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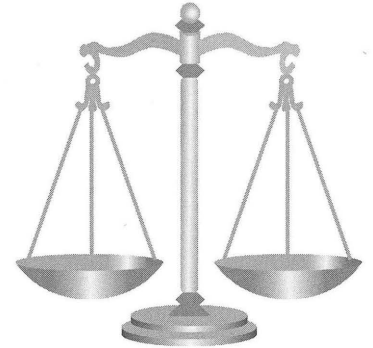
## Not So Sweet: Questions Raised by Sixteen Years of the PLRA and AEDPA

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In a single month sixteen years ago, April 1996, Congress adopted sweeping changes to two major branches of what we might refer to as the law of prisoner litigation. First, in the Antiterrorism and Effective Death Penalty Act, Congress imposed many significant new limitations on the ability of prisoners to challenge the constitutionality of their convictions and sentences through federal habeas corpus law. Then, in the Prison Litigation Reform Act, Congress similarly restricted the ability of prisoners to obtain monetary and injunctive relief in federal court for violations of their constitutional rights perpetrated by corrections officials. The two statutes worked major changes to habeas corpus and prisoner-rights litigation that remain with us to the present day.

Whatever one may think about the underlying impulse to curtail prisoner litigation, the adoption of the AEDPA and PLRA hardly exemplifies Congress at its best. Although both laws responded to long-standing conservative complaints about prisoner litigation, the specific new restrictions on habeas and prisoner-rights lawsuits were adopted hurriedly in an election-year setting, embedded within larger statutes and subject to little rigorous vetting.<sup>1</sup> Anecdotes drove the congressional debate.<sup>2</sup> Drafters seemed oblivious to much of the preexisting law on prisoner litigation, creating many redundancies and gaps in the law, as well as repeatedly using terms with no established meaning. Sixteen years on, sorting out the PLRA and AEDPA messes remains a regular feature of the Supreme Court's docket.

As a result of long-running debates over the meaning of key aspects of the PLRA and AEDPA, the legacy of the statutes has been something of a moving target. Although it was clear from the start that the statutes of '96 were intended to, and did in fact, make it harder for prisoners to advance constitutional claims in federal court, it was much less clear precisely how much harder it would become to prevail on which sorts of claims and to obtain which sorts of relief.

Now, however, with sixteen years of case law and scholarly research behind us, it seems a good time to reconsider both the legacy of the PLRA and AEDPA and the path forward.

This issue of *FSR* thus examines the present state and potential future reform of prisoner-litigation law, particularly in light of the PLRA and AEDPA experience. The contributors consider a diverse range of specific provisions of the two statutes, as well as a host of more general concerns. Although there is much more that could be said about the many insights provided by the contributors, I will in this introductory essay focus on just four major themes that run through many of the articles. Framed as questions, they are: (1) whether the PLRA and AEDPA reflect systemic failures of the democratic process as it relates to prisoner-litigation law; (2) whether the courts have mitigated the inherent problems of the statutes; (3) whether it is time to look beyond the federal courts as the primary safeguard against violations of defendants' and prisoners' rights; and (4) whether the arcane and arbitrary litigation processes engendered by the PLRA and AEDPA should be thought of as punishment in their own right.

### I. The PLRA and AEDPA as Systemic Failure

The PLRA and AEDPA both constitute multipronged attacks on the ability of prisoners to secure relief from federal courts for claimed violations of their constitutional rights. Among other things, the PLRA

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imposed a mandatory requirement that prisoners exhaust administrative remedies before suing in federal court, limited money damages to cases of physical injury, required that even indigent inmates pay filing fees, capped attorney's fees, and limited the potential scope of injunctive relief. For its part, the AEDPA imposed a new one-year statute of limitations for the filing of habeas claims, tightened restrictions on the filing of multiple petitions, mandated heightened deference to state-court decisions on the merits, and limited the ability of petitioners to rely on facts that were not developed in state court.

Although the '96 statutes emerged from a particular confluence of political forces at a particular moment in time, we might nonetheless see them as reflecting deeper flaws in our democratic processes or political culture—flaws that systematically impair the ability of Congress to address prisoner litigation in a manner that fairly takes into account the rights and interests of prisoners. To the extent that this charge hits the mark, it may have implications for the role of the courts in reviewing and implementing the statutes, as well as the utility of efforts by reformers to seek repeal of some of the harshest provisions of the laws.

