

**CRIMINALIZING AMERICA:
THE GROWTH OF FEDERAL OFFENSES AND
REGULATORY OVERREACH**

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME AND FEDERAL
GOVERNMENT SURVEILLANCE

OF THE

COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

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CRIMINALIZING AMERICA: THE GROWTH OF FEDERAL OFFENSES AND REGULATORY OVERREACH

Wednesday, May 7, 2025

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON CRIME AND FEDERAL GOVERNMENT
SURVEILLANCE

COMMITTEE ON THE JUDICIARY
Washington, DC

The Subcommittee met, pursuant to notice, at 2 p.m., in Room 2141, Rayburn House Office Building, the Hon. Andy Biggs [Chair of the Subcommittee] presiding.

Members present: Representatives Biggs, Jordan, Kiley, Lee, Knott, McBath, Raskin, Goldman, and Cohen.

Mr. BIGGS. The Subcommittee will come to order.

Without objection, the Chair is authorized to declare a recess.

We welcome you all to the hearing today. Please stand as the gentleman from North Carolina leads us in the Pledge of Allegiance.

ALL. I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation, under God, indivisible, with liberty and justice for all.

Mr. BIGGS. I thank everyone for coming. I am told others are on their way. I hope that is true.

I recognize myself now for an opening statement.

I thank the Members who are here and those who will be coming. I thank our witnesses today. This is really a great panel we have. A lot of talent and expertise, and I am grateful that you would take time to be with us today.

Today's hearing is titled "Criminalizing America: The Growth of Federal Offenses and Regulatory Overreach." We could have just as easily called it oversight of Congress because we created the problem that we are here to discuss today.

The problem is the number of Federal and regulatory crimes has simply escalated out of control, to the point that law-abiding Americans unknowingly commit several crimes every day. According to one study, the average American commits three felonies per day, which does not consider the overwhelming number of misdemeanors or civil violations.

In some instances, the laws are so obscure and vague that even law enforcement and Federal agencies are unaware that they even exist. The U.S. Code is estimated to contain more than 5,000 crimes today. I will hold it up for you.

This massive tome is the criminal code.

Just a decade ago some scholars estimated that there were approximately 4,500 crimes. The fact that these numbers are just estimates underscores the severity of the problem.

According to a study by the Federalist Society, the number of Federal criminal offenses increased by 30 percent between 1980–2004. There were 452 new Federal criminal offenses enacted between 2000–2007, averaging 56.5 new crimes per year. Over the past three decades Congress has been averaging 500 new crimes per decade.

Keep in mind that these estimated 5,000 criminal laws are not all neatly tucked into Title 18, rather, they are scattered around the other 49 titles as well. The fact that this is only an estimate means that no one knows exactly how many Federal laws subject U.S. citizens to criminal sanction. That includes Congress, the Department of Justice, and other Federal agencies responsible for enforcing those laws, let alone your ordinary American.

I called when I first got elected, initially I wanted to take care, and so 8–9 years ago when I was here I called the Congressional Research Service and I said, “How many, how many crimes do we have,” not just in the Federal Code but through regulatory agencies?

They said—I am not kidding you when I say this—they said, “No one knows.”

I thought that it is impossible that no one knows. Estimates have that over 300,000. So, I guess it truly is no one knows.

So, how did we get here? After all, our Founding Fathers first enumerated Federal crimes in the Crimes Act of 1790. That act enumerated 23 Federal crimes and established punishments for those crimes.

Among others, the Crimes Act of 1790 established crimes for treason, piracy, and counterfeiting. While the legislation did establish some crimes against the person such as murder, and crimes against property such as larceny, the Federal jurisdiction of those crimes is limited to Federal property and Federal territories.

Over the past century Congress has lost its way. Instead of—excuse me—methodically and deliberatively crafting a commonsense criminal code, Congress acted in a knee-jerk reaction to every minor and major crisis. In doing so, Congress believed that there always had to be a Federal response to every headline and every breaking news story.

So, one academic has aptly noted,

It was the spate of bank robberies by John Dillinger in the 1930s that provoked passage of the Federal Bank Robbery Statute. The kidnaping of the Lindbergh baby about the same time caused passage of the Federal statute on kidnapping. The assassination of President Kennedy in the early 1960s prompted the statute on Presidential assassination. And the killing of Senator Robert Kennedy in the late 1960s that resulted in the passage of a statute finally making it a Federal crime to kill a Member of Congress.

More recently we saw the enactment of Sarbanes–Oxley in response to the Enron scandal.

All of us on the dias have witnessed this phenomenon among our own colleagues. Some have termed this the accumulation approach to offenses whereby Congress has simply accumulated new offenses for 200 years or so, with little examination or reformulation of existing offenses, which has resulted in serious overlaps in coverage and irrationalities among offense crime penalties which—excuse me—offense penalties, which create new possibilities for disparity in treatment and for double punishment for the same harm or evil.

This leads to absurdities. For example, the Code of Federal Regulations makes it a Federal crime to sell a quarantined zebra while it is still in quarantine.

Another, 16 U.S.C. 703, and 50 C.F.R. Section 20.91(a) make it a Federal crime to offer to buy swan feathers for use in making a woman's hat.

According to one scholar, the proliferation of crimes makes it extraordinarily difficult to ferret out the law applicable to a particular factual situation. It also creates unfairness within Federal law, which provides Federal prosecutors with a near limitless menu to pursue criminal defendants.

When Congress isn't creating new criminal code provisions, it is passing laws that allow—excuse me—unelected bureaucrats to write regulations that carry civil and criminal penalties. To make matters worse, many of these regulatory crimes are strict liability crimes. Many ordinances do not have *mens rea* requirements, therefore, these ordinances make it a violation of law regardless of whether someone intended to break the law in question.

As a result, Congress wrote and passed a slew of strict liability crimes in which the defendant was not required to possess the *mens rea* typically required to establish guilt of the accused. This resulted in both Federal agencies and Congress using regulatory crimes as another tool to penalize arguably innocent citizens, resulting in the deprivation of liberty and the loss of rights, such as the right to vote or possess a firearm.

What we all too often forget is that many of the problems we seek to solve are actually State and local issues. Under the Federal system, the U.S. Supreme Court has observed that,

States possess primary authority for defining and enforcing the criminal law, and our national government is one of delegated powers alone. Under our Federal system, the administration of criminal justice rests with the States, except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.

Congress has not relented and continues to add Federal crimes to our Federal code. Congress can and should restrain from over-legislating issues that should be left to State and local governments.

This hearing is an opportunity to examine potential legislation introduced in past Congresses to restrict Federal agencies' ability to criminalize conduct that a reasonable, that a reasonable person would consider lawful.

Thank you. I look forward to hearing from our witnesses and the Members.

I will yield back and recognize the Ranking Member Ms. McBath for her opening statement.

Ms. MCBATH. Well, thank you, Chair.

I want to thank you four witnesses today, those of you that I was able to shake hands with. Mr. Tolman, I am sorry, I didn't get a chance to properly thank you for being here today. Thank you for being with us on this hearing on overcriminalization.

Our criminal justice system has many important purposes, laying out the laws that, if followed, prevent us from harming one another, and making our country safer.

Our criminal laws prohibit murder, drug trafficking, and fraud, and impose harsh penalties for those who harm others, whether it be physically or financially. Many of our laws are written clearly to achieve this goal. Many of our law enforcement officers and prosecutors use their judgment to prioritize cases in which they can address the gravest injustices.

Unfortunately, some of our laws are not well-written at all. Some actors in our justice system do not have their priorities in order. Whether due to misguided leadership, or lack of resources, charges are sometimes brought against those who are the easiest to prosecute rather than to those who have caused the greatest harm. Often this results in the disproportionate incarceration of people of color, people with limited financial resources, immigrants, people suffering from addiction, and even people who are actually victims of crime, such as those who commit crimes while being victims of human trafficking.

Overcriminalization, the proliferation of Federal crimes that cover more and more conduct, exasperates this problem. It leads to more surveillance, profiling, and targeting within the minority communities. It allows for people to face multiple charges for one criminal act, lengthening their sentences and increasing mass incarceration.

Minorities are already subjected to harsher penalties for committing the same crimes. The variations of potential charges brought on by our laws allow for even more variability, increasing the potential for discrimination in a system that is supposed to be impartial.

Because of this, communities have lost trust in public safety and the overall system. Many don't feel safe. They don't feel supported enough to call the police when they witness a crime or provide a tip that may break open a case, for fear of being arrested themselves or prosecuted. Which, in turn, makes it even harder to prosecute serious crimes.

This problem is especially troubling, given this Administration's stated priorities. President Trump has already repeated vowed to use the criminal justice system for his own interests, rounding up nonviolent immigrants and people who look like immigrants, pursuing his political enemies, exonerating grifters, and even mass pardons for those who violently assaulted our police officers here in Washington on the Hill January 6th, just because they did so in the name of Trump.

This is an incredible abuse of our criminal justice system which should be focused on preventing and prosecuting violent crimes, preventing theft of families, hard-earned savings—savings, and holding corporations accountable when they harm workers and our consumers.

We need to return to an evidence-based policy agenda that actually uses our limited resources to make us safer.

That is why I am proud to colead, along with Congressman Roy, Ranking Member Biggs, and Congressman Cohen the Count the Crimes to Cut Act. This bipartisan bill would require the Attorney General to provide us with a report detailing all Federal crimes, including the elements, the potential penalties, and the number of prosecutions in the last 15 years, and the *mens rea* requirement, which asks what the mental State of the person was at the time that they committed the crime.

This will help us with the places where we might eliminate policies that simply don't make sense so we can make sure that our criminal justice system is focused on what really, really matters.

I look forward to hearing more from each of our witnesses today about this bipartisan bill that will directly address overcriminalization and other ways that we might be able to address this ongoing problem.

I ask unanimous consent to enter into the record a statement for the record on today's hearing from the National Association of Criminal Defense Attorneys.

Mr. BIGGS. Without objection.

Ms. MCBATH. Thank you. With that, I yield back.

Mr. BIGGS. The gentlelady yields back. I will turn to the Ranking Member of the entire Committee, Mr. Raskin, and yield to you if you would like.

Mr. RASKIN. Thank you, Chair Biggs. I appreciate it. Thanks to the Ranking Member Ms. McBath. Thanks to the witnesses for joining us today.

Criminal Defense Attorney Mike Chase has documented some of the most preposterous crimes in the Federal code.

For example, it is a Federal crime to sell Swiss cheese without holes in it. Some people prefer Swiss cheese without holes in it, but it is a crime to sell it.

It is also a Federal crime to receive through interstate commerce a small toy ball that doesn't contain a warning that says, "This toy is a small ball."

Apparently, it is still a crime to sell canned green beans and call them stringless unless you are sure they are, in fact, stringless.

So, prosecutors may be unlikely to charge some of these ridiculous crimes on their own, but overcriminalization is a serious problem nonetheless because it is an invitation to arbitrary prosecution and selective political prosecution.

We can see and quantify who the overcriminalization problem affects most directly: People who are at a socioeconomic disadvantage, people who don't have the lawyers to defend themselves against such prosecutions with immigrants, people with disabilities. Between Federal, State, local, and Tribal criminal justice systems nearly two million people in the U.S. are incarcerated, costing taxpayers \$182 billion a year.

Congress often crafts new criminal offenses and expands existing crimes without considering whether the Federal Government should even be involved in the underlying conduct. Recent studies estimate there are nearly 5,000 statutory Federal crimes, and between 300,000–400,000 crimes in the regulatory code.

According to one study, Congress created 56 new crimes every year between 2,000–2,008, despite the fact that crime rates were actually declining during this time period.

While Federal criminal law plays a vital role, undoubtedly, in protecting the public, it should complement State law rather than duplicate it, and it should not be the source of an extraordinary burden in the lives of the people.

Some people seem to escape the trend of overcriminalization. Criminal prosecutions of white-collar crimes from public corruption to tax evasion have been declining for decades. Under the current Administration those statistics are likely to plummet further, given the Department of Justice's gutting of the department's top anticorruption unit and its removal of its own power to charge politicians and public officials for bribery and extortion in some cases, its disbanding of anticorruption task forces, and its purge of veteran prosecutors and agents who are dedicated to public safety but who have run afoul of the new pinched political correctness standards of the Administration. These changes have taken a bad situation, and they have made it worse.

So, instead of playing politics and trying to prove who is tougher on crime, we should work in a bipartisan manner to craft evidence-based policy that keeps all of us safe. We could do more to fight crime by addressing underlying issues that give rise to crime and thoroughly studying the criminal code.

During last week's House Judiciary Committee consideration of the Reconciliation Bill I tried to restore funding to hundreds of critical grant programs that were cut by DOGE. Unfortunately, my colleagues refused to even discuss them and voted against our amendment to restore funding to these programs addressing the needs of crime victims, victims of rape and sexual assault.

We can all agree that we need to make sure that our Federal criminal laws are clear and fairly enforced. We cannot have a criminal justice system that holds the President's allies above the law, gutting enforcement of fraud and corruption offenses, and pardoning January 6th top feeders and fraudsters who happen to be allies of the President, while threatening criminal prosecution against journalists, politicians, and peaceful protestors who speak out against the current Administration.

I look forward to working with my colleagues to ensure that the Federal Criminal Code and its enforcement serves the public safety of all the people.

Thank you, Mr. Chair. I yield back.

Mr. BIGGS. The gentleman yields back.

Without objection, all other opening statements will be included in the record. I will now introduce today's witnesses.

I will start with Mr. Brett Tolman. Mr. Tolman is the founder of the Tolman Group, a public policy law firm that works to hold Federal, State, and local governments accountable, and advance transparency. He is also the Executive Director of Right on Crime, an organization that advocates for criminal justice reform.

Mr. Tolman previously served as the United States Attorney for the District of Utah and has testified before Congress multiple times on criminal justice issues, including the First Step Act, and many times before this Committee.

Welcome, Mr. Tolman.

Mr. TOLMAN. Thank you.

Mr. BIGGS. Mr. Jonathan Turley, Professor Jonathan Turley is the J.B. and Maurice C. Shapiro Professor of Public Interest Law, Director of the Environmental Law Advocacy Center, and Executive Director of the Project for Older Prisoners at the George Washington University School of Law.

Professor Turley has written and litigated on a wide range of areas of the law, including the question of overcriminalization before us today. He has also testified here and been before this Committee a number of times.

Mr. GianCarlo Canaparo is a Senior Legal Fellow at the Edwin Meese III Center for Legal and Judicial Studies at *The Heritage Foundation*. His research focuses on constitutional and administrative law, civil rights, the rule of law and the courts. He was the co-author of the study that almost everybody up here has referenced already iterating something in the order of 5,200 Federal crimes in the current Federal Criminal Code.

Thank you for being with us.

Mr. Michael Fox is a Legal Fellow at the CATO Institute's Project on Criminal Justice. His research focuses on overcriminalization, policing, and the criminal justice system. He previously served as a public defender in Colorado.

We welcome each of you today. Thank you for being here. We will begin by swearing you in.

Would each of you please rise and raise your right hand.

Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief, so help you God.

Let the record reflect that the witnesses have answered in the affirmative.

Thank you, each.

Please know that your written testimony will be entered into the record in its entirety. Accordingly, we ask that you summarize your testimony in five minutes. If you are getting close, I tend to tap to kind of give you a 15-second warning. Then I really hammered it.

No, I am just kidding. We want to get as close to the 5-minutes as possible.

So, we are going to start. We are just going to go down the line today. We will begin with you, Mr. Fox. You are recognized for your five minutes.

STATEMENT OF MICHAEL FOX

Mr. Fox. Thank you, Chair Biggs, Ranking Member McBeth, Ranking Member Raskin, and the distinguished Members of the Committee. It is an honor to speak to you today about the rampant overcriminalization and the very real impact it has had on people across the Nation.

We are a Nation of too many laws. As has been said, over 5,200 Federal criminal statutes alone, and that is not counting the over 300–400 Federal regulations, despite having never been passed and land Americans behind bars.

The Federal Government is one of the enumerated powers. Yet, this important limitation hasn't stopped Congress from enacting

criminal statutes that far exceed the legitimate ambit of the Federal Government, nor has it stopped the Justice Department from enforcing laws in a manner inconsistent with constitutional limits or legislative intent.

With so many laws and regulations, it is easy for good people to become entangled in our criminal justice system through no fault of their own. While leading a shark diving charter, John Moore and Tanner Mansell stumbled on what appeared to be the work of poachers. They cut the line, freed the sharks, and reported it to authorities. That would change their lives forever.

