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Attempt: An Overview of Federal Criminal Law

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Summary

It is not a crime to attempt to commit most federal offenses. Unlike state law, federal law has no generally applicable crime of attempt. Congress, however, has outlawed the attempt to commit a substantial number of federal crimes on an individual basis. In doing so, it has proscribed the attempt, set its punishment, and left to the federal courts the task of further developing the law in the area.

The courts have identified two elements in the crime of attempt: an intent to commit the underlying substantive offense and some substantial step towards that end. The point at which a step may be substantial is not easily discerned; but it seems that the more serious and reprehensible the substantive offense, the less substantial the step need be. Ordinarily, the federal courts accept neither impossibility nor abandonment as an effective defense to a charge of attempt. Attempt and the substantive offense carry the same penalties in most instances.

A defendant may not be convicted of both the substantive offense and the attempt to commit it. Commission of the substantive offense, however, is neither a prerequisite for, nor a defense against, an attempt conviction.

Whether a defendant may be guilty of an attempt to attempt to commit a federal offense is often a matter of statutory construction. Attempts to conspire and attempts to aid and abet generally present less perplexing questions.

This report is available in an abridged version as CRS Report R42002, *Attempt: An Abridged Overview of Federal Criminal Law*, by Charles Doyle, without the footnotes, attributions, citations to authority, or appendix found here.

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Introduction

Attempt is a crime 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] In fact, it is not a federal crime to attempt to commit most federal offenses. Here and there, Congress has made a separate crime of conduct that might otherwise have been considered attempt. Possession of counterfeiting equipment and solicitation of a bribe are two examples that come to mind.[3] More often, Congress has outlawed the attempt to commit a particular crime, such as attempted murder, or the attempt to commit one of a particular block of crimes, such as the attempt to violate the controlled substance laws.[4] In those instances, the statute simply outlaws attempt, sets the penalties, and implicitly delegates to the courts the task of developing the federal law of attempt on a case by case basis. Over the years, proposals have surfaced that would establish attempt as a federal crime of general application and in some instances would codify federal common law of attempt.[5] Thus far, however, Congress has preferred to expand the number of federal attempt offenses on a much more selective basis.[6]

Background

Attempt was not recognized as a crime of general application until the 19th century.[7] Before then, attempt had evolved as part of the common law development of a few other specific offenses. The vagaries of these individual threads frustrated early efforts to weave them into a cohesive body of law.[8] At mid-20th century, the Model Penal Code suggested a basic framework that has greatly influenced the development of both state and federal law.[9]

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[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, e.g., MD. CODE ANN. CRIM. LAW §1-102, *United States v. Kelly*, 989 F.2d 162, 163 (4th Cir. 1993); S.C. CODE ANN. §16-1-80, *State v. Reid*, 383 S.C. 285, 292-93, 679 S.E.2d 194, 197-98 (2009). Iowa appears to be the only state in which the general crime of attempt is purely a matter of common law, cf., *State v. Spies*, 672 N.W.2d 792, 797-98 (Iowa 2003); *Fryer v. State*, 325 N.W.2d 400, 406 (Iowa 1982).

[2] *United States v. Hite*, 769 F.3d 1154, 1162 (D.C.Cir. 2014).

[3] 18 U.S.C. 474 and 201(b), respectively.

[4] 18 U.S.C. 1113 and 21 U.S.C. 846, respectively.

[5] 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.).

[6] E.g., Sec. 2, P.L. 110-340, 122 Stat. 3735 (2008), 18 U.S.C. 2442 (attempting to recruit or use child soldiers); sec. 201, P.L. 110-177, 121 Stat. 2536 (2008), 18 U.S.C. 1521 (attempting to file a retaliatory false claim against a federal judge or law enforcement officer).

[7] Sayre, *Criminal Attempts*, 41 HARVARD LAW REVIEW 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").

[8] See, e.g., 1 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"); *Hicks v. Commonwealth*, 86 Va. 223, 226, 9 S.E. 1024, 1025 (1889)(quotation is unattributed in the original)("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'"), quoted in Wagner, *A Few Good Laws: Why Federal Criminal Law Needs a General Attempt Provision and How Military Law Can Provide One*, 78 UNIVERSITY OF CINCINNATI LAW REVIEW 1043, 1051 n.18 (2010).

