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NON-MERIT-BASED TESTS HAVE NO MERIT:
RESTORING DISTRICT COURT DISCRETION
UNDER § 1915(E)(1)

*John R. FitzGerald**

INTRODUCTION

Prisoners in the United States can sue their jailers.¹ Prisoners have a right to sue wardens, guards, medical staff, and any other governmental entity they encounter while incarcerated.² Prisoner suits are referred to as “prisoner civil rights case[s],” and they comprise a significant portion of the federal docket.³ The American prison population is notoriously high.⁴ Given the high prison population, and that a single inmate may file dozens of lawsuits,⁵ courts struggle to keep up with overburdened dockets.⁶ Few prisoners can afford representation,⁷ but, under 28 U.S.C. § 1915(e)(1), district judges “may request an attorney to represent any person unable to afford counsel.”⁸

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1 See 42 U.S.C. § 1983 (2012).

2 See *id.*

3 See, e.g., U.S. DIST. COURT DIST. OF MINN., PRISONER CIVIL RIGHTS FEDERAL LITIGATION GUIDEBOOK 6 (2015), <http://www.mnd.uscourts.gov/Pro-Se/PrisonerCivilRightsLitigation-Guide.pdf>; see also *infra* note 38.

4 See JONATHAN SIMON, MASS INCARCERATION ON TRIAL 3 (2014).

5 See Jaeah Lee, *Why Is It So Hard for Inmates to Sue Prisons?*, MOTHER JONES (Aug. 2016), <http://www.motherjones.com/politics/2016/06/inmates-sue-prisons-prison-litigation-reform-act/>.

6 Kirk Mitchell, *Prison-Centric Colorado Spurs High Volume of Inmate Lawsuits*, DENVER POST (Jan. 24, 2014), <http://www.denverpost.com/2014/01/24/prison-centric-colorado-spurs-high-volume-of-inmate-lawsuits/>.

7 See Jennifer Gerarda Brown, *Posner, Prisoners, and Pragmatism*, 66 TUL. L. REV. 1117, 1124 (1992).

8 28 U.S.C. § 1915(e)(1) (2012).

The circuit courts are split as to what factors district courts may consider when deciding whether to appoint counsel under § 1915(e)(1).⁹ Most circuits permit courts to evaluate, among other things, the merit of a prisoner's claim.¹⁰ In these circuits, district judges may not provide counsel to prisoners who file meritless claims. Other circuits exclude merit as a factor for district judges.¹¹ Instead, these circuits only allow district judges to consider more general factors, such as the complexity of the case, the competence of the plaintiff, or whether the case constitutes an exceptional circumstance.¹²

Prohibiting district courts from considering merit when deciding whether to appoint counsel in prisoner suits is problematic. This prohibition unduly limits discretion and leads district courts to provide counsel in cases where the plaintiff has virtually no chance of winning or the cost of litigation heavily outweighs the remedy sought. This Note considers why some circuits withhold merit as a factor, and whether circuits should continue to do so. This Note argues that all district judges should consider merit when deciding whether to appoint counsel under § 1915(e)(1). Furthermore, this Note argues that district courts should consider what is at stake in the litigation—referred to herein as the “substance.” The substance describes what the plaintiff is seeking as a remedy, such as money damages for past pain and suffering, money damages for a permanent injury, or injunctive relief. Merit and substance should be considered because Congress intended to grant district courts wide discretion with § 1915(e)(1), and without allowing consideration of merit and substance, prisoners are gratuitously provided counsel. The gratuitous provision of counsel unduly burdens courts, lawyers, and defendants, and results in an inefficient distribution of pro bono legal work.

This Note evaluates the circuit split regarding the provision of counsel in prisoner civil rights cases and proposes a uniform test. Part I describes the historical background of the right to counsel and prisoner litigation in the United States. Part II outlines the current circuit split regarding § 1915(e)(1). Part III explains why all district courts should consider merit and substance, using a case study to illustrate the deficiencies of non-merit-based tests. Part IV demonstrates why merit and substance are the best metrics for deciding when to provide counsel. Ultimately, this Note asserts that all district judges should consider: (1) the merit of the claim; (2) what is at stake in the litigation; (3) whether the plaintiff has made a reasonable attempt to secure counsel on his own; and (4) whether the plaintiff appears competent to litigate the matter himself given the difficulty of the case.

9 Columbia Law Sch. Human Rights Clinic, *Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases*, 64 SYRACUSE L. REV. 409, 429 (2014).

10 See *infra* note 54 and accompanying text.

11 See *infra* notes 64–81 and accompanying text.

12 See *infra* notes 64–81 and accompanying text.

I. BACKGROUND

Before discussing how judges should exercise discretion when providing counsel to indigent prisoners, this Note addresses where judges derive such power, and when counsel is a matter of judicial discretion versus a constitutional right. Additionally, this Note discusses the volume of prisoner litigation to illuminate the force of the competing interests at play in construing § 1915(e)(1) tests.

A. *Right to Counsel*

Indigent criminal defendants have a constitutional right to effective counsel.¹³ This right is guaranteed by the Sixth Amendment; it is grounded in the notion that an accused must have counsel before the state may deprive him of his liberty.¹⁴ There is no constitutional right to counsel in civil cases.¹⁵

Whereas the Court adopted a *per se* approach to representation in criminal proceedings, the Court relies on a case-by-case approach for provision of counsel in civil proceedings. In a series of cases in the mid-twentieth century, the Supreme Court sought to mitigate obstacles for indigent litigants in the criminal justice system.¹⁶ For instance, to ensure that indigent litigants possessed the materials necessary to pursue an appeal, the Court required local governments to provide a record when necessary.¹⁷ The Court made similar decisions in the civil context, making it easier for prisoners to pursue civil cases.¹⁸ For instance, in *Johnson v. Avery* the Court struck down a ban on

13 See U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984) (announcing standard for determining whether the right to counsel was violated due to ineffective assistance of defendant's counsel); see also William L. Dick, Jr., Note, *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WM. & MARY L. REV. 627 (1989).

14 See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("Not only . . . precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."); see also Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After 'Gideon'*, ATLANTIC (Mar. 13, 2013), <https://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433/>.

15 See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981); Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 446 (1993). *But cf.* Columbia Law Sch. Human Rights Clinic, *supra* note 9, at 415–20 (asserting that the International Covenant on Civil and Political Rights obligates the United States to ensure access to counsel in civil cases).

16 See Gene R. Nichol, Jr., *Judicial Abdication and Equal Access to the Civil Justice System*, 60 CASE W. RES. L. REV. 325, 337–40 (2010).

17 *Id.* at 337–38 (citing *Mayer v. City of Chicago*, 404 U.S. 189 (1971)).

18 See Eisenberg, *supra* note 15, at 425.

inmates assisting one another in legal matters.¹⁹ The impact of such cases, however, was mitigated by another series of cases that came to treat indigent and nonindigent litigants alike in civil proceedings.²⁰ For example, in *Lassiter v. Department of Social Services*²¹ the Supreme Court ruled that a failure to appoint counsel for indigent parents in a termination of parental status proceeding did not violate the Due Process Clause.²²

This precedent notwithstanding, the Court did hold that a right to counsel should extend to certain civil proceedings.²³ Relying on the Due Process Clause, the Court held that a right to counsel may apply in juvenile proceedings, parole revocations, and terminations of parental rights.²⁴ Unlike the categorical requirement of counsel for indigent defendants in criminal proceedings, the Court's case-by-case approach in civil proceedings²⁵ allows courts to consider several factors in determining whether to appoint counsel in a given case.²⁶ For instance, courts may consider whether the State is a party, or whether substitute procedural safeguards will protect the indigent litigant's interests.²⁷

Civil litigants seeking to attain counsel in a civil matter may attempt to do so under 28 U.S.C. § 1915(e)(1) by moving for appointment of counsel.²⁸ Judges then follow the case-by-case approach to decide whether provision of counsel is appropriate. If rejected, litigants may appeal²⁹ on the grounds that the district court abused its discretion.³⁰ Even though this statute has

19 *Johnson v. Avery*, 393 U.S. 483 (1969); *see also* *Bounds v. Smith*, 430 U.S. 817 (1977) (requiring prisons to provide inmates better access to legal materials); *Haines v. Kerner*, 404 U.S. 519 (1972) (per curiam).

