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Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton

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Abstract
This article considers what limits the constitution places on holding someone criminally liable for another's conduct. While vicarious criminal liability is often criticized, there is no doubt that it is constitutionally permissible as a general matter. Under the long-standing felony murder doctrine, for example, if A and B rob a bank and B shoots and kills a security guard, A can be held criminally liable for the murder. What if, however, A was not involved in the robbery but instead had a completely separate conspiracy with B to distribute cocaine? What relationship, if any, does the constitution require between A's conduct and B's crimes in order to hold A liable for them? It is clear A could not be punished for B's crimes simply because they are friends. This is true even if A suspected B was involved in criminal activity. Beyond this, however, the boundaries are surprisingly uncertain. Though commentators have long debated the wisdom of vicarious criminal liability as a policy matter, the question of whether the constitution constrains the government's ability to punish one person for another's crimes has gone largely unexamined. The lack of attention to this topic is all the more glaring in light of a small but steady line of cases holding that, in the context of conspiracy law, due process forbids vicarious liability for crimes that are not both (a) reasonably foreseeable and (b) done in furtherance of the conspiracy (these are the so-called "Pinkerton limits"). Despite these cases, however, courts continue to permit holding defendants strictly liable for another's conduct in other areas of criminal law, such as felony murder. If negligence is constitutionally required for vicarious liability in a conspiracy why is it not for felony murder vicarious liability? This article aims to examine the extent to which substantive due process limits vicarious criminal liability through the lens of cases that have held Pinkerton's test to be a constitutional minimum in the conspiracy context. First, I consider why courts have treated the Pinkerton test as a constitutional floor and attempt to build a more coherent approach for understanding these cases based on the due process "personal guilt" concept. Second, I explore how these cases might impact other areas of criminal law using three examples: the definition of "scope" in conspiracy law, the felony murder doctrine, and the "material support" provision of the Antiterrorism and Effective Death Penalty Act. Though a clear and thorough account of personal guilt and vicarious liability under the constitution is likely to remain elusive for some time, I hope that this article will help start a broader and much-needed discussion about constitutional constraints on vicarious criminal liability.

Keywords
Conspiracy, Pinkerton, Vicarious Liability, Felony murder, Criminal law, Constitutional law, Substantive due process, Due process

VICARIOUS CRIMINAL LIABILITY AND THE CONSTITUTIONAL DIMENSIONS OF *PINKERTON*

ALEX KREIT*

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INTRODUCTION

Shortly after deciding that the tranquil life of the academy just isn't satisfying my inner need for risk and adventure, I call up my friend Dave and convince him to rob a bank with me. Since I came up with the idea, I tell Dave that it is only fair he do all the legwork to prepare for the robbery. To my pleasant surprise, he agrees and quickly begins to make the necessary arrangements, leaving me free to relax and catch up on my blog reading, ignorant of what exactly it is that he is doing. In the course of his preparations, Dave commits some

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additional crimes: he steals a vintage Buick to use as our getaway car, buys a few weapons on the black market, and, while he is purchasing the weapons, decides to get some marijuana for his personal use. A couple of nights before the robbery, Dave goes to a bar and foolishly tells the bartender about our plan. The bartender tells the police and they bust us before we're able to rob the bank. As a result, I'm on the hook for conspiracy to rob the bank, and, vicariously, for the car theft and the weapons, but not for the marijuana. This is because, under the rule famously announced in *Pinkerton v. United States*,[1] a conspirator is liable for any crimes committed by his co-conspirators that were both reasonably foreseeable and in furtherance of the conspiracy, and Dave's marijuana purchase was neither. Indeed, even if I knew with certainty that Dave was going to buy the marijuana, I could not be held vicariously liable for it, since his marijuana purchase didn't further the conspiracy.[2]

Though critics consistently deride *Pinkerton* as overly broad, its restrictions on vicarious liability seem almost robust compared to some other areas of criminal law. Under the felony murder rule, for example, if Dave and I had been working as a pick-pocketing team and he unexpectedly went berserk and stabbed and killed one of our targets, I could be convicted of murder even if the killing was not reasonably foreseeable.[3] What accounts for this distinction? What, if anything, prevents the government from holding conspirators vicariously liable for *all* crimes committed by their partners, regardless of whether the crimes further the conspiracy or are foreseeable? To put the question more directly: are *Pinkerton*'s limitations on vicarious liability for the acts of co-conspirators constitutionally mandated and, if so, why don't they seem to apply to other areas of criminal law?

Perhaps somewhat surprisingly, the answer to whether the Constitution requires *Pinkerton*'s limits seems to be yes. Dating back to the mid-1970s, every court to consider the issue has held or strongly implied that the *Pinkerton* rule is indeed constitutionally

1. 328 U.S. 640 (1946).

2. *See* United States v. Studley, 47 F.3d 569, 575 (2d Cir. 1995) (noting that "knowledge of another [conspiracy] participant's criminal acts is not enough to hold the defendant responsible for those acts").

3. *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 97–98 (2004) (discussing a felony murder case from 1786 where a young member of a pick-pocketing ring was held vicariously liable for another member's murder). *But see id.* at 98 (noting that such broad liability was the exception at common law and arguing that common law felony murder was, in general, significantly more constrained than is commonly believed).

derived.[4] A number have even indicated that substantive due process goes further by limiting vicarious liability for defendants who played only a small role in the conspiracy even if the *Pinkerton* requirements have been met.[5] To be sure, courts have found constitutional violations in only a few cases[6] and the Supreme Court has never addressed the issue, but the notion that *Pinkerton*'s rule is required by substantive due process appears to be a relatively uncontroversial proposition among federal circuit and district courts.[7] Despite agreement on this basic proposition, however, courts have failed to provide much in the way of analysis or explanation as to why and in what way *Pinkerton* is grounded in substantive due process. Many decisions provide only a paragraph or two of analysis to support their assertion that the *Pinkerton* rule is constitutionally based.[8] Of the courts that have considered the issue in greater depth, none have outlined a clear method for applying *Pinkerton* as a decision of constitutional law.

Scholars, meanwhile, have overlooked the courts' treatment of *Pinkerton* as constitutional law almost entirely. Indeed, for one of the most famous cases in all of criminal law, *Pinkerton* is surprisingly under-examined in general.[9] Of the handful of major articles written

4. *See* United States v. Collazo-Aponte, 216 F.3d 163, 196 (1st Cir. 2000) (discussing cases addressing the constitutional basis of *Pinkerton*); *infra* Part III (analyzing courts' treatment of *Pinkerton* as constitutionally required).

5. *See* United States v. Alverez, 755 F.2d 830, 850 (11th Cir. 1985) ("[W]e are mindful of the potential due process limitations on the *Pinkerton* doctrine in cases involving attenuated relationships between the conspirator and the substantive crime."); *see also id.* at 850 n.25 ("In our view, the liability of such 'minor' participants must rest on a more substantial foundation than the mere whim of the prosecutor."); Mark Noferi, *Towards Attenuation: A "New" Due Process Limit on* Pinkerton *Conspiracy Liability*, 33 AM. J. CRIM. L. 91, 124–33, 147–52 (2006) (discussing cases and arguing that substantive due process should preclude *Pinkerton* liability for defendants who played a minor or attenuated role in the conspiracy).

6. *See* United States v. Walls, 225 F.3d 858, 865 (7th Cir. 2000) (reversing conviction for knowingly possessing a firearm as a felon based on vicarious liability because it was "an unwarranted, and possibly unconstitutional, expansion of the *Pinkerton* doctrine"); United States v. Castaneda, 9 F.3d 761, 766 (9th Cir. 1993) ("Assuming, under *Pinkerton,* that responsibility for both the predicate offense prong and use of a weapon prong of section 924(c) may be established on the basis of foreseeability alone, in Leticia's case, foreseeability has been stretched beyond the limits of due process.").