[9] The American Law Institute began drafting the Model Penal Code in 1952. Its final draft was approved a decade later

The Model Penal Code grouped attempt with conspiracy and solicitation as "inchoate" crimes of general application.[10] 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.[11] 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.[12] The National Commission recommended a revision of title 18 of the United States Code that included a series of "offenses of general applicability"—attempt, facilitation, solicitation, conspiracy, and regulatory offenses.[13]

In spite of efforts that persisted for more than a decade, Congress never enacted the National Commission's recommended revision of title 18.[14] It did, however, continue to outlaw a growing 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.[15] 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

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in May, 1962. The Institute published revised Commentaries in 1985, American Law Institute, MODEL PENAL CODE AND COMMENTARIES, Pt. 1, i, ii (1985). See, generally, Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt. Solicitation, and Conspiracy*, 61COLUMBIA LAW REVIEW 571 (1961).

[10] "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," American Law Institute, MODEL PENAL CODE AND COMMENTARIES (Model Penal Code), Pt. 1, 293 (1985).

[11] For a discussion of some of the diversity of state law see, Cahill, *Attempt by Omission*, 94 IOWA LAW REVIEW. 1207 (2009).

[12] Public Law 89-801, 80 Stat. 1516 (1966), created the National Commission on Reform of Federal Criminal Laws.

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

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

[15] "There must be in the case of robbery ... something feloniously taken, for alto anciently ... an attempt to rob was reputed felony, *voluntas reputabatur pro facto* [(intent is to be regarded as the act)] yet the law is held otherwise at this day, and for a long time since the time of Edward III [1326-1377]." I HALE'S PLEAS OF THE CROWN 532 (1678) (internal citations omitted and transliteration and translation supplied), quoted in Sayre, *Criminal Attempts*, 41 HARVARD LAW REVIEW 821, 821 n.1 (1928). The ancient sentiment still lingers, however, see Garvey, *Are Attempts Like Treason?* 14 NEW CRIMINAL LAW REVIEW 173, (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").

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."[16] 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.[17]

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."[18] Rather than mention the type of conduct that might constitute a substantial step, the Commission defined 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."[19]

Most of the states follow the same path and define attempt as intent coupled to an overt act or some substantial step towards the completion of the substantive offense.[20] Only rarely does a state include examples of substantial step conduct.[21]

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.[22]

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[16] 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.* at §5.01(1)(a), (b).

[17] *Id.* at §5.01(2).

[18] Final Report §1001(1).

[19] *Id.*

[20] E.g., ALA. CODE § 13-4-2 ("(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 such offense"); ALASKA STAT. §11.31.100("(a) A person is guilty of an attempt to commit a crime if, with the 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("(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 offenses.").

[21] E.g., CONN. GEN. STAT. ANN. §53a-49(b). The states more often include a corroboration definition or requirement comparable to that of the Commission's recommendation, e.g., N.D. Cent. Code Ann. §12.1-06-01 [1] ("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)("Conduct does not constitute a substantial step under subdivision (a)(3), unless the person's entire course of action is corroborative of the intent to commit the offense"); WYO. STATS. ANN. §6-1-301(a)(i)("A 'substantial step' is conduct which is strongly corroborative of the firmness of the person's intention to complete the commission of the crime").

[22] *United States v. Resendez-Ponce*, 549 U.S. 102, 107 (2007); see also *United States v. Howard*, 766 F.3d 414, 419 (5th Cir. 2014); *United States v. Anderson*, 747 F.3d 51, 74 (2d Cir. 2014); *United States v. Muratovic*, 719 F.3d 809, 815 (7th Cir. 2013); *United States v. Goodwin*, 719 F.3d 857, 860 (8th Cir. 2013); *United States v. Gordon*, 710 F.3d 1124, 1150 (10th Cir. 2013); *United States v. Pavulak*, 700 F.3d 651, 669 (3d Cir. 2012); *United States v. Evans*, 699 F.3d 858, 867 (6th Cir. 2012); *United States v. Engle*, 676 F.3d 405, 419-20 (4th Cir. 2012); *United States v. Berk*, 652 F.3d 132, 140 (1st Cir. 2011); *United States v. Lee*, 603 F.3d 904, 913-14 (11th Cir. 2010); *United States v. Mincoff*, 574 F.3d 1186, 1195 (9th Cir. 2009); cf., *United States v. Hite*, 769 F.3d 1154, 1162 (D.C. Cir. 2014). The crime which is the

The courts seem to have encountered little difficulty in identifying the requisite intent standard. In fact, they rarely do more than note that the defendant must be shown to have intended to commit the underlying offenses.[23] What constitutes a substantial step is a little more difficult to discern.[24] It is said that a substantial step is more than mere preparation.[25] A substantial step is action strongly or unequivocally corroborative of the individual's intent to commit the underlying offense.[26] It is action which if uninterrupted will result in the commission of that offense,[27] although it need not be the penultimate act necessary for completion of the underlying offense.[28] Furthermore, the point at which preliminary action becomes a substantial step is fact specific; 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.[29]

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object of the attempt is alternatively referred as the underlying offense, the substantive offense, or the predicate offense.

