

A Pursuit of Prisoners' Health and Safety

A conversation with Elizabeth Alexander, director of the ACLU's National Prison Project

by Todd Matthews

Thirty-seven years ago, Elizabeth Alexander graduated from Yale Law School and planned to enter the field of welfare law. When her husband was offered a teaching job in Madison, Wisconsin it changed the course of her legal career. "The only job I could find available was a part-time clinical position at the University of Wisconsin Law School," she recalls. Alexander supervised students in a program that provided services to prisoners at the maximum security state hospital. "The place was extraordinarily, psychologically abusive to the people confined there," she says. What's more, a contract between the organization and the institution precluded any legal action.

That experience shaped her interest in law. Specifically, she wanted to focus on the health and safety of prisoners in America.

In 1981, she was offered a position at the National Prison Project (NPP) in Washington, DC, a program of the American Civil Liberties Union. Twenty-six years later, Alexander, 62, is the NPP's executive director. The organization, which was created in 1972, employs five full-time staff attorneys and has an annual operating budget of \$2 million. It aims to reduce prison overcrowding, improve medical care for prisoners, and minimize the reliance on incarceration as a criminal justice sanction.

"It's always been one of our priorities to work on health and safety issues," Alexander explains. "The single largest category of cases we handle involves health issues. We're also concerned about safety issues in terms of violence from staff and violence from uncontrolled institutions."

A few recent cases handled by the NPP have put the organization's pursuits in headlines.

In November 2007, the NPP reached an agreement with the Mississippi Department of Corrections (MDOC) aimed at improving conditions for inmates at the notorious "Unit 32" supermax facility in Aberdeen, Miss. According to the agreement, the MDOC must remove hundreds of mis-classified and mentally ill prisoners from supermax confinement, improve basic mental health care, and impose

restrictions on the use of force by prison guards. According to the NPP, last year "Unit 32" was the site of a series of homicides, a suicide, and the discovery of a gun in a prisoner's cell. [The settlement will be reported in next month's *PLN*.]

In February 2006, CBS's *60 Minutes* aired a report about a mentally ill, 21-year-old Michigan prisoner who spent five days in August 2006 shackled to a cement slab -- a form of punishment for flooding his cell. The prisoner, Timothy Souder, failed to receive medical attention, and died from hyperthermia and dehydration. In October 2006, the NPP took the prison operators to court. A federal judge issued a preliminary injunction barring the use of mechanical restraints outside a medical setting, and ordered an overhaul of the prison's mental health operations.

The NPP has also been involved in cases seeking air-conditioning in prisons where heat waves present a threat to prisoners. Last July, a judge ordered the Michigan Department of Corrections to install two air-conditioning units at the Southern Michigan Correctional Facility after two people died from heat-related causes. "Putting people in these closed cells without ventilation is becoming more dangerous," says Alexander, who sees the issue a common problem in prisons nationwide.

Despite these successful cases, the biggest challenge facing NPP's work is the Prison Litigation Reform Act (PLRA). The law, passed in 1996, makes it difficult for prisoners to file lawsuits in federal court. Today, a prisoner must try to resolve all aspects of their complaint through the prison's grievance procedure. A prisoner must also pay court filing fees in full, with no room for waivers. In cases of mental or emotional injury, prisoners must show proof of physical injury. Finally, each lawsuit or appeal that is filed and then dismissed by a judge because it is "frivolous, malicious, or does not state a proper claim" counts as one "strike." After three strikes, a prisoner must pay up front for all court costs should he or she file another claim.

"The [PLRA] has made litigation more difficult," says Alexander. "We now have more men, women, and children

locked up, and with virtually no access to courts."

Still, Alexander remains motivated in her work.

"I think I'm extraordinarily lucky," she adds. "I believe in the work I'm doing. Many of my law school classmates, at times, are working for clients whose causes they don't believe in. I always believe in the causes, and I couldn't be luckier doing this work. My concern about clients gives me all the motivation I would need to keep doing this."

Prison Legal News recently spoke with Alexander to get her thoughts on a variety of issues related to conditions of confinement, and her work at the NPP.

