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The Misunderstood Pro Se Litigant: More Than A Pawn In The Game

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Too often, the bar and the bench have regarded, treated, and disposed of those who proceed without counsel as, at best, outsiders. As a result, all parties lose—not only the pro se petitioner, but also those who presume that the pro se petitioner has a worthless claim, or worse, that he himself is somehow worthless because he has no counsel. The authors, with a combined total of four years’ experience as pro se law clerks for the Second Circuit, argue that the pro se petitioner plays a valuable role in our courts, and should not be underestimated.

There are those who recognize that the opportunity to proceed without counsel in our system prevents a stranglehold on justice by lawyers. They respond to the individual pro se petitioner with the same careful and thorough preparation which marks their other legal work. The authors urge the remainder of the legal community to subscribe to the same procedure, underscoring the successes of some of the pro se petitioners whose cases are discussed herein.

I. Introduction

The caveat that one who represents himself as his own attorney has a fool for a client is an acrid admonition to those without alternative. In this society, there are those who must contest without the benefit of counsel not just contractual disputes in small claims court,¹ but also

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† The views expressed in this article are solely those of the authors, and should not necessarily be attributed to any judge of the United States Court of Appeals for the Second Circuit.

¹ The obstacles confronted by the small-claims litigant have been the subject of much discussion. See, e.g., D. Matthews, Sue The B*St*rds (1973); The Small Claims Study Group, Little Injustices: Small Claims Courts and the American Consumer (1972);
alleged violations of their civil rights and liberties as provided for in the United States Constitution, including their right to hold a job, to practice their religion and to be free of racial discrimination. Some must challenge the Dickensian conditions of their confinement, and others must oppose the circumstances that caused such confinement. Although many persons either retain or are assigned counsel, there remains a substantial number who can neither afford counsel nor convince the court to exercise its discretion to appoint counsel. These persons are called pro se litigants.\footnote{18 U.S.C. § 3006A(g) (1970):}

The pro se litigants' record of success is so poor that they have been characterized as a "society of losers," but whether their failure is a result of the frivolousness of their claims or the manner in which the claims are presented is unclear. One point, however, is certain: many presume, notwithstanding the actual reason for the pro se's lack of success, that all pro se cases are frivolous, and that the search for the isolated valid claim is not worth the burden on the judicial system.\footnote{Forbes, What the Legal Community Needs to Know About the Small Claims Court, 6 CREIGHTON L. REV. 317 (1973); Haemmel, The North Carolina Small Claim Court—An Empirical Study, 9 Wake Forest L. REV. 503 (1973); Minton & Steffenson, Small Claims Courts: A Survey and Analysis, 55 J. AM. JUD. Soc'y 324 (1972); Oglesby & Carr, The Small Claims Court in Texas, 3 KAN. L. REV. 238 (1955); Found, The Administration of Justice in the Modern City, 26 HARV. L. REV. 302 (1913); Scott, Small Causes and Poor Litigants, 9 A.B.A.J. 457 (1923); Stoller, Small Claims Courts in Texas: Paradise Lost, 47 TEXAS L. REV. 446 (1969); Note, The Ohio Small Claims Court: An Empirical Study, 42 U. CIN. L. REV. 469 (1973); Note, The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California, 21 STAN. L. REV. 1657 (1969); Comment, Small Claims Court: Reform Revisited, 6 COLUM. J. L. & Soc. PROB. 47 (1969); Comment, The California Small Claims Court, 52 CALIF. L. REV. 876 (1964).

For a listing of early discussions in the development of small claims courts, see Northrop, Small Claims Court and Conciliation Tribunals: A Bibliography, 33 L. LIBRARY J. 39 (1940).} We disagree.
The United States Court of Appeals for the Second Circuit employs two law clerks to read papers submitted by these “losers,” and to assist the court in winnowing those petitions which are nonfrivolous. Briefs on appeal or motions requesting preliminary relief constitute the papers—often no more than barely readable petitions, handwritten on tissue paper—submitted by the pro se on appeal. The condition of these papers merely hints at the frustration endemic to litigating one's own case. “Why did I cease to litigate my case?,” queried one frustrated petitioner. “Justice, itself an elusive abstraction, is a fiction. It assumes an air of reality only because the majority of people in this country live their lives without being required to seek justice. “The unfortunate ones who seek justice find that it exists only in the minds of the judges.”

The basis for such despair is the perception that the courts as today constituted obstruct the promise of the American system, i.e., that any dispute between individual and institution, however great, may be brought before the one institution specifically designed for the vindication of the individual's constitutional rights—the courts—for just resolution. For the pro se litigant, it is his own perception of the judicial system which ultimately determines the court's effectiveness. An argument may be resolved and justice may be effected by the system. But if the courts, as well as those who practice and work therein, discount the pro se litigant and his claims, then at least one essential component of practical justice, the appearance of justice, is withdrawn. This com-


6 The Second Circuit was the first to establish an office with the designated task of both processing and analyzing pro se cases. The Third, Fourth, Fifth, Sixth, Seventh, Tenth, and District of Columbia Circuits now employ pro se law clerks or staff attorneys who scrutinize pro se cases in addition to their other functions. See Ziegler & Hermann, The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts, 47 N.Y.U.L. REV. 157, 239 n.345 (1972).

