CRIME AND EXCESSIVE PUNISHMENT:[1] HOW THE COURTS ACCELERATE THE RACE TO RECIDIVISM

by
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Congress wants citizens to believe that it is very tough on crime. In federal statutes, as well as in the United States Sentencing Guidelines, authorities have imposed heightened penalties on criminals whose history demonstrates violence, a propensity for aggravated conduct involving guns and drugs, or a repetitive disregard for the law.

Who is an armed career criminal? What is an aggravated felony? Who is a career offender? Congress cannot be bothered with the details, but it assures an anxious public that it will lock up all these bad guys and throw away the key.

Words matter in the law. By failing to define recidivist terms, Congress has allowed the courts to finish the job, badly. The Supreme Court tried to remedy congressional sloppiness by creating a "categorical approach" for analyzing past predicate crimes in Taylor v. United States*. However, the Court's legislative drafting has subjected countless defendants to a constitutionally infirm process by forcing courts to wade into the details of ancient convictions.*

In the years since Taylor*, the federal courts have adopted varying approaches when applying the categorical approach in considering past crimes. One contested category of qualifying offenses involves inchoate crimes and secondary*

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[1] *See* FYODOR DOSTOYEVSKY, CRIME AND PUNISHMENT (Buccaneer Books, Inc. 1985) (1866).

liability in a situation wherein a defendant took steps toward (by, e.g., aiding, attempting, or conspiring) an otherwise qualifying felony.

No legal scholar has yet written about the Taylor *secondary and inchoate liability landmine in the context of recidivist regimes. This Article undertakes that analysis to consider how secondary and inchoate liability change the meaning of crimes that directly impact who will be convicted and sentenced under federal recidivism statutes and sentencing protocols.*

INTRODUCTION

A. Taylor *Invents a Problematic Framework*

Congress created a problem when it enacted punitive legislation, such as the Armed Career Criminal Act (ACCA),[2] punishing harshly "armed career criminals" who have committed previous serious crimes such as a "violent felony," without defining precisely who is in fact an armed career criminal or what is actually a violent felony. The Supreme Court then stepped in to finish the job of defining these key terms. But the Court transformed Congress's blank space into a hopelessly complicated conundrum by creating a new legal framework to determine who and what are impacted by the ACCA. Confusion is often the result when the courts try to do the work the people elected legislators to decide in their stead.

In *Taylor v. United States*, the Court urged lower courts to find a "generic" version of a qualifying crime and compare that to the legislature's definition of the same crime to decide what is a violent felony.[3] The Court stated that the legislative

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[2] Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat. 2185 (codified as amended at 18 U.S.C. § 924(e)).

[3] Taylor v. United States, 495 U.S. 575, 577–78 (1990). *Taylor* arose out of a challenge to the ACCA, a statute Congress enacted to target recidivist violent criminals. The ACCA is "harsh medicine," converting the otherwise applicable statutory maximum of ten years into a mandatory minimum term of 15 years and a maximum of life for armed felons previously convicted of three "violent felony" offenses. Rachel Kunjummen Paulose, *Power to the People: Why the Armed Career Criminal Act Is Unconstitutional*, 9 VA. J. CRIM. L. 1, 68 (2021).

The process of counting to three prior felonies has spawned endless litigation. One reason for the confusion is that Congress did not specifically define "violent felony," leaving it to the federal courts to sort out qualifying offenses. A raft of both prior state and federal offenses qualify, meaning that the federal courts' sometimes conflicting interpretations of qualifying offenses has

definition must track the generic definition in order for the conviction to be considered a predicate crime. *Taylor* is important because the United States' congressional fixation with enacting mandatory minimum statutes has created draconian consequences for those accused of repetitive criminal conduct in the federal system.

Should the courts examine both the theory of liability as well as the underlying felony to see if both together still constitute a qualifying predicate under the ACCA when employing the *Taylor* analysis? Does an overly broad state definition of secondary or inchoate liability[4] have the potential to knock out of qualifying status a particular crime? Must the government prove that both the secondary or inchoate liability statute and the underlying felony statute qualify as bases for ACCA enhancements?

In this Article, I argue the answer to all three questions is "yes." Secondary and inchoate liability might broaden a crime such that it no longer fits the definition of a "violent" felony under the ACCA. Thus, a court must examine both the underlying crime as well as the theory of secondary or inchoate liability under a two-part application of the *Taylor* framework, an inquiry I refer to herein as the binary factor analysis.[5] Of wider systemic concern, the *Taylor* analysis has now infected the interpretation of a raft of statutes beyond the ACCA, corrupting the interpretation of everything from immigration status to sentencing factors.

Secondary and inchoate liability change the definition of a crime and implicate both Sixth Amendment jury trial and Fourteenth Amendment due process constitutional concerns. Under the Sixth Amendment, a defendant may not be convicted unless the government proves every element of the crime, including the many recidivist statutes that impose a statutory minimum sentence. Under the Due Process Clause, a statute may be void for vagueness. Given the numbers of defendants sen-

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been the subject of heated debate in the decades since President Ronald W. Reagan signed the ACCA.

[4] I focus on inchoate and secondary liability crimes in this Article, primarily conspiracy, attempt, and aiding and abetting. Although experts disagree on where to draw lines, case law and secondary sources acknowledge these three theories as inchoate crimes and secondary liability crimes. *See* Borden v. United States, 141 S. Ct. 1817, 1823–24 n.3 (2021) ("The most typical examples are inchoate crimes (conspiracy or attempts) and accessory liability (aiding and abetting)."); *see also* United States v. Seals, 130 F.3d 451, 463 (D.C. Cir. 1997) (inchoate offenses include attempt, aiding and abetting); United States v. Dominguez, 992 F.2d 678, 682 (7th Cir. 1993) (aiding and abetting is inchoate crime); MODEL PENAL CODE § 5.01 (AM. L. INST. 1962) (attempt is inchoate crime); *id.* § 5.03 (conspiracy is inchoate crime); 24 C.J.S. *Criminal Procedure and Rights of Accused* § 2459 (2021) (aiding and abetting is inchoate crime).

[5] I have termed this the binary factor analysis for ease of reference. The binary factor analysis asserts that all secondary liability convictions require two *Taylor* analyses: (1) to test the underlying conviction against the generic definition; (2) to test the secondary or inchoate liability theory used against the generic definition.

tenced to virtual lifetime sentences under vague recidivist statutes employing definitions that no one actually understands by any consistent measure,[6] this is a question that may no longer be ignored.[7] The constitutional dimensions of the crisis that secondary and inchoate liability now present to the many recidivist statutes, criminal enhancements, and sentencing schemes implicated under the *Taylor* categorical approach are immense.[8]

I preface my analysis by introducing you to a former client of mine who is now serving what is in effect a life sentence due to congressional inaction on secondary and inchoate liability. I describe the impact of secondary and inchoate liability on one person's life to provide context to the actual outsized impact of *Taylor*: at once obscure and simultaneously routine.

In Part I, I examine the Framers' views of secondary and inchoate liability to unearth the ways in which the doctrine has grown and far outpaced our original understanding. An inchoate liability doctrine such as "attempt" does not necessarily mean what it did at the founding, raising alarm bells for constitutional interpretation.

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[6] *See* Johnson v. United States, 576 U.S. 591, 605 (2015) (describing vague clause of ACCA as "a 'judicial morass that defies systemic solution,' 'a black hole of confusion and uncertainty' that frustrates any effort to impart 'some sense of order and direction.'").

[7] More generally of course, the manifold flaws of the ACCA have generated relentless scholarly criticism. *See, e.g.*, Paulose, *supra* note 3; Sheldon A. Evans, *Categorical Nonuniformity*, 120 COLUM. L. REV. 1771, 1778–79 (2020); Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200 (2019); Nila Bala, *Judicial Fact-Finding in the Wake of* Alleyne, 39 N.Y.U. REV. L. & SOC. CHANGE 1, 8 (2015); Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson's *Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55, 58 (2015); Ethan Davis, Comment, *The Sentence Imposed Versus the Statutory Maximum: Repairing the Armed Career Criminal Act*, 118 YALE L.J. 369, 373–74 (2008); Colleen P. Murphy, *The Use of Prior Convictions After* Apprendi, 37 U.C. DAVIS L. REV. 973, 1013–14 (2004).

[8] The Supreme Court has granted certiorari at least 25 times in the last three decades to resolve cases from all over the country refining the meaning of the categorical approach. *See* United States v. Wooden, 142 S. Ct. 1063 (2022); Pereida v. Wilkinson, 141 S. Ct. 754 (2021); *Borden*, 141 S. Ct 1817; Shular v. United States, 140 S. Ct. 779 (2020); United States v. Davis, 139 S. Ct. 2319 (2019); Quarles v. United States, 139 S. Ct. 1872 (2019); Stokeling v. United States, 139 S. Ct. 544 (2019); United States v. Stitt, 139 S. Ct. 399 (2018); Sessions v. Dimaya, 138 S. Ct. 1204 (2018); Voisine v. United States, 136 S. Ct. 2272 (2016); Mathis v. United States, 136 S. Ct. 2243 (2016); Welch v. United States, 136 S. Ct. 1257 (2016); Johnson v. United States, 559 U.S. 133 (2010); United States v. Castleman, 572 U.S. 157 (2014); Descamps v. United States, 570 U.S. 254 (2013); Sykes v. United States, 564 U.S. 1 (2011); *Johnson*, 576 U.S. 591; Nijhawan v. Holder, 557 U.S. 29 (2009); Chambers v. United States, 555 U.S. 122 (2009); Begay v. United States, 553 U.S. 137 (2008); James v. United States, 550 U.S. 192 (2007); Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007); Shepard v. United States, 544 U.S. 13 (2005); Leocal v. Ashcroft, 543 U.S. 1 (2004); *Taylor*, 495 U.S. 575. Given the unremitting track record of the *Taylor* categorical approach, it is highly likely the subject of this Article will eventually wind its way to the U.S. Supreme Court.

In Part II, I describe the *Taylor* framework: how it arose, what it means, and its impact today. I then review one of the many federal laws impacted by the *Taylor* framework, the complicated ACCA, under which hundreds of people annually are sentenced to a mandatory minimum term of 15 years.[9]

The Supreme Court has never specifically ruled that secondary and inchoate liability render a particular crime overly broad under its *Taylor* framework, but the Court has ruled that secondary and inchoate liability *must* be dissected under *Taylor*. I examine its only case on the topic, *Gonzales v. Duenas-Alvarez*,[10] in Part III. Despite the Court's direction in *Duenas-Alvarez*, the lower courts have split on how to apply *Taylor* to secondary and inchoate liability crimes. I describe this split in the second half of Part III.

In Part IV, I describe the ways in which *Taylor* is difficult to apply to secondary and inchoate liability crimes because state definitions of applicable crimes vary in significant ways. I undertake this analysis by conducting consecutive, 50-state surveys of the classic secondary and inchoate liability theories: aiding and abetting, conspiracy, and attempt. I examine the generic definitions of these theories, the state definitions, and at least one problematic state definition under a flawed one-part, rather than needed two-part, *Taylor* analysis (i.e., under the binary factor analysis).

In Part V, I describe the unsuccessful court challenges attempting to reclaim a proper understanding of *Taylor*, flawed as it is, as well as the effect of *Taylor* on other statutes with undefined terms leading to recidivist liability.

In Part VI, I describe potential criticisms to the arguments I advance in this Article. I answer these potential problems in ways I hope best respond to the myriad of problems *Taylor* has created.

I conclude that Congress must act to remedy its failure.

B. Secondary and Inchoate Liability Create Constitutional Catastrophes for Real People

In 2016, my client John Kelsey Gammell pled guilty in federal court to a white collar computer fraud crime and gun possession crimes.[11] After decades of living on

[9] There is some quantitative evidence that the congressional desire to sentence defendants to virtual lifetime sentences under the ACCA is an efficacious strategy, given the annually decreasing numbers of people eligible for the ACCA as more and more violent criminals are jailed. *See* U.S. SENT'G COMM'N, FEDERAL ARMED CAREER CRIMINALS: PREVALENCE, PATTERNS, AND PATHWAYS 7 (2021) ("During the ten-year study period, the number of armed career criminals decreased by almost half, from 590 in fiscal year 2010 to 312 in fiscal year 2019.").

[10] *Duenas-Alvarez*, 549 U.S. 183.

[11] Plea Agreement and Sentencing Stipulations, United States v. Gammell, No. 17-CR-00134, 2018 WL 2727547 (D. Minn. May 23, 2018), ECF No. 85 (pleading guilty to 18 U.S.C. § 1030(a)(5)(A), (b), (c)(4)(A)(i)(I), (c)(4)(A)(i)(VI), and (c)(4)(B)). I no longer represent Mr.

the straight and narrow, Mr. Gammell's past came back to haunt him[12] when the government announced it would seek to enhance his sentence under the ACCA[13] on the basis of three crimes he committed when he was a teenager.[14] As a nonconformist youth, Mr. Gammell had twice committed aggravated robbery and once aided and abetted second-degree burglary in Minnesota.[15]

Absent the ACCA, Mr. Gammell faced a statutory *maximum* sentence of ten years for his offense.[16] The ACCA created a new floor that imposed a 15-year mandatory *minimum* sentence.[17] The ACCA also eliminated the ceiling and imposed a statutory maximum sentence of life imprisonment.[18] At 55, Mr. Gammell faced the equivalent of life imprisonment given the ACCA's dramatic impact on his sentence.[19]

Over Mr. Gammell's objection, the government asserted the following three state felony convictions, committed decades ago when Mr. Gammell was still a teenager, constituted crimes of violence under the ACCA:[20]

Gammell, who has consented to the publication of this Article featuring our work together. This Article contains no privileged information.

[12] In June 2017, a grand jury indicted Mr. Gammell for a violation of the Computer Fraud and Abuse Act (CFAA). *See* Indictment at 1, United States v. Gammell, No. 17-CR-00134, 2018 WL 2727547 (D. Minn. May 23, 2018), ECF No. 3. Two superseding indictments followed after Mr. Gammell filed motions to dismiss the indictment and suppress evidence, challenging the constitutionality of the government's case. *See* Superseding Indictment, United States v. Gammell, No. 17-CR-00134, 2018 WL 2727547 (D. Minn. May 23, 2018), ECF No. 46; Second Superseding Indictment, United States v. Gammell, No. 17-CR-00134, 2018 WL 2727547 (D. Minn. May 23, 2018), ECF No. 73.

[13] On January 17, 2018, Mr. Gammell pled guilty as charged to a three-count Amended Information. Count I charged Conspiracy to Cause Intentional Damage to a Protected Computer in violation of 18 U.S.C. § 1030(a)(5)(A) (2012) in Minnesota. Counts II and III charged Felon in Possession of a Firearm in the districts of Colorado and New Mexico in violation of 18 U.S.C. § 922(g)(1) (2012). *See* Amended Information, United States v. Gammell, No. 17-CR-00134, 2018 WL 2727547 (D. Minn. May 23, 2018), ECF No. 77. Mr. Gammell took responsibility for his actions and consented to jurisdiction in the district of Minnesota for multiple charges spanning two jurisdictions.

[14] Defendant's Position Regarding Sentencing at 2, United States v. Gammell, No. 17-CR-00134, 2018 WL 2727547 (D. Minn. May 23, 2018), ECF No. 93.

[15] *Id.* at 5.

[16] *See* 18 U.S.C. § 1030(a)(5)(A), (c)(4)(B).

[17] Defendant's Position Regarding Sentencing, *supra* note 14, at 15.

[18] Plea Agreement and Sentencing Stipulations, *supra* note 11, at 17.

[19] Defendant's Position Regarding Sentencing, *supra* note 14, at 1.

[20] The Honorable Judge Wilhelmina M. Wright presided over sentencing proceedings on May 17, 2018. Sentencing, United States v. Gammell, No. 17-CR-00134, 2018 WL 2727547 (D. Minn. May 23, 2018), ECF No. 103–04.

- aggravated robbery;[21]
- aggravated robbery;[22] and
- aiding and abetting second-degree burglary.[23]

We argued that Mr. Gammell's ancient aiding and abetting second-degree burglary conviction did not constitute a qualifying predicate crime under the ACCA because the state legislature in Minnesota too broadly defined "aiding and abetting." In other words, aiding and abetting burglary could not be a "violent" offense under the ACCA. Therefore, Mr. Gammell lacked the requisite three felonies necessary to label him an armed career criminal.

