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## The Pinkerton Doctrine and Murder

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# The Pinkerton Doctrine and Murder

## Abstract

[Excerpt] "Suppose that A hires B to rob a bank in Massachusetts and A then hires C to rob a bank in Rhode Island. B and C have not met face to face, but each knows he is part of a conspiracy to rob banks in more than one state. All agree that no one will be killed in the robberies. A then procures D to get a car for use in the robberies. B uses D's car to rob his bank. During the robbery of C's bank, C pulls out a gun and shoots and kills the bank guard.

Clearly, A, B, C, and D are all guilty of conspiracy to rob banks, the act to which they agreed. Clearly too, A, B, C, and D are not guilty of conspiracy to murder, because they never agreed to kill anyone. C, however, is guilty of murder, since he intentionally killed the bank guard without justification or excuse. But can A, B, and D also be charged with this murder?

There are, of course, several ways in which one person may be guilty of a murder committed by another person. One is by the felony-murder rule, which historically has meant that one is guilty of murder if, in the course of committing a felony, one causes the death of another person. In this example, if the felony-murder rule applies, A, B, and D could be guilty of felony murder of the bank guard – a murder committed by their cofelon, C. But if the felony-murder rule is not applicable, either because the state has rejected the rule, as most commentators have long been urging states to do, or because the state legislature has defined felony murder as second degree murder and the prosecution wants to convict A, B, and D, as well as C of first degree murder of the guard, is there another basis for finding A, B, and D guilty?

The doctrine of complicity, also known as aiding and abetting, is, of course, another way to make a person guilty of a murder committed by someone else. But would A, B, and D be guilty of murder of the bank guard on an aiding and abetting theory in this instance? On mens rea grounds, A, B, and D intended at most to encourage a robbery by C. In Model Penal Code terms, that was their purpose or "conscious objective." But their purpose was not to encourage C to kill anyone. They had expressly agreed that no one would be killed. They did not know that C would kill during the robbery. If aiding and abetting requires a purpose to facilitate the particular crime at issue, A, B, and D would not be guilty of murder of the bank guard by aiding and abetting.

On actus reus grounds, there also would be a problem with complicity. A did hire C to rob the bank. He did actively set in motion the crime which resulted in the killing of the guard. But what did B and D really do to assist or encourage the robbery by C, much less C's murder of the guard? All they did was to agree to be part of a larger conspiracy to rob banks. One could argue that they never facilitated C's specific robbery, and that they did nothing to facilitate his killing of the guard.

There is, however, an alternative way in which A, B, and D can be convicted of C's murder of the guard. If the court finds that A, B, C, and D were in a conspiracy to rob the banks, and if C committed murder in furtherance of that conspiracy, then A, B, and D are all also guilty of murder, as long as they could reasonably have foreseen that such an event would occur in the course of their conspiracy. They could all be guilty of first degree murder, even though A, B, and D never met the bank guard, never assisted or encouraged C to kill him, never wanted C to kill him or knew C would kill him, and never even visited the bank or entered the state in which the bank was located!

The rule by which this result is reached, called the Pinkerton rule, is one of the most controversial doctrines in modern criminal law. Broadly stated, the rule is that "any conspirator in a continuing conspiracy is responsible

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for the illegal acts committed by his cohorts in furtherance of the conspiracy, within the scope of the conspiracy, and reasonably foreseeable by the conspirators as a necessary or natural consequence of the unlawful agreement.” This rule permits conviction of a crime that the accused did not intend, plan, want, or even know about, committed against a victim whom the defendant did not know or want to harm. The rule applies throughout the life of the conspiracy to all who originally agreed to join the conspiracy, unless the defendant overtly acted to disavow and/or defeat the conspiracy.

The Pinkerton rule “is not universally followed.” It is rejected in the Model Penal Code. Many state courts have interpreted their statutes to require more than membership in a conspiracy for complicity in substantive crimes committed in the course of that conspiracy. Commentary on Pinkerton in the academic world, much like commentary on felony murder and on conspiracy in general, is overwhelmingly negative. On the contrary, this article argues that the Pinkerton doctrine, far from being an aberration, is rather more an illustration of our existing criminal law and of some of the important theoretical assumptions behind it. [...]

**Keywords**

conspiracy, robbery, murder

## The *Pinkerton* Doctrine and Murder

MATTHEW A. PAULEY, J.D., PH.D.\*

### I. INTRODUCTION

Suppose that A hires B to rob a bank in Massachusetts and A then hires C to rob a bank in Rhode Island. B and C have not met face to face, but each knows he is part of a conspiracy to rob banks in more than one state. All agree that no one will be killed in the robberies. A then procures D to get a car for use in the robberies. B uses D's car to rob his bank. During the robbery of C's bank, C pulls out a gun and shoots and kills the bank guard.<sup>1</sup>

Clearly, A, B, C, and D are all guilty of conspiracy to rob banks, the act to which they agreed. Clearly too, A, B, C, and D are not guilty of conspiracy to murder, because they never agreed to kill anyone.<sup>2</sup> C, however, is guilty of murder, since he intentionally killed the bank guard without justification or excuse.<sup>3</sup> But can A, B, and D also be charged with this murder?

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1. See *Developments in the Law: Criminal Conspiracy*, 72 Harv. L. Rev. 920, 996-97 (1959) (discussing a similar, though significantly different hypothetical).

2. See generally Karen Anderson & Megan Bertran, *Federal Criminal Conspiracy*, 33 Am. Crim. L. Rev. 729 (1996) (subsequent issues of this journal provide further reviews of the law of conspiracy); Theodore W. Cousins, *Agreement As An Element of Conspiracy*, 23 Va. L. Rev. 898 (1937); Kenneth A. David, *The Movement Toward Statute-Based Conspiracy Law in the United Kingdom and the United States*, 25 Vand. J. Transnatl. L. 951 (1993); George Fletcher, *Is Conspiracy Unique to the Common Law?*, 43 Am. J. Comp. L. 171 (1995); Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 Cal. L. Rev. 1137 (1973); Neal Katyal, *Conspiracy Theory*, 112 Yale L.J. 1307 (2003); Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back From an Ever Expanding, Ever More Troubling Area*, 1 Wm. & Mary Bill Rights J. 1 (1992). For a more recent discussion of conspiracy law, consult Ira Robbins, *Guilty Without Charge: Assessing the Due Process Rights of Unindicted Co-Conspirators*, 2004 Fed. Cts. L. Rev. 1 (2004); Nicholas Schuler, Jr., *The Lone Conspirator: Criminal Law's Oxymoron: In Defense of the Rule of Consistency in Federal Conspiracy Cases*, 2004 U. Ill. L. Rev. 755 (2004); Jesse Winegrad, *Federal Criminal Conspiracy*, 41 Am. Crim. L. Rev. 611 (2004).

3. The literature on intentional murder is, of course, too voluminous to cite here. See generally Wayne R. LaFave & Austin W. Scott, *Criminal Law* 612 (2d ed., West 1986) [hereinafter LaFave & Scott 1986]; Wayne LaFave, *Criminal Law* (4th ed., West 2003) [hereinafter LaFave 2003] (supporting the proposition that an intentional killing is always murder if committed without complete or partial justification, extenuation, or excuse).

There are, of course, several ways in which one person may be guilty of a murder committed by another person. One is by the felony-murder rule, which historically has meant that one is guilty of murder if, in the course of committing a felony, one causes the death of another person. In this example, if the felony-murder rule applies, A, B, and D could be guilty of felony murder of the bank guard – a murder committed by their co-felon, C.<sup>4</sup> But if the felony-murder rule is not applicable, either because the state has rejected the rule, as most commentators have long been urging states to do,<sup>5</sup> or because the state legislature has defined felony murder as second degree murder and the prosecution wants to convict A, B, and D, as well as C of *first* degree murder of the guard, is there another basis for finding A, B, and D guilty?

The doctrine of complicity, also known as aiding and abetting, is, of course, another way to make a person guilty of a murder committed by someone else. But would A, B, and D be guilty of murder of the bank guard on an aiding and abetting theory in this instance? On *mens rea* grounds, A, B, and D intended at most to encourage a robbery by C. In Model Penal Code terms, that was their purpose or “conscious objective.” But their purpose was not to encourage C to kill anyone. They had expressly agreed that no one would be killed. They did not know that C would kill during the robbery. If aiding and abetting requires a purpose to facilitate the particular crime at issue, A, B, and D would not be guilty of murder of the bank guard by aiding and abetting.

On *actus reus* grounds, there also would be a problem with complicity. A did hire C to rob the bank. He did actively set in motion the crime which resulted in the killing of the guard. But what did B and D really do to assist or encourage the robbery by C, much less C’s murder of the guard? All they did was to agree to be part of a larger conspiracy to rob banks. One could argue that they never facilitated C’s specific robbery, and that they did nothing to facilitate his killing of the guard.

There is, however, an alternative way in which A, B, and D can be convicted of C’s murder of the guard. If the court finds that A, B, C, and

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4. The great majority of American jurisdictions adopt the agency theory of felony murder, under which a person is only guilty of felony murder if the murder was “by his own hand or by someone acting in concert with him or in furtherance of a common object or purpose.” *Commonwealth v. Campbell*, 89 Mass. 541, 544 (1863). See e.g. Steven A. Drizin & Allison McGowen Keegan, *The Aftermath of the Lionel Tate Case: Abolishing the Use of the Felony Murder Rule When the Defendant is a Teenager*, 28 Nova L. Rev. 507 (2004) (for more recent analysis and cases); Jennifer DeCook Hatchett, *Kansas Felony Murder: Agency or Proximate Cause*, 48 Kan. L. Rev. 1047 (2000); James Hillard, *Felony Murder in Illinois: The ‘Agency Theory’ vs. The ‘Proximate Cause Theory’: The Debate Continues*, 25 S. Ill. U. L.J. 331 (2001); Clayton T. Tanaka & Larry M. Lawrence II, *Developments in California Homicide Law: The Felony-Murder Doctrine*, 36 Loy. L.A. L. Rev. 1479 (2003).

5. See Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446, 478 (1985) (arguing that the rule should be held unconstitutional).

D were in a conspiracy to rob the banks, and if C committed murder in furtherance of that conspiracy, then A, B, and D are all also guilty of murder, as long as they could reasonably have foreseen that such an event would occur in the course of their conspiracy. They could all be guilty of first degree murder, even though A, B, and D never met the bank guard, never assisted or encouraged C to kill him, never wanted C to kill him or knew C would kill him, and never even visited the bank or entered the state in which the bank was located!

The rule by which this result is reached, called the *Pinkerton* rule, is one of the most controversial doctrines in modern criminal law. Broadly stated, the rule is that “any conspirator in a continuing conspiracy is responsible for the illegal acts committed by his cohorts in furtherance of the conspiracy, within the scope of the conspiracy, and reasonably foreseeable by the conspirators as a necessary or natural consequence of the unlawful agreement.”<sup>6</sup> This rule permits conviction of a crime that the accused did not intend, plan, want, or even know about, committed against a victim whom the defendant did not know or want to harm.<sup>7</sup> The rule applies throughout the life of the conspiracy to all who originally agreed to join the conspiracy, unless the defendant overtly acted to disavow and/or defeat the conspiracy.<sup>8</sup>

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6. James M. Branden, *White Collar Crime: Fourth Survey of Law: Substantive Crimes*, 24 Am. Crim. L. Rev. 459, 485 (1987).

7. Fletcher, *supra* n. 2, at 171. See also *Anderson v. Superior Court*, 78 Cal. App. 2d. 22, 24-25 (Cal. 1947) (holding that defendant’s action of referring women to an abortionist made her guilty of twenty seven other abortions performed by that abortionist, even on women who were not known to the defendant); Jon May, *Pinkerton v. United States Revisited: A Defense of Accomplice Liability*, 8 Nova L.J. 21, 23 (1983) (“a party to a conspiracy may be prosecuted for the substantive crimes of a co-conspirator, committed in furtherance of the conspiracy, even though the person did not participate in the crime and even if he did not intend for that specific crime to occur”).

8. Lisa G. Stark, *Criminal Law: The Natural and Probable Consequences Doctrine Is Not a Natural Result for New Mexico - State v. Carrasco*, 28 N.M. L. Rev. 505, 515 (1998). In such a case of withdrawal, the defendant would, however, still be guilty of conspiracy, on the rationale that this crime was complete with the agreement itself. David, *supra* n. 2, at 982 n. 239. It was in *Hyde v. U.S.*, that the Supreme Court established the principle that withdrawal from a conspiracy requires an affirmative act on the part of the defendant. *Hyde v. U.S.*, 225 U.S. 347, 369 (1912) (stating that defendant is still guilty of conspiracy “until he does some act to disavow or defeat the purpose of the conspiracy”); see also Paul S. Berra, Jr., *Co-Conspirator Liability Under 18 U.S.C. 924(C): Is It Possible To Escape?*, 1996 Wis. L. Rev. 603, 607 (1996) (stating that the “criminal intent for each of the substantive acts is established at” the formation of the conspiracy); *Developments in the Law*, *supra* n. 1, at 957. Interesting arguments about the dangerous combination of the *Hyde* withdrawal doctrine and *Pinkerton* have also been made. See *Vicarious Liability For Criminal Offenses of Co-Conspirators*, 56 Yale L.J. 371, 378 (1947) (“While there is justification for the stringent requirement of an affirmative act of withdrawal on the charge of conspiracy, . . . the operation of that rule in conjunction with vicarious criminal liability may well leave a former conspirator, innocent of all connection with subsequent crimes, defenseless.”).

The *Pinkerton* rule “is not universally followed.”<sup>9</sup> It is rejected in the Model Penal Code.<sup>10</sup> Many state courts have interpreted their statutes to require more than membership in a conspiracy for complicity in substantive crimes committed in the course of that conspiracy.<sup>11</sup> Commentary on *Pinkerton* in the academic world, much like commentary on felony murder and on conspiracy in general, is overwhelmingly negative.<sup>12</sup> On the contrary, this article argues that the *Pinkerton* doctrine, far from being an aberration, is rather more an illustration of our existing criminal law and of some of the important theoretical assumptions behind it.

Understanding *Pinkerton* is important because it remains good law in the federal system<sup>13</sup> and in a considerable number of states.<sup>14</sup> The rule, it

9. William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 Va. L. Rev. 1903, 1950 n. 115 (1993). The courts of North Carolina and New York have rejected the doctrine. *State v. Small*, 272 S.E.2d 128, 135 (N.C. 1980); *People v. McGee*, 399 N.E.2d 1177, 1182 (N.Y. 1979). Massachusetts has apparently never adopted the doctrine. See *Commonwealth v. Stasiun*, 206 N.E.2d 672, 680 (Mass. 1965) (declining to adopt the *Pinkerton* doctrine). Other states have, in the past, rejected the *Pinkerton* doctrine by statute. Richard Bonnie et al., *Criminal Law* 623 (Foundation Press 1997) (citing Ala. Code §§ 13A-4-3(f), 13A-2-23 (2003); 17-A Me. Rev. Stat. Ann. § 151 (2005); N.D. Cent. Code § 12.1-03-01 (2003)). See also LaFave 2003, *supra* n. 3, at 685 (“opposition to it has grown significantly in recent years”); Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes* 693 (7th ed., Aspen Publishers 2001) (“In accord with the Model Penal Code, most jurisdictions currently hold, either by statute or by judicial decision, that conspirators are liable for substantive crimes of their co-conspirators only when the strict conditions for accomplice liability are met.”).

