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## Proxy Crimes

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# LEAD ARTICLE

## PROXY CRIMES<sup>†</sup>

Piotr Bystranowski\* and Murat C. Mungan\*\*

### ABSTRACT

*“Proxy crimes” is a phrase loosely used to refer to conduct that is punished only as a means to target other harmful conduct. Many criminal law scholars find the criminalization of this type of conduct unjustifiable from a retributivist perspective, while others note that proxy criminalization can contribute to mass incarceration and overcriminalization. Given the importance of these problems, a systematic analysis of proxy crimes, currently absent in the criminal law literature, is needed.*

*In this article, we provide a comprehensive analysis of proxy crimes by (i) surveying the existing literature and identifying gaps in prior analyses, (ii) proposing a simple yet useful definition of proxy crimes, (iii) identifying three specific categories of proxy crimes, and (iv) conducting an economic analysis of proxy criminalization which allows us to identify conditions under which proxy criminalization is socially (un)desirable. Finally, in light of our analysis, we present and discuss a specific affirmative defense that can be made available to defendants charged with a proxy crime. We explain how legislators can better balance the social benefits and detriments of proxy criminalization through that affirmative defense.*

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## INTRODUCTION

Over 1.4 million people (or 539 people per 100,000 adult U.S. residents) were incarcerated in American prisons and jails, as of the end of 2017.<sup>1</sup> While this was a noticeable decline from the peak in 2008,<sup>2</sup> the United States still puts more people behind bars than any other country in the world.<sup>3</sup> Roughly one in every four inmates in the world is American.<sup>4</sup> Academics,<sup>5</sup> journalists,<sup>6</sup> activists,<sup>7</sup> and others frequently refer to this problem as “mass incarceration.” Some scholars argue that long prison sentences are a primary cause of mass incarceration.<sup>8</sup> Others have noted that the fundamental problem is not only about too much punishment imposed for violating legitimate criminal statutes, but also about imposing punishment for violating criminal statutes that should not exist in the first place. The latter argument is that States criminalize too much conduct that arguably should not be criminal—a phenomenon referred to as *overcriminalization*.<sup>9</sup>

1. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2019 (2020).

2. Over 1.6 million U.S. residents were incarcerated in 2008. *Id.*

3. ROY WALMSLEY, WORLD PRISON POPULATION LIST (10th ed. 2013), [https://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1\\_10.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1_10.pdf).

4. ROY WALMSLEY, WORLD PRISON POPULATION LIST (8th ed. 2009), [https://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1-8th\\_41.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1-8th_41.pdf).

5. *See, e.g.*, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (10th ed. 2020) (analyzing mass incarceration as a system of “racialized social control”); Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (2009) (describing the effect of mass incarceration on neighborhoods in which large numbers of inhabitants have been imprisoned); Bert Useem & Anne Piehl, *Prison state: The Challenge of Mass Incarceration* (2008) (questioning whether mass incarceration leads to worthwhile social benefits of crime reduction).

6. *See, e.g.*, Eli Hager, *A Mass Incarceration Mystery*, WASH. POST: WONKBLOG (Dec. 15, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/12/15/a-mass-incarceration-mystery/>.

7. *See, e.g.*, ACLU, *Mass Incarceration*, <https://www.aclu.org/issues/smart-justice/mass-incarceration> (last visited Jan. 29, 2021).

8. *See, e.g.*, JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 37, 57 (2005) (attributing mass incarceration to the relative ease with which the American criminal justice system puts people behind bars for violations that rarely result in a prison term in other Western countries).

9. *See* Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 453 (2008) (“[O]vercriminalization . . . mean[s] overlapping or redundant crimes and excessive punishment . . . .”); DOUGLAS N. HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3 (2008) (“[T]he most pressing problem with the criminal law today is that we have too much of it.”); Paul J. Larkin, *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 719 (2013) (referring to overcriminalization as “the use of the criminal law to punish conduct that traditionally would not be deemed morally blameworthy”); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717 (2005) (“[T]he overcriminalization phenomenon consists of: (1) untenable offenses; (2)

One of the main factors contributing to overcriminalization is the constantly growing number of *mala prohibita* offenses<sup>10</sup> and regulatory offenses.<sup>11</sup> While criminal law has traditionally focused on *core offenses*<sup>12</sup> or *mala in se*<sup>13</sup>—prohibited conduct commonly assumed to be immoral, such as murder, theft, or rape—many modern offenses proscribe conduct that would be considered completely innocuous were it not regulated or prohibited by law. The proliferation of these offenses, which are not grounded in conventional morality, not only results in confusion on the part of citizens,<sup>14</sup> but also in a decline in the general legitimacy of the criminal law and its power to stigmatize offenders, which in turn may diminish its deterrent effect.<sup>15</sup> If criminal statutes ban so much conduct that otherwise law-abiding citizens can easily violate them, then the criminal law “no longer distinguishes ‘us’ from ‘them.’”<sup>16</sup>

Scholars have recently noted that much of the expansion of criminal law can be attributed to the existence of what they call “proxy crimes.”<sup>17</sup> Proxy crimes are

superfluous statutes; (3) doctrines that overextend culpability; (4) crimes without jurisdictional authority; (5) grossly disproportionate punishments; and (6) excessive or pretextual enforcement of petty violations.”)

10. *Mala prohibita* offenses are those that proscribe conduct that is “not wrongful prior to and independently of law.” Douglas N. Husak, *Malum Prohibitum and Retributivism*, in *DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW* 65, 66, 69 (R.A. Duff & Stuart P. Green eds., 2005); see also Stuart P. Green, *Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 *EMORY L.J.* 1533, 1535 (1997) (analyzing the moral status of regulatory *mala prohibita*).

11. See Antony Ogus, *Enforcing Regulation: Do We Need the Criminal Law?*, in *NEW PERSPECTIVES ON ECONOMIC CRIME* 42 (Hans Sjögren & Göran Skogh eds., 2004) (critiquing the extent to which criminal law is used in regulatory contexts); Mireille Hildebrandt, *Justice and Police: Regulatory Offences and the Criminal Law*, 12 *NEW CRIM. L. REV.* 43 (2009) (arguing that punishment for regulatory offenses should be imposed under the same principles as in traditional criminal law); Daniel Ohana, *Regulatory Offences and Administrative Sanctions: Between Criminal and Administrative Law*, in *THE OXFORD HANDBOOK OF CRIMINAL LAW* 1064 (Markus D. Dubber & Tatjana Hörnle eds., 2014).

12. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (1978) (introducing the idea that criminal law consists of a core and peripheries); Douglas N. Husak, *Crimes Outside the Core*, 39 *TULSA L. REV.* 755 (2004) (analyzing possible methods of identifying the core of criminal law).

13. *Mala in se* offenses are those that proscribe conduct that is wrongful prior to and independently of law. See Husak, *supra* note 10, at 69; Green, *supra* note 10, at 1571.

14. Because nobody, not even criminal lawyers, can keep track of all the possible ways one can violate criminal law these days, it is hard to believe that any fair notice is given to potential offenders.

15. See, e.g., Murat C. Mungan, *Stigma Dilution and Over-Criminalization*, 18 *AM. L. & ECON. REV.* 88 (2016) (formalizing the idea that the criminalization of minor offenses can dilute the stigma associated with criminal records and thereby reduce the deterrence of more serious crimes); John C. Coffee Jr., *Does Unlawful Mean Criminal: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 *B.U. L. REV.* 193 (1991) (arguing that blurring the distinction between criminal law and tort law undermines the public perception of the former as legitimate and deserving of compliance).

16. HUSAK, *supra* note 9, at 24.

17. See, e.g., Richard H. McAdams, *The Political Economy of Entrapment*, 96 *J. CRIM. L. & CRIMINOLOGY* 107, 159–60 (2005) [hereinafter McAdams, *Entrapment*] (introducing the idea that proxy crimes criminalize behavior that, “while not inherently risking harm, stands in for behavior that does risk harm”); Richard H. McAdams, *The Political Economy of Criminal Law and Procedure: The Pessimists’ View*, in *CRIMINAL LAW CONVERSATIONS* 517 (Paul H. Robinson, Stephen Garvey & Kimberly Kessler Ferzan eds., 2009) [hereinafter McAdams, *Pessimists’ View*] (discussing the undesirable consequences of the growth in the number of proxy crimes in the criminal law system); MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS*

offenses that criminalize conduct (which we will call “proxy conduct”) that is only marginally, if at all, wrongful.<sup>18</sup> However, they are assumed to be either related to, or correlated with, some other wrongdoing, which is either hard to deter or hard to prove in court.<sup>19</sup> In other words, proxy crimes prohibit conduct not because it is considered punishment-worthy, but because such prohibition provides a way to go after some other mischief that is punishment-worthy.<sup>20</sup>

Although the prevalence and importance of proxy crimes has been recognized by many criminal law scholars,<sup>21</sup> none of them thus far have focused on resolving the conceptual and normative confusion that surrounds this rather vast and heterogeneous category.<sup>22</sup> This Article aims to fill this gap by developing a clear definition and categorization of proxy crimes and subsequently providing an economic approach to assessing the normative desirability of criminalizing such conduct. This approach also allows us to identify legislative reforms in the form of allowing affirmative defenses for proxy crimes, which can curb the unwanted consequences associated with proxy criminalization. Before we present our categorization and normative analysis, we provide a brief overview of the kinds of offenses that have been called “proxy crimes,” and the kinds of normative controversies that surround them.

This Article starts its exploration of proxy crimes with the classical example of an offense criminalizing possession of tools ordinarily used for committing burglaries.<sup>23</sup> The exact way in which this offense is defined differs from jurisdiction to jurisdiction. Some statutes provide a list of prohibited tools,<sup>24</sup> while others make it

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Implications for Criminal Law 22 (1993) [hereinafter MOORE, ACT AND CRIME] (discussing the proxy function of possession offenses); MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* 784 (2010) [hereinafter MOORE, PLACING BLAME] (criticizing proxy crimes introduced for evidentiary or preventive reasons); Douglas N. Husak, *Drug Proscriptions as Proxy Crimes*, 36 L. & PHIL. 345 (2017) (characterizing drug offenses as proxy crimes); Doron Teichman, *Convicting With Reasonable Doubt: An Evidentiary Theory of Criminal Law*, 93 NOTRE DAME L. REV. 757 (2017) (highlighting proxy crimes as a central element of the “evidentiary theory of substantive criminal law”).

18. McAdams, *Entrapment*, *supra* note 17, at 160.

19. *Id.* at 159–62 (pointing out that proxy crimes are introduced when “[t]he legislature decides . . . that it is difficult for the prosecutor to prove all the elements of the standard crime”).

20. Kevin Cole, *Better Sex Through Criminal Law: Proxy Crimes, Covert Negligence, and Other Difficulties of “Affirmative Consent” in the ALI’s Draft Sexual Assault Provisions*, 53 SAN DIEGO L. REV. 507, 511–12 (2016) (arguing that proxy crimes “target a state of affairs . . . for the purpose of avoiding a harm that may not be present even when the proxy crime is committed”).

21. *See, e.g.*, McAdams, *Pessimists’ View*, *supra* note 17, at 524 (recognizing the “pervasiveness of proxy offenses, that is, . . . the fact that modern criminal statutes commonly reach behavior that is merely correlated with the true object of concern”).

22. Husak, *supra* note 17, at 355 (arguing that “[n]o canonical definition of a proxy crime is found in the literature”).

23. *See* MOORE, ACT AND CRIME, *supra* note 17, at 20; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 551 (2001); Teichman, *supra* note 17, at 789–90; McAdams, *Pessimists’ View*, *supra* note 17, at 519.

24. For example, Prevention of Offences Act 1851, 14 & 15 Vict. c. 19 (Eng.), which influenced early formulations of the offense in many U.S. jurisdictions.

criminal to possess any unspecified tools “commonly used” for burglary.<sup>25</sup> Some jurisdictions require proof of the defendant’s ulterior intent to use the tools to commit a burglary,<sup>26</sup> while others require only proving the minimal mens rea for knowledge of possession.<sup>27</sup> However, independent of all these differences, one feature of this offense is common to all: mere possession of burglary tools is not wrongful or harmful in itself, and it is criminalized only to allow the state to more effectively deter and punish burglars.<sup>28</sup> This may, of course, interfere with an innocent person’s freedom to carry such tools. However, the law makes the implicit value judgment that sacrificing the freedom of the rare individual who desires to carry burglary tools without any ill-intent is justified to protect would-be victims’ freedom to possess their property without interference from others.<sup>29</sup>

One may think that this type of value judgment is reflected only in modern laws, and that proxy crimes are a modern invention. They are not. References to many proxy crimes can be found in legal history books. Jeremy Bentham, probably the first scholar to acknowledge the distinctiveness of what we call proxy crimes,<sup>30</sup> listed many examples from the English law of his time. He notes, for instance, that it used to be a serious crime to obliterate the marks upon shipwrecked property—as the obliteration indicates the intention to steal such property. Another example

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25. *E.g.*, N.Y. PENAL LAW § 140.35 (Consol. 1965). Such a formulation made it possible to convict some defendants for possessing a screwdriver. *See* *People v. Diaz*, 244 N.E.2d 878 (N.Y. 1969). On the other hand, screwdrivers are statutorily listed among exemplary burglary tools in at least one U.S. jurisdiction. *See* CAL. PENAL CODE § 466 (West 1984).

26. *E.g.*, VA. CODE ANN. § 18.2-94 (1950).

27. *E.g.*, Prevention of Offences Act 1851, 14 & 15 Vict. c. 19 (Eng.).

28. Stuntz, *supra* note 23, at 551; Teichman, *supra* note 17, at 789–90; *see also* McAdams, *Pessimists’ View*, *supra* note 17, at 519 (“[B]ecause burglary is hard to prove, the legislature authorizes criminal punishment for possession of burglar’s tools.”).

