The problem of the justification of proxy criminalization. An economic analysis

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SUMMARY

This dissertation is a multi-disciplinary analysis of a class of criminal offences labelled 'proxy crimes' in the criminal law literature. Proxy crimes are offences criminalizing which is not necessarily wrongful as such but which stands in for some other type of criminal wrongdoing ('primary wrongdoing'). Although proxy crimes seem very common in contemporary criminal law systems and they are increasingly commonly mentioned in the criminal law literature, no comprehensive conceptual and normative analysis has been devoted to them so far. This dissertation intends to fill this gap.

I start with solving some conceptual problems in Chapter I. First, I notice there that the term 'proxy crimes' has been used in the criminal law literature in many meanings that do not necessarily converge. I find the broadest understanding of the term—proxy crimes as any over-inclusive offences—too broad to be informative. There are many possible reasons for drafting over-inclusive criminal offences and possibly every such reason calls for a different kind of conceptual and normative analysis. Because of that, I side with those authors who understand 'proxy crimes' more specifically—as offences that are over-inclusive because of evidentiary concerns. Such a simple definition, however, still leaves many important, potentially controversial features of the denoted class unspecified—throughout most of the Chapter, I discuss such controversial features and try to decide which way of specifying them would offer the greatest theoretical benefit. All this analysis leads to the main goal of the Chapter, i.e., providing a possibly precise definition of proxy crimes. Chapter I concludes with some further arguments on why 'proxy crimes' understood as they are in this thesis are a useful term in criminal law theory—I demonstrate that they differ in crucial respects from some other similar concepts employed by criminal law theorists, such as *mala prohibita*, crimes outside the core, or ancillary offences.

Although Chapter I employs many examples of proxy crimes existing in criminal codes, it can be still demonstrated further how vast and problematic this class is. Chapter II aims at doing exactly that. I do not aspire, though, at approaching any level of completeness there. Instead, I focus on four classes of offences (defined by the type of *actus reus* that they refer to) among which proxy crimes are arguably very common. The first of those classes, statutes criminalizing mere possession of some items, is well-described in the literature and notorious for the difficulty to justify its existence. The three other classes—non-disclosure offences, location offences, membership offences—have received a bit less attention in the literature, but their normatively controversial nature has also been acknowledged. By focusing on offences whose justification has been controversial in the literature, I aim to show that construing them as proxy crimes can bring much clarity to such normative debates. Although that Chapter does not rigorously follow a single methodological approach, the discussion of every offence goes roughly along the following lines: After pointing at a jurisdiction (or jurisdictions) where a given offence exists, I argue why its interpretation as a proxy crime is not only possible but also perhaps preferable to other putative functions that it is construed to serve. Then I point at critical points regarding a given offence that have been raised in case law and/or criminal law literature, always trying to show to what extent such criticisms are generalizable to a broader class of proxy crimes.

The first two Chapters prepare ground for the core of the thesis—the reconstruction of normative arguments for and against the existence of proxy crimes. Chapter III focuses on such arguments that might be raised from the non-consequentialist positions. In this context, I understand non-consequentialism as any theory of criminal law that seeks to justify the imposition of criminal punishment as a legitimate response to some past mischief. Because of that, any non-consequentialist analysis of an offence should start with identifying the *object of punishment*, that is, some type of conduct *for which* the punishment is imposed. I argue at length that the proxy conduct in terms of which a proxy crime is defined is not the true object of punishment, as the punishment is really imposed for the primary wrongdoing for which the proxy conduct merely stands in. If so, two fundamental normative problems emerge, which I label *extension* and *intension* problems. The former refers to the fact of increased risk of punishing the innocent, that is, individuals who have engaged in the proxy conduct but not in the respective wrongdoing. The latter points at the fact that even if an individual convicted of a proxy crime has indeed committed the primary wrongdoing, the criminal law still sends a wrong message, inaccurately pointing at the wrong for which the punishment is imposed.

Even though I think that such problems should disqualify proxy crimes in the eyes of at least some non-consequentialists, I still point at some mitigating factors that have the potential of making proxy crimes less unacceptable.

While Chapter III aimed at providing an analysis that could be shared by a possibly large share of the broad church of non-consequentialism, Chapter IV offers a different approach. There I focus on one, contemporary dominating, consequentialist approach to criminal law: the economic theory of criminal law. Unlike non-consequentialists, proponents of this approach are unlikely to have some categorical aversion to proxy crimes. Instead, they might consider them desirable as long as some empirical parameters are satisfied. In the first part of Chapter IV, I draw on the economic literature on the optimal standard of proof, showing that consequentialists are likely to accept a proxy crime when it effectively lowers the evidentiary threshold sufficient for convicting someone for the primary wrongdoing to the social optimum. The second part of the Chapter lays ground for some more original economic analysis, pointing at some possible additional benefits of proxy crimes, such as the prevention benefits.

In the two normative Chapters, I frequently base my argument on some apparently appealing normative intuitions. It is a commonplace in contemporary philosophy (and philosophy of law is no exception) to check the relative reliability of such intuitions by conducting experimental studies on folk (or expert) intuitions—an approach known as *experimental philosophy* (or, when applied specifically to problems of legal philosophy, *experimental jurisprudence*). Arguably, the case for studying folk intuitions seems to be even stronger in the case of philosophy of criminal law, as such an enterprise might also help verify whether there is an alignment between the assumptions of the criminal law system and popular sentiments—such an alignment seems to be an important factor in criminal law enjoying some form of social legitimacy. Anyway, I follow this suit in Chapter V, where the results of two original experimental studies can be found. Study I tests the most fundamental assumption of my thesis—that proxy crimes serve a purely instrumental function, making it easier to convict individuals suspected of some primary wrongdoing. As that study is conducted on a mixed sample of participants (of laypeople and legal experts), its goal is also to confirm a postulated effect of legal expertise on the intuitions under study. Study II deals with some factors potentially affecting the desirability of proxy crimes, to which the normative frameworks described in this thesis might attach different, perhaps conflicting, meanings. Hence, it is tested which empirical parameters affecting the quality of proxy crimes as a diagnostic test

vis-à-vis the respective primary wrongdoing (the false positive rate, the false negative rate, and the base rate) most affects the intuitive desirability of a given proxy crime. We also check whether there seems to be any systematic tendency to favour criminalizing proxy conduct that typically takes place before, rather than after the primary wrongdoing.