Attempt: An Overview of Federal Criminal Law

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SUMMARY

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Attempt: An Overview of Federal Criminal Law

Attempt is the incomplete form of some other underlying offense. Unlike state law, federal law does not feature a general attempt statute. Instead, federal law outlaws the attempt to commit a number of federal underlying offenses on an individual basis. Occasionally, federal law treats attempt-like conduct as an underlying offense; outlawing possession of drugs with intent to traffic, for instance. One way or another, it is a federal crime to attempt to commit nearly all of the most frequently occurring federal offenses.

Attempt consists of two elements. One is the intent to commit the underlying offense. The other is taking some substantial step, beyond mere preparation, collaborative of the intent to commit the underlying offense. The line between mere preparation and a substantial step can be hard to identify. Some suggest that the more egregious the underlying offense, the sooner preparation will become a substantial step.

Defenses are few and rarely recognized. Impossibility to complete an attempted offense offers no real obstacle to conviction. Abandonment of the effort once the substantial step line has been crossed is no defense. Entrapment may be a valid defense when the government has induced commission of the crime and the defendant lacks predisposition to engage in the criminal conduct.

The penalties for attempt and for the underlying offense are almost always the same. The U.S. Sentencing Guidelines may operate to mitigate the sentences imposed for attempts to commit the most severely punished underlying offenses.

Attempt to commit a particular crime overlaps with several other grounds for criminal liability. The offense of conspiracy, for example, is the agreement of two or more to commit an underlying offense at some time in the future. Attempt does not require commission of the underlying offense; nor does conspiracy. Attempt requires a substantial step; conspiracy may, but does not always, require an overt act in furtherance of the conspiracy. A defendant may be convicted of both an underlying offense and conspiracy to commit that offense. A defendant may be convicted of either an attempt to commit an underlying offense or the underlying offense, but not both. A defendant may be convicted of both attempt and conspiracy to commit the same underlying crime.

Aiding and abetting is not a separate crime. Aiders and abettors (accomplices before the fact) are treated as if they committed the underlying offense themselves. Aiding and abetting requires a completed underlying offense; attempt does not. The punishment for aiding and abetting is the same as for hands-on commission of the offense; the punishment for attempt is often the same as for the underlying offense. A defendant may be convicted of attempting to aid and abet or of aiding and abetting an attempted offense.

Attempt and its underlying offense are distinct crimes. Completion of the underlying offense is no defense to a charge of attempt, but a defendant may not be convicted of both attempt and the attempted underlying offense.

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Introduction

Attempt is an offense of misconduct incomplete, frustrated, or prevented. It is an offense of general application in every state in the Union, and is largely defined by statute in most.[1] The same cannot be said of federal law. There is no generally applicable federal attempt statute.[2] The absence of a general prohibition, however, can be deceptive. Federal prosecution is the likely result for anyone who attempts to commit any of the most common federal crimes. Congress has elected to proscribe attempt on a case-by-case basis, outlawing attempt to commit a particular crime or group of crimes, such as attempted murder and attempted drug trafficking.[3] In those instances, the statute outlaws attempt, sets the penalty, and implicitly delegates to the courts the task of developing the federal law of attempt on a case-by-case basis. Here and there, Congress has made a separate crime out of conduct that might otherwise have been considered attempt. Solicitation of a bribe and possession of counterfeiting equipment are two examples of these attempt-like crimes.[4] Occasionally, Congress has proscribed attempts to commit these attempt-like substantive offenses, as in the case of attempted possession of a controlled substance with intent to distribute.[5]

Over the years, proposals have surfaced that would establish attempt as a federal crime of general application, codify federal common law of attempt, and perhaps adopt some of the adjustments recommended by the Model Penal Code and found in state law.[6] Thus far, however, Congress has preferred to maintain the federal law of attempt in its current state and to expand the number of federal attempt offenses on a selective basis.[7]

[1] Citations to the state general attempt statutes are appended. A few states provide a general statutory penalty provision for attempt and rely on the common law to define the elements of the offense and related matters. *See*, *e.g.*, MD. CODE ANN., CRIM. LAW § 1-102 (2012); United States v. Kelly, 989 F.2d 162, 163 (4th Cir. 1993); *cf. In re* David P., 170 A.3d 818, 824 (Md. Ct. Spec. App. 2017); S.C. CODE ANN. § 16-1-80 (2015); State v. Reid, 679 S.E.2d 194, 197–98 (S.C. Ct. App. 2009), *aff'd*, 393 S.E.3d 274 (S.C. 2011); State v. Green, 753 S.E.2d 259, 261 (S.C. Ct. App. 2014). Iowa appears to be the only state that has no general attempt statute. *See* State v. Ceretti, 871 N.W.2d 88, 96 (Iowa 2015); State v. Walker, 856 N.W.2d 179, 187 (Iowa 2014).

Here and throughout, the date that appears in the citation to a state code refers to the publication date of the volume of the state code in which the cited law appears; it does not refer to the date of the cited law's enactment or to its currency.

[2] United States v. Sineneng-Smith, 910 F.3d 461, 482 (9th Cir. 2018), *vacated*, 590 U.S. 371 (2020); United States v. Hite, 769 F.3d 1154, 1162 (D.C. Cir. 2014).

[3] 18 U.S.C. § 1113; 21 U.S.C. § 846.

[4] 18 U.S.C. §§ 201(b), 474.

[5] 21 U.S.C. §§ 846, 881.

[6] *E.g.*, H.R. 1823 (112th Cong.); H.R. 1772 (111th Cong.); H.R. 4128 (110th Cong.); S. 735 (107th Cong.); S. 413 (106th Cong.); S. 171 (105th Cong.).

[7] *E.g.*, Allow States and Victims to Fight Online Sex Trafficking Act of 2017, P.L. 115-164, § 3, 132 Stat. 1253 (codified as amended at 18 U.S.C. § 2421A) (attempting to promote prostitution); Border Tunnel Prevention Act of 2012, Pub. L. No. 112-127, 126 Stat 370 P.L. 112-127, § 3, 126 Stat. 371 (codified as amended at 18 U.S.C. § 555(d) (attempting to use or construct a border tunnel).

Background

Attempt was not recognized as a crime of general application until the 19th century.[8] Before then, attempt had evolved as part of the common law development of a few substantive offenses.[9] The vagaries of these individual threads frustrated early efforts to weave them into a cohesive body of law.[10] At mid-20th century, the Model Penal Code suggested a basic framework that has greatly influenced the development of both state and federal law.[11] The Model Penal Code grouped attempt with conspiracy and solicitation as "inchoate" crimes of general application.[12] It addressed a number of questions that had until then divided commentators, courts, and legislators.

A majority of the states use the Model Penal Code approach as a guide, but deviate with some regularity.[13] The same might be said of the approach of the National Commission established to recommend revision of federal criminal law shortly after the Model Penal Code was approved.[14] The National Commission recommended a revision of Title 18 of the *U.S. Code* that included a series of "offenses of general applicability"—attempt, facilitation, solicitation, conspiracy, and regulatory offenses.[15]

Despite efforts that persisted for more than a decade, Congress never enacted the National Commission's recommended revision of Title 18.[16] And to this day, the "federal criminal code contains no standalone attempt statute."[17] Congress has, however, continued to outlaw a growing

[8] Francis Bowes Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 821 (1928) ("But the present generalized doctrine that attempts to commit crimes are as such and in themselves criminal is of comparatively late origin. Nothing of such a doctrine is to be found in the treatises on criminal law prior to the nineteenth century, in spite of the fact that records of cases going back to early times show occasional convictions where the defendant failed to complete the crime attempted.").

[9] The offenses that a defendant attempts to commit are referred to alternatively as substantive, underlying, or predicate offenses. The first federal criminal statutes included proscriptions against the attempted commission of a few specific offenses, such as attempted piracy. Crimes Act of 1790, 1 Stat. 115 § 9.

[10] *See, e.g.*, 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 533 (2d ed. 1858) ("There is no one title indeed, less understood by the courts, or more obscure in the text-books, than that of attempt."). *See also* Robert E. Wagner, *A Few Good Laws: Why Federal Criminal Law Needs a General Attempt Provision and How Military Law Can Provide One*, 78 U. CIN. L. REV. 1043, 1051 n.18 (2010) ("It has been truly said by a philosophical writer that 'the subject of criminal attempt, though it presses itself upon the attention wherever we walk through the fields of the criminal law, is very obscure in the books, and apparently not well understood either by the text-writers or the judges.'" (quoting Hicks v. Commonwealth, 9 S.E. 1024, 1025 (Va. 1889))).

[11] The American Law Institute began drafting the Model Penal Code in 1952. Its final draft was approved a decade later in May 1962. The Institute published revised Commentaries in 1985, MODEL PENAL CODE AND COMMENTARIES (Model Penal Code), pts. 1, i, ii (AM. L. INST. 1985) [hereinafter MODEL PENAL CODE]. *See, generally* Herbert Wechsler, William Kenneth Jones & Harold L. Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt. Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571 (1961).

[12] "Article 5 undertakes to deal systematically with attempt, solicitation and conspiracy. These offenses have in common the fact that they deal with conduct that is designed to culminate in the commission of a substantive offense, but has failed in the discrete case to do so or has not yet achieved its culmination because there is something that the actor or another still must do. The offense are inchoate in this sentence." MODEL PENAL CODE, at 293.

[13] For a discussion of some of the diversity of state laws, see Michael T. Cahill, *Attempt by Omission*, 94 IOWA L. REV. 1207 (2009).

[14] Act of Nov. 8, 1966, Pub. L No. 89-801, 80 Stat. 1516 (creating the National Commission on Reform of Federal Criminal Laws (the National Commission)).

[15] FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS: A PROPOSED NEW FEDERAL CRIMINAL CODE (TITLE 18, UNITED STATES CODE), Ch. 10 (1971) [hereinafter FINAL REPORT].

[16] Efforts to enact to the National Commission's recommendations effectively ended on April 27, 1982, when the closure motion on S. 1630 (97th Cong. 1981), which would have enacted an amended version of the Commission's recommendations, failed in the Senate. 128 CONG. REC. 7777 (1982).

[17] United States v. States, 72 F.4th 778, 787 (7th Cir. 2023).

number of attempts to commit specific federal offenses. In doing so, it rarely did more than outlaw an attempt to commit a particular substantive crime and set its punishment. Beyond that, development of the federal law of attempt has been the work of the federal courts.

