlying civil rights legislation and should therefore be reconsidered, see Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010). Although there is no abundance of legislation protecting pro se litigants of the sort that exists with respect to civil rights, our historical regard for the right to prosecute a case without counsel suggests that there is what Professor Wasserman terms a “procedural mismatch” between plausibility

Doing so, however, requires understanding the reasons for plausibility's disproportionate hostility.

3. Explanations for the Disproportionate Increase in Pro Se Dismissals

The now-retired “no set of facts” standard contained only one step, which did not by its own terms disproportionately attack pro se pleadings. Only by manipulation did some courts circumvent its low threshold to dismiss what were arguably too many pro se complaints. By contrast, however, the modern plausibility analysis has two steps, both of which require of courts what, under *Conley*, was done covertly and without Supreme Court endorsement: disregarding conclusory factual allegations and subjecting plaintiffs’ theories of liability to possible competing inferences. Each of these steps, though, is uniquely poised to disproportionately impact pro se pleadings.

a. *Necessarily Conclusory Allegations*

Pro se litigants’ circumstances—both economic and noneconomic—render them substantially more likely to articulate claims using what many courts will deem conclusory allegations.¹⁶⁴ Consequently, pro se complaints will be stripped of meaningful allegations without regard for their relationship to surrounding averments. Indeed, the likelihood that this will occur is heightened by judicial disfavor of pro se claims, which largely goes unchecked due to the “conclusory” label’s malleability¹⁶⁵ and the relative difficulty in successfully appealing these determinations.

First, plaintiffs who are forced to proceed pro se by insolvency will lack the financial wherewithal to conduct the sort of pre-filing discovery necessary to draft sufficiently specific allegations.¹⁶⁶ Purely legal con-

pleading and the policies articulated by liberal construction. It is this mismatch that this Comment seeks to resolve by reforming the treatment of pro se pleadings.

¹⁶⁴ See *supra* subsection I.B.3 (surveying the general challenges faced by pro se litigants in crafting acceptable complaints, including those that may lead to less specific allegations).

¹⁶⁵ See Kilaru, *supra* note 122, at 919-20 (asserting that the majority and dissenting opinions in *Iqbal* highlight just how “manipulable” the distinction between conclusory and nonconclusory allegations can be).

¹⁶⁶ See Lonny S. Hoffman, *Burn Up the Chaff With Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U. L. REV. 1217, 1257 (2008) (“Whether prudent or not, gathering additional factual information to include in the complaint is not costless.”); see also Bone, *supra* note 100, at 860-61

clusions of the sort considered in *Twombly* should not be affected, but factual averments and mixed statements of law and fact upon which they rely, like those disregarded in *Iqbal*, will certainly be impacted. Nowhere will this reality manifest itself more obviously than in pleading mental state, an element without which certain claims, particularly ones concerning civil rights, cannot proceed.¹⁶⁷ These, however, are precisely the claims that a vast majority of pro se litigants pursue.¹⁶⁸ Without some form of documentation of defendants' motive in discrimination suits, for example, pro se plaintiffs will be relegated to pleading purpose quite generally.¹⁶⁹ Such generality very well may prove fatal to the allegations and, consequently, the complaint as a whole. In fact, it proved fatal with respect to Javid Iqbal's complaint,¹⁷⁰ but a poor pro se litigant presumably would have even less of an opportunity to discover relevant facts before filing than did Iqbal's lawyer.

Second, even pro se litigants with adequate funds to conduct informal discovery before filing suit will have allegations ignored as conclusory. Without legal training, pro se litigants are much more likely to rely upon pleading templates for guidance.¹⁷¹ A review of Form 11,

(showing that conclusory allegations are those that are stated at "too high a level of generality" and therefore need further factual support).

¹⁶⁷ See Kilaru, *supra* note 122, at 927-28 (asserting that information about a defendant's mental state is difficult to discover, but, without adequately pleading mental state, motive-based tort claims are likely to fail); see also Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 498 (1989) ("[I]n numerous civil rights suits, considerable information important to the factual preparation of complaints that appear specific will be in the records or minds of government or corporate defendants and cannot be secured before these pleadings must be filed, becoming available only during discovery.").

¹⁶⁸ See Hatamyar, *supra* note 15, at 613 (discussing data showing that about half of the civil rights cases studied in the article were initiated pro se); Rosenbloom, *supra* note 5, at 320 (noting that in a study of pro se litigants, the most common complaints were civil rights actions).

¹⁶⁹ The Federal Rules of Civil Procedure endorse general allegations regarding elements of this nature. See FED. R. CIV. P. 9(b) (permitting "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally"). However, the majority in *Iqbal* asserted that this rule "merely excuses a party from . . . an elevated pleading standard" of the sort imposed upon claims of fraud by Rule 9(b). *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009). Therefore, even allegations of discriminatory intent, and other states of mind, are subject to the limitation on conclusory statements.

