"In Defense of Rights:
The National Prison Project of the ACLU"

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INTRODUCTION

The purpose of this paper is to describe the litigation activities of the National Prison Project (NPP) of the American Civil Liberties Union Foundation in the context of interest group litigation theory. The NPP provides an excellent vehicle by which to test the application of this theory because (1) the NPP is the largest defender of prisoners' rights in the United States and (2) although the activities of numerous groups that have resorted to the courts including blacks (Vose 1958; Kluger 1976; Nasby 1983); women (O'Connor 1980); the handicapped (Olsen 1982); and, Mexican Americans (O'Connor and Epstein 1984) have been analyzed in terms of interest group litigation theory, there has yet to be a study of any group advocating the rights of prisoners.

To facilitate our investigation, we have divided this paper into three parts. In the first, we discuss the history and character of the NPP. In the second, we provide an overview of its litigation activities in the United States Supreme Court. Finally, we examine the activities of the NPP in the context of those factors frequently noted as critical to group litigation success.

Our conclusions are not surprising. We find that while the NPP possesses most factors deemed critical to interest group
litigation success, its ability to win, at least at the level of the United States Supreme Court, is hampered by the general disposition of the Court against prisoners' claims, the propensity of the Solicitor General to side against prisoners' claims, and the mounting competition from other groups in this area of the law.

PART ONE

Origins and Development of the National Prison Project

The creation of the National Prison Project (NPP) in 1972 was the culmination of a series of events that began in the early 1960s. During the early part of that decade, groups seeking expanded civil rights and liberties turned to the courts with increasing frequency. Even though litigation was not a new strategy (see Vose 1958; Greenberg 1977, p. 581-603; O'Connor 1980; Epstein forthcoming), an ever growing number of groups saw the courts as an amenable forum (Cortner 1968; Center for Public Interest Law 1976). By the late 1960s and into the early 1970s, new groups including the Environmental Defense Fund, the Native American Rights Fund, and the Mexican American Legal Defense and Educational Fund as well as well-established organizations such as the NAACP Legal Defense Fund (LDF) and the ACLU were greatly assisted in these efforts by financial support from the Ford Foundation (Ford Foundation 1976).

The litigation mentality that developed during this period, while providing a backdrop for reform, was just one of the events inspiring later concern with prisoners' rights. Prison reformers, however, realized that the courts would provide a
potentially amenable forum for expanded rights only after several favorable Warren Court decisions (Bronstein 1977; Casper 1972; Hirschkop 1971). The first of these was Monroe v. Pape (1961), which "resurrected the Civil Rights Act of 1871" by allowing a damage action against police for unlawful entry of petitioners' home and for illegal search, seizure, and detention (Bronstein 1977, p.31). Later, in 1968, the Supreme Court summarily affirmed an Alabama decision holding that the Fourteenth Amendment protected prisoners. And, shortly thereafter in Johnson v. Avery (1969), the Court reiterated that prisoners' constitutional rights may supersede onerous state regulations (Hirschkop 1971, p.434). Thus, by the late 1960s, the seeds were planted; the notion that litigation could be used to attain greater rights was fully accepted and favorable doctrine was emerging.

Yet, at least one other event was needed to catalyze a full-fledged prisoners' rights movement -- the Attica uprising of late 1971. The story of Attica need not be retold here. Suffice it to say that the harsh realities of prison life were catapulted into the limelight and became a high priority on the agenda of movement attorneys.

Even though all the makings of a successful movement for prison reform were in place -- group consciousness about the problem and favorable precedent, it took Attica to set things in motion for steps to be taken for the establishment of a central coordinating group to guide the movement.

Attica, however, quickly prompted the ACLU, supported by funds from the Playboy Foundation, to hold a 3-day conference in Chicago in early November 1971. At that conference, which
brought together over 250 lawyers and community organizers, Herman Schwartz, who at that time headed the ACLU Prisoner Rights Project headquartered at State University of New York at Buffalo Law School, and Philip Hirschkop, an ACLU Board member and founder of the Penal Reform Institute in Alexandria, Virginia, concurred on the need for a "broad legal assault of suits and proposed legislation dealing with prisoners to be coordinated on a national scale" (Kaufman 1971,p.24).

Soon thereafter, in 1972, the idea for a national center was realized with the merger of the Penal Reform Institute and Prisoner Rights Project into the National Prison Project of the ACLU Foundation headquartered in Washington, D.C. The Steering Committee that guided the creation of the new project consisted of Hirschkop, Schwartz, and Melvin Wulf of the ACLU Foundation. They, in turn, selected Alvin J. Bronstein to head the Project as its Executive Director.