20 *See* *Eisenberg*, *supra* note 15, at 425–27; *Nichol*, *supra* note 16, at 338–40 (first citing *United States v. Kras*, 409 U.S. 434 (1973) (upholding filing fee for indigent individuals filing for bankruptcy); and then citing *Ortwein v. Schwab*, 410 U.S. 656 (1973) (per curiam) (ruling that a filing fee could constitutionally bar access to sue over welfare benefits)).

21 452 U.S. 18 (1981).

22 *Id.* at 33.

23 *See, e.g., Nichol*, *supra* note 16; John Pollock, *The Case Against Case-by-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 *DRAKE L. REV.* 763 (2013); *Dick*, *supra* note 13.

24 *See* *Dick*, *supra* note 13, at 627.

25 *See id.* at 627–28.

26 *See* *Pollock*, *supra* note 23, at 765.

27 *See id.*

28 28 U.S.C. § 1915(e)(1) (2012).

29 The circuits are split as to whether litigants can immediately appeal an order denying a motion for appointment of counsel in civil cases. Most circuits do not allow immediate appeal. For further discussion on this circuit split, *see* Brad D. Feldman, Note, *An Appeal for Immediate Appealability: Applying the Collateral Order Doctrine to Orders Denying Appointed Counsel in Civil Rights Cases*, 99 *GEO. L.J.* 1717 (2011).

30 *See* Columbia Law Sch. Human Rights Clinic, *supra* note 9, at 430; Lisa M. Windfeldt, Note, *Pro Bono Representation—A Lawyer's Statutory Right to "Just Say No": The End of Compelled Indigent Representation—Mallard v. United States District Court*, 25 *WAKE FOREST L. REV.* 647, 660 (1990) (describing the development of abuse of discretion as the standard of review for appointment of counsel).

been in place since 1892,³¹ it has been the subject of very little litigation.³² What litigation has transpired primarily concerns whether an appointed lawyer must accept a case,³³ and what factors district judges may consider when deciding whether to appoint counsel.³⁴

B. Prison Litigation

Many civil litigants moving for counsel are prisoners suing governmental entities.³⁵ Prisoners frequently sue prison guards, medical staff, wardens, disciplinary boards, and other governmental entities, arguing that the conditions of their incarceration violate their constitutional rights.³⁶ Common allegations include violations of the right to due process, privacy, equal protection, and freedom from cruel and unusual punishment.³⁷ Prisoner civil rights cases make up a significant percentage of the federal docket.³⁸ Between 1970 and 1990 the prison population in America nearly quadrupled.³⁹ Not surprisingly, the prisoner civil rights filings simultaneously rose: from 2267 in 1970 to 39,008 in 1995.⁴⁰ “Because almost all of these prisoner plaintiffs are indigent,” they regularly move for counsel.⁴¹

31 Originally, § 1915(e)(1) was codified as 28 U.S.C. § 1915(d). It was changed when Congress passed the Prison Litigation Reform Act in 1996, but the language was not significantly altered. See FED. JUDICIAL CTR., RESOURCE GUIDE FOR MANAGING PRISONER CIVIL RIGHTS LITIGATION 36 (1996), <https://www.fjc.gov/content/resource-guide-managing-prisoner-civil-rights-litigation-special-emphasis-prison-litigation-0>.

32 See Windfeldt, *supra* note 30, at 654.

33 See *id.* at 658; see also *Mallard v. U.S. Dist. Court*, 490 U.S. 296 (1989) (finding that courts cannot compel lawyers to represent indigent civil litigants). But see *Bothwell v. Republic Tobacco Co.*, 912 F. Supp. 1221 (D. Neb. 1995) (finding an inherent power to compel lawyers to represent indigent civil litigants); Eisenberg, *supra* note 15, at 449–51.

34 See *infra* Part II.

35 See Brown, *supra* note 7, at 1124.

36 See *id.*; see also Eisenberg, *supra* note 15, at 425–34.

37 See Eisenberg, *supra* note 15, at 425–34; see also William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 622–23 (1979) (finding that prisoners most frequently bring claims related to “medical care, property loss or damage, and interference with ‘access to the courts,’” as well as claims related to guard brutality, harassment, and visitation problems).

38 See Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 165 tbl.4 (2015) [hereinafter Schlanger, *Trends*]. Although rates have gone down since the passage of the Prisoner Litigation Reform Act, in recent years prisoner civil rights cases have occupied between six and eight percent of the federal docket. *Federal Judicial Caseload Statistics 2015*, ADMIN. OFF. U.S. CTS., <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015> (last visited Nov. 11, 2017); cf. MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION 4 (Kris Markarian ed., 3d ed. 2014) (“Each year the federal courts face dockets filled with huge numbers of § 1983 cases.”). Prisoner civil lawsuits occupied nearly twenty percent of the federal docket before the Prisoner Litigation Reform Act. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1558 (2003) [hereinafter Schlanger, *Inmate*].

39 Eisenberg, *supra* note 15, at 429.

40 Schlanger, *Inmate*, *supra* note 38, at 1583 tbl.IA.

41 Brown, *supra* note 7, at 1124.

In 1996, Congress enacted the Prison Litigation Reform Act (PLRA) to address the volume of prisoner litigation.⁴² “The PLRA did not change much of the substantive law underlying inmate litigation”; rather, it “rewrote both the law of procedure and the law of remedies in individual inmate cases in federal court.”⁴³ The PLRA requires prisoners to pay filing fees, pay court costs, and exhaust all grievance procedures before filing a claim.⁴⁴ Moreover, it requires judges to screen prisoner civil rights cases before allowing them to proceed,⁴⁵ and allows judges to hold telephonic hearings.⁴⁶ For the defendant, the PLRA relinquishes the obligation to respond⁴⁷ and limits the potential damages.⁴⁸ The PLRA has somewhat mitigated prisoner civil rights filings,⁴⁹ but federal dockets are still overwhelmed by prisoner litigation.⁵⁰ The PLRA addresses the volume of prisoner civil rights cases by creating barriers to filing a claim; however, once a claim survives the filing requirements, the PLRA has no impact on whether counsel is provided under § 1915(e)(1).

II. CURRENT CIRCUIT SPLIT REGARDING § 1915(e)(1): DIVIDED ON MERIT

With § 1915(e)(1), Congress granted judges substantial power to appoint counsel with little guidance regarding when and for what reasons they should do so. Over time, the courts of appeals have established parameters for district judges to follow when deciding whether to recruit counsel. The courts of appeals have divided on when an order denying appointment of counsel constitutes an abuse of discretion.⁵¹ Most circuits allow district judges to consider merit before appointing counsel,⁵² but some circuits do not.⁵³

42 42 U.S.C. § 1997e (2012); see also Eleanor M. Levine, Note, *Compensatory Damages Are Not for Everyone: Section 1997e(e) of the Prison Litigation Reform Act and the Overlooked Amendment*, 92 NOTRE DAME L. REV. 2203, 2209–11 (2017).