Ultimately, the district court rejected our interpretation of the ACCA and imposed a sentence of 180 months (15 years),[24] the mandatory minimum term for an armed career criminal.[25]

The Eighth Circuit affirmed Mr. Gammell's conviction under the ACCA.[26] Mr. Gammell filed a petition for certiorari and raised this question before the Supreme Court: in determining whether a burglary (or other allegedly qualifying) conviction based on an aiding and abetting (or other secondary liability) theory qualifies as an enumerated burglary under the ACCA, does the categorical[27] approach apply

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[21] *See* Presentence Report at ¶ 58, United States v. Gammell, Cr. No. 17-CR-00134, 2018 WL 2727547, ECF No. 88 (describing April 30, 1981 Hennepin County District Court conviction) (on file with author).

[22] *See id.* at ¶ 59 (describing July 6, 1981 Hennepin County District Court conviction).

[23] *See id.* at ¶ 60 (describing January 25, 1984 Hennepin County District Court conviction).

[24] Judgment in Criminal Case at 2, United States v. Gammell, No. 17-CR-00134, 2018 WL 2727547 (D. Minn. May 23, 2018), ECF No. 109.

[25] *See id.* The sentence reflected Mr. Gammell's conviction under Counts II and III of the superseding indictment. Judge Wright sentenced Mr. Gammell to 60 months as to Count I, with the terms for all three counts to run concurrently. *Id.* Mr. Gammell filed a timely notice of appeal on June 1, 2018 to challenge his classification under the ACCA. *See* Notice of Appeal, United States v. Gammell, No. 17-CR-00134, 2018 WL 2727547 (D. Minn. May 23, 2018), ECF No. 122.

[26] United States v. Gammell, 932 F.3d 1175, 1180 (8th Cir. 2019).

[27] The [Supreme] Court created the notion of a "generic" crime to create a "uniform definition independent of the labels used by the various States' criminal codes" to consider ACCA predicate crimes in *Taylor v. United States*. The Court termed this a "categorical approach to predicate offenses . . . since an elaborate factfinding process regarding the defendant's prior offenses would be impracticable and unfair." Examining the states' criminal codes, the Court defined the elements of generic burglary and warned lower courts not to look to the "facts underlying [the prior] convictions." Rather, the Court said, the trial court should simply examine whether a state's definition fit within this concocted generic definition (which the Court had to create from treatises and state law comparisons in this case) or was even more narrow.

Paulose, *supra* note 3, at 47–48. In other words, "under the categorical approach, courts must look to the statutory elements of an offense, rather than the defendant's conduct," in determining

to both the burglary statute and the aiding and abetting doctrine, such that a burglary conviction based on an overbroad aiding and abetting statute does not constitute generic burglary? We argued that secondary liability must be subjected to the categorical approach of the ACCA. It is not regularly tested in circuit courts. Thus, we argued the ACCA is unconstitutional as applied under the Sixth and Fourteenth Amendments.[28]

Unfortunately for my client, the Supreme Court[29] denied his petition.[30] Although we lost the battle, I write now about this serious issue, arguing that the basis for secondary and inchoate liability must be subjected to a *Taylor* analysis along with the underlying crime, is worthy of academic attention as well as the Court's remedy. *Taylor* should be struck down as a frolic and detour, unfaithful to the Constitution from its inception. Congress must amend the ACCA and sister schemes that penalize recidivist crime without defining such crimes.

I. THE FOUNDERS VIEWED SERIOUSLY THE SECONDARY AND INCHOATE LIABILITY DISTINCTION

Secondary and inchoate liability is a significant theory of liability in that it draws into the criminal system so many people whose role in a crime may be minimal. The law treats as equally guilty those who hold starring roles in secondary and inchoate liability crimes and those actors who may utter a single line in the drama.

The ability of the contemporary criminal justice system to toss the girlfriend literally left holding the bag (containing drugs regarding which she has minimal understanding) and the international drug kingpin (who has leveraged an army of subordinates across a multinational market for narcotics) into the same "criminal" category under a secondary and inchoate liability theory (e.g., conspiracy) is fascinating because secondary and inchoate liability do not mean today what they meant at the founding. Justice Scalia, the great defender of originalism, pointed out the lack of unanimity on what secondary and inchoate liability mean.[31]

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whether a prior conviction constitutes a predicate crime. U.S. SENT'G COMM'N, OFF. OF GEN. COUNS., PRIMER ON CATEGORICAL APPROACH 1 (2019).

[28] Petition for Writ of Certiorari at 7–10, Gammell v. United States 140 S. Ct. 2809 (2020) (No. 19-7288).

[29] Gammell v. United States, 140 S. Ct. 2809, 2809 (2020).

[30] *Id. See generally* Petition for Writ of Certiorari, *supra* note 28.

[31] Justice Scalia described the confusion regarding "attempt" in particular:

> [T]he definition of attempt has not been nearly as consistent as the Court suggests. Nearly a century ago, a leading criminal-law treatise pointed out that "'attempt' is a term peculiarly indefinite" with "no prescribed legal meaning." Even the modern treatise the Court relies upon . . . explains—in a subsection entitled "The Confusion"—that jurisdictions vary widely in how they define the requisite *actus reus*. Among the variations are: "'an act toward the commission of' some offense"; "an act 'in furtherance of'" an offense; "'a substantial step toward the commission of the crime'"; "'some appreciable fragment of the crime'"; and the

The architects of the Anglo-American legal tradition viewed the distinction between primary and secondary and inchoate liability as "highly necessary."[32] At common law, the treatment of principals versus accessories carried "'intricate' distinctions."[33] Sir Michael Foster wrote that an acquittal under one theory ought not bar indictment under the other theory because the conditions of guilt are "specifically"[34] different. Originally, some forms of secondary and inchoate liability were not even considered a crime.[35] Early law "started from the principle that an attempt to do harm is no offense."[36]

> wonderfully opaque "'commencement of the consummation.'" . . . These are not simply different ways of saying "substantial step." The Model Penal Code definition that the Court invokes . . . is just that: a model. It does not establish the degree of homogeneity that the Court asserts. The contention that the "federal system" has a "well-settled" definition of attempt . . . tells us nothing; many terms in federal indictments have only one *federal* definition, not because that is the universally accepted definition, but because there is only one Federal Government.

United States v. Resendiz-Ponce, 549 U.S. 102, 112–13 (2007) (Scalia, J., dissenting) (first quoting 1 F. WHARTON, CRIMINAL LAW § 229 (11th ed. 1912); then quoting 2 WAYNE R. LAFAVE, SUBST. CRIM. L. § 11.4(a), at 218–19 (2d ed. 2003); and then quoting Supplemental Brief for United States at 22, United States v. Resendiz-Ponce, 549 U.S. 102, 112–13 (2007)).

[32] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 39–40 (1769) ("Why then, it may be asked, are such elaborate distinctions made between accessories and principals, if both suffer the same punishment? For these reasons. 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted: the commission of an actual robbery being quite a different accusation, from that of harbouring the robber. . . . [T]he distinction of principal and accessory will appear to be highly necessary; though the punishment is still much the same with regard to principals, and such accessories as offend *a priori*.").

[33] Standefer v. United States, 477 U.S. 10, 15 (1979) (quoting 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 231 (1883)) ("In felony cases, parties to a crime were divided into four distinct categories: (1) principals in the first degree who actually perpetrated the offense; (2) principals in the second degree who were actually or constructively present at the scene of the crime and aided or abetted its commission; (3) accessories before the fact who aided or abetted the crime, but were not present at its commission; and (4) accessories after the fact who rendered assistance after the crime was complete.").

[34] MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, IN THE COUNTY OF SURRY; AND OF OTHER CROWN CASES: TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW 362 (Michael Dodson ed., W. Strahan & M. Woodfall 2d eds., 1776) ("For if the offences of the principal and accessory do, in consideration of law, *specifically differ*; and if a person indicted as a principal cannot be convicted upon evidence tending *barely* to prove him to have been an accessory before the fact, which I think must be admitted, I do not see how an acquittal upon one indictment could be a bar to a second for an offense specifically different from it.").

[35] 2 FREDERICK POLLACK & FREDRIC MAITLAND, THE HISTORY OF ENGLISH LAW 508 n.4 (2d ed. 1909).

[36] *Id.*

However, the law has taken a different route from that starting point.[37] For example, "[w]hen the first Congress convened . . . it merged the concepts of principal in the second degree (those who aided and abetted) and accessory before the fact (those who commanded and counseled) in piracy cases."[38] In the 19th century,[39] judges and legislators created distinct substantive and secondary offenses.[40] One safeguard precluded prosecution of the accessory if the principal was not convicted.[41] As the law developed, defining these judge-made rules and categories became convoluted and often resulted in the "defeat" of justice.[42] As an answer to this, in the 19th century, legislators in the Parliament,[43] States,[44] and later Congress, created distinct substantive and secondary offenses.[45] All of these statutes were "part and parcel" of the "same reform movement."[46]

In its leading case on aiding and abetting, the Court described the common law evolution of one form of secondary and inchoate liability.[47] "The harshness of

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[37] *See generally* Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464 (1954).

[38] CHARLES DOYLE, CONG. RSCH. SERV., R43769, ACCOMPLICES, AIDING AND ABETTING, AND THE LIKE: AN OVERVIEW OF 18 U.S.C. § 2, at 1 (2020).

[39] Justice was often thwarted by the older rule and a desire for reform brought about statutory modification in England. Two English statutes, in 1826 and 1848 were designed to change this outmoded rule. The 1848 statute was reenacted with unimportant changes in 1861 and this statute remains in effect today. The statute of 1826 authorized conviction of a separate substantive offense, but it was interpreted to mean "not to make those triable who before could never have been tried." The real reform came in 1848 when the statute allowed an accessory to be indicted, tried and convicted as a principal felon. The modern practice is to make the accessory before the fact triable independently of the principal and to "provide that the prior conviction of the principal is not a pre-condition of the prosecution of an accessory before the fact."

John H. Tate Jr., *Distinctions Between Accessory Before the Fact and Principal*, 19 WASH. & LEE L. REV. 96, 96 (1962) (footnotes omitted) (quoting Rex v. Russel [1832] 168 Eng. Rep. 1302, 1306; then quoting MODEL PENAL CODE app. A, at 41 (AM. L. INST., Tentative Draft no. 1, 1953)).

[40] *See generally id.*

[41] Standefer v. United States, 447 U.S. 10, 15 (1980).

[42] *Id.* at 16.

[43] *Id.*

[44] *Id.* at 16 n.9.

[45] *Id.* at 18.

[46] *Id.*

[47] "'Where several acts constitute[d] together one crime, if each [was] separately performed by a different individual . . . all [were] principals as to the whole.' . . . [A] person's involvement in the crime could not be merely partial but minimal too." Rosemond v. United States, 572 U.S. 65, 72–73 (2014) (alteration in original) (quoting 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 649 (7th ed. 1882)); "'The quantity [of assistance was] immaterial,' so long as the accomplice did 'something' to aid the crime." *Id.* at 73 (alteration in original) (quoting ROBERT DESTY, A COMPENDIUM OF AMERICAN CRIMINAL LAW § 37a (1882)).

the common law in dealing with all of the parties to a crime was mitigated by distinguishing between accessory before the fact and principal."[48] Part of the harshness dealt specifically with the application of the death penalty to all parties to felony offenses, a shocking result by contemporary standards.[49] However, "[t]his distinction is almost defunct today, made so primarily by statute."[50] Nevertheless, the statutory blurring of the line between primary and secondary and inchoate liability did not abrogate all distinctions.[51]

II. THE SUPREME COURT TAKES A "CATEGORICAL APPROACH" TO RECIDIVIST STATUTES

A person convicted under a secondary and inchoate liability theory, no matter how minimal his role, could be subject to a number of very strict recidivist federal statutes imposed upon habitually violent criminals whose categorization turns on how Congress has labeled previously convicted persons who return to crime. We turn now to the legal framework for how to interpret those recidivist statutes before considering their implications for those convicted under secondary and inchoate liability theories.

A. Taylor *Creates an Analytical Framework*

In *Taylor v. United States*, the U.S. Supreme Court held that in determining whether a particular state crime constitutes a qualifying predicate crime for a recidivist offense, the courts must apply a "categorical approach" that looks to the statutory elements of the offense, not the facts of the particular case, to determine if the offense comports with or is narrower than the generic definition formulated by the

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[48] Tate, *supra* note 39, at 101. "But the distinction between the two degrees is without practical effect. Its origin is, that anciently those only who are now called principals of the first degree were deemed principals at all: persons present abetting were accessories at the fact. But when the courts came to hold the latter to be principals, they termed them principals of the second degree." BISHOP, *supra* note 47, at § 648.

[49] "Because at early common law all parties to a felony received the death penalty, certain procedural rules developed tending to shield accessories from punishment." *Standefer*, 447 U.S. at 15.

[50] Tate, *supra* note 39, at 101.

> "The ancient doctrine that 'no accessory can be convicted or suffer any punishment where the principal is not attainted or hath the benefit of his clergy' led to the escape of many offenders. On the other hand it served in certain cases to mitigate the ferocity of the ancient law in the punishment of felons." Whereas the common law denied a merger of the crimes of accessory before the fact and principal, modern statutes have removed this distinction from the criminal law.

Id. at 96 (footnote omitted) (quoting 1 RUSSELL ON CRIME 164–65 (J. W. Cecil Turner ed., 11th ed. 1958) (1819).

[51] *See generally Standefer*, 447 U.S. 10.

Taylor Court.[52] The *Taylor* Court specifically examined the meaning of "burglary" for purposes of the ACCA.[53]

Arthur Taylor pled guilty to being a felon in possession of a firearm in a Missouri federal district court in 1988.[54] The defendant previously had committed four felonies, including two second-degree burglaries under Missouri state law.[55] The government sought to use the defendant's prior convictions to categorize him as an armed career criminal under the ACCA, subjecting him to a 15-year mandatory minimum.[56] The defendant objected that his burglary crimes could not constitute predicate crimes under the ACCA; he claimed they did not present a serious risk of injury.[57] The district court rejected the defendant's argument and sentenced him to a 15-year sentence under the ACCA.[58]

On appeal, the question for the Court was whether burglary could constitute a predicate crime for the ACCA, however any state chose to define burglary.[59] In other words, what does a prior conviction for burglary mean under the ACCA? How must the government prove the prior crime was violent? Deferring to the States' individual definitions of predicate crimes could lead to 50 different definitions of basic crimes and widely disparate impacts depending on the jurisdiction in which a defendant was convicted.

The Supreme Court created the notion of a generic crime to create a "uniform definition independent of the labels used by the various States' criminal codes" to consider ACCA predicate crimes in *Taylor*.[60] Unfortunately, there is no such thing as a generic crime. The Court created this concept to capture the idea of a national and widely accepted definition of a crime. But the Court left it to the lower courts to define what exactly a generic crime is, for any particular type of prohibited action, adding further to judicial burdens. In doing so, the Court created the possibility that lower courts that could not agree on the definition of generic crime would create less uniformity, more disagreement, and deeper division.

The categorical framework, which Justice Blackmun concocted out of thin air, has imposed upon the ACCA a complicated superstructure untouched in the years since by the legislature, under which judges, prosecutors, and defense lawyers must subject predicate offenses to a litany of tests we all are making up as we go along. The *Taylor* test also has now been incorporated into a wide range of federal law

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[52] Taylor v. United States, 495 U.S. 575, 600 (1990).

[53] *Id.* at 577–78.

[54] *Id.* at 578.

[55] *Id.*

[56] *Id.* at 579.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 580.

[60] *Id.* at 592.

whenever Congress fails to define a term that must be determined before subjecting a person to a longer sentence, rendering monumental the daily impact of *Taylor* on prosecutors and defendants alike.

The Court praised its "categorical approach to predicate offenses . . . since an elaborate factfinding process regarding the defendant's prior offenses would be impracticable and unfair."[61] Reviewing the states' criminal codes, the Court defined the elements of generic burglary[62] and warned lower courts not to look to the "facts underlying [the prior] convictions."[63] Rather, the Court said, the trial court should simply examine whether a state's definition fit within this concocted generic definition[64] (which the Court created from treatises and state law comparisons in this case) or was even more narrow.[65] If so, the offense would qualify as an ACCA predicate.[66]

Where the state statute is indivisible, setting forth different means of committing the same crime, rather than different elements, the Court held that the lower courts may not consider the particular facts of the underlying crime in determining whether the statute conforms with the generic version of the offense.[67] The Court fulfills its task by comparing the elements of the state crime with the elements of the generic offense.[68] The Court remanded the case to determine whether Taylor's burglary convictions under Missouri law conformed with the generic definition of burglary.[69]

Taylor further instructs us that in determining whether a state burglary conviction satisfies the generic definition of that offense, the underlying facts of any individual case are irrelevant, as the Court's task is to focus solely on the words of the statute.[70] "Under the categorical approach . . . we focus on the elements of the state statute and consider whether a violation necessarily satisfies the federal definition of violent felony," considering both the text of the statute and the state court's application of the statute.[71]

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[61] *Id.* at 577.