7. *See infra* Part III (discussing courts' treatment of *Pinkerton* limits as constitutionally mandated).

8. *See, e.g.*, United States v. Cherry, 217 F.3d 811, 818 (10th Cir. 2000) (noting "the due process limitations inherent in *Pinkerton*" without discussion of these limitations).

9. A Lexis *Shepard's* report reveals only 193 law review articles that have cited *Pinkerton* since 1980. By way of comparison, the equally famous Commerce Clause case *Wickard v. Filburn*, 317 U.S. 111 (1942) decided four years before *Pinkerton*, has been cited in 1699 law review articles during that same period according to *Shepard's*. Similarly, a Lexis search for "atleast10(Pinkerton)" yields only fifty law review articles,

on conspiracy law since *Pinkerton* was decided, none has had *Pinkerton* as its primary topic and only two have given the case detailed treatment.[10] Most of the commentary that has focused on *Pinkerton* has been aimed at critiquing or, less commonly, defending the soundness of holding defendants vicariously liable for the acts of their co-conspirators.[11] In a recent and notable exception, one commentator relied on cases holding *Pinkerton* to be constitutionally required to argue in favor of a due process-based rule that would restrict vicarious liability for conspirators who are "attenuated" from the conspiracy.[12] However, the underlying questions of why *Pinkerton*'s "reasonably foreseeable" and "in furtherance of" formula may be constitutionally required and what cases that have adopted this position might mean for other areas of criminal law remain essentially unexamined by scholars.[13] Thus, although the courts that

a number of which are unrelated to the conspiracy case. Indeed, scholarship on the law of conspiracy generally has been sparse. *See* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1311 (2003) (noting the lack of scholarship on criminal conspiracy law).

10. In his significant article on conspiracy in 2003, Neal Katyal posited that only two major articles on conspiracy had been written since 1959. *See id.* at 1311 n.8 (citing Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959); Philip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973)). None of these articles discuss *Pinkerton* in any detail. To Katyal's list of major articles, one might add the influential 1959 *Harvard Law Review* Note on conspiracy and Paul Robinson's 1984 article *Imputed Criminal Liability*, both of which address *Pinkerton* in some detail but do not focus on the case. *See Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920, 993–1000 (1959) [hereinafter *Criminal Conspiracy*] (analyzing and critiquing *Pinkerton*); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984) (discussing different theories that may justify imputed liability and applying them to various doctrines including *Pinkerton*).

11. *See, e.g.*, *Criminal Conspiracy*, *supra* note 10, at 998 ("No court which has taken the *Pinkerton* approach has offered an adequate rationale for convicting a conspirator for the crimes of his associates."); Katyal, *supra* note 9, at 1372–75 (providing a functional defense of *Pinkerton* but acknowledging that other considerations such as unfair discrimination "may very well be a reason to reject *Pinkerton* or to take other mitigating steps"); Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 7 (1992) (criticizing *Pinkerton* liability because it "permits the government to hold a defendant criminally responsible for all reasonably foreseeable acts of co-conspirators regardless of actual knowledge, intent, or participation") (citation omitted); Matthew A. Pauley, *The Pinkerton Doctrine and Murder*, 4 PIERCE L. REV. 1, 42 (arguing that *Pinkerton* is not an "aberration" but rather "is fundamentally consistent with American law in many ways").

12. *See* Noferi, *supra* note 5, at 147–54 (arguing for limiting *Pinkerton* liability on the basis of "attenuation").

13. Though Mark Noferi provides a thorough and helpful history of cases discussing *Pinkerton* and substantive due process, he does not analyze the constitutional dimensions of *Pinkerton* itself or the implications for other areas of criminal law. *See id.* at 140–41 (arguing that "cases equating 'foreseeability' with 'due process' appear misleading" to his task of exploring limits on *Pinkerton* itself because they provide "little more than a restatement of *Pinkerton*'s 'foreseeability' test"). Instead Noferi focuses his analysis exclusively on whether the cases support a new

have addressed the issue are in general agreement that *Pinkerton*'s limitations on vicarious liability are constitutionally based, there is still no framework for analyzing due process issues in vicarious liability cases, little understanding of the reasons for treating the *Pinkerton* limits as constitutionally mandated, or even an active discussion about these important questions. As Judge Nancy Gertner recently put it: "In short, the law has not yet developed clear and cogent standards to assess the outer due process limits of *Pinkerton*."[14]

The lack of attention paid to the ascendance of *Pinkerton* as a constitutionally based decision among federal courts is all the more surprising given that its rule is now one of the few that appears to place constitutional restrictions on the government's ability to define crimes.[15] No court or commentator has addressed how the recognition of *Pinkerton*'s limits as constitutionally required might impact other areas of substantive criminal law. If *Pinkerton*'s limitations on vicarious liability—modest though they may be[16]—are a constitutional floor, however, the potential impact may be significant. The "reasonably foreseeable" requirement, for instance, imposes a minimum mens rea of negligence for vicarious liability stemming from a conspiracy, but the Supreme Court has "affirmed and reaffirmed that strict liability as a general matter is constitutional."[17] Indeed, as noted above, a defendant can be convicted of felony murder based on a killing committed by her co-felon even if the killing was accidental and not reasonably foreseeable.[18] If negligence

attenuation limit on *Pinkerton* for defendants who play a minor role in a conspiracy and what such a limitation might look like. *Id.* at 147–52.

14. United States v. Hansen, 256 F. Supp. 2d 65, 67–68 n.3 (D. Mass. 2003).

15. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 54 (1997) ("Constitutionally speaking, substantive criminal law is almost entirely unregulated.").

16. Indeed, discussing *Pinkerton* as a rule limiting vicarious liability may seem somewhat ironic given that the decision itself represented a significant expansion on vicarious liability when it was issued. *See infra* Part I (discussing the creation of *Pinkerton* liability). Nevertheless, the phrase "*Pinkerton* limits" is helpful and appropriate in this context as this Article examines whether the *Pinkerton* rule could be constitutionally reduced (or eliminated) or whether it sets minimum requirements for vicarious liability under the Due Process Clause.

17. Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 832 (1999); *see also* United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978) (noting that, though strict liability is disfavored, it "[does] not invariably offend constitutional requirements").

18. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 557 (4th ed. 2006) ("[T]he felony murder rule authorizes strict liability for a death that results from commission of a felony."); James J. Tomkovicz, *The Endurance of the Felony Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1438 (1994) ("The broadest version of the doctrine makes even an accidental killing—one caused by nonnegligent conduct—murder."). Under the law in most states, so long as the killing is committed in furtherance of a group of felonies set by

is constitutionally required for vicarious liability in a conspiracy why is it not for felony murder vicarious liability?

Viewing *Pinkerton*'s test as a constitutional minimum also raises questions within conspiracy law itself about the current approach to defining the "scope" of a conspiratorial agreement. In this area, courts continue to follow an approach developed before the rise of *Pinkerton* liability, which analyzes the scope of a conspiracy from an evidentiary perspective and limits it only where a mass trial might unfairly influence the jury. As a result, a defendant can be convicted of being part of a large conspiracy, even if he is unaware of its breadth or details, so long as he knows the essential nature of the group's plan. When this ex-post definition of a conspiracy's scope is used to expand a defendant's substantive liability, it can result in strict liability for crimes that were not foreseeable to her or done in furtherance of her agreement.