¹⁷⁰ See *Iqbal*, 129 S. Ct. at 1954 (concluding that Iqbal's "complaint fail[ed] to plead sufficient facts").

¹⁷¹ That proponents of strengthening pro se assistance advocate for increased access to such materials demonstrates pro se litigants' substantial reliance on them. See, e.g., VanWormer, *supra* note 20, at 1014-15 (considering as necessary to assist pro se litigants a "centralized clearinghouse" through which pro se litigants can access "printable forms necessary to initiate a case and make motions, as well as instructional

appended to the Federal Rules,¹⁷² though, demonstrates that following these exemplars may prove detrimental to pro se litigants. The Form 11 model encourages plaintiffs to plead negligent operation of a motor vehicle without asserting what aspect of the defendant's driving was negligent, such as, for example, swerving or speeding.¹⁷³ However, "it is difficult to see the difference between this negligence allegation and the key allegations [disregarded] in *Iqbal*."¹⁷⁴ The likelihood that these allegations are ignored is not only attributable to their obvious level of generality, but also to their resemblance to legal conclusions, which courts have long excluded from consideration.¹⁷⁵ Thus, the Federal Rules entice pro se litigants to plead using shorthand factual allegations,¹⁷⁶ while courts, with Supreme Court approval, are apt to punish them for doing so.¹⁷⁷ In this way, pro se litigants are unusually disadvantaged by the first prong of the plausibility analysis.

By excluding critical allegations from consideration, courts are able to more easily deem a complaint's theory implausible.¹⁷⁸ Thus, judicial power to disregard "direct allegations of liability-creating conduct" can be wielded to dismiss disfavored claims by disfavored par-

materials related to the filing of such forms"). The importance of the forms appended to the Federal Rules cannot be overstated, as their primary architect, Charles Clark, considered them "the most important part of the rules" concerning pleading. See Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958) ("We require a general statement. How much? Well, the answer is made in what I think is probably the most important part of the rules so far as this particular topic is concerned, namely, the Forms.").

¹⁷² FED. R. CIV. P. Form 11 (setting forth the minimal allegations necessary to plead basic negligence, including date, place, and that the defendant "negligently drove a motor vehicle" resulting in injury to plaintiff).

¹⁷³ See Bone, *supra* note 100, at 861 (acknowledging that Form 11 makes no mention of what defendant's car did to hit plaintiff or why it is alleged to have constituted negligence).

¹⁷⁴ *Id.* For one court's acknowledgement that *Iqbal* calls into question the continuing viability of the Federal Rule Forms, see *Doe ex rel. Gonzalez v. Butte Valley Unified School District*, No. 09-0245, 2009 WL 2424608, at *6-7 (E.D. Cal. Aug. 6, 2009).

¹⁷⁵ See Ides, *supra* note 139, at 612 (asserting that the allegation of negligence in Form 9 is both a conclusion of law and an "assertion of fact . . . that . . . defendant drove in a manner below the standard of due care"); see also Bone, *supra* note 100, at 866 ("Today, it is settled law that a judge deciding a 12(b)(6) motion need not accept legal conclusions . . . as true." (citation omitted)).

¹⁷⁶ See FED. R. CIV. P. 84 ("The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.").

¹⁷⁷ The inconsistency perhaps stems from the Supreme Court's circumvention of the appropriate rulemaking process by which to affect formal changes to pleading doctrine.

¹⁷⁸ See Bone, *supra* note 100, at 861-62 (claiming that the *Iqbal* majority made it easier to conclude that the complaint failed the second prong by aggressively using the first prong).

ties.¹⁷⁹ The legal community's negative perception of pro se litigants makes them likely targets of such unequal use of this discretionary authority.¹⁸⁰ Bias against pro se litigants, though, even more deeply infects *Iqbal's* second prong.

b. *Biased Plausibility*

While earlier developments in summary judgment practice provide general insight into how pleading standards have changed,¹⁸¹ one particular parallel has unfortunately emerged for pro se litigants. It is the potential for judicial "cognitive illiberalism"¹⁸²: "an inability to recognize how cultural background influences one's own (as opposed to others') decisionmaking."¹⁸³ Indeed, the likelihood that such cognitive biases infect determinations is greatest at the pleading stage, during which neither party introduces evidence for consideration by the judge.¹⁸⁴

Professors Kahan, Hoffman, and Braman studied *Scott v. Harris*, in which the Supreme Court relied on a video of a high-speed chase to reconsider a trial court's factual findings and ultimately reverse its denial of summary judgment.¹⁸⁵ The Court held that no reasonable juror could find that the respondent, the fleeing driver, did not pose a deadly risk to the public, thus warranting the force used by police to end the chase.¹⁸⁶ A study of the public's own reactions to the video, howev-

¹⁷⁹ Burbank, *supra* note 16, at 117 (asserting that by giving judges the power to disregard factual allegations, *Iqbal* strengthened plausibility as "an invitation to the lower federal courts to screen out complaints in disfavored classes of cases").

