A Legal Horror Story: *Pro se* Litigants

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Let's get this out of the way. *Pro se* litigants file a lot of lawsuits. A lot**.** Between 2000 and 2019, twenty-seven percent of all civil cases had at least one *pro se* plaintiff or defendant.[1] In 2022, forty-six percent of filings in federal courts of appeals were *pro se*.[2]

And many of the *pro se* complaints that are filed in federal court are filed by prisoners with nothing but time on their hands and an infatuation with the law. From 2000 to 2019, in ninety-one percent of prisoner petition filings, the plaintiffs were self-represented.[3] Most of those filings included constitutional claims.

Pro se litigants are known for their failures to follow the traditional rules of litigation, including mandated procedural rules, either out of ignorance, defiance, or both. But though *pro se* litigants are about as annoying as the fly in your house that you just cannot seem to get rid of, they should not be taken lightly. Remember Goliath?

I. The Right of Self-Representation

A. The Source of the Right

You may recall a time when you were sitting at your desk and had a fleeting thought that the Founders got it wrong when they decided that people should be able to represent themselves in a court of law. You may have exclaimed: That pesky Constitution! But did you know that although the Sixth Amendment guarantees a defendant the right to represent himself in criminal matters, there is no constitutional right to do so civilly?

Historically, the right of self-representation was guaranteed in many colonial charters and declarations of rights that gave the colonist a right to choose between pleading through a lawyer and representing oneself.[4] That right has been protected by statute since the beginning of our Nation. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, was enacted by the First Congress and signed by President George Washington one day *before* the Sixth Amendment was proposed

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[1] Just the Facts: Trends In Pro Se Civil Litigation From 2000 to 2019 (Feb. 11, 2021), https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019#figures_map

[2] Chief Justice John G. Roberts, Jr., U.S. Sup. Ct., 2022 Year-End Report On The Federal Judiciary 6 (2022)

[3] U.S. Courts, Statistical Tables for Federal Judiciary.

[4] *Faretta v. California,* 422 U.S. 806, 828, 95 S. Ct. 2525, 45 L. Ed.2d, 562 (1975).

and provided that "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of …counsel….[5]

The right is currently codified in 28 U.S.C. §1654, which provides in relevant part, that "in all courts of the United States the parties may plead and conduct their own cases personally or by counsel….."[6] Because the statute only applies to Federal Courts, the right of *pro se* litigants varies from state to state depending on the state's constitution and statutes.

B. Limitations of *Pro Se* Litigation

Although the right to self-representation is a fundamental part of our history, for many of us—judges included—it has become a nuisance. *Pro se* litigants flood the courts' dockets and can be a drain on judicial resources. In an attempt to damn the floodgates, pursuant to 28 U.S.C. §1915(e)(2), proceedings in *forma pauperis* are subject to screening by federal courts to limit claims that are frivolous, malicious, or otherwise fails to state a claim upon which relief may be granted.

The right of self-representation also has limits. Although a party may represent himself *pro se*, a non-attorney may not represent other parties in federal court.[7] For instance, under § 1654, a litigant may not proceed *pro se* on behalf of an estate when the estate has additional beneficiaries, other than the executor or personal representatives, and/or where the estate has creditors. The rule against a non-attorney *pro se* party representing another party applies even if the non-attorney who is seeking to represent another has obtained a general power of attorney.[8]

But the right to proceed *pro se* under § 1654 is not limited to cases where the *pro se* party is a named plaintiff. Rather, the statute provides for *pro se* representation in any case that is a party's "own."[9] The relevant query then becomes what cases are considered a party's "own"? Courts have tackled this question when determining whether a parent can represent their children because taken by itself § 1654 does not say when a child's case belongs to the parent.[10] To answer this question, federal courts consider whether federal or state law designates a child's

[5] Sec. 35 of the Judiciary Act of 1789, 1 Stat. 73, 92.
[6] 28 U.S.C. §1654
[7] *Devine v. Indian River Cnty. Sch. Bd.,* 121 F.3d 576, 581-82 (11th Cir. 1997)
[8] *See e.g. Johns v. Cty of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997)
[9] 42 U.S.C. § 1654
[10] *See e.g. Sprague v. Dep't of Fam. & Protective Servs.,* 547 F. App'x 507, 508 (5th Cir. 2013)

claim as belonging to the parent. For example, parents may litigate *pro se* if their minor child is denied social security benefits.[11]