Unbeknownst to Moore and Mansell, it was actually a bona fide research project. In an act that defies commonsense, Assistant U.S. Attorney Thomas Watts Fitzgerald charged them with felony theft within the maritime jurisdiction of the United States. The trial judge didn't give the defense requested jury instruction explaining what rational people would understand to be theft:

The wrongful taking of property with the intent to deprive the owner of the use and benefit and convert it to the use of one's own, one's self or another.

The jurors sent seven notes to the judge begging for a way to acquit before reluctantly convicting Moore and Mansell. The 11th Circuit Court of Appeals affirmed. Nevertheless, Judge Barbara Lagoa lambasted the prosecuted and castigated Watts Fitzgerald by name for his imprudent exercise of discretion in choosing to prosecute the case. Judge Lagoa highlighted the sheer absurdity of branding Moore and Mansell lifelong felons for engaging in conduct that no rational human being would interpret as criminal.

Our system was painstakingly designed to discourage ill-conceived prosecutions and palpably unjust convictions. Yet, it plainly failed to do so here.

At the founding, the greatest protection against unjust convictions and excessive punishment was the citizen jury. The framers understood that depriving a human being of their liberty should not be easy. The Government had to prove to a jury that a given prosecution was wise, fair, and legitimate. Jurors would scrutinize the Government's actions with a fine-toothed comb and ensure that the sentence was proportionate to the wrongfulness of the crime. Jurors had a civic duty to acquit against the evidence when justice demanded.

It is indisputable that jurors still have this important power today. Devoid of juries as a meaningful safeguard against an overly punitive government, it is all the more important that we robustly apply the other core defendant protecting doctrines.

At common law, prosecutors had to prove that a defendant knew or intended to commit a crime. This is known as *mens rea*.

It is highly doubtful that a jury cognizant of its historic power to acquit against the evidence would have convicted Moore and Mansell. It is highly unlikely Watts Fitzgerald would have even charged them if he had known that a jury could call his bluff. Likewise, had the jury been given a narrow instruction on the definition of the word "theft," the jurors likely would have acquitted as well.

You, too, can easily become a criminal. It is as simple as walking your dog on Supreme Court grounds with a standard six-foot leash, where the maximum permitted length is only four feet. Any longer,

and you could be looking at 60 days in jail. No one is aware of this regulation because there is no signage putting potential violators on notice. Yet, anyone of us could be charged with violating it, despite the reality that no reasonable person would understand this to be against the law.

There are many actions Congress can take to mitigate these profound injustices. Here are some examples:

Draft prescription legislation; repeal statutes that confer blanket criminal lawmaking authority on Federal agencies; include a *mens rea* component in every new statute; establish a default *mens rea* setting where existing statutes are silent; and mandate that Federal judges inform jurors of their historic prerogative to acquit against the evidence.

As Justice Gorsuch notes in his recent book, “criminal laws aren’t the solution to every problem.”

A criminal justice system must be perceived by the public as legitimate to be effective. A system that seeks to send well-meaning people like John Moore and Tanner Mansell to prison over a veritable mistake, merits neither our confidence nor our respect. I am eager to work with you to change that.

Thank you for holding this important hearing. I look forward to your questions.

[The prepared statement of Mr. Fox follows:]

Testimony of Michael Fox, Legal Fellow, Project on Criminal Justice, CATO Institute

Good afternoon, Chairman Jordan, Ranking Member Raskin, Chairman Biggs, Ranking Member McBath and the distinguished members of this Subcommittee.

My name is Mike Fox, and I'm a legal fellow with the Cato Institute's Project on Criminal Justice.

It's an honor to speak to you today about rampant overcriminalization and the very real impact it's had on ordinary people across the nation.

We are a nation of too many laws—over 5,200 federal criminal statutes alone. That's not counting the estimated over 300,000 federal regulations—that despite having never been passed by Congress—can land Americans behind bars. And this is on top of state laws and local ordinances, which is where the majority of criminal law resides. It's important to note that while the federal government is one of enumerated powers, this important limitation hasn't stopped Congress from enacting criminal statutes that far exceed the ambit of the federal government. Nor has it stopped the Justice Department from enforcing laws in a manner inconsistent with constitutional limits or even legislative intent.

With so many laws and regulations, it's easy for good people to become ensnarled in our criminal justice system through no fault of their own.

When John Moore and Tanner Mansell headed to work one day in August of 2020, the Jupiter Florida based boat crew had no way of knowing their lives would change forever. While out on a charter, they stumbled upon what appeared to be an illegal longline fishing line. Believing this was the work of poachers, they cut the line, freed some sharks, and reported their actions to authorities.

Unbeknownst to this goodhearted boat crew, this wasn't the work of poachers, rather a bona fide research project licensed by the National Ocean and Atmospheric Administration. In an act that defies common sense, Assistant United States Attorney Thomas Watts Fitzgerald charged them with a felony for “theft within a maritime jurisdiction of the United States” and sought to send them to prison.

Thinking that reasonable people wouldn't consider this theft, they opted to go to trial. Unfortunately, things only got worse from there. The judge didn't give the defense requested jury instruction explaining what rational people understand to be theft. Absent this instruction, the very act of taking the property was itself the crime.

After sending seven notes to the judge, literally begging for a way to acquit, the jury reluctantly convicted Moore and Mansell. The Eleventh Circuit Court of Appeals affirmed. But Judge Barbara Lagoa, herself a former federal prosecutor, authored a powerful concurrence— lambasting the prosecution and castigating Watts Fitzgerald by name for his “imprudent exercise of discretion” in choosing to prosecute the case. Lagoa accused Watts Fitzgerald of “taking a page out of Inspector Javert's playbook,” highlighting the sheer absurdity of branding these men

as lifelong felons for engaging in conduct that no rational human being would interpret as criminal.

Our system was painstakingly designed to discourage ill-conceived prosecutions and prevent palpably unjust convictions. Yet, it plainly failed to do so here. I want to briefly discuss two of these safeguards that Congress has the power to address.

At the Founding, perhaps the single greatest protection against unjust convictions and excessive punishments was the citizen jury. The Framers understood that depriving a human being of their liberty wasn't supposed to be easy. Jurors were the conscience of the community. The government had to prove to a jury that the prosecution was wise, fair, and legitimate and that the sentence was proportionate to the wrongfulness of the crime. Jurors were tasked with scrutinizing the government's actions with a fine-tooth comb. Jurors had a civic duty to acquit against the evidence when justice demanded.

It's indisputable that jurors still have this important power. However, the system has undertaken deliberate efforts to ensure that they remain unaware of it and to guarantee that those most aware of it are categorically excluded from jury service.

Devoid of juries as a meaningful safeguard against an overly punitive government, it's all the more important that we robustly apply the other core defendant protecting doctrines.

At common law, prosecutors were required to prove that a defendant had a guilty mind—meaning that the defendant knew or intended to commit a crime. This is known as *mens rea*.

It's highly doubtful that a jury cognizant of its historic powers and prerogatives would have convicted Moore and Mansell. In fact, it's unlikely Watts Fitzgerald would even have charged them had he known that a jury would call his bluff. Likewise, had the jury been given a narrow instruction on the definition of the word "theft," they likely would have acquitted Moore and Mansell. Fortunately, Moore and Mansell still have recourse as they seek Supreme Court review.

You too can easily become a criminal. It's as simple as walking your dog on Supreme Court grounds with a standard-length six-foot leash where the maximum permitted length is only four feet. Any longer and you could be staring down sixty days in jail. No one is aware of this regulation because there's no signage putting potential violators on notice. Yet, any one of us could be charged with violating it, despite the reality that no reasonable person would understand this to be against the law.

What can Congress do: Draft prescriptive legislation; repeal statutes that confer blanket criminal lawmaking authority on federal agencies; include a *mens rea* component in every new statute; establish a default *mens rea* setting where existing statutes are silent; mandate that federal judges inform jurors of their historic prerogative to acquit against the evidence; conduct

meaningful oversight of the Justice Department; and stay true to the limits the Constitution places on the exercise of federal power.

As Justice Gorsuch notes in his recent book “criminal laws aren’t the solution to every problem” Rather, it ought to be a place of last resort—what we use to protect the public from those whose actions tear at the very fabric of civil society.

A criminal justice system must be understood by the public as legitimate to be effective. A system that prosecutes people whose conduct is just barely, if at all, wrongful in the sense that it poses a genuine harm to others, erodes the rule of law and undermines public trust. A system that seeks to send well-meaning people like John Moore and Tanner Mansell to prison over a veritable mistake, merits neither our confidence, nor our respect. I’m eager to work with you to change that.

Thank you for holding this important hearing and I look forward to your questions.

Mr. BIGGS. Thank you. Now, we will recognize Mr. Canaparo for your five minutes.

STATEMENT OF GIANCARLO CANAPARO

Mr. CANAPARO. Thank you all very much for having me. It is my pleasure and honor to testify.

My name is GianCarlo Canaparo. Among other things, as was mentioned, I wrote this report which is, as far as we know, the most recent and up-to-date count of the crimes in the United States Code only.

I want to begin with the ancient Roman maxim that ignorance of the law is no excuse. That old rule makes very good sense when the law prohibits things that are morally wrong like murder, kidnapping, or theft. Because every person knows that morally wrong actions are often legal, and it is fair to presume that people know that, we can also fairly presume knowledge of some laws that are morally neutral, what lawyers call *malum prohibitum* crimes, provided that those crimes are well-publicized, not too numerous, and based on commonsense like, for instance, the rule against smoking in this building.

What if *malum prohibitum* crimes are not well-publicized, numbering in the tens or hundreds of thousands, and defy commonsense?

What if, for instance, as Congressman Raskin mentioned, we needed a crime to sell Swiss cheese that didn't have holes in it, and what if we divided that crime among four different laws and scattered them pell-mell throughout hundreds of thousands of pages of law? America has in fact done exactly that because it is a Federal crime to sell Swiss cheese without holes in it. To know that you would have to consult three statutory provisions and a Federal regulation.

It is not the only such crime. In 2022, I partnered with the Mercatus Institute to deploy an algorithm to count the crimes in the—to count the provisions in the United States Code that create at least one crime, and then to estimate the number of crimes contained therein.

Our report found that the number was 5,199 crimes in the U.S. Code. That is only in the U.S. Code. That is already more than anyone person could know. The Code of Federal Regulation includes probably hundreds of thousands more. As you mentioned, Chair, nobody actually knows.

Now, the Swiss cheese crime is only one example. As Representative Raskin mentioned, Mike Chase, the lawyer who wrote “How to Become A Federal Criminal,” it is a hilarious and depressing book about some of these most extreme examples.

It is illegal to sell bacon that is in a package that doesn't display the representative slice through a visual window, clear window.

It is a crime to submit a design to the Federal Duck Stamp Contest if your design does not primarily feature eligible waterfowl.

Again, a crime to sell a marble across State lines if it is not marked with a warning that says this toy is a marble.

Now, there is some laughter in the room because those examples are ridiculous. That is the first problem with the proliferation of *malum prohibitum* crimes. The criminal law should not be ridicu-

lous. Ridiculousness brings the criminal law, indeed, the whole system of law into disrepute. It brings our lawmakers into disrepute, both Congress and the agencies, which are meant to be reasonable and competent Governors and not pedantic nannies.

The second problem is that if knowledge of the law is not a reality, the rule of law itself suffers. Everyone will know, of course, that they can't actually know the law. Everyone will know, therefore, that they can't obey the law. All the while everyone will remember that they cannot justly be expected to do the impossible.

Americans will rightly conclude, then, that such a system of laws is unjust and worthy—unworthy of both obedience and defense.

Meanwhile, the Government won't be able to enforce all those laws equally and fairly, so the rule of law will be tainted by bias or the appearance of bias, both of which are destructive to the rule of law.

Now, numerosity is one problem. The lack of any intent or *mens rea* element is another.

The intent element is a requirement as ancient as the maxim that ignorance of the law is no excuse. At the same time that we wrote the foundation under that maxim we eliminated intent elements from many of those numerous crimes. That means that you can be guilty of violating countless thousands of Federal criminal laws even though you don't know that they exist, and even if you don't know that you are breaking them.

So, for instance, the Swiss cheese crime has no intent element, so even if you don't know about that law, and even if you don't know that your Swiss cheese lacks holes, you can be prosecuted.

You can find many more examples of such prosecutions in my written testimony and in the sources cited therein.

The take-away from all of this is that the proliferation of Federal crimes and erosion of intent elements has made America's criminal law both ridiculous and unfair. That status quo is terrible for the rule of law and ought to be changed.

What could Congress do?

You could order agencies to count the criminal regulations to get a handle on the problem. A word of caution: That passes beyond the Department of Justice. It may even at this point be beyond the agencies. It might be better simply to repeal regulatory crimes that have not been enforced in, say, 10 years.

Meanwhile, Congress can and should create a default intent element in any Federal regulation, regulatory crime that lacks one.

Finally, Congress or the courts might create a limited mistake of law defense for certain *malum prohibitum* crimes.

All these are good options. I hope you will consider them. Thank you for inviting me.

[The prepared statement of Mr. Canaparo follows:]

Quantifying and Remedying Overcriminalization in Federal Law**Testimony Before****U.S. House Judiciary Subcommittee on Crime and Federal Government Surveillance**

United States House of Representatives

May 7, 2025

GianCarlo Canaparo

Senior Legal Fellow

Edwin Meese III Center for Legal and Judicial Studies

The Heritage Foundation¹

My name is GianCarlo Canaparo, and I am a senior legal fellow at The Heritage Foundation. Thank you for inviting me to testify.

Everyone is familiar with the line “ignorance of the law is no excuse.” The roots of that famous maxim stretch back through the English common law and Roman law, all the way to Aristotle.² This rule makes eminent sense when the law prohibits things that are morally wrong like murder, battery, theft, fraud, kidnapping, and arson. Lawyers call these crimes *malum in se*, which is Latin for “wrong in itself.” Every reasonable person knows that acts that are *malum in se* are inherently wrong, and so we can fairly presume knowledge that such things are also illegal. We can also fairly presume knowledge of some laws that target morally neutral behavior, like staying in a federal park past closing hour, smoking in a government building, or violating traffic laws. Lawyers call these crimes *malum prohibitum*, Latin for “wrong because prohibited.” When these crimes are well-publicized, not too numerous, and based on common sense, we can fairly presume knowledge of them too. For example, consider the prohibition on smoking in this building. There are signs posted near every door that tell you that you can’t smoke here. And it is, at this point, common knowledge that smoking is prohibited in federal buildings. So if someone was arrested for smoking in the hallway, we would not think it

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² See Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 Harv. L. Rev. 75, 76–80 (1908); Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 Wm. & Mary L. Rev 671 (1976).

unjust to punish him even if, somehow, he didn't know that smoking was illegal.

But what if *malum prohibitum* crimes are not well-publicized, number in the thousands or tens of thousands, and prohibit things that are not based on common sense? What if, for example, we made it a crime to sell Swiss cheese that didn't have holes in it? And what if we divided that crime among four different statutory and regulatory provisions and scattered them throughout hundreds of thousands of pages of federal laws? Would it then be just to say that ignorance of the law is no excuse? America has, in fact, done exactly that. It is a federal crime to sell Swiss cheese without holes in it, and to figure that out, you'd need to consult three statutes and a federal regulation.³

Swiss cheese is only one example. There are so many examples of crimes spread throughout the United States Code and Code of Federal Regulations that American criminal law is now the subject of justly deserved ridicule. Lawyer and author Mike Chase published the informative and amusing book *How to Become a Federal Criminal*,⁴ that chronicles some of the most absurd of the countless crimes hidden throughout American law.

- It is a crime to sell a tufted mattress unless you have burned 9 cigarettes on the tufted part of it.⁵
- It is a crime to sell a package of bacon unless the packaging includes a transparent window that “shall be designed to reveal at least 70 percent of the length (longest dimension) of the representative slice, and this window shall be at least 1 1/2 inches wide.”⁶
- It is a crime to submit a design to the Federal Duck Stamp contest if your design does not primarily feature “eligible waterfowl.”⁷
- It is a crime to sell a toy marble across state lines unless it is marked with a warning that says “this toy is a marble,” and it is also a crime to sell a small ball across state lines unless it is marked with a warning that says, “this toy is a small ball.”⁸

These examples are ridiculous, and that is the first problem with the proliferation of *malum prohibitum* crimes. The criminal law should not be ridiculous. The criminal law is meant to be society's most powerful censure against the worst behavior, but these criminal laws are picayune. It brings the criminal law, indeed the whole system of law, into disrepute. And it brings our lawmakers into disrepute—Congress, which authorizes regulatory agencies to make so many of these crimes, and the agencies themselves, which are supposed to be reasonable and competent defenders of public safety, not pedantic nannies.

