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PANEL DISCUSSION: THE FEDERAL PROSECUTOR'S ROLE IN THE REGULATORY PROCESS

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PANELISTS
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Honorable Jed S. Rakoff†††
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MR. CARBERRY: Good afternoon. This panel is on "The Federal Prosecutor's Role in the Regulatory Process." Federal prosecutors have the ability to prosecute federal crimes. As you know, there are thousands of federal crimes.¹ Federal prosecutors work closely in some instances with regulators and the types of prosecutions they elect to bring are coordinated with regulators. In other areas, there is no coordination and it is basically left to the individual Assistant or to an individual U.S. Attorney's Office to determine how to proceed in the courts criminally, what regulatory scheme to operate under, or what resources to bring to bear.

One of the tensions in any prosecutor's office is the tension between the need to address severe crimes immediately, the street crimes that affect people's quality of life, and the desire to enhance

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1. See Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681 (1992) (explaining how the Judicial Conference has sought to influence the "federalizing" of criminal offenses); Sam J. Ervin, III, *The Federalization of State Crimes: Some Observations and Reflections*, 98 W. VA. L. REV. 761, 762 (1996) (same).

other areas of federal law enforcement of federal, civil, or administrative concern. One of the things that becomes unique in federal criminal law enforcement is the sometimes triple layers of attack that the government will direct at a particular problem. It will be both administrative and civil on one side, and criminal on the other.

We have a very distinguished and experienced panel to discuss this. John Martin, who is a District Judge for the Southern District of New York and a former U.S. Attorney, is seated to my left.

Next to John is Bob Fiske. Bob was a U.S. Attorney in the Southern District of New York. He has held other government positions, and he is, as was John, a very effective, skillful and experienced defense attorney.

To my immediate right is Ron Noble. Ron is currently teaching at New York University School of Law. He was the Under Secretary of the Treasury for Enforcement. He had a stint as the Chief of Staff in the Criminal Division of the Department of Justice ("Department" or "DOJ"), and he also was an Assistant U.S. Attorney in Philadelphia.

To my left is Mary Ellen Kris. Mary Ellen is a graduate of Fordham Law School. She was an Assistant United States Attorney in both the Criminal and Civil Division, emphasizing environmental cases, she was an environmental civil and criminal defense attorney, and currently Mary Ellen is Regional Director for the New York State Department of Environmental Conservation. She has the important region, New York City.

Next to Ron is Jed Rakoff. Jed is a District Judge in the Southern District of New York. He was a very experienced defense attorney. He is one of the authors of a treatise on corporate crime.² He was also the Chief of the Business Crimes Unit in the U.S. Attorney's Office in the Southern District of New York.

To Jed's right is Mary Spearing. Mary is also a graduate of Fordham Law School. She was most recently the Chief of the Fraud Section of the Department of Justice. She also had been Chief of the General Litigation Section in the Department of Justice and she also had been an Assistant United States Attorney in Philadelphia. Mary is currently a member of the firm of Baker & Botts.

I am going to ask this first question to Mary because Mary is most recently in the government. Given the many demands on the government, Mary, how do you make the decision to prosecute

2. See JED S. RAKOFF ET AL., *CORPORATE SENTENCING GUIDELINES: COMPLIANCE AND MITIGATION* (1993 & Supp. 1998).

someone or undertake an investigation at the request of a regulatory agency for a regulatory violation?

MS. SPEARING: I think that what amazed me when I was Chief of the Fraud Section is how timid a lot of agencies were. I think that the squeaky wheel really does get the grease. The most aggressive agencies who demanded our attention with serious cases got serious attention.

I saw over and over again that we would have to reach out to a number of agencies to actually tell them that we wanted to focus on their regulatory scheme or their enforcement efforts. We would do that in a number of cases.

In a number of cases, it was driven by the Attorney General's priorities. Very often, she would direct that we meet with an agency and talk about what enforcement efforts they were making.

But most of the time, I have to say that we were in a responsive mode at the Fraud Section.

MR. CARBERRY: Mary Ellen, as a regulator, what is the place of the criminal enforcement of the regulative statutes?

MS. KRIS: I can answer on my own personal views. When I was still with the U.S. Attorney's Office, there was a real interest on the part of management to do environmental cases, and we never could seem to get the quality case we were looking for from the regulatory agencies. As a prosecuting office at the time, I felt we wanted to set an agenda and felt that the regulatory agencies were an impediment.

Now that I am on the other side of the street and I am the regulator, I actually have referred some cases out for prosecution. My orientation is quite different now than it was as a prosecutor.

I feel that the regulatory agency is uniquely qualified to establish its own priorities and policies. One of the things that is challenging about this area of the law is that the regulatory agency which perhaps, by orientation, does not view enforcement the same way a prosecutor's office does, must translate its needs and policies to the prosecuting office. Sometimes that which maybe makes the best prosecution of a particular environmental crime may not actually make the best policy in terms of what you want to achieve for the environment.

So I think that, in the environmental arena in particular, doing quality referrals and investigations and prosecutions requires phenomenal cooperation and teamwork, above and beyond that which is essential for any good interface between an enforcement office

and a regulatory office. It also raises, I think, some fairly unique parallel proceedings questions.

My perspective is that it is difficult. From a regulatory standpoint, my pitch is that to do this really well requires real teamwork and a respect for the regulatory mission of the agency which the prosecuting office is serving and working with.

MR. CARBERRY: What types of cases would you want to involve the criminal process in?

MS. KRIS: Essentially, in the environmental area, for the most part, I think it is appropriate — it is common sense — to go to those situations where you believe there was intentional misconduct or a pattern of misconduct, such that it is really flagrant; it is not just bad judgment or a mistake, but maybe more a systemic issue with respect to an individual or an organization.

It seems to me that using criminal enforcement, in addition to the other regulatory administrative and civil tools that exist, is appropriate when you have a broad, systemic problem that you are trying to address, whether with just that actor or in a particular area of environmental law where we are trying to deter others.

MR. CARBERRY: Jed, do you have something to add?

JUDGE RAKOFF: Yes. I passed Charlie a note because I was thinking about Bill Tandy, whom this program is rightly devoted to because he was a very great man and a very great public servant. If Bill were asked about the topic here, and what Mary Ellen was just addressing, "what is the role of a federal criminal prosecutor in the regulatory process," I am very confident that if Bill Tandy were here, he would say "none." The reason he would say none I think maybe needs to be put on the table for discussion.