II. Popular Constitutional Claims

A. Section 1983 Litigation

If you handle constitutional violations claims, you are intimately familiar with 42 U.S.C. § 1983. Section 1983 is the primary remedial statute for asserting federal civil rights claims against local public entities, officers, and employees. But how did §1983 come to be codified? Like many of our rights that are cemented by statute, it has historical underpinnings.

The Civil Rights Act of 1871, also known as the Ku Klux Klan Act, is an Act of the United States Congress that empowered the President to suspend the *writ of habeas corpus* to combat the Ku Klux Klan and empower the President to use military force to protect African Americans.[12] Several of the Act's provisions exist as codified statues; the most important being § 1983. Section 1983 allows individuals to sue in federal court when state and local officials violate federal law.

To succeed on a § 1983 claim, a plaintiff must prove that his constitutional rights were violated, and that the violation was caused by a person acting under color of law. Only claims against "state actors" are eligible for relief under the statute.[13] A plaintiff bringing a § 1983 claim must start by identifying the constitutional right that was violated. Section 1983 itself is not a source of substantive rights but rather a vehicle for obtaining relief.

I have not personally conducted a survey but if I was in Las Vegas and forced to place a bet on which statute is most commonly known amongst prisoners, I am placing all of my money on "§1983."

B. First Amendment Claims

Claims asserting a violation of First Amendment rights are popular amongst *pro se* litigants. After all, the freedom of religion and speech are considered the most cherished values in America. Even when unpopular or looked down upon to do so, freedom of speech provides

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[11] *Crozier for A.C. v. Westside Cmty. Sch. Dist.*, 973 F.3d 882, 887 (8th Cir. 2020)
[12] U.S. Senate: "The Enforcement Acts of 1870 and 1871" www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm.
[13] *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 940, 102 S.Ct. 2744,73 L. Ed.2d 482 (1982)

the right to not salute the flag, to use offensive words and phrases, and to burn the flag in protest.[14] Those who assert their First Amendment rights are also protected from retaliation. More specifically, the First Amendment prohibits retaliation by public officials.

To state a colorable First Amendment retaliation claim under §1983, the plaintiff must establish that he (1) engaged in protected First Amendment activities, (2) the defendant took some action that adversely affected his First Amendment right, and (3) there was a causal relationship between his protected activity and the defendant's conduct.[15] Inmates have a "First Amendment right to be free from retaliation for filing a grievance" that is "clearly established."[16]

In some circuits, such as the Fourth Circuit, courts are cautioned they should treat an inmate's claim of retaliation by prison officials "with skepticism."[17] Courts also defer to prison administrators when considering restrictions on prisoners' speech.[18] In *Jones v. North Carolina Prisoner's Union,* the North Carolina Department of Corrections prohibited inmates from soliciting other inmates to join the North Carolina Prisoners Union and barred Union meetings and bulk mailings concerning the Union from outside sources. Delivering the opinion for the majority, Justice William H. Rehnquist, wrote that because realities of running a penal institution are complex and difficult, it was necessary to recognize the wide-ranging deference to be accorded the decisions of prison administrators.[19]

Another common basis for asserting First Amendment violation claims is the right to religious exercise. Federal courts have held that while prisoners have the right to religious exercise under the First Amendment, the right "may be subjected to reasonable restrictions and limitations" by prison officials.[20] As such a prisoner bringing a claim that prison officials violated his right to exercise his religion must first establish that "the belief or practice asserted is religious

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[14] *See West Virginia Board of Education v. Barnette,* 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943); *see also Cohen v. California,* 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971); *see also Texas v. Johnson,* 491 U. S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989); *see also United States v. Eichman,* 496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d 287 (1990)

[15] *Martin v. Duffy* 858 F.3d 239, 249(4th Cir.2017).