[23] E.g., *United States v. Howard*, 766 F.3d at 419; *Pascual v. Holder*, 723 F.3d 156, 159 (2d Cir. 2013); *United States v. Goodwin*, 719 F.3d at 860; *United States v. Muratovic*, 719 F.3d at 815; *United States v. Gordon*, 710 F.3d at 1150; *United States v. Pires*, 642 F.3d 1, 8 (1st Cir. 2011); *United States v. Manzo*, 636 F.3d 56, 66 (3d Cir. 2011); *United States v. Mincoff*, 574 F.3d 1186, 1195 (9th Cir. 2009); in some instances, they will characterize this as "act[ing] with the culpability required to commit the underlying substantive offense," *United States v. Barlow*, 568 F.3d 215, 219 (5th Cir. 2009); see also *United States v. Tykarsky*, 446 F.3d 458, 469 (3d Cir. 2006)("acting with the kind of culpability otherwise required for commission of the crime").

[24] *United States v. Dobbs*, 629 F.3d 1199, 1208 (10th Cir. 2011)(here and hereafter internal citations and quotation marks hare been omitted)("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), quoting, Chief Judge Learned Hand in *United States v. Coplon*, 185 F.2d 629, 633 (2d Cir. 1950)("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").

[25] *United States v. Howard*, 766 F.3d 414, 419 (5th Cir. 2014); *United States v. Anderson*, 747 F.3d 51, 73-4 (2d Cir. 2014); *United States v. Muratovic*, 719 F.3d 809, 815 (7th Cir. 2013); *United States v. Goodwin*, 719 F.3d 857, 860 (8th Cir. 2013); *United States v. Gordon*, 710 F.3d 1124, 1150 (10th Cir. 2013).

[26] *United States v. Hite*, 769 F.3d 1154, 1164 (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"); *United States v. Aldawsari*, 740 F.3d 1015, 1020 (5th Cir. 2014); *United States v. Howard*, 766 F.3d 414, 419 (5th Cir. 2014); *United States v. Gordon*, 710 F.3d 1124, 1151 (10th Cir. 2013); *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").

[27] *United States v. Goodwin*, 719 F.3d 857, 860 (8th Cir. 2013); *United States v. Sanchez*, 615 F.3d 836, 844 (7th Cir. 2010)("[A] substantial step must be something that makes it reasonably clear that had the defendant not been interrupted or made a mistake he would have completed the crime"); *United States v. Muratovic*, 719 F.3d 809, 815 (7th Cir. 2013); *United States v. Gordon*, 710 F.3d 1124, 1150 (10th Cir. 2013).

[28] *United States v. Howard*, 766 F.3d at 419 ("A substantial step is more than mere preparation, but is less than the last act necessary before the crime is in fact committed); *United States v. Anderson*, 747 F.3d 51, 73-4 (2d Cir. 2014); *United States v. 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").

[29] *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"); *United States v. Farhane*, 634 F.3d at 147, 148 ("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 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

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.[30] The line between preparation and attempt is closest to preparation where the harm and the opprobrium associated with the predicate offense are greatest.

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,[31] or any element of the predicate offense for that matter. Recall that the only elements of the crime of attempt are intent to commit the predicate offense and a substantial step in that direction. Nevertheless, a court will sometimes demand proof of one or more of the elements of a predicate offense in order to avoid sweeping application of an 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 or substantive," apparently for that very reason.[32]

Defenses

Impossibility

Defendants charged with attempt have often offered one of two defenses—impossibility and abandonment. Rarely have they 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 impossibility is a defense to the charge of attempt—that is, if the competed offense would not be a crime, neither is a prosecution for attempt permitted."[33]

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."[34]

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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"); *United States v. Sanchez*, 615 F.3d at 844.