The traditional prosecutor, à la Bill Tandy, viewed his role as basically a champion of morality, of right over wrong, and viewed the criminal law, I think with perhaps good reason, as basically directed to the affirmation of the moral law where it has been severely infringed. In the white-collar business crime area, that means fraud and lying — both of which are readily within the purview of very traditional federal criminal statutes, like the mail fraud statute³ and the statute against fraud and false statements.⁴

The regulatory process looks at the criminal law differently. It looks at the criminal law as an instrument of social policy and invokes academia, invokes all the kinds of ideas that became current beginning with the New Deal, and inevitably focuses, I think, more

3. See 18 U.S.C. § 1341 (1984 & Supp. 1998).

4. See *id.* § 1001.

on the effects of the actions that are being looked at than on the intentions of the persons who are the actors.

If Bill Tandy were here, I think he would say that was a dreadful mistake, and that social policy ought to be left largely to economic deterrence outside the criminal process, and that jail and prison ought to be reserved for people who are evil people, to use a very old-fashioned, non-legalistic term.

MR. CARBERRY: I believe there has been a division between people who view law enforcement, as stated in the criminal codes, as a reflection of formal moral standards, and people who have viewed law enforcement basically as enforcement of regulations and statutes passed by Congress, which may not be *malum prohibitum* crimes,⁵ but *malum in se* crimes,⁶ as we know them in common law.

But, Ron, when you were in Treasury, you were in an agency that had both civil and criminal functions; you had two divisions, Customs and the Internal Revenue Service, which have both civil and criminal jurisdictions. How do you make your decisions on how to proceed, how to divide the resources, and what types of crimes you are going to bring in those areas?

PROF. NOBLE: I want to respond to that question, but also can I say something controversial? I want to take a different position. I want to submit that it is important to have regulatory rules and regulatory options to keep our law enforcement officers safe and to keep our citizens safe.

What I want to do is draw your attention to Waco as an example. In Waco, we had an agency that armed to the teeth because they knew that the people inside of the compound had machine guns.⁷ Our criminal law said that if you have machine guns, you are engaged in serious criminal violations and your criminal exposure is therefore very high.

Now, I think, when we have laws saying that it is unlawful to possess, for example, machine guns, the reason we have those laws is not because it is evil in and of itself to own machine guns; it is a *malum prohibitum* crime, not a *malum in se* crime. Why? Because

5. "A wrong prohibited; a thing which is wrong *because* prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law." BLACK'S LAW DICTIONARY 960 (6th ed. 1990).

6. "A wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law." *Id.* at 959.

7. See Pierre Thomas, *Judgment of ATF in Raid on Cult at Waco is Faulted*, WASH. POST, Aug. 14, 1993, at A8.

we are afraid they are going to do something evil with those machine guns.

So, as a society, if we had a regulatory framework, a civil enforcement framework, that said "Our goal as law enforcers should be to get these dangerous machine guns off the streets," then our mindset as prosecutors and as agents would be different. For example, if we had a drug bust that we were trying to make and we got into the apartment, and before we could make the arrest the drugs were flushed down the toilet and there was no evidence of the drugs, we would say, "My God, that is a failure. We failed an opportunity to arrest otherwise culpable people."

If we use the same analogy with machine guns, if we were to say, "Before we got in there, they melted all the machine guns, they melted all the assault weapons," we would also, under the current framework, consider that a failure because there is only a criminal law enforcement scheme.

So my view is that we need to have a mixture of civil enforcement options, regulatory options, and criminal options, so that when a current situation arises, we can decide why Congress passed this law. We know one reason is to get votes. But another reason might be to effect some social policy, for example, to have our streets safer. So I think a mixture of criminal law enforcement and civil enforcement options is a good thing, not a bad thing.

MR. CARBERRY: But how do you decide which option to use?

PROF. NOBLE: I would just say it has to be on a case-by-case basis, and this has a sort of strange outcome. I would approach a situation like Waco or the Montana Freeman,⁸ and I would say, "What is the harm we are trying to address? What is the evidence we have of that harm? Can we enforce the law without putting our citizens and our agents at unnecessary risk?" So, for example, if I know that I cannot get into a facility safely in order to execute the criminal law, if I know that by putting them on notice, they are going to destroy their weapons possibly or turn those weapons on me, one of the things I might do is use a court to get a court order to say "Comply with X, Y, or Z or you come under the penalty of some criminal contempt sanction."

Then I do not have to worry about evidence being destroyed and I have achieved the harm of identifying people, not as being viola-

8. See *A Chronology of the 81-day Siege of the Freeman Compound*, NEWS & OBSERVER (Raleigh, N.C.), June 14, 1996, at A1 (providing a day-by-day account of the standoff).

tors of a gun law, because they believe in a Second Amendment right or because they have some fear of the Federal Government, but because their fear has been taken to the point of ignoring valid court orders. I think it has to be done on a case-by-case basis. That would be my view.

MR. CARBERRY: One of the options the Federal Government often has is to proceed civilly under criminal statutes, for example, under the Racketeer Influenced and Corrupt Organizations (“RICO”) statute,⁹ under the money laundering statute,¹⁰ or under the injunction against fraud statute.¹¹

Bob, in your experience, how would you make that decision as a U.S. Attorney? When do you use your civil resources? When do you use your criminal resources? There is a current memo from the Attorney General which basically says, “Screw them seven ways to Sunday, do everything you can.”¹²

MR. FISKE: There is one element of the sufficiency of the evidence that might go into that judgment. I can see making the decision that you did not have enough evidence to make it a criminal case, but that you were willing to proceed civilly. I think that kind of a situation is going to be relatively rare.

I think my view, as a U.S. Attorney, in almost every case I could think of, would be to proceed criminally if we had the evidence that justified it. If there was also a civil remedy, that could be considered in conjunction, if it was appropriate. But I would not have deferred a valid criminal prosecution to pursue a civil remedy.

MS. SPEARING: Charlie, can I just get back to what Jed said earlier, and correct me if I am wrong, but it sounded as though what you were saying was that regulatory violations should never be criminally prosecuted because we should reserve our criminal laws for the big bad guys who have formed this bad intent. Are you saying that there are no violators of regulatory schemes that are not bad actors?

JUDGE RAKOFF: First of all, of course, I was not expressing my view. As a federal judge, I have no views. But what I was putting on the table is the notion that the criminal law should be

9. See 18 U.S.C. §§ 1961-1968 (1984 & Supp. 1998).

10. See *id.* § 1956(e).

11. See *id.* § 1345.

12. See Office of the Attorney General, *Memorandum: Coordinate Parallel Criminal, Civil & Administrative*, July 28, 1997. It is available online at <<http://www.usdoj.gov/ag/readingroom/970728.htm>> (last updated Oct. 30, 1997) [hereinafter *AG Memo*].

reserved for people who have acted with *mens rea*,¹³ and should not be used as an instrument of social policy because of its unique deterrent effect. That is a tempting thing to do from a social policy perspective, but I think its inevitable result is to place in prison people who did not in their minds and hearts intend to do wrong. That strikes me as arguably immoral in and of itself.

