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Youngjae Lee¹

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Abstract

A solution to the problem of “overcriminalization” appears to be decriminalization of certain crimes. This Essay focuses on a group of crimes that has been labeled “proxy crimes” as a candidate to be eliminated. What are proxy crimes? Douglas Husak defines them as “offenses designed to achieve a purpose other than to prevent the conduct they explicitly proscribe.” Michael Moore describes them as involving situations where we “use one morally innocuous act as a proxy for another, morally wrongful act or mental state.” Put that way, proxy crimes seem highly problematic, and Larry Alexander and Kimberly Ferzan bluntly put it, “We reject proxy crimes.” This Essay asks whether we should reject proxy crimes by presenting and evaluating Alexander and Ferzan’s treatment of the subject. After describing several different types of crimes that may be characterized as proxy crimes and Alexander and Ferzan’s rejection of most of them and their arguments for doing so, this Essay argues that their rejection of proxy crimes is incomplete, which leaves their theory open to a range of possibilities regarding the proper place of proxy crimes in criminal law. This Essay concludes that getting a handle on the problem of proxy crimes and overcriminalization requires a theory of the state and an articulation of the proper relationship between the state and its citizens that can give guidance on when the state can demand obedience from citizens to support the state and when failures to comply with such demands render one criminally culpable. Without such a theory, proposals to address overcriminalization cannot travel very far.

Keywords Overcriminalization · Malum prohibitum · Proxy crimes · Disobedience · Criminalization

✉ Youngjae Lee
ylee@law.fordham.edu

¹ Fordham University School of Law, New York, USA

1 Introduction

A solution to the problem of “overcriminalization” appears to be decriminalization of certain crimes. This Essay focuses on a group of crimes that has been labeled “proxy crimes” as a candidate to be eliminated. “Proxy crimes” have been described in various ways. Douglas Husak defines “proxy crimes” as “offenses designed to achieve a purpose other than to prevent the conduct they explicitly proscribe,” and describes drug laws, many of which are controversial, as falling into this category.¹ Put that way, the definition of “proxy crime” itself contains an argument in favor of its elimination. Why not attempt to achieve that ultimate purpose directly instead of prohibiting and punishing conduct that is not of the primary concern? Michael Moore’s definition even more starkly lays bare the potentially problematic nature of proxy crimes, when he says that in criminal law “we sometimes use one morally innocuous act as a proxy for another, morally wrongful act or mental state.”² This definition similarly sounds an alarm. Why criminalize and punish “morally innocuous” acts when they are mere stand-ins for moral wrongs? Moore criticizes proxy crimes for giving “liberty a strong kick in the teeth right at the start.”³ Larry Alexander and Kimberly Ferzan bluntly put it, “We reject proxy crimes.”⁴

This Essay asks whether we should, following Alexander and Ferzan, reject proxy crimes, especially if it is indeed the case that proxy crimes criminalize “morally innocuous” conduct. There is a growing literature on proxy crimes in criminal law theory,⁵ but a particularly insightful and productive discussion of the topic can be found in Alexander and Ferzan’s treatment of proxy crimes in their two recent books, *Crime and Culpability: A Theory of Criminal Law*⁶ and *Reflections on Crime and Culpability: Problems and Puzzles*.⁷ Alexander and Ferzan propose that we see criminal culpability as consisting of, and largely limited to, “the conscious imposition of risks to others’ legally protected interests,”⁸ and come out against proxy crimes largely on that basis. They also suggest that their approach can help us

¹ Douglas Husak, “Drug Proscriptions as Proxy Crimes”, *Law and Philosophy* 36 (2017): pp. 345–66.

² Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford and New York: Oxford University Press, 1997), p. 783.

³ *Ibid.*, p. 784.

⁴ Larry Alexander and Kimberly Kessler Ferzan, *Reflections on Crime and Culpability: Problems and Puzzles* (New York: Cambridge University Press, 2018), p. 8; see also *ibid.*, p. 12 (“We are generally opposed to proxy crimes.”).

⁵ Some contributions are: Douglas Husak, “*Malum Prohibitum* and Retributivism”, in R.A. Duff and Stuart Green (eds.), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford: Oxford University Press, 2005), pp. 65–90; Stuart Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (New York: Oxford University Press, 2006); Andrew Cornford, “Preventive Criminalization”, *New Criminal Law Review* 18(1) (2015): pp. 1–34; Victor Tadros, *Wrongs and Crimes* (New York: Oxford University Press, 2016), pp. 329–32; R.A. Duff, *The Realm of Criminal Law* (Oxford: Oxford University Press, 2018), pp. 313–32.

⁶ Larry Alexander and Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (New York: Cambridge University Press, 2009).

⁷ Alexander and Ferzan, *Reflections on Crime and Culpability*.