10. Model Penal Code § 2.06 cmt. (a) (ALI 1985) (declining to follow the *Pinkerton* Rule).

11. See Dale E. Bennett & Cheney C. Joseph, Jr., *The Louisiana Criminal Code of 1942 – Doctrinal Provisions, Defenses, and Theories of Culpability*, 52 La. L. Rev. 1083, 1099 (1992) (expressing the view that “the so-called ‘*Pinkerton* Doctrine’ may have no force in Louisiana”) see *Commonwealth v. Perry*, 256 N.E.2d 745, 747 (Mass. 1970) (another Massachusetts case rejecting *Pinkerton*); see generally Rollin M. Perkins, *The Act of One Conspirator*, 26 Hastings L.J. 337, 340 n. 16 (1974).

12. See e.g. LaFave & Scott 1986, *supra* n. 3, at 589; Model Penal Code § 2.06 cmt. (a); Berra, Jr., *supra* n. 8, at 622-23; *Developments in the Law*, *supra* n. 1, at 998; *Liability for Co-Conspirators’ Crimes in the Wisconsin Party to a Crime Statute*, 66 Marq. L. Rev. 344, 366 (1983); *Vicarious Liability*, *supra* n. 8, at 377; Wayne LaFave & Austin Scott, *Handbook of Criminal Law* 515 (West 1972); LaFave 2003, *supra* n. 3, at 684-85 (discussing more recent criticism).

13. See e.g. Baruch Weiss, *What Were They Thinking? The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 Fordham L. Rev. 1341, 1426 (2002) (calling the *Pinkerton* doctrine “well established”). See also *Nye & Nissen v. U.S.*, 336 U.S. 613, 618 (1949) (reaffirming *Pinkerton*). More recent cases also support this proposition. E.g. *U.S. v. Newsome*, 322 F.3d 328, 338 (4th Cir. 2003); *U.S. v. Wade*, 318 F.3d 698, 701 (6th Cir. 2003) (expressing the continued view that a defendant is liable for all the crimes of his co-conspirators if done in furtherance of the conspiracy and if reasonably foreseeable). See also Christine Fisher, *Comment: Conspiring to Violate the Lacey Act*, 32 Envtl. L. 475, 495 n. 273 (2002) (pointing out that the only significant limitation on *Pinkerton* today is that “if there is insufficient evidence to prove conspiracy, conviction of any substantive counts using the *Pinkerton* rule cannot stand”). See Kelly Elaine Lochman, *Note: Who Brought the Kid? United States v. McClain And the Application of Sentencing Enhancements When Use of a Minor in a Concerted Criminal Activity Was Foreseeable*, 36 Ga. L. Rev. 863, 867-68 (2002) (“the *Pinkerton* doctrine is now frequently used by most courts to hold defendants liable for their co-conspirators’ foreseeable acts, though some courts have limited its application.”). Most courts “have chosen to apply [*Pinkerton*] even when there is only slight evidence connecting the defendant to the conspiracy.” *Id.* at 878. “Courts have generally embraced the notion of holding co-conspirators liable for the foreseeable acts of others in furtherance of a conspiracy, and have recognized that this does not result in unwarranted strict liability.” *Id.* at 892. The argument of this article by Lochman is that, because of the “analogy . . .

has been said, “is applied in an enormous number of prosecutions.”<sup>15</sup> For example, one commentator has recently argued that the *Pinkerton* doctrine “may likely aid the United States government in prosecuting a figure like Zacarias Moussaoui, who was behind bars in a Minneapolis jail at the time of 9/11.” Under *Pinkerton*, it would not be necessary to prove that Moussaoui “knew every member of the conspiracy, that he was aware of the end result of the conspiracy, or that he took any steps toward achieving the plot – only that he could reasonably have foreseen that people would be killed.”<sup>16</sup>

When LaFave and Scott published their often-cited *Handbook on Criminal Law* in 1972, they noted that the *Pinkerton* doctrine had “never gained broad acceptance.” Eleven years later in an article in the *Nova Law Journal* in 1983, Jon May concluded that this “assertion is no longer correct.”<sup>17</sup> Since the early 1970s, according to May, the rule has been used with increasing frequency, especially in narcotics cases<sup>18</sup> and appears to have become largely “entrenched” in federal law.<sup>19</sup> In a recent book, Pro-

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between the results in *Pinkerton* and in *McClain*,” the Eleventh Circuit was correct to conclude, in *McClain*, that a section 3B1.4 sentence enhancement is proper “if the defendant should have foreseen the use of a minor in the commission of a crime.” *Id.* at 892-93. See also Beth Allison Davis & Josh Vitullo, *Federal Criminal Conspiracy*, 38 Am. Crim. L. Rev. 777 (2001); Raphael Prober & Jill Randall, *Federal Criminal Conspiracy*, 39 Am. Crim. L. Rev. 571, 584, 601 (2002) (repeating the rule that “the reasonably foreseeable overt acts of one co-conspirator committed in furtherance of the conspiracy are attributed to the other conspirators,” but noting that “some courts have attempted to limit *Pinkerton* liability”). See Katyal, *supra* n. 2; *Danger in Numbers: Why It Makes Sense To Have Harsh Punishments for Conspiracy*, 2003 APR Legal Aff. 44, 46 (2003) (serving as more recent evidence of *Pinkerton*’s continued vitality). Case law is also supportive. See e.g. *U.S. v. Richards*, 204 F.3d 177, 210 (5th Cir. 2000) (holding that use of mail in an investment scheme was reasonably foreseeable thus triggering *Pinkerton* analysis); *U.S. v. Ciccono*, 219 F. 3d 1078, 1084-85 (9th Cir. 2000). See Paul H. Robinson, *Imputed Criminal Liability*, 93 Yale L.J. 609, 676 n. 240 (1984) (an older account of *Pinkerton*’s relevance). See also *U.S. v. Castaneda*, 16 F.3d 1504, 1511 (9th Cir. 1994) (stating that federal courts use the *Pinkerton* doctrine to “punish conspiracy and the offenses that are its object”). See generally Anderson & Bertron, *supra* n. 2, at 755 n. 59; LaFave & Scott 1986, *supra* n. 3, at 589; Peter Low et al., *Criminal Law: Cases and Materials*, 476-77 (2d ed., Foundation Press 1986).

14. See Kadish, *supra* n. 9, at 693 (“several state courts continue to subject co-conspirators to vicarious liability under *Pinkerton*”). For case law, see e.g. *State v. Walton*, 630 A.2d 990, 998 (Conn. 1993) (upholding a *Pinkerton* instruction). See also Jennifer Walwyn, *Targeting Gang Crime: An Analysis of Calif. Penal Code Section 12022.53 and Vicarious Liability for Gang Members*, 50 UCLA L. Rev. 685, 689-90 (2002) (arguing that the “*Pinkerton* doctrine can be used to prosecute gang members because gangs are a quintessential example of group criminality” and describing the *Pinkerton* doctrine as “incredibly broad” and requiring “very little definite participation for [the defendant] to be vicariously liable”); Stuntz, *supra* n. 9, at 1956 n. 115 (*Pinkerton* “remains good law in the federal system and in a large number of states”); Low et al., *supra* n. 13, at 476-77 (recognizing on-going vitality of *Pinkerton*); Lloyd L. Weinreb, *Criminal Law: Cases, Comments, Questions*, 671 (6th ed., Foundation Press 1998) (arguing that “the *Pinkerton* rule has been accepted in some but not all states”).

15. Marcus, *supra* n. 2, at 6.

16. Robbins, *supra* n. 2, at 3; see also John Gibeaut, *Prosecuting Moussaoui*, 88 A.B.A. J. 36 (2002) (discussing efforts to prosecute Zacarias Moussaoui).

17. May, *supra* n. 7, at 21 n. 6.

18. *Id.* at 21.

19. *Id.* at n. 6.



fessor Joshua Dressler says that the *Pinkerton* doctrine, “adopted in the federal courts, is the majority rule in states that have considered the issue.”<sup>20</sup> In short, as one commentator has observed, in many courts in the United States, “a conspirator can be held responsible for crimes committed by her co-conspirators as long as such crimes were in furtherance of the agreement and were reasonably foreseeable.”<sup>21</sup>

The “reasonably foreseeable” component of the *Pinkerton* doctrine in effect imputes criminal liability for what the Model Penal Code calls negligence.<sup>22</sup> A person is guilty of another co-conspirator’s crime, under *Pinkerton*, if it was “reasonably foreseeable.” In other words, it does not matter whether the defendant himself, subjectively, actually foresaw this crime. What matters is only whether a reasonable person, objectively, would have foreseen it. The defendant is guilty even if he did not know there was a risk that this crime would be committed if he “should have known” of that risk when he agreed to be a conspirator.<sup>23</sup>

There can be no question that the *Pinkerton* doctrine has prompted vituperative criticism.<sup>24</sup> The President of the National Association of Criminal Defense Lawyers, an organization with 25,000 members, for example, had this to say against the rule:

[T]he *Pinkerton* doctrine permits the government to hold a defendant criminally responsible for all reasonably foreseeable acts of co-conspirators regardless of actual knowledge, intent, or participation. Thus, if the government cannot prove a defendant guilty on various substantive charges, it need only convince the jury of the defendant’s guilt of conspiracy to secure convictions on the otherwise unsupportable substantive charges.<sup>25</sup>

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20. Joshua Dressler, *Understanding Criminal Law*, 488 (3d ed., Lexis 2001). Even LaFave, who insists in his 2003 text that the rule “has never gained broad acceptance,” is forced to concede that “this is not to suggest that what might be called the *Pinkerton* rule has not had an impact upon the law of accomplice liability. The *Pinkerton* approach has been used . . . by courts in establishing a basis for finding that the defendant was accountable for crimes directly attributed to another.” LaFave 2003, *supra* n. 3, at 684-85. It also “appears to have been included within some statutes defining accomplice liability.” *Id.*

21. Marcus, *supra* n. 2, at 6; see Bonnie et al., *supra* n. 9, at 623 (for a recent view that “the *Pinkerton* rule is probably the law in a majority of American jurisdictions”); Lochman, *supra* n. 13, at 867-68 (stating that most courts follow *Pinkerton*).

22. Model Penal Code § 2.02(2)(d) (ALI 1985).

23. Marcus, *supra* n. 2, at 7 n. 28.

24. But it helps make conspiracy popular among prosecutors. See Charles P. Bubany, *Fifth Circuit Survey: June 1994 – May 1995: Criminal Law*, 27 Tex. Tech. L. Rev. 655, 658 (1996) (“The offense [of conspiracy] is appealing for a number of reasons, not the least of which is its usefulness in fixing guilt for substantive offenses as well as for conspiracy.”).

25. Marcus, *supra* n. 2, at 7 (citing Letter from Jeff Weiner, President of National Association of Criminal Defense Lawyers (Feb. 1991)); see Joshua Dressler, *Reassessing the Theoretical Underpin-*

Convicting one person of any crime committed by another is difficult to justify, given the law's preference for individual rather than collective or associational guilt and given the independence of each person's will.<sup>26</sup> It is even more difficult to countenance when there is no proof that the convicted person was even subjectively aware of a risk that this crime would occur.<sup>27</sup> And this doctrine seems *most* strained when it is applied, as it has been, to convict one person of a *murder* committed by someone else based on such negligent perception of risk.<sup>28</sup>

Murder, of course, is the most horrific of crimes. Conviction of murder can result in imprisonment for life or, in some states, even the death penalty. Is it fair to permit a person to be convicted of murder because he *should have* perceived a risk that *another person* – perhaps someone he never met – *might* kill someone else? Is murder based on this negligence theory defensible? These are important questions to which an analysis of the *Pinkerton* doctrine gives rise.

This article examines the *Pinkerton* doctrine in general and, more precisely, its application to permit one person to be convicted of murder through negligent failure to perceive a risk that another person would kill. Part II of the article examines in detail the 1946 case of *Pinkerton v. United States*, which, though not a murder case, developed the *Pinkerton* doctrine of conspiratorial liability. After analyzing the arguments of the majority and the dissent by Justice Rutledge criticizing the majority's new rule and reasoning – criticism echoed in much of the scholarly literature – we move, in Part III, to a review of a number of post *Pinkerton* cases in which the doctrine has been expanded beyond the original holding. Special attention will be given to those cases in which co-conspirators have been found guilty of murder in conspiracies where murder was not the original object or plan.

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*nings*, 37 Hastings L.J. 91, 93 (1992) (arguing that accomplice liability rules, like *Pinkerton*, “may be unjust . . . because . . . they are not tied to the doctrine of causation”).

26. See Dressler, *supra* n. 25, at 140 (stressing the “focus upon individual culpability” underlying our “common-law rules of crimes”).

27. See Berra, Jr., *supra* n. 8, at 603 (suggesting that *Pinkerton*'s “‘reasonable foreseeability’ standard offers little meaningful protection to unknowing co-conspirators” and thus the courts should adopt “an alternative standard, a ‘practical certainty’ standard, which focuses on the actual culpability of each co-conspirator”).

28. The word negligence is used in this article in the way the Model Penal Code does in § 2.02: “A person acts negligently with respect to a material element of an offense when he *should* be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct.” (emphasis added). In *Punishment and Responsibility: Essays in the Philosophy of Law*, 136-37 (Oxford University Press, 1968) [hereinafter Hart, *Punishment*], H.L.A. Hart speaks of “inadvertent negligence,” which he defines as “unthinking carelessness” and which he distinguishes from recklessness, “that is, wittingly flying in the face of a substantial and unjustifiable risk, or the conscious creation of such a risk.”

Part IV sets the rule in context by contrasting it with the law of causation and with both the Model Penal Code and “natural and probable consequences” approaches to complicity. Part V of the article examines the merits of criminalizing negligent killing as murder. The discussion includes a revisiting of Holmes’s familiar argument in favor of an objective (negligence) standard in murder (and manslaughter) prosecutions, as well as an assessment of more recent attempts to come to terms with the subjective/objective debate in criminal homicide cases. Part VI concludes with thoughts on the uniqueness of the *Pinkerton* doctrine and what if anything can and should be done about its perceived unfairness. Taken as a whole, the argument is that, even when broadly applied to crimes that were not original objectives of the conspiracy but were reasonably foreseeable, *Pinkerton* is not an aberration in the law. Instead, it is consistent with the way the law has been and with the way it should continue to be interpreted.

