# A Sunny Deposition: How the *In Forma Pauperis* Statute Provides an Avenue for Indigent Prisoners to Seek Depositions Without Accompanying Fees

*Shon R. Hopwood*[1]*

It is 6 a.m. on a Sunday. The prisoner rocks back and forth on the edge of a two-inch thick mattress. Pain pulls him[2] out of a deep sleep and his eyes remain half-open as orange rays of light flood between the bars. His abdominal pain worsens, and he walks down to the guard's office to report his symptoms through gritted teeth. The guard telephones the prison clinic and relays their message to the prisoner: he can visit the medical facility the next morning, twenty-four hours away.

The pain becomes intolerable. That afternoon, he reports his condition to the day guard. The cycle continues. Late that night, the prisoner awakens, his teeth chattering so violently that the noise reverberates in the cell. He crawls to the door. He pounds on it. A guard arrives at the narrow window. The prisoner's cellmate yells at the guard to do something, while the prisoner, unable to speak, lies on the floor groaning. On his walkie-talkie, the guard reports a medical emergency.

Thirty minutes later, a physician's assistant appears. Vital signs are taken. The prisoner is given two tablets of ibuprofen, the prison world's universal remedy. The medic tells the guard that the situation is definitely *not* an emergency.

The prisoner suffers through the night. Two prisoners carry him to the medical facility early the next morning. There, he waits two hours before another examination. Thirty-six hours after the prisoner first reported the

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[1] Candidate for B.S., Bellevue University, 2011. Mr. Hopwood plans to attend law school in fall 2011. In 1998, Mr. Hopwood was sentenced to serve twelve years and three months in federal prison for his role in five armed bank robberies. He served close to eleven years in custody and was released in April 2009. While in prison, the United States Supreme Court granted two petitions for certiorari that Mr. Hopwood wrote in his prison law library.

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[2] Editor's Note: The *Harvard Civil Rights–Civil Liberties Law Review*'s policy is to use the feminine article. Since Mr. Hopwood's experience is with all-male prisons, and because most prisoners are male, he uses the masculine article.

abdominal pain, he is finally examined by a doctor, who quickly concludes that the prisoner's appendix has perforated. A surgery is performed. A second surgery is performed because the appendix perforation caused an abscess and infection of the entire lining of the abdomen. Later, the prisoner learns that the major reason for appendix perforation is delay in diagnosis and treatment.

After a few weeks, the prisoner is returned to the general population. He finds cases in the prison's law library stating that when prison staff members are deliberately indifferent to a serious medical need, it violates the Eighth Amendment's prohibition of cruel and unusual punishment. Although his prison job pays only twelve cents an hour and he barely possesses the money needed to purchase laundry detergent and ramen noodle soup from the commissary, the prisoner files a civil action against the prison's medical personnel.

The judge orders discovery. Because the prison doctor now claims that the infections were not a result of delayed treatment, the judge informs the prisoner that he needs to prove his claim through expert testimony. The prisoner sits in his cell deliberating on how he might succeed with such meager financial resources. He pleads to the court and requests a deposition with an expert, arguing that he is unable to pay fees related to the deposition. The judge denies his request a first time, a second time, and then a final time by granting the prison's motion for summary judgment.

If you were the prisoner, would you feel that your constitutional rights were meaningful or hollow?

## INTRODUCTION

The above hypothetical is not an anomaly. Over the course of serving a decade in prison, I watched prisoners with serious medical issues have their requests for treatment denied or delayed. The types of denied or delayed care I witnessed were not cases on the outer edge of medical technology or care; the majority were deliberate or vindictive denials of care,[3] and the re-

[3] The following cases are representative of the kinds of treatment (and lack thereof) that I witnessed during my prison stay. *See, e.g.*, Gibson v. Moskowitz, 523 F.3d 657, 663 (6th Cir. 2008) (finding deliberate indifference of prison psychiatrist for failing to aid inmate, who eventually died of dehydration, where psychiatrist knew that detention room was over ninety degrees, inmate had vomited, and inmate had lost over forty pounds within three days); Goebert v. Lee County, 510 F.3d 1312, 1328 (11th Cir. 2007) (dismissing on procedural grounds deliberate indifference claim against jail facility commander who refused pretrial detainee's request for medical attention after leaking amniotic fluids, and who indicated he automatically disbelieved any medical complaint by an inmate merely because "inmates had lied before"); Easter v. Powell, 467 F.3d 459, 464 (5th Cir. 2006) (addressing deliberate indifference claim against prison nurse who refused to follow inmate's prescribed course of treatment even while knowing inmate had heart condition, was experiencing chest pain, and did not have prescribed heart medication); Greeno v. Daley, 414 F.3d 645, 654–55 (7th Cir. 2005) (dismissing deliberate indifference claim against prison nurse who allegedly deprived prisoner of medication and persisted with ineffective treatment despite inmate's deteriorating condition).

mainder were a result of prison budget decreases coinciding with growing prison overcrowding.[4]

The reasons why prisoners receive inadequate treatment are legion, but based on my experience, I believe that one reason this problem continues unabated is the lack of an adequate deterrent; the percentage of successful prisoner claims hovers between 10–15%.[5] Prison staff understand that only the most flagrant violations stand a chance at success, and even then, the odds are against the prisoner. In order for prisoners to receive the care they are constitutionally guaranteed, they must, as a group, secure greater success in proving Eighth Amendment claims.[6] This article is meant to facilitate that process.

While the reasoning behind this article may apply to any indigent litigant claiming that his constitutional rights have been violated, due to limited space, I purposely am focusing on one specific claim from a particular type of indigent litigant; a prisoner claiming that prison officials were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment. And because the majority of indigent prisoner claims are litigated pro se, I also purposely wrote the article in a way so that prisoners can copy and paste these arguments directly into their requests for depositions.

One reason why deliberate indifference claims are rarely successful when filed by indigent prisoners is that once a prisoner has met the requirements for filing *in forma pauperis* ("IFP") and satisfied the stringent guidelines established by the Prison Litigation Reform Act ("PLRA"),[7] the prisoner faces one final and difficult hurdle: finding a way to procure the evidence necessary to prove denied or delayed medical care had a detrimental effect. This is especially true when the prisoner needs expert evidence,[8] as the ability to obtain expert witnesses can be a decisive factor in civil litigation.[9]

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[4] *See* Amy Vanheuverzwyn, *The Law and Economics of Prison Health Care: Legal Standards and Financial Burdens*, 13 U. PA. J.L. & SOC. CHANGE 119, 120 (2010) (citing JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS 38 (2006), *available at* http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf (finding that in California one prisoner died every week as a result of medical malpractice or neglect in 2005)).

[5] Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1598–99, 1603 (2003).

[6] *Cf.* Owen v. City of Independence, 445 U.S. 622, 651 (1980) (noting civil rights suits are "intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well").

[7] 28 U.S.C. § 1915 (2006).

[8] *See, e.g.*, Langston v. Peters, 100 F.3d 1235, 1240 (7th Cir. 1996) (holding that inmate alleging deliberate indifference delay in medical care must place "*verifying medical evidence* in the record to establish the detrimental effect of delay" or risk dismissal of his suit) (emphasis added) (citation omitted).

[9] The National Center for State Courts concluded that one of the "three main financial barriers to effective access to the trial court" is "third-party expenses," such as "deposition costs and expert witness fees." NAT'L CTR. FOR STATE COURTS, U.S. DEP'T OF JUSTICE, TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY 9 (1997), *available at* http://www.ncjrs.org/pdffiles1/161570.pdf.

In most cases, pauper prisoners are expected to secure medical expert evidence through the normal means of discovery. While interrogatories sometimes prove useful, prisoners often need a medical professional to examine them in order for that professional to issue an opinion on the detrimental effect of non-treatment or delayed treatment. In such cases, personal examinations coupled with depositions are the only means for a pauper prisoner to gain the evidence necessary to survive summary judgment. The problem is that pauper prisoners can rarely afford the subpoena, witness, and court reporter fees necessary to obtain such a deposition.

The solution is addressed by the IFP statute, 28 U.S.C. § 1915, in which Congress authorized the "commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefore . . . ."[10] Congress also provided that "officers of the court shall issue and serve all process, and perform all duties in such cases" and "[w]itnesses shall attend as in other cases."[11] These two provisions, in tandem, should permit indigent litigants the ability to administer depositions without the prepayment of fees.

The argument that the IFP statute provides a waiver of deposition fees is not new, and unfortunately, it has not been regarded favorably by courts. It was raised in the 1980s and early 1990s, during the zenith of frivolous prisoner litigation and prior to the passage of the PLRA. With regard to witness fees, several federal courts of appeals were asked whether the IFP statute required the government to subsidize witness fees both during discovery and at trial; every court that faced the issue concluded that it did not.[12] For the last twenty years, the argument for a different construction of the IFP statute has lain dormant, though the circuit courts' decisions have been called into question by a subsequent Supreme Court ruling,[13] and the policy considerations underlying those decisions have been ameliorated by the passage of the PLRA. In addition, the majority of courts giving the IFP statute a narrow construction failed to consider a canon of statutory construction given prominence by the Supreme Court in recent years. The doctrine of constitutional avoidance counsels against a construction of a statute that would produce serious questions of its constitutionality. This doctrine has force with regard to the IFP statute, because if indigent litigants are deprived of the means to secure the evidence needed to prove their claims, serious due process and equal protection questions arise. For these reasons,

[10] 28 U.S.C. § 1915(a)(1) (2006).