[30] Holmes, THE COMMON LAW, 68 (1938 ed.)(emphasis added)("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*").

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

[32] *United States v. Manzo*, 636 F.3d at 58. 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. It does not prohibit a private person who is a candidate from attempting ... to use a future public office to extort money…. 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.'" Id. at 68-9.

[33] *United States v. Ballinger*, 395 F.3d 1218, 1239 n.8 (11th Cir. 2005); see also *United States v. Tykarsky*, 446 F.3d at 465. For a criticism of state law in the area see, Hasnas, *Once More unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible*, 54 HASTINGS LAW JOURNAL 1 (2002).

[34] *United States v. Rehak*, 589 F.3d 965, 971 (8th Cir. 2009).

Since the completed offense would be a crime if circumstances were as the defendant believed them to be, prosecution for attempt is traditionally permitted.[35]

Unfortunately, as the courts have observed, "the distinction between legal impossibility and factual impossibility [is] elusive."[36] Moreover, "the distinction ... is largely a matter of semantics, for every case of legal impossibility can reasonably be characterized as a factual impossibility."[37] Thus, shooting a stuffed deer when intending to shoot a deer out of season is offered as an example of legal impossibility. Yet, shooting into the pillows of an empty bed when intending to kill its presumed occupant is considered an example of factual impossibility.[38]

The Model Penal Code avoided the problem by defining 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."[39] 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."[40] Several states have also specifically refused to recognize an impossibility defense of any kind.[41]

The federal courts have been a bit more cautious. They have sometimes conceded the possible vitality of legal impossibility as a defense,[42] but generally have judged the cases before them to involve no more than unavailing factual impossibility.[43] In a few instances, they have found it

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[35] *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"); *United States v. Cote*, 504 F.3d 682, 687 (7th Cir. 2007)("This view is merely an application of the well-established principle that factual impossibility or mistake of act is not a defense to an attempt charge ... Futile attempts because of factual impossibility are attempts still the same. For an attempt conviction, the Government was required to prove [only] that Mr. Cote acted with the specific intent to commit the underlying crime and that he took a substantial step towards completion of the offense"); 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 Fifth, Ninth, and Eleventh Circuits).

[36] *United States v. Manzo*, 636 F.3d at 67.

[37] *United States v. Tykarsky*, 446 F.3d at 465-66.

[38] *Id.* at 465.

[39] Model Penal Code §5.01(1)(a).

[40] Final Report §1001(1).

[41] E.g., COLO. REV. STAT. ANN. §18-2-101(1)("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 §16-4-4; ILL. COMP. STAT. ANN. ch. 720 §5/8-4(b) ("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").

[42] *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"); *United States v. Manzo*, 636 F.3d at 67 n.10 ("[L]egal impossibility can sometimes be a defense to a crime"); *United States v. Ballinger*, 395 F.3d at 1238 ("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 *United States v. Hsu*, 155 F.3d 189 (3d Cir. 1998)] 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").

[43] *United States v. Mehanna*, 735 F.3d at 53 (emphasis of the court)("[A]s we previously have explained, factual impossibility is not a defense to liability for inchoate offenses such as conspiracy or *attempt*"); *United States v. Engle*, 676 F.3d 405, 420 (4th Cir. 2012); *United States v. Bauer*, 626 F.3d 1004, 1007 (8th Cir. 2010)("Bauer's first contention is one of factual impossibility…. Bauer intended to receive child pornography, but failed only because of circumstances unknown to him [i.e., his solicitation was addressed to an undercover agent rather than a 14-year old child"); *United States v. Rothensberg*, 610 F.3d 621, 626 (11th Cir. 2010)("[T]o prove an attempted exploitation offense under 18

unnecessary to enter the quagmire, and concluded instead that Congress intended to eliminate legal impossibility with respect to attempts to commit a particular crime.[44]

Abandonment

The Model Penal Code recognized an abandonment or renunciation defense.[45] 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.[46] The revised federal criminal code recommended by the National Commission contained similar provisions.[47] Some states recognize an abandonment or renunciation defense;[48] the federal courts do not.

