Statement of Rachel E. Barkow
Segal Family Professor of Regulatory Law and Policy
Faculty Director, Center on the Administration of Criminal Law
New York University School of Law

Before the House Committee on the Judiciary
Task Force on Over-criminalization
Regulatory Crime: Overview – Defining the Problem
October 30, 2013

Mr. Chairman and Members of the Task Force: Thank you for inviting me to testify before you regarding the problem of over-criminalization as it relates to regulatory crime. It is an honor to appear before you.

I am testifying today in my personal capacity and not as a member of the United States Sentencing Commission.

It is my understanding that the "regulatory crimes" that are the primary focus of this hearing are those statutes that criminalize the violation of agency regulations. These statutes occur across a wide range of substantive areas but generally share in common a format that "delegate[s] to an agency the power to promulgate regulations, while providing that violations of the yet to be written regulations will be crimes subject to statutory penalties."[1] A common form is a law that "provides for criminal punishment of anyone 'who knowingly violates any other [regulatory] requirement set forth in [a specific title] or any regulation issued by the Secretaries to implement this Act, [or] any provision of a permit issued under this Act."[2] An example would be pollution-control statutes, which criminalize the release of pollutants in broad terms but leave agencies to define through regulation "[w]hat constitutes a pollutant, what kind of permitting is required to handle that pollutant, how the pollutant may be stored, and who within an organization may be subject to criminal penalties.'"[3]

Before addressing some specific issues raised by federal regulatory crimes, I would like to situate regulatory crimes more generally within the larger mission of the Task Force to address the problem of "over-criminalization." Over-criminalization has several connotations. It could refer to a concern that federal criminal laws produce excessive incarceration rates or prison populations.[4] To the extent the Task Force is concerned with prison overcrowding and rising incarceration rates in the federal system,

[1] Richard E. Myers II, *Complex Times Don't Call for Complex Crimes*, 89 N.C. L. REV. 1849, 1852 (2011).
[2] Darryl K. Brown, *Criminal Law's Unfortunately Triumph Over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 674 (2011) (quoting H.R. 3968, 109th Cong., § 506(g)(2) (2005)).
[3] Myers, *supra* note 1, at 1852.
[4] *See*, *e.g.*, Statement of Ranking Member Conyers, House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization, available at judiciary.house.gov/news/2013/05082013.html (welcoming the work of the Task Force in analyzing the issue of "[u]nduly expansive criminal provisions in our law unnecessarily driv[ing] up incarceration rates").

a focus beyond regulatory crime is necessary. Almost half of all federal prisoners are there for drug offenses.[5] Firearms and immigration offenses make up another large segment of the prison population.[6] Regulatory crimes are a relatively minuscule part of the federal prison population. Regulatory crimes largely fall within those crimes that the Bureau of Prisons lumps together as "miscellaneous," and collectively they amount to only 0.8% of the total prison population.[7] Thus, while it is a laudable goal to improve the treatment of regulatory crimes, doing so will not address the broader problem of over-criminalization in the federal system insofar as the concern is the number and rates of people incarcerated.

Federal over-criminalization could also refer to the problem of federal laws intruding on areas that are adequately addressed by the states.[8] Regulatory crimes, however, are typically well suited for federal attention. Indeed, they are the paradigmatic example of an area that is appropriate for federal involvement because of their complexity and interstate commercial concerns.[9]

Over-criminalization may also refer to the sheer quantity of criminal laws, particularly when citizens are expected to comply with all of them.[10] Regulatory crimes are a major culprit in this respect, accounting for a huge chunk of the number of criminal laws on the books. By some estimates, there are more than 300,000 federal regulations, administered by as many as 200 agencies, that are punishable by criminal penalties.[11]

---

[5] Federal Bureau of Prisons, *Quick Facts About the Bureau of Prisons*, *available at* http://www.bop.gov/news/quick.jsp (last updated August 24, 2013) (46.8% of federal inmates were sentenced for a drug offense).

[6] Taken together, these groups account for over a quarter of the prison population, with 16.4% of federal inmates sentenced for weapons, explosives and arson offenses, and 11.7% of federal inmates sentenced for immigration offenses. *Id*.

[7] *Id. See also* Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 35 (2012).