Bronstein, who has remained with the Project since 1972, long had been involved in the civil rights movement. A graduate of New York Law School, Bronstein worked as counsel or a consultant to a number of organizations including the Lawyers Constitutional Defense Committee (LCC), the Congress on Racial Equality, the NAACP LDF, the Student Non-Violent Coordinating Committee, the Southern Christian Leadership Conference, and the Black Panther Party. During the 1960s, he headed the LCDC office in Jackson, Mississippi. At the time he was recruited by the Steering Committee, he was working in New Orleans where he had recently founded an integrated law firm to train black lawyers.
and to coordinate civil rights cases in the South.

With Bronstein and a staff of three attorneys, the Project established three priorities. "First, getting people out. Next, protection of prisoners' First Amendment activities. Next, reform of pre-trial facilities" (Civil Liberties 1973, p.4). To accomplish these goals, the Project initially encouraged local ACLU affiliates to file cases and then it would render assistance in the form of sample pleadings, encouragement, and advice (Civil Liberties 1973, p.4).

Since that time, the Project and its goals have grown substantially. Now staffed by eight attorneys, the Project clearly has established itself as the leading advocate of prisoners' rights. It has been able to do so for several reasons. First, the NPP has taken full advantage of its status as an ACLU Foundation project, drawing on its parent group's resources and strong network of local affiliates. As Bronstein has noted, "affiliates are our eyes and ears." And, even though Bronstein believes the NPP has a great deal of "autonomy" not necessarily enjoyed by the other projects because the NPP raises its own funds, national "respects" its work, and the Project has a separate Steering Committee, the NPP has enjoyed repeat player status (Galanter 1974) with the Court because of its association with the ACLU.

Second, the NPP has reached out to other organizations to establish a coordinated network of prisoners' rights litigators. According to Bronstein, "a lot of networking goes on." He went on the note, for example, if the LDF or the New York Legal Aid Society get involved with a case, or if either group learns of
some social injustice, they will contact Project attorneys. Similarly, if a case requires more extensive factual development or particular expertise not enjoyed by the Project, it will call on other groups such as the American Medical Association for assistance in order to develop a better trial record. The pinnacle of its efforts to coordinate prisoners' rights litigation came in 1977 when it began publication of the Prisoners' Assistance Directory, a compilation of attorneys and groups throughout the United States involved in prisoners' assistance.

A third reason for the Project's emergence as the major advocate of prisoners' rights is closely related to its ties with groups. Not only has it been able to develop ties with other civil rights organizations, it also has carefully developed its own network of attorneys willing to take prisoners' rights cases on a pro bono basis. Although Bronstein noted that many large D.C. firms have pro bono departments "very active" in this area of the law, he singled out the work of Covington and Burling as being especially helpful.

Another factor contributing to the ACLU's dominance in this area has been its financial solvency, a factor that cannot be underestimated given that Bronstein has estimated that it can cost more than $100,000 to bring a prisoners' rights case through trial. Unlike many of the other ACLU projects, the NPP raises all of its own funds from foundations and other contributions and currently relies heavily on awards of attorneys' fees to supply over one third of its operating budget. The Project's ability to
collect its attorneys' fees has not only enhanced its litigation efforts, it also has made it easier to attract local counsel who also can share in these fee awards. In sum, as Bronstein has noted, "attorneys' fees have become "a factor of our existence."

As the NPP has emerged as the representative of prisoners' rights, its priorities too have expanded. Bronstein now claims that the Project engages in four kinds of activities. First, while the NPP provides only a small amount of individualized service to prisoners, it receives more than 500 individual requests for assistance each week. Many of those inquiries involve questions pertaining to transfers or to conjugal rights, which the Project refers elsewhere. It will, however, try to render assistance to inmates who already are involved in pending NPP class actions.

A second NPP activity is public education, a category that includes testifying at legislative hearings, appearing on television or radio, running conferences, and writing articles. A perusal of quarterly NPP reports reveals that the Project indeed is doing a great deal of this activity. Bronstein or other NPP attorneys regularly appear on network television or participate in a variety of conferences. In 1981, for example, Bronstein served as Chair of the Practising Law Institute Program — Representing Prisoners. Also participating was Steven Ney, NPP staff counsel.

A third activity of the NPP is its function as a back-up or resource center. According to Bronstein, "like the old OEO..." it provides "experts, briefs, and pleadings."