Susan Herman suggests some of the basic concerns in her contribution to this issue: "Prisoners, who are usually deprived of the right to vote, do not have much of a lobby. Politicians vie to attract votes by appearing to be 'tough on crime' (which they assume means being tough on prisoners)."<sup>3</sup> In a similar vein, James Robertson notes that no inmates testified before Congress about the potential impact of the PLRA.<sup>4</sup> As Sharon Dolovich suggests, prisoners seem just the sort of "discrete and insular" minority that, as the Supreme Court once warned, requires heightened judicial protection from legislative oppression.<sup>5</sup> Given their lack of political power, prisoners seem poorly positioned to resist becoming the target of symbolic legislation through which politicians can express their disapproval of crime and criminals.

In light of these dynamics, it is not surprising that Congress, when considering prisoner-litigation reforms, would tend to credit claims that most prisoner litigation is frivolous and to adopt measures that restrict the availability of relief. In this sense, it may be fair to view the PLRA and AEDPA as reflecting systemic failures in the democratic process.

Interestingly, though, there does not seem anything inevitable about prisoner litigation rising to the top of the legislative agenda. Congress has not repeatedly restricted habeas and prisoner rights, the way that it has, for instance, repeatedly adopted new mandatory minimum sentencing laws. Perhaps this is because the substantive rights at issue are constitutional, meaning that Congress's role is largely limited to questions of process—questions that are less likely to excite the public imagination than are questions bearing more directly on penal severity. Process questions are of greatest interest to system insiders—judges, lawyers, corrections officials—and insiders won't be inclined to think about legal change in purely symbolic terms; it is they who have to bear the transaction costs of figuring out and implementing a new regime. After all of the litigation spawned by the PLRA and AEDPA, we might understand why insiders have not demanded additional waves of prisoner-litigation reform since 1996.

There may be parallels with Congress's failure thus far to respond to the Supreme Court's 2005 decision in *United States v. Booker*, which transformed the federal sentencing guidelines from mandatory to advisory.<sup>6</sup> The question of whether the guidelines range should be binding (absent legally sufficient grounds for departure) or advisory (but with a presumption of reasonableness during appellate review) is a quintessential insiders' question. Although Congress did engage with the "bindingness" of the guidelines in the 2003 PROTECT Act,<sup>7</sup> it should not be surprising that Congress has declined to return to such an arcane topic since then, especially now that the insiders have invested considerable effort in filling in *Booker's* many gaps.

The PROTECT Act also has other interesting parallels with the AEDPA: both statutes were adopted hurriedly, with important but obscure changes to insiders' law linked to unrelated measures with broad political appeal and unstoppable legislative momentum, in the one case addressing terrorism and in the other child abduction and abuse. Whether there are common causal forces behind such seemingly random collisions between the political system and the law of criminal procedure is not clear. Nor is it clear whether one should find it reassuring that Congress mostly seems to leave insiders' law in this area alone, but does swoop in at irregular intervals to adopt ill-considered reforms.

But perhaps there are some post-1996 developments that make it less likely that prisoner-litigation law will be made a vehicle for expressing distaste for criminals. For instance, the innocence movement was still in its infancy in the mid-1990s; a wave of high-profile exonerations since then may diminish enthusiasm for further restricting access to post-conviction remedies. More generally,

reduced crime rates since the mid-1990s seem to have lessened the political salience of crime. The death penalty, too, has been in sharp decline since the mid-1990s<sup>8</sup>; to the extent that capital punishment loses its salience, so, too, will one of the most important arguments against habeas—that is, that habeas endlessly delays executions. Additionally, groups such as Human Rights Watch have done a great deal since 1996 to raise public awareness of prison rape; passage of the Prison Rape Elimination Act in 2003 demonstrated the success of their efforts and revealed a surprising level of concern in the political system regarding at least one aspect of prison conditions. Finally, the successful advocacy for the Fair Sentencing Act of 2010 by groups like Families Against Mandatory Minimums suggests that prisoners and their supporters may no longer be quite so politically powerless as was once the case. Indeed, developments such as these may even offer some glimmer of hope for the many thoughtful reforms proposed by this issue's contributors.

## II. Courts as Corrective Forces for Flawed Prisoner-Litigation Statutes

If one takes the view that the PLRA and AEDPA imposed arbitrary and unjustified limitations on the ability of prisoners to obtain redress for constitutional violations, then one might wonder if the courts have tended to mitigate or exacerbate the problems with the statutes. After all, the PLRA and AEDPA had more than their share of ambiguities, which, as a practical matter, left the courts with considerable power to determine the ultimate harshness of the new prisoner-litigation regime.