[8] *See, e.g.*, Statement of Chairman Goodlatte, House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization, *available at* judiciary.house.gov/news/2013/05082013.html (arguing that the Task Force needs to "take a closer look at our laws and regulations to make sure that they . . . do not duplicate state efforts"); Statement of Crime Subcommittee Chairman Sensenbrenner, House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization, *available at* judiciary.house.gov/news/2013/05082013.html ("Congress must ensure the federal role in criminal prosecutions is properly limited to offenses within federal jurisdiction and within the scope of constitutionally delegated powers").

[9] Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 547-48, 570-71 (2011) (documenting that most states give state-level prosecutors instead of local prosecutors the authority to pursue state regulatory crimes and explaining that this allows for the development of expertise in "complex areas whereas local prosecutors may not have a critical mass of these cases or sufficient personnel to develop the specialized knowledge necessary to pursue them effectively," which holds true of federal regulatory offenses as well).

[10] *See, e.g.*, Statement of Crime Subcommittee Ranking Member Scott, House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization, *available at* judiciary.house.gov/news/2013/05082013.html (referring to the large number of criminal offenses); Paul J. Larkin, Jr., *A Mistake of Law Defense as a Remedy for Overcriminalization*, 29 CRIMINAL JUSTICE 10, 11 (Spring 2013).

[11] Myers, *supra* note 1, at 1865.

Finally, over-criminalization may refer to treating behavior as criminal that is either innocent or that is more properly addressed with civil sanctions.[12] This might be called "a divorce between legal guilt and moral blameworthiness."[13] The remainder of my testimony will address three key areas related to this aspect of over-criminalization and regulatory crimes.

First, regulatory crimes may lack sufficient mens rea requirements to ensure that defendants charged under those laws are sufficiently blameworthy to merit the stigma and severity of a criminal sentence. A "guilty mind" has long been a bedrock requirement for the blameworthiness of a criminal conviction. It may be absent in some regulatory offenses, however, because the conduct is not wrongful in itself and individuals may lack adequate notice that their conduct has been criminalized.

Second, regulatory violations have been subject to criminal penalties on the theory that criminalization will make the regulatory scheme more effective. But it is an empirical question whether criminalization is the optimal strategy for addressing the violation of all regulatory offenses or whether civil enforcement and penalties could achieve the same levels of deterrence and regulatory compliance for some provisions.

Third, Congress typically is not aware of the specific regulations that the agency will pass when it authorizes criminal punishment for their violation. That delegates to agencies the authority to fill in the details about what is criminalized. This framework raises the question whether Congress should take a greater role in making criminalization determinations because of institutional advantages associated with the legislative process.

I. The Importance of Mens Rea and Notice

Mens rea – the concept of a guilty mind – is a cornerstone of our criminal justice system.[14] The common law respected the notion of "[a]ctus non facit reum nisi mens sit rea – an act does not make one guilty unless his mind is guilty."[15] This notion "reflects the common sense view of justice that blame and punishment are inappropriate in the absence of choice."[16] Herbert Wechsler, the legendary criminal law scholar, explains why mens rea is so important to blameworthiness: "Unless the actor realized or should have realized that his behavior threatened such unjustifiable injury; unless he knew or should have known the facts that gave his conduct its offensive quality or tendency, it

[12] *See, e.g.*, Statement of Chairman Goodlatte, *supra* note 8 (observing that "Americans who make innocent mistakes should not be charged with criminal offenses"); Statement of Ranking Member Scott, *supra* note 10 (noting with concern that many criminal provisions do not "requir[e] that criminal intent be shown to establish guilt).

[13] Larkin, *supra* note 10, at 10.

[14] "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951).

[15] EDWARD COKE, THE THIRD PART OF THE INSTITUTE OF THE LAWS OF ENGLAND 107 (William S. Hein & Co. 1986) (1644).

[16] SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 242 (9th ed. 2012).

was an accident."[17]

For most crimes, the prohibited conduct is malum in se, or wrong in itself, such that it is common knowledge that engaging in the conduct is unlawful. Thus, in most cases, criminal offenses need only specify that the defendant has the requisite awareness or knowledge that he or she is engaging in the underlying conduct, without an additional requirement that the government also establish that the defendant was aware that the conduct itself was unlawful, for a defendant to have the traditional culpability that that criminal law requires.

Other crimes, including regulatory offenses, are not wrong in themselves. Thus a defendant who knowingly engages in the conduct that the law prohibits may not be culpable in the traditional sense. But if the defendant knows the conduct is illegal or is aware of the risk that it may be illegal and engages in the conduct in any event, culpability can be supplied by the defendant's willingness to flout the democratically enacted law.