## II. THE *PINKERTON* CASE

### A. *Facts of the Case and Majority Opinion*

Walter and Daniel Pinkerton were two bootlegging brothers who lived a short distance away from each other on Daniel Pinkerton’s farm.<sup>29</sup> They were indicted for “crimes concerned with unlawful possession, transportation, and dealing in whiskey, in fraud of the federal revenues.”<sup>30</sup> More specifically, each brother was charged with conspiracy to violate the Internal Revenue Code and with several substantive violations of the Code. Each was convicted by a jury of the one conspiracy count and of several of the substantive offenses.<sup>31</sup>

Affirming the convictions, the United States Court of Appeals for the Fifth Circuit noted that the conspiracy could be inferred from a number of factors: the close proximity of the two brothers’ houses, the brothers’ frequent association with each other, and the many cases in which both had previously been convicted of liquor law violations. There was even evidence that, on one occasion, Walter Pinkerton had drawn a gun on investigators and threatened to kill the sheriff who was searching the farm. Moreover, more than once, Daniel had posted bond for Walter when Walter had been arrested on state charges in Alabama.<sup>32</sup>

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29. *Pinkerton v. U.S.*, 328 U.S. 640, 641 (1946).

30. *Id.* at 648 (Rutledge, J., dissenting).

31. *Id.* at 641.

32. Tripp, *Margins of the Mob: A Comparison of Reeves v. Ernst and Young with Criminal Association Laws in Italy and France*, 20 Fordham Intl. L.J. 263, 272 n. 72 (1996).

The Pinkerton brothers appealed their convictions to the United States Supreme Court.<sup>33</sup> Daniel Pinkerton's first contention was that there was insufficient evidence to connect him to the conspiracy. Justice Douglas, writing the opinion of the Court, rejected this argument summarily, saying "there was enough evidence for submission of the issue to the jury."<sup>34</sup> In so doing, Douglas followed the traditional approach in conspiracy cases, which often relies on circumstantial evidence to find the *actus reus* – that is to say, the agreement – of conspiracy.<sup>35</sup>

Both brothers also argued that the substantive convictions should have merged with the conspiracy conviction and that only a single sentence not exceeding the maximum permitted by the conspiracy statute should have been imposed.<sup>36</sup> Justice Douglas quickly dismissed this contention as well:

The common law rule that the substantive offense, if a felony, was merged in the conspiracy has little vitality in this country. It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses.<sup>37</sup>

A conspiracy, Douglas said, quoting earlier cases, "has ingredients, as well as implications, distinct from the completion of the unlawful project." It was, in short, altogether proper for the jury to have convicted the two brothers of conspiracy to defraud the IRS and of substantive violations which were the objects of the conspiracy.<sup>38</sup>

The main issue before the Supreme Court in considering Daniel Pinkerton's appeal was not the conspiracy charge. Rather, it was Daniel's conviction on the substantive counts.<sup>39</sup> There was, as Douglas noted, "no evidence that Daniel participated directly in the commission of the substantive offenses on which his conviction" was sustained.<sup>40</sup> On the contrary,

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33. Both brothers appealed, but Daniel's contentions prompted the Court's formulation of the "Pinkerton Doctrine." *Pinkerton*, 328 U.S. at 642.

34. *Id.* at 645.

35. See e.g. Johnson, *supra* n. 2, at 1142 n. 17 (arguing that the "existence of the agreement need not be proved directly, but may be implied from proof of concerted action by the defendants"); *Developments in the Law*, *supra* n. 1, at 1008 n. 33 (arguing that, in Sherman Act prosecutions, a "conspiracy conviction will lie even when no act has occurred resembling a direct expression of the agreement").

36. *Pinkerton*, 328 U.S. at 642.

37. *Id.* at 643.

38. See David, *supra* n. 2, at 980-81 (stating that courts in Britain abolished the merger doctrine, which had been a long-standing common law principle, as early as 1844). It was not until the *Pinkerton* case in the middle of the twentieth century, however, that the American Supreme Court made a similar pronouncement, although the Court, in cases before *Pinkerton*, had consistently found the doctrine of merger inapplicable. *Id.*

39. *Vicarious Liability*, *supra* n. 8, at 372 n. 11 ("Although both defendants appealed, the only serious contention of error was Dan's sentence on the substantive crimes.")

40. *Pinkerton*, 328 U.S. at 645.

Daniel Pinkerton was in jail on other charges when some of the crimes were committed.<sup>41</sup>

Daniel had not been indicted as an aider and abettor and his case had not been submitted to the jury on an aiding and abetting theory.<sup>42</sup> Instead, the trial judge had instructed the jury that, in the Supreme Court's words,

each petitioner could be found guilty of the substantive offenses, if it was found at the time those offenses were committed petitioners were parties to an unlawful conspiracy and the substantive offenses charged were in fact committed in furtherance of it.<sup>43</sup>

In other words, if Daniel and Walter were in a conspiracy to defraud the IRS and Walter committed specific acts of fraud in furtherance of that conspiracy, Daniel was equally guilty of those crimes.<sup>44</sup>

On appeal, Daniel Pinkerton argued that this jury instruction had been erroneous. He cited the Third Circuit's opinion in *United States v. Sall*, where it had been held that mere participation in a conspiracy was not sufficient to sustain convictions for substantive crimes committed in furtherance of that conspiracy and that direct participation in the commission of the offenses was a prerequisite to such convictions.<sup>45</sup>

Ruling that the trial judge's instruction in the *Pinkerton* case was correct and rejecting the reasoning in *Sall*, the Supreme Court affirmed Daniel Pinkerton's convictions and held "that evidence of direct participation in the commission of substantive offenses was not necessary."<sup>46</sup> In other words, the Court ruled that a conspirator may be held guilty of substantive crimes committed by his co-conspirator in furtherance of the conspiracy even if he did not participate in those offenses and even if there is no evidence that he even had knowledge of them.<sup>47</sup>

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41. *Id.* at 648.

42. *Id.* at 645 n. 6.

43. *Id.*

44. *Id.* The precise words of the trial judge's charge were as follows: "if you are satisfied . . . that at the time these particular substantive offenses were committed . . . that the two defendants were in an unlawful conspiracy . . . then you would have a right . . . to convict each of these defendants on all these substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy." *Id.*

45. *Id.* at 646; see James M. Shellow et al., *Pinkerton v. United States and Vicarious Criminal Liability*, 36 Mercer L. Rev. 1079, 1081 (1985) (explaining the substantive basis of Daniel Pinkerton's appeal).

46. LaFave 2003, *supra* n. 3, at 684.

47. See Bubany, *supra* n. 24, at 658.

### B. *The Dissent*

The Supreme Court decision in *Pinkerton v. United States* was not unanimous. Justice Rutledge began his now-famous dissent by saying that the majority opinion was “without precedent” and “a dangerous precedent to establish.”<sup>48</sup> He made three main arguments against the majority’s rule and reasoning.

First, Rutledge said, Daniel Pinkerton had not aided and abetted these substantive crimes:

The proof showed that Walter alone committed the substantive crimes. There was none to establish that Daniel participated in them, aided and abetted Walter in committing them, or knew that he had done so . . . [t]here was no evidence that he counseled, advised, or had knowledge of those particular acts or offenses.<sup>49</sup>

The only evidence against Daniel Pinkerton, Rutledge averred, was that he had “confederated” with his brother over the years “to commit similar crimes concerned with unlawful possession, transportation, and dealing in whiskey, in fraud of the federal revenues.”<sup>50</sup> In other words, in Rutledge’s view, “Daniel had been held guilty of the substantive crimes committed only by Walter on proof that he did no more than conspire with him to commit offenses of the same general character.”<sup>51</sup>

Why was it so bad to have convicted Daniel Pinkerton of these crimes without proof that he had aided and abetted them? For Rutledge, the Court’s opinion confused the three classes of crime which Congress had, by statute, separately defined: “(1) completed substantive offenses; (2) aiding, abetting, or counseling another to commit them; and (3) conspiracy to commit them.”<sup>52</sup> These three classes of crime should be kept distinct, Rutledge said:

The gist of conspiracy is the agreement; that of aiding, abetting, or counseling is in consciously advising or assisting another to commit particular offenses, and thus becoming a party to them; that of substantive crime, going a step beyond aiding, abetting, counseling to completion of the offense.<sup>53</sup>

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48. *Pinkerton*, 328 U.S. at 648 (Rutledge, J., dissenting).

49. *Id.* at 648, 651.

50. *Id.* at 648.

51. *Id.* at 651.

52. *Id.* at 649.

53. *Id.* at 649.

Second, Rutledge argued that convicting Daniel Pinkerton of both conspiracy and the substantive crimes in this case amounted to double jeopardy.<sup>54</sup> This is not because of the discredited rule of merger, which would always bar conviction of both conspiracy and substantive crimes which are the objects of the conspiracy. In fact, Rutledge dismissed the defendants' merger argument as quickly as Douglas did, saying that the "old doctrine of merger of conspiracy in the substantive crime has not obtained here."<sup>55</sup> Rather, Rutledge said, this case presents "the substance if not the technical effect of double jeopardy" because under these facts Daniel was being punished twice for agreeing to commit a crime. If there had been evidence of aiding and abetting the substantive crimes, conviction of these crimes and of conspiracy to commit them might be possible. But without evidence of aiding and abetting, the court was punishing Daniel Pinkerton twice for the same thing – for having "agreed with Walter at some past time to engage in such transactions generally."<sup>56</sup> As to Daniel Pinkerton, Rutledge said, "this was only evidence of conspiracy, not of substantive crime."<sup>57</sup> It was, in other words, evidence of one crime only, not of two. In short, in Rutledge's view, without the agreement, Daniel was guilty of no crime in this record. With it and no more, so far as his own conduct is concerned, "he was guilty of two."<sup>58</sup>

Third, Rutledge condemned the majority opinion for importing the concept of vicarious liability into criminal law. Rejecting the "analogies from private commercial law and the law of torts" as "dangerous . . . for transfer to the criminal field," Rutledge found the Court's holding resulted in "a vicarious criminal responsibility as broad as, or broader than, the vicarious civil liability of a partner for acts done by a co-partner in the course of the firm's business."<sup>59</sup>

### C. Critique of the Dissent

Are Rutledge's three main criticisms in *Pinkerton* valid? On the issue of aiding and abetting, the majority admitted that there was "no evidence to show that Daniel participated *directly* [emphasis added] in the commission of the substantive offenses" with which he was charged.<sup>60</sup> And yet, the Court seemed to indicate that the rationale for its holding was entirely con-

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54. *Id.* at 651-52.

55. *Id.* at 650.

56. *Id.* at 651.

57. *Id.*

58. *Id.* at 652.

59. *Id.* at 651.

60. *Id.* at 645.

sistent with the rationale behind the law of complicity: “the rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same general principle.”<sup>61</sup>

Moreover, can it really be said that Daniel did not aid and abet these crimes? Surely the fact that he was in jail and not physically present when the crimes were committed is wholly irrelevant to his liability as an accomplice.<sup>62</sup> As early as 1930 in a *Harvard Law Review* essay on “Criminal Responsibility for the Acts of Another,” Francis Sayre pointed out that “one who counsels, procures, or commands the commission of a felony through a guilty agent but who is himself absent from the crime has from very early times been punishable.”<sup>63</sup> This principle can be traced to Anglo-Saxon law, as well as to the time of Bracton.<sup>64</sup>

But, there was no evidence that Daniel actually commanded or even counseled his brother to commit these specific crimes in this way and at this time. Does this matter to accomplice liability? It is well settled in the law of complicity that a person can be criminally liable “even though [his] agent committed the act through a different instrumentality, or at a different time, or in a different place from that ordered or authorized.”<sup>65</sup>

What did Daniel Pinkerton do to aid and abet these crimes? All he did, it is said, was to agree with his brother to commit crimes of that general nature. But why can agreeing not be sufficient for aiding and abetting? The Supreme Court case of *Hicks v. U.S.*,<sup>66</sup> among many other cases, established that the *actus reus* of aiding and abetting “may include shouting words of encouragement, acting as a lookout, or merely being present and ready to aid the perpetrator if necessary.”<sup>67</sup> If a person can be an accomplice by merely telling the principal that he is willing to help, how is it that Daniel Pinkerton was not an accomplice by agreeing with his brother to commit such crimes? In other words, why can’t proof of conspiracy be proof of complicity?<sup>68</sup>

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61. *Id.* at 647.

62. See May, *supra* n. 7, at 25 (“Frequently a principal in the first degree is present at the time that an offense is committed. Presence, however, is not required. If A employs a child to pass a counterfeit check, or if A leaves poison for another who subsequently drinks it, A is considered a principal in the first degree under a theory of constructive presence.”).

63. Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 *Harv. L. Rev.* 689, 694 (1930) (citing F.W. Maitland and Frederick Pollock’s famous two-volumed history: Pollock & Maitland, 2 *History of English Law Before the Time of Edward I*, 509 (2d ed., University Press 1959) [hereinafter Pollock & Maitland] and Sir James FitzJames Stephen, *A History of the Criminal Law of England*, 231 *et seq.* (MacMillan 1883)).

64. *Id.* at 696 n. 29 (citing Pollock & Maitland).

65. *Id.* at 702-03.

66. 150 U.S. 442 (1890).

67. Grace Mueller, *The Mens Rea of Accomplice Liability*, 61 *S. Cal. L. Rev.* 2169, 2170 (1998).

68. See Perkins, *supra* n. 11, at 340 (assessing the differences of complicity and conspiracy and the argument that, despite “this possibility of separate existence, . . . complicity and conspiracy normally



If Daniel Pinkerton *did* aid and abet the substantive crimes by his agreement, why is it double jeopardy to charge him with both conspiracy and the substantive crimes themselves? Unless we are abolishing the crime of conspiracy, or applying the merger rule to bar all prosecutions of both conspiracy and the object crimes – a solution which neither the majority nor the dissent in *Pinkerton* were ready to adopt – it is unpersuasive to speak of double jeopardy here.

Rutledge's most serious criticism is his accusation that the Court is adopting a theory of vicarious liability. This criticism of the *Pinkerton* case has been echoed by many others.<sup>69</sup> In a 1985 article, for instance, Professor Shellow and his colleagues stated categorically that, in the *Pinkerton* case, "the Supreme Court imported the civil concept of vicarious liability into the American law of criminal conspiracy."<sup>70</sup> The view that *Pinkerton* adopts a new vicarious liability also informed the Model Penal Code's rejection of the *Pinkerton* doctrine as offensive to the law's "sense of just proportion."<sup>71</sup>

*Pinkerton*'s majority opinion does strongly suggest that adoption of the tort standard of vicarious liability is the Court's objective. The Court draws analogies to agency law,<sup>72</sup> pointing out that the "overt act of one partner may be the act of all without any new agreement specifically directed to that act."<sup>73</sup> The same rationale should apply to conspiracy, the Court says. As "long as the partnership in crime continues, the partners act for each other in carrying it forward."<sup>74</sup> After all, it is well settled that the overt act of one conspirator is the act of all for purposes of proving the *actus reus* of the conspiracy itself. "If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of

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go hand-in-hand"). Perkins quotes from Judge Learned Hand's opinion in *U.S. v. Falcone*, 109 F.2d 579, 581 (2d Cir. 1940), in which Hand says that "a conspirator with" another to commit a crime is "in substance the same thing, an abettor" of that crime. Perkins, *supra* n. 11, at 340 n. 21; *see also* Bubany, *supra* n. 24, at 658 ("The evidence needed to support a conspiracy conviction typically will support an aiding and abetting conviction.").