The second problem is that it has forever been a bedrock principle of the rule of law that the law be *actually* knowable, but our law is not. The rule “ignorance of the law is no excuse” was not meant to be a convenient legal fiction to facilitate the prosecution of *malum prohibitum* crimes. It was

³ See 21 U.S.C. § 331; 21 U.S.C. § 333; 21 U.S.C. § 343(g); 21 C.F.R. § 133.195(a)(1).

⁴ Mike Chase, *How to Become a Federal Criminal: An Illustrated Handbook for the Aspiring Offender* (2019).

⁵ 15 U.S.C. §1192(a), §1196; 16 C.F.R. §1632.3(c), §1632.4(d)(2)(iv).

⁶ 21 U.S.C. § 676; 9 C.F.R. 217.8(b)(5)(ii).

⁷ 16 U.S.C. § 707(a); 50 C.F.R. §91.14.

⁸ 15 U.S.C. §1263, §1265; 16 C.F.R. §1500.19(b)(4)(i).

meant as a reflection of reality. The law was, in fact, supposed to be actually knowable. In ancient republican Rome, the plebian citizens walked out of the city in part to protest the promulgation of too many laws.⁹ In imperial Rome, the Emperor Caligula was disdained for displaying new tax laws at the top of high pillars where no one could read them.¹⁰ In pre-constitutional America, James Madison warned that “it will be of little avail to the people that laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood.”¹¹

If knowledge of the law is no longer a reality, then the very system of laws itself is liable to fail. Everyone will know that they cannot actually know the law. Everyone will know, therefore, that they cannot obey the law. And all the while, everyone will remember that they cannot justly be expected to do the impossible, and that it is impossible to know thousands of laws. From these premises, they will rightly conclude that such a system of laws is unjust.

And everyone will find a great deal of evidence for the injustice of a system of vast and unknowable laws. They will see that the laws are enforced unequally. One of these ticky-tacky laws will be used against one person today, but not against a different person tomorrow. Perhaps that’s because law enforcement lacks the resources to enforce all these rules. That is a problem in itself. But perhaps it’s because of bias or favoritism—a much worse problem that, again, undermines the rule of law. Even the perception of bias undermines the rule of law, and a vast and unknowable code of laws always creates that perception. For a fuller discussion of the damage that too many laws does to the rule of law and to the body politic, I refer you to Justice Neil Gorsuch and Janie Nitze’s book, *Over Ruled: The Human Toll of Too Much Law*.¹²

My more modest task today is to show you that America’s criminal laws really are so numerous that these fears are not merely hypothetical.

There have been several attempts since the 1980s to count the number of crimes in the United States Code.¹³ Until 2022, all of those attempts failed for various reasons—lack of manpower, lack of a reliable counting method, or assumptions that made the counts only very rough estimates. In 2022, however, I partnered with Patrick McLaughlin, Liya Palagashvili, and Jonathan Nelson of the Mercatus Center to deploy an algorithm to count the crimes in the 2019 U.S. Code. We used carefully selected search terms, refined over a long iterative process, to reliably identify code sections that

⁹ John Chipman Gray, *The Nature and Sources of the Law* 162–70 (2d ed. 1921).

¹⁰ Gaius Suetonius Tranquillus, *The Twelve Caesars* ¶ IV.37 (Robert Graves trans., 1957).

¹¹ *The Federalist* No. 62 (James Madison).

¹² Neil Gorsuch & Janie Nitze, *Over Ruled: The Human Toll of Too Much Law* (2024). For related readings on this topic consider Lon L. Fuller, *The Morality of Law* 49–51 (3d ed. 1969); Ronald L. Gainer, Report to the Attorney General on Federal Criminal Code Reform, 1 *Crim. L.F.* 99, 100 (1989); Paul J. Larkin, Jr., Public Choice Theory and Overcriminalization, 36 *Harv. J.L. & Pub. Pol’y* 715 (2013); Edwin Meese III & Paul J. Larkin, Jr., Reconsidering the Mistake of Law Defense, 102 *J. Crim. L. & Criminology* 725 (2012); Julie R. O’Sullivan, The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study, 96 *J. Crim. L. & Criminology* 643, 643 (2006).

¹³ GianCarlo Canaparo, Patrick McLaughlin, Jonathan Nelson and Liya Palagashvili, *Count the Code: Quantifying Federalization of Criminal Statutes*, Heritage Found. Special Report No. 251 (Jan. 2022), https://www.heritage.org/crime-and-justice/report/count-the-code-quantifying-federalization-criminal-statutes#_ftnref46.

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created at least one crime.¹⁴ We found 1,510 such statutes. One statute does not mean one crime; each statute could create any number of crimes. Congress is not consistent in its crime-writing practices. Accordingly, we developed a way to estimate the number of crimes created in various statutes. The final number we reached as 5,199 federal crimes in the United States Code as of 2019.

This number is still only an estimate, but it is the most reliable one to date. We also compared the 2019 Code to older versions, and we were able to confirm that the number of crimes has consistently risen.

If there were only 5,199 federal crimes (to say nothing of all the state crimes), that would be far too many for any person to know. But that is not the total number of federal crimes because there are many more in the Code of Federal Regulations. Nobody knows how many such crimes there are, but one estimate from the 1990s put that number somewhere around 300,000.¹⁵ When my co-author, Patrick McLaughlin, testified before this committee last year, he ran our algorithm through the Code of Federal Regulations (CFR) and found that it identified 719 provisions that created at least one crime.¹⁶ That number, however, is far smaller than the actual number of CFR provisions that create crimes.

The reason our algorithm won't give an accurate number of crimes in the CFR is because the CFR creates crimes in a different way than the U.S. Code does. When the U.S. Code creates a crime, it says something amounting to, "It shall be a crime to do *X*." And it will very often say something like, "*X* includes violating any and all regulations promulgated under this chapter." A federal agency, thereafter, merely promulgates a regulation setting certain requirements. It is a crime to violate those requirements, but the operative language that our algorithm identifies is not present in the CFR. The CFR is, in effect, referring to the operative language in the U.S. Code. That's why you need to consult at least two provisions of law to identify regulatory crimes. The Swiss cheese crime is a good example. You will not find any of our search terms in the CFR provision that says Swiss cheese must have holes throughout the cheese. But you will, however, find the phrase "shall be imprisoned" in the related U.S. Code provisions, which make it a crime to violate the Food and Drug Administration's regulatory requirements for Swiss cheese.

In sum, the number of crimes in the federal law is enormous and growing and applies to so many things that no reasonable person would think are crimes.

It would be bad enough if our criminal laws were merely ridiculous even if nobody was ever prosecuted for violating them. Unfortunately, however, people are prosecuted for violating them. As Dr. McLaughlin testified last year, "the expansion of federal criminal laws over the past few decades

¹⁴ Those search terms included "shall be fined under this title," "imprisonment for not more than," "sentenced to imprisonment or death," "shall be fined," "shall be punished," and similar phrases that were commonly used to create criminal liability.

¹⁵ John C. Coffee, Jr., Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. Rev. 193, 216 (1991) (citing Thomas B. Leary, *The Commission's New Option That Favors Judicial Discretion in Corporate Sentencing*, 3 Fed. Sentencing Rep. 142, 144 n.10 (1990)); see also Harvey Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (2011).

¹⁶ Patrick A. McLaughlin, *Quantifying Criminalization in Federal Law*, Testimony before the U.S. House Judiciary Subcommittee on Crime and Federal Government Surveillance, April 30, 2024.

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has been linked to an increase in federal incarceration rates, especially for drug-related offenses, reflecting broader trends towards more extensive criminalization and harsher penalties.”¹⁷ A number of these prosecutions have made national news, and I’ll recount just a few here. More can be found in The Heritage Foundation booklet *USA v. You: The Flood of Criminal Laws Threatening Your Liberty*, which was endorsed by several organizations across the political spectrum including the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, Right on Crime, and the American Center for Law and Justice.¹⁸

In 2009, Eddie Leroy Anderson of Idaho was camping with his son on federal lands.¹⁹ While there, they looked for arrowheads but did not find any. A federal agent somehow found out that they had tried to find arrowheads and had them criminally charged with *attempted* violation of a law against stealing antiquities. Facing felony convictions punishable by two years in prison, the Andersons plead guilty to misdemeanors, did a year of probation, and paid a \$1,500 fine each.²⁰

In 2003, the Court of Appeals for the Eleventh Circuit upheld the conviction of Abbie Schoenwetter for violating the Lacey Act, which makes it a crime to violate the laws of other nations when importing fish and wildlife.²¹ Schoenwetter imported lobsters into the United States in apparent violation of size and packaging requirements set by a Honduran regulation.²² It was difficult for the American courts to figure out just what the Honduran law required and whether it was valid. The Honduran government provided conflicting opinions on it, although it eventually decided that the regulation was invalid. The Eleventh Circuit, however, disregarded this final judgment of Honduran officials. The court said that if it had to figure out which interpretation of Honduran law was correct, or if it had to defer to the final judgment of the Honduran officials rather than their first assessment, it “would be caught up in the endless task of redetermining foreign law.” That Schoenwetter’s liberty depended on the court getting the right answer didn’t matter to the Eleventh Circuit. Accordingly, it upheld Schoenwetter’s sentence of 97 months in prison.²³

Perhaps most famously, race car legend Bobby Unser was convicted of abandoning a snowmobile in a protected wilderness area.²⁴ He and a friend were caught in a blizzard in the woods and were forced to abandon the snowmobile to seek shelter. They barely survived two days and two nights trapped in the blizzard, fighting hypothermia. When they were finally saved, they went to the authorities for help to recover the lost snowmobile, but rather than help them find it, the U.S. Forest

¹⁷ *Id.*
¹⁸ *USA vs You: The Flood of Criminal Laws Threatening Your Liberty*, The Heritage Foundation, <http://static.heritage.org/2013/pdf/USAvsYOU.pdf>
¹⁹ Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, Wall Street Journal, July 23, 2011, <https://www.wsj.com/articles/SB10001424052748703749504576172714184601654>.

²⁰ *Id.*
²¹ *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003), as amended (May 29, 2003).

²² *Id.*
²³ *Id.*
²⁴ Conn Carroll, *Bobby Unser vs the Feds*, Daily Signal, Mar. 14, 2011, <https://www.dailysignal.com/2011/03/14/bobby-unser-vs-the-feds/>.

Service had them prosecuted.²⁵

It used to be the case that the danger of being prosecuted for violating an arcane *malum prohibitum* crime was lessened by the requirement of what lawyers call *mens rea*.²⁶ *Mens rea*, Latin for “guilty mind,” is the intent element of a crime. For example, to be guilty of first-degree murder, you must premeditate, and to be guilty of battery, you must intend to touch your victim. The intent element of a crime is an ancient requirement of the criminal law because the criminal law is meant to punish morally blameworthy conduct, and we recognize that accidents are not morally blameworthy.²⁷ They may, of course, lead to civil liability—even an accidental injury entitles the victim to compensation—but they have not historically led to criminal liability. In his characteristically vivid style, Justice Robert Jackson put the point this way:

“A relation between some mental element and punishment for a harmful act is almost as instinctive as the child’s familiar exculpatory ‘But I didn’t mean to,’ and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.”²⁸

Justice Oliver Wendell Holmes, Jr., put it even more simply: “even a dog distinguishes between being stumbled over and being kicked.”²⁹ Unfortunately, America’s criminal law often doesn’t make that distinction.

With the rise of *malum prohibitum* offenses, came the fall of *mens rea*. Many of these thousands of crimes have no *mens rea* element of any kind, so you can be guilty of violating them even though you don’t know that these laws exist and even if you don’t intend to break them.³⁰ The Swiss cheese crime is, again, a good example. It has no intent element, so even if you don’t know that it’s a crime to sell Swiss cheese that lacks “holes or eyes developed throughout,”³¹ and even if you don’t know that your Swiss cheese lacks such holes, you can still be prosecuted. The case of Bobby Unser is another good example. He and his friend did not intend to abandon their snowmobile on federal lands. They intended, in the moment, only to save their lives, and they intended, later, to retrieve it. But their intent did not matter.

Crimes without *mens rea* requirements are called strict liability crimes. These crimes have existed in the past but, to quote legal theorist Lon Fuller, they have “never achieved respectability in

²⁵ Fields & Emshwiller, *supra* note 19.

²⁶ See generally, John G. Malcolm, *Morally Innocent, Legally Guilty, The Case for Mens Rea Reform*, 18 *Federalist Soc’y Rev.*, (Sept. 2017), <https://fedsoc.org/fedsoc-review/morally-innocent-legally-guilty-the-case-for-mens-rea-reform>.

²⁷ Francis Bowes Sayre, *Mens Rea*, 45 *Harv. L. Rev.* 974 (1932).

²⁸ *Morrisette v. United States*, 342 U.S. 246, 250 (1952).

²⁹ Oliver Wendell Holmes, Jr., *The Common Law* 3 (1881).

³⁰ See Zack Smith and Nathan Pysno, *Without Intent Revisited: Assessing the Intent Requirement in Federal Criminal Law 10 Years Later*, Heritage Found. Special Rep., (Dec., 2021), <https://www.heritage.org/without-intent-revisited>.

³¹ 21 C.F.R. § 133195(a).

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our law.”³² Even so, they have proliferated.³³ Sometimes they happen simply because Congress forgets to add a *mens rea* requirement into a statute. Sometimes they happen because Congress wants to make it easy for people to be imprisoned. This is often the case with “social welfare” crimes—crimes that forbid conduct that is not immoral but that contravenes policy preferences. As President Barack Obama explained, putting *mens rea* elements in social welfare crimes “could undermine public safety and harm progressive goals.”³⁴

With due respect to former President Obama, his argument perverts the criminal law. It reduces it from a serious guardian against terrible behavior into a petty tool of policy making. But what President Obama seems to have forgotten is that in either case, the outcome remains the same: someone is going to prison. If the criminal law is limited to intentional bad acts, then that person probably deserves to go to prison. But if the criminal law extends to accidental violations of arcane policy rules, the person probably doesn’t. Worse, Obama’s argument implies that individual liberty can and should be taken away to advance policy preferences. Those conclusions do not sit well within America’s legal tradition. The criminal law was not meant to be a tool of policy engineering. It should be used only on morally blameworthy behaviors, and intent is a central part of moral blameworthiness.

So where do we go from here? For years now, my colleagues and I have asked the federal government to count, review, and cut the excess federal crimes in both the U.S. Code and in the CFR.³⁵ Likewise, we have asked the government to adopt a default *mens rea* law that would apply some default intent requirement to any federal crime that lacks one.³⁶ My colleagues, former Attorney General Ed Meese and Paul Larkin, have also asked the courts or Congress to create a limited mistake-of-law defense.³⁷ Because the maxim “ignorance of the law is no defense” no longer makes sense in America, people charged with certain *malum prohibitum* crimes should be able to raise ignorance of the law as a defense.³⁸ All of these are good options, and we hope that Congress considers them. Thank you for giving me the opportunity to testify today.

³² Fuller, *supra* note 12 at 77 (“Strict criminal liability has never achieved respectability in our law.”); *see also* Morissette, 342 U.S. at 250 (1952) (Jackson, J.) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”); H.L.A. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, in H.L.A. Hart, *Punishment and Responsibility: Essays in Philosophy of Law* 136, 152 (1968) (“strict liability is odious”).

³³ *See* Malcolm, *supra* note 26; Smith & Pysno, *supra* note 29.

³⁴ Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811, 829 n. 89 (2017).

³⁵ Canaparo, *et al.*, *supra* note 13; John S. Baker, Jr., *Corporations: Measuring the Explosive Growth of Federal Crime Legislation*, 5 Engage 23 (2004); John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes* (Heritage Found., Legal Memo. No. 26, June 16, 2008); Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Educ. and the Workplace, 107th Cong. (2002) (testimony of Paul Rosenzweig, Senior Legal Research Fellow, Center for Legal and Judicial Studies, The Heritage Foundation).