Mens rea is so foundational to American criminal law that even when a statute is silent as to whether mens rea is required, courts generally presume that its omission was not an intentional one by the legislature and interpret the law to require mens rea.[18] Indeed, an animating principle of the Model Penal Code[19] is that, "unless some element of mental culpability is proved with respect to each material element of the offense, no valid criminal conviction may be obtained."[20] The Model Penal Code therefore has a default rule that, in the absence of a stated mens rea requirement, the government must show that a defendant was at least reckless with respect to each offense element.[21]

While the Model Penal Code was hugely influential in the states,[22] it had less of an impact at the federal level. The federal code thus lacks a comparable default rule to

---

[17] Herbert Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 524, 527-28 (1955).

[18] *Staples v. United States*, 511 U.S. 600, 619 (1994) (applying the "background rule of the common law favoring mens rea"); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2466 (2003) ("[I]n the absence of clear congressional direction to the contrary, textualists read mens rea requirements into otherwise unqualified criminal statutes because established judicial practice calls for interpreting such statutes in light of common law mental state requirements.").

[19] The Model Penal Code was the product of a law reform effort of the American Law Institute. Herbert Wechsler, with the assistance of distinguished judges, law professors and lawyers, drafted a model code that distilled and organized fundamental principles from the common law into a systematic criminal code. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 322-26 (2007).

[20] Model Penal Code § 2.02 cmt. 1 (1985).

[21] Model Penal Code § 2.02(3). The Model Penal Code includes another default interpretive rule that "[w]hen the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears." *Id.* §2.02(4).

[22] Roughly two-thirds of the states reformed their own codes in light of the Model Penal Code. Ronald L. Gainer, *Remarks on the Introduction of Criminal Law Reform Initiatives*, 7 J. L. ECON. & POL'Y 587, 588 (2011).

the one in the Model Penal Code. To be sure, the federal courts follow the common law presumption that statutes require mens rea even when they do not state the requirement explicitly, but a notable exception in the federal case law applies to public welfare offenses, which include regulatory crimes.[23]

Regulatory crimes are unique among criminal laws in that they often lack the kind of mens rea requirements that establish that a defendant was blameworthy in acting as he or she did. Regulatory crimes without traditional mens rea requirements fall into two general categories.

Some regulatory crimes are strict liability. To establish criminal liability for these offenses, the government need only prove that the conduct occurred. There is not even a requirement that the defendant knew he or she was engaging in the prohibited conduct. So, for example, a defendant can be criminally liable for shipping a mislabeled drug, even if he or she was not conscious of the fact that the drug was mislabeled.[24]

The rationale behind strict liability offenses is that the underlying activity affects "the lives and health of the people which, in the circumstances of modern industrialism, are largely beyond self-protection."[25] So, the argument goes, the risk of any error should fall not on the innocent consumers, but on the people who are opting to engage in the underlying activity of distributing the products. If those individuals engaging in the commercial activity know that they will be strictly liable for any violations of the law and subject to criminal punishment, the theory is that those individuals will take great care in conducting those activities. And because the government will not need to prove even negligence, there is no risk that the manufacturer or distributor will escape liability by claiming he or she exercised reasonable care, even when more could have in fact been done to prevent the harm. This strict liability category of regulatory crimes therefore lacks any culpability requirement and has been widely criticized by criminal law scholars and theorists.[26]

Other regulatory crimes are not pure strict liability offenses, but they nevertheless criminalize conduct that a defendant may not know is wrongful. These laws require the government to prove that the defendant was aware or intended the prohibited conduct, but there is no additional requirement that the government also prove that the defendant knew that conduct was against the law. Most criminal laws do not require the government to show that the defendant was aware that his or her conduct was unlawful. The absence of this requirement is not problematic in most cases because it is common knowledge that

---

[23] *Morissette v. United States*, 342 U.S. 246, 262 (1952). *See also United States v. Balint*, 258 U.S. 250, 252 (1922) (recognizing that legislatures could dispense with mens rea and observing "[m]any instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon the achievement of some social betterment rather than the punishment of the crimes as in the cases of mala in se").

[24] *United States v. Dotterweich*, 320 U.S. 277 (1943).

[25] *Id*. at 280.

