THE YALE LAW JOURNAL

ANDREW HAMMOND

Pleading Poverty in Federal Court

ABSTRACT. What must a poor person plead to gain access to the federal courts? How do courts decide when a poor litigant is poor enough? This Article answers those questions with the first comprehensive study of how district courts determine when a litigant may proceed in forma pauperis in a civil lawsuit. It shows that district courts lack standards to determine a litigant's poverty and often require litigants to answer an array of questions to little effect. As a result, discrepancies in federal practice abound—across and within district courts—and produce a pleading system that is arbitrary, inefficient, and invasive.

The Article makes four contributions. First, it codes all the poverty pleadings currently used by the ninety-four federal district courts. Second, it shows that the flaws of these procedures are neither inevitable nor characteristic of poverty determinations. By comparing federal practice to other federal means tests and state-court practices, the Article demonstrates that a more streamlined, yet rights-respecting approach is possible. Third, the Article proposes a coherent in forma pauperis standard—one that would align federal practice with federal law, promote reasoned judicial administration, and protect the dignity of litigants. Such a solution proves that judges need not choose between extending access to justice and preserving court resources. In this instance and perhaps others, judges can serve both commitments of the federal system. Fourth, the Article illustrates how to study procedure from the bottom up. Given the persistent and widening levels of inequality in American society, no account of civil procedure is complete without an understanding of how poor people litigate today.

AUTHOR. Senior Lecturer in Law, Letters, and Society in the College and Lecturer in Law, University of Chicago Law School. I am grateful for comments from Emily Buss, Zach Clopton, Justin Driver, Ben Eidelson, Bonnie Ernst, Lee Fennell, Amanda Frost, Maggie Gardner, Abbe Gluck, Daniel Hemel, Scott Hemphill, William Hubbard, Aziz Huq, Emma Kaufman, Ariel Jurow Kleiman, Liz McCuskey, Lou Mulligan, David Noll, Richard Re, Judith Resnik, Ezra Rosser, Shayak Sarkar, Margo Schlanger, Liz Schneider, Brian Soucek, Ben Spencer, Adam Steinman, and Charles Tyler. Katherine Blankinship provided steadfast research assistance. Thanks also to the organizers and participants of the American University Washington College of Law's Poverty States conference, the annual Law & Society meeting, the Civil Procedure Workshop at the University of Arizona James E. Rogers College of Law, and the Liman Colloquium at Yale Law School as well as the law faculties at the University of California-Davis, the University of Chicago, the University of Florida, George Washington University, Indiana University, the University of Maryland, the University of Michigan, Northwestern University, the University of Richmond, and the University of San Diego for allowing me to workshop earlier versions. Finally, I thank Hannah Schoen and the other editors of the *Yale Law Journal*.

ARTICLE CONTENTS

INTRODUCTION 1481

I. IN FORMA PAUPERIS PRACTICE IN FEDERAL COURT 1485
- A. The History of In Forma Pauperis Status in Federal Court 1486
- B. The Benefits of In Forma Pauperis Status 1492
- C. The Flaws of Federal In Forma Pauperis Practice 1495
  - 1. Summary Statistics of the In Forma Pauperis Forms 1496
  - 2. The Arbitrary Nature of Federal In Forma Pauperis Practice 1497
  - 3. An Inefficient Procedure for Judges 1500
  - 4. An Invasive Procedure for Litigants 1503
  - 5. A Faulty Status Quo for the Federal Courts 1505

II. OTHER SOURCES OF POVERTY PLEADING 1507
- A. Means Tests in Federal Law 1507
- B. In Forma Pauperis Practice in State Courts 1510

III. TOWARD A COHERENT IN FORMA PAUPERIS STANDARD 1514
- A. Designing a National In Forma Pauperis Standard for the Federal Courts 1515
- B. Adopting a National In Forma Pauperis Standard for the Federal Courts 1521
  - 1. Congress 1522
  - 2. The Judicial Conference 1523
  - 3. U.S. District Courts 1525

IV. BOTTOM-UP PROCEDURE 1526
- A. A Different Perspective 1526
- B. Whither Civil Procedure? 1530

CONCLUSION 1537

APPENDIX A: IN FORMA PAUPERIS PRACTICE IN U.S. DISTRICT COURTS AND STATE COURTS 1539

APPENDIX B: PROPOSED IN FORMA PAUPERIS FORM 1565

INTRODUCTION

In a nation racked with persistent poverty and increasing inequality, it is worth asking how the federal courts encounter and accommodate litigants with limited means. Almost forty million Americans live below the federal poverty level.[1] Forty percent of American adults report not having the savings to cover a $400 emergency—the same amount it costs to file a case in federal court.[2] Yet, these financial realities for low-income litigants collide with a civil justice system that demands that those individuals act as their own advocates. The federal courts constitute an indispensable forum for low-income individuals. They hear thousands of cases involving alleged unlawful practices by the employers and government actors with whom poor people interact on a regular basis. Indeed, employment discrimination, police misconduct, and disability determinations make up a significant portion of the federal question cases in the federal courts.[3] Given that American civil justice largely relies on private enforcement of fundamental rights, we should not lose sight of procedural rules that only apply to poor litigants. Procedural rules may impinge on the ability of litigants to vindicate their claims, especially those arising under the Constitution and the laws of the United States. Mindful of those stakes, this Article works through the first rule that poor people encounter when they file a lawsuit in federal court.

Since 1892, Congress has authorized the federal courts to grant in forma pauperis (IFP) status to litigants who submit a financial affidavit declaring their poverty. Yet, the regime now in place—governed by 28 U.S.C. § 1915(a) and Federal Rule of Civil Procedure 83—affords federal judges broad discretion to determine whether a litigant qualifies for IFP status. As a result, the manner in which people plead poverty in federal court varies dramatically across the federal system. This pleading structure burdens judges and litigants, and it differs from the

1. Kayla Fontenot et al., *Income and Poverty in the United States: 2017*, U.S. CENSUS BUREAU 11 (Sept. 2018), https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-263.pdf [https://perma.cc/EBE8-SSY8]. The poverty threshold in 2017 was an annual income of $24,858 for a family of four including two children. *See id.* at 47. Poverty rates among African Americans and Latinos are about twice those of white Americans. *See id.* at 12.

2. *Report on the Economic Well-Being of U.S. Households in 2017*, BOARD GOVERNORS FED. RES. SYS. 21 (May 2018), https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf [https://perma.cc/XT6W-GCA7].

3. Of the 267,769 cases filed in the federal trial courts in fiscal year 2017, twenty-two percent of cases were brought under the Social Security Act or civil rights statutes, including the Americans with Disabilities Act, § 1983, and Title VII. *See Table 4.4: U.S. District Courts—Civil Cases Filed, by Nature of Suit*, ADMIN. OFF. U.S. CTS. 1-2, 4 (2017), https://www.uscourts.gov/sites/default/files/data_tables/jff_4.4_0930.2017.pdf [https://perma.cc/7AT6-LYGB].

poverty determinations conducted by federal agencies, state agencies, and state courts.

This Article builds its argument from the ground up by tracing the disparate IFP practices of the United States' ninety-four federal trial courts. Drawing on both federal law and state-court practice, the Article proposes a coherent IFP standard. It connects this inquiry with broader debates in procedure, including those around access to justice and the future of civil adjudication. More broadly, this Article typifies what one might call bottom-up procedural scholarship. Such an approach will often prioritize poor litigants over wealthy ones, trial courts over appellate, and routine adjudications over precedent-shattering rulings.

The Article begins by identifying and documenting the range of federal in forma pauperis practice. In granting IFP status, the federal court waives the initial filing fee and sometimes confers other benefits on the litigant, including assistance effectuating service of process and even appointed counsel.[4] Beyond these concrete benefits, IFP status instantiates the federal system's purported commitment not to let a litigant's indigence interfere with the merits of that litigant's claims. However, 28 U.S.C. § 1915(a), as well as the tradition of local rules and court practices enabled by the Federal Rules, gives judges significant discretion in determining whether a litigant's poverty warrants IFP status. That discretion, in turn, has produced a dizzying degree of variation across and within the ninety-four U.S. district courts.

In forma pauperis motions do not equip federal judges with the tools to accurately assess a movant's poverty,[5] and federal courts differ in the information they collect about litigants' financial situations. Part I demonstrates how this lack of uniformity across and within courts creates disparate practices in the federal judiciary.[6] The coding summarized in Part I highlights these differences, with many forms requiring more information than necessary.

Also, few federal courts provide back-end guidance for judges presented with an in forma pauperis motion. With no standard ex ante, judges are left to determine how much income is too low, how many expenses are too high, and how many assets are too few.[7] Moreover, computing a movant's income and expenses is arithmetic and does not demand the skills of an Article III judge.

As for the litigants, the federal courts unnecessarily ask poor people to plead too much to prove their poverty. Some of the IFP forms betray a wealthy person's conception of income—asking would-be litigants to appraise their jewelry and

4. *See infra* Part I.

5. Throughout the Article, I use the terminology of "movant" or "litigant" rather than "plaintiff" or "defendant."

6. *See infra* Part I.

7. *Id.*

artwork, to divulge their stock holdings, and to itemize their inheritances. A poor litigant should not need to plead the make and model of any vehicle in their possession or disclose their educational attainment. A judge need not require, as one of the forms used by the Judicial Conference of the United States does, a litigant to list income from a dozen categories, fifteen types of expenses, and ten types of assets. Such a cumbersome, standardless pleading system needlessly burdens judges and litigants.

Part II disproves that this degree of unreliability is inherent in poverty pleadings. Indeed, one cannot fully appreciate the flaws in federal practice until surveying the landscape of poverty determinations outside of the federal courts. By comparing federal IFP determinations to other poverty determinations, the Article illustrates that federal practice need not be so arbitrary. Federal and state agencies routinely determine the poverty of applicants.[8] These agencies apply means tests to determine whether an individual or family is eligible for government assistance, including Medicaid, food assistance, and welfare.[9] Federal courts should follow suit. To be sure, it is unusual to liken federal courts to welfare agencies, but in this context, both institutions are engaged in an identical enterprise—attempting to distribute a means-tested benefit in a rational, efficient manner. The constitutional origins and distinct functions of courts and agencies should not prevent us from comparing how they make those poverty determinations.

For those who would prefer to compare federal courts only to other courts, state court systems serve as ready-made analogs. State courts use a variety of mechanisms to make poverty determinations.[10] In fact, these courts use rules similar to those of human-services agencies that the federal courts should also adopt. For example, some state courts already use bright-line income tests tied to the federal poverty guidelines and adjunctive eligibility (i.e., qualifying for one program as a presumption of qualification for another). These agency and state-court practices highlight the rudimentary nature of our federal system.

Part III draws on these lessons from federal law and state-court practice to propose a coherent federal IFP standard. This national standard would not only bring IFP status in line with federal law and state-court practice but also better promote access to justice for poor people. It would build on the lessons of other

8. *See infra* Part II.

9. *See, e.g.*, *Medicaid, Children's Health Insurance Program, & Basic Health Program Eligibility Levels*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-eligibility-levels/index.html [https://perma.cc/XVU6-6JZK]; Food & Nutrition Serv., *Am I Eligible for SNAP?*, U.S. DEP'T AGRIC. tbl.1, https://www.fns.usda.gov/snap/eligibility [https://perma.cc/7AH4-QGUT].

10. *See infra* Part II.

poverty determinations by clarifying an income threshold and allowing for adjunctive eligibility.[11] Federal judges could save valuable time by streamlining this fairly ministerial function, and the new IFP standard would preserve their discretion in cases where the court determines that paying the fees and costs would cause the litigant substantial hardship. To adopt the new standard, Congress could amend the federal IFP statute, the Judicial Conference could amend the Federal Rules or propose a new form, or individual district courts could implement the new standard. While there are potential drawbacks to a uniform national standard, including that it could stifle variation based on regional differences in costs of living, the proposal advanced in this Article would reduce the arbitrary qualities of federal IFP determinations in ways that benefit judges and litigants alike.

Beyond the details of federal IFP practice, much procedure scholarship considers additional protections for poor litigants (and access-to-justice reforms generally) to be at odds with the demands of efficient judicial administration. Due process values are understood to be in conflict with preserving judicial resources. In Part IV, the Article shows why the trade-off between procedural protections and judicial resources is not preordained.[12] It suggests that these principles should not always be treated as "either/or" design choices, but rather as mutually reinforcing features that legitimize a procedural system.[13] The Article reconciles this seeming conflict in a specific instance: a poor litigant's first step into federal court.

In the process, the Article models a different approach to the study of procedure. By concentrating on an admittedly obscure procedure, the Article stresses the lived reality for litigants when they seek redress in federal court. In doing so, this project emphasizes not the appellate courts of the federal system but rather the trial courts that are, for most, the face of justice. The Article dwells on one of the run-of-the-mill procedures that litigants encounter every day in the federal system. Put simply, this is procedure not from the top down but from the bottom up.

The Article makes its case in four parts. Part I uncovers the major flaws in current in forma pauperis practice in federal court. By collecting and coding all IFP forms currently in use in the U.S. district courts, the Article shows how these IFP determinations are irrational, inefficient, and invasive. Part II demonstrates that the problems in federal practice are not inevitable in a large court system or even characteristic of poverty determinations. Federal law contains other poverty determinations that are more straightforward than current IFP practice. State

11. *See infra* Part III.

12. *See infra* Part IV.

13. *See infra* Section IV.B.

courts also offer useful guidance for the federal system. Part III proposes a new standard, one that would bring IFP determinations in line with federal law and better promote access to justice for poor Americans. The Article lays out how Congress, the Judicial Conference of the United States, or individual district courts could adopt this proposal. Part IV connects the challenges associated with federal practice in this area to the longstanding conversation among proceduralists about balancing the need to protect access to the courts for indigent litigants and the need for rationalized judicial resources. The Article concludes with an exploration of how this scholarship informs the study of civil procedure, suggesting that those litigants who have few resources may have the most to teach us about how adjudicatory systems function (or fail to) in our inegalitarian age.

I. IN FORMA PAUPERIS PRACTICE IN FEDERAL COURT

What must a poor person plead for a federal court to waive fees and costs? How poor must that person be? Common law courts have long possessed the authority to waive fees and costs for indigent litigants, and Congress has authorized federal courts to do so for 125 years.[14] The precise practices that have emerged from that authority warrant a comprehensive study.[15] This Part begins

---

14. *See infra* notes 16-24 and accompanying text. The first question listed on the federal judiciary's website deals with in forma pauperis practices:

> [Question:] How do I file a civil case? Is there a charge?
>
> [Answer:] A civil action is commenced by the filing of a complaint. Parties instituting a civil action in a district court are required to pay a filing fee pursuant to Title 28, U.S. Code, Section 1914. The current fee is $350. Complaints may be accompanied by an application to proceed in forma pauperis, meaning that the plaintiff is incapable of paying the filing fee. Proceedings in forma pauperis are governed by Title 28, U.S. Code, Section 1915.

FAQs: Filing a Case, ADMIN. OFF. U.S. CTS., https://www.uscourts.gov/faqs-filing-case [https://perma.cc/3D5Q-8XMS].

15. The only two relevant reports from the Federal Judicial Center are from 1984 and 1994; they deal with whether district courts allow prisoners and other IFP litigants to pay partial filing fees. *See* MARIE CORDISCO, FED. JUDICIAL CTR., PARTIAL PAYMENT OF FILING FEES IN IN FORMA PAUPERIS CASES: CURRENT PRACTICES OF FEDERAL DISTRICT COURTS (1994) (detailing "the current practice in each United States District Court regarding the imposition of partial filing fees"); THOMAS E. WILLGING, FED. JUDICIAL CTR., PARTIAL PAYMENT OF FILING FEES IN PRISONER IN FORMA PAUPERIS CASES IN FEDERAL COURTS: A PRELIMINARY REPORT (1984) (focusing on the Northern District of Ohio's practices). To be sure, such an effort is considerably easier now that nearly all district courts make their local forms available on their respective court websites. Legal scholars have discussed in forma pauperis practice, but these articles were published anywhere from thirty to one hundred years ago, and none systematically analyzed federal practice in the district courts. *See, e.g.*, Robert S. Catz & Thad M. Guyer, *Federal In Forma Pauperis Litigation: In Search of Judicial Standards*, 31 RUTGERS L. REV. 655, 656 (1978)

by sketching the historical context of the modern federal in forma pauperis statute. It touches briefly on the IFP regime in the United Kingdom before moving to the federal IFP statute in the United States. It then details the benefits that currently flow from this status. The bulk of the Part, however, relates the results of a survey of the ninety-four federal district courts' current IFP forms and practices.

A. The History of In Forma Pauperis Status in Federal Court

Although this Article focuses on the federal statutory regime of in forma pauperis in the United States, special treatment of poor litigants was a feature of common law legal systems long before the federal statute was first enacted in 1892.[16] This historical background underscores the longstanding aspiration for courts to furnish a procedural system that does not distinguish between the rich and the poor.

There is some evidence that at common law there was a right to sue regardless of ability to pay and that statutes merely regulated the right of an indigent to sue.[17] Regardless of its provenance, though, the in forma pauperis right in England can claim uncontested authority since 1495.[18] In effect for four centuries, England's in forma pauperis statute absolved a plaintiff of paying the typical

(describing federal practice as "both diffuse and inconsistent"); Ben. C. Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270 (1966); Stephen M. Feldman, *Indigents in the Federal Courts: The In Forma Pauperis Statute—Equality and Frivolity*, 54 FORDHAM L. REV. 413, 414 (1985); John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1923); Lee Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VAL. U. L. REV. 21 (1967); Comment on Recent Case, *Procedure: Suits In Forma Pauperis*, 6 CALIF. L. REV. 226 (1918). More current writing on in forma pauperis practice in the federal and the state courts can be found in bar journals. *See, e.g.*, Regan Strickland Beatty, *Access to the Bankruptcy Courts: The In Forma Pauperis Provision,* 85 OKLA. B.J. 822 (2014); Christian J. Grostic, *An Indigent Plaintiff in the Federal Courts*, FED. LAW., Jan.-Feb. 2014, at 70; Christine E. Rollins, *Statutory Assistance for Attorneys Providing Pro Bono Services*, 60 J. MO. B. 112 (2004). Justice Douglas discussed federal in forma pauperis practice in such a journal nearly sixty years ago. William O. Douglas, *In Forma Pauperis Practice in the United States*, N.H. B.J., Oct. 1959, at 5, 6 (explaining why "the pauper is entitled to the benefits of all of the court's processes").

16. *See generally* Maguire, *supra* note 15, at 362-65 (discussing in forma pauperis status in the Anglo-American legal tradition).

17. *See* Brunt v. Wardle (1841) 133 Eng. Rep. 1254, 1257 ("[A]fter all, is the 11 H[en]. 7, c. 12 any thing more than confirmatory of the common law?"); *see also* 7 ENCYCLOPAEDIA OF THE LAWS OF ENGLAND 192 (A. Wood Renton & Max A. Robertson eds., 2d ed. 1907) (describing early recognition of the "common-law right" to proceed in forma pauperis).

18. *See* An Acte to Admytt Such P[er]sons as Are Poore to Sue In Forma Paup[er]is 1495, 11 Hen. 7 c. 12 [hereinafter Acte to Admytt].

fees and costs associated with a lawsuit.[19] A plaintiff had to submit documentation to the court from two attorneys certifying that his suit had merit.[20] Starting in the 1880s, in forma pauperis practice was enshrined in court rules. In 1949, the British Parliament created what aspired to be a comprehensive system of legal aid and, in the process, abolished the right to litigate in forma pauperis.[21]

In 1892, the U.S. Congress passed the first statute authorizing the federal courts to allow plaintiffs to proceed in forma pauperis. The statute provided that "any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor" if the plaintiff submitted an affidavit that "because of his poverty, he is unable to pay the costs" and that his case has merit.[22] The statute required that the court's officers would serve process in these cases and authorized the court to request an attorney "to represent such poor person, if it deem[ed] the cause

19. This is not to say that there were no other costs to the indigent litigant. At common law, a pauper who lost his case could be whipped. *See* An Acte that the Defendunt Shall Recov[er] Cost[s] Ageinste the Pleyntif, if the P[lain]t[iff] Be Nonsuited, or if the V[er]dicte Passe Ageinste Him 1532, 23 Hen. 8 c. 15 (noting that indigent litigants "shall suffer other punysshement as by the discrecion of the Justices or Judge afore whome suche suities shall depende, shalbe thought reasonable").

20. Acte to Admytt, *supra* note 18. The statute of 1495 did not apply to civil defendants. *Id.*; *see also* COMMITTEE ON LEGAL AID AND LEGAL ADVICE IN ENGLAND AND WALES, REPORT, [Cmd.] 6641 (1945) (discussing British in forma pauperis practice); Alex Elson, *The Rushcliffe Report*, 13 U. CHI. L. REV. 131, 142 (1946) ("[T]he significance of the Rushcliffe report is that the bar of England at this time is willing to consider the need for legal assistance as a fundamental problem requiring immediate national consideration.").

21. The Legal Aid and Advice Act 1949, 12 & 13 Geo. 6, c. 51 (abolishing in forma pauperis status "in respect of proceedings in all courts in England and Wales except the Judicial Committee of the Privy Council"); *see also* Richard I. Morgan, *The Introduction of Civil Legal Aid in England and Wales, 1914-1949*, 5 TWENTIETH CENTURY BRIT. HIST. 38 (1994) (describing the creation of the legal aid system).

22. Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252, 252. Federal courts sitting in admiralty developed an analog to in forma pauperis status before the 1892 statute. Typically made available to seamen suing for wages, this procedure allowed litigants to proceed upon a juratory caution, which permitted sailors to avoid the court fee. *See, e.g.*, The Arctic, 1 F. Cas. 1089 (E.D. Mich. 1871) (No. 509A); The Great Britain, 10 F. Cas. 1050 (S.D.N.Y. 1843) (No. 5736); *see also* Maguire, *supra* note 15, at 381 n.102 (collecting admiralty cases that "without the aid of statute, bore the English stamp in the matter of poor persons' proceedings"); Comment on Recent Case, *supra* note 15, at 227-28 (discussing admiralty practice). Congress enacted a statutory right in such cases in 1948. *See* 28 U.S.C. § 1916 (2018) (authorizing seamen to "institute and prosecute suits and appeals in their own names and for their own benefit for wages or salvage or the enforcement of laws enacted for their health or safety without prepaying fees or costs or furnishing security therefor").

worthy of a trial."[23] To guard against false statements and frivolous cases, the statute also authorized courts to dismiss any case if "the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious," and it made a fraudulent in forma pauperis statement punishable as perjury.[24]

The House Report for the eventual statute suggests that Congress wanted to ensure that indigent plaintiffs possessed the same procedural rights as plaintiffs who could afford to pay the fees and costs of litigation.[25] The Report described the legislation as an attempt to solve the problem where "persons with honest claims may be defeated, and doubtless often are, by wealthy adversaries."[26] The legislative history also suggests that Congress wanted to "keep pace" with states that had adopted similar policies.[27]

While Congress focused on providing poor people with initial entry to the federal courts, it did not consider whether courts could recoup the waived fees and costs in the event of the plaintiff's recovery. Federal courts were left to interpret the statute and its eventual amendments.[28] Over the next century, the courts wrestled with several questions, including whether in forma pauperis status was a mandatory or discretionary benefit conferred by the court, how to penalize fraudulent claims to this status, and which litigants in which proceedings could plead that status.

As to the first of these questions, federal courts are not required to grant in forma pauperis status. Rather, the decision to grant a litigant's motion is in the court's discretion. In *Kinney v. Plymouth Rock Squab Co.*, the Supreme Court held that judges are not required to grant requests for assistance in forma pauperis because the statute merely conferred the authority to do so when the claim was "sufficiently meritorious to justify the . . . request."[29]

---

23. Act of July 20, 1892, § 4, 27 Stat. at 252.

24. *Id.*

25. *See* H.R. REP. NO. 52-1079, at 1 (1892).

26. *Id.*

27. *See id.*; *see also* Comment on Recent Case, *supra* note 15. Earlier decisions from some state supreme courts held that the right to proceed in forma pauperis derived from statute. *See*, *e.g.*, Hoey v. McCarthy, 24 N.E. 1038 (Ind. 1890); Campbell v. Chicago & Nw. Ry., 23 Wis. 490 (1868).

28. Neitzke v. Williams, 490 U.S. 319, 324-25 (1989) (discussing how "[t]he brevity of § 1915(d) and the generality of its terms have left the judiciary with the not inconsiderable tasks of fashioning the procedures by which the statute operates and of giving content to § 1915(d)'s indefinite adjectives," including "frivolous").

29. 236 U.S. 43, 45 (1915).

Furthermore, since the federal statute was enacted, Congress has authorized the federal courts to dismiss claims filed in forma pauperis if the action is frivolous or malicious. The Supreme Court reasoned in *Neitzke v. Williams* that a litigant who bore no costs also lacked "an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits."[30] However, aside from dismissal of the suit, the only potential sanctions for a fraudulent in forma pauperis affidavit are prosecution for perjury and assessment of costs.[31] The statute further provides that "the court shall dismiss the case at any time if the court determines that . . . the allegation of poverty is untrue."[32] Mistakes made in good faith cannot save an erring movant.[33]

Congress has amended the federal IFP statute several times since 1892, extending the status to defendants,[34] appellants,[35] and noncitizens.[36] It has also

---

30. 490 U.S. at 324; *see also* Denton v. Hernandez, 504 U.S. 25, 27 (1992); Zatko v. California, 502 U.S. 16, 16-17 (1991) (per curiam) (airing the concern that "in forma pauperis petitioners lack the financial disincentives—filing fees and attorney's fees—that help to deter other litigants from filing frivolous petitions"). Others have explored the extent to which lawyers have an obligation to represent clients who cannot afford to pay them. *See, e.g.*, David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735 (1980).

31. *See* Adkins v. E.I. du Pont de Nemours & Co., 335 U.S. 331, 338-39 (1948) (identifying perjury prosecutions as "a sanction important in protection of the public against a false or fraudulent invocation of the statute's benefits" and discussing "other sanctions to protect against false affidavits" including authorizing courts to dismiss the case and "render judgment for costs"); Pothier v. Rodman, 261 U.S. 307 (1923). Admittedly, it is difficult to find perjury prosecutions for fraudulent in forma pauperis applications in published opinions of the federal courts.

32. 28 U.S.C. § 1915(e)(2)(A) (2018); *see, e.g.*, Thomas v. Gen. Motors Acceptance Corp., 288 F.3d 305, 306 (7th Cir. 2002) (interpreting § 1915(e)(2)(A) as mandatory, requiring that once "the allegation of poverty [is proven] false, the suit ha[s] to be dismissed; the judge ha[s] no choice").

33. *See, e.g.*, Osoria v. AT&T Co., No. 11-cv-4296, 2013 WL 4501450, at *3 (N.D. Ill. Aug. 21, 2013) (dismissing the case after discovering that the plaintiff did not list assets on her IFP application, despite her argument that she misunderstood the application).

34. Act of June 25, 1910, ch. 435, § 1, 36 Stat. 866, 866.

35. *Id.*

36. Act of Sept. 21, 1959, Pub. L. No. 86-320, 73 Stat. 590; *see also* Rowland v. Cal. Men's Colony, 506 U.S. 194, 198 n.2 (1993) (discussing the legislative history that cited the Judicial Conference's concern that the "distinction between citizens and aliens as contained in existing law may be unconstitutional" and also "in violation of various treaties entered into by the United States with foreign countries which guarantee[] to their citizens access of the courts of the United States."). In *Rowland*, the Supreme Court held that "only a natural person may qualify for treatment *in forma pauperis* under § 1915." 506 U.S. at 196.

provided that the federal government would pay for records in criminal appeals[37] as well as transcript fees in civil and criminal appeals.[38]

One issue left unaddressed by these reforms concerned the status of bankruptcy courts. Federal courts disagreed as to whether a bankruptcy court was a "court of the United States" within the meaning of 28 U.S.C. § 1915 and therefore had the power to grant a motion to proceed in forma pauperis.[39] Those that held that in forma pauperis status did not apply to bankruptcy proceedings relied on *United States v. Kras*.[40] There, the Supreme Court held that, despite the IFP statute, all parties were required to pay commencement fees for filing a petition for bankruptcy.[41] In 2005, however, Congress authorized a district or bankruptcy court to waive filing and other fees in personal bankruptcy cases for individuals who are unable to pay.[42] As will be discussed below, in creating this parallel fee-waiver provision for Chapter 7 debtors, Congress set an income threshold of 150% of the federal poverty line.[43]

While this Article's focus is on nonprisoner civil litigation, it is worth briefly detailing the only time that Congress restricted IFP status in prison litigation. In 1996, Congress passed the Prison Litigation Reform Act (PLRA),[44] citing the

37. Act of June 27, 1922, ch. 246, 42 Stat. 666.

38. Act of Jan. 20, 1944, ch. 3, 58 Stat. 5.

39. *Compare In re* Perroton, 958 F.2d 889, 896 (9th Cir. 1992) (concluding that a bankruptcy court is not a "court of the United States" for the purposes of 28 U.S.C. § 1915(a)), *with In re* McGinnis, 155 B.R. 294, 294 (Bankr. D.N.H. 1993) (collecting bankruptcy cases granting in forma pauperis status to Chapter 7 debtors).

40. 409 U.S. 434 (1973).

41. *Id.* at 440-45 (distinguishing *Boddie v. Connecticut*, 401 U.S. 371 (1971) on the grounds that a bankruptcy proceeding, unlike a divorce action, does not involve a fundamental interest); *see also, e.g.*, Henry Rose, *Denying the Poor Access to Court:* United States v. Kras *(1973)*, *in* THE POVERTY LAW CANON 188, 191-96 (Marie A. Failinger & Ezra Rosser eds., 2016) (detailing the disagreement within the Supreme Court as to the application of *Boddie*); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 86 (2011) (characterizing *Boddie* as the Supreme Court failing to guarantee access for "all poor civil litigants" and instead "identif[ying] a narrow band (largely in family conflicts) . . . garnering constitutional entitlements to government subsidies to use courts").

42. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

43. *Id.* § 418, 119 Stat. at 109.

44. Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321, 1366 (1995); *see* Jones v. Bock, 549 U.S. 199, 203 (2007) ("Prisoner litigation continues to 'account for an outsized share of filings' in federal district courts." (quoting Woodford v. Ngo, 548 U.S. 81, 94 n.4 (2006))). *See generally* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) (laying out the scope and history of prison litigation in the federal system).

tide of "substantively meritless prisoner claims that have swamped the federal courts."[45] Congress enacted the PLRA to "filter out the bad claims and facilitate consideration of the good."[46] The statute was designed "to reduce the quantity and improve the quality of prisoner suits."[47] Yet in addition to an administrative exhaustion requirement[48] and a "three strikes" rule to limit lawsuits brought by prisoners who had a track record of frivolous cases,[49] the PLRA created a "prescreening" regime.[50] As drafted, that regime threatened to upend longstanding federal practice for prisoner and nonprisoner litigants alike. As amended by the PLRA, 28 U.S.C. § 1915(a)(1) now reads:

> [A]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor.[51]

The insertion of the word "prisoner" raised the issue of whether Congress intended to restrict in forma pauperis proceedings only to incarcerated persons. Given that the PLRA was intended to limit prisoner litigation, reading the text literally would create the odd result that prisoners could file cases without prepayments of fees, but nonprisoners could not. As a result, courts have considered this a scrivener's error.[52]

---

45. Shane v. Fauver, 213 F.3d 113, 117 (3d Cir. 2000) (emphasis omitted) (discussing the legislative history of the PLRA).

46. *Bock*, 549 U.S. at 204.

47. Porter v. Nussle, 534 U.S. 516, 524 (2002).

48. 42 U.S.C. § 1997e(a) (2018) (barring a prisoner's suit "until such administrative remedies as are available are exhausted").

49. *See* 28 U.S.C. § 1915(g) (2018); Ball v. Famiglio, 726 F.3d 448, 452 (3d Cir. 2013) (illustrating how courts apply the "three strikes" rule); Abdul-Akbar v. McKelvie, 239 F.3d 307, 314 (3d Cir. 2001) (en banc) ("It is important to note that § 1915(g) does not block a prisoner's access to the federal courts. It only denies the prisoner the privilege of filing before he has acquired the necessary filing fee.").

50. Under the PLRA, federal courts are required to dismiss an action or appeal sua sponte if the action is "frivolous" or "malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. §§ 1915(e)(2)(B)(i)-(iii).

51. *Id.* § 1915(a)(1).

52. *See, e.g.*, Floyd v. USPS, 105 F.3d 274, 275 (6th Cir. 1997), *overruled in part by* Callihan v. Schneider, 178 F.3d 800 (6th Cir. 1999). The PLRA's legislative history indicates that Congress amended the act to limit prisoners' access to pro se filings and that Congress had not

The federal courts continue to wrestle with how to interpret 28 U.S.C. § 1915 in light of the PLRA.[53] Prisoners who litigate in federal court face barriers apart from IFP determinations. Such barriers, as well as the prisoners' IFP determinations, are worthy of more study, but to include them in this Article would muddle its analysis of federal civil practice. As a result, this Article's analysis applies to prisoner litigants only insofar as it discusses barriers that both prisoner and nonprisoner litigants face, including having to plead one's poverty.

The history of IFP practice in the United Kingdom and the United States suggests that these common law systems have consistently sought some procedural mechanism to reduce the likelihood that a litigant's lack of resources impinges on that person's ability to press their case in court. Indeed, both of these countries' court systems have sought to use IFP determinations as a gatekeeping function to determine which parties should receive a subsidy to litigate. The next Section describes the benefits that IFP status confers.

B. The Benefits of In Forma Pauperis Status

The federal in forma pauperis statute allows a litigant to pursue a case in federal court without paying filing fees and costs provided that the litigant submits an affidavit demonstrating an inability "to pay such fees or give security therefor."[54] It is worth enumerating briefly which benefits flow from IFP status and which do not.[55] As mentioned above, Congress sets the filing fee—currently

been focused on other aspects of litigation by those unable to pay filing fees. Reading this history, the Sixth Circuit in *Floyd* applied "basic axioms of statutory interpretation, and . . . a little common sense" to hold that the word "prisoner" in § 1915(a)(1) was a scrivener's error. *Id.* at 275-77. Other circuits have construed "assets such prisoner possesses" to read as "assets such persons possess." *See, e.g.*, Lister v. Dep't of Treasury, 408 F.3d 1309, 1312 (10th Cir. 2005) ("Section 1915(a) applies to all persons applying for IFP status, and not just to prisoners.").

53. *See, e.g.*, DeBlasio v. Gilmore, 315 F.3d 396, 399 (4th Cir. 2003) (holding that the PLRA fee requirements are not applicable to a released prisoner and that his obligation to pay filing fees is determined by evaluating whether he qualifies under the general in forma pauperis provision of 28 U.S.C. § 1915(a)(1)).

54. 28 U.S.C. § 1915(a)(1); *see also* Douglas, *supra* note 15, at 5 (identifying the "expenses which can discourage poor persons from turning to law courts to preserve their rights, or result in deprivation of the full benefits which the law offers them").

55. This Article does not go so far as to recommend what in forma pauperis status should entail beyond the initial fee waiver. Instead, this project's goal is to analyze how district courts require litigants to plead their poverty. In a subsequent project, however, I plan to address the question of what the federal courts should provide indigent litigants. The poverty determination of the in forma pauperis application is the threshold question for such an inquiry, and it would be ill-advised to recommend what benefits should flow from this indigence status without first examining who precisely is considered indigent.

at $350.[56] The Judicial Conference can impose "additional fees," and it has added a $50 "Administrative Fee for Filing a Civil Action, Suit or Proceeding in a District Court."[57] The district court's waiver of these fees is the best-known benefit of IFP status.

There is some disagreement in the circuits as to which fees and costs are and are not waived for the IFP litigant.[58] Some district courts will waive fees associated with electronic filing and other records and transcripts,[59] but others do not consider daily transcripts to be part of the "fees and costs."[60] Discovery costs, such as those from deposing witnesses, are typically excluded as well. Despite Rule 54(b)'s "presumption that the losing party will pay costs," the Rule nonetheless "grants the court discretion to direct otherwise."[61] One recognized situation where courts either reduce or deny costs is when "the losing party is indigent."[62] However, the Fourth, Tenth, and Eleventh Circuits have held that a district court can assess costs against an unsuccessful IFP litigant.[63] Relatedly,

---

56. 28 U.S.C. § 1914(a).

57. *Id.* § 1914(b).

58. *See, e.g.*, D. VT. R. 3(c) (waiving for in forma pauperis litigants "the cost of filing and serving the complaint, but not litigation expenses unless provided by statute"). One could imagine an arrangement in which district courts should be permitted to calibrate who receives IFP status according to the benefits that come with the status. In other words, if a district court assigned counsel to every IFP litigant who files her case without an attorney, perhaps that district court would (or even should) be more parsimonious with granting the status.

59. *See* DeBlasio v. Gilmore, 315 F.3d 396, 398 (4th Cir. 2003); *see also* Zavala v. Deutsche Bank Trust Co. Ams., No. C 13-1040 LB, 2013 U.S. Dist. LEXIS 77664, at *112 (N.D. Cal. May 29, 2013) ("If you cannot afford to pay the PACER access fees, you may file a motion with the court asking to be excused from paying those fees. A court may, for good cause, exempt persons from the electronic public access fees, in order to avoid unreasonable burdens and to promote public access to such information.").

60. Barcelo v. Brown, 655 F.2d 458, 462 (1st Cir. 1981). *But see* W.D. KY. R. 5.3(b) (authorizing the court to "order production of additional documents as necessary" at no cost to the IFP litigant). The Administrative Office's transcript order form, the AO435, lists "in forma pauperis" under the purpose of the order. *AO 435: Transcript Order*, ADMIN. OFF. U.S. CTS. (2018), https://www.uscourts.gov/sites/default/files/ao435.pdf [https://perma.cc/7AHD-FP4R]. *See generally* M.L.B. v. S.L.J., 519 U.S. 102, 124 (1996) (holding that states cannot condition appeals of the termination of parental rights on the affected parent's ability to pay record-preparation fees).

61. Rivera v. City of Chicago, 469 F.3d 631, 634 (7th Cir. 2006).

62. Mother & Father v. Cassidy, 338 F.3d 704, 708 (7th Cir. 2003).

63. Olson v. Coleman, 997 F.2d 726, 728 (10th Cir. 1993); Harris v. Forsyth, 742 F.2d 1277, 1277-78 (11th Cir. 1984) (per curiam); Flint v. Haynes, 651 F.2d 970, 972-73 (4th Cir. 1981); *see* 28 U.S.C. § 1915(f) (2018); Kenneth R. Levine, *In Forma Pauperis Litigants: Witness Fees and Expenses in Civil Actions*, 53 FORDHAM L. REV. 1461, 1463 n.6 (1985).

some local rules allow the court to deduct fees and costs from recovery or at the close of litigation.[64]

Beyond the waived filing fee, IFP litigants receive other benefits. First, in many district courts, when a federal judge grants an in forma pauperis motion, the court will direct the U.S. Marshal to serve process on the indigent litigant's adversary.[65] In 1983, the Judicial Conference added language to Rule 4(c) retaining service of process by the Marshals Service for in forma pauperis plaintiffs. The purpose of the 1983 amendments was to relieve the U.S. Marshals of the burden of serving process in all cases.[66] Furthermore, unlike the waived fees, the court may assess the costs of service if the plaintiff prevails in the litigation.[67]

Of all the benefits conferred by IFP status, appointment of counsel is arguably the most consequential.[68] Some district courts appoint counsel in civil actions for IFP litigants.[69] It is difficult, though, to know how many courts engage in

64. *See* Moore v. McDonald, 30 F.3d 616, 621 (5th Cir. 1994) (holding that courts may impose costs at the conclusion of an in forma pauperis plaintiff's lawsuit, as in other cases).

65. *See, e.g.*, N.D. ILL. R. 3.3(g) ("Where an order is entered granting the IFP petition, that order shall, unless otherwise ordered by the court, stand as authority for the United States Marshal to serve summonses without prepayment of the required fees."); *see also* FED. R. CIV. P. 4(c)(3) (similar provision). The 1892 statute read: "That the officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases." Act of July 20, 1892, ch. 209, § 3, 27 Stat. 252, 252.

66. *See* 128 CONG. REC. 30929-30 (1982) (letter from the Office of Legislative Affairs, U.S. Department of Justice, endorsing the amendments).

67. 28 U.S.C. § 1920; *see, e.g.*, Powell v. Carey Int'l, Inc., 548 F. Supp. 2d 1351, 1355 (S.D. Fla. 2008).

68. Relatedly, if the IFP litigant proceeds pro se, some courts provide access to court-administered mediation. *See, e.g.*, *Mediation Plan for Pro Se Civil Cases with Parties Granted In Forma Pauperis Status*, U.S. DISTRICT CT. FOR W. DISTRICT TENN. 1 (Nov. 2018), https://www.tnwd.uscourts.gov/pdf/content/ProSeIFPCivilCaseMediationPlan.pdf [https://perma.cc/TRD3-9F67] (stating that mediation is available to "to all civil cases with Pro Se IFP parties"). There is some disagreement as to whether federal or state courts can compel counsel to serve an IFP litigant. *See, e.g.*, Douglas, *supra* note 15, at 5 (claiming that in a civil suit, a judge "has no power to require anyone to serve as counsel"); William B. Fisch, *Coercive Appointments of Counsel in Civil Cases In Forma Pauperis: An Easy Case Makes Hard Law*, 50 MO. L. REV. 527, 535-42 (1985) (discussing the history of compelling counsel to represent poor litigants); Laura B. Hardwicke, *After* Mallard v. United States*: The Federal Courts' Inherent Power to Appoint Representation for Indigent Civil Litigants*, 22 LOY. U. L.J. 715 (1991); Shapiro, *supra* note 30 (arguing against the claim that lawyers should have an affirmative obligation to serve without compensation).

69. *See, e.g.*, N.D. ILL. R. 83.35 (describing the procedure for "the assignment of a member of the trial bar to represent a party who lacks the resources to retain counsel . . . in a civil action"); D.N.J. R. app. H (laying out procedures to "govern the appointment of attorneys to represent pro se parties in civil actions who lack sufficient resources to retain counsel pursuant to 28

this practice or how often they do so. There is no constitutional, statutory, or local rule requiring such an appointment.