[62] *Id.* at 598 (footnote omitted) ("Although the exact formulations vary, the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.").

[63] *Id.* at 600.

[64] *Id.* at 592 ("We think that 'burglary' in § 924(e) must have some uniform definition independent of the labels employed by the various States' criminal codes.").

[65] *Id.* at 602.

[66] *Id.*

[67] *Id.* at 600.

[68] *See id.* at 602.

[69] *Id.* Justice Scalia concurred in part to critique the Court's reliance on legislative history. *Id.* at 603 (Scalia, J., concurring).

[70] *Id.* at 588–89 (majority opinion).

[71] *See* United States v. Swopes, 886 F.3d 668, 670–71 (8th Cir. 2018) (en banc).

If the state crime encompasses conduct beyond the generic definition, a defendant's conviction for aiding and abetting an offense is not an ACCA predicate crime, "even if the defendant's actual conduct (i.e., the facts of the crime) fits within the generic offense's boundaries."[72] "Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense."[73]

Over the past 30 years, the federal courts have struggled with how to apply the categorical approach (and its various iterations) when parsing qualifying crimes under the ACCA. One area of particular vexation has been how to think about secondary and inchoate liability crimes.

For a time, defendants tried to argue that no secondary and inchoate liability crimes could constitute ACCA predicates. However, the Supreme Court shut down that expansive claim. In *James v. United States*, the Court refused to eliminate all

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[72] Mathis v. United States, 136 S. Ct. 2243, 2248 (2016).

[73] Moncrieffe v. Holder, 569 U.S. 184, 190–91 (2013) (alteration in original) (quoting Johnson v. United States, 559 U.S. 133, 137 (2010)). *Taylor* creates yet more analytical rules for more complex statutes. For example, where the state statute is indivisible, setting forth different means of committing the same crime, rather than different elements, the district court may not consider the particular facts of the underlying crime in determining whether the statute conforms with the generic version of the offense. *See* Descamps v. United States, 570 U.S. 254, 261 (2013). The court fulfills its task by comparing the elements of the state crime with the elements of the generic offense. *See Taylor*, 495 U.S. at 598–99.

The Supreme Court added an additional layer to the ACCA superstructure by creating what it calls the "modified categorical approach." When a state statute is divisible, the court will apply a "modified categorical approach." As one federal appellate court has noted:

> Only when the statute has the same or narrower elements as the generic crime does the prior conviction count as a violent felony. But if the statute is divisible, setting forth "multiple, alternative versions of the crime," and not all of the alternatives satisfy the generic definition, then we apply the "modified categorical approach" to decide which of the alternatives was the basis for the conviction.

United States v. McArthur, 850 F.3d 925, 937–38 (8th Cir. 2017) (internal citations omitted).

The modified categorical approach allows the court to disregard the strictly legal approach and consider certain facts relevant to the crime. Under the modified categorical approach, the court may consider a very limited category of documents to determine whether a conviction for a particular crime tracks the generic classification of that crime:

> We hold that enquiry under the ACCA to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.

Shepard v. United States, 544 U.S. 13, 26 (2005). Again, the court may not look at these underlying documents where the statute is indivisible, setting forth only one set of elements for a crime.

attempt offenses as ACCA predicates.[74] The Court rejected the defendant's Sixth Amendment argument, holding that the lower court did not engage in factfinding when it merely looked at elements of the offense to categorize attempted burglary in Florida as a violent crime.[75]

So, given that secondary and inchoate liability crimes *may* be ACCA-eligible, how then should courts examine those crimes? The Court already has signaled that the failure to separately consider theories of liability may be unconstitutional in multi-tiered statutes. Unfortunately, the lower courts have not applied the Court's holding to the ACCA. Further, the lower courts have expanded *Taylor* to apply to many federal statutes containing ill-defined terms.[76]

B. A Commonly Used Recidivist Statute Is Held Hostage by Taylor*: The Armed Career Criminal Act*

Given how commonly *Taylor* is used and how complex its analysis has become, it is helpful to examine its impact on secondary and inchoate liability in the context of one of the statutes most frequently invoked in the name of *Taylor*: the ACCA. The ACCA mandates a minimum 15-year sentence for felons who possess three predicate convictions for "violent felony" or "serious drug" offenses.[77]

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[74] James v. United States, 550 U.S. 192, 213 (2007). *James* was overruled in part by *Johnson*, given its reliance on the now defunct residual clause of the ACCA. *Johnson*, 559 U.S. 133.

In other contexts, courts have considered the complexity of attempt crimes. *Compare* United States v. Havis, 927 F.3d 382, 387 (6th Cir. 2019) ("The text of § 4B1.2(b) controls, and it makes clear that attempt crimes do not qualify as controlled substance offenses.") *with* United States v. Dozier, 848 F.3d 180, 182 (4th Cir. 2017) ("Given the unique complexity of general attempt statutes, we hold that sentencing courts must compare the state and generic elements of such statutes as well as the elements of the underlying substantive statutory offense when determining whether a prior attempt conviction qualifies as a controlled substance offense. The district court failed to make these required comparisons . . . under § 4B1.2 of the Sentencing Guidelines.").

[75] *James*, 550 U.S. at 214.

[76] *See infra* Part IV.

[77] The relevant text of the ACCA is as follows:

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(1).

In turn, the felon in possession statute reads in relevant part as follows:

> (g) It shall be unlawful for any person—
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . .

In our post-*Johnson*[78] legal landscape, the ACCA defines a "violent felony" in relevant part as "any crime punishable by imprisonment for a term exceeding one year" that:

> i. has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> ii. is burglary, arson, or extortion, [or] involves use of explosives . . . [79]

Subsection (i) is known as the force clause; subsection (ii) is understood as the enumerated offense clause. Burglary is an enumerated offense since it is listed specifically in the statute.[80] The government bears the burden to prove that prior offenses constitute predicate offenses under the ACCA since the statute fails to provide a qualifying list of state or federal offenses.[81] In other words, the government must prove before the district court that a defendant's prior conviction is a "violent felony" or "serious drug" offense.[82]

However, this does not end a court's inquiry because, even as to enumerated offenses, the case law does not dictate that any enumerated offense, however defined by any state, qualifies as a predicate offense under the ACCA. Rather, the Supreme Court requires that the predicate offense "in § 924(e) must have some uniform definition independent of the labels employed by the various States' criminal codes."[83] The definition of a predicate offense employed by any state must conform to, or be narrower than, the generic definition.

> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(1).

[78] *See* Johnson v. United States, 576 U.S. 591, 606 (2015) (striking down residual clause of ACCA as void for vagueness). *Johnson* was a critical case in that it marked the first time the Court struck down a provision of the ACCA as so vague it created constitutional landmines, which it had criticized endlessly before and now after. "The Act defines 'violent felony' as follows: 'any crime punishable by imprisonment for a term exceeding one year . . . that . . . *or otherwise involves conduct that presents a serious potential risk of physical injury to another*.' § 924(e)(2)(B)." *Id.* at 593–94 (emphasis added). The Court voided the "emphasis added" words.

[79] 18 U.S.C. § 924(e)(2)(B).

[80] *Id.* § 924(e)(2)(B)(ii).

[81] *See* United States v. Webster, 442 F.3d 1065, 1068–69 (8th Cir. 2006).

[82] In this Article, I am focusing only on the definition of "violent" offenses since drug offenses are infrequently challenged on definitional terms under the ACCA. A federal appellate court reviews de novo the district court's determination that a prior conviction is a violent felony under the ACCA. United States v. Eason, 829 F.3d 633, 640 (8th Cir. 2016) (quoting United States v. Shockley, 816 F.3d 1058, 1062 (8th Cir. 2016)).

[83] *See* Taylor v. United States, 495 U.S. 575, 592 (1990).

III. THE SUPREME COURT RULES SECONDARY LIABILITY REQUIRES A TWO-PART *TAYLOR* ANALYSIS

A. Duenas-Alvarez *Applies* Taylor *to Secondary Liability*

In *Gonzales v. Duenas-Alvarez*,[84] the Supreme Court considered the impact of *Taylor* on a secondary liability crime that might serve as a predicate in a recidivist scheme. Justice Breyer posited, for the Court, that secondary liability might render an underlying crime so broad that it no longer captured the generic meaning of a crime under *Taylor*.[85] Although *Duenas-Alvarez* arose in the context of immigration proceedings, it explicitly applied *Taylor's* categorical analysis.

The government attempted to deport Luis Alexander Duenas-Alvarez for committing a felony, subjecting him to removal under federal immigration law.[86] Duenas-Alvarez aided and abetted theft in California by taking a vehicle he did not own, but he claimed California too broadly defined secondary liability.[87] The question before the Court was how to analyze a state secondary liability crime of aiding and abetting under *Taylor*.

In *Duenas-Alvarez*, the Supreme Court conducted the *Taylor* categorical analysis of accomplice liability, separate and apart from the analysis of the underlying offense which the defendant aided and abetted.[88] The Court noted that aiders and abettors are universally treated as principals to the underlying crime, and thus, the *Taylor* generic crime may include aiding and abetting the underlying crime.[89] Nonetheless, the Court agreed that if there were something "special" about the State's application of the aiding and abetting doctrine, such that it criminalized conduct beyond the generic understanding of accomplice liability, the defendant would "succeed" in establishing that the underlying conviction is not an ACCA predicate.[90] Thus, the Court undertook a *Taylor* categorical analysis of the challenged aiding and abetting statute to determine whether it criminalized conduct beyond the generic definition.[91] In other words, the Court undertook a two-part *Taylor* analysis, dissecting for overbreadth, both the underlying crime as well as the theory of secondary liability, which I refer to herein as the binary factor analysis.[92]

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[84] Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189 (2007).

[85] *Id.* at 191.

[86] *Id.* at 185, 188.

[87] *Id.* at 190.

[88] *Id.* at 193–94.

[89] *Id.* at 189–90.

[90] *Id.* at 191.

[91] *Id.*

[92] *See supra* note 5.

Although Mr. Duenas-Alvarez fell short of the mark in trying to prove that California's definition of aiding and abetting was overly broad, the Court acknowledged a future case might recognize something "special" about a state aiding and abetting statute which would place it outside the mainstream generic definition.[93]

B. The Lower Courts Split on How to Apply Taylor *in Secondary Liability Cases:* Valdivia-Flores v. Gammell

A federal appellate court found the *Duenas-Alvarez* "special" exception that Justice Breyer had envisioned in *United States v. Valdivia-Flores*,[94] another immigration case. In that case, the defendant was subject to federal deportation as a result of a Washington state drug trafficking conviction.[95] He argued that his Washington conviction was broader than the generic definition of drug trafficking, not because of the terms of the drug statute, but rather because of the overly broad scope of accomplice liability in Washington.[96] "Critically . . . Washington defines aiding and abetting more broadly than does federal law so that Washington forbids more conduct."[97]

The Ninth Circuit agreed with Mr. Valdivia-Flores. Specifically, the court determined that to establish accomplice liability, Washington requires mere knowledge that one's act will further the crime, whereas federal law insists upon specific intent.[98] Reviewing the plain language of a statute as well as the state court's case law interpreting it, the Ninth Circuit determined the Washington aiding and abetting statute was broader than its federal analogue, and therefore the drug offense could not be classified as an aggravated felony: "[W]here, as here, a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime."[99]

Valdivia-Flores thus applied the *Duenas-Alvarez* framework to the immigration statutes and found secondary liability a basis to reverse, using a two-part *Taylor* categorical approach (the binary factor analysis). Mr. Valdivia-Flores appears to be the first and last defendant to have convinced a federal appellate court that a state sec-

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[93] *Duenas-Alvarez*, 549 U.S. at 191.

[94] United States v. Valdivia-Flores, 876 F.3d 1201, 1210 (9th Cir. 2017).

[95] *Id.* at 1203.

[96] *Id.* at 1207.

[97] *Id.*

[98] *Id.* at 1207–09.

[99] *Id.* at 1208 (quoting United States v. Grisel, 488 F.3d 844, 850 (9th Cir. 2007)).

ondary liability statute was defined in overly broad fashion using the *Taylor* framework and the *Duenas-Alvarez* test. Unfortunately, *Valdivia-Flores* was not the last court to speak on *Taylor's* requirements and *Duenas-Alvarez's* application.[100]

IV. STATE SECONDARY AND INCHOATE LIABILITY DEFINITIONS VARY WIDELY

Part of the reason *Taylor* creates such problems for defendants convicted under secondary and inchoate liability theories is that the legislative bodies that define crimes do not agree on those definitions in this country. This is a particular problem where States, rather than the federal government, define basic crimes that federal prosecutors then rely upon as predicates for federal recidivist schemes. State sovereignty may result in 50 different definitions for the same illegal action.

Let us return to the case of Mr. Gammell to try to create some order out of what has become the highly disordered ACCA regime. Mr. Gammell was convicted of aiding and abetting second-degree burglary in Minnesota.[101] Under the convoluted *Taylor* approach, a court's examination of Minnesota's state burglary statute does not end our inquiry. The court must then examine Minnesota's aiding and abetting statute to determine if the state definition is broader than the federal generic definition. Only if both statutes use definitions that fit within the generic definition might Mr. Gammell's conviction for aiding and abetting burglary be considered an ACCA predicate crime. In other words, the court must subject both the state primary statute and the state secondary and inchoate liability statute to a *Taylor* analysis under a proper understanding of Supreme Court precedent, under the binary factor analysis this Article advances. A review of all 50 state statutes shows how much confusion *Taylor* has sown.

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[100] *See* Bourtzakis v. United States Att'y Gen., 940 F.3d 616, 618–21, 624 (11th Cir. 2019) ("We are not persuaded by the decision of the Ninth Circuit that adopted Bourtzakis's position.") (citing *Valdivia-Flores*, 876 F.3d at 1206–10).

[101] United States v. Gammell, 932 F.3d 1175, 1178 (8th Cir. 2019); Presentence Report at ¶ 60, United States v. Gammell, No. 17-CR-00134, 2018 WL 2727547 (D. Minn. May 23, 2018), ECF No. 88 (on file with author). The criminal complaint charged him as follows:

> COUNT 1: BURGLARY MINN. STAT. § 609.582, 2(a) (1982); 609.05
> That on or about the 21st day of December, 1983, in Hennepin County, JOHN KELSEY GAMMELL, intentionally aiding, advising, counseling or conspiring with another, entered a dwelling, 65 South 11th Street, apartment #134, without consent as defined in section 609.581, Subd. 4, and with intent to commit a crime, theft.

Amended Felony Information at 4, United States v. Gammell No. 17-CR-00134, 2018 WL 2727547 (D. Minn. May 23, 2018), ECF No. 77. The relevant Minnesota aiding and abetting statute at the time was section 609.05 of the Minnesota Statutes. MINN. STAT. § 609.05 (West 1982).

A. Aiding and Abetting Is a Form of Secondary Liability

1. Consider the Generic Definition of Aiding and Abetting

As to aiding and abetting, we have a federal generic definition in that Congress codified the meaning of this form of secondary liability in 1948. The federal aiding and abetting statute provides as follows:

> (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.[102]

For centuries, the Supreme Court has interpreted this language to require both action and intent. An aider and abettor undertakes acts of assistance "with the intention of encouraging and abetting" the crime.[103] More recently, the Court clarified that "an aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime."[104]

Judge Learned Hand authored perhaps the most classic description of the standard in the federal law:

> It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, "abet"—carry an implication of purposive attitude towards it.[105]

This intent must go to the specific and entire crime charged; an intent to assist a lesser offense is insufficient.[106] That is to say, the defendant must possess foreknowledge and assent to the full scope of the crime.[107]

The federal statute simplifies the common law aiding and abetting standard, which imposes liability for a crime upon a person who helps another complete the action.[108] A person who facilitates any part of a criminal mission is liable as an aider

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[102] 18 U.S.C. § 2.