A fourth purpose of the Project, which takes up over 50
percent of its time, is litigation. According to Bronstein, the NPP's litigation can be subdivided into five major categories, with specific case selection contingent upon several factors including cost, local resources, NPP staff resources, and importance of the issue:

1. state-wide or major institutional litigation;
2. women's institutional cases including equal protection challenges, use of drugs for behavior modification;
3. juvenile institutions;
4. selected damage cases including suicides and assaults; and,
5. state jail suits where permitted by state statute.

PART II

Litigation Activities

Even though the NPP is by its own admission, involved in almost every major prisoners' rights suit, the remainder of this paper focuses on its activities before the U.S. Supreme Court. We realize that the Supreme Court is perhaps not the best forum by which to judge NPP activities, but given the nature of case reporting systems this kind of analysis can be performed with accuracy at the Supreme Court level. Also, interest group litigation theory, which we will use in the third part of this paper, was developed through analyses of group activity before the Supreme Court.

Since the formation of the NPP in 1972 through 1982, the Supreme Court has decided 28 full opinion cases dealing with prisoners' rights. The NPP and/or the ACLU participated in 57 percent (n=16) of these cases. It sponsored six cases and

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appeared as amicus curiae in the remaining 10. Furthermore, in one half of the 12 cases in which it did not participate, at least one other organization was there representing the prisoners' rights position.

Even though the prisoners' rights position was well represented by groups, the win/loss ratio, at least at the level of the Supreme Court, is quite low. In fact, the prisoners' rights position was outrightly adopted by the Justices in only 39 percent (n=11) of the cases. One could argue that given the conservative nature of the Burger Court, this percentage is within an acceptable range. Yet, consider the success rates of other "rights" causes. Women, for example, have won 59 percent of their cases (O'Connor and Epstein 1983c, p.328), while expanded black employment rights have triumphed in 58 percent (O'Connor and Epstein 1982, p.716). And, what is even more surprising is that prisoners' rights claims interest group participation is notoriously low in this area (O'Connor and Epstein 1981).

The NPP's presence does not appear to bolster this success rate. Of the 16 cases in which it participated, the prisoners' rights position was adopted by the Court is only 25 percent (n=4). Even worse, the NPP lost every case that it sponsored.

Clearly summary percentages of the kind used here often mask case nuances. But in this particular instance, this does not seem to be the case. Several NPP losses, in fact, were quite devastating to the cause. In Bell v. Wolfish (1979), for example, the Court rejected pre-trial detainees' claims concerning conditions of their confinement. Later, in 1981, in Rhodes v. Chapman, a case in which the NPP filed an amicus and assisted the
lead attorneys, the Supreme Court rejected prisoners' claims that
double celling was violative of the Eighth Amendment.

Why has the NPP fared so poorly, at least at the level of
the U.S. Supreme Court? To answer this question, we turn to an
examination of the factors that have been deemed critical to
interest group litigation success: longevity, staff, issue
focus, financial resources, use of technical data, well-timed
publicity, coordination between national and its affiliates,
cooperation with other organizations, aid of the Solicitor
General, competition, and judicial process factors.

Part III

An Examination of Litigation Success Factors

Longevity.

The vast majority of scholars who have examined interest
group litigation have agreed on the importance of longevity, that
is, the number of years that the group has used litigation and
the increasing frequency of usage (Yale Law Journal 1948-49,p.
585; Vose 1959; O'Conner 1980,p.18-19; Epstein forthcoming). On
both of these measures the NPP scores quite high. While the NPP
is only 12 years old, its parent organization was founded in
1920, making it one of the oldest public interest organizations
in the United States. In Galanter's (1974) terms, there is no
question that the ACLU is a repeat player, accruing committant
advantages.

Staff.

Another factor critical to interest group litigation success
is the expertise of its staff (Meltsner 1973; Sorauf 1976; Belton
1978; O'Connor and Epstein 1984). Once again, the NPP ranks very high. From the beginning, its Steering Committee was composed of nationally recognized experts in prisoners' rights. It, in turn, selected as head of the Project a seasoned civil rights litigator who participated in several major Supreme Court cases including Duncan v. Louisiana (1968). Bronstein then recruited similarly dedicated and experienced attorneys to staff the Project. Among those who have worked for the NPP are Mary Mc Clement, who had five years of experience as a trial attorney in the Justice Department; Elizabeth Alexander, a Wisconsin public defender with extensive corrections litigation and teaching experience; and, Claudia Wright, a Florida assistant public defender with experience in felony and juvenile cases.