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

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U.S.C. §2422(b), the Government does not have to prove the existence or identity of a specific minor victim; a fictitious minor will suffice so long as the defendant understood and believed that a minor was involved"); *United States v. Morris*, 549 F.3d 548, 550 (7th Cir. 2008)("[T]he fact that a defendant is mistaken in thinking that the person he is trying to entice is underage is not a defense to a charge of attempted illegal sexual contact with a minor"); *United States v. Rankin*, 487 F.3d 229, 231 (5th Cir. 2007)(The fact that the defendant delivered a bomb to an undercover agent rather than a murder-intending spouse did not preclude—on factual impossibility grounds—application of the attempt sentencing guideline); *United States v. Sims*, 428 F.3d 945, 959-60 (10th Cir. 2005)("[A]s to his Count One conviction for attempting to entice a minor, factual impossibility is generally not a defense to criminal attempt…. We agree with our sister circuits ... it is not a defense to an offense involving enticement and exploitation of minors that the defendant falsely believed a minor to be involved").

[44] *United States v. Tykarsky*, 446 F.3d 458, 466 (3d Cir. 2006)("We, however, find it unnecessary to resolve this thorny semantical questions 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)"); *United States v. Yang*, 281 F.3d 534, (6th Cir. 2002)("[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 EEA…. 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").

[45] Model Penal Code §5.01(4)("When an 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.").

[46] 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").

[47] Final Report §1005(3)(a), (c).

[48] E.g., MINN. STAT. ANN. §609.17[subd.3]("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)("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]("(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").

withdrawal defense in the case of conspiracy, the other principal inchoate offense,[49] they have declined to recognize a comparable defense to a charge of attempt.[50]

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. However, both set the penalties for 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.[51] 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;[52] others set the penalty at the same level as the crime attempted, again with exceptions for particular offenses in some states.[53]

Most federal attempt crimes carry the same penalties as the substantive offense.[54] The Sentencing Guidelines, which greatly influence federal sentencing beneath the maximum penalties set by statute, reflect the equivalent sentencing prospective.[55] Except for certain terrorism, drug

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[49] *United States v. Williams*, 605 F.3d 556, 569 (8th Cir. 2010); *United States v. Gonzalez*, 596 F.3d 1228, 1234 (10th Cir. 2010); *United States v. Eppolito*, 543 F.3d 25, 29 (2d Cir. 2008).

[50] *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); see also *United States v. Mehanna*, 735 F.3d 32, 57 (1st Cir. 2013).

[51] 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.

[52] E.g., ALA. CODE §13A-4-2(d)("An attempt is a: (1) Class A felony if the offense attempted is murder. (2) Class A felony if the offense attempted is a Class A felony. (3) Class C felony if the offense attempted is a Class B felony. (4) Class A misdemeanor if the offense attempted is a Class C felony. (5) Class B misdemeanor if the offense attempted is a Class A misdemeanor. (6) Class C misdemeanor if the offense attempted is a Class B misdemeanor. (7) Violation if the offense attempted is a Class C misdemeanor"); see also ALASKA STAT. §11.31.100(d); ARIZ. REV. STAT. ANN. §13-1001[C]; CALF. PENAL CODE §664 ("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, the person guilty of the attempt shall be punished by imprisonment in the state prison 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.").

[53] E.g., DEL. CODE ANN. tit.11 §531("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 ANN. §35-41-5-1(a)("An attempt to commit a crime is a felony or misdemeanor of the same class as the crime attempted. However, at attempt to commit murder is a Class A felony"); N.H. REV. STAT. ANN. §629.1[IV]("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").

[54] E.g., 21 U.S.C. 846(attempted drug offenses); 18 U.S.C. 32(a) (attempted destruction of aircraft or their facilities), 1594(a) (attempts to commit certain human trafficking offenses). In many instances, attempt is interwoven with the elements of the underlying offense, e.g., 18 U.S.C. 984(f)(1)(destruction of U.S. property)("Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or explosives ... shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both"), 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").

[55] U.S.S.G. §2X1.1(a). 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).

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.[56]

Relation to Other Offenses

The relation of attempt to the predicate offense is another of the interesting features of the law of attempt. It raises those questions which the Model Penal Code and the National Commission sought to address. May a defendant be charged with attempt even if he has not completed the underlying offense? May a defendant be charged with attempt even if he has also committed the underlying offense? May a defendant be convicted for both attempt and commission of the underlying offense? May a defendant be charged with attempting to attempt an offense? May a defendant be charged with conspiracy to attempt or attempt to conspire? May a defendant be charged with aiding and abetting an attempt or with attempting to aid and abet?