43 Schlanger, *Inmate*, *supra* note 38, at 1627.

44 28 U.S.C. § 1915(a)–(b) (2012); 28 U.S.C. § 1915(f)(2)(A); 42 U.S.C. § 1997e(a); see also Schlanger, *Inmate*, *supra* note 38, at 1627–33 (juxtaposing prisoner litigation pre- and post-PLRA).

45 28 U.S.C. § 1915A(a); Schlanger, *Inmate*, *supra* note 38, at 1629–30.

46 42 U.S.C. § 1997e(f)(1); Schlanger, *Inmate*, *supra* note 38, at 1630.

47 42 U.S.C. § 1997e(g)(1); Schlanger, *Inmate*, *supra* note 38, at 1630.

48 42 U.S.C. § 1997e(e); 28 U.S.C. § 1346(b)(2); Schlanger, *Inmate*, *supra* note 38, at 1630.

49 Schlanger, *Trends*, *supra* note 38, at 155–62.

50 See *supra* note 38 and accompanying text.

51 Compare *Montgomery v. Pinchak*, 294 F.3d 492, 498–99 (3d Cir. 2002) (“As a threshold matter, a district court must assess whether the claimant’s case has some arguable merit in fact and law.”), with *Navejar v. Iyiola*, 718 F.3d 692, 696 (7th Cir. 2013) (per curiam) (“*Pruitt* nowhere suggests that a district court should consider whether recruiting counsel would affect the outcome of a case; instead, that inquiry is reserved for the appellate court’s review for prejudice.”).

52 See *infra* note 54 and accompanying text.

53 See *infra* notes 64–81 and accompanying text.

A. *The Competing Tests*

The majority rule, followed by the First, Second, Third, Sixth, Ninth, Tenth, and D.C. Circuits, allows district judges to consider the merit of the case before appointing counsel.⁵⁴ A district court does not abuse its discretion by denying a motion for counsel on the basis that the claim lacks merit.⁵⁵ “Were it otherwise, the appointment in most instances would work a hardship on counsel with no concomitant benefit to the party requesting it.”⁵⁶ Although circuits allowing consideration of merit apply different tests, this Note will refer to them collectively as “merit-based tests.”

Mars v. Hanberry, a Sixth Circuit case, illustrates a merit-based test.⁵⁷ Plaintiff Joseph Mars appealed a decision by the United States District Court for the Eastern District of Michigan denying his motion to appoint counsel

54 *Harold v. Univ. of Colo. Hosp.*, 680 F. App'x 666, 671 (10th Cir. 2017) (“The plaintiff has the burden of demonstrating that his claim is sufficiently meritorious to warrant appointed counsel.”); *Montgomery*, 294 F.3d at 498–99 (“As a threshold matter, a district court must assess whether the claimant’s case has some arguable merit in fact and law.”); *United States v. Rae*, No. 98-3021, 98-3055, 1999 WL 229023, at *1 (D.C. Cir. Mar. 1, 1999) (per curiam) (“With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits.”); *Hodge v. Police Officers*, 802 F.2d 58, 60 (2d Cir. 1986) (“As a threshold matter . . . the district court must consider the merits of the indigent’s claim.”); *Wilborn v. Escalderon*, 789 F.2d 1328, 1330 (9th Cir. 1986) (noting that counsel will only be appointed under “exceptional circumstances,” which requires evaluation of the merits and consideration of the plaintiff’s ability to represent himself pro se given the complexity of the case); *Cookish v. Cunningham*, 787 F.2d 1, 2–3 (1st Cir. 1986) (per curiam) (“That the plaintiff has alleged sufficient facts to state a claim in the complaint does not in and of itself require the appointment of counsel.”); *Mars v. Hanberry*, 752 F.2d 254, 256 (6th Cir. 1985) (“Appointment of counsel . . . is not appropriate when a *pro se* litigant’s claims are frivolous, or when the chances of success are extremely slim.” (internal citations omitted)); *Boyd v. Petralis*, No. 16-CV-6286, 2017 WL 4533649, at *1 (W.D.N.Y. Oct. 10, 2017) (“[E]ven though a claim may not be characterized as frivolous, counsel should not be appointed in a case where the merits of the . . . claim are thin and his chances of prevailing are therefore poor.” (second alteration in original) (quoting *Carmona v. U.S. Bureau of Prisons*, 243 F.3d 629, 632 (2d Cir. 2001))); *Torres v. Saba*, No. 16-cv-06607, 2017 WL 2902823, at *10 (N.D. Cal. July 7, 2017) (denying motion to appoint counsel because the “likelihood of success on the merits looks rather low” and because “plaintiff has not shown a difficulty articulating his claims”); *Hendricks v. Mohr*, No. 2:15-cv-3130, 2017 WL 2362405, at *7 (S.D. Ohio May 31, 2017) (denying motion to appoint counsel because the case was too premature to accurately evaluate the merits); *Delacruz v. Vidal*, No. 15-cv-10695, 2017 WL 1330191, at *2 (D. Mass. Apr. 6, 2017) (“In making the determination whether to appoint counsel, a court must consider the totality of the circumstances, focusing on the merits of the case, the complexity of the legal issues, and the litigant’s ability to represent himself.”).

55 See, e.g., *Harold*, 680 F. App'x at 671 (“The magistrate judge had discretion to consider the legal merits of Mr. Harold’s claims in weighing the appointment of counsel and, finding none, did not abuse its discretion in twice denying counsel.”).

56 *Spears v. United States*, 266 F. Supp. 22, 26 (S.D.W. Va. 1967).

57 *Mars*, 752 F.2d 254.

and dismissing his complaint.⁵⁸ He had alleged negligent treatment by federal prison officials.⁵⁹ Mars sought \$5.2 million under the Federal Tort Claims Act for physical abuse and mental damage.⁶⁰ On appeal, the Sixth Circuit determined that the complaint lacked any basis for the district court to exercise subject-matter jurisdiction.⁶¹ Because appointment of counsel is not appropriate in the Sixth Circuit when the chances of success are slim, the court affirmed the denial.⁶² The court reasoned that “Mars’ complaint suffer[ed] from fatal jurisdictional defects, Mars ha[d] no chance of success based on the facts alleged in the pleadings and appointment of counsel would be a futile act.”⁶³

The Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits review § 1915(e)(1) decisions differently. Although these circuits apply differing tests, this Note will refer to them collectively as “non-merit-based tests” because they do not allow the district court to consider the likelihood of success of the plaintiff’s complaint. An example of a non-merit-based approach is *Rivera v. Kettle Moraine Correctional Institution*,⁶⁴ a case decided in the Eastern District of Wisconsin. Inmate Ernesto Rivera sued Kettle Moraine Correctional Institution alleging that six nurses violated his Eighth Amendment right by their “deliberate indifference to his serious medical needs.”⁶⁵ According to Rivera, when he complained of severe abdominal pain, the nurses failed to respond properly by delaying getting him to a physician and thereby causing his appendix to rupture.⁶⁶ When Rivera moved for counsel the court sought input from “a law firm whose business it is to pursue similar claims.”⁶⁷ The firm informed the court that medical negligence would be very difficult to prove given that appendicitis is often either missed or misdiagnosed, and the misdiagnosis was exacerbated by Rivera generalizing his pain.⁶⁸ Once Rivera specified that the pain was in his right side, he was transported to a hospital.⁶⁹ The firm ultimately concluded that “the case did not warrant the kind of investment that would be required to handle the case.”⁷⁰ This conclusion notwithstanding,⁷¹ because merit and substance

58 *Id.* at 255.

