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Denying Access to Justice During a Carceral Crisis

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Denying Access to Justice During a Carceral Crisis

Brett Dignam[1]

Enthusiasm for punishment has given America an unprecedented and uncomfortable position as the quintessential carceral state. As some states find themselves spending more tax dollars on incarceration than higher education[2] and new studies reveal the dire psychiatric consequences of holding tens of thousands of people in extreme social isolation,[3] talk of reform is building. Proponents of reform advocate a shift to strategies aimed at alternatives to incarceration, as well as reducing the use of long mandatory minimum sentences and providing opportunities to those leaving our prisons in an effort to stem the tide of recidivism. But the U.S. continues to incarcerate at a higher rate than any other country. For the more than 1.5 million people who remain in U.S. prisons,[4] access to justice is often an illusion.

Prisoners seek access to the justice system for two basic things – relief from an unconstitutional conviction and relief from unconstitutional conditions of confinement. Federal courts have long been the ultimate arbiter of the federal constitutional rights of prisoners, particularly those convicted of state crimes and held in state prisons. We now know that innocent people are convicted and can spend decades in prison.[5] Those cases have prompted increased scrutiny of police investigation and prosecutorial practices. Historically, federal habeas corpus hearings have been an important forum where evidence of misconduct by state police and prosecutors has been developed, particularly in death penalty cases.[6] Federal courts have also frequently examined the constitutionality of prison conditions, including rape and deliberate indifference to serious medical needs, and have issued both injunctive relief and monetary awards for unconstitutional conditions.[7]

However, two broad statutes, passed during a single week in April 1996, erected formidable barriers to prisoners' access to federal courts. First, on April 24th, in reaction to the bombing of the federal building in Oklahoma City, Congress passed the Anti-Terrorism and Effective Death Penalty Act ("AEDPA").[8] Though targeted at streamlining federal mechanisms used to challenge the death penalty, the statute's expansive reach extends to all criminal cases. Significant

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[1] Clinical Professor of Law, Columbia Law School.

[2] Academy of Arts and Sciences, Public Research Universities: Changes in State Funding 9-11 (2015), https://www.amacad.org/multimedia/pdfs/publications/researchpapersmonographs/PublicResearchUniv_ChangesInStateFunding.pdf.

[3] *See, e.g.*, Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units*, 15 Int'l J. Offender Therapy & Comparative Criminology 6 (2008).

[4] Bureau of Justice Statistics, Correctional Populations in the United States, 2014 5 (revised Jan. 21, 2016), *available at* http://www.bjs.gov/content/pub/pdf/cpus14.pdf. Another more than 700,000 people are housed in the nation's jails. *Id.*

[5] As of May 7, 2016, the National Registry of Exonerations had identified 1,781 exonerations since 1989. The vast majority of these have been non-DNA cases. See National Registry of Exonerations, *Exonerations By Year: DNA and Non-DNA*, U. Mich. L. Sch., http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx (last visited May 7, 2016).

[6] 28 U.S.C. § 2254 authorizes federal courts to review the constitutionality of state convictions.

[7] 42 U.S.C. § 1983 gives federal courts jurisdiction over these claims.

[8] Pub. L. No. 104-32, 110 Stat. 1214 (1996).

provisions codified and intensified common law exhaustion and procedural default requirements, and imposed a one-year deadline for the filing of a federal habeas corpus petition challenging the constitutionality of a conviction.[9]

Two days later, Congress passed a second statute with broad implications for prisoners. The Prison Litigation Reform Act ("PLRA")[10] erected new and daunting barriers to federal civil litigation of unconstitutional prison conditions. The statute requires prisoners to file timely prison grievances and to fully exhaust all available remedies before filing a federal action.[11] It also modified *in forma pauperis* provisions that now require prisoners challenging prison conditions to pay a $350 federal civil filing fee, regardless of indigence.[12] Significantly, the PLRA also limits the power of federal courts to grant prospective injunctive relief, assumes that all prospective relief will end in two years,[13] and erects new barriers to settlements enforceable in federal court.