29. This is of course more likely when we criminalize possession of tools that have many legitimate uses next to criminal ones. In the case of *Benton v. United States*, for example, the police, after targeting the defendant based on a hint from an informer, searched the trunk of his car, in which they found a sledgehammer, an axe, two wrecking bars, a hacksaw with several blades, a length of knotted rope, a brace, and a bit. 232 F.2d 341 (D.C. Cir. 1956). This sufficed to convict Benton under the statute criminalizing possession of “any instrument, tool, or other implement for picking locks or pockets, or that is usually employed, or reasonably may be employed in the commission of any crime, if he is unable satisfactorily to account for the possession of the implement.” In his reversal, Judge Bazelon found the statute unconstitutional on the basis that it created a statutory presumption of culpable intent on the side of the possessor where the presumed fact does not bear “rational connection” with this intent. *Id.* at 344–45. The lack of rational connection can be inferred precisely from the fact that tools which “reasonably may be employed in the commission of any crime” have many legitimate uses. *Id.* at 344. Judge Bazelon stated that a statutory presumption of culpable intent might be legitimate in cases of possession of “articles like opium or lottery tickets which experience teaches are generally held for illicit purposes.” *Id.* at 345. This was not the only U.S. case that found the broadly defined possession of burglary tools without any need to prove ulterior intent unconstitutional. *See, e.g.*, *Foster v. State*, 286 So. 2d 549, 551 (Fla. 1973) (stating that the Florida statute criminalizing the possession of burglary tools cannot be construed to cover the possession of a simple screwdriver). *See also* FLETCHER, *supra* note 12, at 199, citing and discussing a very similar judgment by the German State court (*Landgericht*) in Heidelberg, which refused to enforce a statute criminalizing the possession of thieves’ tools because it was based on a legislative presumption of guilt.

30. Bentham referred to proxy crimes as “presumed offences.” *See* JEREMY BENTHAM, *THEORY OF LEGISLATION* 425 (R. Hildreth trans., 1887).

he refers to is that it was a felony for a mother to conceal the birth of her illegitimate child,<sup>31</sup> as such behavior indicated that either she intended to kill, or has already killed, the child.

The catalogue of modern proxy crimes is ever expanding. New proxy crimes are crafted in response to the new complexities and challenges of modern life. Some Western countries, such as the United Kingdom,<sup>32</sup> Australia,<sup>33</sup> and Denmark,<sup>34</sup> have recently introduced legislation allowing them to punish their citizens for travelling without a legitimate purpose to areas controlled by terrorist organizations like ISIL. Again, they have not done so because a British or Australian national travelling to northern Syria in 2015 did anything wrongful just by travelling there. However, a British or an Australian national making a trip to northern Syria in 2015 was perceived as having an increased propensity for being involved in terrorist activity. The existence of such potential, however, would be very hard, if not impossible, to prove beyond a reasonable doubt before the British or Australian court precisely because such an individual operated in terrorist-controlled areas, where it may not be easy to collect evidence.<sup>35</sup>

The prevalence of proxy crimes does not stop criminal law scholars from thinking about normative arguments against their institution, and these arguments are not limited to general normative arguments against overcriminalization.<sup>36</sup> Proxy crimes lead to the erosion of the traditionally high evidentiary threshold in criminal law because the prosecutor is required to prove beyond a reasonable doubt only the commission of a given proxy act rather than the harder-to-prove primary wrongdoing.<sup>37</sup> Thus, proxy crimes may also result in convictions of individuals who are innocent with respect to the primary wrongdoing (e.g., the conviction of “innocent” possessors of burglar’s tools who never intended to commit actual burglaries).<sup>38</sup> Another common concern is that proxy crimes undermine the *expressivist*

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31. Such conduct is actually still a felony in Arkansas, *see* ARK. CODE ANN. § 5-26-203 (1975) (“A person commits the offense of concealing birth if he or she hides the corpse of a newborn child with purpose to conceal the fact of the child’s birth or to prevent a determination of whether the child was born alive.”), and a misdemeanor in numerous other jurisdictions, *see, e.g.*, WASH. REV. CODE ANN. § 9.02.050 (LexisNexis 1909) (“Every person who shall endeavor to conceal the birth of a child by any disposition of its dead body, whether the child died before or after its birth, shall be guilty of a gross misdemeanor.”).

32. Terrorism Act 2000, c.11, §§ 58B, 58C (Eng.).

33. *Criminal Code Act 1995* (Cth) ss 119.2, 119.3 (Austl.).

34. *See* DANISH MINISTRY OF IMMIGRATION, PREVENTING AND COUNTERING VIOLENT EXTREMISM AND RADICALISATION: NATIONAL ACTION PLAN 19 (2016), <https://stopekstremisme.dk/filer/preventing-and-countering-extremism-and-radicalisation.pdf>.

35. *See* Sandra Krähenmann, *The Obligations under International Law of the Foreign Fighter’s State of Nationality or Habitual Residence, State of Transit, and State of Destination*, in FOREIGN FIGHTERS UNDER INTERNATIONAL LAW AND BEYOND 229, 238–39 (Andrea De Guttry, Francesca Capone & Christophe Paulussen eds., 2016).

36. *See, e.g.*, HUSAK, *supra* note 9, at 159 (criticizing “ancillary offenses” for contributing to excessive punishment).

37. MOORE, PLACING BLAME, *supra* note 17, at 783–84 (“For what is this ‘proxying function’ but an evasion of our normal requirements of proof beyond a reasonable doubt?”).

38. *See, e.g.*, *Benton v. United States*, 232 F.2d 341, 344 (D.C. Cir. 1956).

function of substantive criminal law:<sup>39</sup> that is, criminal law is assumed to express (and shape) a given community's attitudes on what constitutes public wrongdoing, so statutory crime definitions ought to precisely indicate the types of evil that the criminal law aims to avert and which evils constitute the object of punishment. However, when a person is convicted of a proxy crime *in lieu* of some primary wrongdoing, the criminal law fails to convey a clear message for what kind of wrongdoing this person is actually being punished.

Given the theoretical arguments against proxy crimes, it is not surprising that there are many court rulings in which offenses that might be classified as proxy crimes have been found to be unconstitutional. <sup>40</sup> Still, many other proxy crimes continue to exist in the criminal justice system without triggering much controversy. Are there any normative arguments capable of explaining why it may make sense to declare certain proxy conduct as crimes and not others? Can we identify conditions under which benefits of proxy criminalization (such as increased deterrence in the context of hard to enforce offenses or prevention of particularly harmful wrongdoing) outweigh the risks, making them socially desirable? We aim to provide a framework which can be used in answering these questions from an economic perspective through our normative analysis.

However, before we get to this point, it is useful to resolve some conceptual problems. Many of those problems stem from the fact that the category of proxy crimes is hardly homogenous. Thus, there appears to be no consensus within prior scholarship as to how these offenses ought to be defined. In Part I, after reviewing existing scholarship which contains differing definitions of proxy crimes, this Article provides an alternative, simple, and clear definition of proxy crimes. Subsequently, we propose a categorization of proxy crimes that is based on the type of relationship (temporal or causal) that links criminalized proxy conduct to the primary wrongdoing that it ultimately targets. The first category of proxy conduct consists of those where the prohibited conduct precedes or facilitates the target primary wrongdoing (e.g., possession of burglary tools). The second category of proxy conduct outlaw actions that follow the primary wrongdoing (e.g., conduct that increases profitability or reduces the chances of apprehension; bulk-cash

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39. Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397, 401–08 (1965) (arguing that punishment, by definition, is imposed in order to express or communicate a condemnatory message); *see also* Jean Hampton, *The Moral Education Theory of Punishment*, 13 *PHIL. & PUB. AFFS.* 208 (1984) (arguing that the imposition of punishment should cause the offender and society at large to reflect on the moral reasons not to engage in a given type of wrongdoing).

40. *See, e.g.*, *United States v. Bajakajian*, 524 U.S. 321 (1998) (finding that the offense of bulk-cash smuggling, to the extent it imposes a penalty of full forfeiture of the smuggled cash, is inconsistent with the Eighth Amendment to the U.S. Constitution); *State v. Birdsell*, 104 So. 2d 148 (La. 1958) (striking down a Louisiana statute criminalizing possession of drug paraphernalia as unreasonable under the Due Process Clause of the Fourteenth Amendment); *State v. Saiez*, 489 So. 2d 1125 (Fla. 1986) (invalidating a Florida statute criminalizing possession of devices used for counterfeiting credit cards); *Foster v. State*, 286 So. 2d 549, 551 (Fla. 1973) (finding that a conviction under a statute criminalizing possession of burglary tools required a showing of actual use where the defendant possessed only a simple screwdriver).



transportation is an example). The third category of proxy conduct consists of a less-specific version of the primary wrongdoing resulting from the omission of hard-to-prove elements from the offense's definition (e.g., the offense of accepting illegal gratuities as a proxy crime supplementing the primary offense of bribery). These categories may not encompass all proxy crimes, and in some cases, it may be difficult to designate the category to which the proxy crime belongs. Nevertheless, our typology allows us to identify the functions served by the most typical instances of proxy criminalization. We refer to these functions in our economic analysis, where we identify conditions under which the criminalization of such conduct is justifiable.

A common feature among all three types of proxy conduct is that they increase the net expected costs of committing the targeted crime, but this comes at the expense of potentially punishing (or deterring) proxy conduct that could be committed by innocent individuals who have no desire to commit crimes. However, the three categories of conduct also have differing features and functions. For instance, because conduct in the first category precedes the harmful act, it can give enforcers grounds to conduct investigations prior to the commission of the act, and thereby lead to preventive benefits in addition to deterrence benefits.<sup>41</sup> Criminalization of the second type of conduct, on the other hand does not result in the same sort of preventive benefits because the proxy conduct necessarily occurs after the commission of the primary wrongdoing. Moreover, whereas criminalizing the first and second types of proxy conduct increases the cost, or decreases the benefits, of committing the primary crime, criminalizing the third type of conduct merely lessens the evidentiary burden on the State by removing an otherwise necessary element to prove the commission of the target crime.<sup>42</sup>

These distinctions and commonalities, which are discussed further below, provide an economic lens through which one can view the social desirability of criminalizing each type of conduct. Based on these insights, we construct a Beckerian law enforcement model to identify conditions under which proxy criminalization is more likely to be socially desirable.<sup>43</sup> We leave the description and discussion of these conditions to Part III, after formally presenting our economic model in Part II. However, it is worth highlighting the primary trade-off that emerges from our

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41. The distinction between the prevention and deterrence functions of enforcement is subtle and often goes unnoticed. While deterrence benefits are obtained by causing a potential offender to refrain from committing crime, typically through incentives, preventive benefits are obtained by stopping a person who intends to commit crime before he can complete his crime. See Tim Friehe & Avraham Tabbach, *Preventive Enforcement*, 35 INT'L REV. L. & ECON. 1 (2013) (explaining the distinction between preventive and deterrence benefits of enforcement and discussing the conditions under which preventive enforcement can be superior to non-preventive enforcement); see also Murat C. Mungan, *Optimal Preventive Law Enforcement and Stopping Standards*, 20 AM. L. & ECON. REV. 289 (2018) (discussing the properties of optimal stopping standards given preventive benefits from such stops).

42. See Stuntz, *supra* note 23, at 551.

43. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (providing a model of criminal behavior to study optimal enforcement methods).

model and which determines the social desirability of proxy criminalization; namely, the tension between criminal harm prevention and the chilling of benign behavior.<sup>44</sup>

Based on this insight, we discuss legislative reforms that can be implemented upon the criminalization of proxy conduct. Specifically, we consider the possibility of allowing defendants in proxy crime cases to raise an affirmative defense to show that they have not engaged in the conduct in question to deliver the harm sought to be prevented. We argue that this approach is superior to the alternative of proxy criminalization without the availability of affirmative defenses. This is because once the affirmative defense is made available, the legislator can choose the standard of proof required to successfully raise the affirmative defense, which can be used to calibrate the trade-offs between the benefits of harm prevention and the costs of chilling benign behavior.

In Part I, we proceed by discussing the definitions of proxy crimes in the existing literature, proposing our own definition, and subsequently categorizing proxy crime. In Part II, we discuss the functions served by (as well as the undesired consequences resulting from) the criminalization of proxy conduct and employ a simple economic model of law enforcement. Using these insights, we identify factors that affect the social desirability of criminalizing proxy conduct in Part III. We then discuss policy implications in Part IV and provide concluding remarks in Part V.

## I. DEFINING AND CATEGORIZING PROXY CRIMES

The term “proxy crimes” is a useful (and perhaps for that reason an increasingly prevalent<sup>45</sup>) concept in criminal law theory. However, even though several criminal law scholars conceive of proxy crimes along similar lines, they still disagree or

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44. See, e.g., Murat C. Mungan, *A Utilitarian Justification for Heightened Standards of Proof in Criminal Trials*, J. INST'L & THEOR'L ECON. 352 (2011); Louis Kaplow, *On the Optimal Burden of Proof*, 119 J. POL. ECON. 1104 (2011) [hereinafter Kaplow, *On the Optimal Burden*]; see also Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 746–47, 752–72 (2012) [hereinafter Kaplow, *Burden of Proof*] (analyzing a similar trade-off in determining the optimal standard of proof in criminal trials between the benefits gained from deterring harmful acts and the costs associated with deterring socially valuable or benign acts).

45. Notable texts that make extensive use of the term “proxy crimes” include: Stephen Fogdall, *Exclusive Union Control of Pension Funds: Taft-Hartley's Ill-Considered Prohibition Comment*, 4 U. PA. J. LAB. & EMP. L. 215, 226 (2001) (describing proxy crimes as prohibiting “innocent behavior as a means of reaching offensive behavior”); Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 912 (2004) (defining proxy crimes as “offenses that are not blameworthy in themselves, but that stand in for more culpable activities”); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 11–22 (2006) (interpreting the offense of violating a protective order as a proxy for domestic violence); Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 880 (2011) (arguing that “proxy punishment” is imposed when three criteria are met: (1) the primary offense is too difficult to prosecute; (2) the proxy crime is easier to prosecute; and (3) those who commit the proxy crime have also committed the real crime); Piotr Bystranowski, *Retributivism, Consequentialism, and the Risk of Punishing the Innocent: The Troublesome Case of Proxy Crimes*, 53 DIAMETROS 26 (2017) (providing a normative analysis of how proxy crimes may lead to punishing the innocent by effectively lowering the evidentiary threshold).

lack specificity on many crucial features in defining the category of proxy crimes.<sup>46</sup> We review two general approaches to conceptualizing proxy crimes in the criminal law literature, namely, (1) those that conceive of proxy crimes as over-inclusive (or rule-like) offenses,<sup>47</sup> and (2) those that view proxy crimes as a means of reducing the evidentiary burden on the State.<sup>48</sup> Although our interpretation of this term does not fit squarely within either approach, it incorporates many aspects of the “evidentiary” approach, which we review below. We subsequently provide our preferred definition of proxy crimes that we use throughout the remainder of this Article.<sup>49</sup> We also describe in detail three types of proxy crimes that we find particularly common in modern criminal law systems.