7 The preliminary relief typically sought is the assignment of counsel, see note 2 supra, and leave to proceed in forma pauperis, which is basically a waiver of the circuit court's present fifty dollar docketing fee, see 28 U.S.C. § 1915 (1970). Before the court of appeals will schedule an appeal, State prisoners must obtain from the district court, the circuit court, or the Circuit Justice a certificate of probable cause, see 28 U.S.C. § 2253 (1970).

As a rule of thumb, it is likely that a civil rights complainant or a federal prisoner seeking to vacate his conviction will request counsel and leave to proceed in forma pauperis. A State prisoner seeking to overturn his conviction will likely seek both of these, i.e., counsel and in forma pauperis, and a certificate of probable cause.


9 Id.

10 On the appearance of justice, see 2 J. ATLAY, VICTORIAN CHANCELLORS 469 (1893):
ponent, more than cosmetic in effect, is more often accorded to non-pro
se litigants, who are familiar with the procedural maze. The courts must
respond similarly to the pro se litigant with justice in form as well as in
substance, even if his claim is less than substantial, for without such
"total justice" he may easily conclude that no justice whatever has been
done.

Against this background, it is submitted that any effort required to
discover or to resolve a valid claim is worthwhile. The following sections,
discussing non-prisoner and prisoner cases, demonstrate that the Sec-
ond Circuit appreciates the application of justice, both actual and ap-
parent, in pro se cases. The court provides this justice not only by its
demeanor, but also by remediying inflicted injury and by responding to
demands that constitutional doctrines be enforced, whether or not the
litigant has counsel.

II. Non-Prisoner Cases

The so called "non-prisoner" cases include patent disputes,\textsuperscript{11} admir-
alty claims,\textsuperscript{12} tax problems,\textsuperscript{13} the receipt of social security benefits,\textsuperscript{14}
and all other cases, including those dealing with the abridgment of an
individual's constitutional rights, for which the court has subject matter
jurisdiction. In addition to those cases which the court is competent to
consider, there is a host of complaints which are filed by pro se litigants
in federal district court, despite the absence of subject matter jurisdic-
tion, such as landlord-tenant actions and domestic relations cases. A
number of these complaints are patently ridiculous. In another circuit,
for example, one pro se complainant charged that Satan and his lieuten-
ants had directly obstructed his career.\textsuperscript{15} This circuit has had similar

339 (2d Cir. 1973).

1972).

\textsuperscript{13} See 28 U.S.C. §§ 1340, 1346(a)(1), 1491 (1970)(refund suits); 26 U.S.C. §§ 6213,
7482 (1970) (petitions to and appeals from the United States Tax Court). See, e.g., Frazier
v. Commissioner, No. 73-8312 (2d Cir., decided Jan. 29, 1974).

\textsuperscript{14} See 42 U.S.C. § 301 et seq. (1970). See, e.g., notes 20 to 25 infra, and accompanying
text.

experiences. In a subset of these insensate petitions, a sad and not atypical case is that of the pro se who, while pursuing his complaint, becomes embroiled with court clerical personnel, and as a result of a confusing progression of misconceptions, institutes a new court action which takes on a life of its own, evolving into a plethora of complex motions, appeals, and perhaps new actions and mandaminone of which pertains to the merits of the original action. Regrettably, these complaints have received such publicity that the bar and the public generally share the mistaken notion that all, or at least most, pro se litigants are bereft of reason, or at the least, of reasonableness.

Such a litigant, as a rule, an individual with either a real problem or at least the perception that he has been wronged. He lacks the resources to retain counsel or has retained counsel in the past with adverse results, and has therefore decided that "this time" he will fare no more poorly on his own. Most proceed without counsel for the former reason, and most, although their injury is real, fail— notwithstanding the maxim, "ubi injuria, ibi remedia"—because there is no remedy, at least in federal court, for the injury sustained.

Some, however, do succeed. They overcome what are to them ubiquitous procedural entanglements. The spectrum of individuals who are successful is as varied as the injuries themselves. In one case, for example, a pro se seaman successfully challenged his counsel’s authority to settle his case without his consent while he was at sea in the South Pacific. In a second case, a businesswoman who acted as her own attorney won contests in the district and appellate courts with the United States Department of Labor over employment advertisements for college students. A recent successful pro se litigant, Minnie Gold, was a German-Jewish refugee who had contracted tuberculosis while hiding from the Nazis in Belgium in 1943. From this initial disease, further lung problems developed. Gold came to America in 1949, worked

Mayo’s application for leave to proceed in forma pauperis was denied on the grounds that “the Court has serious doubts that the complaint reveals a cause of action upon which relief can be granted by the court,” and that there was a question as to “whether plaintiff may obtain personal jurisdiction over the defendant in this judicial district.” 1 Id. at 283.

"Where there is a wrong, there is a remedy." Thomsen v. Terrace Navigation Corp., 490 F.2d 88 (2d Cir. 1974). For a second successful seaman appeal, see Peltzman v. Central Gulf Lines, Inc., 497 F.2d 332 (2d Cir. 1974).