69. *See e.g.* May, *supra* n. 7, at 23 ("Critics have argued that the rationale of *Pinkerton* represents an unwarranted extension of the civil doctrine of respondeat superior into criminal jurisprudence."). May also says that such critics "misinterpret the case as having announced a doctrine of liability predicated upon one's mere membership in a conspiracy." *Id.* at 38; *see also* Shellow, *supra* n. 45, at 1085 (referring to "*Pinkerton*'s effective, though mercifully limited, recognition of the principle of guilt by association"); *Vicarious Liability*, *supra* n. 8, at 376 (arguing that what is new in the *Pinkerton* case is the "imposition of vicarious liability for substantive offenses committed by co-conspirators").

70. Shellow, *supra* n. 45, at 1080.

71. *See* Model Penal Code § 2.06 cmt. (a).

72. *See* Shellow, *supra* n. 45, at 1084 ("Agency jargon and agency concepts had been a routine feature of conspiracy opinions for decades prior to *Pinkerton*.").

73. *Pinkerton*, 328 U.S. at 646-47.

74. *Id.* at 646.

the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense.”<sup>75</sup>

The analogy between the overt act requirement for proof of conspiracy and the use of overt acts of one conspirator to hold another conspirator guilty of substantive crimes was sharply criticized in a 1959 article on “Criminal Conspiracy”:

An act committed before the defendant joined the conspiracy is sufficient to supply the necessary requirement of an overt act as to him. Yet, if that act was a crime, it is difficult to believe that a court would hold the defendant liable for it. Furthermore, even if the overt act has any practical importance in determining the defendant’s liability for conspiracy, it is not attributed to each defendant personally in order to hold him responsible for its effects, but is rather meant to show something concerning the grouping as a whole—either that the grouping existed, or that it had reached a stage of development dangerous to society. Thus, the defendant’s punishment as a conspirator does not vary with the seriousness of the overt act proved in establishing his guilt. Moreover, a court should hesitate to draw an analogy to the overt act to impute liability for a substantive crime if only because this is likely to entail far more serious criminal consequences.<sup>76</sup>

On the other hand, the *Pinkerton* rationale has strong precedent. In 1827, Justice Story, speaking for the Supreme Court, may be said to have anticipated the *Pinkerton* doctrine when he said that “the act of one conspirator . . . is considered the act of all, and is evidence against all. Each is deemed to consent to, or command, what is done by any other in furtherance of the common object.”<sup>77</sup> This rule “has been repeated by the Court down through the years.”<sup>78</sup>

What, then, was new in the *Pinkerton* case? For Justice Rutledge and the other *Pinkerton* critics, the new development was the Court’s explicit willingness to adopt the vicarious liability doctrine in criminal law and to impose such vicarious liability “solely upon evidence that the defendant was a conspirator.”<sup>79</sup>

Rutledge and the other critics are quite right to point out that, if *Pinkerton* and any other cases adopted a broad vicarious liability theory for the whole of criminal law, this would be a significant departure from tradi-

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75. *Id.* at 647.

76. *Developments in the Law*, *supra* n. 1, at 998.

77. *U.S. v. Goodling*, 25 U.S. 460, 469 (1827).

78. *See e.g. Hyde v. U.S.*, 225 U.S. 347, 359 (1912); *Logan v. U.S.*, 144 U.S. 263, 308-09 (1892).

79. *Developments in the Law*, *supra* n. 1, at 993.

tion. Francis Sayre makes this clear in his previously cited 1930 essay on "Criminal Responsibility for the Acts of Another." Tracing the tort concept of respondeat superior back to the eighteenth and nineteenth centuries, Sayre stresses that no comparable rule developed in criminal law. In fact, Sayre says, the doctrine was expressly repudiated in a 1730 English case, *Rex v. Huggins*. There, the defendant Huggins, warden of the fleet, was charged with the murder of one of the prisoners in his charge. The servant of Huggins' deputy warden had transferred the prisoner to an unhealthy cell, where he had died of disease. The court held that, although the servant was guilty, Huggins, the warden, was not:

It is a point not to be disputed that in criminal cases the principal is not answerable for the act of the deputy, as he is in civil cases; they must each answer for their own acts, and stand or fall by their own behaviour.<sup>80</sup>

Sayre concludes that this and other cases "have made it clear that . . . the doctrine of respondeat superior will not serve as a ground of criminal liability."<sup>81</sup>

The reasons are plain. Criminal law is based on the idea that guilt is personal and individual. Vicarious liability by definition means that one is automatically responsible for the torts of another because of one's status relationship to that other person as principal and agent. An employer is vicariously liable for the torts of his employee, committed in the course of the employment, because of his status as employer and regardless of whether he encouraged or even knew about the tortious behavior.<sup>82</sup> Based on these assumptions, "any doctrine of vicarious criminal liability is repugnant to common law concepts."<sup>83</sup>

But does the *Pinkerton* case really adopt vicarious liability? Before *Pinkerton*, "participation in a conspiracy could establish liability for crimes committed by other conspirators, [but] this was simply a means of proving complicity."<sup>84</sup> In other words, before *Pinkerton* it was well accepted that evidence of participation in a conspiracy could be taken by a jury as a factor in determining that a person had aided and abetted the crimes which

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80. Sayre, *supra* n. 63, at 700-01.

81. *Id.* at 701.

82. May, *supra* n. 7, at 24 n. 17 (citing William L. Prosser, *The Law of Torts*, 467 (4th ed., West 1971)).

83. *Vicarious Liability*, *supra* n. 8, at 374; *see also* Sayre, *supra* n. 63, at 702 ("vicarious liability is a conception repugnant to every instinct of the criminal jurist"); Shellow, *supra* n. 45, at 1083 ("the criminal law has never accepted the doctrine of respondeat superior, which is a form of liability without fault").

84. Susan Brenner, *Civil Complicity: Using the Pinkerton Doctrine to Impose Vicarious Liability in Civil RICO Actions*, 81 Ky. L.J. 369, 384 (1992-93).

were the objectives of that conspiracy. What was new, if anything, in the *Pinkerton* case was the proposition that this evidence of conspiracy was to be *presumed* to be evidence of complicity *as a matter of law*.<sup>85</sup> In other words, the *Pinkerton* Court said, in effect, that “conspiracy is conclusive on complicity.”<sup>86</sup> This prompted some to say that the fault in *Pinkerton* lay in converting a rule of evidence into a rule of law.<sup>87</sup> This was, at any rate, the position of the drafters of the Model Penal Code:

Conspiracy may prove solicitation, aid, or agreement to aid, etc.; it is evidentially important and may be sufficient for that purpose. But whether it suffices ought to be decided by the jurors; they should not be told that it establishes complicity as a matter of law.<sup>88</sup>

Understood not as adopting a theory of vicarious liability<sup>89</sup> but rather as expanding the law of complicity and treating participation in conspiracy as sufficient evidence, in law, for complicity in the substantive crimes that were the objects of that conspiracy, the *Pinkerton* decision is much narrower and less fearsome than either Justice Rutledge or its many other detractors have argued.<sup>90</sup> Moreover, there are two other important reasons to regard *Pinkerton* as a narrow holding. The first comes from language in the case itself – dicta in which the Court tries to make clear when the rule applies and when it does not. The other comes from the nature of the *Pinkerton* case itself.

The majority opinion in *Pinkerton* states that the holding would not necessarily apply if the facts were different:

A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which

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85. *Contra Commonwealth v. Knapp*, 26 Mass. 496, 518 (1830) (“The fact of the conspiracy being proved against the prisoner, is to be weighed as evidence in the case having a tendency to prove that the prisoner aided, but it is not *in itself* to be taken as a legal presumption of his having aided unless disproved by him. It is a question of evidence for the consideration of the jury.”).

86. Fletcher, *supra* n. 2, at 172.

87. See *Vicarious Liability*, *supra* n. 8, at 378 (criticizing this holding for permitting “the prosecution to trust to a mechanical rule of law as an alternative to unequivocal proof”); see generally May, *supra* n. 7.

88. See Model Penal Code § 2.06 cmt. (a).

89. Brenner, *supra* n. 84, at 385 (“*Pinkerton* is not actually a rule of vicarious liability.”).

90. See also *Developments In the Law*, *supra* n. 1, at 994, 997-98 (“The Supreme Court appears in *Pinkerton* to have considered the liability of a conspirator for the substantive offense an application of the complicity doctrine . . . . It is arguable that the defendant in the *Pinkerton* case itself could have been convicted as an accomplice.”).

could not reasonably be foreseen as a necessary and natural consequence of the unlawful agreement.<sup>91</sup>

From this statement, courts have inferred that in

order for the *Pinkerton* rule imposing liability for the substantive crimes of other conspirators to apply, it must be proven beyond a reasonable doubt that (1) the substantive offense was committed by one of the members of the conspiracy, (2) while the one committing the crime was a member of the conspiracy, (3) in furtherance of the conspiracy, and<sup>92</sup> (4) that the substantive crime was a reasonably foreseeable part of the conspiracy.<sup>93</sup>

The facts of *Pinkerton* also show the narrow nature of the holding. The substantive crimes with which both brothers were charged were the very crimes which were the objectives of the alleged conspiracy between them. As Justice Douglas said for the majority, the “unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise.”<sup>94</sup> The issue in the *Pinkerton* case has been precisely formulated: “If one conspirator commits the crime which was the very objective of the wrongful combination, is the co-conspirator guilty of that target offense, without having done more than join in the conspiracy?”<sup>95</sup>

The *Pinkerton* holding was not the great leap into uncharted and dangerous waters that the dissent and other critics claimed it to be. The Court did expand the definition of the *actus reus* of complicity a bit to say that evidence of participation in conspiracy is evidence of complicity as a matter of law.<sup>96</sup> But the Court did not impose a categorical vicarious liability which had never been known before, and both the dicta about reasonable foreseeability and the specific facts of the case indicate that the holding was quite limited.

How well would these limitations continue to apply in later cases? Does the subsequent development of the *Pinkerton* doctrine, after 1946, show that the courts have made an unjustified departure from established

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91. *Pinkerton*, 328 U.S. at 647-48.

92. At least some commentators have read this “and” as an “or”. See e.g. Pamela H. Bucy, *Crimes By Health Care Providers*, U. Ill. L. Rev. 589, 627 (1996).

93. Carl Horn, *For the Criminal Practitioner: Review of 4th Circuit Opinions in Criminal Cases Decided in Calendar Year 1993*, 51 Wash. & Lee L. Rev. 159, 183 (1993); see e.g. *U.S. v. Chorman*, 910 F.2d 102, 111 (4th Cir. 1990).

94. *Pinkerton*, 328 U.S. at 647.

95. Perkins, *supra* n. 11.

96. See *Vicarious Liability*, *supra* n. 8, at 374 (expressing view that, in doing so, the Court went too far, broadly interpreting the complicity statute in violation of the principle that criminal statutes should be strictly construed).

precedent on the issue of when one person may be guilty of a crime – particularly murder – committed by another?

### III. EXPANSIONS OF THE *PINKERTON* DOCTRINE IN THE CASE LAW

As we have seen, the *Pinkerton* doctrine has been applied in an enormous number of prosecutions. Moreover, the doctrine has evolved in those cases to a point considerably beyond what the *Pinkerton* case itself says. A sampling of a few of those cases is sufficient to give a sense of how changes from the original rule emerged.

#### A. *State v. Bridges*

The opinion of the New Jersey Supreme Court in *State v. Bridges*,<sup>97</sup> as contrasted with the opinion of the intermediate Appellate Division in the same case, shows an important expansion of *Pinkerton* to substantive crimes that were reasonably foreseeable by the defendant but not the original objectives of the conspiracy. The defendant Bennie Bridges got into a heated argument with one Andy Strickland at a birthday party. Bridges left the party, angrily shouting that he would return with help from his “boys.” Bridges then picked up two acquaintances, co-defendants Bing and Rolle, and asked them to return to the party with him because he expected a confrontation. They agreed to come and armed themselves with guns to hold back the crowd and “intimidate the majority of the boys at the party” so Bridges could fight with Strickland. When they returned to the party, Bridges began fighting with a friend of Strickland while Bing and Rolle shouted to the crowd, “Nobody jump in” and “Nobody here is Superman.” Someone in the crowd hit Bing in the face, whereupon Bing and Rolle drew their guns and fired them into the crowd, hitting and killing one of the onlookers. Defendant Bridges was convicted of conspiracy to commit aggravated assault and of several substantive crimes, including murder, for which charge he received a sentence of life imprisonment, with parole ineligibility for thirty years. He appealed, contending that he was not responsible for the murder.<sup>98</sup>

The applicable statute in *Bridges* is reasonably typical of the kind of *Pinkerton* statute which some states have adopted.<sup>99</sup> It provided that a person is legally accountable for the conduct of another person when,

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97. 628 A.2d 270 (N.J. 1993).

98. *Id.* at 271-72.

99. *But see* Bonnie et al., *supra* n. 9, at 623 (expressing the view that *Pinkerton* is enforced in most states without statute: “The *Pinkerton* rule is probably the law in a majority of American jurisdictions.

(3) He is an accomplice of such other person in the commission of an offense; or

(4) He is engaged in a conspiracy with such other person.<sup>100</sup>

The intermediate Appellate Division reversed Bridges' murder conviction, holding that he was not responsible for the murder committed by Bing and Rolle in the course of their conspiracy. The court went on to say that the state statute "contemplated 'complete congruity' between accomplice and vicarious conspirator liability."<sup>101</sup> In other words, the intermediate court said that *Pinkerton* liability based on conspiracy required "a level of culpability and state of mind that is identical to that required of accomplice liability."<sup>102</sup> Adopting what has sometimes been described as the "same *mens rea* approach" to accomplice liability,<sup>103</sup> the Appellate Division therefore concluded that "a conspirator is vicariously liable for the substantive crimes committed by co-conspirators only when the conspirator had the same intent and purpose as the co-conspirator who committed the crimes."<sup>104</sup>

The Appellate Division went on to argue that accomplice liability requires subjective fault. Vicarious criminal liability based on *Pinkerton* can require no less. As the State Supreme Court later said,

the Appellate Division thus interpreted *Pinkerton* to prescribe a requirement of subjective foreseeability of the criminal consequences as a basis for vicarious co-conspirator liability.<sup>105</sup>

But *Pinkerton*'s subjective foreseeability also requires *more* of prosecutors, according to the Appellate Division in *Bridges*. Under *Pinkerton*, the Appellate Division said, a crime "must have been within [a co-conspirator's] contemplation when he entered into the agreement and reasonably comprehended by his purpose and intention in entering into the agreement."<sup>106</sup> In other words, to convict a defendant like Bridges of the substantive crime of murder under *Pinkerton*, it would not be enough to show that the killing was within his contemplation when the shooting was

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Typically, it is enforced without explicit statutory support."); see also *Bridges*, 628 A.2d at 285 (stating that the "*Pinkerton* doctrine is a judicially-created doctrine").