⁸ *Ibid.*, p. 83.

address overcriminalization, which they see as “[o]ne of the great problems with the current criminal law.”⁹

This Essay presents and evaluates Alexander and Ferzan’s treatment of proxy crimes and proceeds as follows. Sections 2 and 3 explain several different types of crimes that may be characterized as “proxy crimes” and describe Alexander and Ferzan’s rejection of most of them and their arguments for doing so. Section 4 describes two modest bases they give for punishing proxy crimes, being a “scoff-law” by “flouting the law” and “risking other peoples’ riskings,” and observes that these concessions do not change their overall stance against proxy crimes. Section 5 examines the concept of “legally protected interests” in their formulation of criminal culpability as “the conscious imposition of risks to others’ legally protected interests” and argues that Alexander and Ferzan’s rejection of proxy crimes is not as thorough as they say it is. Section 6 concludes that Alexander and Ferzan’s rejection of proxy crimes is incomplete because it lacks an account of the proper relationship between citizens and the state that can give guidance on when the state can demand obedience from citizens to support the state and when failures to comply with such demands render one criminally culpable. This incompleteness leaves their theory open to a range of possibilities regarding the proper place of proxy crimes in criminal law, despite their stated position in opposition to proxy crimes as a general matter.

2 What Are Proxy Crimes?

What are proxy crimes and why do they exist? Proxy crimes exist for different reasons, as there are different kinds of proxy crimes.

First, there is conduct that may be, in Alexander and Ferzan’s terms, “presumptively culpable” in that these are “specific forms of conduct that are presumptively but not always... culpable.”¹⁰ Alexander and Ferzan give as one of their examples driving in excess of the speed limit, which is not inherently risky but may be “presumptively reckless.”¹¹

Second, the state frequently criminalizes certain conduct not because it directly causes harm but because it might lead or contribute to harm less directly, by, say, further acts by the agent of the conduct or others. Various possession offenses—such as those involving weapons—may be categorized in this group of offenses.¹²

⁹ Alexander and Ferzan, *Crime and Culpability*, p. 289.

¹⁰ Alexander and Ferzan, *Reflections on Crime and Culpability*, p. 83; Alexander and Ferzan, *Crime and Culpability*, p. 309.

¹¹ Alexander and Ferzan, *Reflections on Crime and Culpability*, pp. 83–84.

¹² Alexander and Ferzan call such offenses “preemptive crimes.” Alexander and Ferzan, *Reflections on Crime and Culpability*, p. 84 n.2; Alexander and Ferzan, *Crime and Culpability*, pp. 309–10. Husak calls them “offenses of risk prevention.” Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008), p. 38.

Third, there are offenses that have been called “regulatory offenses,” sometimes called “public welfare offenses,”¹³ as opposed to ordinary offenses. Regulatory offenses refer to a type of criminal offense that the government enacts as a way of enforcing its regulation of various aspects of our lives—air quality, food safety, environmental preservation, and so on. In United States federal law, typically, a statute would authorize a federal agency (or authorize the President to authorize an agency) to promulgate regulations to implement the statute and specify that certain violations of the statute or the regulations are crimes.¹⁴ The broad scope of the government regulations means that not all of these offenses are proxy crimes. The crime of killing an animal that is designated as an endangered or threatened species by the appropriate agency, for instance, looks like a regulatory offense that is not a proxy crime.¹⁵ The crime of giving investment advice for compensation without registering as an investment advisor, on other hand, is both a regulatory offense and a proxy crime, as the licensing requirement is a way of reducing the risk of, among other things, securities fraud and is not about preventing investment advising without a license.¹⁶

Fourth, the state also criminalizes conduct that in itself may be morally neutral but is easier to detect and is associated with certain types of criminal behavior. Money laundering, defined roughly as engaging in transactions with money that is derived from certain criminal activities, is an example of a crime like this.¹⁷

Fifth, the state imposes certain affirmative duties in order to aid law enforcement. For instance, information-gathering offenses like the requirement that one declare the amount of currency one is carrying abroad over a certain minimum is a way of criminalizing conduct that seems morally neutral in order to unveil more clearly

¹³ *Morrisette v. United States*, 342 U.S. 246 (1952); see generally Darryl Brown, “Public Welfare Offenses”, in Markus Dubber and Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal Law* (New York: Oxford University Press, 2014), pp. 862–83.

¹⁴ See, e.g., 31 USC s. 5322; 15 USC s. 80b-17; see also Richard Lazarus, “Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law”, *Georgetown Law Journal* 83(7) (1995): p. 2441 (“[A]t the federal level, Congress has virtually criminalized civil law by making criminal sanctions available for violations of otherwise civil federal regulatory program.”).

¹⁵ 16 USC s. 1533 (making it unlawful for anyone to “violate any regulation pertaining... to any threatened species of fish or wildlife listed pursuant to” the law that authorizes the Secretary of Interior to designate a species as an endangered or threatened species).

¹⁶ 15 USC s. 80b-3 (“[I]t shall be unlawful for any investment adviser, unless registered under this section, ... to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.”); 15 USC s. 80b-2 (“‘Investment adviser’ means any person who, for compensation, engages in the business of advising others... as to the advisability of investing in, purchasing, or selling securities...”); 15 USC s. 80b-17 (“Any person who willfully violates any provision of this subchapter, or any rule, regulation, or order promulgated by [the Securities and Exchange] Commission under authority thereof, shall, upon conviction, be fined not more than \$10,000, imprisoned for not more than five years, or both.”).

