

**Psychological Constructions of Criminality:  
Law, Crime Severity, and Bias in Lay Determinations of Criminal Attempt**

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How do jurors absorb, interpret, and apply facts and law to decide at what point a defendant's thoughts and actions cross the line from being legally innocent to criminal? The stakes in this cognitive process are high—for the defendant whose liberty hangs in the balance, for the victims and communities impacted by the alleged crime, for the legal players involved in any particular case, and for society as a whole in regard to the underlying moral implications about when and why we employ the force of criminal punishment. And yet, the legal system is largely in the dark about how lay decision makers weigh legally relevant and irrelevant information in their constructions of criminality.

Criminal attempt is one area of law that may be especially susceptible to mismatches between legal expectations and cognitive realities in this regard. Any kind of intentional crime can be attempted, and liability for attempt could attach at any point between the first inception of a criminal idea and the moment when it is actualized. The ambiguity of the laws defining criminal attempt heightens the risk of misinterpretation and bias entering the process of lay adjudication. Furthermore, there are significant jurisdictional variations in the legal standards for attempt—e.g., the majority / Model Penal Code's "Substantial Step" test, which explicitly seeks to expand the criminality of attempts, versus the common law's relatively more defense-friendly "Proximity" standard. Repeat legal players who are trained in the law have a generally shared understanding of where these standards theoretically draw their respective lines of liability, but does that legal understanding cohere with how jurors assign criminality?

To shine an empirical light into this arena, I have conducted a series of experiments exploring the roles of law (Substantial Step versus Proximity), crime severity (low, moderate, or severe), and bias (based on signaled religion: the defendant is "Mohammed Farooq" who is affiliated with a mosque, "Michael Fenton" who is affiliated with a church, or no name and place of worship are indicated) in lay determinations of criminal attempt. The data thus far reveal that for one-time lay decision makers, the given legal standard either makes no difference to their constructions of attempt liability or, under some circumstances, the defendant is surprisingly worse off under the theoretically more defense-friendly Proximity test. In particular, when presented with ambiguous facts and shorter legal instructions, or when the defendant appears to be Muslim and has been charged with a serious attempt, lay decision makers are significantly more likely to construe his thoughts and actions as criminal when applying the Proximity standard as compared to the Substantial Step standard.

My findings point to a critical disconnect between what is legally supposed to matter and what actually seems to matter in lay constructions of criminality. These results bear practical implications for lawmakers who decide which legal standards to adopt and why; judges who are responsible for instructing jurors on the law; and prosecutors and defense attorneys who may be negotiating, trying, and appealing cases under a potentially erroneous set of assumptions about lay applications of facts and law.