100. N.J. Stat. Ann. § 2C:2-6b(3)-(4) (2004).

101. *Bridges*, 628 A.2d at 273.

102. *Id.* at 272.

103. The Model Penal Code adopts this view. Contrast the natural and probable consequences approach, discussed in some detail later in this article, which, like *Pinkerton*, adopts a standard of negligence to assess the guilt of the accomplice in one crime for unanticipated crimes growing out of the original crime.

104. *Bridges*, 628 A.2d at 272.

105. *Id.* at 274.

106. *Id.*

done. It would be necessary for the prosecutor to show that, when he *entered the initial agreement* – not a conspiracy to murder, of course, since the defendants never agreed to kill anyone,<sup>107</sup> but a conspiracy to assault – the killing was within Bridges’ subjective contemplation and “comprehended by his purpose and intention in entering into the agreement.”<sup>108</sup>

The substantive crimes at issue in *Pinkerton* were, as we have seen, within Daniel Pinkerton’s contemplation and “comprehended by his purpose and intention in entering the agreement.” As the Court pointed out in that case, those crimes were the very objects of the initial agreement. The difficulty in *Bridges* is that the crime of murder was not the precise object of the conspiracy. To hold Bridges guilty of murder under *Pinkerton*, the court would have to say that *Pinkerton* is significantly different from the “same *mens rea*” or so-called model-penal-code approach to accomplice liability and that it would permit convictions on something less than subjective fault.

This is precisely the position that the New Jersey Supreme Court took on appeal from the Appellate Division in *Bridges*. Citing *State v. Stein*<sup>109</sup> and other cases, the Court held that, under *Pinkerton*,

so long as a conspiracy is still in existence, “an overt act of one partner may be the act of all without any new agreement specifically directed to that act,” provided the substantive act could “be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.”<sup>110</sup>

Complicity, in other words, requires subjective fault. *Pinkerton*, by contrast, is *objective*. In *Bridges*, the New Jersey Supreme Court said the *Pinkerton* doctrine,

purported to impose vicarious liability on each conspirator for the acts of others based on an objective standard of reasonable foreseeability . . . . [I]t was understood that the liability of a co-conspirator under the objective standard of reasonable foreseeability would be broader than that of an accomplice, where the defendant must actually foresee and intend the result of his or her acts.<sup>111</sup>

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107. They were, of course, not charged with conspiracy to murder, nor could they have been, as the dissent in the State Supreme Court case points out. *Id.* at 283 (O’Hern, J., concurring in part and dissenting in part).

108. *Id.* at 274.

109. 360 A.2d 347 (N.J. 1976).

110. *Bridges*, 628 A.2d at 274.

111. *Id.*



In *Bridges*, the New Jersey Supreme Court, adopting a totally different interpretation of the relevant New Jersey statute than the Appellate Division, held that the *Pinkerton* doctrine should be expanded beyond the original *Pinkerton* case to make a conspirator guilty of crimes that were “not within the scope of the conspiracy if they are reasonably foreseeable as the necessary or natural consequences of the conspiracy.”<sup>112</sup> In *Bridges*, although the conspiracy “did not have as its objective the purposeful killing of another person,” the agreement did contemplate “bringing loaded guns” to the party, thus creating a situation in which “it could be anticipated that the weapon might be fired at the crowd.” The Court reasoned:

From that evidence a jury could conclude that a reasonably foreseeable risk and a probable and natural consequence of carrying out a plan to intimidate the crowd . . . would be that one of the gunslingers would intentionally fire at somebody, and, under the circumstances, that act would be sufficiently connected to the original conspiratorial plan to provide a just basis for a determination of guilt for that substantive crime.<sup>113</sup>

Justice O’Hern, concurring in part and dissenting in part in *Bridges*, condemned the majority for allowing “a sentence of life imprisonment to be imposed on the basis of a negligent appraisal of a risk that another would commit a homicide.”<sup>114</sup> This case, he went on to say, is “an example of the most extreme sort – life imprisonment with no possibility of parole for thirty years on the basis of a negligent mental state.”<sup>115</sup> The legislature, he averred, never intended that someone could be convicted of murder and sentenced to life in prison for negligence. O’Hern added, “[w]ith certain exceptions for motor-vehicle accidents, negligence will not even sustain a conviction of reckless manslaughter.”<sup>116</sup> O’Hern concluded that the approach to *Pinkerton* adopted by the court, “may implicate a person, on the basis of negligence or stupidity, in very serious offenses which he never contemplated or agreed, expressly or by implication, to have perpetrated.”<sup>117</sup>

O’Hern also made the point that, since the defendant *Bridges* did not intend to kill the victim, he could not have been convicted of attempted murder, or as an accomplice to the murder, or of conspiracy to commit

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112. *Id.* at 280.

113. *Id.* at 281.

114. *Id.* (O’Hern, J., concurring in part and dissenting in part).

115. *Id.* at 284.

116. *Id.* at 286.

117. *Id.* at 284 (quotation and citation omitted).

murder.<sup>118</sup> Like felony murder,<sup>119</sup> he concluded, this application of *Pinkerton* destroys the “carefully measured grid of criminal responsibility.”<sup>120</sup> *Pinkerton* liability under the statute, he said, should be reserved for cases like the *Pinkerton* case itself – where the issue concerns guilt of “the crime or crimes that were the object of the conspiracy.”<sup>121</sup>

The New Jersey Supreme Court majority in *Bridges*, then, makes the dictum in the *Pinkerton* case about reasonable foreseeability central to the *Pinkerton* doctrine.<sup>122</sup> In the *Pinkerton* case itself, reasonable foreseeability was not an issue because the crimes committed were the very ones agreed on. The *Bridges* case extends *Pinkerton* to substantive crimes that were reasonably foreseeable but not the objects of the conspiracy.

### B. *People v. Bringham*

Nor is *Bridges* the only case that so expands *Pinkerton*. In other cases and other jurisdictions, courts have focused on this standard of reasonable foreseeability,<sup>123</sup> emphasizing that co-conspirators can be liable for substantive crimes based on negligence even where negligence would hardly be sufficient for commission of the substantive offense by the principal.<sup>124</sup>

118. O’Hern says that “an accomplice must be a person who acts with the *purpose* of promoting or facilitating the commission of the substantive offense for which he is charged as an accomplice.” *Id.* at 283 (quoting *State v. White*, 484 A.2d 691, 694 (N.J. 1984)). Conspiracy, he says, also requires purpose. *Id.* (O’Hern, J., concurring in part and dissenting in part).

119. The merger doctrine, which requires an independent felony for application of the felony-murder rule, is often said to be based on a similar concern for the gradation of the homicide system.

120. *Id.* at 283-84 (O’Hern, J., concurring in part and dissenting in part).

121. *Id.* at 286.

122. See Shellow et al., *supra* n. 45, at 1086 (stating, “foreseeability is an absolutely essential element of *Pinkerton* liability, despite Justice Douglas’ seemingly cavalier treatment of the issue in almost an afterthought to the opinion”).

123. The Court, however, omitted language about reasonable foreseeability just a few years after *Pinkerton*. *Nye & Nissen v. U.S.*, 336 U.S. 613, 618 (1949) (stating that “a conspirator could be held guilty of the substantive offense even though he did no more than join the conspiracy, provided that the substantive offense was committed in furtherance of the conspiracy and as a part of it”).

124. See e.g. *U.S. v. Luskin*, 926 F.2d 372 (4th Cir. 1991) (affirming the defendant’s guilty conviction under *Pinkerton* for use of a firearm during a conspiracy to kill his wife); *Johnson v. State*, 482 S.W.2d 600, 605 (Ark. 1972) (reversed in part on different grounds) (defendant held responsible for the death of a girl during a burglary attempt); *Commonwealth v. Roux*, 350 A.2d 867, 871-72 (Pa. 1976) (defendant held guilty of murder after he conspired with others to rob and beat the victim). For a discussion of the application of the *Pinkerton* doctrine to 18 U.S.C. § 924(c), one of Congress’s main statutory weapons in the war on drugs, consult Berra, *supra* n. 8, at 603-04, who calls this statutory provision “one of the more ‘popular’ federal mandatory minimum statutes” and says that it

prohibits the use of firearms in relation to drug trafficking crimes. Under Section 924(c), drug offenders are subject to a minimum of five years in prison if a firearm is used in furtherance of their underlying drug crimes. Furthermore, . . . drug conspirators are not only liable for their own guns, but also for their accomplice’s firearms if their use was ‘reasonably foreseeable.’

But what does “reasonable foreseeability” mean? Courts using the *Pinkerton* doctrine often have great difficulty defining and using that term.<sup>125</sup> It has been said, for example, that “reasonable foreseeability” “could signify any position within a broad range” such as,

for example, all acts with a substantial probability of occurrence (e.g., one chance in five); acts that are more probable than not to occur; acts of very high probability (e.g., 90%); and acts so likely that their occurrence is a practical certainty. . . . [N]o court uses one of these degrees of probability for all contexts; each varies the requirement with the circumstances.<sup>126</sup>

There is also the problem of the erratic and unpredictable co-conspirator. Does this mean that practically any crimes are reasonably foreseeable because the co-conspirator could have done anything? In *People v. Brigham*,<sup>127</sup> the defendant, an experienced hit man, and an acquaintance named Bluit, armed with automatic weapons, set out in a car to find and kill a man named Chuckie. They saw a teenager on the street and defendant said to Bluit, “That is Chuckie.” Bluit responded, “we’re gonna get him.” As the car got closer to the teenager, however, the defendant recognized that he was not Chuckie, and so warned Bluit, saying, “man, that is not Chuckie, man.” Bluit ignored this, saying again “we’re gonna get him” and directed the driver to stop. Appellant and Bluit got out of the car and walked up to the teenager, a fourteen-year-old named Barfield. When they got closer, defendant said to Bluit, “Don’t do it. It ain’t cool. That’s not the dude, man. Come on.”<sup>128</sup> But Bluit rejected the defendant’s advice, saying he wanted to let people know “we [are] serious.” Bluit fired twice, hitting and killing Barfield.<sup>129</sup>

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*Id.* at 603-04. Berra goes on to say that the federal courts have relied on *Pinkerton* in insisting on this foreseeability standard. “If such use is found to be ‘reasonably foreseeable,’ the unarmed accomplices are immediately subject to, at minimum, the same minimum five-year penalty as the armed principal.” *Id.* at 606. Because courts often say that drug trafficking is by nature dangerous and violent, however, Berra says that reasonable foreseeability is always found in such cases and the standard more closely approximates one of strict liability. *Id.*

125. See *People v. Luparello*, 187 Cal. App. 3d 410, 452 n. 2 (Cal. App. 4th Dist. 1987) (Weiner, J., concurring) (while focusing on the natural and probable consequences approach to the law of complicity, Justice Weiner discusses what he calls the “foreseeable consequence” doctrine and asks whether “probable and natural consequences” means the same thing as “natural and foreseeable consequences”).

126. *U.S. v. Powell*, 929 F.2d 724, 726 (D.C. Cir. 1991).

127. 216 Cal. App. 3d 1039 (Cal. App. 1st Dist. 1989).

128. See Sayre, *supra* n. 63, at 721 n. 111 (expressing view that the courts in cases like this are “imposing criminal liability upon one who fails to prevent another from engaging in anti-social conduct – a very effective means of social pressure”).

129. *Brigham*, 216 Cal. App. 3d at 1044-45.

At trial, the prosecution argued and the jury found that the defendant knew that Bluit was “hardheaded”<sup>130</sup> and erratic, and, as such, he could reasonably have foreseen that Bluit, once set in motion, might very well kill someone other than the assigned target, even if told not to do so.<sup>131</sup> The defendant was convicted of first-degree murder.<sup>132</sup> The Court of Appeal affirmed, pointing out that the defendant “was an experienced assassin or hit man as was Bluit” and they “had worked together in the past.” Defendant admitted that he knew Bluit was “hardheaded,” and the court said that “one who is hardheaded may be foreseeably and irrationally difficult to dissuade or control once embarked upon a criminal enterprise.”<sup>133</sup> Even if the killing of Barfield did not further the parties’ original criminal conspiracy to kill Chuckie, a point that the court is careful not to concede, “it was nonetheless a foreseeable result<sup>134</sup> . . . of . . . the original . . . agreement to kill Chuckie.”<sup>135</sup>

### C. *U.S. v. Alvarez*

Both *Bridges* and *Brigham* are only slightly more difficult cases than *Pinkerton* itself. Even though the conspiracies in those cases did not contemplate precisely what was done, still the crimes committed were of the same nature as those agreed upon.<sup>136</sup> There were conspiracies to assault

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130. The dissent makes much of this term:

The only ostensible “‘evidence’ of what the majority describes as Bluit’s ‘presumably erratic and uncontrollable nature’ is a single passing reference to Bluit as ‘hardheaded’ in one of appellant’s several lengthy statements to the police . . . According to the dictionary definition, [the dissent notes by contrast] a ‘hardheaded’ person is not irrational or erratic, but ‘stubborn, willful, . . . not moved by sentiment or impulse; having no illusions, practical, sober, realistic.’”

*Id.* at 1067 (Kline, P.J., dissenting) (emphasis in original).

131. *Id.*

132. *Id.* at 1042.

133. *Id.* at 1054.

134. The court equates reasonable foreseeability with the natural and probable consequences:

[W]hether or not Bluit’s conduct was ‘reasonably foreseeable’ is the equivalent of whether that conduct was a reasonable or natural and probable consequence of a criminal act of Bluit which appellant agreed to and did encourage and facilitate. The Supreme Court has . . . [treated these terms] as synonymous in the law of aiding and abetting.

*Id.* at 1056. The court thus seems to be equating the *Pinkerton* doctrine with the natural and probable consequences approach to complicity. As the dissent interprets the majority’s argument, the “derivative liability of an aider and abettor for the ‘natural and probable consequences’ of a criminal enterprise is indistinguishable from that imposed upon a defendant charged with conspiracy.” *Id.* at 1058 (Kline, P.J. dissenting). But are they the same? This issue will be examined later in the article.

135. *Id.* at 1055.