[103] Hicks v. United States, 150 U.S. 442, 455 (1893).

[104] Rosemond v. United States, 572 U.S. 65, 75–76 (2014). "[T]hose who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime." *Id.* at 71 (quoting Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 181 (1994)).

[105] United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

[106] *See Rosemond*, 572 U.S. at 75–76.

[107] *Id.* at 76.

[108] *Id.* at 70.

and abettor.[109] As the Supreme Court explained, a person is responsible for aiding and abetting a crime, and thus is punishable as a principal, "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."[110]

Legal commentators track a similar definition, focusing on both action and intent. For example, LaFave defines aiding and abetting as: "assistance or encouragement . . . with the intent thereby to promote or facilitate commission of the crime."[111] *Black's* defines aiding and abetting as: "to assist or facilitate the commission of a crime, or to promote its accomplishment."[112] "To 'aid' is to assist or help another. To 'abet' means, literally, to bait or excite, as in the case of an animal. In its legal sense, it means to encourage, advise, or instigate the commission of a crime."[113]

2. State Definitions of Aiding and Abetting Differ

Let us use Mr. Gammell's case as a model. Minnesota defines aiding and abetting thus:

> A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.[114]

The Minnesota aiding and abetting statute is substantially broader than that of most other states or of the federal generic aiding and abetting classification because it conflates the definition of conspiracy with aiding and abetting. Why is this important? It is critical because conspiracy requires proof of agreement; conspiracy does not require a completed crime, and conspiracy is a standalone crime often separately codified; aiding and abetting is precisely the opposite as to all three distinguishing characteristics.[115] Thus, although generic burglary may include both principals and aiders and abettors,[116] the Minnesota standard for accomplice liability is so broad that it "criminalizes conduct that most other States would not consider"

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[109] *Id.* at 73.

[110] *Id.* at 71.

[111] 2 WAYNE LAFAVE, SUBST. CRIM. L. § 13.2, at 337 (3rd ed. 2018).

[112] *Aid and Abet*, BLACK'S LAW DICTIONARY 81 (11th ed. 2019).

[113] CHARLES E. TORCIA, 1 WHARTON'S CRIMINAL LAW § 29, at 181 (15th ed. 1993).

[114] MINN. STAT. § 609.05 subdiv. 1 (describing liability for crimes of another).

[115] *See* United States v. Frazier, 880 F.2d 878, 886 (6th Cir. 1989) (aiding and abetting does not require proof of agreement), *cert. denied*, 493 U.S. 1053 (1990). *Frazier* also reiterated that conspiracy versus aiding and abetting are distinct and separate theories of liability. *See also* United States v. Dehertogh, 696 F.3d 162, 169 (1st Cir. 2012) ("[T]he aiding and abetting offense, unlike conspiracy and attempt, requires that the target crime have been completed."). *But see* United States v. Shabani, 513 U.S. 10, 11 (1994) (federal narcotics conspiracy requires no overt act).

[116] *See* Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189 (2007).

burglary.[117] Only three other states have aiding and abetting statutes which, like Minnesota's, impose accomplice liability for those who only conspired with another to commit a crime.[118]

The drafters of the Model Penal Code expressly rejected use of conspiracy as a basis of aider and abettor complicity in substantive offenses committed in furtherance of its aims.[119] The drafters noted that extending aider and abettor liability to conspiracy extends the scope of accomplice liability far beyond "reasonable limits."[120] Instead, the Model Penal Code imposes aider and abettor liability on one who, acting "with the purpose of promoting or facilitating the commission of the offense . . . (ii) aids or agrees or attempts to aid such other person in planning or committing it."[121] Although the Model Penal Code expands the federal, generic definition, it still is substantially narrower than the Minnesota version. Fourteen states have adopted versions of the Model Penal Code formulation.[122]

The aiding and abetting statutes of the remaining states and the District of Columbia do not provide for criminal liability when the defendant only conspires or agrees with the other, without committing an affirmative act.[123]

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[117] *Id.* at 191.

[118] *See* OHIO REV. CODE ANN. § 2923.03(A)(3) (LexisNexis 2021–2022); N.D. CENT. CODE § 12.1-03-01(1)(c) (2021); WIS. STAT. § 939.05(2)(c) (2019–20). The North Dakota statute requires both that the defendant be a coconspirator "and his association with the offense meets the requirements" of one of the other, more traditional bases for accomplice liability. N.D. CENT. CODE § 12.1-03-01(1)(c) (2021). North Dakota thus has constrained the broad conspiracy liability accepted under Minnesota law.

[119] *See* MODEL PENAL CODE Part I Commentaries, vol. 1, at 298 (AM. L. INST. 2021).

[120] *Id.*

[121] MODEL PENAL CODE § 2.06(3)(a)(ii) (AM. L. INST. 1985).

[122] *See* ALASKA STAT. § 11.16.110(2)(B) (2021); ARIZ. REV. STAT. ANN. § 13-301(2) (2022); ARK. CODE ANN. § 5-2-403(a)(2) (2021); DEL. CODE ANN. tit. 11, § 271(2)(b) (2022); HAW. REV. STAT. § 702-222(1)(B) (2021); 720 ILL. COMP. STAT. ANN. § 5/5-2(c) (West 2022); ME. STAT. tit. 17-A, § 57(3)(A) (2021); MO. REV. STAT. § 562.041.1(2) (2022); MONT. CODE ANN. § 45-2-302(3) (2021); N.H. REV. STAT. ANN. § 626:8 III(a) (2020); N.J. STAT. ANN. § 2C:2-6(c)(1)(b) (West 2021); OR. REV. STAT. § 161.155(2)(b) (2021); 18 PA. CONS. STAT. § 306(c)(1)(ii) (2022); WASH. REV. CODE § 9A.08.020 (3)(a)(ii) (2022).

[123] *See* ALA. CODE § 13A-2-23 (2022); COLO. REV. STAT. § 18-1-603 (2021); CONN. GEN. STAT. § 53a-8(a) (2021); D.C. CODE § 22-1805 (2022); FLA. STAT. § 777.011 (2022); GA. CODE ANN. § 16-2-20(b) (2021); IDAHO CODE § 19-1430 (2022); IND. CODE § 35-41-2-4 (2021); KAN. STAT. ANN. § 21-5210 (2021); KY. REV. STAT. ANN. § 502.020(1)(b) (2022) (adopting Model Penal Code version, but omitting "agrees"); LA. STAT. ANN. § 14:24 (2021); MASS. GEN. LAWS ch. 274, § 2 (2022); MISS. CODE ANN. § 97-1-7 (2022); NEB. REV. STAT. § 28-206 (2021); NEV. REV. STAT. § 195.020 (2017); N.M. STAT. ANN. § 30-1-13 (2022); N.Y. PENAL LAW § 20.00 (McKinney 2022); N.C. GEN. STAT. § 14-5.2 (2022); OKLA. STAT. tit. 21, § 21-172 (2021); 11 R.I. GEN. LAWS § 11-1-3 (2022); S.C. CODE ANN. § 16-1-40 (2021); S.D. CODIFIED LAWS § 22-3-3 (2022); TENN. CODE ANN. § 39-11-402(2) (2018) (adopting Model Penal Code version, but omitting "agrees"); TEX. PENAL CODE ANN. § 7.02(2) (West 2021)

Although Maryland does not have an aiding and abetting statute, the case law follows the approach of the majority view and common law, extending accomplice liability to one who assists, supports, or supplements the efforts of another in the commission of a crime or instigates, advises, or encourages the commission of the crime.[124]

3. Challenges to Aiding and Abetting Liability Abound

In sum, only three states follow Minnesota in expanding accomplice liability to encompass a defendant who merely conspires with another to commit a crime. An additional 14 states follow the Model Penal Code approach of imposing liability on one who agrees to commit a crime, but only when he does so acting "with the purpose of promoting or facilitating the commission of the offense."[125] The remaining 32 states and the District of Columbia, like the federal statute, require something more than an agreement to give rise to aider and abettor complicity.[126] As a result, the offense of aiding and abetting burglary in Minnesota "reaches beyond generic [burglary] to cover certain nongeneric crimes."[127]

We see under this analysis that Mr. Gammell's Minnesota conviction for aiding and abetting in Minnesota is not a violent felony under the ACCA because the statutory elements are broader than the generic definition of aiding and abetting. But this answer only becomes clear when a court engages the binary factor analysis. Unfortunately, very few courts are presently applying the binary factor analysis, leaving countless defendants subject to the ACCA who might not in fact be guilty of armed career criminal status.

B. Conspiracy Is a Form of Inchoate Liability

Let us try another hypothetical examining state inchoate liability theories. What if Mr. Gammell had instead been convicted of conspiring to distribute drugs in Florida?[128] Would his crime constitute a predicate crime under the ACCA? Only

(adopting Model Penal Code version, but omitting "agrees"); UTAH CODE ANN. § 76-2-202 (2022); VT. STAT. ANN. tit. 13, § 4 (2021); VA. CODE ANN. § 18.2-18 (2022); W. VA. CODE § 61-11-6 (2020); WYO. STAT. ANN. § 6-1-201 (2021).

[124] *See, e.g.*, Kohler v. State, 36 A.3d 1013, 1018–19 (Md. Ct. Spec. App. 2012); Handy v. State, 326 A.2d 189, 196 (Md. Ct. Spec. App. 1974).

[125] MODEL PENAL CODE, *supra* note 119, at § 2.06(3)(a) (2021).

[126] Notably, three of these states, Kansas, Tennessee, and Utah, have adopted the Model Penal Code version, but have omitted its expansion of the common law to those who merely "agree" to aid another.

[127] Gonzales v. Duenas-Alvarez, 549 U.S. 183, 190 (2007).

[128] The Florida drug distribution statute reads in part: "(1)(a) Except as authorized by this chapter and chapter 499, a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance." FLA. STAT. § 893.13(1)(a) (2022). Courts have upheld Florida drug distribution convictions as ACCA predicates. *See, e.g.*, *In re* Rogers, 825 F.3d 1335, 1340 (11th Cir. 2016).

by subjecting this hypothetical crime to a thorough *Taylor* analysis does the answer reveal itself: no, not in Florida, although the answer will vary by state.

1. Consider the Generic Definition of Conspiracy

Again, we look to the federal criminal code to provide the generic definition of conspiracy since no federal criminal common law exists.[129] The federal general conspiracy statute provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.[130]

The federal definition is comprised of two elements: agreement and an overt act.[131] The overt act need not be completed by any particular defendant but may be attributed to any member of the conspiracy.[132] Conspiracy is a separate crime from the substantive offense, and it requires specific intent.[133] "A conspiracy does not automatically terminate simply because the Government, unbeknownst to some of the conspirators, has 'defeat[ed]' the conspiracy's 'object.'"[134]

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[129] *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 32 (1812).

[130] 18 U.S.C. § 371.

[131] *See* United States v. Falcone, 311 U.S. 205, 210 (1940) ("The gist of the offense of conspiracy as defined by § 37 of the Criminal Code, 18 U.S.C. § 88, is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy.").

[132] *See* Pinkerton v. United States, 328 U.S. 640, 647 (1946) (internal citations omitted) ("That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all. An overt act is an essential ingredient of the crime of conspiracy . . . If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense.").

[133] *See* United States v. Pinckney, 85 F.3d 4, 8 (2d Cir. 1996) (internal citations omitted) ("It is elementary that conspiracy is a crime, separate and distinct from the substantive offense. Conspiracy requires proof of: (1) an agreement among the conspirators to commit an offense; (2) specific intent to achieve the objective of the conspiracy; and (3) usually, an overt act to effect the object of the conspiracy. Although the government need not prove commission of the substantive offense or even that the conspirators knew all the details of the conspiracy, it must prove that 'the intended future conduct they . . . agreed upon include[s] all the elements of the substantive crime.'").

[134] United States v. Jimenez Recio, 537 U.S. 270, 274 (2003) (quoting United States v. Cruz, 127 F.3d 791, 795 (9th Cir. 1997) (alteration in original).

LaFave teaches us that the common law notion of conspiracy did not require action beyond agreement, but modern statutes have rejected this notion.[135] *Black's* also emphasizes both the mens rea and the actus reus of conspiracy while it acknowledges differing state views on core concepts.[136] As well, the Model Penal Code adopts the view that an overt act is necessarily a component of conspiracy.[137]

2. State Definitions of Conspiracy Differ

In Florida, conspiracy is defined as follows: "A person who agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy."[138] Unlike the vast majority of the states, Florida tracks only the first part of the generic definition. In other words,

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[135] 2 SUBST. CRIM. L. § 12.2(b) (3d ed.) (describing overt act requirement) states:

> At common law a conspiracy was punishable even though no act was done beyond the mere making of the agreement. This is still the rule in the absence of a statute providing otherwise, but most of the states now require that an overt act in furtherance of the plan be proven for all or specified conspiratorial objectives. In a few states this overt act must be a "substantial step" toward commission of the crime. On the federal level, an overt act is specifically required by the general conspiracy statute, and thus the absence of such a requirement in subsequently enacted federal conspiracy statutes dealing with specific subjects have been taken to reflect an intent by Congress to instead follow the common law as to those other provisions.

[136] *Conspiracy*, BLACK'S LAW DICTIONARY 351–52 (11th ed. 2019) (internal citations omitted) notes:

> An agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose.
>
> Conspiracy is a separate offense from the crime that is the object of the conspiracy. A conspiracy ends when the unlawful act has been committed or (in some states) when the agreement has been abandoned. A conspiracy does not automatically end if the conspiracy's object is defeated.

[137] MODEL PENAL CODE, *supra* note 119, at § 5.03 (2021) (describing criminal conspiracy):

> (1) Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.
>
> (2) Scope of Conspiratorial Relationship. If a person guilty of conspiracy, as defined by Subsection (1) of this Section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.
>
> . . . .
>
> (5) Overt Act. No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

[138] FLA. STAT. § 777.04(3) (2022).

Florida's definition is broader than the federal definition because it requires only an agreement, not an action.

Florida courts have reiterated that the state's failure to require an overt act tracks the common law tradition and distinguishes it from the federal statute.[139] A minority of ten states have statutes that facially follow Florida's lead.[140] Two states do not have conspiracy statutes that lay out the federal elements, but case law demonstrates that they track Florida and follow the common law.[141] One state's courts interpreted its statute to track Florida and follow the common law too.[142] Thirty-two states have statutes that facially track the federal definition and require an overt act.[143] One state's courts interpreted its statute to track the federal definition[144] and another state's statute requires an overt act unless the conspiracy was to commit a felony.[145] Three states go further than the federal definition, and require agreement, action, plus a substantial step towards the goal of the conspiracy.[146] We see from this review that states follow at least three distinct approaches, with some nuance within each, in defining or interpreting conspiracy.

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[139] *See, e.g.*, Slaughter v. State, 301 So.2d 762 (Fla. 1974) ("At common law, it was not necessary to aver and prove an overt act."), *cert. denied*, 420 U.S. 1005.

[140] *See* DEL. CODE ANN. tit. 11, § 511–13 (2022); FLA. STAT. § 777.04 (2022); MICH. COMP. LAWS § 750.157a (2022); MISS. CODE ANN. § 97-1-1 (2022); MO. REV. STAT. § 562.014.1 (2022); NEV. REV. STAT. § 199.480 (2021); N.M. STAT. ANN. § 30-28-2 (2022); OR. REV. STAT. ANN. § 161.450 (2021); S.C. CODE ANN. § 16-17-410 (2021); VA. CODE ANN. § 18.2-22 (2022).

[141] Carroll v. State, 53 A.3d 1159, 1169 (Md. 2012); Commonwealth v. Nee, 935 N.E.2d 1276, 1282 (Mass. 2010).

[142] State v. Porto, 591 A.2d 791, 795 (R.I. 1991).