¹⁸⁰ See *supra* subsection I.B.3 (discussing bias against pro se litigants).

¹⁸¹ For a detailed discussion of the lessons about pleading that can be learned from summary judgment, see generally Hoffman, *supra* note 166, at 1240-43. For a more extreme take on the links between the two procedural devices, see Thomas, *supra* note 92, at 28-34.

¹⁸² See Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 842-43 (2009) (coining the term and explaining its effect on the Court's decision to grant summary judgment).

¹⁸³ Christopher Slobogin, *The Perils of the Fight Against Cognitive Illiberalism*, 122 HARV. L. REV. F. 1, 2 (2009), <http://www.harvardlawreview.org/media/pdf/slobogin.pdf>.

¹⁸⁴ See *Has the Supreme Court Limited Americans' Access to Courts?*, *supra* note 121, at 12-13 (explaining that the prejudicial effect of "cognitive illiberalism" is more "worrisome" at the motion to dismiss stage because of the lack of an evidentiary record).

¹⁸⁵ See 550 U.S. 372, 386 (2007) (finding a police officer entitled to summary judgment).

¹⁸⁶ See *id.* ("The car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise.").

er, indicated the contrary. Members of certain subcommunities sharing common experiences and values—eerily reminiscent of the experience and common sense referred to in *Iqbal*—perceived less danger in the plaintiff’s flight and attributed more responsibility to police.¹⁸⁷

According to the authors, this division demonstrated that the Court operated in a state of cognitive illiberalism; it displayed “overconfidence in the unassailable correctness of [its] factual perceptions . . . and unwarranted contempt for [contrary] perceptions.”¹⁸⁸ The potential for the same “type of decisionmaking hubris”¹⁸⁹ to afflict courts’ determinations on the plausibility of plaintiffs’ claims is significant. The analysis requires courts to imagine other possible explanations for allegations put forth in complaints,¹⁹⁰ which courts may favor if they more closely align with the judges’ predispositions or experiences. Indeed, the Supreme Court endorsed a process similar to this bias by emphasizing “judicial experience and common sense” as the lens through which to evaluate plausibility.¹⁹¹

The subjectivity that inheres in the comparative endeavor portends special trouble for pro se litigants and the liberal construction afforded their complaints.¹⁹² As a group, pro se litigants have “identity-defining characteristics” that differ from lower court judges.¹⁹³ Unlike members of the federal bench and their clerks, for example, a majority of pro se litigants are black, Asian, or Hispanic.¹⁹⁴ Kahan and

¹⁸⁷ See Kahan, Hoffman & Braman, *supra* note 182, at 841 (noting that segments of the public that value egalitarianism and social solidarity more than hierarchy and individualism tended to disagree with the Court’s conclusion in *Scott v. Harris*).

¹⁸⁸ *Id.* at 843.

¹⁸⁹ *Id.* at 842.

¹⁹⁰ See, e.g., *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 711 (7th Cir. 2008) (“The plausibility of an explanation depends on the plausibility of the alternative explanations.”).

¹⁹¹ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (noting that a court must draw on its “judicial experience and common sense” when determining the plausibility of a claim); Burbank, *supra* note 16, at 118 (“The *Iqbal* Court’s reliance on ‘judicial experience and common sense’ is, in certain types of cases, an invitation to ‘cognitive illiberalism’ . . .”).

¹⁹² See Bacharach & Entzeroth, *supra* note 7, at 30-31 (noting that the rule set forth in *Haines* runs into trouble because “plausibility is inherently subjective and judges likely gauge ‘plausibility’ differently based on their ideologies, attitudes, and experiences”).

¹⁹³ See Kahan, Hoffman & Braman, *supra* note 182, at 879 (asserting that individuals whose opinions differed from the Court’s shared “a core of identity-defining characteristics”).