[26] Kadish, *supra* note 16, at 300 (observing that "[t]he great majority of academic writing has opposed absolute liability"). Reflecting these criticisms, the Canadian Supreme Court has concluded that imprisonment on the basis of strict liability is unconstitutional under Canadian law. *Id*. at 299.

the activity is unlawful. It would make little sense to add a requirement to murder statutes that defendants know that killing is unlawful because that is a shared understanding that is pervasive in society.[27]

In the case of regulatory offenses, a common knowledge of wrongfulness is unlikely to be present. Thus the risk of not including an element that requires the government to show that the defendant knew the activity was unlawful is that innocent individuals may find themselves facing criminal liability. If it is not common knowledge generally or among people engaged in an activity that a certain product needs to be registered or that the activity must be conducted in a particular way, then people without any reason to know of those facts or to investigate the regulatory landscape will become ensnared in the criminal justice system.[28] On the other hand, critics have pointed out that requiring the government to prove a defendant's knowledge of the law would be a difficult undertaking.[29]

For its part, the Supreme Court has interpreted some statutes to require an awareness of wrongdoing or illegality, even when the statute is silent about that element, because of a concern that statutes would otherwise reach innocent conduct.[30]

The Court has not interpreted all regulatory criminal laws this way. The Court has observed that, in most of the cases where it has not interpreted a regulatory crime to require an awareness of wrongdoing, "Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."[31]

The line, then, has been based on the Court's assessment of when Congress would and would not require such proof. That, in turn, depends on whether the Court believes

---

[27] Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 413 (1958) (observing that, when criminal laws align with "community attitudes and needs . . . knowledge of wrongfulness can fairly be assumed" and "any member of the community who does these things without knowledge that they are criminal is blameworthy, as much for his lack of knowledge as for his actual conduct").

[28] Arthur Leavens, *Beyond Blame – Mens Rea and Regulatory Crime*, 46 U. LOUISVILLE L. REV. 1, 1 (2007) (explaining how "mens rea serves a notice function" in the context of regulatory crimes).

[29] *See* Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 749-752 (2012) (discussing the merits of this view).

[30] "Where the conduct covered by the statute is neither inherently wrongful nor dangerous, the Court interprets the statute to require actual knowledge of the law." John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 698-699 (2012). *See, e.g.*, *Liparota v. United States*, 471 U.S. 419, 426 (1985) (interpreting a statute to require the government to show that a defendant knew that the manner in which he or she possessed or acquired food stamps was unlawful and doing so to avoid "criminaliz[ing] a broad range of apparently innocent conduct"); *Cheek v. United States*, 498 U.S. 192, 201 (1991) (interpreting a statute that criminalizes one "who willfully attempts in any manner to evade or defeat any tax" to require the government to show that the defendant knew of the duty established by the law and "voluntarily and intentionally violated that duty"). For a broader summary of cases in which courts have interpreted statutes to require a knowledge of illegality, see Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 343-346 (1998).

[31] *Liparota*, 471 U.S. at 433.

individuals are reasonably on notice that their conduct may be subject to regulations.[32] If an activity is highly regulated and the actors participating in it are typically sophisticated, the Court is more comfortable reading statutory silence with respect to mens rea as intentional. The Court in that instance assumes that Congress prefers to create an incentive for individuals to develop knowledge of the relevant regulatory scheme in order to comply with it.[33]

Regulatory offenses thus involve a substantial amount of guess work about what level of liability Congress intends. If Congress wishes to tie regulatory crimes to traditional notions of criminal liability in an effort to check what it views as over-criminalization, modification of many of these laws would be advisable.

II. Is Criminalization Necessary?

A second issue raised by regulatory crimes is whether criminalization is necessary to achieve the public policy goals of the regulatory framework. When the Supreme Court upheld the use of a strict liability criminal regulatory statute in *United States v. Dotterweich*,[34] it observed that Congress elected a regime that "dispenses with the conventional requirement for criminal conduct – awareness of some wrongdoing" in order to achieve "the larger good."[35] The assumption was that making individuals who sold food and drugs strictly liable and subject to criminal punishment for adulterated products would make them act more carefully. Or, in the Court's words, criminal "penalties serve as effective means of regulation."[36]

It is a key empirical question whether criminalization is necessary to achieve "the larger good" of a regulation or whether other mechanisms would do so just as effectively.[37] Strict liability could still be used in a civil regime, so the inquiry does not center on mens rea options. Rather, the question is what quantum of punishment is necessary to deter violations of the act. A criminal sanction, unlike a civil sanction, can include a term of imprisonment. Criminal sanctions also connote a judgment of blameworthiness that carries a stigma. Convictions carry collateral consequences as well, such as the loss of licenses and ineligibility for certain government programs, depending on the crime. Policymakers could therefore assess whether these additional features of criminal punishment are necessary to achieve the ends of the regulatory scheme.