Both AEDPA and the PLRA have deprived people in prison of access to justice. AEDPA privileges finality and efficiency by elevating state evidentiary records and the decisionmaking of state court judges. This expeditious review, which accords excessive deference to actors who operate in forums with incentives to defend prosecutorial action, has effectively deprived prisoners of an objective and independent review of their convictions. Simultaneously, the PLRA has erected barriers to civil actions filed by prisoners. At the front end, it has increased filing fees, required complete exhaustion of all internal prison remedies and injected initial screening of prisoner complaints. At the back end, it discourages even meritorious litigation by limiting prospective injunctive relief and reducing attorney fee awards.

A. Restrictions on Habeas Corpus Deny Prisoners A Federal Forum to Challenge Their Conviction

The historical roots of federal habeas corpus, commonly referred to as the Great Writ, are well known. Enshrined in the American Constitution but famously suspended during the Civil War, habeas corpus jurisdiction of federal courts over state prisoners was established by the Judiciary Act of February 5, 1876. Almost one hundred years later, in *Fay v. Noia*, Justice Brennan traced this history and the centrality of the writ to "the unceasing contest between personal liberty and government oppression."[14]

In this pre-AEDPA case, Mr. Noia was convicted with Santo Caminito and Frank Bonino of felony murder.[15] The only evidence against each defendant was his signed confession.[16] Caminito and Bonino appealed unsuccessfully but were later released when their confessions were found to have been coerced in violation of the Fourteenth Amendment.[17] Mr. Noia did not appeal, but the

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[9] 28 U.S.C. § 2244(d)(1); 28 U.S.C. § 2255(f).

[10] Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321 (1996).

[11] 42 U.S.C. § 1997(e)(a).

[12] 28 U.S.C. § 1915.

[13] 18 U.S.C. § 3626(b)(1).

[14] Fay v. Noia, 372 U.S. 392, 400-401 (1963).

[15] *Id.* at 394.

[16] *Id.* at 395.

[17] *Id.*

parties stipulated to the coercive nature of his statement during post-conviction proceedings.[18] The federal trial court denied Mr. Noia's habeas petition for failure to exhaust his claim through direct appeal.[19] The Second Circuit Court of Appeals reversed, noting that Americans soundly condemn the "satanic conditions" under which the statement was taken when they are employed by a totalitarian regime.[20] After reviewing the history of habeas corpus at length and acknowledging the need to balance this great constitutional privilege against the demands of federalism, the Supreme Court found that federal courts have the power and the duty to provide the "ultimate remedy" of habeas corpus relief when the States withhold it.[21] Thus, the Court ultimately held that federal habeas jurisdiction was not defeated by procedural defaults during state court proceedings.[22] As a result, habeas petitioners were granted access to federal court if they could establish that they had not deliberately bypassed state mechanisms for relief.[23]

With a change in administration and new appointments to the United States Supreme Court, the law governing federal habeas corpus shifted dramatically.[24] Decisions during the intervening years have steadily eroded the principles that animated *Fay v. Noia*. In the 1991 case *Coleman v. Thompson*, the Supreme Court explicitly rejected *Fay*'s standard allowing federal habeas petitions absent deliberate bypass of state procedure, and required petitioners to demonstrate both cause and prejudice for any state procedural default.[25] Five years later, Congress codified these changes in AEDPA, articulating a clear preference for efficiency and finality.

As amended by AEDPA, 28 U.S.C. § 2254 imposes several limits on a federal court's ability to grant habeas relief to a state prisoner.[26] A federal habeas corpus petition must be filed no later than one year after the challenged state conviction becomes final.[27] The exhaustion and procedural default provisions of AEDPA are daunting and a navigational challenge for even experienced habeas counsel.[28] A narrow gateway through these requirements exists for those who can establish a "fundamental miscarriage of justice," but they must meet the extremely demanding standard of actual innocence.[29] These cases are "rare," and require a petitioner "to persuade the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt."[30]

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[18] *Id.* at 395-96.

[19] *Id.* at 396.

[20] *Id.* at 396, n.2.

[21] *Id.* at 441.

[22] *Id.* at 438.

[23] *Id.*

[24] See Michael Graetz & Linda Greenhouse, The Burger Court and the Rise of the Judicial Right 65-74 (forthcoming 2016) (Chapter 3, "Shrinking the 'Great Writ'") for a summary explication of these developments during the Burger Court years.

[25] Coleman v. Thompson, 501 U.S. 722, 724 (1991).

[26] Cullen v. Pinholster, 563 U.S. 170, 181 (2011).