Definition

Attempt may once have required little more than an evil heart.[18] That time is long gone. The Model Penal Code defined attempt as the intent required of the predicate offense coupled with a "substantial step": "A person is guilty of an attempt to commit a crime, if acting with the kind of culpability otherwise required for commission of the crime, he . . . purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."[19] The Model Penal Code then provided several examples of what might constitute a "substantial step"—lying in wait, luring the victim, gathering the necessary implements to commit the offense, and the like.[20]

The National Commission recommended a similar definition: "A person is guilty of criminal attempt if, acting with the kind of culpability otherwise required for commission of a crime, he intentionally engages in conduct which, in fact, constitutes a substantial step toward commission of the crime."[21] Rather than mention the type of conduct that might constitute a substantial step, the Commission borrowed the Model Penal Code language to define it: "A substantial step is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime."[22]

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[18] "'There must be in the case of robbery . . . something feloniously taken; for although anciently . . . an attempt to rob was reputed felony, *voluntas reputabatur pro facto* [the intent is considered the crime] yet the law is held otherwise at this day, and for a long time since the time of Edward III [1326–1377].'" Sayre *supra* note 9 at 859 n.1 (quoting I HALE'S PLEAS OF THE CROWN 532 (1678)). The ancient sentiment may still linger, however. *See* Stephen P. Garvey, *Are Attempts Like Treason?* 14 NEW CRIM. L. REV. 173, 212 (2011) ("If the state can legitimately criminalize only wrongs that cause or risk harm, and if it respects the fact that an actor who sets out to commit a crime can always change his mind until he takes the last step, we are apt to end up with a law of attempts in which an attempt is a crime only when the actor has taken the last step, or come very close to taking it. Perhaps it should be that way. My suggestion here, however, is that an actor who chooses to form the intent to commit a crime, and who perhaps in addition resolves to commit it, has violated a duty of loyalty to his fellow citizens, and a state should be permitted to punish him for that breach. Perhaps it can do so while keeping faith with liberalism. Perhaps not."); *but see* Norman Abrams, *A Constitutional Minimum Threshold for the Actus Reus of Crime? MPC Attempts and Material Support Offenses*, 37 QUINNIPIAC L. REV. 269 (2019) ("The adoption by the drafters of the MPC [MODEL PENAL CODE] attempts provision of a substantial step test emphasizing the dangerousness of the actor instead of the previously-used common law dangerous proximity approach, expanded the circle of possible criminal liability to include conduct somewhat more remote from the commission of the crime being attempted than under other tests. Add to that the fact that the drafters, while applying as the new test the idea that the substantial step conduct must strongly corroborate the criminal purpose, interpreted that feature of the test in a manner that makes it a fairly weak limitation of the scope of criminal liability for attempt.").

[19] MODEL PENAL CODE § 5.01(1)(c). The Model Penal Code's alternative definitions provided: "A person is guilty of an attempt to commit a crime, if acting with the kind of culpability otherwise required for commission of the crime, he: (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part." *Id.* § 5.01(1)(a), (b).

[20] *Id.* § 5.01(2).

[21] FINAL REPORT § 1001(1).

[22] *Id.*

Most of the states follow the same path and define attempt as intent coupled with an overt act or substantial step toward the completion of the substantive offense.[23] Only rarely does a state include examples of substantial step conduct.[24]

Intent and a Substantial Step

The federal courts are in accord and have said: "As was true at common law, the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct," that is, unless accompanied by "an overt act qualifying as a substantial step toward completion" of the underlying offense.[25]

The courts seem to have encountered little difficulty in identifying the requisite intent standard. They rarely do more than note that the defendant must be shown to have intended to commit the underlying offense.[26] What constitutes a substantial step is a little more difficult to discern.[27] It is

[23] *E.g.*, ALA. CODE § 13A-4-2 (2006) ("(a) A person is guilty of an attempt to commit a crime if, with the intent to commit a specific offense, he does any overt act towards the commission of the offense."); ALASKA STAT. § 11.31.100 (2019) ("(a) A person is guilty of an attempt to commit a crime if, with intent to commit a crime, the person engages in conduct which constitutes a substantial step toward the commission of that crime."); COLO. REV. STAT. ANN. § 18-2-101 (2018) ("(1) A person commits criminal attempt if, acting with the kind of culpability otherwise required for commission of an offense, he engages in conduct constituting a substantial step toward the commission of the offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense. . . .").

[24] *E.g.*, CONN. GEN. STAT. § 53a–49(b) (2012) ("Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law: (1) Lying in wait, searching for or following the contemplated victim of the crime; (2) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission; (3) reconnoitering the place contemplated for the commission of the crime; (4) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed; (5) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances; (6) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances; (7) soliciting an innocent agent to engage in conduct constituting an element of the crime."). The states more often include a corroboration definition or requirement comparable to that of the Commission's recommendation. *See, e.g.*, N.D. CENT. CODE ANN. § 12.1-06-01 [1] (2012) (". . . "A 'substantial step' is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime . . ."); TENN. CODE ANN. § 39-12-101(b) (2018); WYO. STAT. ANN. § 6-1-301(a)(i) (2019).

[25] United States v. Resendiz-Ponce, 549 U.S. 102, 107 (2007); *see also* United States v. Brown, 125 F.4th 1043, 1054 (11th Cir. 2025); United States v. Concepcion-Guliam, 62 F.4th 26, 33 (1st Cir. 2023) ("'To prove attempt, the government must show that a defendant intended to commit the substantive offense and that he took a substantial step toward its commission.'" (quoting United States v. Gobbi, 471 F.3d 302, 309 (1st Cir. 2006)), *cert denied*, 144 S. Ct. 171 (2023); Collier v. United States, 989 F.3d 212, 221 (2d Cir. 2021); United States v. Davis, 985 F.3d 298, 302 (3d Cir. 2021); United States v. Fulks, 120 F.4th 146 (4th Cir. 2024); United States v. Rider, 94 F.4th 445, 458 (5th Cir. 2024); United States v. Ferguson, 65 F.4th 806, 814 (6th Cir. 2023); United States v. Osadzinski, 97 F.4th 484, 491 (7th Cir. 2024); United States v. Burch, 113 F.4th 815, 820 (8th Cir. 2024); United States v. Eller, 57 F4th 1117, 1119–20 (9th Cir. 2023); United States v. Flechs, 98 F.4th 1235, 1243 (10th Cir. 2024), *cert. denied*, 145 S. Ct. 310 (2024) (mem.); *cf.* United States v. Hillie, 37 F.4th 680 (D.C. Cir. 2022) (per curiam). The crime that is the object of an attempt is alternatively referred as the underlying offense, the substantive offense, or the predicate offense.

[26] The cases do little more than list the first entry from the boilerplate formula of the offense's elements, e.g., *Fulks*, 120 F.4th at 156 ("Attempt requires (1) an intent to commit the crime. . ."); United States v. Al Jaberi, 97 F.4th 1310, 1326 (11th Cir. 2024); United States v. Wilder, 87 F.4th 816, 820 (6th Cir. 2023).

[27] United States v. Ferguson, 65 F.4th 806, 813 (6th Cir. 2023) ("Two traits unite these ['substantial step'] cases. First, all of the defendants had fully completed their planning, as demonstrated by the fact that each had the means and ability to accomplish his intended crime. Measuring their actions from the future crime and looking back, they had nothing left to do but execute the actus reus. Second, the defendants intended to commit their crimes imminently. In three of the four cases, the crime was a day or less away from being committed."); United States v. Dobbs, 629 F.3d 1199, 1208 (continued...)

said that a substantial step is more than mere preparation.[28] A substantial step is action strongly or unequivocally corroborative of the individual's intent to commit the underlying offense.[29] It is action which, if uninterrupted, will result in the commission of that offense,[30] although it need not be the penultimate act necessary for completion of the underlying offense.[31] Furthermore, the point at which preliminary action becomes a substantial step is fact-specific;[32] action that constitutes a substantial step under some circumstances and with respect to some underlying offenses may not qualify under other circumstances and with respect to other offenses.[33]

(10th Cir. 2011) ("In some instances, defining conduct which constitutes a substantial step has proved to be a thorny task"); United States v. Pratt, 351 F.3d 131, 136 (4th Cir. 2003) ("The decisions are too numerous to cite, and would not help much anyway, for there is, and obviously can be, no definite line [between preparation and attempt.]" (alteration in original) (quoting United States v. Neal, 78 F.3d 901, 905 (4th Cir. 1996)).

[28] *Flechs*, 98 F.4th at 1244; *Rider*, 94 F.4th at 452; *Wilder*, 87 F.4th at 820; United States v. Robinson, 87 F.4th 658, 669 (5th Cir. 2023); United States v. Dennis, 81 F.4th 764, 768 (8th Cir. 2023).

[29] *Flechs*, 98 F.4th at 1244; *Wilder*, 87 F.4th at 820; United States v. Hite, 769 F.3d 1154, 1164 n.5 (D.C. Cir. 2014) ("For an action to constitute a 'substantial step,' it must 'strongly corroborate[] the firmness of defendant's criminal attempt,' such that 'a reasonable observer, viewing it in context could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute.'" (alteration in original) (first quoting United States v. Farner, 251 F.3d 510, 513 (5th Cir. 2001); and then quoting United States v. Dworken, 855 F.2d 12, 19–20 (1st Cir. 1988))); United States v. Stahlman, 934 F.3d 1199, 1225 (11th Cir. 2019) (stating "'strongly corroborate the required culpability'" (quoting United States v. Murrell, 369 F.3d 1283, 1288 (11th Cir. 2004))); United States v. Bryant, 913 F.3d 783, 786 (8th Cir. 2019); United States v. Clarke, 842 F.3d 288, 297 (4th Cir. 2016); United States v. Aldawsari, 740 F.3d 1015, 1020 (5th Cir. 2014); United States v. Wesley, 417 F.3d 612, 618–19 (6th Cir. 2005) ("'Because of the problems of proving intent in attempt cases and the danger of convicting for mere thoughts, desires, or motives, we require that the substantial step consist of objective acts that mark the defendant's conduct as criminal in nature.' This objective conduct must unequivocally corroborate the required subjective intent to engage in the criminal conduct." (quoting United States v. Bilderbeck, 163 F.3d 971, 975 (6th Cir. 1999)) (citing United States v. Pennyman, 889 F.2d 104, 106 (6th Cir. 1989))).