[143] *See* 18 U.S.C. § 371; MODEL PENAL CODE, *supra* note 4, at § 5.03; ALA. CODE § 13A-4-3(a) (2022); ALASKA STAT. § 11.31.120(a) (West 2020); ARIZ. REV. STAT. ANN. § 13-1003(A) (2022); ARK. CODE ANN. § 5-3-401(1)–(2) (2021); CAL. PENAL CODE § 184 (West 2022); COLO. REV. STAT. § 18-2-201(1)–(2) (2021); CONN. GEN. STAT. § 53a-48(a) (2021); GA. CODE ANN. § 16-4-8 (2021); HAW. REV. STAT. § 705-520(2) (2021); IDAHO CODE § 18-1701 (2022); 720 ILL. COMP. STAT. ANN. § 5/8-2(a) (West 2022); IND. CODE § 35-41-5-2(b) (2021); IOWA CODE § 706.1 (2022); KAN. STAT. ANN. § 21-5302(a) (2021); KY. REV. STAT. ANN. § 506.050(1) (2022); LA. STAT. ANN. § 14:26(A) (2021); MINN. STAT. ANN. § 609. 609.175 subd. 2 (West 2021); MONT. CODE ANN. § 45-4-102(1) (2021); NEB. REV. STAT. § 28-202 (2021); N.H. REV. STAT. ANN. § 629:3(I) (2020); N.J. STAT. ANN. § 2C:5-2(d) (West 2021); N.Y. PENAL LAW § 105.20 (McKinney 2022); N.D. CENT. CODE § 12.1-06-04(1) (2021); OKLA. STAT. tit. 21, § 421 (2021); 18 PA. CONS. STAT. § 903(e) (2022); S.D. CODIFIED LAWS § 22-3-8 (2022); TENN. CODE ANN. § 39-12-103(d) (2022); TEX. PENAL CODE ANN. § 15.02 (West 2021); UTAH CODE ANN. § 76-4-201 (2022); VT. STAT. ANN. tit. 13, § 1404(b) (West 2021); WIS. STAT. § 939.31 (2019–20); WYO. STAT. ANN. § 6-1-303 (2021).

[144] *See* State v. White, 722 S.E.2d 566, 578 (W. Va. 2011).

[145] *See* ARIZ. REV. STAT. ANN. § 13-1003(A) (2022).

[146] *See* ME. STAT. tit. 17-A, § 151(4) (2021); OHIO REV. CODE ANN. § 2923.01(A)(2), (B) (LexisNexis 2021–2022); WASH. REV. CODE § 9A.28.040(1) (2022).

3. Challenges to Conspiracy Liability Abound

In sum, only 13 states follow Florida in expanding conspiracy liability to encompass a defendant who merely agrees with another to commit a crime. Thirty-four states follow the federal statute and the Model Penal Code approach of imposing liability on one who agrees to commit a crime, but only when he or a co-conspirator take an overt action in furtherance of the conspiracy. The remaining three states require agreement, an overt act, and a substantial step towards the conspiracy goal to give rise to conspiracy complicity. As a result, the offense of aiding and abetting burglary in Florida "reaches beyond generic [burglary] to cover certain nongeneric crimes."[147]

In Minnesota, the state further breaks down the conspiracy statutes depending on whether the defendants completed the conspiracy or not, making the inquiry even more complicated.[148] We see under this analysis that Mr. Gammell's hypothetical Florida conviction for conspiring in Florida is not a violent felony because the statutory elements are broader than the generic definition of conspiracy. Thus, if Mr. Gammell had been convicted of conspiracy to distribute narcotics in Florida, he should not qualify as an armed career criminal.

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[147] Gonzales v. Duenas-Alvarez, 549 U.S. 183, 190 (2007).

[148] *Compare* Minn. Stat. § 609.175 (West 2021) *with* Minn. Stat. § 609.05 (West 2021).

C. Attempt Is a Form of Inchoate Liability

Let us take another example using a hypothetical conviction against Mr. Gammell for attempting[149] to commit robbery[150] in Ohio.[151] In Ohio, attempt is defined as follows: "(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."[152]

The Buckeye state criminalizes mere knowledge. In other words, Ohio's attempt definition is broader than the federal definition because it requires only an agreement, not an action.[153]

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[149] Some courts have refused to apply the binary factor analysis in ACCA cases involving attempt convictions. *See* United States v. Lynch, 518 F.3d 164, 170–71 (2d Cir. 2008) (declining to subject attempt to *Taylor* methodology in ACCA case under now-rejected residual clause).

[150] Ohio's robbery statute is particularly odd in that it subsumes attempt without cross-referencing or defining the term. The current robbery statute reads as follows:

> (A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> (1) Have a deadly weapon on or about the offender's person or under the offender's control;
>
> (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;
>
> (3) Use or threaten the immediate use of force against another.

OHIO REV. CODE ANN. § 2911.02(A)(1)–(2) (LexisNexis 2021–2022). Courts have ruled that attempted robbery may be an ACCA predicate crime under the force clause. *See* Waagner v. United States, 971 F.3d 647, 656 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1248 (2021) (attempted robbery in Ohio is ACCA predicate crime even post-Johnson); Hill v. United States, 877 F.3d 717, 719 (7th Cir. 2017) ("When a substantive offense would be a violent felony under § 924(e) and similar statutes, an attempt to commit that offense also is a violent felony."); United States v. Thomas, 13 Fed. App'x 233, 241 (6th Cir. 2001) (unpublished) ("As to whether the prior convictions met the requirements for an ACCA enhancement, the district court properly counted the two prior attempted robbery convictions in support of an ACCA enhancement, because the statutory definition of 'violent felony' includes attempts.").

[151] *See* United States v. Sanders, 470 F.3d 616, 624 (6th Cir. 2006) (holding Ohio robbery conviction served as ACCA predicate felony).

[152] OHIO REV. CODE ANN. § 2923.02(A), (B), (E)(1) (LexisNexis 2021–2022). The code goes on to read in relevant part:

> (B) It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the attempt was either factually or legally impossible.
>
> . . . .
>
> (E)(1) Whoever violates this section is guilty of an attempt to commit an offense. . . .

Id.

[153] *See* United States v. Collins, 808 F. App'x 131, 135–36 (4th Cir. 2020) (internal citations omitted), *cert. denied*, 141 S. Ct. 1080 (2021) ("When a defendant is convicted pursuant to a state's general attempt statute which encompasses all or nearly all substantive crimes, 'two sets of elements are at issue: the elements of attempt and the elements of the underlying . . . offense.' Though we have held that 'both the inchoate crime and the underlying offense are subject to [the] categorical approach,' we have also recognized that general attempt statutes do not set forth standalone crimes and 'must be considered in relation to the object crime.' Because attempt is

1. Consider the Generic Definition of Attempt

Unlike aiding and abetting and conspiracy, Congress never has codified the federal prohibition against generally attempting crime, despite numerous attempts over the years to formalize the law.[154] Rather, the federal government has in some instances[155] prohibited the attempt of certain crimes[156] or prohibited crimes that are by their nature attempts.[157]

The Supreme Court has not provided a generic definition of attempt. However, numerous federal circuit courts agree that attempt encompasses both intent and action.[158] "At common law an attempt was defined as the specific intent to engage in criminal conduct and an overt act which is a substantial step towards committing the crime."[159] As one court put it:

> We have defined "attempt" as requiring "[1] an intent to commit" the underlying offense, along with "[2] an overt act constituting a substantial step towards the commission of the offense." "'Mere preparation' to commit a crime 'does not constitute a substantial step.'" A substantial step occurs when a defendant's "actions unequivocally demonstrat[e] that the crime will take place unless interrupted by independent circumstances." "Even when the defendant's intent is clear, his actions must cross the line between preparation and attempt."[160]

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subject to the categorical approach, its elements must categorically match generic attempt. 'Our precedent defines generic attempt as requiring (1) culpable intent to commit the crime charged and (2) a substantial step toward the completion of the crime, which is consistent with the definition of attempt found in the Model Penal Code.'").

[154] *See* CHARLES DOYLE, CONG. RSCH. SERV., R42001, ATTEMPT: AN OVERVIEW OF FEDERAL CRIMINAL LAW 1 (2020).

[155] *See, e.g.*, 18 U.S.C. § 1113 (attempted murder); 18 U.S.C. § 1201(d) (attempted kidnapping); 18 U.S.C. § 2241 (a)–(d) (attempted aggravated sexual abuse); 18 U.S.C. § 2241(a)–(c) (attempted drug trafficking).

[156] *See generally* DOYLE, *supra* note 154.

[157] *See, e.g.*, 18 U.S.C. § 201(b)(2) (solicitation of bribe); 18 U.S.C. § 474(a) (possession of counterfeiting equipment).

[158] *See, e.g.*, United States v. Gonzalez-Monterroso, 745 F.3d 1237, 1243 (9th Cir. 2014) (internal citations omitted) ("Analyzing this claim requires us to first determine whether Delaware's attempt statute is a categorical match for the federal definition of 'attempt.'").

[159] United States v. Gomez-Hernandez, 680 F.3d 1171, 1174–75 (9th Cir. 2012).

[160] *Gonzalez-Monterroso*, 745 F.3d at 1243 (internal citations omitted).

Attempt is a relatively late addition to the federal criminal code.[161] The Anglo-American legal tradition denied attempt as a crime in and of itself.[162] English common law "started from the principle that an attempt to do harm is no offense."[163] Later, an attempt was classified as a misdemeanor when the attempt was to commit a felony.[164]

The Model Penal Code describes attempt as follows:

> 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; or
>
> (c) 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.[165]

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[161] *See* Francis Bowes Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 821 (1928) ("That those should not be allowed to go free who attempt to commit some crime but fail, is a feeling deep rooted and universal. 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.").

[162] "At common law, the attempt to commit a crime was itself a crime if the perpetrator not only intended to commit the completed offense, but also performed 'some open deed tending to the execution of his intent.'" United States v. Resendiz-Ponce, 549 U.S. 102, 106 (2007) (Scalia, J., dissenting) (*citing* LAFAVE, *supra* note 31, at § 11.2(a)).

[163] LAFAVE, *supra* note 111, at § 11.2(a) (quoting POLLACK & MAITLAND, *supra* note 35, at 508 n.4) (describing development of the crime of attempt).

[164] "So it is a misdemeanour at common law to attempt to commit a felony or misdemeanour." ROBERT CAMPBELL, PRINCIPLES OF ENGLISH LAW: FOUNDED ON BLACKSTONE'S COMMENTARIES 102 n.41 (1907); *see also* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 546 (18th ed. 1836) ("It is equally a crime to give as to receive, and in many cases the attempt itself is an offence complete on the side of him who offers it.").

[165] MODEL PENAL CODE § 5.01, *supra* note 119 (describing criminal attempt). The Model Penal Code goes on to define "substantial step" for those states requiring this element:

> *Conduct That May Be Held Substantial Step Under Subsection (1)(c).*
> Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negativing 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:
> (a) lying in wait . . . ;
> (b) enticing . . . ;

Likewise, the leading treatise combines intent and action:

> The crime of attempt consists of (1) an intent to do an act or to bring about a certain consequence which would in law amount to a crime; and (2) an act in furtherance of that intent. Under the prevailing view, an attempt thus cannot be committed by recklessness or negligence or on a strict liability basis, even if the underlying crime can be so committed.[166]

Similarly, *Black's* defines attempt as "[t]he act or an instance of making an effort to accomplish something, esp. without success" and in criminal law, "[a]n overt act that is done with the intent to commit a crime but that falls short of completing the crime. Attempt is an inchoate offense distinct from the attempted crime."[167]

2. State Definitions of Attempt Differ

Scholars have argued persuasively that Ohio's definition criminalizes inaction.[168] This argument is compelling in light of the heavy reliance Ohio courts place on omission, especially in endangerment cases.[169] Repeatedly, Ohio has criminalized

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(c) reconnoitering . . . ;
(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
(e) possession of materials to be employed in the . . . crime . . . ;
. . . .
(g) soliciting.
Conduct Designed to Aid Another in Commission of a Crime. A person who engages in conduct designed to aid another to commit a crime that would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.

See id.

[166] LAFAVE, *supra* note 111, at § 11.3(a).

[167] *Attempt*, BLACK'S LAW DICTIONARY (11th ed. 2019) (internal citations omitted) ("An attempt to commit an indictable offence is itself a crime. Every attempt is an act done with intent to commit the offence so attempted. The existence of this ulterior intent or motive is the essence of the attempt . . . [Yet] [a]lthough every attempt is an act done with intent to commit a crime, the converse is not true. Every act done with this intent is not an attempt, for it may be too remote from the completed offence to give rise to criminal liability, notwithstanding the criminal purpose of the doer. I may buy matches with intent to burn a haystack, and yet be clear of attempted arson; but if I go to the stack and there light one of the matches, my intent has developed into a criminal attempt. Attempt . . . is the most common of the preliminary crimes. It consists of steps taken in furtherance of an indictable offence which the person attempting intends to carry out if he can. As we have seen there can be a long chain of such steps and it is necessary to have some test by which to decide that the particular link in the chain has been reached at which the crime of attempt has been achieved; that link will represent the actus reus of attempt.").

[168] *See, e.g.*, Michael T. Cahill, *Attempt by Omission*, 94 IOWA L. REV. 1207, 1222 (2009) ("However conceptually unusual it may seem that one could attempt a crime by doing nothing, many American criminal codes allow for just such a possibility.").

[169] *See id.* at 1239 (citing State v. Schaffer, 713 N.E.2d 450, 450–52 (Ohio Ct. App. 1998)); State v. Melvin, No. 21135, 2003 WL 1524567, at *2 (Ohio Ct. App. Mar. 26, 2003))

intent minus action. For example, the Ohio state courts upheld a guilty verdict for attempted aggravated murder against a defendant who thought malevolent thoughts about the potential victim while stabbing furniture.[170] At no time did the defendant actually physically harm the victim.[171]

Only seven states follow Ohio's lead and explicitly criminalize inaction.[172] Twelve states track the generic definition requiring both action and intent.[173] Six states require action but not intent.[174] Seventeen states go further than the generic definition and require a substantial step towards the crime.[175] Three states simply prohibit "attempt" without further defining the term.[176] Five states and the federal

("Similarly, in an Ohio case, a police officer found a two-year-old about to step from the curb onto a street; upon the child's return to his house, some 100 yards away, his mother said he had been gone for just five or ten minutes. Another Ohio case involved a bus driver who found an unattended two-year-old wandering around a parking lot in the rain wearing only a diaper.").

[170] *See* State v. Green, 702 N.E.2d 462, 465 (Ohio Ct. App. 1997) ("The record indicates that appellant observed Friend's van and determined that Friend and her van had to be eliminated, followed Friend's van into the Kmart parking lot, parked his vehicle a short distance away from Friend's van, watched Friend leave her van and enter Kmart, pulled out his red pocketknife and opened the blade, climbed inside Friend's van, and lay in the back seat waiting for Friend to return. While inside the van, appellant sliced the back of one of the seats in Friend's van as he thought about stabbing and killing Friend and then drinking her blood.").

[171] *Id.* at 464.

[172] *See* ARIZ. REV. STAT. ANN. § 13-1001(A)(2) (2022); CONN. GEN. STAT. § 53a-49(a) (2021); DEL. CODE ANN. tit. 11, § 531(2) (2022); KY. REV. STAT. ANN. § 506.010(b) (2022); LA. STAT. ANN. § 14:27(A) (2021); N.H. REV. STAT. ANN. § 629:1(1) (2020); N.J. STAT. ANN. § 2C:5-1(a)(2) (West 2021).

[173] *See* ALA. CODE § 13A-4-2(a) (2022); CAL. PENAL CODE §21(a) (West 2022); KAN. STAT. ANN. § 21-5301(a) (2021); MD. CODE ANN., PUB. SAFETY § 13A-1004 (2022); MISS. CODE ANN. § 97-1-7 (2022); MONT. CODE ANN. § 45-4-103(1) (2021); NEV. REV. STAT. § 193.153 (2021); N.M. STAT. ANN. § 30-28-1 (2022); N.Y. PENAL LAW § 110.00 (McKinney 2022); TENN. CODE ANN. § 39-12-101 (2022); TEX. PENAL CODE ANN. § 15.01 (West 2021); WIS. STAT. § 939.32(3) (2019–20).

[174] *See* FLA. STAT. § 777.04(1) (2022); MASS. GEN. LAWS ch. 274, § 6 (2022); MICH. COMP. LAWS § 750.92 (2022); OKLA. STAT. tit. 21, § 42 (2021); S.D. CODIFIED LAWS § 22-4-1 (2022); VT. STAT. ANN. § 18.2-18 (West 2021).