136. For the view that the logic of *Brigham* dates back to nearly the beginning of the twentieth cen-

and/or kill, and someone was assaulted and killed. A different problem arises when there is a conspiracy to commit one crime and another, completely different, crime is committed in furtherance of that conspiracy.<sup>137</sup>

In *U.S. v. Alvarez*,<sup>138</sup> drug dealers in a Miami motel became involved in a shoot-out with agents of the Bureau of Alcohol, Tobacco, and Firearms (BATF). One of the BATF agents was killed. The dealers were convicted of conspiracy to commit and of commission of various drug offenses. The two dealers who fired the shots were convicted of first-degree murder of a federal agent. The *Pinkerton* issue was whether three other drug dealers could be convicted of murder for these killings, even though they played no role in the shooting.<sup>139</sup>

On appeal, these defendants argued that, as a matter of law, "murder is not a reasonably foreseeable consequence of a drug conspiracy,"<sup>140</sup> that the trial judge "erred in deciding to submit the *Pinkerton* issue to the jury,"<sup>141</sup> and that "their murder convictions therefore should be reversed."<sup>142</sup> Conceding that "the instant case is not a typical *Pinkerton* case" because the murder "was not within the originally intended scope of the conspiracy, but instead occurred as a result of an unintended turn of events,"<sup>143</sup> the Eleventh Circuit nevertheless rejected the defendants' argument and held that, "although the murder convictions of the three appellants may represent an unprecedented application of *Pinkerton*, such an application is not improper."<sup>144</sup>

The *Alvarez* case represents a significant expansion of the *Pinkerton* doctrine to cases of "reasonably foreseeable but originally unintended substantive crimes."<sup>145</sup> Conscious of this expansion, the Eleventh Circuit emphasized important limits on the holding:

Although our decision today extends the *Pinkerton* doctrine to cases involving reasonably foreseeable but originally unintended substantive crimes, we emphasize that we do so only within nar-

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ture at least, *see Sayre, supra* n. 63, at 704 (saying [i]n 3 Green. Ev., sec. 44, the law is thus stated: "If the party employed to commit a felony on one person, perpetrates it, by mistake, upon another, the party counseling is accessory to the crime actually committed.") (quoting *State v. Kennedy*, 67 S.E. 152, 154 (S.C. 1910)).

137. Sayre poses the issue thus, in the context of the law of complicity: "The difficulties arise when the agent's acts do not fall within the precise scope of the other's commands." Sayre, *supra* n. 63, at 696.

138. 755 F.2d 830 (11th Cir. 1985).

139. *Id.* at 836.

140. *Id.* at 848.

141. *Id.*

142. *Id.*

143. *Id.* at 850.

144. *Id.* at 848.

145. *Id.* at 850.

row confines. Our holding is limited to conspirators who played more than a “minor” role in the conspiracy, or who had actual knowledge of at least some of the circumstances and events culminating in the reasonably foreseeable but originally unintended substantive crime.<sup>146</sup>

The court also said it was “mindful of the potential due process limitations on the *Pinkerton* doctrine in cases involving attenuated relationships between the conspirator and the substantive crime.”<sup>147</sup> And the court cited evidence supporting the conclusion that all three of the appellants “were more than ‘minor’ participants in the drug conspiracy” and that all “had actual knowledge of at least some of the circumstances and events leading up to the murder.” The court concluded that the “relationship between the three appellants and the murder was not so attenuated as to run afoul of the potential due process limitations on the *Pinkerton* doctrine.”<sup>148</sup>

The *Alvarez* case and its limitations are not binding precedent in state courts. Even the *Pinkerton* case itself is not binding on state courts. Both cases are based on the federal conspiracy and complicity statutes, and are not applicable in state trials on state charges.<sup>149</sup> But, as we have seen, many state courts do follow the *Pinkerton* doctrine. In so doing, many follow the expansions of the *Pinkerton* doctrine which cases like *Bridges*, *Brigham*, and especially *Alvarez* have worked out. It is well settled that a conspirator is guilty of reasonably foreseeable<sup>150</sup> but totally unintended

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146. *Id.* at 851 n. 27.

147. *Id.* at 850. In a footnote, the Court cited the words of Judge Mansfield of the Second Circuit, who, in discussing the natural and probable consequences approach to complicity, stated:

[I]t seems to me to place an undue strain on the concept to reason that, once a general conspiracy is shown, a minor or subordinate member who commits some act in furtherance of it thereby becomes an aider and abettor of parallel conduct of which he was unaware on the part of another member . . . merely because he should have reasonably foreseen that his conduct might assist others to commit such acts.

*Id.*

148. *Id.* at 851.

149. Views that *Pinkerton*'s statutory basis is unclear have been stated:

[W]hile the court did not identify the statutory basis of its holding, the only general provision of the Criminal Code defining vicarious liability is section 2, which recites the common-law rule that one who “aids, abets, counsels, commands, induces or procures . . . is punishable as a principal.” . . . [The court] must have been construing section 2 to encompass conspiratorial as well as complicitous liability. In light of the strong policy against common-law crimes, explicit statutory definition of the conspirator's liability for the substantive crimes of a co-conspirator would seem the preferable alternative.

*Developments in the Law*, *supra* n. 1, at 994-95 (footnotes omitted).

150. In drug conspiracies, the courts seem to take the view that violent crimes are always a reasonably foreseeable consequence. See *Berra*, *supra* n. 8, at 606 (stating,

substantive crimes committed by his co-conspirator in furtherance of the conspiracy, even when those crimes differed markedly from the conspiracy's objectives.<sup>151</sup> How much of a departure is this expanded *Pinkerton* doctrine from traditional aiding and abetting law? If the original *Pinkerton* case can be seen as only a slight expansion of aiding and abetting, is this also true of the expanded *Pinkerton* doctrine? Would abolition of *Pinkerton* require a change in the way the law looks at aiding and abetting and conspiracy in general?

#### IV. COMPARING THE *PINKERTON* DOCTRINE WITH THE LAW OF COMPLICITY

A careful analysis of another hypothetical case will demonstrate that the *Pinkerton* doctrine does not significantly change the law of complicity. Suppose that A gives B some bricks and urges him to go to the roof of a building in a large city in the middle of the day and casually throw the bricks off the roof. B does so and kills X. A is charged with second-degree murder.<sup>152</sup>

The legal concept of causation could make A guilty. We could say that A *caused* the death of X through B's actions. The problem with this approach, obviously, is that it may not be possible to satisfy either of the two types of causation – but for (actual) causation and proximate (legal)

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the *Pinkerton* doctrine of liability appears to be moving perilously close to strict liability. Repeatedly characterizing the drug-dealing business as dangerous and violent, the circuit courts seem to accept the notion that the presence of weapons should always be expected. This allows the courts to gradually exhaust the *Pinkerton* reasonable foreseeability standard of almost all substantive meaning.)

151. See e.g. *Park v. Huff*, 506 F.2d 849, 863 (5th Cir. 1975) (affirming conviction in case where defendant had been found guilty of murder on evidence only that he participated in a liquor store conspiracy without proof that he had knowledge of or participated in the murder conspiracy); *U.S. v. Gironda*, 758 F.2d 1201, 1212 (7th Cir. 1985) (asserting that the *Pinkerton* doctrine imposes liability not only for "the object offense, but also for acts committed in furtherance of the conspiracy" and thus upholding convictions for substantive crimes based on this *Pinkerton* rationale); *Martinez v. State*, 413 So. 2d 429 (Fla. 3d Dist. App. 1982) (restating the "general rule, that a co-conspirator is criminally responsible for a crime committed in pursuance of the common purpose or which results as a natural and probable consequence of the conspiracy").

152. This illustration is drawn from Holmes' own example:

[F]or instance, if a workman on a house-top at mid-day knows that the space below him is a street in a great city, he knows facts from which a man of common understanding would infer that there were people passing below . . . . If then, he throws down a heavy beam into the street, he does an act which a person of ordinary prudence would foresee is likely to cause death.

Oliver Wendell Holmes, *The Common Law* 47 (Mark DeWolfe Howe ed., The Belknap Press of Harvard University 1967).

causation – both of which are required. Actual, but for causation, means, of course, that, but for A's encouragement, B would not have thrown the bricks off the roof and killed the person. This, by itself, is not easy to show. Proximate causation means that A's encouragement was the proximate cause of the act and the resulting death – that there were no independent, intervening causes between A's encouragement and the resulting death. But B's action could be seen as an independent intervening cause. After all, B did not have to listen to A's encouragement or advice. B could have disregarded A's advice and chosen not to throw the bricks. If B's action broke the chain of causation, A's encouragement is not the proximate cause of the death of X.<sup>153</sup>

If A is not guilty of second-degree murder through the causation doctrine, he may be guilty under the alternative theory of complicity or aiding and abetting.<sup>154</sup> Could we convict A of the second-degree murder of X by the doctrine of aiding and abetting? Was A an accomplice to B's murder of X? The answer is probably yes. As long as A intended to encourage the act of throwing the bricks off the roof and as long as A had the *mens rea* for the crime of second-degree murder, A can be guilty of second-degree murder of X by aiding and abetting. In other words, if A wanted B to throw the bricks off the roof and if A was extremely reckless about whether the result of B throwing the bricks off the roof would be the killing of someone, then A can be guilty of second-degree murder of X. It would not matter if A's encouragement was neither the but for nor the proximate cause of X's death. Even if B might well have thrown the bricks off the roof anyway and even if B's choice to follow A's advice is seen as an independent intervening act of free will breaking the chain of causation, still A's encouragement can make him guilty of second-degree murder of X here under the doctrine of aiding and abetting.<sup>155</sup>

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153. Several commentators assert that human choice and free will present a problem for the causation doctrine in holding one criminal guilty of a crime committed by another. See *Luparello*, 187 Cal. App. 3d at 440 (citing Kadish) (“[T]he uncaused nature of a principal’s volitional act impairs, if not precludes, a causative explanation for accomplice liability.”); Sanford Kadish, *Complicity and Blame: A Study in the Interpretation of Doctrine*, 73 Cal L. Rev. 323, 333 (1985) (“We regard a person’s acts as the products of his choice, not as an inevitable, natural result of a chain of events. Therefore, antecedent events do not cause a person to act in the same way that they cause things to happen, and neither do the antecedent acts of others. To treat the acts of others as causing a person’s actions (in the physical sense of cause) would be inconsistent with the premise on which we hold a person responsible.”); Mueller, *supra* n. 67 (citing H.L.A. Hart & Tony Honore, *Causation in the Law*, (2d ed., Oxford University Press 1985) and arguing that “human choices and actions are intervening factors that break the causal chain”).

154. For a review of the way in which the law of complicity functions as an “alternative doctrine” to causation in holding one individual criminally accountable for the crimes of another, consult Dressler, *supra* n. 25 and Sanford Kadish, *A Theory of Complicity*, in Ruth Gavison, *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (Ruth Gavison ed., Clarendon Press 1987).

155. See also Mueller, *supra* n. 67, at 2171-72 (stating, “[m]ost courts ignore the inherent causation



Suppose, however, that the facts of the hypothetical were a bit different. Suppose that, after A encouraged B casually to throw the bricks off the roof, B had gone to the roof, seen his arch enemy X, and had then thrown one of the bricks at X as hard as he could and had thereby killed X. Would A be guilty of *premeditated* (first degree) murder of X under a theory of aiding and abetting?<sup>156</sup>

The answer to this question may depend on whether we are using the Model Penal Code or the Natural and Probable Consequences approach to aiding and abetting. The Model Penal Code approach to aiding and abetting provides in pertinent part:

(3) A person is an accomplice of another person in the commission of an offense if:

a) with the purpose of promoting or facilitating the commission of the offense, he

(i) solicits such other person to commit it; or

(ii) aids or agrees or attempts to aid such other person in planning or committing it; . . . .

(4) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.<sup>157</sup>

Under the Model Penal Code approach, A would probably not be guilty of premeditated murder in the hypothetical for two reasons. One, he did not intentionally encourage the specific act of throwing the brick at X.<sup>158</sup> Two, he does not have the *mens rea* for premeditated murder: he did not intend to kill anyone and was at worst reckless about whether the consequences of his act – encouraging casual brick throwing – would be killing someone.<sup>159</sup>

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problems associated with complicity”).

156. This is what Sayre once called the hard type of case “when the agent’s acts do not fall within the precise scope of the other’s commands.” Sayre, *supra* n. 63, at 696.

157. Model Penal Code § 2.06 (3)-(4).

158. See Model Penal Code § 2.06, cmt. (a) (stating, “[the defendant] must have the purpose to promote or facilitate the particular conduct that forms the basis for the charge, and thus he will not be liable for conduct that does not fall within that purpose”).

159. This so-called “same *mens rea*” approach to aiding and abetting has been discussed. See May, *supra* n. 7, at 30 (stating, “[t]o be held accountable, . . . the accomplice must have the same intent as the principal”); Mueller, *supra* n. 153, at 2168 (stating, “accomplice liability should only attach where the accused accomplice possesses the full *mens rea* requirement of the substantive offense”). The drafters of the Model Penal Code were apparently not certain whether their position was dominant. See John-

Under the natural and probable consequences approach, by contrast, “[s]econdary parties . . . are also guilty of unintended crimes committed by the primary party if those crimes are a natural and probable consequence of the intended offense.”<sup>160</sup> This approach long predates the *Pinkerton* case and the Model Penal Code and has deep roots in the common law.<sup>161</sup> It is similar to what has been called the “common purpose” or “joint enterprise” approach, whereby, as Professor Sanford Kadish summarized in his study of “Reckless Complicity,” “so long as S is an accomplice in any crime of P he is thereby made an accomplice of any other crime that he should have foreseen (the American version) or did foresee (the English version) P might commit.”<sup>162</sup>

Following the natural and probable consequences approach, A probably would be guilty of second-degree murder of X by aiding and abetting in our hypothetical because intentional murder could be seen as a natural and probable consequence of the crime he intentionally encouraged – a kind of reckless endangerment. In other words, if A is guilty of reckless endangerment by intentionally encouraging B to throw bricks off the roof, he is also guilty of the crime of intentional murder if he should have foreseen that, by giving B the bricks and encouraging B to throw them, B might very well use the opportunity to commit the crime of intentional murder.<sup>163</sup>

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son, *supra* n. 2, at 1146 n. 38 (quoting Model Penal Code § 2.06, cmt. at 24 (tent. draft no. 1, 1953)) (“Whether or to what extent this position involves departure from existing law, it is most difficult to say.”); LaFave & Scott 1986, *supra* n. 3, at 590-91; Glanville Williams, *Criminal Law: The General Part* 133-36 (2d ed., Stevens & Sons Limited 1961) (both urging the Model Penal Code as the better approach to this question).

160. Dressler, *supra* n. 25, at 97.

161. See Sayre, *supra* n. 63, at 699 (“Under the early law as laid down by Staunford and Plowden, A was liable if, having commanded or procured B to commit a crime, B . . . committed a crime different from the one directed, but a natural and probable consequence flowing out of it.”). Relying on Coke and then Blackstone, Sayre tells us that this “continued to be the law with surprisingly little change through the barren centuries following.” *Id.*

162. Sanford H. Kadish, *Reckless Complicity*, 87 J. Crim. L. and Criminology 369, 375 (1997). For a modern application of this common design or purpose approach, see e.g. *U.S. v. Carter*, 445 F.2d 669 (D.C. Cir. 1971) (Fahy, J., concurring in part, dissenting in part) (arguing that where “defendant did not himself kill” the victim and “seemed to repudiate the killing,” the test of whether the defendant could be guilty of murder for his co-felon’s action “should be . . . whether [the killing] was in furtherance of a common design or purpose”).