59 *Id.*

60 *Id.*

61 *Id.* (“The United States is the only proper party in an action pursuant to the Federal Tort Claims Act, and the FTCA does not grant federal courts jurisdiction over actions against individual defendants such as federal employees.” (citations omitted)).

62 *Id.* at 256.

63 *Id.*

64 No. 14-C-6, 2014 WL 2875897 (E.D. Wis. June 24, 2014).

65 *Id.* at *1.

66 *Id.*

67 *Id.* at *6.

68 *Id.* at *2.

69 *Id.*

70 *Id.*

71 *See id.* at *6 (“Only after receiving the firm’s evaluation and upon further research of the law did the court realize that the merits and substance of the claim are not among

were not factors for the court to consider when deciding whether to appoint counsel, and because the case was complex,⁷² the court was required to appoint counsel.⁷³

Rivera applied the Seventh Circuit's test, under which district judges must appoint counsel if the prisoner has tried and failed to secure counsel independently and the issue is too complex for the prisoner to litigate on his own.⁷⁴ Merit is explicitly excluded as a factor.⁷⁵ Similarly, in the Eighth Circuit, district judges give serious consideration to appointing counsel whenever an indigent plaintiff establishes a prima facie case which, if proven, would entitle him to relief.⁷⁶ If the claim survives a motion to dismiss, indicating that it is neither malicious nor frivolous, the district court considers whether the plaintiff has attempted in good faith to retain counsel and whether the nature of the case is such that the plaintiff and the court would benefit from the assistance of counsel.⁷⁷

The Fourth, Fifth, and Eleventh Circuits require appointment of counsel only if the case presents an exceptional circumstance.⁷⁸ The Fourth Circuit provides no guidance to help identify exceptional circumstances. The Eleventh Circuit provides some clarity, advising that if the "essential facts and legal doctrines [are] ascertainable without the assistance of court-appointed counsel," then the case does not present an exceptional circumstance.⁷⁹ Although the Fifth Circuit does not provide an exact definition,⁸⁰ it does instruct judges to consider:

- (1) the type and complexity of the case; (2) whether the [plaintiff] is capable of adequately presenting his case; (3) whether the [plaintiff] is in a position to investigate adequately . . . ; and (4) whether the evidence will

the factors to be considered by the district court in deciding whether to recruit counsel in this circuit.").

72 That *Rivera's* § 1983 claim relied on medical evidence was sufficient for it to be deemed complex. *Id.* at *7.

73 *Id.* at *8 ("I conclude . . . that under the law of this circuit it would be considered an abuse of discretion for the court to deny *Rivera's* request that the court recruit counsel for him.").

74 See *Pruitt v. Mote*, 503 F.3d 647, 654 (7th Cir. 2007) (en banc).

75 See *Navejar v. Iyiola*, 718 F.3d 692, 696 (7th Cir. 2013) (per curiam) ("*Pruitt* nowhere suggests that a district court should consider whether recruiting counsel would affect the outcome of a case; instead, that inquiry is reserved for the appellate court's review for prejudice.").

76 *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984).

77 *Sours v. Norris*, 782 F.2d 106, 107 (8th Cir. 1986) (per curiam).

78 *Wahl v. McIver*, 773 F.2d 1169, 1174 (11th Cir. 1985) (per curiam) (asserting that appointment of counsel in civil cases is "a privilege that is justified only by exceptional circumstances"); *Ulmer v. Chancellor*, 691 F.2d 209, 212 (5th Cir. 1982) ("The trial court is not required to appoint counsel for an indigent plaintiff . . . unless the case presents exceptional circumstances."); *Cook v. Bounds*, 518 F.2d 779, 780 (4th Cir. 1975) (establishing that "counsel should be allowed only in exceptional cases").

79 *Wahl*, 773 F.2d at 1174.

80 See *Ulmer*, 691 F.2d at 213 (quoting *Branch v. Cole*, 686 F.2d 264, 266 (5th Cir. 1982) (per curiam)).

[largely] consist . . . of conflicting testimony so as to require skill in the presentation of evidence and in cross examination.⁸¹

Absent from all three “exceptional circumstance” tests is an explicit merit or substance factor.

B. Latent Alternative Tests

Two additional approaches to provision of counsel in prisoner civil rights cases have been advanced—the market test and the marketability test. These tests are not currently used. Collectively, these tests will be referred to as “market-based tests” because they rely on the private market to determine whether provision of counsel is appropriate.

Judge Richard Posner long championed the market test. He first introduced it in *McKeever v. Israel*,⁸² where the Seventh Circuit reversed a decision denying appointment of counsel to an indigent prisoner.⁸³ In dissent, Judge Posner explained that prisoners seeking damages should be able to find representation on a contingent-fee basis if the case has some merit,⁸⁴ and prisoners seeking injunctive relief should be able to find representation if their case has some merit because the court can award attorneys’ fees under 42 U.S.C. § 1988.⁸⁵ Plaintiffs unable to secure counsel should thus be presumed to have an insufficiently meritorious claim and denied appointment of counsel.⁸⁶ Accordingly, the dispositive factor under the market test when deciding whether to appoint counsel in a prisoner civil rights case is whether the prisoner managed to retain counsel independently.

Judge David Piester introduced the marketability test a decade later.⁸⁷ He shared Judge Posner’s faith in the private market as a mechanism for deciding § 1915(e)(1) motions, but recognized flaws in the market test—specifically, the dissonance between prisoners and the private market.⁸⁸ Thus, attempting to integrate the market test with reality, Judge Piester created a four-step test to determine which claims warrant counsel. First, judges determine whether there is a market of lawyers whose professional practice aligns with the prisoner’s claim.⁸⁹ Plaintiffs may bring cases for which there is no realistic market, in which case provision of counsel is based only on factors divorced from the private market.⁹⁰ In cases where a market does exist, the

81 *Id.* (citations omitted).

82 689 F.2d 1315 (7th Cir. 1982). Judge Posner reiterated his commitment to the market test on multiple occasions after *McKeever*. See, e.g., *Hughes v. Joliet Corr. Ctr.*, 931 F.2d 425, 429 (7th Cir. 1991); *Merritt v. Faulkner*, 697 F.2d 761, 770 (7th Cir. 1983) (Posner, J., concurring in part and dissenting in part).

83 *McKeever*, 689 F.2d at 1323.

84 See *id.* at 1324–25 (Posner, J., dissenting).

85 See *id.*

86 *Brown*, *supra* note 7, at 1132.

87 *Bothwell v. Republic Tobacco Co.*, 912 F. Supp. 1221 (D. Neb. 1995).

88 See *id.* at 1236 n.14.

89 *Id.* at 1236.

90 See *id.* at 1236–37.

second step is to evaluate the plaintiff's access to that market.⁹¹ If the plaintiff does not have access, provision of counsel must be based only on factors divorced from the private market.⁹² If the plaintiff does have access to the market, then the marketability analysis is performed: the court determines whether the plaintiff has a feasible case for the private market given the available fee arrangements.⁹³ If the plaintiff has a feasible claim but was not able to retain counsel in the private market, the court must determine whether his inability to retain counsel was a product of indigence, in which case counsel must be appointed, or other factors, in which case provision of counsel is unnecessary.⁹⁴

III. RESTORING DISCRETION WHERE IT BELONGS: A CALL FOR MERIT-BASED TESTS

A uniform, merit-based test should be adopted by all courts of appeals. This Part begins with a brief statutory interpretation of § 1915(e)(1). Section III.B uses *Pruitt v. Mote* as a case study to illustrate the deficiencies of non-merit-based tests. Specifically, Section III.B argues that non-merit-based tests cause district courts to appoint counsel too readily, which unnecessarily overwhelms courts, attorneys, and defendants. Section III.C addresses criticisms of merit-based tests, and ultimately argues for a uniform test for deciding § 1915(e)(1) motions. Specifically, district courts should consider: (1) the merit of the claim; (2) what is at stake in the litigation; (3) whether the plaintiff has made a reasonable attempt to secure counsel on his own; and (4) whether the plaintiff appears competent to litigate the matter himself given the difficulty of the case.