[27] 28 U.S.C. § 2254(d)(1)(A). Under certain circumstances, a petitioner can file a timely petition within one year after new evidence is discovered or could have been discovered through reasonable diligence. 28 U.S.C. § 2254 (d)(1)(D).

[28] While some prisoners have a right to counsel in state post-conviction proceedings, no petitioner has that right in federal habeas court.

[29] See Schlup v. Delo, 513 U.S. 298 (1995) (showing of actual innocence can excuse procedural default); House v. Bell, 547 U.S. 518 (2006) (applying *Schlup* in post-AEDPA context); McQuiggin v. Perkins, ___ U.S. ___, 133 S. Ct. 1924 (2013) (actual innocence showing overcomes one-year AEDPA time bar).

[30] Schlup, 513 U. S., at 329.

For the few who manage to file timely petitions, exhaust their state remedies and avoid procedural default, explicit deference to state court findings almost always poses an insurmountable barrier to federal review.[31] AEDPA requires a federal habeas petitioner to establish either (1) that the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law, or (2) that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.[32] Recent interpretation of this provision has confirmed that federal habeas jurisdiction must be evaluated and determined based solely on the state court record and that enormous deference must be accorded to state court decisions.[33]

An empirical study of habeas litigation in federal trial courts during the first ten years after AEDPA called into question whether the statute had accomplished its stated goals of reducing delay and achieving finality in habeas litigation.[34] The average time from state conviction to federal filing in non-capital cases increased, and the number of claims per petition significantly increased.[35] However, the statute did severely restrict federal litigation. Twenty-two percent of the non-capital cases were dismissed as time-barred, and depositions or mental or physical examinations were ordered as discovery in only .3 percent of non-capital cases.[36] While only 1 percent of all petitioners in non-capital cases had been granted relief before AEDPA, courts granted relief in only 7 of 2384 of the non-capital cases reviewed during the decade after AEDPA was enacted: a relief rate of 0.29 percent.[37]

B. The PLRA Severely Limits Federal Challenges to Unconstitutional Conditions of Confinement

Challenges to state prison conditions are typically brought under 42 U.S.C. § 1983 rather than by way of habeas corpus.[38] Federal courts began examining state action that violated federal constitutional rights when the Supreme Court revitalized Section 1983 in *Monroe v. Pape*.[39] Faced with the vivid scene of a family rousted out of bed in the middle of the night and made to stand naked in their living room while 13 police officers ransacked their home, the *Monroe* Court held that Section 1983 was available for the vindication of federal rights, even if the conduct violated state law for which a state remedy existed. It did not take long for the Court to extend

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[31] Cullen, 563 U.S. 170.

[32] 28 U.S.C. § 2254(d).

[33] Cullen, 563 U.S. 170.

[34] Nancy J. King et al., Executive Summary: Habeas Litigation in U.S. District Courts (2007), *available at* http://cdm16501.contentdm.oclc.org/cdm/ref/collection/criminal/id/102.

[35] *Id.* at 4.

[36] *Id.* at 5-6.

[37] *Id.* at 9. Both the rate of evidentiary hearings and the rate at which relief was granted were much higher in capital cases, where petitioners are far more likely to have counsel. *Id.* at 5. Federal evidentiary hearings were held in only .41 percent of non-capital cases while evidentiary hearings were granted in 10 percent of the capital cases. *Id.* at 5. Relief was granted in 1 out of 8 capital cases. *Id.* at 10.

[38] The line between habeas and civil rights litigation has evolved and is now defined. Challenges to the fact or duration of confinement that seek release as the ultimate remedy are cognizable in federal habeas while challenges to conditions of confinement may be brought under Section 1983. See Heck v. Humphrey, 512 U.S. 477 (1994); Wilkinson v. Dotson, 544 U.S. 74 (2005).

[39] 365 U.S. 167 (1961).

that paradigm beyond the arrest context in order to examine unconstitutional prison conditions.[40]

During the next 25 years, individual and systemic litigation was successfully brought to challenge a broad range of prison conditions,[41] but criticisms of the effect on federal court dockets began to mount. State correctional officials, who were often the target of that litigation, argued vigorously that they were being micromanaged by federal courts and forced to litigate thousands of "frivolous" claims.[42] Sympathetic to the position that these issues were better resolved at the state level, Republican politicians incorporated a proposal to stop frivolous prison litigation into their "Contract with America" in 1994. Congress finally passed the PLRA, which specifically targeted Section 1983 prison conditions cases.