163. The doctrine of natural and probable consequences usually arises in a different context: most often, murders during robberies. See e.g. *Developments in the Law*, *supra* n. 1, at 1008 n. 582.

An apparent exception to the requirement of intent in the law of complicity arises when the robber is held for a murder perpetrated by his associate in the course of an armed robbery. However, it is reasoned that since the defendant desired that he and his partner commit the robbery, he may be taken to have intended the probable results.

*Id.*

The *Pinkerton* doctrine would produce a slightly different result than the natural and probable consequences approach when applied to these facts.<sup>164</sup> Under the *Pinkerton* rule, we would first ask whether A and B were in a criminal conspiracy at the time that B committed premeditated murder of X.<sup>165</sup> Assuming that both A and B were in a criminal conspiracy to commit reckless endangerment, by virtue of their agreement to throw bricks off the roof, the next step would be to ask whether the intentional murder of X was a reasonably foreseeable consequence of the conspiracy and whether it was in furtherance of the conspiracy. According to *Brigham*, previously discussed, one could answer yes to both of those questions. If killing the wrong person was in furtherance of the criminal conspiracy to kill Chuckie,<sup>166</sup> and if it was a reasonably foreseeable consequence of that conspiracy, then intentionally killing someone with a brick could be in furtherance of and a reasonably foreseeable consequence of the crime of recklessly endangering people's lives with bricks. Surely, the crime of intentional murder is no further removed from the crime of reckless endangerment than the crime of intentional murder was from dealing in illegal drugs in *Alvarez*. Both the *Pinkerton* doctrine and the natural and probable consequences rule would, in short, permit A to be convicted of intentional murder here.<sup>167</sup>

So far, then, the *Pinkerton* doctrine seems to be roughly the same as the natural and probable consequences approach to aiding and abetting.<sup>168</sup>

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164. Of course, *Pinkerton* would produce a sharply different result here from the Model Penal Code approach to aiding and abetting. For discussions of the relationship between *Pinkerton* and complicity doctrines, consult Susan W. Brenner, *Of Complicity and Enterprise Criminality: Applying Pinkerton Liability to RICO Actions*, 56 Mo. L. Rev. 931 (1991) and Robinson, *A Question of Intent: Aiding and Abetting Law and the Rule of Accomplice Liability Under 924(c)*, 96 Mich. L. Rev. 783, 805 n. 97 (1997).

165. Of course, under both complicity and *Pinkerton*, A generally cannot be guilty of murder of X unless the principal (B) is also guilty. For a discussion of exceptions to this, see the treatment of the innocent agency doctrine in any standard review of criminal law.

166. The Court of Appeals in *Brigham* stated:

even if that murder did not further the parties' original criminal agreement to kill Chuckie (which we do not concede), it was nonetheless a foreseeable result (a natural and probable consequence) of either the original appellant-Bluitt agreement to kill Chuckie, or of any of the original criminal acts of Bluitt which were thereafter encouraged or facilitated by appellant.

216 Cal. App. 3d at 1055.

167. For a critique of both the *Pinkerton* and natural and probable consequences approach to a situation like this, and a defense of the Model Penal Code "same *mens rea*" approach to accomplice liability, consult Mueller, *supra* n. 153, at 2172-73 which argues, "the accomplice should possess the full *mens rea* required of a perpetrator of the substantive offense."

168. For the similarity of the two doctrines, see *People v. Beeman*, 35 Cal. 3d 547, 560 (Cal. 1984) (stating, "that the liability of an aider and abettor extends also to the natural and probable consequences of the acts he knowingly and intentionally aids and encourages"); *State v. Davis*, 682 P.2d 883, 885-86 (Wash. 1984) (holding defendant guilty of first degree robbery when he stood as a lookout while an-

Are there any circumstances where these two doctrines would produce different results? Does *Pinkerton* ever go beyond natural and probable consequences?

Let us revisit the hypothetical previously considered. Suppose that A organizes a conspiracy to rob banks. He hires B to rob Bank 1 and hires C to rob Bank 2. B and C have not met each other, but each knows of the other's role in the conspiracy and each agrees to be a part of the criminal enterprise. D helps B rob Bank 1 by providing a getaway car. During his robbery of Bank 2, C intentionally kills X, a bank guard. Are B and D guilty of the intentional murder of X?<sup>169</sup>

Using causation, of course, there is likely to be no guilt here. It would be very difficult for the prosecution to show that, "but for" any actions by B or D, X would not have been killed, let alone that C's action was not an independent intervening cause breaking the chain of proximate causation.

Under the Model Penal Code approach to aiding and abetting, B and D would also not be guilty on these facts. Neither B nor D encouraged the act of killing X. Neither B nor D has the *mens rea* for intentional murder because neither intended that anyone would be killed.<sup>170</sup>

Even under the natural and probable consequences approach to aiding and abetting, one might say there are problems with convicting B and D of intentional murder of X under these facts. This approach, we recall, says that if you aid and abet one crime, you are guilty of all other crimes that are reasonably foreseeable (natural and probable) consequences of that crime.<sup>171</sup> But did B and D aid and abet C's robbery of Bank 2? What did they do, one might ask, to assist this crime? If they did not aid and abet the robbery of Bank 2 by C, how can they be responsible for the murder of X

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other person robbed a pharmacy at gunpoint, even though the defendant may have been unaware that the principal was armed). Distinction between the two doctrines have been discussed. See Shellow et al., *supra* n. 45, at 1098 n. 85 (stating that "[t]he confusion between accomplice liability and *Pinkerton* liability is common to, but not confined to, judicial opinions in this area").

169. For a hypothetical similar, but not identical to this, consult *Developments in the Law, supra* n. 1, at 996 and Sanford H. Kadish & Stephen Schulhofer, *Criminal Law and Its Process* 739 (6th ed., Little, Brown & Company 1995) [hereinafter Kadish & Schulhofer].

170. For a look at how *Pinkerton* would differ sharply from this approach, consult Bonnie, et al., *supra* n. 9, at 624 which states, "[i]f the otherwise applicable principles of complicity limit the liability of an accomplice to crimes which he or she had an actual purpose to aid or encourage, the effect of the *Pinkerton* approach to the scope of liability for conspiracy would be considerable."

171. See e.g. *Brigham*, 216 Cal. App. 3d at 1052 (stating, "the aider and abettor is also liable for the natural and probable consequences of any criminal act he knowingly and intentionally aids and abets, in addition to the specific and particular crime he and his confederates originally contemplated") (emphasis in original); Bonnie et al., *supra* n. 9, at 586 (stating, "the liability of an accomplice includes the natural and probable consequences of the criminal endeavor that the accomplice meant to aid or encourage. This rule applies chiefly where the principal actor engages in some act of violence not expressly endorsed by the accomplice").

even if it was a natural and probable consequence – a reasonably foreseeable consequence – of C’s robbery of Bank 2?

Is it really true that B and D did not aid and abet C’s robbery of Bank 2, however? They surely had the *mens rea* for that robbery. After all, they had agreed to rob banks. As far as the *actus reus*, wasn’t agreeing to be part of the conspiracy to rob the banks sufficient encouragement of C to rob Bank 2 to qualify as aiding and abetting? As we have seen, practically any small and insignificant act – smiling, applauding, shouting – can be enough for the *actus reus* of aiding and abetting. Couldn’t it be said that B and D *did* aid and abet C’s robbery by agreeing to be part of the whole plan? Surely such agreement made C’s robbery more likely by leading him to believe that, if anything went wrong, for instance, he would have B and D, as well as A and anyone else in the conspiracy, to back him up.<sup>172</sup>

This is precisely the position on aiding and abetting that the original *Pinkerton* case takes. If any small encouragement can be aiding and abetting,<sup>173</sup> then agreement to be part of a conspiracy can be as well. Thus, B and D are guilty of aiding and abetting the robbery of Bank 2. Or, put differently, they are guilty of that crime – just as Daniel Pinkerton was guilty of the substantive tax violations committed by his brother while he was in jail – because their agreement encouraged the bank robbery and they had the *mens rea* for bank robbery as it was the very object of their agreement.

But what of the murder of X? How can aiding and abetting the robbery of Bank 2 explain why B and D are guilty of aiding and abetting the murder which occurred during the robbery of Bank 2? The answer, of course, is that once we recognize that B and D are accomplices in the robbery of the bank, then under both natural and probable consequences and under *Pinkerton*, they are both guilty of the murder of X as long as it was a natural and probable consequence of the robbery. Since murders often happen in the course of bank robberies, a court is likely to say that B and D are both guilty of intentional murder of X under both the natural and probable consequences approach to aiding and abetting and the *Pinkerton* doctrine.<sup>174</sup>

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172. For the view that the *Pinkerton* doctrine would make B and D guilty of C’s murder of X in such a situation because their “acts of alliance” in the conspiracy “caused” the crime of murder to be committed, consult Brenner, *supra* n. 84, at 386. For a similar approach, also consult *Developments in the Law*, *supra* n. 1, at 998-99 which states, “[c]riminal acts done in furtherance of a conspiracy may be sufficiently dependent upon the encouragement and material support of the group as a whole to warrant treating each member as a causal agent to each act.”

173. See Mueller, *supra* n. 67, at 2171, for the view that even trivial acts like supplying a toy gun to frighten the victim or telling the principal when the store to be robbed is least crowded will qualify as aiding and abetting.

174. Many cases and commentaries conclude that murder is a natural and probable consequence of robbery. See *People v. Tiller*, 447 N.E.2d 174 (Ill. 1982) (holding an accomplice may be guilty of a murder committed by the principal during a robbery even though the accomplice had left the scene and

The point of all this is that the *Pinkerton* doctrine, even in its broadest application to crimes that were not the original objectives of the conspiracy but which should have reasonably been foreseen, does not represent a significant change in the law of complicity.<sup>175</sup> Abolishing the *Pinkerton* doctrine, then, would logically mean either abolishing the natural and probable consequences approach to aiding and abetting – a move recommended by the Model Penal Code but rejected by many states<sup>176</sup> – or changing the law's requirement of the *actus reus* of complicity to say that words alone, even words of agreement and encouragement, cannot constitute aiding and abetting. Conversely, we could restrict *Pinkerton* by saying that B and D were not in a conspiracy with C to rob banks unless B and D actually met with C face to face and assisted him in his specific crime. But that would require a fundamental change in the law of conspiracy.<sup>177</sup> Changing *Pinkerton*, in short, means changing a great deal more.

## V. THE JUSTICE OR INJUSTICE OF THE *PINKERTON* DOCTRINE

If justice demands that the *Pinkerton* doctrine be abolished or substantially modified, then, one might say, courts or legislatures should do so,

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had warned the principal not to kill the victim); Sayre, *supra* n. 63, at 706 (“death is not an improbable consequence of robbery or burglary”).

175. May is thus largely correct in his conclusions that *Pinkerton* “is not an aberration, but rather, a reaffirmation of some basic tenets of the common law” and “is merely a restatement of the common law doctrine which holds accessories liable for the natural and probable consequences of their acts.” May, *supra* n. 7, at 24, 35.

176. In 1989, the Court of Appeals of California declared that “[t]he ‘natural and probable consequence’ rule of accomplice liability . . . is established in the criminal laws of most American jurisdictions.” *Brigham*, 216 Cal. App. 3d at 1058. In 1997, Bonnie et al. amended this conclusion in their treatise, stating that the “rule of natural and probable consequences is still good law in many jurisdictions. It has been abandoned, however, in most states that have adopted comprehensive revisions of their penal laws.” Bonnie et al., *supra* n. 9, at 586.

177. This problem of the size of the conspiracy has been called the most serious difficulty of conspiracy law which the *Pinkerton* doctrine aggravates. See Model Penal Code, § 2.06 cmt. (a) at 307 (“law would lose all sense of just proportion if simply because of the conspiracy itself each [of the minor players in the conspiracy] were held accountable for thousands of additional offenses of which he was completely unaware and which he did not influence at all”); LaFave & Scott 1986, *supra* n. 3, at 589 (“If the *Pinkerton* rule were adhered to, each prostitute or runner in a large commercialized vice ring could be held liable for an untold number of acts of prostitution by persons unknown to them and not directly aided by them.”). Several commentators acknowledge that conspiracies can be very large and encompass many minor players. See e.g. Peter J. Henning, *Individual Liability For Conduct By Criminal Organizations in the United States*, 44 Wayne L. Rev. 1305, 1321-22 (1998) (discussing cases where broad conspiracy charges among large numbers of defendants have been upheld); Johnson, *supra* n. 2, at 1144-48 (“Conspiracy thus permits any member of a large-scale organization to be punished for all the crimes committed by its members . . . . Once it is established that all participants conspired generally to further all the crimes of the organization, it is not surprising that they each should be held responsible for all of the crimes actually committed in furtherance of that agreement. Reforms which would abolish the conspiracy-complicity rule without also abandoning the principle that all participants in a conspiracy are guilty of the same crime of conspiracy are basically inconsistent.”).

regardless of any other changes that would have to be made in the law of complicity or conspiracy. A powerful argument can be presented that justice *does* demand that *Pinkerton* be abolished. After all, is it fair to say that a person, by joining a conspiracy with another person, can be responsible for crimes that this other person commits in furtherance of the conspiracy – even a crime as serious as murder – if all the state can prove is that he *should* have foreseen these crimes? Is it fair to make one person guilty of a murder committed by another person based on a prior agreement to commit some other crime and a mental state of negligence?<sup>178</sup>

Two questions are presented: (1) Should negligence ever be a sufficient mental state for murder? In other words, should A be guilty of murder of B if A negligently kills B?; and (2) If A's guilt cannot be predicated on negligence, should the law find C guilty of B's murder based on a negligence theory if A and C were committing a crime at the time that A killed B?

The preliminary answer to the first question is that negligence is usually not sufficient to convict A of the murder of B. Under the common law and under the model penal code, extreme recklessness or recklessness with depravity is usually the minimum mental state for a conviction of murder.<sup>179</sup>

Murder, however, can be based on negligence. If A was intoxicated at the time he killed B, then the Model Penal Code and many states say that the relevant issue is not whether he was subjectively aware of the risk that his action would kill B – what the Model Penal Code calls recklessness – but rather whether he would have been aware of that risk if he had been sober.<sup>180</sup> In that way, the relevant inquiry comes very close to a negligence standard: it asks not what risk he was aware of, but what risk he would have been aware of had his mental state been closer to that of the reasonable (sober) man.<sup>181</sup>

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178. Once again, it is important to emphasize that the terms negligence and recklessness are being used as the Model Penal Code defines them. See Model Penal Code § 2.02.