A. *Interpreting § 1915(e)(1)*

There are two competing interests when a court attempts to generalize when counsel should be appointed under § 1915(e)(1). Judicial systems want to “caution against routine appointment of counsel,” but not so much as to “oblige indigent litigants to demonstrate that they can win their cases without the aid of counsel.”⁹⁵ Striking a balance between these competing interests requires a policy judgment regarding their relative importance. Such a policy decision should be made only after considering the practical implications. Before engaging in the pragmatic analysis, however, it is imperative to interpret the statute under which courts derive the authority to appoint counsel. This analysis helps illuminate how Congress intended § 1915(e)(1) to operate.

91 *Id.* at 1237.

92 *Id.*

93 *Id.*

94 *Id.* at 1237–38.

95 *Cooper v. A. Sargenti Co.*, 877 F.2d 170, 174 (2d Cir. 1989) (per curiam).

That “[t]he court *may* request an attorney to represent any person unable to afford counsel” implies a grant of discretion.⁹⁶ Indeed, most courts have determined that much.⁹⁷ But district judges in non-merit-based circuits are divested of discretion. By minimizing district judges’ discretion to mere box-ticking, like in the Seventh Circuit, non-merit-based tests stray from the statutory text. Although the language of § 1915(e)(1) is sufficiently vague to permit non-merit-based tests, a far more intuitive reading is that district judges should consider the relevant factors of a litigant and his claim to decide whether provision of counsel is appropriate. Under this scheme, the appellate court’s role is not to reduce district court discretion to a checklist, but rather to ensure—through abuse of discretion review—that district courts only consider relevant factors and reach reasonable judgments based on facts supported by the record.

Congress intended to give courts vast discretion with § 1915(e)(1).⁹⁸ Opting against a blanket right to counsel in civil cases, Congress addressed inequities plaguing indigent litigants by giving discretion to those with judicial expertise—judges. District judges represent the judicial expertise in the enterprise of providing counsel in prisoner civil rights cases. Appointment of counsel is addressed at the outset of a case. District judges are, at the time of the motion, familiar with the claimant, his claim, and his opponent. Moreover, district judges confront prisoner civil rights cases regularly, and are thus poised to know how a particular case compares to the rest. As the judicial expert equipped to exercise discretion, district judges must, in order to adequately exercise such discretion, be able to consider the most relevant factors when deciding whether to appoint counsel, such as merit and substance.

Courts of appeals decide what factors are relevant for district judges to consider when determining whether provision of counsel is appropriate. First and foremost, merit and substance are relevant. Withholding them as factors undermines discretion on the district-court level, advances a crude interpretation of the statute, and carries pragmatic consequences. Withholding merit and substance as factors prevents the courts with the most relevant judicial expertise from making the decision about counsel. Courts of appeals that deem merit and substance off limits for district courts deciding on motions for counsel, such as the Seventh Circuit,⁹⁹ contravene the best reading of § 1915(e)(1).

B. Case Study: *Pruitt v. Mote*

The Seventh Circuit decision in *Pruitt v. Mote* provides a useful case study for identifying the deficiencies of non-merit-based tests. This Section argues that non-merit-based tests lead to provision of counsel too often,

96 See 28 U.S.C. § 1915(e)(1) (2012) (emphasis added).

97 See, e.g., *Cooper*, 877 F.2d at 171–72; Columbia Law Sch. Human Rights Clinic, *supra* note 9, at 429.

98 Cf. *Brown*, *supra* note 7, at 1152 n.153.

99 *Pruitt v. Mote*, 503 F.3d 647, 654 (7th Cir. 2007) (en banc).

which puts unduly high pressure on almost every actor in prisoner civil rights litigation. Courts are tasked with the administrative work of pairing clients with attorneys, attorneys are asked to take on cases more often than they may prefer, and defendants confront higher costs in otherwise inexpensive matters.

Pruitt established the Seventh Circuit's non-merit-based test.¹⁰⁰ Inmate Benjamin Pruitt accused a guard of sexual assault.¹⁰¹ Four times before trial, Pruitt moved for counsel.¹⁰² Each motion was denied.¹⁰³ Reviewing the denials en banc, the Seventh Circuit reversed and remanded the case because the district court failed to fully apply the proper legal standard.¹⁰⁴ The district court only evaluated the complexity of the issues, but not the plaintiff's competence.¹⁰⁵ Judge Sykes clarified the test for § 1915(e)(1) motions in her decision: the district court must inquire (1) whether an indigent plaintiff has made reasonable efforts to retain counsel on his own or has been precluded from making such efforts, and (2) whether the plaintiff appears competent to try the case himself given the legal and factual complexities of the case.¹⁰⁶

Although prison civil rights cases occupy a significant portion of the docket,¹⁰⁷ this test has not been revisited for ten years.¹⁰⁸ Change is overdue because the current scheme too readily appoints counsel. So long as a prisoner writes to multiple lawyers, the analysis boils down to the complexity of the case and the competence of the plaintiff.¹⁰⁹ And as a general matter, while the majority of prisoners have below average education,¹¹⁰ prison civil

100 *Id.* at 649. *Pruitt* was not the first Seventh Circuit case to address provision of counsel. Over a quarter century before *Pruitt*, in *Maclin v. Freake*, the Seventh Circuit established a very different test—one far more homologous to the majority test—under which district judges considered the merit of a claim first. 650 F.2d 885, 887 (7th Cir. 1981), *abrogated on different grounds* by *Farmer v. Haas*, 990 F.2d 319 (7th Cir. 1993).

101 *Pruitt*, 503 F.3d at 649.

102 *Id.*

103 *Id.*

104 *Id.* at 661.

105 *Id.* at 660.

106 *See id.* at 654.

107 *See supra* note 38 and accompanying text.

108 Not only has the Seventh Circuit neglected to reconsider its test, there is a remarkable lack of scholarly and judicial attention given to § 1915(e)(1) review.

109 *See Hopkins v. Pierce*, No. 17-CV-1316, 2017 WL 4269961, at *2 (C.D. Ill. Sept. 26, 2017).

110 *See Eisenberg, supra* note 15, at 442 (“Average IQ’s for prison inmates have been reported to be as low as 80. Seventy percent of prison and jail inmates have not completed high school; 40% have learning disabilities; and 75% read at or below the eighth grade level.” (footnote omitted)); Stephanie Ewert & Tara Wildhagen, *Educational Characteristics of Prisoners: Data from the ACS* (U.S. Census Bureau, Working Paper No. 2011-8, 2011), <https://www.census.gov/content/dam/Census/library/working-papers/2011/demo/ewert-wildhagen-prisoner-education-4-6-11.pdf>.

rights cases are predominately complex.¹¹¹ Consequently, district courts must appoint counsel in cases where it is impractical and inefficient.