Relation to the Predicate Offense

A defendant need not complete the predicate offense to be guilty of attempt.[57] 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.[58] This is no longer the case in federal court—if it ever was. In federal law, "[n]either common sense nor precedent supports success as a defense to a charge of attempt."[59]

The Double Jeopardy Clause ordinarily precludes conviction for both the substantive offense and the attempt to commit it. The clause prohibits both dual prosecutions and dual punishment for the

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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 factors, or failing to adequately explain the chosen sentence—including an explanation of any deviation from the Guidelines range," *Gall v. United States*, 552 U.S. at 51. The Guidelines and subsection 3553(a) factors weigh heavily in the totality of the circumstances assessment of whether a particular sentence is substantively reasonable, *Id.*

[56] U.S.S.G. §2X1.1(b)(" [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).

[57] *United States v. Williams*, 698 F.3d 374, 382 (7th Cir. 2012); *United States v. Johnson*, 639 F.3d 433, 439 (8th Cir. 2011)("A defendant's success in attaining his criminal objective is not necessary for an attempt conviction"); *United States v. Iribe*, 564 F.3d 1155, 1161 (9th Cir. 2009); *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).

[58] Sayre, *Criminal Attempts*, 41 HARVARD LAW REVIEW 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. 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. 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 ("Any 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. REV. STAT. ANN. §14:27[C]; MONT. CODE ANN. §45-4-103(5)("Proof of the completed offense does not bar conviction for the attempt").

[59] *United States v. Malasanos*, 472 F.2d 642, 643 (7the Cir. 1973); *United States v. York*, 578 F.2d 1036, 1040 (5th Cir. 1978) ("Proof that a crime had been competed does not absolve the defendants of the attempt"); *United States v. Iribe*, 564 F.3d 1155, 1161 (9th Cir. 2009).

same offense.[60] Punishment for both a principal and a lesser included offense constitutes such dual punishment,[61] and attempt ordinarily constitutes a lesser included offense of the substantive crime.[62]

Instances where the federal law literally appears to create 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 the other statutes already proscribe 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 United States Code "shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt."[63] Within chapter 63 are sections that make it a crime to attempt to commit bank fraud, health care fraud, and securities fraud.[64] There may be some dispute over whether provisions like those of Section 1349 are intended to outlaw attempts to commit an attempt or simply to reiterate a determination to punish equally the substantive offenses and attempts to commit them.[65]

Relation to Other General Provisions

Conspiracy

The Model Penal Code and National Commission resolved attempt to attempt and conspiracy to attempt questions by banning dual application. Crimes of general application would not have applied to other crimes of general application.[66] A few states have comparable provisions.[67] The federal code does not. The attempting to conspire or conspiring to attempt questions do not offer as many issues of unsettled interpretation as the attempt to attempt questions, for several reasons. First, the courts have had more occasion to address them. For instance, it is already clearly established that a defendant may be simultaneously prosecuted for conspiracy to commit and for

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[60] *United States v. Dixon*, 509 U.S. 688, 696 (1993); *United States v. Pires*, 642 F.3d 1, 10 (1st Cir. 2011); *United States v. Basciano*, 599 F.3d 184, 196 (2d Cir. 2010).

[61] *United States v. Mahdi*, 598 F.3d 883, 888 (D.C.Cir. 2010); *United States v. Robertson*, 606 F.3d 943, 950-51 (8th Cir. 2010).

[62] *United States v. Pumpkin Seed*, 575 F.3d 552, 562 (8th Cir. 2009); *United States v. D'Amico*, 496 F.3d 95, 99-100 (1st Cir. 2007); *United States v. Mitchell*, 484 F.3d 762, 773 (5th Cir. 2007).

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

[64] 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 (health care fraud) and 18 U.S.C. 1348 (securities and commodities fraud).

[65] 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, simply 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, Robbins, *Double Inchoate Crimes*, 26 HARVARD JOURNAL ON LEGISLATION 1 (1989).

[66] Final Report, §1005(1)("An offense defined in sections 1001 to 1004 [(criminal attempt, facilitation, solicitation, and conspiracy)] shall not apply to another offense defined in sections 1001 to 1004"); Model Penal Code §5.04(3)("A person may not be convicted of more than one offense defined by this Article for conduct designed to commit or to culminate in the commission of the same crime").