[11] 28 U.S.C. § 1915(d) (2006).

[12] *See, e.g.*, Pedraza v. Jones, 7 F.3d 194, 196 (5th Cir. 1995); Malik v. Lavalley, 994 F.2d 90, 90 (2d Cir. 1993); Tedder v. Odel, 890 F.2d 210, 211–12 (9th Cir. 1989); Boring v. Kozakiewicz, 833 F.2d 468, 474 (3d Cir. 1987); McNeil v. Lowney, 831 F.2d 1368, 1373–74 (7th Cir. 1987); Cookish v. Cunningham, 787 F.2d 1, 4–5 (1st Cir. 1986); U.S. Marshals Serv. v. Means, 741 F.2d 1053, 1056–57 (8th Cir. 1984) (en banc); Johnson v. Hubbard, 698 F.2d 286, 289–90 (6th Cir. 1983).

[13] Mallard v. U.S. District Court, 490 U.S. 296 (1989).

prisoners should argue that the IFP statute must be revisited as to witness fees.

With regard to court officers' fees for depositions, there currently exists case law that supports prisoners' ability to obtain a waiver of those fees. My suggestion is for prisoners to use this body of law to advocate for a waiver of fees related to administering depositions.

In the first section of this article, I describe the history of the IFP statute and the current circuit court jurisprudence on the scope of the statute. In the second section, I explain why indigent prisoners alleging deliberate indifference claims need the ability to conduct depositions. Third, I explain the arguments prisoners should put forth as to why the IFP statute allows district courts to waive fees associated with depositions.

## I. THE *IN FORMA PAUPERIS* STATUTE

Title 28, United States Code, Section 1915, the *In Forma Pauperis* ("IFP") statute, enables indigent parties to file actions in federal court without prepayment of filing and related fees. The original IFP statute was enacted by Congress in 1892[14] and was based, in part, on the belief dating back to the Magna Carta that indigent individuals should not be barred from court proceedings due to a lack of financial resources.[15] Since its inception, the IFP statute has been used by scores of indigent litigants seeking justice in the federal courts and has been the primary means through which prisoners litigate violations of their constitutional rights.

Both the Congressional Record and House Report provide insight into the policies embodied in the IFP statute. Representative Culberson, a supporter of the bill, acknowledged that the effect of the bill would be to open up the courts "to a class of persons who are now denied the right of bringing suits in the courts of the United States, that have no money or property by which to comply with the rules of the courts with respect to costs."[16] The House Report states that the question before Congress was a simple one: "[w]ill the Government allow its courts to be practically closed to its own citizens, who are conceded to have valid and just rights, because they happen to be without the money to advance pay to the tribunals of justice?"[17] Congress answered the question by passing the IFP statute and noting many "enlightened States" already possessed similar IFP statutes, and that the federal government "ought to keep pace with this enlightened judgment."[18]

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[14] 28 U.S.C. § 1915 (2006) (originally enacted as Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252).

[15] Stephen M. Feldman, *Indigents in the Federal Courts: The In Forma Pauperis Statute—Equality and Frivolity*, 54 FORDHAM L. REV. 413, 413 (1985).

[16] 23 CONG. REC. 5171, 5199 (1892) (statement of Rep. Culberson).

[17] H.R. REP. NO. 52-1079, at 2 (1892).

[18] *Id.*

This newfound "enlightened judgment," however, received a stingy reception from the courts. The Supreme Court, first addressing the statute in *Bradford v. Southern Railway*,[19] narrowly construed the statute and held that it did not apply to appellate proceedings. Due to the Court's construction, Congress broadened the statute's scope through amendments—a course of action that continued throughout the twentieth century. In 1910, for example, Congress amended the statute to include defendants within its purview and applied it to appellate matters.[20] Congress further amended the statute in 1922 by providing that the United States would pay for printing the record for use in a Writ of Error or criminal appeal.[21] In 1944, Congress provided that the federal government would pay the transcript fees for appeals *in forma pauperis*.[22] And in 1959, Congress allowed indigent non-citizens the ability to proceed as paupers.[23]

But not every amendment broadened the scope of § 1915. Congress in 1996 added restrictions to the IFP statute through the PLRA. The PLRA requires that all incarcerated individuals must eventually pay court filing fees in full.[24] The Act also places a "three strikes" provision into the IFP statute: for every lawsuit or appeal dismissed by a judge as frivolous, one "strike" is assessed. Once three such strikes accumulate, a prisoner cannot file another lawsuit *in forma pauperis* and must pay the filing fee in full before a court will docket the case.[25] The only exception to the three strikes rule occurs if a prisoner is in imminent danger of serious physical injury.[26]

The new restrictions added to the IFP statute were welcomed by the courts. Indeed, the PLRA has withstood several constitutional challenges.[27] However, while the PLRA amendments were heralded by Congress and upheld by the courts, scholars have noted that these new statutory provisions place significant burdens on prisoners earning little to no money while incarcerated.[28]

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[19] 195 U.S. 243 (1904).

[20] Act of June 25, 1910, ch. 435, § 1, 36 Stat. 866 (codified as amended at 28 U.S.C. § 1915 (2006)).

[21] Act of June 27, 1922, ch. 246, § 1, 42 Stat. 666 (codified as amended at 28 U.S.C. § 1915 (2006)).

[22] Act of Jan. 20, 1944, ch. 3, § 5A, 58 Stat. 5 (codified as amended at 28 U.S.C. § 753 (2006)).

[23] Act of Sept. 21, 1959, 73 Stat. 590 (codified as amended at 28 U.S.C. § 1915 (2006)).

[24] 28 U.S.C. § 1915(b)(1) (2006).

[25] 28 U.S.C. § 1915(g) (2006).

[26] *Id.*

[27] *See, e.g.*, Miller v. French, 530 U.S. 327, 341–42 (2000) (rejecting separation of powers challenge); Wilson v. Yaklich, 148 F.3d 596, 602–06 (6th Cir. 1998) (rejecting equal protection, right of access, substantive due process, bill of attainder, and ex post facto challenges); Rivera v. Allin, 144 F.3d 719, 723–28 (11th Cir. 1998) (rejecting right of access, separation of powers, due process, and equal protection challenges); Carson v. Johnson, 112 F.3d 818, 821–23 (5th Cir. 1997) (rejecting right of access, due process, and equal protection challenges).

[28] *See* Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 140–42 (2008).

The IFP statute is now in its 118th year. Just as in 1892, it is the primary means for indigent litigants to access the courts. The statute provides that:

> (a)(1) Subject to subsection (b), any 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. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.[29]

The statute also allows courts to direct payment by the United States of certain litigation expenses, such as:

> (c)(1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court;
> (2) preparing a transcript of proceedings before a United States magistrate judge in any civil or criminal case, if such transcript is required by the district court . . . ; and
> (3) printing the record on appeal if such printing is required by the appellate court . . . . Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.[30]

Despite a host of subsequent Congressional amendments, the current IFP statute also contains some language virtually identical to that enacted in 1892. Subsection (d) reads:

> The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.[31]

Appellate courts have been confronted with questions of whether the IFP statute provides an avenue for district courts to waive fees for court officer service, performance of duties, and the attendance of witnesses. With regard to service, courts have uniformly held that § 1915(d) requires Mar-

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[29] 28 U.S.C. § 1915(a)(1) (2006).

[30] *Id.* § 1915(c)(1)–(c)(3).

[31] *Id.* § 1915(d). The 1892 statute reads: "That the officers of the 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 (current version at 28 U.S.C. § 1915 (2006)).

shals to serve process for plaintiffs proceeding IFP.[32] The Eighth Circuit in *Moore v. Jackson* cited the language of § 1915(d) that "[o]fficers of the court shall issue and serve all process, and perform all duties in such cases" for the proposition that service by Marshals is "compulsory," because "[s]ubmitting a waiver of service is a component of 'all process' and § 1915(d) compels the officers of the court to perform 'all duties' associated with such process."[33] While those courts discussed process at the inception of a suit, none discussed whether service is compulsory when an indigent plaintiff requests service of a subpoena for a deposition.

As noted above, every court to address whether the IFP statute provides a waiver of witness fees has answered in the negative.[34] Although the circuits addressing whether the IFP statute waives witness fees have been unanimous in result, their reasoning has not always been uniform. For example, in *U.S. Marshals Service v. Means*, the Eighth Circuit en banc sought to rely upon the plain language of § 1915(d) as a basis for finding no waiver of witness fees and expenses.[35] But when that inquiry proved inconclusive, the *Means* court examined the legislative history, which it found did not address the issue, and held that absent a "clear statement," the court could not "infer congressional intent to have section 1915 cover witness fees and expenses."[36]

The *Means* court further found that the statutory structure supported its construction. The court noted that § 1915 was enacted as a whole in 1948, and thus, it had to be interpreted "as a whole."[37] Since § 1915(b) included specific language providing for government payment of certain expenses, and § 1919(d) did not, the court concluded that under the canon of *expressio unius est exclusio alterius*,[38] the specific government funding provisions con-

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[32] *See, e.g.*, Rance v. Rocksolid Granit USA, Inc., 583 F.3d 1284, 1287 (11th Cir. 2009); Olsen v. Mapes, 333 F.3d 1199, 1204 (10th Cir. 2003); Moore v. Jackson, 123 F.3d 1082, 1085 (8th Cir. 1997) (citing Mallard v. U.S. District Court, 490 U.S. 296, 302 (1989) for the proposition that court officers' service is required under § 1915(d)); Lindsey v. U.S. R.R. Ret. Bd., 101 F.3d 444, 446 (5th Cir. 1996); Graham v. Satoski, 51 F.3d 710, 712 (7th Cir. 1995) ("The Marshals Service is required to serve process on behalf of individuals proceeding in forma pauperis."); Romandette v. Weetabix Co., 807 F.2d 309, 310 n.1 (2d Cir. 1986).

