

7                   MR. SCHWARZ:  And while Judge Thompson  
8  is walking up, you may be interested in the dialogue  
9  that the starting pay for corrections guards in Great  
10 Britain is double what the starting pay is in the  
11 State of Alabama.

12                   MS. SCHLANGER:  We're going to hear now  
13 from our next panel, and what our speakers will talk  
14 about is another method of oversight and that is  
15 oversight by litigation or by judge, and it is really  
16 my pleasure and privilege to welcome these three very  
17 distinguished panels, so we are going to start with  
18 Al Bronstein and Stephen Hanlon and Judge Myron  
19 Thompson.  Let me tell you a little bit about them.

20                   Mr. Bronstein founded the American Civil  
21 Liberties Union's National Prison Project in 1972 and  
22 is now the director emeritus.  He is currently the  
23 U.S. board member of Penal Reform International and  
24 is a member of the assembly of delegates to the World  
25 Organization Against Torture.

1                   Mr. Hanlon is a partner at the law firm  
2 Holland & Knight and has been pro bono counsel in  
3 several different class action lawsuits addressing  
4 unsafe and abusive conditions in prisons and jails  
5 too, I think, right? No, just prisons.

6                   Judge Thompson serves on the U.S. District  
7 Court for the Middle District of Alabama sitting in  
8 Montgomery and has presided over a large number of  
9 individual actions brought by prisoners, and quite a  
10 number of them, of larger injunctive cases involving  
11 overcrowding, gross medical neglect and other  
12 unconstitutional conditions.

13                   Our panelists are going to talk about court  
14 intervention and litigation, litigated intervention,  
15 the role of lawyers and of judges, and are going also  
16 to discuss the recent congressional, this is not so  
17 recent, the congressional changes in that system, The  
18 Prison Litigation Reform Act which was passed in  
19 1996. So thank you all for coming and we are going  
20 to start with Mr. Bronstein.

21                   MR. BRONSTEIN: Thank you.

22                   Before 1970 there was no court supervision  
23 of jails and prisons in this country. We operated on  
24 what was called a hands-off doctrine. The Supreme  
25 Court had articulated a theory that prison officials

1 knew best and knew how to take care of their own  
2 facilities and they wouldn't interfere. That changed  
3 partly, I think, as a result of the outgrowth of  
4 World War II, the civil liberties, and Civil Rights  
5 Movement of the sixties. Every early civil rights  
6 lawyer, including myself, started out, every  
7 prisoners' rights lawyer started out in the Civil  
8 Rights Movement. And then aided by the public  
9 awareness that came out of the Attica disturbance,  
10 the Attica uprising in September of '71, the courts  
11 began to look at prisoners.

12           The early organizations, the NAACP, Legal  
13 Defense Fund, the New York Legal Aid Society, they  
14 had a marvelous Prisoners' Rights Project, still do,  
15 Southern Center for Human Rights that Steve operates  
16 that came on a little later, and the ACLU National  
17 Prison Project was organized in 1972 and became the  
18 largest such organization in the country.

19           Let me give you two examples, I detailed  
20 some of this in my written report, but two early  
21 examples of the court intervention. One was in Judge  
22 Thompson's court. His predecessor, Chief Judge Frank  
23 Johnson of the Middle District of Alabama, took a pro  
24 se handwritten petition by a prisoner and certified  
25 it as a statewide class action even though the

1 prisoner wasn't in his district, did you know that?  
2 And appointed a law professor at the University of  
3 Alabama and then told him to call our office and get  
4 help and he appointed me as amicus with the rights of  
5 the party, a phenomenon known only to Judge Johnson.

6           We litigated that case. We proved with  
7 some hints from Judge Johnson in his decision denying  
8 the state's motion to dismiss that if we could prove  
9 that the totality of conditions in the state prison  
10 system actually made prisons worse, that that would  
11 be a violation of the eighth amendment and then given  
12 the broad remedial powers of the court of equity he  
13 could address issues that weren't really directly  
14 found in the constitution and we proved it and we did  
15 it. He found the system unconstitutional.

16           He appointed -- in his view of not  
17 interfering too much in the state he made the  
18 mistake, I think, of appointing a committee of 20  
19 leading citizens of the State of Alabama to be the  
20 court monitors and to run around and just bother the  
21 hell out of all the wardens. That part of the order  
22 was set aside by the Fifth Circuit. They affirmed  
23 and everything else but said no, that's a little too  
24 intrusive, and he then appointed two people, one a  
25 prison official, John Conrad, who had been the

1 research director of the Federal Bureau of Prisons,  
2 and one local lawyer and they became the monitors.  
3 That was an early kind of case.

4           One other thing that's important to mention  
5 in this, same question, I think Steve Bright asked  
6 the question, about literally sometimes to get the  
7 legislature to give you the funds to comply with the  
8 court order, and Frank Johnson, we found a way around  
9 that. Alabama for the first six, seven years, George  
10 Wallace was the governor, they weren't willing to  
11 comply with the court's order and the state, there  
12 was an announcement in the papers, the state was  
13 about to get \$48 million from offshore oil  
14 investments and we moved to intervene the state  
15 treasurer as a party for the purpose under the  
16 federal rules for the purpose of implementing the  
17 court order. Frank Johnson, Judge Johnson, ordered  
18 him into the case and then enjoined the expenditure  
19 of any of that \$48 million until they appropriated  
20 the money to fix the prison system and that worked.

21           The other example that A.T. Wall mentioned  
22 earlier today was quite different, and the Alabama  
23 case lasted only about eight or nine years before it  
24 was dismissed as being in total compliance and now  
25 Steve Bright is suing them all over again.

1           In Rhode Island, the case was filed also  
2 pro se. We were appointed by Judge Petine, the chief  
3 judge in the Middle of District of Rhode Island. We  
4 proved that the system was a mess, it was a very old  
5 prison system, it was so dangerous that the entire  
6 medium-security facility, which was the largest  
7 prison in the system, was devoted exclusively to  
8 protective custody so people couldn't get out of  
9 maximum to go down, there was no medium to go to and  
10 they couldn't get to minimum without going through  
11 medium, so they were all stuck in the old max which  
12 was built, as I said, in 1890. Old max also has the  
13 pre-trial detainees that Rhode Island has as a result  
14 of the unified system. And Judge Petine took this  
15 tour with the law students and saw the filth and  
16 degradation in the pretrial unit and said that's the  
17 presumption of innocence that you heard about.

18           He appointed, after finding the whole  
19 system unconstitutional, a special master, one of the  
20 first special masters in contemporary prison  
21 litigation, and he had the good sense to pick a  
22 person with corrections experience, Alan Breed, who  
23 had been an official here in the State of California,  
24 ran the California Youth Authority, and was later  
25 after the mastership the first director of the

1 National Institute of Corrections.

2           20 years it took to fix that system. It  
3 went through three corrections directors. This all  
4 happened I think when A.T. Wall was still in grade  
5 school, although he did come in during the tenure of  
6 either John Moran or George Vost. It was George Vost  
7 who actually cleaned up the system and came into the  
8 court for the first time and said, "Well, we ought to  
9 comply with this, it sounds like good corrections  
10 practice," and he brought the governor in and things  
11 have changed and Rhode Island, in my opinion, today  
12 has one of the best state systems in the country.  
13 It is small, but it is a model system.

14           I know my time is up. One minute more.

15           By the eighties corrections officials were  
16 welcoming this kind of litigation. Bill Leake, the  
17 former president of the ACA, called me and said,  
18 "Look, there's a couple of pro se cases in South  
19 Carolina for a good district judge, you get into  
20 those cases and I will settle with you and I can get  
21 the resources I need from the state legislature," and  
22 we did that and we settled. Most of the cases after  
23 1980 were settled by consent decrees. The state  
24 didn't want to go through and pay the money to spend  
25 on attorneys' fees. They recognized that what we

1 wanted for them they really wanted as well in most  
2 cases, and almost all of the cases after 1980  
3 resolved themselves with consent decrees.