[30] United States v. Peoples, 119 F.4th 1097, 1101(7th Cir. 2024) ("[A] substantial step is . . . 'something that makes it reasonably clear that had [the defendant] not been interrupted or made a mistake . . . [he] would have completed the crime.'" (third, fourth and fifth alterations in original) (quoting United States v. Sanchez, 615 F.3d 836, 844 (7th Cir. 2010)); United States v. Gonzalez-Monterroso, 745 F.3d 1237, 1243 (9th Cir. 2014) (quoting Hernandez-Cruz v. Holder, 651 F.3d 1094, 1102 (9th Cir. 2011)) ("A substantial step occurs when a defendant's 'actions unequivocally demonstrate[e] that the crime will take place unless interrupted by independent circumstances.'"); United States v. Gordon, 710 F.3d 1124, 1150 (10th Cir. 2013).

[31] United States v. Pugh, 945 F.3d 9, 20 (2d Cir. 2019) ("'For a defendant to have taken a "substantial step," he must have engaged in more than "mere preparation," but may have stopped short of "the last act necessary" for the actual commission of the substantive crime.' 'A defendant may be convicted of attempt even where significant steps necessary to carry out the substantive crime are not completed.'" (quoting United States v. Yousef, 327 F.3d 56, 134 (2d Cir. 2003))); United States v. Garner, 915 F.3d 167, 170 (3d Cir. 2019); United States v. Anderson, 747 F.3d 51, 73-74 (2d Cir. 2014); *Gordon*, 710 F.3d at 1151 ("The fact that further, major steps remain 'before the crime can be completed does not preclude a finding that the steps already undertaken are substantial.'" (quoting United States v. Irving, 665 F.3d 1184, 1196 (10th Cir. 2011))).

[32] United States v. States, 72 F.4th 786, 789 n.7 (7th Cir.), *reh'g denied*, No. 22-1477, 2023 WL 5432933 (7th Cir. Aug. 23, 2023).

[33] United States v. Soto-Barraza, 947 F.3d 1111, 1120 (9th Cir. 2020) ("'[C]onduct that would appear to be mere preparation in one case might qualify as a substantial step in another.'" (quoting United States v. Villegas, 655 F.3d 662, 669 (7th Cir. 2011))); United States v. Larive, 794 F.3d 1016, 1019 (8th Cir. 2015); United States v. Muratovic, 719 F.3d 809, 815 (7th Cir. 2013) ("This line between mere preparation and a substantial step is 'inherently fact specific; conduct that would appear to be mere preparation in one case might qualify as a substantial step in another.'" (quoting *Villegas*, 655 F.3d at 669)). This is particularly true when conduct, which would otherwise be considered attempt or aiding and abetting, is a substantive offense, *e.g.*, possession of counterfeiting plates or providing material support to a terrorist. *See* United States v. Farhane, 634 F.3d 127, 147, 148 (2d Cir. 2011) ("While the parameters of the substantial step requirement are simply stated, they do not always provide bright lines for application. This is not surprising; the identification of a substantial step, like the identification of attempt itself, is necessarily a matter 'of degree' that can vary depending on 'the particular facts of each case' viewed in light of the crime charged. An act that (continued...)

It is difficult to read the cases and not find that the views of Oliver Wendell Holmes continue to hold sway: the line between mere preparation and attempt is drawn where the shadow of the substantive offense begins.[34] The greater the harm of the completed offense, the farther from completion a substantial step will first be seen.

Federal criminal law prohibits several attempt-like, second-degree substantive offenses. These involve steps along the way to commission of a first-degree substantive offense, *e.g.*, burglary (first-degree substantive offense); possession of burglary tools (second-degree substantive offense). They include crimes such as making counterfeiting plates,[35] materially assisting a terrorist offense,[36] enticing a child to engage in sexual activity,[37] and possession of controlled substances with intent to distribute.[38] Federal law also condemns attempts to commit some, but not all, of these second-degree substantive offenses.[39] The same rules apply to attempts to commit second-degree substantive offenses as to first-degree substantive offenses. They have two

may constitute a substantial step towards the commission of one crime may not constitute such a step with respect to a different crime. Thus, substantial step analysis necessarily begins with a proper understanding of the crime being attempted. . . Further important to a substantial step assessment is an understanding of the underlying conduct proscribed by the crime being attempted. The conduct here at issue, material support to a foreign terrorist organization, is different from drug trafficking and any number of activities (e.g., murder, robbery, fraud) that are criminally proscribed because they are inherently harmful. The material support statute criminalizes a range of conduct that may not be harmful in itself but that may assist, even indirectly, organizations committed to pursuing acts of devastating harm . . . Accordingly, while a substantial step to commit a robbery must be conduct planned clearly to culminate in that particular harm, a substantial step towards the provision of material support need not be planned to culminate in actual terrorist harm, but only in support—even benign support—for an organization committed to such harm." (first quoting *United States v. Coplon*, 185 F.2d 629, 633 (2d Cir.1950) (L. Hand, J.); and then quoting United States v. Ivic, 700 F.2d 51, 66 (2d Cir. 1983), *abrogated by* Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994)).

[34] OLIVER WENDELL HOLMES, THE COMMON LAW, 68 (1938 ed.) ("Eminent judges have been puzzled where to draw the line, or even to state the principle on which it should be drawn, between the two sets of cases. But the principle is believed to be similar to that on which all other lines are drawn by the law. Public policy, that is to say, legislative considerations, are at the bottom of the matter; the considerations being, in this case, *the nearness of the danger, the greatness of the harm, and the degree of apprehension felt*." (emphasis added)).

[35] 18 U.S.C. § 474 ("Whoever makes . . . any plate . . . in the likeness of any plate designated for the printing of such obligation or security [of the United States] . . . "). Counterfeiting is a separate offense. *Id.* § 471.

[36] *Id.* § 2339A ("Whoever provides material . . . resources . . . intending that they are to be used in . . . a violation [of one of lists of designated federal terrorist offenses].").

[37] *Id.* § 2422(b) ("Whoever . . . within the special maritime and territorial jurisdiction of the United States knowingly . . . entices . . . any individual [under 18 years of age] . . . any individual [under 18 years of age] . . . to engage in . . . sexual activity . . ."). It is a separate offense for an adult to engage in sexual activity with a child within the special maritime or territorial jurisdiction of the United States. *Id.* § 2241(c).

[38] 21 U.S.C. § 841(a)(1) ("[I]t shall be unlawful for any person knowingly . . . to possess with intent to distribute . . . a controlled substance."). It is a separate offense to distribute a controlled substance. *Id.*

[39] *E.g.*, 18 U.S.C. § 2339A ("Whoever provides material . . . resources . . . intending that they are to be used in . . . a violation [of one of lists of designated federal terrorist offenses] . . . *or attempts . . . to do such act* . . .." (emphasis added)); *id*. § 2422(b) ("Whoever . . . within the special maritime and territorial jurisdiction of the United States knowingly . . . entices . . . any individual [under 18 years of age] . . .to engage in . . . sexual activity . . . *or attempts to do so* . . ." (emphasis added)); 21 U.S.C. § 846 ("Any person who attempts . . . to commit any offense defined in this subchapter [which includes § 841] . . .").

elements: intent and a substantial step.[40] The penalties for attempting to commit them are the same as the penalty to commit them.[41]

Instances where federal law condemns an attempt-to-attempt offense present an intriguing question of interpretation. Occasionally, a federal statute will call for equivalent punishment for attempt to commit any of a series of offenses proscribed in other statutes, even though one or more of the other statutes already outlaw attempt. For example, 18 U.S.C. § 1349 declares that any attempt to violate any of the provisions of Chapter 63 of Title 18 of the *U.S. Code* "shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt."[42] Within chapter 63 are sections that make it a crime to attempt to commit bank fraud, health care fraud, or securities fraud.[43] There may be some dispute over whether provisions like those of § 1349 are intended to outlaw attempts to commit an attempt or to reiterate a determination to punish equally the substantive offenses and attempts to commit them.[44]

Defenses

Impossibility

Defendants charged with attempt under federal law have often offered one of three defenses—impossibility, abandonment, and entrapment. They have rarely prevailed. The defense of impossibility is a defense of mistake, either a mistake of law or a mistake of fact. Legal impossibility exists when "the actions which the defendant performs or sets in motion, even if fully carried out as he desires, would not constitute a crime. The traditional view is that legal

[40] *E.g.*, 18 U.S.C. § 2422(b); United States v. Strubberg, 929 F.3d 969, 974 (8th Cir. 2019) (18 U.S.C. § 2422(b)) ("To prove attempt, the government must establish '(1) intent to commit the predicate offense; and (2) conduct that is a substantial step toward its commission.'" (quoting United States v. Spurlock, 495 F.3d 1011, 1014 (8th Cir. 2007))); 21 U.S.C. § 846; United States v. Daniels, 915 F.3d 148, 161 (3d Cir. 2019) ("[F]ederal 'attempt' requires intent and a substantial step towards . . . the commission of the crime."); 18 U.S.C. § 2339A; United States v. Suarez, 893 F.3d 1330, 1335 (11th Cir. 2018)("'A defendant is guilty of attempt when (1) he has a specific intent to engage in the criminal conduct for which he is charged and (2) he took a substantial step toward commission of the offense.'" (quoting United States v. Jockisch, 857 F.3d 1122, 1129 (11th Cir. 2017))).

[41] 18 U.S.C. § 2339A ("Whoever provides material . . . resources . . . intending that they are to be used in . . . a violation [of one of lists of designated federal terrorist offenses] . . . *or attempts . . . to do such act* . . . shall be imprisoned for any term of years or for life." (emphasis added)); *id.* § 2422(b) ("Whoever . . . within the special maritime and territorial jurisdiction of the United States knowingly . . . entices . . . any individual [under 18 years of age] . . . to engage in . . . sexual activity . . . *or attempts to do so* . . . shall be fined under title and imprisoned not less than 10 years or for life." (emphasis added)); 21 U.S.C. § 846 ("Any person who attempts . . . to commit any offense defined in this subchapter [which includes § 841] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt . . .").

[42] Other examples include 18 U.S.C. § 1594 (human trafficking) and 21 U.S.C. § 846 (controlled substances).

[43] 18 U.S.C. § 1344 ("Whoever knowingly executes, or attempts to execute, a scheme or artifice— (1) to defraud a financial institution . . . shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."); *see also* 18 U.S.C. §§ 1347, 1348 (health care fraud and securities and commodities fraud).

