

# HOFSTRA LAW REVIEW

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Testing Lay Intuitions of Justice: How and Why?

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# TESTING LAY INTUITIONS OF JUSTICE: HOW AND WHY?

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When John Darley and I wrote *Justice, Liability, and Blame: Community Views and the Criminal Law*, our goal was not to provide the definitive account of lay intuitions of justice but rather to stimulate interest in what we saw as an important but long-term project that would require the work of many people. Having this American Association of Law Schools program is itself something toward that end and for that we thank Christopher Slobogin and Cheryl Hanna.

In this brief introduction to the Symposium, let me set the stage by doing four things. Part I of this Article summarizes the arguments we have made elsewhere as to why we think lay intuitions of justice are important for criminal law rule-makers. Part II sketches how we have gone about testing lay intuitions of justice. Part III looks briefly at one simple study to illustrate our methodology, which we have used on a variety of issues, as described in Part IV.

## I. TESTING LAY INTUITIONS OF JUSTICE: WHY?

Why are lay intuitions important? They have not been thought important in the past. The Utilitarian concerned with crime control commonly wrote them off as something akin to superstition, something that rational policymakers should rise above, something we must divest ourselves of through close analytical reasoning. That, I think, is a short-

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\* Edna & Ednyfed Williams Professor of Law, Northwestern University School of Law. Much of the material contained in this Article is a summary of previously published works, including: PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995); Paul H. Robinson, *Some Doubts About Argument by Hypothetical*, 88 CAL. L. REV. 813 (2000); Paul H. Robinson & John M. Darley, *Objectivist Versus Subjectivist Views of Criminality: A Study in the Role of the Social Science in Criminal Law Theory*, 18 OXFORD J. LEGAL STUD. 409 (1998); Paul H. Robinson & John M. Darley, *Testing Competing Theories of Justification*, 76 N.C. L. REV. 1095 (1998); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

sighted view; one a good Utilitarian ought not take. Lay intuitions ought to be recognized as critical to the Utilitarian analysis for several reasons. Regardless of whether lay intuitions are irrational, popular perceptions about what constitutes the proper rules for doing justice are a real force in the world, which only the foolish scientist or policymaker would ignore.

Social science research increasingly suggests that the real power to gain compliance with society's rules of prescribed conduct lies not in the threat or reality of official criminal sanction, but in the power of the intertwined forces of social and individual moral control.<sup>1</sup> The networks of interpersonal relationships in which people find themselves, the social norms and prohibitions shared among those relationships and transmitted through those social networks, and the internalized representations of those norms and moral precepts are what cause people to obey the law.

The law is not irrelevant to these social and personal forces.<sup>2</sup> Criminal law, in particular, plays a central role in creating and maintaining the social consensus necessary for sustaining moral norms. In fact, in a society as diverse as ours, the criminal law may be the only society-wide mechanism that transcends cultural and ethnic differences. Thus, the criminal law's most important real world effect may be its ability to assist in the building, shaping, and maintaining of these norms and moral principles. It can contribute to and harness the compliance-producing power of interpersonal relationships and personal morality.

The criminal law can have a second effect in gaining compliance with its commands. If it earns a reputation as a reliable statement of what the community, given sufficient information and time to reflect, would perceive as condemnable, people are more likely to defer to its commands as morally authoritative and as an appropriate guide in those borderline cases where the propriety of certain conduct is unsettled or ambiguous in the mind of the actor. The importance of this role should not be underestimated. In a society with the complex interdependencies characteristic of ours, an apparently harmless action can have destructive consequences. When that action is criminalized by the legal system, one would want the citizen to "respect the law" in such an instance even though he or she does not immediately intuit why that action is banned.

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1. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468-71 (1997).

2. See *id.* at 471-77.

Such deference will be facilitated if citizens are disposed to believe that the law is an accurate guide to appropriate prudential and moral behavior.

The extent of the criminal law's effectiveness in both these respects—in facilitating and communicating societal consensus on what is and is not condemnable, and in gaining compliance in borderline cases through deference to its moral authority—we argue is, to a great extent, dependent on the degree of moral credibility that the criminal law has achieved in the minds of the citizens governed by it. Thus, the criminal law's moral credibility is essential to effective crime control, and is enhanced if the distribution of criminal liability is perceived as “doing justice”—that is, if the criminal law assigns liability and punishment in ways that the community perceives as consistent with the community's principles of appropriate liability and punishment. Conversely, the system's moral credibility, and therefore its crime control effectiveness, is undermined by a distribution of liability that deviates from community perceptions of just desert.<sup>3</sup>

## II. TESTING LAY INTUITIONS OF JUSTICE: HOW?

A number of methods can be used to probe lay judgments about complex issues. We chose to use the “scenario” method.<sup>4</sup> Subjects are presented with a short description of a person's conduct, and are asked whether and, if so, how much liability and punishment the actor should receive for the conduct. Subjects are then given another scenario, and assess liability and punishment for that actor, then another scenario, and so on. These scenarios are varied by the researchers in ways driven by the theories being tested, and the researcher examines the differences among the liabilities assigned to each scenario.

Rather than having the subjects assign ratings to what can quite quickly become a large number of differing scenarios, why not just ask the subjects whether they think a particular rule formulation is appropriate? Because psychologists have discovered that subjects often do not have mental access to the principles and processes they use to make decisions, and thus cannot accurately articulate those principles. Instead, researchers present subjects with various cases to judge, and infer their

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3. A more detailed account of these arguments appear in our article *The Utility of Desert*, *id.* at 453-99.

4. See Paul H. Robinson & John M. Darley, *Testing Competing Theories of Justification*, 76 N.C. L. REV. 1095, 1108-09 (1998).

judging principles from the resulting patterning of responses between the different cases.

We employed these techniques in the present research.<sup>5</sup> We presented subjects with cases to judge in the form of short scenario descriptions of potentially criminal actions. Because the focus of our research was testing various legal issues contained in criminal codes, we designed the variations in our scenarios to reflect the different approaches one might take to these issues.

One way of summarizing the implications of the various aspects of the research design is to say that we conducted an experiment designed to determine whether the experimental respondents took one view or another on the issues being tested. Experimentation is an unusual tactic in research concerning legal issues; other empirical techniques such as the examination of existing records, other archival procedures, or opinion surveys are more common. Part of what we seek to demonstrate to criminal law theorists and code drafters is that this most rigorous form of scientific research, experimentation, can be brought to bear on their issues of debate.

