NOTE

Access Denied: Limitations on Pro Se Litigants' Access to the Courts in the Eighth Circuit

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> *Lest the citizenry lose faith in the substance of the system and the procedures we use to administer it, we can ill afford to confront them with a government dominated by forms and mysterious rituals and then tell them they lose because they did not know how to play the game or should not have taken us at our word.*[1]

INTRODUCTION

Complaints regarding the federal courts' overflowing dockets are by no means a new phenomenon.[2] Frivolous claims further exacerbate the hostility that judges, attorneys, and laypersons feel towards anything that appears to tip the scales in favor of a larger docket.[3] Pro se lawsuits pose a particular problem because many pro se lawsuits are dismissed as frivolous.[4] Accordingly legal professionals and laypersons alike assume that all pro se litigation is frivolous.[5] Such an assumption, however, is dangerous because it could lead to a growing indifference to the cries of pro se litigants with legitimate claims.[6]

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[1] Moore v. Price, 914 S.W.2d 318, 323 (Ark. 1996) (Mayfield, J., dissenting) (quoting Teegarden v. Director, 591 S.W.2d 675, 678 (Ark. Ct. App. 1979)).

[2] *See* Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 935-36 (1990) (noting that civil rights cases comprise large portion of federal docket); Kim Mueller, Comment, *Inmates' Civil Rights Cases and the Federal Courts: Insights Derived from a Field Research Project in the Eastern District of California*, 28 CREIGHTON L. REV. 1255, 1259 (1995) (noting large number of inmates' civil rights cases filed annually in federal district courts); Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 519 (1996) (remarking that, of large number of inmates' civil rights cases filed in federal courts, majority are dismissed as frivolous); 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, 822 (1997) (noting that commentators have recently complained about sharp litigation increase).

[3] *See* Newman, *supra* note 2, at 520.

[4] *See* Newman, *supra* note 2, at 519.

[5] *See id.*

[6] The Honorable Jon O. Newman notes that state attorney generals often exaggerate

Despite the proliferation of frivolous claims, both the First Amendment and the Due Process Clause of the Fourteenth Amendment guarantee sufficient access to the courts.[7] Even with these rights to judicial process, however, the intricate requirements of the summary judgment rule often hinder pro se litigants' access to the courts.[8] Summary judgment is granted when there is no genuine issue of material fact.[9] This procedural device allows for the speedy disposition of a controversy without the need for trial.[10] A recent Eighth Circuit case illustrates the complications that the summary judgment rule poses to pro se litigants.[11] In *Beck v. Skon*, the Eighth Circuit held that a district court does not have to provide specialized instructions by notifying pro se litigants of the requirements of the summary judgment rule.[12] In doing so, the Eighth Circuit effectively prevents pro se litigants from attaining meaningful access to the courts.

This Note examines the Eighth Circuit's decision. It argues that although pro se litigants are generally expected to abide by rules of civil

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the frivolity problem in pro se litigation. Newman, *supra* note 2, at 520-22. He mentions that in response to the increasing number of lawsuits, attorney generals have adopted the routine of labeling all pro se prisoner litigation as frivolous. *Id.* at 520. Judge Newman also comments on the often false and misleading accounts of these pro se prisoner cases to the general media and how this affects public sentiment regarding pro se litigation. *Id.* at 520; *cf.* Blaze, *supra* note 2, at 935 (discussing cynicism's influence on way courts decide civil rights actions, including actions involving pro se litigants).

[7] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."); U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); Bounds v. Smith, 430 U.S. 817, 828 (1977) ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts."); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972) (holding that First Amendment serves as constitutional basis for right of access to courts); Chambers v. Baltimore & Ohio Ry. Co., 207 U.S. 142, 148 (1907) (citing privileges and immunities clause as basis for constitutional right of access). *But see* Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983) (stating that baseless litigation is not immunized by First Amendment right to petition).

[8] Joseph M. McLaughlin, Note, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 FORDHAM L. REV. 1109, 1112 (1987).

[9] FED. R. CIV. P. 56(c).

[10] *Id.*

[11] Beck v. Skon, 253 F.3d 330 (8th Cir. 2001).

[12] *Id.* at 333.

procedure, the Eighth Circuit and other courts should adopt a rule providing specialized instructions to a pro se litigant at the summary judgment stage. Part I reviews the history of pro se litigation and then examines the summary judgment rule as it applies to pro se litigants. Part II describes the facts, procedure, and holding of *Beck* and details the court's rationale. Part III argues that because pro se litigants are entitled to meaningful access to the courts, the Eighth Circuit should adopt a rule requiring special notice at the summary judgment stage.

I. BACKGROUND

A. *Definition and Background of Pro Se Litigation*

A pro se litigant is one who represents herself in a lawsuit without the aid of an attorney.[13] Given the complex procedures that accompany a lawsuit, pro se litigants often face great difficulty finding their way through the judicial system.[14] These challenges include underestimating the importance of deadlines and failing to comprehend many of the judicial system's procedures.[15] Therefore, pro se litigants often lose on procedural technicalities, not on the merits of their cases.[16]

To further exacerbate the pro se problem, many pro se litigants are prisoners petitioning for habeas corpus or bringing civil rights claims.[17] Many of these prisoner litigants are uneducated and poor.[18] Some even suffer mental problems, only adding to the difficulties that they face in litigation.[19] The problems, however, do not stop there. The prisoners' confinement impinges on their ability to gather the evidence required to support a case against the alleged defendant.[20] This confinement makes

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[13] BLACK'S LAW DICTIONARY 1236 (7th ed. 1999).

[14] *See* Blaze, *supra* note 2, at 989-90; McLaughlin, *supra* note 8, at 1110; Park, *supra* note 2, at 821.

[15] *See* sources cited *supra* note 14.

[16] *See* McLaughlin, *supra* note 8, at 1110.

[17] *See* McLaughlin, *supra* note 8, at 1113; 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, 159-60 (1972).

[18] *See* Hooks v. Wainwright, 536 F. Supp. 1330, 1337-38 (M.D. Fla. 1982), *rev'd on other grounds*, 775 F.2d 1433 (11th Cir. 1985); McLaughlin, *supra* note 8, at 1136; Zeigler & Hermann, *supra* note 17, at 158-59.

[19] Interview with Margaret Johns, Associate Professor of Law, UC Davis School of Law in Davis, Cal. (Oct. 1, 2001).

[20] *See, e.g.*, Hannah v. United States, 410 F.2d 1049, 1051 (D.C. Cir. 1969) ("There is a natural concern due to the fact that in seeking consideration of his complaint appellant has been seriously handicapped by his incarceration. . . ."); Hudson v. Hardy, 412 F.2d 1091,

it more difficult to adhere to procedural deadlines and requirements.[21] Moreover, civil pro se litigants face even greater hurdles to having their claims adjudicated.[22]

Civil litigants, as opposed to criminal litigants, do not have a settled constitutional right to counsel.[23] This explains why many civil litigants opt to proceed pro se. Pro se civil litigants want counsel to represent them, yet they lack the financial resources and the ability to attract attorneys.[24] Furthermore, while courts are split on whether civil litigants hold a constitutional right to self-representation,[25] civil litigants do have a statutory right to self-representation under 28 U.S.C. § 1654.[26] This federal statute provides that the parties may plead and conduct their own causes in all courts of the United States.[27] Many states also provide

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1094 (D.C. Cir. 1968) (noting that pro se prisoner litigant "has neither the facilities nor has he had the opportunity to provide the documentary evidence necessary, by ordinary standards, to defeat appellees' motion for summary judgment," Phillips v. United States Bd. of Parole, 352 F.2d 711, 713 (D.C. Cir. 1965) (per curiam) ("Appellant has been in the custody of the federal prison system from the inception of this litigation and has, thus, been operating under the handicaps such detention necessarily imposes upon a litigant, both in terms of ability to secure the advice of counsel and of opportunities to track down the evidence necessary to support his case.").