[175] *See* ALASKA STAT. § 11.31.100(a) (West 2020); ARK. CODE ANN. § 5-3-201(A)(2) (2021); COLO. REV. STAT. § 18-2-101(1) (2021); GA. CODE ANN. § 16-4-1 (2021); HAW. REV. STAT. § 705-500(1)(b) (2021); 720 ILL. COMP. STAT. ANN. § 5/8-4(a) (West 2022); IND. CODE § 35-41-5-1 (2021); ME. STAT. tit. 17-A, § 152(1) (2021); MINN. STAT. § 609.852; MO. REV. STAT. § 562.012.1 (2022); NEB. REV. STAT. § 28-201 (2021); N.D. CENT. CODE § 12.1-06-01(1) (2021); OR. REV. STAT. ANN. § 161.405 (2021); 18 PA. CONS. STAT. § 901(a) (2022); UTAH CODE ANN. § 76-4-101 (2022); WASH. REV. CODE § 9A.28.020(1) (2022); WYO. STAT. ANN. § 6-1-301 (2021).

[176] *See* IDAHO CODE. § 18-306 (2022); S.C. CODE ANN. § 16-1-80 (2021) (referring to "the common law offense of attempt"); W. VA. CODE § 61-11-8 (West 2020).

code do not have general attempt statutes.[177] We see from this review of state law that there are at least six competing approaches that the states follow in defining attempt.

3. Challenges to Attempt Liability Abound

In sum, a minority of states follow Ohio in expanding attempt liability to encompass a defendant who takes no action to commit a crime, either by criminalizing omission or inaction. A second small group of states track the generic definition. Another small number of states narrow the generic definition by omitting the mens rea. A fourth group of states expands the generic definition by requiring intent, action, and a substantial step towards the crime to give rise to attempt liability. The remaining states either do not define the term or have no statute at all. As a result, the offense of attempting second-degree robbery in Ohio "reaches beyond [the] generic [offense] to cover certain nongeneric crimes."[178]

We see under this analysis that Mr. Gammell's hypothetical Ohio conviction for attempting robbery in Ohio is not a violent felony because the statutory elements are broader than the generic definition of attempt. Thus, Mr. Gammell would not be an armed career criminal if one purported predicate crime was attempted robbery in Ohio.

V. COURT CHALLENGES EMPLOYING THE BINARY FACTOR ANALYSIS HABITUALLY FAIL

A. Cases Are Few and Far Between Under the ACCA

Part of the challenge of this argument is that most circuit courts do not seem to understand the nuanced binary factor analysis and confront it head on. In my client's case, the complexity of his argument created an intra-circuit split in the United States Court of Appeals for the Eighth Circuit.[179] One judge on the panel

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[177] States lacking any codification of attempt are Iowa, Maryland, North Carolina, Virginia, and Rhode Island.

[178] Gonzales v. Duenas-Alvarez, 549 U.S. 183, 190 (2007).

[179] Since *Duenas-Alvarez*, Judge James B. Loken and Judge Jonathan A. Kobes of the United States Court of Appeals for the Eighth Circuit have directly confronted the question of how to analyze predicate crimes relying upon secondary liability in the context of the ACCA. Both Judge Loken and Judge Kobes acknowledged the need to separately analyze the underlying offense as well as the theory of liability. Both also ultimately found that although the defense's theory of the need to analyze secondary liability statutes was compelling, the facts did not support the notion that the statutes were, in fact, overbroad in the particular cases adjudicated before them. *See* United States v. Boleyn, 929 F.3d 932, 934 (8th Cir. 2019); United States v. Gammell, 932 F.3d 1175, 1177 (8th Cir. 2019) (Kobes, J., concurring in part and concurring in judgment).

> . . . Raising an issue of first impression in this circuit, defendants argue that no conviction under this statute can be a predicate prior conviction under the ACCA, the CSA, or the career offender guidelines because aiding and abetting liability is inherent in the definition

that heard Mr. Gammell's appeal agreed that secondary liability must be examined as well as the underlying conviction:

> Both Supreme Court and Eighth Circuit precedent require us to evaluate Gammell's claim about the scope of Minnesota aiding and abetting. In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 191 (2007), when confronted with a similar argument about the scope of California's definition of aiding and abetting, the Supreme Court said that a conviction potentially based on an aiding and abetting theory would not qualify as a predicate offense under the Immigration and Nationality Act if a defendant could show that there was "something special about [his state's] version of [aiding and abetting]—for example, that [his state] in applying it criminalizes conduct that most other states would not." We recently recognized the same possibility in the ACCA context when evaluating the aiding and abetting statute in Iowa. We reasoned that "[a]s aiding and abetting liability is inherent in every conviction under [the Iowa statute at issue], it is consistent with the categorical approach to look to Iowa's aiding and abetting statute in determining whether the prior offense of conviction is overbroad." *United States v. Boleyn*, 929 F.3d 932, 937 n.3 (8th Cir. July 8, 2019). Gammell was convicted of aiding and abetting second-degree burglary and has made the same type of argument as the appellants in *Boleyn* and *Duenas-Alvarez*. We are therefore required to analyze Minnesota's aiding and abetting law.[180]

> of all drug offenses, and Iowa's doctrine of aiding and abetting is broader than "the generic definition of aiding and abetting."
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> . . . .
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> This case presents a different issue, whether Iowa's doctrine of aiding and abetting liability renders every § 124.401 conviction overly broad under each of the three federal enhancement provisions at issue. The argument was "teed up," in defendants' view, by the Supreme Court's decision in *Gonzales v. Duenas-Alvarez* that "every jurisdiction—all States and the Federal Government—has expressly abrogated the distinction among principals and aiders and abettors." This is certainly true in Iowa, where a separate statute provides that aiders and abettors are to be "charged, tried and punished as principals."
>
> . . . .
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> Looking only to the fact of a prior conviction and the statutory definition of a drug offense under Iowa Code § 124.401, including the Iowa law of aiding and abetting liability, as the categorical approach requires, we conclude that convictions under this state statute categorically "involve" and "relate to" the offenses described in 18 U.S.C. § 924(e)(2)(A)(ii) and 21 U.S.C. § 802(44). Accordingly, the district courts properly imposed the ACCA and CSA statutory enhancements based on prior convictions … under Iowa Code § 124.401.

Boleyn, 929 F.3d at 934–38.

[180] *Gammell*, 932 F.3d at 1183 (Kobes, J., concurring in part and concurring in judgment) (some internal citations omitted). By contrast, the majority opinion declined to undertake any analysis of the theory of liability. *See id.* at 1180 (describing aiding and abetting as "irrelevant" to second-degree burglary conviction). This leaves the Eighth Circuit in the odd position of an intra-circuit split. *Compare Boleyn,* 929 F.3d at 936–38 (reviewing definition of drug offense as well as aiding and abetting definition under state law as mandated by categorical approach), *and* United

But his dissent did not carry the day, and Judge Kobes joined the opinion of the court only because he found no evidence that Minnesota aiding and abetting departed from the generic definition after he conducted the *Duenas-Alvarez* analysis.[181]

Under the ACCA, some judges have noted that appellate lawyers are beginning to realize that secondary and inchoate liability may add a new question under the *Taylor* categorical analysis. But most of these judges have failed to actually address the challenge, simply dismissed questions, and resorted to looking only at the underlying offense.[182]

B. Related Statutes Are Poisoned by Taylor

One of the intriguing aspects of the binary factor analysis is that it has application far beyond the ACCA. Again, only a handful of judges have confronted the

States v. Newman, 798 F. App'x 960, 960–61 (8th Cir. 2020) (examining state definition of aiding and abetting as well as underlying conviction), *with* United States v. Harris, 810 F. App'x 485, 486 (8th Cir. 2020) ("As a result, 'it matters not whether' the defendant 'was convicted as a principal or aider or abettor; it matters only whether the substantive offense qualifies' as a crime of violence.") (citing *Gammell*, 932 F.3d at 1180).

[181] *Gammell*, 932 F.3d at 1182 (Kobes, J., concurring in part and concurring in judgment).

[182] *See* United States v. Buie, 960 F.3d 767, 772–73 (6th Cir. 2020) (internal citations omitted) ("[W]e must assume that Buie was convicted of aiding and abetting arson, the minimum conduct criminalized by the statute . . . Comparing that 'minimum conduct' to the general understanding of what constitutes arson, Buie claims that § 39-3-202 criminalizes more conduct than generic arson, meaning his offense is not an ACCA predicate.").

> But Buie's argument confronts a hard reality. In every American jurisdiction, to our knowledge, principals and those who aid and abet them are held to have committed the same crime, and are punished in kind . . . We emphasize[] a bedrock principle of criminal law frequently employed by this Court and others: "[O]ne who causes another to commit an unlawful act is as guilty of the substantive offense as the one who actually commits the act." Aiding and abetting arson is no different. The Tennessee arson statute's act element thus corresponds with generic arson.

Id. at 772–73.

binary factor analysis directly,[183] and fewer still[184] have found it a winning argument.[185] For the most part, judges have refused to wrestle with this argument despite its implications for other complex statutory structures (e.g., requiring the courts to define a crime of violence) and sentencing schemes.[186]

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[183] *See Newman*, 798 F. App'x at 960 (internal citations omitted) ("Newman first argues that he does not qualify as a career offender because his prior convictions do not count as predicate offenses. Specifically, he argues that 'the Iowa statute underlying all of [his] prior convictions is overbroad' 'because Iowa's aiding and abetting statute is broader than the generic definition of aiding and abetting' . . . Newman claims that the Iowa statute only requires knowledge, whereas the federal aiding-and-abetting standard requires a higher mens rea . . . As the government points out, we recently decided that issue . . . *Boleyn* disagreed, and its holding binds this panel.").

[184] *See Harris*, 810 F. App'x at 486-87 (internal citations omitted) (first quoting United States v. Zackery, 494 F.3d 644, 649 (8th Cir. 2007); then United States v. Brown, 550 F.3d 724, 728 (8th Cir. 2008); and then *Gammell*, 932 F.3d 1175, 1180 (8th Cir. 2019) ("Second, Harris argues his robbery conviction is not a crime of violence under the force clause because one can be liable for aiding and abetting under the statute of conviction and '[a]n aider and abettor does not have to personally use, attempt to use, or threaten violent physical force to be convicted of aiding and abetting a robbery.' But the 'crime of violence' definition focuses on the "offense" under state law, not the theory of liability under which the person is convicted of that offense. *See* § 4B1.2(a). 'Aiding and abetting' is 'not itself an offense' but is 'simply one way to prove' guilt of the underlying offense . . . '[A] fundamental theory of American criminal law is that an aider and abettor is guilty of the underlying offense.' As a result, 'it matters not whether' the defendant 'was convicted as a principal or aider or abettor; it matters only whether the substantive offense qualifies' as a crime of violence . . . As discussed above, under our precedents, Harris's underlying offense qualifies as a crime of violence.").

[185] *See* Bourtzakis v. United States Att'y Gen., 940 F.3d 616, 618–21 (11th Cir. 2019), *cert. denied sub nom.* Bourtzakis v. Barr, 141 S. Ct. 245 (2020) (internal citations omitted) ("This appeal presents the question whether a conviction for delivery of cocaine under Washington law, WASH. REV. CODE § 69.50.401(a)(1)(i) (1989), categorically qualifies as an 'aggravated felony' under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43). The Department of Homeland Security denied Dimitrios Bourtzakis's application for naturalization on the ground that his prior conviction in Washington for delivery of cocaine is an aggravated felony under section 1101(a)(43), which bars him from establishing the 'good moral character' necessary for naturalization . . . Bourtzakis filed a complaint challenging that denial, *id.* § 1421(c), but the district court ruled that his prior conviction is an aggravated felony and dismissed his complaint. Because we agree with the district court that Bourtzakis's prior conviction categorically qualifies as an aggravated felony, we affirm . . . Bourtzakis offers two arguments why the Washington statute is broader than the federal Act and does not categorically qualify as an 'aggravated felony,' 8 U.S.C. § 1101(a)(43). First, he argues that accomplice liability under the Washington statute is broader than accomplice liability under the federal Act . . . Although Bourtzakis's arguments are not forfeited, they fail on the merits. We reject each argument in turn.").

[186] Courts repeatedly have subjected attempt statutes to a *Gammell* review in cases outside the ACCA realm. *See, e.g.*, United States v. Dozier, 848 F.3d 180, 181 (4th Cir. 2017) (testing West Virginia's attempt statute against federal definition in determining U.S.S.G. § 4B1.2 sentencing enhancement for career offender allegedly convicted of controlled substance offense); United States v. Gomez, 757 F.3d 885, 899 n.10 (9th Cir. 2014) (subjecting both California's attempt statute and sexual conduct to Taylor analysis as crime of violence in illegal reentry case);

I have found few attempts[187] by defendants to invoke the binary factor analysis in other contexts in which secondary and inchoate liability may impact the qualification of a predicate crime, although possibilities may arise under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*;[188] the Comprehensive Crime Control

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United States v. Gonzalez-Monterroso, 745 F.3d 1237, 1243–45 (9th Cir. 2014) (rejecting predicate conviction as crime of violence under U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A)(ii) in illegal reentry case after finding Delaware's attempt statute broader than generic definition); United States v. Gomez-Hernandez, 680 F.3d 1171, 1175 (9th Cir. 2012) (applying Taylor categorical analysis to determine whether Arizona definition of attempt corresponded to generic definition of attempt in illegal reentry case applying enhancement for crime of violence under U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A)(ii)); United States v. Hernandez-Galvan, 632 F.3d 192, 198 (5th Cir. 2011) (subjecting North Carolina attempt definition to Taylor analysis under U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A)(ii) in illegal reentry case); United States v. Silva, 380 F. App'x 642, 642–43 (9th Cir. 2010) (finding California's attempt statute no broader than generic definition and therefore crime of violence in attempted illegal reentry case); United States v. Rios-Perez, 380 F. App'x 662, 663 (9th Cir. 2010) (finding California's attempted murder statute fit within generic category of attempt in illegal reentry case requiring crime of violence); Vaca-Tellez v. Mukasey, 540 F.3d 665, 671 (7th Cir. 2008) (analyzing Illinois burglary with intent to commit theft under generic definitions of both burglary and attempt in question of aggravated felony per alien felony removal case); Rebilas v. Mukasey, 527 F.3d 783, 787–88 (9th Cir. 2008) (determining that Arizona's attempted public sexual indecency fell outside federal definition of attempted sexual abuse and could not constitute aggravated felony in illegal reentry case); Ming Lam Sui v. I.N.S., 250 F.3d 105, 119 (2d Cir. 2001) (holding that federal counterfeit securities conviction exceeded federal definition of attempted fraud and did not constitute aggravated felony in alien removal case); *see also* United States v. Cazares-Rodriguez, No. 17-CR-00327-GPC-1, 2017 WL 2212031, at *10 n.7 (S.D. Cal. May 19, 2017) ("The Court observes that 'attempt offenses,' in fact, require two *Taylor* analyses, one that compares the definition of 'attempt' under state law to the generic definition of 'attempt' and one that compares the underlying criminal offense to its generic counterpart.").

[187] *See, e.g.*, United States v. Castro-Gomez, 792 F.3d 1216, 1218 (10th Cir. 2015) (illegal reentry case searching for crime of violence as predicate offense) ("The Ninth Circuit disagreed, refusing to myopically focus on the elements of the underlying substantive offense. Instead, the court viewed Arizona's definition of attempt—which requires an offender to act intentionally—in tandem with the state's definition of aggravated assault. This holistic approach produced a definition of attempted aggravated assault that applies only to intentional conduct, dispelling any possibility the defendant's Arizona conviction might have been premised on ordinary recklessness. We find the Ninth Circuit's reasoning both persuasive and directly applicable here.").

[188] The question under the Immigration and Nationality Act is whether the defendant has committed an "aggravated felony." Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101). "The Immigration and Nationality Act (INA), 66 Stat. 163, 8 U.S.C. § 1101 *et seq.*, provides that a noncitizen who has been convicted of an 'aggravated felony' may be deported from this country." Moncrieffe v. Holder, 569 U.S. 184, 187 (2013) (first quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 186 (2007); and then quoting Shepard v. United States, 544 U.S. 13, 24, 125 (2005)). The definition of an aggravated felony is shaped by the categorical approach.

> When the Government alleges that a state conviction qualifies as an "aggravated felony" under the INA, we generally employ a "categorical approach" to determine whether the state

Act, 18 U.S.C. § 16;[189] the federal firearms offenses, generally at 18 U.S.C. § 924(c);[190] the federal child sexual exploitation laws, including at 18 U.S.C.A.

> offense is comparable to an offense listed in the INA. Under this approach we look "not to the facts of the particular prior case," but instead to whether "the state statute defining the crime of conviction" categorically fits within the "generic" federal definition of a corresponding aggravated felony. By "generic," we mean the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison. Accordingly, a state offense is a categorical match with a generic federal offense only if a conviction of the state offense "necessarily" involved . . . facts equating to [the] generic [federal offense].