Subjects first read a paragraph of core information describing the background of the various scenarios. Next, they read a specific scenario and were asked to assign a liability to the perpetrator described in it. For instance, the base scenario for the study on the objective requirements of attempt read as follows:<sup>6</sup>

Ray, a locksmith, recalls working on a safe in a coin shop. The safe was kept in a back room and always contained valuable coins. Ray thinks about how easily he could sneak into the back room during normal business hours and "crack" the safe. Ray decides that he will rob the safe in the coin shop. Before he does anything to prepare for the robbery, Ray tells a friend that he has decided to rob the safe.

In this version of the scenario, the actor, Ray, does no act toward commission of the robbery. He only thinks about it. It establishes a useful point of comparison to other scenarios in which Ray does more toward committing the offense. Another scenario uses the same situation but has Ray completing the offense:

Ray, a locksmith, recalls working on a safe in a coin shop. The safe was kept in a back room and always contained valuable coins. Ray decides that he will rob the safe in the coin shop. To make sure that the

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5. See *id.* at 1109-10.

6. See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* app. at 229-31 (1995).

safe is still there, Ray goes to the coin shop to check out the situation before the robbery. The next day Ray goes to the coin shop and meets the old man who owns it. While the owner helps another customer, Ray slips into the back room and cracks the safe. Ray slips away with a briefcase full of valuable coins. That night Ray tells a friend about what he did, and his friend tells the police. The next day two policemen search Ray's home with a search warrant, find the coins, and arrest him.

This scenario provides the point of comparison at the other end of the spectrum of conduct, the completed offense. A variety of other scenarios test interim points along the spectrum from "thought only" to "completed offense" and are likely to give liability scores, we speculate, that fall between these two "control" scenarios.

No doubt some people will give higher punishment for all the scenarios than other people. In cases involving killings, for example, some people may give the death penalty, while others, who are opposed to its use, will not. But using the experimental design we have chosen, we can functionally exclude from our analysis whether the subject is a generally harsh or easy sentencer, which is not the focus of our concerns. Our interest is in the difference in liability between specific scenarios, not the absolute amount of liability attached to any one scenario.

As noted above, scenarios differ in ways designed to elicit any differences in liability that subjects might attach to differences in the actor's objective conduct. Thus, we constructed scenarios in which the actor, Ray, in the objective requirements of attempt study, engaged in conduct that would just satisfy one attempt formulation but not another. For example, in one scenario, Ray's conduct satisfies the Model Penal Code's ("MPC") "substantial step" test, which generally allows the earliest assignment of liability of any of the various formulations:<sup>7</sup>

Ray, a locksmith, recalls working on a safe in a coin shop. The safe was kept in a back room and always contained valuable coins. Ray decides that he will rob the safe in the coin shop. To make sure that the safe is still there, Ray goes to the coin shop and checks out the situation before the robbery. Ray tells a friend what he has decided to do.

In another scenario, Ray goes further and satisfies the requirement of the common-law "dangerous proximity" formulation.<sup>8</sup>

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7. See MODEL PENAL CODE § 5.01(1)(c) (1985).

8. See *id.* § 5.01 cmt. (5)(b) (explaining the dangerous proximity test).

Ray, a locksmith, recalls working on a safe in a coin shop. The safe was kept in a back room and always contained valuable coins. Ray decides that he will rob the safe in the coin shop. To make sure that the safe is still there, Ray goes to the coin shop and checks out the situation before the robbery. Ray tells a friend about his plans to rob the safe the next day. His friend tells the police. The next day Ray goes to the coin shop and slips into the back room, where he begins to crack the safe. Before Ray is able to open the safe, however, two undercover policemen burst into the room and arrest him.

A series of other scenarios have Ray engaging in conduct that satisfied some other formulation. By looking at our subjects' liability and punishment responses, we can see which test best corresponds to their lay intuitions of the minimum requirements for attempt liability.

Notice that we have attempted to vary the scenarios only with respect to the element that is relevant to the theoretical comparison in question. The subjects perceive the different scenarios as having the same overall characteristics, so that any differences in liabilities assigned can be attributed to the one characteristic that is varied between the contrasting scenarios—in this study, the extent of the actor's conduct toward the offense. More on the difficulties of scenario design in a moment.

The task of each subject, then, in response to each scenario, was to assign a degree of liability and punishment to the protagonist in the scenario—in their view, to assign punishment to a wrongdoer. Subjects did this by marking their judgment on the scale shown below:

#### LIABILITY SCALE

N	0	1	2	3	4	5	6	7	8	9	10	11
no liab.	liab.	1 day	2 wks	2 mo	6 mo	1 yr	3 yr	7 yr	15 yr	30 yr	life	death
	but no punish										imprisonment	

As one can see, subjects may choose among assigning no criminal liability to the protagonist, liability but no punishment, and eleven levels of punishment, ranging from one day in jail to the death penalty.<sup>9</sup> Notice that the length of the prison sentence increases differentially as the assigned punishments increase. For instance, an assignment of punishment level two is an assignment of fourteen days in prison, an increase of

9. See Robinson & Darley, *supra* note 4, at 1112-13.

only thirteen days over punishment level one. An assignment of punishment level nine is a fifteen year increase from the punishment represented by punishment level eight. We constructed the scale in this way for two reasons: First, and primarily, because the differences correspond to the differences in grading categories used in typical American criminal codes. Second, because the differences correspond, roughly at least, to what ordinary people perceive as equal differences between sentences. Thus, these sorts of differences are the ones available to code drafters when they decide how to grade an offense, the ones juries and judges must deal with when sentencing a convicted offender, and perhaps the ones that come to the minds of citizens when they read and think about criminal sentences.

In designing the scenarios, our task was to create as many as were needed to provide a reasonably complete test of the issues we were investigating in the particular study. In the attempt study referred to above, for example, we found that eleven scenarios were needed. This included the two control scenarios, four scenarios each embodying one of the major formulations of the objective requirements of attempt, and five more scenarios testing an additional issue—the effect on liability and punishment of the actor’s renunciation at various points in the process. These scenarios are described in Table 2.1, below.

Pilot testing indicated that for most studies, ten to fourteen scenarios could be read and evaluated by a subject in approximately one half hour. Further, the subjects were able to maintain concentration; their reports indicated that they found the task quite interesting, and were intrigued by thinking about what differences in cases “made a difference” to them.

As this indicates, all of our subjects responded to all of the cases.<sup>10</sup> In the experimental design literature, this is referred to as a “within-subjects” design. This design focuses the subjects’ attention on the differences between the scenarios. The danger is that they think the existence of a difference implies an instruction from the researcher that the difference should “make a difference,” that it should provoke different liability assignments from the subject. To counter this possibility, we told subjects that we did not expect that different scenarios necessarily should get different liability judgments, and they were to give us their own judgments about what differences mattered. Looking over the individual responses, we noted that subjects did rate some cases alike as to the liabilities they generated.

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10. *See id.* at 1113.