Finally, in forma pauperis status in the district court typically follows a plaintiff if she appeals. The Federal Rules of Appellate Procedure provide that when a litigant is granted IFP status in the district court, a timely motion for leave to proceed in forma pauperis on appeal must generally be granted.[70] If a district court dismisses a frivolous case under 28 U.S.C. § 1915(d), that litigant must reapply to the appellate court to proceed in forma pauperis on appeal, since the finding of frivolousness is viewed as certification that appeal is not taken in good faith.[71] Typically, IFP status also waives the fees collected by the clerk of the district court when a litigant files a notice of appeal.

In sum, by granting in forma pauperis status, the federal district court waives the initial filing fee of $400 and sometimes confers other benefits on the litigant. While not all the costs associated with litigation are waived for IFP litigants, the possible benefits to the successful movant—the waived filing fee, assistance effectuating service of process, waiver of other litigation costs, and even appointed counsel—are substantial.[72] The fact that this status follows the litigant on appeal makes it an even more important determination at the trial-court level. The next Section analyzes how the ninety-four U.S. district courts structure a litigant's poverty pleading.

C. The Flaws of Federal In Forma Pauperis Practice

As mentioned, the federal IFP statute and Rule 83 afford federal judges broad discretion in determining whether a litigant can proceed in forma pauperis. Based on the first complete analysis of all the IFP forms and financial affidavits used in the ninety-four U.S. district courts,[73] this Article finds that current federal practice is inconsistent across districts and, because of the lack of standards

U.S.C. § 1915"); *see also* Mallard v. U.S. Dist. Court, 490 U.S. 296, 302-03 (1989) (identifying many American state statutes specifying that courts could assign or appoint counsel).

70. FED. R. APP. P. 24(a); *see* Montana v. Comm'rs Court, 659 F.2d 19, 23 (5th Cir. Unit A Sept. 1981).

71. *See, e.g.*, Oatess v. Sobolevitch, 914 F.2d 428, 430 n.4 (3d Cir. 1990).

72. Forty percent of Americans report being unable to cover an emergency cost equal to the $400 filing fee. *See Report on the Economic Well-Being of U.S. Households in 2017*, *supra* note 2, at 21.

73. *See infra* Tables 1-4. To see how these materials were compiled and coded, please refer to the Appendix. The tables detail the results of the coding. Throughout this Section, citations are made to the results in the tables. Some districts are double counted in the summary statistics because some courts use one of the AO forms but also require a district-specific affidavit.

for interpreting the various forms, within them as well. This Section lays out the survey of the district courts and identifies the flaws of the status quo.

1. Summary Statistics of the In Forma Pauperis Forms

Twenty-two district courts use the AO 239, the long-form application created by the Judicial Conference, either alone or in conjunction with a court-specific affidavit.[74] Consisting of five pages, the AO 239 asks movants to list sources of income across twelve categories, expenses across fifteen categories, employment history for the past two years, any cash on hand, assets, money owed to the litigant or the litigant's spouse, and dependents. A movant must also indicate whether she "expect[s] any major changes" to her income, expenses, assets, or liabilities in the next year; whether she has spent or will spend any money for expenses or attorneys' fees in conjunction with the lawsuit; and her age and years of schooling.

Thirty-seven district courts accept the shorter AO 240 form.[75] At two pages, the AO 240 covers much of the same ground as the AO 239 form, but in less detail. Eighteen district courts accept it exclusively, while eight accept both the AO 239 and the AO 240 forms.[76] The remaining forty-six district courts have created and use their own forms and/or affidavits.[77] Of these courts, eleven have forms that resemble the AO 239[78] and fourteen have created and use forms resembling the AO 240.[79] However, in each of these forty-six district courts, there is substantial variation both in terms of the types of questions asked and the level of detail required. Indeed, this survey is an illustrative example of the variation that follows from a federal system that permits local rulemaking.[80]

---

74. *See infra* Table 1.

75. *See id.*

76. *See id.*

77. *See id.*

78. *See infra* Tables 2-4.

79. *See id.*

80. *See* 12 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3153, at 580 (3d ed. 2014) (quoting a former Director of the Federal Judicial Center who had referred to "rampant inconsistency between local and national rules," and noting that "[p]olicing local divergences has proved difficult" (footnotes omitted)); Daniel R. Coquillette et al., *The Role of Local Rules*, A.B.A. J., Jan. 1989, at 62 (describing the Judicial Conference's 1989 Local Rules on Civil Practice Project); Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 555.

2. *The Arbitrary Nature of Federal In Forma Pauperis Practice*

A poverty determination, often referred to as a means test in social policy, seeks to accurately target a benefit to those who need it. Irrationality is a definitional vice in public benefits—it undermines a program's legitimacy by arbitrarily excluding some who qualify for the program's services. As the survey of the ninety-four district courts' forms and affidavits shows, the wide variety of information elicited by the courts and the lack of standards against which to interpret that information combine to create an irrational in forma pauperis regime.

All the district courts that use their own forms inquire into the sources of the movant's income. All federal IFP forms share some basic similarities, asking the movant about her current employment, if any, and her wage income. Some ask very few questions, like that of the Northern District of Indiana, which asks if the movant or the movant's spouse is employed, if they have money from some other source, and for the value of their assets.[81] The form subsequently inquires, "If you have no income listed above, explain how you (and spouse, if married) obtain food, clothing, shelter, and other necessities of basic living."[82] Other district courts ask detailed questions about sources of income. Some ask about retirement payments, including Social Security, pensions, and annuities. Eight district court forms ask detailed questions about public assistance,[83] and several ask about cash on hand.[84] The Western District of New York asks whether someone has filed for bankruptcy in the past decade.[85] The District of Nevada and the District of Rhode Island ask if financial resources have been transferred to someone else recently.[86] All district courts inquire as to the litigant's assets, but discrepancies emerge there too. The Southern District of Alabama asks about "automobiles, boats, [and] motor homes" as well as the "Make & Model" of each.[87]

---

81. *Motion to Proceed In Forma Pauperis*, U.S. DISTRICT CT. FOR N. DISTRICT IND. 1 (Aug. 2016), http://www.innd.uscourts.gov/sites/innd/files/Approved%20IFP%20Motion-fillable.pdf [https://perma.cc/4JAS-ZZH7].

82. *Id.*; *see also Motion to Proceed Without Prepayment of Fees*, U.S. DISTRICT CT. FOR S. DISTRICT ALA. (Aug. 1, 2015), https://www.alsd.uscourts.gov/sites/alsd/files/forms/IFPMotion-localAO240.pdf [https://perma.cc/M5XL-7DFU] ("If you have indicated that you have minimal or no assets or income, please explain how you provide for your basic living needs such as food, clothing and shelter. (*e.g.* food stamps, family assistance or charitable contributions.)").

83. *See infra* Table 2.

84. *See infra* Table 4.

85. *See infra* Table 2.

86. *See infra* Table 4.

87. *See id.*

Indeed, some of these forms betray a rich person's idea of assets, asking litigants about inheritances, jewelry, artwork, and stocks.[88]

A few district courts identify threshold amounts, which permit movants to omit any source of income or asset under that threshold. The Northern District of Illinois asks if anyone living in the same home as the movant has an income of more than $200 a month.[89] That court also asks the movant to list only those assets valued at more than $1,000. The Southern District of New York asks if the movant "or anyone else living at the same residence . . . received more than $200 in the past 12 months from any of the [listed] sources."[90] Such a practice frees the movant from having to count every penny in her possession. However, these threshold amounts are used by only a handful of district courts.

While most district court forms follow the conventions for expenses of the AO 239 and AO 240 forms, others diverge. For example, the Northern District of Florida asks litigants to list monthly gas expenses for their cars. The District of Connecticut asks litigants about any money owed to doctors, hospitals, or lawyers.[91] Five district courts do not ask about the applicant's average expenses and bills.[92]

Some variations across district courts reflect the particular circumstances in that given state. Understandably, the District of Alaska asks about the Alaska Permanent Fund Dividend, which functions as a negative income tax for the state's residents.[93] It is not surprising that no other district court would ask about Alaska dividend payments. It is surprising, though, that the district court

88. *See, e.g.*, *U.S. Stock Ownership Down Among All but Older, Higher-Income*, GALLUP (May 24, 2017), https://news.gallup.com/poll/211052/stock-ownership-down-among-older-higher-income.aspx [https://perma.cc/HL4Q-H7AE].

89. *In Forma Pauperis Application and Financial Affidavit*, U.S. DISTRICT CT. FOR N. DISTRICT ILL. 2 (Aug. 23, 2018), http://www.ilnd.uscourts.gov/_assets/_documents/_forms/_online/Form.pdf [https://perma.cc/BL8F-B3TF].

90. *Application to Proceed Without Prepaying Fees or Costs*, U.S. DISTRICT CT. FOR S. DISTRICT N.Y. 1 (Aug. 5, 2015), http://www.nysd.uscourts.gov/file/forms/application-to-proceed-without-prepaying-fees-or-costs-ifp-application [https://perma.cc/G9F4-9EUD].

91. *Financial Affidavit in Support of Motion for Leave to Proceed In Forma Pauperis Pursuant to 28 U.S.C. § 1915*, U.S. DISTRICT CT. FOR DISTRICT CONN. 5 (Nov. 4, 2013), http://www.ctd.uscourts.gov/sites/default/files/forms/IFP-PROSE%20rev%206-17.pdf [https://perma.cc/V9GH-FFTP].

92. *See infra* Tables 3, 4.

93. *Application to Waive the Filing Fee*, U.S. DISTRICT CT. FOR DISTRICT ALASKA 3 (Dec. 2013), http://www.akd.uscourts.gov/sites/akd/files/forms/PS11.pdf [https://perma.cc/LW7G-CNB5].

in Puerto Rico is the only district court that asks the movant whether she has any income from horse racing and gambling.[94]

District courts also ask questions that fail to fit neatly into the category of income or expenses. For instance, in addition to the courts that use the AO 239 form, eighteen district courts ask a movant to disclose any contact and/or payments to an attorney or other legal professional. Three district courts ask the movant if she has paid or will be paying anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form.[95]

In addition to the district courts that use the AO 239 form, fifteen district courts ask about the movant's years of schooling. A litigant's schooling may bear on whether that litigant is capable of pursuing the litigation pro se, but it should not necessarily impact a court's determination of her financial situation. Other forms contain details that are oddly out of date,[96] while the Eastern District of Oklahoma is the only district court that requires a notarized form.[97]

What does this jumble reveal? A survey of federal in forma pauperis practice exposes discrepancies across and within districts, a lack of sophistication in assessing the movant's indigence, and a potential for inaccuracy. The range of the categories of questions asked by the various district courts as well as the discrepancies within the categories suggest a cacophony of practices among the ninety-four district courts.[98]

These discrepancies are difficult to justify on the grounds of judicial administration or geographic diversity. For example, although geographic diversity might justify variation across states, it does not easily justify variation within states. Alabama, California, Florida, Illinois, Louisiana, Ohio, Oklahoma, Penn-

---

94. *Motion to Proceed In Forma Pauperis*, U.S. DISTRICT CT. FOR DISTRICT P.R. 3 (1983), https://www.prd.uscourts.gov/sites/default/files/documents/17/AffidavitToAccompanyMotionToProceedInFormaPauperis.pdf [https://perma.cc/RN5H-LC5G].

95. *See infra* Table 4.

96. Four district courts refer to Aid to Families with Dependent Children, the federal cash assistance program that Temporary Assistance to Needy Families (TANF) replaced over twenty years ago. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. *See generally* Andrew Hammond, *Welfare and Federalism's Peril*, 92 WASH. L. REV. 1721, 1729-35 (2017) (discussing TANF's replacement of Aid to Families with Dependent Children).

97. *Motion for Leave to Proceed In Forma Pauperis & Supporting Affidavit*, U.S. DISTRICT CT. FOR E. DISTRICT OKLA. 3 (Sept. 2013), http://www.oked.uscourts.gov/sites/oked/files/forms/Motion%20to%20Proceed%20IFP_0.pdf [https://perma.cc/P48W-WAV3].

98. *But see* Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 960 (2017) (explaining that in this common law system "our legal culture is deeply committed to consistency across cases").

sylvania, Texas, Virginia, Washington, West Virginia, and Wisconsin have multiple district courts, but some of the district courts in these thirteen states ask whether an individual receives public assistance while other district courts in these states do not. For what reason would some district courts not want information about a litigant's receipt of public assistance when others in the same state would want that information?

The degree of difference across district courts undermines the federal system. Within states, district courts ask different questions about, for example, the sources of a litigant's income and the variety of a litigant's expenses. These questions have little to do with a litigant's ability to pay. District courts also vary in how much information they demand from movants, asking questions with varying degrees of specificity.

3. An Inefficient Procedure for Judges

In addition to allowing discrepancies across district courts, current federal practice permits significant intradistrict variance in IFP determinations.[99] All the forms currently in use in the federal courts—the AO 239 form, the AO 240 form, and the district-court-specific forms—leave judges with no benchmark for deciding how much income is sufficiently low, how many expenses or debts are sufficiently high, and how many assets are sufficiently few. With no articulated threshold on any in forma pauperis form, judges must identify some means test (such as the federal poverty guidelines[100]) or create their own.[101] Few federal courts provide any guidance for judges presented with an in forma pauperis motion.[102]

This status quo is particularly troublesome in any district court made up of several judges. In a court like the Northern District of Illinois with thirty district

99. I use the phrase "intradistrict variance" to describe the incidence of judges within the same district court making different determinations based on the same IFP form or forms.

100. *See, e.g.*, Assistant Sec'y for Planning & Evaluation, *U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs*, U.S. DEP'T HEALTH & HUM. SERVICES (Jan. 11, 2019), https://aspe.hhs.gov/poverty-guidelines [https://perma.cc/4G53-PNV8].

101. One might expect judges to use the federal poverty guidelines issued by the U.S. Department of Health and Human Services. There might be other standards of need lurking in federal doctrine. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20 (1973) (defining poor people as those who "because of their impecunity were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit").

102. To my knowledge, the District of Nevada is the only district court that, in its local rules, provides such guidance. *See* D. NEV. R. 1-1 to -4.

judges and several magistrate judges, differences in a judge's approach to in forma pauperis motions could lead to disparate outcomes in litigation. Even those who would defend different indigence determinations across district courts might balk at defending inconsistent determinations within a single court. Some judges might use 100% of the federal poverty level (FPL) as their threshold. Others will use 200%. Some will simply have their law clerks review the forms and decide based on the information provided.[103] In that sense, even if each of the ninety-four district courts used either the AO 239 or the AO 240 form, federal in forma pauperis practice would still be far from uniform.

According to some district courts, "a plaintiff's income must be at or near the poverty level."[104] Others have concluded that the applicant must show that he cannot "both provide himself with the necessities of life and pay the costs of litigation."[105] The Supreme Court has held that an applicant need not be "absolutely destitute" to qualify for IFP status.[106] Some courts, though, have emphasized that this status is targeted at those who are "truly impoverished."[107]

Even if the Judicial Conference or local rules were to instruct federal judges to use a means test tied to the federal poverty level, it would not be clear how to use some information requested on the forms. For example, some federal judges may look at the receipt of public assistance as evidence of a movant's indigence,

---

103. *See* Todd C. Peppers et al., *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 ALB. L. REV. 623, 635 (2008) (noting that "97% of the [federal district judge] respondents stated that their law clerks review the relevant briefs and draft memoranda and orders regarding dispositive motions"); Albert Yoon, *Law Clerks and the Institutional Design of the Federal Judiciary*, 98 MARQ. L. REV. 131, 142 (2014) (citing studies showing that "law clerks are playing an increasingly larger role in the opinion-writing process").

104. Bulls v. Marsh, No. 89 C 3518, 1989 WL 51170, at *1 (N.D. Ill. May 5, 1989); *see also* Zaun v. Dobbin, 628 F.2d 990, 992 (7th Cir. 1980) (holding that a federal court is not prohibited "from requiring particularized information with regard to the financial status of a party seeking leave to proceed under § 1915").

105. United States v. Valdes, 300 F. Supp. 2d 82, 84 (D.D.C. 2004) (denying an IFP petition due to the movant's resources and income), *rev'd on other grounds*, 475 F.3d 1319 (D.C. Cir. 2007).

106. Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 339 (1948); *see* Rowland v. Cal. Men's Colony, 506 U.S. 194, 203 (1993) (explaining that the Court considers an in forma pauperis "affidavit . . . sufficient [when it] states that one cannot because of his poverty pay or give security for the costs . . . and still be able to provide himself and dependents 'with the necessities of life'" (second alternation in original) (quoting *Adkins*, 335 U.S. at 339)); *see also* Lewis v. Ctr. Mkt., Civ. Nos. 09-306 et al., 2009 WL 5217343, at *3 (D.N.M. Oct. 29, 2009) ("[T]he federal standards for IFP are not a bright-line percentage rule, but rather, rely on the discretion of the court.").

107. *See, e.g.*, Brewster v. N. Am. Van Lines, Inc., 461 F.2d 649, 651 (7th Cir. 1972) ("This privilege to proceed without posting security for costs and fees is reserved to the many truly impoverished litigants who, within the District Court's sound discretion, would remain without legal remedy if such privilege were not afforded to them.").

while other federal judges might look at the same movant's income from public assistance as freeing that movant up to pay the filing fee.[108]

Thus, even if all district courts were to decide tomorrow to adopt one form, such as the AO 240, federal in forma pauperis practice would remain irrational because it would still fail to provide federal judges with any standards by which to interpret the forms. With no guidelines for judges to follow, the federal system merely asks several questions without showing judges how to use the answers to those questions in making the in forma pauperis determination.

Aside from its arbitrary variation, federal IFP practice is also an inappropriate use of a federal judge's time.[109] Computing a movant's income and expenses is arithmetic and does not demand the attention of a federal judge. Currently, federal judges must make complicated, arcane poverty determinations—often reconciling a dozen categories of income with a dozen categories of expenses. Such determinations are not, by their nature, adjudicatory. Federal judges could take back some of their time by streamlining a fairly ministerial function.

Furthermore, this inefficiency makes it plausible to think that many federal judges and their clerks do not engage in a careful evaluation of the information provided on the IFP form. Such inattention would render the collection of the information in the first place all the more pointless. In fact, this insight may explain why some district courts direct in forma pauperis applications to a particular judge or even to staff in the clerk's office.[110] Two of the district courts with

---

108. *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1990 n.122 (2007) (explaining how "in the absence of strong feedback" a judge can "lock into a routine set of practices even when those practices are suboptimal or flawed").

109. The role of the judge in pro se proceedings is much discussed in the courts and the scholarly literature. Discussion of pro se litigants by courts can range from the solicitous to the condescending. *See, e.g.*, United States v. Dujanovic, 486 F.2d 182, 186 (9th Cir. 1973) (describing pro se litigants as "rang[ing] from the misguided or naive . . . through the pressured one under the hardships of the accusation of crime and the sophisticated person enamored with his own ability, to the crafty courtroom experienced one who ruthlessly plays for the break," but noting that "[a]ll eventually play the part of the proverbial fool"). Perhaps IFP motions channel these litigants into a system in which the district court provides more assistance than they might otherwise find. The pro se system, then, may significantly overlap with IFP practice. To be sure, a pro se appearance sometimes signals indigence for litigants who want to bring a case but need the assistance of an attorney. However, it is beyond the scope of this Article to explore the connection between pro se and IFP practice in a comprehensive fashion.

110. *See, e.g.*, Grostic, *supra* note 15 (recounting how a case brought by an in forma pauperis litigant was transferred to a particular judge per local administrative rule). For a classic criticism of these practices, see Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1456 (1983), which argues that "[t]he proliferation of staff and subjudges and the delegation of power to them weaken the judge's individual sense of responsibility."

the highest number of civil filings manage in forma pauperis pleadings differently. The Southern District of New York runs IFP applications through the Clerk's Office, whereas the Northern District of Illinois treats IFP applications like other pleadings, channeling them through an individual judge's chambers.[111] This sorting of litigants based on ability to pay might raise other, even constitutional, questions.[112] Even a district court that relies more heavily on judiciary staff for IFP determinations would save time and improve accuracy with the test proposed later in this Article.

Judges either take IFP determinations seriously or they do not. If the former is true, the system is arguably inefficient. If the latter, then there is little reason to collect all this information and there are significant accuracy gains to be had. Especially in the face of persistent criticisms of the increasing demands on federal trial judges' time and resources,[113] federal judges should use a more streamlined, sophisticated test to determine whether an IFP movant is sufficiently poor. Such a test would free judges to focus on other aspects of civil litigation.

4. An Invasive Procedure for Litigants

Current federal practice needlessly burdens not only judges but litigants as well. All the federal in forma pauperis forms are invasive. Asking movants to itemize every source of income, every expense, every asset, and their years of schooling is demeaning. Even if an in forma pauperis form is precisely targeted, poor litigants are being asked too much to plead their poverty.

Consider a working parent who believes she was fired from her job because of her gender. She seeks to bring a Title VII claim against her employer. Because

---

111. Based on background interviews with former clerks in both courts.

112. *See, e.g.*, E. Donald Elliott, Twombly *in Context: Why Federal Rule of Civil Procedure 4(b) Is Unconstitutional*, 64 FLA. L. REV. 895, 910 (2012) (stating that "it is unfair and humiliating to subject poor people to pre-service review of their lawsuits but exempt those wealthy enough to pay a filing fee"); Feldman, *supra* note 15, at 414 (asking whether "an in forma pauperis complaint [can] be dismissed even though an identical paid complaint cannot be similarly dismissed" but concluding that the difference in treatment is constitutional because wealth is not a suspect classification). These questions are ultimately beyond the scope of this Article.