[33] *Moore*, 123 F.3d at 1085.

[34] *See, e.g.*, Pedraza v. Jones, 7 F.3d 194, 196 (5th Cir. 1995); Malik v. Lavalley, 994 F.2d 90, 90 (2d Cir. 1993); Tedder v. Odel, 890 F.2d 210, 211–12 (9th Cir. 1989) (holding that the IFP statute does not provide for a waiver of witness attendance fees); Boring v. Kozakiewicz, 833 F.2d 468, 474 (3d Cir. 1987); McNeil v. Lowry, 831 F.2d 1368, 1373 (7th Cir. 1987); Cookish v. Cunningham, 787 F.2d 1, 5 (1st Cir. 1986); U.S. Marshals Serv. v. Means, 741 F.2d 1053, 1057 (8th Cir. 1984) (en banc); Johnson v. Hubbard, 698 F.2d 286, 289–90 (6th Cir. 1983).

[35] 741 F.2d at 1056 ("While the plain language of section 1915 expressly provides for service of process for an indigent's witnesses, it nowhere mentions payment of fees and expenses for such witnesses.").

[36] *Id.*

[37] *Id.*

[38] "A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY 661 (9th ed. 2009).

tained in § 1915 precluded the court from "inferring an additional and significant provision for witness fees and expenses."[39]

The Sixth Circuit in *Johnson v. Hubbard* took a different route to reach the same destination. There, the court noted that § 1915(d) must be read *in pari materia*[40] with its criminal law counterpart, 18 U.S.C. § 1825.[41] In 1965, Congress passed § 1825, which explicitly provided that the government must pay witness fees in criminal cases. Since Congress failed to amend § 1915(d) to apply identical language to civil cases, the *Hubbard* court found this Congressional inaction controlling and concluded that district courts have no authority to waive witness fees for indigent litigants.[42]

Other circuits relied on both *Means* and *Hubbard* in concluding that district courts have no authority under the IFP statute to waive payment of witness fees for an indigent litigant.[43] These decisions rarely included in-depth analysis and none delved into the statutory language. Rather, the circuits' decisions as a whole focused on the policy concern that a different construction of the IFP would lead to the waste of resources on frivolous prison litigation.

## II. Indigent Prisoners Are Unable to Succeed on Deliberate Indifference Claims Without a Deposition

Although the Eighth Amendment affords prisoners some form of relief from individuals who either fail to treat or delay the prisoner's treatment, it is well established that the bar is set relatively high for a prisoner accusing prison officials of such a violation. To prove that prison officials have displayed "deliberate indifference to serious medical needs of prisoners,"[44] a prisoner must satisfy both an objective and a subjective component. The objective component requires a prisoner to demonstrate that the deprivation is "sufficiently serious";[45] in this context, a "serious medical need" is one that has been diagnosed by a physician as mandating treatment or one so obvious that even a lay person would understand the need for a doctor's attention.[46] The subjective component requires a prisoner to demonstrate that prison officials acted with a "sufficiently culpable state of mind,"[47] that offi-

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[39] *Means*, 741 F.2d at 1057.

[40] "It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." Black's Law Dictionary 862, *supra* note 38, at 862.

[41] 698 F.2d 286, 290 (6th Cir. 1983).

[42] *Id.*

[43] *See, e.g.*, Pedraza v. Jones, 7 F.3d 194, 196 (5th Cir. 1995); McNeil v. Lowry, 831 F.2d 1368, 1373 (7th Cir. 1987).

[44] Estelle v. Gamble, 429 U.S. 97, 104 (1976).

[45] Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Wilson v. Seiter, 501 U.S. 294, 301 (1991)).

[46] Gutierrez v. Peters, 111 F.3d 1364, 1373 (7th Cir. 1997) (citing cases from five other circuits that adopt the same formulation of "serious medical need").

[47] *Farmer*, 511 U.S. at 834.

cials must "both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," and "must also draw the inference."[48] Prisoners are not, however, required to show that the officials intended for the harm to occur. Indeed, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."[49]

When it comes to such nuanced legal issues as deliberate indifference, "[e]ven a relatively sophisticated [prison] litigant may find it difficult to identify and present the right type of evidence."[50] It is therefore imperative that pauper prisoners have access to verified medical evidence if they are to be successful in substantiating their claims.[51]

To bring a successful claim, pauper prisoners must first obtain evidence from a qualified medical expert that satisfies the two elements defined above. To accomplish this difficult task, the prisoner is commonly required to demonstrate that the attending physicians were wrong in their assessment of how to treat the injury,[52] that the physician knew they were wrong,[53] and that they continued the course of treatment knowing that their failure to provide appropriate treatment would cause severe pain or additional harm.[54] The Eighth Amendment standards in the deliberate indifference context are often highly dependent on technical medical questions that cannot be answered objectively without the benefit of verified medical evidence.[55] Because the prison litigant's claims will often be contradicted by the defendants themselves,[56] prisoners will normally be called on to answer such questions

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[48] *Id.* at 837 (quoting Wilson v. Seiter, 501 U.S. 294, 297 (1991)).

[49] *Id.* at 842.

[50] Pruitt v. Mote, 503 F.3d 647, 664 (7th Cir. 2007) (Rovner, J., concurring).

[51] *See* David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 HASTINGS L.J. 281, 281 (Jan. 1990) ("The ability to obtain an expert witness can be a decisive factor in civil litigation. Without the benefit of expert testimony, litigants may be unable to prove all but the most readily observable injuries and cannot make use of any sophisticated techniques for valuing losses.").

[52] *Compare* Coleman v. Rahija, 114 F.3d 778, 785 (8th Cir. 1997) ("Coleman presented sufficient 'verifying medical evidence' that [defendant] 'ignored a critical or escalating situation or that the delay posed a substantial risk of serious harm for her claim to succeed.") (internal citations omitted), *with* Crowley v. Hedgepeth, 109 F.3d 500, 502 (8th Cir. 1997) (precluding claim of deliberate indifference to medical needs when inmate failed to place verifying medical evidence in the record to establish detrimental effect of delay in medical treatment).

[53] *See* Greiveson v. Anderson, 538 F.3d 763, 779–80 (7th Cir. 2008) (holding that disagreement with physician's course of treatment is insufficient to establish defendant's liability).

[54] *See* Miltier v. Beorn, 896 F.2d 848, 852 (4th Cir. 1990) (holding that failure to provide the care that a treating physician himself believes is necessary could be conduct which surpasses negligence and constitutes deliberate indifference).

[55] Napier v. Madison Cnty., 238 F.3d 739, 742 (6th Cir. 2001) (quoting Hill v. Dekalb Reg'l Youth Det. Ctr., 40 F.3d 1176, 1188 (11th Cir. 1994)). *See also* Williams v. Liefer, 491 F.3d 710, 715 (7th Cir. 2007) (citing cases from other circuits requiring verifying medical evidence and noting "a plaintiff must offer medical evidence that tends to confirm or corroborate a claim that the delay was detrimental").

[56] *See* Sweat v. Cook, No. 09-1255, 2010 U.S. Dist. LEXIS 35019, at *15–16 (D.S.C. Mar. 12, 2010) (granting summary judgment when "a licensed physician who has been in-

as whether the defendant physicians knowingly departed "from accepted professional judgment, practices or standards."[57] Without an opportunity for the prisoner to have an independent examination by a disinterested physician, making such a showing becomes an impossible feat. Securing the necessary evidence can only be accomplished by deposing a physician who is not employed by the defense.[58] This is necessary because courts are generally reluctant to second-guess the medical positions of the defendants and their experts without contrary medical evidence supporting the prisoner's claims.[59]

Proving that a particular course of treatment conforms to accepted professional standards or whether the degree of pain experienced as a result of delayed treatment is typical or atypical are matters solely within the purview of medical professionals. The usual treatments for a given condition, the risks associated with delaying treatment, and the standard course of medical treatment for a similarly situated patient are all common issues that arise in these types of cases.[60] However, the majority of deliberate indifference claims tend to fail when it comes to proving just these points.

The reason these claims typically fail is because indigent prisoners cannot obtain the necessary evidence. Obviously, indigent prisoners cannot conduct a deposition on their own; their only chance is to request an examination and deposition from a medical professional not associated with the prison. But discovery requests come with a price. In order to conduct a deposition, litigants must provide fees to request the presence of witnesses, subpoena those witnesses, and have a court reporter transcribe the deposition

volved in providing direct care to the Plaintiff attests that [he] has been afforded prompt and adequate care for his medical complaints"); Berchiolly v. Ashcroft, No. 04-1318, 2007 WL 710117, at *5 (C.D. Ill. Mar. 6, 2007).