Addressing concerns about the large number of frivolous federal lawsuits filed by prisoners,[43] the PLRA contained initial screening provisions that allow federal courts to dismiss civil actions filed by prisoners before requiring the state to respond.[44] The "three strikes" provision also bars prisoners who have had three frivolous cases dismissed from filing *in forma pauperis* unless the prisoner is under imminent danger of serious physical injury.[45]

The PLRA exhaustion requirements have been among the most significant and effective deterrents to prison condition litigation.[46] Although the Supreme Court had definitively rejected an argument that state administrative exhaustion should be required before litigation of federal constitutional claims could be brought under Section 1983, the PLRA legislatively reversed that holding for prisoners.[47] After allowing the lower courts to debate the statutory language, the Supreme Court held that the PLRA exhaustion provisions applied to "all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."[48] And in 2005, the full weight of PLRA "total exhaustion" was announced.[49] Detained juveniles, who have been repeatedly raped and assaulted with the knowledge and assistance of guards, must now comply with exacting prison procedures

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[40] Cooper v. Pate, 378 U.S. 446 (1964); Houghton v. Shafer, 392 U.S. 639 (1968) (holding resort to state administrative remedies was not necessary to entitle petitioner to relief under Section 1983).

[41] See e.g., Estelle v. Gamble, 429 U.S 97 (1976) (deliberate indifference to a prisoner's serious medical need states an Eighth Amendment violation that is cognizable under Section 1983); Farmer v. Brennan, 511 U.S. 825 (1994) (prison officials may be held liable under Eighth Amendment for denying humane conditions of confinement); Women Prisoners of the District of Columbia, et al. v. District of Columbia, 899 F. Supp. 659 (D.D.C. 1995).

[42] A case widely described as a federal lawsuit over chunky peanut butter was touted as the archetypal example. Examination of the litigation record revealed that it raised serious due process issues of constitutional dimension. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks,* 62 Brooklyn L. Rev. 520 (1996).

[43] In 1995, prisoners filed nearly 40,000 cases or almost one fifth of the federal court civil docket; plaintiffs prevailed in fewer than 15 percent of those cases. Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1558, n. 3 & 4 (2003).

[44] 28 U.S.C. § 1915A.

[45] 28 U.S.C. § 1915(g); Coleman-Bey v. Tollefson, ___ U.S. ___, 135 S. Ct. 1759 (2015).

[46] 42 U.S.C. § 1997e(a) provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

Editor's Note: The Supreme Court's decision on exhaustion in Ross v. Blake, No.15-339, 2016 WL 3128839 (U.S. June 16, 2016), came down as this publication was going to press.

[47] *Compare* Patsy v. Board of Regents for the State of Florida, 457 U.S. 496 (1982) *with* 42 U.S.C. § 1997e(a).

[48] Porter v. Nussle, 534 U.S. 516, 532 (2002).

[49] Woodford v. Ngo, 548 U.S. 81 (2006). Although the Court held exhaustion to be an affirmative defense rather than a jurisdictional requirement that must be pled by the plaintiff prisoner, forms provided by *pro se* offices routinely ask for information about exhaustion.

even if that requires filing a grievance within 48 hours, as do women prisoners who must file timely grievances about a pattern of rape and harassment even if they correctly fear retaliation after filing such complaints.[50]

Injunctive relief, successfully achieved through systemic challenges to prison conditions before the PLRA, is now difficult to achieve either through litigation or settlement – and the scope of relief is limited. The statute requires prospective injunctive relief to be supported by findings, to be narrowly drawn, to extend no further than is necessary to correct a violation of federal rights and to be the least intrusive means of doing so.[51] Parties can and sometimes do stipulate that the requirements have been met,[52] but the statute is designed to direct parties to private agreements enforceable in state court rather than to federal court enforcement.[53] Continuing jurisdiction to oversee implementation of federal consent decrees has become rare.

Constitutional standards are demanding and violation of prisoners' constitutional rights has become increasingly difficult to prove. But egregious violations of basic human dignity continue to occur. Persistent and creative lawyers have used the limitations imposed by the PLRA to forge successful litigation strategies. *Brown v. Plata*[54] and *Nunez v. City of New York* exemplify that meaningful relief remains possible.