### A. *Two Existing Conceptions of “Proxy Crimes”*

Although proxy crimes are more and more frequently the subject of scholarly discussions, it is not necessarily easy to distill the exact meaning of this notion. The term “proxy crimes” has been used in the Anglo-American criminal law literature in a number of rather discrepant, even if still closely related, ways.<sup>50</sup> Furthermore, roughly the same category of crimes labeled “proxy crimes” by one author is often referenced differently by another.<sup>51</sup> As a result of this terminological tangle, any serious attempt to define proxy crimes should start with a survey of existing definitions in the criminal law literature.

The existing literature offers two (implicit) definitions—a broad as well as a relatively narrower one—of proxy crimes. We explain and discuss each in turn. The first definition, the broader of the two, uses the term to refer to the entire class of *over-inclusive* (or *rule-like*) offenses.<sup>52</sup> This definition possibly encompasses a majority of existing offenses, and notably includes a wide group of so-called hybrid offenses.<sup>53</sup> The second conception of the term, the narrower definition, which can also be seen as a refinement of the first one, uses the term to refer to a more specific sub-class of over-inclusive offenses: those whose over-inclusiveness is meant to help overcome some evidentiary hurdles. This second, more specific, conceptualization is closer to the definition we adopt, as we explain below.

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46. See *infra* Part I.A.

47. See *infra* Part I.A.1.

48. See *infra* Part I.A.2.

49. See *infra* Part I.B.

50. See Husak, *supra* note 17, at 355 (“No canonical definition of a proxy crime is found in the literature.”).

51. See, e.g., Frederick Schauer, *Bentham on Presumed Offences*, 23 UTILITAS 363, 363–64 (2011) (using the term “presumed offenses”).

52. “Rule-like offense” is an offense defined without direct reference to its background justification. Rule-like offenses are typically over-inclusive. That is, they criminalize some instances of conduct that should not be criminalized according to the rule’s background justification. See, e.g., FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 15–16, 24–25 (2009) (analyzing the concept of rules in the legal system).

53. See HUSAK, *supra* note 9 at 106–07 (explaining that hybrid offenses criminalize some pre-legal, moral wrongdoing while defining the criminalized conduct in a somewhat artificial, stipulative way).

## 1. Proxy Crimes as Over-Inclusive Offenses

Professors Larry Alexander and Kimberly Kessler Ferzan introduced a conceptualization of proxy crimes that is certainly the broadest in the existing literature, and which remains quite influential: proxy crimes are offenses that are defined in a rule-like manner.<sup>54</sup> In other words, these crimes are defined without direct reference to their background justification,<sup>55</sup> and only indirectly address the primary wrongdoing they are intended to avert,<sup>56</sup> while designating the proscribed behavior in a more determinate or specific way.<sup>57</sup> A standard example is speeding.<sup>58</sup> The background justification behind the illegalization of exceeding a posted speed limit is the wrongfulness of driving in a dangerous way.<sup>59</sup> However, instead of directly

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54. LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 66 (2009) [hereinafter ALEXANDER & FERZAN, *CRIME AND CULPABILITY*]; LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *REFLECTIONS ON CRIME AND CULPABILITY: PROBLEMS AND PUZZLES* 83–92 (2018) [hereinafter ALEXANDER & FERZAN, *REFLECTIONS*].

55. *See, e.g.*, SCHAUER, *supra* note 52, at 15–16 (“Every rule has a background justification—sometimes called a rationale—which is the goal that the rule is designed to serve. . . . [I]n practice the abstract rationales or background justifications are typically reduced to concrete rules. These concrete rules are designed to serve the background justifications, but it is the rule itself that carries the force of law, and it is the rule itself that ordinarily dictates the legal outcome.”).

56. ALEXANDER & FERZAN, *CRIME AND CULPABILITY*, *supra* note 54, at 66 n.69 (claiming that proxy crimes “may be created not merely to relieve the prosecutor of the need to prove hard-to-prove matters but also to relieve actors of difficulties in estimating whether particular conduct is unduly risky”); ALEXANDER & FERZAN, *REFLECTIONS*, *supra* note 54, at 83 (referring to proxy crimes as “crimes that forbid specific forms of conduct that are presumptively but not always reckless (culpable)”). Proxy crimes, so understood, are “defined by criteria that do not perfectly map onto the underlying harms that the crimes are intended to avert.” Larry Alexander, *You Got What You Deserved*, 7 *CRIM. L. PHIL.* 309, 314 (2013). For a now-classic exposition of the rules versus standards debate, see generally FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991). Professor Louis Kaplow also offers a seminal paper tackling this issue from an economic perspective. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *DUKE L.J.* 557 (1992).

57. Larry Alexander & Kimberly Kessler Ferzan, *Beyond the Special Part*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 253, 275 (R.A. Duff & Stuart P. Green eds., 2013) [hereinafter Alexander & Ferzan, *Beyond the Special Part*] (claiming that introducing proxy crimes might be acceptable when they provide actors with “epistemic guidance”). However, note that in a more recent piece, Alexander and Ferzan seem to assume that proxy crimes are a proper subclass of rule-like offenses, defined as forbidding “specific forms of conduct that are presumptively but not always reckless (culpable).” ALEXANDER & FERZAN, *REFLECTIONS*, *supra* note 54, at 83. In another place, Alexander and Ferzan offer yet another understanding of proxy crimes as “acts that do not risk harm in themselves.” Larry Alexander & Kimberly Kessler Ferzan, *Culpable Acts of Risk Creation*, 5 *OHIO ST. J. CRIM. L.* 375, 391 n.6 (2007). In the same place they write “[t]here are two types of proxy crimes—crimes that set forth a rule that is overinclusive (e.g., speed limits, ages of consent), and crimes that punish actions that are not culpable for law enforcement reasons (e.g., possession of burglar’s tools).” *Id.* The understanding of proxy crimes furthered in this Article—offenses that are over-inclusive because of evidentiary concerns—encompasses possibly the whole second type and some part of the first type mentioned by Alexander and Ferzan. Another point is that, according to how over-inclusiveness is defined in this Article, the second type also refers to over-inclusive offenses and, as such, is a subclass of the first type. All in all, it should be noted that in basically every text in which they employ the term “proxy crimes,” Alexander and Ferzan define it in a noticeably distinct way without giving any hint whether they always intend to refer to the same concept.

58. *See, e.g.*, R.A. Duff, *Crime, Prohibition, and Punishment*, 19 *J. APPLIED PHIL.* 97, 102 (2002).

59. *Id.*

criminalizing dangerous driving, speeding laws only illegalize driving above the posted speed limit.<sup>60</sup>

Because the correspondence between the proscribed proxy conduct and the background justification behind a given offense (i.e., the primary wrongdoing) is imperfect, rule-like offense definitions likely result in over-inclusiveness. In other words, it is “possible to break an overinclusive law without actually causing (or risking) the harm or evil that law is designed to proscribe.”<sup>61</sup> For example, speeding also covers actual instances of exceeding a posted speed limit where it was not unjustifiably risky.<sup>62</sup> Technically, for Alexander and Ferzan, over-inclusiveness is a very likely but not a conceptually necessary result of enacting rule-like offenses.<sup>63</sup> Despite this, they appear to use rule-likeness and over-inclusiveness interchangeably.<sup>64</sup> Accordingly, some authors subscribing to their conceptualization of proxy crimes no longer use “rule-likeness,” instead opting to define this class of offenses merely in terms of over-inclusiveness.<sup>65</sup> We follow suit and assume that over-inclusiveness is a defining feature of proxy crimes for purposes of illustrating the difficulties that arise from this conceptualization.<sup>66</sup>

As we argue below, a large number, if not a majority, of existing offenses are in some way over-inclusive. However, Alexander and Ferzan focus their analysis mostly on one specific subclass of over-inclusive offenses: “hybrid offenses.”<sup>67</sup> This subclass of offenses can be characterized by “a more or less artificial,

60. Another example offered by Alexander and Ferzan is the background justification behind the offense of having a sexual intercourse with a person under 15 years old: the wrongfulness of having sex with a person not mature enough to express their consent. However, the offense is defined in terms of age, which is taken as a proxy for lack of maturity. See Alexander & Ferzan, *Beyond the Special Part*, *supra* note 57, at 275 (“One area in which we may find ‘proxies’ to be necessary is where there are questions of maturity and capacity. For instance, at some point, a teenage girl becomes sufficiently rational to consent to sexual intercourse. But this point varies . . .”).

61. HUSAK, *supra* note 9, at 154.

62. Or, to revisit Alexander and Ferzan’s example of having sex with underage minors, that offense also covers cases in which a particular minor actually was mature enough to express their consent. See Alexander & Ferzan, *Beyond the Special Part*, *supra* note 57, at 275 (“[M]iscalculations may occur on both sides of the equation—some 15-year-olds are sufficiently mature that they should be able to determine for themselves whether to consent to intercourse, but many may not be.”).

63. See *supra* notes 54–56 and accompanying text for an explanation of what *rule-likeness* entails.

64. See, e.g., ALEXANDER & FERZAN, *CRIME AND CULPABILITY*, *supra* note 54, at 297–98 (discussing “the overinclusive nature of rules”).

65. “The draft employs *overinclusive rules—proxy crimes*—to address the problem of unwanted sex.” Cole, *supra* note 20, at 511 (emphasis added). Elsewhere in the same paragraph, though, Cole gives a slightly more elaborate definition: proxy crimes “target a state of affairs . . . for the purpose of avoiding a harm that may not be present even when the proxy crime is committed.” *Id.*

66. There are at least two reasons to prefer over-inclusiveness to rule-likeness as a defining feature of proxy crimes. First, rules are typically understood to be expressed in a way that ignores their background justification, and in general are easier to interpret than standards. Proxy crimes, as understood here, always satisfy the former but not necessarily the latter feature, since they might be expressed using vague, standard-like terms, while still being over-inclusive. Second, rule-likeness might imply both over- and under-inclusiveness, while proxy crimes are better characterized only by over-inclusiveness, although they can also be accidentally under-inclusive in some respects.

67. See HUSAK, *supra* note 9, at 106 (defining “hybrid offenses”).

stipulative determination of a genuine *malum in se*.<sup>68</sup> They are typically employed in situations in which there could be doubts regarding the exact breadth of the wrongful conduct.<sup>69</sup> In other words, the conduct causing or unjustifiably risking the target harm or evil may be defined only in a vague, open-ended way.<sup>70</sup> Using the example from before, the legislature may believe that unreasonably risky driving is a wrongful act. However, criminalizing this directly would result in some borderline cases where there could be disagreement over whether the primary wrongdoing has actually occurred. To overcome this problem, a precise but stipulative definition of the criminalized conduct is given, such as driving over 55 miles per hour or with blood alcohol content over 0.08%. The problem then, of course, is that it might cover some instances of conduct that would not otherwise be considered wrongful.

The purely consequentialist advantages of such hybrid offenses are easy to list: they facilitate convictions by allowing the prosecutor to prove a more straightforward set of facts;<sup>71</sup> they limit the scope of law enforcement's discretion and thus possibly reduce incidence of abuse;<sup>72</sup> and finally, they give potential offenders clearer guidance as to what kind of conduct may be prosecuted.<sup>73</sup>

Additional benefits associated with hybrid offenses become apparent once we recognize that both law enforcement and potential offenders may struggle to properly classify borderline cases. It follows, then, that hybrid offenses can potentially provide such individuals with *epistemic guidance* in situations where they may inaccurately estimate the relevant risk.<sup>74</sup> It should be also noted that hybrid

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68. Duff, *supra* note 58, at 102. Note that this definition assumes normative agreement on what constitutes the target harm or evil, and only allows for possible disagreement on what constitutes unjustifiably risking the harm or evil. However, a possibly over-inclusive, rule-like way of defining offenses might be at least equally common in situations where there is room for actual social disagreement on what constitutes the target harm or evil, morally. See R.A. Duff & Stuart P. Green, *Introduction: The Special Part and its Problems*, in *DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW 1*, 10–16 (R.A. Duff & Stuart P. Green eds., 2005) (discussing the descriptivist, as opposed to moralistic, approach to defining offenses).

69. See R.A. DUFF, *ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW* 258–59 (2007) (arguing that sometimes defining an offense in terms of the underlying wrong would be “too vague a specification to meet ‘rule of law’ demands for certainty”).

70. *Id.*

71. Duff, *supra* note 58, at 103 (“[Hybrid offenses] make it easier to obtain convictions: it is easier to prove that a man’s sexual partner was under sixteen than to prove her immaturity, or to prove that a driver was exceeding the speed limit than that she was driving dangerously.”).

72. HUSAK, *supra* note 9, at 108 (discussing “curbing discretion, and reducing abuse in law enforcement”).

73. Duff & Green, *supra* note 68, at 10 (“The guiding thought here is that the criminal law, insofar as it is addressed to citizens, must aim to lay down clear ‘rules of conduct’ for them that will tell them precisely what they must or must not do, on pain of punishment if they break the rules.”).