The issue then becomes, are there regulatory offenses that also involve *mens rea*? Yes. But to give you an example of the distinction I am drawing, take the securities fraud area, which is one of the areas where this has been going on for the longest period of time.¹⁴ There are intentional acts of fraud of a great variety involving the securities market. They could all, frankly, be prosecuted, there is really no doubt, under the mail fraud statute.¹⁵ But if someone wants to bring, as I used to be prone to bringing, prosecutions under Rule 10b-5¹⁶ instead, no harm, no foul.

But there are also all sorts of rule offenses, rules that the Securities and Exchange Commission ("SEC") has promulgated,¹⁷ far more technical rules that, on paper, could be the subject of criminal prosecution. I am just raising the question whether criminal prosecution is the appropriate route to go in those cases.

It is not that prosecutors do not have the power. It is right there. Congress gave it. But if in fact what those folks were doing was a sophisticated form of thievery, then they ought to be prosecuted for that under the fraud statutes. If, instead, they were breaking, perhaps unknowingly, or certainly not with bad intent, some rules that exist primarily to promote the efficiency of the marketplace, I am raising the question of whether things like the efficiency of the marketplace could be better and more appropriately dealt with through economic civil sanctions than through criminal sanctions.

JUDGE MARTIN: Can I add a footnote to that? I think that part of the problem that Jed addressed raises another issue, and

13. "As an element of criminal responsibility: a guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty knowledge and wilfulness." BLACK'S LAW DICTIONARY 985 (6th ed. 1990).

14. See Paul H. Dawes, *The Mens Requirement for Criminal Liability under Section 10(b) and Rule 10b-5*, in SECURITIES LITIGATION 515, at 519 (PLI Corp. L. & Prac. Course Handbook Series No. B0-0033, Sept.-Oct. 1998) (examining the new issues of *mens rea* of insider trading for corporate entities).

15. See 18 U.S.C. § 1341 (1984 & Supp. 1998).

16. See 17 C.F.R. § 240.10b-5 (1998).

17. See *id.* §§ 201-301.

that is the fair notice element that is part of due process.¹⁸ When you have so many regulatory schemes that carry criminal penalties and they are not being enforced on the criminal side, then all of a sudden you come down on some area of regulatory law, making it criminal because the statute has been there. You sweep into the criminal process people who had no idea that they were ever subjecting themselves to criminal liability. I think that when you are talking about something that is basically *malum prohibitum*, that is tremendously unfair, even though you can say in an over-arching sense they had notice because the statute was on the books.

In real life — I have seen this, and I think any of us who have done criminal defense work have seen it — I have seen instances where people were engaged in a certain type of conduct, and all of a sudden they found themselves being prosecuted for something they never realized was criminal.

MR. CARBERRY: But if the statute is on the books and you are a federal prosecutor sworn to uphold the law and a regulatory agency wants to bring a proceeding, who is going to make the decision as to what to do? We all understand Jed's point, which is "Fraud is fraud, it does not really matter what scheme it is in," although the question of when does conflict of interest become fraud leads to the notice question; and secondly, if you lie to the agencies, it is wrong, and you should not be obstructing their investigatory process. But beyond those two standards, who makes the decision?

JUDGE MARTIN: Part of the problem is you really have a balkanization of the prosecutorial decision-making process. I think one of the things that I found most difficult, and that Bob did too, is when you have agencies of limited jurisdiction and they have found a criminal violation, something that you would not as a prosecutor in any other context prosecute, they would bang your head to try and get prosecuted some violation of their regulation. So it changes the whole perception of what is important in law enforcement.

It is very hard when you have an agency that has devoted its time to a case and investigated it for a long time, but you say, "On a normal scale of prosecutorial discretion, this is not something I would prosecute."

18. See *McBoyle v. United States*, 283 U.S. 25, 27 (1931) ("[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, or what the law intends to do if a certain line is passed.").

MR. CARBERRY: But in most of those instances, the agents would come in and be dealing with junior prosecutors; it would not reach the level of the U.S. Attorney. So do junior prosecutors have discretion not to proceed? Who is making the decision?

JUDGE MARTIN: I think they would come to the U.S. Attorney. Sure, they are at the junior prosecutor level, but most of these regulatory violations involve defendants, usually with some money, and they get the "Gerard Lynches" and the people who know the system, and it does ultimately work its way up to the U.S. Attorney, who, if the U.S. Attorney declines, then the agency lawyers are saying, "It is just the 'old-boy-network' at work."

MR. FISKE: I think that if an agency brought a case to an Assistant and the Assistant declined it because, even though it might be a crime, the Assistant did not think it was a crime that deserved to be prosecuted, the agency, if they cared about it, would take that decision up the line right to the U.S. Attorney.

I think there is a very important reason for a dialogue at that point between the U.S. Attorney and the agency to try to make a judgment as to whether, in this particular situation, a criminal prosecution would have a significant deterrent effect that would enhance the goals and objectives of the agency in a meaningful way. I think that is a factor that the U.S. Attorney should take into consideration in a major way.

MR. CARBERRY: Bob, you had the reverse situation in a case that is reported in the Second Circuit, where the U.S. Attorney determined that it was a violation of the regulatory scheme and the regulator saying no, it was not, and the U.S. Attorney proceeded with the criminal prosecution.¹⁹

MR. FISKE: That is an example of the U.S. Attorney proceeding — this is unusual, I think — to make something criminal that even the agency is not suggesting is a violation, and the result can be a very negative result for the enforcement efforts of the agency.

This was a prosecution of the chief financial officer of Southland Corporation, a man named Clark Matthews, in the Eastern District fourteen or fifteen years ago.²⁰ Count one charged Mr. Matthews with a conspiracy to bribe the state tax commission to get favorable

19. See *United States v. Matthews*, 787 F.2d 38 (2d Cir. 1986) (holding that at least so long as uncharged criminal conduct is not required to be disclosed by any rule lawfully promulgated by the SEC, nondisclosure of such conduct cannot be the basis of a criminal prosecution).