Issue Focus.

Many scholars have noted that it is critical for interest groups to focus "on one issue area at a time . . . [because] single issue strategies allow an organization to concentrate all of its efforts in one area and as its lawyers bring a series of cases, it can be expected that their competence also increases" (O'Connor 1980,p.22; see also Vose 1959; Puro 1971). This is particularly true for the ACLU. Those who have studied the Union often have found that when it focuses on one area of the law at a time, its effectiveness tends to be enhanced (Sorauf 1976; Berger 1979; O'Connor 1980).

If what others have found holds true for the NPP, then it should have a significant impact on this area of the law. Even though its litigation can be divided into specific areas of concern, it almost exclusively concentrates on prisoners' rights.
Financial Resources.

Although no interest group will ever admit that it has sufficient funds, the NPP appears to be doing quite well, operating on an annual budget of approximately 750,000 dollars. Over the years, an increasing proportion of the NPP's budget has come from attorneys' fees. In 1980, for example, awards of attorneys' fees totaled only $100,000. By 1983, however, that figure had risen to "over a million dollars."

Use of Technical, Non-Legal or Statistical Data.

Another way in which interest groups have succeeded in court has been through the use of non-legal information, a tradition that can be traced to Louis Brandeis' use of the pioneering Brandeis Brief (see generally, Rosen 1972; Davis 1973; Levin and Moise 1975; Sander 1982). Later, the NAACP LDF used this tactic successfully in Brown v. Board of Education (1954).

The NPP too has used non-legal data to its advantage. For example, in the Chapman litigation, Bronstein sought out the expert aid of the American Medical Association and the American Public Health Association to win over Justice Harry Blackmun's vote, who is widely believed to be swayed by "what doctors say."

The NPP also recognizes the importance of statistical data to prove constitutional infringements, which often are particularly important at the trial court level as the basis for substantiating claims. In a 1981 quarterly report, for example, the NPP claimed:

We are preparing to conduct a statistical study modeled after a recent study in Alaska to
show that blacks are given disproportionately longer prison sentences solely because of their race. We planned to bring together a group of experts to discuss the feasibility and methodology of such a study and its subsequent utilization in a lawsuit. The meeting was held ... and we received a small grant from the Field Foundation to pay for the expense of this meeting. At this meeting it was tentatively decided that this project was feasible and a number of social scientists expressed interest in working on the study. It was agreed that we would first develop a litigation plan based upon a hypothetical "study" to be distributed to the meeting participants after which a specific study methodology might be designed. We are now working on the litigation plan (National Prison Project 1981,p.5).

Other quarterly reports are replete with further evidence of the emphasis the NPP places on this kind of information.

Well-timed Publicity.

Well-timed publicity, traditionally in the form of the well-placed law review article or media exposure long have been credited as key to interest group litigation success (Newland 1959; Peltason 1955; Berger 1979). The NPP truly has recognized the importance of this factor. Yet, it has pursued publicity in a variety of ways. One of the stated activities of the Project
is "public education." To that end Bronstein and other staff members regularly appear on television, radio, or participate in more specialized legal conferences as well as contribute to law reviews and books.

Another example of the NPP's attempts to generate attention for its cause comes from studies on the status of courts and prisons in the United States. Indeed, there is evidence that these reports are highly regarded. In its brief in Howe v. Smith (1981), the U.S. government, in fact, cited to a NPP 1981 report on prison conditions.

Coordination between National and its Affiliates.

Coordination between national leaders and local affiliates is a double edged sword for the NPP yet one that it handles well. On one hand, the Project must deal with the ACLU national office and one the other, it is a national office in and of itself.

Its relations with the national office are quite good for reasons previously outlined. Bronstein is well-respected and in that regard is given a high degree of autonomy. Additionally, the Project is the largest among the ACLU's many and is entirely responsible for its own funding, further enhancing its independence.

As also previously noted, it depends heavily on affiliates as its "eyes and ears." According to Ruth Cowan (1976), who examined another ACLU project, when litigation is pursued with the help of affiliates, particularly when the group has a clearly defined issue focus, chances for success are increased. Given the NPP's ability to work well with the ACLU national office and local affiliates, its scores high on this factor.
Cooperation with other Organizations.