4           We became the victims of our own success  
5 and Congress, I think to celebrate my retirement from  
6 the Prison Project in 1996, passed the Prison  
7 Litigation Reform Act which resulted from really an  
8 outrageous set of lies perpetrated by the National  
9 Association of State Attorney Generals, Chunky versus  
10 Smooth Peanut Butter case. They claim that -- they  
11 solicited 10 examples of prison litigation. One, a  
12 prisoner suing about he ordered chunky peanut butter  
13 from the commissary; he got smooth. One got the  
14 wrong cleansing thing. Those are isolated things  
15 picked out of really important pieces of litigation.

16           Some really extreme members of Congress  
17 bought into this thing and the PLRA passed without  
18 any congressional hearings and is now a law. Steve  
19 Hanlon can tell you more about that. And I will come  
20 back and answer some questions about some other  
21 things I want to say even if they're not contained in  
22 the questions.

23           MS. SCHLANGER: Thank you, Mr.  
24 Bronstein.

25           Mr. Hanlon.

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MR. HANLON: Thank you.

I, as I indicated in my written remarks, would really like this commission to seriously consider the question of whether or not we need judicial oversight in our prisons, whether or not it has been effective, and whether or not it is sound national policy, and particularly whether or not our existing national policies as formulated by our courts, particularly the United States Supreme Court, and the United States Congress move that policy goal forward or backward. I've suggested to you that, in my remarks, that those policies are really standing in the way of what I think is a highly effective remedy in our prisons.

I am not nearly as experienced in this litigation as Al Bronstein or Judge Thompson. I have been practicing law for 40 years and it is only in the last few years that at the insistence of Steve Bright that I began to work in this area because I was convinced that it was impossible to win in this area.

I do think that I have some experience in what it takes to get lawyers; qualified, experienced, competent lawyers to do this highly complex work, and I think there are substantial disincentives in the

1 system right now as a result of these recent changes.

2           The basic argument that I think I'm making  
3 is that if you would like to have Judge Thompson and  
4 others in the federal judiciary involved in judicial  
5 oversight, I go with the territory. We can't get  
6 Judge Thompson into this judicial oversight unless  
7 there are lawyers like myself and others who are  
8 prepared to bring these cases, and there are several  
9 huge obstacles to bringing these cases as a result of  
10 this emerging national policy.

11           The first one I believe is the Farmer  
12 versus Brennan test for deliberate indifference to  
13 establish cruel and unusual punishment under the  
14 eighth amendment to the constitution, and Farmer  
15 established a standard of subjective recklessness as  
16 defined by the criminal law as the test to establish  
17 a violation in that. Justice Blackman had a dissent  
18 in Farmer in which he describes that focus as, and  
19 I'm quoting him, "Myopic and mistaken." And I would  
20 imagine that you have over the course of your  
21 hearings here taken some interesting testimony where  
22 you would have a pretty good idea of whether a  
23 problem is subjective recklessness which focuses on  
24 individual culpability of individual state actions  
25 with respect to specific acts or failure to act, or

1 whether Justice Blackman is right that the real  
2 problem here is what he calls a cumulative  
3 agglomeration of action and inaction by the  
4 institution that we know as the prison system. The  
5 institution in the sense of baseball being an  
6 institution. That institution has an enormous number  
7 of players in it. It is has the governor, it has the  
8 legislature, it has the executive officers, the head  
9 of the prison system, et cetera, and at least in  
10 Justice Blackman's view, that's really where our  
11 focus ought to be. It would be interesting to me  
12 what you believe after you've had all this testimony  
13 on that issue. If you agree with me that that's the  
14 wrong focus, then I think you ought to say so.

15           One of the institutions I work with, the  
16 Constitution Project, put together a blue ribbon  
17 panel, Judge Sessions is on that panel, dealing with  
18 the death penalty and took a look at the effect of  
19 the United States Supreme Court's decision in  
20 Strickland on the appropriate test for ineffective  
21 assistance of counsel, and in a remarkably well-  
22 written report called into serious question the  
23 Strickland test and I think it is a commission such  
24 as yours that can, I think, render a significant  
25 public service by doing that very thing if you

1 believe that what we're looking at is not really the  
2 problem.

3           Also I believe there are a host of  
4 provisions of the PLRA that I would hope you would  
5 address beginning from caps on fees which push fees  
6 down to a third to a half of what market rates are,  
7 as well as court decisions which eliminate the  
8 catalyst theory for recovery of attorneys' fees when  
9 attorneys have caused a good result in a prison  
10 system and can get it settled without winding up in  
11 Judge Thompson's court, and whether or not lawyers in  
12 the private practice should be expected to fund the  
13 significant cost of experts in this litigation even  
14 when they prevail and meet the subjective  
15 recklessness test, and even when you are in the  
16 remedial phase afterward where the only way you can  
17 help the institution is to hire those experts to get  
18 them the kind of expertise that they need to solve  
19 those problems.

20           So I will rely on my written remarks and my  
21 answers to your questions thereafter on other issues,  
22 but I think you've got a series of important issues  
23 that you can address in this area and move the ball  
24 forward significantly in terms of national policy.

25           MS. SCHLANGER: Thank you very much.

1                   Judge Thompson.

2                   JUDGE THOMPSON: I appreciate the  
3 opportunity to share some thoughts with you here  
4 today, Commissioners. I had some prepared remarks  
5 but they say that an old dog cannot be taught new  
6 tricks. Well, after listening to the comments this  
7 morning and earlier this afternoon; in fact, the  
8 comments of my fellow witnesses here, this old dog  
9 has learned several new tricks, things that are so  
10 substantial that unfortunately I have to vary from my  
11 prepared remarks.

12                   I had wanted to basically talk about  
13 judicial oversight in the sense of the cases that I  
14 handled over the years from prison overcrowding, to  
15 chain gangs, to the hitching post, just a whole host  
16 of cases. Once the mental health system was under my  
17 supervision. I know what it is like to have a  
18 monitor, I know all about that.

19                   In my remarks I will address the  
20 limitations of a court and I basically say several  
21 things. First of all, that courts are basically  
22 reactionary. We don't prevent violations, we remedy  
23 them, and our intrusion in the system is only to the  
24 extent of redressing the violation and it is really  
25 up to the executive and the legislative branches of

1 government to come up with the oversight that  
2 prevents constitutional violations.

3           The courts are not intended to do that, the  
4 courts are not in the business of overseeing  
5 institutions, monitoring institutions and so forth.  
6 And my remarks go on to say that just the limitations  
7 of judicial oversight, the cost of it, that it is a  
8 rather blunt way of addressing an issue. After  
9 listening this morning to the other witnesses, and  
10 particularly the witness from the Federal Bureau of  
11 Prisons, I realized that I as a judge wear two hats.  
12 I wear a Hat Number 1 as hearing these institutional  
13 cases, but I further realize that I wear a hat as a  
14 sentencing judge, and as a sentencing judge I realize  
15 from the testimony that I have significant judicial  
16 oversight. That first of all, when a defendant  
17 appears before me, in fashioning a sentence I can  
18 determine, for instance, whether that defendant  
19 should receive mental treatment, whether he should be  
20 offered some type of mental evaluation, and  
21 ultimately whether that mental evaluation follows him  
22 into the prison system. And as part of that process  
23 I have actually called in before me members of the  
24 prison system, the Federal Bureau of Prisons, to tell  
25 me what facilities, what they have available to treat

1 a particular defendant in fashioning a sentence.