To take another example, one particularly controversial provision of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which has gained prominence for making it a crime to provide "material support" to a "foreign terrorist organization," seems to do away with both of *Pinkerton*'s requirements by mandating added criminal liability "if the death of any person results" from the material support.[19] Litigants and commentators have argued that the provision is unconstitutional because it criminalizes support of foreign organizations that engage in peaceful and legitimate endeavors (such as providing humanitarian aid), thereby infringing on rights under both the First Amendment and the Due Process Clause.[20] The *Pinkerton* limits may provide new insight into the questions about AEDPA's "material support" provision that could

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the legislature, it constitutes felony murder. *See* Tomkovicz, *supra*, at 1434 (noting that most American jurisdictions have adopted this approach to felony murder). *But see generally* Binder, *supra* note 3 (arguing such broad felony murder liability was, by far, the exception at common law).

19. 18 U.S.C. § 2339B(a)(1) (2000). In full, the provision reads:

> Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

Id.

20. *See, e.g.*, David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 205 (noting that the U.S. government defends AEDPA on the grounds that restrictions on financial contributions to a political group is not direct association, subject to strict scrutiny, but is a regulation of conduct that only incidentally affects the right to association).

help to reduce some of the confusion among the courts that have considered its constitutionality.[21]

This Article aims to examine the extent to which substantive due process limits vicarious criminal liability through the lens of cases that have held *Pinkerton*'s test to be a constitutional minimum in the conspiracy context. The Article *does not* directly address how the prevailing methods for analyzing fundamental rights questions would treat vicarious criminal liability,[22] whether the *Pinkerton* rule is desirable as a matter of policy or criminal theory, or whether the Constitution might place limits on vicarious liability for the acts of co-conspirators beyond those in *Pinkerton*. Rather, my goals here are, first, to examine why courts consider the *Pinkerton* test to be a constitutional floor and build a more coherent approach for understanding *Pinkerton*'s limits as constitutional requirements on vicarious liability; and, second, to explore how this more detailed account of "the due process limitations inherent in *Pinkerton*"[23] might impact other areas of criminal law. In so doing, I hope also to spark a broader conversation about the extent to which the concept of personal guilt under the Due Process Clause might constrain substantive criminal law.

Part I of this Article examines the *Pinkerton* decision and the rise of its two-pronged test in state and federal courts. Part II provides a history of the decisions that have found *Pinkerton*'s test to be a constitutionally required limit on vicarious liability for the acts of co-conspirators. Part III takes a closer look at the constitutional dimensions of *Pinkerton* by drawing upon the "personal guilt" due process concept that the Supreme Court has recognized in the context of another area of vicarious criminal liability. In the process, this Part will seek to develop a clearer framework for understanding and applying the *Pinkerton* test as a rule of constitutional law. Part IV discusses some of the areas of substantive criminal law that might be affected by the account of *Pinkerton* as constitutional law advanced in Part III. The examination in Part IV is not meant to be exhaustive,

21. *See infra* Part IV.C (examining AEDPA as another area of criminal law to which vicarious liability applies).

22. For example, this Article does not thoroughly analyze whether *Pinkerton*'s "formula [rises] to the level of [a] fundamental principle, so as to limit the traditional recognition of a State's capacity to define crimes and offenses." Clark v. Arizona, 126 S. Ct. 2709, 2719 (2006); *see also* Montana v. Egelhoff, 518 U.S. 37, 43 (1996) (plurality opinion) (noting that a state's ability to carry out and define crimes "is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental") (citations and internal quotations omitted).

23. United States v. Cherry, 217 F.3d 811, 818 (10th Cir. 2000).

but instead provides a window into some of the issues that courts' treatment of the "reasonably foreseeable" and "in furtherance of" requirements as constitutionally required raises. To that end, this Part provides an overview of the potential implications of *Pinkerton*'s limits in three distinct areas: (1) the definition of the "scope" of an unlawful agreement in a conspiracy; (2) felony murder vicarious liability; and (3) AEDPA's "material support" provision. Part V concludes that recognition of *Pinkerton*'s limits as constitutionally required poses difficult challenges for broad applications of vicarious liability in other areas of criminal law. These issues deserve greater attention than they have received. In particular, courts that have held *Pinkerton* to be based in substantive due process should work in future cases toward creating a clear framework that would allow the principles guiding this rule to be consistently applied across cases.

I. THE STRANGE RISE OF "*PINKERTON* LIABILITY"

Pinkerton v. United States[24] is one of the most well known cases in criminal law today. As anyone who has taken criminal law will recall, under *Pinkerton* a defendant may be held liable for any crimes committed by her co-conspirators that were (1) reasonably foreseeable to the defendant and (2) done in furtherance of the illegal agreement.[25] Indeed, the case is so famously linked to this rule that most courts refer to vicarious liability for the acts of co-conspirators as "*Pinkerton* liability."[26] It is surprising, then, that the *Pinkerton* opinion itself seemed to recite the rule almost as an after thought.

Brothers Walter and Daniel Pinkerton lived two hundred yards from each other on Daniel's farm, where they were engaged in an ongoing illegal whiskey business that had resulted in each being convicted "many times" of violating state liquor laws.[27] Both brothers were charged and convicted of conspiracy to violate the tax code, as well as a number of substantive counts of tax evasion.[28] There was, however, "no evidence to show that Daniel participated directly in the

24. 328 U.S. 640 (1946).
25. *Id.* at 647–48.
26. *See* United States v. Radermacher, 474 F.3d 999, 1002–03 (7th Cir. 2007) (discussing *Pinkerton* liability); State *ex rel.* Woods v. Cohen, 844 P.2d 1147, 1148 (Ariz. 1992) ("The liability of an accused for acts committed by co-conspirators is often called '*Pinkerton*' liability, after the case in which the United States Supreme Court recognized the doctrine as part of federal criminal law and upheld it against a double jeopardy challenge.").
27. Pinkerton v. United States, 151 F.2d 499, 500 (1945), *aff'd*, 328 U.S. 640 (1946).
28. *Pinkerton*, 328 U.S. at 641.

commission of the substantive offenses"[29] or even knew of their commission—the substantive offenses had been committed by Walter alone.

Daniel challenged his convictions for the substantive offenses by relying on a 1940 case from the Third Circuit, which held that a defendant could be convicted of a crime committed by her co-conspirator only if she had directly participated in or aided and abetted it.[30] The Third Circuit reasoned that holding a conspirator liable for all crimes committed during the course of the conspiracy, as the government urged, was not authorized by the federal criminal code's provision on aiding and abetting liability. Under that statute, "[w]hoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."[31]

Justice Douglas, writing for the *Pinkerton* majority, rejected Daniel's argument in a short two-paragraph discussion.[32] Douglas based his analysis almost entirely on the rule that, in a criminal conspiracy, "an overt act of one partner may be the act of all without any new agreement specifically directed to that act."[33] According to the overt act rule, established before *Pinkerton*, Conspirator A's act can be used to satisfy the overt act element of a conspiracy charge against Conspirator B (the other element, of course, is that the defendant intentionally entered into the criminal agreement).[34] "The governing principle is the same," Douglas reasoned, "when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project."[35] He concluded that, "[i]f [the overt act element] can be supplied by the act of one conspirator, we fail to see why the

29. *Id.* at 645.

30. *See* United States v. Sall, 116 F.2d 745, 747–48 (3d Cir. 1940) (holding that the federal statute provides for criminal liability as a principal of a substantive offense only for those who directly commit the crime or aid or abet it).

31. *Id.* at 747 (quoting 18 U.S.C. § 550 (current version at 18 U.S.C. § 2 (2000))); *see also id.* ("It was not sufficient merely to prove that he was a member of the conspiracy . . . and that in the course of that conspiracy those particular crimes were committed by other conspirators.").