74. ALEXANDER & FERZAN, *CRIME AND CULPABILITY*, *supra* note 54, at 310 (arguing that proxy crimes in particular “may be justified in circumstances where agents are particularly prone to rationality errors”); ALEXANDER & FERZAN, *REFLECTIONS*, *supra* note 54, at 84 (stating that proxy crimes are ultimately justified by the concern “that the individuals in the relevant situations are not epistemically well situated to determine the underlying risks”). Reducing individuals’ uncertainty as to exactly what conduct is wrongful, prohibited, or both, is typically assumed to be desirable without any further proof in moral or legal philosophy. However, from a purely consequentialist perspective, it is possible to argue that sometimes such uncertainty has beneficial

offenses include so-called temptation cases where the law gives us reasons to distrust our own potentially (and temporarily) impaired judgment.<sup>75</sup> For example, an intoxicated driver might believe he would be just alright to drive or a lustful man might believe a 14-year-old girl is just mature enough to have sex, but the law tells them not to act upon such judgment. However, it does not seem right to assume that hybrid offenses are desirable only in temptation cases.<sup>76</sup> The presence of a hybrid offense may cause an offender to abstain from the questionable conduct for exclusionary normative reasons.<sup>77</sup> This means that a hybrid offense gives a potential offender a reason to refrain from a given act, even if she is quite convinced that this token-act does not constitute primary wrongdoing. Moreover, this incentive to abstain might go further on normative or moral grounds, causing the actor to be persuaded that a given type of conduct is, in general, unreasonably risky and therefore wrongful. Even if a potential offender is convinced that he is sober enough to drive when his blood alcohol content exceeds the statutory limit, the law gives him a normative reason not to drive in such a state because the act unjustifiably risks the target harm or evil.

Hybrid offenses could still result in problematic over-inclusiveness. In addition to covering individuals who committed a token behavior without knowing if it was unjustifiably risky,<sup>78</sup> hybrid offenses also problematically apply to individuals who are “epistemically privileged.”<sup>79</sup> In other words, these offenses apply to individuals

consequences because it magnifies the deterrent effect on risk-averse potential offenders. See Alon Harel & Uzi Segal, *Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Detering Crime*, 1 AM. L. ECON. REV. 276, 277–80 (1999). Still, one might argue that even in situations in which factual uncertainty (for example, regarding the chances of apprehension) could indeed increase deterrence, normative uncertainty as to whether a given act is wrongful or prohibited might actually decrease deterrence by triggering self-serving biases on the side of the potential offender. See Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal*, 84 N.Y.U. L. REV. 980, 1009–10 (2009) (providing some experimental evidence of the tendency to interpret legal standards in a self-serving way).

75. See HUSAK, *supra* note 9, at 109 (defining temptation cases as “situations in which a person’s self-interest urges him to proceed while his judgment is clouded by lust, intoxication, or the like”).

76. See Feldman & Teichman, *supra* note 74, at 1008 (providing some convincing evidence that people are generally susceptible to self-serving interpretations of vague, standard-like legal provisions also outside the typical temptation setting, especially in the context of criminal law prohibitions and in morally-charged cases).

77. This is just one example of a more general point: the State can create moral obligations by enacting prohibitions for which it has good ex ante reasons. See A.P. SIMESTER & ANDREW VON HIRSCH, *CRIMES, HARMS, AND WRONGS: ON THE PRINCIPLES OF CRIMINALISATION* 25 (2011) (arguing that “the state acts as a conduit, crystallising those ex ante reasons into a more particular, practicable form—the moral force of which derives not from the enactment itself, but from the purposes it serves and which lie behind its enactment”).

78. We should note, though, that Alexander and Ferzan postulate that an individual accused of a hybrid offense should always be given a right to prove that her token-act was not harmful or evil and that she gave sufficient weight both to the possibility of mis-assessing the relevant risk and to the social value of following rules. See Alexander & Ferzan, *Beyond the Special Part*, *supra* note 57, at 276. Thus, even if the authors allow for some over-inclusiveness of hybrid offenses “in the books,” they want this over-inclusiveness ideally to be eradicated “in action.” This is roughly implied by their assumption that consequentialist considerations can give the legislature reasons to enact over-inclusive criminal legislation but cannot give individuals exclusionary moral reasons to follow it, since there is “an ineliminable gap between when a legislator should create rules and when a citizen should follow them. A citizen can thus violate a justified rule justifiably.” *Id.* at 268.

79. HUSAK, *supra* note 9, at 155.

who know, or justifiably and truthfully believe, that their hybrid-offense token acts are not unjustifiably risky and do not seem to deserve punishment. There have been some proposals as to how to justify the latter type of over-inclusiveness,<sup>80</sup> but we refrain from going into more detail regarding this and other normative problems with hybrid offenses.<sup>81</sup> What is important for our investigation is that at least some hybrid offenses provide potential offenders with epistemic guidance or exclusionary normative reasons to abstain from the proscribed conduct, which, in turn, might explain the normative reason behind their inclusion in criminal codes.

Hybrid offenses, however, do not exhaust the universe of over-inclusive offenses, since epistemic guidance is not the only possible reason to enact over-inclusive offenses. Alexander and Ferzan themselves note two other justifications:<sup>82</sup> (1) evidentiary—defining offenses in terms that are over-inclusive but might be easier to prove before the court;<sup>83</sup> and (2) preventive—criminalizing conduct that can lead to harm if there were further wrongful conduct, but whose criminalization allows law enforcement to intervene beforehand. Indeed, these two reasons alone encapsulate a potentially large number of existing over-inclusive offenses, perhaps many more than those covered by epistemic guidance or other rationales. In the following section, we show how the evidentiary justification can be used as a defining feature of proxy crimes.

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80. See, e.g., Duff, *supra* note 58, at 104 (justifying punishing the epistemically privileged by pointing at their “civic arrogance,” as exhibited by engaging in behavior from which their fellow citizens abstain); HUSAK, *supra* note 9, at 155–56 (justifying the same thing by noting the difficulty of distinguishing between the epistemically privileged and the merely fortunate; that is, individuals who were fortunate enough to engage in conduct that was not unjustifiably risky but who did not know so in advance).

81. To briefly list some other problems raised by Husak: first, the justifiability of hybrid offenses rests on the assumption that the lawmaker is better suited than a given individual to assess the riskiness of a given type of conduct, which is both empirically questionable in concrete cases and normatively suspicious, as it is quite illiberal; second, the examples of hybrid offenses presented most often are temptation offenses, where the judgment of a potential offender is impaired because of lust, intoxication etc., which are easy to justify but by no means exhaust the universe of hybrid offenses. See HUSAK, *supra* note 9, at 109–11. But see *supra* note 76 and literature cited therein for arguments that the benefits of epistemic guidance are by no means limited to temptation cases.

82. Reasons which—unlike epistemic guidance—can never justify over-inclusive criminalization on retributivist grounds. Alexander & Ferzan, *Beyond the Special Part*, *supra* note 57, at 277. It also should be noted that these three reasons—giving epistemic guidance, evidentiary, and preventive—do not exhaust the universe of possible reasons behind over-inclusive offense definitions. Possible other reasons include: the natural inability of language to adequately express the background rationale, see H.L.A. HART, THE CONCEPT OF LAW 6–13 (1961); the reliance on a possibly arbitrary and rule-like legal definition of what counts as harm in the terms of a given offense (e.g., the scope of the offense of homicide depends on a supposedly rule-like legal definition of death), see Green, *supra* note 10, at 1577 (stating that a legal definition of dying is needed in order to exhaustively determine what counts as a wrongful killing); and the willingness both to cover new and unknown types of wrongdoing that might emerge only in the future, and to counteract strategic behavior of some offenders who might try to structure their activity so that it is not criminal, see Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1535 (2008) (arguing that overbroad criminal statutes might be necessary to allow prosecution of strategic offenders).

83. See *infra* Part I.2.



## 2. Proxy Crimes as a Means of Reducing the Evidentiary Burden

The second meaning popularly ascribed to the term “proxy crimes” in the literature refers to a distinct subclass of over-inclusive offenses, which is defined by the justification for the introduction of such offenses into law: to make it easier to prove guilt and thus secure a conviction of a person who is targeted for another offense or merely suspected of some other wrongdoing.

Jeremy Bentham was one of the first scholars to postulate the existence of such a class of offenses. He labelled this class as “presumed” or “evidentiary” offenses.<sup>84</sup> For Bentham, presumed offenses were an example of a broader class of “accessory offenses,” or offenses whose rationale can be understood only in relation to some other, “principal” offense.<sup>85</sup> These offenses might be characterized as being “injurious or otherwise in themselves, but furnishing a presumption of an offence committed.”<sup>86</sup> Thus, while an act constituting a presumed offense might be totally harmless in itself, it strongly indicates (i.e., forms a presumption) that some other offense has been committed by the same actor.<sup>87</sup> For example, it was a felony in eighteenth century England for the mother of an illegitimate child to conceal its birth because the concealment came with the presumption of infanticide (intended or already committed).<sup>88</sup> It was also an offense for a group of men to meet armed and disguised, as it indicated “a formed design to offer violent resistance to the officers of the customs.”<sup>89</sup> Two other examples provided by Bentham indicate participation in a theft: possession of stolen property and obliteration of the marks upon shipwrecked property.<sup>90</sup> Bentham implied that all these types of conduct could be theoretically undertaken for an innocent reason, but in practice, they are committed almost exclusively by actual criminals.<sup>91</sup>

Because the conduct denoted by a presumed offense of that kind is typically good evidence of the primary offense, Bentham argues that such conduct should be

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84. BENTHAM, *supra* note 30, at 425 (“The fourth class [of accessory offenses] is composed of presumed offences, that is, of acts which are considered as proofs of an offence. They may be called *evidentiary offences* . . .”). This terminological convention was then followed by Frederick Schauer. *See* Schauer, *supra* note 51, at 364; FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 224–50 (2003).

85. The three other examples of accessory offenses given by Bentham are: offenses implying intention to commit the principal offense (attempts and preparatory offenses); offenses not implying intention but rather some kind of propensity to commit a crime the future (e.g., “gaming, prodigality, and idleness, when poverty is added to it”); and offenses defined in terms of conduct that is basically innocent but which may accidentally contribute to causing harm (e.g., selling gunpowder or poison in the absence of any specific criminal intent). *See* BENTHAM, *supra* note 30, at 423–25.

86. *Id.* at 425.

87. Actually, the examples used by Bentham suggest he meant a presumed offense could either indicate the commission of another offense in the past or the likelihood that the same actor will commit a crime in the future.

88. BENTHAM, *supra* note 30, at 425.

89. *Id.* at 426.

90. *Id.* Frederick Schauer also provides an in-depth analysis of examples used by Bentham. *See* Schauer, *supra* note 51, at 366–68.

91. BENTHAM, *supra* note 30, at 426.

sufficient to convict the actor of the primary offense.<sup>92</sup> However, the legislature—presumably afraid that in practice the courts would not find such evidence alone sufficient for conviction of the primary offense—enacted a separate offense (i.e., a presumed offense) defined exactly in terms of this conduct.<sup>93</sup> As far as Bentham is concerned, this result is suboptimal, and stems from distrust between the legislature and the judiciary<sup>94</sup> (a form of agency costs, to use a somewhat more modern term). If the legislature were to have full confidence that the courts would not acquit defendants too often when faced with evidence of accessory conduct, such as possession of stolen property, these presumed offenses would be “arranged under their proper head” and presented as genuine presumptions sufficient to establish the primary offense.<sup>95</sup>

The first scholar, to the best of our knowledge, who used the term “proxy crimes” to refer to roughly the same concept that Bentham labelled “presumed offenses”<sup>96</sup> was Professor Michael Moore. Professor Moore argues that the possession of burglary tools, for example, should be interpreted as a proxy for either past or future illegal acts.<sup>97</sup> By doing so, we are able to convict for past offenses that we cannot otherwise prove and prevent future offenses which we cannot otherwise punish. However, since the mere act of possession is typically not wrongful in any way, such possession offenses *are not* legitimate offenses according to Moore’s views on criminalization.<sup>98</sup>

In another context, Moore develops a more general account of proxy crimes.<sup>99</sup> He describes a proxy crime as using “one morally innocuous act as a proxy for another, morally wrongful act or mental state.”<sup>100</sup> Again, Moore argues that in either of their two functions, evidentiary or preventive, proxy crimes are not legitimate offenses. In the evidentiary context, proxy conduct either gives us a practical certainty that a given actor has committed the primary offense or has formed the necessary culpable intent,<sup>101</sup> or it does not give us such certainty and allows us to circumvent the evidentiary threshold.<sup>102</sup> Alternatively, the preventive function of proxy crimes allows us to “isolate a convenient point in time from which it is

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92. *Id.* at 425–26.

93. *Id.* at 426 (arguing that the introduction of presumed offenses is result of “the English legislature fearing that juries, too prone to lenity, would not see in these presumptions a certain proof of guilt”).

94. *Id.*

95. *Id.*

96. And in all likelihood, the first scholar to use the term “proxy crimes” at all.

97. MOORE, ACT AND CRIME, *supra* note 17, at 22.

98. *Id.*

99. MOORE, PLACING BLAME, *supra* note 17, at 783.

100. *Id.*

101. In that case the proxy crime is superfluous, since the proxy conduct itself provides sufficient evidence to convict a person of the primary offense. *Id.* at 784–85.

102. *Id.* at 784. Moore argues that lowering this threshold, if desirable at all, should be done up front by changing procedural rules, not by meddling with the substantive criminal law. *Id.* Doron Teichman, on the other hand, argues that lowering the evidentiary threshold by changing the substantive criminal law might be preferable to changing procedural rules. *See generally* Teichman, *supra* note 17.

predictable that some moral wrongs will occur, and such wrongs can this way be efficiently prevented by preventing the earlier, non-wrongful act.”<sup>103</sup> In other words, such proxy crimes allow us to prevent further, worse offenses by catching actors while they are committing a less-harmful proxy crime. However, no such preventive goal can justify imposing punishment for non-wrongful conduct according to Moore.<sup>104</sup>

Another author that subscribes to this conceptualization of “proxy crimes” is Professor Richard McAdams. He defines the term as offenses prohibiting behavior that, “while not inherently risking harm, stands in for behavior that does risk harm.”<sup>105</sup> As it stands, this definition seems to define the general class of over-inclusive offenses, and thus may better fit the definition of proxy crimes provided in Part I.A.1. However, all subsequent considerations by McAdams indicate that he focuses on one specific subclass of over-inclusive offenses—those whose sole purpose is to overcome evidentiary hurdles. Accordingly, he says that proxy crimes are typically introduced in situations where there is some preexisting primary offense for which it is hard for prosecutors to prove all elements. In response to this difficulty, the legislature reacts by removing the hard-to-prove elements from the offense definition.<sup>106</sup> McAdams sees the resulting offense as “a prophylactic crime, that bars conduct that neither causes nor risks harm but is correlated with other conduct that is harmful or risky.”<sup>107</sup>

Additionally, McAdams, following the analysis of over-inclusive offenses by William Stuntz,<sup>108</sup> describes two ways in which a proxy crime can be drafted. Both start with an existing primary offense defined in terms of the elements “A,” “B,” and “C.”<sup>109</sup> Out of these elements, let us presume “C” tends to be difficult to prove beyond a reasonable doubt before the court.<sup>110</sup> The first way to overcome this evidentiary problem is to add a proxy offense defined merely in terms of “A” and “B,” and completely skip the difficult element “C” that was evidentially problematic. However, if element “C” was the crucial component that made the offense wrongful in the first place, then an over-inclusive proxy offense is created by its removal.<sup>111</sup> Another way for a proxy crime to be created is by defining an offense in terms of elements “D,” “E,” and “F,” which might be harmless in and of themselves, but happen to correlate with the original harmful behavior defined through

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103. MOORE, *PLACING BLAME*, *supra* note 17, at 784.