[16] *Booker v. S.C. Dep't of Corr.,* 855 F.3d 533, 546 (4th Cir. 2017).

[17] *Stevens v. Morris,* 73 F.3d 1310, 1317 (4th Cir. 1996).

[18] *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977).

[19] *Id*. at 126

[20] *Abdur -Rahman v. Mich. Dept. of Corr.*, 65 F.3d 489, 491(6th Cir, 1995)

in the person's own sceheme of things and is sincerely held."[21] Then, the plaintiff must also establish that the defendant's behaviour infringes upon this practice or belief." [22]

Because of the high bar for *pro se* prisoners to properly plead and prevail on claims asserting a violation of the First Amendment, you should always look for opportunities to file early dispositive motions. Even if a complaint makes it past the federal courts' initial screening, do not give up hope of getting the complaint dismissed on the pleadings.

C. Fourth Amendment Claims

Although the famous rapper Jay-Z has "99 Problems," a violation of his Fourth Amendment right to be free from unreasonable searches and seizures is not one of them.[23] In the song "99 Problems", the rapper describes his encounter with a police officer asking to search the rapper's vehicle without a warrant. Paraphrasing, the rapper politely declines and explains that although he did not pass the bar, he knew enough about his rights that he would not allow an illegal search to occur. Whoever thought a rap verse would be taught in constitutional law classes?

The Constitution, through the Fourth Amendment, protects people from searches and seizures, but only those that are deemed unreasonable under the law.[24] Whether a particular type of search is considered reasonable in the eyes of the law, is determined by balancing two important interests.[25] First is the intrusion on an individual's Fourth Amendment rights. Second is the government's legitimate interest, such as public safety. As you can imagine, the Fourth Amendment prohibition of unreasonable searches does not apply to prison cells, although prisoners have tried.[26]

Another type of claim arising under the Fourth Amendment rights is based on the protections provided from the use of excessive force. Under the Fourth Amendment, a police officer may use only such force as is objectively reasonable under the circumstances.[27] Notably, while the Fourth Amendment prohibition against excessive seizures bars excessive force against free citizens, the Eighth Amendment's ban on cruel and unusual punishment bars excessive force

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[21] *Barhite v. Caruso*, 377 F.App'x 508, 510 (6th Cir. 2010).
[22] *Kent v. Johnson,* 821 F.2d.1220, 1224 -25 (6th Cir. 1987).
[23] *Caleb Mason, Jay-Z's 99 Problems, Verse 2: A Close Reading With Fourth Amendment Guidance for Cops and Perps,* 56 St. Louis U. L.J. (2012), available at: https://scholarship.law.slu.edu/lj/vol56/iss2/7/
[24] *See, e.g., Carroll v. United States*, 267 U.S. 132, 147, 69 L. Ed. 543, 45 S. Ct. 280 (1925)
[25] *United States v. Knights* , 534 U.S. 112, 122 S. Ct. 587, 592, 151 L. Ed. 2d 497 (2001)
[26] *Hudson v. Palmer,* 468 U.S. 517, 530, 104 S.Ct. 3194, 82 L.ed.2d393 (1984).
[27] *Graham v. Connor,* 490 U.S. 386, 397,109 S. Ct. 1865, 104, L.ed.2d443 (1989).

against convicted persons.[28] Consequently, you are more likely to encounter excessive force claims by *pro se* litigants that arise under the Eighth than the Fourth Amendment.

D. Eighth Amendment Claims

Prison officials have a legal duty under the Eighth Amendment to refrain from using excessive force and to protect prisoners from assault by other prisoners. Prison officials may violate the Eighth Amendment if they knew about a risk of assault by other prisoners for failure to respond, or if prison conditions or practices create an unreasonable risk of assault.[29]

To prevail on an excessive use of force claim under the Eighth Amendment, a plaintiff must show the defendant officer used force "maliciously and sadistically for the purpose of inflicting pain."[30] The Eighth Amendment only prohibits "cruel and unusual" punishment, but not uncomfortable or even harsh ones.[31] Thus, a prisoner's road to prevailing on an excessive force claim is a long and arduous one.