32. 328 U.S. at 646–48.

33. *Id.* at 646–47 (citation omitted). The Court also analogized its decision to aiding and abetting liability, though did not base its decision on this theory as Daniel had not been charged as an aider or abettor. *Id.*

34. *Criminal Conspiracy*, *supra* note 10, at 946. At common law, the agreement itself was all that was required for a conspiracy conviction. The overt act requirement was introduced into the federal statute without explanation, possibly due to a mistaken legislative interpretation of what was necessary to prove conspiracy at common law. *Id.* at 945–47; *see also* United States v. Goodling, 25 U.S. 460, 469 (1827) ("[T]he act of one conspirator . . . is considered the act of all, and is evidence against all.").

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

same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense."[36] Accordingly, the Court upheld Daniel's convictions for Walter's crimes.

In the next and final paragraph of the opinion, Douglas delivered the passage that forms the basis for *Pinkerton*'s famous test, noting, without elaboration, that

> [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 could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.[37]

As discussed below, *Pinkerton*'s final paragraph later evolved into the now widely followed two-part test. But, upon a close reading of the decision it is far from clear that the Court intended to embrace the broad "*Pinkerton* liability" that exists today. Specifically, today's two-part test seems to ignore the Court's admonition regarding vicarious liability for substantive offenses that do "not fall within the scope of the unlawful project."[38] This is significant because, in *Pinkerton*, the substantive crimes and the goal of the scope of the conspiracy were one in the same. The Pinkertons were convicted of conspiracy to violate various provisions of the tax code and the substantive crimes were instances where Walter "did unlawfully remove, deposit and conceal . . . a large quantity of distilled spirits . . . whereof a tax was then and there imposed by the laws of the United States, with intent then and there to defraud the United States of such tax."[39] In other words, the relationship between the scope of the conspiracy and the substantive offenses in *Pinkerton* was as close as it could be. As Justice Douglas explained: "The unlawful agreement contemplated *precisely* what was done. It was formed for the purpose.

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36. *Id.*

37. *Id.* at 647–48.

38. *Id.* This limit or "element" was not universally overlooked and was noted by one court as late as 1978, but is now generally omitted from the *Pinkerton* charge used in federal courts.

> There are, of course, cases which fall within the exceptions in Pinkerton where (1) the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, (2) did not fall within the scope of the unlawful project, or (3) was merely a part of the ramifications of the plan which could not reasonably have been foreseen as a necessary or natural consequence of the unlawful agreement.

United States v. Molina, 581 F.2d 56, 61 (2d Cir. 1978).

39. Pinkerton v. United States, 151 F.2d 499, 500 (1945), *aff'd*, 328 U.S. 640 (1946).

The act done was in execution of the enterprise."[40] Accordingly, it is far from clear that the *Pinkerton* majority believed it was authorizing vicarious liability for crimes that were not also the actual objective of the illegal agreement.[41]

Whatever the majority's intentions, however, Justice Rutledge recognized the potentially sweeping nature of its holding. In a dissent joined "in substance" by Justice Frankfurter,[42] he sharply criticized the majority's opinion as "a dangerous precedent"[43] that appeared to pave the way for an "almost unlimited scope of vicarious responsibility for others' acts which follows once agreement is shown."[44] Rutledge, following the Third Circuit's analysis, argued that such a broad approach was inconsistent with the statutory scheme adopted by Congress because it permitted Daniel to be convicted for "substantive crimes committed only by Walter" without any "evidence that he counseled, advised or had knowledge of those particular acts or offenses."[45] In addition to statutory-based criticisms, Rutledge argued that the majority's approach to vicarious liability may be unconstitutional, stating that, "[i]f it does not violate the letter of constitutional right, it fractures the spirit."[46]

As a matter of statutory interpretation, Justice Rutledge's reasoning appears to be far more persuasive than the majority's. Indeed, the majority did not identify any statutory basis at all for holding defendants liable for the substantive crimes of their co-conspirators in the absence of proof of aiding and abetting. Nor did the Court explain its reasons for rejecting Justice Rutledge's and the Third Circuit's analysis of the federal aiding and abetting statute, which was the only general provision of the criminal code defining vicarious

40. *Pinkerton*, 328 U.S. at 647 (emphasis added); *see also id.* ("The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle."). Justice Douglas indicated another possible limitation on conspiracy liability earlier in the opinion while discussing the Pinkerton brothers' separate merger argument. There, he sympathetically quoted a report by the Conference of Senior Judges that concluded that "the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking." *Id.* at 644 n.4.

41. *See* Nye & Nissen v. United States, 336 U.S. 613, 620 (1949) (describing *Pinkerton* as "narrow in scope" and applicable only "where the conspiracy was one to commit offenses of the character described in the substantive counts").

42. *Id.* at 654 (Frankfurter, J., substantially concurring in Justice Rutledge's dissent).

43. *Id.* at 648 (Rutledge, J., dissenting in part).

44. *Id.* at 650.

45. *Id.* at 651.

46. *Id.* at 650.

liability.[47] That statute, still in effect today, defines the instances in which a person can be convicted as a principal for violating the federal criminal code and does not include anything akin to *Pinkerton* liability.[48] Instead, it limits liability as a principal of a crime to a person who "aids, abets, counsels, commands, induces, or procures its commission . . . ."[49] Thus, the *Pinkerton* majority appears to have created an entirely new basis for criminal liability out of statutory thin air, arguably in violation of the prohibition against creation of federal common law crimes.[50] To this day, the *Pinkerton* "elements" are nowhere to be found in the federal criminal code,[51] though they have been incorporated into provisions of the (now discretionary)[52] Federal Sentencing Guidelines.[53] By contrast, the federal conspiracy statute specifies that the overt act requirement is satisfied where "one or more of such persons do any act to effect the object of the

47. *See Criminal Conspiracy*, *supra* note 10, at 994 (noting that the majority did not identify the statutory basis for its holding).

48. 18 U.S.C. § 2(a) (2000) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."); *id.* § 2(b) ("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.").

49. *Id.* § 2(a).

50. The lack of a statutory basis for the Court's reasoning has been largely unexamined by commentators. The one exception is a recent insightful Comment by Michael Manning, which argues that *Pinkerton* impermissibly created a federal crime without any statutory basis. Michael Manning, Comment, *A Common Law Crime Analysis of* Pinkerton v. United States*: Sixty Years of Impermissible Judicially-Created Criminal Liability*, 67 MONT. L. REV. 89 (2006); *cf.* United States v. Long, 301 F.3d 1095, 1103 (9th Cir. 2002) ("The *Pinkerton* doctrine is a *judicially-created rule* that makes a conspirator criminally liable for the substantive offenses committed by a co-conspirator when they are reasonably foreseeable and committed in furtherance of the conspiracy.") (emphasis added).

51. Interestingly, at least one version of the Federal Criminal Code that was proposed in the 1970s and 1980s sought to add *Pinkerton* elements to the federal code. *See* Johnson, *supra* note 10, at 1146 (noting that early drafts of the Code rejected *Pinkerton* but later drafts added the "reasonably foreseeable" and "in furtherance of" *Pinkerton* elements). But, the Code was never passed. *See* John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 Am. U. L. Rev. 545, 551 n.31 ("The proposal for a new Federal Criminal Code was introduced in the 93rd Congress, and the effort to enact such legislation lasted for about a dozen years.").