113. *See, e.g.*, Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 781 (1981) ("Few would dispute that the caseload in the federal courts has reached crisis proportions."); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 770 & n.1 (1981) (explaining that federal district court filings more than doubled between 1968 and 1980); Judith Resnik, *Managerial Judges and Court Delay: The Unproven Assumptions*, 23 JUDGE'S J. 8, 54 (1984) (arguing that "[j]udges' time is one of the most expensive resources in the courthouse"); *Caseload Increases Stress Need for New Federal Judgeships*, ADMIN. OFF. U.S. CTS. (Sept. 10, 2013), http://www.uscourts.gov/news/2013/09/10/caseload-increases-stress-need-new-federal-judgeships [https://perma.cc/R3JA-C66F].

her income is below the federal poverty level, she is able to secure representation through a local legal aid office. She also begins to receive food assistance to supplement her lost wages. After filing a complaint with the Equal Employment Opportunity Commission, she could file her claim in Arizona state court, where she would automatically receive IFP status. However, if she filed that same Title VII case in the U.S. District Court of Arizona, she would first need to fill out the AO 239 form. To do so, she would have to swear under penalty of perjury to her sources (and amounts) of income across twelve categories, expenses across fifteen categories, employment history for the past two years, any cash on hand, any assets, and debts owed to her. She would have to divulge how many years of schooling she has had. After engaging in such an invasive process, this litigant may receive IFP status or she might not. A federal judge could interpret her receipt of food assistance and her employment history as evidence of her ability to afford the filing fee and the concomitant costs of the litigation. A different judge in the same court could look at that same evidence as reasons to grant IFP status.

To accurately determine a litigant's poverty, a court need not require a litigant to answer five pages' worth of questions and itemize sources of income, expenses, assets, and debts across forty-two categories for herself and members of her household. Nor is such a cumbersome pleading process necessary to deter fraud. Courts already possess tools to encourage truthful statements from litigants. As described in Part I, any litigant who applies to proceed in forma pauperis signs an affidavit "under penalty of perjury that the information below is true" with the acknowledgement that "a false statement may result in a dismissal of [that litigant's] claims."[114]

Since these applications require a significant amount of information, the applications function as a tax on litigation by poor people. However, not all potential IFP litigants will be in a similar position to pay the tax. There will be some who find it easier to comply with the paperwork—whether through education, assistance from family or friends, or simply having more time. Others who lack those resources or face other obstacles (such as a language barrier) may not.[115]

Finally, by making access to federal court cumbersome for poor litigants, the current IFP regime risks shielding the federal courts from cases and claims more

---

114. *AO 239: Application to Proceed in District Court Without Prepaying Fees or Costs (Long Form)*, JUD. CONF. U.S. 1 (2015), https://www.uscourts.gov/sites/default/files/ao239_1.pdf [https://perma.cc/MK7F-2ZP9].

115. *See, e.g.*, Anandi Mani et al., *Poverty Impedes Cognitive Function*, 341 SCIENCE 976, 976-77 (2013). In the literature on tax compliance, many have argued that complexity is costly for both taxpayers and tax collectors, leading to arbitrary decisions and inequitable treatment of taxpayers. *See, e.g.*, Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267, 1291-94.

likely to be brought by poor people.[116] If federal courts are making it too burdensome for poor people to bring meritorious claims, one might expect that the federal courts are less likely to receive claims brought by poor people involving, for example, employment discrimination, police misconduct, and disputes over government services.[117] As a result, there are costs and harms beyond those to the particular litigants who may be deterred from accessing the federal courts. If the litigants in federal court are unrepresentative of the people who would otherwise bring federal claims, federal jurisprudence could itself become distorted.[118]

5. A Faulty Status Quo for the Federal Courts

This overview of current practice suggests an accretion of nonsensical practices permitted by broad statutory language and enabled by the absence of rulemaking at the national level and the proliferation of local rules and forms at the court level. This status quo most likely persists because of the judiciary's failure to view the system from the perspective of the litigants who must navigate it.

Some may defend current practice as a positive good—that federal courts should ask dozens of questions of a litigant to understand how underresourced that litigant truly is. Litigants should pay, they will argue, either with their money or their time. In fact, this notion of imposing costs on poor people to

---

116. *See* Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 502-03 (2012) (arguing that restrictive procedural rules marginalize plaintiffs with fewer economic resources); Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1836 (2014) (detailing how "[l]itigation forces dialogue upon the unwilling and temporarily alters configurations of authority").

117. *See* Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1538-39 (2016) (discussing concerns that as "low-income claims disappear from the docket" judges could "lose important opportunities to engage with these categories of issues and litigants"). Others have argued that these litigants have themselves been sources of change in federal practices. *See, e.g.*, Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 510-16 (1980) (discussing how the revolution of structural reform litigation was not brought about by remedial innovations of federal judges, but by new groups of litigants advancing novel claims).

118. *See In re* McDonald, 489 U.S. 180, 184 (1989) (per curiam) (underscoring that "[p]aupers have been an important—and valued—part of the Court's docket" (citing Gideon v. Wainwright, 372 U.S. 335 (1963))); *see also* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 500 (2009) ("When the resources and abilities of opposing parties are lopsided, the adversarial system will fail to produce accurate results."). *See generally* ALEXANDRA D. LAHAV, IN PRAISE OF LITIGATION 29-30 (2017) (characterizing litigation as a democracy-promoting institution that helps to enforce the law, fosters transparency, offers a form of social equality by giving litigants equal opportunity to be heard, and promotes participation in self-government).

access government services such as the courts has a long tradition in the United States and elsewhere.[119] By keeping pleadings complicated, we encourage only those litigants who are confident in their claims and committed to press those claims in court.

However, the Supreme Court has explained that the purpose of 28 U.S.C. § 1915 is "to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States, solely because . . . poverty makes it impossible."[120] The IFP process is not meant to serve as an additional, merits-filtering process that is not imposed on other litigants. Its purpose is simply to remove the barrier of poverty for litigants who would otherwise bring a federal lawsuit. If one wanted such an additional process, then that merits screening should be based on the actual merits of the claims, rather than on an irrational process that makes litigants jump through procedural hoops to test their confidence in their claims.

Regardless of whether one thinks poor litigants should or should not be subjected to probing questions about their life circumstances, the substantial variance created by the current system remains. Given that the federal courts ask for a wide variety of information from litigants, the courts cannot all be making determinations of the ultimate issue (the ability to bring suit with one's own resources) accurately. Some are demanding too much, and some may be demanding too little. Both types of errors risk undermining the functions of federal district courts.

If IFP determinations permit false negatives (i.e., poor people being denied IFP status), then the current system deprives indigent litigants of meaningful access to the federal courts. Despite federal law's longstanding commitment not to let a litigant's indigence interfere with the merits of that litigant's claims, the IFP statute, as administered by the federal courts, is at substantial risk of doing precisely that. If there are false positives (i.e., nonpoor people being granted IFP status), then prevailing practice not only deprives the federal system and sometimes the local bar of scarce resources but also fails to target this benefit to those who most need it. These false positives mean the federal judiciary is depriving itself of resources—and not only by failing to collect fees. IFP status triggers other resources in the federal system. For instance, using the U.S. Marshals to effectuate service of process takes the Marshals away from other crucial func-

119. State TANF programs, for instance, often require applicants to jump through various bureaucratic hoops to receive assistance.

120. Denton v. Hernandez, 504 U.S. 25, 31 (1992) (alteration in original) (quoting Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 342 (1948)).

tions. In those districts where appointment of counsel sometimes follows conferral of IFP status, federal judges are mobilizing the bar to aid poor litigants. Judges should do so only when a person could not otherwise afford an attorney.

Furthermore, if the success of an in forma pauperis motion influences, let alone determines, the outcome of the litigation, then all proceduralists should be committed to making the federal courts more accurate in their IFP screening. Fortunately, federal law provides myriad analogous means tests with which to compare IFP determinations. Comparing these determinations to the more standardized, albeit imperfect, means tests in other federal programs can help us envision a more coherent IFP test.

II. OTHER SOURCES OF POVERTY PLEADING

The federal judiciary currently measures the poverty of its litigants in rudimentary ways. As outlined in Part I, federal practice exhibits several flaws. However, these flaws are not inevitable or even characteristic of poverty determinations. Federal and state agencies and state court systems routinely make poverty determinations. The federal judiciary should look to and learn from other means tests in federal law, including those administered by federal and state agencies. Federal judges should also draw on the in forma pauperis rules of state court systems.

A. Means Tests in Federal Law

When the government, or any organization, devises a means test, it seeks to accurately target the benefit to those who need it. Federal law contains multiple means tests to determine whether an individual is poor enough to merit receiving public benefits, such as Medicaid, food assistance, and welfare. Many of these means tests use the federal poverty guidelines published by the U.S. Department of Health and Human Services (HHS). The HHS poverty guidelines for 2019 for the forty-eight contiguous states and the District of Columbia calculate the federal poverty level on the basis of household size; a household of one is currently set at $12,490, while a household of three is set at $21,330.[121]

Many researchers and government officials have conceded that the federal poverty guidelines need revision.[122] Originally created using back-of-the-envelope calculations based on the U.S. Department of Agriculture's Thrifty Food

121. Assistant Sec'y for Planning & Evaluation, *supra* note 100.

122. *See, e.g.*, Rebecca M. Blank, *Why the United States Needs an Improved Measure of Poverty*, BROOKINGS (July 17, 2008), https://www.brookings.edu/testimonies/why-the-united-states

Plan, the poverty guidelines apply to the lower forty-eight states and the District of Columbia. The guidelines fail to consider government benefits like food assistance or low-income tax credits.[123] Most of the means tests in federal law use income thresholds tagged to HHS's federal poverty level (FPL). It is telling, though, that none of the major federal public-benefits programs use the federal poverty level as the means test, but rather a multiple of that level such as 125% or 185% FPL.[124] For instance, the Legal Services Corporation (LSC), the federal agency that funds legal aid across the country, limits its grantees to serve only those whose household annual income does not exceed 125% FPL.[125] As mentioned above, when Congress enacted a fee-waiver provision for Chapter 7 filers in federal bankruptcy court, they established a threshold of 150% FPL.[126]

-needs-an-improved-measure-of-poverty [https://perma.cc/G4YA-AUPE] ("It is not too strong a statement to say that, 45 years after they were developed, the official poverty thresholds are numbers without any valid conceptual basis."); Rourke L. O'Brien & David S. Pedulla, *Beyond the Poverty Line*, STAN. SOC. INNOVATION REV. (2010), https://ssir.org/articles/entry/beyond_the_poverty_line [https://perma.cc/8ZFW-7R6Z] ("Most people who care about measuring poverty—academics, policymakers, nonprofit leaders, and the like—agree that the way the federal government currently determines who is poor and who is not doesn't work."); Chad Stone et al., *A Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET & POL'Y PRIORITIES (Dec. 11, 2018), https://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality [https://perma.cc/V8LZ-XSMT].

123. In 2009, the federal government created an interagency working group to develop a Supplemental Poverty Measure (SPM) that would address some of the shortcomings of the official federal poverty guidelines. That federal effort led the U.S. Census Bureau, in cooperation with the Bureau of Labor Statistics, to create the SPM. *See, e.g.*, Trudi Renwick & Liana Fox, *The Supplemental Poverty Measure: 2015*, U.S. CENSUS BUREAU (Sept. 2016), https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-258.pdf [https://perma.cc/NL6W-UXVP]. However, the SPM does not replace the official poverty measure and is not used to determine eligibility for government programs. One day, the federal government may replace the poverty guidelines with the SPM, but, currently, there are no plans to implement the SPM. As a result, this Article uses the HHS poverty guidelines as the most useful means test in federal law.

124. Many of these federal programs use different terminology to refer to the same features of the means test. *See* DAVID A. SUPER, PUBLIC WELFARE LAW 189 (2016) ("Jargon varies significantly from program to program: what AFDC [TANF's predecessor] called disregards, [the Supplemental Nutrition Assistance Program (SNAP)] calls exclusions or deductions. What AFDC called a family unit or grant group is called a household in SNAP and a filing unit in Medicaid."). SNAP, Supplemental Security Income (SSI), and Social Security all have a different definition of the word "elderly." *Id.*

125. 45 C.F.R. § 1611.3(c)(1) (2018).

126. *See supra* text accompanying note 43.

For the Supplemental Nutrition Assistance Program (SNAP), formerly known as food stamps, most households must meet both the gross and net income tests, set at 130% and 100% FPL, respectively.[127] Gross income refers to income before any deductions are made. Net income allows for several deductions.[128] The Affordable Care Act established a new methodology for determining income eligibility for Medicaid, known as Modified Adjusted Gross Income, but that legislation's Medicaid expansion was tagged to 133% FPL.[129]

Federal public assistance also makes use of "adjunctive eligibility," a bureaucratic practice where qualifying for one public benefit serves as a presumption for qualifying for another. For instance, SNAP households have to meet income tests unless all members are receiving Temporary Assistance for Needy Families (TANF) or the disability benefit Supplemental Security Income (SSI). TANF recipients often automatically qualify for Medicaid. Such a shortcut takes advantage of the administrative data of federal and state bureaucracies to save the applicant and the agency time and resources.

In touting the merits of means tests for federal public benefits as a model for federal IFP determinations, this Article risks effacing some of the persistent problems with administering antipoverty programs. To be sure, irrationalities and inefficiencies persist in the administration of federal public benefits. Occasionally, localities and state governments erect barriers to access, and sometimes

127. *See, e.g.*, *Supplemental Nutrition Assistance Program (SNAP) Benefits Categorical Eligibility Desk-Aid*, N.Y. OFF. TEMPORARY & DISABILITY ASSISTANCE (May 2016), https://otda.ny.gov/policy/directives/2016/ADM/16-ADM-06-Attachment-1.pdf [https://perma.cc/94SJ-7BSR]. A household with an elderly person or a person who is receiving certain types of disability payments only has to meet the net income test. It is not uncommon for other public-assistance programs to have slightly less stringent means tests for the elderly or people with disabilities. *See, e.g.*, 42 U.S.C. § 1396a(a)(10)(C) (2018) (giving states the option to establish a program for individuals with significant health needs whose income is too high otherwise to qualify for Medicaid under other eligibility groups).

128. These deductions include: (1) a twenty percent deduction from earned income; (2) a standard deduction of $157 for household sizes of one to three persons and $168 for a household size of four (and higher for some larger households); (3) a dependent care deduction when needed for work, training, or education; (4) medical expenses for elderly or disabled members that are more than $35 for the month if they are not paid by insurance or someone else; (5) legally owed child support payments; and (6) in some states a set amount for shelter costs for homeless households.

129. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2001, 124 Stat. 119, 271 (2010) (amending the Medicaid statute to create a new eligibility standard); *see also Getting MAGI Right*, GEO. CTR. FOR CHILD. & FAMILIES (Jan. 2015), http://ccf.georgetown.edu/wp-content/uploads/2015/01/Getting-MAGI-Right_Jan-30-2015.pdf [https://perma.cc/8X8R-8BKA].

those policies are struck down by courts.[130] Still, those practices should not obscure two basic features that the federal judiciary could borrow: a means test tied to the federal poverty level and adjunctive eligibility.

As argued in detail in Part III, the federal judiciary should learn from these federal public-assistance programs in administering its own means test for indigent litigants. The federal judiciary should use the poverty guidelines published by the federal government, and it should do so in a manner that is consistent with other poverty determinations in federal law. SNAP, Medicaid, and the LSC all target their services to those truly in need. Oddly enough, the federal government funds civil legal services based on the federal poverty guidelines, but it does not require that litigants receiving those services enjoy the benefits of in forma pauperis status when their federally funded attorney files their case in federal court. An adjunctive eligibility rule would fix that discrepancy and others.

B. In Forma Pauperis Practice in State Courts

Moving past federal law, one can also compare the federal in forma pauperis statute to the indigence rules that govern state courts in the United States. In this instance, both federal and state courts are performing identical functions: assessing a party's financial situation to determine whether that party merits a fee waiver and other benefits. A review of those state statutes and court rules offers a way forward for a more coherent and efficient federal practice.[131]

Proceduralists and state courts themselves often look to the federal system for procedural innovations.[132] Here, however, looking in the other direction

---

130. *See* Lebron v. Sec'y, Fla. Dep't of Children & Families, 710 F.3d 1202 (11th Cir. 2013) (affirming the district court's injunction of a Florida statute requiring drug testing as a condition of welfare eligibility); Marchwinski v. Howard, 113 F. Supp. 2d 1134 (E.D. Mich. 2000) (enjoining a Michigan law authorizing the drug testing of welfare recipients), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

131. In this way, improving in forma pauperis practice avoids the inside/outside fallacy that sometimes afflicts public law scholarship: scholars will criticize the institutional actors in a legal system and then identify a proposal that those same, allegedly deficient actors should implement. *See* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013). Here, federal judges can borrow practices from their counterparts in the state judiciaries.

132. *See, e.g.*, Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 319 (2001) (finding that roughly half of states have adopted the Federal Rules as their own civil procedure system); *cf.* Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1172-75 (2005) (noting that "although the federal rules once exerted a powerful influence on state procedure, during the last two decades state

proves illuminating. There are good reasons to turn to state court systems for procedures that deal with low-income litigants. First, poor litigants are more likely to be found in state than in federal court.[133] Second, several states' in forma pauperis rules predate the federal system's commitment.[134] Third, the fifty state court systems, as well as the District of Columbia's system, offer a range of models from which the federal system can borrow best practices.

Like 28 U.S.C. § 1915, many states' in forma pauperis statutes have amorphous indigence standards.[135] Some states give IFP status to a litigant who is

deference to the federal rules has waned" and advocating for an interstate collaborative system to replace the failure of the top-down Federal Rules model). *But see* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1753-59 (2010) (arguing that scholars have paid insufficient attention to state courts as innovative sites of statutory interpretation); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 117 (2002) (criticizing "the legal academy's . . . ignorance of the wondrous variation in state and local systems").

133. *See* Hannah Lieberman, *Uncivil Procedure: How State Court Proceedings Perpetuate Inequality*, 35 YALE L. & POL'Y REV. 257, 260 (2016) ("Defendants in these millions of [state] civil cases tend to be persons of low or modest income."); Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. ON POVERTY L. & POL'Y 473, 475 (2015) (discussing the need for a social justice approach to "state civil courts serving large numbers of low-income, unrepresented litigants"); Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 743 (2015) (detailing how "*pro se* litigation—primarily involving the indigent—now dominates the landscape of state courts"). The rise of poor litigants in state courts offers a functional explanation for why states have experimented with "civil *Gideon*." *See* Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245, 245 (2006) (documenting state statutes or court rules that "provide[] for a right to counsel and the extent to which state right-to-counsel statutes attempt to ensure that counsel is competent"); Clare Pastore, *A Civil Right to Counsel: Closer to Reality?*, 42 LOY. L.A. L. REV. 1065, 1074, 1081 (2009) (noting that "a small number of judges" have been calling for it and that the term connotes an "implicit adoption of the public defender model as an aspirational goal"). *But see* Benjamin H. Barton, *Against Civil* Gideon *(and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1227-29, 1231-34 (2010) (expressing skepticism toward civil *Gideon* efforts); Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227, 1231 (2014) (same).

134. *See, e.g.*, An Act Providing a Mean to Help and Speed Poor Persons in Their Suits, 1834 Ky. Acts 327; An Act to Assist Poor Persons in the Prosecution of Their Suits, 1800 N.J. Laws 339; An Act Providing a Mean to Help and Speed Poor Persons in Their Suits, ch. 65, 1823 Va. Acts 356; *see also* THOMAS K. URDAHL, THE FEE SYSTEM IN THE UNITED STATES (Madison, Wis., Democrat Printing Co. 1898) (describing the history of fee systems among government officers including judges); Lee Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VAL. U. L. REV. 21, 30 (1967) (collecting states' in forma pauperis rules). Edwina Clarke and Judith Resnik pointed me to these sources.

135. *See* IOWA CODE § 610.1 (2018) ("Such affidavit shall also include a brief financial statement showing the person's inability to pay costs, fees, or give security."); LA. CODE CIV. PROC. ANN. art. 5182 (West 2018) (requiring that IFP status be "restricted to litigants who are clearly entitled to it").

unable to pay the fee and still provide for herself and her family.[136] Other states' statutes and court rules contain itemized categories of income and expenses in the statute.[137] However, several states administer more refined means tests for their in forma pauperis procedures. Twenty-six states use a means test tied to the federal poverty guidelines.[138] Most states that identify an income threshold set it at 125% of the federal poverty line[139] or higher.[140]

Several state court systems allow for adjunctive eligibility. Litigants who receive other means-tested public benefits are automatically eligible to proceed in forma pauperis. Most state court systems that permit a litigant to prove her indigence through benefit receipt include TANF, SSI, Medicaid, and SNAP among the qualifying benefits.[141] Some include less frequently available benefits such as

136. *See* CAL. GOV'T CODE § 68632(c) (West 2009) (allowing state courts to waive fees for "[a]n applicant who, as individually determined by the court, cannot pay court fees without using moneys that normally would pay for the common necessaries of life for the applicant and the applicant's family"); KY. REV. STAT. ANN. § 453.190 (LexisNexis 2017) (defining a "poor person" as someone who "is unable to pay the costs and fees of the proceeding in which he is involved without depriving himself or his dependents of the necessities of life, including food, shelter, or clothing").

