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Symposium: AEDPA and the PLRA After 25 Years: Introduction

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AEDPA AND THE PLRA AFTER 25 YEARS: INTRODUCTION

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In 1996, Congress passed two important statutes that bear on the criminal justice system. The Antiterrorism and Effective Death Penalty Act[1] sought to recalibrate the relationship between state and federal courts by limiting the scope of federal habeas corpus review of state criminal convictions and by restricting the availability of federal habeas relief.[2] Proponents of these provisions sought "to curb the abuse of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation in capital cases."[3]

The Prison Litigation Reform Act[4] limited the availability of federal relief for prisoners by codifying exhaustion requirements, mandating full payment of filing fees, authorizing judicial screening of prisoner complaints before docketing that can result in revocation of good-time credit, requiring a physical injury as a basis for recovery for mental or emotional injury, and adding a "three strikes" rule that bars prisoner access to federal court in certain circumstances.[5] These provisions

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1. Pub. L. No. 104–132, tit. I, 110 Stat. 1214, 1217–26 (1996) (codified at 28 U.S.C. §§ 2244, 2253–2255, 2261–2266 (2018)).

2. AEDPA also contains provisions relating to terrorism that are beyond the scope of this symposium.

3. H.R. REP. No. 104–23, at 8 (1995). Concern about delays in death penalty cases also arose at the state level. For example, in 1994 the Ohio Constitution was amended to eliminate the jurisdiction of the court of appeals in death penalty cases. Under the new arrangement, all appeals in death penalty cases go directly to the state supreme court as a matter of right. *See* OHIO CONST. art. IV, §§ 2(B)(2)(a)(ii), 3(B)(2). Under this arrangement, death penalty defendants receive only one round of appellate review whereas other criminal defendants have the opportunity for two rounds of appeals, one by right to the court of appeals and the possibility of discretionary review in the supreme court. Before the 1994 amendment, death penalty defendants were provided with two rounds of appellate review as a matter of right: first in the court of appeals, and then in the supreme court. The Ohio Supreme Court rejected a federal constitutional challenge to the new arrangement in the first case that arose under the 1994 amendment. State v. Smith, 684 N.E.2d 668, 678–85 (Ohio 1997).

4. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104–134, tit. VIII, 110 Stat. 1321, 1321–66 to –77 (codified at 18 U.S.C. § 3626 note, 28 U.S.C. §§ 1346(b)(2), 1915–1915A & 42 U.S.C. § 1997e) (2018).

5. The PLRA also contains provisions relating to remedies for unlawful prison conditions. 18 U.S.C. § 3626 (2018).

sought to reduce judicial oversight of prison operations and deter what proponents regarded as a torrent of frivolous lawsuits that undermined the authority of correctional officials and imposed unjustified costs on government at all levels.[6]

Both of these statutes quickly elicited criticism.[7] They also have generated substantial bodies of jurisprudence.[8] To mark the twenty-fifth anniversary of AEDPA and the PLRA, the *Case Western Reserve Law Review* held a symposium in November 2021 that brought together a wide range of scholars, practitioners, and federal judges to discuss many questions about those statutes. This issue contains papers that were presented on that occasion.

The first three papers in this symposium issue address the relationship between the statutes and the COVID-19 pandemic. Nancy J. King focuses on the equitable powers of federal courts under AEDPA during the pandemic.[9] She emphasizes that this statute, whatever else it did, left intact judicial authority to grant habeas relief to prisoners held in violation of the Constitution. That authority is embodied in 28 U.S.C. § 2241. Professor King examines how some federal courts during the pandemic have used the equitable discretion that Section 2241 affords. More generally, she suggests that equitable considerations are important factors in addressing emergencies and unanticipated developments

6. *See, e.g.,* 141 Cong. Rec. 26448–49 (1995) (statement of Sen. Abraham); *id.* at 26548–49 (statement of Sen. Dole); *id.* at 26553 (statement of Sen. Hatch); *id.* at 26553–54 (statement of Sen. Kyl).

7. *See, e.g.,* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997); John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429 (2001); Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How to Fix It*, 33 CONN. L. REV. 919 (2001).

8. On AEDPA, see, e.g., Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (holding that a decision requiring jury unanimity in criminal cases was not retroactive); Bucklew v. Precythe, 139 S. Ct. 1112 (2019) (rejecting a death row inmate's challenge to the state's method of execution); Montgomery v. Louisiana, 577 U.S. 190 (2016) (holding that a ruling barring sentences of life without parole for juvenile offenders applied retroactively); Felkner v. Jackson, 562 U.S. 594 (2011) (overturning habeas relief where the federal district court showed insufficient deference to the findings of the state courts). On the PLRA, see, e.g., Lomax v. Ortiz-Marquez, 140 S. Ct. 1721 (2020) (holding that dismissal of a prisoner's lawsuit, with or without prejudice, counts as a PLRA "strike"); Ross v. Blake, 578 U.S. 632 (2016) (finding that federal courts must strictly construe the PLRA's exhaustion requirement); Brown v. Plata, 563 U.S. 493 (2011) (affirming an order that limited the population of an overcrowded state prison); Cutter v. Wilkinson, 544 U.S. 709 (2005) (rejecting claims that state prison officials had failed to accommodate inmates' exercise of their religious beliefs).

9. Nancy J. King, *Equitable Powers after AEDPA—Lessons from the Pandemic*, 72 CASE W. RSRV. L. REV. 631 (2022).

but cautions that those considerations will not inevitably militate in favor of relief in all circumstances. She urges Congress and the judiciary to retain the flexibility embodied in Section 2241 while continuing to debate the appropriate exercise of federal habeas authority.