2           Now I want to give you one dramatic  
3 instance that comes to mind. I had a defendant  
4 before me who was a cross-dresser, extremely  
5 effeminate, and I was deeply concerned that if I  
6 sentenced him to jail that he would be sexually  
7 abused. As part of the sentencing process I required  
8 that the Federal Prison Bureau come before me and  
9 tell me what they could do to assure me that if I  
10 sentenced him to prison, that he would not be  
11 sexually abused, that is the type of oversight. Now  
12 whether they actually carried out their promise is  
13 one thing, but the fact that they were called before  
14 a court to assure that court that this particular  
15 defendant was not abused was very important.

16           Secondly, not only at the front end do I  
17 realize as a sentencing judge wearing my criminal hat  
18 that I engage in some oversight, even when a  
19 defendant comes out of prison I realize that I engage  
20 in some oversight.

21           Within the last I think it was year and a  
22 half I had a prisoner come out who was mentally ill  
23 but who had gone into the prison system displaying no  
24 symptoms of mental illness. I had a hearing on the  
25 matter essentially to determine why he was mentally

1 ill. The evidence revealed that while in the prison  
2 system he had become psychotic and that the federal  
3 prison system while incarcerating him essentially  
4 warehoused him in a one cell to treat his mental  
5 illness. Actually they weren't treating his mental  
6 illness, that was a way of not treating his mental  
7 illness, and basically confined him.

8           After holding that hearing and hearing not  
9 only from the defendant but we actually appointed a  
10 court psychiatrist to review his medical record while  
11 in the federal prison system to confirm what he was  
12 saying; that he had actually become psychotic while  
13 in the system and that the federal prison system had  
14 done nothing; in fact, had exacerbated his problem by  
15 confining him and putting him in solitary  
16 confinement. I then sent my record to the federal  
17 prison system and asked them to investigate it and  
18 report back to me not by order but by suggestion as  
19 to whether the findings I had made were accurate  
20 because I had not heard from the federal prison  
21 system itself. I knew that within the federal prison  
22 system they did have certain sort of procedures  
23 whereby they did investigate complaints. I realized  
24 that a complaint from a federal judge carried a lot  
25 of weight and I did hear back from them and they did

1 report to me that they had investigated the matter  
2 thoroughly. But my point being that as a sentencing  
3 judge, first of all, I am actually a part of the  
4 prison process, I am the one who sentences people to  
5 prison, and I, as a sentencing judge, do have  
6 significant authority in what is in that prisoner's  
7 record, I have significant authority in requiring, at  
8 least to the extent we're talking about in the  
9 federal prison, that the prison assure that judge  
10 that that defendant will be treated fairly. And,  
11 secondly, when the prisoner does come out again, my  
12 relationship with the federal prison is such that I  
13 can write letters to the prisoner; in fact, can hold  
14 hearings and request an investigation of a matter.  
15 And this is not something that I, a right I have sort  
16 of when I'm wearing that institutional civil hat when  
17 you have all these sort of well-know cases, but I  
18 think every federal judge in this country has that  
19 authority, it is not unique to me, and I also think  
20 that every state judge to some degree has that  
21 authority, and if they would merely go and visit  
22 these prisons and see them and be more concerned  
23 about what happens to individuals after they are  
24 sentenced, I think that that part of the oversight  
25 process can be expanded. So my bottom line is I

1 think that as we talk about judicial oversight, you  
2 should include judges as sentencers, as people who  
3 sentence people as a significant player in that role.

4 MS. SCHLANGER: Thank you very much.

5 As we have been doing through this whole  
6 hearing I will start with a question or two, but at  
7 Judge Thompson's request, before we open it up, he  
8 asked that I remind everyone that he cannot talk  
9 about cases that are either before him or might come  
10 before him again, which means really any injunction  
11 that's alive, they can all come before him again, so  
12 I'd ask you to keep that in mind.

13 MR. BRIGHT: It is sort of like a  
14 Supreme Court confirmation hearing.

15 JUDGE THOMPSON: Mr. Bright, I so wish.

16 MR. BRIGHT: Me too.

17 MS. SCHLANGER: So until that  
18 confirmation hearing sometime in the future, we will  
19 stick with prison reform.

20 I have a question about the limitations of  
21 litigation as an oversight method and I have two that  
22 I'm curious about. The one is that you sort of see  
23 it a lot more with prisons rather than jails. There  
24 seems to be a lot more big injunctive litigation  
25 involving prisons rather than jails and I wonder if

1 that might tell us something about the limitations of  
2 this kind of oversight in general, so I will come  
3 back to my second one. Since I have the mike for two  
4 or three, I will just start with that.

5 MR. BRONSTEIN: I can respond to that.

6 We very carefully during the 26 years I ran  
7 the Prison Project, or 25 years, selected prison  
8 systems rather than jails just because of the  
9 numbers. We could impact the lives of more people by  
10 suing the entire state prison system in Rhode Island  
11 than picking one jail in Massachusetts, more people  
12 involved, so that was the main reason. We also felt  
13 that it was difficult from a class action status to  
14 work with jails because the turnover is so -- not in  
15 L.A. County where the average trial detainee waits  
16 three years for trial, but in most jails you have a  
17 turnover and class action status problems, so that's  
18 why we picked prisons generally, but there is some  
19 very effective litigation involving jails.

20 One thing I neglected to mention, I will do  
21 it now, sort of finishing off the scenario of the  
22 effectiveness of court supervision, by 1989, '88,  
23 there were 39 states plus the District of Columbia  
24 and the Virgin Islands and Puerto Rico that had their  
25 entire state prison system or one or more major

1 institutions under a court order involving  
2 overcrowding and the totality of conditions, my  
3 office had 25 of those cases, so it was a very  
4 significant judicial oversight by the middle, end of  
5 the eighties.

6 MS. SCHLANGER: The reason that I asked  
7 the question about jails was in part just to  
8 understand what are the things -- if this kind of  
9 litigation is going to work as an oversight  
10 mechanism, Mr. Hanlon already told us that we need  
11 lawyers and they need to get paid more than the PLRA  
12 allows and that Buckannan is a problem and there are  
13 all these issues. What I'm trying to get at is what  
14 are the preconditions for this kind of oversight  
15 mechanism to be in play, to work. So I think what I  
16 hear you saying about the jails is that one of the  
17 things that we need is inmate populations that can  
18 meet these criteria for class action status, the  
19 cases don't get mooted out, and I'm sort of in search  
20 of what are the other preconditions for this type of  
21 litigation work as an oversight mechanism.

22 MR. BRONSTEIN: Right now you have, and  
23 Steve didn't mention all of the other barriers  
24 created by the Prison Litigation Reform Act, they  
25 have a two-year limitation on jurisdiction basically

1 that any court order entered into a jail by the court  
2 in a jail or prison case at the end of two years is  
3 subject to a motion to dismiss by the defendants, and  
4 the court is obligated to dismiss unless you can  
5 prove present unconstitutionality, you have to  
6 prove your case all over again, very low fees and the  
7 expert problems that we mentioned.

8           It is much more difficult to get  
9 preliminary injunctions, consent decrees are almost  
10 impossible because the PLRA requires that the consent  
11 decree include language to the effect that the  
12 parties concede to the constitutional violation.

13 Well, one of the advantages of consent decrees for  
14 the state defendants was they didn't have to concede  
15 constitutional violations which would expose them to  
16 damage lawsuits. Now you have to have that  
17 concession plus a whole bunch of other barriers. A  
18 single federal judge could no longer after the PLRA  
19 enter any kind of relief which would reduce the  
20 prison population. In many of our cases, in  
21 Tennessee, a judge, a federal judge in Nashville  
22 enjoined the state from taking anymore prisoners in.  
23 Judge Jackson did the same in Alabama until it came  
24 down to what he considered to be the appropriate  
25 population. Single judges can't do that anymore, you

1 have to have a three-judge court, so all of these  
2 barriers make it much more difficult to litigate in  
3 these counties.