[57] Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261–62 (7th Cir. 1996).

[58] *See, e.g.*, Dodson v. Wilkinson, 304 F. App'x. 434, 437–38, 439–42 (6th Cir. 2008). The trial court in this case had denied a pro se prisoner's request for a medical expert pending determination of prisoner's final course of treatment for Hepatitis C. *Id.* at 437. The court later awarded summary judgment to the defendant physician, who had testified that the prisoner's disease was unlikely to progress in ten to twenty years. *Id.* The court found that the prisoner had failed to proffer sufficient evidence demonstrating a detrimental effect as a result of any testing or treatment delays that could rebut the defendant doctor's testimony as to the prisoner's prognosis. *Id.* at 439. The denial and summary judgment were upheld on appeal. *Id.* at 430–41.

[59] *See, e.g.*, Stevenson v. Pramstaller, No. 2:08-cv-79, 2009 U.S. Dist. LEXIS 89685, at *13–14 (W.D. Mich. Feb. 18, 2009) (examining Sixth Circuit opinions showing that courts are generally "reluctant to second guess medical judgments"); Scheckells v. Goord, 423 F. Supp. 2d 342, 348 (S.D.N.Y. 2006) ("[L]ay people are not qualified to determine . . . medical fitness, whether physical or mental; that is what independent medical experts are for." (quoting O'Connor v. Pierson, 426 F.3d 187, 202 (2d Cir. 2005))).

[60] *See, e.g.*, Collington v. Milwaukee County, 163 F.3d 982, 989 (7th Cir. 1998) ("A plaintiff can show that the professional disregarded the need only if the professional's subjective response was so inadequate that it demonstrated an absence of professional judgment, that is, no minimally competent professional would have so responded under those circumstances."); Ruiz v. Homerighouse, No. 01-CV-0266E(Sr), 2003 U.S. Dist. LEXIS 24739, at *12 (W.D.N.Y. Feb. 13, 2003) ("Ruiz's *unsubstantiated* claim that the one-week delay caused a degeneration in his condition is inadequate to bar summary judgment.").

of those witnesses.[61] These costs are not insubstantial. The fees for witnesses are forty dollars per day, plus travel expenses and subsistence[62]; the fees for service by U.S. Marshals start at fifty-five dollars per hour[63]; and the fees for court reporters to transcribe a deposition can be thousands of dollars.[64] While these are often reasonable costs for private parties, a rule requiring federal prisoners, who are paid an average of $0.12 to $0.40 an hour,[65] to pay these fees is simply unworkable. And to the extent that prisoners are unable to afford this option, their deliberate indifference claims are essentially doomed.

Circuit court decisions illustrate this point. In *Laughlin v. Schriro*,[66] prisoner Laughlin believed he was experiencing a heart attack and pressed the emergency call button in his cell at 7:30 a.m.[67] When no one responded, he pressed the button again and a prison guard came, albeit twenty minutes later. Laughlin informed the guard that he was having a heart attack, and another guard arrived at the cell twenty minutes later. Laughlin told the second guard that he was experiencing a heart attack, and medical personnel arrived after another delay of fifteen minutes. He was then taken to a medical unit, and there, despite his claims, Laughlin was treated by a physician with an over-the-counter antacid and returned to his cell.[68] At 2:43 p.m., medical personnel again responded to Laughlin's cell, where he continued to complain of a heart attack. He was later admitted into the prison infirmary and the next day transported to an outside hospital, where he was diagnosed with having had a heart attack.[69] A week later, he received an angioplasty.

Laughlin later alleged that the prison staff's delay in treating his heart attack constituted deliberate indifference to his serious medical needs. The Eighth Circuit began its discussion by noting that, when a prisoner alleges that delayed medical care violates his Eighth Amendment rights, he must place "verifying medical evidence in the record to establish detrimental effect" of the delay.[70] The court concluded that while Laughlin submitted sufficient evidence documenting the delay, ultimate diagnosis, and subsequent treatment, Laughlin had "offered no evidence establishing that any delay in

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[61] Congress provided "fees" for any witness "before any person authorized to take his deposition." 28 U.S.C. § 1821(a)(1) (2006). Congress specifically mandated the U.S. Marshals to routinely collect "fees" for service of process. 28 U.S.C. § 1921 (2006). Likewise, Congress allowed court reporters to collect "fees" for transcripts. 28 U.S.C. § 753(f) (2006).

[62] 28 U.S.C. § 1821(a)(1) (2006).

[63] Revision to U.S. Federal Marshals Service Fees for Services, 73 Fed. Reg. 69,552, 69,553 (Nov. 19, 2008) (to be codified at 28 C.F.R. pt. 0).

[64] Schlanger, *supra* note 4, at 1629.

[65] Peter Wagner, THE PRISON INDEX: TAKING THE PULSE OF THE CRIME CONTROL INDUSTRY § III (2003), *available at* http://www.prisonpolicy.org/prisonindex/prisonlabor.html (last visited Oct. 27, 2010).

[66] 430 F.3d 927 (8th Cir. 2005).

[67] *Id.* at 928.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 929.

treatment had a detrimental effect . . . ."[71] The court therefore granted summary judgment to the prisoner defendants.

Why did Laughlin not place verifying medical evidence in the record? The answer, while not stated in the opinion, is not difficult to surmise. It is highly unlikely that he could afford the costs of deposing a doctor not associated with the prison. The construction of the IFP statute that I advocate below would allow a district court to waive the fees associated with conducting depositions for cases such as *Laughlin,* where the indigent prisoner has no other means to access verifying evidence and that evidence is dispositive as to summary judgment.

Would my construction of the IFP statute have made a difference in *Laughlin*? It is impossible to know, because Laughlin likely could not afford an independent expert evaluation. However, medical studies have found that delayed treatment for heart attacks is associated with worse outcomes.[72]

Unfortunately, the *Laughlin* decision is not an outlier. As noted above, prisoners are often required to establish through "verifying evidence" that prison staff continued the course of treatment knowing that their failure to provide adequate treatment would cause severe pain or cause additional harm.[73] In this context, it is hard to imagine many instances where a pauper prisoner can successfully provide sufficient verifying evidence without the benefit of deposing a medical professional intimately familiar with the medical aspects of the case.[74] This is just one instance where denying an indigent prisoner the means to obtain evidence seals the fate of his chance for constitutional vindication.

## III. The IFP Statute Authorizes an Indigent Litigant to Conduct a Deposition Without the Payment of Fees.

The IFP statute "is designed to ensure that indigent litigants have meaningful access to the federal courts."[75] With that purpose in mind, prisoners should argue that both § 1915(a)(1) and § 1915(d) allow district courts to waive fees associated with administering depositions for indigent litigants

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[71] *Id.*

[72] *See, e.g.*, John M. Rawles & Neva E. Haites, *Patient and General Practitioner Delays in Acute Myocardial Infarction*, 296 Brit. Med. J. 882 (1988).

[73] *See, e.g.*, Lepper v. Nguyen, 368 F. App'x. 35, 40 (11th Cir. 2010) (noting that prisoner plaintiff was unable to submit medical evidence showing that his hand injury could have been "fixed by nonsurgical re-location of his bones or that his injury would be less severe if his medical treatment had been different"); Davis v. Samalio, 286 F. App'x. 325, 327 (7th Cir. 2008) (finding that prisoner failed to establish verifying evidence).

[74] *Cf.* Thomas W. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 Wake Forest L. Rev. 203, 209 (1996) ("Experts play a crucial role in malpractice litigation: in virtually every case, the opposing parties must have experts to testify as to the applicable standard of care. In addition, medical experts often testify about causation issues.").

[75] Neitzke v. Williams, 490 U.S. 319, 325 (1989) (citing Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 342–43 (1948)).

who have no other way to obtain the evidence needed to successfully litigate their constitutional claims.

### *A. 28 U.S.C. § 1915(a)(1) Permits District Courts to Allow Indigent Litigants to Conduct Depositions Sans Fees.*

Although the portions of the IFP statute that use the word "shall" are mandatory, the use of the word "may" in § 1915(a)(1) means simply permissible. The statute states that courts "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 therefore . . . ."[76] The question is whether this permissible language allows a court to waive fees associated with depositions for indigent litigants.

The interpretation of a statute must begin, of course, with its statutory language.[77] If unambiguous, the statute's language is ordinarily to be regarded as conclusive in the absence of a clearly expressed legislative intent to the contrary.[78] There are, nevertheless, additional factors that typically assist courts in determining a "statute's objective and thereby illuminat[ing] its text."[79] These factors include statutory structure, purpose, context, and history.[80] All of these factors point towards the construction allowing indigent litigants to conduct depositions without the payment of related witness, court reporter, or subpoena fees.

To begin, there is no indication that Congress intended any meaning other than the common one of the terms in § 1915(a)(1). This silence compels courts to "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."[81] The statutory language of § 1915(a)(1) is "broad in its application and reach."[82] It allows courts to authorize paupers to commence, prosecute, or defend any civil or criminal suit, action, proceeding or appeal without the prepayment of fees. Based upon this language, there is little reason to think that Congress did not intend for it to cover civil depositions.