The courts' track record has been mixed. For instance, in her contribution to this issue, Elizabeth Alexander argues that the "particular plaintiffs" provision of the PLRA could have had a large, negative impact on the scope of injunctive relief available to prisoners and their ability to have class actions certified; however, the courts have eschewed expansive interpretations of this provision.<sup>9</sup> Likewise, Sharon Dolovich discusses a pair of recent Supreme Court decisions that declined to interpret other PLRA restrictions broadly.<sup>10</sup> And, for her part, Giovanna Shay notes a number of lower-court decisions that have recognized exceptions to the PLRA's exhaustion requirement.<sup>11</sup>

On the other side of the PLRA ledger, though, Michael Mushlin argues that the courts have interpreted the statute's "physical injury" requirement in a more restrictive fashion than necessary, thereby precluding relief in several cases in which prisoners' constitutional rights were violated in particularly outrageous ways.<sup>12</sup>

As to the AEDPA, Larry Yackle argues that it is actually the Supreme Court, and not Congress, that deserves the lion's share of the blame for the "colossal mess that federal habeas corpus has become."<sup>13</sup> He points in particular to two interpretive tendencies. First, the Court has "typically focused on the text of AEDPA provisions without sufficient attention to the policy implications."<sup>14</sup> Second, the Court "insisted that every AEDPA provision, in turn, had to be read to alter habeas law in some way (usually to the disadvantage of habeas petitioners)."<sup>15</sup> Yackle suggests that this interpretive strategy is "inapt" because the Court had adopted a number of important changes to habeas law in the years leading up to 1996, and there is "no reason to think that anyone in Congress meant those changes to be adjusted."<sup>16</sup>

Nancy King's contribution suggests that AEDPA has indeed had an impact. Based on a comprehensive analysis of 2,188 noncapital habeas cases filed in 2003 and 2004, King finds a grant rate of just 0.8 percent, as compared with a one percent rate prior to AEDPA.<sup>17</sup> Of course, this 20 percent reduction in the grant rate may be due at least in part to other factors (e.g., changes in the composition of the federal judiciary), but it is hard not to think that AEDPA is playing a role.

Why have the courts not more consistently adopted narrow interpretations of the PLRA and AEDPA? After all, it is their jurisdiction that is being squeezed. Part of the explanation probably lies in a principled commitment to the sorts of textualist interpretive strategies that Yackle describes. Additionally, one imagines that some judges are not overfond of this particular corner of their jurisdiction, dominated as it is by pro se litigants who, even pre-1996, were only very rarely able to put together a meritorious claim for relief. Then, too, notwithstanding its formal political insulation, there is no reason to think that the federal judiciary is entirely free from the public attitudes toward crime and criminals that have so marked our political discourse; the judges are, of course, ultimately products of the political system.

Whatever the explanation, the evidence suggests that the courts have not by any means systematically mitigated the harshness of the prisoner-litigation reforms, and, in fact, may have at times created greater harshness than was plainly mandated by the statutes.

### III. Alternatives to the Federal Courts

Historically, the federal courts have played a crucial role in responding to systemic abuses in state criminal-justice and corrections systems. Although the sort of overt racism that once particularly warranted federal judicial intervention now seems a thing of the past, problems undoubtedly remain. But is it wise to continue to regard the federal courts as the primary agent of redress and reform, or is it time now to look elsewhere for leadership? After all, the post-1996 judicial track record discussed above does suggest a certain ambivalence in the federal system regarding prisoner litigation.

What about the state courts, for instance? In his contribution, Daniel O'Brien argues that large improvements in the quality of state post-conviction processes between the late 1960s and the mid-1990s significantly diminished the need for federal habeas review.<sup>18</sup> With more robust forms of collateral review now available, it is possible to imagine state courts playing a more active and effective role in addressing wrongful convictions and misconduct by police and prosecutors.

In their contribution, however, Lynn Adelman and Jon Deitrich sound a warning note, emphasizing that judges in most states are electorally accountable.<sup>19</sup> Although we may have moved beyond the heyday of tough-on-crime politics, Adelman and Deitrich note much evidence suggesting that these political dynamics may still play an important role in judicial elections, and hence judicial behavior—perhaps even a growing role in light of the increasing amount of money and negative advertising in judicial elections.

Eric Freedman suggests a middle ground of sorts.<sup>20</sup> He sees a critical role for state courts in the post-conviction process, but also calls on federal courts to ensure that state criminal defendants really are given at least one full and fair opportunity to challenge the constitutionality of their convictions. He also calls on states to provide for effective assistance of counsel in the post-conviction process. This would surely be a helpful complement to the other sorts of advances noted by O'Brien.