¹⁹⁴ See OFFICE OF DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS: CHARACTERISTICS, NEEDS, SERVICES 3 (2005), available at http://www.nycourts.gov/reports/AJJI_SelfRep06.pdf (reporting that over eighty percent of pro se litigants surveyed were not Caucasian).

his coauthors observed that racial differences can result in not only opposing perceptions of a set of facts, but, more importantly, conflicting conclusions based thereon.¹⁹⁵ The difference manifests in the parties these populations tend to support, with minorities favoring plaintiffs more often than Caucasians.¹⁹⁶ Furthermore, poorer pro se litigants tend to harbor a greater level of suspicion toward authority figures.¹⁹⁷ That most pro se litigants sue governmental officials¹⁹⁸ renders this difference critical to plausibility decisions because courts—significant wielders of authority themselves—may unintentionally favor alternative, lawful explanations for alleged official misconduct.¹⁹⁹ In fact, pro se litigants' distrust of the court system over which judges exercise control exacerbates the disconnect.²⁰⁰ These, as well as other, influential differences between pro se litigants and the courts evaluating their complaints²⁰¹ raise the specter of unintentional privileging of competing inferences.²⁰²

Accordingly, without a version of liberal construction that adequately accounts for the change in pleading standards that *Iqbal* finalized, courts risk alienating a group of citizens by summarily dismissing their claims as undeserving of discovery. The result is particularly ironic because pro se litigants are the only group of litigants selected for special accommodations at the pleading stage of litigation.

¹⁹⁵ Kahan, Hoffman & Braman, *supra* note 182, at 867.

¹⁹⁶ *See id.* (finding that African Americans were significantly more likely to find for plaintiffs than Caucasians).

¹⁹⁷ *See id.* at 879-80 (noting that differences, including degrees of wealth, affected whether individuals “view[ed] those in authority with trust or suspicion”).

¹⁹⁸ *See* Rosenbloom, *supra* note 5, at 323 (“Almost four out of every five pro se cases were filed against at least one government defendant.”).

¹⁹⁹ *See, e.g.,* Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1154 (2008) (“[T]he courts tend to reflect the insider view that discrimination is rare and that most claims are meritless, rather than the opposing view that discrimination is pervasive.”) For an assertion that the majority in *Iqbal* displayed these institutional biasing effects, see Spencer, *supra* note 119, at 197-99.

²⁰⁰ *See supra* subsection I.B.2 (listing the reasons that litigants choose to proceed pro se, which include distrust for lawyers and the legal system in general).

²⁰¹ For an acknowledgement that judges as a group may differ in their explanations of facts from other groups as a result of “legal and judicial professionalization,” see Kahan, Hoffman & Braman, *supra* note 182, at 883.

²⁰² This discussion should be read neither to insinuate bad faith on the part of federal judges construing pro se complaints nor to deny the myriad differences between federal pro se litigants. Instead, it is intended merely to call attention to the potential for the plausibility inquiry to disadvantage certain pro se complaints that an identifiable group of self-represented litigants tend to pursue and that implicate the courts' inherent trust in official behavior.

III. REFASHIONING LIBERAL CONSTRUCTION IN A POST-PLAUSIBILITY ERA

Liberal construction's commendable components—the most notable of which is the judicial practice of inferring the correct cause of action from complaints invoking an incorrect one²⁰³—should be retained because plausibility has not rendered them unfit to accommodate pro se litigants. However, as a rule meant to support meritorious pro se litigation, liberal construction should be strengthened to account for the difficulties the new plausibility standard presents.²⁰⁴ First, courts should demand less specificity of factual allegations drafted by pro se litigants in order to comport with the policy underlying liberal construction. Second, favored competing inferences must be transparent in order to prevent pro se litigants from repeating the errors that initially caused dismissal when amending their complaints.²⁰⁵

A. *Restraining Judicial Authority to Carve Complaints*

Although *Erickson* presaged *Iqbal*'s negative impact on pro se complaints,²⁰⁶ the Supreme Court's decision also suggested a way to mitigate the troublesome effect: restrain courts' discretion to disregard allegations they deem conclusory.²⁰⁷ Building upon this foundation, liberal construction should require courts to consider all pro se

²⁰³ See, e.g., *Hansen v. May*, 502 F.2d 728, 729-30 (9th Cir. 1974) (holding that the lower court should have treated a pro se plaintiff's claim as one made pursuant to § 1983, despite having been styled as one for habeas corpus).

²⁰⁴ Notably, these challenges emerged prior to *Twombly* as a result of lower courts' informal elevation of pleading requirements. Thus, even if Congress overturns *Twombly* and *Iqbal* by statute, see, e.g., Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009), these adaptations would still help to ensure that pro se litigants receive the accommodations necessary to protect their access to courts.

²⁰⁵ These recommendations are an attempt to adapt to the new plausibility standard, rather than to repudiate it as an incorrect construction of federal pleading requirements. They would most appropriately be implemented by judicial decree, just as was liberal construction itself. Indeed, a modified rule of liberal construction is ill-suited to both the rulemaking and legislative processes. The Federal Rules are transubstantive, rendering a party-specific rule anathema. And, while the federal government has codified special pleading requirements in the past, in this context, an analogous statute would unnecessarily constrain the judicial flexibility needed to accommodate pro se litigants.