¹⁷ 18 USC s. 1957 (criminalizing engaging in “a monetary transaction in criminally derived property of a value greater than \$10,000 [where the property] is derived from specified unlawful activity”).

morally suspect conduct, like running an illicit business.¹⁸ These types of offenses frequently also require reports of signs of suspicious activities by other people.¹⁹

Sixth, the state may enact crimes that eliminate culpable mental state requirements, even if that entails criminalizing conduct that is not culpable, as a way of preventing undesirable behavior and easing the burden of prosecuting. These crimes are often referred to as “strict liability” crimes.²⁰

This typology has the usual problems that taxonomies like this have. The “regulatory offenses” category may, for instance, turn out to be unwieldy given the wide reach of government regulations and the number of regulatory and enforcement tools that the government has at its disposal. Also, these categories are not mutually exclusive, as an offense can have multiple features listed above. One might say that proxy crimes constitute a family of offenses and these features—like family resemblances—are present among members in greater or lesser degrees.²¹

Another way of thinking about this typology is as a list of items on a menu of options presented to a lawmaker who seeks to use the state power to achieve a particular objective. The menu might have different sections, including a civil section and a criminal section, and the criminal section might present the lawmaker different tools that the lawmaker can use when crafting legislation. Strict liability is one option. Another option is to impose a positive obligation (or criminalize omissions). Empowering an agency to enact regulations and criminalizing violations of such regulations is another. Targeting inchoate offenses and attempting to eliminate risks before they come to fruition as harms is another option.

The reason these categories all fall under the heading of proxy crimes is that the possibility of overinclusive crime definitions is not only present, which is arguably the case for all laws, but also, typically, is the very *point* of laws in each category. That is, each category represents a legal strategy to address something that the state may see as a problem through criminal law despite the likelihood of criminalizing morally innocent conduct. The risk of punishing individuals for conduct that is not morally wrongful is to be tolerated, if not enthusiastically embraced, depending on one’s attitude toward such things. This does not mean that proxy crimes *always* criminalize innocent conduct. It is certainly the case that morally wrongful behaviors are often targeted by these laws. Neither is it the case that these laws are potentially problematic simply because of the possibility of *accidentally* punishing innocent conduct. When these laws end up covering conduct that is morally innocent, it is often no accident, as the laws are *designed* to sweep both morally innocent and

¹⁸ See, e.g., 31 USC. s. 5316(a); 31 USC s. 5316(b) (1986); 31 USC s. 5322 (2001); see also *United States v. Bajakajian*, 524 U.S. 321 (1998).

¹⁹ See generally Sandra Guerra Thompson, “The White-Collar Police Force: ‘Duty to Report’ Statutes in Criminal Law Theory”, *William & Mary Bill of Rights Journal* 11(3) (2009): pp. 3–65; Sungyong Kang, “In Defense of the ‘Duty to Report’ Crimes”, *UMKC Law Review* 86 (2017): pp. 361–403; Gerard E. Lynch, “The Lawyer as Informer”, *Duke Law Journal* 1986 (1986): pp. 520–21.

²⁰ See generally A.P. Simester (ed.), *Appraising Strict Liability* (New York: Oxford University Press, 2005).

²¹ Cf. Frederick Schauer, “On the Nature of the Nature of Law”, *Archives for Philosophy of Law and Social Philosophy* 98(4) (2012): pp. 457–67.

morally wrongful together into one class. Of course, that the point of these crimes is to target morally innocent conduct is precisely what makes them troubling.

3 Are Proxy Crimes Justifiable?

If proxy crimes are problematic in the way described, should we eliminate all of them? As noted above, Alexander and Ferzan say they “reject proxy crimes.”²² Their view, though, is a little more complicated than that, as they endorse the first type of proxy crime listed above—the offenses that criminalize presumptively culpable conduct.²³ Alexander and Ferzan say that “legislatures might be justified in enacting crimes that forbid specific forms of conduct that are presumptively but not always reckless (culpable)”²⁴ as such laws “give actors significant epistemic guidance,” especially “in circumstances where agents are particularly prone to rationality errors.”²⁵ They explain as follows:

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 from girl to girl. Here, miscalculations may occur on both sides of the equation—some fifteen-year-olds are sufficiently mature that they should be able to determine for themselves whether to consent to intercourse, but many may not be. The putative defendant, who has every incentive to *want* to believe that his future partner is competent, may not adequately take opposing information into account. Because we know that these mistakes are bound to happen, a nice clear cut-off point—a set age restriction—gives epistemic guidance to actors who may greatly need it.²⁶

Alexander and Ferzan are not as accommodating of other types of proxy crimes. For instance, the second type of proxy crime described above, criminalizing conduct that may not directly cause harm but may lead to harm, such as weapons possession, is problematic from their perspective. They argue against criminalizing such conduct as, in their view, “[w]hen the actor has not unleashed a risk beyond his control, he is not culpable, even if he intends to unleash the risk in the near future.”²⁷

As to the third type of proxy crime described above, regulatory or public welfare offenses, it is difficult to generalize as there are many laws and regulations of different kinds, but presumably a big chunk of it not having to do with “culpable” or “presumptively culpable” conduct is to be eliminated for Alexander and Ferzan.

²² Alexander and Ferzan, *Reflections on Crime and Culpability*, p. 8.

²³ *Ibid.*, pp. 83–84; see also Alexander and Ferzan, *Crime and Culpability*, pp. 309–10.

²⁴ Alexander and Ferzan, *Reflections on Crime and Culpability*, p. 83.