As is usual in these designs, the order in which the cases were given to the subjects was randomized. To make the subjects' contrast task simpler for them, cases with one dimension of variation were grouped together. The order of cases within those groups was randomized, as was the order in which the groups were presented. Randomization prevents results from being dependent upon the order in which the scenarios were judged.<sup>11</sup>

One further methodological matter deserves additional attention: scenario design. As is apparent, our "scenarios" are glorified versions of the hypotheticals that criminal law professors have so long employed as a form of argument and analysis. But our scenarios are different in an important way, and that difference highlights the danger of the analysis-by-hypothetical that we law professors so often practice.

When people make blameworthiness judgments, they take into account an astonishing variety of factors.<sup>12</sup> Small facts of every sort can make a difference to a person's determination of blameworthiness. Given this kind of intuitive sophistication, it should be no surprise that, in order to make intuitive blameworthiness judgments, people want to know the "story." They want and need some basic sense of who the people are and what has happened. Most importantly for our purposes, if the scenario does not give them the basic relevant facts, readers often fill in the missing important details on their own, drawing upon what "usually" is the situation or what "probably" happens in such a case, extrapolating from the facts they are given. Because everyone's life experience is different, different people may "fill out" the story with different details. The fewer details the scenario provides, the more the reader is left to fill in. Thus, the variability of the "stories" that different readers envision is at its greatest when the scenario is at its shortest.

For scenario drafters, this malleability of the scenario's meaning is a major headache. It makes drafting scenarios a difficult undertaking. After a set of scenarios is prepared, isolating the factors to be tested and varying them appropriately among the different scenarios, it must be field tested to determine how the scenarios are actually perceived by subjects. During this field testing, subjects are not even commonly asked the ultimate question, "how much liability do you think is appropriate?" Instead, they are asked a series of questions about what the sce-

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11. For a more detailed discussion of our methodology, see ROBINSON & DARLEY, *supra* note 6, app. at 217-28.

12. The work reported in *Justice, Liability, and Blame: Community Views and the Criminal Law*, repeatedly demonstrates this point. *See id.*

narios say. For example, "according to the scenario, did Abel intend to cause the harm?" or "how harmful was the conduct?"

These "manipulation checks," as they are called, tell the designer whether the scenario is being perceived as intended. If it is not, the facts are then manipulated in a way that the designer thinks will produce the desired perception, and the instrument is retested in the field. Without the quality control measure of manipulation checks, one can never know whether the subject's reaction to the scenario is a reaction to the scenario intended by the designer or a reaction to a different situation, constructed from the subject's special reading and extrapolation of the facts.

As noted, the less information the scenario provides, the more the subject must "read in" to compose a mental picture with enough information to make a meaningful judgment of blameworthiness. Thus, the argument-by-hypothetical, as practiced by law professors, is a particularly dangerous exercise because the hypotheticals tend to be thin on facts, inviting more uncontrolled and unknown information to be "read in."

Let me give some examples of common problems for scenario designers. Consider the following two straightforward hypotheticals, the results of which we want to compare to test the subject's intuition, in this instance, about the role of harm in assessing blame:

1. X hits Y. Y is injured.
2. Z hits Y. Y dies.

What should be the extent of liability of X and of Z? It would seem that any difference in liability between the two hypotheticals should demonstrate the role of resulting harm, yes? No.

Subjects commonly read in different degrees of intentionality depending on the facts of the story. They may read in greater intentionality in the case of a death than in the case of an injury. The reader may assume that because Y died from Z's hit but not from X's hit, Z hit with a greater determination to cause Y's death, whereas X may have only intended to cause injury. The reader could make this kind of determination without really thinking about it, in the course of making a good faith intuitive judgment of blameworthiness. Under these circumstances, any difference in liability between the scenarios may be because of the difference in perceived intentionality rather than the difference in resulting harm.

Assume you adjust the hypotheticals to better control the perception of intentionality:

1. Intending to kill Y, X hits Y. Y is injured.
2. Intending to kill Y, Z hits Y. Y dies.

What should be the extent of liability of X and of Z? In fact, it is not always sufficient to simply tell the subject the fact you want them to perceive. Especially when that fact is something as subjective as intention, as opposed to extent of harm, the subject may find the stated fact unbelievable and discount it. But assume your manipulation check confirms that your revision has succeeded in controlling the subject's perceptions of intentionality. Can we assume that any difference in liability between the two hypotheticals then springs from the difference in resulting harm? Not necessarily.

A reader may well assume that, even if the intentions of the two are the same, Z's hit involved greater force than X's. After all, Y died from Z's hit but not from X's. Upon this reading, any liability difference reported for the two hypotheticals is of little value. Greater liability for Z than X might reflect the subject's view that resulting death deserves more punishment than resulting injury, all other things being equal. But it also might reflect the subject's view that, while actual resulting harm is irrelevant, the greater force used by Z deserves greater punishment. Or, it might reflect some unknown combination of these two views.

Assume you try to avoid this problem by explicitly describing the force used in each case:

1. X hits Y with a stick that is one inch in diameter, breaking the stick in half. Y is injured.
2. Z hits Y with a stick that is one inch in diameter, breaking the stick in half. Y dies.

What should be the extent of liability of X and of Z? Does a comparison of the blameworthiness of X and Z now depend entirely on the difference of resulting harm? Not necessarily.

For example, subjects commonly take account of subsequent results when they judge the extent of a prior risk. If a result actually occurs, the subject is more likely to rate its probability of occurring, as judged at an earlier time, as higher than in the case where the risked harm does not in fact result. In other words, the benefit of hindsight

commonly alters a subject's perception of what the extent of risk must have been.<sup>13</sup> Thus, any difference in liability may be due, in part or in whole, to the subject's perception that X and Z have created different degrees of risk. For example, the reader may assume that, while X and Z have used the same amount of force, each struck Y somewhat differently, in ways that would create different degrees of risk of death. Any difference in liability between the two hypotheticals, then, might be the result of either the perceived difference in risk created or the result of the difference in resulting harm, or of some unknown combination of the two.

The larger point here is that when we law professors throw around hypotheticals, we often have little idea what the respondent is really responding to. By pretesting how a scenario is perceived, and manipulating it until it is perceived in the way that tests the issues desired, the designer can have greater confidence that the resulting pattern of liability does result from the differences being tested, not from some unseen, inadvertent difference perceived by the subjects.<sup>14</sup>

### III. TESTING LAY INTUITIONS OF JUSTICE: AN ILLUSTRATION

To illustrate how this methodology plays out in practice, consider Study 1 reported in *Justice, Liability, and Blame: Community Views and the Criminal Law*,<sup>15</sup> a simple study about the objective requirements for attempt liability. Some of the scenarios from the study are quoted above to illustrate the methodology.<sup>16</sup> The study examines those cases in which an individual takes steps toward committing a crime but does not actually commit it. Thinking about committing a crime is not itself a crime. However, at some point in a person's course of conduct, after the initial thought but before actual commission of the offense, the person becomes criminally liable.