[44] The issue is conceptually difficult and one of proximity to the substantive offense, such as defrauding a bank. A court might conclude, for example, that, without more, studying the auditing procedures of a bank would constitute no more than mere preparation for the substantive crime of defrauding the bank. On the other hand, it might conclude that such study would constitute a substantial step towards endeavoring (attempting) to attempt to defraud the bank. For a general discussion of judicial treatment of "attempt to attempt," "conspiracy to attempt," and "attempt to conspire" cases in both state and federal courts *see* Ira Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1 (1989).

impossibility is a defense to the charge of attempt—that is, if the completed offense would not be a crime, neither is a prosecution for attempt permitted."[45]

Factual impossibility exists when "the objective of the defendant is proscribed by criminal law but a circumstance unknown to the actor prevents him from bringing about that objective."[46] Since the completed offense would be a crime if circumstances were as the defendant believed them to be, prosecution for attempt is traditionally permitted.[47]

Yet, as the courts have observed, "the distinction between legal impossibility and factual impossibility [is] elusive."[48] Moreover, "the distinction . . . is essentially a matter of semantics, for every case of legal impossibility can reasonably be characterized as a factual impossibility."[49]

The Model Penal Code defined attempt to include instances when the defendant acted with the intent to commit the predicate offense and "engage[d] in conduct that would constitute the crime if the attendant circumstances were as he believe[d] them to be."[50] Under the National Commission's Final Report, "[f]actual or legal impossibility of committing the crime is not a defense if the crime could have been committed had the attendant circumstances been as the actor believed them to be."[51] Several states have also specifically refused to recognize an impossibility defense of any kind.[52]

The federal courts have been a bit more cautious. They have sometimes conceded the possible vitality of legal impossibility as a defense,[53] but other times have judged the cases before them to

[45] United States v. Ballinger, 395 F.3d 1218, 1238 n.8 (11th Cir. 2005) (en banc) (quoting United States v. Oviedo, 525 F.2d 881, 883 (5th Cir.1976)); United States v. Reed, 75 F.4th 396, 403 n.2 (4th Cir. 2023); *see generally* Ken Levy, *It's Not Too Difficult: A Plea to Resurrect the Impossibility Defense*, 45 N.M. L. REV. 225 (2014); John Hasnas, *Once More unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible*, 54 HASTINGS L.J. 1 (2002).

[46] United States v. Rehak, 589 F.3d 965, 971 (8th Cir. 2009) (quoting United States v. Sobrilski, 127 F.3d 669, 674 (8th Cir.1997); United States v. Carter, 15 F.4th 26, 36 (1st Cir. 2021).

[47] United States v. Black, 104 F.4th 996, 1002 (7th Cir. 2024) ("'[F]actual impossibility or mistake of fact is not a defense to an attempt charge.''' (quoting United States v. Cote, 504 F.3d 682, 687 (7th Cir. 2007))); United States v. Bauer, 626 F.3d 1004, 1007 (8th Cir. 2010) ("Factual impossibility, however, generally is not a defense to an inchoate offense such as attempt, because a defendant's success in attaining his criminal objective is not necessary for an attempt conviction."); *see also* United States v. Manzo, 636 F.3d 56, 66 (3d Cir. 2011); United States v. Sims, 428 F.3d 945, 959–60 (10th Cir. 2005) (citing cases in accord from the U.S. Court of Appeals for the Fifth, Ninth, and Eleventh circuits).

[48] *Manzo*, 636 F.3d at 67 n.7 (alteration in original) (quoting United States v. Tykarsky, 446 F.3d 458, 466 (3d Cir. 2006)).

[49] *Tykarsky*, 446 F.3d at 465–66 (quoting United States v. Hsu, 155 F.3d 189, 199 (3d Cir. 1998)).

[50] MODEL PENAL CODE § 5.01(1)(a).

[51] FINAL REPORT § 1001(1).

[52] *E.g.*, COLO. REV. STAT. § 18-2-101(1) (2018) ("Factual or legal impossibility of committing the offense is not a defense if the offense could have been committed had the attendant circumstances been as the actor believed them to be."); GA. CODE ANN. § 16-4-4 (2019); 720 ILL. COMP. STAT. ANN. 5/8-4(b) (2016) ("It is not a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.").

[53] United States v. Mehanna, 735 F.3d 32, 52 (1st Cir. 2013) ("[L]egal impossibility exists when a defendant sets out to achieve an objective which, even if achieved as envisioned, will not constitute a crime."); *Manzo*, 636 F.3d at 67 n.10 ("[L]egal impossibility can sometimes be a defense to a crime." (quoting United States v. Dixon, 449 F.3d 194, 202 n. 2 (1st Cir.2006))); United States v. Ballinger, 395 F.3d 1218, 1238 n.8 (11th Cir. 2005) (en banc) ("The traditional view is that legal impossibility is a defense to the charge of attempt."); United States v. Joiner, 418 F.3d 863, 869 (8th Cir. 2005) ("Even if we assume arguendo, legal impossibility is a defense."); *but see* United States v. Yang, 281 F.3d 534, 542 (6th Cir. 2002) ("The court [in *Hsu*, F.3d 189 at 199-200] noted that virtually no other circuit continued to recognize the defense of legal impossibility, and that even in the Third Circuit the defense had been severely limited.").

involve no more than unavailing factual impossibility.[54] In a few instances, they have concluded instead that Congress intended to eliminate legal impossibility with respect to attempts to commit a particular crime.[55]

Abandonment

The Model Penal Code recognized an abandonment or renunciation defense.[56] A defendant, however, could not claim the defense if his withdrawal was merely a postponement or was occasioned by the appearance of circumstances that made success less likely.[57] The revised

[54] United States v. Carter, 15 F.4th 26, 37 (1st Cir. 2021) ("[T]he District Court explained that in its view, 'if the FDA, *even if mistakenly*, disavowed a legal right to regulate compounding pharmacies like NECC, and if the evidence at trial showed that the FDA abstained from regulating NECC as a result of its internal determination of its own jurisdiction, a legal impossibility defense would plainly be available.'") (quoting United States v. Conigliaro, 384 F. Supp. 3d 145, 153 (D. Mass. 2019)); United States v. Gray, 942 F.3d 627, 631-32 (3d Cir. 2019) ("Gray's reliance on the doctrine of legal impossibility is equally without merit . . . Gray argues that because the firearm found in his possession was not stolen, he could not have possessed a stolen firearm . . . [but] the District Court's conclusion that the firearm was stolen [is] legally sound."); United States v. Saldaña-Rivera, 914 F.3d 721, 725 (1st Cir. 2019) ("[W]e have rejected factual impossibility as a defense to an attempt crime."); United States v. Wrobel, 841 F.3d 450, 456 (7th Cir. 2016) ("Factual impossibility and mistake of fact are not defenses to an attempt crime."); United States v. O'Donnell, 840 F.3d 15, 21 (1st Cir. 2016) (legal impossibility defense unavailable on the facts); *Mehanna*, 735 F.3d at 53 ("[A]s we previously have explained, 'factual impossibility is not a defense to liability for inchoate offenses such as conspiracy or attempt.'" (second and third alterations in original) (quoting *Dixon*, 449 F.3d at 2052); United States v. Engle, 676 F.3d 405, 420 (4th Cir. 2012); United States v. Bauer, 626 F.3d 1004, 1007 (8th Cir. 2010); United States v. Rothenberg, 610 F.3d 621, 626 (11th Cir. 2010).

[55] *Tykarsky*, 446 F.3d at 466 ("We, however, find it unnecessary to resolve this thorny semantical [impossibility] question here . . . After examining the text of the statute, its broad purpose and its legislative history, we conclude that Congress did not intend to allow the use of an adult decoy, rather than an actual minor, to be asserted as a defense to §2422(b)."); *Yang*, 281 F.3d at 542 ("[T]he Third Circuit . . . reviewed its holding in *United States v. Everett* . . . that legal impossibility is not a defense to the charge of attempted distribution of a controlled substance under 21 U.S.C. § 846. Consistent with the analysis in *Everett*, the *Hsu* Court reviewed the legislative history of the [Economic Espionage Act of 1996] . . . Accordingly, the court concluded that legal impossibility is not a defense to a charge of attempted theft of trade secrets . . . We find persuasive the logic and reasoning of the Third Circuit.").

[56] MODEL PENAL CODE § 5.01(4) ("When the actor's conduct would otherwise constitute an attempt . . . it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.").

[57] *Id.* ("[R]enunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.").

federal criminal code recommended by the National Commission contained similar provisions.[58] Some states recognize an abandonment or renunciation defense;[59] the federal courts do not. [60]

Admittedly, a defendant cannot be charged with attempt if he has abandoned his pursuit of the substantive offense at the mere preparation stage. Yet, this is for want of an element of the offense of attempt—a substantial step—rather than because of the availability of an affirmative abandonment defense. Although the federal courts have recognized an affirmative voluntary withdrawal defense in the case of conspiracy, the other principal inchoate offense,[61] they have declined to recognize a comparable defense to a charge of attempt.[62]

Entrapment

The law affords defendants a limited entrapment defense when the government or its agents have had a hand in the commission of the offense. The Model Penal Code and the National Commission both endorsed a general entrapment defense.[63] Most states recognize the defense in one form or another either by statute or under common law.[64] The federal courts recognize two

[58] FINAL REPORT § 1005(3)(a), (c).

[59] *E.g.*, MINN. STAT. § 609.17, subd.3 (2018) ("It is a defense to a charge of attempt that the crime was not committed because the accused desisted voluntarily and in good faith and abandoned the intention to commit the crime."); MONT. CODE ANN. § 45-4-103(4) (2017) ("A person is not liable under this section if, under circumstances manifesting a voluntary and complete renunciation of criminal purpose, the person avoided the commission of the offense attempted by abandoning the person's criminal effort."); N.H. REV. STAT. ANN. § 629.1(III) (2016) ("(a) It is an affirmative defense to prosecution under this section that the actor voluntarily renounces his criminal purpose by abandoning his effort to commit the crime or otherwise preventing its commission under circumstances manifesting a complete withdrawal of his criminal purpose. (b) A renunciation is not 'voluntary' if it is substantially motivated by circumstances the defendant was not aware of at the inception of his conduct which increase the probability of his detection or which make more difficult the commission of the crime. Renunciation is not complete if the purpose is to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.").

[60] United States v. Alebbini, 979 F.3d 537, 545 (6th Cir. 2020); United States v. Temkin, 797 F.3d 682, 690 (9th Cir. 2015) ("Temkin's abandonment argument fails because abandonment is not a defense when an attempt, as here, 'has proceeded well beyond preparation.'" (quoting United States v. Bussey, 507 F.2d 1096, 1098 (9th Cir. 1974)); United States v. Young, 613 F.3d 735, 745 (8th Cir. 2010) ("We hold today that a defendant cannot abandon an attempt once it has been completed. We emphasize that all of our sister circuits that have faced this issue have either held that a defendant cannot abandon a completed attempt or have alluded to such a determination.") (citing cases in accord from the Second, Sixth and Ninth Circuits).