20. See *United States v. Dole*, 601 F.Supp. 430, 431 (1984) (denying motions of dismissal for defendants Dole and Matthews).

tax treatment for Southland.²¹ That conspiracy, quite arguably, was barred by the statute of limitations,²² and indeed the jury acquitted on that count.²³

Three years after that statute had expired, but two years before the prosecution, Mr. Matthews ran for reelection to the Board of Directors of Southland. The second count charged that it was a criminal violation of the proxy rules for Mr. Matthews not to have disclosed to the stockholders who were voting for his reelection that he had participated in this alleged crime to bribe the state tax officials.²⁴

Ira L. Sorkin, who was then the Regional Administrator of the SEC, spoke out publicly after this case was brought and said he disagreed with this theory.²⁵ Judge Sifton allowed it to go to the jury and the jury convicted Mr. Matthews.²⁶ The Second Circuit reversed and said that the proxy rules only required a disclosure of actual criminal convictions, and it was far too vague, far too fuzzy, far too illusory, to try to inject qualitative judgments as to what did or did not reflect on someone's integrity and then make that a requirement for disclosure with a penalty of criminal prosecution if it was not disclosed.²⁷

I think the opinion made sense to most people. I believe that the SEC would never have brought that case, even civilly.

MR. CARBERRY: In some areas of the law, tax being the major example, the Department of Justice cannot recommend criminal prosecution without Internal Revenue Service ("IRS") approval, and the Department has centralized review to have uniform approval of the tax system. In other areas, like securities, there are no restrictions. Ron, why is that?

PROF. NOBLE: In ten words or less, right? Just to be clear — I was never in charge of the IRS.

I think this ties into Judge Martin's comment. I believe that the reason why the IRS is able to create tremendous transactional costs before a criminal tax prosecution is brought is because the

21. See *id.*

22. See *id.* at 432.

23. See *Matthews*, 787 F.2d at 39.

24. See *Dole*, 601 F.Supp. at 431.

25. See Charles W. Stevens, *Southland Officials' Trial May Result in New Applications of Securities Law*, WALL ST. J., Feb. 5, 1985 ("I don't know of any other case where someone is accused of failing to disclose a crime they haven't been convicted of It's a new approach.").

26. See *Dole*, 601 F.Supp. at 433; *Matthews*, 787 F.2d at 39.

27. See *Matthews*, 787 F.2d at 47-48.

IRS is as big and as powerful as it is, and they have not let go of a jurisdiction that Main Justice has had in the Tax Division or that the agency continues to have.

But there are other federal agencies with regulatory responsibilities that have criminal penalties and find themselves going to U.S. Attorneys with violations that seem important to those agencies. But in the mix of cases and offices, like the Southern District of New York, and sometimes the small offices like the Eastern District of Pennsylvania, they do not seem to be important cases.

One of the questions that I have had all along is whether the policy should be made bottom-up, with an aggressive special agent in charge of that agency, or an aggressive agency head, or an aggressive Cabinet-level officer going over to the Justice Department and persuading prosecutors to prosecute that case, or whether the policy should be formulated at the top and trickle down to the bottom.

My view, having spent a number of years in Washington, is the better course is for it to be bottom-up as opposed to top-down.

MR. CARBERRY: Why is that?

PROF. NOBLE: Washington.

MS. SPEARING: Charlie, I think that you raised a very good question, which is, why is the decision of whether to bring the case made in Washington in a very centralized kind of system, whether it is antitrust, or tax, or to some extent the Environmental Division?

With respect to all other offenses, including some regulatory offenses, it is made "out in the field," as we say in Washington. I do not think there is a rational, articulable reason as to why that distinction exists.

I think that, to the extent that U.S. Attorneys start wanting to do antitrust cases themselves, Justice will cede control of that, the way they have ceded control of the Environmental Division powers.

It seems to me that the decision whether to prosecute a securities fraud case is made in the district in which it is brought, but an environmental case has to go through the Environmental Division at Main Justice, developed over time and there really is no basis for it anymore.

MR. CARBERRY: Partly, at least historically, the explanation has always been that these are difficult areas requiring some sort of agency expertise in evaluating the case, and that these are areas where having national standards of law enforcement is important.

But now some Assistants decide whether or not a particular criminal statute is going to be enforced in their districts.

MS. KRIS: So what you have is a uniform standard of enforcement in certain divisions and not a uniform standard in other divisions.

MR. CARBERRY: Right. So if the criminal law process is now an important part of the regulatory process, despite Jed's eloquent objections, what is rational about it?

MS. SPEARING: I do not think you can centralize everything in a department or it will come to a grinding halt.

MR. CARBERRY: But wouldn't that be beneficial?

MS. SPEARING: Now I think so. But, as I was saying to you at lunch — and I know you do not want to talk about anything except regulatory crimes — I think a more troubling question is if you commit a million-dollar bank fraud in Los Angeles, there may be a decision not to prosecute because of resources and their threshold intake level requirements. But if you commit the exact same federal crime in Raleigh, North Carolina, you will be in jail for years and your name will be on the front page of the paper. So to me, the disparity in enforcement is with respect to all federal crimes, not just regulatory crimes.

MR. CARBERRY: But Los Angeles has a cutoff on bank fraud. Each office has a policy on cutoffs. But you still have people doing other cases. If you have a million-dollar cutoff on bank fraud and you have an Assistant prosecuting a \$14,000 insider trading case, what is the point?

There are no uniform standards, for example, when an SEC insider trading case will become a criminal case, other than, as Bob pointed out, on the evaluation of the evidence. After that, it is really just hit or miss.

Is that a rational system? And, as this system increases, is this a system that is going to go forward? John, you have much more experience in this.

JUDGE MARTIN: Congress has put some criminal statutes on the books because people in some part of the country think that it was important. And I think there is something to be said for that. It is simply true that local problems are different. For example, stealing a horse in Montana probably is a more serious offense than stealing a horse in New York. So the things that may be inconsequential to a New York prosecutor represent something that the prosecutors in another jurisdiction feel is important.

I do not think uniformity across the country is good. Indeed, the Sentencing Guidelines prove that when we try to get uniformity we do not necessarily advance the system of justice.²⁸ That is why you have presidential appointees serving as U.S. Attorneys. Each is supposed to be exercising independent judgment as to what is important in his or her district.

JUDGE RAKOFF: Charlie, I would like to call attention to the difference between consistency resulting from oversight and rules — which, as Judge Martin points out, in the case of the Sentencing Guidelines has not worked well, and I do not think has worked well internally when it is a question of the multiple rules issuing out of Washington on tax cases or environmental cases or fraud cases.