The gratuitous appointment of counsel required by *Pruitt* foists a burden on courts, attorneys, and defendants. District courts bear the administrative burden by having to locate and secure counsel.¹¹² If the court struggles to recruit counsel it will delay the litigation process. Additionally, judges are placed in a position where they must ask favors of lawyers who frequently appear before them as litigants. A dubious dynamic. The burden can be transferred to lawyers using an electronic system that randomly assigns the case, but due to the time and money required to maintain such a system, it is more a way to rearrange the burden than to relieve it.¹¹³

Private attorneys are most frequently asked to take prisoner civil rights cases.¹¹⁴ There are ample reasons to decline a request. To begin with, the cases require significant personal and financial commitment. Appointed attorneys are expected to advance money to cover costs of discovery, travel, and other litigation expenses.¹¹⁵ Some lawyers are not in a position to advance these costs—fewer are willing.¹¹⁶ What is more, since prisons tend to be isolated in rural locations, lawyers may have to travel far distances without reimbursement.¹¹⁷ Once they arrive at the prison, lawyers are at the mercy of the institution with regard to whether, and if so, how promptly, they

111 See *Henderson v. Ghosh*, 755 F.3d 559, 566 (7th Cir. 2014) (per curiam) (finding the case complex because it required expert medical evidence); *Swofford v. Mandrell*, 969 F.2d 547, 552 (7th Cir. 1992) (finding a case complex because the plaintiff must prove a state of mind); *Merritt v. Faulkner*, 697 F.2d 761, 764 (7th Cir. 1983) (noting that factual and legal issues are commonly more complex in civil cases than criminal cases, especially where constitutional issues are raised); *Cole v. Janssen Pharm., Inc.*, 265 F. Supp. 3d 892, 896 (E.D. Wis. 2017) (“[D]ecisions by the [Seventh Circuit] suggest that many, if not most, prisoner cases could be considered sufficiently complex in light of the inherent mental, educational, and physical limitations and barriers most prisoners face so as to require recruitment of counsel.”); Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES (Mar. 21, 1994), <https://www.nytimes.com/1994/03/21/nyregion/flood-of-prisoner-rights-suits-brings-effort-to-limit-filings.html>; cf. Eisenberg, *supra* note 15, at 434 (explaining that prisoner civil rights litigation rarely involves disputed facts, but instead tends to involve disputes regarding “whether the prison’s reaction to a given factual situation was appropriate”). But cf. *Smith v. Pollard*, No. 16-cv-10, 2017 WL 3913023, at *7 (W.D. Wis. Sept. 6, 2017) (ruling that a sexual assault lawsuit was not too complex for the prisoner-plaintiff).

112 This is more tedious than it may sound. Consider the innumerable offices explicitly dedicated to connecting clients with willing pro bono lawyers. See, e.g., *Our Mission*, VOLUNTEER LAWYER NETWORK, INC., <https://www.volunteerlawyernetwork.net/who-we-are/> (last visited Oct. 16, 2017).

113 See, e.g., *Dixon v. Ill. Dep’t of Corr.*, No. 16-cv-1222, 2017 WL 3016936, at *5 (S.D. Ill. July 13, 2017); *Simelton v. City of Cairo*, No. 13-0265, 2013 WL 3270957, at *2 (S.D. Ill. June 27, 2013).

114 See Eisenberg, *supra* note 15, at 463.

115 See *id.* at 484.

116 See *id.*

117 See *id.*

can meet with their client.¹¹⁸ “[T]he nature of the client must be considered,” too.¹¹⁹ Prisoner plaintiffs may exhibit antisocial behavior and poor judgment, such as the behavior and judgment that led to criminal conduct in the first place.¹²⁰ Some prisoners may have unreasonable expectations regarding the outcome of their claim, developed through time spent in a social environment consisting solely of other prisoners. This is not to say prisoners do not deserve a lawyer, but rather that not all lawyers are cut out to represent prisoners.

Attorneys may take on pro bono cases even though they are not suited for it, which can have negative consequences. The person requesting the representation is a judge before whom the attorney likely often appears, whose job is easier if the attorney accepts the case, and with whom the attorney likely has a deep interest in maintaining a good relationship. So, attorneys may accept pro bono cases even though it is not in their best interest. Because attorneys and firms strive to maintain a good reputation with judges (not to mention the community at large), volunteering lawyers are pressed to do high-quality work on pro bono cases while simultaneously balancing the interests of paying clients. Not only does the client suffer from having an unsuited lawyer, but the lawyer may suffer as well. If a case is meritless, jury members might question the firm’s/attorney’s judgment in accepting the case, which could influence the jury member’s decision to personally retain the firm/attorney, or to advise a friend to retain the firm/attorney. If inexperienced attorneys are delegated the pro bono cases (which is common)¹²¹ and give an unimpressive performance, the jury may develop—and promulgate—a negative perception of the lawyers and their firm. In other words, when asked to take a prisoner civil rights case as a favor for the court, an attorney/firm must decide between risking business or risking rapport with the judge.

Finally, *Pruitt* imposes an unnecessary burden on defendants. When counsel is provided in meritless cases, the financial burden becomes higher for the defendant. Along with counsel, the government sometimes provides an expert witness.¹²² As a result, defendants often face higher legal fees because their attorneys must spend more time addressing the claim. They may also have to hire their own expert witness to refute the plaintiff’s. Taken in tandem, cases that would otherwise be disposed of at a low cost require significant investment from the defendant.

Although the PLRA was passed to address the issue of overwhelming prisoner litigation, it does not negate the deficiencies of *Pruitt*. Under the

118 See *id.* (“Often the time waiting to see a client at the prison can exceed the time of the interview and travel.”).

119 *Id.*

120 See *id.*

121 See KEVIN LAPP & ALEXA SHABECOFF, PRO BONO GUIDE: AN INTRODUCTION TO PRO BONO OPPORTUNITIES IN THE LAW FIRM SETTING 5 (2d ed. 2001), <http://hls.harvard.edu/content/uploads/2008/07/guide-pro-bono.pdf>.

122 See FED. R. EVID. 706; *Rowe v. Gibson*, 798 F.3d 622, 631–32 (7th Cir. 2015).

PLRA, a claim shall be dismissed if “the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.”¹²³

C. *Pruitt v. Mote: Deficient but Repairable*

This Section first addresses potential criticisms of merit-based tests. Specifically, that merit-based tests afford too much discretion, ask judges to rule on the merits prematurely, and withhold counsel too often. Second, this Section argues for a uniform merit-based test.

Every time a prisoner moves for appointment of counsel in a merit-based test jurisdiction, the court will be able to justify denying the motion. This generalization is true because merit-based tests subject prisoners to a Morton’s Fork.¹²⁴ If a prisoner adequately proves merit, the judge may infer that the case is not too complex for the prisoner to manage independently and may thus deny the motion.¹²⁵ Conversely, if the prisoner cannot adequately demonstrate merit,¹²⁶ the judge may deny the motion on that basis.¹²⁷

The Morton’s Fork begs the question: Are district judges granted too much discretion under merit-based tests? It is a substantial grant of power. But the Morton’s Fork is not a reason to restrict discretion. Rather, the Morton’s Fork is a symptom of the wide discretion § 1915(e)(1) calls for. It is a necessary result when judges are weighing relevant factors as they see appropriate. In the event that judges exploit the Morton’s Fork and unreasonably withhold counsel, prisoners may appeal. Just because a court will always be able to explain why it denied a motion to appoint counsel does not mean the decision will always be upheld.

Another possible criticism of merit-based tests is that judges are asked to rule on the merits with insufficient information. To judge a case’s merit absent counsel seems to contravene a central pillar of our justice system. Moreover, one may argue that to judge a case’s merit before a trial is to look through the wrong end of the telescope. The *raison d’être* of a trial is to establish the facts in order to make a judgment.¹²⁸ Judging the merits before trial asks judges to rule on the merits without the information gathering process that allows for such a ruling. Judges do have some information at the outset, though. They know the facts alleged in the complaint, they may know the asserted defenses, and they can always ask either party for more information. Therefore, rendering a judgment on the merits before trial is more akin to looking through a telescope on a foggy day.