Gold v. Secretary of HEW, 463 F.2d 38 (2d Cir. 1972).
as a seamstress, and, in 1951, became a citizen. When tailoring became too physically demanding, she studied bookkeeping, and worked for the YMCA until she contracted an active case of pneumonia and was forced to quit. She claimed that she was one hundred per cent disabled, and sought disability insurance payments. The request was rejected by the Social Security Administration, whose decision was upheld by the federal district court, on the ground that it was supported by substantial evidence. Still without the benefit of counsel, Gold asked the court of appeals for assistance. The court ultimately concluded that “the attitude of the [hearing] examiner as revealed in the transcript hardly measured up to his statutory duty.” Aside from his failure to advise her to retain counsel, “[the examiner’s] intolerance of her confusion and inability to digest the written exhibits with which she was faced shortly before the hearing began, his failure to call witnesses or to indicate that she ought to do so because he considered her case unpersuasive, and his concern in eliciting information about her job history and the reparations to the exclusion of almost all else compounded Gold’s difficulties [lack of counsel, ill health, and inability to speak English well] and provided her with less than a fair hearing.” The case was remanded to the district court to establish her period of disability and the payment due her.

Another pro se case, Jackson v. Statler Foundation, may well have been the most significant contest determined by the Second Circuit in the 1973-74 term. It illustrates that a case artlessly prepared and

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2 After preliminary screening by the pro se law clerks, see note 6 supra, the court assigned counsel to represent Gold. See 28 U.S.C. § 1915(d) (1970); note 2 supra.
3 463 F.2d at 43.
4 Id. at 43-44.
5 In 1971, in another Social Security benefits case, a sixty-nine-year-old widow won summary judgment in the Second Circuit. Widermann v. Richardson, 461 F.2d 1228 (2d Cir. 1971). Whereas Gold, as a pro se, was successful in securing the appointment of counsel, Widermann argued her own case before the court. See N.Y.L.J., Nov. 21, 1971, at 1, col. 7. It should be noted that, although Gold was successful in her main case, her legal entanglements were not concluded by this victory. In January 1973, the court granted to her assigned counsel attorney’s fees in the amount of $753.12, one-quarter of her ultimate Social Security award—the maximum percentage allowed by statute. See 42 U.S.C. § 406 (b)(1) (1970). She moved to vacate the order, claiming that it was inconsistent for the court to appoint counsel to represent her because she was indigent, and then to have attorney’s fees deducted from her award without any showing whatsoever that she was not still indigent. The motion was denied. Gold v. Secretary of HEW, No. 72-1061 (Nov. 13, 1973) (unreported).
6 496 F.2d 623 (2d Cir. 1974), revising per curiam opinion, slip op. 573 (2d Cir., Dec. 4, 1973) (unreported).
7 Close competitors in the criminal procedure and prisoners’ rights area, respectively, are United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), rehearing en banc denied, slip op. 3631 (2d Cir., Sept. 27, 1974), (departing from the antiquated due process rulings in Ker v. Illinois, 119 U.S. 436 (1886), and Frisbie v. Collins, 342 U.S. 519 (1952), limiting
pleaded by a litigant without counsel can still have far-reaching constitutional effects. The appellant, Reverend Donald L. Jackson, sued thirteen private charitable foundations located in the Buffalo, New York area, alleging racial discrimination against himself, his children, and his foundation, because the appellee foundations had refused to hire him as a director, to give scholarships to his children, and to give money to his foundation, all for racially discriminatory reasons. Reverend Jackson also challenged an alleged pattern of discriminatory employment and investment by the foundations, seeking injunctive and declaratory relief, damages, the revocation of appellees' tax-exempt status under the Internal Revenue Code, and an order directing the foundations to surrender all their assets to the United States Treasury.23

The trial judge ruled, inter alia, that, insofar as the Reverend's claims were based on section 1983 of title 42,24 the Supreme Court case of Moose Lodge No. 107 v. Irvis25 precluded a finding of state action, thus requiring dismissal. In Moose Lodge, the Supreme Court had held that the operations of Pennsylvania's regulatory scheme enforced by the State liquor board did not so implicate the State in the lodge's racially discriminatory practices as to make those practices state action within the purview of the Equal Protection Clause. At oral argument in the Second Circuit, Reverend Jackson attempted to distinguish Moose Lodge, to show that tax exemptions to the appellee foundations constituted state action, thereby giving the color of law to the alleged racial discrimination. The appellees' argument on this point was not responsive to the appellant's challenge, thus indicating that they perhaps had taken both Reverend Jackson and his claims for granted. The appellees had divided the issues in the case among the five attorneys representing the foundations. The attorney entrusted with the state action issue, in response to a question by the presiding judge, conceded that he was familiar with neither the facts nor the issues of Moose Lodge, the only case cited by the district court in dismissing the case for lack of federal jurisdiction.26

due process to the guarantee of a constitutionally fair trial, regardless of the method by which jurisdiction was obtained over the defendant), and United States ex rel. Johnson v. Chairman of New York State Board of Parole, 609 F.2d 925 (2d Cir. 1974) (pro se in district court) (holding that parole board must furnish to State prisoners a statement of its reasons for denying parole). For a discussion of Johnson, see notes 84 to 100 infra, and accompanying text.