But I would distinguish that from centralized review. I think there is a great benefit in having some option to have national or disinterested review of decisions that are taken by a local U.S. Attorney. The concomitant of being able to exercise good judgment because you are right there on the spot and can see all the nitty-gritty things that are going on, is that sometimes you lose perspective on the broader national priorities and the broader picture.

I would suggest, if you wanted to ask the question, “What is a rational or most efficient approach?” I think the answer would be primary decision-making at the local level with very few actual rules, such as cutoffs for a million-dollar bank robbery or anything like that, but a reasonable opportunity for review at the national level as an option that counsel can pursue.

MR. FISKE: If I can just follow up on that, I think there clearly are some situations where, just from a law enforcement point of view, it is good to have centralized review. For example, take the RICO statute.²⁹ Particularly when that first came in, nobody really knew what it meant, nobody knew how far it should reach. The same thing was true with the money laundering statute.³⁰ And you could have people out in the field going off in a half-cocked direction and then getting a bad decision from a district judge that could be a setback to the overall national enforcement program.

28. See U.S. SENTENCING COMM'N, UNITED STATES SENTENCING GUIDELINES MANUAL (1998); see also Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1029 (1997) (referring to the discretion exercised by the prosecution and the judge in arriving at downward departures for substantial assistance pursuant to Guideline § 5K1.1.).

29. See 18 U.S.C. §§ 1961-1968 (1984 & Supp. 1998).

30. See *id.* § 1956.

So I think there are situations like that where there is a legitimate need for review, just in terms of having a national policy as to whether this is the kind of conduct that the government wants to prosecute under this particular statute. But I think those kind of situations are relatively limited.

MR. CARBERRY: What about the situation, which is more and more common now because of aggressive enforcement in civil divisions, of parallel criminal and civil proceedings, where in the settlement of the case the criminal penalties or the criminal charges will be lessened greatly by more money forked over in the civil settlement?

Mary, your department, the Fraud Section, was sort of on the cutting edge of using criminal statutes as extortion for a few years. Maybe you would like to say something about that.

MS. SPEARING: That was during the defense procurement fraud crisis, and I was not the extorter then.

I just want to comment also. You are referring to this memo from the Attorney General as though this was a new thing. That memo was a reiteration of a memo that Edwin Meese³¹ had issued in 1986.³² The current Attorney General's Council on White-Collar Crime³³ thought it was time to dust it off and send it out again, because the law enforcement agencies, particularly the Federal Bureau of Investigation ("FBI"), were resisting doing investigations if all they were going to get was a civil resolution. So that message that went out from the Attorney General, to pursue all avenues, is not a new message.

MR. CARBERRY: No, it is a "Meese" message.

31. United States Attorney General, 1985-88.

32. See Office of the Attorney General, *Memorandum: Coordination of Criminal & Civil Fraud, Waste & Abuse Proceedings*, July 16, 1986, cited in U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 4-4.1100 (Aspen Law 1987).

33. *Testimony Before the House Appropriations Committee, Subcommittee on the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies*, 105th Cong. (May 1, 1996) (statement of John C. Keeney, Acting Assistant Attorney General, Criminal Division).

The Attorney General's Council on White-Collar Crime, which the Criminal Division chairs, is responsible for identifying emerging trends in white-collar crime and in developing strategies and cooperative initiatives to respond to such crimes. The role and efforts of the Council on White-Collar Crime are augmented by the interagency coordination and initiative 'working groups' on bank fraud, health care provider fraud, telemarketing fraud, insurance fraud, and computer crime. These groups have proved to be particularly successful vehicles for fostering effective multi-agency investigations and prosecutions of economic crimes.

MS. SPEARING: I forgot what your question is, but something about extortion. I do not think it is extortion for the Civil Division to be pursuing a civil settlement with a health care company that we are also investigating criminally. I think that, frankly, the accomplishments in that area and others have been phenomenal for the Department of Justice.

MS. KRIS: May I interject, Charlie? I want to add a slightly different angle on that. I think that the message in Attorney General Reno's memo about assessing the value of having combined civil, administrative, and criminal enforcement to get your maximum result is a wonderful goal. The reality is that it is so difficult to balance the competing issues, and the risk is that there can be much unfairness visited on individuals and companies.

What I saw in private practice was that the greater problem for my clients was not the use of criminal prosecution to extort a civil result, but using administrative powers, particularly suspension and debarment, as a club to force a criminal disposition in a case that never would have resulted in a criminal disposition in a million years.

So again, I think that when you are talking about enforcement in an area that stems from regulations, statutes, and policies, I think that it presents challenges and stresses that already exist in the system and puts greater emphasis on the integrity and the balance and the judgment of the people exercising the discretion.

That does not mean it should not be done. I do agree with Judge Rakoff that Bill Tandy would never have applauded the criminalization of non-criminal regulations for the sake of changing the industry.

On the other hand, because it is harder does not mean it should not be done, because it is harder perhaps to understand the underlying policy than it might be. To take Ron's earlier example, when you think about it, the issue is we want to get the guns off the street. Well, many times in a regulatory arena there is a comparable public health and safety issue, though it may not leap off the page to a particular prosecutor or an individual.

But what all that means is all the important issues we have talked about today, in terms of federalism or centralization or training, when all is said and done, the system only works when there are checks and balances and fairness and integrity. It is particularly challenging, I think, in the regulatory area.

JUDGE MARTIN: I also think that insider trading cases exemplify part of the way to move from the civil into the criminal side of

regulatory enforcement.³⁴ That is an area where, I think, it started out with most people on Wall Street not thinking of it as being criminal.³⁵

But I think that the cases we brought — it started with Bob and continued thereafter — really were all cases where on the facts of the case there was ample evidence that the people who were involved were using means to hide their activities that clearly manifested that they were engaged in conduct that they thought was fraudulent.³⁶ By bringing those cases in that area, you build up public notice that this in fact is criminal conduct.

I have said to defendants when sentencing today, “I just cannot believe that people are still engaged in insider trading. There was a time when people could reasonably say they did not understand it was criminal. Now, today, you are engaging in it. It is clearly ‘you are doing the crime, you do the time,’ because you had ample notice that this is criminal.” I think you can say that now.

PROF. NOBLE: I would like to follow up on Bob Fiske’s point. Why should the presumption be that if someone brings a case to you that could be satisfied civilly or criminally, and you have the evidence to go either way, that one must always go criminally? That is, if I understood you correctly, you said if the evidence is there to prosecute it criminally, why not prosecute it criminally.

Why shouldn’t the presumption be that we can resolve this case however we want to resolve it, depending upon the case, but there is no presumption that if we have evidence to take it criminally, we are going to take it criminally?