³⁶ *See, e.g.*, Malcolm, *supra* note 26; Smith & Pysno, *supra* note 29; *see also* GianCarlo Canaparo, Paul Larkin, & John Malcolm, *Four Ways The Executive Branch Can Advance Mens Rea Reform*, Heritage Found. Legal Memo. No. 258, Jan. 28, 2020, <https://www.heritage.org/courts/report/four-ways-the-executive-branch-can-advance-mens-rea-reform> (providing options to the executive branch).

³⁷ Paul J. Larkin & Edwin Meese, *Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. & Criminology 725 (2012). Their proposal is cabined in many ways—for example, it would only be available against social welfare crimes—so that the defense does not become a *de facto* get-out-of-jail free card.

³⁸ The Supreme Court has already created a small exception to the rule. In *Lambert v. California*, 355 U.S. 225 (1957), the Court held that ignorance of the law was an excuse when there was no probability that the defendant could have knowledge of the law.

Mr. BIGGS. Thank you.

The gentleman's time has expired.

The Chair recognized Professor Turley for your five minutes.

STATEMENT OF JONATHAN TURKEY

Mr. TURLEY. Thank you, Chair Briggs, Ranking Member McBeth, Chair Jordan, and the Ranking Member Raskin for the pleasure of and honor of speaking to you today about criminalization of Federal law.

It was exactly 27 years ago, on May 7, 1998, that I appeared in this room to testify on overcriminalization of Federal law. I note this for two reasons: First, my birthday was just yesterday and I didn't think I could feel any older then, so I thank you for making me feel very, very old. The second is, too, it is something of a marking point, a navigational beacon on how little success we have had over 27 years. We are facing the same crisis of overcriminalization.

There are an estimated over 5,000 Federal crimes, and hundreds of thousands of regulatory crimes. This would have been unimaginable for the framers. After all, in the Constitution there are only three crimes mentioned: Treason, piracy, and counterfeiting. When Congress got to the point of actually creating a criminal code they came up with 23. They seemed to think that was sufficient.

It would be truly otherworldly for them to know what happened to the Federal Criminal Code, particularly because they believed that police powers largely rested with the States.

The danger is that it erases the line between criminal and civil conduct. That danger is that criminal law not just is meant to create a stigma because it is supposed to reflect an intent of harmful or even evil intent, but it also creates all types of costs for our legal system. The framers talked about that. Madison talked about it in the *Federalist* 62.

What they said is that you can't make criminal laws where people or citizens just have to guess what is criminal. It has to be the brightest of bright line rules.

Instead, we have become a Nation of mattress tag felons where everything that you do can also be treated as a felony.

Now, while we say ignorance is no excuse, the problem is that Congress has created a system where you have to be ignorant of the crimes because nobody, including Congress, knows what the crimes are. So, it is hardly surprising that the citizens do not.

One out of every 47 adults are now reportedly under some form of correctional supervision. That is also a cost. The proliferation of crimes is moving a huge percentage of citizens into the criminal justice system.

It also allows prosecutors to overcharge, also to coerce by plea bargain. Citizens are faced with near bankruptcy, if not direct bankruptcy, in fighting a criminal case.

The Supreme Court has tried its best to try to reinforce the narrow meaning of crimes. As Oliver Wendell Holmes said, "If my fellow citizens want to go to Hell, I will help them. It is my job." The point is, as was raised in a couple of cases by the Justices, Congress is allowed to do stupid things. Congress isn't sending anyone to Hell, it has created Hell for the entire citizenship of this country

because no one knows what is a crime anymore, and anyone can be charged as a felon. That is wrong.

Now, this is a problem of Congress' making, and Congress will have to solve it. I have suggested some ideas in my testimony including, as was stated earlier, an effort to get agencies, preferably through an Executive Order, to either name all of the crimes under their jurisdiction or explain why they cannot do so.

I have also encouraged the creation of a Committee with a counterpart in the executive branch that can act more swiftly to reduce these.

I actually believe there is one reason to be optimistic here. With the advantage of AI, and my colleague has used it brilliantly with his algorithm, it may be possible today, when it was not possible 27 years ago when I spoke to this Committee last on this subject, it may be possible for us to actually do something about this, using AI and properly written algorithms to identify the number of crimes and to do something about them.

I hope that we are all up to that task because this is, perhaps, the darkest legacy of the U.S. Congress. It has failed the American people. It has used criminalization as a way of putting an exclamation point on their issues. That has to end.

I hope some of my suggestions may help. I have the honor again of speaking with you today. I would be happy to answer any questions.

[The prepared statement of Mr. Turley follows:]

**Written Statement
Jonathan Turley**

**Shapiro Professor of Public Interest Law
The George Washington University Law School**

**“Criminalizing America: The Growth of Federal Offenses and Regulatory
Overreach”**

**Subcommittee on Crime and Federal Government Surveillance
Committee on the Judiciary
United States House of Representatives**

May 7, 2025

Chairman Biggs, ranking member McBath, members of the Subcommittee, my name is Jonathan Turley. I am a law professor at George Washington University, where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law.¹ It is an honor to appear before you today to discuss the criminalization of America.

Exactly twenty-seven years ago, on May 7, 1998, I appeared in this very committee room before the House Judiciary Committee to discuss the rapid criminalization of federal laws, particularly in the form of administrative crimes.² I testified on the exponential growth of federal crimes in every aspect of American life. Regrettably, that over-criminalization has continued largely unabated with chilling implications for our society.

For the purposes of background, I come to this subject as someone who has been both an academic and a criminal defense attorney in this area for over three decades. Since my testimony over a quarter of a century ago, I have seen progress in many areas in which I have testified. However, the criminalization of administrative and civil violations continues to be a habit that Congress simply cannot shake.

There are an estimated 5,000 federal crimes and hundreds of thousands of regulatory crimes.³ These federal crimes overlay state crimes, which have also expanded exponentially. This would have been unimaginable for our Founders, who viewed police powers as resting primarily with the states. There are only three specific crimes mentioned in the Constitution: treason, piracy, and counterfeiting. Federal criminal and regulatory authority remained very limited into the early twentieth century. The federal

¹ I appear today on my own behalf, and my views do not reflect those of my law school or the media organizations that feature my legal analysis.

² United States House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law on "Administrative Crimes and Quasi Crimes," May 7, 1998 (testimony of Professor Jonathan Turley).

³ See John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 (1991).

criminalization of our society has occurred with the increasing federal incursion into state police powers and the effective delegation of creating new crimes to federal agencies by passing catch-all criminal provisions.

The line between criminal and civil conduct is one of the most important elements of our legal system and traditions. Sir William Blackstone described crimes as denoting offences against public law that “are of a deeper and more atrocious dye.” Crimes were largely reserved for those acts that most threatened the public order and safety. The very allegation of criminal conduct brought a stigma of an act committed with criminal intent, reflecting a malicious or even evil character of the actor.⁴ Today, Congress has allowed the criminalization of conduct in the United States to a chilling degree. As law professor John Baker stated, “There is no one in the United States over the age of 18 who cannot be indicted for some federal crime.”⁵

With these layers of criminal provisions, the focus of criminal conduct has moved from its narrowly defined origins of intent, or *mens rea*, to any act deemed worthy by Congress or agencies to warrant criminal rather than civil redress. These include criminal negligence provisions that I have criticized for decades as erasing important lines between criminal and civil conduct. There are also criminal strict liability violations that do not require the showing of scienter or intent, but only the commission of the prescribed act.

The Framers recognized the harm that comes from the over-criminalization of conduct. James Madison wrote in Federalist Paper 62 that “It will be of little avail to the people that laws are made by men of their own choice if the laws be . . . so incoherent that they cannot be understood . . . [so] that no man who knows what the law is today, can guess what it will be like tomorrow.”⁶ That is precisely what we have allowed to occur. Today, citizens have no idea what is considered a criminal act and are often surprised by minor violations resulting in criminal charges. While we continue to mouth the adage that “ignorance of the law is no excuse,” we have let our criminal laws become an unintelligible morass where no one can fully understand what is now criminal conduct. Congress often does not even define the scope of a crime and defers to agencies to do so, leaving key details to a subterranean administrative process that few citizens understand or follow. Since Congress has no clue about the full range of criminal provisions that it has allowed to be established, it is hardly surprising that citizens are even less cognizant of the scope of federal criminal provisions, let alone the combination of federal and state systems. Indeed, even the agencies have a hard time keeping track of this perpetual criminalization machine. In *Caring Hearts Personal Home Services, Inc. v. Burwell*, then 10th Circuit Judge (now Justice) Neil Gorsuch wrote about how even the Centers for Medicare & Medicaid Services became confused by this labyrinth of criminal provisions:

⁴ 2 HENRY DE BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND 384 (Samuel E. Thorne trans. & ed., Harvard Univ. Press 1968) (c. 1300)

⁵ William N. Clark & Artem M. Joukov, The Criminalization of America, 76 Ala. Law. 224, 224 (2015) (quoted and cited by *Gamble v. United States*, 139 S. Ct. 1960, 2008 n.98 (2019) (Gorsuch, J., dissenting)).

⁶ The Federalist No. 62, at 323-24 (James Madison) (George W. Carey & James McClellan eds., 2001).

“Executive agencies today are permitted not only to enforce legislation but to revise and reshape it through the exercise of so-called ‘delegated’ legislative authority. The number of formal rules these agencies have issued thanks to their delegated legislative authority has grown so exuberantly it’s hard to keep up. The Code of Federal Regulations now clocks in at over 175,000 pages. And no one seems sure how many more hundreds of thousands (or maybe millions) of pages of less formal or ‘sub-regulatory’ policy manuals, directives, and the like might be found floating around these days.

For some, all this delegated legislative activity by the executive branch raises interesting questions about the separation of powers. For others, it raises troubling questions about due process and fair notice - questions like whether and how people can be fairly expected to keep pace with and conform their conduct to all this churning and changing ‘law.’

But what if the problem is even worse than that? What happens if we reach the point where even these legislating agencies don’t know what their own “law” is?

...
This case has taken us to a strange world where the government itself - the very ‘expert’ agency responsible for promulgating the ‘law’ no less - seems unable to keep pace with its own frenetic lawmaking. A world Madison worried about long ago, a world in which the laws are ‘so voluminous they cannot be read’ and constitutional norms of due process, fair notice, and even the separation of powers seem very much at stake.”⁷

Justice Gorsuch is not alone in raising the alarm over this criminalization trend. The Supreme Court has repeatedly returned to the over-criminalization of our society, with both the massive increase in the number of crimes and the length of sentences. In *Morrisette v. United States*, Supreme Court Justice Robert Jackson wrote: “The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law ... to choose between good and evil ... and took deep and early root on American soil.”⁸

In 1998, a Task Force of the American Bar Association concluded that more than 40% of the federal criminal code had been enacted since 1970 alone.⁹ Since that time, the criminal provisions have exploded in size. In *Sykes v. United States*, Justice Antonin Scalia observed, “It should be no surprise that as the volume increases, so do the number of imprecise laws. . . . Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem” without dealing “with the nitty-gritty.”¹⁰

The most direct cost of over-criminalization is moving an ever-expanding number of citizens into the criminal justice system. Today, one out of every 47 adults is reportedly under “some form of correctional supervision.” It also produces other ills within the

⁷ *Caring Hearts Pers. Home Servs., Inc. v. Burwell*, 824 F.3d 968, 2016 WL 3064870, at *1 (10th Cir. 2016).

⁸ *Morrisette v. United States* 342 U.S. 246, 251-252. (1952)

⁹ Am. Bar Ass’n Task Force on Federalization of Criminal Law, *the Federalization of Crime* (1998).

¹⁰ *Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

criminal justice system. It allows prosecutors to coerce citizens into plea agreements to avoid the ruinous costs of a criminal defense. It allows the government to overcharge for petty or minor offenses and seek excessive punishment. While our criminal system recognizes the need for prosecutorial discretion, it is Congress that creates the framework for such discretion. By criminalizing a huge swath of human conduct, we have allowed prosecutors discretion to not simply decide how to handle traditional criminal allegations, but whether to convert unintentional or negligent conduct into crimes.¹¹

The Court has pushed back on these trends in cases like *Bond v. United States*¹² and *Yates v. United States*¹³ where the justices rejected excessive charges. In *Bond*, “an amateur attempt by a jilted wife to injure her husband’s lover” was hit with a charge under the Chemical Weapons Convention Implementation Act of 1998. In *Yates*, a commercial fisherman caught an undersized red grouper in the Gulf of Mexico and, aware that you cannot catch undersized fish, ordered a crew member to toss the suspect catch into the sea. For that offense, he was charged under the Sarbanes-Oxley Act of 2002. There is, however, a limit to what courts can do when Congress tosses aside its responsibilities toward citizens. As Justice Oliver Wendell Holmes explained “if my fellow citizens want to go to Hell I will help them. It’s my job.”¹⁴ In dissenting from the majority opinion written by Justice Ruth Bader Ginsburg in *Yates*, Justice Kagan chastised the majority for taking such corrective action, noting that such objections from justices should be confined to “lectures, . . . law review articles, and . . . dicta.”

Congress created this problem, and Congress will have to correct it. However, it has allowed this problem to become so massive that few have an appetite to try to take a bite out of it. Past efforts have failed to create meaningful reductions. In May 2013, the House of Representatives Committee on the Judiciary created an Over-Criminalization Task Force to consider the problem of over-criminalization.¹⁵ Despite some fine work and testimony, there was little demonstrable progress in reducing the almost incomprehensible level of criminal provisions created by Congress. The most chilling fact about over-criminalization is that we still do not have a precise number of crimes enforced at the federal level.

The criminalization of America is one of the most destructive failures of the legislative branch. It is a trend that is fueled by the worst motivations of politicians to amplify the seriousness of a given cause by making violations criminal acts. Absent a criminal dimension, federal laws were somehow viewed as lesser concerns for public policy. The result is that, rather than making criminal provisions the exception for legislation, it became the rule. This means that an ever-larger percentage of our

¹¹ BRIAN W. WALSH & TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 29 (2010).

¹² 572 U.S. 844 (2014).

¹³ 574 U.S. 528 (2015).

¹⁴ 1 HOLMES-LASKI LETTERS 249 (M. Howe ed. 1953).

¹⁵ See *Defining the Problem and Scope of Over-Criminalization and Over-Federalization: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong. 65-66 (2013).

population is being pulled into the criminal justice system and often left with lasting and life-changing criminal records.¹⁶

The solution is, and always has been, clear. We need to return to bright-line rules emphasizing mens rea, or criminal intent, as the basis for crimes. That would likely result in most federal crimes being redefined as civil violations. Once again, the Supreme Court has tried on the margins to coax laws back to core scienter standards, including pushing back on criminal strict liability cases. For example, in *Morrisette v. United States*,¹⁷ a scrap metal dealer found some discarded bomb casings on an Air Force bombing range and sold them at a junk market. He was prosecuted for “knowingly” converting government property. Morrisette insisted, while he did take the casings, he did not know that they had any value. The Court ruled that “knowing” applies to all the elements of the offense and rejected the strict liability charge.

Likewise, in *Staples v. United States*, the Supreme Court looked at the strict liability provisions of the National Firearms Act and overturned the conviction.¹⁸ By not registering his weapon, the defendant was convicted of violating a provision making it unlawful “for any person to possess a machinegun that [was] not properly registered with the Federal Government.” The statute conspicuously omitted any mens rea requirement. Prosecutors should be required to prove that he “knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun.” Justice Clarence Thomas agreed in the 7-2 majority opinion and laid out the factors that the Court would impose in such cases to limit criminal strict liability in cases of the “public welfare.”¹⁹ Those factors include that the statute involves relatively new crimes of inherently dangerous activities and exposes defendants to relatively low penalties or stigmas.

Recently, the Court continued its narrowing of criminal elements in *Thompson v. United States*, where a former Chicago alderman was convicted of making false statements under 18 U.S.C. § 1014 to the Federal Deposit Insurance Corporation. The Court unanimously overruled the Seventh Circuit and held that false statements under the provision do not include “misleading” statements. They must actually be false. While not directly on point, it shows how the Court tried to maintain bright-line interpretations regarding criminal conduct and has reinforced doctrines like lenity. The Supreme Court has repeatedly relied on the doctrine of lenity to guarantee that “no citizen should be held accountable [to] a statute whose commands are uncertain, or subjected to punishment that is not clearly proscribed.”²⁰ Without Congress changing the course of our criminalization

¹⁶ Gorsuch, Neil., Nitze, Janic. Over Ruled: The Human Toll of Too Much Law. United States: HarperCollins, 2024.

