

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.