²⁵ Alexander and Ferzan, *Crime and Culpability*, p. 310.

²⁶ *Ibid.*, pp. 310–11 (emphasis in original).

²⁷ Alexander and Ferzan, *Reflections on Crime and Culpability*, p. 84 n.2.

Alexander and Ferzan are also against crimes that are designed to “provide the police with an investigatory justification for ferreting out violations of real, *malum in se* crimes.”²⁸ This position implies that the fourth and fifth types of proxy crimes described above—such as anti-money laundering laws and violations of currency reporting requirements—are to be discarded as well.

Alexander and Ferzan similarly are against strict liability crimes that are overbroad in order to ease the burden on prosecutors as they “see no reason to ease the burden such that an actor who creates no unjustified risk of harm to any legally protected interest may be criminally punished despite having done nothing culpable.”²⁹ This would mean eliminating the sixth type of proxy crime.

In sum, Alexander and Ferzan appear to derive from their theory of criminal culpability an ambitious program of decriminalization. If one were to visualize their position, one could imagine a person holding up her thumb and index finger, grabbing a thick chunk of the criminal code, and ripping it out, leaving only a thin sliver behind. The fact that they identify overcriminalization as “[o]ne of the greatest problems with the current criminal law” and announce that their position “radically recasts the criminal law landscape” and “challenges the status quo” suggests that this drastic-decriminalization reading is consistent with their intent.³⁰ The next two sections complicate this conclusion.

4 Proxy Crimes, Scofflaws, and Risking Other People’s Riskings

Alexander and Ferzan introduce two ideas that soften their general stance against proxy crimes. The first is the idea of being “scofflaw,”³¹ and the second is the idea of “risking other people’s riskings.”³² Explaining both ideas can build on their suggestion that proxy crimes may be appropriate in cases of presumptively culpable conduct where the laws give people “significant epistemic guidance” about which activities are likely to harm legally protected interests, especially “in circumstances where agents are particularly prone to rationality errors.”³³

As noted above, the example they give for criminalization of presumptively culpable conduct is the age of consent law. Alexander and Ferzan propose that a person who engages in sexual relations with a person under the age of consent, knowing the person’s age and knowing the law prohibiting sexual relations with that person, may be culpable because the person “risk[s] having unconsented-to intercourse.”³⁴ The problem is that the age of consent law may not always capture those who are

²⁸ *Ibid.* p. 89 n. 9.

²⁹ Alexander and Ferzan, *Crime and Culpability*, p. 310.

³⁰ *Ibid.*, p. 289.

³¹ Alexander and Ferzan, *Reflections on Crime and Culpability*, p. 85.

³² *Ibid.*, p. 17.

³³ Alexander and Ferzan, *Crime and Culpability*, p. 310; Alexander and Ferzan, *Reflections on Crime and Culpability*, pp. 83–84.

³⁴ Alexander and Ferzan, *Crime and Culpability*, p. 311; see also Alexander and Ferzan, *Reflections on Crime and Culpability*, pp. 85 & 85 n.5.

incapable of consenting because some are more mature than others. So the question is whether a person who actually does not consciously risk unconsented-to sex (due to his independent determination that she is mature enough to consent) is nevertheless culpable when he is in knowing violation of the age of consent laws.

Addressing that question, Alexander and Ferzan introduce the idea of a “scoff-law” as follows:

What should we do with a person who does not culpably risk the harm but who does violate the proxy crime? . . . If the actor does not risk harm to a legally protected interest, the question is whether he has still shown sufficient respect for the “rule of law.” Here, the jury could be asked whether the actor, knowing that he was violating the law (the proxy crime), (1) gave sufficient weight in his justifying reasons to the chance that he might be wrong about the girl’s capacity to consent, and thus, enough weight to the risk of epistemic error, and (2) gave sufficient weight to the value of having rules decide these cases for all citizens (i.e., to the risk that he is undermining the moral message of the law). If taking these values into account, his action was still justified—for example, in this particular case, he had excellent reasons to believe the girl had the capacity to consent—then he is not culpable for violating the proxy crime. On the other hand, if he is epistemically arrogant without good reason—she was very mature and gave valid consent, but he had no good reason to believe this—then he may be punished for his failure to show sufficient respect to rule-of-law values.³⁵

There is much going on here, but the basic idea seems to be that those who engage in sexual conduct with underage persons may have either “risk[ed] having unconsented-to intercourse” or “failed to show sufficient respect to rule-of-law values,” or both.³⁶

There is, however, some ambiguity in this passage. It is not clear if “fail[ing] to show sufficient respect to rule-of-law values” is to be folded into a general culpability—“risk[ing] having unconsented-to intercourse”—analysis or whether it is an independent basis for punishment. When Alexander and Ferzan say that the jury should be asked whether the defendant “gave sufficient weight in his justifying reasons to the chance that he might be wrong about the girl’s capacity to consent, and thus, enough weight to the risk of epistemic error,” it sounds like the jury is to ask whether the defendant has “risk[ed] having unconsented-to intercourse,” but the assumption of the paragraph is that we are dealing with “a person who does not culpably risk the harm.” So it is not clear how a person who does not culpably risk the relevant harm has not given “enough weight to the risk of epistemic error.” Perhaps we are to create a space where the partner appears just mature enough to give valid consent, which exculpates the defendant, but the person needs to have a reason to believe that she is mature that is strong enough to overcome the contrary presumption set by the age of consent law if she is underage. The last two sentences of the quoted passage suggest that this is the correct reading, since, it appears, the jury is to

³⁵ Alexander and Ferzan, *Crime and Culpability*, p. 311.