137. *See, e.g.*, DEL. CODE ANN. tit. 10, § 8802(b) (2018) (instructing litigants to "provide complete information as to the affiant's identity, the nature, source and amount of all of the affiant's income, the affiant's spouse's income, all real and personal property owned either individually or jointly, all cash or bank accounts held either individually or jointly, any dependents of the affiant and all debts and monthly expenses").

138. *See infra* Table 5. Guam and West Virginia are the two jurisdictions that set a means test not tied to the federal poverty guidelines.

139. *Id.*; *see, e.g.*, CAL. GOV'T CODE § 68632(b) (allowing state courts to waive fees for "[a]n applicant whose monthly income is 125 percent or less of the current poverty guidelines updated periodically in the Federal Register by the United States Department of Health and Human Services").

140. *See* FLA. STAT. ANN. § 57.082(2)(a) (West 2006) (200%); MONT. CODE ANN. § 47-1-111(3)(a) (2017) (133%); UTAH CODE ANN. § 77-32-202(3)(a)(ii) (West 2017) (150%); ARIZ. CODE JUD. ADMIN. § 5-206 (2015) (150%); N.J. CT. R. 1:13-2 & 2:7 (150%); N.M. CT. R. 10-408 (150%); TEX. R. CIV. P. 145 (200%); *Application to Waive Filing Fees and Service Costs*, VT. JUDICIARY 2 (Nov. 2014), https://www.vermontjudiciary.org/sites/default/files/documents/Form-228.pdf [https://perma.cc/V4NF-YGVX] (150%).

141. *See, e.g.*, CAL. GOV'T CODE § 68632(a) (waiving fees for litigants who are receiving any of seven public benefits including SSI, SNAP, TANF, and Medicaid); *see infra* Table 5; *cf.* MASS. GEN. LAWS ANN. ch. 261, § 27A (West 2004) (omitting SNAP); MICH. COMP. LAWS § 400.10a(d) (2017) (including TANF and SSI in the definition of "public assistance," but not SNAP or childcare assistance).

General Assistance,[142] while others single out means-tested veterans' benefits.[143] In fact, in some of these states, the Affordable Care Act's expansion of Medicaid, made optional by the Supreme Court in *National Federation of Independent Business v. Sebelius*,[144] has had the additional effect of making more litigants automatically eligible for in forma pauperis status.[145]

Some states sensibly align their in forma pauperis procedures with legal aid. Eighteen states allow litigants represented by legal aid attorneys automatically to qualify for IFP status.[146] For instance, Minnesota allows for any litigant represented by a civil legal services attorney or a volunteer pro bono attorney to proceed in forma pauperis.[147] South Carolina allows for a similar mechanism for a litigant to plead her poverty, but it requires that litigant's attorney to certify to the court that representation is provided through that legal aid organization or pro bono program and that the party is unable to pay the filing fees.[148]

Some states allow their judges to permit a partial filing fee for those who wish to proceed in forma pauperis.[149] This option avoids the benefit-cliff problem, whereby those who fall just above the threshold receive no benefits, in much the same way that other public-benefits programs like SNAP have benefit amounts that taper off with an increase in income.[150] Federal practice allows judges to assign partial filing fees, but this practice appears to be more common in prisoner suits than in other cases.[151]

---

142. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/5-105(a)(2)(i) (West 2003) (allowing the receipt of Aid to the Aged, Blind, and Disabled (AABD) or General Assistance to meet the indigence standard).

143. *See* MASS. GEN. LAWS ANN. ch. 261, § 27A(a) (identifying poverty-related veterans' benefits); WIS. STAT. ANN. § 814.29(1)(d) (West 2007); NEB. R. 3-13; N.M. CT. R. 10-408 (waiving fees in juvenile cases); WASH. CT. GEN. R. 34.

144. 567 U.S. 519 (2012) (rendering the Medicaid expansion optional because the federal government could not threaten states with the loss of their existing Medicaid funding if they declined to comply).

145. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 261, § 27A. *But see* TEX. R. CIV. P. 145 (not specifying which "government entitlement programs" create adjunctive eligibility).

146. *See infra* Table 5.

147. MINN. STAT. § 563.01 (2016).

148. S.C. R. CIV. P. 3(b)(2).

149. *See, e.g.*, CAL. GOV'T CODE §§ 68631, 68632(c), 68636(d), 68637(e) (West 2009).

150. Elizabeth Wolkomir & Lexin Cai, *The Supplemental Nutrition Assistance Program Includes Earnings Incentives*, CTR. ON BUDGET & POL'Y PRIORITIES (2018), https://www.cbpp.org/sites/default/files/atoms/files/7-25-17fa.pdf [https://perma.cc/P84Z-GE8G].

151. *See, e.g.*, E.D. TENN. R. 4.2 ("Depending on the amount of funds available to the petitioner, the Court may require the petitioner to pay a portion of the filing fee.").

Putting these different features together, several states' in forma pauperis rules offer an appealing model for the federal system. They offer the litigant four ways to plead poverty: (1) a bright-line means test pegged to the federal poverty guidelines; (2) adjunctive eligibility through public-benefit programs; (3) eligibility through legal aid representation; and (4) a catchall determination that would preserve some of the discretion of current federal practice.[152] These four pathways would reduce the administrative burden for federal judges and litigants as well as standardize and rationalize outcomes by targeting in forma pauperis status to benefit the truly needy.

III. TOWARD A COHERENT IN FORMA PAUPERIS STANDARD

In a nation where half of households have an annual income of less than $62,000,[153] who should pay for the federal courts is an open question. One could imagine a pay-per-use system, a system that is financed entirely by general tax revenues, or, what is most likely, a combination of both. Rather than entering the debate about how best to finance a court system, this Article fastens itself to the institutional limits of the federal courts.[154] By binding itself to the federal

152. This fourth possibility is often phrased as "substantial hardship." *See, e.g.*, 735 ILL. COMP. STAT. 5/5-105(a)(2)(iii) (West 2003).

153. Jonathan L. Rothbaum, *Redesigned Questions May Contribute to Increase*, U.S. CENSUS BUREAU (Sept. 12, 2018), https://www.census.gov/library/stories/2018/09/highest-median-household-income-on-record.html [https://perma.cc/9L94-KJRX] ("Income data released by the U.S. Census Bureau today show that 2017 median household income was the highest on record at $61,372.").

154. Others have thoughtfully explored what such a commitment to equal justice for poor people means absent a given institutional framework. *See, e.g.*, Richard M. Re, *"Equal Right to the Poor,"* 84 U. CHI. L. REV. 1149, 1216 (2017) (exploring the meaning of the federal judicial oath of office as "an authoritative directive that federal courts attend to economic equality"); Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2127-30 (2000) (discussing paying for legal representation in the context of mass torts); *see also* Omri Ben-Shahar, *The Paradox of Access Justice, and Its Application to Mandatory Arbitration*, 83 U. CHI. L. REV. 1755, 1759 (2016) ("It is so commonly assumed that access justice benefits the weak that the premise has escaped any significant scrutiny."). Others have considered how best to pay for civil adjudication. *See, e.g.*, Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 739 (2010) (proposing a one-way progressive fee-shifting rule); *see also* Deborah R. Hensler, *Financing Civil Litigation: The US Perspective*, *in* NEW TRENDS IN FINANCING CIVIL LITIGATION IN EUROPE: A LEGAL, EMPIRICAL, AND ECONOMIC ANALYSIS 149 (Mark Tuil & Louis Visscher eds., 2010) (describing how civil litigation is financed in the United States and considering whether the current structure leads to excessive litigation). Indeed, some may argue that no one should have to pay to access the federal courts. Instead of embracing such a solution, this Article

system's commitment laid out in 28 U.S.C. § 1915, the Article uses that statutory commitment of access for indigent litigants as the baseline from which to analyze current federal practice. Taking seriously Congress's promise to provide access to poor litigants, this Part proposes a coherent in forma pauperis standard.

A. Designing a National In Forma Pauperis Standard for the Federal Courts

Federal courts should allow litigants to proceed in forma pauperis if they meet one of four conditions. First, any litigant whose net income is at 150% of the federal poverty level and who has assets of less than $10,000 should be considered indigent by a federal court. That income calculation should include at least partial deductions for necessary expenses like medical expenses, childcare, housing, and transportation. Such an income threshold would be consistent with the federal indigence standard for bankruptcy proceedings as well as with means tests for SNAP, Medicaid, legal aid providers, and many state court systems.

In calculating eligibility for in forma pauperis status, the federal courts should also consider assets. LSC-funded organizations must set reasonable asset ceilings for eligible households.[155] A court should still look at a litigant's assets even if that litigant's income is below the federal poverty level. If a movant is low income but has significant assets that could be used to pay the filing fee without hardship, those assets should be considered. The rule could allow the court to look into whether a litigant has recently tried to reduce their assets to avoid using them for their litigation.[156] In practice, it seems unlikely that the federal courts would see such a litigant, but to ensure accurate targeting, the federal rule should include an asset limit. That asset limit should exclude the movant's residence and vehicle, and should be limited to $10,000 in liquid assets.

The second way a litigant could proceed in forma pauperis is adjunctive eligibility through federal public-assistance programs. Today, public assistance is included as a source of income on most IFP forms.[157] As a result, a federal judge

promotes an accurate, streamlined process that serves the commitments of Congress and the federal judiciary better than the status quo.

155. *See 2019 Basic Field Grant Terms and Conditions*, LEGAL SERVICES CORP., https://www.lsc.gov/grants-grantee-resources/grantee-guidance/grant-assurances/2019-basic-field-grant-terms-and-conditions [https://perma.cc/ZLC9-D8A6].

156. *See* D.N.H. R. 4.2(b) ("An applicant shall be entitled to proceed in forma pauperis if the applicant's financial affidavit . . . demonstrates that the applicant is unable to pay or prepay the fees and pay the costs of the action and the court determines that the applicant has not deliberately depleted his or her assets in order to become eligible for in forma pauperis status.").

157. *See supra* Section I.C.

can just as easily use a litigant's receipt of federal food stamps to discredit her pleading of poverty instead of as evidence of the litigant's indigence. Instead of counting benefit receipt as a source of income, federal judges should follow the lead of various states and use it as a bureaucratic shortcut to prove the movant's poverty. As mentioned above, the federal judiciary could take advantage of the accurate screening conducted by agencies administering federal public assistance with little fear of fraud.

Third, along the lines of Minnesota, South Carolina, and other states, the federal courts could adopt a rule that litigants represented by a legal aid organization, including those funded by the federal LSC, can proceed in forma pauperis.[158] Such a rule would eliminate the contradictory practice where a litigant might be needy enough to merit a federally funded legal services lawyer, but not needy enough for a federal court to waive fees and costs. As with adjunctive eligibility for public benefits, such a rule would shift the burden of determining need from the judges to legal aid organizations who must make that determination in the first instance. Moreover, this rule would encourage underresourced litigants to seek assistance or simply advice from these organizations, potentially cutting down on the litigants who proceed pro se.

Finally, this new proposed standard would preserve the discretionary authority of the federal courts. By providing a catchall category, a federal judge would still be able to permit a litigant to proceed in forma pauperis even if she could not prove her indigence through the three mechanisms outlined above. This discretionary category would allow judges to grant in forma pauperis status to an individual who, for instance, is disqualified on the basis of income, but has significant expenses not included in the new means test.

There will be opposition to these proposed changes. One critique is that this national standard would neglect differences in costs of living. Some may believe that the status quo allows, albeit haphazardly, for regional, state, and intrastate variations—a worthy design feature for a country that spans a continent. In a related vein, discretion, some say, is a feature, not a bug, of the Federal Rules.[159]

---

158. *But see* Gillian K. Hadfield, *Higher Demand, Lower Supply—A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 140 (detailing that 6,581 LSC-funded attorneys represent one-half of one percent of all lawyers in the United States). To be sure, there will be some overlap among these three categories of automatic qualification. An individual who is being represented by an LSC-funded attorney may receive (or at least may be eligible to receive) Medicaid. However, due to the sheer number of Americans who live below the federal poverty level, it is unlikely that this overlap will reduce the number of people who are eligible for IFP status.

159. *Compare* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008), *with* Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95 (2009). Many have located this generalized discretion in the Federal Rules

However, federal law is chock-full of means tests that apply nationwide and even more that apply to the lower forty-eight states.[160] That said, to address stark regional differences, the new standard could permit district courts via local rule to increase the income means test to, say, 200% of the federal poverty level. In other words, the new standard could allow courts to choose their own means test tied to the federal poverty level so long as it exceeded 150%. Such an income threshold may be more appropriate for areas where the cost of living is far higher than the national average. Making such an upward adjustment permissible among districts sacrifices some of the uniformity across districts but would use the suggested floor as a signal of reasonableness. Nevertheless, this option would also invite a district court to make a considered decision while still cutting down on the intradistrict variance by requiring that judges in the same district use the same means test.

Others might argue that a uniform IFP standard deprives judges of the benefits of incremental, Burkean learning.[161] To be sure, a national standard could

---

themselves. *See, e.g.*, Bone, *supra* note 108, at 1967 ("Case-specific discretion has been at the heart of the Federal Rules ever since they were first adopted in 1938."); Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1795 (2002) (emphasizing that "vast discretion remains at virtually every turn" in the Federal Rules); Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1565-66 (2003) (distinguishing primary and secondary discretion); Mark Moller, *Procedure's Ambiguity*, 86 IND. L.J. 645, 650 (2011) (describing how the Federal Rules "embrac[e] vague, discretion-conferring tests"); Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 128-29 (2015) ("Rules deliberately use abstract, discretionary—almost poetic—language in order to allow district courts to achieve the flexible goal of procedural due process."). *But see* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 557 (describing the "global vision of the drafters" of the Federal Rules to be that "litigants should have their day in court").

160. The federal poverty guidelines are calculated for the lower forty-eight states, Alaska, and Hawaii, respectively.

161. *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 892 (1996) (noting that traditions "reflect a kind of rough empiricism: . . . they have been tested over time, in a variety of circumstances, and have been found to be at least good enough"); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 359 (2006) ("The argument for Burkeanism is that respect for traditions is likely to produce better results, all things considered, than reliance on theories of one or another kind, especially when those theories are deployed by such fallible human beings as judges."). *But cf.* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules . . . . It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."); David A. Strauss, *Tradition, Precedent and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1706 (1991) ("Some precedents may be said to be part of a tradition. But not all are. Some are simply the decisions of a group of judges rendered a few years ago.").

squelch some of this knowledge building. However, some features of the survey summarized in Part I suggest that in forma pauperis practice is characterized not by considered reflection but by clerical drift: the failure to update forms that list defunct public-benefit programs, confusion in various clerks' offices as to which form is currently accepted, and the lack of a record of deliberation on IFP pleadings in district courts or the Judicial Conference. Moreover, a discretionary system does not necessarily mean the decision maker must be deprived of standards, as is the case with the status quo. Federal law often provides rules of decision to assist federal judges, including in instances that are committed to the judge's discretion.[162] This proposed national standard still preserves a judge's discretion by permitting the judge to grant IFP status even if the litigant is not eligible on the basis of income, adjunctive eligibility, or legal aid representation. This national standard does not, however, permit judges to deprive poor litigants of IFP status if they satisfy one of those three conditions. In a sense, the national standard guards against the particularly parsimonious judge by relying less on district- or judge-specific learning.

Some might worry that adjunctive eligibility will lead to false negatives and false positives. Of course, there are individuals who are poor enough to receive SNAP but do not want to receive assistance or may have recently been kicked off the program. One would not want a system that penalizes poor litigants who fail to enroll in antipoverty programs. However, that would only be true if adjunctive eligibility was the only way to proceed in forma pauperis. As for false positives, such inaccurate determinations are less of a concern for the public-assistance programs used in the proposed test. SNAP is currently experiencing record-low

162. The Sentencing Guidelines serve as a prominent example. *See* United States v. Booker, 543 U.S. 220 (2005).

levels of fraud.[163] Fraud rates among beneficiaries in the Medicaid and TANF programs are also low.[164]

Others might be concerned that linking IFP eligibility to other programs ties in forma pauperis determinations to the often-embattled American safety net and the vicissitudes of congressional funding. If Congress were to eliminate the LSC or to block grant Medicaid or SNAP, participation in those programs could plummet.[165] A criticism in the same vein, but from a different angle, might posit that the United States is fitfully moving toward universalism in the provision of old-age insurance, education, and healthcare. Some argue that means tests are

---

163. Only about one percent of SNAP benefits are trafficked, compared with four percent before the system became electronic. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-956T, SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: PAYMENT ERRORS AND TRAFFICKING HAVE DECLINED, BUT CHALLENGES REMAIN 11 (2010). When the Food and Nutrition Service began issuing SNAP through electronic benefit transfer (EBT) cards, the Anti-Fraud Locating Using EBT Retailer Transactions (ALERT) system was created to monitor electronic transaction activity and identify suspicious stores for analysis and investigation. *See SNAP: Examining Efforts to Combat Fraud and Improve Program Integrity, Joint Hearing Before the Subcomm. on Gov't Operations & the Subcomm. on the Interior of the H. Comm. on Oversight & Gov't Reform*, 114th Cong. 14 (2016) (statement of Kevin W. Concannon, Under Secretary, Food, Nutrition and Consumer Services). In fiscal year 2015, over 1,900 stores were permanently disqualified for trafficking and another 800 stores were sanctioned for other violations. *Id.* at 83 (statement of Stacy Dean, Vice President for Food Assistance Policy, Center on Budget and Policy Priorities). Trafficking has fallen dramatically over the past 15 years. *See id.*

164. *See* Peter Budetti, *How CMS Is Fighting Fraud: Major Program Integrity Initiatives*, CENTERS FOR MEDICARE & MEDICAID SERVICES (June 11, 2012), https://www.cms.gov/Outreach-and-Education/Look-Up-Topics/Fraud-and-Abuse/Fraud-page.html [https://perma.cc/EE47-S7F2]. The Improper Payments Information Act of 2002 led to the creation of a national audit, the Medicaid Payment Error Rate Measurement, which estimates the percentage of payments that either should not have been made or were made for the wrong amount. *See Payment Error Rate Measurement Manual*, CENTERS FOR MEDICARE & MEDICAID SERVICES (Jan. 2018), https://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicaid-and-CHIP-Compliance/PERM/Downloads/FY17PERMManual.pdf [https://perma.cc/WG8H-FLRQ]; *cf.* Medicaid Integrity Program, *Annual Summary Report of Comprehensive Program Integrity Reviews*, CENTERS FOR MEDICARE & MEDICAID SERVICES (June 2012), https://www.cms.gov/Medicare-Medicaid-Coordination/Fraud-Prevention/FraudAbuseforProfs/Downloads/2012pisummary.pdf [https://perma.cc/K6XR-AE53] (providing a summary of best practices for preserving the integrity of state Medicaid programs). There is concern that the Earned Income Tax Credit (EITC) is rife with improper payments, *see, e.g.*, Robert Greenstein et al., *Reducing Overpayments in the Earned Income Tax Credit*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 20, 2018), https://www.cbpp.org/research/federal-tax/reducing-overpayments-in-the-earned-income-tax-credit [https://perma.cc/5T3H-P85C], but no state has used EITC receipt as a way to prove one's indigence. The federal judiciary should similarly ignore the EITC.

165. *See* Hammond, *supra* note 96, at 1765-69 (discussing recent congressional proposals to restructure Medicaid and SNAP).

stigmatizing and should be abandoned altogether.[166] Yet, participation in these programs is more secure than the first criticism suggests and far more widespread than the other criticism allows. As for the concern about tying in forma pauperis determinations to other federal programs, attempts to block grant Medicaid and SNAP have repeatedly failed since 1996, including in the last Congress.[167] As for the second, a substantial portion of the United States receives Medicaid or SNAP. Medicaid pays for close to half the births in the United States.[168] One in seven Americans receive SNAP benefits.[169]

The sheer unpredictability of the current regime means that if this Article's proposal were adopted, some people who may have obtained IFP status under the status quo would not.[170] But, if this proposal is sound, those are people who should not have received IFP status in the first place (the false positives discussed earlier). In the bargain, truly poor people will not be blocked by the whims of a particular judge. This Article proposes a streamlined system that sharply reduces the number of people who are unjustly asked to pay the costs and fees of litigation rather than a system that permits some litigants to avoid costs and fees that they could afford to pay. Moreover, all these criticisms fail to see this proposal in light of current practice. The sensible approach is not to maintain the status quo but to take all possible steps to rationalize federal practice, making it more efficient for judges and less demeaning for litigants. In light of the capricious features of federal practice, it would be ill-advised to eschew effective improvements simply because the improvements themselves are not flawless.[171]

Finally, Congress, the Judicial Conference, and district courts could adopt any of these proposed pathways without necessarily adopting the others. Each

166. *See, e.g.*, NEIL GILBERT, TRANSFORMATION OF THE WELFARE STATE: THE SILENT SURRENDER OF PUBLIC RESPONSIBILITY 142 (2002) ("'The means test stigmatizes beneficiaries' is a mantra that has gained almost factual status from repetition."); Andrew G. Biggs, *Means Testing and Its Limits*, NAT'L AFF., Fall 2011, at 97.

167. *See* Hammond, *supra* note 96, at 1765-69.

168. *See, e.g.*, Phil Galewitz, *Nearly Half of U.S. Births Are Covered by Medicaid, Study Finds*, KAISER HEALTH NEWS (Sept. 3, 2013), https://khn.org/news/nearly-half-of-u-s-births-are-covered-by-medicaid-study-finds/ [https://perma.cc/5DL4-75PM].