Id. at 190 (alteration in original) (internal citations omitted).

[189] The Comprehensive Crime Control Act attempts to define a "crime of violence" which is in turn an "aggravated felony" for application to the INA.

> The Immigration and Nationality Act (INA) renders deportable any alien convicted of an "aggravated felony" after entering the United States.
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> . . . .
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> The INA defines "aggravated felony" by listing numerous offenses and types of offenses, often with cross-references to federal criminal statutes. According to one item on that long list, an aggravated felony includes "a crime of violence . . . for which the term of imprisonment [is] at least one year." The specified statute, 18 U.S.C. § 16, provides the federal criminal code's definition of "crime of violence."
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> . . . .
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> To decide whether a person's conviction "falls within the ambit" of that clause, courts use a distinctive form of what we have called the categorical approach. The question, we have explained, is not whether "the particular facts" underlying a conviction posed the substantial risk that § 16(b) demands. Neither is the question whether the statutory elements of a crime require (or entail) the creation of such a risk in each case that the crime covers. The § 16(b) inquiry instead turns on the "nature of the offense" generally speaking. More precisely, § 16(b) requires a court to ask whether "the ordinary case" of an offense poses the requisite risk.

Sessions v. Dimaya, 138 S. Ct. 1204, 1210–11 (2018) (internal citations omitted). The Supreme Court recently found the residual clause of the federal code definition impermissibly vague. *See id.* at 1211 (striking down as unconstitutional "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" as impermissibly vague definition of crime of violence).

[190] The federal firearms laws describe carrying a gun during "a crime of violence" as a basis for a sentencing enhancement.

> [§ 924(c)] authorizes heightened criminal penalties for using or carrying a firearm "during and in relation to," or possessing a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime." § 924(c)(1)(A). The statute proceeds to define the term "crime of violence" in two subparts . . . .
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> . . . .
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> For years, almost everyone understood § 924(c)(3)(B) to require exactly the same categorical approach that this Court found problematic in the residual clauses of the ACCA and § 16.
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> . . . .
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> What's more, when Congress copied § 16(b)'s language into § 924(c) in 1986, it proceeded on the premise that the language *required* a categorical approach.

§ 2252;[191] and the United States Sentencing Guidelines § 4B1.1.[192] A noteworthy exception may be found in a thoughtful analysis conducted by Judge William H. Pryor of the United States Court of Appeals for the Eleventh Circuit regarding an immigration statute, wherein the judge found the legal theory intriguing but the facts unconvincing.[193]

United States v. Davis, 139 S. Ct. 2319, 2324, 2326, 2331 (2019). The Supreme Court recently found the residual clause of the federal firearms code impermissibly vague. *See id.* at 2336 (striking down as unconstitutional "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," as impermissibly vague definition of crime of violence).

[191] Federal judges are required to impose mandatory sentences in many child pornography cases involving recidivists, requiring the courts to determine under the categorical approach the applicability of prior crimes. *See, e.g.*, United States v. Sonnenberg, 556 F.3d 667, 669–70 (8th Cir. 2009) ("A defendant convicted of receipt of material involving the sexual exploitation of minors faces an increased statutory sentencing range under 18 U.S.C. § 2252(b)(1) if he has a state conviction 'relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward.' To determine whether the prior offense qualifies as a predicate offense for the purpose of a sentence enhancement, federal courts apply a categorical approach.").

[192] The issue under the United States Sentencing Guidelines is the definition of crime of violence for career offender status under § 4B1.1. U.S. SENT'G COMM'N, GUIDELINES MANUAL §4B1.1 (2021). Section 4B1.1 provide[s] that a defendant is a career offender if:

> (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.
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> [T]he Guidelines defined "crime of violence" as, among other things, "any offense under federal or state law punishable by imprisonment for a term exceeding one year that . . . involves conduct that presents a serious potential risk of physical injury to another."

Stinson v. United States, 508 U.S. 36, 38 (1993).

> The Commission sought to implement this directive by promulgating the "Career Offender Guideline," which created a table of enhanced total offense levels to be used in calculating sentences for "career offenders" . . . Pursuant to that Guideline, each defendant who qualifies for career offender status is automatically placed in criminal history "Category VI," the highest available under the Guidelines.
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> . . . .
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> . . . [T]he "Career Offender Guideline . . . adopts an entirely plausible version of the categorical approach that the statute suggests."

United States v. LaBonte, 520 U.S. 751, 753–54, 756 (1997) (internal citations omitted) (quoting United States v. LaBonte, 70 F.3d 1396, 1403–09 (1st Cir. 1995)).

[193] *See* Bourtzakis v. United States Att'y Gen., 940 F.3d 616, 621 (11th Cir. 2019) ("We agree with Bourtzakis on this point," finding it necessary to analyze state aiding and abetting definition as well as underlying crime).

VI. HOW WOULD THE BINARY FACTOR ANALYSIS WORK IN ACTION?

A. Responses to Potential Criticisms of the Binary Factor Analysis

1. Secondary and Inchoate Liability Are Relevant

Opponents of the binary factor analysis generally take the bright line position that a conviction for secondary or inchoate liability is *never* relevant to the *Taylor* analysis.[194] In other words, critics claim the categorical analysis applies only to the underlying offense, not the secondary and inchoate liability statute. So in Mr. Gammell's case, a view contrary to mine would assert that a court need only analyze the Minnesota burglary statute, not the Minnesota aiding and abetting statute.[195]

I assert that the caselaw is clear that the Supreme Court said the opposite in *Duenas-Alvarez*.[196] If there is "something *special* "[197] about an aiding and abetting statute, a defendant could succeed in showing that the statute exceeds the generic definition required by *Taylor* and its progeny. *Duenas-Alvarez* is not simply the interpretation of the Supreme Court; it is also the most just interpretation.

If my interpretation is wrong, the Supreme Court never would have undertaken the analysis of California's aiding and abetting doctrine it found necessary in *Duenas-Alvarez*.[198] The issue in *Duenas-Alvarez* was how to apply the *Taylor* framework to a defendant convicted of aiding and abetting theft.[199] The lower court found that the aiding and abetting language, *ipse dixit*, placed the theft statute outside the generic definition of theft.[200] The Supreme Court reversed and held that the aiding and abetting language must be evaluated to determine whether it exceeds the bounds

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[194] Some defendants have taken the opposite bright line view and claimed aiding and abetting *always* renders a crime ACCA ineligible. This is not a prudent assertion given the Court's decision in *James*. *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring) (quoting 3 E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 110 (1790)) ("This principle [of stare decisis] is grounded in a basic humility that recognizes today's legal issues are often not so different from the questions of yesterday and that we are not the first ones to try to answer them. Because the 'private stock of reason . . . in each man is small . . . individuals would do better to avail themselves of the general bank and capital of nations and of ages."').

[195] "Thus, for the purposes of applying the ACCA, it matters not whether Gammell was convicted as a principal or aider or abettor; it matters only whether the substantive offense qualifies as a violent felony." United States v. Gammell, 932 F.3d 1175, 1180 (8th Cir. 2019).

[196] Gonzales v. Duenas-Alvarez, 549 U.S. 183, 183 (2007).

[197] *Id.* at 191 (emphasis in original).

[198] *Id.* at 190–91.

[199] *Id.* at 185, 187.

[200] *Id.* at 188.

of generic aiding and abetting.[201] Any *Taylor* predicate conviction deserves the same inquiry.

The *Duenas-Alvarez* defendant then endeavored to show that California's aiding and abetting liability fell outside the limit of generic aiding and abetting.[202] Specifically, the defendant claimed that California embraced a version of "natural and probable" consequences that went beyond generic aiding and abetting, and in a manner anomalous when compared to other states.[203] The Supreme Court was unpersuaded.[204] Nothing "special" about California's aiding and abetting doctrine placed it outside the generic definition or the mainstream of the definitions used by other states.[205] However, the Court left open the possibility that a future defendant could use the *Taylor* framework to make "such [a] showing" in an aiding and abetting case.[206] That is to say, a future defendant could attack the means of committing the offense—e.g., aiding and abetting—under *Taylor*. The conclusion to draw is that *Duenas-Alvarez* stands for the proposition that aiding and abetting *is* relevant to the *Taylor* categorical analysis.

No court which disagrees with my view of secondary and inchoate liability and rejects the binary factor analysis has ever addressed the Court's analysis in *Duenas-Alvarez*. Instead, critics set up a straw man argument to remind us all of that which I do not contest—i.e., that the law has abrogated the distinction between principals and aiders and abettors. That is not the question. The question is whether the scope of an aiding and abetting statute is relevant to the *Taylor* categorical analysis. Is it possible for an aiding and abetting statute to be so broad as to sweep into its ambit defendants who would not be deemed to have committed a generic burglary? In *Duenas-Alvarez*, the Court answered the question with a decisive yes: "The criminal activities of these aiders and abettors of a generic theft must themselves fall within the scope of the term 'theft' in the federal statute."[207]

Consider a hypothetical future legislature considering how to sweep into its dragnet more people under an aiding and abetting theory. A state could extend aider and abettor liability to anyone who aids, abets, counsels, *or speaks with* the person who commits a crime. If a defendant were then convicted of being an aider and abettor to a burglary on the basis of speaking with a burglar, that statute would flunk the *Taylor* test. Specifically, our hypothetical statute would sweep within its ambit conduct that would exceed the generic definition of aiding and abetting. Thus, our

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[201] *Id.* at 189–90.

[202] *Id.* at 190–94.

[203] *Id.* at 190–91.

[204] *Id.* at 193–94.

[205] *Id.*

[206] *Id.* at 193.

[207] *Id.* at 190.

hypothetical aiding and abetting burglary, like the *Taylor* burglary, could not be considered an enumerated offense.[208]

Very rarely have circuit courts explicitly addressed and decided in the government's favor how to analyze aiding and abetting, or even secondary and inchoate liability more generally,[209] under *Taylor*.[210] But significantly, the Supreme Court has addressed this issue, in language not uncertain, and left open the *possibility* that an aiding and abetting statute could be so broad as to render the complete offense outside ACCA parameters.[211]

2. The Binary Factor Analysis, Retroactively Applied, Would Impact Many Currently Incarcerated People

It is true that, should the Court embrace my interpretation of the ACCA, many past convictions are subject to reexamination. Hundreds if not thousands of prisoners will seek habeas relief. The judicial branches will have to slowly work through the merits of each individual claim. Efficiency was never the goal of our constitutional framers. Defendants who are set free ought not have been imprisoned in the first place. We should regret more their lost years than the cost of a faithful interpretation of our law to the bureaucratic state.

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[208] Some courts have cited cases such as Roberts v. Holder, 745 F.3d 928 (8th Cir. 2014) (per curiam) and United States v. Salean, 583 F.3d 1059 (8th Cir. 2009) to support the notion that they may simply avert their eyes from secondary liability statutes in statutes such as the ACCA. Neither case sheds light on the question I raise in this Article. That is, neither *Salean* nor *Roberts* addressed the question of whether an aiding and abetting statute should be subject to a *Taylor* categorical analysis for ACCA purposes. The *Salean* court simply reiterated what is clear from the Supreme Court's reversal of the Ninth Circuit in *Duenas-Alvarez*: aiding and abetting does not render a crime non-generic *ipse dixit*. *Salean*, 583 F.3d at 1060 n.2. The *Salean* defendant did not challenge the state aiding and abetting statute. The *Roberts* court, in a per curiam decision, simply repeated the *Salean* language; the *Roberts* defendant, too, left unchallenged the state aiding and abetting statute. *Roberts*, 745 F.3d at 931 n.2.

[209] The binary factor analysis has created a federal circuit split. Some courts have simply refused, without explanation, to engage a *Gammell* analysis. *See* United States v. Richardson, 948 F.3d 733, 741–42 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 344 (2020) ("So to sustain a conviction under § 924(c), it makes no difference whether Richardson was an aider and abettor or a principal. Moreover, the First, Third, Tenth, and Eleventh Circuits have held that aiding and abetting Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)."). Other courts have engaged a *Gammell* analysis, with mixed results for defendants. *See* Roman-Suaste v. Holder, 766 F.3d 1035, 1039–40 (9th Cir. 2014) (analyzing California aiding and abetting statute under *Taylor* analysis in illegal reentry case). Some defendants are even citing the *Gammell* case as the basis for their invocation for this binary factor analysis. *See* United States v. Yackel, 990 F.3d 1132, 1136 (8th Cir. 2021) (analyzing Minnesota aiding and abetting caselaw in career offender case).

[210] United States v. Valdivia-Flores, 876 F.3d 1201, 1209 n.3 (9th Cir. 2017).

[211] *See* James v. United States, 550 U.S. 192, 202 (2007).

Moreover, this parade of horribles has been threatened before, each and every time the Court reverses a statute or longstanding practice in landmark cases that have undermined our previous understanding of the law.[212] No change in the law has yet drowned the judicial branch in petitions, and my proposed course correction to the ACCA is unlikely to do so.

3. The Binary Factor Analysis Will Bring More Fairness to the Criminal Justice Process

A third criticism is that forcing prosecutors to prove the applicability of both the underlying offense as well as the theory of secondary and inchoate liability will add to the burdens of Assistant U.S. Attorneys. This is hardly a basis on which to deny the constitutional rights of those facing lifetime sentences. One hopes that lawyers on both sides of the courtroom would save exhaustive litigation for truly jury-worthy cases. Regardless, precedent would eventually be built, guiding judges and litigants alike. Over time, the contours of applicable predicate crimes would become easier to navigate.

Further, a defendant's criminal history and the seriousness of the offense already are taken into account in every case in federal court through the United States Sentencing Guidelines matrix and sentencing enhancements.[213] There is no need to double dip via the ACCA and sister statutes.

4. The Binary Factor Analysis Addresses a Real-World Problem

A fourth criticism may lie in the nature of secondary and inchoate liability. Some may suggest my concerns are esoteric. However, the concern I raise in this Article is not merely academic. Laws exist on the books of states and the federal government that subject individuals to liability under the weakest of pretexts.[214] For example, conspiracy is a vaporous concept capable of manipulation, as the courts

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[212] *See, e.g.*, Johnson v. United States, 576 U.S. 591, 597, 606 (2015) (striking down ACCA residual clause as void for vagueness); Apprendi v. New Jersey, 530 U.S. 466 (2000) (declaring unconstitutional United States Sentencing Guidelines when applied in mandatory rather than discretionary fashion); United States v. Lopez, 514 U.S. 549, 551 (1995) (striking down federal firearm crime exceeding congressional authority under Commerce Clause).

[213] *See, e.g.*, U.S. SENT'G COMM'N, GUIDELINES MANUAL ch. 5, pt. A, at 407 (2021) (Sentencing Table) (raising sentencing range based on prior crimes); U.S. SENT'G COMM'N, GUIDELINES MANUAL §4B.1.1(a)-(b) (2021) (requiring maximum criminal history range based on current and two prior crimes of violence).

[214] *See generally* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1309 (2003) ("For more than 50 years, these questions have prompted a series of critiques of conspiracy law. The major scholarly articles have alleged the doctrine 'unnecessary' and stated that the 'assumed dangers from conspiracy . . . have never been verified empirically'") (first quoting Philip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1140 (1973); and then quoting Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 414 (1959)).

repeatedly have recognized.[215] How many individuals have been convicted under secondary and inchoate liability theories who are not actually tied to criminal activity, especially in times of perceived national crisis,[216] or who participate in politically

[215] *See* Krulewitch v. United States, 336 U.S. 440, 445–46 (1949) (Jackson, J., concurring) ("This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice. The modern crime of conspiracy is so vague that it almost defies definition."); United States v. Hoskins, 902 F.3d 69, 83–84 (2d Cir. 2018) ("The carefully tailored text of the statute, read against the backdrop of a well-established principle that U.S. law does not apply extraterritorially without express congressional authorization and a legislative history reflecting that Congress drew lines in the FCPA out of specific concern about the scope of extraterritorial application of the statute, persuades us that Congress did not intend for persons outside of the statute's carefully delimited categories to be subject to conspiracy or complicity liability."); United States v. Marinello, 855 F.3d 455, 459 (2d Cir. 2017) (denying rehearing en banc) (Jacobs, J., dissenting) ("At some point, prosecutors must encounter boundaries to discretion, so that no American prosecutor can say, 'Show me the man and I'll find you the crime.'"), *rev'd* 138 S. Ct. 1101, 1110 (2018) ("The Government must show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant.").