For example, the ordinary meaning of prosecution is "the carrying out of a plan, project, or course of action to or toward a specific end,"[83] or

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[76] Martin v. Franklin Capital Corp., 546 U.S. 132, 136 (2005).

[77] Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2350 (2009); United States v. Ron Pair Enters., 489 U.S. 235, 240–41 (1989).

[78] Russello v. United States, 464 U.S. 16, 20 (1983) (quoting United States v. Turkette, 452 U.S. 576, 580 (1981)).

[79] Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998).

[80] *Id.*

[81] *Russello*, 464 U.S. at 21 (quoting Richards v. United States, 369 U.S. 1, 9 (1962)).

[82] Harry A. Blackmun, U.S. Circuit Judge, Eighth Circuit, Address at the Eighth Circuit Judicial Conference, Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases (Sept. 18, 1967), *in* 43 F.R.D. 343, 344.

[83] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1821 (Philip Babcock Gove ed., 1965) [hereinafter WEBSTER'S].

"[t]he commencement and carrying out of any action or scheme."[84] Thus, a pauper may follow to the end or carry out any civil suit, action or proceeding. In turn, "proceeding" undoubtedly includes the event of a civil deposition because the common meaning of "proceeding" is "the course of procedure in a judicial action or in a suit in litigation"[85] or "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment."[86] Finally, the term "fees" in § 1915(a)(1) must encompass witness, service, and court reporter fees since such fees are "a charge fixed by law for certain privileges or services."[87] The natural and plain reading of § 1915(a)(1) therefore allows courts to waive witness, service, and court reporter fees for indigent litigants prosecuting a civil proceeding.

This construction accords with Congress' use of the term "fees" in other statutes enacted in the same year as § 1915(a)(1). Section 1821(a)(1) provides "fees" for any witness "before any person authorized to take his deposition."[88] Congress specifically mandated the United States Marshals to routinely collect "fees" for service of process.[89] Likewise, Congress allowed court reporters to collect "fees" for transcripts.[90] The above statutes all employ a common understanding of the term "fees," and there is no indication that Congress did not intend the same meaning in § 1915(a)(1).[91]

Two additional considerations point towards a construction allowing judicial discretion to waive fees. First, it would be strange for Congress to authorize the commencement of a civil suit, allocate complimentary service of process at the inception of the suit, transcripts and a printing of record on appeal without the payment of fees, but deny an indigent the ability to marshal the evidence necessary to sustain or succeed in that civil suit. Such a construction is implausible.[92]

Second, a construction should generally comport with the statutory purpose.[93] Congress' overarching goal in enacting the IFP statute was to "assure equality of consideration for all litigants" by putting indigents "on a

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[84] BLACK'S LAW DICTIONARY, *supra* note 38, at 1341.

[85] WEBSTER'S, *supra* note 83, at 1807.

[86] BLACK'S LAW DICTIONARY, *supra* note 38, at 1341. *See also* Edwin E. Bryant, THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE 3–4 (2d ed. 1899).

[87] WEBSTER'S, *supra* note 83, at 833. *See also* BLACK'S LAW DICTIONARY, *supra* note 38, at 690.

[88] *See* 28 U.S.C. § 1821 (2006).

[89] *See id.* § 1921.

[90] *See id.* § 753(f).

[91] If there is a shred of doubt regarding the meaning of "fees" in § 1915(a)(1), prisoners should refer courts to the section headings contained in Title 28. The following section headings all use the same comprehensive meaning of "fees." *See, e.g.*, *id.* §§ 1824, 1825, 1871, 1914, 1921, 1923, 1930.

[92] *See* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) (stating an interpretation of a statute must not produce an "absurd result"). *See also* Coppedge v. United States, 369 U.S. 438, 445 (1962) (denouncing a construction of § 1915 that "would deprive the legislation of sensible meaning").

[93] *See* Duncan v. Walker, 533 U.S. 167, 179 (2001).

similar footing with paying plaintiffs."[94] Congress accomplished this goal by guaranteeing "'no citizen shall be denied an opportunity to commence, prosecute, or defend an action . . . solely because . . . poverty makes it impossible . . . to pay or secure the costs' of litigation."[95] Given this purpose, it is difficult to fathom how equality of litigation could be achieved without apportioning the means for indigents to pursue evidence legally necessary to succeed on their claims.

Thus, § 1915(a)(1) should be interpreted to mean that district courts have the ability to waive the witness, service, and court reporter fees associated with depositions. While § 1915(a)(1) permits the waiver of fees, § 1915(d) all but requires it.

### *B. 28 U.S.C. § 1915(d) Requires Court Officers to Administer Service and Carry Out Normal Duties and Witnesses to Attend Proceedings Without the Payment of Fees by Indigent Litigants.*

The portion of the IFP statute still remaining from the original 1892 version states that "[o]fficers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases."[96] The question is whether this subsection requires compulsory performance of duties by court officers and compulsory attendance of witnesses, notwithstanding an indigent litigant's inability to pay fees for these services. This is a somewhat different question from whether 28 U.S.C. § 1915(d) authorizes a district court *to order government payment* for court officer and witness fees. My contention is not that § 1915(d) provides government subsidization of deposition fees, but that district courts have authority to waive these fees entirely for indigent litigants.

As noted above, every circuit court to address the witness fee issue has ruled to the contrary.[97] But upon close inspection, those decisions prove problematic on a number of levels. First, while the circuits pretended to base their decisions on the plain meaning of the statute, not one actually consulted the words of the 1892 statute or the common, ordinary meaning of those words at the time it was passed—for when interpreting the so-called plain meaning of a statutory provision, the starting point is the plain meaning of the terms in existence at the time the statute was enacted.[98]

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[94] Neitzke v. Williams, 490 U.S. 319, 329–30 (1989) (citations omitted) (internal quotation marks omitted).

[95] Denton v. Hernandez, 504 U.S. 25, 31 (1992) (citing Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 342 (1948)).

[96] 28 U.S.C. § 1915(d) (2006).

[97] *See supra* note 34.

[98] *See, e.g.*, Molzof v. United States, 502 U.S. 301, 307 (1992); Mallard v. U.S. District Court, 490 U.S. 296, 301 (1989); Regents of Univ. of Cal. v. Pub. Emp't Relations Bd., 485 U.S. 589, 598 (1988) (giving statutory language "its normal meaning" and citing a dictionary "from the period during which the [statutory provision] was enacted" to interpret the statute).

To be fair, the circuits did not have the benefit of the Supreme Court's discussion of § 1915(d) in *Mallard v. United States District Court*.[99] There, the Court was asked to decide if a district court "request" for counsel pursuant to § 1915(e) requires compulsory representation of an indigent litigant in a civil case. After reviewing the common meaning of the statute, the Court first noted that the attorney provision contained in § 1915(e) was enacted in 1892, along with § 1915(d).[100] The fact that Congress did not intend § 1915(e) to license compulsory appointments of counsel was indicated, the Court believed, by comparing subsection (e) to subsection (d).[101] The Court stated:

> Whereas § 1915[e] merely empowers a court to *request* an attorney to represent a litigant proceeding *in forma pauperis*, § 1915[d]—adopted at the very same time as § 1915[e]—treats court officers and witnesses differently: "The officers of the court *shall* issue and serve all process, and perform all duties in such cases. Witnesses *shall* attend as in other cases, and the same remedies shall be available as are provided for by law in other cases." (Emphasis added.) Congress evidently knew how to require service when it deemed compulsory service appropriate. Its decision to allow federal courts to request attorneys to represent impoverished litigants, rather than command, as in the case of court officers, that lawyers shall or must take on cases assigned to them, bespeaks an intent not to authorize mandatory appointments of counsel.[102]

Contrary to the circuits, the Court in *Mallard* was convinced that § 1915(d) requires court officers to carry out duties and witnesses to attend. The Court's interpretation therefore calls into doubt those lower court decisions like *Means* and *McNeil* which held that § 1915(d) does not require witnesses to appear when subpoenaed, if an indigent litigant has not tendered witness fees.[103]

An examination of federal statutes enacted prior to the IFP statute supports the view that Congress intended for the ordinary meaning of the terms in § 1915(d) to determine its scope. By 1892, Congress already had in place statutes setting forth fees for both services provided by court officers and the

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[99] 490 U.S. 296 (1989).

[100] *Id.* at 301–02.

[101] *Mallard* actually interpreted the former § 1915(d) which due to an amendment in 1996 has been moved to § 1915(e). Act of Apr. 26, 1996, Pub. L. No. 104-134, § 804(a)(2), 110 Stat. 1321, 1321-73, redesignated former subsection (d) as (e) and former subsection (e) as (f). I refer to the present structuring of the subsection.

[102] *Mallard*, 490 U.S. at 301–02 (emphasis in original).