On Challenges NPP Faces In Affecting The High Rates Of Incarceration

One of the problems is that a number of the doctrines of the Supreme Court make it virtually impossible to attack the real problem, which is the enormous number of people coming in at the front end. It makes it difficult to do any litigation around that. At the NPP, we have primarily focused on the back-end. Even though conditions of confinement are terribly important issues, every year the failure to provide decent conditions kills lots of people. What would really be far more effective would be some attack on the front end. But all sorts of doctrines make it impossible to sue over sentence processing. A whole range of decisions make it very difficult to show the racial impact of our sentencing policy, in particular, discrimination in death penalty sentences. It's very difficult to show selective prosecution. There's a whole interlocking range of doctrines that have put much of this out of bounds, and what we're left with is trying to save peoples' lives once they are enmeshed in the prison system.

On Why More Law Firms Or Organizations Don't Tackle Confinement Conditions On Behalf Of Prisoners

That's a good question. I don't really have an answer. A decade ago, there were more state programs, but funding has been difficult. The irony is that as the prison

population has grown so much, courts have become more conservative. We now have more men, women, and children locked up, and with virtually no access to courts. If you were to take the number of people in prisons and jails, and gather them into a single city, it would be the fourth largest city in the country.

On NPP's Criteria For Accepting Cases And Pursuing Litigation

Often, lawyers or ACLU affiliates request our assistance in cases that come to their attention. Occasionally, a prisoner will write to us. Or we become involved because a judge asks. In the last couple decades, we've had five supreme court arguments -- two were because the Supreme Court asked us to represent. Almost all the litigation that we do nationwide involves class actions. Statewide, we are less likely to take a class action case because these days the evidentiary burden to prove Eighth Amendment violations is so huge, taking on a whole state is virtually prohibitive. The Supreme Court has developed a number of doctrines that make this litigation very difficult. It's a question of resources. We have eight lawyers at any given time, and we are involved with cases in 20-25 states. Take a case like *Ruiz vs. Estelle*, in Texas, where we spent more than \$1 million on discovery. It would cost several times that today.

On The Evolution Of Litigation On Behalf Of Prisoners Since Alexander Became An Attorney In 1971

It is much, much harder. A very conservative Supreme Court has imposed a number of requirements. One is the state-of-mind

requirement to show an Eighth Amendment violation. Also, there is the requirement, in *Rhodes v. Chapman*, of providing very specific proof of a specific condition that causes a deprivation of a human need and a danger to the prisoner. Since 1996, the huge problem has been the exhaustion requirements and other effects of Prison Litigation Reform Act (PLRA). The National Prison Project did a study and looked at about 300 pro se prisoner cases where prisoners were affected by the range of procedural decisions on the Sixth circuit. Only five out of 300 had survived initial screening. That's the devastation the PLRA has caused.

On The Distinction Between Incarceration As A Form Of 'Punishment' Versus A Form Of 'Rehabilitation' Toward Preparing Prisoners For Release Into Society-At-Large

First of all, that's another area that the Supreme Court has put off limits for litigation. This is an issue of public opinion and legislation. While there has been a massive increase of people in prison for drug violations, there is some optimism. In recent years, there is a counter-trend to prisoner bashing that has gone on for politicians -- the Second Chance Act. It is one ground for hope that at least some people are realizing that our criminal justice system is dysfunctional and needs some change. But we need to go on from

the Second Chance Act. Are we really protecting public safety by sending this incredible tsunami of people into the system? Isn't this counterproductive to crime control in itself? That's a matter of public policy where we have to go from here.

On NPP'S Future

In order for NPP to grow, the PLRA has to be repealed, including restrictions on attorney fees. Right now, we are depending on individual donations through the ACLU to support our work. We can no longer support our work through attorney fees. But there are a couple things we're looking at. One of the growing issues, of course, is immigration detainees. A year ago, we added challenging immigration detention to the things we work on. We also work on juvenile issues. There continue to be new challenges. But the biggest thing that needs to be done is a fundamental change in our criminal justice system. We just have way too many people who are caught in the maw of jails and prisons. No other country does it the way we do. We've got to change. 🗞

Todd Matthews is an independent journalist based in Seattle, Washington. This is the second in an ongoing series of interviews with the top prison and jail litigators in the country.



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