[67] E.g., ME. REV. STAT. ANN. tit. 17-A §154[1]("It shall not be a crime to conspire to commit, or to attempt, or solicit, any crime set forth in this chapter [relating to the crimes of general application: attempt, conspiracy, and solicitation]"); N.D. CENT. CODE §12.1-06-05; ORE. REV. STAT. ANN. §161.485.

attempt to commit the same substantive offense.[68] Second, as a particular matter, conspiracies to attempt a particular crime are relatively uncommon; most individuals conspire to accomplish, not to attempt.

Third, in a sense, attempting to conspire is already a separate crime, or alternatively, is a separate basis for criminal liability. Solicitation is essentially an invitation to conspire, and solicitation to commit a crime of violence is a separate federal offense.[69] Moreover, an attempt that takes the form of counseling, commanding, inducing, procuring or aiding and abetting another to commit a federal crime is already a separate basis for criminal liability.[70]

Fourth, a component of the general conspiracy statute allows simultaneous prosecution of conspiracy and a substantive offense without having to addressing the conspire to attempt quandary. The conspiracy statute outlaws two kinds of conspiracies: conspiracy to violate a federal criminal statute and conspiracy to defraud the United States.[71] Conspiracy to defraud the United States is a separate crime, one that need not otherwise involve the violation of a federal criminal statute.[72] Consequently, when attempt or words of attempt appear as elements in a substantive criminal provision, conspiracy to attempt issues can be avoided by recourse to a conspiracy to defraud charge. For example, the principal federal bribery statute outlaws attempted public corruption.[73] The offense occurs though no tainted official act has yet been performed or foregone.[74] It is enough that the official has sought or been offered a bribe with the intent of corrupting the performance of his duties.[75] Bribery conspiracy charges appear generally to have been prosecuted, along with bribery, as conspiracy to defraud rather than conspiracy to violate the bribery statute.[76]

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[68] *United States v. Iribe*, 564 F.3d 1155, 1160-161 (9th Cir. 2009); see also *United States v. Muratovic*, 719 F.3d 809, 811 (7th Cir. 2013) (affirming convictions for attempting to violate and conspiracy to violate the Hobbs Act); *United States v. Anderson*, 747 F.3d 51, 73-4 (2d Cir. 2014)(finding evidence sufficient to support convictions for both conspiracy and attempt to violate the Controlled Substances Act).

[69] 18 U.S.C. 373.

[70] 18 U.S.C. 2 ("(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal").

[71] 18 U.S.C. 371.

[72] *United States v. Rodman*, 776 F.3d 638, 642 (9th Cir. 2015)("We have construed the language in 18 U.S.C. §371 to include obstructing the operation of any government agency by any deceit, craft or trickery, or at least by means that are dishonest. We have also clarified that a conspiracy need not deprive the government of property, involve any detrimental reliance by the government, or involve independently illegal goals or means. Instead, the elements of a conspiracy under 18 U.S.C. §371 are (1) defendant entered into an agreement (2) to obstruct a lawful function of the government (3) by deceitful or dishonest means and (4) at least one overt act in furtherance of the conspiracy"); *United States v. Mendez*, 528 F.3d 811, 815 (11th Cir. 2008); *United States v. Douglas*, 398 F.3d 407, 412 (6th Cir. 2005); *United States v. Jackson*, 33 F.3d 866, 871-72 (7th Cir. 1994).

[73] 18 U.S.C. 201(b).

[74] *United States v. Peleti*, 576 F.3d 377, 382-83 (7th Cir. 2009); *United States v. Valle*, 538 F.3d 341, 346-47 (5th Cir. 2008); *United States v. Quinn*, 359 F.3d 666, 673 (4th Cir. 2004).

[75] 18 U.S.C. 201(b)("Whoever—(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official ... with intent—(A) to influence any official act; or ... (2) being a public official ... directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for: (A) being influenced in the performance of any official act ... shall be fined under this title ... or imprisoned for not more than fifteen years, or both").

[76] See, e.g., *United States v. Turner*, 548 F.3d 1094, 1096 (D.C.Cir. 2008); *United States v. Wantuck*, 525 F.3d 505, 510-11 (7th Cir. 2008); *United States v. Coker*, 514 F.3d 562, 566 (6th Cir. 2008).

Aiding and Abetting

Unlike attempt, aiding and abetting is not a separate offense; it is an alternative basis for liability for the substantive offense. Anyone who aids, abets, counsels, commands, induces, or procures the commission of a federal crime by another is as guilty as if he committed it himself.[77] Aiding and abetting requires proof of intentional assistance in the commission of a crime by another.[78] When attempt is a federal crime, the cases suggest that a defendant may be punished for aiding and abetting the attempt and that a defendant may be punished by attempting to aid and abet the substantive offense.[79]

[77] 18 U.S.C. 2(a).