A prison official, however, need not physically strike a prisoner or allow an assault to occur to violate the Eighth Amendment protection from cruel and unusual punishment. The deliberate indifference to a prisoner's serious medical needs constitutes cruel and unusual punishment and is therefore prohibited.[32] The Supreme Court has concluded that the deliberate indifference to serious medical needs of prisoners constitutes unnecessary and wanton infliction of pain.[33] The Supreme Court has defined deliberate indifference for Eighth Amendment purposes as when a defendant "knows of and disregards an excessive risk to inmate health or safety."[34]

If you encounter an Eighth Amendment deliberate indifference claim, make sure you read the complaint carefully. If the complaint includes an allegation that a medial professional provided treatment to the prisoner, there must be an allegation that the prison official acted with the mental state equivalent to criminal recklessness to establish the subjective component of the claim.[35] Therefore, if there are allegations that the prisoner received treatment but disagrees with the proper course of the treatment, you could get the complaint dismissed on the pleadings.

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[28] *Id*. at 388; *See also Whitley v. Albers,* 475 U.S. 312, 318-19, 106 S.Ct. 1078, 89L.ed.2d. 251 (1986)
[29] See?e¡g¡?Farmer.v¡.Brennan, 511 U.S. 825, 828, 843, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); see.also. *Howard v. Waide,* 534 F.ed 1227, 1235-41 (10 Cir. 2008)
[30] Hudson.v¡.McMillian?❶69.U¡S¡7?❸?778.S¡Ct¡❺❺❶?77❸L¡Ed¡8d7❶❷(7❺❺8)¡
[31] Rhodes.v¡.Chapman, 452 U.S. 337, 347, 101S.Ct. 2392, 69L.Ed. 2d59 (1981).
[32] Estelle.v¡.Gamble?429 U. S. 97, 103, 97, S. Ct. 285, 50L.Ed. 2d251 (1976)
[33] *Id.*
[34] Farmer v. Brennan, 511 U.S. 825, 837,114 S.Ct. 1970 128L.Ed. 2d 811 (1994)
[35] Griffith.v¡.Franklin.Cty¡.Kentucky, 975 f.3d.554, 568 (6th Cir. 2020)

III. Managing the Challenges of *Pro Se* Claims

Pro se litigation poses inherent problems for courts, attorneys, and claims professionals. *Pro se* litigants are more likely to file frivolous claims, numerous and lengthy pleadings, and making sense of incoherent arguments can take a lot of time, resulting in increased litigation fees.

Another problem is that settling claims with *pro se* litigants can be difficult. They lack perspective as to what constitutes a reasonable settlement and may be reluctant to even make a demand. Settling a claim is even more difficult, if not impossible, when money is not the *pro se* litigant's ultimate objective. The use of a mediator to resolve claims with *pro se* litigants may be invaluable. A *pro se* litigant is more likely to listen to someone they perceive as being neutral when deciding whether, and for how much, they should settle their case.

When dealing with *pro se* litigants it also is important to maintain professionalism as challenging as that may be. Under all circumstances, you must refrain from providing a *pro se* litigant with advice. Be careful when speaking with *pro se* litigants because anything you say, can and will be used against you.

To manage some of these challenges, especially costs, you should always evaluate the chance of obtaining a dismissal on the pleadings. Another tactic to posture a case for a dispositive motion is to utilize requests for admissions. Under Rule 36(a)(3) of the Federal Rules of Civil Procedure, requests for admissions are automatically deemed admitted if the opponent fails to timely respond or object.

Although courts have noted their disinclination to strictly apply Rule 36(a)(3) against a *pro se* party, the longer the requests go unanswered, the greater chance you have of getting a case dismissed without incurring extensive litigation costs. But whatever you do, do not take *pro se* litigants lightly because they can be dangerous. Remember, *pro se* prisoners have nothing but time on their hands.

IV. Conclusion

Though challenging, *pro se* litigation can be fun (or at least you may have a laugh or two). But the constitutional can be complex and there are too many to address in this essay. So, if you are dealing with a *pro se* litigant, even pre-suit, please remember that Eagles are always willing to assist.