24 Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
26 If advocates generally stand accused of inadequate preparation and unpolished
Yet the issue presented—whether a tax exemption to a private foundation may constitute state action—was one of first impression,\textsuperscript{32} polarized the active judges four-to-four on a sua sponte motion for en banc reconsideration of the original ruling in Reverend Jackson’s favor,\textsuperscript{33} and resulted in a decision which Judge Friendly, dissenting, regarded not only as having “staggering implications,”\textsuperscript{34} but also as presenting a “disastrous course” for any court to follow.\textsuperscript{35}

Thus, although the pro se appellant’s complaint, brief, and, indeed, his entire manner of instituting the litigation, were haphazard and confusing,\textsuperscript{36} the court nonetheless accepted his invitation to penetrate the “murky waters of the ‘state action’ doctrine,”\textsuperscript{37} regarded by one commentator as the most important problem in American law.\textsuperscript{38} This case

\textsuperscript{32} Jackson v. Statler Foundation, 496 F.2d at 627-28, 636-37.
\textsuperscript{33} Id. at 636.
\textsuperscript{34} Id. at 638.
\textsuperscript{35} Id. at 641.
\textsuperscript{36} Reverend Jackson sent “some ten to fifteen mimeographed and/or printed form letters to some 14,900 foundations, nationwide, over a period of three years. [He] apparently requested of each of these 14,900 foundations that it name him to its board of directors, give scholarships to his children and give grants to his foundation.” Id. at 626 n.1.
\textsuperscript{37} Id. at 626.
\textsuperscript{38} Black, “State Action,” Equal Protection, and California’s Proposition 14, 81 Harv. L. Rev. 69 (1967).

It should be observed that, even where the court has found no substantial merit to a particular pro se appeal, some form of assistance, albeit occasional, is accorded. For example, in an appeal concerning federal condemnation proceedings for the expansion of the United States Coast Guard Academy in Connecticut, the pro se appellants argued that the condemnation award was incorrectly determined. United States v. Certain Land In the Town of New London, 492 F.2d at 1381 (2d Cir. 1974). The court noted:

"We would ordinarily merely affirm on the clear opinion of the district court, since we have considered [this] and other points raised by appellants and for the most part find them without merit. Our hesitation relates only to an argument not discussed in the district court opinion, probably because it was not clearly raised in the trial court: appellants' allegation that they were twice required, in effect, to pay city tax bills totaling $3,035.30. We are not satisfied with the Government's casual response to this claim, but we are also unsure of the pertinent facts and the identity of the proper parties to this collateral controversy.

Accordingly, the judgment of the district court is affirmed. The Government is directed to bring the facts as to the tax payments to the attention of the district court, which we assume will examine into the matter and, if appellants are correct, attempt to devise proper relief."
demonstrates that the fact that the litigant is pro se does not necessarily bar the Second Circuit's consideration of his claim, no matter how far-reaching its consequences. It also illustrates the Second Circuit's concern for, and sensitivity to, the frustrations of the litigant without counsel. Finally, it indicates that the sensitivity of the pro se himself often allows him to perceive injustices not apparent to others. This sensitivity is all the more important in prisoner cases, where the liberty of a human being is directly at stake.

III. Prisoner Cases

The remaining petitioners we shall discuss are found in "the black flower of civilized society"—the prisons. Not surprisingly, these litigants have two primary concerns: to obtain freedom, even if it is a conditional one, such as parole; or to secure while within prison that measure of dignity, however restricted, guaranteed by the Bill of Rights. A prisoner who wishes to attain his freedom must resort to what Chief Justice Marshall has characterized as "The Great Writ"—the writ of habeas corpus. He who challenges the conditions of his confinement must file a civil rights complaint.

The prisoner seeking either goal must satisfy procedural limitations which sometimes draw distinctions owing more to legal history than to the average man's sense of justice. For example, one who wishes to be released from a State facility often does not realize that, before seeking relief in federal district court, he must exhaust available State judicial remedies. The writ's jurisdictional limitation mirrors the federal court's policy of comity toward State sovereigns. In certain cases, a prisoner who challenges some prison condition which even indirectly

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*Id. at 1382.


33 Although it is true that, in many respects, constitutionally protected freedoms enjoyed by members of the general public may be withdrawn or constricted as to State prisoners to the extent "justified by considerations underlying our penal system," Price v. Johnston, 334 U.S. 266, 285 (1948), it is equally clear that such limitations cannot be absolute.

41 *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807).


affects the fact or duration of his confinement must also exhaust available State remedies, although ordinarily that is not the case and arguably it should never be so. It is due to the failure, and perhaps the incapacity, of prisoners to appreciate the federal court's somewhat incomprehensible jurisdictional circumscriptions that prisoner petitions, as with non-prisoner motions and complaints, are so often dismissed out of hand.

Mastering federal jurisdiction is, however, not the sole impediment to a prisoner who wishes to file an action. Other inhibitions, delays, or even bars to court access must be surmounted before the underlying claims will be considered.

Prison confinement itself has been employed as a bar to prisoners' civil rights actions. Recently, however, a district court in this circuit held that incarceration alone was no reason to suspend a prisoner's right to institute such an action. It has also been held that prison may not be the source of other stumbling blocks which either inhibit or deny a prisoner's access to court. Last term, the Second Circuit, considering whether access had been denied, found merit to an inmate's pro se complaint which alleged that prison officials had refused him access to the prison typewriter and law library; that his letters to the courts and to law book publishers were delayed; that nine of his law books had been confiscated; and that he had been placed in segregation, under degrad-

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45 See Part II supra.

ing conditions, for his refusal to discontinue his legal activities. Several or all of these allegations (or ones similar) not infrequently cluster as the gravamen of a prisoner’s civil rights action. It is apparently not universally understood that a prisoner, no less than other persons, has a constitutional right of access to the courts, and that prison authorities may neither place burdens on that right, nor punish its exercise.