52. United States v. Booker, 543 U.S. 220, 260 (2005).

53. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 cmt. n.2 (2006) (noting that a defendant "is accountable for the conduct . . . of others that was both: (i) in furtherance of the jointly undertaken criminal activity; and (ii) reasonably foreseeable in connection with that criminal activity"); *see also* United States v. Studley, 47 F.3d 569, 575 (2d Cir. 1995) (discussing the sentencing guidelines' relevant conduct standard). *But see* William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 510 (1990) (noting that the sentencing rule may be somewhat more constrained than *Pinkerton* liability).

conspiracy,"[54] further undercutting the soundness of the majority's reasoning that substantive vicarious liability was warranted as an extension of the overt act rule.[55]

In the years following *Pinkerton*, the decision was "almost universally condemned by the academic community."[56] And, although no statistics exist, *Pinkerton* liability appears to have been "rarely utilized until the 1970's."[57] Indeed, in 1962 the drafters of the Modal Penal Code rejected *Pinkerton* liability[58] and by 1972, LaFave and Scott's influential *Handbook on Criminal Law* declared that the *Pinkerton* rule had "never gained broad acceptance."[59] One factor that may have

54. 18 U.S.C. § 371 (2000).

55. For a policy-based argument against the Court's analogy between an overt act and substantive crime, see *Criminal Conspiracy*, *supra* note 10, at 998. The most plausible statutory justification for the *Pinkerton* majority's holding is that it impliedly determined "that 'aiding and abetting' and 'conspiring' are, and are intended by Congress to be, the same thing, differing only in the form of the descriptive words." Pinkerton v. United States, 328 U.S. 640, 651 n.4 (1946) (Rutledge, J., dissenting); *see also* Krulewitch v. United States, 336 U.S. 440, 451 (1949) (Jackson, J., concurring) ("In *Pinkerton v. United States*, [the Court] sustained a conviction of a substantive crime where there was no proof of participation in or knowledge of it, upon the novel and dubious theory that conspiracy is equivalent in law to aiding and abetting."); *cf.* United States v. Rosenberg, 888 F.2d 1406, 1426 n.14 (D.C. Cir. 1989) (Edwards, J., dissenting in part and concurring in part) ("At their core, the *Pinkerton* and the aider-and-abettor doctrines embody the same principle: a defendant who willingly enters into a confederacy of crime can legitimately be held accountable for all reasonably foreseeable offenses committed by his confederates."); Jon May, *Pinkerton v. United States Revisited: A Defense of Accomplice Liability*, 8 NOVA L.J. 21, 40 (1983) ("Membership in a conspiracy, however, is evidence of [a defendant's] status as an accessory before the fact and, to the extent that he is an accessory before the fact, he is responsible for the natural and probable consequences of his actions."). This account may be plausible under the facts of *Pinkerton* itself, given that the substantive offenses and aims of the conspiracy were the same. The problem, of course, is that "*Pinkerton* liability" is *significantly* broader than aiding and abetting liability under the "natural and probable consequences" rule. *See* United States v. Greer, 467 F.2d 1064, 1071 (7th Cir. 1972) (holding that a conspirator's liability for crimes committed by other co-conspirators is broader than an aider and abettor's liability for the principal's crimes); *Criminal Conspiracy*, *supra* note 10, at 995–96 (discussing breadth of *Pinkerton* liability in relation to accomplice liability). *See generally* Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689 (1930) (discussing vicarious criminal liability prior to *Pinkerton*). Indeed, if it were otherwise, there would be no need for *Pinkerton* liability, as all *Pinkerton* offenses would be aiding and abetting offenses. Thus, whatever the merits of *Pinkerton* liability may be as a matter of policy, the decision does not appear to be justifiable as a matter of statutory interpretation. *See generally* Manning, *supra* note 50 (arguing that there is no statutory basis for *Pinkerton* liability).

56. May, *supra* note 55, at 21–24 (discussing criticisms of *Pinkerton*).

57. *Id.* at 23.

58. MODEL PENAL CODE § 2.06 cmt. 6(a) (1962); *see also* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW 358–59 (2d ed. 2003) ("Such [*Pinkerton*] liability might be justified for those at the top directing and controlling the entire operation, but it is clearly inappropriate to visit the same results upon the lesser participants in the conspiracy.").

59. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 515 (1st ed. 1972).

contributed to *Pinkerton*'s disuse was the nature of federal sentencing practices at the time, which led one commentator to conclude that potential liability for additional substantive offenses under *Pinkerton* was "not of great significance" because "only a very unimaginative judge would actually fix the length of the prison term on so abstract a basis."[60] It is worth noting, incidentally, that these dynamics likely help explain the lack of scholarship focused on *Pinkerton*, and the minimal treatment the case received in articles on conspiracy generally, during that time.

In the early 1970s, however, things began to change as prosecutors started to employ *Pinkerton* "with increasing frequency, particularly in the context of narcotics prosecutions."[61] By the end of the decade, the case, which seemed to have one foot in the grave during the 1960s, had become "extremely popular among state and federal prosecutors."[62] In the process, two of the three factors identified off-handedly at the end of Justice Douglas' opinion were quickly transforming into a rule of black letter law that permitted vicarious liability of a kind seemingly much broader than that envisioned by the *Pinkerton* majority. By the early 1990s, the two-part test for "*Pinkerton* liability" had gained nearly universal acceptance among the courts. As Professor Paul Marcus explained: "In virtually every jurisdiction 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."[63]

II. *PINKERTON* AS CONSTITUTIONAL LAW

The emergence of cases treating *Pinkerton*'s two-prong test as a constitutionally based minimum requirement for imposing vicarious liability coincided with the rise of its use by prosecutors, possibly as a way of preventing the increasingly broad interpretations of vicarious liability under *Pinkerton* from tumbling out of control.[64] Indeed, the

60. Johnson, *supra* note 10, at 1165.
61. May, *supra* note 55, at 21.
62. *Id.* at 23.
63. Marcus, *supra* note 11, at 6. *But see* DRESSLER, *supra* note 18, at 527–29 (noting that although the case is widely followed "one should be cautious in measuring the strength of the *Pinkerton* rule" as some states have adopted it in a more limited form).
64.

> While this result may at first seem harsh, liability is not unlimited. The Court in *Pinkerton* was careful to point out that a conspirator is accountable only for the acts of others in furtherance of the conspiracy, i.e., those acts which were within the scope of or were a reasonably foreseeable consequence of the unlawful agreement.

first federal decision to use the phrase "*Pinkerton* charge" also held that its "elements" placed limits on vicarious liability in a conspiracy. In 1964, the Eastern District of Pennsylvania considered post-conviction motions for judgments of acquittal and new trials stemming from a wide-ranging conspiracy in which eleven individuals were found guilty of conspiracy.[65] Four of these defendants were also convicted of substantive offenses under a vicarious liability theory.[66] At trial, the court failed to instruct the jury on any of the *Pinkerton* limits, charging them that, if they found the defendants guilty of the conspiracy charge, they could also convict them of any "substantive crime committed by other alleged co-conspirators."[67] The government argued that the failure to include the *Pinkerton* elements in the jury charge was of no matter and that the convictions should be upheld because the substantive crimes were necessarily committed in furtherance of the conspiracy. The court disagreed and reversed the convictions, finding that the defendants could not be held vicariously liable for substantive crimes of their co-conspirators that they had not reasonably foreseen.[68] According to the court, the limitations discussed briefly at the end of *Pinkerton* were "elements in the absence of which guilt for the substantive crime could not attach to all conspirators."[69] Although the decision did not describe the *Pinkerton* limits as constitutionally based, its reasoning laid the foundation for such a determination and begged the question: if the "elements" in *Pinkerton*'s final paragraph are not based in statute, why are they required for vicarious liability in a conspiracy?