[103] The *Mallard* Court's discussion of § 1915(d) comports with earlier decisions of the Court involving that subsection. *See, e.g.*, Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 343 (1948).

attendance of witnesses.[104] For example, in 1853, Congress passed an act providing for the payment of witness fees in a form similar to that existing in the current witness fee statute, 28 U.S.C. § 1821.[105] Like the current witness fee statute, the 1853 Fee Act provided that a witness shall be compensated for appearing in court or before any officer pursuant to law and shall be reimbursed for necessary travel based on mileage.[106] The common practice, at the time, was to tax as costs any fees for services performed by court officers and the attendance of witnesses.[107]

Given these statutes and common practice, it is clear why Congress added the "shall" language to the IFP statute. Congress was no doubt aware of the fees charged for services and the attendance of witnesses. Since the purpose of the statute was to allow indigent parties to litigate in court without the prepayment of "fees and costs,"[108] it would have been antithetical to that purpose for Congress to continue to require fees for court officer services and witness attendance. The phrase "as in other cases" must surely have meant that witnesses were compelled to testify, as in paid cases, regardless of whether the indigent party had tendered fees. No other interpretation of the phrase contained in § 1915(d) matches both the context and plain meaning of the statute at the time it was enacted.[109]

Setting the statutory language aside, the strength of the circuit courts' construction can be understood by what practical effect that construction offers. Unfortunately, not one court was able to say what exactly Congress meant when it stated that witnesses shall appear during IFP proceedings, given the fact that fees were charged for such appearances, and indigent litigants were unable to pay those fees. Rather than treat appearances as compulsory, those courts have instead chosen to treat the two sentences as if they are nothing more than mere Congressional suggestion. But that cannot be right, because statutes are "to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[110] As noted previously, Congress already had statutes in place providing for

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[104] Sanborn v. United States, 135 U.S. 271, 282–86 (1890).

[105] 1853 Fee Act, Ch. 80, § 1, 10 Stat. 161, 162–67 (current version at 28 U.S.C. § 1920 (2006)).

[106] *Id.* at 167; 28 U.S.C. § 1821(b)–(c) (2006) (providing for an attendance fee and for reimbursement of travel expenses). *See also* United States v. Finnell, 185 U.S. 236, 240 (1902) (discussing the 1853 Fee Act).

[107] *Sanborn*, 135 U.S. at 282–86.

[108] Act of July 20, 1892, Ch. 209, § 1, 27 Stat. 252 (codified as amended at 28 U.S.C. § 1915 (2006)).

[109] Furthermore, in both the 1853 and 1870 statutes regarding witnesses and court officers, Congress used the ordinary meaning of the terms "witnesses," "attend," "officers of the court," and "fees." *See* Act of June 22, 1870, Ch. 150, §§ 11–17, 16 Stat. 162, 164; 1853 Fee Act, Ch. 80, § 1, 10 Stat. 167 (current version at 28 U.S.C. § 1920 (2006)). In the IFP statute, Congress provided no hint that it did not intend the plain meaning of those terms to govern 28 U.S.C. § 1915(d) (2006).

[110] Market Co. v. Hoffman, 101 U.S. 112, 115–16 (1879). *See also* Duncan v. Walker, 533 U.S. 167, 174 (2001) (declining to adopt a "construction of the statute, [that] would render [a term] insignificant").

witnesses' fees and appearances in civil cases, and it must be assumed that Congress had some goal in mind by supplying the "witnesses shall appear" language in the IFP statute. But the circuit courts' construction effectively renders § 1915(d) meaningless, by removing the availability of witnesses for indigent litigants who, by their very definition as paupers, are unable to pay the related fees.[111]

The circuit courts also confused the chronological history of various amendments to the IFP statute. The Sixth Circuit, for example, held that § 1915(d) "must be read in conjunction with its criminal law counterpart, [28 U.S.C.] § 1825."[112] Since Congress explicitly stated in § 1825 that marshals "shall pay all fees of witnesses," whereas § 1915 merely says that witnesses "shall attend," the Sixth Circuit found this disparate language controlling.[113] But the problem with that rationale is that § 1915(d) was enacted 72 years prior to the enactment of § 1825,[114] and the addition of a specific funding provision in § 1825 does not indicate a repeal of § 1915(d), because the Supreme Court has explained that "repeals by implication are not favored."[115]

The Eighth Circuit made the same mistake. The court concluded that the statutory structure of § 1915, which the Eighth Circuit believed Congress passed "as a whole in 1948," compelled the court to hold that § 1915 "does not authorize government payment of witness fees and expenses for indigent litigants."[116] But as noted above, § 1915 was not originally enacted as a whole in 1948[117]; thus, these later enacted amendments are irrelevant to the original meaning of § 1915(d). For later structural changes "do not declare the meaning of earlier law"; "do not seek to clarify an earlier enacted general term"; "do not depend for their effectiveness upon clarification, or a change in the meaning of an earlier statute"; and "do not reflect any direct focus by Congress upon the meaning of the earlier enacted provisions."[118] Accordingly, the later enactments and new statutory structure should not guide how courts should interpret the earlier provision contained in § 1915(d).

One of the principal reasons the Eighth Circuit came to a contrary construction was by invoking the canon of *expressio unius est exclusion alterius*.[119] This canon requires that where Congress uses particular language in

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[111] *See supra* note 34.

[112] *Johnson*, 698 F.2d at 290.

[113] *Id.*

[114] *Id.*

[115] Watt v. Alaska, 451 U.S. 259, 267 (1981) (quoting Morton v. Mancari, 417 U.S. 535, 549 (1974)).

[116] *Means*, 741 F.2d at 1056.

[117] Mallard v. U.S. District Court, 490 U.S. 296, 301–02 (1989) (noting that Congress adopted § 1915(d) in 1892).

[118] Almendarez-Torres v. United States, 523 U.S. 224, 237 (1998).

[119] *Means*, 741 F.2d at 1056 ("Generally speaking, a legislative affirmative description implies denial of the non-described powers.").

one section of a statute but omits it in another section of the same statute, it is generally presumed that Congress has acted intentionally in the disparate inclusion or exclusion.[120] The *Means* court was convinced that under *expressio unius*, the specific funding provisions contained in § 1915(c) prohibited the court from inferring additional funding in § 1915(d), absent a clear expression of such intent.[121] This analysis proves awkward given the history of § 1915.[122]

The *expressio unius* canon "does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series' justifying the inference that items not mentioned were excluded by deliberate choice."[123] Here, had subsection (d) been attached or included in subsection (c), there might have been a role for the canon to play in supporting a conclusion that Congress intended to require payment of witness fees by indigents. But that is not what the statute provides. Subsection (c) sets forth specific examples of expenses that are to be paid by the United States. Subsection (d), on the other hand, sets forth instances of compulsory service by court officers and compulsory attendance of witnesses where no fees are paid by the government or indigent litigants.[124] The specific language in subsection (c) plainly does not imply, much less establish, that Congress expected indigent litigants to pay for service of process, performance of duties by court officers, or the attendance of witnesses. More importantly, resolving the meaning of § 1915(d) by comparing it to § 1915(c) is a senseless exercise, given that subsection (d) was enacted 56 years earlier than subsection (c).[125] Nor can a "new postenactment statutory restructuring" assist in illuminating the intent of an earlier provision.[126] The *Mallard* Court recognized these well-settled principles in construing § 1915(e) by comparing it only to its 1892 partner, § 1915(d).[127]

The courts of appeals' decisions interpreting § 1915(d) are also inconsistent. Several circuits have uniformly held that the first sentence of § 1915(d) requires the U.S. Marshals to serve indigents' civil complaints to defendants without regard to fees for service.[128] Nevertheless, those same

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[120] Russello v. United States, 464 U.S. 16, 23 (1983).

[121] *Means*, 741 F.2d at 1056.

[122] CHUCK PALAHNIUK, LULLABY: A NOVEL 34 (2003) ("The trick to forgetting the big picture is to look at everything close-up.").

[123] Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (quoting United States v. Vonn, 535 U.S. 55, 65 (2002)).

[124] *Cf.* Rowland v. Cal. Men's Colony, 506 U.S. 194, 198 (1993) (noting different benefits each subsection of § 1915 provides).

[125] *See* 28 U.S.C. § 1915 (2006) (historical and statutory notes map history of statute from 1892 to present). Although there are technically 56 years between the respective enactments of section (d) and section (c), section (d) can be traced to 1892 and a section (c) precursor first appeared in 1910. Since even the section (c) precursor followed 18 years after section (d), the two sections cannot be deemed contemporaneously enacted with each other. *Compare* Act of July 20, 1892, ch. 209, 27 Stat. 252, *with* Act of June 25, 1910, ch. 435, 36 Stat. 866.

[126] Castillo v. United States, 530 U.S. 120, 125 (2000).

[127] Mallard v. U.S. District Court, 490 U.S. 296, 301–02 (1989).