[61] United States v. Jimenez, 96 F4.th 317 325 (2d Cir. 2024) ("[W]ithdrawal from a conspiracy is an affirmative defense.") (alteration in original) (quoting United States v. Hamilton, 538 F.3d 162, 173 (2d Cir. 2008); United States v. Brumfield, 89 F.4th 506, 523 (5th Cir. 2023), *cert. denied*, 145 S. Ct. 244 (2024); United States v. Ravenell, 66 F.4th 472, 482 (4th Cir. 2023)), *cert. denied*, 144 S. Ct. 1344 (2024) (mem.); United States v. Mejia, 55 F.4th 1, 10 (1st Cir. 2022).

[62] Again: United States v. Alebbini, 979 F.3d 537, 545 (6th Cir. 2020); United States v. Temkin, 797 F.3d 682, 690 (9th Cir. 2015); United States v. Young, 613 F.3d 735, 745 (8th Cir. 2010).

[63] MODEL PENAL CODE § 2.13(1) ("A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either: (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) employing methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it."); FINAL REPORT § 702(2) ("Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause a normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.").

[64] *E.g.*, ALASKA STAT. § 11.81.450 (2018); N.H. REV. STAT. ANN. § 626:5 (2016); N.J. STAT. ANN. § 2C:2-12 (2015); WASH. REV. CODE § 9A.16.070 (2105); Commonwealth v. Denton, 75 N.E.3d 589, 592 (Mass. 2017); People v. (continued...)

forms of entrapment, but rarely find them applicable. One speaks to the level of government intervention and the other primarily to the defendant's susceptibility to temptation. The first, "'[e]ntrapment by estoppel, arises when a government official tells a defendant that certain conduct is legal, and the defendant commits what otherwise would be a crime in reasonable reliance in the official representation.'"[65]

The second entrapment defense "has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct."[66] The defendant must offer evidence of government inducement,[67] after which the government must prove predisposition of the defendant beyond a reasonable doubt.[68]

Government inducement for purposes of the entrapment defense consists of government overreaching involving "'intimidation, threats, dogged insistence,' or 'excessive pressure.'"[69] Offering a defendant the opportunity to commit a crime, without more, does not qualify as government overreaching;[70] some courts have described the necessary degree of inducement as overpowering or overbearing.[71]

Fromuth, 206 Cal. Rptr. 3d 83, 98-99 (Cal. Ct. App. 2016); State v. Hayes, 752 A.2d 16, 19 (Vt. 2000); State v. Babers, 514 N.W.2d 79, 82–83 (Iowa 1994).

[65] United States v. Turner, 61 F.4th 866, 868 n.4 (11th Cir. 2023); United States v. Allen, 983 F.3d 463, 470 (10th Cir. 2020); United States v. Peithman, 917 F.3d 635, 648 (8th Cir. 2019) (quoting United States v. Parker, 267 F.3d 839, 843 (8th Cir. 2001)); United States v. Lechner, 806 F.3d 869, 875 (6th Cir. 2015). Some courts articulate a more specific standard, *e.g.*, United States v. Lynch, 903 F.3d 1061, 1076 (9th Cir. 2018) ("To establish the defense of entrapment by estoppel, a defendant has the burden to show: '(1) an authorized government official, empowered to render the claimed erroneous advice, (2) who was aware of all the relevant historical facts, (3) affirmatively told [the defendant] the proscribed conduct was permissible, (4) that [the defendant] relied on the false information, and (5) that [the] reliance was reasonable.'" (quoting United States v. Schafer, 625 F.3d 629, 637 (9th Cir. 2010))).

[66] Mathews v. United States, 485 U.S. 58, 63 (1988); United States v. Peperno, 119 F.4th 322 (3d Cir. 2024); United States v. Elboghdady, 117 F.4th 224, 233 (4th Cir. 2024); United States v. Roubideaux, 112 F.4th 606, 611 (8th Cir. 2024); United States v. Sewell, 103 F.4th 1292, 1294 (7th Cir. 2024).

[67] United States v. Cascella, 943 F.3d 1, 6 (1st Cir. 2019) ("'Entrapment is an affirmative defense.' To present this affirmative defense, a defendant must first carry the burden of production . . ."(quoting United States v. Vasco, 564 F.3d 12, 18 (1st Cir. 2009))); United States v. Baker, 928 F.3d 291, 296 (3d Cir. 2019) ("'Under our jurisprudence, to make an entrapment defense a defendant must come forward with some evidence as to both inducement and non-predisposition.'" (quoting United States v. El-Gawli, 837 F.2d 142, 145 (3d Cir. 1988))); United States v. Young, 916 F.3d 368, 375 (4th Cir. 2019); United States v. Williamson, 903 F.3d 124, 132 (D.C. Cir. 2018); United States v. Dixon, 901 F.3d 1322, 1346 (6th Cir. 2023).

[68] *Young*, 916 F.3d at 375–76; *Williamson*, 903 F.3d at 132; *Dixon*, 901 F.3d at 1346.

[69] *Cascella*, 943 F.3d at 6 (quoting United States v. Diaz-Maldonado, 727 F.3d 130, 137 (1st Cir. 2013)); *see also Baker*, 928 F.3d at 296 ("Inducement is not 'mere solicitation' or 'merely opening an opportunity for a crime.' Rather, 'the defendant must show that law enforcement engaged in conduct that takes the form of persuasion, fraudulent representation, threats, coercive tactics, harassment, promises of reward or pleas based on need, sympathy or friendship.'" (quoting United States v. Dennis, 826 F.3d 683, 690 (3d Cir. 2016))); *Williamson*, 903 F.3d at 132.

[70] *Cascella*, 943 F.3d at 6-7 (citing United States v. Gendron, 18 F.3d 955, 961 (1st Cir. 2013)); United States v. Mayfield, 771 F.3d 417, 435 (7th Cir. 2014) ("Inducement means more than mere government solicitation of the crime; the fact that the government agents initiated contact with the defendant, suggested the crime, or furnished the ordinary opportunity to commit it is insufficient to show inducement.").

[71] *James*, 928 F.3d at 256 ("To be inducement, the government's action must overpower the defendant. *Cf. Groll* [United States v. Groll, 992 F.2d 755, 759 (7th Cir. 1993)] (noting that 'three phone calls urging a defendant to buy cocaine after an initial refusal were not sufficient inducement' but that an informant calling a defendant every day for a month raised a colorable claim)."); United States v. Williamson, 903 F.3d 124, 132 (D.C. Cir. 2018) ("'The government's behavior amounts to inducement when it was such that a law-abiding citizen's will to obey the law could have been overborne.' A range of government conduct could qualify as inducement under that standard, including 'persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship.'" (first quoting United States v. Glover, 153 F.3d 749, 754 (D.C. Cir. 1998); and then quoting United States v. Sanchez, 88 F.3d 1234, 1249 (D.C. Cir. 1996))).

"Predisposition 'focuses upon whether the defendant was an unwary innocent or, instead, an unwary criminal who readily availed himself of the opportunity to perpetrate the crime.'"[72] Whether the defendant was an "unwary innocent" or, instead, an "unwary criminal" turns on the facts in a particular case.[73] The factors that a jury might appropriately consider include:

(1) the defendant's character or reputation;

(2) whether the government initially suggested the criminal activity;

(3) whether the defendant engaged in the criminal activity for profit;

(4) whether the defendant evidenced a reluctance to commit the offense that was overcome by government persuasion; and

(5) the nature of the inducement or persuasion by the government.[74]

Successful claims are rare, but not unknown.[75]

Sentencing

The Model Penal Code and the National Commission's Final Report both imposed the same sanctions for attempt as for the predicate offense as a general rule.[76] However, both set the penalties for the attempts to commit the most serious offenses at a class below that of the predicate offense, and both permitted the sentencing court to impose a reduced sentence in cases when the attempt failed to come dangerously close to the attempted predicate offense.[77] The states set the penalties for attempt in one of two ways. Some set sanctions at a fraction of, or a class below, that of the substantive offense, with exceptions for specific offenses in some instances;[78]

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[72] *Young*, 916 F.3d at 376 (quoting *Mathews*, 485 U.S. at 63).

[73] United States v. Wenxia Man, 891 F.3d 1253, 1279 (11th Cir. 2018); United States v. Dennis, 826 F.3d 683, 694 (3d Cir. 2016) ("'Because of the subjective, fact-intensive nature of the predisposition inquiry, it may well be that the facts of a given case indicate that an individual defendant is predisposed to commit some crimes, but not others.'" (quoting United States v. Isnadin, 742 F.3d 1278, 1302 (11th Cir. 2014))).

[74] United States v. Hilliard, 851 F.3d 768, 785 (7th Cir. 2017); United States v. Temkin, 797 F.3d 682, 691 (9th Cir. 2015); United States v. Mohamud, 843 F.3d 420, 432 (9th Cir. 2016); *see also* United States v. Tee, 881 F.3d 1258, 1263 (10th Cir. 2018) ("Predisposition may be shown by 'evidence of similar prior illegal acts or it may be inferred from defendant's desire to profit, his eagerness to participate in the transaction, his ready response to the government's inducement offer, or his demonstrated knowledge or experience in the criminal activity." (quoting United States v. Nguyen, 413 F.3d 1170, 1178 (10th Cir. 2005))).

[75] *E.g.*, United States v. Barta, 776 F.3d 931, 937 (7th Cir. 2015) ("The FBI frequently emailed and called Barta, with no response from Barta. There were 'repeated attempts at persuasion.' The FBI invented false deadlines for Barta to commit to the deal and invented false problems . . . The FBI significantly sweetened what would have already been an attractive deal to Bart and his co-defendants . . . And the FBI pressed Barta . . . to make a deal that it had reason to believe Barta would be making mainly to benefit his less fortunate friend . . . The presence of all these plus factors shows that the government induced Barta to commit a crime, one that the government concedes he had no predisposition to commit. That is enough to establish entrapment as a matter of law." (quoting *Mayfield*, 771 F.3d 417, 435)).

[76] FINAL REPORT § 1001(3); MODEL PENAL CODE § 5.05.