[21] *See* Note, *Pro Se Appeals in the Fifth Circuit: The Gradual Demise of the Notice Exception to Federal Rule of Appellate Procedure 4(a) and an Argument for Its Resurrection*, 4 REV. LITIG. 71, 74 (1983) [hereinafter Note, *Pro Se Appeals in the Fifth Circuit*] (noting that criminal defendants' confined status precludes them from complying with procedural deadlines).

[22] *See, e.g.*, Julie M. Bradlow, Comment, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 670 (1988) (highlighting various problems that pro se civil litigants face).

[23] *See* Lassiter v. Dep't of Soc. Serv., 452 U.S. 18, 26-27 (1981) (stating presumption that civil, namely indigent, litigants have no right to counsel unless their physical liberty is at stake). This presumption must be weighed against other elements in the due process balancing test. *Id. See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976), for the due process balancing test factors. The Sixth Amendment states that in all criminal prosecutions the accused shall enjoy the right to "have Assistance of Counsel for his defense." U.S. CONST. amend. VI.

[24] *See* Jacobsen v. Filler, 790 F.2d 1362, 1367-68 (9th Cir. 1986) (Reinhardt, J., dissenting); *see also* Zeigler & Hermann, *supra* note 17 at 165, 189, 193-95 (highlighting that most pro se litigants are impoverished and that this poverty denies sufficient access to courts).

[25] *Compare* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942) (holding that Constitution does not force lawyer upon defendant), *and* Garrison v. Lacey, 362 F.2d 798, 799 (10th Cir. 1966) (finding court is not required to appoint lawyer for civil litigant and allowing civil litigant to proceed pro se), *with* Andrews v. Bechtel Power Corp. 780 F.2d 124, 137 (1st Cir. 1985) (concluding that civil litigant does not have constitutional right to appear pro se), *and* O'Reilly v. New York Times, 692 F.2d 863, 867 (2d Cir. 1982) (holding that there is no presumption of right to self-representation in civil cases).

[26] 28 U.S.C. § 1654 (2000).

[27] *Id.*

pro se litigants with the right to self-representation in state courts.[28]

Although the Constitution does not guarantee civil litigants a right to counsel, it does guarantee all litigants meaningful access to the courts.[29] In *Bounds v. Smith*, plaintiffs were inmates in the North Carolina Department of Correction.[30] They filed three separate actions under 42 U.S.C. § 1983, alleging that the state denied them access to the courts, which violated the Fourteenth Amendment, for failing to provide legal research resources.[31] The district court granted summary judgment in favor of the plaintiffs.[32] The United States Supreme Court affirmed.[33] The Court held that the right of access requires that prison authorities assist prisoners in the preparation of their legal papers by providing prisoners with sufficient law libraries or adequate assistance by legal professionals.[34] Hence, meaningful access to the courts means more than providing simple access. The Constitution requires the state to assist parties in special circumstances.[35]

B. A Glance at the Federal Rules of Civil Procedure

To better understand the problems that pro se litigants face, it is necessary to understand the role that procedure plays in the framework of pro se litigation. If pro se litigants fail to comply with the Federal Rules of Civil Procedure, it can spell disaster for otherwise meritorious claims.[36] Examining Rules 12(b)(6) and 56(e) sheds further light on the procedural problems posed to pro se litigants.

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[28] *See, e.g.*, ALA. CONST. art. I, § 10; GA. CONST. art. I, para. XII; ME. CONST. art. I, § 20; MICH. CONST. art I, § 13; MISS. CONST. art I, § 14; UTAH CONST. art. I, § 11; WIS. CONST. art. I, § 21(2).

[29] *See* Bounds v. Smith, 430 U.S. 817, 828 (1977); Johnson v. Avery, 393 U.S. 483, 485 (1969).

[30] *Bounds*, 430 U.S. at 818.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 833.

[34] *Id.* at 828.

[35] *See* McLaughlin, *supra* note 8, at 1137 (stating that pro se litigant's right of access to courts can be safeguarded only by imposition of notification rule as constitutional minimum).

[36] *See* Bradlow, *supra* note 22, at 670.

1. Rule 12(b)(6) — Motion to Dismiss for Failure to State a Claim

Rule 12(b)(6) covers motions to dismiss for failure to state a claim.[37] When a defendant files such a motion, it requests that the court review whether the plaintiff has stated a sufficient claim based only on the pleadings.[38] However, when matters outside the pleading support a motion to dismiss, the motion to dismiss converts to a motion for summary judgment and is governed by Rule 56(e).[39] For example, on a motion to dismiss a court may allow the parties to introduce affidavits to support their motions.[40] In such cases, the motion to dismiss converts to a motion for summary judgment because the motion is now based on materials outside the pleadings.[41] Conversion occurs when the defendant challenges the sufficiency of the pleader's claim with evidence outside the pleadings.[42]

2. Rule 56(e) — Summary Judgment

Rule 56(e) requires that when affidavits or other evidentiary materials support a motion for summary judgment, the opponent must respond with counteraffidavits.[43] The opponent may not simply refer back to her original pleading to fulfill this requirement.[44] In short, the pro se plaintiff

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[37] FED. R. CIV. P. 12 (b)(6).

[38] *See id.*; *see also* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1366, at 485 (2d ed. 1990) [hereinafter WRIGHT & MILLER] (explaining role judges play in motions to dismiss).

[39] FED. R. CIV. P. 12(b); *see* WRIGHT & MILLER, *supra* note 38, § 1366, at 485. Rule 12(b)(6) explains when the court must convert the motion to dismiss to a motion for summary judgment:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

FED. R. CIV. P. 12(b); *see also* CHARLES WRIGHT, LAW OF FEDERAL COURTS, § 99, at 668 (4th ed. 1983) [hereinafter WRIGHT, LAW OF FEDERAL COURTS] (explaining technicalities of summary judgment rule).

[40] WRIGHT & MILLER, *supra* note 38, § 1366, at 485.

[41] *Id.*

[42] *Id.*

[43] FED. R. CIV. P. 56(e); *see also* FED. R. CIV. P. 56(e) Advisory Committee's Notes, 1963 Amendment (explaining that amendment requires nonmoving party to establish by affidavits triable issue of fact when motion is supported by supplementary materials).

[44] *See* Jacobsen v. Filler, 790 F.2d 1362, 1366 n.11 (9th Cir. 1986); Hudson v. Hardy, 412 F.2d 1091, 1094 (D.C. Cir. 1968); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 321-22 (1986)

has to do more work to keep her claim alive.

A federal court grants a motion for summary judgment when the pleadings and supporting evidentiary materials convince the court that no genuine issue of material fact exists.[45] This entitles the movant, the party moving for summary judgment, to a final judgment as a matter of law, thereby terminating the lawsuit.[46] Thus, the movant has the burden of proving that no issue of material fact exists.[47]

C. *Legal Ramifications for Pro Se Litigants for Failure to Comply with the Federal Rules of Civil Procedure*

The summary judgment rule poses a particular problem to pro se litigants who often do not know that when presented with a motion for summary judgment they must submit a counteraffidavit.[48] Pro se litigants also have difficulty reading procedural rules effectively.[49] In fact, many pro se litigants mistakenly believe that a lawsuit runs smoothly from complaint to trial.[50] Therefore, when pro se litigants are

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(holding that nonmoving party must respond only when movant offers proof of absence of material fact).