Cooperation is often listed as a factor critical to the pursuit of a successful litigation strategy for numerous reasons. Most important is that "if among organizations with the same constituency, disagreement on goals is widely present and widely reported, the Court may prefer not to become involved in the fray" (O'Conn or 1980, p. 27). As with the other factors thus far discussed, the NPP scores high; it coordinates its activities both in and out of the courtroom with other groups.

Inside the courtroom, its litigation activities are almost always in support of or supported by other groups. In fact, at the level of the Supreme Court, there was only one case in which no other group beside the NPP was present. Its most frequent allies include the American Bar Association, the NAACP LDF, the National Legal Aid and Defender Association, and the Prisoners Rights Project of the Legal Aid Society of New York. These alliances have allowed the NPP to present a unified front to the Court.

The NPP also has been able to establish a coordinated extra-court legal network. This has been greatly facilitated by publication and regular updating of the Prisoners' Assistance Manual and the periodic conferences held by the Project or attended by its staffers.

The fact that the NPP has excelled in this area is not surprising. Bronstein long has recognized the importance of networking; in fact, his New Orleans law firm was dedicated to that purpose.
Aid of the U.S. Solicitor General.

Another factor deemed critical to the success of interest group litigation is the aid of the Solicitor General’s Office, generally in the form of compatible amicus curiae briefs (Vose 1959; Manwaring 1962). Often considered to be the Court’s tenth member." The Solicitor General is a highly successful litigator. Steven Puro found that the Court adopted the position advocated in an amicus curiae brief filed by the Solicitor General in 45 of the 48 cases he studied (1971, p. 183). A more recent study conducted by the authors found that the U.S. had a 68 percent success rate in 150 criminal cases examined (O’Connor and Epstein 1983a, p. 5).

On this particular factor the NPP rates exceptionally low. In only one of the cases examined here did the Solicitor General participate on the side the NPP as amicus curiae. And, when the NPP went head to head with the Solicitor General, it won only twice.

Clearly then, the Solicitor General’s opposition to NPP goals has hurt its success rate in the Supreme Court. This is a major problem for the NPP because as one study indicates, the U.S., regardless of administration, rarely adopts a pro-criminal defendant position (O’Connor 1982). Thus, it is unlikely that this situation will change in the near future.

Competition.

The presence of competing interest groups in court can often have a negative affect (Manwaring 1962; O’Connor and Epstein 1982, 1983; Wasby 1983). As more and more conservative, pro-law and order groups take to the courts, it is likely that they will
affect the NPP's litigation strategy. Currently however, the NPP does not view groups such as the Americans for Effective Law Enforcement and the Washington Legal Foundation as problems. While Bronstein admits that they have "affected the process," he noted that they are "so strident and so bizarre" that they have probably helped. Yet, it seems that as these groups enter the judicial forum with increasing frequency and in increasing numbers, they will be a force with which to reckon.

Judicial Process Factors.

Factors inherent in the judicial process are a final consideration for interest group litigation success. Although there are several factors that fall into this category, the one which is most relevant to this paper is Supreme Court personnel. The NPP fully realizes that it has a problem at the Supreme Court level; every single case it lost at that level had been won by the NPP in the court immediately below! As Bronstein has noted, "there is a great distinction between decisions of the Supreme Court and those of lower federal courts" (1977,p.42).

Among the Justices who Bronstein views as most problematic are Rehnquist and Burger. He noted that Justice Rehnquist has made several personal attacks on the ACLU and that Chief Justice Burger has written several personal letter to ACLU Board members criticizing of Bronstein.

While Bronstein has tried to tailor litigation efforts because of U.S. Supreme Court decisions, he does not consider the prospects for the future to be good, noting that the "Court hurts us more in its impact on lower court judges." The NPP is
especially concerned about the message being sent to the lower
courts concerning their intervention in prison matters. However,
Bronstein believes that "Ronald Reagan appointments (to the
Court) in the long run will do more damage that the (current)
Court."

CONCLUSION

In this paper we examined the litigation activities of the
NPP in the context of interest group litigation theory. In many
ways the NPP is a model litigator. It has expert attorneys, has
a sharp issue focus, is financially solvent, etc. Yet, the NPP's
litigation, at least at the level of the Supreme Court, is
hampered by several factors that are not likely to change in the
near future. Based on this, it is hardly surprising that we
conclude that the NPP should do its utmost to keep prisoners'
rights litigation out of our nation's highest tribunal.

NOTES

1. Comments attributed to Alvin J. Bronstein used here and
elsewhere were obtained during an interview conducted with him by
the authors on August 12, 1983.

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