123 42 U.S.C. § 1997e(c) (2012).

124 A “Morton’s Fork” describes a dilemma where two alternative lines of reasoning lead to the same undesired outcome. Robert E. Wagner, *Gordon Gekko to the Rescue?: Insider Trading as a Tool to Combat Accounting Fraud*, 79 U. CIN. L. REV. 973, 982 n.58 (2011).

125 Pollock, *supra* note 23, at 769–70.

126 Doubtless, a prisoner’s inability to sufficiently demonstrate the merit or complexity of his case is partially a function of his lack of counsel. *See id.* at 768–69, 769 n.18.

127 *Id.* at 769–70.

128 *Cf.* FED. R. CIV. P. 54.

Provision of counsel is an act of discretion—one that will only be appealed if denied—so judges can, and should, err on the side of the plaintiff whenever the fog is simply too thick to render a confident assessment. Furthermore, in some cases *substance* is clear even when *merit* is not. For instance, the costs of litigation may not be warranted for a plaintiff seeking damages for a past injury, as opposed to injunctive relief for an untreated medical problem or damages for a permanent injury requiring ongoing treatment and/or diminished capacity. In such cases the medical care will have been provided by the prison and the plaintiff's incarceration will prevent any wage loss. If the damages sought for pain and suffering fall well below the cost of litigation, and there is not a significant societal benefit to gain through litigation, counsel should not be appointed regardless of merit.

Concerns about a premature judgment on the merits can be further allayed by considering procedure. Under *Pruitt*, a pro se prisoner files a motion for appointment of counsel to the district judge, who cannot consider merit.¹²⁹ If denied counsel, the prisoner may appeal the decision and argue abuse of discretion. The appellate court will decide whether the district court abused its discretion and whether the abuse of discretion was prejudicial. The appellate court evaluates merit in the latter determination.¹³⁰ The case will only be remanded (and counsel provided), therefore, if the claim is sufficiently meritorious. This means that allowing district judges to evaluate merit is not as extraordinary as it may seem—the appellate court already does it. Moreover, the grant of authority is not absolute. Prisoners denied counsel based on merit or substance can appeal. Thus, if the case does warrant provision of counsel, procedural safeguards are in place to ensure counsel is appointed.

A final issue to consider is how often district judges grant motions for appointment of counsel under *Pruitt*, notwithstanding a claim's apparent lack of merit and substance, only to find by and by that counsel indeed impacts the outcome of the case. Put differently, prisoners who are granted counsel presumably never appeal the decision; so how many prisoners in non-merit-based circuits prevail on their claim who would have been denied counsel under a merit-based test? If the test is well calibrated, this concern is unconvincing. While there will be anomalies, so long as merit and substance requirements are low—and litigants have an opportunity to appeal the denial of appointed counsel—the number of plaintiffs who lose explicitly due to lack of counsel should be minimal.

Pruitt should be readdressed, and the new test should contain the *Pruitt* factors plus merit and substance. Merit and substance are precisely what private firms consider when deciding whether to take a case for a contingency fee.¹³¹ Because prisoner civil rights litigation is no different from the law-

129 See *supra* notes 100–06 and accompanying text.

130 *Pruitt v. Mote*, 503 F.3d 647, 659 (7th Cir. 2007) (en banc).

131 See Tracy Schorn, *Working on a Contingency Fee Basis*, 31 WASH. LAW. 12 (2016); *Twelve Things Prospective Clients Should Know About Contingency Fee Agreements*, LAW OFF. WILLIAM D. BLACK, <https://www.billblacklawfirm.com/twelve-things-prospective-clients-should>

yers' perspective,¹³² the same factors should be considered by judges—although weighted differently since remuneration is not the prevailing interest. After all, for civil litigants it is most often the strength of one's claim, not indigence, that prevents parties from acquiring an attorney.¹³³

Neither merit nor substance should operate as high bars. Setting low thresholds for merit and substance balances the need to avoid compulsory appointment of counsel and the need to prevent litigants from pursuing their matter pro se when, despite the apparent lack of merit or substance, counsel would make a material difference in their case.

A demonstration of merit should not mean a showing that the plaintiff faces a high likelihood of success. The standard could be identical to the current standard for prejudice at the appellate level in the Seventh Circuit: a prisoner overcomes the merit requirement if he demonstrates that “there is a reasonable likelihood that the presence of counsel would [make] a difference in the outcome of the litigation.”¹³⁴ Alternatively, courts could require that “the defendant[] [have] no dispositive defenses and the controlling law [leave] at least a chance for the plaintiff to prevail on the merits.”¹³⁵ The requirement that plaintiffs make a showing of substance should also be a low bar. Prisoners should not have to demonstrate that their case will prove remunerative to counsel if won, but merely that the damages sought reasonably warrant the recruitment of counsel.

By mitigating compulsory provision of counsel in claims lacking the requisite merit or substance this new test will ease the burden on courts, attorneys, and defendants. Of course, courts will still have to solicit lawyers to represent indigent prisoners, attorneys will still be asked to take such cases as a favor for the court, and defendants will still face the high costs associated with represented plaintiffs. Courts, attorneys, and defendants will not be as overwhelmed, however, because counsel will be appointed in fewer cases. Furthermore, courts soliciting counsel will know that it is for a somewhat meritorious and substantive claim. Soliciting someone's free professional services will become less irksome, knowing that it is not a futile assignment. Likewise, attorneys asked to take a case will know that the court has already deemed the claim to have a threshold level of merit and substance. Finally,

know-about-contingency-fee-agreements/ (last visited Oct. 17, 2017) (“Any attorney's decision concerning whether to handle a case on a contingency fee basis should be based on the merits of the case and . . . whether . . . the claimed damages justify the economic risks.”); *Will A Lawyer Take My Case?*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/takecase> (last visited Oct. 17, 2017).

132 Prisoners seeking damages can retain counsel on a contingency fee basis. See U.S. DIST. COURT DIST. OF MINN., *supra* note 3, at 20. Indigent prisoners seeking injunctive relief may also secure counsel because courts may award attorneys' fees to prevailing plaintiffs. 42 U.S.C. § 1988 (2012); Brown, *supra* note 7, at 1130.

133 *Cooper v. A. Sargenti Co.*, 877 F.2d 170, 173 (2d Cir. 1989) (per curiam) (“[T]he availability of counsel for claims by individuals is determined less by the wealth of the claimant than by the merits of the claim.”).

134 *Pruitt*, 503 F.3d at 659 (emphasis omitted).

135 Brown, *supra* note 7, at 1129.

defendants who face higher costs because their opponent is represented will know that the costs are increased because the judge deemed the claim sufficiently meritorious and substantive to justify the “extraordinary step” of recruiting counsel.¹³⁶

Because fewer pro bono hours will be spent on losing cases, adding merit and substance requirements to *Pruitt* will improve the distribution of volunteer legal work. When judges recruit counsel for prisoners, they chiefly call on private law firms,¹³⁷ and such law firms typically incentivize only a limited number of pro bono hours per attorney.¹³⁸ Likewise, small firms and solo practitioners can only contribute a limited number of pro bono hours per year to maintain a profitable practice. In other words, pro bono legal work is an exhaustible resource.¹³⁹

Courts play a major role in the distribution of this valuable resource.¹⁴⁰ Every hour a lawyer spends volunteering on a futile matter, a pro bono hour that could have been spent meaningfully is lost.¹⁴¹ By adding merit and substance to the requirements in *Pruitt*, fewer pro bono hours will be spent on futile or nugatory claims and more can be spent on constructive matters. If lawyers notice their volunteer hours are valued and spent meaningfully, as opposed to just “giving the semblance of merit to undeserving complaints,” the frequency and vigor of their volunteerism may increase.¹⁴²

IV. MERIT OVER MARKET

If one accepts that non-merit-based tests are impractical, what then remains is determining the optimal metric by which to delineate claims that warrant counsel from claims that do not. Merit and substance constitute the

136 *Cole v. Janssen Pharm., Inc.*, 265 F. Supp. 3d 892, 898 (E.D. Wis. 2017).

