

# The Explosion of the Criminal Law and Its Cost to Individuals, Economic Opportunity, and Society

*By William R. Maurer & David Malmstrom*



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THE EXPLOSION OF THE CRIMINAL  
LAW AND ITS COST TO INDIVIDUALS,  
ECONOMIC OPPORTUNITY, AND SOCIETY



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# The Explosion of the Criminal Law and Its Cost to Individuals, Economic Opportunity, and Society

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Today's legislatures use the criminal code not just to prevent or punish wrongdoing, but to regulate a wide range of personal, economic, and social conduct. This overcriminalization occurs at both the state and federal level. By the most recent count, there are at least 4,450 federal crimes on the books, an average of 57 crimes added to federal law per year.<sup>1</sup> Given the enormity of the code, it is no wonder that the Ninth Circuit's Chief Judge, Alex Kozinski, believes "You're (Probably) a Federal Criminal."<sup>2</sup> And if the reader were not yet a criminal, with a growth rate of 500 crimes per decade, you may eventually become one, even if you do nothing to alter your current conduct. Even if you somehow manage to steer clear of violating a federal statute, there are many more federal regulations that could land you in jail. Many of these federal crimes cover conduct that is truly local in nature and thus violate constitutional federalism.<sup>3</sup> There is a similar trend in state law to criminalize personal, economic, and social conduct and, while these laws do not violate principles of federalism, they do illustrate the consequences of an overly-expansive criminal code.

This growth in the federal criminal law has been made at the taxpayer's expense. In 2007, there were nearly 2.3 million people held in custody in the U.S.,<sup>4</sup> with the average cost per year to incarcerate an inmate at \$20,674 (federal and state combined).<sup>5</sup> In other words, the cost to the taxpayer of the legislature's

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expansion of the criminal law has become astronomical. However, looking at the cost of incarceration alone provides an incomplete picture. One must also consider: the salaries of the thousands of government employees necessary to enforce these laws, the social cost of wrongful convictions, the proliferation of petty offenses, the associated decline in respect for the judicial system, and the lost tax revenue and opportunity costs of incarcerating individuals who would otherwise be contributing to the economy (especially in the case of victimless crimes).<sup>6</sup> Paradoxically, overcriminalization is so expensive that the only thing keeping our criminal justice system from imploding is its inherent inefficiencies and the existence of (often completely arbitrary) prosecutorial discretion. The taxpayers and our public agencies simply could not support perfect enforcement or anything even close.

In addition to these larger societal costs, overcriminalization often has a deleterious effect on the more vulnerable classes, such as immigrants and entrepreneurs. Without a strong grasp of English, much less the analytical skills of a seasoned lawyer, many immigrants are expected to navigate a labyrinth of complex laws and regulations that stand in the way of opening even the most modest businesses. In violation of the right to earn an honest living, foremost among "the privileges or immunities" protected by the Fourteenth Amendment, many cities and states have regulations, backed by criminal sanctions, that create insurmountable barriers to entrepreneurship and economic prosperity.

Take, for example, occupational licensing laws. Nearly 500 occupations are regulated by states, and about half of those require state licenses. Many states require African hairbraiders to obtain a license to engage in business. However, the state does not require an African hairbraiding license; it requires a cosmetology license. A cosmetology license typically costs several thousand dollars and requires over 1,500 hours of instruction.<sup>7</sup> However, of the 1,500 hours of instruction to obtain a cosmetology license, typically there is not a single hour spent teaching African hairbraiding. In fact, African hairbraiding is a highly specialized skill that has been passed down for thousands of years and is considered by its practitioners to be a form of

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cultural expression. Needless to say, not only are these requirements arbitrarily applied to African hairbraiders, they erect barriers to the independence of oftentimes poor women who may not have many other marketable skills and who have come to this country to seek a better life. Unsurprisingly, some of these women choose to operate outside the law and, ironically, oftentimes outside the reach of taxing authorities.

