

Author:



BY MARGO SCHLANGER

Henry M. Butzel Professor of

Law

University of Michigan



JUSTICE WATCH | An Alliance for Justice blog tracking the latest developments in the fight for a fair America

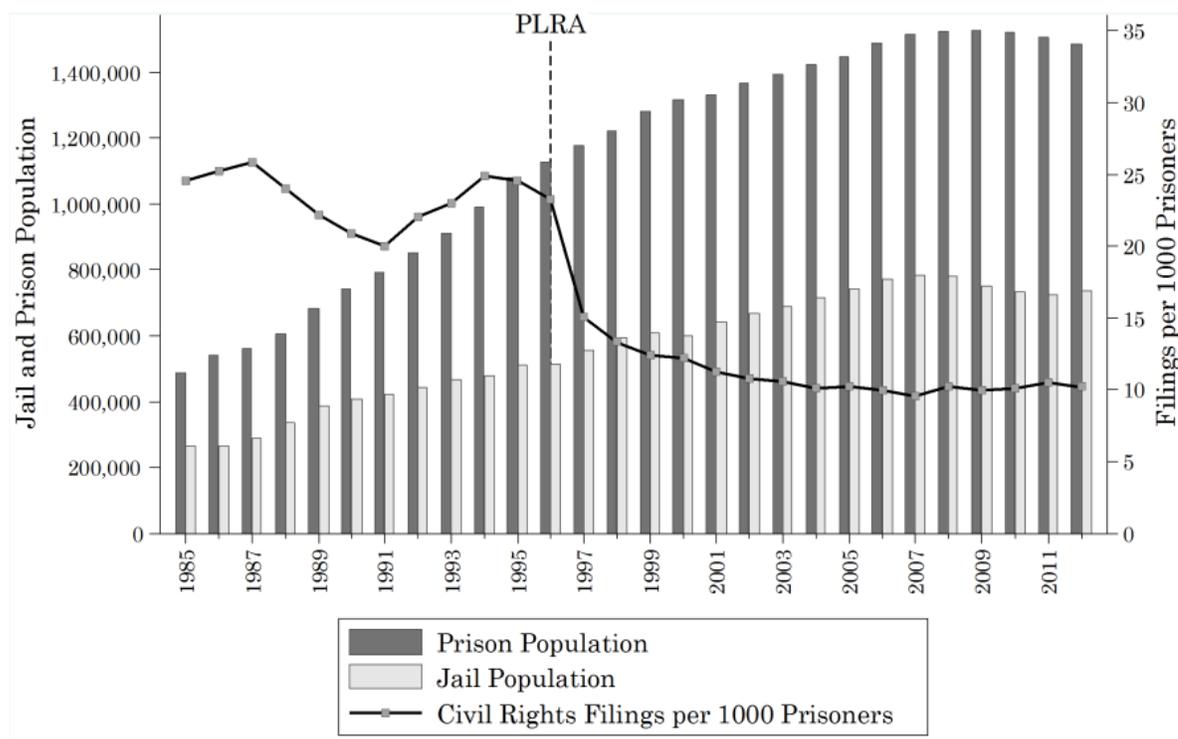
GUEST BLOG: The declining prison litigation docket

February 25, 2015



On Monday, the Supreme Court heard argument in a prisoner civil rights case, *Coleman-Bey v. Tollefson*. The issue under review is how best to interpret the “three-strikes” provision of the Prison Litigation Reform Act (PLRA). This statute, passed in 1996 as part of the Newt Gingrich “Contract with America,” sharply limited court access for prisoners in myriad ways. *Coleman-Bey* is a small case, relevant to very few prisoners and very few cases. It’s about a stand of trees in a pretty big forest. The forest-level summary is that the PLRA has cut the civil rights litigation rate per prisoner by more than half since 1995. The federal courts are playing a far lesser role in remedying prisoner civil rights violations than they used to.