179. See generally Kadish & Schulofer, *supra* n. 169, at 458; LaFave & Scott, *supra* n. 3, at 666-70 and any other standard texts or treatises on criminal law.

180. See Model Penal Code § 2.08 (2) (“When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.”).

181. Of course the rationale for this also turns on the fact that A was reckless when he began to drink, and therefore his recklessness carries over to his later act, done in a state of intoxication. Still, the fact remains that he may not have been aware of the risk that his actions posed to others at the time that he did the specific act that killed. In that sense, he is being punished for negligence – for taking a risk that he should have been aware of (if he had been sober) but was not. In *Hamilton v. Commonwealth*, the Court found a defendant guilty of murder for a drunk-driving homicide where the evidence only showed that he “should have known of the plain and obvious likelihood that death or great bodily injury could have resulted.” 560 S.W.2d 539, 543 (Ky. 1977). However, in a dissenting opinion, Justice Palmore disagrees:

Felony murder can also be seen as a way in which A can be guilty of murder of B based on negligence. It is, of course, true that, in its strict common-law form, felony murder is based on strict liability, not on negligence. Still, where the felony must be a felony inherently dangerous to life, as it must be in practically all jurisdictions today,<sup>182</sup> one could say that the doctrine uses a negligence standard. A reasonable person would be aware that, if he or she commits armed bank robbery or rape or arson, someone could be killed. A killing proximately resulting from such a felony is foreseeable and that is at least part of the reason why we make that killing felony murder.

The law does, in short, sometimes make negligence a sufficient mental state for murder. Should it do so? Is there any rationale that can be offered for such a position? Oliver Wendell Holmes thought so, and said as much in his famous book *The Common Law*. In his chapter on Criminal Law, Holmes is at pains to stress that “the actual state of mind accompanying a criminal act plays a different part from what is commonly supposed.”<sup>183</sup> We tend to think, Holmes says, that criminal law is primarily concerned with personal subjective fault. But “liability to punishment cannot be finally and absolutely determined by considering the actual personal unworthiness of the criminal alone,” Holmes answers. “That consideration will govern only so far as the public welfare permits or demands.”<sup>184</sup>

The “purpose of the criminal law,” according to Holmes, following in the utilitarian tradition of Bentham and Mill, “is only to induce external conformity to rule.” The law “is ready to sacrifice the individual so far as necessary in order to accomplish that purpose” so that “the actual degree of personal guilt involved in any particular transgression cannot be the only element, if it is an element at all, in the liability incurred.”<sup>185</sup>

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I concede that fatal carelessness in the operation of a motor vehicle calls for stern punishment, but murder is something else. There simply is a difference in culpability between committing an act that endangers people whose presence is known and an act that endangers people whose presence *should* be anticipated but *in fact* is not known.

*Id.* at 544 (Palmore, J., dissenting) (emphasis in original). For the view that, in most courts, negligent drunk driving which results in death can be punished as murder, consult *U.S. v. Fleming*, 739 F.2d 945 (4th Cir. 1984) and David Luria, *Death on the Highway: Reckless Driving as Murder*, 67 Or. L. Rev. 799 (1988).

182. See e.g. *People v. Satchell*, 489 P.2d 1361 (Cal. 1972) (discussing inherently dangerous felony limitation) (overruled in part on different grounds); see generally Fletcher, *Reflections on Felony Murder*, 12 Sw. U. L. Rev. 413 (1981).

183. Holmes, *supra* n. 152, at 42.

184. *Id.* at 41.

185. *Id.* at 42.



Holmes does not deny that criminality is based on blameworthiness. But it is blameworthiness judged by an objective, external standard, not the personal motives or intentions of the criminal that counts, Holmes avers. A law, Holmes says, “which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.”<sup>186</sup> The test, Holmes says, must be

not only external . . . but . . . of general application. [Laws] do not merely require that every man should get as near as he can to the best conduct possible for him. They require him at his own peril to come up to a certain height.<sup>187</sup>

Holmes describes a standard in these passages which is, without question, an objective standard of negligence. He describes “the conception of the average man, the man of ordinary intelligence and reasonable prudence.” He says criminal behavior should be measured against a standard which will “take no account of incapacities, unless the weakness is so marked as to fall into well-known exceptions, such as infancy or madness.” Each individual is required, in short, to have the qualities of the law-abiding reasonable man, and “to have those qualities at his peril.”<sup>188</sup>

Applying this conception of criminal law to murder, Holmes states that “foresight of the consequences of the act is enough in murder as in tort,” and that the “test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen.” In other words, if

the known present state of things is such that the act done will very certainly cause death, and the probability is a matter of common knowledge, one who does the act, knowing the present state of things, is guilty of murder, and the law will not inquire whether he actually foresaw the consequences or not.<sup>189</sup>

Holmes illustrates his point with an example similar to the hypothetical previously considered:

For instance, if a workman on a house-top at mid-day knows that the space below him is a street in a great city, he knows facts from which a man of common understanding would infer that there were

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186. *Id.*

187. *Id.* at 43.

188. *Id.*

189. *Id.* at 45. Holmes, of course, applies this rationale in the famous case of *Commonwealth v. Pierce*, 138 Mass. 165 (Mass. 1884), where he upholds the manslaughter conviction of a physician who killed a woman by wrapping her in rags soaked in kerosene without apparent evidence that the defendant was subjectively aware of the risk that his actions posed to her life.

people passing below. He is therefore bound to draw that inference, or, in other words, is chargeable with knowledge of that fact also, whether he draws the inference or not. If then, he throws down a heavy beam into the street, he does an act which a person of ordinary prudence would foresee is likely to cause death, or grievous bodily harm, and he is dealt with as if he foresaw it, whether he does so in fact or not. If a death is caused by the act, he is guilty of murder.<sup>190</sup>

In short, the law of murder, for Holmes, as indeed all law, requires men “at their peril to know the teachings of common experience, just as it requires them to know the law . . . . A harmful act is only excused on the ground that the party neither did foresee, nor could with proper care have foreseen harm.”<sup>191</sup>

For Holmes, then, negligence – defined, as the Model Penal Code does, by an objective standard of carelessness – is clearly sufficient for serious crimes like murder. More recent commentators have similarly defended such use of negligence in the criminal law.<sup>192</sup> In *Punishment and Responsibility*, for example, H.L.A. Hart emphasizes that negligence is not the same as strict liability – that there is, as he puts it,

a world of difference between punishing people for the harm they unintentionally but carelessly cause, and punishing them for the harm which no exercise of reasonable care on their part could have avoided.<sup>193</sup>

Hart also notes that, in “Anglo-American law there are a number of statutory offenses in which negligence . . . is made punishable.” Moreover, he says, “the common law as distinct from statute also admits a few crimes, including manslaughter, which can be committed by inadvertent negligence.” Hart distinguishes “‘inadvertent negligence’ . . . not only from deliberately and intentionally doing harm but also from ‘recklessness,’ that is, wittingly flying in the face of a substantial, unjustified risk.”<sup>194</sup>

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190. *Id.* at 47.

191. *Id.* at 48.

192. It should be noted that not all commentators go so far as Holmes in endorsing a standard of negligence for murder cases. See Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. Ill. L. Rev. 363 (2004), arguing that “*intentional* action and forbearance are the only” proper objects of criminal punishment. Morse argues for a “consistent subjectivism” in criminal law. His view is thus sharply opposed to that of Holmes.

193. H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 136 (Oxford University Press 1968).

194. *Id.* at 137. Hart’s definitions of negligence, a term which he uses synonymously with “inadvertent negligence,” and recklessness are very similar to those used by the American Law Institute in the

Hart recognizes that some commentators on criminal law criticize this use of negligence. He cites Glanville Williams for the view that punishment for negligence “cannot be justified on either a retributive or a deterrent basis”<sup>195</sup> and Jerome Hall for the opinion that “punishment should be confined to ‘intentional or reckless doing of a morally wrong act.’”<sup>196</sup>

These scholars are wrong, however, Hart stresses. Negligence can be a sufficient mental state for crime because in “some cases at least we may say ‘he could have thought about what he was doing’ with just as much rational confidence as one can say of any intentional wrong-doing ‘he could have done otherwise.’”<sup>197</sup>

Commentators like Holmes and Hart, then, have recognized that negligence can be a sufficient mental state for serious crimes. Whether negligence is sufficient for murder or not, however, can it be sufficient for complicity in murder? In other words, as previously noted, if A cannot be guilty of murder of B if A killed B negligently, should the law find C guilty of murder of B based on negligence if A and C were committing a crime at the time A killed B?

The answer, of course, as we have seen, is yes, if C and A were committing a crime when A killed B, and if the killing of B was a reasonably foreseeable consequence of the crime. Under both the *Pinkerton* doctrine and the “natural and probable consequences” approach to aiding and abetting, if A is guilty of murder of B based on a mental state far greater than negligence – intent to kill, for example – C, A’s partner in crime, can also be guilty of that murder based on a mental state no greater than negligence. The rationale for this result is that, by agreeing to commit a crime with A, C should be responsible for any other, reasonably foreseeable crimes that grow out of that initial crime. By agreeing to do one bad thing, in effect, C has agreed to be responsible for other bad things.<sup>198</sup>

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Model Penal Code.

195. *See id.* at 138 (citing Williams, *supra* n. 159).

196. Hart, *supra* n. 193, at 138.

197. *Id.* at 152. Hart goes on to point out that sometimes it is fair and accurate to say that the defendant truly “could not have helped it,” as for example “when we have evidence, from the personal history of the agent or other sources, that his memory or other faculties were defective, . . . [as] in the case of a child or a lunatic.” “What is crucial,” Hart insists, “is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise those capabilities.” Both of the following questions must be answered yes, in Hart’s view, then, for punishment to be justified: “(1) Did the accused fail to take those precautions which any reasonable man with normal capacities would in the circumstances have taken? (2) Could the accused, given his mental and physical capacities, have taken those precautions?” Like Holmes, however, Hart recognizes that it “may, in practice, be impossible to do more than excuse those who suffer from gross forms of incapacity, viz. infants or the insane.” *Id.* at 152-55.

198. For a defense of this view, consult Brenner, *supra* n. 84, at 387 which states, “[t]he criminal doctrines discussed above impute liability for crimes others actually perpetrate by holding one liable

Is this a fair result? Yes, if one recognizes that a choice to do one thing makes one responsible for later consequences of that choice, even if those consequences were not intended or even foreseen when the initial choice was made. There is ample support in the history of philosophy for this rationale of punishment. Aristotle, for example, says that when a person makes a choice, he is responsible for the consequences of that choice.

Choice, according to Aristotle, is the result of conscious deliberation and is distinct from mere voluntary action. When man acts by choice, Aristotle says, he is a free agent. He freely chooses certain actions; over time, those actions become habits; eventually, those habits instill in him a good or a bad character. Because he makes the first choice, Aristotle says, he is responsible for the consequences of this choice. In other words, if a person chooses to do bad acts, he chooses to become a bad person. If he chooses to walk in the sun, he chooses to perspire. If he chooses to commit a crime, he chooses to pay the penalty for that crime. If he chooses to commit one crime, he chooses to commit any other crimes that are reasonably foreseeable and probable consequences of that crime.<sup>199</sup> The point is that Anglo-American law has followed and continues to follow this Aristotelian reasoning.<sup>200</sup> As one widely cited treatise on criminal law has stated,

the established rule, as it is usually stated by courts and commentators, is that accomplice liability extends to acts of the principal . . . which were a “natural and probable consequence” of the criminal scheme the accomplice encouraged or aided.<sup>201</sup>

In his recent essay on “Reckless Complicity,” Kadish illustrates this perspective – which he links not only to the natural and probable consequences doctrine but also to the “common purpose” or “joint enterprises” approach of English law – with a passage from Sir Arthur Conan Doyle’s Sherlock Holmes story *The Adventure of The Priory School*:

Holmes stated: “I must take the view . . . that when a man embarks upon a crime, he is morally guilty of any other crime which may spring from it.”<sup>202</sup>

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for the ‘bad act’ of either assisting in the commission of a crime or entering into a conspiracy of which the criminal consequences were a foreseeable result.” For a critique of this approach, consult Mueller, *supra* note 67, at 2173 and Kadish, *supra* note 153, at 353.

199. See generally Aristotle, *Ethics*, 1135 b 5-7; see also Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 Am. J. Juris. 97, at 110-111 (1994).

200. See generally e.g. K.J.M. Smith, *A Modern Treatise on the Law of Criminal Complicity* (1991).

201. LaFave & Scott 1986, *supra* n. 3, at 590.

202. Sir Arthur Conan Doyle, *The Adventure of the Priory School*, in *Sherlock Holmes: The Complete Novels and Stories*, vol. 1, 744 (Bantam Books, 1986).

In short, strong arguments affirm that A can be guilty of murder of B if A killed B negligently. Moreover, even if the state needs to show that A killed B with a mental state worse than negligence in order to convict A of B's murder, C can be guilty of murder of B if A and C were committing a crime when A killed B, and if the murder was a reasonably foreseeable consequence of that crime. This position that the law takes is consistent with a long philosophical tradition – a tradition which finds expression in the writings of giants of jurisprudence as diverse as Aristotle and Holmes. Viewed in this way, the *Pinkerton* doctrine is not an aberration in American law, but rather is consistent with the way the law has been, and, arguably, with the way it should continue to be.

## VI. CONCLUSIONS

The *Pinkerton* case itself is not a radical departure from existing law. It is, at most, a small expansion of the *actus reus* requirement for complicity and an avowal that agreement is evidentiary proof of complicity. Moreover, the facts of the *Pinkerton* case show that the case's holding is a narrow one. In *Pinkerton*, the crimes with which both brothers were charged were the very ones on which they had agreed. The dictum in *Pinkerton* about reasonable foreseeability, which seems initially to limit the holding by suggesting the types of cases where it would not apply, also appears to permit an expansion of the *Pinkerton* doctrine in cases – like *Bridges*, *Brigham*, and *Alvarez* – where the crimes committed were not originally intended but were reasonably foreseeable consequences of the initial crime agreed upon.

A comparison of this expanded *Pinkerton* doctrine with the natural and probable consequences approach to aiding and abetting – an approach followed by some states – shows that the *Pinkerton* doctrine, even as expanded, is not an aberration. Rather, the *Pinkerton* doctrine is fundamentally consistent with American law in many ways. Abolition of the *Pinkerton* doctrine would require major changes in the law, either in the law of complicity or of conspiracy or of both.

Finally, the *Pinkerton* doctrine is consistent with a philosophical tradition that can explain why negligence should be a sufficient mental state to convict a person of a serious crime like murder and, perhaps more important, a tradition which can explain why a choice to do one bad act can make one responsible for further unforeseen but foreseeable bad consequences.

In the end, the *Pinkerton* doctrine is less of an aberration than an illustration of a good deal of our existing law and of some of the theoretical assumptions behind it. Changing *Pinkerton* would mean not only changing

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much of current law but also rejecting a number of important principles upon which that law is based.