³⁶ *Ibid.*

ask the question whether “he had excellent reasons to believe the girl had the capacity to consent” or whether “she was very mature and gave valid consent, but he had no good reason to believe this.” In the end, then, the question is whether the defendant is culpably risking unconsented-to sex, and the only difference the proxy crime makes is that it gives people more information as to when they might be engaging in unconsented-to sex.

But there is another possible reading, which is that we are dealing with a person who has not culpably risked unconsented-to sex but the person may still be guilty of lawbreaking, or being a scofflaw. Alexander and Ferzan sometimes sound as if the core wrong of being a scofflaw is the act of flouting by itself, or possibly even the *attitude* of being disrespectful. In the quoted passage, they say that “the question is whether [the defendant] has... shown sufficient *respect* for the ‘rule of law’” and that “if [the defendant] is *epistemically arrogant*... then he may be punished for his failure to show sufficient *respect* to rule-of-law values.”³⁷ And, furthermore, they say that a scofflaw is to be punished for being a scofflaw and “at the uniform level set for all scofflaws”³⁸ since “[a] scofflaw is a scofflaw is a scofflaw,” and “the punishment [for being a scofflaw] should be the same across the range of proxy crimes.”³⁹ They accordingly reject the argument that “those who violate proxy crimes that are meant to safeguard very weighty interests are more culpable *qua* scofflaws than those who violate less important proxy crimes.”⁴⁰ These suggest that the punishment for consciously violating a proxy crime should be not just for failing to place “enough weight to the risk of epistemic error” and thereby being risky, but also *for disrespect of the law*. That they add that they “advocate ‘undermining the rule of law’ as its own legally protected interest,”⁴¹ that they regard “the value of the rule of law itself to be a legally protected interest,”⁴² and that they “deem ‘undermining of the rule of law’ to be a legally recognized harm”⁴³ suggests that they see being a scofflaw as an independent offense, whether the core wrong is the act of flouting or the attitude of disrespect.⁴⁴

There is yet a third possible reading, which has to do with “risking other people’s riskings,” which they discuss extensively.⁴⁵ Namely, a person who goes against a prohibition may have “created a risk that others will follow his lead and violate proxy crimes in circumstances in which they underestimate the riskiness of that conduct.”⁴⁶ A person who has sex with an underage person against a prohibition but is justified in doing so given the relevant risks may confuse another person as to

³⁷ *Ibid.* (italics added for emphasis).

³⁸ *Ibid.*, p. 313.

³⁹ Alexander and Ferzan, *Reflections on Crime and Culpability*, p. 86.

⁴⁰ *Ibid.*

⁴¹ Alexander and Ferzan, *Crime and Culpability*, p. 312.

⁴² *Ibid.*

⁴³ *Ibid.*, p. 313.

⁴⁴ On punishing disobedience as conduct or attitude, see Youngjae Lee, “Recidivism as Omission: A Relational Account”, *Texas Law Review* 87(3) (2008), pp. 595–96.

⁴⁵ Alexander and Ferzan, *Reflections on Crime and Culpability*, pp. 17–65.

⁴⁶ *Ibid.*, p. 85.

the legal status of underage sex and increase the risk of another person engaging in unconsented-to sex with a minor. Alternatively, a person who has sex with an underage person against a prohibition but is justified in doing so given the relevant risks may inspire another person to have underage sex by providing him with a way to deceive the law enforcement as to why, he, too, is justified in doing the same.⁴⁷ That this is what Alexander and Ferzan may mean when they designate “undermining the rule of law” as a “legally recognized harm” is evident when they say that flouting the law is “dangerous” and that “that danger *is* the product of the example set by those who flout proxy crimes”⁴⁸ and that “the punishment... for being a scofflaw... should reflect the culpability of consciously creating the risk of inducing others’ risky conduct.”⁴⁹

No matter which of these three possible readings is correct, none of them appear to change Alexander and Ferzan’s overall position of endorsing proxy crimes for the most part only in cases of presumptively culpable conduct. The first and third readings seem to be just another specification of “the causal universe that one must take into account in determining whether one’s action is actually justified” since they both ultimately lead back to the risk of unconsented-to sex by *someone*.⁵⁰ The second reading suggests that Alexander and Ferzan propose going beyond the risk of unconsented-to sex and punishing the act of disobedience itself, but this independent basis seems to be only a modest expansion given that they deny that “those who violate proxy crimes that are meant to safeguard very weighty interests are more culpable *qua* scofflaws than those who violate less important proxy crimes” and argue instead that “[a] scofflaw is a scofflaw is a scofflaw” and is to be punished “at the uniform level set for all scofflaws.”⁵¹

5 Types of Legally Protected Interests

Sections 3 and 4 have presented a detailed account of the ways in which Alexander and Ferzan “reject proxy crimes.” However, there is more to probe here, and to assess how deeply Alexander and Ferzan’s arguments against proxy crimes really cut, we need to go back to their original formulation of criminal culpability as “the conscious imposition of risks to others’ legally protected interests.”⁵² To understand this formulation, we need to know what “legally protected interests” are.