[77] FINAL REPORT § 1001(3) ("Criminal attempt is an offense of the same class as the offense attempted, except that (a) an attempt to commit a Class A felony shall be a Class B felony, and (b) whenever it is established by a preponderance of the evidence at sentencing that the conduct constituting the attempt did not come dangerously close to commission of the crime, an attempt to commit a Class B felony shall be a Class C Felony and attempt to commit a Class C felony shall be a Class A misdemeanor"); MODEL PENAL CODE § 5.05.

[78] *E.g.*, ALA. CODE §13A-4-2(d) (2006) ("An attempt is a: (1) Class A felony if the offense attempted is murder. (2) Class B felony if the offense attempted is a Class A felony. (3) Class C felony if the offense attempted is a Class B (continued...)

others set the penalty at the same level as the crime attempted, again with exceptions for particular offenses in some states.[79]

Most federal attempt crimes carry the same penalties as the substantive offense.[80] The Sentencing Guidelines, which greatly influence federal sentencing beneath the maximum penalties set by statute, reflect the equivalent sentencing prospective.[81] Except for certain terrorism, drug trafficking, assault, and tampering offenses, however, the Guidelines recommend slightly lower sentences for defendants who have yet to take all the steps required of them for commission of the predicate offense.[82]

Relation to Other Offenses

The federal law of attempt is associated with several other areas of federal criminal law relating to conspiracy, aiding and abetting, and predicate offenses.

felony. (4) Class D felony if the offense attempted is a Class C felony. (5) Class A misdemeanor if the offense attempted is a Class C felony. (6) Class B misdemeanor if the offense attempted is a Class A misdemeanor. (7) Class C misdemeanor if the offense attempted is a Class B misdemeanor. (8) Violation if the offense attempted is a Class C misdemeanor."); ALASKA STAT. § 11.31.100(d) (2018); ARIZ. REV. STAT. ANN. § 13-1001(C) (2010); CAL. PENAL CODE § 664 (2010) ("Every person who attempts to commit any crime . . . shall be punished where no provision is made by law for the punishment of those attempts, as follows: (a) If the crime attempted is punishable by imprisonment in the state prison, or by imprisonment pursuant to subdivision (h) of Section 1170, the person guilty of the attempt shall be punished by imprisonment in the state prison, or in a county jail, respectively, for one-half of the term of imprisonment prescribed upon a conviction of the offense attempted. However, if the crime attempted is . . . murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole.").

[79] *E.g.*, DEL. CODE ANN. tit. 11 § 531 (2015) ("Attempt to commit a crime is an offense of the same grade and degree as the most serious offense which the accused is found guilty of attempting."); IND. CODE § 35-41-5-1(a) (2009) ("An attempt to commit a crime is a felony or misdemeanor of the same level or class as the crime attempted. However, an attempt to commit murder is a Level 1 felony."); N.H. REV. STAT. ANN. § 629.1(IV) (2016) ("The penalty for attempt is the same as that authorized for the crime that was attempted, except that in the case of attempt to commit murder the punishment shall be imprisonment for life or such other term as the court shall order.").

[80] *E.g.*, 21 U.S.C. § 846 (attempted drug offenses); 18 U.S.C. §§ 32(a) (attempted destruction of aircraft or their facilities), *id.* § 1594(a) (attempts to commit certain human trafficking offenses). In many instances, attempt is interwoven with the elements of the underlying offense. *E.g.*, *id.* § 844(f)(1) (destruction of U.S. property) ("Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive . . . shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both."); *id.* § 1956(a)(1) (money laundering) ("Whoever . . . conducts or attempts to conduct such a financial transaction . . . shall be sentenced to a fine of not more than $500,000 . . . or imprisonment for not more than twenty years, or both.").

[81] U.S. SENT'G GUIDELINES MANUAL § 2X1.1(a) (U.S. SENT'G COMM'N (2024). When imposing sentence for a violation of federal law, a court must begin by calculating the sentencing range recommended by the Guidelines for a particular case. Gall v. United States, 552 U.S. 38, 49 (2007). The result is advisory, to be considered along with other statutory factors under 18 U.S.C. § 3553(a). The resulting sentence will survive appellate scrutiny if it is procedurally and substantively reasonable. A sentence is procedurally reasonable if it is free of procedural error, "such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation of any deviation from the Guidelines range." *Gall*, 552 U.S. at 51. The Guidelines and § 3553(a) factors weigh heavily in the totality of the circumstances assessment of whether a particular sentence is substantively reasonable. *Id.*

[82] U.S. SENT'G GUIDELINES MANUAL § 2X1.1(b) (U.S. SENT'G COMM'N (2024) ("[D]ecrease by 3 [offense] levels, unless the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control."), (c) (exceptions for attempts to commit certain assault, drug, tampering offenses), (d) (exceptions for attempts to commit various terrorism offenses).

Conspiracy

Attempt and conspiracy are inchoate offenses; crimes on their way to becoming other crimes unless stopped or abandoned. Conspiracy is a scheme to commit another crime.[83] Attempt is an endeavor to commit another crime.[84] Conspiracy requires two or more offenders;[85] attempt needs but one.[86] Intent to commit some target or predicate offense or misconduct satisfies the mens rea element in both cases.[87] Attempt always, and conspiracy often, occurs only with the commission of some affirmative act—some overt act or substantive step—in furtherance of the criminal objective. Both attempt and conspiracy generally carry the same punishment as their predicate offenses.[88] Conspiracy and its predicate offense, however, exist as separate crimes that may be punished separately,[89] while attempt constitutes only a lesser-included component of its predicate offense.[90] Neither attempt nor conspiracy requires the completion of a predicate offense before

[83] Ocasio v. United States, 578 U.S. 282, 287 (2016) ("'[T]he fundamental characteristic of a conspiracy is a joint commitment to an 'endeavor which, if completed, would satisfy all of the elements of the underlying substantive' criminal offense.'" (second alteration in original) (quoting Salinas v. United States, 522 U.S. 52, 65 (1997))); United States v. Jimenez Recio, 537 U.S. 270, 274 (2003) ("The Court has repeatedly said that the essence of a conspiracy is 'an agreement to commit an unlawful act.'" (quoting Iannelli v. United States, 420 U.S. 770, 777 (1975))); *see also* United States v. Muñoz-Martinez, 79 F.4th 44, 53 (1st Cir. 2023); United States v. Fallon, 61 F.4th 95, 115–16 (3d Cir. 2023).

[84] *Attempt*, BLACK'S LAW DICTIONARY (12th ed. 2024).

[85] Rogers v. United States, 340 U.S. 367, 375 (1951) ("[A]t least two persons are required to constitute a conspiracy."); United States v. Gallagher, 90 F.4th 182, 197 (4th Cir. 2024); United States v. Escajeda, 8 F.4th 423, 426 (5th Cir. 2021); United States v. Leal, 921 F.3d 951, 959 (10th Cir. 2019).

[86] *See, e.g.*, 18 U.S.C. § 1349 ("*Any person* who attempts . . . to commit any offense under this chapter [relating to fraud] . . ." (emphasis added)); 21 U.S.C. § 846 ("*Any person* who attempts . . . to commit any offense under this subchapter [relating to controlled substances] . . ." (emphasis added)); 18 U.S.C. § 1030(b) ("*Whoever* . . . attempts to commit an offense under subsection (a) of this section [relating to computer fraud and abuse] . . ." (emphasis added)).

[87] *Attempt*: United States v. Anderson, 932 F.3d 344, 350 (5th Cir. 2019) ("'To be guilty of an attempt, the defendant (1) must have been acting with the . . . culpability otherwise required for the commission of the crime which he is charged with attempting . . .'" (first alteration in original) (quoting United States v. Salazar, 958 F.2d 1293 (5th Cir. 1992))); United States v. Stahlman, 934 F.3d 1199, 1225 (11th Cir. 2019); United States v. Rang, 919 F.3d 113, 120 (1st Cir. 2019). *Conspiracy*: *Ocasio*, 578 U.S. at 288 ("A defendant must merely reach an agreement with the 'specific intent that the underlying crime be committed' by some member of the conspiracy." (quoting 2 KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 31:03 (6th ed. 2008))); *Anderson*, 932 F.3d at 350; United States v. Espinoza-Valdez, 889 F.3d 654, 657 (9th Cir. 2018); United States v. Gorski, 880 F.3d 27, 31–32 (1st Cir. 2018).

[88] United States v. Resendiz-Ponce, 549 U.S. 102, 107 (2007) ("As was true at common law, the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct," that is, by a substantial step towards a completion of the underlying substantive offense.); *Stahlman*, 934 F.3d at 1225; United States v. Bryant, 913 F.3d 783, 786 (8th Cir. 2019). The general federal conspiracy statute contains an overt act requirement. 18 U.S.C. § 371 ("If two or more persons conspire . . . to commit any offense against the United States . . . *and one or more of such persons do any act to effect the object of the conspiracy* . . ." (emphasis added)). In number of individual statutes, however, Congress has opted not to include an overt act requirement. *See, e.g.*, Whitfield v. United States, 543 U.S. 209, 214 (2005) (relating to 18 U.S.C. § 1956(h) money laundering conspiracy); Salinas v. United States, 522 U.S. 52, 63 (1997) (relating to 18 U.S.C. § 1962(d) RICO conspiracy); United States v. Shabani, 513 U.S. 10, 11 (1994) (relating to 21 U.S.C. § 846 controlled substance conspiracy).

[89] Callanan v. United States, 364 U.S. 587, 597 (1961); *see also Salinas*, 522 U.S. at 65; United States v. Martinez, 921 F.3d 452, 471 (5th Cir. 2019); United States v. George, 886 F.3d 31, 41 (1st Cir. 2018).

[90] United States v. Rivera-Relle, 333 F.3d 914, 921-22 n.11 (9th Cir. 2013) ("Unlike conspiracy, the prosecution may not obtain convictions for both the completed offense and the attempt if the attempt has in fact been completed. The attempt is an offense included in the completed crime, and therefore, cannot support a separate conviction and sentence.").

prosecution.[91] Conspiracy admits a narrow defense of withdrawal;[92] attempt does not.[93] Neither offers anything but the most remote prospect of an impossibility[94] or entrapment defense.[95] The courts have affirmed convictions for both conspiracy and attempt to commit the same underlying predicate offense.[96]

Congress has made solicitation, essentially an attempt to conspire, a separate federal offense in 18 U.S.C. § 373. Section 373 prohibits efforts to induce another to commit a crime of violence "under circumstances strongly corroborative" of intent to see the crime committed.[97] Section 373's crimes of violence are federal "felon[ies] that [have] as an element the use, attempted use,

[91] *Conspiracy*: United States v. Jimenez Recio, 537 U.S. 270, 274 (2003); United States v. Stanton, 103 F.4th 1204, 1211 (6th Cir. 2024); United States v. Green, 47 F.4th 279, 291 (5th Cir. 2022); United States v. Turchin, 21 F,.4th 1192, 1203 (9th Cir. 2022). *Attempt*: United States v. Bellot, 113 F.4th 1151, 1155 (9th Cir. 2024), *petition for cert. filed*, No. 24-6544 (U.S. Feb. 11, 2025); United States v. Burch, 113 F.4th 815, 820 (8th Cir. 2024); United States v. Rider, 94 F.4th 445, 459 (5th Cir. 2024).