Other contributors look beyond the judiciary entirely for leadership. Joseph Hoffmann focuses on the need to address innocence claims effectively, but notes that the courts are not well-positioned to perform screening and investigation roles for such claims.<sup>21</sup> He lauds the emergence of private initiatives, such as the Innocence Project, that have increasingly played a pivotal role in screening and investigating innocence claims. He also finds much promise in public initiatives such as the North Carolina Innocence Inquiry Commission, an independent state agency that reviews and investigates assertions of wrongful conviction. Hoffmann observes, "Actors situated outside the judicial system—whether private or public—are structurally better positioned to screen and investigate post-conviction innocence claims than are the courts, if for no other reason than that they do not suffer from the same inherent conflict of interest. Courts have an inherent interest in the affirmation of judgments rendered by courts."<sup>22</sup>

Michele Deitch also finds a number of inherent weaknesses in the role of judges as overseers of prison conditions.<sup>23</sup> For one thing, the substantive constitutional standards are so low that courts cannot even begin to address many serious deficiencies in the correctional system. For another, the lawyer- and expert-intensive judicial oversight model is too expensive, especially at a time when corrections budgets are already stretched far too thin. In light of these and other considerations, Deitch urges states to create independent prison oversight agencies, which would conduct regular inspections of all institutions and issue findings and recommendations publicly. To be sure, she sees a continuing role for courts as a "fail-safe protector of prisoners' rights," and urges repeal of the PLRA so that courts may play this role more effectively.<sup>24</sup> Yet she also sees a potential unexpected benefit from the PLRA to the extent that it may spur reformers to consider alternatives to the judicial model of oversight.<sup>25</sup> Perhaps the AEDPA has had, or could have, a similar benefit in spurring non-judicial initiatives in the area of post-conviction review.

### IV. Process as Punishment

The '96 statutes were largely couched as efforts to reduce the burdens imposed by prisoner litigation on federal courts and state governments, but it may be no less apt to think of the statutes as increasing the severity of punishment. Indeed, at one level, this point may seem self-evident. After all, the AEDPA's very title ("effective death penalty") reveals that it was in some sense a sentencing statute—Congress intended to facilitate the imposition of our nation's most severe punishment. And it also seems obvious that the diminished accountability of prison officials under the PLRA would lead to harsher conditions of incarceration for many inmates.

But I mean to suggest here a different sense in which the new procedural requirements are punitive—in which they are a punishment in their own right. Malcom Feeley famously observed



years ago that legal process could constitute punishment,<sup>26</sup> but this point may have a unique valence in the context of post-1996 prisoner litigation. Long before Feeley even, Kafka showed us that subjecting a person to an arbitrary and opaque legal process may be profoundly dehumanizing. And, in some respects, contemporary prisoner litigation does have a distinctly Kafkaesque character.

As Larry Yackle puts it, habeas litigation has become a “nightmare,” “delivering unjust and bizarre results even in the run of ordinary cases, and, at best, squandering resources on endless and pointless procedural digressions.”<sup>27</sup> Nancy King’s detailed accounting of habeas grants from 2003 and 2004 seems to capture some of this flavor. She doesn’t find any pattern in the cases; “they appear to be a random assortment of errors affecting a wide variety of proceedings.”<sup>28</sup> The procedural history of many of these cases is of mind-numbing complexity, dragging out over many years. And—in a truly Kafkaesque irony—at least three of the eighteen “winners” obtained no benefit from the victory, with one actually receiving a much longer sentence for his troubles. Only four of the winners secured immediate release from prison, while proceedings continue to drag on for two of the remainder—now approaching a decade after the filing of their habeas petitions.

On the prisoner-rights side, David Fathi’s contribution evocatively describes the emergence of a “separate but unequal system of court access that applies only to prisoners.”<sup>29</sup> Fathi’s phrase suggests an analogy to the system of “separate but equal” that stigmatized African-Americans in the Jim Crow South.

But it may be James Robertson’s effort to describe what the PLRA looks like from the perspective of a “punk” (a sexually abused inmate) that most powerfully captures the nightmarish quality of the statute, particularly its creation of arbitrary barriers to legal redress that seem almost willfully blind to the realities of prison life.<sup>30</sup> Robertson suggests that prison rape is a de facto part of court-imposed sentences of incarceration.<sup>31</sup> Perhaps the PLRA and AEDPA should also be regarded as a de facto part of the punishment.

A large body of procedural justice research teaches that the process through which a legal decision is made may matter as much, or even more, to the people affected by a decision than the content of the decision.<sup>32</sup> In particular, a legal process that treats participants with dignity and respect may promote respect for the law and legal system, even if the substance of the decision is adverse. With increasing attention being paid to the challenges of prisoner reentry,<sup>33</sup> it is unfortunate that our prisoner-litigation processes now seem so ill-designed to promote positive attitudes toward the law.