How likely is this trend to stop? At the federal level, given current Supreme Court Commerce Clause jurisprudence, some scholars suggest that the Federal overcriminalization trend is unlikely to be stopped in the federal courts. According to Professor Ilya Somin, the Supreme Court adopted an almost limitless definition of “economic” activity in *Gonzalez v. Raich*, ensuring that “virtually any activity can be ‘aggregated’ to produce the ‘substantial affect [on] interstate commerce’ required to legitimate congressional regulation under *Lopez* and *Morrison*.”<sup>8</sup> Second, “*Raich* made it easier for Congress to impose controls on even ‘noneconomic’ activity by claiming that it is part of a broader ‘regulatory scheme.’”<sup>9</sup> Finally, Somin warns that *Raich*’s reassertion of the rational basis test as the proper test for determining whether the aggregate of one’s activities “substantially affect interstate commerce” provides little safeguard.<sup>10</sup> Without a doubt, *Raich* is an unfortunate decision for constitutional federalism. However, other scholars, such as Randy Barnett, refuse to concede that *Raich* is federalism’s death-knell:

[i]n one important respect, the holdings of *Lopez* and *Morrison* survive completely intact: a statute that is on its face entirely outside the powers of Congress described by the Commerce and Necessary and Proper Clauses is unconstitutional.<sup>11</sup>

Barnett notes that the *Raich* majority’s painstaking attention to the *Lopez* and *Morrison* frameworks is an encouraging victory for federalism, “however unfaithful[]” the Court was in ultimately completing this exercise.

Until criminal law refocuses on protecting and vindicating the rights of individuals by purging itself of the many victimless crimes, burdensome regulations, social welfare goals, statutes designed to protect economic interests, and petty offenses, the fundamental right of all individuals to be free in their

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person and property<sup>12</sup> will continue to wither. With respect to federal criminal law, the courts must recall that our government is one of limited, enumerated powers and our system of federalism does not permit the usurpation of the state’s role in defining permissible intrastate conduct. Moreover, government actors, at the local, state and federal level, should pause to remember that they are the stewards of the public’s money and recognize the constitutional limits of governmental action.

## Endnotes

1 John S. Baker, Jr., *Revisiting the Growth of Federal Crimes*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 26, June 16, 2008, [http://www.heritage.org/Research/LegalIssues/upload/lm\\_26.pdf](http://www.heritage.org/Research/LegalIssues/upload/lm_26.pdf)

2 Alex Kozinski and Misha Tseytlin, *You’re (Probably) a Federal Criminal*, in IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE “THE AIMS OF THE CRIMINAL LAW (Timothy Lynch ed., 2009).

3 See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). *But see* *Gonzales v. Raich*, 545 U.S. 1 (2005).

4 Heather C. West and William J. Sabol, BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEPT OF JUSTICE, PRISONERS IN 2007 (2009).

5 These figures are from 1997, the averages would be higher today taking inflation into account. Federal Bureau of Prisons, Key Indicators/Strategic Support System, Washington, DC: U.S. Department of Justice, October 1997.

6 For a complete discussion of the many consequences of overcriminalization, see Erik Luna, *Overcriminalization: The Politics of Crime*, 54 AM. U.L.REV 703, 725 (2005).

7 See Trent England & Claire Wendt, *Silly Laws Turn Entrepreneurs into Crooks*, HERITAGE FOUNDATION COMMENTARY, Sep. 27, 2005, available at <http://www.heritage.org/press/commentary/ed092705d.cfm>:

In Mississippi, the law required 3,200 hours of coursework just to apply for a license. Any violation was considered a crime. Hair braiders challenged the law in court in 2004 and won, requiring the law to be rewritten with more freedom and less economic protectionism. California law required at least nine months of full-time study at a cosmetology school, which could cost more than \$5,000. A court in California found that the licensing requirement was irrational as applied to hair braiding and struck it down.

8 Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the*

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*War on Drugs*, 15 CORNELL J. L. & PUB. POL'Y, 507, 508-09 (2006).

9 *Id.* at 509.

10 *Id.*

11 Randy Barnett, *Limiting Raich*, 9 LEWIS & CLARK L. REV. (Winter 2005).

12 *See* U.S. CONST. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.



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