4 JUDGE THOMPSON: I would just like to  
5 add that anecdotally looking at Alabama, we look at a  
6 county like Macon County which is the poorest county  
7 in the state, I'm sure that when lawyers look at  
8 those counties they say to themselves if I bring this  
9 lawsuit what's the likelihood that I can bring about  
10 effective change even if I win. It is probably not,  
11 the likelihood is not very good, there just aren't  
12 funds, and you are looking at a county that can  
13 barely keep its schools open, let alone provide an  
14 adequate jail.

15 MR. HANLON: I want to second that.  
16 Lawyers really do look at it and say is there an end  
17 game here, is there something we can do that will  
18 effectively move the ball down the court. That  
19 analysis precedes every one of these cases.

20 MS. SCHLANGER: A similar kind of  
21 question was I heard once Al's successor at the  
22 National Prison Project say that the best you could  
23 hope for out of prison litigation is to go from a  
24 system being a horrible system to it being a pretty  
25 bad system. It may be that it gets past that but it

1 won't be because of the litigation; that that's as  
2 much as the litigation can do is, from horrible to  
3 pretty bad.

4 MR. BRONSTEIN: Elizabeth and I have  
5 disagreed on many things and I disagree with that,  
6 and the A.T. Wall system is living proof of that.

7 JUDGE THOMPSON: I would like to  
8 comment on that. I do think that people perceive  
9 that judicial oversight will allow for a good prison,  
10 that is not the function of the court. The function  
11 of the court is to provide a prison system that meets  
12 minimum constitutional standards, and that does not  
13 necessarily translate into a good prison. Judge  
14 Johnson's order cabining the funds of the state would  
15 have what, the life of about five seconds if it were  
16 entered today and I think we would have to be very  
17 candid about that. That order could not survive  
18 appellate review today.

19 Looking at the way the law is today, I  
20 think we are playing our eyes too low when we assume  
21 that the remedy that a federal court will provide  
22 will be one that will, for instance, cure  
23 overcrowding. Well, actually I should say cure  
24 crowding. Federal courts can cure overcrowding but  
25 they can't cure crowding.

1                   JUDGE SESSIONS: Professor, I will join  
2 them in disagreeing. I think that lawyers are the  
3 hand-maiden for the courts and unless the lawyers  
4 bring those cases to the court, the court can't go  
5 out and grab them. I disagree somewhat about the  
6 unavailability of appropriate review in jail cases.  
7 I have been there, done that. It was effective  
8 because the judge has the power to correct what is  
9 wrong. And what I would like Mr. Hanlon, who is my  
10 partner, to do is to enunciate for us -- the courts  
11 are constant, there's a constancy and availability of  
12 them, and talk to us a bit about how you accommodate  
13 what you are talking about in your paper, which I  
14 have not yet read, and how this commission could  
15 bring about those things which will help in the work,  
16 that needs to be brought to the court's attention.

17                   MR. HANLON: I think the most important  
18 thing you can do is question the impediments of  
19 settlement. That's where this work is really  
20 challenging, exciting. We can, frankly, get more  
21 done with prison officials in working out a  
22 settlement that we could ever get in court.

23                   JUDGE SESSIONS: Is that because of the  
24 threat that's there that the court will do it if they  
25 don't do it or what is it? I shouldn't invite you to

1 speculate, I'm just asking what you think.

2 MR. HANLON: Al pointed out this  
3 serious problem. In most civil litigation one of the  
4 best things that we have to deliver for the defendant  
5 is the defendant doesn't have to admit liability. We  
6 have this problem in the act that is going to require  
7 a finding to trigger jurisdiction and even if we were  
8 to get an order, a subsequent intervener could come  
9 in and upset the order if there weren't a finding, so  
10 that's, I think, a serious impediment. The  
11 elimination of the catalyst theory is a serious  
12 impediment because those state lawyers who are trying  
13 to help their client here can't go back to the client  
14 and say, "Look, let's get in and solve this problem  
15 now and we are going to save these fees from  
16 accumulating." Well, limit them. You need as many  
17 incentives to settlement of prison litigation as you  
18 can possibly get because we can do very creative  
19 things there. We frequently, and I think you have  
20 heard this before in testimony here, it is almost  
21 like we're family when we get a mediation there and  
22 we're trying to work something out that they can get  
23 back to their legislature and get worked out. Any of  
24 those areas of settlement ought to go the way of old  
25 flesh.

1 MS. SCHLANGER: Steve.

2 MR. BRIGHT: I will add two things to  
3 that. One, I think it is a last resort, the court  
4 intervention. But, secondly, there are those cases  
5 where the people, things have gotten so bad that  
6 people look at it as how do we sit down and solve the  
7 problem, now how do we have an all out war in court.  
8 But I want to ask two things.

9 One, the limit on Legal Services lawyers.  
10 I'm talking about fees and all that. It used to be  
11 that Legal Services lawyers could handle prison cases  
12 and so Macon, Alabama, whatever, the Legal Services  
13 Program, if they saw things were that bad, they could  
14 bring a lawsuit. They can't do that anymore, just to  
15 comment on that.

16 And then, second, I would ask Mr. Bronstein  
17 just to talk about, elaborate a bit on the problems  
18 with the two-year time period to try to implement the  
19 remedy in the case.

20 MR. BRONSTEIN: Your first point is  
21 well taken. When we brought the Tennessee statewide  
22 case our co-counsel was the Legal Services Program,  
23 Middle Tennessee in Nashville, and they provided a  
24 lot of person power, lawyer power to assist us in the  
25 statewide case and they couldn't do that today.

1                   MR. BRIGHT:  And that also, I might  
2   just interrupt and say, that also accounts for who  
3   was doing the jail cases because you are suing  
4   prisons because it affects a lot of people, and the  
5   people suing the Johnson County Jail in Tennessee is  
6   the local Legal Services lawyer.

7                   MR. BRONSTEIN:  Legal Services people  
8   and they can't do it anymore.

9                   The two-year question -- well, it is  
10  illustrated in Rhode Island.  We thought we could fix  
11  Rhode Island in a couple of years.  Rhode Island had  
12  700 prisoners, sentenced them pretrial, when we filed  
13  that lawsuit, 700 in the entire state, and we thought  
14  three facilities, 700 prisoners, great judge, Judge  
15  Petine, we thought we would fix it in two years.  
16  Well, it took 20 years.  The legislature just  
17  wouldn't provide the funds.  The first two  
18  corrections directors we were dealing with were not  
19  very reform minded, they were pretty stubborn, there  
20  were all kinds of other problems, some of them that  
21  A.T. alluded to.  There was a significant Mafia  
22  problem in Rhode Island, both the prisoners and  
23  staff, I think, were also members of the Mafia, the  
24  chief judge of the Rhode Island Supreme Court was a  
25  member of the Mafia, there were a lot of problems to

1 deal with.