MR. FISKE: I am just trying to think of a case in four years, where I think virtually every case we prosecuted could have been

34. See, e.g., *United States v. Newman*, 664 F.2d 12, 19 (2d. Cir. 1981) (reversing the district court’s dismissal of the securities fraud charge because it concluded that there was no “clear and definite statement” in the federal securities laws which both antedated and proscribed the acts alleged in (the) indictment“ so as to give the defendant a reasonable opportunity to know that his conduct was prohibited), *cert. denied*, 464 U.S. 863 (1983), *overruled in part* by *United States v. O’Hagan*, 521 U.S. 642 (1997).

35. See *Warning Anew on Insider Trading*, *Bus. Wk.*, July 21, 1980, at 168 (“This sort of thing [i.e., trading on inside information] happens every day.”).

36. See *S.E.C. v. Wang*, 944 F.2d 80, 81 (2d. Cir. 1991) (affirming plan of recovery and conviction of an analyst in the mergers and acquisitions department of Morgan Stanley & Co., Inc., with providing material, nonpublic information about actual or contemplated tender offers, mergers or other extraordinary business transactions acquired in confidence during defendant’s employment); Kurt Eichenwald, *Ex-Morgan Analyst is Sentenced to 3-Year Prison Term*, *N.Y. TIMES*, Oct. 27, 1988, at D7 (reporting sentencing of defendant Wang for an insider trading scheme that involved at least two other people).

brought civilly in one way or another. Maybe we were missing something, but I do not remember getting into a lot of long discussions about “Why shouldn’t we go civil with this?”

PROF. NOBLE: But that just might reflect the mindset of a certain U.S. Attorney’s Office.

MR. FISKE: Yes. It probably did.

JUDGE MARTIN: I followed Bob, and I looked at all those cases. They were right when he brought them.

MR. FISKE: I think what I was really trying to say is that the principle reason for criminal prosecution is deterrence. Whether it is successful in the end, people can debate, but that is the rationale for it. You are trying to deter this kind of conduct by other people in the future.

If you have a choice between indicting somebody and sending them to jail or suing them and collecting a certain amount of money, which they may or may not be able to pay, it seems — at least it seemed to me — that you get a greater law enforcement deterring effect by prosecuting them and sending them to jail.

PROF. NOBLE: But if you follow that to its logical conclusion, the U.S. Attorney’s Office or a prosecutor would never enter into an immunity agreement with anyone. That is, at some point you do a cost/benefit analysis and you say, “This person, though he or she engaged in criminal conduct, he or she can give us more, so we are going to go that route versus another route.” Why couldn’t you apply the same logic for civil enforcement schemes?

MR. FISKE: Because you are changing, I think, the question a little bit. The reason people give immunity agreements is not to be able to bring a civil case, but to be able to bring a criminal case. So the immunity is simply a step along the way towards a criminal prosecution with a deterrent objective.

JUDGE MARTIN: I also think when you are looking at whether to bring a civil or criminal case, what you are looking at is what is the evidence that the defendant engaged in willful conduct knowing that he or she was violating the law. For example, in tax evasion, you could settle every tax evasion case as a civil case; the defendants would love to just pay the money. But if you are saying it is important to enforce the law, when you have the evidence that there is a willful violation, then, you bring it criminally.

JUDGE RAKOFF: When it comes to bringing both, I think there are a number of problems that are just beginning to surface.

One, of course, is the question of sharing information that comes through the Grand Jury. The memo — it is a shame Janet Reno is

not here to defend herself, and I am sure the memo, as Mary points out, is something that has existed from time immemorial — but the memo suggests that you can get around that problem by having more search warrants.³⁷ Well, do we really want to encourage more searches as a way of going around the Grand Jury disclosure problem? That seems counter-productive.

Another problem is that the government has somewhat perhaps had a charmed life when it comes to parallel proceedings, because rarely have they had to feel the down-side of that. The down-side, of course, is the defendant who wants to, can use the civil action to get discovery as to the criminal case. Whenever that is threatened, or many times when it is threatened, the government will say, “Oh, sorry about that. We did not really mean to bring the civil action. Let’s put it on hold and stay it while we proceed with the criminal case.”

But at least one thing, it seems to me, that the government ought to be thinking about is whether there are not considerable strategic down-sides to bringing parallel proceedings that may yet emerge in the future, even though they have not emerged in the past.

MR. CARBERRY: What about the unfairness to the individual under investigation to have to defend himself in a civil proceeding at the same time that either there is a criminal charge pending or a criminal investigation ongoing, and he has the constitutional right not to speak in that proceeding, but an inference could be drawn against him in the civil proceeding? And yet, the same party is manipulating both sides. I mean, you have the government controlling the criminal proceeding and the government controlling the timing and the way the civil proceeding goes.

Is there any restriction at all on subjecting defendants both to double legal fees and to basically forcing them to assert their privilege so they are at a disadvantage in the civil case?

JUDGE RAKOFF: Well, of course; if you are asking me about that, until three years ago (when I left private practice), I would have thought that subjecting someone to double legal fees was wholly to be encouraged.

Seriously, however, there are several possible responses. To begin with, the problem can be mitigated by protective orders that can be sought on the civil side barring the government from having access to the defendant’s testimony if he chooses not to invoke the Fifth.

37. See *AG Memo*, *supra* note 12.

But I think it is reasonably fair to say that if the government wants to pursue something both civilly and criminally and that imposes, coincidentally, some difficulties on the defendant, he nevertheless committed conduct that raises both civil and criminal problems and therefore it is fair game.

What I would like to stress, though, is that the opposite should also come into play, that the government should have to assume the burdens of going forward both civilly and criminally, and should not just be able to use this, as you put it, Charlie, as an extortionate weapon that they can shake at the defendant to force him to plead guilty or to raise the stakes. If they have a serious civil lawsuit, fine, they should bring it; but then they should have to meet the requirements that every other civil litigant would have to meet, which include reciprocal discovery.

MR. CARBERRY: One of the recent developments certainly in the government contract area that has even complicated things further for the government has been the *qui tam* suits,³⁸ where individuals who are knowledgeable about a fraud on the government can sue on the government's behalf, and the government has time to either take over the suit or, if the individual proceeds on his own, the individual gets a certain amount of any proceeds to be gained.

Mary, how does that complicate your decisions both civilly and criminally on how to handle matters?

MS. SPEARING: I think that the emergence of the *qui tam* lawsuits is another wrinkle in this whole parallel proceeding issue. I think that it really does raise for the Department issues, which Mary Ellen raised, about the integrity and high ethical standards for prosecutors, which are particularly paramount in this area, I think. And it is a very sensitive area.