[128] *See supra* note 32.

courts concluded that the next sentence—"witnesses shall attend as in other cases"—is not mandatory unless witness fees are tendered.[129] In other words, the lower courts have interpreted the terms "*shall* issue and serve all process" and "*shall* attend," divergently. In doing so, those courts have essentially invented a statute rather than interpreting one.[130] The meaning of § 1915(d) must be consistent, with both compulsory service of court officers and compulsory attendance of witnesses notwithstanding an indigent's payment of fees.[131]

The Eighth Circuit also placed reliance on an absence of legislative history for § 1915(d) to support its conclusion that the statute does allow for a waiver of witness fees.[132] Of course, the Eighth Circuit could not find the applicable legislative history because it reviewed the history for 1948, rather than 1892.[133]

The 1892 legislative history is informative on the scope of § 1915(d). The House Report acknowledged the primary goal of § 1915 was to solve the problem that "persons with honest claims may be defeated, and doubtless often are, by wealthy adversaries."[134] In an attempt to solve the problem, the Report noted that in cases involving a citizen's liberty, witnesses would be furnished "on demand."[135] During debate on the bill, Representative Stone asked the sponsor of the bill how court officers were to be paid, and whether they were being forced to work for nothing. Representative Culbertson responded:

> We are simply in these cases of charity and humanity compelling these officers, all of whom make good salaries, to do this work for

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[129] *See* Pedraza v. Jones, 7 F.3d 194, 196 (5th Cir. 1995); McNeil v. Lowney, 831 F.2d 1368, 1373 (7th Cir. 1987); U.S. Marshals Serv. v. Means, 741 F.2d 1053, 1056–57 (8th Cir. 1984) (en banc).

[130] *Cf.* Clark v. Martinez, 543 U.S. 371, 378 (2005).

[131] While the term "officers of the court" likely did not include court reporters in 1892, *see* Miller v. United States, 317 U.S. 192 (1942), the meaning of one statute may be affected by subsequent acts of Congress. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 134 (2000). Since Congress includes court reporters as officers of the court, *see* 28 U.S.C. § 753 (2006), indigent prisoners should argue that the term "officers of the court" in § 1915(d) must now include court reporters.

[132] *Means*, 741 F.2d at 1056.

[133] *Id.*

[134] H.R. REP. NO. 52-1079, at 2 (1892). ("The Government will not determine questions involving the liberty of the citizen without furnishing his witnesses on his demand.").

[135] *Id.* Kenneth Levine argues that the language in the Report indicates that the statute was never intended to cover witness expenses, since the committee failed to mention "expenses or disbursements, choosing instead to limit its discussion to 'costs' and 'security for costs.'" Kenneth Levine, *In Forma Pauperis Litigants: Witness Fees and Expenses in Civil Actions*, 53 FORDHAM L. REV. 1461, 1469 (1985). But as noted above, such a construction would "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." Clark v. Uebersee Finanz-Korporation, 332 U.S. 480, 489 (1947). Moreover, in the late nineteenth century, witness fees were taxed as costs. *See* Sanborn v. United States, 135 U.S. 271, 282–86 (1890). And it can be presumed that Congress included the subsection for the reason named: so indigent litigants could secure "witnesses on demand." 23 CONG. REC. 5171, 5199 (1892).

> nothing. That is all the bill does. There may be one such case upon a docket of five hundred; and they are not required to do much *ex-officio* service.[136]

Representative Culbertson's statement and the relevant legislative history—from 1892, not 1948—provide evidence that the original meaning of § 1915(d) was to allow for waiver of court officer and witness fees.

In construing the statute, the circuits also failed to follow a cardinal rule of statutory construction that the words of a statute must be viewed in their place within the overall statutory scheme.[137] A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme,"[138] and "fit, if possible, all parts into a harmonious whole."[139] The construction I propose fits most logically and comfortably into both the previously and subsequently enacted IFP statutes. Subsection (a)(1) broadly permits district courts to allow IFP litigants to proceed without the prepayment of fees in certain circumstances. Subsection (c) requires the government to pay certain expenses related to indigent litigation, and subsection (d) mandates certain procedures (such as service and attendance of witnesses) with no payment of fees by anyone. Based upon its plain language, purpose, statutory structure, and history, the statute simply should not be construed to prohibit courts from requiring the attendance of witnesses for depositions or trials without the payment of fees by indigents.

There is an additional justification for construing § 1915 in a manner that affords indigent litigants the means to conduct a deposition: "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[140] Since a contrary interpretation of § 1915 would raise serious equal protection and due process questions, the courts should adopt a construction requiring compulsory service, performance of duties by court officers, and witness attendance, especially in situations where an indigent prisoner's only means of proving his claim is through a deposition sans fees.

In deciding whether a statutory construction is constitutionally doubtful, courts must use the "lowest common denominator" method of interpretation.[141] "In other words, when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional

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[136] *Id.*
[137] *See, e.g.*, W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100 (1991).
[138] Gustafson v. Alloyd Co., 513 U.S. 561, 569 (1995).
[139] FTC v. Mandel Bros., 359 U.S. 385, 389 (1959).
[140] United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909).
[141] Clark v. Martinez, 543 U.S. 371, 380 (2005).

problems pertain to the particular litigant before the Court."[142] Considering the most egregious factual scenario, it is clear that an interpretation depriving an indigent plaintiff of a deposition, which in some cases is the only means of proving a claim of deliberate indifference, poses significant constitutional problems.

Starting with *Griffin v. Illinois,* the Supreme Court has confronted the problem of "[p]roviding equal justice for poor and rich, weak and powerful alike."[143] *Griffin* involved a state rule that conditioned a criminal appeal on the ability of a defendant to procure a trial transcript and provide it to the appellate court.[144] Although the Court noted that the Constitution does not guarantee the right to appeal, once the state provides such a right, it may not thereafter "bolt the door to equal justice."[145] In declaring the state's rule unconstitutional, the *Griffin* Court drew support from both the Due Process and Equal Protection Clauses.[146] The Court has later expounded on these rights in two lines of cases relevant here.

The Court has long established that prisoners have a due process right of access to the courts.[147] In *Johnson v. Avery,* for example, the Court invalidated a prison policy that actively interfered with prisoner attempts to prepare habeas corpus motions.[148] The Court later extended the right to include prisoners' ability to file civil rights actions challenging conditions of their confinement.[149] Reasoning that civil rights actions are no less important than habeas corpus writs, the Court felt compelled to extend the right to access.[150]

In *Bounds v. Smith,* the Court discussed when the due process right of access is implicated.[151] There the Court was mindful that it had previously "struck down restrictions and required remedial measures to insure that inmates' access to the courts is adequate, effective, and meaningful."[152] Meaningful access in that case required prison officials to supply inmates with law libraries or some comparable form of legal assistance. The relevant inquiry, the Court stated, was whether the procedure at issue was necessary to give

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[142] *Id.*

[143] 351 U.S. 12, 16 (1956).

[144] *Id.* at 13–14.

[145] *Id.* at 24. While the Court does warn that it will not "support a wasteful abuse of the appellate process," it is clear that many prisoners have suffered serious violations of their constitutional rights and lack adequate resources to litigate. *Id.* In addition, the restraints in the Prison Litigation Reform Act of 1995 have effectively addressed many of these policy concerns. *See, e.g.*, 42 U.S.C. § 1997e (2006).

[146] *Griffin*, 351 U.S. at 16–20.

[147] *See* Lewis v. Casey, 518 U.S. 343, 350–51 (1996); Burns v. Ohio, 360 U.S. 252, 258 (1959).

[148] 393 U.S. 483, 490 (1969).

[149] Wolff v. McDonnell, 418 U.S. 539, 579 (1974).

[150] *Id.*

[151] 430 U.S. 817 (1977).

[152] *Id.* at 822.

prisoners a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."[153]

In another line of cases, the Court has used equal protection analysis to justify providing court access for civil litigants regardless of their ability to pay court fees. The Court in *Boddie v. Connecticut* held that refusing to allow indigent people to petition for divorce unless they paid the sixty dollar filing fee violated due process.[154] Critical to that decision was the fundamental nature of the right at issue: "[G]iven the basic position of the marriage relationship in this society's hierarchy of values," due process, the Court stated, prohibited "a State from denying, solely because of inability to pay, access to its courts to individuals who seek dissolution of marriage."[155]

Two years later, the Court clarified when the Constitution requires the waiver of court fees in civil cases.[156] The petitioner in *United States v. Kras* complained that he could not pay fees totaling fifty dollars to secure a bankruptcy discharge.[157] Although obtaining bankruptcy is momentous, the Court believed that it was not on par with the interest in establishing dissolution of marriage.[158] That same year, the Court, in *Ortwein v. Schwab,* held the line drawn in *Kras*.[159] *Ortwein* concerned a twenty-five dollar fee for court review of agency determinations reducing welfare benefits. There, the Court concluded that the right at issue was not a "fundamental interest," and thus, no waiver of fees was constitutionally mandated.[160] Viewed together, *Kras* and *Ortwein* stand for the proposition that the government need not waive court fees when no "fundamental interest" is at stake.

The presence of a fundamental right was crucial to the decision in *M.L.B. v. S.L.J.*[161] In that case, the petitioner argued that both due process and equal protection mandated a waiver of appellate fees for reviewing terminations of parental rights. Noting that choices about family and children are of the utmost importance in American society, the Court agreed that the Constitution could not allow the state to "bolt the door to equal justice."[162] The Court came to this conclusion in spite of the fact that due process does not demand an appeal for review of parental status, nor the routine appointment of counsel at a parental rights termination hearing.[163]

Based on these decisions, it is doubtful whether an indigent civil litigant can constitutionally be denied a deposition to gain evidence needed to prevail in a civil rights action. In other words, those sections of the United

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[153] *Id.* at 825–27.
[154] 401 U.S. 371, 379–81 (1971).
[155] *Id.* at 374.
[156] United States v. Kras, 409 U.S. 434 (1973).
[157] *Id.* at 436.
[158] *Id.* at 445.
[159] 410 U.S. 656 (1973) (per curiam).
[160] *Id.* at 659.
[161] 519 U.S. 102 (1996).
[162] *Id.* at 124 (citing Griffin v. Illinois, 351 U.S. 12, 24 (1956)).
[163] *Id.* at 117, 123.