2 MR. BRIGHT: Kind of like Family 2,  
3 wasn't it?

4 MR. BRONSTEIN: But the family didn't  
5 want to work with us and it is very difficult.

6 You have funding issues. First of all, you  
7 have sort of admission of we've got to fix these  
8 things and that takes some time. You want to do that  
9 in a friendly, cooperative way working with the  
10 prison officials rather than beating them over the  
11 head, so it takes some time to talk about it with  
12 them. Then you need to get the legislature on board  
13 and executive branch. We never had -- even though  
14 the governor was the main defendant in Rhode Island,  
15 no governor ever showed up to Judge Petine's regular  
16 conferences until about 16 years after the lawsuit  
17 had been adjudicated and then a new governor came in  
18 and brought in George Vost as the commissioner from  
19 Boston and the two of them showed up at this hearing  
20 before Judge Petine and the judge says, "Tell us what  
21 we have to do to fix this." Well, that hadn't  
22 happened before and it was very unusual, so the two-  
23 year thing is just almost impossible to work with. I  
24 think I disagree with Steve. Steve thinks that the  
25 two years is an incentive to get things fixed quickly

1 and I think what happens is it becomes a deterrent.  
2 The defendants say, "Well, we can stall this for two  
3 years and then we can move" -- take the Pelican Bay  
4 case. The judge, Judge Henderson, gave the state two  
5 years to come up with the compliance plan. This was  
6 before the PRLA was passed. The moment the PRLA was  
7 passed, that was down the drain. I think the two  
8 years is a very serious impediment to resolving the  
9 prison, the jail litigation.

10 MR. HANLON: Let me clarify my  
11 position. Just from my experience it does seem to me  
12 that it has had some effect of focusing people's  
13 attention on very serious problems, and this seems to  
14 me that -- I have seen it work effectively that way.  
15 The problem with the two years, again, this Farmer,  
16 because the test of whether or not to extend is going  
17 to get back to the subject of recklessness rather  
18 than a test that I would be much more comfortable  
19 with a two-year limitation, which would be did you  
20 substantially comply with the judge's order. I would  
21 much rather go in on that, quit trying to find out  
22 whether there's a bad person around.

23 MR. BRONSTEIN: I don't think, Steve,  
24 that Farmer is as much of an impediment as you think  
25 of it because although the majority opinion first

1 talks about the testing, they say, well, if the  
2 defendants knew or should have known, and the should  
3 have known is not the criminal intent mechanism, it  
4 is a much, it is a less onerous kind of thing.

5 JUDGE THOMPSON: It is a difficult  
6 standard to meet.

7 MR. BRONSTEIN: It is difficult but it  
8 is not impossible.

9 JUDGE THOMPSON: And when you are  
10 dealing with a system like a bureaucracy, a prison,  
11 it is hard to find out who to point your finger at  
12 and I think that's the problem.

13 MR. BRONSTEIN: Under the facts in  
14 Farmer, you remember, we won Farmer.

15 JUDGE THOMPSON: I want to again  
16 reiterate one group of people that you leave out when  
17 you are talking about prison overcrowding and that's  
18 state judges. Routinely in the prison overcrowding  
19 cases that I have it is convincing those state judges  
20 not to send people to jail if they don't have to and  
21 quite often you will have the lawyers for the state  
22 agreeing sometimes to a consent decree that they can  
23 take to their state judges so as to let them know  
24 this is the bind we are in. These are principal  
25 players whom the state has no control over quite

1 often. And I know that has played itself out in  
2 Alabama, it is playing itself out as Steve knows in  
3 state court where the state judges are crowding our  
4 state prisons and the state officials are complaining  
5 to the state judges, and until you get those state  
6 judges on board and address particularly the issue of  
7 prison overcrowding, I think you are leaving out a  
8 principal player.

9 MR. BRONSTEIN: Since you raised the  
10 question of crowding, let me mention something that  
11 you only briefly mentioned yesterday which I hope  
12 this commission, everyone up here has taken the  
13 opportunity to say we hope the commission addresses  
14 this, this is my hope.

15 33 years ago the National Advisory  
16 Commission on Criminal Justice Standards and Goals,  
17 the last commission of your kind, commented in their  
18 report that we use prison too much in this country,  
19 there were too many people in prison, and at that  
20 time there were 300,000 people in our prisons and  
21 jails. Today there are 2.3 million, it is not 2.2 as  
22 somebody said yesterday. If we count the way other  
23 countries count, juveniles in secure facilities and  
24 people in immigration facilities, it is a little over  
25 2.3 million. That is 25 percent of the world's

1 prison population. There are nine million people in  
2 jails and prisons throughout the country, throughout  
3 the world. We have 2.3, 25 percent of them in this  
4 country. I think we can really provide some public  
5 service by saying is this really the land of the  
6 free. What are we talking about? Why do we have so  
7 many people in our jails and prisons. Our  
8 incarceration rate is six times that of Canada on the  
9 U.S. Mainland. They have a similar immigration  
10 problem, they have similar minority populations,  
11 similar indigenous populations, similar crime rates,  
12 except their homicide rate is now since they  
13 abolished death penalty, it has been going down.  
14 Their incarceration rate is 116,000, our is 750.  
15 That's something that seems to me we ought to say  
16 something about.

17 MR. GREEN: Mr. Bronstein, you watched  
18 this over 30 years and you have seen this escalation.  
19 Can you talk about what kind of factors are at play  
20 that have created this tremendous escalation, but,  
21 more importantly, we talked about how we get the  
22 public interested, how do we frame this so that  
23 people care whether or not we've got two million  
24 people in prison and deal with just what many believe  
25 is a concern with fear and, therefore, we're willing

1 to put up with it. How do we deliver the message?

2 MR. BRONSTEIN: That's the tough one.

3 The easier one is why it is happening. I think that

4 politicians discovered that it was wise to run by

5 being tough on crime even before the Willie Horton

6 stuff. Governor Wilder, the first black governor in

7 the south, Virginia, ultimately for ran governor, he

8 became a death penalty advocate, advocate of harsher

9 punishment. It is difficult for me to say this as

10 still a long time ACLU staff member and consultant,

11 but I think the press has a great deal of

12 responsibility in this, particularly the broadcast

13 media. I travel around the country and the opening

14 program, the opening segment of every local news

15 program is a crime and so the public thinks that

16 crime is happening every minute. You are safer in

17 Washington, Los Angeles or New York than you are

18 today in Rome or London or Paris, the crime rate is

19 higher there in terms of street crime, yet that's not

20 the perception in this country, so the press has to

21 have a role in educating people about this. Somehow

22 we are beginning to get some of the fiscal

23 conservatives to say the fastest rising line item in

24 our state budget is corrections, it is increasing at

25 twice the rate as -- well, California bankrupted

1 their public school system by building new prisons  
2 and the same is being recognized in other states.

3 I think we have to be honest with people  
4 and say that prisons don't really work for what most  
5 people think you want it for. We're sending too  
6 maybe people, particularly property offenders. We  
7 have to deal with certain categories of offenders in  
8 a different kind of way. It is not going to affect  
9 public safety if -- marijuana possession in  
10 California, has it become more dangerous since you  
11 changed your law? Marijuana possession, instead of a  
12 mandatory one-year minimum it is community treatment,  
13 it saves the state money in dealing with it in that  
14 way. I don't see there's any increase in crime.  
15 Public education, get the media on board on this. It  
16 is a tough job because we have done so much negative  
17 publicity in the last 30 years, but I think it can be  
18 done.

19 MS. SCHLANGER: Senator Romero.

20 SENATOR ROMERO: Thank you. I have to  
21 apologize first, I need to leave at this time, I have  
22 some legislative obligations I've got to return to,  
23 but I wanted to thank the panel.

24 I would say certainly in California it is  
25 not lost on me or this legislature or any advocates

1 for reform the role of the judicial system. I have  
2 no doubt that had California not been sued over and  
3 over and over that we wouldn't even be where we are  
4 now in terms of beginning to anticipate some reforms  
5 and seeing some of them, as modest as they can be.