Moreover, the prisoner who does obtain access to the courts may yet be obliged to tolerate continued and unnecessary delay resulting from a court’s foolish error. In the Second Circuit this past term, John Anthony Taylor, a prisoner convicted of bank robbery, challenged his conviction by filing a petition claiming that the key prosecution witness had been promised “special favors” in exchange for “the most damaging testimony possible” against him. Although the Government normally must disclose this information at trial for purposes of impeachment, such disclosure had not been made in this case. Instead, the federal prosecutor, in an affidavit opposing Taylor’s application, denied that any of the alleged promises had been made. Despite the obvious need for a hearing in these circumstances, the district court decided to credit the Government’s affidavit, and denied Taylor’s motion. On appeal, the district court order was reversed, with the Second Circuit stating that “the rule [requiring a hearing] should be well known to Assistant United States Attorneys, who ought not to lead courts into errors, and to federal trial judges, who ought not to make them.” The court decried an unnecessary appeal, and, “more important,” the fact that “Taylor [had] been denied an evidentiary hearing he should have had a year ago.” Taylor had pursued the relief requested pro se. Whether delay caused by such obvious error would have been precluded by the presence of counsel remains a nice question.

As suggested above, even more obnoxious than a delay due to denial of court access by prison officials is a delay due to denial of court access

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43 Corby v. Conboy, 457 F.2d 251, 253 (2d Cir. 1972).
45 See Harris v. Pate, 440 F.2d 315, 317 (7th Cir. 1971).
47 The application was made pursuant to 28 U.S.C. § 2255 (1970).
48 The quoted words were used by the prosecution witness in an affidavit offered in Taylor’s support.
52 Id. The court also instructed that, on remand, the petition be assigned to another judge.
by the court itself. One prisoner asserted in his pro se civil rights complaint that, when he was arrested, his confessions "came about through beating . . . [by] . . . a certain police officer with a night [stick]."

In support of this claim, a physician's report presented to the district court stated that the petitioner had "contusion and ecchymosis of the right shoulder." Although not a direct witness to the beating, the petitioner's accomplice in the crime stated in an affidavit that he had heard the petitioner "screaming as though he was in great pain," and that he later saw that the petitioner's "whole arm and shoulder were swollen."

Only a trial could have tested the validity of this civil rights action, the district court itself noting that "other civil cases of the same vintage have been tried." The court nevertheless refused to appoint counsel, observing that "it does not appear practicable to try the case while the plaintiff is confined." This ruling suggested that the petitioner could have tried the case when he was released. But, since he was serving a sentence of from twenty years to life, the petitioner was effectively barred from prosecuting his claim. In response to the prisoner's request for a writ of mandamus, the Second Circuit last term remanded the civil rights action, with instructions that counsel be appointed.

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5 Contusion: "A bruise." W. DORLAND, ILLUSTRATED MEDICAL DICTIONARY 313 (23d ed. 1957). Ecchymosis: "An extravasation [discharge or escape] of blood; also a discoloration of the skin caused by the extravasation of blood." Id. at 424.

6 The petitioner was not challenging his conviction, which was arguably tainted by the use at trial of an involuntary confession. Rather, he brought a civil rights action for the alleged police beating, an action cognizable under section 1983 of title 42, 42 U.S.C. § 1983 (1970). What effect a favorable determination obtained in a civil rights action might have on a subsequent habeas corpus application is a problem mentioned, but not resolved, in Preiser v. Rodriguez. 411 U.S. 475, 510-12 (1973).

66 The appointment of counsel in such a case is discretionary. See note 2 supra.

65 The appointment of counsel in such a case is discretionary. See note 2 supra.


6 His conviction was for two counts of second degree murder. See 28 U.S.C. § 1651 (1970). The All Writs Act provides in pertinent part:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

This flexible statute operates, in certain instances, as an exception to the finality of determination rule, 28 U.S.C. § 1291 (1970). Although mandamus traditionally was a means to overturn a district court's "usurpation of power," De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1946), more recent decisions have extended the scope of mandamus to include both a supervisory purpose, i.e., to correct recurring erroneous practices, La Buy v. Howes Leather Co., 332 U.S. 249 (1947), and an advisory purpose, i.e., to raise important questions of first impression, Schlagenhauf v. Holder, 379 U.S. 104 (1964). See Note, Supervisory and Advisory Mandamus Under the All Writs Act, 68 HAW. L. REV. 595 (1973). For another example wherein mandamus was used, see notes 67-73 infra, and accompanying text.

66 Williams v. Judd, No. 72-8173 (2d Cir., May 11, 1973) (unreported). Although successful at this stage of his civil rights action, Williams has been particularly unsucces-
Tangentially, it is interesting to note that a *pro se* does not always want counsel. In one criminal case, for example—wherein one would have least expected an individual to have chosen himself as his own advocate—the defendant, Hector Echeverria, sought before trial to be relieved of his court-appointed counsel. The district court denied the motion, stating that the defendant would have to proceed with assigned counsel because he had "no knowledge of the system of justice in the United States," and because he "is a Cuban national . . . and he doesn't speak the English language, which would make the proceeding with 15 other defendants [all Cuban nationals] quite involved." In short, the district judge did not want "a circus made out of this trial."