[45] *See* FED. R. CIV. P. 56(c); Jensen v. Klecker, 648 F.2d 1179, 1182 (8th Cir. 1981); Cubbage v. Averett, 626 F.2d 1307, 1308 (5th Cir. 1980) (per curiam); Keiser v. Coliseum Props., Inc., 614 F.2d 406, 410 (5th Cir. 1980); Jones v. Halekulani Hotel Inc., 557 F.2d 1308, 1310 (9th Cir. 1977); *see also* JACK FRIEDENTHAL ET AL., CIVIL PROCEDURE § 9.3, at 458 (3d ed. 1999) (explaining federal standard for determining whether to grant summary judgment).

[46] *See* FED. R. CIV. P. 56(c); *Jensen*, 648 F.2d at 1182; *Cubbage*, 626 F.2d at 1308; *Keiser*, 614 F.2d at 410; *Jones*, 557 F.2d at 1310; Reiver v. Murdoch & Walsh, P.A., 625 F. Supp. 998, 1003 (D. Del. 1985); *see also* FRIEDENTHAL, *supra* note 45, § 9.3, at 458 (explaining federal summary judgment procedures).

[47] *See* Cedillo v. Int'l Ass'n of Bridge & Structural Iron Workers, Local Union No. 1, 603 F.2d 7, 10 (7th Cir. 1979); FRIEDENTHAL, *supra* note 45, § 9.2 at 455 (stating that moving party most often will support motion with outside evidence); WRIGHT, LAW OF FEDERAL COURTS, *supra* note 39, § 99, at 668.

[48] *See Jacobsen*, 790 F.2d at 1368 (Reinhardt, J., dissenting) (stating that laypersons are unable to realize their procedural obligations); Ross v. Franzen, 777 F.2d 1216, 1219 (7th Cir. 1985) (asserting that because pro se litigants do not have legal background, it is unrealistic to assume that pro se litigants understand that they must respond to motion for summary judgment); Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983) (holding that district court erred in dismissing pro se litigant's case due to his lack of legal background); Parisie v. Greer, 705 F.2d 882, 898 (7th Cir. 1983) (per curiam) (Swygert, J., concurring in part, dissenting in part) (encouraging trial courts to notify pro se litigants of their procedural obligations when they are understandably confused); Hooks v. Wainwright, 536 F. Supp. 1330, 1345-46 (M.D. Fla. 1982) (noting that lack of pro se litigants' education sheds light on fact that courts cannot assume that pro se litigants can appreciate procedural responsibilities).

[49] *See* Powell v. Alabama, 287 U.S. 45, 69 (1932); *see also* Bradlow, *supra* note 22, at 659 (discussing how and why pro se litigants are disadvantaged).

[50] McLaughlin, *supra* note 8, at 1118; *Jacobsen*, 790 F.2d at 1368; Lewis v. Faulkner, 689

served with a motion for summary judgment, they assume that they can defend themselves when they appear before the judge.[51] The summary judgment rule essentially serves as a procedural roadblock for pro se litigants who fail to understand the legal consequences — final judgment on the merits — of procedural noncompliance.

Several courts have pinpointed just how Rule 56(e) denies access to pro se litigants: Rule 56(e) does not state explicitly the requirement to submit affidavits and other evidentiary materials.[52] This problem worsens when a motion to dismiss converts to a motion for summary judgment. In such a case, the motion papers often do not indicate that the motion is one for summary judgment.[53] These procedural technicalities are likely to confuse pro se litigants unfamiliar with the intricacies of the summary judgment rule.[54]

Currently, two different approaches exist regarding the problem of providing special notice to pro se litigants in the summary judgment context. Most circuits mandate that pro se litigants be notified of their summary judgment procedural responsibilities.[55] The Eighth Circuit, on the other hand, does not require that pro se litigants be given special notice of their summary judgment responsibilities.[56]

F.2d 100, 102 (7th Cir. 1982).

[51] *See Jacobsen*, 790 F.2d at 1368; *Lewis*, 689 F.2d at 102; *see also* McLaughlin, *supra* note 8, at 1118 (noting that pro se litigants believe they contest summary judgment motion at trial).

[52] *See* Moore v. Florida, 703 F.2d 516, 519 (11th Cir. 1983); *Lewis*, 689 F.2d at 101-02; Davis v. Zahradnick, 600 F.2d 458, 460 (4th Cir. 1979). The *Jacobsen* majority draws the opposite conclusion, stating that Rule 56 is explicit. *Jacobsen*, 790 F.2d at 1366. This argument, however, is undermined when a court adopts a local court rule that explicitly defines the requirements to oppose a motion for summary judgment. Therefore, *Jacobsen's* rationale is unsuitable in districts without similar local rules explicitly explaining the requirements for summary judgment.

[53] *See Lewis*, 689 F.2d at 101.

[54] McLaughlin, *supra* note 8, at 1119.

[55] The Second, Fourth, Seventh, Ninth, Eleventh, and District of Columbia Circuits require specialized notice of summary judgment requirements for pro se litigants. *See, e.g.*, McPherson v. Coombe, 174 F.3d 276, 281-82 (2d Cir. 1999); Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997); Anderson v. Angelone, 86 F.3d 932, 935 (9th Cir. 1996); Lucas v. Dep't of Corr., 66 F.3d 245, 248 (9th Cir. 1995); Klingele v. Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988); Garaux v. Pulley, 739 F.2d 437, 439-40 (9th Cir. 1984); *Moore*, 703 F.2d at 520-21; *Lewis*, 689 F.2d at 101-02; Ham v. Smith, 653 F.2d 628, 630-31 (D.C. Cir. 1981); Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975).

[56] Beck v. Skon, 253 F.3d 330, 332 (8th Cir. 2001) (holding that district court is not required to provide special notice to pro se litigant at summary judgment stage); Fingerhut Corp. v. Ackra Direct Mktg. Corp., 86 F.3d 852, 856 (8th Cir. 1996) (stating that pro se litigants must comply with Federal Rules of Civil Procedure). Both the Fifth and Sixth Circuits also have refused to require its district courts to provide special notice of summary judgment responsibilities. *See, e.g.*, Martin v. Harrison County Jail, 975 F.2d 192, 193 (5th Cir. 1992) (holding that Rules of Civil Procedure, by themselves, provided sufficient notice

1. Eighth Circuit's Stance on Pro Se Litigants

The Eighth Circuit currently does not require specialized instructions for pro se litigants at the summary judgment stage.[57] It holds fast to the principle that pro se status does not excuse a litigant from complying with the Federal Rules of Civil Procedure and with a court's orders.[58] In *Carman v. Treat*, the Eighth Circuit held that the plaintiff's pro se status did not give him the right to disregard the Federal Rules of Civil Procedure.[59] Ultimately, the Eighth Circuit relies on the principle that ignorance of the law is no excuse for failing to comply with the law.[60]

2. Alternative Avenues Taken by Other Courts

While the Eighth Circuit does not require that district courts provide notice to pro se litigants of their summary judgment responsibilities, several other circuits do support specialized instructions.[61] Even the

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of summary judgment responsibilities); Brock v. Hendershott, 840 F.2d 339, 342-43 (6th Cir. 1988) (stating that pro se litigants are not entitled to special treatment).

[57] *Beck*, 253 F.3d at 333.

[58] *Fingerhut Corp.*, 86 F.3d at 856 (recognizing that pro se representation does not excuse party from complying with Federal Rules of Civil Procedure).

[59] *See* Carman v. Treat, 7 F.3d 1379, 1381 (8th Cir. 1993).