[216] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 635 (2006) (reversing alleged terrorist's conspiracy and other terrorism related convictions) ("Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But requirements they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements. We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge–viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the rule of law that prevails in this jurisdiction.") (emphasis omitted).

unpopular groups,[217] or who believe they are free people simply exercising their constitutional rights?[218]

Cases throughout our history show the important Sixth and Fourteenth Amendment rights at stake when trying to understand the tremendous impact of secondary and inchoate liability statutes. When the prosecutor holds the power to define an amorphous statute, codification of statutes is meaningless.[219] When a

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[217] *See, e.g.*, Detroit Will Breathe v. Detroit, No. 20-CV-12363, 2020 WL 8575150, at *2 (E.D. Mich. Sept. 16, 2020) (recognizing "protesters have an interest in voicing their beliefs and seeking reform," following city's lawsuit to shut down BLM protests charging that "Counter-Defendants illegally, maliciously, and wrongfully conspired with one another with the intent to and for the illegal purpose of disturbing the peace, engaging in disorderly conduct, inciting riots, destroying public property, resisting or obstructing officers in charge of duty, and committing acts of violence against Counter-Plaintiffs and DPD officers. Counter-Defendants, in combination, conspired to disturb the peace, engage in disorderly conduct, incite riots, destroy public property, resist or obstruct officers in charge of duty, or otherwise commit acts of violence against Counter-Plaintiffs and DPD officers. This conspiracy resulted in the illegal, unlawful, or tortious activity of disturbing the peace, engaging in disorderly conduct, inciting riots, destroying public property, resisting or obstructing officers in charge of duty, and other acts of violence against Counter-Plaintiffs and DPD officers."); *see* Defendants' Answer and Counterclaim at 63, ¶¶ 132–34, Detroit Will Breathe v. Detroit, No. 20-CV-12363, 2020 WL 8575150 (E.D. Mich. Sept. 16, 2020) ECP. No. 43.

[218] *See, e.g.*, United States v. Dellinger, 472 F.2d 340, 348, 386, 497 (7th Cir. 1972) (reversing conspiracy convictions of Chicago Seven in part because of repression of constitutional rights: "[T]here are high standards for the conduct of judges and prosecutors, and impropriety by persons before the court does not give license to depart from those standards.").

> The trial judge's behavior must not preclude "that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of court, counsel and jury." Judicial comments in the presence of the jury are subject to special scrutiny because of the recognized fact that "the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." Cautionary instructions do not cure a comment "of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence." Although in these instances the Court was speaking of portions of a judge's instructions, the same principle must apply to the cumulative effect of a series of judicial remarks deprecating defense counsel and the defense case.
>
> The district judge's deprecatory and often antagonistic attitude toward the defense is evident in the record from the very beginning. It appears in remarks and actions both in the presence and absence of the jury.

Id. at 386 (first quoting Offutt v. United States, 348 U.S. 11, 17 (1954); then quoting Starr v. United States, 153 U.S. 614, 626, (1894); and then quoting Quercia v. United States, 289 U.S. 466, 472 (1933)).

[219] *See* Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 492 (2017) ("With the well-documented escalating reach of federal criminal law, and the enormous breadth of civil regulatory schemes embodied in modern federal legislation, there is hardly a person or business in the United States that could not theoretically become subject to a federal enforcement action of one kind or another. The breadth of regulated

judge "fills in the blank" because Congress has failed to fulfill its responsibility to define crimes, separation of powers is a mirage.[220] When a criminal defendant's rights blow in the wind depending on the region of the country from which she hails, the Constitution's promise of fundamental due process rights is empty.[221] None of this is tolerable, but especially not as to a statute as habitually problematic as the ACCA or the other commonly used statutes infected by *Taylor*.

B. Possible Solutions to the Taylor *Problem*

1. Abandon Taylor

The categorical approach is judicial legislation by Justice Blackmun.[222] It ought to be abandoned as a failed judicial incursion upon the duties of Congress, and the Supreme Court itself should say so at the next opportunity. No other approach respects the separate and significant duties of the judicial and legislative branches.

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conduct coupled with the reality of limited enforcement resources necessarily means that prosecutorial discretion is a central feature of modern federal law enforcement.").

[220] *See* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 175 (Yale Univ. Press 1978) (1970) ("The judicial process is too principle-prone and principle-bound—it has to be, there is no other justification or explanation for the role it plays. It is also too remote from conditions, and deals, case by case, with too narrow a slice of reality. It is not accessible to all the varied interests that are in play in any decision of great consequence. It is, very properly, independent. It is passive. It has difficulty controlling the stages by which it approaches a problem. It rushes forward too fast, or it lags; its pace hardly ever seems just right. For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy.").

[221] *See* Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1748, 1764 (2011) ("The Fifth Amendment also comes into play here, with its sweeping, albeit nonspecific, promise of fair courtroom procedures—'due process of law,' a phrase repeated in the Fourteenth Amendment and specifically made applicable there to state and local governments as well as the feds.") (quoting U.S. CONST. amend. V, XIV).

> It might at first be thought that the Due Process Clause holds special promise as a sturdy guarantor of rights because it appears twice in the written Constitution—first in the Fifth Amendment, announcing a right against the federal government, and later in the Fourteenth Amendment, proclaiming a right against states.

Id. at 1764.

[222] "The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A *casus omissus* does not justify judicial legislation." Ebert v. Poston, 266 U.S. 548, 554 (1925).

2. Require Sentencing Phase Trials on Uncertain Definitions

Allowing courts to make up terms that determine the application of penalties, sentence departures, and deportation is a Sixth Amendment violation under *Apprendi v. Jersey*[223] and its progeny.[224] Given how frequently the application of recidivist statutes such as the ACCA raise the ceiling and the floor of applicable sentencing ranges, the Constitution requires these facts to be found by a jury beyond a reasonable doubt, not a judge by a preponderance of the evidence.[225] Unless the courts abandon *Taylor*, the only constitutionally conforming model would leave factfinding to the jury under a bifurcated sentencing process, such as we currently utilize in federal capital cases.

3. Empower the States to Lead on Criminal Enforcement

The Tenth Amendment reserves to the states the general police powers.[226] Instead of respecting this demarcation of authority, Congress repeatedly has stepped in to federalize all manner of crime. This was never the Framers' design.[227]

Instead, Congress should reserve to the states in the first instance the power to punish crime, including the question of how harshly to punish recidivists. States have a much better sense of which crimes fit into the category of the most violent, serious, or threatening actions to the daily sense of order. This approach also would encourage state legislatures to undertake the heavy lifting of defining precisely which crimes under their own state codes should be labeled predicate crimes for the purpose of recidivist punishment.

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[223] Apprendi v. New Jersey, 530 U.S. 466, 476, 490 (2000).

[224] *See generally* Rachel Kunjummen Paulose, *Power to the People: Why the Armed Career Criminal Act Is Unconstitutional*, 9 VA. J. CRIM. L. 1 (2021).

[225] *See* Alleyne v. United States, 570 U.S. 99, 115–17 (2013); United States v. Booker, 543 U.S. 220, 244 (2005); Blakely v. Washington, 542 U.S. 296, 301 (2004).

[226] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. "[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." New York v. United States, 505 U.S. 144, 157 (1992).

[227] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) ("Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy.") (citing THE FEDERALIST NO. 45, at 293 (James Madison).

Congress could still reserve its power to define truly federal crime which crosses state lines and by extension, recidivist federal crime.

4. Adopt New Federal Legislation

The best solution in this case, as in every situation in which the original problem is unclear statutory language, would be for Congress to amend the text to provide clear direction as to precisely which crimes constitute predicate crimes under the proliferating recidivist federal statutes. Congress should provide a list of predicate crimes (both federal and state) for every recidivist statute, including the ACCA.[228]

Some members of Congress have recognized that their silence has left a void that the courts have filled quite unsatisfactorily, in this case with more uncertainty. That silence also threatens to derail the statute if the Court were to declare the ACCA void for vagueness. To redress the situation, Senator Tom Cotton[229] suggested substitutionary language in the ACCA to redefine a predicate offense as a

[228] For guidance, Congress might consider its most recent significant narcotics reforms. Congress provided a clear description of crack cocaine crimes eligible for sentencing reduction in the First Step Act of 2018, Pub. L. 115-391, § 401, 132 Stat. 5194, 5520–21 (2018) (broadly popular legislation that proceeded with bipartisan support). *See* Terry v. United States, 141 S. Ct. 1858, 1864 (2021) ("In light of the clear text, we hold that § 2(a) of the Fair Sentencing Act modified the statutory penalties only for subparagraph (A) and (B) crack offenses—that is, the offenses that triggered mandatory-minimum penalties.").

[229] Senator Cotton (R-Arkansas) and co-sponsors David Perdue (R-Georgia), Marsha Blackburn (R-Tennessee), Josh Hawley (R-Missouri), and Lindsey Graham (R-South Carolina) introduced the Restoring the Armed Career Criminal Act of 2019 in the U.S. Senate while Representative David Kustoff (R-Tennessee) introduced a sister bill in the House of Representatives. *See* 165 Cong. Rec. S2962 (daily ed. May 20, 2019); 165 Cong. Rec. H4009 (daily ed. May 20, 2019).

"previous serious felony conviction."[230] A previous serious felony conviction, in turn, would be redefined as follows:

> (B) the term 'serious felony conviction' means—
>
> (i) any conviction by a court referred to in section 922(g)(1) for an offense that, at the time of sentencing, was an offense punishable by imprisonment for a statutory maximum term of not less than 10 years; or
>
> (ii) any group of convictions for which a court referred to in section 922(g)(1) imposed in the same proceeding or in consolidated proceedings a total term of imprisonment not less than 10 years, regardless of how many years of that total term the defendant served in custody.

A resuscitated Cotton bill would be a good place to start again. It clearly lays out a readily discernable test for a predicate crime: the legislature's statement of the maximum term of imprisonment. In other words, any crime punishable by ten years or more, regardless of the actual sentence imposed, would qualify as an ACCA predicate. A quick purview of the most serious felonies in the U.S. Code shows this line

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[230] Restoring the Armed Career Criminal Act, S. 1547, 116 Cong. §1–2 (2019). The text of the bill reads as follows:

> SEC. 1. SHORT TITLE.
>
> This Act may be cited as the 'Restoring the Armed Career Criminal Act.
>
> SEC. 2. AMENDMENTS TO THE ARMED CAREER CRIMINAL ACT.
>
> Section 924 of title 18, United States Code, is amended—
>
> (1) in subsection (a)(2), by striking "(a)(6), (d), (g), (h), (i), (j), or (o) of section 922" and inserting "(a)(6), (d), (h), (i), (j), or (o) of section 922, or, except as provided in subsection (e) of this section, subsection (g) of section 922"; and
>
> (2) by striking subsection (e) and inserting the following:
>
> (e) (1) Whoever knowingly violates section 922(g) and has three or more previous serious felony convictions for offenses committed on occasions different from one another shall be fined under this title and imprisoned not less than 15 years and not more than 30 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

of demarcation does indeed sweep within its ambit the felonies most likely to threaten life[231] and limb.[232]

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[231] *See, e.g.*, crimes punishable by death including 18 U.S.C. § 1324(a)(1)(B)(iv) (murder related to the smuggling of aliens); 18 U.S.C. §§ 32–34 (destruction of aircraft, motor vehicles, or related facilities resulting in death); 18 U.S.C. § 36(b) (murder committed during a drug-related drive-by shooting); 18 U.S.C. § 37(a) (murder committed at an airport serving international civil aviation); 18 U.S.C. § 115(a)–(b) [by cross-reference to 18 U.S.C. § 1111] (retaliatory murder of a member of the immediate family of law enforcement officials); 18 U.S.C. §§ 241, 242, 245(d)(1), 247 (civil rights offenses resulting in death); 18 U.S.C. § 351(a) [by cross-reference to 18 U.S.C. § 1111] (murder of a member of Congress, an important executive official, or a Supreme Court Justice); 18 U.S.C. § 794(a)–(b) (espionage); 18 U.S.C. § 844(d), (f)(3), (i)(death resulting from offenses involving transportation of explosives, destruction of government property, or destruction of property related to foreign or interstate commerce); 18 U.S.C. § 924(j) (murder committed by the use of a firearm during a crime of violence or a drug-trafficking crime); 18 U.S.C. § 930(c) [by cross-reference to 18 U.S.C. § 1111] (murder committed in a federal government facility); 18 U.S.C. § 1091(b) (genocide); 18 U.S.C. § 1111 (first-degree murder); 18 U.S.C. § 1114(a) [by cross-reference to 18 U.S.C. § 1111] (murder of a federal judge or law enforcement official); 18 U.S.C. § 1116(a) [by cross-reference to 18 U.S.C. § 1111] (murder of a foreign official); 18 U.S.C. § 1118(a) (murder by a federal prisoner); 18 U.S.C. § 1119(b) [by cross-reference to 18 U.S.C. § 1111] (murder of a U.S. national in a foreign country); 18 U.S.C. § 1120(b) [by cross-reference to 18 U.S.C. § 1111] (murder by an escaped federal prisoner already sentenced to life imprisonment); 18 U.S.C. § 1121(a)–(b)(1) [by cross-reference to 18 U.S.C. § 1111] (murder of a state or local law enforcement official or other person aiding in a federal investigation; murder of a state correctional officer); 18 U.S.C. § 1201(a) (murder during a kidnapping); 18 U.S.C. § 1203(a) (murder during a hostage taking); 18 U.S.C. § 1503(a), (b)(1) [by cross-reference to 18 U.S.C. § 1111] (murder of a court officer or juror); 18 U.S.C. § 1512(a)(1), (a)(3) [by cross-reference to 18 U.S.C. § 1111] (murder with the intent of preventing testimony by a witness, victim, or informant); 18 U.S.C. § 1513(a)(1)–(2) [by cross-reference to 18 U.S.C. § 1111] (retaliatory murder of a witness, victim, or informant); 18 U.S.C. § 1716 (j)(3) (mailing of injurious articles with intent to kill or resulting in death); 18 U.S.C. § 1751(a) [by cross-reference to 18 U.S.C. § 1111] (assassination or kidnapping resulting in the death of the President or Vice President); 18 U.S.C. § 1958(a)(murder for hire); 18 U.S.C. § 1959(a) (murder involved in a racketeering offense); 18 U.S.C. § 1992(a)(1) (willful wrecking of a train resulting in death); 18 U.S.C. § 2113(e) (bank-robbery-related murder or kidnapping); 18 U.S.C. § 2119(3) (murder related to a carjacking); 18 U.S.C. § 2245 [by cross-reference to 18 U.S.C. §2251(e)] (murder related to rape or child molestation); 18 U.S.C. § 2251(e) (murder related to sexual exploitation of children); 18 U.S.C. § 2280(G) (murder committed during an offense against maritime navigation); 18 U.S.C. § 2281(a)(1)(F) (murder committed during an offense against a maritime fixed platform); 18 U.S.C. § 2332(a) (terrorist murder of a U.S. national in another country); 18 U.S.C. § 2332(a) (murder by the use of a weapon of mass destruction); 18 U.S.C. § 2340A(a) (murder involving torture); 18 U.S.C. § 2381 (treason); 21 U.S.C. § 848(e)(1)(A) (murder related to a continuing criminal enterprise or related murder of a federal, state, or local law enforcement officer); 49 U.S.C. § 46502(a)(2)(B) (death resulting from aircraft hijacking).

[232] 18 U.S.C. § 3559(a)(1)–(3) describes the hierarchy of federal offenses permitting a federal sentence of ten years or more as Class A (punishable up to death), B (punishable up to 25 years), and C (punishable up to ten years) felonies.

CONCLUSION

The over-expansive effect of secondary and inchoate liability on qualifying crimes under the ACCA is a serious issue on which no one has written, despite the Supreme Court's withering scrutiny of this vexatious statute. More generally, since *Duenas-Alvarez*, the Court has not returned to the subject of secondary and inchoate liability to describe *Duenas-Alvarez*'s application to a broad array of statutes that require courts to categorize past criminal conduct. Academics, courts, litigants, and elected representatives should consider the impact of secondary and inchoate liability when drafting, adjudicating, and interpreting criminal statutes. Eliminating the *Taylor* analysis, or at a minimum, applying the binary factor analysis, will ensure a more fair criminal justice system.