[92] Smith v. United States, 568 U.S. 106, 110–12 (2013); United States v. Jimenez, 96 F.4th 317, 325 (2d Cir. 2024); United States v. Brumfield, 89 F.4th 506, 523 (5th Cir. 2023); United States v. Ravenell, 66 F.4th 472, 482 (4th Cir. 2023), *cert. denied*, 144 S. Ct. 1344 (2024) (mem.); United States v. Mejia, 55 F.4th 1, 10 (1st Cir. 2022) ("To succeed on such a withdrawal claim, a coconspirator 'must act affirmatively either to defeat or disavow the purposes of the conspiracy. Typically, this requires 'evidence either of a full confession to authorities or a communication . . . to his coconspirators that he has abandoned the enterprise and its goals.'") (quoting United States v. Juodakis, 834 F.3d 1099, 1102 (1st Cir. 1987)).

[93] United States v. Alebbeni, 979 F.3d 537, 548 (6th Cir. 2020); United States v. Patterson, 877 F.3d 419, 428 (1st Cir. 2017) ("[E]vidence of abandonment does not in and of itself suffice to negate evidence of attempt."); United States v. Temkin, 797 F.3d 682, 690 (9th Cir. 2015) ("[A]bandonment is not a defense when an attempt, as here, 'has proceeded beyond preparation.'" (quoting United States v. Bussey, 507 F.2d 1096, 1098 (9th Cir. 1974)).

[94] *Conspiracy*: United States v. James, 928 F.3d 247, 256–57 (3d Cir. 2019) ("The defense of entrapment requires proof of two elements: [1] government inducement of the crime, and [2] a lack of predisposition on the part of the defendant to engage in the criminal conduct." (quoting Mathews v. United States, 485 U.S 58, 63 (1988))); United States v. Young, 916 F.3d 368, 376 (4th Cir. 2019); United States v. Wenxia Man, 891 F.3d 1253, 1266 (11th Cir. 2018) ("[S]heer impossibility is no defense." (quoting United States v. Jones, 765 F.2d 996, 1002 (11th Cir. 1985))); United States v. Banker, 876 F.3d 530, 539 (4th Cir. 2017) ("[F]actual impossibility is not a defense." (quoting United States v. Engle, 676 F.3d 405, 419–20 (4th Cir. 2012))). *Attempt*: United States v. Strubberg, 929 F.3d 969, 976 (8th Cir. 2019) ("A valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in criminal conduct." (quoting United States v. Wynn, 827 F.3d 778, 786 (8th Cir. 2016))); United States v. Rutgerson, 822 F.3d 1223, 1234 (11th Cir. 2016); United States v. Saldaña-Rivera, 914 F.3d 721, 725 (1st Cir. 2019) ("we have rejected factual impossibility as a defense to an attempt crime."; United States v. Suarez, 893 F.3d 1339, 1335 (11th Cir. 2018).

[95] United States v. Gomez, 6 F.4th 992, 1001(9th Cir. 2021) ("The Supreme Court has 'firmly recognized the defense of entrapment in the federal courts. Entrapment occurs only when the criminal conduct was the product of the creative activity of law-enforcement officials,' in other words, 'when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.'" (quoting Sherman v. United States, 356 U.S. 369, 372 (1958))); "[T]he affirmative defense of entrapment has two elements: '[1] government inducement of the crime and [2] absence of predisposition on the part of the defendant' to engage in the criminal conduct.") *id.* (quoting United States v. Gurrolla, 333 F.3d 944, 951 (9th Cir. 2003))); *see also*, United States v. Harris, 7 F.4th 1276, 1289 (11th Cir. 2021) (conspiracy and entrapment); United States v. Mercado, 53 F.4th 1071, 1079 (7th Cir. 2022) (attempt and entrapment).

[96] United States v. House, 120 F.4th 1313, 1315 (7th Cir. 2024) (conspiracy to possess and attempted possession of marijuana); Fernandez v. United States, 114 F.4th 1170, 1172 (11th Cir. 2024) (conspiracy to violate and attempt to violate the Hobbs Act); United States v. Xu, 114 F.4th 829, 836 (6th Cir. 2024) (conspiracy to and attempt to steal trade secrets), *reh'g denied*, No. 22-4020 (6th Cir. Oct. 7, 2024).

[97] 18 U.S.C. § 373(a); United States v. Gillis, 938 F.3d 1181, 1195-96 (11th Cir. 2019) (per curiam) ("To be convicted under § 373, the defendant (1) must solicit another person to 'engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force,' and (2) must solicit 'such other person to engage in such conduct' under circumstances strongly corroborative of that intent.") (quoting 18 U.S.C. § 373)); United States v. Dvorkin, 799 F.3d 867, 878 (7th Cir. 2015); *e.g.*, United States v. Linehan, 56 F.4th 693, 698–99 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 209 (2023) (mem.).

or threatened use of physical force against property or against the person of another."[98] Examples of "strongly corroborative" circumstances include "the defendant offering or promising payment or another benefit in exchange for committing the offense; threatening harm or other detriment for refusing to commit the offense; repeatedly soliciting or discussing at length in soliciting the commission of the offense, or making explicit that the solicitation is serious; believing or knowing that the persons solicited had previously committed similar offenses; and acquiring weapons, tools, or information for use in committing the offense, or making other apparent preparations for its commission."[99] As is the case of attempt, "[a]n individual cannot be guilty of both the solicitation of a crime and the substantive crime."[100] Although the crime of solicitation is complete upon communication with the requisite intent, renunciation prior to commission of the substantive offense is a statutory defense.[101] The offender's legal incapacity to commit the solicited offense himself, however, is not a defense.[102]

Aiding and Abetting

Unlike attempt, aiding and abetting (acting as an accomplice before the fact) is not a separate offense; it is an alternative basis for liability for a substantive offense.[103] Anyone who aids, abets, counsels, commands, induces, or procures the commission of a federal crime is as guilty as if he committed it himself.[104] Aiding and abetting requires proof of intentional assistance in the

[98] 18 U.S.C. § 373(a); *Gillis*, 938 F.3d at 1196–1201 (holding that kidnapping under 18 U.S.C. § 120(a) is not a crime of violence for purposes of § 373(a) because it proscribes both conduct which is violent and that which is not); United States v. Korab, 893 F.2d 212, 215 (9th Cir. 1989) ("Section 373(a) encompasses only solicitations of federal felonies"); United States v. Doggart, 947 F.3d 879, 883, 887 (6th Cir. 2020) (Section 373 does not cover solicitations to burn down a mosque in violation of the federal arson statute,18 U.S.C. § 844(i) (in the absence of support for § 844(i)'s jurisdictional element (interstate commerce)); but it does cover solicitations to burn down a mosque in violation of 18 U.S.C. § 247 (destroying religious property).

[99] United States v. Hale, 448 F.3d 971, 983 (7th Cir. 2006) (per curiam) (citing United States v. McNeil, 887 F.2d 448, 450 (3d Cir. 1989)); *see also Dvorkin*, 799 F.3d at 879 ("Evidence sufficient to strongly corroborate a defendant's intent includes, but is not limited to, 'evidence showing that the defendant: (1) offered or promised payment or some other benefit to the person solicited; (2) threatened to punish or harm the solicitee for failing to commit the offense; (3) repeatedly solicited the commission of the offense or expressly stated his seriousness; (4) knew or believed that the person solicited had previously committed a similar offense; or (5) acquire weapons, tools or information, or made other preparations, suited for use by the solicitee.'" (quoting United States v. White, 698 F.3d 1005, 1015 (7th Cir. 2012) (per curiam)).

[100] *Korab*, 893 F.2d at 213.

[101] 18 U.S.C. § 373(b) ("It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not 'voluntary and complete' if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence."); *see also Dvorkin*, 799 F.3d at 880.

[102] 18 U.S.C. § 373(c) ("It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for its commission, because he was incompetent or irresponsible, or because he is immune from prosecution or is not subject to prosecution.").

[103] 18 U.S.C. § 2; United States v. Hill, 63 F.4th 335, 363 (5th Cir. 2023) ("Title 18 U.S.C. § 2 does not establish a separate crime of 'aiding and abetting,' United States v. Pearson, 667 F.2d 12, 13 (5th Cir. Unit B 1982); instead aiding and abetting 'is simply a different way of proving liability for the same activity criminalized elsewhere even if the aider and abettor did not himself commit all elements of the substantive offense,'" United States v. Rabhan, 540 F.3d 344, 348 n.15 (5th Cir. 2008); Young v. United States, 22 F.4th 1115, 1122 (9th Cir. 2022); United States v. Williams, 941 F.3d 234, 236-37 (6th Cir. 2019) (per curiam) ("Section 2 'does not create a separate crime, but rather abolishes the common law distinction between the principals and accessories.'" (quoting United States v. Superior Growers Supply, Inc., 982 F.2d 173, 177–78 (6th Cir. 1992))); United States v. Cottier, 908 F.3d 1141, 1147 (8th Cir. 2018).

[104] 18 U.S.C. § 2(a).

commission of a crime.[105] When attempt is a federal crime, the cases suggest that a defendant may be punished for aiding and abetting the attempt to commit the substantive offense *or* for attempting to aid and abet the commission of the substantive offense.[106]

The Predicate Offense

A defendant need not complete the substantive underlying offense to be guilty of attempt.[107] On the other hand, some 19th century courts held that a defendant could not be convicted of attempt if the evidence indicated that he had in fact committed the predicate offense.[108] This is no longer the case in federal court—if it ever was. Under federal law, "[n]either common sense nor precedent supports success as a defense to a charge of attempt."[109]

Since conviction for attempt does not require commission of the predicate offense, conviction for attempt does not necessitate proof of every element of the predicate offense,[110] or any element of the predicate offense for that matter, other than intent. Recall that the only elements of the crime

[105] Rosemond v. United States, 572 U.S. 65, 71 (2014) ("[A] person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission."); United States v. Garcia, 99 F.4th 253, 263 (5th Cir. 2024); Medunjanin v. United States, 99 F.4th 129, 134 (2d Cir. 2024) (per curiam); United States v. Everett, 91 F.4th 698, 712 (4th Cir. 2024), *cert. denied*, 145 S. Ct. 242 (2024) (mem.); United States v. Bellot, 113 F.4th 1151, 900, 903 (9th Cir. 2024), *petition for cert. filed*, No. 24-6544 (U.S. Feb. 11, 2025)).