137 *See Eisenberg, supra* note 15, at 463.

138 *See The 2017 Survey of Pro Bono Hours*, CHAMBERS ASSOCIATE, <http://www.chambers-associate.com/law-firms/pro-bono-hours> (last visited Oct. 16, 2017) (demonstrating that of 108 firms, forty-five limit the amount of pro bono hours associates may count toward their annual billable hours). At the remaining firms, associates are misguided if they think their firm’s unlimited billable pro bono hour policy means they can truly bill as many pro bono hours as they like without consequences. *See Gabe Friedman, Lawyer Who Helped Save Death Row Inmate Didn’t Make Partner*, BLOOMBERG L.: BIG L. BUS. (Dec. 1, 2016), <https://biglawbusiness.com/lawyer-who-helped-save-death-row-inmate-didnt-make-partner/> (revealing that an associate at K&L Gates—one of the unlimited pro bono billable hour firms—did not receive competitive bonuses or make partner in part because he billed too many pro bono hours); *see also* SUSAN R. MARTYN & LAWRENCE J. FOX, TRAVERSING THE ETHICAL MINEFIELD 450 (3d ed. 2013) (asserting that essentially no nonbillable activity counts towards bonuses, “no matter how important to the health of the firm or the good of the poor”).

139 *See Cooper v. A. Sargenti Co.*, 877 F.2d 170, 172 (2d Cir. 1989) (per curiam).

140 *Id.*

141 *Id.* (“Because this resource is available in only limited quantity, every assignment of a volunteer lawyer to an undeserving client deprives society of a volunteer lawyer available for a deserving cause.”).

142 *See id.* at 172–73.

ideal metrics, as opposed to the only suggested alternative: reliance on the private market. Market-based tests defer to the private market as the litmus test for merit. In contrast, relying more generally on merit and substance captures the consideration of the market while permitting a more holistic exercise of discretion. Judge Posner's market test fails because it is too reductive. Judge Piester's marketability test fails because it is too encumbering.

Posner's market test eviscerates § 1915(e)(1),¹⁴³ which is not ambiguous enough for Posner's interpretation.¹⁴⁴ Underlying § 1915(e)(1) is the assumption that Congress intended the courts to play a role—at least in some instances—when a litigant has not secured counsel in the private market. In that sense, § 1915(e)(1) “reflects Congress's desire to work *against* market forces.”¹⁴⁵ Posner's strict construction of § 1915(e)(1) reserves no role for courts when the market leaves a litigant unrepresented.¹⁴⁶

The market test does not remedy the problems caused by *Pruitt* because it is too extreme. Although it is geared toward controlling overcrowded federal dockets by delineating meritorious from meritless cases, it is reductive insofar as it inadequately measures merit and social value.¹⁴⁷ Lawyers' willingness to take a case in the private market does not properly test merit. First, prisoners lack access to the legal market due to constrained communication outside the prison, limited information on attorneys, and poor reading and writing skills.¹⁴⁸ Second, forces other than merit influence a lawyer's willingness to take a case, such as inconvenience or bias.¹⁴⁹ More generally, the market test wholly disregards the societal value of prisoner cases that is unaccounted for in the valuation of potential damages. For instance, society benefits from “the deterrence and declaration of public norms that [a] case may yield,”¹⁵⁰ as well as the vindication of important statutory or constitutional rights.¹⁵¹

The market test fails prisoners by too frequently withholding representation and fails society by disregarding the nonremunerative value of prisoner cases. Such an extreme approach illuminates why § 1915(e)(1) exists, and why extreme caution is due when reworking *Pruitt* to ensure that merit and substance requirements are not excessively high. *Pruitt* is too generous, but

143 Brown, *supra* note 7, at 1152.

144 *Id.* at 1120–21 (“[T]he market test rests on dubious statutory interpretation.”).

145 *Id.* at 1151.

146 *Id.* at 1154 (“If courts construe a statute too strictly, denying a remedy in cases where Congress meant to confer the remedy, the courts effectively reduce the power of Congress.”).

147 *See id.* at 1139–40.

148 *See id.* at 1140–44 (highlighting the handicaps that inhibit prisoners from “selling” their claims in the market); *see also* Merritt v. Faulkner, 697 F.2d 761, 768–69 (7th Cir. 1983) (Cudahy, J., concurring).

149 *See* Brown, *supra* note 7, at 1144–51 (suggesting that lawyers may reject a potential client for reasons other than merit, such as inconvenience and bias); *see also id.* at 1137–38.

150 *Id.* at 1119–20.

151 *See id.* at 1139.

prisoners with meritorious, socially valuable cases must not be denied counsel.

Theoretically, Judge Piester managed to perfect the market test. So why has his marketability test not caught on? Moreover, why was Piester's *Bothwell* opinion the first and last one to mention the test? Because it is only perfect in theory—in reality, it is impractical and unnecessary. Considering the volume of prison civil rights cases with motions for appointment of counsel, a test cannot be overly encumbering. The marketability test is just that. It may be pertinent on some occasions to consider whether there is a legal market for a prisoner's claim, how much access a prisoner has to the market, and so on; however, the typical case does not require such a rigorous, Sisyphean survey of the legal market and the plaintiff's place in it.

At its core, the marketability test asks judges to consider the market, but instead of relying on it steadfastly—as Posner suggests—to rely on it reasonably, taking reasonable precaution to acknowledge when to stray from the market. This is exactly what judges are expected to do when they consider merit. Judge Piester's test corrects the reductive market test but remains too concentrated on the market. Under the test proposed in this Note, the “marketability” of a claim is wrapped in with merit, but a judge can rely on the private market as much or as little as a case necessitates.

Non-merit-based tests take too much discretion from district judges and give it to appellate courts. Market-based tests take too much discretion from district judges and displace it in the private market. Adding merit and substance to the factors in *Pruitt* gives district judges the latitude to consider the most relevant factors without being overly encumbering.

CONCLUSION

All district judges should consider merit and substance when determining whether to appoint counsel under § 1915(e)(1). Absent such considerations, § 1915(e)(1) operates too generously and is too easily exploited. Adding merit and substance to *Pruitt* is the best way to promote efficiency and adequately ensure representation when it is in plaintiffs' and society's best interest. Striking a better balance than *Pruitt* benefits judges and defendants by relieving the burdens imposed by the high volume of prisoner civil rights cases with appointed counsel. It also benefits the community by more efficiently distributing pro bono hours.

This Note used *Pruitt* as a case study to demonstrate that the Seventh Circuit is using a deficient test when confronting § 1915(e)(1) motions. The conclusions reached apply to the Fourth, Fifth, Eighth, and Eleventh Circuits with regard to merit, and all circuits with regard to substance. This Note provides a template test. District courts should consider: (1) the merit of the claim; (2) what is at stake in the litigation; (3) whether the plaintiff has made a reasonable attempt to secure counsel on his own; and (4) whether the plaintiff appears competent to litigate the matter himself given the difficulty of the case.