104. In an oft-cited passage, such an approach “gives liberty a strong kick in the teeth right at the start.” *Id.* Many authors cite this passage as expressing Moore’s general opinion on proxy crimes. However, it only applies to justifications that say that proxy crimes help facilitate early police intervention against non-wrongful conduct that might ultimately result in wrongful behavior.

105. McAdams, *Entrapment*, *supra* note 17, at 159–60.

106. *Id.* at 160.

107. *Id.*

108. See Stuntz, *supra* note 23.

109. McAdams, *Pessimists’ View*, *supra* note 17, at 524.

110. See *id.*

111. *Id.*

“A,” “B,” and “C.”<sup>112</sup> In this case, the proxy crime defined by “D,” “E,” and “F” will not be wrongful itself, but is usually accompanied by the harmful offense defined by “A,” “B,” and “C.” The offense of giving illegal gratuities to public officials (which is basically bribery minus the hard-to-prove element of *quid pro quo*) would be a model example of the first type, while the offense of possession of burglary tools (as a proxy for the offense of burglary) would be a good example of the latter.

In his discussion of proxy crimes, Professor Doron Teichman follows McAdams’s definition and implicitly narrows the scope of the term to only those offenses that aim primarily to overcome evidentiary hurdles.<sup>113</sup> Indeed, proxy crimes play an important role in Teichman’s “evidentiary theory” of substantive criminal law. The theory postulates that some institutions of substantive criminal law serve a dual purpose of (1) enabling prosecutors to secure a conviction of defendants whose guilt of a primary offense has not been proven beyond a reasonable doubt, and (2) grading punishments in proportion to the strength of the evidence for the primary offense collected against the defendant.<sup>114</sup> And so, a proxy crime being introduced in addition to some primary offense may enable a prosecutor to charge a defendant whose guilt with respect to the primary offense could not be proved beyond a reasonable doubt.<sup>115</sup> At the same time, because criminal sanctions for committing a proxy crime are typically lower than those for committing the corresponding primary offense, there is some room for “calibration” of the severity of punishment relative to the strength of the evidence collected against a defendant.<sup>116</sup>

### *B. An Alternative Definition and Three Types of Proxy Crimes*

We define proxy crimes as conduct that is not wrongful in itself (or that is innocuous or harmless) but is nevertheless criminalized to reduce harms from another kind of harmful activity, despite society having no inherent reason to deter the proxy conduct. This harm reduction can be achieved by lowering the evidentiary threshold, as discussed in the prior literature, but it may also be achieved by

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112. In other words, conduct “BC” constitutes a more general class, of which “ABC” is an (analytically) proper subset, while “DEF” refers to conduct which is analytically distinct and independent of “ABC” but (empirically) tends to correlate with it, for whatever reason.

113. Teichman, *supra* note 17, at 785 (discussing “the role of proxy crimes in relaxing the burden of proof”).

114. *Id.* at 771 (observing that the criminal law system “calibrates sanctions in proportion to the degree of certainty of guilt, even when guilt is not proven beyond a reasonable doubt,” and that it does so by “designing criminal offenses that incorporate evidentiary considerations”).

115. *Id.* at 785.

116. *Id.* at 785–86 (noting that, “[g]enerally speaking, proxy crimes entail a more moderate punishment than the crime they serve as a proxy for” and, thus, “[w]hile those who committed the underlying crime itself without a reasonable doubt are given the full penalty that they deserve, those whose guilt was proven to a lesser degree via the proxy crime are given a more lenient penalty”).

reducing the expected benefits from the targeted harmful activity, or else by facilitating its prevention before it even occurs.<sup>117</sup>

Thus, we find the second, narrower conceptualization of proxy crimes<sup>118</sup> more useful as a starting point, as it is based on the assumption that evidentiary offenses pose specific kinds of problems compared to other types of over-inclusive offenses. A typical over-inclusive offense refers to conduct that usually, although not always, is wrongful, and thus society has an interest in getting rid of it altogether. For example, even if people driving with a blood alcohol content above the statutory level may not always create an unacceptable risk, on average, the harm that could result may warrant legalization.

The types of evidentiary offenses which we believe can properly be called proxy crimes are different. They typically refer to conduct that is essentially innocuous and is criminalized only because it is associated with some primary wrongdoing. This is what we find most distinguishing about this class of offense: society has no reason to deter the prohibited conduct other than as a means to deter and punish some other, harmful conduct.

Evidentiary offenses with this feature stand in contrast to criminalized conduct that, as a class, are risky, but which may not carry significant risk in certain circumstances. To illustrate this point more clearly, contrast the proxy crime of “burglary tool possession” to the conduct crime of driving under the influence. Whereas the former carries no harm absent further wrongdoing (actual burglary), the latter, on average, results in unjustifiable harms, even if it is not accompanied by any additional, harmful conduct. This is why, we argue, punishing people for evidentiary offenses of the former type should be addressed with a distinctive kind of normative analysis.

However, at the same time, many scholars who conceptualize “proxy crimes” solely along evidentiary lines unnecessarily narrow this class of crimes. If we define proxy crimes in terms of their evidentiary function (punishing individuals whom we suspect of committing the primary wrongdoing but cannot prove it beyond a reasonable doubt), we ignore the fact that they can serve other functions in addition to, or instead of, their evidentiary function.<sup>119</sup> First, proxy crimes might

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117. By introducing the second part of this definition, we acknowledge that the criminalization of proxy conduct need not necessarily increase the likelihood of punishment for a given criminal, as would typically be the case under prior definitions of proxy conduct, which focus on its evidentiary functions. If, for instance, the international transportation of large sums of money is criminalized, an offender may choose not to transport large sums of money internationally. Thus, for this offender, the probability of punishment need not be increased. However, his net benefit from crime is decreased, because now he cannot transport money obtained from criminal activities through his most preferred method. Thus, some potential offenders who anticipate this type of behavioral change may be deterred from committing crime in the first place.

118. See *supra* Part I.A.2.

119. Defining proxy crimes in terms of the evidentiary function also seems to stipulate that the criminalized proxy conduct has some significant probative value *vis-a-vis* the primary wrongdoing. In other words, we have a good reason to presume that a proxy offender has committed the primary wrongdoing even if we cannot prove it beyond a reasonable doubt. The definition of proxy crimes we offer does not imply such restrictions; allowing, however, that proxy crimes have a purely pretextual character, i.e., they are not particularly indicative of any

better deter the primary wrongdoing because they lower the net benefit of the primary offense, either by increasing the likelihood of apprehension, lowering the reward from the offense, or raising the preparation costs. Second, they might serve a preventive function, giving police grounds to intervene and stop the primary wrongdoing from taking place, even in cases where the offender is undeterred from committing the wrongdoing.

Having made explicit our definition of proxy crimes, we now offer a categorization of proxy crimes, based on the characteristics of criminalized proxy conduct: (1) conduct that typically occurs *before* the primary wrongdoing, (2) conduct that typically occurs *after* the primary wrongdoing, or (3) conduct that is a generalized description of the primary wrongdoing. To be clear, we are certain that proxy crimes, as we understand them, constitute a highly heterogeneous class, and thus it would be difficult to offer an exhaustive classification. We are confident, however, that the majority of common proxy crimes can be easily placed under one of the three categories. Furthermore, we think that the three categories are clearly distinct on a conceptual level and exhibit important differentiating features, which map nicely into the functions we discuss in our economic analysis.<sup>120</sup>

The first category is based on temporal or causal relationships that link the criminalized proxy conduct with the primary wrongdoing. The first category of proxy crime is the criminalized proxy conduct that might make it *easier or cheaper* for a person to engage in the primary wrongdoing. The possession of burglary tools and many other possession offenses fall into this category. Even if the items these offenses refer to are not necessary to commit a further offense, they nevertheless make it easier or cheaper. One possession offense not yet mentioned illustrates such a case: the possession of a substantial amount of an illegal drug (let us say over twenty-eight grams of cocaine)<sup>121</sup> as a proxy for drug dealing.<sup>122</sup> It is not essential for a drug dealer to carry a large amount of a drug, but it makes his life somewhat easier. At the same time, it is something that tends to differentiate him from a typical drug user (who is more likely to carry a smaller amount just for personal use). In cases like this, the proxy conduct might be interpreted as contributing

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primary wrongdoing. See Husak, *supra* note 17, at 356 (defining “pretextual offenses” as offenses that are used in order “to solve the commission of past crimes and prevent the commission of future crimes that often are completely unrelated to” these offenses); Victor Tadros, *Crimes and Security*, 71 MOD. L. REV. 940, 951 (2008) (discussing “intentionally non-ideal offenses,” that is, offenses where a vast majority of the proscribed conduct is not the intended target); James Edwards, *Justice Denied: The Criminal Law and the Ouster of the Courts*, 30 OXFORD J. LEGAL STUD. 725, 732 (2010) (describing the concept of intentionally non-ideal offenses as “ouster offenses”).

120. See *infra* Part II.

121. See, e.g., FLA. STAT. § 893.135(1)(b) (2020).

122. See JOSEPH L. HOFFMANN & WILLIAM J. STUNTZ, *DEFINING CRIMES* 400 (2017) (arguing that, as dealing drugs is consensual and typically takes place in hiding and is thus hard to detect, effective enforcement of drug laws is dependent on proxy crimes like possession offenses: “Save perhaps for the law of terrorism, nowhere else is the definition of criminal conduct so driven by the need to define crimes the government can prove—because there is so much it *can’t* prove.”).

to or facilitating the primary wrongdoing. Thus, this type of proxy crime is expected to cause at least some potential offenders to refrain from the proxy conduct while carrying on with the (now more expensive) primary wrongdoing. Others, being deterred from the proxy conduct, might find the primary wrongdoing too expensive in its absence and would be completely deterred from the primary wrongdoing. In this way, proxy crimes belonging to this category can serve not only the evidentiary function (by indicating that the proxy offender has committed, or at least intended to commit, the primary wrongdoing), but also the deterrence function (by making the primary wrongdoing more expensive to commit) and the preventive function (by giving the police a basis on which to apprehend a potential offender before she even attempts the primary wrongdoing).

Moving to the second category of proxy crimes: where the criminalized proxy conduct typically occurs after the primary wrongdoing has occurred. Here, the goal of the proxy conduct is to increase the profitability of the criminal proceeds or to lower the likelihood of apprehension. Let us start by briefly describing the former setting. It might be the case that the proxy conduct consists of an offender enjoying the proceeds of the primary wrongdoing or undertaking actions that increase their profitability. Many offenses surrounding money laundering can be interpreted this way. The offense of bulk-cash smuggling, which criminalizes of moving more than \$10,000 across the border without reporting it as required by law,<sup>123</sup> follows exactly these lines: a criminal, wanting to more freely enjoy her illegal proceeds abroad, is more likely to engage in moving substantial sums of cash across the border than a totally innocent person.<sup>124</sup> The reaction among rational offenders to the enactment of a proxy crime offense will be similar to their reactions in the previous case, since the proxy conduct in both categories is essentially about increasing the profitability of the primary wrongdoing. Some smugglers will simply refrain from the proxy conduct of moving cash across the border, and some will be deterred from both the proxy conduct of moving cash and the primary conduct of the profitable illegal activity.

We note another setting in which one can observe proxy crimes belonging to the second category: where the criminalized conduct aims at lowering the likelihood of detection and conviction of the primary wrongdoing. Non-disclosure offenses are a useful example: a corrupt official is more likely than an innocent one to engage in untruthful disclosure,<sup>125</sup> just as a company that has illegally disposed of pollutants is more likely than an innocent one to fail to comply with environmental recordkeeping and reporting requirements.<sup>126</sup> Here, if truthful disclosure is too likely to lead to the detection of the primary wrongdoing, potential offenders are

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123. See 31 U.S.C. § 5332.

124. See *infra* note 141 and accompanying text.

125. See RUXANDRA BURDESCU, GARY J. REID, STUART GILMAN & STEPHANIE TRAPNELL, INCOME AND ASSET DECLARATIONS: TOOLS AND TRADE-OFFS 2, 4, 96–97 (2009) (noting that in many jurisdictions, failure to disclose assets by public officials is criminalized as it indicates illicit enrichment).

126. See 7 U.S.C. § 1361.

likely to either go on with both the proxy and primary conduct or be deterred from both. Proxy crimes consisting of conduct that typically occurs after the primary wrongdoing are more likely to serve evidentiary and deterrence functions. Unlike the first category, however, they are less likely to act as preventive measures—precisely because of their temporal position.

The two categories of proxy crimes discussed so far cover criminalized conduct that is clearly distinct from the primary wrongdoing yet also happens to complement it. Our third and final category is distinct in this respect: proxy crimes in this category have an analytic link to the primary wrongdoing. In some cases, a proxy crime is created by dropping elements from the primary offense that are hard to prove or otherwise make the enforcement of the primary offense difficult (but which often determine the wrongfulness of the offense). In such situations, a proxy crime is nothing more than a generalization of the primary wrongdoing, and it is impossible to commit the primary wrongdoing without engaging in the criminalized conduct (although the reverse is possible). We already presented an example of this type of proxy crime:<sup>127</sup> the offense of a public official accepting illegal gratuities<sup>128</sup> can be interpreted as nothing more than an offense of bribery without the evidentiary problematic element of *quid pro quo*.

Our categorization highlights the different features of various proxy conduct and suggests that there may be different rationales for criminalizing them. Next, we present an economic theory through which those rationales can be identified, and we allude to our categorization in our subsequent discussions.