[106] *Bellot*, 113 F.4th at 1156 ("[T]here are two paths to conviction on this substantive offense under an aiding and abetting theory. The first path alleges that a defendant *aided and abetted an attempt* to possess cocaine. Under such a path, a defendant lends support to a principal who actually attempted to commit the possession crime but failed. The second path alleges that a defendant *attempted to aid and abet* the possession of cocaine. Under this path, the principal only pretends to commit the possession crime, but the defendant attempts to support the principal by 'engag[ing] in conduct that would have established his complicity had the crime been committed.' The only difference between these two paths is that *aiding and abetting an attempt* requires a 'guilty principal,' while *attempting to aid and abet* does not. But in either case, paradoxically the crime ultimately charged is the same; the aider and abettor is charged with attempt to possess with the intent to distribute cocaine." (alteration in original) (quoting United States v. Washington, 106 F.3d 983, 1004–05 (D.C. Cir. 1997)); United States v. Villarreal, 707 F.3d 942, 959 (8th Cir. 2013) (A jury may convict a defendant under the theory "'that the defendant aided and abetted the commission of attempted sexual abuse.'" (quoting United States v. Papakee, 573 F.3d 569, 574 (8th Cir. 2009)); United States v. Bristol-Martir, 570 F.3d 29, 39 (1st Cir. 2009) (finding evidence sufficient to convict on a charge of aiding and abetting an attempt to possess narcotics with the intent to distribute, but vacating on other grounds); United States v. Partida, 385 F.3d 546, 560 (5th Cir. 2004) (evidence sufficient to uphold a conviction for attempting to aid and abet possession of a controlled substance with intent to distribute).

[107] *Bellot* 113 F.4th at 1155 ("An 'attempt' is an 'inchoate crime[ ]' that 'does not require completion of the crime' to be illegal" (alteration in original) (quoting United States v. Iribe, 564 F.3d 1155, 1160–61 (9th Cir. 2009)); United States v. Burch, 113 F.4th 815, 820 (8th Cir. 2024); United States v. Rider, 94 F.4th 445,459 (5th Cir. 2024); United States v. Dixon, 449 F.3d 194, 202 (1st Cir. 2006); United States v. Sims, 428 F.3d 945, 959–60 (10th Cir. 2005); United States v. Washington, 106 F.3d 983, 1004 (D.C. Cir. 1997); *cf.* United States v. Muratovic, 719 F.3d 809, 813 (7th Cir. 2013) ("Because the Hobbs Act criminalizes not just successful robberies but attempts as well, the government need not prove that the defendant's actions actually obstructed, delayed, or affected commerce . . .").

[108] Francis Bowes Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 838 n.66 (1928) ("Thus, it has been held that there cannot be a conviction for an attempt where the proof shows that the crime attempted was carried through to successful completion." (citing Graham v. People, 181 Ill. 477, 55 N.E. 179 (1899); People v. Stanton, 106 Cal. 139, 39 Pac. 525 (1895); Regina v. Nicholls, 2 Cox C.C. 182 (1847). *Contra* State v. Shepard, 7 Conn. 54 (1828)). States have sometimes crafted explicit rejections in order to escape such precedents. *E.g.*, IDAHO CODE § 18-305 (2016) ("[A]ny person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt."); LA. STAT. ANN. § 14:27(C) (2016); MONT. CODE ANN. § 45-4-103(5) (2017) ("Proof of the completed offense does not bar conviction for the attempt.").

[109] United States v. Malasanos, 472 F.2d 642, 643 (7th Cir. 1973) (per curium); United States v. York, 578 F.2d 1036, 1040 (5th Cir. 1978) ("Proof that a crime had been completed does not absolve the defendants of the attempt.").

[110] United States v. Pires, 642 F.3d 1, 6 (1st Cir. 2011); United States v. Manzo, 636 F.3d 56, 66 (3d Cir. 2011).

of attempt are intent to commit the predicate offense and a substantial step in that direction. Nevertheless, a court will sometimes demand proof of completion of one or more of the elements of a predicate offense in order to narrow the attempt provision. For instance, the Third Circuit has held that "acting 'under color of official right' is a required element of an extortion Hobbs Act offense, inchoate [i.e., attempt] or substantive," apparently for that very reason.[111]

Conversely, when Congress has made a predicate offense's substantial step a separate crime (a second-degree substantive offense), the government need only prove intent and a substantial step toward completion of the new crime. For instance, federal law separately prohibits engaging in sexual activity with a child, enticing a child to engage in sexual activity (a second-degree crime), and attempting to induce a child to engage in sexual activity.[112] To convict a defendant of attempt, the government must establish an intent and substantial step toward enticement, but need not establish that the defendant otherwise attempted to engage in sexual activity with a child.[113]

[111] *Manzo*, 636 F.3d at 58, 68–69 (Manzo, a candidate for elective office, had been charged with attempted extortion under color of official right based on official actions he would take or omit if elected. The court observed that, "[a] Hobbs Act inchoate offense prohibits a person acting 'under color of official right' from attempting . . . to use his or her public office in exchange for payments. . . to use a future public office to extort money at a future date.'" (quoting Krulewitch v. United States, 336 U.S. 440, 445 (1949)). "To sustain an 'under color of official right' Hobbs Act charge here would create a 'legal alchemy with the power to transform any gap in the facts into a cohesive extortion charge.'" *Manzo*, 636 F.3d at 69 (quoting United States v. Manzo, 714 F. Supp. 2d 486, 497 (D.N.J. 2010), *aff'd*, 646 F.3d 56 (3d Cir. 2011)).

[112] 18 U.S.C. §§ 2423(a), 2422(b).

[113] United States v. Isabella, 918 F.3d 816, 831 (10th Cir. 2019) ("In *Faust*, we explained that '[s]ection 2422(b) requires only that the defendant intend to entice a minor, not that the defendant intend to commit the underlying sexual act.'" (quoting United States v. Faust, 795 F.3d 1243, 1249 (10th Cir. 2015))), *cert. denied*, 144 S. Ct. 514 (2023) (mem.); United States v. York, 48 F.4th 494, 500 (7th Cir. 2022); United States v. McCarron, 30 F.4th 1157, 1162 (9th Cir. 2022).

Appendix. State General Attempt Statutes (Citations)

ALA. CODE §§ 13a-4-2, 13aA-4-5 (2006);[114] ALASKA STAT. §§ 11.31.100, 11.31.140, 11.31.150 (2018); ARIZ. REV. STAT. ANN. §§ 13-1001, 13-1005 (2010); ARK. CODE ANN. §§ 5-3-201 to 5-3-204 (2013); CAL. PENAL CODE §§ 664, 665 (2010); COLO. REV. STAT. ANN. § 18-2-101 (2018); CONN. GEN. STAT. ANN. §§ 53a-49 to 53a-51 (2012); DEL. CODE ANN. tit. 11, §§ 531, 532, 541 (2015); FLA. STAT. ANN. § 777.04 (2017); GA. CODE ANN. §§ 16-4-1 to 16-4-6 (2019); HAW. REV. STAT. §§ 705-500 to 705-502, 705-530 to 705-531 (2016); IDAHO CODE ANN. §§ 18-305 to 18-307 (2016); ILL. COMP. STAT. ANN. ch. 720 §§ 5/8-4, 5/8-5 (2016); IND. CODE ANN. §§ 35-41-5-1, 35-41-5-3 (2009); KAN. STAT. ANN. § 21-5301 (2007); KY. REV. STAT. ANN. §§ 506.010, 506.020, 506.110 (2014); LA. STAT. ANN. § 14:27 (2016); ME. REV. STAT. ANN. tit. 17-A §§ 152, 152-a, 154 (2006); MD. CODE ANN., CRIM. LAW § 1-201 (2012); MASS. GEN. LAWS ANN. ch. 274, § 6 (2014); MICH. COMP. LAWS ANN. §§ 750.91, 750.92 (2004); MINN. STAT. ANN. § 609.17 (2018); MISS. CODE ANN. §§ 97-1-7, 97-1-9 (2015); MO. ANN. STAT. § 562.012 (2012); MONT. CODE ANN. § 45-4-103 (2017); NEB. REV. STAT. § 28-201 (2008); N.H. REV. STAT. ANN. § 629:1 (2016); N.J. STAT. ANN. §§ 2C:5-1, 2C:5-4 (2015); N.M. CODE ANN. § 30-28-1 (2004); N.Y. PENAL LAW §§ 110.00 to 110.10 (2009); N.C. GEN. STAT. § 14-2.5 (2017); N.D. CENT. CODE §§ 12.1-06-01, 12.1-06-05 (2012); OHIO REV. CODE ANN. § 2923.02 (2014); OKLA. STAT. ANN. tit. 21, §§ 41 to 44 (2018); ORE. REV. STAT. ANN. §§ 161.405 to 161.430, 161.485; 18 PA. CONS. STAT. §§ 901, 905, 906 (2015); R.I. GEN. LAWS ANN. § 12-17-14 (2002); S.C. CODE ANN. § 16-1-80 (2015); S.D. CODIFIED LAWS §§ 22-4-1, 22-4-2, 22-4-3 (2017); TENN. CODE ANN. §§ 39-12-101, 104 to 107 (2018); TEX. PENAL CODE ANN. §§ 15.01, 15.04, 15.05 (2019); UTAH CODE ANN. §§ 76-4-101, 76-4-102 (2017); VT. STAT. ANN. tit. 13, §§ 9, 10 (2018); VA. CODE ANN. §§ 18.2-25 to 18.2-28 (2014); WASH. REV. CODE ANN. § 9A.28.020 (2015); W. VA. CODE ANN. § 61-11-8 (2014); WIS. STAT. ANN. § 939.32 (2005); WYO. STAT. ANN. §§ 6-1-301, 6-1-304 (2019).

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[114] Here and throughout, the date in the citation refers to the publication date of the state code volume in which the cited law appears. It does not refer to the date of the law's enactment or to its currency.

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