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13. See also Baruch Fischhoff, *For Those Condemned to Study the Past: Heuristics and Biases in Hindsight*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 335, 341 (Daniel Kahneman et al. eds., 1982) ("In hindsight, people consistently exaggerate what could have been anticipated in foresight. They not only tend to view what has happened as having been inevitable but also to view it as having appeared 'relatively inevitable' before it happened."); Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 *J. EXPERIMENTAL PSYCHOL.* 288, 297 (1975) ("Finding out that an outcome has occurred increases its perceived likelihood.").

14. For a more detailed discussion, see Paul H. Robinson, *Some Doubts About Argument by Hypothetical*, 88 *CAL. L. REV.* 813, 819-23 (2000).

15. ROBINSON & DARLEY, *supra* note 6, at 14-28.

16. See *supra* pp. 614-16.

The history of Anglo-American criminal law reveals that at one time or another the law has used several remarkably different definitions of the point at which a person's preparation becomes a criminal attempt. State laws still disagree on this issue. The underlying practical considerations are twofold. On the one hand, the law does not want to assign liability to a person who has not committed a crime and, in the final event, would not do so. On the other hand, the law wishes to be able to "head off" crimes before they are committed and to punish those who have manifested their intention to commit them. On a more theoretical level, there generally is thought to be insufficient moral blameworthiness in pure thoughts to support criminal conviction and condemnation. But at some point between the thought and the completed offense, sufficient blameworthiness does attach. Thus, there is the need to define a category of criminal attempt.

In such cases, because the harm or evil of the actual offense has not occurred, the liability assigned to attempt is termed "inchoate liability." In most current legal codes inchoate liability leads to less punishment than would be given if the same offense had been completed, but there is some controversy on this point. Indeed, the MPC, the provisions of which have served as a model for code reform, generally grades an attempt the same as the completed offense. Most jurisdictions, however, have been reluctant to adopt the MPC's inchoate grading provision.

The older (common-law) legal tests for determining when a person's conduct reaches the point of criminal attempt tend to be quite demanding, in the sense that they require the person to come close to committing the crime before attempt liability is imposed. Under the "dangerous proximity" test, a common formulation, a person typically has to reach a point where the offense is likely to be completed successfully. Arrest before this point does not result in liability. An example of dangerous proximity was set forth above. A locksmith, Ray, decides to rob a coin shop safe he recently worked on. He goes back to the shop and confirms that the safe is still there. He then tells a friend of his plan to rob the coin shop the next day. Unbeknownst to the locksmith, his friend notifies the police. The next day, the locksmith goes to the coin shop and begins to crack the safe. Suddenly, two police officers burst in and arrest him. Although the locksmith has not completed the robbery, he has come dangerously close to completion; his conduct satisfies the requirements of the dangerous proximity test, thus making him liable for attempt.

The dangerous proximity test reflects a view that the moral blameworthiness sufficient for criminal condemnation does not arise until the

actor is dangerously close to committing the offense. This test seeks to balance the two practical considerations mentioned above in a specific way—to allow some opportunity for successful intervention by those who would prevent the crime but delay the point of liability until the time when completion is a real danger. The dangerous proximity test is somewhat pragmatic in that it does not ask complex questions about what can be inferred about the person and his intentions. It simply requires citizens to avoid bringing plans for criminal activities to a point at which they could be successfully completed.

The most common test in modern American codes, however, is the “substantial step” test, as formulated in MPC section 5.01(1)(c).<sup>17</sup> Rather than focusing on how close the person has come to completion of the offense, as the dangerous proximity test does, the substantial step test focuses upon how far the person has moved toward committing the offense after forming the intention to commit the offense. Any “substantial step” in the direction of commission is adequate, assuming the person’s intention to commit the offense is clear and unequivocal. This test typically imposes liability at an earlier point in the steps toward commission than does the dangerous proximity test. It reflects a claim that the moral blameworthiness required for criminal condemnation attaches earlier. It also alters the balance of interests between the individual and society toward the interests of society by reducing an individual’s opportunity to desist on his own in favor of allowing earlier intervention.<sup>18</sup>

Table 2.1 outlines the eleven versions of the scenario, and the legal test to which each corresponds. The initial core scenario, in which the person only forms the intent to commit the crime, is shown in row (1). The substantial step scenario, in which the person returns to the shop to see if the safe is still there, is shown in row (2). Brief characterizations of the other scenarios are given in the “description” column of the table.

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17. See MODEL PENAL CODE § 5.01(1)(c) (1985).

18. Other tests for attempt focus upon criteria other than whether the person has come dangerously close or whether he has externalized his intention in performing a substantial step toward commission. The “probable desistance” test focuses upon whether the person, without intervention by others, would have been likely to continue in the actions necessary to complete the offense. The “unequivocality” test attaches liability at the point where an observer, knowing only of the person’s actions toward committing the offense without knowing his state of mind, would believe that the person intended to commit the offense. The warning to members of society here is clear: Do not carry out a series of actions that would lead a reasonable observer to believe that you intend to commit a crime. Not only do each of these four tests represent a different point at which attempt liability attaches and rely upon different criteria, but each also has a distinct rationale and uses attempt liability for a somewhat different purpose. See ROBINSON & DARLEY, *supra* note 6, at 15-16.

The "summary" column of Table 2.1 gives a summary description of each scenario, which is used to identify this scenario in subsequent tables. The "comment" column gives further explanation of the legal treatment of the case.

TABLE 2.1 Attempt Scenarios

Core Story: A locksmith, Ray, recalls working on a safe in a coin shop. The safe was kept in the back room and always contained valuable coins. Ray thinks about how easy it would be to "crack" the safe. Ray decides he will rob the safe in the coin shop.