[78] *Rosemond v. United States*, 134 S.Ct. 1240, 1245 (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. Sosa*, 777 F.3d 1279, 1292 (11th Cir. 2015)("Thus, to convict under a theory of aiding and abetting, the government must prove that (1) someone committed the substantive offense; (2) the defendant contributed to and furthered the offense; and (3) the defendant intended to aid in its commission"); *United States v. Thum*, 749 F.3d 1143, 1148-149(9th Cir. 2014)("In this circuit, the elements necessary for an aiding and abetting conviction are: (1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that some committed the underlying substantive offense").

[79] *United States v. Villarreal*, 707 F.3d 942, 959 (8th Cir. 2013)("A jury may convict a defendant ... under any one of four theories: ... or (4) that the defendant aided and abetted the commission of attempted sexual abuse"); *United States v. Bristol-Martir*, 570 F.3d 29, 45 (1st Cir. 2009)(finding evidence sufficient to conviction 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); *United States v. Samuels*, 308 F.3d 662, 668 (6th Cir. 2002)(upholding a conviction for aiding and abetting an attempt to possess cocaine with the intent to distribute); *United States v. Washington*, 106 F.3d 983, 1003 (D.C.Cir. 1997)(same).

Appendix. State General Attempt Statutes (Citations)

ALA. CODE §§13A-4-2, 13A-4-5; ALASKA STAT. §§11.31.100, 11.31.140, 11.31.150; ARIZ. REV. STAT. ANN. §§13-1001, 13-1005; ARK. CODE ANN. §§5-3-201 to 5-3-204; CAL. PENAL CODE §664; COLO. REV. STAT. ANN. §18-2-101; CONN. GEN. STAT. ANN. §53a-49; DEL. CODE ANN. tit.11 §§531, 532, 541; FLA. STAT. ANN. §777.04; GA. CODE §§16-4-1 to 16-4-6; HAWAII REV. STAT. §§705-500 to 705-502, 705-530 to 705-531; IDAHO CODE §§18-305 to 18-307; ILL. COMP. STAT. ANN. ch. 720 §§5/8-4, 5/8-5; IND. CODE ANN. §§35-41-5-1, 35-41-5-3; KAN. STAT. ANN. §21-5301; KY. REV. STAT. ANN. §§506.010, 506.020, 506.110; LA. REV. STAT. ANN. §14:27; ME. REV. STAT. ANN. tit. 17-A §§152, 154; Md. Code Ann. Crim. Law §1-201; MASS. GEN. LAWS ANN. ch. 274 §6; MICH. COMP. LAWS ANN. §750.92; MINN. STAT. ANN. §609.17; MISS. CODE ANN. §§97-1-7, 97-1-9; MO. ANN. STAT. §564.011; MONT. CODE ANN. §45-4-103; NEB. REV. STAT. §28-201; NEV. REV. STAT. §193.330; N.H. REV. STAT. ANN. §629.1; N.J. STAT. ANN. §§2C:5-1, 2C:5-4; N.M. CODE ANN. §30-28-1; N.Y. PENAL LAW §§110.00 to 110.10, 40.10; N.C. GEN. STAT. §14-2.5; N.D. CENT. CODE §§12.1-06-01, 12.1-06-05; OHIO REV. CODE ANN. §2923.02; OKLA. STAT. ANN. tit.21§§41 to 44; ORE. REV. STAT. ANN. §§161.405 to 161.430; PA. STAT. ANN. tit. 18, §§901, 905, 906; R.I. GEN. LAWS ANN. §12-17-14; S.C. Code Ann. §16-1-80; S.D. CODIFIED LAWS §§22-4-1, 22-4-2; TENN. CODE ANN. §§39-12-101, 104 to 109; TEX. PENAL CODE ANN. §§15.01, 15.04, 15.05; UTAH CODE ANN. §§76-4-101, 76-4-102; VT. STAT. ANN. tit. 13 §9; VA. CODE §§18.2-25 to 18.2-28; WASH. REV. CODE ANN. §9A.28.020; W.VA. CODE ANN. §61-11-8; WIS. STAT. ANN. §939.32; WYO. STAT. ANN. §§6-1-301, 6-1-304.

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