[60] *See* Kurkowski v. Volcker, 819 F.2d 201, 204 (8th Cir. 1987); *see also Beck*, 253 F.3d at 333 (stating that pro se litigant is not entitled to special instructions at summary judgment stage); *Fingerhut Corp.*, 86 F.3d at 856 (stating pro se litigants must comply with Federal Rules of Civil Procedure); *Carman*, 7 F.3d at 1381 (prohibiting pro se prisoner from disregarding Federal Rules of Civil Procedure).

[61] These include the Second, Fourth, Seventh, Ninth, Eleventh, and District of Columbia circuits. *See, e.g.*, McPherson v. Coombe, 174 F.3d 276, 282 (2d Cir. 1999) (requiring district court or opponent in moving papers to inform pro se defendant of effects of Rule 56); Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997) (remanding based on district court's "failure to notify pro se prisoner of his rights and responsibilities" under Rule 56); Anderson v. Angelone, 86 F.3d 932, 935 (9th Cir. 1996) (noting that "if the pro se litigant is a prisoner, the district court's duties are even greater"); Lucas v. Dep't of Corr., 66 F.3d 245, 248 (9th Cir. 1995) ("When the district court transforms a dismissal into a summary judgment proceeding, it must inform a plaintiff who is proceeding pro se that it is considering more than the pleadings and must afford a reasonable opportunity to present all pertinent material."); Klingele v. Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988) ("The district court is obligated to advise prisoner pro se litigants of Rule 56 requirements."); Moore v. Florida, 703 F.2d 516, 520-21 (11th Cir. 1983) (quoting Lewis v. Faulkner, 689 F.2d 100 (7th Cir. 1982)) ("Since few prisoners have a legal background, we think it appropriate to lay down a general rule that a prisoner who is a plaintiff in a civil case and is not represented by counsel is entitled to receive notice of the consequences of failing to respond with affidavits to a motion for summary judgment."); Lewis v. Faulkner, 689 F.2d 100, 101-03 (7th Cir. 1982) ("If counsel for defendants fail to provide [notice of Rule 56(e) requirements] it will be the district judge's responsibility to do so. . . ."); Ham v. Smith, 653 F.2d 628, 630-31 (D.C. Cir. 1981) (recognizing that "district judges should accord special attention to pro se litigants faced with summary judgment motions"); Roseboro v.

Supreme Court is no stranger to the concept of assisting pro se litigants.[62] The Court has acknowledged that pro se litigants deserve special consideration and has even reversed a lower court's ruling on that basis.[63] In *Haines v. Kerner,* the Court held that courts must liberally construe pro se litigants' pleadings.[64] In *Haines,* the pro se prisoner complained that he suffered physical injuries and that his rights were deprived during solitary confinement.[65] The Court reversed the lower court's dismissal of the case.[66] It concluded that the pro se prisoner was entitled to an opportunity to submit evidence.[67] The Court also intimated that pro se complaints were entitled to more leeway than formal pleadings prepared by lawyers.[68]

The Second Circuit has adopted a similar principle. It has held that district courts may not grant summary judgment against pro se litigants unless it is clear that the pro se litigants understand the consequences of Rule 56.[69] That court has stated explicitly that if the movant does not inform the pro se litigant of those consequences, the district court must do so.[70]

The Fourth Circuit has articulated a similar rule.[71] In one case, the Fourth Circuit recognized the pro se plaintiff's right to reasonable safeguards when confronted with the possibility of summary judgment.[72] It required that the pro se litigant be notified of his responsibility to

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Garrison, 528 F.2d 309, 310 (4th Cir. 1975) ("A pro se plaintiff is entitled to [fair notice of the requirements of the summary judgment rule] when confronted with the possibility of summary disposition of his case.").

[62] *See* Boag v. MacDougall, 454 U.S. 364, 365 (1982); Hughes v. Rowe, 449 U.S. 5, 9 (1980); Haines v. Kerner, 404 U.S 519, 520-21 (1972).

[63] *Haines,* 404 U.S. at 520.

[64] *See id.*

[65] *Id.* at 519-20.

[66] *Id.* at 521.

[67] *Id.* at 520.

[68] *Id.*

[69] McPherson v. Coombe, 174 F.3d 276, 282 (2d Cir. 1999); *see* Irby v. N.Y. City Transit Auth., 262 F.3d 412, 414 (2d. Cir. 2001); Vital v. Interfaith Med. Ctr., 168 F.3d 615, 620-21 (2d Cir. 1999).

[70] *See* Graham v. Lewinski, 848 F.2d 342, 344 (2d Cir. 1988); Beacon Enter., Inc. v. Menzies, 715 F.2d 757, 767 (2d Cir. 1983).

[71] *See, e.g.,* Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979) (noting that pro se litigants are entitled to special notice of consequences of Rule 56 motion); Plante v. Shivar, 540 F.2d 1233 (4th Cir. 1976) (remanding case after determining that district court did not provide adequate notice to pro se litigant); Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975) (holding that districting court must provide notice of summary judgment requirements to pro se litigant).

[72] *Roseboro,* 528 F.2d at 310.

respond to the defendant's motion for summary judgment.[73] In another case, the Fourth Circuit reversed and remanded a district court's judgment for failing to notify the pro se litigant that the court was treating the 12(b)(6) motion as one for summary judgment.[74] The Fourth Circuit also mandated that the notice be sufficiently comprehensible to a pro se litigant.[75]

More recently, the Seventh Circuit reaffirmed its position regarding notice to pro se litigants.[76] In *Timms v. Frank*, a pro se litigant appealed a grant of summary judgment in favor of her defendant-employer because she never received sufficient notice of the ramifications of failing to respond with counteraffidavits.[77] The court ruled that civil pro se litigants are entitled to notice regarding the consequences of failing to respond to summary judgment motions.[78] The court held that notice should include the text of the summary judgment rule and a short, clear description written in plain English explaining that any factual assertions in the movant's affidavits would be assumed true unless the pro se litigant submitted counteraffidavits.[79] The Court also held that it was the movant's responsibility for providing such notice to the pro se litigant.[80] It did, however, provide that if the movant failed to do so, the district court would be responsible for providing notice.[81] Furthermore, the Seventh Circuit adopted in its local rules a provision requiring notice to pro se litigants at the summary judgment stage.[82]

II. *BECK V. SKON*

A. Facts and Procedure

In *Beck v. Skon*, Davis Wayne Vanderbeck ("Beck"), an inmate at the Minnesota Correctional Facility, suffered a gunshot wound that resulted

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[73] *Id.*

[74] *Zahradnick*, 600 F.2d at 460; *see also Plante*, 540 F.2d at 1235 (defining reasonable opportunity to present materials in Rule 56 motion as giving notice that court is treating 12(b)(6) motion as one for summary judgment).

[75] *Zahradnick*, 600 F.2d at 460.

[76] Timms v. Frank, 953 F.2d 281, 284-85 (7th Cir. 1992).

[77] *Id.* at 283.

[78] *Id.* at 284.

[79] *Id.* at 285.