²⁰⁶ See *supra* subsection II.B.1 (explaining why *Erickson* provides little assurance that liberal construction as presently practiced will meet the challenges facing pro se litigants post-*Iqbal*).

²⁰⁷ See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (admonishing the lower court for dismissing allegations as conclusory when they were adequate to "put the[] matters in issue").

allegations in evaluating a Rule 12(b)(6) motion unless they are pure legal conclusions. That way, courts will not unintentionally punish pro se litigants for crafting allegations as specifically as their circumstances and legal acumen permit.

Strengthening liberal construction with such a supplement is not without support in the Federal Rules of Civil Procedure. For example, Rule 1 instructs courts to construe and administer the Rules to ensure “just” determinations.²⁰⁸ Similarly, Rule 8(e) demands that “[p]leadings . . . be construed so as to do justice.”²⁰⁹ With a principled distinction between conclusory and acceptable factual allegations evading even the strongest legal minds,²¹⁰ pro se litigants most certainly cannot be expected to grasp the difference. A lack of experience with courts exacerbates this inability, as increased interaction with the courts would provide them, as it does practicing lawyers, an intuitive sense of how judges decide Rule 12(b)(6) motions.²¹¹ Accordingly, to administer pleading requirements to ensure fair results, pro se litigants should be better insulated from the admonition against conclusory factual allegations that they are unable to identify ex ante.²¹²

To implement this rule, however, a principled distinction must still be established between purely legal conclusions and general or shorthand factual allegations, and it must be one that pro se litigants can fairly be expected to comprehend.²¹³ For purposes of liberally

²⁰⁸ See FED. R. CIV. P. 1 (requiring that the Rules “be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding”).

²⁰⁹ FED. R. CIV. P. 8(e).

²¹⁰ See Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 417 (1921) (rejecting the assumption “that there is some clear, easily drawn and scientific distinction” between facts and conclusions aside from the level of specificity at which they are stated). Indeed, the endeavor proved so difficult that the drafters of the Federal Rules abandoned it altogether. See Burbank, *supra* note 16, at 115 (“Yet, an important reason why the drafters of the 1938 Federal Rules rejected fact pleading is that one person’s ‘factual allegation’ is another’s ‘conclusion.’” (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 574-75 (2007) (Stevens, J., dissenting))).

²¹¹ See Leandra Lederman & Warren B. Hrungrung, *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers’ Effects on Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235, 1252-53 (2006) (“[A]s experts and repeat players in the court system, litigating attorneys should have . . . better access to information about what the . . . judge likely will do.”).

²¹² For the origins of this functional argument, see Email from Stephen B. Burbank, Professor, University of Pennsylvania Law School, to author (Nov. 11, 2009, 14:52 EST) (on file with author).

²¹³ Although any attempt to distinguish between legal conclusions and factual allegations superficially harkens back to code pleading, which has long been rejected, the gloss that follows does not resuscitate the hypertechnical distinctions of yore. Rather, it seeks to establish a uniquely low specificity threshold beyond which allegations

construing pro se complaints, then, legal conclusions that courts need not presume true should be only those in which pro se plaintiffs assert that defendants' conduct either (1) amounts to a violation of the law or (2) satisfies an element of the alleged offense in obviously "canonical form."²¹⁴ All other allegations, including the mixed statements of law and fact that comprise the majority of complaints, should be presumed true. For example, a pro se prisoner's averment that a particular punishment constituted retaliation for free speech, and therefore violated the First Amendment, would not pass muster. By contrast, if that same plaintiff alleged that a prison guard subjected her to harsh conditions of confinement *because* of complaints she made about the guard's behavior, the statement would be presumptively entitled to consideration in determining the complaint's plausibility. Simply put, courts should accept general statements regarding objectively verifiable facts, but reject legal determinations supposed to be made from those statements: the motive for certain conduct can be confirmed or disproved by evidence, while that conduct's constitutionality is a determination made only in light of such evidence.²¹⁵

Severely curtailing courts' ability to carve conclusory factual allegations from pro se complaints errs on the side of considering allegations and thereby heightens the chance that claims are deemed plaus-

are entitled to the presumption of truth for one particular subgroup of litigants whom courts have singled out for special treatment due to policy considerations. In that regard, it benefits from the work of a leading scholar during the code-pleading era and one of its strongest critics, Walter Wheeler Cook, who believed that factual specificity differentiates conclusions from allegations and that the required amount of specificity should comport with "notions of fairness and convenience." Cook, *supra* note 210, at 422-23.

²¹⁴ See Bone, *supra* note 100, at 867 n.94 (suggesting that one extreme way to narrow the class of excludable conclusions is to limit it to "allegations that simply insert 'plaintiff' and 'defendant' into a legal proposition otherwise stated in some recognizably canonical form").