## II. AN ECONOMIC THEORY OF PROXY CRIMINALIZATION

Consistent with our definition and categorization of proxy crimes, we now consider the social costs and benefits associated with the criminalization of proxy conduct.<sup>129</sup> The benefits from criminalizing proxy conduct flow from the deterrence<sup>130</sup> or prevention<sup>131</sup> of the socially harmful acts for which the conduct in question is perceived to be a proxy (e.g., the illegalization of the receipt of gifts by public officers in their official capacity, to reduce harms from bribery, as discussed in Part I).

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127. See *supra* note 112 and accompanying text.

128. See 18 U.S.C. § 201.

129. We follow the standard approach in the law enforcement literature to formalize social costs and benefits and weigh them against each other. See, e.g., A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, in 1 HANDBOOK OF LAW AND ECONOMICS 403, 406 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

130. Deterrence is one of the most commonly studied function of punishment in the law and economics literature. See, e.g., Murat C. Mungan, *The Law and Economics of Fluctuating Criminal Tendencies and Incapacitation*, 72 MD. L. REV. 156, 166 (2012).

131. We follow a framework similar to that introduced in Friche & Tabbach, *supra* note 41, and extended in Mungan, *supra* note 41.



The costs of proxy criminalization include the chilling of benign behavior<sup>132</sup> as well as the sum of punishment<sup>133</sup> and enforcement costs.<sup>134</sup>

To discuss these benefits and costs, we consider two categories of individuals: potential offenders and law-abiding individuals.<sup>135</sup> We start our discussion with the social gains derived from proxy criminalization, which requires an analysis of the incentives faced by potential offenders.<sup>136</sup>

### A. Social Gains from Proxy Criminalization

Potential offenders are people who obtain benefits by committing an offense that generates social harms.<sup>137</sup> They also perceive expected costs associated with the commission of the act, and only commit the act if the perceived benefits outweigh the perceived costs.<sup>138</sup> Therefore, increasing the perceived expected cost of committing these acts deters the commission of offenses by these individuals.<sup>139</sup> Criminalizing proxy conduct can increase these expected costs in multiple ways, and we consider here three specific “channels” through which proxy crimes operate. These can loosely be called the (i) profit reduction, (ii) prevention enhancement, and (iii) evidentiary hurdle reduction channels. We note that these channels ought not to be confused with the three types of proxy crimes discussed in detail in Part II. The channels discussed here relate to the functions of proxy criminalization that can be present, to varying degrees, when any type of proxy conduct discussed in Part II is criminalized.

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132. These costs have been introduced and studied in the law and economics literature. *See, e.g.*, Mungan, *supra* note 44; Kaplow, *On the Optimal Burden*, *supra* note 44; Kaplow, *Burden of Proof*, *supra* note 44.

133. *See* Polinsky & Shavell, *supra* note 129, for formalizations of punishment costs.

134. *See id.* and Becker, *supra* note 43, at 174–76, for formalizations of enforcement costs.

135. This is a simplified approach adopted in Kaplow, *On the Optimal Burden*, *supra* note 44, at 1106, 1109. A more realistic approach where the two groups are endogenously determined can be found in Mungan, *supra* note 44, at 365–67.

136. In formalizing individuals’ incentives, we follow Becker, *supra* note 43, at 173, 176–79, and the extensive literature following its assumptions. *See, e.g.*, Nuno Garoupa, *The Theory of Optimal Law Enforcement*, 11 J. ECON. SURVEYS 267 (1997); Polinsky & Shavell, *supra* note 129. We note, however, that many crimes may be committed impulsively. *See, e.g.*, Erkmen Giray Aslim, Murat C. Mungan, Carlos I. Navarro & Han Yu, *The Effect of Public Health Insurance on Criminal Recidivism* (Geo. Mason L. & Econ. Rsch. Paper Series, Working Paper No. 19-19, 2020) (discussing how increased access to health insurance can reduce the recidivism of violent crimes, which is consistent with a theory that such crimes are often committed impulsively). Our analysis can be extended to these cases by incorporating the possibility of “judgement lapses,” as analyzed in Murat C. Mungan, *A Behavioral Justification for Escalating Punishment Schemes*, 37 INT’L REV. L. & ECON. 189 (2014), and in Robert D. Cooter, *Lapses, Conflict, and Akrasia in Torts and Crimes: Towards and Economic Theory of the Will*, 11 INT’L REV. L. & ECON. 149 (1991).

137. This is the standard approach to defining potential offenders in the economics of law enforcement literature. *See, e.g.*, Garoupa, *supra* note 136, at 268; Polinsky & Shavell, *supra* note 129, at 406; Becker, *supra* note 43, at 176.

138. These perceived costs and benefits need not equal the actual costs associated with the commission of crime. This possibility can be explicitly incorporated in the analysis through the inclusion of perception distortions, as in Aslim et al., *supra* note 136.

139. This approach describes the conventional method of studying criminal behavior introduced in Becker, *supra* note 43.

First, because the proxy conduct may increase the profitability of the criminalized act, its criminalization may partially offset those benefits.<sup>140</sup> For instance, criminal organizations may find it profitable to transport large amounts of cash into jurisdictions where they can more easily engage in money laundering.<sup>141</sup> Criminalizing the transportation of large amounts of cash naturally reduces the expected benefit from possessing large amounts of cash. Upon criminalization, the organization will either alter its preferred method of conducting business and comply with the law, or it will commit proxy crimes and face increased expected costs associated with violating those laws. In both cases, deterrence is enhanced through the lowering of the organization's expected return from crime because putting large amounts of cash obtained through criminal activity to use is now more costly.<sup>142</sup>

Second, criminalization of proxy conduct may increase the odds that offenders are caught and stopped prior to the commission of the primary offense.<sup>143</sup> Criminalizing the possession of burglary tools, for instance, may allow the police to stop and arrest a burglar before he commits any offense.<sup>144</sup> Thus, upon criminalization, the offender must choose either not to use burglary tools to break and enter or face the risk of being punished for possessing burglary tools prior to successfully robbing his target.<sup>145</sup> Again, in both cases the potential offender's expected net-benefits from crime are reduced, leading to increased deterrence.<sup>146</sup> Moreover, this type of proxy criminalization can lead to crimes being stopped earlier, and thereby confer social benefits in the form of criminal harm prevention.<sup>147</sup>

Finally, proxy criminalization can increase the likelihood that offenders are punished for their wrongdoings by reducing the evidentiary requirements for proving

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140. See *supra* Part I.B for additional discussion of these benefits.

141. See FIN. ACTION TASK FORCE, MONEY LAUNDERING THROUGH THE PHYSICAL TRANSPORTATION OF CASH 33–48 (2015), <https://www.fatf-gafi.org/media/fatf/documents/reports/money-laundering-through-transportation-cash.pdf> (mentioning breaking the audit trail, paying a supplier, and banking the money in another jurisdiction as possible objectives of criminals who move cash across the border).

142. See Heike Mai, *Cash, Freedom and Crime: Use and Impact of Cash in a World Going Digital*, DEUTSCHE BANK RESEARCH: EU MONITOR 9–10 (Nov. 23, 2016), <https://perma.cc/4FDU-P2KS> (click “view the live page,” then click “PDF 711k” to access full article) (arguing that measures aimed at reducing the circulation of cash “would certainly raise the transaction costs for international crime”).

143. See *supra* Part I.B for additional discussion of how proxy criminalization can increase the probability of prevention.

144. See MOORE, ACT AND CRIME, *supra* note 17, at 21 (arguing that “[t]he typical motivation behind possession statutes is a preventive one: it is to prevent future burglaries that there is a crime called possession of burglary tools”).

145. This type of preemptive enforcement naturally carries preventive benefits of the kind described in Friehe & Tabbach, *supra* note 41, and Mungan, *supra* note 41. Moreover, this type of enforcement generates deterrence not only by increasing expected punishment costs, but also by reducing a potential offender's expected benefit from the crime, as explained in Murat C. Mungan & Jonathan Klick, *Forfeiture of Illegal Gains, Attempts, and Implied Risk Preferences*, 43 J. LEGAL STUD. 137, 140 (2014).

146. See Mungan & Klick, *supra* note 145, at 140–41, 147, 149.

147. See Friehe & Tabbach, *supra* note 41; Mungan, *supra* note 41.

the commission of a crime.<sup>148</sup> Criminalizing the receipt of gifts by public officials, for instance, makes it much simpler to prove the commission of a crime in cases involving bribery because prosecutors do not need to present evidence of a quid pro quo.<sup>149</sup> This in turn increases the expected cost to the offender receiving a bribe, because doing so now leads to punishment more frequently.

Summarizing our observations above, we denote the harms inflicted by potential offenders as a function of proxy criminalization as:

$$\gamma(1 - p)H(s) \tag{1}$$

where  $s$  measures the severity of the proxy criminalization regime;  $p$  is the increased likelihood that criminal acts are prevented prior to their completion due to proxy criminalization;  $\gamma$  is the proportion of potential offenders in society; and  $H(s)$  is the average social harm inflicted by the unprevented actions of potential offenders.<sup>150</sup>

Our observation that the criminalization of proxy conduct increases deterrence implies that  $H(0) \geq H(s)$  where  $H(0)$  measures the criminal harm in the absence of proxy criminalization.<sup>151</sup> Moreover, since some potential offenders choose to commit proxy conduct even when they are criminalized but punished moderately, it follows that an increase in severity with which proxy conduct is punished should generate additional deterrence, unless  $s$  is very large.<sup>152</sup> When the punishment for proxy crimes is increased to very high levels, all (or all except a very small fraction of) potential offenders may be deterred from committing the proxy crime.<sup>153</sup>

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148. See *supra* Part I for additional discussion of how proxy criminalization can reduce evidentiary requirements for punishment.

149. Quid pro quo tends to be hard to prove because it usually takes place in a private setting without leaving any physical trace.

150. Thus,  $\gamma H(s)$  is the total harm that would be inflicted by potential offenders absent any preventive measures.

151. We assume that criminalizing proxy crimes without punishing them leads to no deterrence. This implies that harms from crime under proxy criminalization with a sanction of  $s=0$  equals the harms from crime without proxy criminalization of  $H(0)$ . It is possible that fixed costs associated with punishment, defined as  $k$ , below, may generate some small degree of deterrence. However, this possibility can be ruled out in settings where the benefits from proxy conduct are bounded from below. See Thomas J. Miceli & Murat C. Mungan, *The Limit of Law: Factors Influencing the Decision to Make Harmful Acts Illegal 2* (Geo. Mason L. & Econ. Rsch. Paper Series, Working Paper No. 20-22, 2020) (explaining the implications of this type of lower bound in a related setting).

152. We distinguish between moderate and large sanctions because when faced with large sanctions, the offender may simply switch to not committing the proxy conduct and forgo the expected benefits from it. Thus, there may be an upper bound to the degree of deterrence that can be obtained from proxy criminalization.

153. As previously noted in this Part and in *supra* Part I, when faced with very large sanctions for proxy conduct, in some cases the potential offender may choose to commit the harmful act without engaging in the proxy conduct. We note that this is not possible if the proxy conduct in question belongs to the third category of proxy conduct, which we outlined in *supra* Part I.B.

Mathematically, this corresponds to  $H'(s) < 0$  for small and moderate  $s$  where  $H'$  denotes the derivative of  $H$ .<sup>154</sup>

Finally, if, as in the second example, proxy criminalization leads to more frequent prevention of crime, then  $p > 0$ . We note, however, that proxy criminalization may, in some cases, not lead to any sizeable preventive benefits. These cases would correspond to those where  $p = 0$ .<sup>155</sup>

Based on these observations, we can note the social gains, in the form of deterrence and prevention, obtained from penalizing proxy crimes and punishing them with a sanction of  $s$  as:

$$G(s, \gamma) = \gamma H(0) - \gamma(1 - p)H(s) = \gamma[H(0) - H(s)] + \gamma p H(s) \quad (2)$$

These gains can be decomposed into two parts. The first component, namely  $\gamma[H(0) - H(s)]$ , denotes reductions in all potential harms inflictible by attempted crimes owing to deterrence effects.<sup>156</sup> The second component,  $\gamma p H(s)$ , denotes reductions in criminal harm inflicted due to crimes prevented prior to inflicting harm as a result of proxy criminalization.

### B. Social Harms Due to Proxy Criminalization

We categorize the social costs associated with proxy criminalization into two types: costs due to the chilling of benign behavior<sup>157</sup> and enforcement costs,<sup>158</sup> which capture the costs incurred by convicts as well as costs associated with the administration of enforcement.<sup>159</sup> We express these losses as:

$$L(s, \gamma) = (1 - \gamma)B(s) + C(s, \gamma) \quad (3)$$

Here,  $B(s)$  represents the benefits obtained by people who commit the proxy conduct for exclusively benign reasons.<sup>160</sup> This term is multiplied by  $(1 - \gamma)$  since this represents the proportion of individuals who are exclusively interested in engaging in benign activity. On the other hand, punishment can potentially be inflicted on both people who commit benign acts as well as harmful acts (i.e., both innocents and criminals engaging in the same proxy conduct) who remain

154. We note that  $H'(s) < 0$  for all  $s$  is, at least theoretically, possible. However, this is not a condition that needs to hold for our analysis. Specifically, for proxy conduct in the third category, described in *supra* Part I.B, this condition will hold whenever the benefit distribution from the primary offense among potential offenders is unbounded.

155. This is likely to be the case for proxy conduct which occurs after the primary wrong-doing, and increases its profitability, i.e., proxy conduct that fits in the second category we describe in *supra* Part I.B.

156. A similar decomposition can be found in Mungan, *supra* note 41, at 298.

157. See *supra* note 132 and literature cited therein for detailed discussions of chilling effects.

158. To abbreviate descriptions, we henceforth refer to the sum of enforcement and punishment costs collectively as enforcement costs.