¹⁷ 320 U.S. 277 (1943).

¹⁸ *Staples v. United States*, 511 U.S. 600 (1994).

¹⁹ This term was coined almost 100 years ago by Professor Francis B. Sayre in considering the rise of strict-liability offenses. See generally Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933).

²⁰ *United States v. Santos*, 533 U.S. 507, 514 (2008).

trend, however, those decisions are about as effective as moving around the deck chairs on the Titanic.

That brings us back to the main challenge. It is the same challenge that Congress has faced for decades. It must first determine how many criminal provisions currently exist. Congress should ask President Donald Trump to issue an executive order requiring every agency to assemble a list of all criminal offenses and their elements. Once the universe of criminal provisions is established, we need to explore new technology, including AI, to sort out these provisions for possible decriminalization. Experts can help design an algorithm to use for these purposes to identify provisions that lack criminal intent and conduct worthy of criminalization. The benefit of new technology could be the critical difference from past efforts. However, Congress must also be committed to achieving these goals. To that end, I recommend the establishment of parallel bodies in the legislative and executive branches. Congress should create a Special Committee for the Decriminalization of Federal Laws and Regulations. The Trump Administration should create a counterpart office or task force to expedite the work of the Committee. This work could serve as a model for the states to address their own runaway criminalization crisis.

I would also recommend a new House rule for future sessions of Congress that requires any new criminal provision to meet narrowly stated criteria and receive the approval of multiple committees, including the Judiciary Committee. The fact is that the criminalization of American life is due to a perverse political incentive. With so many matters now subject to the criminal code, legislators feel that their insular public policy issue will not be seen as serious unless it is also a matter for criminal prosecution. Criminal provisions are treated as putting an exclamation point on policies. It is self-authenticating that a given issue is so important to the legislator that it is a matter for prosecution and not simply civil enforcement. To paraphrase James Madison, Congress must first show that it can control the criminal code and then show it can control itself.

It is hard to imagine returning to this Committee to testify again on over-criminalization exactly 27 years after my prior testimony. However, it is even harder to imagine the exponential growth in these criminal offenses over those roughly three decades. Despite that history, I remain optimistic that we can still reverse this trend. That optimism is due to the development of new technologies and the continued bipartisan commitment to decriminalizing our laws.

Once again, thank you for the honor of appearing before you to discuss these important issues. I am happy to answer any questions from the Subcommittee.

Jonathan Turley
J.B. & Maurice C. Shapiro Chair of Public Interest Law
George Washington University

Mr. BIGGS. Thank you, Professor Turley. We are thrilled that you would spend the birthday eve with us, as you did so many years ago.

Now, Mr. Tolman, you are recognized for five minutes.

STATEMENT OF BRETT TOLMAN

Mr. TOLMAN. Thank you, Chairm Biggs, Ranking Member McBath, Ranking Member Raskin, and the Members of the Subcommittee. Thank you for having me.

I spent 25-plus years working in the Federal criminal justice system, and over 15 years warning that the justice system is a powder keg waiting to blow.

Let me get straight to the point. Overcriminalization is a real and growing threat to our justice system, to the rule of law, and to individual freedom in this country. Overcriminalization happens when the Government creates too many laws, laws most Americans don't know even exist.

We don't know, as many have stated, we don't know the number. I am encouraged by Professor Turley's comments that we may eventually know that number.

It is not justice as it currently stands, it is chaos disguised as law.

Let me give you an example, one that I learned on Instagram of Charles and Heather Maude. When I saw their story, I reached out and volunteered to represent them pro bono.

They are a South Dakota ranching family. Under the Biden DOJ they were charged with Federal crimes over a land dispute involving a fence on property that had been in their family for over 100 years. They were threatened not only with prosecution, but they were indicted and then told that they should seek alternatives to raising their two minor children Lyle and Kennedy.

I was honored to fight on their behalf. Last week we announced the dismissal of the criminal case against them.

It is the abusive prosecution that we see all too often in our justice system. With the attorney—help of the Attorney General Bondi and the Secretary of the Agriculture Brooke Rollins these charges were dropped for this family. It should not have ever happened. It shouldn't take those at the highest levels having to review what is being done by those with this power for ultimately justice to be applied.

This isn't how a free Nation should operate. We are punishing people who make mistakes, not criminals, not violent offenders, just people who happen to run afoul, often of laws that they don't understand or they don't know.

We incarcerate indiscriminately. It is not making us safer. Nearly half of Federal inmates are nonviolent drug offenders. Our prisons are beyond capacity. To add fuel to the fire, hundreds of thousands of Americans remain on some kind of community supervision for many years after their release, far beyond what studies have shown reduce recidivism.

It is estimated \$500 million and burdens on parole officers' valuable time are required now to monitor nonviolent offenders. That is why the Safer Supervision Act must be reintroduced to stream-

line and simplify safer—or Federal supervision. It is just one tool to address overcriminalization.

In addition, prosecutors have too much discretion, too little restraint, and no, virtually no oversight.

I have been a prosecutor. I know how important those tools are to catch true criminals. Without constitutional checks like *mens rea*, the intent to commit a crime, we risk punishing innocent Americans for actions they didn't even know were illegal.

Adding to their unsettling perception of unbridled power is the use of civil asset forfeiture, abusive and unconstitutional way to take citizens' property without ever securing a criminal conviction.

That is why I support Chair Biggs' *Mens Rea* Reform Act and the FAIR Act, which restores the basic principle that intent matters.

The administrative State is another part of the problem. Unelected bureaucrats are creating tens of thousands of new rules and regulatory crimes every year: Seventy-five to one compared to Congress. Most of those rules are made by people whom you didn't vote for and cannot hold accountable.

That is why I also support Representative Chip Roy's Count the Crimes to Cut Act. It is simple. We need to know what crimes are on the books and who is enforcing them. Let's audit this system. It is commonsense and it is required if we want a constitutional rule of law in our justice system.

We cannot ignore the role that some judges are playing. When judges pick winners and losers based on politics, not law, they erode the trust in the entire system. Recent rulings on deportation, election integrity, and sanctuary cities are just the latest examples. This issue is bipartisan. Democrats have also tried to pack courts when decisions don't go their way.

In short, overcriminalization fuels lawfare, undermines our Constitution, and strips Americans of their rights and dignity, and leads to over-incarceration, abuse of prosecutorial discretion, runaway regulation, and judicial activism.

[The prepared statement of Mr. Tolman follows:]



**Statement of Brett Tolman, former U.S. Attorney and
Executive Director of Right On Crime**

**U.S. House Judiciary Committee
Subcommittee on Crime and Federal Government Surveillance
“Criminalizing America: The Growth of Federal Offenses and Regulatory Overreach”**

May 7, 2025

Chairman Biggs, Ranking Member McBath, and distinguished members of the Subcommittee: thank you for inviting me to participate in today’s hearing on overcriminalization.

My name is Brett Tolman, and I am the Executive Director of Right On Crime, a national criminal justice campaign of the Texas Public Policy Foundation, where we focus on conservative, data-driven solutions to reduce crime, restore victims, reform offenders, and lower taxpayer costs. I am also a former United States Attorney for the District of Utah, appointed by George W. Bush in 2006 and a former chief counsel for crime and terrorism for the U.S. Senate Judiciary Committee.

Overcriminalization occurs when the government creates too many laws. A nation based on the rule of law should not be ruled solely *by* laws. Overcriminalization inverts this and fuels systemic abuse and degradation of the rule of law.

The total number of federal laws is largely unknown but is estimated to be over 300,000.¹ And it keeps growing. As of 2018, the U.S. Code encompassed 54 volumes and approximately 60,000 pages.² Over the last decade, Congress has adopted around 300 new laws each session.³

Federal agencies have been busy, too. When the Federal Register began in 1936, it was 16 pages long. It now adds more than 70,000 new pages each year.⁴ The 2024 *Federal Register* closed out at 106,109 pages, the highest count ever.⁵ Given this breadth, it should come as no surprise that the average American commits, on average, three felonies a day.⁶

How has this become the standard of our criminal justice system?

Overcriminalization goes against the basic tenets of living in the freest nation in the world: consistency and fair notice in the application of the law. As we punish and incarcerate Americans who may have made a mistake where they did not victimize, many will come out of the system a better criminal and likely commit more crimes.

¹ https://www.heritage.org/crime-and-justice/report/count-the-code-quantifying-federalization-criminal-statutes/#_ftnref17.

² <https://www.gpo.gov/how-to-work-with-us/agency/congressionally-mandated-reports>.

³ <https://www.govtrack.us/congress/bills/statistics>.

⁴ https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2024-08/cfr_pages_by_calendar_year.pdf.

⁵ <https://cei.org/publication/10kc-2025-numbers-of-rules/>.

⁶ <https://www.wsj.com/articles/SB10001424052748704471504574438900830760842>.

Right on CRIME

Imposing a criminal penalty should be the heaviest artillery at our society's disposal. Incarceration was once largely reserved for addressing obvious morally culpable behavior. Today, we punish inconsistently and incarcerate indiscriminately with no impact on public safety.

Take, for example, the recent case against Charles and Heather Maude. Under the Biden DOJ, criminal charges were brought against the Maudes, a South Dakota family who has a small cattle and hog operation. This family endured a senseless politically motivated prosecution waged by the Biden Administration over 25 acres of federal land.

The Maudes were not criminals. They fenced in land that had been part of their ranch for over 100 years. But, empowered by pointless laws and unfettered discretion, the minor land dispute devolved into an overzealous criminal prosecution. No criminal penalty should have even existed for a land dispute. And the Maudes should never have been charged.

Fortunately, under the Trump Administration, overcriminalization and senseless prosecutions will not stand. Thanks to Attorney General Pam Bondi and Agriculture Secretary Brooke Rollins, the criminal charges against Charles and Heather Maude were dismissed last week.⁷

Overcriminalization is an existential threat to our criminal justice system and the rule of law. Rogue prosecutors ignore certain crimes and pick and choose who are criminals. Politically biased judges find creative and questionable ways to legitimize an outcome. And the media creates controversy, ignoring the routine banality of government work and instead scours for government gossip.

Disregard for the rule of law and increased overcriminalization has led to the overincarceration of non-violent Americans; the abuse of prosecutorial discretion; the reckless power of the administrative state; and lawfare facilitated by political judges.

Overcriminalization & Overincarceration

The United States is a world leader in incarceration because of overcriminalization. Too many individuals are ensnared by the criminal justice system and subjected to overly harsh sentences, even though such imprisonment does not necessarily enhance public safety. Indeed, almost half of federal inmates are nonviolent drug offenders.⁸

Our federal prisons have been operating for years at over 100% capacity.⁹ And those who emerge from prison then face a different kind of overcriminalization in the form of collateral

⁷ <https://www.usda.gov/about-usda/news/press-releases/2025/04/28/trump-administration-announces-us-government-has-dropped-criminal-charges-against-small>.

⁸ https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

⁹ <https://www.forbes.com/sites/walterpavlo/2022/02/07/statistics-show-federal-bureau-of-prisons-unable-to-implement-key-policies-during-crisis/>; see also <https://www.prisonpolicy.org/blog/2020/12/21/overcrowding/#:~:text=Before%20the%20pandemic%2C%20nine%20state,into%20prisons%20across%20the%20country>.



consequences: loss of access to jobs, housing, voting rights, second amendment rights, licenses, and public benefits.

To add fuel to the fire, hundreds of thousands of Americans remain on some kind of community supervision for years after their release. For the low-level offenders, supervision is often arbitrary and an unnecessary burden to parole officers who could better spend their time restricting former violent offenders with an eye on public safety.

Nationwide, it is estimated that 1 out of every 47 adults is under some form of correctional supervision.¹⁰ And some estimates report that the federal supervised release system alone is a \$500 million drain on the taxpayer every year.¹¹ The tradeoff of such an investment is that supervised release will keep our communities safe. But with a recidivism rate hovering around 50%, it is willful ignorance to assert that the current supervised release system is working. And it is not serving taxpayers well.

Lawmakers on both sides of the aisle recognize the urgency to streamline the federal supervision system. The *Safer Supervision Act*, led by Representative Wesley Hunt in the House with bipartisan support in the House and Senate, ensures that supervision is more effective, fair, and tailored to individual needs.¹² Current supervision policies fuel overcriminalization, empowering judges to apply a one-size-fits-all approach. This often keeps people under supervision for too long or fails to provide the right level of support.¹³ That is why the *Safer Supervision Act* is a great tool to address overcriminalization.

Overcriminalization & the Abuse of Prosecutorial Discretion

The breadth of criminal penalties alone is problematic. But in the heightened political era we live in, prosecutorial discretion is the tip of the spear.

Prosecutors – state and federal alike – are granted the awesome power of discretion. They choose who to charge, what to charge, and what sentence to recommend. This discretion is a powerful tool that is often wielded responsibly. However, as we have witnessed in the last few years, too many prosecutors are abusing their discretion in targeted and politicized ways.

On one hand, prosecutors must have tools available to convict criminals. I was the U.S. Attorney for Utah, prosecuting violent criminals including the kidnapper of Elizabeth Smart. I know firsthand that having the right tools at your disposal can lead to appropriately tough sentences. But on the other hand, those tools must be limited by constitutional principles and thoughtful restraints.

¹⁰ This includes the estimated one million Americans behind bars and those on federal probation or parole.

¹¹ https://www.realclearpolicy.com/articles/2024/03/27/congress_must_pass_the_safer_supervision_act_1021209.html.

¹² H.R. 5005 (<https://www.congress.gov/bills/118/congress/house-bill/5005/text>); S. 2681 (<https://www.congress.gov/bills/118/congress/senate-bill/2681>).

¹³ See, generally, <https://rightoncrime.com/the-safer-supervision-act/>.

Right on CRIME

One such restraint on unbridled prosecutorial discretion is requiring the government to prove criminal intent. Put in simple mathematical terms, mens rea + actus reus = crime. If a person has the intent to commit the crime (mens rea) and performs the act to follow through on that intent (actus reus), a judge or jury can have the reasonable belief that the crime has been committed. This formula is the backbone of our criminal justice system.

Tragically, the mens rea element has increasingly been abandoned, written in an unclear way, or underutilized. The flaw with eliminating or diminishing state of mind requirements is that Americans can be convicted and even imprisoned based solely on what they do, not whether they mean to do it.

The degradation of a critical element in criminal law will break down legitimacy in prosecutions, convictions, and even convict the innocent. To restore normalcy and preserve the criminal justice system, reforms should be made to improve the consistent use of the mens rea element in federal criminal law. That's why I applaud Chairman Biggs for leading this effort with his introduction of the *Mens Rea Reform Act*, which would insert a default mens rea element where it is currently lacking.¹⁴ Mens rea improvements are frankly one of the most important reforms to overcome overcriminalization.

Overcriminalization & the Administrative State

Bureaucracy – the administrative state – is also a massive contributor to our overcriminalization crisis. As I mentioned, nobody knows how many regulatory crimes are on the books. No one agency keeps track. By modest estimates, however, administrative offenses still outnumber criminal laws passed by Congress 75-to-1.

To put a finer point on it, consider the following: in 2015, Congress adopted approximately 100 new laws. The same year, federal agencies collectively issued 3,242 final rules and published another 2,285 proposed rules.¹⁵ That's more than 5,000 in just one year.

Faceless, unelected, and unaccountable bureaucrats wield their power to the extreme. In fact, 71% of the nearly 3,000 rules issued by the Department of Health and Human Services between 2001 and 2017 were issued by lower-level officials rather than the Senate-confirmed leaders. At the Food and Drug Administration, the number was 98%.¹⁶ Thousands of activities have been deemed illegal by those who never have to justify their decisions to the voter. And when coupled with the absence of the mens rea requirement, it is plain to see how overcriminalization is particularly oppressive from regulatory offenses.

The incredible volume of regulatory crimes and unaccountability means that Americans can be ensnared and easily targeted. Do you think this can't happen to you? It has been reported that

¹⁴ H.R. 59 (<https://www.congress.gov/bills/119th-congress/house-bill/59/text>).

¹⁵ <https://regulatorystudies.columbian.gwu.edu/reg-stats>, see also <https://sep.fas.org/crs/mise/R43056.pdf>.

¹⁶ <https://pd.pacificlegal.org/HHSReport>.