---

[32] *See, e.g.*, *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) (noting in a case involving the shipment of corrosive liquids that "[t]he probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation").

[33] Susan R. Klein & Ingrid B. Grobey, *Overfederalization of Criminal Law? It's a Myth*, 28 CRIMINAL JUSTICE 23, 28 (Spring 2013).

[34] 320 U.S. 277 (1943).

[35] *Id.* at 281.

[36] *Id.* at 280-281.

[37] In the Sentencing Reform Act, Congress embraced the parsimony principle that punishment should not be greater than necessary to achieve its goals. 18 U.S.C. §3553(a) (instructing courts "sentence sufficient, but not greater than necessary" to achieve the purposes of punishment set out in the statute). While that law addresses sentences in individual cases, the principle should apply at the macro level in setting up sanction regimes in the interest of fiscal responsibility and limited government.

For some would-be individual violators, the prospect of prison and the collateral consequences of a conviction may be necessary. They may view the risk of civil penalties "as a mere cost of doing business" that can be passed along to consumers.[38] Even if that is not possible – because the individual does not own a business to pass through fines or the fines are too high – bankruptcy may be an option that allows for a "fresh start."[39] Prison, in contrast, cannot be passed through to someone else, nor does the stigma of a conviction.[40]

Until now, my testimony has focused on individual defendants, but the question of the need for criminal versus civil sanctions is one that should also be asked with respect to corporate defendants. Corporations cannot be imprisoned, of course, so criminal laws do not provide that added disincentive. But criminal actions against companies do produce a greater stigma than civil actions do. The reputational sanction that comes with criminal charges and convictions can in some cases put in jeopardy a firm's ability to survive.[41] In addition, criminal convictions subject defendant companies in many regulatory areas to "'debarment,' meaning that the company is not eligible to enter into a contract with the federal government for a specified time period."[42] That is effectively a death sentence for some companies.[43]

Prosecutors, armed with the leverage that the threat of a criminal prosecution brings, can often extract significant concessions from companies eager to avoid indictment. This leverage typically encourages companies to assist the government in identifying individual law violators within the company. In addition, federal prosecutors are increasingly reaching deferred prosecution agreements (DPAs) and nonprosecution agreements (NPAs) with companies that allow companies to avoid indictment in exchange for agreeing to prosecution demands that may include significant changes to corporate practice and personnel and often the installation of a monitor to oversee the changes. In effect, these DPAs and NPAs give prosecutors additional regulatory power over the company. While DPAs and NPAs can enhance the effectiveness of a regulatory regime, they raise questions about the competency and propriety of prosecutors to impose regulatory conditions.[44]

Regulatory provisions may differ in terms of whether they require the additional disincentives that criminalization provides. And in weighing the benefits that

---

[38] Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867, 880 (1994).
[39] *Id*.
[40] *Id*. (noting the impact of prison "can be devastating" and "[t]he moral stigma associated with a criminal conviction can, standing alone, irreparably destroy not only existing and future economic relations, but social and familial relations as well").
[41] Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 87, 90-91 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).
[42] Lazarus, *supra* note 38, at 880.
[43] *Id*.; Kadish, *supra* note 16, at 784-785, 802.
[44] *See generally* PROSECUTORS IN THE BOARDROOM (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (collecting essays that assess the benefits and costs associated with the increasing use of DPAs and NPAs).

criminalization can bring, it is also important to take into account the added costs of employing a criminal regime to determine if those costs are worth it, or if civil sanctions could achieve the same ends just as effectively and at a lesser cost in some cases.

Sound criminal justice policy – in all areas, not just regulatory offenses – should rest on an assessment of the costs and benefits of criminal punishment to determine whether limited federal dollars are best spent on prison terms or if less costly options are just as effective. Civil regulatory agencies are often underfunded to achieve their regulatory goals, so money that would otherwise go to prison terms may be better spent on more civil personnel to investigate and detect violations. The deterrence literature is clear that would-be offenders care much more about the odds of detection than the amount of punishment should they be caught.[45] And if deterrence can be achieved just as effectively at a lesser cost, that frees up funds to use on additional public safety measures.