169. *See, e.g.*, Alan Bjerga, *Food Stamps Still Feed One in Seven Americans Despite Recovery*, BLOOMBERG NEWS (Feb. 3, 2016), https://www.bloomberg.com/news/articles/2016-02-03/food-stamps-still-feed-one-in-seven-americans-despite-recovery [https://perma.cc/L4DU-BDNJ].

170. *See* Douglas, *supra* note 15, at 8 ("Much of the value of the *in forma pauperis* practice would be lost if too stringent standards of poverty were required to qualify as a pauper.").

171. In fact, one could easily reverse engineer this proposal for the federal system and apply it to any state court system. State legislatures or state courts could adopt this model in forma pauperis practice through statute or judicial rule, respectively.

of the changes proposed above would ease the administrative burden for the federal courts and reduce the likelihood of discrepancies across and within district courts. Taken together, this Article's proposed national standard offers a no-wrong-door solution: litigants may receive IFP status through either a simple calculation of net income and assets based on federal law, adjunctive eligibility based on other federal programs, representation by a legal aid attorney, or the judge's discretion.

B. Adopting a National In Forma Pauperis Standard for the Federal Courts

Although we can now envision a more coherent IFP standard, the question is how to implement it. These institutional avenues are driven by the federal judiciary's rulemaking framework established by Congress through the Rules Enabling Act.[172] Most proceduralists would welcome a reasoned Supreme Court decision that fashions a workable, national standard for in forma pauperis determinations by construing 28 U.S.C. § 1915(a). Yet it is unlikely we will see such a decision. The Supreme Court has insisted that those who seek to improve the Federal Rules of Civil Procedure pursue changes not through judicial interpretation, but through the rulemaking process.[173] As a result, there are three plausible ways to replace the status quo of in forma pauperis determinations: (1)

---

172. The Rules Enabling Act delegates to the Supreme Court the power "to prescribe general rules of practice and procedure" for cases in federal court, subject to congressional acquiescence. 28 U.S.C. § 2072(a) (2018); *see, e.g.*, Gene R. Nichol Jr., *Judicial Abdication and Equal Access to the Civil Justice*, 60 CASE. W. RES. L. REV. 325, 330 (2010) (contending that judges play "a singular and defining role in creating, maintaining, and assuring open, effective, and meaningful access to the system of justice they administer"); Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501, 517 (2016) ("Since the mid-1970s, the Federal Rules of Civil Procedure have been amended and federal procedure altered by three different casts of characters: the Advisory Committee on Civil Rules, the majority of the Supreme Court of the United States, and the judges on the federal district courts.").

173. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) ("A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168-69 (1993))); Crawford-El v. Britton, 523 U.S. 574, 595 (1998) ("To the extent that the court was concerned with this procedural issue, our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process."); *see also* Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 449 (2013) (describing the Court's tendency to "engage[] in amendment by case law instead of through the [rulemaking] process"); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 453-54 (2008) (criticizing the Court for circumventing the formal rule-amendment process through *Bell Atlantic Corp. v. Twombly*, 550 U.S.

Congress could amend 28 U.S.C. § 1915; (2) the Judicial Conference could amend (and the Supreme Court could approve) the Federal Rules of Civil Procedure and/or propose a new form; or (3) district court practice could converge as district courts adopt the new standard. This Section considers each option in turn.

1. Congress

Congress could amend 28 U.S.C. § 1915 to contain the following in forma pauperis standard[174]:

> A litigant may proceed in forma pauperis if:
>
> a) That person's income after taxes and basic necessities, including, but not limited to medical expenses, childcare, housing, and transportation, is 150% of the federal poverty level or less, and that person's assets are less than $10,000, excluding their home and their vehicle;
>
> b) That person receives public assistance (including, but not limited to the Supplemental Nutrition Assistance Program, Medicaid, Supplemental Security Income, or Temporary Assistance to Needy Families);
>
> c) That person is represented by a pro bono attorney, including one practicing as part of a legal aid organization funded by the Legal Services Corporation; or
>
> d) That person, in the sound discretion of the court, cannot pay the fees and costs without causing substantial hardship to the litigant or the litigant's family.

There are good reasons to start with Congress. First, federal in forma pauperis practice is ultimately a creature of congressional design. Second, the test at issue (how poor is poor enough) is fundamentally legislative.[175] Third, Congress

544 (2007)). *But see* Porter, *supra* note 159, at 142 (noting a lack of scholarly consensus on "the Court's role in the rulemaking process, or on the related question of the relationship between the Court's rulemaking role (however that might be defined) and its Article III powers of adjudication").

174. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 400 (2015) ("Congress . . . has ultimate authority over the Federal Rules of Civil Procedure."). *But see* David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 961 ("Although they have formal roles, the Judicial Conference, Supreme Court, and Congress act largely as rubber stamps in the rulemaking process.").

175. *See supra* notes 44-53 and accompanying text (discussing the PLRA's mangling of in forma pauperis determinations for nonprisoners); *see also* Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 718

sets means tests for other federal programs: the income thresholds for Medicaid, SNAP, and other programs are laid out in statute. This statutory fix would allow for adjunctive eligibility in a manner consistent with other means tests in federal law and many state court systems. It would also set a bright-line means test that would eliminate inter- and intradistrict discrepancies, directing federal judges to consult the best available standard: the poverty guidelines determined by the federal government. While streamlining eligibility standards, it would still allow judges to grant in forma pauperis status in the absence of public-benefits participation or an arithmetic income calculation by preserving the "substantial hardship" standard that persists in judicial opinions.[176]

2. The Judicial Conference

Although Congress could amend the statute to create a more coherent in forma pauperis standard, such a statutory fix may not be forthcoming.[177] Instead, the Judicial Conference could propose, through the Rules Enabling Act, an amendment to the Federal Rules of Civil Procedure that would set out the four pathways included in the statutory language above.[178] Such an amendment would give federal judges the much-needed rules of decision for granting in forma pauperis status.

Although less desirable than a new rule, the federal courts could also create a more coherent system simply by producing a new form. Without amending the Federal Rules of Civil Procedure, the Judicial Conference of the United States, through the Administrative Office, could replace either or both of the AO

---

n.186 (1988) ("The proposal is decidedly not that Congress assume primary responsibility for prospective procedural law.").

176. *See* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 80 (1989) ("The federal rule drafters . . . relied to a large extent on trial judge discretion to shape optimal lawsuit structure for each dispute."); Gardner, *supra* note 98, at 1002 n.327 (noting that "rules are often rounded at the edges as decisionmakers chafe at their under- or overinclusiveness"); Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897, 1941-43 (2014) (advocating for a discretionary "safety valve" for class action rules).

177. Congress is increasingly unproductive. *See Vital Statistics on Congress*, BROOKINGS tbl.6-4 (Apr. 18, 2014), https://www.brookings.edu/wp-content/uploads/2016/06/Vital-Statistics-Chapter-6-Legislative-Productivity-in-Congress-and-Workload_UPDATE.pdf [https://perma.cc/HKV7-HVBP] (showing the number of bills enacted by Congress decreasing every session since the 108th Session (2003-2004)).

178. *See* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 332-33 (2006) (explaining that the Court uses supervisory power to "announce procedural rules not otherwise required by Congress or the Constitution").

239 and AO 240 forms with a streamlined in forma pauperis application.[179] Such a form would solicit the information relevant to the determination set forth in the statutory language outlined above.[180] A model form is included at the end of this Article.[181] Like the status quo, a new form would fail to give judges the rules of decision they need to interpret the movant's information. But by eliminating extraneous inquiries, such as questions about jewelry and the make and model of a movant's car, such a form may discourage a decision maker's caprice. Alternatively, the Judicial Conference could solicit interest from individual district courts in adopting this simplified practice as a pilot district, as they have done with two recent projects.[182]

A new in forma pauperis form might appear quite quotidian, especially compared to the statutory fix proposed above. However, there is a rich tradition of providing forms for federal litigants—one that dates back to the creation of the

179. *See* Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2072-2074 (2018)) (vesting in the Judicial Conference the power to initiate amendments to the rules, and thus to forms like AO 239and AO 240); James C. Duff, *Overview for the Bench, Bar, and Public: The Federal Rules of Practice and Procedure*, ADMIN. OFF. U.S. CTS., http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public [https://perma.cc/AG6Y-78NX]; *see also* Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2601-10 (1998) (discussing the interplay between Congress and the federal judiciary); Subrin & Main, *supra* note 172, at 502 (describing the "lengthy process" of "federal procedural amendments" which "includes review by the Advisory Committee on Civil Rules, the Committee on Rules of Practice and Procedure (the 'Standing Committee'), the Judicial Conference of the United States, the United States Supreme Court, and finally, the United States Congress").

180. *See supra* Section III.B.1; *see also* D.C. CT. R. § 15-712, https://www.dccourts.gov/sites/default/files/NEW%20IFP%20application%20fill-in-blanks.pdf [https://perma.cc/Z5FR-M989] (using a checklist format to determine eligibility).

181. *See infra* Appendix B. This form is a first attempt to streamline the IFP process in such a way that would be consistent with gathering enough information to make an accurate determination without making the process unduly burdensome for litigants and judges. In order to implement the form effectively, the district courts would most likely also need to provide some additional guidance, perhaps in a frequently asked questions document.

182. *Expedited Procedures Pilot Project: Overview*, FED. JUD. CTR., https://www.fjc.gov/content/320247/expedited-procedures-pilot-project-overview [https://perma.cc/9QZU-VPCZ]; *Mandatory Initial Discovery Pilot Project Overview*, FED. JUD. CTR., https://www.fjc.gov/content/321837/mandatory-initial-discovery-pilot-project-overview [https://perma.cc/W2VT-FXD2]; *see also* William D. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1882 (2002) (pointing out that "liberal discovery can also work against poorer litigants [who] can be flooded with discovery requests"); Jeffrey S. Sutton & Derek A. Webb, *Bold and Persistent Reform: The 2015 Amendments to the Federal Rules of Civil Procedure and the 2017 Pilot Projects*, JUDICATURE, Autumn 2017, at 12 (discussing both pilot projects).

Federal Rules of Civil Procedure.[183] Recent amendments to Rule 84 suggest that the Judicial Conference is backing away from its use of sample forms for pro se litigants.[184] Scholars have criticized the Judicial Conference's decision to do away with the appendix of sample complaints and other forms.[185] However, many of the forms provided by the Judicial Conference in civil, criminal, and bankruptcy proceedings remain available to litigants. There is no evidence that the Judicial Conference is planning to do away with either the AO 239 or the AO 240 form. As a result, it would be fairly simple for the Judicial Conference to propose improvements to these forms along the lines suggested by this Article, or to replace them with the model form provided.

3. U.S. District Courts

If Congress and the Judicial Conference fail to act, individual district courts could promulgate their own local rule laying out the four pathways outlined above: a means test, adjunctive eligibility through public benefits, representation by a legal aid attorney, and a discretionary test. Individual district courts could also adopt a simplified form like the one included in this Article—just as they have decided to adopt the AO 239, the AO 240, or their own form. Every district court may adopt one of the forms provided by the Judicial Conference or create their own. That freedom at the court level could be used to stitch together a more coherent federal system. Admittedly, such a method would allow interdistrict differences to persist in federal practice: any district court that failed to adopt

183. *See* Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958) ("We require a general statement [in Rule 8]. How much? Well, the answer is made in what I think is probably the most important part of the rules so far as this particular topic is concerned, namely, the Forms."); Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 9 (2016) ("The Federal Rules illustrated this simpler approach with several hypothetical complaints that were included in the rules' appendix.").

184. *See* Sarah Staszak, *Procedural Change in the First Ten Years of the Roberts Court*, 38 CARDOZO L. REV. 691, 715 (2016) (arguing that by "eliminat[ing] a variety of sample forms available to guide parties during the course of litigation," the Rule 84 amendments did away with tools that "were especially useful for pro se cases and small-firm litigants, who may otherwise lack the access to alternate resources"). For discussion of the rulemaking process in the Roberts Court, see Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2016); and Porter, *supra* note 159, at 124-27.

185. *See, e.g.*, A. Benjamin Spencer, *The Forms Had a Function: Rule 84 and the Appendix of Forms as Guardians of the Liberal Ethos in Civil Procedure*, 15 NEV. L.J. 1113 (2015); Steinman, *supra* note 183, at 9, 51-52.

this form would continue to plod along the path of the status quo.[186] But the streamlined standard described in this Section would sharply reduce intradistrict variance in any district court that adopts this standard.[187] As more district courts adopted this standard, the federal system would slowly but surely rationalize its in forma pauperis practice.

IV. BOTTOM-UP PROCEDURE

This Article's most basic aim is to document the inconsistencies and flaws in federal in forma pauperis determinations and how they could be changed in such a way that promotes the interests of the courts and litigants alike. Along the way, though, the Article illustrates a different approach to the study of procedure.

A. A Different Perspective

In forma pauperis determinations are only a single feature of federal practice, but they are also the lived reality for thousands of litigants who seek redress in federal court. This Article's emphasis, then, is not on the federal appellate courts, but on the trial courts that hear most litigants' claims. It dwells not on the rulings and reasoning of the highest court, but on the everyday procedures that define civil adjudication in the federal courts. In other words, this is procedural scholarship that begins not from the top down, but from the bottom up. The Article models this mode of analysis, call it "bottom-up procedure," with a first attempt to chart the range of federal in forma pauperis practice.

This perspective on civil procedure demands that we not lose sight of how people with few resources access systems of adjudication. These individuals expose cracks in adjudicatory systems.[188] Resources tend to smooth bumps in the procedural road and enable parties to take alternative paths to resolve disputes.

---

186. *See* Burbank, *supra* note 175, at 715 (describing the "trend of modern procedural law" as a move "away from rules that make policy choices" and "towards those that confer on trial courts a substantial amount of normative discretion").

187. *See id.* at 718 ("Effective procedural reform will not come from a small group of 'experts,' nor will it come from the Supreme Court alone.").

188. See Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 258 (2004) ("Given that the quality of representation depends on the ability to pay, current civil procedure doctrine would seem to provide a systemic distribution of the risk of error in favor of those who have the greatest share of social resources."). For an example of how "[a] focus on outsiders reveals how law intersects with their forced marginalization," see Guadalupe T. Luna, *"Facts Are Stubborn Things:" Irregular Housing in the Texas Colonias*, 28 WIS. J.L. GENDER & SOC'Y 121, 128 n.41 (2013).

Those who lack resources are often unable to seek out a different forum, and so they are most likely to reveal the deficiencies in the system. By following poor litigants through systems of civil justice, we can readily engage with norms and practices that pervade trial courts but sometimes fail to rise to the courts of review.

This perspective of bottom-up procedure is not confined to a single methodology. To make these norms and practices legible, scholars will need to collect data on these practices through coding court materials as this Article does; performing quantitative analyses of various stages of litigation;[189] and interviewing clerks, judges, lawyers, and, perhaps most importantly, the litigants themselves.[190] Importantly, this approach should not displace existing procedural scholarship or its attendant emphasis on aggregate litigation, the rise of alternative dispute resolution, and transnational applications of personal jurisdiction.[191] A bottom-up perspective may yield insights on these topics as well. Rather, the bottom-up perspective is an attempt to resist the instinct in the academy and the judiciary to equate federal courts with the big case and parties with deep pockets.[192] Federal courts are also fora for poor people.

Those who study civil justice can borrow from the fields of criminal and administrative procedure for examples of this bottom-up perspective on procedure. Scholars of criminal procedure often embrace this approach.[193] As Issa Kohler-

189. For an example of quantitative analysis of federal district court practice, see Miguel de Figueiredo et al., Against Judicial Accountability: Evidence from the Six Month List (unpublished manuscript) (Feb. 20, 2018), https://ssrn.com/abstract=2989777.

190. For an example of how qualitative research can build legal theory, see Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017).

191. *See* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1709-10 (2017) (comparing "the rise of non-traditional omnibus legislation" as "a symptom of the bigger problems of legislative gridlock and overwhelming regulatory complexity" with "the rise of" multidistrict litigation as "a sign of deeper pressures on the traditional model of procedure").

192. *See* Thomas O. Main, *Procedural Constants: How Delay Aversion Shapes Reform*, 15 NEV. L.J. 1597, 1613 (2015) (arguing that "[a]lthough big cases constitute a small percentage of federal court litigation, the problems with big cases tend to dominate popular narratives about civil litigation and tend to fuel reforms that affect all cases, rather than only the big cases"); *see also* Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 47 (1957); *cf.* Gluck, *supra* note 191, 1709-10.

193. *See, e.g.*, William J. Stuntz, *Plea Bargaining and the Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); ISSA KOHLER-HAUSMANN, MISDEMEANORLAND 12 (2018) (citing Stuntz's article as one example of an approach that maintains that "statutorily authorized punishments and legal rules offer little guidance to the empirical regularities of existing criminal courts and criminal punishment"). This comparative strength in criminal procedure may reflect the influence of sociology on the study of punishment more generally. *See* Tracey L.

Hausmann wrote in her recent study of low-level criminal courts in New York City, a bottom-up perspective insists that "legal actors always need to make a practical determination about what the law means in the first instance in constrained situations of choice."[194] The forces that constrain these actors in criminal procedure constitute a logic of legal activity on the ground that "those at the top of various constitutive organizational hierarchies . . . [do not] necessarily intend, plan, or even consciously embrace."[195] An insistence on studying how courts concretize formal rules on a daily basis often leads to a focus on run-of-the-mill cases, many of which involve people with few resources.

Criminal procedure's greater emphasis on the experiences of poor litigants in court may derive from the fact that that procedural system requires appointment of counsel. This routine representation, guaranteed by *Gideon v. Wainwright* and its progeny, in turn, makes procedural lapses more evident.[196] A bottom-up approach recognizes that the criminal process on the ground does not

Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 394-95 (2000) (drawing on sociological theory for an ecological understanding of poverty, crime, and marginalization); Calvin Morrill et al., *Seeing Crime and Punishment Through a Sociological Lens: Contributions, Practices, and the Future*, 2005 U. CHI. LEGAL F. 289, 291 (contrasting European sociology of crime's "top-down" approach with the "long tradition in American sociology of 'bottom-up' inquiry").

194. KOHLER-HAUSMANN, *supra* note 193, at 13; *see also* MONA LYNCH, HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT 2-7 (2016) (arguing that the severity of federal drug laws allows prosecutors near-unilateral power to dictate punishments); Issa Kohler-Hausmann, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, *in* THE NEW CRIMINAL JUSTICE THINKING 246, 266 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (discussing how the interplay of formal law and extralegal forces "generates a set of research questions about how legal rules are fundamentally always interpolated into the course of ongoing activity").

195. KOHLER-HAUSMANN, *supra* note 193, at 13; *see also* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1373 (2018) (observing that "[f]ew scholars of American criminal justice doubt that such extralegal forces—ranging from resource imbalances between prosecutors and defendants, to informal institutional norms and practices, to the complex power dynamics associated with race, gender, and class—produce sometimes-sizable gaps between the criminal law codified on the books and the criminal law implemented on the ground").

196. *See* Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963); Thomas H. Cohen, *Who Is Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, 25 CRIM. JUST. POL'Y REV. 29, 35 (2014) (reporting defendant indigency rates of about eighty percent in felony cases). Of course, this contrast between civil procedure and criminal procedure is not to suggest that *Gideon*'s legacy is free of criticism. *See, e.g.*, Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1769 (2016) (observing that "too many lawyers appointed to represent poor criminal defendants do not perform their intended role in the system, because they have been conditioned not to fight for their clients").

square with our constitutional commitments.[197] Criminal rules sound in a kind of constitutional formalism, lending themselves to a bottom-up perspective, whereas civil procedure, in its diffuse, technical nature, can appear less pliant.[198] Yet even administrative procedure, which resembles civil procedure more than criminal procedure in its statutory regime, has made more of this bottom-up perspective than civil procedure has. Scholars of administrative adjudication, like their counterparts in criminal procedure, have attended to the processing of a large number of claims, its implications for dispute resolution,[199] and how it empowers street-level decision makers.[200] Using the bottom-up approach, scholars of civil procedure could borrow from these two fields.

---

197. *See, e.g.*, Alexandra Natapoff, Gideon*'s Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 449 (2015) (arguing that "the formalist *Gideon* framework . . . falls apart as a descriptive mechanism at the bottom").

198. William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 4 (1996) (noting that "the provision of counsel and counsel's performance, discovery, settlements, the questioning of witnesses, the disposition of cases that don't go to the jury—all issues that have been constitutionalized in criminal cases—are in civil cases governed by rules of civil procedure, by statute, by nonconstitutional common law, or by local custom."); *see also* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 777-78 (1997). *But see* Crespo, *supra* note 195, at 1310 (arguing that, to the contrary, there is a "surprising degree of procedural—and thus regulatory—heterogeneity" in plea bargaining).

199. *See* JERRY L. MASHAW, BUREAUCRATIC JUSTICE 3 (1983) (discussing the origin of the "due process revolution" in administrative law); Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1119 (2014) (arguing that "the current system of bottom-up workplace law enforcement relies too heavily on workers themselves to be claims-makers"); Deborah E. Anker, *Legal Change from the Bottom Up: The Development of Gender Asylum Jurisprudence in the United States*, *in* GENDER IN REFUGEE LAW: FROM THE MARGINS TO THE CENTRE 46, 67 (Efrat Arbel et al. eds., 2014) (identifying "a ground-level jurisprudence that is having significant impact on other aspects of refugee law and decision-making institutions including at higher levels"); Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1148-60 (2018) (discussing the results of a multiyear study of social security disability benefits litigation in the federal courts); Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173, 1177 n.13 (2016) (modeling "an inquiry into lower-level expertise" that "has the benefit of refocusing analysis on a critical expertise rationale for administrative action that has tended to erode over time.).