Echeverria challenged this order, albeit interlocutory, by filing a petition for a writ of mandamus. He claimed that he had a right to proceed *pro se*, and cited proper authority. Moreover, he stated that he had been a Cuban legislator, and was familiar with the law both in this country and in his own. Further, he had been tried before in this country, and was presently serving a ten-year sentence. His perception of the manner in which his assigned counsel had proceeded at the prior trial prompted him to request the right to defend himself. After the Second Circuit ruled that Echeverria did have a right to proceed *pro se*, the jury trial was conducted, resulting in the conviction of all defendants but one—Echeverria.

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*See* note 65 *supra.*

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*Id.* at 6.

*See* note 65 *supra.*

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*United States v. Artega-Alvarez* (S.D.N.Y., Mar. 20, 1974) (unreported). Echeverria's experience cannot be considered typical of *pro se* cases. In fact, in the case of the noted *pro se*, Clarence Earl Gideon, the converse occurred. Gideon's claim was that, "I requested the court to appoint me [an] attorney and the court refused." A. LEWIS, *GIDEON'S TRUMPET* 79 (1964). The trial judge's opinion of Gideon's unsuccessful defense was that Gideon "did as well as most lawyers would have done in handling his case." *Id.* at 238. Yet, after the Supreme Court concluded that Gideon had the right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963), and after the assignment of counsel and retrial, Gideon was acquitted.
A prisoner must surmount either his own inertia or the barriers inadvertently or consciously erected by others before his underlying claim will be considered. These hurdles have remained a constant throughout past years. There has, however, been a marked change recently in the types of pro se prisoner applications received by the Second Circuit. The absolute number of habeas corpus petitions has declined, but that of civil rights complaints and motions of federal prisoners to vacate their sentences has risen. It is not worthwhile for present pur-

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The plight of the litigant bent on conducting his own defense recently was noted in a national news periodical:

Charged with taking $850 in rent deposits for houses he did not own, Donald Rowell, 31, decided that he could do a better job with his defense than could Alice Rucker, his court-appointed attorney. So the Detroit defendant took over his case and put an unusual witness on the stand, none other than lawyer Rucker. Now, asked self-appointed Attorney Rowell in his best courtroom manner, "Have I ever lied to you?"

Witness Rucker: Do you really want me to answer that?
Attorney Rowell: Yes, I do.
Witness Rucker: Mr. Rowell, you have lied to me so many different times I cannot even begin to count them.
Guilty, said the jury. Six and a half to ten years, said the judge. Next case.

TIME, June 10, 1974, at 79, col. 3.

Although one attorney who proceeded as a pro se defendant in several prosecutions was on each occasion acquitted, see R. CoHN, FOOL FOR A CLIENT (1971), an attorney acting pro se does not, by virtue of the fact that he is an attorney, always fare well. See United States v. Harrison, 451 F.2d 1013 (2d Cir. 1971) ("It is obvious from the record that defendant, although an attorney, had little knowledge of either the procedures or means of defense." Id. at 1014. "The fact that appellant is an attorney does not necessarily mean that he is capable of adequately defending himself." Id. at 1015).

"DISPOSITION OF PRO SE APPEALS IN THE SECOND CIRCUIT OVER A 5 YEAR PERIOD"

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poses to surmise the causes of these trends;\textsuperscript{15} the results, however, are clear. As mentioned at the outset, and as the figures indicate, few prisoners obtain even preliminary relief from the circuit court.\textsuperscript{16} But the fact that it considers many frivolous petitions has not, in the authors' opinion, overly encumbered the court. Certainly, in considering all these cases, the court has provided both apparent and substantial justice.

Speaking for the majority of an en banc court, Judge Medina addressed this question in 1957:

The fact that many such determinations do not result in the release of the prisoner does not indict our system's efficiency; it but demonstrates the time and effort we are prepared to devote to keeping to a minimum the miscarriages of justice that occa-

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<th>CIVIL AND CIVIL RIGHTS COMPLAINTS</th>
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<td>78</td>
<td>105</td>
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* For a brief explanation of preliminary relief, see note 7 supra.
** When the certificate is granted, see note 7 supra, and if the case is not summarily remanded to the district court, then counsel automatically is assigned, pursuant to Nowakowski v. Maroney, 386 U.S. 542 (1967), and a full appeal follows.

\textsuperscript{15} Although this is true, the following lines of inquiry are suggested. The decline in petitions by State prisoners corresponds to an approximately equivalent increase in civil rights complaints. This equivalent decline and increase, see chart at note 74 supra, represents a trend over the past few years. It is possible, although only careful scrutiny of the cases would determine exactly what the situation is, that State prisoners have turned from the writ to the speedier remedy provided by section 1983, with its concomitant "no-exhaustion" requirement. This reliance on section 1983 may be a result of the prisoner's misunderstanding that the statute may be used to challenge the validity of confinement. On the other hand, it is possible that prisoners are not using section 1983 to challenge their convictions, but, instead, are beginning to complain about the prison conditions which journalists and sociologists have discussed with alarm for some time. In such a setting, the decrease in State prisoner petitions might reflect, not the prisoner's naivete, but rather, his understanding that he initially must exhaust State judicial remedies. Again, only an empirical study will pinpoint accurately the reasons for these shifts. For one example, see Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321 (1973).

sionally occur despite all precautions. We would not, were the choice ours, eliminate or restrict the writ because of the high percentage of times the detention is shown to be proper. Similarly, we would not refuse a prisoner a hearing on the ground that we think it improbable he will be able to prove his assertions. We must not play fast and loose with the basic constitutional rights in the interest of administrative efficiency.  