159. See *supra* note 134 and literature cited therein for detailed discussions of enforcement costs.

160. As with harms from crime, we assume that not criminalizing the proxy conduct leads to the same level of exclusively benign behavior as proxy criminalization enforced through negligible sanctions.

undeterred after the criminalization of proxy conduct. Thus, punishment costs, captured by  $C$ , include costs that are incurred by the imposition of punishment on both groups of individuals (i.e., those with size  $\gamma$  as well as  $1 - \gamma$ ). Nevertheless, we allow  $C$  to be affected by  $\gamma$ , because these groups can be affected differently by changes in legal regimes. To illustrate this idea, we may express  $C$  more specifically as:

$$C(s, \gamma) = (\sigma s + k)[\gamma\psi(s) + (1 - \gamma)\beta(s)] \quad (4)$$

where  $k$  represents the fixed costs a person suffers from being punished (i.e., time spent with legal proceedings, as well as prior inconveniences suffered due to searches, stops, and/or seizures),<sup>161</sup> and  $\sigma s$  is the variable cost of punishing a person with a sanction of  $s$  (i.e.,  $\sigma$  is the marginal cost of imposing a sanction of  $s$  on a person),<sup>162</sup> and  $\psi(s)$  and  $\beta(s)$  denote the proportion of individuals among each group who are punished for committing the proxy crime. We note that

$$\psi(s) > \beta(s) \quad (5)$$

as long as the enforcement mechanism leads to more frequent punishments of criminals than non-criminals.<sup>163</sup>

Absent proxy criminalization, both costs disappear. Therefore, the losses from proxy criminalization simply equal  $L(s)$ . Using these observations, we note that proxy criminalization can lead to net gains if, and only if, there is some proxy criminalization regime such that

$$G(s, \gamma) > L(s, \gamma) \quad (6)$$

i.e., one which generates greater gains than losses.<sup>164</sup>

Next, we discuss the factors affecting whether this condition may hold. In doing so, we make repeated references to the expressions we have defined in this part.

### III. FACTORS AFFECTING THE DESIRABILITY OF CRIMINALIZATION

As we previously noted, whether criminalizing proxy conduct can lead to more gains than losses depends on the presence of some regime  $s$ , such that  $G(s, \gamma) > L(s, \gamma)$ . To gain a better understanding of the factors affecting whether

161. See, e.g., Mungan, *supra* note 41, at 298–99; Miceli & Mungan, *supra* note 151, at 2, 13.

162. See generally A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1 (1999), where this assumption is adopted. Following this literature, we assume that these costs are linear to simplify the analysis.

163. This is likely to hold when the likelihood of wrongful punishment, frequently referred to as a type-1 error, is low.

164. This reflects that we are using a standard welfare function, which aggregates the benefits received by and costs inflicted on all individuals. This is the standard approach used in the economics of crime literature. See, e.g., Polinsky & Shavell, *supra* note 129, at 406.

this condition may hold, we can express the difference between the gains and losses explicitly as:

$$\Delta(s, \gamma) = G(s, \gamma) - L(s, \gamma) = \gamma H(0) - \gamma(1-p)H(s) - (1-\gamma)B(s) - (\sigma s + k)[\gamma\psi(s) + (1-\gamma)\beta(s)] \quad (7)$$

Using this expression, it follows that proxy criminalization can generate benefits, which off-set its costs if there is some severity of proxy criminalization,  $s$ , such that:

$$\Delta(s, \gamma) > 0 \quad (8)$$

Inspecting this condition reveals interrelated factors affecting the social desirability of proxy criminalization.

We start with a very simple sufficient condition under which proxy criminalization enhances welfare. If criminalizing proxy conduct and punishing it with very small sanctions leads to preventive benefits large enough to off-set fixed costs of punishment, then proxy criminalization is socially desirable. In symbols, this corresponds to the following condition:<sup>165</sup>

$$p > k \left[ \psi(0) + \frac{1-\gamma}{\gamma} \beta(0) \right] \quad (9)$$

Here, the left-hand side measures the effectiveness of prevention, whereas the right-hand side represents the fixed costs that have to be incurred in order to achieve prevention.

When this condition holds, some form of proxy criminalization is certainly efficient. This is because criminalizing the proxy conduct leads to sizeable preventive benefits which can be obtained at relatively low social costs. Thus, social welfare can be enhanced, even without utilizing the deterrence function of proxy criminalization.

We note, however, that the sizeable preventive benefits satisfying (9) are merely a sufficient condition for the optimality of proxy criminalization. Thus, even when there are no sizeable preventive benefits, proxy criminalization may be optimal. Next, we discuss other factors affecting the social desirability of proxy criminalization, assuming (9) does not hold.

First, proxy criminalization is unlikely to enhance welfare when the degree of criminal harm reduction achievable through the combination of deterrence and prevention is small relative to the variable and fixed costs of punishment. Thus, a necessary condition for socially desirable proxy criminalization is the possibility

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165. This condition is easily obtained by manipulating the condition under which  $\Delta(0, \gamma) > 0$ .

of reducing criminal harm by more than punishment costs.<sup>166</sup> In other words, there must be some punishment severity  $s$  such that:

$$\gamma H(0) - \gamma(1-p)H(s) > (\sigma s + k)[\gamma\psi(s) + (1-\gamma)\beta(s)] \quad (10)$$

This condition, in turn, is more likely to hold when the preventive impact of proxy criminalization ( $p$ ) is large, when proxy criminalization enhances deterrence significantly (i.e.,  $H(s)$  is decreasing fast in  $s$ ), and when the variable and fixed costs associated with punishment are small.

Second, when this condition holds, proxy criminalization is more likely to be optimal when the proportion of people who would, but for its criminalization, commit the proxy conduct to increase their expected criminal gains is large (i.e.,  $\gamma$  is large). This can be verified by noting that  $\Delta(s, \gamma)$  is increasing in  $\gamma$  whenever  $s$  satisfies (9), above.<sup>167</sup>

Finally, we note that even when (10) holds, and  $\gamma$  is large, proxy criminalization can be inefficient when it leads to significant deterrence of benign behavior (i.e., when  $B(s)$  is increasing rapidly in  $s$ ).

We summarize these findings by noting that proxy criminalization is less likely to be optimal when:

- (i) the extent to which proxy criminalization enables enforcers to prevent harmful conduct before it occurs is small (i.e.,  $p$  is small),
- (ii) fixed costs associated with enforcement are large (i.e.,  $k$  is large),
- (iii) the proportion of people who would, but for its criminalization, commit the proxy conduct to increase their criminal gains (i.e.,  $\gamma$ ) is small,
- (iv) the per-person marginal cost of punishment is large (i.e.,  $\sigma$  is large),
- (v) the deterrence of benign behavior is highly responsive to changes in the punishment (i.e.,  $B(s)$  is increasingly rapid  $s$ ) and
- (vi) the harms from crime are not very responsive to changes in punishment, (i.e.,  $H(s)$  is decreasing slowly in  $s$ ).

Next, we briefly discuss how the identification of these factors can help illuminate the discussions surrounding proxy crimes presented earlier in this Article. Take possession of burglary tools: as with any other criminal possession offense, policing it tends to be cheaper and proving its commission tends to be easier compared to the corresponding primary offense.<sup>168</sup> It is possible for the police to find

166. This condition is obtained by manipulating the condition  $\Delta(s, y) > 0$  and noting that  $B(s) > 0$ .

167. Mathematically, this can be shown by noting that

$$\begin{aligned} \frac{\partial \Delta}{\partial \gamma} &= [H(0) - (1-p)H(s)] + B(s) - (\sigma s + k)[\psi(s) - \beta(s)] > \\ &[H(0) - (1-p)H(s)] + B(s) - (\sigma s + k)[\psi(s) - \beta(s) + \frac{\beta(s)}{\gamma}] > 0 \end{aligned}$$

where the second inequality follows directly from (10), above.

168. See, e.g., Markus D. Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 836 (2001) (“So broad is the reach of possession offenses, and so easy are they to

criminal tools during unrelated searches, thus allowing  $k$  to be low, possibly even close to zero. Furthermore, to the extent that finding a person in possession of burglary tools can prevent the burglaries that this person intended to commit,  $p$  can be high.

Note, however, that this second observation depends mostly on the way criminal burglary tools are legally defined.<sup>169</sup> Consider one extreme, in which the offense criminalizes possessing *any tools useful in committing burglaries*. Such a law would supremely increase  $p$  (as the police would be allowed to stop possessors of any kind of tools, thus possibly preventing many burglaries) at the expense, however, of potentially significant social losses associated with  $B(s)$ , as many tools that are useful for break-ins can serve a plethora of legitimate purposes. At the other extreme, consider a law that criminalizes possession of only those tools that tend to be exclusively possessed by criminals and do not have many legitimate purposes. Such a law would perhaps not be considered as harmful to the interests of law-abiding citizens,<sup>170</sup> but it may not as effectively serve its preventive function, since the police would not be allowed to stop possessors of non-listed tools even if those tools are likely to be used to commit burglaries.

Consider also bulk-cash smuggling (i.e., moving cash above some legally stipulated amount across the border without declaring it). The reason behind illicit movement of cash is typically either: (1) to move proceeds originating from some criminal activity to a jurisdiction where they are easier to launder; or (2) to fund illegal activities (such as acts of terrorism) elsewhere.<sup>171</sup> If so, then criminalizing bulk-cash smuggling is more likely optimal to the extent that it increases the probability of preventing harmful acts ( $p$ ) and/or the proportion of offenders who are deterred from acts that would increase the profitability of criminal activities ( $\gamma$ ) is substantial. The fixed costs of enforcement ( $k$ ) seem also small. Since the screening infrastructure at airports and border crossings (aimed at detecting other kinds of illicit items being carried) is in place anyway, officers searching for larger amounts of hidden cash does not seem to require much additional cost. A more complex analysis should be aimed at the cost borne by law-abiding citizens. How many

detect and then to prove, that possession has replaced vagrancy as the sweep offense of choice.”); Markus D. Dubber, *The Possession Paradigm: The Special Part and the Police Model of the Criminal Process*, in *DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW* 91, 96 (R.A. Duff & Stuart P. Green eds., 2005) (“Possession is easy to detect and, once detected, easy to prove. Driven by enforcement concerns, possession is built for speed. . . . A burglary suspect caught with the loot may escape a burglary conviction because of an inadmissible confession, but he will not be able to beat a conviction for possession of stolen property.”).

169. See *supra* notes 23–29 and accompanying text for a discussion of variation in the way possession of burglary tools is defined in different jurisdictions.

170. This observation helps explain some examples from relevant case law in which criminalization of possession of “criminal tools” was deemed legitimate only if such tools are used *exclusively* by criminals. For instance, courts have invalidated statutes criminalizing possession of “opium or lottery tickets which experience teaches are generally held for illicit purposes,” *Benton v. United States*, 232 F.2d 341, 345 (D.C. Cir. 1956), and statutes criminalizing possession of “any machinery, plates or any other contrivance designed to reproduce instruments purporting to be the credit cards of an issuer who has not consented to the preparation of such credit cards,” *State v. Saiez*, 489 So. 2d 1125, 1127 (Fla. 1986).

171. See *supra* note 141.



people might be expected to move large sums of *legal* cash across the border is an empirical question, but there is no reason to think that such a group is small. However, the cost borne by such individuals (amounting to filling out the cash declaration truthfully) is not substantial. This is true even if multiplied across society, or in a rigid system that forces all travelers carrying small amounts of cash to fill out a declaration.

The main purpose of these two examples is to highlight how some of the six factors affecting the desirability of proxy criminalization are likely to differ across distinct types of proxy conduct (or even within the same proxy offense), thus justifying further empirical investigations aimed at uncovering their respective values. Notably, two factors have not been mentioned in those analyses: the fixed ( $k$ ) and variable ( $\sigma$ ) cost of punishment. We take the latter to be independent of other circumstances and therefore fairly constant across different proxy crimes. Furthermore, as public debates surrounding criminal justice suggest, the costs of imposing punishment are perceived as substantial.<sup>172</sup> This provides yet another argument that the benefits of introducing a given proxy crime should be well inspected to ascertain whether they outweigh the unavoidable burden of imposing additional punishment.

#### IV. AFFIRMATIVE DEFENSES

Our analysis, as well as nearly all the literature, suggests that proxy crimes are typically introduced when the enforcement of a given primary offense is particularly difficult.<sup>173</sup> These difficulties in enforcement stem from the fact that the primary offense's definition contains some elements that are hard to detect or prove according to the legally required standard.<sup>174</sup> Hence, as demonstrated by our analysis,<sup>175</sup> proxy criminalization can lead to social gains by deterring (and possibly preventing) the primary wrongdoing, gains which may otherwise not be realized. This is precisely what makes the prospect of criminalizing some proxy conduct attractive. However, social gains from instituting proxy crimes come at a cost.<sup>176</sup> In our model, these costs are primarily represented by the value of chilled

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172. See, e.g., Murat C. Mungan, *Positive Sanctions versus Imprisonment 2* (Geo. Mason L. & Econ Rsch. Paper Series, Working Paper No. 19-03, 2019); Brian Galle, *The Economic Case for Rewards over Imprisonment*, 96 IND. L.J. 471, 516–18 (2021) (discussing how large costs associated with imprisonment may make giving of rewards for not committing crime a viable alternative or complement to imprisonment as a deterrence device).

173. See *supra* Part I.A.2; see also Stuntz, *supra* note 23, at 520 (“Substituting an easy-to-prove crime for one that is harder to establish obviously makes criminal litigation cheaper for the government.”); Teichman, *supra* note 17, at 784 (“While this behavior might seem harmless and might not merit criminal liability, it might also be easy to prove and highly correlated with drunk driving—a harmful behavior that merits punishment but is often difficult to prove.”).

174. See *supra* note 110 and accompanying text.

175. See *supra* Part II.A.

176. In this Article, we have listed social costs that affect the desirability of proxy criminalization within our model. See *supra* Part II.B. For analyses focusing on social costs of proxy criminalization from different perspectives, see, for example, Stuntz, *supra* note 23, at 523, 538, 551–52, analyzing how proxy crimes pervert the incentives of actors in the criminal justice system from the point of view of “political economy,” and HUSAK,

benign conduct.<sup>177</sup> Is there a way of securing the social benefits which stem from proxy criminalization while avoiding at least some of its costs?