6           An area that I have felt very empowered by  
7 is certainly when it comes to the juvenile system and  
8 that's exactly -- the judges are paramount. To large  
9 extent I have lot confidence in the ability of the  
10 State of California to reform the juvenile system.  
11 What I have done at this point then is I'm taking it  
12 to the judges, we're taking it outside and basically  
13 having them and partnered with the media, because I  
14 think it has got to be a very creative and really  
15 audacious coalition that brings this together. There  
16 are three different branches of government and then  
17 there's the role of the free press. The media has  
18 been profound in presenting these issues to the  
19 California electorate in terms of what has been going  
20 on to the best they can. I have advocated for the  
21 strong role of the media presence in looking at our  
22 prisons and jails and I hope when we write the final  
23 report, we really address the role of the media as  
24 the facilitator for change. But it has been very  
25 encouraging to see the questioning, the visitation,

1 the beginning to recall, to take a look at what  
2 happens to these kids when they send them to the  
3 juvenile authority and what are the alternatives.  
4 I'm happy to hear that, it has taken a lot of work,  
5 but I feel very -- I don't want to say vindicated,  
6 but I feel very satisfied that this work is not done  
7 in a vacuum. As lonely as it sometimes feels in the  
8 legislature to do this work, the judges in California  
9 are playing a significant role that I don't even  
10 think we can begin to tap at this point and it is an  
11 area that nationally I think we've really got to make  
12 sure that we maximize.

13           Having said that, I do have to leave. I  
14 thank you all. Fellow commissioners, welcome to  
15 California. Stay, enjoy yourself, it is a beautiful  
16 day, we ordered it just for you, and I'll look  
17 forward to working with you when we get about writing  
18 the reports.

19           MR. BRONSTEIN: One more thing going  
20 back to Mr. Green's question, if I may. I was just  
21 thinking about how do you get the message out.

22           I have found as I travel around the country  
23 I very often, the local ACLU will ask me to speak at  
24 one of the middle schools or the high schools.  
25 Middle school is like sixth, seventh and eighth

1 grade. These young people are very receptive to the  
2 kinds of things I talk about. I can spend an hour  
3 with a group of middle school students and really  
4 change their perceptions about the death penalty,  
5 they begin to think about it. If you can somehow  
6 come up with a report that can be used and utilized  
7 and distributed in the schools, the high schools and  
8 the middle schools, I think that would be an  
9 important thing, get these kids talking to their  
10 parents and challenging what their parents say, not  
11 just because they saw some unfortunate person was  
12 raped or mugged or abused on the news but look, this  
13 is what this national commission says about these  
14 things. We have to look at it more broadly and not  
15 anecdotally. That would be one way of doing it. I  
16 mean, I think that was one of the successes of the  
17 Attica Commission. They came out with a paperback  
18 book that was in every bookstore in America and  
19 people were reading about it. And they had a video,  
20 I told Alex Busansky this, they had a video that came  
21 out on national T.V. and it really resonated with  
22 people; wow, look what happened there, and the causes  
23 of the riot. The same thing in New Mexico. The  
24 attorney general of New Mexico, now the senator, Jeff  
25 Bingaman. He came out with a report saying the riot

1 in New Mexico was caused by us, our neglect over  
2 these years. Those things can really sell the public  
3 and particularly the younger people.

4 MS. SCHLANGER: Judge Thompson, I want  
5 to follow up on what you said in your initial remarks  
6 and then what Senator Romero just said.

7 Is there a way to encourage sentencing  
8 judges to do the kind of intervention that you are  
9 talking about --

10 JUDGE THOMPSON: Yes, I think that is.

11 MS. SCHLANGER: -- or is that too much  
12 in their face?

13 JUDGE THOMPSON: No, I really don't. I  
14 think the remarks that were made earlier this morning  
15 by the director of the Bureau of Prisons as to what  
16 he does with federal judges are very important and  
17 could be replayed in each state. That is, when a  
18 federal judge takes the oath of office, one of the  
19 first things that he or she does is to visit a  
20 federal prison. In Montgomery we have Maxwell  
21 Prison. I would say that on average a federal judge  
22 visits that prison once a year and I would say --  
23 and, in fact, my law clerks quite often go there with  
24 one of the magistrate judges or with me to visit that  
25 prison.

1                   When I go to judicial conferences, if they  
2 are held near a federal prison it is routine, and I  
3 think Judge Sessions may remember this, it is routine  
4 for us to go visit that prison. Now what does this  
5 mean. It means that the prison system knows that  
6 judges are going to be coming and visiting. Now  
7 you are absolutely right, some of you are saying  
8 they're probably going to lay out the better food for  
9 us. But it is, I think, an important part of our, of  
10 sort of the overall judicial oversight to go visit  
11 those prisons as sentencing judges and make sure that  
12 what we see there meets our expectations. And I  
13 think the wardens are trying to let us know that when  
14 we sentence someone, they're going to be treated  
15 fairly. I don't think that happens in state systems  
16 and I think that if state judges were required to  
17 visit state prisons on a fairly regular basis, I  
18 think it would be beneficial for the judges and I  
19 think it would be beneficial for the prisoners  
20 because I think it would make them more transparent  
21 and I think it would make the judges more aware of  
22 what's going on, and I don't think that's going to  
23 cost the state one dime. It is something they can do  
24 and I don't think it would be controversial, I just  
25 think it needs to be done. I think that's one model

1 I would take to the federal system and play it out.

2 MS. SCHLANGER: Steve Rippe.

3 MR. RIPPE: Several of us were down in  
4 Louisiana a couple of weeks ago talking to Secretary  
5 Stalder and they're in a real fiscal bind for obvious  
6 reasons and he has been told to pretty drastically  
7 cut his budget. And we asked him how he was going to  
8 do that and one of the principal ways he is going to  
9 do it with less prisoners in his jails through  
10 sentencing reform. So I guess my question to you all  
11 is, and we have talked about it, what would you like  
12 us to have in the report, what should we say about  
13 sentencing reform?

14 MR. BRONSTEIN: Well, I would make a  
15 list of things that ought to be reviewed. Mandatory  
16 minimum sentencing is a great mistake, I think. It  
17 binds the hands of judges and it sentences too many  
18 people in for longer periods of time than necessary.  
19 Not only do we have the most people in the most  
20 prisons, in jails, in world, but we also have the  
21 longest sentences in the world. Our average time  
22 served is four or five times higher than any of the  
23 countries in Western Europe, any of the industrial  
24 countries, so mandatory minimums should be abolished.  
25 The recidivist, so-called recidivist statutes, three

1 strikes, which has been just a total disaster, is  
2 greatly responsible for the California numbers that  
3 you have heard, and so often the third strike, any  
4 one of them is, you know, a stolen pizza or  
5 something.

6           Looking at a range of options, we ought to  
7 look at sentencing sort of as a stairway and we ought  
8 to look at the lowest step first, you know, real  
9 probation with large caseloads where the probation  
10 can work. In most of the big cities probation  
11 officers have a caseload of 100 or more and they  
12 can't do anything but play cop. In Sweden probation  
13 officers have a caseload of 10 and every probation  
14 officer has 10 graduate students in social work that  
15 work for them so that every probationer has a  
16 one-to-one relationship with somebody who is helping  
17 them sort of work their way through the system.

18           We ought to then look at other kinds of things  
19 and use the top of the ladder of prisons as the last  
20 resort instead of the first resort. It is the most  
21 expensive, it doesn't work very well. There are some  
22 kinds of people that I would like to see off the  
23 streets and for those people we ought to put them in  
24 prison, but 50 percent of the people in prison in  
25 America today are property offenders. Mr. Lappin's

1 system is jammed full of first-offender possession,  
2 drug possession. We don't need to send those people  
3 to prison. So I would talk about things like that  
4 and get the public thinking about how costly this is,  
5 how damaging it is. Prison is a damaging experience;  
6 it really brutalizes people.