[80] *Id.*

[81] *Id.*

[82] John R. Maley, *Developments in Federal Civil Practice for Seventh Circuit Practitioners*, 33 IND. L. REV. 1123, 1131-32 (2000).

in his partial immobility.[83] Concluding that walking and climbing stairs exacerbated his injuries, Beck's physicians recommended that prison officials relocate him to a cell closer to the cafeteria and infirmary.[84] Beck requested to be placed in cell hall D, the cell hall closest to the cafeteria, or to be transferred to another jail that contained a medical unit.[85]

The prison refused to fulfill Beck's specific relocation request because he did not meet the prison's criteria for cell hall D inmates.[86] Alternatively, Beck neither had an acute nor terminal illness requiring him to stay in a medical unit.[87] Instead of relocation, prison officials offered Beck two other accommodations, both of which Beck refused.[88] Prison physicians also postponed Beck's hernia operation because he refused to sign the medical permit forms required for surgery.[89]

Beck filed a civil rights action against prison officials, alleging that they had violated his constitutional rights under the Eighth and Fourteenth Amendments.[90] On the magistrate judge's recommendation, the district court granted summary judgment for the prison officials.[91] Asserting that genuine issues of material fact were present, Beck appealed the district court's grant of summary judgment to the Eighth Circuit.[92] He contended that the Eighth Circuit should have reversed the lower court's ruling because the district court failed to adequately notify him on how to respond to motions for summary judgment.[93]

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[83] Beck v. Skon, 253 F.3d 330, 332 (8th Cir. 2001).

[84] *Id.*

[85] *Id.*

[86] *Id.* Cell hall D was restricted to inmates who complied with stringent behavioral standards. *Id.*

[87] *Id.*

[88] *Id.* Instead, prison officials offered Beck the use of a wheelchair or the option of having meals delivered to his cell. *Id.*

[89] *Id.*

[90] *Id.* at 331. Beck alleged constitutional violations for failure to relocate him and for conditioning his surgery on his execution of release of liability. *Id.*

[91] *Id.* at 332. In addition, the magistrate judge found nothing in the record demonstrating that the defendant was deliberately indifferent to the plaintiff's medical needs. *Id.* Facts as to whether officials conditioned Beck's surgery on release of future liability, however, remained. *Id.* at 334.

[92] *Id. at* 331.

[93] *Id.* at 333. Beck also alleged constitutional violations of the Eighth and Fourteenth Amendments for failure to relocate him and for conditioning his surgery on his execution of release of liability. *Id.* at 331.

B. The Eighth Circuit's Holding and Rationale

The Eighth Circuit affirmed in part, reversed in part, and remanded.[94] The court noted that it does not require a district court to provide particularized instructions to a pro se litigant at the summary judgment stage.[95] The court reasoned that Beck, like any other civil litigant, was required to respond to defendants' motion to avoid summary judgment.[96] It also observed that Beck was a frequent litigator in the Eighth Circuit and thus "under[stood] the jurisprudential process."[97]

III. ANALYSIS

A. The Eighth Circuit's Rule Violates the Constitutional Rights of Pro Se Litigants by Failing to Provide Meaningful Access to the Courts

Pro se litigants are entitled to meaningful access to the courts because such access is a fundamental constitutional right.[98] The Supreme Court has held that this right of access requires that states assist pro se litigants in certain circumstances,[99] such as providing prisoners with law libraries and legal assistance.[100] Over several decades, the Supreme Court and several circuits have re-emphasized that the main criterion in establishing inmate access to the courts is that this access is "adequate, effective, and meaningful."[101] The Supreme Court has indicated that

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[94] *Id.* at 334.

[95] *Id.* at 333.

[96] *Id.*

[97] *Id.*

[98] *See* Bounds v. Smith, 430 U.S. 817, 828 (1977); Ross v. Moffitt, 417 U.S. 600, 612-15 (1974); Wolff v. McDonnell, 418 U.S. 539, 579 (1974); Johnson v. Avery, 393 U.S. 483, 485 (1969); Rudolph v. Locke, 594 F.2d 1076, 1078 (5th Cir. 1979). The privileges and immunities clause of the United States Constitution serves as one constitutional basis for the right of access to the courts. *See* Chambers v. Baltimore & Ohio Ry. Co., 207 U.S. 142, 148 (1907); Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230). A second constitutional source for the right of access to the courts has been found in the First Amendment Right to Petition the government for redress of grievances. *See* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). *But see* Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743 (1983) (stating that baseless litigation is not immunized by First Amendment Right to Petition).

[99] *Bounds*, 430 U.S. at 828.

[100] *See* McLaughlin, *supra* note 8, at 1118; *see also Bounds*, 430 U.S. at 828 (holding that "fundamental constitutional right of access requires prison authorities to assist inmates in preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law").

[101] *Bounds*, 430 U.S. at 822; *accord* Hoppins v. Wallace, 751 F.2d 1161, 1162 (11th Cir. 1985) (per curiam); Johnson v. Hubbard, 698 F.2d 286, 289 (6th Cir. 1983); Twyman v. Crisp,

meaningful access to the courts is the "touchstone" of the constitutional right of access.[102]

If pro se litigants have a right of access to the courts, the courts must ensure that they provide access that is "adequate, effective, and meaningful."[103] In light of that concern, courts generally hold pro se pleadings to more liberal standards than pleadings drafted by attorneys.[104] This special standard applied to pro se pleadings reflects the courts' desire to afford laypersons the opportunity to proceed in a legal system designed for trained attorneys.[105] Applying that rationale to the summary judgment context, pro se litigants ought to be provided notice of the pitfalls of not properly responding to a motion for summary judgment.[106]

Without such notice, pro se litigants' access to the courts is frustrated.[107] Courts realize that an inartfully crafted pro se complaint does not serve as an adequate basis for deciding the case on the merits.[108] As such, many courts engage in the practice of liberally construing pro se

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584 F.2d 352, 359 (10th Cir. 1978) (per curiam); United States v. Wilkins, 281 F.2d 707, 716 (2d Cir. 1960) (stating that any procedure adopted by court in handling pro se litigants should be calculated to provide meaningful access). This meaningful access standard applies not only to inmates, but also to other litigants, such as indigents. *See Ross*, 417 U.S. at 616. Although the Supreme Court rejected the claim that indigents have a constitutional right to appointed counsel, it did hold that courts must guarantee the indigent defendant an adequate opportunity to present his claims fairly. *See id.*

[102] *Bounds*, 430 U.S. at 823.

[103] *Id.* at 822.

[104] *See, e.g.*, Hughes v. Rowe, 449 U.S. 5, 9-10 (1980) (per curiam) ("It is settled law that the allegations of such a complaint, 'however inartfully pleaded' are held 'to less stringent standards than formal pleadings drafted by lawyers.'") (citing Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam)); Madyun v. Thompson, 657 F.2d 868, 876 (7th Cir. 1981) (noting that it is commendable for courts to be "cautious in resolving pro se prisoners' cases through summary judgment."); *see also* McLaughlin, *supra* note 8, at 1122 (commenting on the liberality with which some courts approach pro se pleadings). Note also that filing handwritten materials does not prejudice pro se prisoners. *See Twyman*, 584 F.2d at 358; Tarlton v. Henderson, 467 F.2d 200, 201 (1972) (per curiam).

[105] *See, e.g., Hughes*, 449 U.S. at 9; *Haines*, 404 U.S. at 520-21.

[106] *See, e.g., Haines*, 404 U.S. at 520-21.

[107] *See* Ross v. Franzen, 777 F.2d 1216, 1219 (7th Cir. 1985) (analogizing ruling in *Haines* to relaxation of summary judgment requirements for pro se litigants). While a pro se litigant should not gain any advantages in a lawsuit due to his pro se status, courts recognize that a pro se litigant's lack of legal training ought not cause him to suffer any disabilities that easily could be prevented by judicial attention to his claim. *See* Camps v. C & P Tel. Co., 692 F.2d 120, 124 (D.C. Cir. 1981); *cf.* Gordon v. Leeke, 574 F.2d 1147, 1152-53 (4th Cir. 1978) ("[A] district court is not required to act as an advocate for a pro se litigant; but . . . should afford him a reasonable opportunity to determine the correct person . . . against whom the claim is asserted, [and] advise him how to proceed. . . .").