In this part, we analyze the extent to which such a middle ground can be achieved by giving the defendant charged with a proxy crime the opportunity to raise an affirmative defense.<sup>178</sup> The defense would be that their conduct lacked an element or aspect which related to the harmfulness of their act.<sup>179</sup> As long as the burden of proving the existence of such a defense rests with the defendant, some social benefits of proxy criminalization would remain in place because prosecutors would continue to avoid the high burden of demonstrating the hard-to-prove element. At the same time, the evidentiary threshold for proving the affirmative defense might be set in such a way to make it relatively easy for only those defendants who are innocent of the primary wrongdoing to take advantage of the defense.

A simple example illustrates this point. The primary offense of bribery is hard to enforce because its definition contains an element that is hard to prove (and without which there is no harm): *quid pro quo*.<sup>180</sup> To deter bribery more effectively, lawmakers can introduce a proxy crime to impose punishment on public officials for merely accepting gifts, without any need to prove the existence of the *quid pro quo* element.<sup>181</sup> While such a proxy crime brings social benefits in the form of increased deterrence of bribery, it also chills some instances of benign gift-giving (i.e., not associated with any *quid pro quo*) which causes social losses.<sup>182</sup> To mitigate the latter loss, the state could introduce an affirmative defense: the defendant charged with accepting illegal gifts can avoid liability as long as the defendant can demonstrate (to some legally required standard) that the gift was not associated with any *quid pro quo*.

It is possible to require the defendant to prove their affirmative defense beyond a reasonable doubt.<sup>183</sup> However, it may be quite difficult even for a person innocent

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supra note 9, at 38–39, focusing on the impact of proxy crimes and other over-inclusive offenses on excessive imposition of punishment.

177. See *supra* Parts II and III.

178. See Murat C. Mungan, *Justifications, Excuses, and Affirmative Defenses*, 36 J.L. ECON. & ORG. 343, 343–45 (2020) (explaining the general function of affirmative defenses in the American legal system).

179. Such an affirmative defense can be interpreted as a form of a *de minimis* defense. See generally Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the De Minimis Defense*, 1997 BYU L. REV. 51, 52–53 (1997) (analyzing the *de minimis* defense from section 2.12 of the Model Penal Code and comparing it to similar concepts in criminal law systems of Continental Europe); Douglas N. Husak, *The De Minimis 'Defence' to Criminal Liability*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 328, 330 (R.A. Duff & Stuart Green eds., 2011) (analyzing the relationship between *de minimis* defenses and issues such as criminalization and the distinction between offenses and defenses).

180. See, e.g., *McCormick v. United States*, 500 U.S. 257, 273–74 (1991) (affirming that merely receiving an illegal campaign contribution does not support conviction under the Hobbs Act, unless the *quid pro quo* has been proved beyond a reasonable doubt).

181. See 18 U.S.C. § 201(c)(1)(A)–(B) (criminalizing gratuities).

182. See George D. Brown, *Putting Watergate Behind Us—Salinas, Sun-Diamond, and Two Views of the Anticorruption Model*, 74 TUL. L. REV. 747, 770 (2000) (arguing that, just as in the private sector, giving of gifts may simply serve the function of securing a healthy working relationship with a public official).

183. The legality of placing the burden of persuasion on the defendant for proving facts pertaining to affirmative defenses is discussed in the remainder of this part.

of the primary wrongdoing (bribery, in this case) to disprove an element of the offense. For example, even if a public official charged with accepting gratuities can show a legitimate reason for accepting a gift, it might still be prohibitively costly for the defendant to exclude (beyond a reasonable doubt) the possibility of some quid pro quo. For this reason, the defendant could be required to demonstrate the circumstances giving rise to the affirmative defense according to some lower standard, such as preponderance of the evidence or clear and convincing evidence.<sup>184</sup> This would make it easier for defendants innocent of the primary wrongdoing to use the affirmative defense and preserve part of the main social benefit from proxy criminalization, while still making it difficult for actual criminals to use the defense. We return to this example after briefly reviewing the legal landscape that pertains to both defining affirmative defenses in criminal law, as well as the standards of proof that states may require for successfully raising an affirmative defense.

The idea of supplementing a proxy crime with an affirmative defense, in practice, boils down to introducing a reversed burden of persuasion for a criminal offense's elements that might be hard to prove for the prosecution, but which would be relatively easy to disprove for an innocent defendant. The legitimacy of such a framework under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution has been the subject of substantial Supreme Court jurisprudence. On one hand, the Court has argued that the validity of a statutory presumption in a criminal offense definition should not be based solely on comparative convenience of the production of evidence by the defendant,<sup>185</sup> and that the relation between the presumption and the fact upon which the inference is based has to satisfy the *rational connection* test.<sup>186</sup> Furthermore, the Court's reservations against statutory presumptions and reversed burden of proof covers not only definitions of crimes, but also statutory factors that influenced the severity of punishment.<sup>187</sup> In other cases, however, the Court has taken a more permissive stance, arguing that a reversed burden of proof in substantive criminal law is valid as long as it is

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184. See, e.g., N.J. REV. STAT. § 2C:2-8(d) (1983) (allowing the use of involuntary intoxication as an affirmative defense, provided it is "proved by clear and convincing evidence"); MICH. COMP. LAWS § 768.21a(3) (2014) (stating that a defendant must prove the insanity defense by preponderance of evidence).

185. See *Tot v. United States*, 319 U.S. 463, 469–70 (1943) (arguing that the convenience argument applies only "where the defendant has more convenient access to the proof, and where requiring him to go forward with proof will not subject him to unfairness or hardship").

186. The *Tot* court introduced the concept of rational connection in the following passage: "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Id.* at 467–68.

187. See *Mullaney v. Wilbur*, 421 U.S. 684, 698–99 (1975) (stating that an element of an offense that is crucial in determining the degree of culpability and social stigma associated with conviction cannot be subject to the reversed burden of proof simply because it was framed as a factor influencing the severity of punishment).

formally framed as pertaining to a defense (to be proved by the defendant) rather than to an offense element (to be disproved by the defendant).<sup>188</sup>

This brief review of the relevant caselaw is aimed at showing that the reversed burden of proof might be subject to some restrictions and that such restrictions might be loosened by framing the element subject to the reversed burden as a defense, rather than as part of the offense. This is precisely the possibility that we explore now.

We start by reemphasizing the fact that even under the most demanding standard (for the defendant), the prospects of innocents avoiding conviction are already better than under proxy criminalization without any defense. In our framework, this implies that affirmative defenses lead to benefits in the form of reduced costs associated with the chilling of benign conduct. These benefits, of course, need to be weighed against the possible costs associated with the increased commission of the harmful act, which the law seeks to deter. After all, if the standard chosen for the affirmative defense is too easily met, then even the truly guilty may occasionally avoid conviction by introducing rather weak evidence.<sup>189</sup>

In general, the standard of proof which balances these costs and benefits will depend on many factors, including how likely it is for an average defendant to furnish exculpatory evidence.<sup>190</sup> Thus, as is the case with affirmative defenses in other domains of criminal law, one could expect there to be a lot of variation in the standard of proof chosen to raise a valid defense in proxy crime cases.<sup>191</sup>

However, there is a plausible superiority of proxy criminalization over affirmative defenses that pertains to the *burden of production* as opposed to the *burden of persuasion*. As explained in the preceding parts, one of the main reasons for proxy criminalization is that it is very difficult for the prosecutor to prove the elements which would constitute the primary wrongdoing that proxy criminalization seeks to deter in the first place. Stated differently, the fear is that the prosecution may frequently fail to produce sufficient evidence to meet the very demanding burden of proof beyond a reasonable doubt. In an important subset of these cases, the worry may be that the prosecutor is often unable to get *any* evidence that pertains to one of the elements. This could result because the prosecutor may not have adequate access to potential sources of evidence. The defendant, on the other hand, may have cheaper and easier access to such information. Thus, placing the burden of

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188. See *Patterson v. New York*, 432 U.S. 197, 205–07 (1977) (upholding a New York statute requiring defendants charged with murder to demonstrate, by preponderance of evidence, extreme emotional disturbance in order to reduce the crime to manslaughter; and holding that the statute does not violate the Due Process Clause as long as it constitutes a defense and is not based on an element in the offense definition).

189. See, e.g., Mungan, *supra* note 44, at 353 (explaining how weakening the standard of proof for affirmative defenses may increase the probability that both the guilty and the innocent may successfully raise affirmative defenses).

190. *Id.*

191. *Id.* at 344 and accompanying text (noting the variation in the degree of proof required to successfully raise an affirmative defense across jurisdictions). The same article provides an economic rationale for this observed variation.

production on the defendant by using the complementary standard of proof for judging the adequacy of the evidence provided by the defendant may be a superior approach.

To better explain this possibility, which we have only explained in abstract terms, we return to our bribery example. Assuming that the prosecutor has proven beyond a reasonable doubt (or is capable of proving) that the defendant in fact received a gift as a public officer, the only question left is whether there exists a quid pro quo. In a legal regime where the proxy conduct has not been criminalized, the prosecutor would have to prove this element beyond a reasonable doubt. An alternative is to criminalize the receipt of gifts by public officials and to allow an affirmative defense based on lack of quid pro quo that requires the defendant merely produce sufficient evidence to generate reasonable doubt regarding the existence of the quid pro quo. These two approaches may appear identical, but they are not. This is because, in the event that no evidence is produced regarding the issue of quid pro quo, the defendant prevails under the first approach, and the opposite is true under the second approach. Thus, shifting the burden of production through an affirmative defense can result in cheaper and more frequent evidence production by requiring production by the party who has easier access to it.<sup>192</sup> Thus, in such cases, a system that includes proxy criminalization and affirmative defenses would be superior to no proxy criminalization at all. Moreover, depending on the trade-off between deterrence benefits and chilling costs, introducing affirmative defenses with even more demanding standards for the defendant may lead to even better outcomes.

These observations imply the possibility that allowing affirmative defenses may broaden the optimal scope of proxy criminalization. However, this result comes about only because affirmative defenses make convictions less likely, compared to the alternative in which proxy criminalization cases do not allow affirmative defenses at all.

Our discussion thus far relates to the comparison between criminalizing proxy conduct and not criminalizing it, and how the availability of affirmative defenses affects this comparison. Now, turning to the comparison between proxy criminalization with an affirmative defense versus proxy criminalization without an affirmative defense.

There are a few likely effects of switching from a regime in which an affirmative defense is not available to one in which it is available, but where the defendant must prove the defense beyond a reasonable doubt. This switch is likely to matter very little for defendants who wish to frivolously raise the affirmative defense, because it would be quite difficult to meet this standard of proof with equivocal evidence. On the other hand, defendants who have a valid defense may meet this

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192. See, e.g., Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413 (1997) (offering a procedural cost minimization rationale for how the burden of production is often allocated).

high standard of proof in cases where they are—perhaps by chance—in possession of evidence that documents the true state of affairs.

This implies that affirmative defenses introduced with very high standards of proof are likely to have negligible effects on the deterrence of potential offenders but may reduce the deterrence of benign behavior slightly. Thus, unless the issue giving rise to the affirmative defense is one about which even innocent defendants are unlikely to possess evidence,<sup>193</sup> the introduction of an affirmative defense will generate superior results compared to a regime in which there are no affirmative defenses.

This observation, of course, does not imply that the standard of proof applicable to affirmative defenses ought to be set at very demanding levels. It is merely a theoretical way of establishing the existence of *some* regime involving an affirmative defense which is superior to regimes not allowing affirmative defenses, and thus demonstrating the social desirability of affirmative defense. The precise standard of proof that ought to be associated with affirmative defenses depends on many factors as previously noted.<sup>194</sup>

#### CONCLUSION

Mass incarceration and other overuses of criminal sanctions result not only from imposing harsh punishment for violating legitimate statutes, but also from the fact that modern legal systems criminalize too much conduct that should not be criminal—a phenomenon known as *overcriminalization*. Many criminal law scholars argue that criminal law reform should start with establishing constraints on the scope of substantive criminal law. In this Article, we add to this effort by analysing the social desirability of one of the contributors to overcriminalization, namely the increasingly frequent criminalization of proxy conduct.

Although the prevalence of proxy crimes in modern criminal law systems and their contribution to the phenomenon of overcriminalization have already been noted by others, we provided a comprehensive and novel analysis that was, until now, absent from the literature. To highlight the inconsistent understandings of what proxy crimes entail, we reviewed two clearly different definitions of the term and explained why we find neither of them to be fully adequate. Thus, we provided our alternative definition of proxy crimes, which allowed us to identify a distinctive class of criminal offenses. This definition called for a special kind of normative analysis: we understand proxy crimes to consist of criminalized conduct that is harmless in itself, but is nevertheless criminalized to reduce harms from another kind of harmful activity. We also introduced three categories of proxy crimes, as well as three channels through which proxy criminalization can reduce the incidence of the primary wrongdoing.

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193. This result is proven, at a higher level of generality, in Proposition 5 in Mungan, *supra* note 44, at 370.

194. See *supra* notes 191–93 and accompanying text.

Having thus resolved some persistent conceptual problems surrounding proxy crimes, we turned to the economic analysis of proxy criminalization. With the help of an economic model of criminal behavior, we identified key factors that affect the social desirability of proxy criminalization. Our economic analysis provides an illuminating theoretical explanation for some existing controversies and patterns in proxy criminalization, in addition to generating postulates regarding the optimal scope of proxy crimes.

Finally, in light of our economic analysis, we discussed some general policy recommendations on how to better address the trade-off between the benefits from criminal harm prevention and deterrence and the costs of chilling benign behavior by allowing defendants charged with proxy crimes to raise an affirmative defense. After discussing the constitutional permissibility of such a reversed burden of proof, we explained its likely impact on behavior. Specifically, we argued that a carefully crafted affirmative defense, allowing a person charged with a proxy crime to demonstrate his lack of involvement in the corresponding primary wrongdoing, can reduce the costs associated with proxy criminalization without sacrificing much of its benefits.

Reflecting back on our analysis, we believe that it identifies the primary theoretical considerations that bear on the social desirability of proxy criminalization. It also highlights the important role that affirmative defenses can play in curbing some of the undesirable consequences of this type of criminalization. For any given proxy conduct, whether the factors we have identified favor its criminalization, and, if so, what the optimal standard of proof for an affirmative defense might be, naturally depend on answers to difficult empirical questions. It is our hope that our analysis may encourage policy makers and legislators to ask the correct questions when deciding issues that pertain to proxy criminalization and to facilitate future work which may ultimately provide answers to these difficult empirical questions.