<i>Scenario Number, Description (and Abbreviation)</i>	<i>Summary</i>	<i>Comment</i>
1. The actor only thinks about robbing the safe and decides to do so. He takes no action toward committing the crime. (TH)	Only <i>thinks</i> about offense	No test would assign liability.
2. After deciding to rob the shop, the actor goes to the coin shop to make sure the safe is still there. (SS)	<i>Substantial step test</i> satisfied	Actor is liable under this test, because "reconnoitering" (casing) the shop is a substantial step.
3. After deciding to rob the shop, the actor makes a special tool to crack the safe with. (EQ)	<i>Unequivocality test</i> satisfied	The actor is liable under this test because action manifests criminal intent.
3a. The actor cases the shop and meets the owner while he does so. Out of pity for the owner, he gives up his plan to rob the safe. (EQR)	<i>Renounces after reaching point of unequivocality</i>	The Model Penal Code (MPC) allows a defense if an actor's renunciation of criminal intent is "complete and voluntary." No liability if this defense is available.
4. Having told a friend he intends to rob the shop, the actor drives there. Before he can get to the shop he is stopped by police, who were informed of his intent by the actor's friend. (PD)	<i>Probable desistance test</i> satisfied	Without outside interruption the actor would have completed the offense. Actor is liable under this test.
5. The actor is in the process of cracking the safe in the coin shop when he is stopped by two undercover policemen. (PX)	<i>Dangerous proximity test</i> satisfied	Actor is liable because the offense is nearly completed.
5a. When he is in the shop and about to crack the safe, the actor feels pity for the shopowner and decides not to rob the safe. (PXF)	<i>Renounces after reaching point of dangerous proximity</i>	MPC allows a defense when actor renounces his criminal intent "completely and voluntarily." No liability if this defense is available.
5b. When he is in the shop and about to crack the safe, the actor stops because he sees a policeman in the front of the store and he fears getting caught. (FR)	<i>Desists out of fear after dangerous proximity</i>	Actor is allowed no renunciation defense because renunciation was not voluntary. Actor is liable for full attempt.
6. The actor completes the robbery and returns home with the coins. (CP)	<i>Offense complete, no renunciation</i>	The actor is liable for the completed offense.
6a. The actor completes the robbery and returns home. On the way home, he feels pity for the shopowner and returns the coins to the safe. (CPR)	<i>Renounces after offense is complete</i>	Actor is liable for completed offense because renunciation defense not available.
6b. The actor completes the offense, feels pity for the shopowner, tries to return the coins to the safe, but is caught by police. (UNR)	<i>Renounces, but is unsuccessful at "undoing"</i>	Actor is liable for completed offense because renunciation defense unavailable.

After reading each scenario, subjects indicated what criminal liability, if any, they would assign to the locksmith. The liability results of the study are reported in Table 2.2. Columns (d) and (e) summarize the liability that would be assigned to the scenario by the common-law and the MPC, respectively.

**TABLE 2.2 Liability for Various Degrees of Conduct Toward a Completed Theft Offense**

<i>Attempt Scenarios</i>	<i>(a) Liability</i>	<i>(b) % No Liability (N)</i>	<i>(c) % No Liability or No Punishment (N+0)</i>	<i>(d) Common Law Result</i>	<i>(e) Model Penal Code Result</i>
1. Thought only (TH)	1.46	65	77	No liability	No liability
2. Substantial step (SS)	1.54	50	73	No liability	Attempt liability <sup>a</sup>
3. Unequivocality (EQ)	1.81	42	65	<sup>b</sup>	Attempt liability <sup>a</sup>
3a. Renounces	0.38	85	92	No defense	Complete defense
4. Probable desistance (PD)	1.88	27	62	<sup>b</sup>	Attempt liability <sup>a</sup>
5. Dangerous proximity (PX)	5.35	0	0	Attempt liability	Attempt liability <sup>a</sup>
5a. Renounces	0.69	46	85	No defense	Complete defense
5b. Desists out of fear	1.58	35	65	No defense	No defense
6. Completed offense (CP)	6.12	0	0	Full offense liability	Full offense liability
6a. Renounces and "undoes"	3.23	12	27	No defense	No defense
6b. Renounces but unable to "undo"	5.35	0	4	No defense	No defense

Liability Scale: N=No criminal liability, 0=Liability but no punishment, 1 = 1 day, 2=2 weeks, 3=2 months, 4=6 months, 5=1 year, 6=3 years, 7=7 years, 8=15 years, 9=30 years, 10=life, and 11=death.

<sup>a</sup>An attempted theft under the Model Penal Code is graded the same as a completed theft.

<sup>b</sup>This depends upon which of the common-law tests is applicable in the jurisdiction.

We will focus on the different liabilities assigned to the various attempt scenarios. The reader may consult the original study for a discussion of the effects of renunciation and the related act of desisting out of fear of being apprehended.<sup>19</sup>

Table 2.2 arrays the various scenarios from top to bottom in terms of the general progression of how close they come to the actual commission of the crime. In the first scenario, row (1), the individual develops an intention to commit the crime and does not progress further. In the last scenario, row (6), the individual actually commits the crime.

Adjacent to the scenario descriptions are three columns indicating related but different ways of analyzing the degree of liability that our respondents assign to the perpetrator whose actions were described in the specific case under discussion. Column (a) reports the average amount of liability assigned to the perpetrator on the eleven point scale discussed above. Subjects who assign no liability or liability without punishment are included in this calculation as assigning a liability of zero. Column (b) reports what percentage of the respondents chose "No Liability" for the locksmith, roughly equivalent to a jury verdict of "not guilty." Column (c) reports what percentage of respondents chose either the "No Liability" or "Liability But No Punishment" options of the scale. This gives the percentage of subjects who would impose no punishment on the defendant. This percentage will always be equal to or higher than the percentage shown in column (b) because it includes the subjects reported in column (b) and the subjects who report that they judge that the perpetrator deserves criminal liability but does not deserve any punishment. Columns (d) and (e) characterize the treatment of the offense given by various legal formulations.