I think that the Department has realized that they should not assume that line prosecutors understand all these issues. I know that we spent a lot of time discussing getting training for line prosecutors all over the country and in Main Justice, because these issues which may seem evident, such as not threatening to bring a

38. "‘Qui tam’ is abbreviation of Latin phrase ‘qui tam pro domino rege quam pro si ipso in hac parte sequitur’ meaning ‘Who sues on behalf of the King as well as for himself.’ It is an action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution. It is called a ‘*qui tam* action’ because the plaintiff states that he sues *as well* for the state as for himself." BLACK'S LAW DICTIONARY 1251 (6th ed. 1990).

criminal case while a civil investigation is going on, are not that apparent or evident to all line assistants.

It is scary, when you think about it, how many kinds of delicate issues they are dealing with at one time and how they are communicating with a *qui tam* relater's³⁹ lawyer or the Civil Division, and if they know the mine field that exists out there in the way they pursue discussions with defense counsel and joint meetings and joint sharing of information.

I guess what concerns me about the whole *qui tam* area is whether the *qui tam* relater's lawyers are going to be driving the train in terms of enforcement priorities. For example, when the Civil Division gets hit with thirty-two *qui tam* lawsuits in the *Columbia* case,⁴⁰ they put a ton of resources on that one case, which may be completely appropriate.

But the point is that when *qui tam* lawsuits are dumped in the Department's lap, the Civil Division has to respond, and the Criminal Division has to respond.

What concerns me is not so much the Department making the right decision — because I think ultimately, after investigating the case, they often do not join the *qui tam* suit, they make the right decision — but what concerns me is the resources and the enforcement priorities being set, or perhaps being set, by the private bar.

MR. CARBERRY: What about the dealings? This has not come up yet. But stepping back from *qui tam* now, as corporate crimes become more and more targets of investigations, there is an interaction sometimes between people who have a financial interest in a government action of some kind against a corporation and in their own private actions.

Are there standards that prosecutors have, written standards in the Department, on what they should do in terms of relationships with private attorneys when they have a financial interest in the outcome of a particular government case?

39. "Qui tam plaintiffs are also frequently referred to as 'informers' or 'relators.'" Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 341 n.1 (1989) (concluding that the authorization of *qui tam* actions remains a constitutionally acceptable means by which Congress may shape and secure the interests of the United States).

40. See, e.g., *United States ex rel. Thompson v. Columbia/HCA Healthcare Corporation*, 125 F.3d 899, 900 (1998) (involving a physician who brought a *qui tam* action pursuant to the False Claims Act against a healthcare provider and affiliated entities, alleging they submitted Medicare claims for services rendered in violation of Medicare anti-kickback statutes and self-referral statutes).

MS. SPEARING: I do not know that there are written standards that are distributed throughout the Department. I think that they are cautioned to have very much of an arm's-length relationship with a *qui tam* relater or a *qui tam* relater's lawyer. Although I will say that there is a very wide and differing treatment of *qui tam* relaters in the Department, Philadelphia being a prime example of a U.S. Attorney's Office that embraces *qui tam* relaters in a way that the rest of the Department is more wary of.

PROF. NOBLE: Philadelphia lawyers are hungrier.

MR. CARBERRY: Mary Ellen, you are a state regulator. How do you decide if you are going to seek criminal enforcement by going to state authorities or federal authorities, since you are in the area of environmental law, which obviously has overlapping jurisdictions?

MS. KRIS: I would say that, as a general rule, there is probably a presumption you are going to go to the state because we are all part of the state. Our lawyer, for all intents and purposes, is viewed as the Attorney General of the State of New York.

MR. CARBERRY: And who is that?

MS. KRIS: I will let you know in about a week.⁴¹ But being a product of the federal system, I think that when you make an enforcement decision, whether it is to go civil or criminal or to do the case yourself, or to bring in an outside attorney, outside agency, or whether to go federal, the decision should be made on the facts. It should be made on the various practicalities of how the case will be better investigated and presented.

I do not know how much my agency has done federally in the past. I know I've got a number of things now that are pending on the federal level. For me, the decision is based on things like in which jurisdiction the particular circumstances would be better handled, whether there are more resources that can be devoted, because by going federal you have other agencies — such as the FBI, the Environmental Protection Agency (“EPA”) and others — who can be brought in.

There may be parallel jurisdiction. There may be federal offenses that are uniquely relevant to the particular facts at hand that would not be handled effectively, if at all, if you stayed within the

41. See Gregg Birnbaum, *Vacco Finally Gives Up Lost Cause*, N.Y. Post, Dec. 15, 1998, at 16 (“An ecstatic Eliot Spitzer yesterday geared up to take over the state's top legal post after Attorney General Dennis Vacco gave up trying to overturn the election results.”).

state system. There may be prior conduct of the actor that relates somehow to that courthouse or that U.S. Attorney.

So I think that essentially, as with all prosecutive judgments, the decision how to proceed, whether it is civil, criminal, or a combination of the two, at the same time or sequentially, or whether to go federal or state, should be driven by the severity of the conduct, the resources, predictability of outcome, and a balance of the various goals that you are trying to achieve.

For example, to go back to a theme of the regulator versus the prosecuting office, in many environmental cases where there are environmental crimes — let's say, for example, deliberate dumping, where you have evidence that someone is deliberately dumping some kind of a horrible substance into the sewer system, something that even a traditional prosecutor would recognize as a bad thing — there it may be clearer that you should be going criminal, both in terms of getting the appropriate punishment for the individual, as well as for deterrent value. But there are other concerns, such as making sure you have sufficiently addressed the environmental health and safety harm associated with it.

So, among other things, if you have a situation where you believe you are going to have to have parallel civil or administrative enforcement in order to address potential or immediate harm at a site, it seems to me another factor that should be taken into consideration is the very practical one of how do you get along with that office.

We have talked about a lot of the important theoretical and policy-driven kinds of things today. One of the things I do not think we have focused on all that much is the down-to-earth question of "Can you work together, do you cooperate, do you speak the same language, do you respect each other, can you work as a team?" That is certainly part of what I look for in referring cases. And where I do not get that kind of service for my agency from the lawyers who are supposed to represent us, I do everything I can not to go back to that office. So that is one of my principal considerations.

MR. CARBERRY: So you think prosecutors obviously would want your good case and, despite the enormous collegiality between the Eastern District and the Southern District sharing one city, that they maybe would have some jealousy over the case, and maybe New Jersey would claim venue, and then, of course, the local offices. So, would prosecutors maybe do some of your less-important cases in trade for doing your big case?