Americans today are “ten times more likely” to wind up in a case before a federal agency than a court.¹⁷

Agencies must be reined in. DOGE put a spotlight on this problem. But Congress must act in kind and hold lawmakers and federal agencies accountable.

That brings us to one of the most commonsense pieces of legislation – Representative Chip Roy’s *Count the Crimes to Cut Act*.¹⁸ This bill would require the Attorney General and heads of every federal agency to produce a report of all the federal criminal statutes and regulations that have criminal penalties. For each federal criminal offense, the report would outline the elements, the penalties, the number of prosecutions brought by the DOJ in the last 15 years, and the mens rea element.

The *Count the Crimes to Cut Act* tackles the overcriminalization problem head-on by finally requiring a fulsome audit and evaluation of federal statutory and regulatory laws, something the Congressional Research Service, Department of Justice, and American Bar Association have all tried and failed to do.¹⁹ The *Count the Crimes to Cut Act* deserves bipartisan support and is a must-pass bill to address overcriminalization.

Overcriminalization & Judges

Lastly, the federal bench is a developing area where overcriminalization runs rampant.

In recent years, lower courts have abused judicial powers to exert themselves into policymaking, rather than deciding “cases and controversies” as the Constitution tasks them to do.²⁰ Federal district courts’ abuse of nationwide rulings veers outside of their constitutional lane, defies nearly two centuries of precedent, politicizes the courts and incentivizes “forum shopping” to find a sympathetic judge. This practice undermines public confidence in the federal judiciary.

This problem is exacerbated when there are hundreds of thousands of criminal laws on hand. A biased judge who prioritizes policymaking over decision-making may be enticed and even emboldened by the vastness of the criminal code to render decisions that are inconsistent with the case.

Just in the last few weeks, federal district court judges across the country have ruled that President Trump may not undergo certain actions, including deportation actions, requiring voters to prove they are citizens, and defunding sanctuary cities that violate federal law.²¹ As some have argued,

¹⁷ <https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/Testimony-Turley-2016-04-20.pdf>.

¹⁸ H.R. 8672 (<https://www.congress.gov/bills/118/congress/house-bill/8672/text>).

¹⁹ See, generally, <https://www.congress.gov/118/meeting/house/117202/witnesses/HHRG-118-JU08-Wstate-TolmanB-20240430.pdf>.

²⁰ Article III, Section 2, Clause 1.

²¹ <https://x.com/ScottJenningsKY/status/1915749864614375627>



the politically fueled litigation and forum shopping is to fulfill one outcome: stop Trump in his tracks and run out the clock on his Presidency.

This is the most recent slew of actions that are grabbing the headlines. But a similar argument could be made – and indeed *has* been made – by Democrats. It was not long ago that cries to expand the size of the Supreme Court of the United States were commonplace due to the perceived political bias of some justices.²²

This is an issue for both sides of the political aisle and should be addressed.

Article III judges are not the only ones at issue here. In fact, administrative law judges have more discretion and power to abuse the system – again fueled by overcriminalization. As I mentioned, it is increasingly commonplace that a person can be heralded into an administrative court. And odds are, if that happens, you will likely lose. Take for example the unusually strong track record at the Securities and Exchange Commission (SEC). From October 2010 – March 2015, the SEC won about 90% of its contested in-house proceedings compared to 69% of its cases brought to a federal court.²³

This hearing is not focused on judicial reform. But I raise this issue before the subcommittee today to show how overcriminalization is part of the conversation when thinking about how to restore and promote the rule of law on the bench.

Conclusion

It is a commonplace and disturbing maxim, most popularly stated by Stalin’s secret police chief: “Show me the man and I’ll show you the crime.”²⁴ But this troubling omen has been and can continue to be a reality unless and until overcriminalization issues are solved.

I mentioned several policy solutions throughout my testimony and urge this Committee to lead the effort and take them head on. Failing to do so may untether our great nation from its principles of equal justice under the law.

Justice Neil Gorsuch argued in his recent book that overcriminalization will slowly tear down the institutions created by the Bill of Rights. He wrote:

Instead of governing ourselves through our elected representatives, our laws will be made by officials who do not answer to us. Instead of having independent judges to decide our disputes, we will have ones who are forced to account to others. Instead of jealously

²² See, e.g., <https://www.forbes.com/sites/saradorn/2023/07/05/democrats-push-for-court-packing-after-controversial-supreme-court-rulings-why-the-proposal-is-likely-doomed/>, <https://www.politico.com/news/magazine/2024/07/29/biden-supreme-court-reform-00171667>, <https://www.rpc.senate.gov/policy-papers/the-democrats-plan-to-pack-the-supreme-court>, and <https://www.nbcnews.com/politics/supreme-court/democrats-introduce-bill-expand-supreme-court-9-13-justices-n1264132>.

²³ <https://texaslawreview.org/wp-content/uploads/2016/10/Mark-94-SeeAlso.pdf>.

²⁴ See, e.g., <https://oxfordeagle.com/2018/05/09/show-me-the-man-and-ill-show-you-the-crime/>.

Right on CRIME

guarding our rights to think, speak, pray, and pursue happiness, we will allow our liberties to become more and more circumscribed, all in the name of better protecting our own well-being. Instead of a rule *of* law designed to ensure fair notice, equal treatment, and room for individual flourishing, we will have rule *by* laws that can be applied and altered in ways that few can anticipate, that often favor the connected and moneyed, and that come to cover nearly every facet of our lives.²⁵

I take Justice Gorsuch's cautionary wisdom to heart, and I hope that members of this subcommittee and Congress will, too.

Thank you again for your time and I look forward to your questions.

²⁵ Gorsuch, Neil and Nitze, Janie, [Over Ruled: The Human Toll of Too Much Law](#).

Mr. BIGGS. Thank you.

We appreciate all your testimony. Now, we will begin, proceed under the five-minute rule with questions.

The Chair recognizes the gentleman from North Carolina, Mr. Knott for five minutes.

Mr. KNOTT. Thank you, Mr. Chair.

To the witnesses and those opening statements, this is an important topic, and I thank you for your scholarship and for your advocacy.

I will put just one single plug in as a former Federal prosecutor, like you, Mr. Tolman. I will say that as a society we all have benefited from good criminal law enforcement. There is a very distinct role and an important role in the legitimate use of the prosecutorial authorities and to combat real crime. As an organized crime prosecutor I saw real crime.

Unfortunately, the topic that we are diving into today delegitimizes, I would submit, the use of criminal law. It weakens it and it pollutes it in the minds of all Americans. I am thrilled that we are having this discussion.

One of the unfortunate effects at the local, the State, and the Federal level—Mr. Tolman your example speaks to this quite clearly—is it inverts the intended constitutional balance where the Government should be working for the citizens, but in reality, all citizens now, because of the abuse, are working for the Government. Whether you are an educator, a business owner, whether you are a family, a someone who is just an independent person, your ability to operate freely has been greatly hindered over the last 50 years because of the overcriminalization of what should be civil actions.

To that end, Mr. Tolman, the Administrative State, in my opinion, and sort of its all-encompassing bureaucracy has been so confusing and robust in its growth that most people don't even know how to conceptualize it, respond to it, adhere to it, challenge it if there is an enforcement action of some sort.

What are some ways that citizens can or how should we better enable citizens to protest and to fight back when the Administrative State approaches them?

Mr. TOLMAN. I couldn't agree more. It has been almost impossible.

Two things: The Attorney General now has started a commission that will be reevaluating cases that lack that appropriate intent, or that look like they might have been warfare, lawfare, or politicization of the power. In addition, Secretary Rollins, and I think other agencies should follow, has opened up a hotline for individuals to call and to identify their case and what is going on, and to be able to plead their case.

I only happened on the Maudes based on Instagram and a social media post. I would love to know those others out there of all walks of life that are being targeted unfairly by our Justice Department.

Mr. KNOTT. Mr. Turley, in your opinion what is something simple that we could do quickly to give citizens relief from these confusing patchworks of criminal enforcement? For instance, what about a reasonable care defense or something that we could afford citizens efficiently and quickly right now?

Mr. TURLEY. The challenge for Congress is this has snowballed to such a size, and it has—to mix my metaphor, it has also metastasizes throughout the system.

Mr. KNOTT. Right.

Mr. TURLEY. Most of the problems here are going to be administrative crimes where Congress creates a general crime, just leaves it to agencies to fill in the details. It is what Justice Scalia said, “the fuzzy leaves the details to be sorted out by courts, legislation.” He could add also by agencies.

I suggested a couple of things that Congress can do to start here to make changes in how it proceeds.

One is to establish a tight rule that if you create a new crime you have to not only go through multiple Committees but satisfy a narrow type of standard. That standard should include a *mens rea* requirement. That itself would at least stop the flow from here.

Then you need to focus on what has already gone through the system. I suggest a couple of steps to try: First, gauge the exact number of crimes that were are dealing with here, but also to create a shadow system, to create a Committee here and also in the Executive Office that can work in realtime together.

So, part of the problem is that the delay in dealing with this, as we saw with previous task forces, is just otherworldly.

Mr. KNOTT. Right.

Mr. TURLEY. Just the clock got burned and nothing really happened. I hope my testimony lays that out in some sense.

Mr. KNOTT. It does.

In terms of just the long term risk here when we look at potential criminalization of criminal preferences, what is the long term risk to our country if we don't get this under control?

Mr. TURLEY. Well, it is interesting that this is—we always have a certain conceit that the problems we face today are unique. This was a problem with the framers they understood. If you make everything a crime, you make everyone a criminal. Then, frankly, it loses all distinction as what is a crime and what is a civil violation.

Mr. KNOTT. Right.

Mr. TURLEY. That line between what is criminal and what is civil is key to our rule of law. It is those are the navigational beacons for citizens to define their conduct. You lose that if you turn everyone into a presumptive criminal. Then, it changes what it is to be a citizen in this country.

Basically, prosecutorial discretion becomes discretion that will turn anyone into a felony at any time—a felon at any time. That danger cannot be overstated.

Mr. BIGGS. The gentleman's time has expired.

Mr. KNOTT. Thank you. I yield back.

Mr. BIGGS. Thank you.

The Chair now recognizes the Ranking Member Ms. McBath for five minutes.

Ms. MCBATH. Thank you, Mr. Chair.

Mr. Fox, as you know, minorities and Members of marginalized communities often face barriers to accessing legal resources, including legal representation, knowledge of their rights, understanding the legal system, or the means to navigate a really complex legal

system, and making them far more vulnerable to unjust prosecution and punishment.

Can you just expound a little bit with us today and explain how overcriminalization exploits these disparities?

Mr. FOX. Yes, sure.

So, if you look at the Federal inmate population right now it looks like it is about 156,000 people. That is a lot, considering that the Federal Government actually doesn't have that much jurisdiction over crimes, mostly quintessential State laws and the lot there.

If you look, it is 35 percent Black when the population is 14 percent Black; 31 percent Hispanic when the population is 19 percent Hispanic. A lot of these laws, it is just that they want to go after people that have limited means, that have less resources to fight back. So, that way they are able to go after people that they think are easy targets.

As was mentioned earlier, a lot of the people that are in Federal prison is low level drug offenders and nonviolent drug offenders. These are not people who actually need to be incarcerated, who need to be in the system.

We spend about \$182 billion over the course of a year incarcerating 200 million—or, I am sorry, two million people. Frankly, all this does is undermine people's trust in the system. There are jurisdictions in certain cities in the country where the clearance rate for violent crimes is at or near zero. Everyone wants violent crimes solved, but when you are harassing people over things that most people agree shouldn't be crimes, you sort of undermine legitimacy. People are not willing to call the police. They are not willing to testify for the prosecution.

When there was a lot of these communities, D.C. being one of them, that are over- and under-policed at the same time, meaning that there are a lot of officers per capita, yet the crime rates are still pretty high because the arrests are for low-level offenses that people just really don't want to get involved with.

Ms. MCBATH. Thank you for that.

Mr. Tolman, how does the investigation of minor crimes reduce the effectiveness of law enforcement personnel and prevent them from addressing violent crime?

You touched on it a little bit earlier. So, if you could spend a little bit more time telling us about that?

Mr. TOLMAN. Yes. We are not using our resources for the most important crimes and the crimes in which we need to be afraid of an individual rather than just mad at an individual for what they did.

It is ironic that the one particular AUSA was referred to by Mr. Fox earlier. I actually had a case against him. It was an individual who owned an aquarium that brought in the wrong type of a fish and was saddled with a Federal felony. Did not know that he brought in the wrong type of fish. The paperwork was one of the issues.

That happens every day in this country. We can talk about the crimes that are not being that we laugh at. Many of those crimes are being used by bureaucrat prosecutors.

I am very proud of the work that I did, but the number of cases that I wish were actually aimed at the violent individuals in our communities, we have stopped working and being part of gang task forces across this country. We have limited the use of the Federal resources on sex trafficking and human trafficking.

We have got to get back to being good partners to our State police and law enforcement officers who have the primary responsibility on violent crime.

Ms. MCBATH. Thank you for that.

Then, also, can you kind of explain how statutes that were meant to target our kingpins, like you just said, violent crime, like the mandatory minimum drug statutes that we have yet to meaningfully reform—that is easy for me to say—how they end up sweeping in the low-level offenders?

Mr. TOLMAN. Well, absolutely. We are in a really backward system right now. We are using, oftentimes, higher level individuals in a drug distribution ring to cooperate and get credit against lower-level individuals.

I have prosecuted many drug cases. We rarely ever were able to get intel on the upper levels and actually take down drug conspiracy rings. Instead, we utilized what we could to get low-level individuals.

We simply did not have the knowledge. We didn't take the time or the patience because we didn't have the resources to investigate those conspiracies and those drug rings and cartels properly.

Ms. MCBATH. Thank you so much. I yield back.

Mr. BIGGS. The gentlelady yields. The Chair recognizes the gentlelady from Florida, Ms. Lee.

Ms. LEE. Thank you, Mr. Chair.

Thank you to our witnesses for joining us today. I think you have a group of Members here that are very interested in finding ways to refine and streamline our criminal justice code. You all are very helpful with the ideas and thoughtful testimony that you have brought with you here today. I would like to go back to something and, Professor Turley, I am going to start with you.

Mr. Fox told a story about a case in his opening remarks that I thought was very instructive in this way. I am a former State court judge. In my experience juries work very hard to follow the instructions that are given to them, most juries, and to apply the law correctly as charged by the court.

What is the effect if the elements of an offense are incoherent or vague, what is the effect on the instruction that goes to the jury? How might that affect cases that they are deliberating on?

Mr. TURLEY. Thank you for that question. It is probably one of the most important ones that the Committee can tackle.

The effect is huge. I spent most of my career as a criminal defense attorney. I can say that there are certain crimes they don't have much of an argument to make because we have strict liability criminal offenses and criminal negligence offenses.

I actually testified against both, 27 years ago. That those are two categories that the Congress should focus on that we could do away with most of those offenses. Because once you get into court you don't have much of an option.

The point is that if you have got a client as a criminal defense attorney who comes to you on one of these crimes you have got if you take a look at the *Yates* case that went to the Supreme Court of the undersized grouper, right, those cases, well, we look at we go, my God, how did that ever be criminalized?

It is a tough case for a criminal defense attorney because the judge is handcuffed. The judge is going to give instructions based on that statute. As you say, jurors are very faithful in carrying it forward when the judge tells them you have got to apply this.

So, we have to eliminate those laws. We can't just rely on discretion.

The other thing about prosecutorial discretion is enormously important because I really do agree what comes around when you talk about the role of prosecutors here, most prosecutors, like Mr. Tolman, are very faithful and very thoughtful. I have worked with a lot of great ones. Prosecutorial discretion only works if you frame the range of discretion.

What you have done is you have blown away that frame. There are literally discretion of a prosecutor covers conduct that everyone commits every day, that is the danger. It is not that we are not saying you shouldn't have discretion, but you are the ones who are supposed to wall in the discretion and allow them to work within it.

Ms. LEE. Staying on that point, I think that gets back to I believe it was Justice Scalia, the fuzzy laws that we have and hand over to regulatory agencies, share with us, if you will, what the consequence of that is when you leave too much discretion in the hands of the regulatory agents to—agencies to actually criminalize behavior?

Have you seen disproportionate impact or exercise of that authority by different agencies?

Mr. TURLEY. Yes.

There are certain agencies that pull the trigger pretty fast. The point is that whether you are on the regulatory side or you are an actual prosecutor, there is a tendency to just lower the boom on people, to count stack. Because what you want is to get a plea agreement. Most cases end up in pleas.