The first instances of federal courts explicitly referencing "due process" limitations in discussing vicarious liability under *Pinkerton* came in the mid-1970s, around the same time prosecutors were beginning to regularly bring *Pinkerton* charges against defendants. The phenomenon developed largely in the Fifth Circuit, where a handful of majority and dissenting opinions mentioned the possibility of constitutional limits on, or inherent in, *Pinkerton* just as casually as Justice Douglas had outlined the *Pinkerton* test itself. The first example came in 1975, when a Fifth Circuit dissenter observed,

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United States v. Decker, 543 F.2d 1102, 1104 (5th Cir. 1976).

65. United States v. Barrow, 229 F. Supp. 722, 724–25 (E.D. Pa. 1964), *rev'd on other grounds*, 363 F.2d 62 (3d Cir. 1966).

66. *Id.* at 733–34.

67. *Id.* at 733.

68. *Id.* at 734 ("Only if the particular travel by the named traveler could be reasonably foreseen by the non-traveling defendants could the jury convict on the count alleging that travel.").

69. *Id.*

without elaboration, that the defendant "might raise due process objections to the validity of his murder conviction on the *Pinkerton* theory."[70] One year later, in *United States v. Decker*,[71] a Fifth Circuit majority picked up on the remark, noting that "[w]hile holding one vicariously liable for the criminal acts of another may raise obvious due process objections, it has received considerable support in this Circuit in the conspiracy context."[72] In *Decker*, the defendant argued that *Pinkerton* was unsound and should be overruled or, in the alternative, that it should not apply to a drug distribution conspiracy where a conspirator could become "liable for any remote sale of the drug passing through the conspiracy."[73] The court rejected these arguments, though it explained that:

> [w]hile this result may at first seem harsh, liability is not unlimited. The Court in *Pinkerton* was careful to point out that a conspirator is accountable only for the acts of others in furtherance of the conspiracy, i.e., those acts which were within the scope of or were a reasonably foreseeable consequence of the unlawful agreement.[74]

Finally, in 1979, the court in *United States v. Moren*,[75] again noted the idea that vicarious liability "may have due process limitations" but found that there was no cause for concern in that case because the jury could have inferred actual drug possession by the defendants.[76] Thus, application of *Pinkerton* was "not so attenuated as to give us due process concerns."[77]

In 1983, the Fifth Circuit expanded on its claim that *Pinkerton*'s elements may impose constitutional minimums for vicarious liability. In *Ferguson v. Estelle*,[78] the court considered a habeas corpus petition of two defendants who had been convicted of "arson by riot" under the Texas Anti-Riot statute.[79] The convictions were based on their participation in a riot in which fifty union members "armed with 2 x 4's, pipes, bottles, and rocks 'invaded'" a job site.[80] Twenty of the rioters set fire to a trailer, but neither of the defendants was identified as having directly participated in the arson.[81] The Anti-Riot

70. Park v. Huff, 506 F.2d 849, 864 (5th Cir. 1975) (Thornberry, J., dissenting). *See generally* Noferi, *supra* note 5, at 124–27 (discussing these early cases).
71. 543 F.2d 1102 (5th Cir. 1976).
72. *Id.* at 1103 (citing *Park*, 506 F.2d at 864 (Thornberry, J., dissenting)).
73. *Id.* at 1104.
74. *Id.*
75. 588 F.2d 490 (5th Cir. 1979).
76. *Id.* at 493.
77. *Id.*
78. 718 F.2d 730 (5th Cir. 1983).
79. *Id.* at 731.
80. *Id.* at 732.
81. *Id.*

statute provided that a defendant who joined a riot could be held vicariously liable for arson "by other participants in the riot, *either* in furtherance of the purpose of the assembly *or* which should have been anticipated as a result of the assembly."[82] Though the defendants did not dispute that both *Pinkerton* elements had been proven in their case, they claimed their convictions should be overturned because both elements were absent from the statute. Specifically, they argued that the Anti-Riot statute was facially unconstitutional "because it imposes criminal responsibility for the acts of another in the absence of a relationship between the defendant and the criminal conduct sufficiently substantial to satisfy the [D]ue [P]rocess [C]lause."[83]

The court began its analysis by discussing the 1961 Supreme Court case *Scales v. United States*,[84] which examined whether the Constitution constrained imposition of criminal liability for participating in a group that was engaged in both legal and illegal activity.[85] In that setting, the *Scales* Court held that the concept of "personal guilt" under the Due Process Clause required that a defendant intend to assist in the illegal aims of a group before criminal liability may be imposed based on associating with a group that was engaged in illegal activity.[86] After its discussion of *Scales*, the Fifth Circuit turned to vicarious liability under the Texas statute and found that, despite the potential for concern in some cases, the defendants' convictions were constitutional because both of the *Pinkerton* elements had in fact been shown.[87] The court concluded, however, that, "[i]f, on the facts of a particular case, it should appear that either [*Pinkerton* element] is absent, an important question would arise. But the petitioners have not suggested that theirs is such a case, and they are without standing to raise the potential problems of others."[88]

In the middle of the 1980's, the idea that *Pinkerton*'s test for vicarious liability was constitutionally required began to gain broader acceptance and spread outside of the Fifth Circuit. In the 1985 case *United States v. Alvarez*,[89] the Eleventh Circuit provided the most detailed discussion to that date of the constitutional limits on

82. *Id.* at 735 (emphasis added).
83. *Id.*
84. 367 U.S. 203 (1961). This case is discussed in more detail below. *See infra* Part III (exploring the basis for constitutional limits on *Pinkerton* liability).
85. *Estelle*, 718 F.2d at 735–36 (discussing *Scales*).
86. 367 U.S. at 225.
87. *Estelle*, 718 F.2d at 736.
88. *Id.* (citing *Pinkerton*, 328 U.S. at 647–48).
89. 755 F.2d 830 (11th Cir. 1985).

vicarious liability in a conspiracy and implied that the *Pinkerton* limits themselves may not be sufficient to meet due process concerns in all instances. In *Alvarez*, a cocaine deal initiated by two undercover federal agents turned into a shoot-out when one of the sellers heard backup agents approaching the motel room where the transaction was taking place.[90] During the mêlée, one of the sellers shot and killed one of the undercover officers.[91] Three co-conspirators were convicted of murder under a *Pinkerton* theory.[92] One had served as an armed lookout during the incident, another introduced the agents to the "leader" of the conspiracy and was present during the shooting, and the third acted as a Spanish to English translator during the incident.[93]

The defendants argued that their convictions were unconstitutional because they were not sufficiently individually culpable for the killing.[94] They claimed that the murder was too distinct from the purposes of the drug transaction and that their individual roles in the conspiracy were too minor to countenance criminal liability.[95] The government argued that those considerations should be left to the prosecutor and that "prosecutorial discretion would protect truly 'minor participants'" in a conspiracy from unwarranted criminal liability.[96] The court rejected this view, and strongly indicated that it believed due process might require constraints on vicarious liability beyond the *Pinkerton* limitations.[97] Specifically, it found no authority for the government's contention "that all conspirators, regardless of individual culpability, may be held responsible under *Pinkerton* for" substantive crimes that were "reasonably foreseeable but originally unintended."[98] The court implied that vicarious liability for such crimes could only be imposed if the defendant was not a minor participant in the conspiracy and knew there was a strong likelihood that the foreseeable, but originally