7 MS. SCHLANGER: Judge Gibbons.

8 JUDGE GIBBONS: You are suggesting that  
9 this commission should take on the task of sentence  
10 reform. Well, the problem with that is we have a  
11 time limit and we have limited funding to spend in  
12 that time limit and we have from the Vera Institute a  
13 charge to look at safety and abuse in prisons. Now I  
14 don't know that we can do more on sentence reform, I  
15 don't think it even needs study, it is so awful that  
16 it is self-evident, but other than to say if you are  
17 going to do this stupid thing, you've got to do it by  
18 providing safe conditions that meet minimum  
19 constitutional standards.

20 MR. BRONSTEIN: I agree with you, Judge  
21 Gibbons, that that's not a mandate but in saying we  
22 want to have safe prisons where prisoners are free  
23 from abuse and where staff are safe as well, one of  
24 the things we have to do is reduce the numbers of  
25 people in those prisons. We just have too many

1 people in prisons to keep them safe. I mean, the  
2 Men's Central Jail somebody testified -- well, my  
3 young associate from the local ACLU this morning  
4 mentioned she thought that there were 5,500 to 6,000  
5 men in Men's Central Jail in Los Angeles. There are  
6 7,000 there today, not 5,500 to 6,000. Well, that's  
7 obscene. That's a facility that my expert said  
8 should have 2,400 prisoners in it and they have 7,000  
9 there. So that's worth saying, something like that.  
10 That's not a safe prison.

11 JUDGE GIBBONS: And it probably with  
12 those numbers could never be made safe --

13 MR. BRONSTEIN: No.

14 JUDGE GIBBONS: -- but the message, it  
15 seems to me, that we can give is you can't do that  
16 unless you want to spend the money for a facility  
17 that will take care of 10,000.

18 MR. BRONSTEIN: Well, no. You can make  
19 your prisons safer by keeping people out of prisons  
20 and jails who don't need to be there.

21 JUDGE GIBBONS: In states that face a  
22 big budget like New Jersey and California it is very  
23 likely that that's what's going to happen because the  
24 legislature will come to their senses and say let's  
25 reduce the prison population.

1                   MR. BRONSTEIN: We can be safe and be  
2 smart at the same time.

3                   MR. RYAN: This will be scary.

4                   Since I'm one of those individuals that has  
5 a name that's on the other side of the "V" that goes  
6 over, I have some concerns about litigation and its  
7 oversight possibilities.

8                   MR. HANLON: Only in your official  
9 capacity, sir.

10                  MR. RYAN: Sometimes.

11                  And I am concerned about your frivolous  
12 side since I was ordered one time to make sure that I  
13 did not feed an inmate any food that would kill him  
14 as a result of a lawsuit and I have ensured that I  
15 have kept my 2,600 calories and so forth on going  
16 through on that, or the time that I was ordered not  
17 to put an inmate in a cell because he was  
18 claustrophobic and had issues to try to deal with  
19 those types of things.

20                  When I left Santa Clara County in  
21 California and went to Florida I had either 37 or 34  
22 lawsuits against me as a facility administrator. I  
23 never had to come back to California because all of  
24 them were thrown out on summary judgment, they were  
25 gone. So my concern in saying that is litigation,

1 I'm concerned, I take them personally, I actually  
2 read the cases and say what the heck, because if  
3 there's some element of truth in that case, I want to  
4 fix it.

5           The other personal episode out of Santa  
6 Clara County is I took over on February 2nd,  
7 Groundhogs Day, 1998, and found out that 30 days  
8 later that we did not have proper assessment of TDDs  
9 and ADA issues regarding the hearing impaired. I  
10 called the local ACLU to ask them to help me deal  
11 with that particular thing, what kind of suggestions  
12 they would make. We made an appointment, it was  
13 sometime around my favorite day, March 17th, six  
14 weeks later, and I thought I was getting one  
15 attorney. Six attorneys from the ACLU arrived and  
16 handed me a lawsuit, Prazoo versus Ryan, after  
17 telling me that I did not meet the ADA standards, so  
18 I struggle with the fact that we need litigation.  
19 You know, if you just told me, I would fix it. I'm  
20 trying to be a proactive administrator.

21           What sort of things can we do to prevent  
22 litigation from your end? If I'm a good  
23 administrator, I should be doing those things anyway  
24 and trying to get them fixed. Sometimes I can't get  
25 them fixed. I would like to do the preliminary stuff

1 before you hand me the "V" versus Ryan.

2 MR. HANLON: All right. Good. This  
3 phenomenon, by the way, is not limited to prisons,  
4 okay?

5 MR. RYAN: I'm a jail.

6 MR. HANLON: Or jails. Okay.

7 I spent most of my professional career  
8 doing institutional reform litigation, and what we  
9 do, and I have seen many, many lawyers who are in  
10 this field do this, is that we go in and investigate.  
11 We know that this is going to be a substantial  
12 undertaking, we don't have the luxury of doing things  
13 that aren't going to be productive, and in almost  
14 every case in my career I have laid that out in a  
15 letter, okay? Certainly in any prison litigation I  
16 have done I have sat down with the prison officials  
17 beforehand and you have a natural, it is a little bit  
18 defective mechanism in the PRLA about exhaustive  
19 administrative remedies, it seems to me there seems  
20 to be some national minimum standards about what  
21 exhaustion really might be, but --

22 MR. BRONSTEIN: That's up in the  
23 Supreme Court right now.

24 MR. HANLON: That's right. We may get  
25 some national standards or we might get some from the

1 Congress too. Less chance there.

2           But in any event, my sense of what I do in  
3 institutional reform litigation is I go in and I  
4 speak to the officials involved and I say, "Would you  
5 please move this way?" And they say, "No, I'm not  
6 going to move that way." And then I go into a  
7 federal court and I say, "Will you please make them  
8 move that way?" "Okay." And then we spend some  
9 time, now in prison litigation it is going to be  
10 limited largely to two years, and the whole goal of  
11 litigation is just to try to move the battleship.  
12 I'm just trying to move it that way, okay? And I  
13 know that when I get through or when the judge, more  
14 importantly, when the judge gets through it is going  
15 to slip back, okay? And I'm going to have to keep  
16 going back in. This is a Sisyphus kind of existence.  
17 We're just pushing that stone up the hill and it  
18 keeps slipping back down. Because you've -- and I  
19 haven't done any jail litigation, okay, but --

20           MR. RYAN: And I appreciate that.  
21 Thank you.

22           MR. HANLON: Well, I don't know, it  
23 might have been a good experience for me.

24           It is not just an administrator that you  
25 are looking at, it is the legislature and the whole

1 political process, and it is going to keep slipping  
2 back, you know. My clients don't contribute to  
3 political campaigns, they don't have any political  
4 voice, even when they get out in some of the states  
5 they don't have a political voice, so that's the way  
6 I view it. And I think -- I have seen an awful lot  
7 of what I call very responsible prison litigation in  
8 the time that I have been involved.

9 MR. BRONSTEIN: But I think you are  
10 talking about something different.

11 I would guess that the 37 or 38 lawsuits  
12 against you probably, more than half them were filed  
13 pro se by prisoners without lawyers.

14 Well, one of the things you might think  
15 about and Rhode Island, I don't know whether A.T.  
16 Wall is still here but they have done that, as you  
17 may know the Supreme Court in the Casey case a few  
18 years ago basically said you don't have to provide  
19 law libraries anymore, they overruled the old law  
20 library case and some of the states acted  
21 irresponsibly; Arizona for one and abolished the law  
22 libraries completely and provided other alternatives.  
23 Maybe since Dora has come back, come to Arizona, she  
24 has changed that.