In *Plata*, the statutory cap on permanent injunctive relief became a frame for relief. A three-judge panel, required by the PLRA when a prisoner release order is sought,[55] determined that overcrowding had caused the Eighth Amendment violation of the prisoners' right to constitutional medical care. It took more than two decades and eighty remedial orders to develop an adequate factual record in that case. Notwithstanding the stark finding that, due to overcrowding, an average of one prisoner dies of avoidable negligence in California prisons each week,[56] the state litigated PLRA issues through the Supreme Court. Implementation of the order that California reduce its prison population to 137 percent of rated capacity has been hard fought and slow.[57]

Nunez was the sixth successive class action lawsuit in 25 years that challenged the use of excessive force, and unconstitutional deliberate indifference to a substantial risk of serious harm from that force, at the New York jails on Rikers Island.[58] The fifth case, *Ingles v. Toro*, was resolved by the PLRA preferred Private Settlement Agreement mechanism that was enforceable in state court.[59] Unconstitutional conduct continued to occur and five years after the *Ingles* private settlement

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[50] *Id.* at 121 (Stevens, J., dissenting).

[51] 18 U.S.C. § 3626(a) & (b)(2). A common feature of pre-AEDPA settlements was a statement that the agreement was not predicated on a finding or concession of constitutional violation. That approach enabled parties to compromise and achieve meaningful relief without costly and lengthy litigation.

[52] *See, e.g.*, Consent Judgment at 58, Nunez v. City of New York, 11-cv-5845 (LTS) (JCF) (S.D.N.Y. Oct. 21, 2015).

[53] 18 U.S.C. § 3626(c)(2).

[54] 563 U.S. 493 (2011).

[55] 18 U.S.C. § 3626(a)(3).

[56] Plata, 563 U.S. at 507-08.

[57] *See, e.g.*, Joan Petersilia, Voices from the Field: How California Stakeholders View Public Safety Realignment (Stanford Criminal Justice Center Working Paper 2014), *available at* http://www.law.stanford.edu/organizations/programs-and-centers/stanfordcriminal-justice-center-scjc/california-Realignment; *see also* Prison Law Office, California's Prison Crowding Reduction Plans and Credit Laws (updated Mar. 16, 2016), *available at* http://prisonlaw.com/wp-content/uploads/2016/03/pop-reduction-credit-laws-info-letter-March-2016-final.pdf.

[58] Amended Complaint ¶ 2, Nunez v. City of New York, 11-cv-5845 (LTS) (JCF) (S.D.N.Y. filed May 24, 2012).

[59] *See* Ingles v. Toro, 438 F. Supp.2d 203 (S.D.N.Y. 2006).

agreement was approved, the same lawyers filed *Nunez*. The parties recently stipulated to a federal consent order that has detailed and extensive implementation and monitoring provisions.[60]

Plata and *Nunez* are rare examples of systemic injunctive relief ordered by a federal court. Each case required the resources of premier prisoners' rights legal offices and major law firms to wade through extensive discovery and motion practice. Navigating the PLRA requires skill and expertise, but the overwhelming number of prisoner lawsuits are filed and litigated *pro se*. Notwithstanding this evidence that serious constitutional violations continue to occur, the sharp impact of the PLRA on both filings and outcomes in prisoner litigation is beyond debate.[61]

Conclusion

Echoing the sentiments of Fyodor Dostoyevsky, that one can judge a civilized society by how well it treats its prisoners,[62] Justice Brennan identified the "root principle" of habeas corpus as the government's mandate to be accountable for imprisonment.[63] Justice Kennedy has recently reminded us that the concept of human dignity is a guiding principle in prison conditions cases.[64] The integrity of our carceral system depends on our commitment to enforce the Constitution. Serious efforts to improve access to justice must include people we have deprived of their liberty in the interest of promoting justice. •

[60] Consent Judgment, Nunez v. City of New York, 11-cv-5845 (LTS) (JCF) (S.D.N.Y. Oct. 21, 2015).

[61] Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine Law Rev. 153 (2015).

[62] Fay v. Noia, 372 U.S. 392, 402 (1963); Fyodor Dostoevsky, The House of the Dead (1861).

[63] Fay v. Noia, 372 U.S. at 441.

[64] Brown v. Plata, 563 U.S. 493, 510 (2011) (prisoners who are deprived of the fundamental right to liberty "retain the essence of human dignity inherent in all persons").