[108] *See* Estelle v. Gamble, 429 U.S. 97, 112 (1976) (Stevens, J., dissenting).

pleadings. Evidentiary materials, such as affidavits, often are required to supply sufficient facts to decide a pro se litigant's case.[109] Pro se complaints that facially appear to have no merit sometimes progress into significant constitutional controversies when courts further develop the factual issues pursuant to a defendant's motion for summary judgment.[110] Providing notice to pro se litigants at the summary judgment stage, therefore, is merely a logical extension of the liberal pleading standard that courts should afford to pro se litigants.[111] Failing to provide notice of the legal ramifications of summary judgment denies pro se litigants meaningful access to the courts.[112] By denying pro se litigants meaningful access to the courts, the Eighth Circuit violates its pro se litigants' constitutional rights.

B. The Eighth Circuit is Out of Sync With Its Sister Circuits

Various federal circuit courts recognize that pro se litigants have special needs, and the United States Supreme Court is no stranger to this concept.[113] In light of the Court's concern to provide pro se litigants with a meaningful opportunity to present their cases, it is strange that the Eighth Circuit would require that pro se litigants strictly comply with procedural technicalities.[114] Several other circuits recognize that

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[109] *See id.*

[110] *See* James C. Turk, Foreword, *Access to the Federal Courts by State Prisoners in Civil Rights Actions*, 64 VA. L. REV. 1349, 1352 (1978) (noting that because 42 U.S.C. § 1983 is worded in broad, general terms, hundreds of controversies common to daily life in prison constitute legally cognizable claims).

[111] The circuits that require notification of summary judgment obligations to pro se litigants hold this view. *See, e.g.*, Moore v. Florida, 703 F.2d 516, 520-21 (11th Cir. 1983) (holding that district courts should notify pro se litigants of summary judgment requirements); Lewis v. Faulkner, 689 F.2d 100, 101-02 (7th Cir. 1982) (advocating general rule that pro se prisoner litigants in civil cases should be entitled to receive notice of consequences of not adhering to summary judgment requirements).

[112] *See* McLaughlin, *supra* note 8, at 1120.

[113] *See* Hughes v. Rowe, 449 U.S. 5, 9-10 (1980) (per curiam); Haines v. Kerner, 404 U.S 519, 520-21 (1972); McPherson v. Coombe, 174 F.3d 276, 282 (2d Cir. 1999); Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997); Anderson v. Angelone, 86 F.3d 932, 935 (9th Cir. 1996); Lucas v. Dep't of Corr., 66 F.3d 245, 248 (9th Cir. 1995); Klingele v. Eikenberry, 849 F.2d 409, 413 (9th Cir. 1988); Garaux v. Pulley, 739 F.2d 437, 440 (9th Cir. 1984); *Moore*, 703 F.2d at 520-21; *Lewis*, 689 F.2d at 101-02; Ham v. Smith, 653 F.2d 628, 630-31 (D.C. Cir. 1981) (per curiam); Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam).

[114] Several circuits adhere to this view. *See Moore*, 703 F.2d at 520-21; *Lewis*, 689 F.2d at 101-02; *see also* Helen B. Kim, Note, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to be Heard*, 96 YALE L.J. 1641, 1644 (1987) (discussing how pro se litigants can be heard in our unfair adversarial legal system); McLaughlin, *supra* note 8, at 1121 (noting that expansion of liberal attitude towards pro se pleadings can result in paternalism).

applying these strict procedural requirements to pro se litigants is unfair.[115]

For example, influenced by Seventh Circuit precedent, one federal district court in the Seventh Circuit explicitly adopted in its local rules a provision requiring special notice to pro se litigants at the summary judgment stage.[116] The rule requires that if the movant files a motion for summary judgment, it must include a notice to the pro se litigant.[117] This notice must briefly explain that the litigant must submit to the court additional evidence contradicting the facts stated in the motion for summary judgment, or else the court will assume that all facts stated in the movant's motion are true.[118] The rule also requires that the movant include the full text of Rule 56.[119]

Several other circuits similarly require that pro se litigants have sufficient notice regarding the rules of summary judgment.[120] Recently,

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[115] *See McPherson*, 174 F.3d at 282; *Rand*, 113 F.3d at 1525; *Anderson*, 86 F.3d at 935; *Lucas*, 66 F.3d at 248; *Klingele*, 849 F.2d at 413; *Garaux*, 739 F.2d at 440; *Moore*, 703 F.2d at 520-21; *Lewis*, 689 F.2d at 101-02; *Ham*, 653 F.2d at 630-31; *Roseboro*, 528 F.2d at 310.

[116] The local rule states:

> If a party is proceeding pro se and an opposing party files a motion for summary judgment, counsel for the moving party must submit a notice to the unrepresented opposing party that: (1) briefly and plainly states that a fact stated in the moving party's [statement] . . . and supported by admissible evidence will be accepted by the Court as true unless the opposing party cites specific admissible evidence contradicting that statement of a material fact; and (2) sets for the full text of Fed. R. Civ. P. 56 . . . and (3) otherwise complies with applicable case law regarding notice to pro se litigants opposing summary judgment motions.

S.D. IND. R. 56.1(j); *see also* Maley, *supra* note 82, at 1134 (providing amendments made to Local Rule 56.1, which governs summary judgment practices in United States District Court of Indiana).

[117] S.D. IND. R. 56.1(j); *see also* Maley, *supra* note 82, at 1131-34.

[118] *See* sources cited *supra* note 117.

[119] *See* sources cited *supra* note 117.

[120] *See, e.g., McPherson*, 174 F.3d at 282 (requiring district court or opponent in moving papers to inform pro se defendant of effects of Rule 56); *Rand*, 113 F.3d at 1525 (remanding based on district court's "failure to notify pro se prisoner of his rights and responsibilities" under Rule 56); *Anderson*, 86 F.3d at 935 (noting that "if the pro se litigant is a prisoner, the district court's duties are even greater"); *Lucas*, 66 F.3d at 248 ("When the district court transforms a dismissal into a summary judgment proceeding, it must inform a plaintiff who is proceeding pro se that it is considering more than the pleadings and must afford a reasonable opportunity to present all pertinent material."); *Klingele*, 849 F.2d at 411-12 ("The district court is obligated to advise prisoner pro se litigants of Rule 56 requirements."); *Moore*, 703 F.2d at 5221 ("Since few prisoners have a legal background, we think it appropriate to lay down a general rule that a prisoner who is a plaintiff in a civil case and is not represented by counsel is entitled to receive notice of the consequences of failing to respond with affidavits to a motion for summary judgment."); *Lewis*, 689 F.2d at

the Second Circuit continued its trend of providing specialized instructions to pro se litigants.[121] The court adopted the principle that unless it is clear that the pro se litigant understands the consequences of the summary judgment rule, the movant must inform the pro se litigant.[122] The court held that if the movant is unable to provide such notice, the district court must do so.[123]

The Fourth Circuit, too, requires that notice be sufficiently clear to a pro se litigant.[124] It has asserted that failure to provide notice of the consequences of summary judgment to the pro se litigant constitutes procedural error necessitating remand.[125] The Fourth Circuit also requires that the pro se plaintiff be advised of his right to file counteraffidavits[126] and that failing to respond may result in summary judgment entered against him.[127]

The District of Columbia Circuit recognized early on that prison life disables pro se prisoner litigants from litigating their cases sufficiently.[128] Hence, it held that applying the requirements of Rule 56 with "strict literalness" to a pro se prisoner is unfair.[129] Indeed, many circuits have acknowledged in their opinions that pro se litigants deserve assistance in the form of notice at the summary judgment stage.[130]

Despite the fact that a majority of the circuits require that pro se litigants be provided with notice of summary judgment procedure, the

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101-02 ("If counsel for defendants fail to provide [notice of Rule 56(e) requirements] it will be the district judge's responsibility to do so. . . ."); *Ham*, 653 F.2d at 630-31 (recognizing that "district judges should accord special attention to pro se litigants faced with summary judgment motions"); *Roseboro*, 528 F.2d at 310 ("A pro se plaintiff is entitled to [fair notice of the requirements of the summary judgment rule] when confronted with the possibility of summary disposition of his case.").