As Alexander and Ferzan observe, the answer to that question is easy when it comes to “harms to others,” such as “being killed, maimed, or even punched in the face.”⁵³ That is, a person is culpable when he or she consciously imposes risks of

⁴⁷ These are adopted from Alexander and Ferzan’s example of gun possession in their discussion of risking other people’s riskings. *Ibid.*, p. 49.

⁴⁸ *Ibid.*, p. 85 (emphasis added).

⁴⁹ *Ibid.*, p. 87.

⁵⁰ *Ibid.*, p. 50.

⁵¹ *Ibid.*, p. 86.

⁵² Alexander and Ferzan, *Reflections on Crime and Culpability*, p. 83.

⁵³ Alexander and Ferzan, *Crime and Culpability*, p. 269.

harm to others' bodily integrity. However, one's bodily integrity is not the only type of "legally protected interest" according to them, as they discuss many possibilities besides those, though they choose not to fully take on "a host of thorny questions about what interests the criminal law ought to protect."⁵⁴

For our purposes, one highly relevant discussion of interests that are protected by the criminal law other than those involving harms to others can be found in their example of a law that criminalizes walking across the grass.⁵⁵ In this example, the "legally protected interest" would be the grass, but the person who walks across it may not be culpable because the person may reasonably believe that the walk is harmless and does not risk harming the grass. But that is not all there is to the culpability analysis, as they mention that the person walking across the grass may be "culpable, not for the damage to the grass, but for unfairly free-riding on the restraint of others."⁵⁶ They explain: "If everyone in a town agrees that pretty grass is more important than getting from one point to another in the most direct manner (by walking on the grass), they may agree to refrain from walking on the grass so as to reflect this collective value."⁵⁷ In such a case, they say that "it is at least plausible that some free-riding may be culpable and blameworthy" and the culpability does not "stem from any risk of injury, but from the fact that [one] receives a benefit from others' restraint while failing to abide by the agreement."⁵⁸

Put in their terms, then, what would be the legally protected interest in the case of walking across the lawn? It is straightforward to call free-riders free-riders, but it is not easy to spell out what legally protected interest is threatened by free-riders. Indeed, it is the lack of a clear victim in such cases that makes the act of free-riding tempting even to those who are ordinarily conscientious. The harm of free-riders, one might say, is to the robustness of a collective venture, the benefits of which are difficult to realize unless most people cooperate. The existence of free-riders makes such collective endeavors difficult to maintain because cheaters beget more cheaters and sap the good will necessary to motivate people at large to cooperate and continue to realize the collective value. Thus, while the resentment you might feel when a person cuts in line (even if the person who cuts in line cuts behind you in front of other people, which makes the exact harm to you somewhat unclear) might make you think that you are the victim, you would not be the primary victim in such a case. The most direct victim is the collective practice of standing in line, which, if most people cooperate, inures to the benefit of most people, as the practice enables them to partake in an orderly system where they can get their business done efficiently and relatively effortlessly and be on their way.

⁵⁴ *Ibid.*

⁵⁵ Alexander and Ferzan, *Reflections on Crime and Culpability*, p. 58.

⁵⁶ *Ibid.*, p. 59.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* Though Alexander and Ferzan use the term "agreement" here, it does not seem that they mean to be invoking a contractual obligation given that the source of the prohibition they are discussing is not a contract or a promise but a law. There is an extensive literature on the relationship between free-riding and political obligation. For a discussion, see Youngjae Lee, "Punishing Disloyalty? Treason, Espionage, and the Transgression of Political Boundaries", *Law and Philosophy* 31(3) (2012): pp. 319–20.

There is another legally protected interest we might consider. Once the possibility of identifying public cooperative ventures as legally protected interests is identified, the logic can be extended to situations that are not necessarily characterized as instances of free-riding. For instance, one may posit, like John Rawls in the following passage, a natural duty to support just institutions:

[A] fundamental natural duty is the duty of justice. This duty requires us to support and to comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves. Thus if the basic structure of society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do his part in the existing scheme.⁵⁹

Such a natural duty to support just institutions would have to be rooted in the value of the state, which is the source of the criminal laws and institutions that support the laws. A typical definition of a state is that it is a set of political institutions organized to govern a particular territory that successfully lays claim to the monopoly of legitimate violence within the territory.⁶⁰ The state does a number of things, including protecting the physical safety of those within its territory, operating a system of dispute resolution spanning from police force to administrative agencies to the judicial branch, solving coordination problems by establishing and enforcing conventions, such as rules of the road, and so on. So, given that the state exists, and given that it does these things, one may think of institutions of the state to be legally protected interests that one may not consciously risk harming, given that the state carries out valuable functions that make it possible for individuals to live normal lives as we understand normalcy today. That this is not a farfetched reading of Alexander and Ferzan is indicated in their choice to include “[h]arm to government functions” (such as “bribery and perjury”) on a list of “legally protected interests” they provide as a starting point.⁶¹

Yet another type of legally protected interest we might consider stems from the possibility of one being culpable through failures to act. Criminalizing omissions is a longstanding topic of controversy and puzzlement in criminal law theory,⁶² and Alexander and Ferzan allow for culpability for omissions in situations where affirmative duties to act exist and one’s failure to act despite the existence of such duties can endanger legally protected interests.⁶³ The critical question then becomes whether such affirmative duties exist, and for our purposes, the most important sources of such affirmative duties are statutory commands to act in a certain way.⁶⁴ Alexander and Ferzan mention such commands as a “trigger of legal duties” and

⁵⁹ John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), p. 115.