Here’s the key chart, taken from one of my articles (and shared with the Supreme Court in an amicus brief on behalf of several dozen professors, including me). It shows the steep drop in federal civil rights filings per prisoner in the late 1990s, and the plateau since. I have argued that even at prisoner litigation’s peak, what people used to call the “flood” of prisoner lawsuits was, in actuality, a flood of prisoners. But whether or not you agree, it’s clear that the flood has abated:



Coleman-Bey deals with 28 U.S.C. § 1915(g), part of the federal in forma pauperis statute, which governs when filing fees are waived. Most indigent plaintiffs in federal court are exempt from the filing fee—currently \$400 in district court, \$500 in the courts of appeals. However, prisoners are different; even if they qualify as indigent (as most do), they are nonetheless required to pay the full amount of filing fees, over time, with the money levied from their prison account. This is the same account prisoners use to pay for postage, hygiene items, extra food, and the like. So where in forma pauperis status for a non-prisoner exempts that plaintiff from certain expenses, the same status merely allows a prisoner to avoid pre-payment of fees, but not the fees themselves.

In the provision at issue in Coleman-Bey, Congress further clamped down on prison litigation. Even the limited payment-but-no-prepayment version of in forma pauperis status is not available to prisoners who are deemed too-frequent, and too-unsuccessful litigants. The statute provides:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section [that is, in forma pauperis] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

Thus prisoners are allowed three “strikes” – dismissals of an action or appeal on the grounds that it is frivolous, malicious, or fails to state a claim – before they are barred from the watered-down version of indigent court access otherwise available to them.

The issue in Coleman-Bey is whether a district court’s dismissal of a lawsuit counts as a strike while that dismissal is still pending on appeal. Eight circuits have sided with the prisoner and said no; the Sixth and

Seventh Circuits have taken a stricter view.

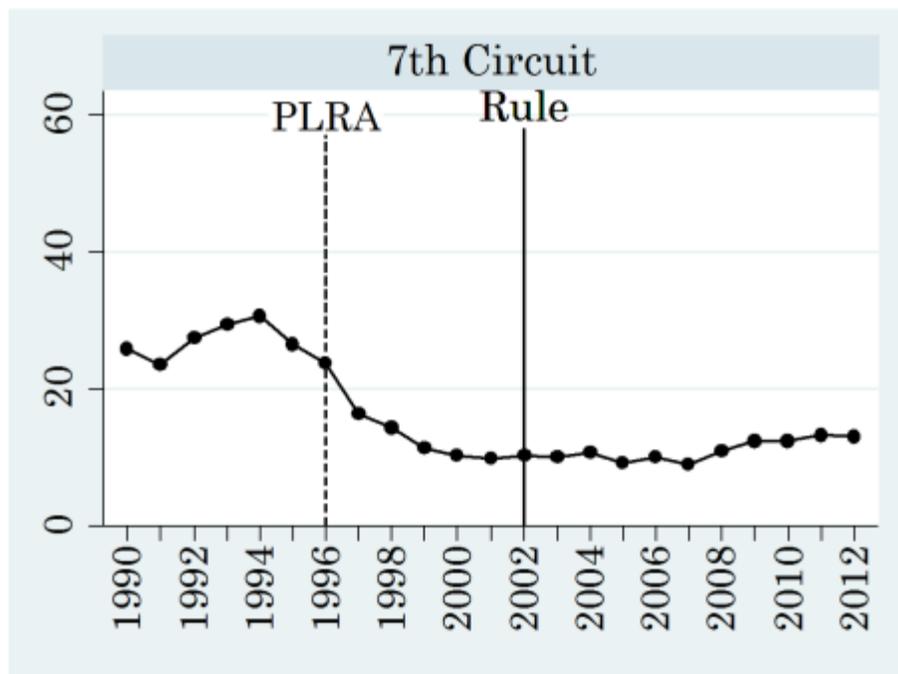
I'm not going to recap the Supreme Court oral argument at any length: Steve Vladeck does a terrific job of that over on SCOTUSBlog. As he explains, members of the Court seemed to find the statutory language ambiguous on this point, and seemed concerned about the consequences of ruling for the prisoner. A prisoner who just incurred his third strike in the district court would have a kind of “use it or lose it” moment, a couple of the justices worried out loud, while that order was pending on appeal, and might therefore file lots of cases.