## Notes

- <sup>1</sup> For an overview of the legislative processes, see Mark Tushnet and 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).
- <sup>2</sup> For a discussion of the anecdotes and of the important data that was not part of the PLRA debate, see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).
- <sup>3</sup> Susan N. Herman, *Prison Litigation Reform Acts*, 24 FED. SENT’G REP. 263, 263 (2012).
- <sup>4</sup> James E. Robertson, *The Prison Litigation Reform Act as Sex Legislation: (Imagining) a Punk’s Perspective of the Act*, 24 FED. SENT’G REP. 276, 279 (2012).
- <sup>5</sup> Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT’G REP. 245, 254 (2012) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)). James Robertson makes a similar point in *The Jurisprudence of the PLRA: Inmates as “Outsiders” and the Counter-majoritarian Difficulty*, 92 J. CRIM. L. & CRIMINOLOGY 187 (2002).
- <sup>6</sup> 543 U.S. 220 (2005).
- <sup>7</sup> Douglas A. Berman, *Taking Stock of the Feeney Amendment’s Many Facets*, 16 FED. SENT’G REP. 93 (2003).
- <sup>8</sup> Michael M. O’Hear, *The Beginning of the End of Life Without Parole?*, 23 FED. SENT’G REP. 1 (2010).
- <sup>9</sup> Elizabeth Alexander, *Isn’t It Ironic? The “Particular Plaintiffs” Provision of the PLRA*, 24 FED. SENT’G REP. 229 (2012).
- <sup>10</sup> See Dolovich, *supra* note 5 (discussing *Jones v. Bock*, 549 U.S. 199 (2007), and *Brown v. Plata*, 131 S. Ct. 1910 (2011)).
- <sup>11</sup> Giovanna Shay, *Exhausted*, 24 FED. SENT’G REP. 287 (2012).
- <sup>12</sup> Michael B. Mushlin, *Unlocking the Courthouse Door: Removing the Barrier of the PLRA’s Physical Injury Requirement to Permit Meaningful Judicial Oversight of Abuses in Supermax Prisons and Isolation Units*, 24 FED. SENT’G REP. 268 (2012).
- <sup>13</sup> Larry Yackle, *AEDPA Mea Culpa*, 24 FED. SENT’G REP. 330, 330 (2012).
- <sup>14</sup> *Id.*
- <sup>15</sup> *Id.* at 331.
- <sup>16</sup> *Id.*
- <sup>17</sup> Nancy J. King, *Non-Capital Habeas Cases after Appellate Review: An Empirical Analysis*, 24 FED. SENT’G REP. 308, 310 (2012).

- <sup>18</sup> Daniel J. O'Brien, *Heeding Congress's Message: The United States Supreme Court Bars Federal Courthouse Doors to Habeas Relief Against All but Irrational State Court Decisions, and Oftentimes Doubly So*, 24 FED. SENT'G REP. 321, 322–23 (2012).
- <sup>19</sup> Lynn Adelman & Jon Deitrich, *Why Habeas Review of State Court Convictions Is More Important Than Ever*, 24 FED. SENT'G REP. 292 (2012).
- <sup>20</sup> Eric M. Freedman, *State Post-Conviction Remedies in the Next Fifteen Years: How Synergy Between State and Federal Governments Can Improve the Criminal Justice System Nationally*, 24 FED. SENT'G REP. 298 (2012).
- <sup>21</sup> Joseph L. Hoffman, *Innocence and Federal Habeas after AEDPA: Time for the Supreme Court to Act*, 24 FED. SENT'G REP. 300, 30 (2012).
- <sup>22</sup> *Id.* at 303.
- <sup>23</sup> Michele Deitch, *The Need for Independent Prison Oversight in a Post-PLRA World*, 24 FED. SENT'G REP. 236 (2012).
- <sup>24</sup> *Id.* at 242–43.
- <sup>25</sup> *Id.* at 236.
- <sup>26</sup> MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).
- <sup>27</sup> Yackle, *supra* note 13, at 330.
- <sup>28</sup> King, *supra* note 17, at 310.
- <sup>29</sup> David C. Fathi, *The Prison Litigation Reform Act: A Threat to Civil Rights*, 24 FED. SENT'G REP. 260, 26 (2012).
- <sup>30</sup> Robertson, *supra* note 4.
- <sup>31</sup> *Id.* at 281.
- <sup>32</sup> Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407 (2008).
- <sup>33</sup> Michael M. O'Hear, *The Second Chance Act and the Future of Reentry Reform*, 20 FED. SENT'G REP. 75 (2007).