⁶⁰ Leslie Green, *The Authority of the State* (New York: Oxford University Press, 1988); George Klosko, *Political Obligations* (New York: Oxford University Press, 2005).

⁶¹ Alexander and Ferzan, *Crime and Culpability*, p. 281.

⁶² For a recent discussion, see Andrew Ashworth, *Positive Obligations in Criminal Law* (Oxford and Portland, Oregon: Hart Publishing, 2013), ch. 4.

⁶³ Alexander and Ferzan, *Reflections on Crime and Culpability*, p. 66.

⁶⁴ *Ibid.*, p. 68.

elaborate by giving examples of commands such as “the demand to pay taxes, serve on a jury, report cases of suspected abuse, and... serve in the military.”⁶⁵ Alexander and Ferzan note the state’s commands to people to do something as opposed to refrain from doing something “require normative grounding that explains why the state may coopt the labor or property of the actor for the greater good,” and one such normative grounding may be the duty to support the state and its institutions, as just mentioned.⁶⁶

We might pause here and ask at what point a person imposes enough of a risk to a legally protected interest to become culpable. How would one go about knowing how risky is risky enough? On this, Alexander and Ferzan’s answer is that “the threshold question—did the actor manifest insufficient concern for others—is a question about community expectations and our societal understanding of what citizens owe each other” and that these are the kinds of “questions the jury should be answering.”⁶⁷ To the objection that there are very few jury trials and that most cases get resolved as a result of a combination of prosecutorial discretion to pursue or decline to pursue charges and negotiated pleas, their general answer is that empowering juries in this way would shape the behaviors of prosecutors and the bargaining position between prosecutors and defendant in a way that would lead to more fair outcomes.⁶⁸ That answer is fair enough, and for our purposes the important conclusion is that, once legislators criminalize with “an understanding of the precise interests threatened,”⁶⁹ which threats to such interests are serious enough to be a violation of the relevant laws is a “question about community expectations and our societal understanding of what citizens owe each other” to be left to the jury.⁷⁰

In sum, it appears that there are at least three different ways of risking legally protected interests in addition to risking harms to others. First, one may free-ride by taking benefits produced by others’ restraints without restraining oneself in the same way. Second, one may interfere with workings of a just government and its institutions. Third, one may fail to comply with the state’s commands to engage in certain conduct for the greater good.

6 Are Many Types of Proxy Crimes Justifiable After All?

Having clarified Alexander and Ferzan’s concept of legally protected interests, let us revisit the question of which proxy crimes are justifiable. We saw above that Alexander and Ferzan allow proxy crimes in the case of presumptively culpable conduct, especially in situations where individuals are prone to error in assessing the level of risk-taking they are engaging in. But that is only one kind of proxy crime.

⁶⁵ *Ibid.*, p. 68 n.11.

⁶⁶ *Ibid.*

⁶⁷ Alexander and Ferzan, *Crime and Culpability*, p. 316.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, p. 270.

⁷⁰ *Ibid.*, p. 316.

What about the second type of proxy crime, which criminalizes conduct that may not directly cause harm but may lead to harm, such as weapons possession? It seems that, despite Alexander and Ferzan's statement to the contrary, this may be potentially grounded in the culpability of free-riding. It seems plausible to believe that the overall risk of harm from weapons in a community can be brought down considerably if a state prohibits weapons possession, meaning that once everyone gives up his or her weapon, individuals in the community can move about more freely without fear of being gunned down. However, when an individual opts out of the system and comes into possession of a gun, that person would have more protection than others in the community, since he or she would be the only one with a gun. But in such a case, the person enjoys a baseline level of safety thanks to the restraints others in the community have shown and an enhanced level of safety due to his weapons possession, which makes the person a free-rider on other people's efforts. It seems then that, any time anyone benefits from a prohibition that enhances the overall safety of a community and yet goes against the prohibition himself, there is potentially criminal culpability. There is thus a seed here that can grow into a full panoply of inchoate offenses, a type of proxy crime, that an individual would need to comply with in order to avoid becoming culpable as a free-rider.

The third type of proxy crime, which can be classified as "regulatory offenses," may be justified on similar grounds in many instances. Consider again the requirement that those who give investment advice for compensation do so only after registering as an investment advisor. Advising a person on how to invest his or her funds and accepting a fee for the advice without registering with the government does not seem culpable, so long as no fraud is involved, the relevant parties understand the relevant risks, and so on. So what would be wrong with practicing investment advising without registering in such a situation? The answer would be that, by having a license requirement like that, we would be ensuring a healthy securities market, which in turn benefits every market participant. We could tell similar stories about driving without a license or driving a car that has skipped the last legally required inspection. These are all situations where the state imposes certain requirements on individuals in order to ensure a safe communal space for citizens to engage in certain activities, and those who participate in the activities without complying with the measures put in place in order to ensure such safe spaces would be undermining the communal setup and free-riding on the efforts of others that have made creations of such safe spaces possible.