[121] See *McPherson*, 174 F.3d at 282.

[122] *Id.*

[123] *Id.*

[124] *See* Davis v. Zahradnick, 600 F.2d 458, 460 (4th Cir. 1979).

[125] *Id.*

[126] *Id.*

[127] *Id.*; *see also* Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (finding district court should have warned pro se plaintiff about requirements of summary judgment rule).

[128] *See* Hudson v. Hardy, 412 F.2d 1091, 1094 (1968); Phillips v. United States Bd. of Parole, 352 F.2d 711, 718 (1965).

[129] *See Hudson*, 412 F.2d at 1094; *Phillips*, 352 F.2d at 718.

[130] *See* McPherson v. Coombe, 174 F.3d 276, 282 (2d Cir. 1999); Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997); Anderson v. Angelone, 86 F.3d 932, 935 (9th Cir. 1996); Lucas v. Dep't of Corr., 66 F.3d 245, 248 (9th Cir. 1995); Klingele v. Eikenberry, 849 F.2d 409, 413 (9th Cir. 1988); Garaux v. Pulley, 739 F.2d 437, 440 (9th Cir. 1984); Moore v. Florida, 703 F.2d 516, 520-21 (11th Cir. 1983); Lewis v. Faulkner, 689 F.2d 100, 101-02 (7th Cir. 1982); Ham v. Smith, 653 F.2d 628, 630-31 (D.C. Cir. 1981) (per curiam); *Roseboro*, 528 F.2d at 310.

Eighth Circuit fails to follow suit.[131] Even the Supreme Court has acknowledged the need for courts to assist pro se litigants.[132] Given this trend, the Eighth Circuit must recognize that pro se litigants have special needs that require the court's help. This help includes providing notice of summary judgment requirements to pro se litigants.

C. Public Policy Supports Providing Specialized Instructions to Pro Se Litigants at the Summary Judgment Stage

Although most inmate lawsuits are dismissed as frivolous, a significant number of these cases pose legitimate issues.[133] A handful of these inmate lawsuits has resulted in major constitutional victories for prisoners.[134] Therefore, failing to address the legitimacy of these claims denies pro se litigants the adequate and meaningful access to which they are entitled.[135] The vast majority of pro se civil litigation involves 42 U.S.C. § 1983 actions for violations of civil rights and habeas corpus actions.[136] The Supreme Court has emphasized repeatedly the significant role that civil rights actions and habeas corpus petitions play in developing fundamental constitutional rights.[137] Furthermore, the public

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[131] *See, e.g.*, Beck v. Skon, 253 F.3d 330, 333 (8th Cir. 2001) (refusing to remand case on ground that district court failed to advise pro se litigant how to respond to summary judgment motion); Fingerhut Corp. v. Ackra Direct Mktg. Corp., 86 F.3d 852, 856 (8th Cir. 1996) (refusing to remand case because pro se litigant received inadequate notice of default judgment).

[132] *See, e.g.*, Hughes v. Rowe, 449 U.S. 5, 9-10 (1980) (finding pro se litigants are held to less stringent standard then pleadings drafted by lawyers); Haines v. Kerner, 404 U.S. 519, 521 (1972) (noting that it holds pro se pleadings to "less stringent standards than formal pleadings drafted by lawyers").

[133] *See* Newman, *supra* note 2, at 519.

[134] Newman, *supra* note 2, at 519; *see, e.g.*, Helling v. McKinney, 509 U.S. 25 (1993) (upholding right of prison inmate not to be deliberately subjected to second-hand smoke); Hudson v. McMillian, 503 U.S. 1 (1992) (upholding prisoner's claim of use of excessive force); Vitek v. Jones, 445 U.S. 480 (1980) (barring involuntary transfer of prisoner to mental facility without procedural due process); Wolff v. McDonnell, 418 U.S. 539 (1974) (requiring procedural due process protections in prison disciplinary proceedings); Fisher v. Koehler, 902 F.2d 2 (2d Cir. 1990) (recognizing unconstitutional conditions at local jail); Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974) (finding unconstitutional conditions at local jail).

[135] *See* Bounds v. Smith, 430 U.S. 817, 828 (1977).

[136] *See* Bradlow, *supra* note 22, at 670 (discussing pro se civil actions as it relates to civil rights and habeas corpus actions); Newman, *supra* note 2, at 519; *see also* Note, *Pro Se Appeals in the Fifth Circuit*, *supra* note 21, at 73 (noting how most pro se civil actions are civil rights actions and habeas corpus petitions).

[137] *See, e.g.*, *Bounds*, 430 U.S. at 827; *Wolff*, 418 U.S. at 579; Johnson v. Avery, 393 U.S. 483, 485 (1969); Brown v. Allen, 344 U.S. 443, 502 (Frankfurter, J., concurring) (1953); *see also* Ballard v. Spradley, 557 F.2d 476, 481 (5th Cir. 1977) (highlighting importance to courts and society, in general, of encouraging citizens to aid in prosecuting violators of law). *But see*

has an interest in allowing public law issues to be heard sufficiently by a court. Public law litigation is unique in that it seeks more that just the resolution of a dispute between private parties.[138] Public law involves issues of constitutional and statutory importance, and the outcome of public law cases impacts many people.[139]

Moreover, almost all prisoners litigate on a pro se basis.[140] Although inmates may request appointment of counsel, few courts actually grant such requests.[141] This leaves an inmate no choice but to give up his case entirely or proceed as a pro se litigant.

Given the federal courts' ever-increasing docket size, some commentators have noted that courts have an interest in reducing frivolous pro se litigation.[142] One judge even described the increase of pro se litigation as a "floodtide" that is overwhelming the courts.[143] Indeed, the large number of frivolous prisoner lawsuits has many jurists spurning prisoner lawsuits altogether.[144] Although the burden on the courts poses a legitimate concern, the courts cannot deny meaningful access to all pro se litigants simply because some pro se litigants file frivolous claims. Pro se litigants, however, like all citizens, have the constitutional right to meaningful access to the courts.[145] Accordingly, the courts should ensure that this right of access is a realistic goal for pro se litigants to reach.

Indigents also have no constitutional or statutory right to counsel in civil cases.[146] Many civil litigants, even those who do not qualify as

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United States v. Wilkins, 281 F.2d 707, 715 (2d Cir. 1960) (stating that large number of habeas corpus petitions are frivolous).

[138] *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

[139] *Id.* (noting that judges in public law cases manage various forms of relief that "have widespread effects on persons not before the court").

[140] *See* Mueller, *supra* note 2, at 1280; *see also* Newman, *supra* note 2, at 519.

[141] *See* Mueller, *supra* note 2, at 1280.

[142] *See* LEONIDAS RALPH MECHAM, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 1995 REPORT OF THE DIRECTOR 60-61 (1995); *see also* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[143] JONA GOLDSCHMIDT ET AL, MEETING THE CHALLENGE OF PRO SE LITIGATION, A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS, at 8 (American Judicature Society 1998) (quoting M. Thompson, *Shortage in the Court*, THE DAILY JOURNAL, Jan. 20, 1995, at 1).

[144] Newman, *supra* note 2, at 520.