Despite the fact that most prisoner applications are insubstantial, prisoner cases as important as *Jackson v. Statler Foundation* do arise. One excellent past example is Martin Sostre's handwritten *pro se* complaint, filed in 1968. Inmate Sostre challenged his lengthy commitment to solitary confinement, *i.e.*, twelve months and eight days; the excision of material from personal letters, as well as other restrictions on his correspondence; deprivation of the opportunity to use the prison exercise yard; and the seizure of his magazines, papers and writings. The court, in an exhaustive opinion by Judge (now Chief Judge) Kaufman, characterized Sostre's claims as "important questions concerning the federal constitutional rights of state prisoners which neither Supreme Court precedent nor our own past decisions have answered." The en banc decision, although it has been criticized, is now relied on as the primary authority in an area where resolutions by other circuits were previously either "inconclusive or conflicting."  

Although the court granted relief to a number of *pro se* habeas petitioners during the past term, there was no one petition of general interest. On the prisoners' rights side, however, there was a most significant opinion—*United States ex rel. Johnson v. Chairman of New York State Board of Parole*. Thomas Johnson, a New York State prison inmate, had been confined since his 1966 sentence as a second-felony

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77 United States *ex rel.* Marcial v. Fay, 247 F.2d 662, 669 (2d Cir. 1957). Judge Medina’s judicial posture with respect to habeas petitions has been held equally applicable to civil rights actions. See Sewell v. Pegelow, 291 F.2d 198 (4th Cir. 1961).

78 See notes 26-38 supra, and accompanying text.


81 Sostre *v.* McGinnis, 442 F.2d at 181. The en banc court said: "We voted to hear the initial argument of this appeal *en banc*, a procedure we reserve for extraordinary circumstances, so that we might give plenary review to a complex of urgent social and political conflicts persistently seeking solution in the courts as legal problems . . . ." *Id.*

82 See note 74 supra.

83 A noteworthy previous Second Circuit *pro se* habeas corpus case is *United States ex rel. Frizer v. McMann*, 437 F.2d 1312 (2d Cir.) (en banc), cert. denied, 402 U.S. 978 (1971) (continuance of chronic situation causing substantial delays in bringing accused persons to trial cannot excuse denial of due process rights in any particular case where defendant is not party to delay or absent other circumstances peculiar to his case).

84 500 F.2d 925 (2d Cir. 1974).
offender to a term of fifteen to sixteen years. After seven years in custody, he sought to be released on parole. Johnson appeared before the New York State Board of Parole, but the Board denied the request, continuing his imprisonment for another year. Johnson was especially aggrieved because he was given no reasons for the decision; without such explanation, he could not know how to improve his chances at the next parole hearing. He therefore asked the State Supreme Court, in an article 78 proceeding, to require the Board to provide him with a statement of reasons. The court, however, informed him that a parole board's decision was not reviewable if lawfully rendered, and that in his case the decision had been lawfully rendered, since the Board was not required to specify its reasons for denying parole.

Johnson appealed no further within the State judicial system. Instead, he petitioned for a writ of habeas corpus in the United States District Court for the Eastern District of New York. Recalling our earlier remark that "incomprehensible jurisdictional circumscriptions" frequently result in summary dismissals, it would seem that Johnson's habeas petition, lacking complete State-remedy exhaustion, was doomed to dismissal. However, his inaccurate characterization was corrected by the district court, which noted that Johnson had neither requested release nor challenged the fact or duration of confinement; jurisdiction, therefore, was not dependent upon an application for a writ of habeas corpus. Since the Supreme Court has ruled that papers of pro se petitioners must be held to less stringent standards than are formal pleadings prepared by attorneys, the district court liberally construed Johnson's request for a statement of reasons as an application for injunctive relief pursuant to the Civil Rights Act. Hence, exhaustion was not required.

However, Johnson had another obstacle to overcome. His commonsense notion that reasons for denial of his parole request should have been provided to him was directly contradicted by the applicable Second Circuit authority, Menechino v. Oswald. The district court, however, notwithstanding Menechino, relied principally upon two other cases to align itself with Johnson's position. First, the Second Circuit

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84 N.Y. Correction Law § 212, subd. 10 (McKinney 1989).
85 See text accompanying note 47 supra.
88 United States ex rel. Johnson v. Chairman of New York State Bd. of Parole, 353 F. Supp. at 417; see note 46 supra.
89 430 F.2d 403 (2d Cir. 1970).
in *United States ex rel. Bey v. Connecticut Board of Parole* was reluctant to consider parole release an “act of grace.” This represented, in the district court’s view, a shift in attitude since *Menechino*. Second, and more important, in *Morrissey v. Brewer*, the Supreme Court had replaced the right-privilege distinction with a requirement that due process be accorded to anyone who suffers a grievous loss. Thus, the district court was led to conclude that “it is not possible to continue in the confidence that *Menechino* earlier warranted . . .” The considerations leading to this conclusion—that without a statement of reasons, Johnson’s loss was grievous—were clearly stated:

In parole release cases the most basic of human liberties is involved, the interest in freedom from imprisonment, and the governmental function, determination of parole eligibility, is one of the highest importance, for it is directly related to the safety of the people in their persons and property, and of the greatest difficulty, for it requires predictive evaluation of human conduct in one of the most complex of human situations, and in circumstances in which erroneous decision is inevitably destructive either of individual or of public interests of manifest importance. But the difficulty of decision and the patent risks involved in giving expression to the ground of a decision denying parole—inviting deceptive enactment of an unreal “rehabilitation” charade—cannot justify mute denials that create a risk of anomie and deny guidance.

Affirming the district court ruling, the Second Circuit concurred in the characterization of Johnson’s petition as a civil rights complaint. Instead of overruling *Menechino*, the court distinguished that case, on the ground that *Menechino* had involved a “whole gamut of due process rights,” while *Johnson* involved only a claim to a statement of reasons. Applying *Morrissey*, the court concluded that the interest at stake in a parole proceeding was “enormous,” and that reasons were required to protect “the inmate against arbitrary and capricious decisions or actions based upon impermissible considerations.”

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1. 443 F.2d 1079 (2d Cir. 1971).
2. Id. at 1085.
5. Id.
6. Johnson v. Chairman, New York State Bd. of Parole, 500 F.2d at 926.
7. Id.
8. Id. at 929.
9. Id.
IV. Conclusion

The disabled refugee requesting Social Security benefits, the inmate attempting without success to mail papers to court or counsel, and the other cases discussed within this comment belie the popular notion that a pro se litigant is an individual devoid of reason or, at the least, one without something better to do. Although these case histories discredit such bias, the bias nevertheless persists, and may in part account for the bar’s, and occasionally the bench’s, ignoring, taking for granted, or even taking advantage of the litigant without counsel. Fortunately for such a litigant, however, he is not met with derision by the Second Circuit. On the contrary, the Second Circuit approach to assuring an efficient and sympathetic analysis of the pro se’s legal claim has served to foster similar approaches in circuits throughout the country. The pro se law clerks appointed by the court provide the necessary expertise—particularly in the areas of criminal, constitutional, and prisoner civil rights law—to clarify, present, and evaluate the claims of the counsel-less litigant, thereby reducing the burden on the court.

To suggest that the Second Circuit practice functions well is not to say that more cannot be done, by the bar as well as by the bench. Presently, for example, an opposing counsel only infrequently responds to a pro se petition. Absent such counterargument, the pro se is left to wonder why he has not prevailed. With the receipt of such response by opposing counsel, the court itself would be better prepared to resolve petitioner’s claims, clarified in the crucible of controversy. The court, too, can do something more. For example, there are petitioners who think that a denied request for leave to proceed in forma pauperis means that the court disbelieves that the petitioner is poor. They do not understand that the court must consider the substantiality of the claim, as well as the petitioner’s financial circumstances. This confusion could easily be remedied by adding to the word “denied” a brief statement of the court’s reasons for refusing relief, such as “for failure to exhaust available State remedies,” or “for the reasons stated in the district court opinion.”

These are but a few practices which, if adopted by the bar and the bench, could help to attain what we have described at the outset as a concept of “total justice.” Basic to this concept is the premise that the pro se litigant is more than a pawn in a game labeled “justice.” Indeed, some pro se claims contain substantial merit, and, of those, some open frontiers in the vast land of the law. Like a stream, they may either swell merging rivers of legal change, or, by the force of their current alone, erode the hard foundation of past practice to form new channels for legal analysis. Certainly, the incidence of substantial claims leads one to the conclusion that the legally artless documents submitted by the pro se are worth much effort. Even in the case of insubstantial claims, we should not—nay, we must not—remove what is for the individual bereft
of hope that last bastion for righting wrongs, the federal courts. For, with less than the full appearance of justice, the law, and not only the pro se litigant, suffers.

For similar conclusions in opposition to the movement to restrict habeas corpus jurisdiction, see Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1 (1956):

It has been said of the habeas corpus cases that one who searches for a needle in a haystack is likely to conclude that the needle is not worth the effort. That emphasis distorts the picture. Even with the narrowest focus it is not a needle we are looking for in these stacks of paper, but the rights of a human being. And if the perspective is broadened, even the significance of that single human being diminishes, and we begin to catch a glimpse of the full picture. The aim which justifies the existence of habeas corpus is not fundamentally different from that which informs our criminal law in general, that it is better that a guilty man go free than that an innocent one be punished. To the extent that the small number of meritorious petitions shows that the standards of due process are being honored in criminal trials we should be gratified; but the continuing availability of the federal remedy is in large part responsible for that result. What is involved, however, is not just the enforcement of defined standards. It is also the creative process of writing specific content into the highest of our ideals. So viewed, the burdensome test of sifting the meritorious from the worthless appears less futile, and there is less room for the emotions of federalism.

Id. at 25-26 (footnote omitted).