²¹⁵ See *id.* at 873-74 (discussing objectively verifiable facts in the context of plausibility analysis). Drawing the line at objective verifiability comports with the previous acknowledgment that Form 11 should be sufficient to entitle pro se plaintiffs to discovery. It requires a plaintiff claiming basic negligence to state only, "On [X] date, at [X] place, the defendant negligently drove a motor vehicle against the plaintiff." FED. R. CIV. P. Form 11. Its use of the term "negligently," however, is not a legal conclusion that can be disregarded, but rather just a description of the defendant's driving, like "sporadic" or "substandard," which can be objectively verified through discovery. See *supra* subsection II.B.3.a (discussing Form 11 as endorsing shorthand factual allegations). Accordingly, similar descriptive terms that resemble legal conclusions should not be disregarded when liberally construing pro se complaints. Cf. Bone, *supra* note 100, at 873-74 (explaining that some conclusory statements do provide the court with a sufficient basis to evaluate a claim's success under the plausibility standard).

ible.²¹⁶ However, this recommendation should not be interpreted to strip courts of their ability to dismiss overly fanciful or clearly outrageous claims and claims for which there is absolutely no valid basis in the law because the plausibility prong remains intact. Therefore, such claims—the majority of which are admittedly pursued *pro se*²¹⁷—will not survive motions to dismiss despite the change outlined above. Although similarly emasculating *Iqbal*'s first prong may be prudent for entire classes of claims involving hard-to-verify facts, the transsubstantive application of the Federal Rules would not permit such a development. However, because *pro se* litigants have already been selected for special treatment, transsubstantivity should not block their entitlement to a less stringent version of *Iqbal*'s first prong.

B. Making Inferences Transparent to Assist with Complaint Amendments

Courts are presently amenable to granting *pro se* litigants leave to amend their complaints.²¹⁸ Although exceedingly liberal access to amendments should be retained for *pro se* plaintiffs, such access is of little use when unaccompanied by transparent explanations as to why particular complaints are insufficient.²¹⁹ Failures to set forth such explanations are likely to increase post-*Iqbal* because of the subjectivity that inheres in plausibility analysis and courts' inability to recognize that perceptions of factual circumstances differ among groups.²²⁰ Accordingly, the inferences that courts believe render theories of wrongdoing implausible should be made clear so *pro se* litigants can

²¹⁶ See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1959-60 (2009) (Souter, J., dissenting) (agreeing with the majority that, without the factual allegations disregarded as conclusory, the complaint failed to state a plausible claim to relief); Bone, *supra* note 100, at 861-62 (noting that *Iqbal*'s first prong "did all the work" by making it easy to conclude that the complaint did not raise a plausible inference of wrongdoing).

²¹⁷ See Byron C. Keeling, *Toward a Balanced Approach to "Fivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1142 (1994) ("[P]ro se litigants file a large proportion of the nut claims.").

²¹⁸ See, e.g., *Shomo v. City of New York*, 579 F.3d 176, 183 (2d Cir. 2009) ("[A] *pro se* complaint . . . should not [be] dismiss[ed] without granting leave to amend at least once" (internal quotation marks omitted) (emphasis added)).

²¹⁹ See Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 436-40 (2004) (discussing transparency as essential to providing *pro se* litigants meaningful judicial accommodations and noting that explanation is a "particularly important" component of that transparency).

²²⁰ For a fuller discussion of this type of unintentional decisionmaking confidence or "hubris," see *supra* subsection II.B.3.b.

better supplement their complaints to undercut the viability of those inferences and thereby increase the plausibility of their own.²²¹

A heightened sense of “judicial humility”²²² in drawing competing inferences is perhaps the first step toward increasing the aforementioned transparency. Courts should second-guess their disregard for inferences upon which pro se plaintiffs rely to ensure that their disbelief is not motivated by a difference in values or predispositions, but rather by a more neutral conviction that the inferences would not persuade individuals sharing even the litigants’ “identity-defining” traits.²²³ That way, courts will be both less likely to alienate pro se litigants by discounting inferences that these litigants, as a recognizable group, deem credible, and better able to identify favored competing inferences when granting leave to amend. As a result, pro se litigants will understand the allegations requiring additional factual enhancement to make the necessary, but unmade, inferences plausible and limit courts’ skepticism. Indeed, including suggestions in the opinion as to the types of support needed to sustain missing elements would be advisable, as pro se litigants may otherwise neglect to include all the facts within their possession on the assumption that complaints should be as “short and plain” as possible.²²⁴

In fact, despite having unabashedly privileged its own perception of the facts alleged in *Iqbal*, one redeeming quality of the majority’s opinion in that case is its presentation of the competing inference that, for five Justices, made *Iqbal*’s claim implausible. In particular, the majority expressly stated its belief that, in light of the recent Sep-

²²¹ A related approach would permit plaintiffs to conduct limited discovery to quell courts’ skepticism as to plausibility. See, e.g., Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 140 (2010) (“Where the complaint’s implausibility is due to an informational inequity, an opportunity to re-plead does little good without some narrow discovery to ameliorate the problem.”). Additional transparency would work well in conjunction with pre-dismissal discovery because it would direct the discovery and thereby limit its cost.