MS. KRIS: I think that is more likely to happen at the state level than the federal. But I do view myself as a customer or client, in that I think that one of the ways to get better results— and just better work overall— is to try to establish that there is a certain amount of sales going on here.

Whether it is *qui tam* lawyers who have a financial interest in selling cases to the Department of Justice, or it is agents who are trying to sell their criminal case, or it is an agency that has a mission to try to accomplish, we are all vying for resources. I think a critical factor for us is to get the kind of responsiveness and respect that we need.

MR. FISKE: I cannot let that subject go by without using it as an opportunity to say something more about Bill Tandy. One of the things that made Bill so extraordinarily valuable to all of the U.S. Attorneys that he worked with was his relationship with the law enforcement agencies. There were very few of them that, if they had a choice to go to any different office, would not come to Bill Tandy before they would go anywhere else.

JUDGE MARTIN: Let me just say one thing. One of the problems I see in this is that because you are talking about agencies who can bring you the big case, I think there is a real tension in the bringing of the cases that are big in publicity and those that are probably more important to the community.

I have heard a lot of people in this room say that the government today is not doing as much in the white-collar area as they did some years ago. I do not know whether that is true, but I do know that they are certainly doing a lot more with organized crime, gangs, and people who are doing a lot more damage to society than people who engage in insider trading. But I think that the problem is that the glamour is with the big regulatory cases.

MR. CARBERRY: Or even the big organized crime cases. John, you used the phrase “balkanization” of federal law enforcement — you have so many agencies, you have the prosecutors’ offices in competing jurisdictions. We have been basically talking about cases where the prosecutor has discretion, but there have been occasions where basically agencies put the cases up for bid — or maybe never that directly — but there is some sense that they could move the case somewhere else, and they want something else besides someone to service that case.

Each new U.S. Attorney inherits the majority of the criminal cases which are responses to indictments that he cannot change. But he or she can make a significant difference in an office’s priori-

ties, whether it is organized crime, whether it is white-collar crime, or whether it is just responding to opportunities in any one area and moving your resources in.

JUDGE MARTIN: I think there is even less ability to set priorities. The problem I found when I was a U.S. Attorney was there were just so many big cases there to be done, it was getting enough people to do them. It was very hard to say, "Gee, I think we should look into the construction industry, and let me take four Assistants and maybe drill a few dry holes." I mean, there was just such a backlog of really significant cases, it was very hard to do that type of prioritization.

MR. CARBERRY: So what do you need to do that, John? That is a perfect example, the construction industry in New York.

JUDGE MARTIN: Ultimately, I think that when you step back, what we bring to the table as U.S. Attorneys more than anything else is the ability to prosecute. If you have cases ready for prosecution, you should be doing that; the agency should be out doing the investigation.

MS. KRIS: Can I give an example? I think we have a tendency to focus on the big case here, maybe by virtue of our backgrounds. But a lot of what goes on in the criminal field, at the state level anyway, is that there are large numbers of cases that get brought and no one sees them, no one pays attention to them, and they may or may not ultimately have the effect that they are supposed to have, because they never get seen as particularly serious.

As an example, I have uniformed officers who work for me, and one of the things they do is they go out and they catch people who are clamming. There are places in New York City where you are not allowed to clam because the water is contaminated. There are people that go out clamming at night, and then they tag the clams as if were coming from Long Island, which is clean, when in fact they are coming from Jamaica Bay. They end up at the Fulton Fish Market.

We do hundreds of these cases. They are hard cases to make. The officers have to work in the middle of the night to catch these people. They engage in high-speed chases. I am not kidding.

MR. CARBERRY: I didn't think clams were that quick.

MS. KRIS: They end up catching them because the boat crashes. But this type of case is one of several. Let's say these officers bring 2,000 cases a year. They go to criminal court. I may not even know about it. No lawyer in my office works on it.

In certain of the criminal courts the judges know them, know what they do, have developed an appreciation for the work and the importance of the cases. But in Manhattan, for example, they will not even let them come into court because they do not view any of this as criminal.

And so, one of the things about the system is that every now and then, when you have a case that really has some profile to it, it creates an opportunity to tell the world about something that is going on that is really a bad practice and that you have not been able to make a dent in at all, despite hundreds and hundreds of cases and fines and other kinds of penalties.

Thus, one of the things that I look at is evaluating the enforcement techniques we have used before — are we getting the results we want to get; and, if we are not, what should we be doing differently?

The converse of that is these officers who bring these cases, if they go to court, the case is over in no time. If they go civilly, with the legal staff that I have — we've got a docket of thousands of cases and only four lawyers — they may write up this case and no one even looks at it for five years.

The other part of this is to constantly fight against the tendency to use the criminal process because it is easier, because somebody will plead guilty and take a \$500 criminal fine, and they will get a result.

So, I guess, it all again comes down to checks and balances and building up an appreciation for what it is you are trying to do, and having an advocate, whether it is the judge in the criminal court, a sympathetic D.A. or a prosecutor who recognizes the importance of the matter and will proceed aggressively where the facts warrant it.

MS. SPEARING: Mary Ellen just ensured that the only thing people will remember from this panel is don't eat the clams.

PROF. NOBLE: I just want to add — either to join everyone else or to sort of dissent from the view of this panel, if the view is that civil enforcement mechanisms cannot act as a very, very significant deterrence to criminal conduct — I just know, from my experience as a prosecutor, many times I had no difficulty getting someone to plead to five, six, or seven tax counts, but the pleas often stood or fell on the question of what the civil tax penalty would be following the plea, whether or not there would be civil debarment.

Or if we look in New York City, just look at the success Mayor Giuliani has had with the waste-hauling industry.⁴² Right now, the regulatory scheme is a significant civil regulatory scheme augmented by criminal prosecutions. But the kind of investigative work that this City has done with regard to these contractors has improved the waste-hauling industry. If you want to engage in possibly criminal conduct and you are dirty, you are going to have a much more difficult time engaging in it now than you did before.

Certainly, the civil enforcement scheme can complement a criminal enforcement scheme — and I defer to Bob Fiske on individual cases. If you have both, you might prefer criminal, but I do believe that a civil enforcement scheme can work.

MR. CARBERRY: I thank the panelists and thank you.

42. See Selwyn Raab, *Trash Haulers Told: No Mobsters or Odors*, N.Y. TIMES, Sept. 1, 1996, at 43 (reporting that twelve regulations, most aimed at reforming New York City's mobster-scarred private garbage-hauling industry and lowering fees, would be imposed by a new city agency).