200. *See, e.g.*, MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY, at xii (1980) (relating how "the decisions of street-level bureaucrats, the routines they establish, and the devices they invent to cope with uncertainties and work pressures, effectively *become* the public policies they carry out."); *see also* Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1129 (2000) (noting a "new administrative paradigm" that reflects "an increase in the power that ground-level administrators wield over benefit recipients.").

B. Whither Civil Procedure?

In forma pauperis status is absent from the Federal Rules of Civil Procedure. Yet it is a salient aspect of federal practice for poor litigants.[201] That this quotidian corner of civil procedure has gone unexplored for so long reflects, perhaps, the academy and the judiciary's conception of the federal courts.[202] The federal courts do not often concern themselves with how to borrow from the ways in which state courts and administrative agencies mete out justice to the masses. This insufficient attention to the experiences and interests of poor litigants has led to an underspecified accounting of access to justice in the federal system.

This absence of attention on in forma pauperis rules and similar procedures is all the more glaring because of the recent attention scholars have directed at what they see as an increasingly degraded environment of civil procedure. They have observed various ways in which the quality of civil adjudication has declined in recent years, including the disappearing[203] and diminished[204] trial, the lack of counsel,[205] arbitration's displacement of adjudication,[206] the declining

201. Burbank, *supra* note 175, at 715 (describing how "the banner of simplicity and predictability under which [the Federal Rules] fly is by now false advertising" because "[l]itigants and courts need more guidance than the Federal Rules provide, and to find it they must turn to a bewildering array of local rules, standing orders, and standard operating procedures, to say nothing of case law.").

202. *See, e.g.*, Coleman, *supra* note 184, at 1009 (discussing this neglect). The lack of attention is not limited to proceduralists. *See* Resnik, *supra* note 116, at 1831 (noting that at the "1995 Judicial Conference" there was concern "that the federal courts would become places for poor people and criminal defendants, rather than attract a mix of investments from a diverse set of litigants"); Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 327 n.13 (2016) (noting that "[a] surprisingly small number of scholars have devoted sustained attention to the constitutional status of the poor").

203. *See, e.g.*, John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012).

204. *See, e.g.*, Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131 (2018).

205. *See, e.g.*, Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 Mich. L. Rev. 953 (2000); Michael Zuckerman, *Is There Such a Thing as an Affordable Lawyer?*, ATLANTIC (May 30, 2014), https://www.theatlantic.com/business/archive/2014/05/is-there-such-a-thing-as-an-affordable-lawyer/371746 [https://perma.cc/HB2X-9UYW].

206. *See, e.g.*, Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491 (2016); Paul R. Verkuil, *Privatizing Due Process*, 57 ADMIN. L. REV. 963, 983 (2005) (noting how the Supreme Court has characterized "arbitration as an alternative to judicial decisionmaking").

quality of appellate hearings,[207] and the fall of the class action.[208] Some have drawn the field's attention to how these procedural phenomena impact substantive law and, in turn, certain subsets of civil litigants.[209] Some go so far as to say that the Supreme Court and the Judicial Conference have contributed to this decline because they are overly solicitous of the needs of wealthy interests in civil litigation.[210]

In the context of those worrying trends, this Article is an odd fit. After all, the Article identifies a chaotic corner of federal practice that is not new, but

---

207. *See, e.g.*, William M. Richman, *Rationing Judgeships Has Lost Its Appeal*, 24 PEPP. L. REV. 911, 912 (1997) (identifying how appellate practice has "created different tracks of justice for different cases and different litigants"); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 277 (1996) ("Federal appellate courts are treating litigants differently, a difference that generally turns on a litigant's ability to mobilize substantial private legal assistance.").

208. *See, e.g.*, Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013); *see also* Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 844 (2016) ("It has become a commonplace to say that the class action is dying, or at least, that courts and lawmakers are trying to kill it."); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353 (2010); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1853 (2014) (discussing "the attack on class actions"). For earlier prognoses of some of these phenomena, see Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 508 (1986); and Jack B. Weinstein, *The Ghosts of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and* Erie, 54 BROOK. L. REV. 1, 3, 23-30 (1988), which discusses whether the Rules have become "stingier."

209. *See, e.g.*, Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1470 (1987) (warning that "so long as discretion dominates procedure, procedure will dominate substantive law"); Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 818-22 (2010) (explaining how procedure can favor certain groups over others); Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 484-508 (2014) (arguing that civil rights claimants "have been hit particularly hard by increasingly restrictive applications and interpretations of Rule 23"); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 520 (2010) (arguing that "the changing nature of pretrial practice" disproportionately affects "civil rights and employment discrimination cases").

210. *See, e.g.*, Coleman, *supra* note 184, at 1015-23 (2016) (discussing the role of the Judicial Conference); Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389, 405-410 (discussing the role of the Supreme Court in this area); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 304 (2013) (describing the Roberts Court as having "placed a thumb on the justice scale favoring corporate and government defendants"); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 332 (2012) (concluding that the "Roberts Court has shown similar hostility to litigation as a means of vindicating legal rights" and that "this Court's hostility manifests itself in general procedural doctrine").

longstanding. Indeed, these baroque IFP determinations are an antiquated yet enduring feature of civil adjudication in America. Despite the scholarly alarm about the decline of civil procedure, this procedure, one directed by definition at poor people, has escaped notice.

This Article offers a way out. The multitude of laments reflects a desire to move from a degraded to a dignified procedure. This Article makes such a move. Although in forma pauperis status is only one aspect of federal practice, it illustrates how proceduralists might align civil adjudication in such a way that promotes reasoned judicial administration and protects the interests of litigants.

Much of procedural scholarship considers additional protections for poor litigants (and access-to-justice reforms generally) to be at odds with the demands of rationalized judicial administration. The values of due process are understood to be in conflict with preserving judicial resources. Indeed, the Supreme Court's leading case on procedural due process, *Mathews v. Eldridge*, requires that courts balance the private interests of individuals with the probable value of additional procedure and the government's interests, which include the "fiscal and administrative burdens that the additional or substitute procedur[es] . . . would entail."[211] When the Supreme Court decided *Mathews*, the Court and others were concerned with the costs associated with imposing trial-like procedures on federal administrative adjudication. However, that particular context has not stopped the Supreme Court and lower courts from relying on the test laid out in *Mathews* to determine the appropriate procedural protections for state civil proceedings involving the termination of parental rights,[212] involuntary commitment,[213] maximum-security prisons,[214] and incarceration for civil contempt[215] — not to mention the federal procedures governing the detention of American citizens in prisons maintained by the U.S. military.[216]

---

211. 424 U.S. 319, 335 (1976); *see also* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 468 (1986) (characterizing the *Mathews* test as requiring that "[t]he probable value of additional procedural safeguards in protecting an interest [be] weighed against the state's fiscal and administrative burden in providing them").

212. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981).

213. Heller v. Doe, 509 U.S. 312, 330 (1993).

214. Wilkinson v. Austin, 545 U.S. 209, 224 (2005).

215. Turner v. Rogers, 564 U.S. 431, 444 (2011). *But see* Dusenbery v. United States, 534 U.S. 161, 168 (2002) (disclaiming that *Mathews* is "an all-embracing test for deciding due process claims").

216. Hamdi v. Rumsfeld, 542 U.S. 507, 528-29 (2004) (plurality opinion) ("The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property,

This Article rejects the rights/resources trade-off inherent in the *Mathews* balancing test by proposing a procedure that better protects the interests of litigants while still preserving judicial resources. In short, it proposes a procedure that reinforces both judicial administration and access to justice. In doing so, the Article departs from conceptualizing judges as managers in competition with private arbiters.[217] Such a solution suggests that in this area of civil procedure, judges need not choose between preserving court resources and extending access to justice. Rather, in this instance and perhaps others, judges can serve both goals in the federal system.

This Article, in part, urges judges to take back their time by streamlining a specific, fairly ministerial function. Judges' skills are not always required to make IFP determinations. Federal law has created agencies that make poverty determinations as a matter of course. Those determinations are routine and regular. Federal practice should build on those means tests in making IFP determinations. Federal judges need not make complicated, arcane poverty determinations because such determinations do not necessarily demand adjudicatory expertise. It seems uncontroversial to assert that we should prefer that judges adjudicate disputes rather than compute a litigant's resources. This proposal protects an Article III judge's unique attribute—the capacity for reasoned, impartial adjudication.[218]

A streamlined, shorter form also makes the process more sophisticated and more accurate while preserving the dignity of poor people. By taking advantage of adjunctive eligibility and an ex ante means test, this proposal would allow federal courts to preserve the dignity of IFP movants. A truly poor movant would not need to divulge every detail of her financial situation (and other details like schooling) to receive IFP status. This Article's analysis of in forma pauperis practice shows why the trade-off between procedural protections and judicial resources is not inevitable. It suggests that these principles should not always be

without due process of law' is the test that we articulated in *Mathews v. Eldridge*." (citation omitted) (quoting U.S. CONST. amend. V)).

217. *See* Burbank, *supra* note 175, at 716 (identifying the two strategies that "have dominated recent efforts of the rulemakers and debate in the literature" as efforts "to enhance the power of trial judges to manage litigation" and efforts "to enhance incentives for people to avoid litigation").

218. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 435 (1982) (suggesting that "scarce judicial resources should be conserved and employed only when judges' special skill—adjudication—is required").

treated as competing principles or "either/or" design choices, but rather as mutually reinforcing features that legitimize a dignified procedural system.[219] This Article reconciles that apparent conflict in a specific instance: a poor litigant's first step into federal court.

In addition to reconciling access-to-justice and judicial-administration commitments, this approach also alters the aperture of the access-to-justice lens. Often, the literature on access to justice emphasizes the ways that legal rules and institutions deny entry to poor litigants in the first instance or push them out of court on a technicality.[220] However, this Article suggests that access to justice should include the ways in which poor litigants are treated once they enter the civil adjudicatory system. Put differently, suppose a litigant has a meritorious claim but also must clear bureaucratic hurdles in order to pursue that claim. And suppose those hurdles are only put in the way of litigants who are poor. That situation, which describes IFP determinations at a certain level of generality, should be considered an access-to-justice problem. In this light, IFP determinations are yet another barrier in the realm of access to justice, but one that scholars have failed to see as such. A bottom-up approach to procedure expands the concept of "dignity values," which have typically been seen as "reflect[ing] concern for the humiliation or loss of self-respect which a person might suffer if denied an opportunity to litigate," to include instances where a person is given the opportunity to litigate, but must do so in a way that is demeaning and irrational.[221]

---

219. *See, e.g.*, DEBORAH L. RHODE, ACCESS TO JUSTICE 3-25 (2004) (discussing trade-offs in reform attempts); Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1107-08 (2012) (exploring why this perception of a trade-off between access and cost persists among judges and scholars).

220. *See* SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT 219 (2015) (locating the development of the term "access to justice" in the 1970s by activists, the ABA, and the LSC).

221. Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172. Over the last half century, other scholars have sought to articulate the values of due process. *See, e.g.*, Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 24 (1979) (articulating the importance of a judge "assum[ing] a more active role in the litigation, to make certain that he is fully informed and that a just result will be reached"); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 52 (1976) (noting that, in procedural systems, "[j]ustice in a formal philosophical sense is often defined as equality of treatment"); Resnik, *supra* note 218, at 430 (identifying three "values of due process" including "the accuracy of decisionmaking, the adequacy of reasoning, and the quality of adjudication"); *cf.* Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 899 (1981) (admitting that "equality is a notoriously slippery concept, and its procedural implications are puzzling"). *See generally* Rubenstein, *supra* note 182, at 1915 (discussing this scholarship).

A focus on how people with limited means conduct litigation may also alter ongoing conversations among proceduralists.[222] For example, while bankruptcy procedure is thought of as a subset of civil procedure, a bottom-up approach to both civil and bankruptcy procedure may highlight meaningful discrepancies. Indeed, for bankruptcy proceedings, the topic of in forma pauperis status already raises interesting questions. Why, for example, did Congress create a parallel indigence determination for Chapter 7 debtors that embraces a bright-line means test? Is there some feature of bankruptcy proceedings that demands such a means test that other civil adjudication lacks? Put another way, should the federal courts treat poor people differently if they are in bankruptcy proceedings as opposed to other civil litigation? If so, in what ways?

A bottom-up approach to the study of civil procedure could help scholars bridge conversations in civil procedure with those in other procedural domains like criminal and administrative adjudication.[223] For instance, the line of inquiry for bankruptcy procedure laid out above could also be extended to criminal procedure. Rather than treating those doctrinal boundaries as impermeable, why not research poor litigants across procedural domains, civil and criminal?[224] One

---

222. Relatedly, civil procedure scholars have yet to embrace the emphasis on the role of social movements in shaping law, a mode of analysis that shares much with a bottom-up approach. *See, e.g.*, Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360, 364 (2018) (describing "how movement liberalism has been presented within legal scholarship as a way of reasserting a politically productive relationship between courts, lawyers, and social change from the bottom up"). Legal historians have increasingly borrowed and contributed to the broader historiography of social history. *See* TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 11 (2011) (arguing that "the relationship between law and social change looks different when viewed from the bottom-up perspective"); *see also* RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S (2016); KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972 (2016).

223. *See* Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 133 (2008) (arguing that the "civil-criminal procedural dichotomy is inappropriate for the realities of the twenty-first century").

224. Courts often characterize civil procedure as appropriately deficient compared to criminal procedure. The Supreme Court has justified this discrepancy in the relative lack of procedural protections for civil matters on the grounds that in those proceedings the interests at stake are not as serious. *See, e.g.*, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25 (1981) (noting that "an indigent's right to appointed counsel . . . has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation" and emphasizing that "it is the defendant's interest in personal freedom" that drives that result). *But see id.* at 41 n.8, 42 (Blackmun, J., dissenting) (criticizing the majority for "emphasizing the value of physical liberty to the exclusion of all other fundamental interests" and "opting for the insensitive presumption that incarceration is the only loss of liberty sufficiently onerous to justify a right to appointed counsel"); Douglas J. Besharov, *Terminating Parental Rights: The Indigent Parent's Right to Counsel*

application of this approach could put court fees in civil litigation in conversation with the renewed scholarly interest in bail.[225] This approach would also recognize that many poor individuals are in touch with not just one justice system, but multiple, sometimes simultaneously.

No single article could fully cover this vast landscape of procedural scholarship. Yet, by focusing on a single procedural rule, this Article offers a vantage point from which others may view the field. Ideally, others will now have a few more tools and several more questions for studying procedure from the bottom up.[226]

Furthermore, this shift to a study of procedure from the bottom up is not strictly academic. It is a shift with practical implications. The need for scholarship on practices other than in forma pauperis pleadings is particularly urgent as there are other obstacles that poor people must confront to meaningfully access the federal courts. One could examine the *Twiqbal* revolution (or lack thereof).[227] There is some evidence that the insertion of a plausibility standard into Rule 12(b)(6) disproportionately impacts poor litigants.[228] This approach might also lend support to the new Mandatory Initial Discovery Pilot Project that was implemented last year in the District of Arizona and the Northern District of Illinois.[229] Such a project has potential to level the playing field for under-

After Lassiter v. North Carolina, 15 FAM. L.Q. 205, 221 (1981)("*Lassiter*, for all practical purposes, stands for the proposition that a drunken driver's night in the cooler is a greater deprivation of liberty than a parent's permanent loss of rights in a child.").

225. *See, e.g.*, Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 73-95 (2017) (discussing how states have experimented with different ability-to-pay determinations in the context of bail); Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 527 (2016); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1472-73 (2017).

226. Nor should this research be confined to the federal courts. Civil litigation in state courts could also benefit from careful study using this approach.

227. *See* William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV 693, 700 (2016) (suggesting that "special care may need to be reserved for pro se and IFP plaintiffs in the application of pleading standards").

228. *See id.* at 740 (concluding that the *Twiqbal* empirical studies that include pro se and IFP cases "offer suggestive evidence that pro se and IFP plaintiffs are, in fact, more affected by pleading standards than represented plaintiffs" (citing Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, JUDICATURE, Nov./Dec. 2012, at 127, 130-32, 134)); *see also* Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193, 206-07 (2014). *But see* David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1230-34 (2013) (laying out the limitations of empirical studies of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

229. *See Mandatory Initial Discovery Pilot Project Overview*, *supra* note 182; *see also* J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1731 (2012) (pointing out that

resourced litigants in the discovery process. Indeed, the motivation for bottom-up procedure stems not just from a suspicion that judges and scholars often ignore problems specific to litigants with few resources, but also from the possibility that a shift in focus might yield different methods for building more efficient and equitable procedural systems.

CONCLUSION

This Article has analyzed and contextualized what is ultimately an everyday problem in federal civil practice: the way federal courts require litigants to plead their poverty. In capturing the range of federal in forma pauperis determinations, the Article explored how this specialized procedure could be made more coherent, easing the burdens on litigants and judges alike. To do so, the Article placed federal in forma pauperis determinations side-by-side with other means tests in federal law and with in forma pauperis determinations in the states' court systems. Such a comparison suggests a promising new approach for federal practice.

But in a larger sense, this Article is part of a broader inquiry into how inequality in America has impacted civil procedure. The hope is that this Article spurs some pressing questions about civil justice in the United States. In what other ways do procedural systems adhere to rudimentary practices that collide with the practical realities and interests of poor people? Are there other ways in which the federal courts have allowed civil procedure to channel poor litigants into a distinct procedural system? Does the United States now possess, in effect, a subsystem of civil procedure for litigants who happen to be poor?[230] If so, to paraphrase Albert Camus, can we maintain our devotion simultaneously to the federal courts and access to justice?[231]

The Article answers that last question in the affirmative. It identifies a change to a procedural rule that would honor our commitment to the federal courts without sacrificing our fidelity to equal justice. We can serve both commitments of our procedural system—rational administration of the courts and access to

"plenary discovery process also enables the imposition of significant asymmetric costs upon plaintiffs"); sources cited *supra* note 182.

230. *See, e.g.*, D. VT. R. 45 (giving the district court discretion to "decline to subpoena a witness whose proposed testimony is immaterial or repetitive" only in in forma pauperis and pro se cases); Grostic, *supra* note 15 (recounting how a case brought by an in forma pauperis litigant was transferred to a particular judge per local administrative rule).

231. Camus wrote, "I should like to be able to love my country and still love justice." ALBERT CAMUS, LETTRES A UN AMI ALLEMAND 20 (1945) ("Et je voudrais pouvoir aimer mon pays tout en aimant la justice.").

justice for all litigants. In forma pauperis status is only one instance. There may be others.

APPENDIX A: IN FORMA PAUPERIS PRACTICE IN U.S. DISTRICT COURTS AND STATE COURTS

This Article analyzes all in forma pauperis forms used in the U.S. district courts. To conduct this analysis, I first visited each of the ninety-four federal district courts' websites to determine if the court provided an online form. I collected every form that was available and created a database of the forms. I noted whether the district court referred litigants to the Administrative Office of the U.S. Courts, which provides both a long form (AO 239) and a short form (AO 240) to file in forma pauperis. With the help of a research assistant, I contacted each of the ninety-four district courts' clerks' offices to determine whether they also accept the AO 239 and/or AO 240. We also asked the clerks' offices to confirm whether the information and form listed on the courts' websites were accurate. We then refined the list of district courts that use the AO 239, the AO 240, and/or their own district-specific form. The results of that research are reflected in Table 1. My research assistant and I then independently coded each of the district-specific forms and reconciled the coding. We coded each of the forms across the following categories:

1) Sources of Income:

- Employment/Self-employment
- Real property
- Retirement (social security, pensions, annuities, insurance)
- Disability/Workers' comp/Unemployment payments
- Public assistance
- Interest/Dividends
- Stocks/Bonds/Notes
- Money owed to the movant
- Inheritance/Trust funds/Gifts

2) Expenses:

- Rent/Mortgage
- Utilities
- Food
- Medical
- Transportation
- Money owed by the movant
- Insurance (specific categories)
- Maintenance on home

3) Other:

- Schooling
- Consulted with/Paid an Attorney
- Children/Dependents
- Taxes
- Complaint filed raises claims in other lawsuits
- Filed case in same district
- Cash on hand
- Make and model of car

The results of the coding on sources of income, expenses, and other questions are included in Tables 2, 3, and 4 respectively. These tables only list districts that use their own forms.

In the midst of this research, I decided to survey in forma pauperis rules in state courts as well. I had known that I would research state court systems for potential proposals to improve federal in forma pauperis practice. However, once I began this research, I thought it better to systematically code the state court rules, albeit on more limited grounds. To conduct this analysis, my research assistant and I collected any state in forma pauperis statutes and the relevant state court rules. We replicated our procedures for the federal courts. We coded each state's rules in four categories: (1) means tests; (2) adjunctive eligibility based on public benefits; (3) eligibility based on representation by a legal aid attorney; and (4) some discretionary category such as "substantial hardship." The results of the coding of the state court systems are included in Table 5.