²²² See Kahan, Hoffman & Braman, *supra* note 182, at 897-99 (defining “judicial humility” as a way by which judges can prevent privileging value-laden perceptions over competing perceptions likely made by groups with different “identity-defining characteristics”).

²²³ See *id.* at 898-99 (urging a process whereby judges reconsider their conclusions that no reasonable juror could find wrongdoing to make sure that they do not denigrate the views of particular communities that perceive facts differently).

²²⁴ For a compelling discussion of why “cause of action” information should not generate concerns over judicial partiality, see Jona Goldschmidt, *Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience*, 17 MICH. ST. J. INT’L L. 601, 622-23 (2009).

tember 11th attacks, the high-ranking officials likely placed Iqbal in restrictive confinement because of his suspected terrorist connections and not on account of his nationality or race.²²⁵ At least, then, if Iqbal had not retained counsel, his opportunity to amend the complaint would remain meaningful. Iqbal could have, for instance, alleged deficient intelligence connecting him to terrorism in order to rebut the Court's conviction that defendants acted lawfully and render the proposed inference of wrongdoing plausible. To go one step further, discussing the type of factual support tending to adequately "show" motive in the relevant context would at least place him on a more level playing field with litigants whose lawyers understand the type of support required to succeed.²²⁶

Although post-analysis treatment of pro se complaints cannot properly be labeled a method of liberal construction, it is nevertheless a critical extension of the leeway given pro se litigants at the pleading stage of litigation. The present liberal amendment practice with respect to pro se litigants cannot compensate adequately for the pleading developments *Iqbal* enshrined unless significant transparency is infused into the highly subjective second prong of the analysis. Discerning competing inferences that must be rebutted is a daunting task for lawyers well-versed in drafting complaints, let alone pro se litigants. Thus, like limiting the grant of authority to disregard conclusory allegations, requiring greater explanation as to the deficiencies courts perceive in pro se complaints will promote the goal of liberal construction.²²⁷

C. Addressing Concerns Related to Neutrality, Caseload, and Abuse

Pro se advocacy necessarily arouses concerns over judicial neutrality, docket burden, and litigation abuse. Accordingly, it is important to address these concerns because the techniques set forth above will, as intended, lead to pro se litigants accessing discovery in greater numbers. These issues, though, fail to counsel convincingly against a more robust version of liberal construction, particularly in

²²⁵ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951-52 (2009) (noting that all the alleged nonconclusory facts can be read to suggest is that defendants placed plaintiff in restrictive confinement because he was a suspected terrorist, which does not plausibly suggest invidious discrimination).

²²⁶ For a similar suggestion that instructions to pro se litigants be included in orders granting leave to amend so that they can correct defects in their complaints, see Zeigler & Hermann, *supra* note 64, at 211.

²²⁷ See *supra* Section III.A (articulating a functional argument for constraining judicial capacity to disregard "conclusory" allegations based upon Rules 1 and 8(e)).

light of the alternative mechanisms available by which to check excessive pro se litigation.

Some commentators—most notably Judge Bacharach and Professor Entzeroth—argue against robust liberal construction because, in their opinion, it destroys judicial neutrality.²²⁸ However, their criticism does not target adaptations like the first supplement to liberal construction proposed above. Constraining courts' authority to disregard factual allegations does not require judges to treat pro se complaints in a manner that conflicts with their authors' intentions. In fact, it accomplishes quite the opposite. Requiring courts to accept more allegations as presented by pro se litigants will better align their treatment of pro se complaints with litigants' expectations, precisely the goal of Bacharach and Entzeroth's critique.²²⁹ Moreover, while concerns about judicial partiality are perhaps more relevant to the second supplement proposed herein, they are still insufficient to counsel against its implementation. Increasing transparency with respect to pro se complaints aids self-represented litigants by making meaningful amendments more accessible. However, it requires judges neither to substantially alter the process by which they evaluate the sufficiency of pro se complaints nor to advocate on behalf of pro se litigants by affirmatively correcting substantive inadequacies.