If you are on the defense side, you are looking at a client with limited funds. Those funds will evaporate the minute they start a criminal defense. I mean evaporate within months. They will have to sell their house. They will have to tap their relatives.

In the alternative, the prosecutor says, look, instead of my bringing these hundred counts against you, I will let you plea out, plea out on two with no jail time.

Most people accept that. They then become part of the criminal justice system. They get a record. That stigma follows them. They have trouble getting jobs. They have trouble possibly getting leases. It is a horrific system.

Ms. LEE. On that subject, Mr. Tolman, I know in your written testimony you mentioned the Safer Supervision Act, which actually discusses the intersection between community safety and successful reintegration.

Briefly, if you would, tell us why you believe those types of reforms to the supervised release system are important?

Mr. TOLMAN. Yes. Just really quickly, the States are leading on this, conservative States are, are doing amazing things on this. They have realized that if we have them on supervision for a year, maybe 18 months at most, they are incentivized, they do what they are supposed to, they get on with their life.

In the Federal system the average is almost five years of supervision.

Ms. LEE. Thank you, Mr. Chair. I yield back.

Mr. BIGGS. The gentlelady yields. The Chair recognizes the Ranking Member of the entire Committee, Mr. Raskin.

Mr. RASKIN. Thank you very much, Mr. Chair.

The Department of Justice announced that it would demote the Foreign Corrupt Practices Act and not bring prosecutions there. It sacked 17 inspectors general when it started, people who saved us a combined \$91 billion last year in carrying out waste, fraud, abuse, and corruption in the Government.

It pulled the plug on the corruption prosecution of Mayor Adams in New York after Mayor Adams agreed to engage in a political alliance with Donald Trump which then prompted the resignation, ultimately, of six or seven attorneys, including the U.S. Attorney for the Southern District Danielle Sassoon, who was a conservative Federalist Society lawyer and Republican.

Her No. 2 also quit, saying that you would have to be a fool or a coward to give in to this kind of pressure.

Then, they decimated the Public Integrity Unit. They dismantled the Kleptocracy Unit in the Department of Justice. They shut down other units focused on stopping foreign interference in American politics.

Mr. Fox, why is prosecuting white-collar crime with specific enumerated offenses with definite material elements in the crime, why is prosecuting white-collar crime important?

Mr. FOX. Yes, so I looked. It seems like there's about maybe seven percent, give or take, of crimes that DOJ prosecutes. It seems like they fall under the white-collar category. There's a lot of the work that the Federal Government prosecutes are things that far exceed the doctrine of enumerated powers, things like the Federal Government has absolutely zero business getting involved in. White-collar crime is one that arguably can fall under the ambit of the Federal Government.

It's something that is important to discourage political corruption, make sure that people are being prosecuted because the Department of Justice has evidence that they committed a crime and they're not being prosecuted because of what their political views are or that they're not being let off because of what their political views are. People don't trust a system that targets people or ignores people based on the views they espouse or the people they support.

Mr. RASKIN. Do you think that undermines public trust in the justice system?

Mr. FOX. Oh, dramatically.

Mr. RASKIN. It sends out the message that we have this two-track system. One for people who engage in kind of the run-of-the-mill State law crimes like assault, theft, or robbery. Then, one for white-collar criminals in the government, in corporations, or in pol-

itics who are able to get away with it if they know the President or they know the right person.

Mr. FOX. Yes, I think that's right. It also goes back to the question Ranking Member McBath asked which is about, are they going to target people who they know will fight back versus who won't have their resources to. That's all very related there.

Mr. RASKIN. Yes. Have you studied the whole question of whether there is systematic inclusion of a *mens rea* requirement so we're not putting people in jail for most regulatory offenses?

Mr. FOX. Yes. A lot of regulatory offenses and frankly also a lot of statutory crimes don't include a *mens rea*. The theft charge that I talked about before in the Moore and Mansell case, if I were to take Mr. Canaparo's water bottle and give it to Professor Turley, we're on Federal property, technically I could be charged. That's preposterous.

No reasonable person would ever think that's theft. Without an actual explanation as to what theft is that I actually intended to take his wallet and bring it home with me. People would—yes, they would absolutely fall victim to these types of prosecutions which dramatically undermine trust in the system.

Mr. RASKIN. Yes, I understand that the Chair and I think Ms. McBath has the Count the Crimes Act which suggests that we don't even know how many crimes we have. There's been such a radical proliferation of offenses throughout the Federal code. Do you think it would be advisable for us once we've counted the crimes to propose a Cut the Crimes Act where we get rid of a lot of the offenses that transform *malum prohibitum* regulatory crimes into real criminal offenses that most people would think should apply only to *malum in se*?

Mr. FOX. Yes, certainly, I know the Chair also has the *Mens Rea* Reform Act. Those two things in tandem, if you set a default *mens rea* that way we're not sweeping people into the criminal justice system over things they didn't know would be crimes. Then, also, I'm not sure it's actually possible to count all the crimes.

Assuming we can do that, then yes, then we're able to sort of come to a consensus as to what doesn't belong. I would also say if we're not able to do that, there's other changes we could do. I have an idea that we could just inform jurors that they have the power to acquit against the evidence when justice requires. In a case where the Department of Justice brings a charge like the case I discussed before where any rational person would think it's absurd.

The jury can be you know what? We don't agree with the defense theory. This is nonsense. We're going to acquit. That's the power they still have.

Mr. RASKIN. I yield back to Mr. Chair. I don't want to commit a criminal infraction here by going over my time.

[Laughter.]

Mr. KILEY. Too late.

Mr. BIGGS. Too late. The Chair recognizes the gentleman from California, Mr. Kiley.

Mr. KILEY. Thank you, Mr. Chair. In California this last year, we passed an initiative to restore some consequences for things like retail theft. My slogan in connection with this proposition, Prop. 36, was Make Crime Illegal Again, because there are some things in

our State like stealing that are sort of classic textbook criminal behavior that because of our criminal laws, folks could basically carry out with impunity.

That did pass. There are also at the Federal level as has been mentioned ways in which we need to enforce the law against serious crimes in a more aggressive fashion. Perhaps there should be a corollary to that slogan, Make Crime Illegal Again, which is to make noncrimes legal again which is what we're talking about today.

We shouldn't be prosecuting people for buying Swiss cheese without holes or for making a stamp with the wrong kind of duck on it or for accidentally buying the wrong kind of fish for your aquarium. There's some basic intuitive commonsense principles we would all agree that a criminal code should have that it should include things that a typical person either knew or should have known are wrong or are illegal. They should be reasonable things that make sense to people.

Yes, this is the sort of thing that ought to be illegal. They should be in statutes that were issued by elected lawmakers. They should be accessible to the average citizen. They should be easy to understand for the average citizen.

They should be coherent. We shouldn't have conflicting criminal laws. They should be enforced in an even-handed manner. None of those things are met with the current criminal code.

There's a lot of—as we've discussed with liability crimes, there's a lot of things that aren't reasonable and don't make sense. It's a 75 to one ratio for crimes that are issued by bureaucrats as opposed to lawmakers. A lot of the criminal code is behind paywalls you have to pay money to access. Then even if you can access it, you can't make heads or tails about what it says without cross referencing the rest of the code.

There're all kinds of conflicts within the body of law. Because the average person commits several crimes a day unwittingly, it can only be arbitrary in its enforcement. It's not enforced in an even handed manner.

Some of the consequences for this are:

- (1) The diversion of resources toward prosecuting true crimes.
- (2) A weakening of respect for the rule of law, of course.
- (3) A loss of freedom. As sort of the default in society is you have to walk around on eggshells not knowing what is and is not allowed.

Mr. Canaparo, I thought I'd throw out a few questions. You can address any of them. Then, if there's time, perhaps the others could weigh in as well. First, do you think it would make sense to say that we shouldn't have any further crimes that are issued by regulators as regulations and even those that currently exist perhaps should be reconsidered by Congress?

Also, what principles should we consider in drawing the line between criminal and civil liability? What sorts of offenses are more appropriate for one and the other? Finally, are there due process issues that exist because of the nature of the criminal code as it now exists?

Mr. CANAPARO. Let me take the second, first, because it's the easiest one which is I would default to the traditions that we inher-

ited from British common law and has been in American law forever which is that the criminal law is meant to be for those things which are morally reprehensible. That doesn't mean, of course, that accidents or sort of morally neutral things which impose harm don't get punished through civil remedies, right? As Professor Turley mentioned, to make those crimes fundamentally erode that difference and changes the nature of citizenship. That's question (2).

(1) Let me get to, we've been touching on the counting and how we count and how we cut regulatory crimes, right? I think actually you can do both at the same time. What I would recommend is that you direct every agency and, again, probably not through the Department of Justice because this would be run through the Office of Legal Policy. They don't have the staff to do it.

I would say probably direct every agency to send you a list of all the regulations which can be criminally enforced. If they don't do that, any that they don't send you are cut, voided immediately. Why this is good is because there's a ton of stuff the agencies have that they don't actually use, and they don't particularly need.

What they'll do is they'll send you the stuff that they think is important. By virtue of what they don't send you, you can sort of say, OK, this was cheese kind of crimes. Those go away.

Here are the ones that the agencies in their limited time and resources thought they are really important. Let's keep them. I would say in short tell the agencies, tell us what's important. Anything that doesn't show up on your list is voided immediately. You can sort of do both at the same time.

Mr. KILEY. Thank you. I yield back.

Mr. BIGGS. The gentleman yields. The Chair recognizes the gentleman from Tennessee, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chair. Mr. Fox, I'm just curious. I was listening to your testimony about Sacco and Vanzetti or whoever they were, Moore and Mitchell or—

Mr. FOX. Moore and Mansell.

Mr. COHEN. Yes, Moore and Mansell. What should've been the crime for cutting that NOAA apparatus apart?

Mr. FOX. Yes, so going back to actually the point Congressman Kiley just made is I don't think it should be a crime. I think this is a thing—

Mr. COHEN. It shouldn't be a crime to cut up something that you got nothing to do with? It's not your area of jurisdiction and to cut it and destroy it?

Mr. FOX. Well, if they intended to do that, yes. Because they didn't, this is sort of a civil issue where the—I forget the person's name. The person who had the research project should take them to court and they should pay for the loss of the property that was damaged.

I don't think it's the purview of the government to get involved and prosecute them for it. This goes back to the point of why *mens rea* matters. If they had gone in there intending to destroy it, yes, I think that's very different.

Then, that probably would be appropriate to charge them and convict them of what happened. That's not the case here. It was a

mistake. They thought they were saving some wildlife, saving some sharks. Inevitably, it was not poachers.

Mr. COHEN. Just curious. I looked it up and I think it probably should be some type of offense to destroy something with no jurisdiction, and you don't make yourself the police and you make a mistake. They should've taken a deal or something, but regardless of that.

Mr. Tolman, let me ask you a question. Your name was familiar to me, so I googled it for a long time. I didn't find any Tolmans that I would've known. Most of them were scientists and brilliant people like you. There was a Tolman Hall at Vanderbilt. That's where it came. Do you know Tolman Hall?

Mr. TOLMAN. I do know the family. I tried to get into Vanderbilt Law School and was not admitted.

Mr. COHEN. It's a good school and I'm sure—

Mr. TOLMAN. Yes.

Mr. COHEN. —that doesn't mean anything. It's a good school. Overcriminalization, a lot of that is Federal Congresspeople looking for issue du jour and passing laws that probably should be State laws. Is that not correct?

Mr. TOLMAN. I wholeheartedly agree.

Mr. COHEN. Years ago, when I was a State Senator, there was a group of Congresspeople that came down to Nashville and all talked about carjacking. They wanted to make it a Federal law. I suggested that it was more of a State responsibility, and they passed it, Federal law up here.

Now, I don't know what it was. I read somewhere that there's a new carjacking law being proposed I think by Senator Blackburn. It changes the duty—the standard. Right now, you have to have an intent to murder or kill or do great injury to be a Federal crime and now they're reducing it to being—I forget what it is. Do you know what the difference is between this proposed law and the law that exists now?

Mr. TOLMAN. I have seen that. I think the current carjacking law is an inappropriate Federal law. It should be the States. It is their primary role to enforce those laws. Sadly, the carjacking and I would also say the Hobbes Act cases which is in essence now the robbery of a Kentucky Fried Chicken, for example. This is an example of the headline of the day driving the lawmaking and expanding the Federal code.

Mr. COHEN. Well, we'll have to look at that when the bill comes before our Committee to see how we respond to it because it's sometimes so easy to jump into something which is really State law.

Mr. TOLMAN. Yes.

Mr. COHEN. Mr. Fox, I was listening to your testimony. You were talking about respect for the law and all these laws, et cetera. Do you think that the pardoning people that attack policemen just makes people think less of the law?

Mr. FOX. Yes, it's a case-by-case basis. I think the Federal justice system or even State justice systems really don't work well at all. There're obviously problems. Blanket pardoning people who violently attack police and try to overthrow the government, yes, that's wildly inappropriate.

Mr. COHEN. Anybody think it was an appropriate thing to do to pardon all those 1,600 people en masse without going through them case by case? That creates a lot of people thinking it's who you know or what you do, et cetera, et cetera, and disrespect for the court system because it was nothing to do with the prosecutors doing wrong or anything like that. It was just a class of people that he decided to do it.

Then there's been a lot of pardons lately. I don't know if you've kept up with them. Lots of folks in the crypto business who have been convicted, large monetary fines as well as jail time and tremendous amount of restitution and they've been pardoned. It happens.

It used to be that Presidents had some shame. Even if they gave a pardon to their brother or to somebody that gave them a ton of money, they waited until the last minute and they could get out of town. Now, they put it on Truth Social and they parade it around and then they appoint them to be an ambassador somewhere. Thank you. I yield back the balance of my time.

Mr. BIGGS. The gentleman yields back. The Chair recognizes the Chair of the Committee, Mr. Jordan.

Chair JORDAN. Thank you, Mr. Chair. Mr. Canaparo, what was the number? How many crimes? It was, like—you had some number.

Mr. CANAPARO. In the U.S. code, we with reliable certainty estimated 5,199, but that's only the code.

Chair JORDAN. That's only the code. How many crimes are out there that aren't created by Congress but are created by the agencies?

Mr. CANAPARO. We don't know for sure, but the number is almost certainly between three and four hundred thousand.

Chair JORDAN. Americans can be charged with all kinds of crimes that they don't even know exist, that they don't even know they broke that were created by people they didn't elect. That's the situation we're in?

Mr. CANAPARO. Correct.

Chair JORDAN. Such a deal, right? Such a deal for America. This is how ridiculous. I'll give you a real-life example. The ATF out of thin air said something that they had even said was legal that had always been legal, said, "we're going to now say pistol braces are illegal."

If you don't get rid of it, turn it in, destroy it, whatever, your property—if you don't do that, even though we told you it was fine years ago, even though there's nothing in the law that says it's a crime, you're going to be a felon. It's crazy. I want to thank the Chair for bringing this together.

You cannot create a—talk about lack of respect for the citizens of this country. They don't even get a say in the people they elect on most of this stuff that they can get charged with which is crazy. How does that fit with our constitutional system, Professor Turley? I'll let you and Mr. Tolman talk a little here too. We appreciate you all being here.

Mr. TURLEY. Well, it goes to what I mentioned earlier that the danger of overcriminalization is it can change what being a citizen is. If everyone is potentially criminal in conduct that they engage

in every day, it changes the relationship to the government. By the way, it also has an impact on how people view real crime.

If everyone is a presumptive felon, if everyone is a mattress tag puller, if everyone can be charged with the discretion of a prosecutor for things that most people do, then you lose the stigma, the clarity for the real crimes. That includes things like shoplifting. That is, you see the sort of casual attitude toward law breaking, but the government can be a terrible teacher in that respect by treating everything as potentially criminal.

Then nothing is really criminal. It's just basically the government can either bring you into the criminal justice system or not based on a whim or discretion. That has an enormously corrosive impact on the meaning of being a citizen, the relationship of individuals to their State.

Chair JORDAN. It diminishes respect for the law in general. This may lead to less prosecution of real crime which Mr. Kiley just talked about. Then the thing that scares me as much as both of those is it encourages, I think, the weaponization of the government against people they don't like or who have a different political philosophy. We have seen all three of those things in the last few years which is, again, frightening and why this hearing is so important. Mr. Tolman, I'll go to you.