The next article focuses on the PLRA. Margo Schlanger and Betsy Ginsberg analyze the effect of that measure's strict exhaustion requirement on the ability of inmates to obtain judicial review of the conditions of confinement during the pandemic.[10] The authors make clear their general skepticism of the exhaustion requirement and explain why that requirement is especially problematic during a public health emergency. Accepting that the PLRA's exhaustion requirement will remain on the books, however, Professors Schlanger and Ginsberg suggest several ways to ameliorate its impact on pandemic-related prisoner claims. First, courts should allow cases to proceed if a health emergency makes it impractical for a prison grievance system to afford meaningful preventive measures in a timely fashion. Second, correctional institutions could create emergency grievance systems and the government could decline to assert exhaustion defenses in emergencies. Finally, Congress could amend the PLRA to eliminate the exhaustion requirement during an emergency.

Rounding out this portion of the symposium, Hadar Aviram analyzes COVID-related litigation involving California prisons.[11] She focuses on two sets of claims, one a federal class action brought under the PLRA and the other a large number of state habeas corpus proceedings where the PLRA's restrictions do not apply. In the federal case, Professor Aviram notes the shrinking scope of the proposed remedy from reduction in prison population to inmate vaccination to staff vaccination as well as the government's obduracy and the court's hesitancy. She also chronicles the state proceedings at every level of the California judiciary. Neither the federal nor the state litigation resulted in meaningful relief. Professor Aviram suggests that these failures reflect both the inadequacies of legal doctrine and the deep-seated public hostility toward prisoners.

The remaining articles address general issues beyond the pandemic. William M. Carter, Jr., focuses on both AEDPA and the PLRA, observing that they impose wholesale and unique restrictions on the ability of incarcerated persons to gain access to the federal courts.[12] He recognizes that restrictions on access to the courts are not unusual but

10. Margo Schlanger & Betsy Ginsberg, *Pandemic Rules: COVID-19 and the Prison Litigation Reform Act's Exhaustion Requirement*, 72 CASE W. RSRV. L. REV. 533 (2022).

11. Hadar Aviram, *The House Always Wins: Doctrine and Animus in California's COVID-19 Prison Litigation*, 72 CASE W. RSRV. L. REV. 565 (2022).

12. William M. Carter, Jr., *Outsider Speech: The PLRA, AEDPA, and Adjudicative Expression*, 72 CASE W. RSRV. L. REV. 643 (2022).

likens the broad restrictions in these statutes to the restrictions on judicial access for both enslaved persons and free Blacks before the Civil War. Professor Carter then takes a contemporary perspective, analyzing AEDPA and the PLRA through a First Amendment lens. He suggests that the statutory restrictions on access to the federal courts be viewed as content-based, viewpoint-based, and speaker-based restrictions on expression. Applying current doctrine, he urges that such restrictions should trigger strict scrutiny and that courts should hold them to be inconsistent with the First Amendment. But he doubts that courts would reach that conclusion.

The final two articles focus on different aspects of AEDPA. Paul J. Larkin endorses the law's requirement that federal habeas courts defer to state courts' reasonable interpretation of Supreme Court jurisprudence.[13] Mr. Larkin traces the history of federal habeas review of state criminal convictions, criticizes the expansion of that review starting in the 1950s, defends the congressional decision in AEDPA to restrict federal habeas review of state convictions, and rebuts constitutional objections under the Suspension Clause,[14] the Vesting Clause,[15] and the Due Process Clause[16] to the changes in federal habeas review that AEDPA implemented.

In the last contribution to the symposium, Judge J. Philip Calabrese suggests an amendment to AEDPA in cases where a habeas claimant advances a colorable claim of actual innocence.[17] As currently written, the statute might prevent a prisoner who asserts such a colorable innocence claim from obtaining appellate review of the denial of relief. Judge Calabrese suggests that a prisoner in such circumstances should not be required to obtain a certificate of appealability in order to get appellate review.

These articles address a wide range of issues under both AEDPA and the PLRA.[18] In addition to the pieces that appear in this issue,

13. Paul J. Larkin, *The Reasonableness of the "Reasonableness" Standard of Habeas Corpus Review Under the Antiterrorism and Effective Death Penalty Act of 1996*, 72 CASE W. RSRV. L. REV. 669 (2022).

14. U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

15. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

16. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

17. J. Philip Calabrese, *Codifying Innocence: A Modest Step Toward Reform*, 72 CASE W. RSRV. L. REV. 745 (2022).

18. This issue also contains a student contribution that, while not formally part of the symposium, addresses a PLRA issue. *See* Mark Firmin, Note,

several practitioners and federal judges offered their perspectives on these statutes. The entire program is available online.[19]

This symposium would not have been possible without the enthusiastic support of many individuals and entities. First, thanks to Deans Jessica W. Berg and Michael P. Scharf for their continuing assistance and encouragement.

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Two editors of the Law Review deserve special recognition. Symposium Editor Reagan Joy and Editor-in-Chief Andrew Rumschlag developed the symposium and carried it out flawlessly.

Finally, Eric Siler provided extraordinary staff support for the symposium, making sure that everything went smoothly. He has consistently facilitated Law Review programs, so his work this year was par for the course. We cannot thank him enough.

Murphy*'s Law: For Attorney's Fees Shifting Under the PLRA, Everything That Could Go Wrong Has Gone Wrong*, 72 CASE W. RSRV. L. REV. 751 (2022).

19. AEDPA and the PLRA After 25 Years, Nov. 12, 2021, https://case.edu/law/our-school/events-lectures/aedpa-and-plra-after-25-years-case-western-reserve-law-review-symposium [https://perma.cc/64JK-EJSP].