25 What Rhode Island did, and the Federal

1 Bureau of Prisons does this in most of their  
2 facilities, they provide some legal services program,  
3 either through the university with students, a  
4 clinical program, Rhode Island contracted with a  
5 local college to train at least two prisoners in  
6 every one of their facilities on how to be a  
7 paralegal and how to do research, and then they hired  
8 probably the two most experienced law librarians in  
9 the state to work in their central office and they  
10 have a completely -- no books anymore, but all  
11 electronic research system and that kind of service  
12 will reduce litigation. If you provide some service  
13 to the prisoners that can tell them you don't have a  
14 case, it is frivolous, they won't be filing these  
15 lawsuits. You might think about that.

16 JUDGE THOMPSON: Did I understand your  
17 question correctly that you were concerned that you  
18 yourself had identified the problem, called the ACLU,  
19 and rather than approaching you informally they  
20 slapped you with a lawsuit?

21 MR. RYAN: Yes. Six of them.

22 JUDGE THOMPSON: Pardon me?

23 MR. RYAN: Six of them.

24 JUDGE THOMPSON: Six lawsuits.

25 MR. RYAN: To an Informal meeting. Six

1 people. Hey, I've got a problem.

2 JUDGE THOMPSON: I will tell you this  
3 right now. If I heard about that happening in my  
4 court I would be a very upset judge. I just don't  
5 think that should happen.

6 JUDGE GIBBONS: Was that the ACLU of  
7 Southern California?

8 JUDGE THOMPSON: Well, to me it is not  
9 an issue of what particular group did it, but --

10 MR. RYAN: It was in this state.

11 JUDGE THOMPSON: -- I just think it is  
12 an abuse of the process not to obviously pursue  
13 informal resolution, whether it is prison litigation  
14 or any other type of institutional litigation or  
15 litigation, period, that is just an abuse of the  
16 process. And if I as a judge heard about it after  
17 the case had been filed, rest assured I would have  
18 given you some relief. Not throwing the case out,  
19 but I would have let the lawyers know that the  
20 process was not appropriate.

21 But I want to talk about, though, the  
22 notion of frivolous lawsuits. I have rather mixed  
23 feelings about that. I, of course, our court, like  
24 many federal courts, is flooded with these so-called  
25 frivolous lawsuits that some of you have mentioned.

1 And while many of them are frivolous and, in fact,  
2 many prisoners don't recover, I think that they do  
3 play a very important role in oversight of the prison  
4 process. I have tried over the last 25 years a  
5 number of cases where the prisoner alleged physical  
6 abuse by guards. Most of those cases don't succeed,  
7 I would say 99 percent of them don't succeed,  
8 assuming that's by summary judgment, even when they  
9 get to the jury they don't succeed, but I do think  
10 that the process of going to court and letting six  
11 civil people hear what happened in that prison and  
12 passing judgment and letting the guards and the  
13 prison officials know that if you beat someone up you  
14 can arguably be held accountable is a very important  
15 part of the oversight process, even though many of us  
16 might consider that abusive. That is, the number of  
17 suits that are filed. In the long run I think that  
18 while these suits don't always succeed -- in  
19 particular I'm talking about the abuses, not the one  
20 about wanting caviar for breakfast -- but the  
21 physical abuse suits I think have a very prophylactic  
22 effect in curbing actual abuse in prisons.

23 MS. SCHLANGER: Laurie Robinson.

24 MS. ROBINSON: Steve, I wanted to  
25 follow up on the judge's discussion about judicial

1 involvement and oversight and ask you because of your  
2 involvement with the American Bar Association and I  
3 think with the State Bar in Florida what kind of role  
4 can the organized Bar play in terms of calling public  
5 attention and really instigating more lawyer  
6 involvement in the prison and jails issue. It seems  
7 to me that the organized Bar has the ability to be a  
8 key player in public attention to these sets of  
9 issues and over time has played some role but as Al  
10 Bronstein well knows, it has been a very modest  
11 number of lawyers at most who have ever really been  
12 that involved in this set of issues.

13 MR. HANLON: Well, that's a very good  
14 question. We have addressed a lot of important  
15 issues in the American Bar Association in criminal  
16 justice system, and in the state where I principally  
17 practiced, in Florida, so has the Florida Bar, but,  
18 quite frankly, I don't think we're a player in this  
19 problem. I'm trying to get some of the major  
20 Washington law firms now to take a serious look at  
21 trying to work in this area and I think there's a  
22 huge role, to answer your question, for the organized  
23 Bar to play.

24 We have a Death Penalty Representation  
25 Project in the American Bar. It has done a great job

1 of convincing lawyers to do death penalty cases. It  
2 is, again, one of those Sisyphus jobs, it is really  
3 tough to try to get folks to take that work on, but I  
4 think we have some potential here to bring some of  
5 the most responsible players in the country, in the  
6 profession, to do this work and I would like -- I'm  
7 no longer the chair with direct responsibility but I  
8 think I would like to see us get it on the agenda, it  
9 is a good idea.

10 MR. BRONSTEIN: Laurie, if I could add  
11 to it, you probably know the ABA has created, the  
12 standards committee has approved a task force on  
13 advising the Legal Status of Prisoners, the  
14 30-year-old standards that we have, and the reporter,  
15 we have a top-notch reporter, she testified here  
16 yesterday, Michele Deitch, she is in the room  
17 someplace, and we have two co-chairs. I'm one of  
18 them, Marty Love, is the other one. We have a superb  
19 committee which includes people from the ACA. Dora  
20 Schriro was at our last meeting because we were  
21 meeting in Arizona. We have lawyers, we have AJA,  
22 Jail Association people on the committee, we have --  
23 we had Joe Lehman, Director of the Washington  
24 Department of Corrections but he resigned, he left  
25 the job and Pat McManus has taken his place. It is a

1 really good committee and I think this will be an  
2 important venture, we hope to finish it next year and  
3 go through the process of getting it to the standards  
4 committee, the Criminal Justice Section Council, and  
5 you know that routine, you used to be there, but we  
6 will get it through.

7           And the other thing is that the standards  
8 committee approved the concept of having in the  
9 commentary references to international standards and  
10 international human rights law for the first time and  
11 that resulted primarily from Mary Robinson's visit to  
12 the Criminal Justice Section Council and all the  
13 Irish folks on the council said, "Oh, I remember  
14 that, we had a drink in Dublin, didn't we?" And so  
15 it passed easily.

16                   MS. ROBINSON: I thought maybe the Bush  
17 Administration proposed it.

18                   MR. BRONSTEIN: No.

19                   MS. ROBINSON: I'm just kidding.

20                   MR. BRONSTEIN: But I think that's an  
21 important step that the ABA has taken and I think the  
22 Corrections and Sentencing Committee is getting  
23 revitalized, we have new chairs there, and I think we  
24 will be meeting in a couple weeks, so some stuff is  
25 happening, Steve.

1 MS. ROBINSON: That's very encouraging  
2 to hear and I had forgotten about the Legal Status of  
3 Prisoners Standards being updated so that's very  
4 helpful to hear. Thank you very much.

5 MR. HANLON: I have a comment I would  
6 like to make before we get out of here.

7 MS. ROBINSON: Absolutely.

8 MR. HANLON: One provision of the PRLA  
9 that I would hope that you would address is that  
10 there is no action for mental or emotional injury  
11 without the showing of physical injury so that mental  
12 torture is not actionable. I think you ought to call  
13 that into very serious question in your report. When  
14 we saw the horrible television images at Abu Ghraib  
15 our first national response was that's not who we  
16 are, but this law seems to make that very -- it seems  
17 to make it as national policy the idea that mental  
18 torture is not actionable, and I just -- you know,  
19 Solzenetzin was right. I mean, how we deal with our  
20 prisoners tells us more about ourselves than it does  
21 about prisoners and that's something I would hope  
22 very soon would go the way of old flesh.

23 MS. SCHLANGER: Thank you very much to  
24 all the panelists, it has been very informative, and  
25 I think we now have a break until 3:30.