States Code that require fees for witnesses, service of subpoenas, and court reporter transcription, present a serious constitutional rights question when applied to an indigent litigant presenting a valid civil rights claim.

It is important to clarify just what is at stake in cases involving indigent prisoner deliberate indifference claims. An inmate claiming that prison employees failed to treat them or that their medical care was delayed must place "*verifying medical evidence* in the record to establish the detrimental effect."[164] For many, that is a substantial burden to overcome.[165] Without the means and ability to secure evidence legally necessary to succeed on an Eighth Amendment claim, indigent inmate litigants are effectively shut out from the door of justice.

It is hard to imagine an interest more meaningful than the one at issue here. The ability to seek redress for a violation of one's civil liberties may "offer the only realistic avenue for vindication of constitutional guarantees."[166] For prisoners, civil rights actions represent the last fundamental political right which is preservative of all rights. Indeed, if there are no means to draw attention to constitutionally improper behavior, prisoners and free citizens alike have lost the last line of defense against constitutional violations. The Supreme Court has found this right so important that it has allowed plaintiffs to sue federal employees for constitutional violations in the absence of statutory authority, through a cause of action directly under the Constitution.[167]

A claim that prison officials have been deliberately indifferent to a serious medical need also implicates a fundamental right. The Supreme Court has held that deliberate indifference to a prisoner's serious medical needs "constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment."[168] In fact, the Eighth Amendment—applicable to the States through the Fourteenth Amendment—has long been recognized as a fundamental right implicit in the concept of ordered liberty.[169]

Based on these holdings, there is, at the very least, a serious question whether fee provisions that nullify either of these fundamental rights are

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[164] Langston v. Peters, 100 F.3d 1235, 1240 (7th Cir. 1996) (quoting Beyerbach v. Sears, 49 F.3d 1324, 1326 (8th Cir. 1995)).

[165] *See, e.g.*, Johnson v. Doughty, 433 F.3d 1001, 1023 (7th Cir. 2006) (Ripple, J., dissenting) ("It is difficult to see how Mr. Johnson was going to establish this [deliberate indifference] claim without engaging in significant discovery. It is even more difficult to imagine that he could have conducted such discovery from his jail cell.").

[166] Anderson v. Creighton, 483 U.S. 635, 638 (1987) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)).

[167] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

[168] Estelle v. Gamble, 429 U.S. 97, 104 (1976) (quoting Gregg v. Georgia, 48 U.S. 153, 182–83 (1976)); *see also* Lewis v. Sullivan, 279 F.3d 526, 529 (7th Cir. 2002) (Easterbrook, J.).

[169] *Cf.* McDonald v. Chicago, 130 S. Ct. 3020, 3034 (2010) (noting that selected portions of the Bill of Rights which are "fundamental to *our* particular scheme of ordered liberty and system of justice" have been incorporated in the Fourteenth Amendment Due Process Clause) (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968)). The Court also notes that the Eighth Amendment is among those incorporated. *Id.* at 3034–35 & n.12.

constitutionally legitimate. First, the rights at stake here are far more substantial than those in other cases where the Supreme Court required a waiver of fees.[170] Second, without the ability to seek evidence legally necessary to proving their claims, prisoners lack the ability to succeed on their claims of constitutional rights violations, and access to the courts is not "adequate, effective, and meaningful."[171] As one court has stated, "[a] federal law that knocked out prisoners' ability to obtain redress in situations where they are victims of official misconduct, yet lack any non-judicial means to protect themselves, would have to be set aside as unconstitutional under . . . the original meaning of the due process clause."[172] The IFP statute should therefore be interpreted in a manner that avoids these weighty constitutional questions.

Although the traditional approaches to interpreting statutes all lead to the same result, it is clear that the circuit courts based their divergent constructions of the IFP statute in part upon policy concerns that allowing indigent litigants, and especially indigent prisoner litigants, access to free depositions will lead to a massive waste of resources on frivolous claims. The Supreme Court previously raised these policy concerns but also noted that the judiciary's role is "not to make policy, but to interpret a statute."[173] Congress made the policy decision to allow depositions for indigent parties in 1892, and the courts are bound to follow this decision.

Nevertheless, prisoners crafting a deliberate indifference claim under the IFP statute should address courts' policy concerns. Prisoners should first note that the policy considerations underlying the circuit courts' decisions have largely been mitigated by the passage of the PLRA and the discretion afforded judges under the normal rules of civil procedure. To be sure, allowing indigent litigants to conduct depositions sans fees will impose some burdens—for example, district courts will be required to rule upon motions requesting depositions and marshals, and court reporters and witnesses will lose the normal fees generated from services and appearances. But under the PLRA, those burdens will be limited. Indeed, the PLRA allows district courts to dismiss an IFP suit at any time if the judge determines that it "is frivolous, malicious, or fails to state a claim upon which relief may be granted."[174] The PLRA further requires all inmates to pay filing fees, denies IFP status to prisoners with three or more prior "strikes" unless the prisoner is "under imminent danger of serious physical injury,"[175] directs district courts to screen prisoners' complaints before docketing, and permits the rev-

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[170] *Compare* Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (addressing right to dissolution of marriage), *with Estelle*, 429 U.S. at 105–06 (addressing right to adequate medical care for prisoners unable to seek their own medical care).

[171] Bounds v. Smith, 430 U.S. 817, 822 (1977).

[172] *Lewis*, 279 F.3d at 530.

[173] Neitzke v. Williams, 490 U.S. 319, 326 (1989).

[174] 28 U.S.C. § 1915(e)(2)(B) (2006).

[175] *Id.* § 1915(g).

ocation of good time credits for federal prisoners who file malicious or false claims.[176] Prisoners should contend that these provisions act as robust deterrents for prisoners who consider seeking discovery on frivolous claims.

Moreover, if fees for depositions were waived under § 1915, such a construction would not overly burden the justice system nor tie the hands of judges, who possess wide latitude with regard to discovery under the Federal Rules of Civil Procedure. Rule 26, for example, allows judges to limit the number and length of depositions.[177] In addition, a court may, *sua sponte,* limit discovery if it is "unreasonably cumulative" or if it could "be obtained from some other source that is more convenient, less burdensome, or less expensive."[178] Finally, nothing in my proposed construction of § 1915 restricts a court's ability to limit discovery if it determines that the "proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[179] In other words, not all indigent litigants would receive a waiver of deposition fees under the proposed construction of § 1915; such discovery requests would be limited by the usual restraints of the PLRA and Federal Rules for those cases where depositions would be wasteful or burdensome.

On the other hand, in truly meritorious cases where the indigent litigant cannot secure the evidence necessary to succeed and that evidence cannot be obtained through another means of discovery, prisoners should contend that judges should exercise the discretion afforded by Congress under § 1915 to waive the fees needed for indigents to conduct depositions. As noted above, such a construction comports with the statute's language, structure, purpose, and history, and it avoids weighty constitutional questions. It also makes sense as a matter of policy.

## CONCLUSION

Over the course of ten years, I repeatedly saw the serious medical needs of prisoners utterly disregarded by prison medical staff and administrators. I watched a man with a hernia the size of a softball forced to wait in pain for several months because he was told that his condition was not serious enough to warrant surgery. I watched as a friend living in the cell next to mine developed a deadly form of skin cancer. His treatment was delayed for three months, at the end of which an outside surgeon was forced to cut out huge pieces of flesh from his back to remove the cancer that had spread inward. He barely survived. I also witnessed the ordeal of a friend who broke his wrist during a fall. Once the orthopedic doctor had set the bones,

[176] *See id.* § 1915; § 1346(b)(2); § 1932 (2006).
[177] FED. R. CIV. P. 26(b)(2)(A).
[178] FED. R. CIV. P. 26(b)(2)(C)(i).
[179] FED. R. CIV. P. 26(b)(2)(C)(iii).

the doctor ordered the prison to X-ray the wrist in a week in order to check that the bones had healed properly. The prison refused, and when my friend saw the orthopedic doctor a month later, he was told that the bones had healed improperly, and the only options were to re-break and re-set the wrist bones or live with impaired function and discomfort.

In each of these examples, the prisoner complained to multiple medical personnel, the warden, and anyone else who would listen. When that proved unfruitful, they filed deliberate indifference claims in federal district court. The judge, in each case, granted summary judgment in favor of the prison because the prisoners were unable, due to a lack of financial resources, to verify their claims through expert evidence.

The vision of Congress, when it passed the IFP statute in 1892, was that indigent litigants would have the same opportunities for justice as those more financially blessed; that notion has not been realized. Because indigent prisoners are unable to afford the cost of entrance, the house of justice remains, in many cases, boarded up. And while there are no quick fixes, courts do possess the ability to pull a board or two down by returning the IFP statute to the meaning originally intended by Congress: that trial courts possess the authority to waive deposition fees for those in desperate need of justice but unable to afford the price.