Mr. TOLMAN. One thing to keep in mind about the 300,000-plus regulations that have criminal penalties, almost all those are white-collar crime. You're targeting a—you have the largest section of your criminal laws are actually targeting those that mostly likely have no criminal intent. That's why we're seeing such ability of prosecutors without any proper accountability to use that against everyday citizens that don't have criminal intent.

Chair JORDAN. Back to the *mens rea*. For at least that—

Mr. TOLMAN. For at least.

Chair JORDAN. Yes, that would make sense. I'll give the Democrat witness which I normally don't do in hearings like this, I'll let you say something if you want, Mr. Fox.

Mr. FOX. Yes. No, I agree. The whole idea is you have to actually intend to commit a crime. Just doing something, thinking you're trying to help someone like saving a bunch of sharks from poachers, or there's another case where it was a man who was hiking on a mountain.

He was a professional runner. Went up what, unbeknownst to him, was a closed trail and had two tiny little signs. Now, he's battling Federal charges. There's another case, *Lesh v. United States*, is pending in front of the Supreme Court which was a snowmobiler who was charged for taking pictures advertising his business which is not what he was doing, but that's what they allege while he was on Federal land.

In a case like that because the max penalty is six months in jail, according to the Supreme Court despite that there's no textual basis in the Constitution or historical basis at all, he doesn't even get a right to a jury trial at all. This is just government, like, you did something you didn't know was a crime. Now, you're guilty. Not only that, but, of course, Congress never even passed these laws.

Chair JORDAN. Yes, it'd be one thing to shake them down, but they're going to shake them down and put them in jail potentially. It's crazy. Mr. Chair, thank you for this good hearing. I yield back.

Mr. BIGGS. Thank you.

Mr. RASKIN. Mr. Chair, I just have a UC request.

Mr. BIGGS. Please.

Mr. RASKIN. This is the Federal Justice Statistics for 2023. Very interest, 57,000 arrests and 184 of them were for regulatory arrests or 0.2 percent. That may be too high given what was done. So, anyway, for the record.

Mr. BIGGS. Without objection. The Chair recognizes the gentleman from New York, Mr. Goldman.

Mr. GOLDMAN. Thank you, Mr. Chair. Mr. Turley, it's good to see you again. You are a frequent witness for a variety of different hearings for the Republicans. In fact, you testified in the last Congress related to an impeachment investigation.

As I recall, you testified that you believed that the Republican investigation related to Hunter Biden's private foreign investments did merit an impeachment investigation against President Biden, I guess, based on alleged meetings that the President had with Hunter's business partners even though there was never any evidence presented that they discussed Hunter's businesses, business ventures, or that the President ever financially benefited from those ventures. Is that generally an accurate assessment? You didn't call for impeachment? You just suggested there should be an investigation, right?

Mr. TURLEY. The purpose of that hearing was to determine whether there could be an impeachment inquiry and whether—

Mr. GOLDMAN. I'm just asking what you testified.

Mr. TURLEY. I'm trying to say that—

Mr. GOLDMAN. No, did you say directly that there was a legitimate basis to move forward with an impeachment investigation?

Mr. TURLEY. What I said is that if those allegations were proven, they could amount to impeachable offenses.

Mr. GOLDMAN. All right. Well, let's focus for a second on some conduct that's been going on over the last few months. Related to World Liberty Financial, are you familiar with that company?

Mr. TURLEY. No.

Mr. GOLDMAN. You're not familiar? OK. Are you familiar at all with Donald Trump's interest in cryptocurrency?

Mr. TURLEY. No.

Mr. GOLDMAN. You're not familiar with the fact that Donald Trump issued a memecoin two or three days before his inauguration?

Mr. TURLEY. I saw something of that in the press, but I'm not that familiar with it.

Mr. GOLDMAN. OK. Well, let's hypothetically—it's not hypothetical. It's true. Donald Trump has a financial interest in a memecoin named after himself. He recently offered a VIP White House tour and special reception to the memecoin's 25 biggest holders. After that announcement, the coin surged more than 50 percent. Does that seem like something that warrants investigation to you, Mr. Turley?

Mr. TURLEY. Well, there's no question you can investigate that to see if there was any criminal conduct. I want to distinguish between that and the influence peddling scandal that the hearing was about in the Biden Administration.

Mr. GOLDMAN. I'm not talking about that hearing, and I know you like to filibuster, Mr. Turley. No, no. I'm happy to talk about that hearing. It was the biggest joke of an investigation. It was embarrassing that you call yourself a credible criminal professor that you would actually think that there was any evidence that warranted an investigation.

I'm focusing right now because it will seem to me if you have any credibility, you will agree that auctioning off a White House tour for the highest investors in your own company would warrant either impeachment or criminal investigation. Let me move on because it gets worse. The President is a significant financial beneficiary of a company called World Liberty Financial which issues a stablecoin. Are you familiar with stablecoins?

Mr. TURLEY. I'm not.

Mr. GOLDMAN. OK. Stablecoin is essentially a digital version of a dollar that can be used in transactions. Recently, the World Liberty, this organization which Donald Trump is a beneficiary of, entered into a deal with a UAE backed company that would complete a two-billion dollar transaction with a company that has previously admitted to engaging in money laundering. Donald Trump's company will now generate tens to hundreds of millions of dollars in revenue from that transaction with a foreign government.

I'm sure you're familiar with the foreign emoluments clause, Mr. Turley. Would you say that based on that information since apparently you only follow Hunter Biden's finances and not President Trump's, would you say that based on me providing you with that information that this would warrant an impeachment investigation?

Mr. TURLEY. Congressman, you say that we have to preserve our credibility. I think you would agree—

Mr. GOLDMAN. Can you answer the question, sir?

Mr. BIGGS. He's trying to answer the question. Your time has expired. I will allow the gentleman to answer the question.

Mr. TURLEY. Thanks. In the interest of credibility cited by the Member, I'm not going to rely on the facts that you just gave me for the first time to render a judgment. I'm not opposed to investigations of alleged corruption. That was the point of the previous hearing.

The way to establish credibility is not, as you did, sir, just engage in personality attacks and personal innuendos. I'm happy to speak with you and to work with you about anything dealing with corruption in this building. I've been writing about that for three decades. I've been called as a witness for both the Democrats and Republicans dealing with that. The way to—

Mr. GOLDMAN. Well, I've only seen you as a witness for the Republicans.

Mr. BIGGS. Your time is expired, sir. Your time is expired.

Mr. GOLDMAN. I'm happy to yield back.

Mr. BIGGS. Did you finish your answer?

Mr. TURLEY. The way that we can actually regain—

Mr. GOLDMAN. I thought my time is expired.

Mr. BIGGS. Your time is expired. I said your time is expired. He gets an opportunity to finish answering the question.

Mr. GOLDMAN. I would like to reclaim my time—

Mr. BIGGS. You have no additional time. You are out of order. Be quiet.

Mr. GOLDMAN. He's answering my question.

Mr. BIGGS. You are out of order.

Mr. GOLDMAN. I would like to reclaim my time.

Mr. BIGGS. You cannot—no. He's answering the question because you personally attacked him. I said he could answer the question. I give that courtesy.

Mr. GOLDMAN. How did I personally attack him, Mr. Chair?

Mr. BIGGS. You attacked his credibility. We're not going to get into—

Mr. GOLDMAN. That's not a personal attack.

Mr. BIGGS. We're not getting into this right now.

Mr. GOLDMAN. Your witness, his credibility matters, sir.

Mr. BIGGS. You are out of order. You are out of order. You're done. You can't say anything else right now. You may finish answering your question.

Mr. TURLEY. Thank you, Mr. Chair. I think that the one lesson from this exchange is that it's possible that we can restore credibility in this institution if we could just get beyond personal attacks.

Mr. GOLDMAN. There were no personal attacks, Mr. Turley. You are a witness.

Mr. BIGGS. You're done.

Mr. GOLDMAN. Your credibility matters.

Mr. BIGGS. You, sir, have lost your credibility with me. I gave that courtesy to everyone on this bench.

Mr. GOLDMAN. Mr. Chair—

Mr. BIGGS. You ask a question. If they wanted to continue to answer beyond the time limit, I said, "time's expired. You may answer the question." That's my routine. That's what I did today. You challenged him, asked him a question. You wanted an answer. Your time is expired. He is answering the question.

Mr. GOLDMAN. Mr. Chair, I have a parliamentary inquiry.

Mr. BIGGS. You don't like his—you don't like—you don't like his answer. Because you don't like his answer—

Mr. GOLDMAN. I have a parliamentary inquiry.

Mr. BIGGS. —you want to shut him up. What's your inquiry?

Mr. GOLDMAN. My inquiry is when you offered—when my time was up at zero, zero for him to answer the question, he went and answered the question. You then gaveled and said my time was up.

Mr. BIGGS. No. That's not a parliamentary inquiry.

Mr. GOLDMAN. You gaveled and said my time was up.

Mr. BIGGS. That's not a parliamentary inquiry.

Mr. GOLDMAN. I would like to know when—

Mr. BIGGS. That's not a parliamentary inquiry.

Mr. GOLDMAN. —my time is up and when he gets to continue answering my question.

Mr. BIGGS. That is not a parliamentary inquiry. Your parliamentarian is about to tell you that's not a parliamentary inquiry.

Mr. GOLDMAN. He actually disagrees. He thinks it is a parliamentary inquiry.

Mr. BIGGS. That's not a parliamentary inquiry.

Mr. GOLDMAN. Why? I'm asking for the process question, the parliamentary—the process question as to when my time is up which you allowed him to answer the question. You then gaveled and said my time is expired. Then you offered him to answer the question again which he already had done.

Mr. BIGGS. No, sir. If we were to watch—

Mr. GOLDMAN. You did it based on accusations—

Mr. BIGGS. Excuse me. Excuse me. Excuse me.

Mr. GOLDMAN. —that I was personally attacking him which I was not.

Mr. BIGGS. Excuse me. Not only are you out of order, but you're being incredibly rude. Here's the deal. I gave everyone the same courtesy. You didn't like where he was going. You began interrupting again, but your time was expired. He was trying to answer the question. You didn't like the answer.

Mr. GOLDMAN. That is false. I'm happy to have his answer.

Mr. BIGGS. No, no, no. That's what happened.

Mr. GOLDMAN. I didn't like the accusation—

Mr. BIGGS. That's what happened.

Mr. GOLDMAN. —that I was personally attacking him. His credibility is relevant.

Mr. BIGGS. I didn't say that until the third round when you interrupted.

Mr. GOLDMAN. His credibility is relevant.

Mr. BIGGS. You continue to interrupt. You continue to be out of order.

Mr. GOLDMAN. Then, I asked you, sir—

Mr. BIGGS. You are out of order.

Mr. GOLDMAN. I asked you, what am I personally attacking? You said, his credibility and he is a witness. His credibility matters.

Mr. BIGGS. You're out of order. You are so far out of order—

Mr. GOLDMAN. You are not conducting this in a fair and equitable way because—

Mr. BIGGS. Sure I am. Everybody got the same courtesy. You asked a question. They're going to finish answering. Everybody got that same courtesy. You interrupted him while he was giving the answer. That's why you got gaveled.

Mr. GOLDMAN. Then you said my time—

Mr. BIGGS. You got interrupted. You interrupted—

Mr. GOLDMAN. —is up which is when you would go to the next person.

Mr. BIGGS. I gave the same courtesy to every Member on your side of the aisle as I did over here, when your time was expired, five minutes expired. If they were in the middle of answering the question, I let it go. Now, we can talk about that round and round all you want. That's what I did. That's what I do.

Mr. GOLDMAN. Well, I look forward to you continuing to do that.

Mr. BIGGS. That's what's happening—yes, well, good. I look forward to you being in order next time. Mr. Turley, you may continue to answer the question that he so much doesn't want to hear.

Mr. TURLEY. I've never been so certain in saying I'm happy to move on.

Mr. BIGGS. Very good. Thank you. Now, I'll yield to myself, five minutes, and we'll go through this. Mr. Canaparo, you talked about something I thought was very interesting and that was trying to resolve the agency overcriminalization. What you said what we could do is put something forward where the agency would actually reduce the number of crimes that they have, determine what they actually have to have, and then, excuse me, all the rest would be avoided. Can you expand on that?

Mr. CANAPARO. Sure. That given the sheer number of such crimes that are on the books, that's probably the best way to proceed. If you ask them just to say—maybe through the Department of Justice, for instance, just say, gives us the list of all the regulatory crimes. I fear that what would probably happen is that you would not get a list. It may actually be impossible.

What I think the better solution would be do is to say to the agencies directly, all agencies that have any sort of criminal enforcement regulations or criminal enforcement authority, you must by a specific date give us the list of all of them. Any that you have which are not in that list are immediately voided so that if the next year they try to prosecute somebody with one of these arcane regs, that person could say, I have a defense that has been voided by this statute. That's probably the most efficient way to both count and cut at the same time. Because my fear is that if you just try to count, you won't actually ever get a number.

Mr. BIGGS. I don't disagree with that. Professor Turley, you said you wanted wall in prosecutorial discretion because that seems to be a problem. I would suggest to you that a blanket *mens rea* statute might do that. Do you have any other ideas on how to wall in the prosecution?

Mr. TURLEY. Well, we have two sets of criminal laws that we've been discussing. One is the most direct which is in the criminal code for laws passed by Congress. Then, we have this massive unknown body really of agency crimes that were basically written by the agencies.

That's why we don't have really any walls. There are no walls. It basically is almost—it covers the same expanse as civil conduct. You can't have an illegal system like that without fundamental problems for citizens.

The idea is that prosecutor discretion is supposed to exist within a walled space where you define that space. This is the specific conduct. You're absolutely right. If that space is defined by *mens rea*, then prosecutorial discretion really, really works quite well.

I want to say that I really am intrigued by Mr. Canaparo's idea that you can ask the agencies what are the crimes that you are enforcing, and just presume that everything that they don't mention is obviously a crime that's not that important to them. We're going to have to engage in sort of categorical elimination. You're talking about hundreds of thousands of crimes. You're going to have to find some way to make deep and serious cuts. The agency is going to actually give you the map for that.

Mr. BIGGS. Mr. Fox, while not explicitly mentioned in your written testimony, you've written about the trial penalty in the past.

Can you briefly explain why one of the problems we're talking about today, too many laws in the books, contributes to the perpetuation of the trial penalty?

Mr. FOX. Yes, absolutely. Thank you, Mr. Chair. The trial penalty is the difference in the sentence that you're offered at a plea stage and what you would get post-trial. In theory, it should be the same because if it's not the same, there's something changing there.

There's a number of ways that prosecutors can coerce people into pleading guilty. Someone mentioned charge stacking. That's just filing multiple charges. They can threaten family members, threaten to re-indict as a habitual offender, use pretrial detention.

When I was a public defender, I had clients who would be offered plea deals that they could walk home that very moment while the prosecutors were arguing that they were a danger to the community and needed to be held on a bond if they were going to go to trial. Obviously, those two things cannot simultaneously be true. That's another way that they frequently do that.

They've even been able to threaten to impose the death penalty against people just to get them to plead guilty. When you have things like mandatory minimums that tie judges' hands, so if they go to trial and are convicted, there's nothing the judge can do but impose the sentence that he or she is bound to impose. Then absent juries who are able to ask questions, like, what would the sentence be if I convicted or is this something that I think is appropriate as a member of the community to prosecute someone for, they're sort of—prosecutors have unbridled discretion.

I will say I also wrote recently there's two Federal judges, Judge John Kane in Colorado, Judge Jed Rakoff in New York, both of which Judge Rakoff actually said that the point reduction for accepting responsibility is unconstitutional. Judge Kane said that he will not apply it for the same reason. The argument basically is you're getting a reduction in sentence because you're pleading guilty.

That undermines your Sixth Amendment right to a jury trial. The right to a jury trial is the only right that exists twice in the Constitution. It's both in Article 3 and in the Sixth Amendment. Really judges need to aggressively police plea bargains and not just blanketly do whatever prosecutors ask them to do.

Mr. BIGGS. Thank you. Thanks for that. Thanks to our witnesses for being here today. It was kind of fun until the end, right?

[Laughter.]

Mr. BIGGS. We appreciate you being here and your testimony. We will adjourn this meeting.

[Whereupon, at 3:40 p.m., the Subcommittee was adjourned.]

All materials submitted for the record by Members of the Subcommittee on Crime and Federal Government Surveillance can be found at: <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=118207>.