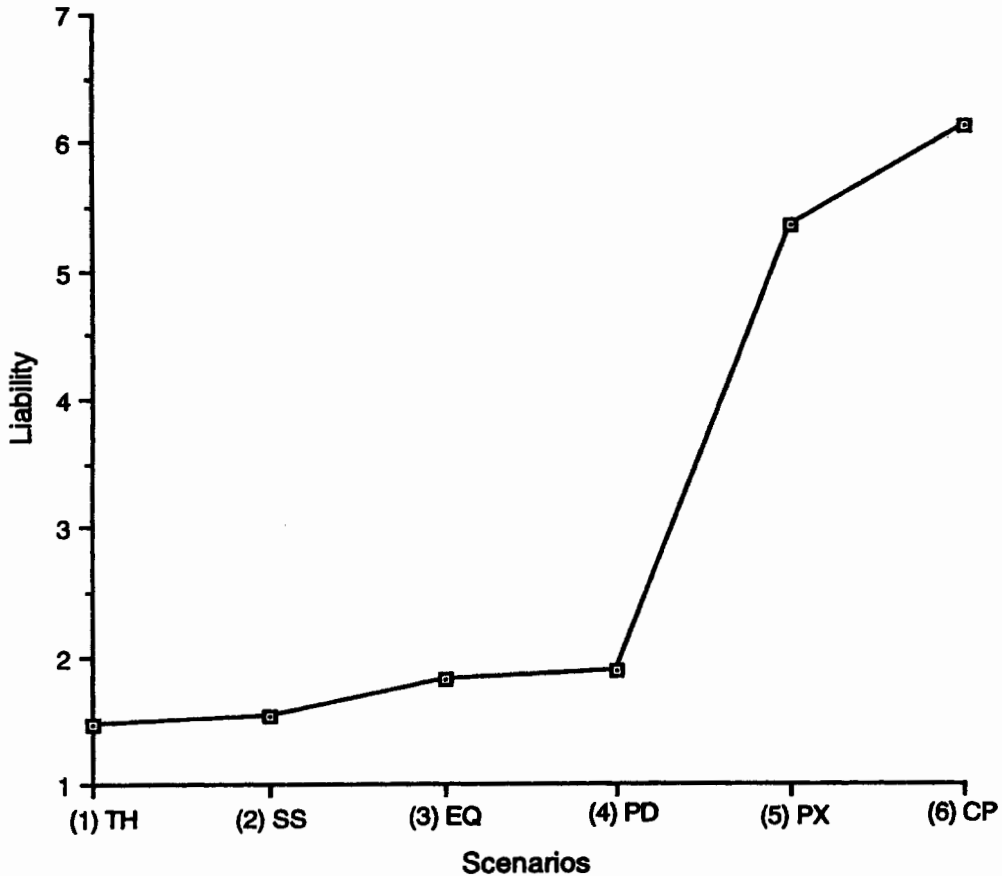
Figures 2.3 and 2.4 present a visual representation of the liability means and percentage of respondents choosing "No Liability" or "Liability But No Punishment" that are presented in columns (a), (b), and (c) of Table 2.2. In these figures, only a subset of the cases are included (excluding scenarios with renunciation or desistance) because we want to highlight specific important conclusions to be extracted from these results. The letters along the horizontal axis of each figure correspond to the abbreviations assigned to each scenario in Table 2.2. In Figure 2.3, the vertical axis represents the subjects' judgment as to liability amount. The higher the point, the more severe the sentence. In Figure 2.4, the vertical axis represents the percentage of respondents assigning no liability, or assigning either no liability or no punishment

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19. See *id.* at 23-26.

to the defendant; the higher the point, therefore, the fewer the people who would impose liability or punishment for the attempt.

**FIGURE 2.3 Liability for Various Degrees of Conduct Toward Theft**



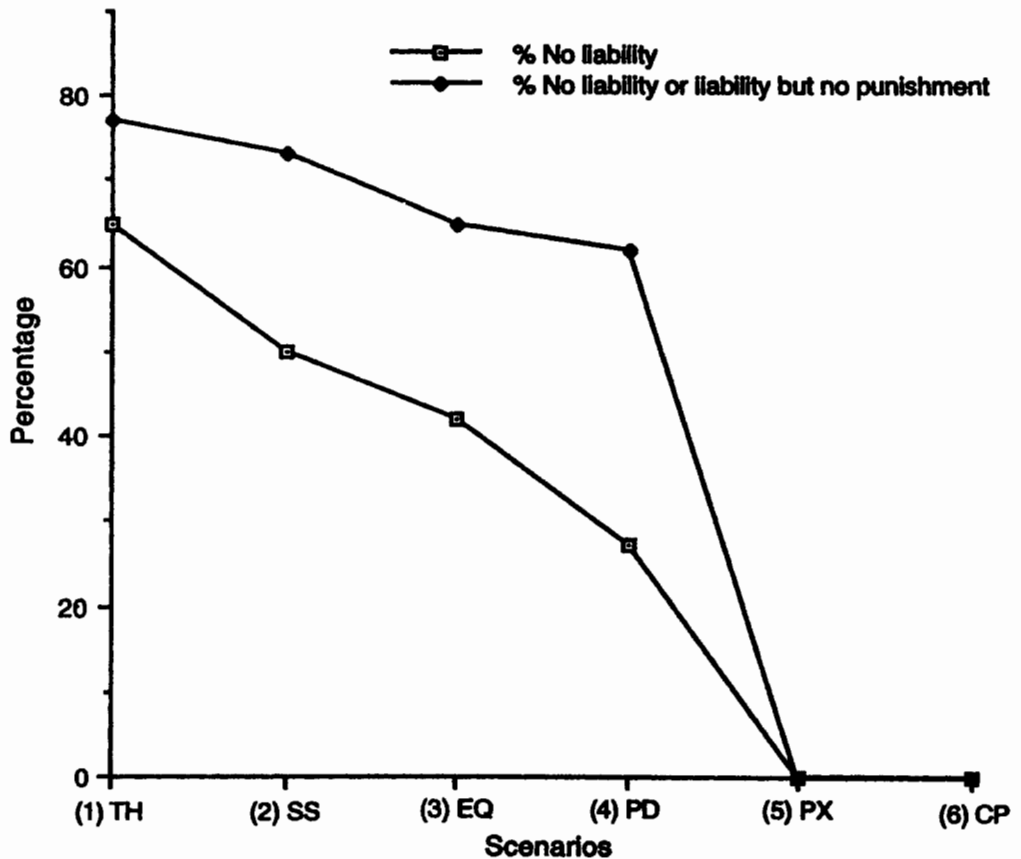
With that explanation, let us turn to the results of this study.<sup>20</sup> Look at the result for scenario (1) in Figure 2.3. It appears that even thinking about committing an offense generates some assignment of liability from our average subject. Recall that this is the case in which the locksmith forms a settled intention to rob the coin dealer but takes no further steps to do so. Looking at Figure 2.4, scenario (1), we notice that 65% of the subjects assign no liability, and therefore 35% of the subjects impose liability in this scenario where the person only thinks about committing the offense and forms the settled intent to do so. However, about one-third of those imposing liability (13% of all subjects) assign no punishment.

The intention of a person to commit an offense has been shown to be a powerful determinant of liability in other contexts. It should be no

20. See *id.* at 21-27.

surprise to see that the person's intention alone has some effect in generating judgments of liability by a minority of the subjects. Here, a commonly unnoticed property of scenario research may create a difference between the result we found and a result that would be likely to emerge from an actual court process. Our scenarios were written "from the eye of God," as it were, and give the readers access to the inner workings of the person's mind. Thus, our subjects were able to believe unequivocally that a person has formed a settled intent to commit a crime. In the real world, it would be extraordinarily difficult to establish intention with such certainty in the absence of any conduct and, as a result, more difficult to carry through a successful prosecution of the individual, even if the law permitted it.

**FIGURE 2.4 Percentage of Subjects Assigning No Liability or Liability But No Punishment**



The scenarios in which the dangerous proximity test criteria are not met are scenarios (1) through (4). Notice that they get very low assignments of liability, and the line connecting them in Figure 2.3 is essentially flat, which suggests that respondents are seeing these cases as alike in the degree of liability they generate. In scenario (5), in which

the criteria for "dangerous proximity" are met, the liability ratings of our subjects suddenly are much higher. This suggests that dangerous proximity best reflects what our respondents perceive to be the critical point after which attempt liability should be assigned.