In assessing the question of whether to make incarceration an available option,[46] it is also important to keep in mind that it may have a negative effect on public safety. While an individual serves his or her sentence, he or she is incapacitated from committing additional crimes. But some individuals may become more prone to committing crimes after being released from prison because of the greater difficulty they will have in maintaining family ties and obtaining employment upon release.[47] This problem is exacerbated by the collateral consequences that flow from felony convictions and that often stand in the way of an individual's ability to reintegrate into society and live a law-abiding life going forward. Thus, it is necessary to weigh the deterrence benefits of incapacitation against the possible crime-increasing effects of incarceration.

This comparison of the costs and benefits of criminal and civil punishments may vary based on the regulatory context. I lack the data or expertise to make an assessment of whether criminal provisions are required in a given regulatory area, and I take no position here. I do hold the view, however, that it is critical to ask the question of whether criminalization is necessary for an effective regulatory regime. Answering that question will require weighing the costs and benefits described above and a more granular analysis that looks to particular regulatory provisions to assess their importance and subject

---

[45] John Braithwaite & Toni Makkai, *Testing an Expected Utility Model of Corporate Deterrence*, 25 LAW & SOC'Y REV. 7, 8 (1991) (citing studies finding that the certainty of a sanction is a more reliable deterrent than the severity of a sanction); Robert J. MacCoun, *Testing Drugs Versus Testing for Drug Use: Private Risk Management in the Shadow of Criminal Law*, 56 DEPAUL L. REV. 507, 514 (2007) (citing studies finding that "certainty of punishment has a modest but reliable causal impact on offending rates, even for offenses with very low detection probabilities, but the severity of punishment has no reliable impact"); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 183-193 (2004) (citing studies finding high probability of punishment is an effective deterrent but that increasing the duration of a sentence to increase the severity of a punishment does not increase deterrence).

[46] Congress made clear that "imprisonment is not an appropriate means of promoting correction and rehabilitation," 18 U.S.C. § 3582(a), so rehabilitation is not an independent justification for incarceration. *See also Tapia v. United States*, 131 S.Ct. 2382, 2388-2389 (2011).

[47] Joanna Shepherd, *The Imprisonment Puzzle, Understanding How Prison Growth Affects Crime*, 5 CRIMINOLOGY AND PUBLIC POLICY 285, 291-292 (2006).

matter, instead of simply making blanket determinations to criminalize without attention to detail.[48]

A cost-benefit analysis need not, however, dictate the outcome. Congress may decide that criminal punishment is necessary or inappropriate for a different reason. One purpose of punishment is "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."[49] Whether the stigma of a criminal conviction and imprisonment are required to provide a defendant with his or her just deserts may depend on the mens rea of a defendant in committing the regulatory violation and the extent of the harm caused.[50] Intentional and repeat violations may merit criminal sanctions whereas other violations may not. Thus, the just deserts inquiry will be critically intertwined with the resolution of the issues of mens rea and notice discussed above.

III. Delegating the Question of Criminalization

The last issue I would like to highlight is the question of who is in the best position to make the decision of whether criminalization is appropriate. Under the current framework that dominates the U.S. Code, Congress is not aware of the specific regulations that the agency will pass when it authorizes criminal punishment for their violation. Congress just makes a blanket determination to allow for criminal penalties without attention to the particular character of any regulation and its significance or to the culpability associated with its violation.[51] To be sure, Congress must provide an intelligible principle to guide agencies in promulgating regulations,[52] but those principles are far more general than the specific rules that are ultimately adopted.

Thus the agency is effectively deciding the specific content of the criminal offenses through its regulatory authority. Once the agency's regulations take effect and are violated under the terms of the criminalization statute, the criminal penalties can be pursued without any further action by Congress to determine if criminalization makes sense for the specific regulations that are ultimately passed. Rather, it is up to individual prosecutors whether criminal prosecution makes sense or whether an individual should be left to the civil process. The current framework therefore places the criminalization decision with executive branch officials.

Richard Lazarus sums up the current approach with respect to environmental crimes as follows:

---

[48] *See* Lazarus, *supra* note 38, at 881 (observing that, in the environmental context, "Congress made relatively little effort to define thresholds for when a defendant's conduct justified adding the possibility of criminal sanctions to civil penalties").