As to the fourth and fifth types of offenses, such as engaging in conduct criminalized to aid law enforcement, like money laundering, and failures to carry out affirmative duties to aid law enforcement by, say, reporting suspected criminal activities, they seem possible to justify on a combination of grounds, such as the duty to support just institutions, the duty to pay one's fair share and not free-ride, and the duty to comply with the state's commands to engage in certain conduct. Take money laundering for instance. Money laundering gives criminals a way to conceal proceeds from criminal activities, which makes it easier for them to avoid detection by law enforcement authorities. This may then be seen as a form of obstruction of

justice, which, in Alexander and Ferzan's terms, can be classified as "[h]arm to government functions."⁷¹

What about the sixth type of offense, those crimes made overbroad on purpose so as to ease the burden on prosecutors, such as strict liability crimes where a person may be committing a crime without realizing it? This type of offense remains difficult to justify on the basis of the culpability of flouting the law. Why is that? Alexander and Ferzan argue that "[a]t most, proxy crimes can make those who *knowingly* violate them into scofflaws."⁷² They arrive at this conclusion through their general conception of culpability as a conscious imposition of risk.⁷³

Taking stock, we started with a typology of six different types of proxy crimes. Alexander and Ferzan's stated position is that the first type of proxy crime—criminalizing presumptively culpable conduct—may be justified but that the second, third, fourth, fifth, and sixth types of proxy crimes are not justifiable. However, it seems to me that the discussion thus far shows that: (1) the relative open position they have taken on which interests may be legally protected; (2) their acknowledgment that free-riding may be culpable; (3) their endorsement of "government functions" as a legally protected interest, which suggests the view that one has a natural duty to support just institutions; and (4) their recognition that statutory commands may provide triggers that give rise to culpability for omissions, together pave the way toward enacting a variety of proxy crimes, even those that belong to the second, third, fourth, and fifth categories. The only type of proxy crime that their view of culpability seems to reliably disallow is the category of strict liability crimes, the kind that eliminates certain mental state elements of crimes in order to ease the burden of prosecution.

To be clear, the argument presented here is not that most proxy crimes can be justified. Laws may be misguided, overbroad, poorly written, or any combination of those, and case-by-case evaluations need to be made to examine whether a given proxy crime should be allowed to exist on various grounds mentioned. This position, though, is already quite a bit removed from the position that proxy crimes, as a general matter, punish those who are not culpable and thus ought to be repealed. Neither is the argument that Alexander and Ferzan would endorse these arguments for proxy crimes generally or for some of the specific proxy crimes mentioned. The argument rather is that their lack of specification of "legally protected interests" and endorsement of laws that impose affirmative duties and punish free-riding open up more space for proxy crimes than they appear to acknowledge.

⁷¹ *Ibid.*, p. 281.

⁷² Alexander and Ferzan, *Reflections on Crime and Culpability*, p. 87 (emphasis added).

⁷³ Accordingly, they also acknowledge "the category of reckless but not knowing violators" as potentially culpable, albeit "less culpable than a knowing scofflaw." *Ibid.*, p. 85 n.5.

7 Conclusion

This Essay observed above that Alexander and Ferzan roll out an ambitious program of decriminalization, but that conclusion appears to have been premature. The only crimes, among the categories of proxy crimes, that Alexander and Ferzan's principles seem to reliably prevent are strict liability offenses. And it is not clear whether that reform alone would lead to a big reduction in the number of what the state calls crimes, given that it is a common legislative practice, at least in the regulatory offenses context, to insert terms like "knowingly" or "willfully" in crime definitions to avoid convicting the unaware,⁷⁴ and when the legislation fails to do so, courts often, though not always, step in to imply mens rea terms.⁷⁵

The upshot of all this is that Alexander and Ferzan's rejection of proxy crimes is unearned, and it is an open question as to whether their theory of criminal culpability brings us closer to a world without overcriminalization. What is needed, in order to properly assess proxy crimes, is a specific articulation of the universe of legal interests that the state may protect through criminal law, especially when it comes to the state's criminalization of conduct that amounts to a failure to support the state by free-riding, interfering with the state, or failing to cooperate with the state. How much room a theory ends up allowing for proxy crimes turns on how these issues are resolved, and it is not obvious exactly how they are to be resolved within Alexander and Ferzan's theoretical framework because they have not placed strict limitations on what can qualify to be "legally protected interests" when it comes to supporting the state. More generally speaking, this Essay's discussion of proxy crimes shows that getting a handle on the problem of overcriminalization requires a theory of the state and an articulation of the proper relationship between the state and its citizens. Without such a theory, proposals to address overcriminalization cannot travel very far.

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⁷⁴ See, e.g., 22 USC s. 2778(c); 50 USC s. 1704(c); see also Lazarus, "Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law", pp. 2448–50, 2454, 2468–71.

⁷⁵ Susan R. Klein and Ingrid B. Grobey, "Debunking Claims of Over-federalization of Criminal Law", *Emory Law Journal* 62(1) (2012): pp. 9–10 ("Moreover, the Court has implied a mens rea in many federal offenses that might otherwise appear to be strict liability offenses."); *ibid.*, pp. 70–71.