Figure 2.4 shows us that between 65% and 27% of our subjects indicate no liability in the first four scenarios, where the defendant does not reach the point of dangerous proximity. However, this percentage drops to 0% in the scenarios where the dangerous proximity test criteria are met, scenarios (5) and (6), a difference that is statistically significant ( $p < .01$ ). Even more strikingly, the percentage of subjects who would impose no liability or no punishment ranges between 77% and 62% for scenarios (1) through (4), but drops to 0% for scenarios (5) and (6) ( $p < .01$ ). The results reveal a relatively dramatic difference in the subjects' view of the scenarios where the dangerous proximity test is not met, scenarios (1) through (4), and those where it is, scenarios (5) and (6). This suggests that, of the available tests, the common-law's dangerous proximity test, as applied to this case, seems to best reflect the views of a majority of the subjects.

Our respondents assign different liabilities for attempts than for completed crimes: the liability mean for the dangerous proximity scenario shown in Table 2.2, row (5), 5.35 (1.8 years), is significantly lower than that for the completed offense in row (6), 6.12 (3.4 years). This result is consistent with the traditional grading of attempt as less serious, and inconsistent with the MPC's grading of attempt as the same as for the completed offense. The MPC's grading of attempt seems all the more incongruous when the liability for a completed offense, 6.12 (3.4 years), is compared to that for the MPC's test for attempt, the "substantial step" test, 1.54 (7.5 days). While the MPC dictates that a person held for attempt is liable at a grade equal to that for the full offense, a majority of the subjects (73%, row (2) column (c)) think that no punishment is appropriate for a mere "substantial step."<sup>21</sup>

The liability results of the study might be summarized in psychological terms as follows. In the view of the subjects, punishment ought not be imposed until a person has reached a point of dangerous proximity to completion of the offense. Further, the level of punishment for attempt ought to be significantly less than that for the completed offense.<sup>22</sup>

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21. Chapter Six in *Justice, Liability, and Blame: Community Views and the Criminal Law* provides a detailed examination of matters of proper grading. *See id.* at 157-99.

22. The original study's examination of the effect of renunciation and desistance suggests the following additional conclusions: Once the point of dangerous proximity is reached, punish-

With respect to legal implications, this study sought to determine which of the tests for the objective requirement of attempt best reflects the community's view. In the scenarios where the person has gone just far enough to satisfy the substantial step test, the unequivocal test, or the probable desistance test, a strong majority of subjects would impose either no liability or no punishment. But, in the scenarios where a person satisfies the common-law's dangerous proximity test, a dramatic shift in opinion occurs: all of the subjects would impose both liability and punishment. This would seem to suggest that, if the community's view were to be the guiding principle in the definition of the offense, criminal codes should revert to the common-law's dangerous proximity test. If early intervention by law enforcement is desired to increase the effectiveness of crime prevention, legislation could create authority to intervene without holding the person liable for an attempt to commit the substantive offense or holding the person liable only at a low level. Liability might be imposed at a fixed misdemeanor level, for an offense of "Preparing to Commit an Offense" or something of such nature.<sup>23</sup>

#### IV. OTHER ISSUES INVESTIGATED

The attempt study discussed above is one of many we have conducted to date. The issues we have investigated include the following:

**FELONY MURDER.** Should the extent of an offender's criminal liability for causing a death depend upon whether the death was caused in the course of a felony? If so, should it vary with the level of culpability as to the killing by the accomplice killer? Should it vary with the defendant's level of culpability as to the killing? Should it vary according to whether the victim is an accomplice or the victim of the underlying felony?<sup>24</sup>

**SEXUAL OFFENSES.** To what extent, if any, should the nature of an offender's prior relationship with a rape victim affect the extent of the offender's criminal liability? Should same-sex rape produce a different degree of liability than heterosexual rape? Should the extent of an offender's liability for consensual intercourse vary depending upon whether the intercourse is unlawful because of the victim's age, mental

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ment still may be avoided by complete and voluntary renunciation. When an offense is completed, a change of heart will only mitigate punishment, not avoid liability, although undoing the offense will mitigate punishment still further. *See id.* at 27.

23. For a more detailed discussion, see *id.* at 14-28.

24. *See id.* at 169-81 ("Study 16: The Culpability of The Person—Felony Murder") (confirming the increase in liability of a person who kills during the commission of a felony).

handicap, or status as a prisoner? Should prior promiscuity or victim gender alter the degree of liability and, if so, how?<sup>25</sup>

**OFFENSE CULPABILITY REQUIREMENTS AND MISTAKE/ACCIDENT DEFENSES.** What minimum culpability level should be required as to the elements of an offense? When should it be different for different elements? Should it vary with the kind of offense?<sup>26</sup>

**VOLUNTARY INTOXICATION.** When should voluntary intoxication impute culpability that the defendant did not in fact have? What culpability level should be imputed? What level of culpability as to becoming intoxicated should be required for imputation?<sup>27</sup>

**NEGLIGENCE.** What characteristics of the defendant, if any, should be taken into account to individualize the objective standard by which an offender's negligence is assessed? What difference should it make, if any, as to whether the case is one of commission or omission?<sup>28</sup>

**RISK-CREATION.** What degree of risk of what kind of injuries should be a ground for criminal liability?<sup>29</sup>

**COMPLICITY.** What minimum conduct should be required for complicity liability? What degree of liability should be imposed for liability as an accomplice compared to that imposed on the perpetrator for the same offense? Should a failed attempt to assist a perpetrator be grounds for criminal liability and, if so, at what degree of liability?<sup>30</sup> What level of culpability should be required for complicity liability? Should the culpability be different as to the different objective elements required for complicity?<sup>31</sup>

**VIEWS OF CRIMINALITY.** Do lay intuitions, in assessing the minimum requirements for criminal liability and the grading of an offense,

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25. *See id.* at 160-69 ("Study 15: The Seriousness of The Offense—Sexual Offenses") (suggesting that all forms of forcible intercourse are viewed as more serious than any form of unlawful consensual intercourse).

26. *See id.* at 84-96 ("Study 8: Offense Culpability Requirements and Mistake/Accident Defenses") (concluding that the significance of culpability elements depends, in part, upon the type of offense as well as the grade of the offense).

27. *See id.* at 105-15 ("Study 10: Voluntary Intoxication") (noting that pre-intoxication culpability is a highly determinative factor in determining liability).