[145] *See* Bounds v. Smith, 430 U.S. 817, 828 (1977); Johnson v. Avery, 393 U.S. 483, 485 (1969).

[146] *See* Ross v. Moffitt, 417 U.S. 600, 618 (1974); Hooks v. Wainwright, 775 F.2d 1433, 1437-38 (11th Cir. 1985); Wiggins v. Sargent, 753 F.2d 663, 668 (8th Cir. 1985); Storseth v.

legally indigent, appear pro se because they simply cannot afford to hire counsel.[147] Because many civil rights actions are dismissed, plaintiffs filing these actions find it difficult to find counsel willing to represent them even on a contingent fee basis.[148] Exacerbating the problem, many of these plaintiffs seek only injunctive or declaratory relief, which does not provide a financial incentive for attorneys.[149]

Despite the fact that indigents cannot afford counsel to represent them, some judges and commentators argue that truly meritorious claims find representation.[150] This argument, however, is problematic. Many civil pro se cases are civil rights actions and habeas corpus petitions, which are often dismissed.[151] In turn, this high dismissal rate taints these pro se litigants' cases as hopeless, thereby dissuading attorneys from agreeing to work on these cases. Furthermore, the track record for successful civil rights claims is far from impressive.[152] Civil rights claims often require a higher standard of proof than other civil cases.[153] Therefore, it is not uncommon for an attorney to shun an otherwise meritorious claim because of the inherent difficulties that accompany most civil rights litigation.

Another obstacle that prisoner litigants face is statutory limits on the

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Spellman, 654 F.2d 1349, 1353 (9th Cir. 1981); Watson v. Moss, 619 F.2d 775, 776 (8th Cir. 1980) (per curiam).

[147] *See* Jacobsen v. Filler, 790 F.2d 1362, 1367-68 (9th Cir. 1986) (Reinhardt, J., dissenting); Park, *supra* note 2, at 831; Zeigler & Hermann, *supra* note 17, at 159-60. Ninety percent of the population cannot afford the high costs of legal assistance. *See* ANNE STRICK, INJUSTICE FOR ALL 103 (Putnam 1977); *see also* John P. Flannery & Ira P. Robbins, *The Misunderstood Pro Se Litigant: More than a Pawn in the Game*, 41 BROOK. L. REV. 769, 773 (1975).

[148] *See* DANIEL E. MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL 8 (John Boston, ed., Oceana Publications 2d ed. 1986) (warning prisoners of difficulty they are likely to have in obtaining counsel because of low rate of successful prisoner litigation); *see also* McLaughlin, *supra* note 8, at 1133-34 (discussing difficulties in obtaining counsel on contingent fee basis).

[149] *See* MARVIN E. FRANKEL, PARTISAN JUSTICE 68, 115 (Hill & Wang 1980); *see also Jacobsen*, 790 F.2d at 1364; Merritt v. Faulkner, 697 F.2d 761, 769 (7th Cir. 1983) (Cudahy, J. concurring) (noting lack of economic incentives for lawyers to represent prisoners).

[150] *Merritt*, 697 F.2d at 769-70 (Posner, J., concurring in part and dissenting in part); *accord* Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978); Elmore v. McCammon, 640 F. Supp. 905, 911 (S.D. Tex. 1986); *see also* Ben C. Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270, 1285 (1966) ("The poor plaintiff who has a meritorious money or property claim can nearly always find a lawyer who will take his case because of the almost universal use of the contingent fee to finance the litigation. . . .").

[151] *See* Bradlow, *supra* note 22, at 670; Newman, *supra* note 2, at 519; *see also* Note, *Pro Se Appeals in the Fifth Circuit*, *supra* note 21, at 73.

[152] *See* McLaughlin, *supra* note 8, at 1134-35.

[153] Interview with Margaret Johns, *supra* note 19.

amount of attorney's fees that they can obtain.[154] For example, the Prisoner Litigation Reform Act (PLRA)[155] limits the attorney's fees awardable to prisoner litigants in lawsuits challenging poor prison conditions as civil rights violations.[156] The PLRA places serious restrictions on both damages and injunctive relief for prisoner litigants.[157] This results in attorneys shying away from civil rights cases, however meritorious.

In addition, many civil rights cases and habeas corpus petitions do not seek money damages, but rather injunctive or declaratory relief.[158] Thus, attorneys are often unwilling to take on these litigants' cases because they cannot collect even on a contingent fee basis.[159] These factors undermine the assumption that truly meritorious claims will attract representation.

Because of their inability to obtain counsel, pro se litigants are largely left to their own devices to navigate their claims through the civil court system. Pro se litigants are unable to decipher procedural rules.[160] As Judge Posner has said, "It is unfair to deny a litigant a lawyer and then trip him up on technicalities."[161] Past cases reveal that providing legal information to pro se litigants leads to increased chances of success both in and out of court.[162] At a minimum, litigants should be warned that when faced with a motion for summary judgment, they must obtain counteraffidavits or other evidentiary materials to avoid having courts enter summary judgment against them.[163] This is especially true when

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[154] *See, e.g.*, 42 U.S.C. § 1997(e) (2002).

[155] The Prison Litigation Reform Act of 1995 is Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996). The statutes affected include 18 U.S.C. §§ 3624, 3626 (2000); 42 U.S.C. § 1997(e) (2002); and 28 U.S.C. §§ 1346(b), 1915 (2002).

[156] *See* 42 U.S.C. § 1997(e) (2002).

[157] *See id.*; *see also* Newman, *supra* note 2, at 522-23.

[158] *See* Bradlow, *supra* note 22, at 670; Note, *Pro Se Appeals in the Fifth Circuit*, *supra* note 21, at 73.

[159] Interview with Margaret Johns, *supra* note 19.

[160] PRISONER CIVIL RIGHTS COMMITTEE, FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 64 (1980).

[161] *See* Merritt v. Faulkner, 697 F.2d 761, 769 (7th Cir. 1983) (Posner, J. concurring and dissenting).

[162] *See* Kim, *supra* note 114, at 1642.

[163] *See* Madyun v. Thomson, 657 F.2d 868, 876 (7th Cir. 1981) (holding that courts must consider whether prisoner claims had fair and meaningful consideration on motions for summary judgment); Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (holding that summary judgment is inappropriate in civil rights action when prisoner litigant has not been advised of his right to file counteraffidavits or other evidentiary materials); Hudson v.

the court intends to transform a motion to dismiss into a motion for summary judgment.

Given this clear lack of meaningful access and representation in the judicial system, the Eighth Circuit should adopt a mandatory notice requirement assisting pro se litigants at the summary judgment stage. Pro se litigants who manage to file a legitimate complaint should not get dismissed on mere procedural technicalities. Notification of the summary judgment rule requirements reasonably safeguards pro se litigants' meaningful access to the courts.

CONCLUSION

Although many problems plague pro se litigation, not all pro se litigants bring frivolous claims. Those pro se litigants who do bring legitimate claims, however, have the odds stacked against them. Lack of education and financial resources leave many prospective litigants at a severe disadvantage. These factors, coupled with an inability to procure willing counsel, leave a significant number of litigants without any other option but to appear pro se.

Pro se litigants are entitled to meaningful access to the courts. Many circuits acknowledge this right and have taken steps to ensure equal access to the courts at the summary judgment stage. The Eighth Circuit, however, falls far behind its sister circuits. It should catch up and provide specialized instructions for its pro se litigants at the summary judgment stage.

Hardy, 412 F.2d 1091, 1094 (D.C. Cir. 1968); *see also* GOLDSCHMIDT, *supra* note 143, at 27 (suggesting procedures that courts should follow during summary judgment proceedings).

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