90. *Id.* at 830–39.
91. *Id.* at 838–39.
92. *Id.* at 839.
93. *Id.* at 851.
94. *Id.* at 849–51.
95. *Id.* at 849.
96. *Id.* at 850 n.25.
97. *See id.* ("In our view, the liability of such 'minor' participants must rest on a more substantial foundation than the mere whim of the prosecutor."); *see also id.* at 850 ("Furthermore, we are mindful of the potential due process limitations on the *Pinkerton* doctrine in cases involving attenuated relationships between the conspirator and the substantive crime.").
98. *Id.*

unintended, crime would be committed.[99] The court concluded, however, that the "individual culpability" of the defendants in that case was "sufficient," because "the relationship between the [defendants] and the murder was not so attenuated as to run afoul of the potential due process limitations on the *Pinkerton* doctrine."[100]

In addition to being the first case to imply that the Constitution might preclude a conviction even where the *Pinkerton* test had apparently been satisfied, *Alvarez* is noteworthy as an indication of how far vicarious liability for the acts of co-conspirators had stretched beyond the category of offenses that was at issue in *Pinkerton*. The *Alvarez* court addressed this fact directly in its analysis by identifying three different categories of substantive offenses that might be punishable under the *Pinkerton* test. "The first and most common" is where the substantive crime "is also one of the primary goals of the alleged conspiracy," as was the case in *Pinkerton*.[101] The second is where the substantive crime directly facilitates one of the conspiracy's primary goals: for example, illegal gun possession during a bank robbery.[102] Though the second category is beyond the conduct at issue in *Pinkerton*, the *Alvarez* court characterized it as within the heartland of "*Pinkerton* liability," which was no doubt true by 1985.[103] The final category—and the one at issue in *Alvarez*—involves substantive crimes that are committed in furtherance of the conspiracy and are reasonably foreseeable, but were "not within the originally intended scope of the conspiracy."[104] The court characterized liability for the third category of crimes as not typical but also "not wholly unprecedented."[105] The court's concern about the expansiveness of the third category seemed, in large part, to drive its concern that due process might constrain *Pinkerton*'s test.

Following *Alvarez*, a number of other courts echoed the idea that *Pinkerton*'s limits were constitutionally based. By 1991, the Fourth, Sixth, and Ninth Circuits had all indicated their support for the proposition that due process required, at a minimum, the *Pinkerton*

99. *Id.* at 850–51 (holding that the conviction did not run afoul of "potential due process concerns" because "all three appellants had actual knowledge of at least some of the circumstances and events leading up to the murder . . . were aware that deadly force might be used," and "were more than 'minor' participants in the drug conspiracy").
100. *Id.* at 851.
101. *Id.* at 850 n.24.
102. *Id.*
103. *Id.* ("In either of these two categories, *Pinkerton* liability can be imposed on all conspirators because the substantive crime is squarely within the intended scope of the conspiracy.").
104. *Id.* at 850.
105. *Id.* at 850 n.25.

limits on vicarious liability.[106] The first reversal of a *Pinkerton* conviction on due process grounds came in 1993, in the Ninth Circuit case *United States v. Castaneda*.[107] In *Castaneda*, Leticia Castaneda's husband was involved in a large-scale heroin and cocaine business. Her role in the business appeared to be limited primarily to delivering phone messages related to drug transactions between her husband and other conspirators on a handful of occasions. On one occasion, for example, Leticia was engaged in a social phone conversation with one of the co-conspirators when her husband asked her to relay information about his efforts to sell drugs, which she did.[108] The strongest evidence against her was that, in one phone conversation, she "active[ly] participat[ed]" in the conspiracy by volunteering "that a street-level dealer had been arrested and that a deal involving [another individual] had fallen through . . . ."[109] Based on this evidence, Castaneda was convicted of conspiracy to distribute heroin and cocaine and, vicariously of seven counts of possession of a firearm in relation to a drug offense.[110] Six of the firearm convictions stemmed from another conspirator's possession of drugs and the seventh was based on her own conspiracy conviction.[111]

Castaneda challenged her convictions on a number of grounds but not on the basis of substantive due process. The court, however, raised the issue *sua sponte* as an error that was "obvious" and "seriously affect[ed] the fairness, integrity or public relations of the judicial proceeding."[112] It framed its due process analysis in terms of *Pinkerton*'s reasonable foreseeability requirement[113] and conducted its foreseeability inquiry from the perspective of Castaneda's role in the

106. *See* United States v. Christian, 942 F.2d 363, 367 (6th Cir. 1991) ("The foreseeability concept underlying *Pinkerton* is also the main concern underlying a possible due process violation."); United States v. Chorman, 910 F.2d 102, 112 (4th Cir. 1990) (finding that convictions were not "so attenuated as to run afoul of possible due process limitations on the *Pinkerton* doctrine"); United States v. Johnson, 886 F.2d 1120, 1123 (9th Cir. 1989) ("We recognize the potential due process limitations on the *Pinkerton* doctrine in cases involving attenuated relationships between the conspirator and the substantive crime."). In addition, a number of other state courts held that due process constrains vicarious liability in a conspiracy. *See* Noferi, *supra* note 5, at 134–37 (discussing state court decisions). Some state courts have also held that due process limits vicarious criminal liability outside of the conspiracy setting. *See* Neil Colman McCabe, *State Constitutions and Substantive Criminal Law*, 71 TEMP. L. REV. 521, 536–41 (1998) (reviewing cases).

107. 9 F.3d 761 (9th Cir. 1993).

108. *Id.* at 767.

109. *Id.*

110. *Id.* at 764.

111. *Id.*

112. *Id.* at 766.

113. *See id.* ("The question is, was it reasonably foreseeable to the defendant that a firearm would be used in relation to the predicate [possession] offense[s]?").

conspiracy and knowledge of the drug organization, as opposed to the overall scope of the conspiracy.[114] "[G]iven Leticia's lack of participation in the conspiracy and her lack of involvement with the predicate offenses," the court determined that, it could not "conclude, without violating the fundamental precepts of due process, that Leticia could have foreseen the other conspirators' use of firearms in relation to the predicate offenses."[115]

The Ninth Circuit's approach in *Castaneda* sheds light on the key role that scope plays in a *Pinkerton* analysis, and in the application of *Pinkerton*'s limitations as a rule of constitutional law. As discussed in more depth below, the extent of liability under *Pinkerton* depends in large part on whether the test is applied based on the scope of each individual's agreement (or participation) or on the scope of the overall conspiracy. Though the court did not address the question of how to define the scope of a conspiracy directly, its implicit narrow approach to that issue was a determinative factor in the result it reached.[116] Conspicuously absent from the court's decision, however, was a detailed explanation of why *Pinkerton*'s limits are constitutionally required. The court's discussion on this point was limited to its observation that "[s]everal circuits, including this one" recognize that due process constrains the overly broad application of vicarious liability under *Pinkerton* and its conclusion that *Pinkerton*'s reasonably foreseeable prong was the main concept underlying a due process analysis.[117]

III. *PINKERTON* AND PERSONAL GUILT

Since *Castaneda*, the First,[118] Seventh,[119] and Tenth Circuits[120] have joined the Fifth, Sixth, Ninth, and Eleventh in characterizing

114. *Id.* at 767.
115. *Id.* at 768.
116. *See id.* at 767 (explaining that "[t]he evidence does not show that she knew much about Uriel's or Barron's organizations, that she knew the low-level distributors involved, [nor] that she had any knowledge of Angulo-Lopez's organization").
117. *Id.* at 766.
118. *See* United States v. Collazo-Aponte, 216 F.3d 163, 196 (1st Cir. 2000) ("We agree with appellant that 'due process constrains the application of *Pinkerton* where the relationship between the defendant and the substantive offense is slight.'" (quoting *Castaneda*, 9 F.3d at 766)).
119. United States v. Walls, 225 F.3d 858, 865 (7th Cir. 2000) (reversing conviction on the grounds that it was "an unwarranted, and possibly unconstitutional, expansion of the *Pinkerton* doctrine" (citing *Castaneda*, 9 F.3d at 766)).
120. United States v. Cherry, 217 F.3d 811, 818 (10th Cir. 2000) (noting that extending *Pinkerton* liability to cover crimes removed from the original object of the conspiracy "appears incompatible with the due process limitations inherent in *Pinkerton*").