28. *See id.* at 116-23 ("Study 11: Individualization of the Objective Standard of Negligence") (positing that it is appropriate to elevate the standard of care for both experienced individuals and those who possess above average intelligence).

29. *See id.* at 28-33 ("Study 2: Creating a Criminal Risk") (focusing on the relationship between the probability or severity of the harm risked and the change in the liability judgment).

30. *See id.* at 33-42 ("Study 3: Objective Requirements of Complicity") (explaining that the greater the degree of assistance provided by an accomplice, the greater the liability assigned to that accomplice).

31. *See id.* at 96-105 ("Study 9: Culpability Requirements for Complicity") (observing that more liability is assigned to more purposeful conduct).

follow an objectivist view of criminality—in which causing or coming close to causing a harm or evil is of primary importance—or a subjective view of criminality—in which a defendant's state of mind is the primary focus?<sup>32</sup>

**OMISSION LIABILITY/DUTY TO ACT.** To persons of what kind of relationship should one have a duty to rescue, upon pain of criminal liability for a failure to do so? Should danger or inconvenience affect one's liability for a failure to rescue another and, if so, to what extent?<sup>33</sup>

**CAUSATION REQUIREMENTS.** Should the extent of an offender's criminal liability for a death depend upon whether the offender's conduct was necessary for the result? Whether it was itself sufficient to cause the result? Should the extent of liability depend upon whether another independent actor intervenes to cause the death?<sup>34</sup>

**ATTEMPT.** What minimum conduct should be required for attempt liability? (This is the question discussed in the text above.) What should be the effect, if any, of renunciation? What degree of liability should be imposed for attempt as compared to that imposed for the completed offense?<sup>35</sup>

**MULTIPLE OFFENSES.** How much should an offender's total criminal liability vary, if at all, when he is being sentenced for more than one offense? Should the effect of multiple offenses depend on the length of time between the commission of the offenses? On the total number of offenses? On whether the offenses are property offenses or assault offenses? On whether the different offenses had the same or different victims?<sup>36</sup>

**THEORIES OF JUSTIFICATION.** In assessing the propriety of giving a justification defense, do lay intuitions look to the subjective state of

32. See Paul H. Robinson & John M. Darley, *Objectivist Versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory*, 18 OXFORD J. LEGAL STUD. 409, 409-47 (1998).

33. See ROBINSON & DARLEY, *supra* note 6, at 42-50 ("Study 4: Omission Liability") (noting that the degree of liability increases when a person fails to fulfill a duty to act).

34. See *id.* at 181-89 ("Study 17: The Strength of the Person's Connection with the Prohibited Result—Causation Requirements") (concluding that liability decreases as the result becomes more remote or accidental in relation to the conduct).

35. See *id.* at 14-28 ("Study 1: Objective Requirements of Attempt") (positing that while the common-law proximity test is the preferred method to determine when attempt liability attaches, many recognize a defense for voluntary and complete renunciation).

36. See *id.* at 189-99 ("Study 18: Punishment for Multiple Offenses") (illustrating that while the severity of the punishment increases as the number of offenses increase, the punishment is also based on the harm caused).

mind of the defendant or the effect of the defendant's conduct in avoiding a greater harm or evil, or both?<sup>37</sup>

**SELF-DEFENSE.** When should one escape liability for an intentional killing upon self-defense? What should be the effect, if any, of the possibility of retreat? Of provocation? What should be the effect, if any, of mistakes as to different aspects of the situation or the governing law?<sup>38</sup>

**DEFENSE OF PROPERTY.** When should one have a defense for the use of force in the defense of property? When should deadly force be allowed? What should be the effect of a mistake?<sup>39</sup>

**CITIZENS' LAW ENFORCEMENT AUTHORITY.** When should a citizen have a defense for the use of force in the exercise of law enforcement authority? What should be the effect, if any, of the use of such force for arrest involving a property offense as opposed to an offense against the person? When should deadly force be allowed? What should be the effect of a mistake?<sup>40</sup>

**INSANITY.** What should be the effect on liability of an offender's mental illness? What effect, if any, should result from differences in the extent of the offender's cognitive dysfunction? From differences in the extent of the offender's control dysfunction?<sup>41</sup>

**INVOLUNTARY INTOXICATION.** Should involuntary intoxication affect an offender's criminal liability? If so, what differences in liability, if any, should arise from differences in the extent of the offender's cognitive dysfunction? From differences in the extent of the offender's control dysfunction?<sup>42</sup>

**IMMATURITY.** Should an offender's age affect the extent of his criminal liability? If so, what ages should have what effect?<sup>43</sup>

37. See Robinson & Darley, *supra* note 4, at 1095-1143 (examining the results of an empirical study that measured community intuitions of various justification defenses).

38. See ROBINSON & DARLEY, *supra* note 6, at 54-64 (discussing "Study 5: Use of Deadly Force in Self-Defense") (suggesting that the use of force in the defense of property is not limited by the constraints of necessity and proportionality).

39. See *id.* at 64-72 ("Study 6: Use of Force in Defense of Property") (distinguishing the use of force from the use of deadly force in the defense of property).

40. See *id.* at 72-79 ("Study 7: Citizens' Law Enforcement Authority") (concluding that while a defense for a citizen's use of nondeadly force to effect an arrest is valid, the use of deadly force to effect an arrest is not).

41. See *id.* at 128-39 ("Study 12: Insanity") (reinforcing the doctrinal distinction that cognitive dysfunctions provide a more persuasive excuse than control dysfunctions).

42. See *id.* at 139-47 ("Study 13: Immaturity and Involuntary Intoxication") (noting the similarity between involuntary intoxication and the insanity defense).

43. See *id.* ("Study 13: Immaturity and Involuntary Intoxication") (supporting the position that young offenders should not be punished by the criminal justice system but rather receive some alternative treatment).

**DURESS.** Should coercion affect an offender's criminal liability? If so, how should its effect vary, if at all, according to the degree of coercion?<sup>44</sup>

**ENTRAPMENT.** Should it alter the degree of an offender's criminal liability that he or she was induced to commit an offense by the police? By a person other than the police? What effect, if any, should the offender's prior criminal record have on the extent of his liability?<sup>45</sup>

There are dozens of other issues to be investigated, and many of the issues listed above have related issues requiring attention. Even the specific issues already investigated need to be retested by others before the results can be relied upon. Our hope is that law professors and social scientists will join together to do this work. Like a version of the "Human Genome Project," there is much to be done to map the full extent of lay intuitions of justice that are relevant to the decisions that criminal law rule-makers must address.

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44. *See id.* at 147-55 ("Study 14: Duress and Entrapment Defenses") (noting that liability is reduced in the presence of duress).

45. *See id.* ("Study 14: Duress and Entrapment Defenses") (concluding that the entrapment defense appears to merge with the defense of duress).