What I want to add here is some strenuous skepticism about this concern. Just in the abstract, it seems highly unlikely that a prisoner with a pending third strike would think of the pending period as a free window for additional frivolous filings. After all, the prisoner would eventually have to pay a full filing fee for each filed case.

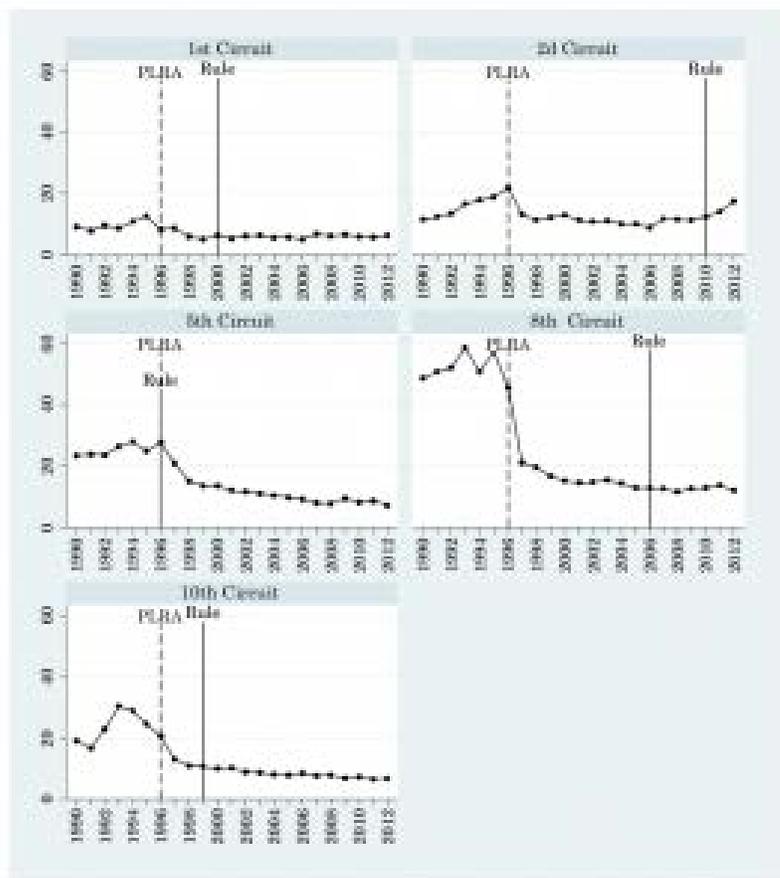
And experience confirms the point. As the amicus brief cited earlier argued, there is no sign at all that the circuits where a dismissal has been counted as a PLRA “strike” only upon appellate finality experienced higher rates of prisoner litigation after adopting that rule than before. Conversely, the Seventh Circuit did not experience a drop-off in prisoner lawsuits after adopting the anti-prisoner rule.

Here's the data on filings per 1,000 prisoners, by circuit, from 1990 to 2012 (the latest year for which filings data are available):

7th Circuit: Anti-Prisoner Rule



Other Circuits (Pro-Prisoner Rule Announced before 2011):



The point is, there's really no reason to be worried about the impact on court dockets of the mildly pro-prisoner rule urged by the plaintiff in *Coleman-Bey*. If anything, the worry should be that indigent prisoners' obligation to pay \$400 to vindicate their civil rights might deter them from seeking such vindication.

Read AFJ's report on this case.

Margo Schlanger is the Henry M. Butzel Professor of Law at the University of Michigan, and the founder and director of the Civil Rights Litigation Clearinghouse. Follow her on twitter at @mjschlanger.

Tags:

Author:



BY MARGO SCHLANGER
Henry M. Butzel Professor of Law
University of Michigan

The views of guest bloggers do not necessarily reflect the opinions of Alliance for Justice.



The views of guest bloggers do not necessarily reflect the opinions of Alliance for Justice.