[49] 18 U.S.C. § 3553(a)(2)(A).

[50] Lazarus, *supra* note 38, at 888 ("Congress needs to replace the existing indiscriminate broad-brush approach by defining environmental crimes in ways that better establish criminal culpability and better identify the kind of conduct that Congress in fact expects to be prosecuted criminally.")

[51] Lazarus, *supra* note 38, at 888.

[52] *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

> To date, Congress, however, has made no meaningful or systematic effort to consider criminal sanctions as presenting an issue distinct from that presented by civil sanctions. Congress has not tried to identify those circumstances in which the culpability of conduct warrants taking the next step of imposing criminal sanctions. Congress has not tried to identify those kinds of environmental standards for which criminal sanctions are more appropriate. . . . By criminalizing far more conduct than it would expect to be the subject of criminal enforcement, Congress has, in effect, delegated all of the line-drawing issues to the executive branch without providing any guidance on how that discretion should be exercised.[53]

The traditional justification for delegation in the civil regulatory sphere rests on the notion that expert agencies are well suited to fill in gaps in the law and to address the resource constraints of having Congress address every issue that may arise. Whatever the merits of that argument in the civil context, there are reasons to view criminal law differently.

First, because criminal law is about blameworthiness, many believe that "criminal law should reflect society's moral judgments, not the judgments of experts."[54] On this view, Congress has a decided advantage over administrative agencies because Congress represents the broadly held views of the electorate. Thus, Congress should make the determination which regulatory violations, if any, are insufficiently deterred through civil sanctions and sufficiently blameworthy that they merit criminal punishment. That means Congress cannot criminalize in advance of knowing what those regulations are and whether civil enforcement works effectively.

Second, constitutional principles of separation of powers have special force in criminal law. "One of the animating features of the Constitution is its preoccupation with the regulation of the government's criminal powers."[55] The Constitution's text and structure "provide[] ample evidence that the potential growth and abuse of federal criminal power was anticipated by the Framers and that they intended to place limits on it through the separation of powers."[56] Bicameralism and presentment allow for careful deliberation before the government can criminalize conduct. But if only the most general decision to allow criminalizing of regulatory violations is made at the legislative level, then the real action is taking place through the administrative process. Thus the key decisions about the content of criminal laws are being made through the less deliberative administrative process, allowing efficiency to trump the greater accountability and consideration that the traditional legislative process provides. But because criminal law involves the greatest threat to individual liberty, it merits the most careful procedures.

---

[53] Lazarus, *supra* note 38, at 883-884.
[54] Myers, *supra* note 1, at 1864.
[55] Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012-1020 (2006) (describing the Constitution's focus on criminal law through prohibitions on bills of attainder and ex post facto laws, limits on the authority to suspend the writ of habeas corpus, a strong judicial check in the form of independent judges and the jury, the President's pardon power, and many of the provisions in the Bill of Rights).
[56] *Id.* at 1017.

Traditional lawmaking procedures are "the price of keeping government abuse in check and ensuring that no one is labeled a criminal without adequate process and the agreement of all the relevant constitutional actors."[57]

Third, the resource constraints of Congress as compared with administrative agencies can help protect against over-criminalization. Because Congress lacks the resources of agencies, it necessarily has to focus attention on the most pressing problems. That, in turn, can avoid an unmanageable expansion of criminal laws by prioritizing those areas where criminal punishment is needed and the threat to individual liberty is justified.[58]

Fourth, the administrative landscape constantly changes, which means that criminal laws tied to regulations will also be a moving target. Moreover, regulations sometimes rest on predictions about what is possible, based on uncertain science and technology.[59] Criminal laws, in contrast, "should be more settled and less dynamic."[60] They should require conduct that is achievable, and they should give sufficient notice to allow actors an opportunity to comply. Having Congress take the lead in identifying those situations that merit criminalization would inject more stability and make it easier for actors to keep track of their obligations than the current approach, which essentially takes Congress out of the equation once it writes a blank check to agencies allowing the violation of any regulation to trigger a criminal penalty.

IV. Conclusion

Thank you for allowing me to testify and share my thoughts on the problem of over-criminalization with respect to regulatory crimes. I would be happy to answer any questions that you might have.

[57] *Id.* at 1040.
[58] *Id.* at 1051-1052 (noting the benefits of procedural costs for limiting over-criminalization).
[59] Lazarus, *supra* note 38, at 882-883.
[60] *Id.* at 883.