TABLE 1.
IN FORMA PAUPERIS FORMS IN THE U.S. DISTRICT COURTS[232]

District	Form
Middle District of Alabama	Both AO 239/240
Northern District of Alabama	Own
Southern District of Alabama	Own
District of Alaska	Own
District of Arizona	AO 239 + affidavit
Eastern District of Arkansas	AO 240
Western District of Arkansas	AO 240
Central District of California	Own
Eastern District of California	AO 240
Northern District of California	Own
Southern District of California	AO 239
District of Colorado	AO 239
District of Connecticut	Own
District of Delaware	AO 239
District of Columbia	AO 240
Middle District of Florida	Both AO 239/240 + affidavit
Northern District of Florida	Own
Southern District of Florida	Both AO 239/240
Middle District of Georgia	AO 239
Northern District of Georgia	AO 239
Southern District of Georgia	AO 240
District of Guam	AO 240
District of Hawaii	AO 240
District of Idaho	Own
Central District of Illinois	Both AO 239/240

232. The following tables include both Article III district courts and Article I federal district courts for Guam, the Northern Mariana Islands, and the Virgin Islands. *See* 48 U.S.C. §§ 1424, 1611, 1821 (2018).

District	Form
Northern District of Illinois	Own
Southern District of Illinois	Own
Northern District of Indiana	Own
Southern District of Indiana	Both AO 239/240 + own
Northern District of Iowa	AO 240
Southern District of Iowa	AO 240
District of Kansas	Own
Eastern District of Kentucky	Both AO 239/240
Western District of Kentucky	Own
Eastern District of Louisiana	AO 240 + affidavit
Middle District of Louisiana	Both AO 239/240 + affidavit
Western District of Louisiana	Own
District of Maine	AO 240
District of Maryland	AO 239 + affidavit
District of Massachusetts	AO 240 + affidavit
Eastern District of Michigan	AO 240
Western District of Michigan	AO 239
District of Minnesota	Own
Northern District of Mississippi	AO 240
Southern District of Mississippi	AO 239
Eastern District of Missouri	Own
Western District of Missouri	Own
District of Montana	AO 239
District of Nebraska	AO 240
District of Nevada	AO 240
District of New Hampshire	AO 239 + own
District of New Jersey	AO 239
District of New Mexico	AO 239
Eastern District of New York	AO 240
Northern District of New York	AO 240
Southern District of New York	Own

District	Form
Western District of New York	Own
Eastern District of North Carolina	AO 239
Middle District of North Carolina	AO 239 + own
Western District of North Carolina	Both AO 239/240
District of North Dakota	Own
District of the Northern Mariana Islands	AO 239
Northern District of Ohio	Own
Southern District of Ohio	Own
Eastern District of Oklahoma	Own
Northern District of Oklahoma	Own
Western District of Oklahoma	Own
District of Oregon	Own
Eastern District of Pennsylvania	AO 239
Middle District of Pennsylvania	AO 240
Western District of Pennsylvania	Both AO 239/240
District of Puerto Rico	AO 240 + affidavit
District of Rhode Island	Own
District of South Carolina	AO 240
District of South Dakota	Both AO 239/240
Eastern District of Tennessee	Own
Middle District of Tennessee	AO 239
Western District of Tennessee	AO 239
Eastern District of Texas	Own
Northern District of Texas	AO 239
Southern District of Texas	AO 240
Western District of Texas	AO 239/240 + own
District of Utah	AO 240
District of Vermont	AO 239/240 + affidavit
District of the Virgin Islands	Own
Eastern District of Virginia	AO 239
Western District of Virginia	Both AO 239/240

District	Form
Eastern District of Washington	Own
Western District of Washington	Own
Northern District of West Virginia	Own
Southern District of West Virginia	Own
Eastern District of Wisconsin	Own
Western District of Wisconsin	Own
District of Wyoming	AO 239

TABLE 2.
INCOME QUESTIONS ON IN FORMA PAUPERIS FORMS IN THE U.S. DISTRICT COURTS

	Employment/ Self-employment	Real Property	Retirement (social security, pension, annuities, insurance)	Disability/ Workers' comp/ Unemployment payments	Public assistance	Interest/ Dividends	Stocks/ Bonds/ Notes	Money owed to the movant	Inheritance/ Trust funds/Gifts
AO 240	⋆	⋆	⋆	⋆		⋆	⋆		⋆
AO 239	⋆	⋆	⋆	⋆	⋆	⋆		⋆	⋆
Northern District of Alabama	⋆	⋆	⋆	⋆	⋆	⋆	⋆		⋆
Southern District of Alabama	⋆	⋆	⋆		⋆	⋆	⋆		⋆
District of Alaska	⋆	⋆	⋆	⋆	⋆	⋆	⋆		⋆
District of Arizona (affidavit; also requires AO 239)	⋆	⋆	⋆	⋆	⋆	⋆		⋆	⋆
Central District of California	⋆	⋆	⋆			⋆	⋆		⋆
Northern District of California	⋆	⋆	⋆		⋆		⋆		
District of Connecticut	⋆	⋆	⋆	⋆	⋆	⋆	⋆		⋆

	Employment/ Self-employment	Real Property	Retirement (social security, pension, annuities, insurance)	Disability/ Workers' comp/ Unemployment payments	Public assistance	Interest/ Dividends	Stocks/ Bonds/ Notes	Money owed to the movant	Inheritance/ Trust funds/Gifts
Middle District of Florida (affidavit; also requires AO 239/240)	*	*	*	*	*	*	*	*	*
Northern District of Florida	*	*	*	*	*	*	*		*
District of Idaho	*	*	*	*	*	*		*	*
Northern District of Illinois	*	*	*	*	*	*	*		*
Southern District of Illinois	*	*	*	*		*	*		*
Northern District of Indiana	*	*					*		
Southern District of Indiana	*	*	*	*	*	*	*		*
District of Kansas	*	*	*	*	*	*	*	*	*
Western District of Kentucky	*	*	*	*	*	*	*	*	*

	Employment/ Self-employment	Real Property	Retirement (social security, pension, annuities, insurance)	Disability/ Workers' comp/ Unemployment payments	Public assistance	Interest/ Dividends	Stocks/ Bonds/ Notes	Money owed to the movant	Inheritance/ Trust funds/Gifts
Eastern District of Louisiana (affidavit; also requires AO 240)	*	*	*			*	*		
Middle District of Louisiana (affidavit; also requires AO 239/240)	*	*	*	*	*	*	*		*
Western District of Louisiana	*	*	*	*	*	*	*		*
District of Maryland (affidavit; also requires AO 239)	*	*	*	*	*	*		*	*
District of Massachusetts (affidavit; also requires AO 240)	*	*	*	*	*	*		*	*
District of Minnesota	*	*	*	*	*	*		*	*
Eastern District of Missouri	*	*	*	*		*	*		*

	Employment/ Self-employment	Real Property	Retirement (social security, pension, annuities, insurance)	Disability/ Workers' comp/ Unemployment payments	Public assistance	Interest/ Dividends	Stocks/ Bonds/ Notes	Money owed to the movant	Inheritance/ Trust funds/Gifts
Western District of Missouri	*	*	*	*	*	*	*		*
District of New Hampshire	*	*	*	*		*	*		*
Southern District of New York	*	*	*	*	*	*	*		*
Western District of New York	*	*	*	*	*	*	*		*
Middle District of North Carolina	*	*	*	*	*	*	*		*
District of North Dakota	*	*	*	*		*	*		*
Northern District of Ohio	*	*	*	*	*	*	*	*	*
Southern District of Ohio	*	*	*			*	*		
Eastern District of Oklahoma	*	*					*		*
Northern District of Oklahoma	*	*	*	*	*	*		*	*

	Employment/ Self-employment	Real Property	Retirement (social security, pension, annuities, insurance)	Disability/ Workers' comp/ Unemployment payments	Public assistance	Interest/ Dividends	Stocks/ Bonds/ Notes	Money owed to the movant	Inheritance/ Trust funds/Gifts
Western District of Oklahoma	*	*	*	*		*	*		*
District of Oregon	*	*	*	*		*	*		*
District of Puerto Rico (affidavit; also requires AO 240)	*	*	*	*	*		*		*
District of Rhode Island	*	*	*	*		*	*		*
Eastern District of Tennessee	*	*	*			*	*	*	*
Eastern District of Texas	*	*	*			*	*		*
Western District of Texas	*	*	*	*	*	*	*		
District of Vermont (affidavit; also requires AO 239/240)	*	*	*			*	*		*
District of the Virgin Islands	*	*	*	*		*	*		*
Eastern District of Washington	*	*	*	*		*	*		*

	Employment/ Self-employment	Real Property	Retirement (social security, pension, annuities, insurance)	Disability/ Workers' comp/ Unemployment payments	Public assistance	Interest/ Dividends	Stocks/ Bonds/ Notes	Money owed to the movant	Inheritance/ Trust funds/Gifts
Western District of Washington	*	*	*	*	*	*	*		*
Northern District of West Virginia	*	*	*	*	*	*		*	*
Southern District of West Virginia	*	*	*	*		*	*		*
Eastern District of Wisconsin	*	*	*	*	*	*	*		*
Western District of Wisconsin	*	*	*	*	*	*	*		*

TABLE 3.
EXPENSE QUESTIONS ON IN FORMA PAUPERIS FORMS IN THE U.S. DISTRICT COURTS

	Rent/ Mortgage	Utilities	Food	Medical	Transportation	Money owed by the movant	Insurance (categories)	Maintenance on home
AO 240	*	*			*	*		
AO 239	*	*	*	*	*		* (homeowner's, life, health, motor vehicle, other)	*
Northern District of Alabama						*		
Southern District of Alabama	*					*		
District of Alaska								
District of Arizona (affidavit; also requires AO 239)	*	*	*	*	*	*	*	*
Central District of California								
Northern District of California	*	*	*			*		
District of Connecticut	*	*	*	*		*	* (asks to list types)	
Middle District of Florida (affidavit; also requires AO 239/240)	*	*	*	*	*	*	*	*

	Rent/ Mortgage	Utilities	Food	Medical	Transportation	Money owed by the movant	Insurance (categories)	Maintenance on home
Northern District of Florida	*	*	*	*	*	*	* (car, medical, dental)	
District of Idaho	*	*	*	*	*		*	*
Northern District of Illinois								
Southern District of Illinois	*	*			*	*		
Northern District of Indiana								
Southern District of Indiana	*	*	*	*	*	*		*
District of Kansas	*	*	*	*	*	*	* (homeowner's or renter's, car, health, life)	*
Western District of Kentucky	*	*	*	*	*		* (homeowner's or renter's, car, health, life)	*
Eastern District of Louisiana (affidavit; also requires AO 240)	*	*				*		
Middle District of Louisiana (affidavit; also requires AO 239/240)						*		

	Rent/ Mortgage	Utilities	Food	Medical	Transportation	Money owed by the movant	Insurance (categories)	Maintenance on home
Western District of Louisiana[233]						*		
District of Maryland (affidavit; also requires AO 239)	*	*	*	*	*		* (homeowner's or renter's, life, health, motor vehicle, other)	*
District of Massachusetts (affidavit; also requires AO 240)	*	*	*	*	*		* (homeowner's or renter's, life, health, motor vehicle, other)	*
District of Minnesota	*	*	*	*	*		*	*
Eastern District of Missouri	*	*			*	*		
Western District of Missouri	*	*	*			*	*	
District of New Hampshire						*		
Southern District of New York	*	*			*	*		
Western District of New York	*	*	*					
Middle District of North Carolina						*		

233. The Western District of Louisiana's form does ask the individual to "[l]ist [his or her] monthly living expenses." *Application to Proceed In Forma Pauperis Under Section 706 (f) of the Civil Rights Act of 1964*, U.S. DISTRICT CT. FOR W. DISTRICT LA. 3 (Dec. 6, 2012), https://www.lawd.uscourts.gov/sites/lawd/files/UPLOADS/LAWD_IFP_Non_Prisoner.pdf [https://perma.cc/DL3T-DUU2].

	Rent/ Mortgage	Utilities	Food	Medical	Transportation	Money owed by the movant	Insurance (categories)	Maintenance on home
District of North Dakota						*		
Northern District of Ohio	*	*	*	*	*		*	*
Southern District of Ohio	*	*				*		
Eastern District of Oklahoma	*					*		
Northern District of Oklahoma	*	*	*	*	*		*	*
Western District of Oklahoma	*	*			*	*		
District of Oregon	*	*			*	*		
District of Puerto Rico (affidavit; also requires AO 240)	*	*	*		*	*		
District of Rhode Island	*	*			*	*		
Eastern District of Tennessee	*	*	*	*	*		* (automobile, hospitalization, life)	
Eastern District of Texas	*	*	*	*	*		*	*
Western District of Texas	*	*		*	*	*	* (asks for what purpose)	
District of Vermont (affidavit; also requires AO 239/240)								
District of the Virgin Islands	*	*			*	*		

	Rent/ Mortgage	Utilities	Food	Medical	Transportation	Money owed by the movant	Insurance (categories)	Maintenance on home
Eastern District of Washington	*	*			*	*		
Western District of Washington	*	*			*	*		
Northern District of West Virginia	*	*	*	*	*		*	*
Southern District of West Virginia								
Eastern District of Wisconsin	*	*	*	*				
Western District of Wisconsin	*	*	*	*	*		*	

TABLE 4.
OTHER QUESTIONS ON IN FORMA PAUPERIS FORMS IN THE U.S. DISTRICT COURTS

	Schooling	Consulted with/ Paid an attorney	Children/ Dependents	Taxes	Complaint filed raises claims in other lawsuits	Filed case in same district	Cash on hand	Make & model of car
AO 240			*					
AO 239	*	*	*	*				*
Northern District of Alabama		*	*					
Southern District of Alabama								*
District of Alaska			*					*
District of Arizona (affidavit; also requires AO 239)	*	*	*	*				*
Central District of California			*	*			*	
Northern District of California			*		*		*	*
District of Connecticut	*		*			*	*	*
Middle District of Florida (affidavit; also requires AO 239/240)			*					*

	Schooling	Consulted with/ Paid an attorney	Children/ Dependents	Taxes	Complaint filed raises claims in other lawsuits	Filed case in same district	Cash on hand	Make & model of car
Northern District of Florida		*	*				*	*
District of Idaho	*	*	*	*				*
Northern District of Illinois			*					*
Southern District of Illinois			*				*	
Northern District of Indiana			*				*	
Southern District of Indiana		*	*					*
District of Kansas	*	*	*	*				*
Western District of Kentucky		*	*	*				*
Eastern District of Louisiana (affidavit; also requires AO 240)			*				*	
Middle District of Louisiana (affidavit; also requires AO 239/240)			*					
Western District of Louisiana			*					

	Schooling	Consulted with/ Paid an attorney	Children/ Dependents	Taxes	Complaint filed raises claims in other lawsuits	Filed case in same district	Cash on hand	Make & model of car
District of Maryland (affidavit; also requires AO 239)	*	*	*	*			*	*
District of Massachusetts (affidavit; also requires AO 240)	*	*	*	*			*	*
District of Minnesota	*	*	*	*				*
Eastern District of Missouri			*				*	
Western District of Missouri			*				*	*
District of New Hampshire			*					
Southern District of New York			*				*	
Western District of New York			*				*	
Middle District of North Carolina			*				*	
District of North Dakota			*				*	
Northern District of Ohio		*	*	*			*	*

	Schooling	Consulted with/ Paid an attorney	Children/ Dependents	Taxes	Complaint filed raises claims in other lawsuits	Filed case in same district	Cash on hand	Make & model of car
Southern District of Ohio			*				*	
Eastern District of Oklahoma			*			* (must be notarized)		*
Northern District of Oklahoma	*	*	*	*				*
Western District of Oklahoma			*					
District of Oregon			*					
District of Puerto Rico (affidavit; also requires AO 240)			*				*	
District of Rhode Island			*				*	
Eastern District of Tennessee			*	*			*	*
Eastern District of Texas			*	*			*	*
Western District of Texas			*				*	

	Schooling	Consulted with/ Paid an attorney	Children/ Dependents	Taxes	Complaint filed raises claims in other lawsuits	Filed case in same district	Cash on hand	Make & model of car
District of Vermont (affidavit; also requires AO 239/240)			*					
District of the Virgin Islands			*					
Eastern District of Washington			*					
Western District of Washington			*				*	
Northern District of West Virginia		*	*	*				*
Southern District of West Virginia			*					
Eastern District of Wisconsin			*					*
Western District of Wisconsin			*					*

TABLE 5.
IN FORMA PAUPERIS RULES IN THE STATE COURTS

State	Means-test (FPL%)	Legal aid waiver	Adjunctive eligibility (public benefits)	Discretionary standard
Alabama				*
Alaska		*		*
Arizona	* (150%)	*	* (TANF, SNAP)	*
Arkansas	*			*
California	* (125%)		* (Medicaid, SNAP, TANF, General Assistance, SSI, State Supplementary Payment, Tribal TANF, In-Home Supportive Services, or Cash Assistance Program for Immigrants)	*
Colorado	* (125%)	*		*
Connecticut	* (125%)		* ("Public assistance" including, but not limited to General Assistance, TANF, AABD, SNAP, or SSI)	*
Delaware				*
District of Columbia			* (SSI, SNAP, TANF, and Medicaid)	
Florida	* (200%)		* (TANF, poverty-related veterans' benefits, or SSI)	*
Georgia				*
Hawaii				*
Idaho		*		*
Illinois	* (125%)		* (SSI, AABD, TANF, SNAP, General Assistance, Transitional Assistance, or Family Assistance)	*
Indiana		*		*

State	Means-test (FPL%)	Legal aid waiver	Adjunctive eligibility (public benefits)	Discretionary standard
Iowa	*			*
Kansas				*
Kentucky	* (determined by Kentucky Supreme Court)			*
Louisiana	* (125%)		* ("Public assistance benefits" but does not specify)	*
Maine			* (specifies "poverty-based" public benefits)	*
Maryland	*	*		*
Massachusetts	* (125%)		* (Medicaid, TANF, AABD, SSI, or Veterans' Benefits)	*
Michigan	* (125%)		* (SSI, TANF)	*
Minnesota	* (125%)	*	* (TANF, SSI, Medicaid, MinnesotaCare, Medicare Part B or Part D, Low Income Home Energy Assistance Program, or SNAP)	*
Mississippi				*
Missouri	* (125%)	*		*
Montana	* (133%)			*
Nebraska	* (125%)		* (TANF, AABD, poverty-related veterans' benefits, SNAP, refugee benefits, Medicaid, SSI, or General Assistance)	*
Nevada		*		*

State	Means-test (FPL%)	Legal aid waiver	Adjunctive eligibility (public benefits)	Discretionary standard
New Hampshire		*		*
New Jersey	*	*		*
New Mexico	*		* (TANF, General Assistance, SSI, SSDI, Veterans' disability benefits if sole source of income, SNAP, Medicaid, public-assisted housing, or Department of Health, Case Management Services)	*
New York		*		*
North Carolina		*	* (TANF, SSI, SNAP)	*
North Dakota	* (125%)		* (TANF, SSI, Medicaid)	
Ohio				*
Oklahoma				*
Oregon				*
Pennsylvania		*		*
Rhode Island				*
South Carolina		*		*
South Dakota[234]				
Tennessee	* (125%)			
Texas		*	* ("Government entitlement program")	*
Utah	* (150%)			*
Vermont	* (150%)		* (Benefit "must be significant to income")	*

234. I could not find any in forma pauperis application or standard in South Dakota law or in the state's court rules.

State	Means-test (FPL%)	Legal aid waiver	Adjunctive eligibility (public benefits)	Discretionary standard
Virginia	* (125%)		*	
Washington	* (125%)	*	* (TANF, Housing and Essential Needs, SSI, Federal poverty-related veterans' benefits, SNAP)	*
West Virginia	*			*
Wisconsin	* (125%)	*	* ("Means-tested public assistance" such as TANF, General Assistance, Medicaid, SSI, SNAP, and veterans' benefits)	*
Wyoming				*

APPENDIX B: PROPOSED IN FORMA PAUPERIS FORM[235]

UNITED STATES DISTRICT COURT

for the _____

_____
(Plaintiff/Petitioner)

v. Case No._____

_____
(Defendant/Respondent)

APPLICATION TO PROCEED IN DISTRICT COURT
WITHOUT PREPAYING FEES OR COSTS

I am a plaintiff, defendant, petitioner, or respondent in a case involving (*explain the nature of the case)*

_____.

I declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief requested. In support of this application, I answer the following questions under penalty of perjury and acknowledge that a false statement may result in a dismissal of my case.

I. Eligibility

1. Do you receive SNAP, Medicaid, or SSI (please specify)?
2. Are you represented by a lawyer from a legal aid organization (please specify)?
   If you answered Yes to either of the above, please skip to the bottom of the page and sign.
   If you answered No to both, please proceed.

II. Income and Assets

3. Are you currently employed? Yes / No
4. What is your monthly income from employment and any other sources? $ _____
5. What are your total assets excluding the home you live in? $ _____

III. Expenses

6. How much are your monthly housing costs (rent/mortgage payments)? $ _____
7. How much do you pay in utilities each month? $ _____
8. How much (if any) are your monthly medical expenses? $ _____
9. How much do you spend on food each month? $ _____
10. Do you have any other monthly expenses? $ _____
11. **Total** Average Monthly Expenses (Add Answers #6 through #10): $ _____

12. Do you have anyone who lives with you and is dependent on you for support? If so, list the initials and age: _____

If there is anything else that you feel impacts your ability to pay the filing fee, please feel free to explain below or attach a written statement.

DATE: _____ SIGNATURE: _____

---

235. The author and publisher expressly disclaim any copyright ownership in this IFP form. However, all other contents of this Article are protected under copyright law and are the exclusive property of the author and publisher.