While these proposals separately fail to blur the line between neutrality and advocacy, together they do warrant skepticism regarding the increased workload that will result from their implementation. Nonetheless, several observations allay these concerns. First, early statistics indicate that *Twombly* and *Iqbal* may actually decrease the number of pro se suits that are filed in the first place.²³⁰ Thus, to the extent that this trend continues, it may negate at least some of the extra workload shouldered by courts overseeing more pro se discovery. Indeed, one of the benefits of working within the plausibility regime (rather than exempting pro se litigants from it completely) is the standard's ability to discourage less meritorious filings. In addition, limiting the effort required of judges liberally construing pro se complaints could counterbalance the resulting increase in discovery-

²²⁸ See Bacharach & Entzeroth, *supra* note 7, at 42 ("The effort to equalize adversarial ability is a futile endeavor, but the hopelessness of the task is not the greatest danger. Instead, the greater danger is the loosening of the well-designed constraints on the role of the judiciary in the adversarial process.").

²²⁹ See *id.* at 43 ("The key to construction of pro se pleadings involves an understanding of what the litigant has said.").

²³⁰ See Hatamyar, *supra* note 15, at 613 ("Interestingly, the percentage of *pro se* plaintiffs . . . declined from *Conley* (30%) to *Twombly* (27%) to *Iqbal* (24%).").

related burdens. The reductions in time and energy spent parsing conclusory from nonconclusory allegations and reconsidering amended complaints should permit courts to dedicate more attention to pro se cases after deciding motions to dismiss.

A related issue to which many attribute the recent shift in pleading standards involves discovery costs incurred by defendants and the potential for abusive litigation. This concern is particularly acute in the context of pro se litigation, which admittedly involves more unmeritorious claims. However, the costs likely to result from more pro se discovery will not be grave because pro se claims are on the whole much simpler than actions pursued with counsel.²³¹ Their simplicity renders pro se claims particularly amenable to supervised discovery, which should quickly reveal to defendants whether or not a summary judgment motion would succeed. In addition, the leeway afforded pro se litigants does not exempt them from Rule 11 sanctions for failing to affirm (1) that “reasonable prefiling inquiry has shown that a filing’s claims and assertions are ‘well grounded in fact and [are] warranted by existing law or a good faith argument for [a change] of existing law’” and (2) that “the filing ‘is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.’”²³² These sanctions should continue to deter some of the excesses that have come to characterize pro se cases.

Leaving the gate to discovery slightly more ajar for pro se litigants will not grind the gears of our federal judicial system to a halt. Accordingly, a stronger version of liberal construction is warranted in light of the countervailing fairness concerns that underlie the system’s historic support for self-representation.

CONCLUSION

Liberal construction developed in response to challenges facing pro se litigants that courts identified as having the potential to unfairly deny them access to discovery. As the term itself suggests, those challenges consisted of the potential for (1) incomprehensible or “inart-

²³¹ See *supra* note 57 (examining the complexity of pro se suits and the burden they impose on courts).

²³² Nichols, *supra* note 49, at 355 (quoting FED. R. CIV. P. 11). The 1983 revisions to Rule 11 eliminated unrepresented litigants’ previous exemption from the Rule’s reach. *Id.* at 355-56. Now, “the rule unequivocally reaches the conduct of *pro se* litigants . . . [and] no federal court may claim that it is powerless to administer [R]ule 11 sanctions against unrepresented parties whose filings it finds to be frivolous-in-fact, frivolous-in-law, or improperly motivated.” *Id.* at 357; see also FED. R. CIV. P. 11.

ful” drafting and (2) incorrect or incomplete invocation of the legal bases for claims. That these difficulties do not include the potential for the standard for evaluating complaints to punish pro se litigants reflects the background notice-pleading regime under which the Supreme Court first granted the leniency. The *Conley* “no set of facts” standard raised a deceptively low bar to pleading a cause of action adequately, thereby posing little threat of inherent unfairness to pro se litigants.

Only through informal channels did lower courts heighten pleading requirements to make suits pursued by particular claimants, including pro se litigants, more vulnerable to dismissal for failure to state a claim. The unexpressed nature of this development perhaps excuses, or at least explains, the system’s previous failure to reevaluate liberal construction as an adequate accommodation to pro se litigants. However, *Iqbal* removed the disguise, ushering in a new era of heightened pleading requirements. Plausibility analysis adds yet another unique challenge to the set of concerns initially identified as requiring liberal construction of pro se pleadings since each of its prongs unfairly punishes unrepresented litigants. As a result, courts would be remiss not to allow greater leniency for self-represented litigants at the pleading stage of litigation.

This Comment endeavors to provide insight into exactly how the plausibility standard disproportionately undercuts the efforts of pro se litigants to access discovery in order to highlight why two particular supplements to liberal construction are advisable. Without meaningful adaptations of the sort here proposed, our legal system risks not only defying the longstanding statutory protections afforded to the right of self-representation, but also infringing upon pro se litigants’ constitutional right to a meaningful opportunity to be heard.