Pinkerton's test as a due process-based limit on vicarious liability for the acts of co-conspirators. The remaining circuits—the Second, Third, Eighth and D.C. Circuits—have never reached the issue. Despite this near consensus, however, no court has provided more than a cursory explanation of the basis for treating *Pinkerton*'s limits as constitutionally mandated or, more fundamentally, why the Constitution limits vicarious criminal liability at all. Only the Fifth and Eleventh Circuits articulated a possible rationale for their conclusion, by referencing concepts of "personal guilt" and "individual culpability" respectively.[121] Neither court, however, explained these ideas in any detail nor analyzed why they might warrant adopting *Pinkerton*'s test as a due process limit on vicarious criminal liability as opposed to other approaches.

The lack of analysis on this point is particularly surprising given that the Supreme Court has repeatedly recognized "personal guilt" as a substantive due process limit on civil and criminal liability for the acts of others.[122] Although the Supreme Court's personal guilt jurisprudence developed largely in the context of challenges to the anti-Communist measures of the McCarthy era,[123] the Court also mentioned the importance of personal guilt in some of its conspiracy decisions from the same time period.[124] At its core, the rule prohibits "guilt by association" in the absence of a substantial relationship between the defendant and the third party's criminal activity. An individual cannot be held vicariously liable merely because she associates with a group or third party that commits a crime. There must be a sufficient, "non-tenuous,"[125] link between her association and the third party's criminal actions. Though a few courts have off-handedly mentioned the "personal guilt" concept in characterizing

121. *See supra* Part II (discussing *United States v. Decker*, 543 F.2d 1102 (5th Cir. 1976), *United States v. Moreno*, 588 F.2d 490 (5th Cir. 1979), *Ferguson v. Estelle*, 718 F.2d 730 (5th Cir. 1983), and *United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985)).

122. *See* Bridges v. Wixon, 326 U.S. 135, 163 (1945) ("The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom and due process of law."); Cole, *supra* note 20, at 218 ("In the wake of *Scales*, the Court consistently applied the 'specific intent' standard to a range of anti-Communist statutes, including many that imposed only a civil disability.").

123. *See* Cole, *supra* note 20, at 215–16 (describing the history of the personal guilt requirement).

124. *See* Kotteakos v. United States, 328 U.S. 750, 772 (1946) ("Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application.").

125. Scales v. United States, 367 U.S. 203, 226 (1961) (stating personal guilt requires an "analysis of the relationship between the fact of membership and the underlying substantive illegal conduct, in order to determine whether that relationship is indeed too tenuous to permit its use as the basis of criminal liability").

Pinkerton's limits as constitutionally mandated,[126] a close examination of the doctrine adds significant weight to that position and, perhaps more importantly for our purposes, helps build a foundation for understanding on what it might mean for other areas of vicarious criminal liability.

The most detailed explanation of the personal guilt requirement came in *Scales*, in 1961, when the Supreme Court considered a provision of the Smith Act that made it a crime to be a member of the Communist Party. In *Scales*, Julius Irving Scales challenged a conviction under the Smith Act, which made it a felony to be a "knowing" member "in any organization which advocates the overthrow of the Government of the United States by force or violence."[127] In an effort to square the statute with constitutional protections, the trial court interpreted it very narrowly to require a showing that the defendant was an "active" member in the organization and that he acted with the specific intent of achieving the group's unlawful aims.[128] With this limiting construction in place, the trial court convicted Scales based on his membership in the Communist Party. Before the Supreme Court, he argued that the law ran afoul of the Fifth Amendment's substantive due process protection by impermissibly imputing guilt without "some concrete involvement in criminal conduct."[129]

126. Recently, Mark Noferi insightfully observed the potential relationship between *Scales*' personal guilt requirement and due process limits on vicarious liability under *Pinkerton*. Noferi, *supra* note 5, at 116–19 (providing an overview of *Scales*). His analysis, however, did not explore what this might mean for the *Pinkerton* test itself but instead focused on proposing a constitutional limit on vicarious liability beyond the *Pinkerton* limits. *See id.* at 147–52 (proposing a new due process limit on *Pinkerton* liability and discussing the concept of personal guilt). No other commentator appears to have discussed *Scales* in relation to *Pinkerton*.

127. *Scales*, 367 U.S. at 205.

128. *Id.* at 220.

129. *Id.* Scales also challenged his conviction on First Amendment grounds, arguing that the Smith Act violated his right of freedom of association. *Id.* at 228. The Court rejected Scales' First Amendment claim on similar but narrower grounds than his due process argument. *Id.* at 230. Specifically, it held that the conviction did not violate Scales' associational rights because he specifically intended to accomplish the illegal ends of the organization. *Id.* at 229. The Court began its brief First Amendment analysis with a comparison to criminal conspiracy laws. *Id.* In a typical conspiracy, "*all* knowing association with the conspiracy is a proper subject for criminal proscription as far as First Amendment liberties are concerned" because the conspiracy is "defined by its unlawful purpose." *Id.* (emphasis added). Although the Smith Act presented a different situation by reaching groups that had both legal and illegal aims, the Court found that the added "specific intent" requirement was sufficient to ensure that a "member for whom the organization is a vehicle for the advancement of legitimate aims and policies [would] not fall within the ban of the statute . . . ." *Id.* According to the Court, this limiting construction prevented the danger that the statute would impair legitimate expression and associations. *See id.* (noting the membership clause should only be construed as far as necessary to deal

Though the Court upheld Scales' conviction based on the trial court's constrained interpretation of the Smith Act, it agreed that the Due Process Clause requires a minimum level of "personal guilt" in order to impose criminal liability based on the actions of a third party.[130] This requirement is substantive, not procedural, and prohibits punishing an individual for another's acts unless she has a sufficient connection to those acts. The *Scales* Court explained that the key issue in determining whether the personal guilt requirement has been met is the relationship between the defendant's conduct and the third party's concededly illegal activity:

> when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), *that relationship must be sufficiently substantial* to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.[131]

Accordingly, the Court noted, criminal liability cannot be based on passive membership in an organization engaged in illegal activity because membership alone does not ensure a sufficiently substantial relationship between the defendant and the criminal acts.[132]

Though the Court did not spell out a precise test for determining whether the "substantial relationship" requirement has been met in a given case, it highlighted two factors in upholding Scales' conviction: knowledge of and intent to further the criminal activity and a minimum level of active involvement in working to achieve the organization's illegal ends.[133] These factors indicate that a

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with groups with illegal aims); *see also* Cole, *supra* note 20, at 218 ("Under the First Amendment [as interpreted in *Scales*], then, the 'specific intent' standard is necessary to tailor the government's regulation to the harms it may legitimately regulate and to minimize the infringement of lawful association."). Thus, under *Scales*, the right of association limits criminal penalties only insofar as they may infringe on legitimate associations. If the group is an entirely criminal enterprise, however, then its members can be punished simply for knowingly associating with it, without undercutting the First Amendment. *Scales*, 367 U.S. at 229. By contrast, the Due Process Clause personal guilt concept requires a substantial relationship between the individual and the punishable activity or acts; mere membership is not enough. *See id.* at 225 ("Membership, without more, in an organization engaged in illegal advocacy, it is now said, has not heretofore been recognized by this Court to [satisfy the requirement of personal guilt.]"). Professor David Cole offers a persuasive argument against this view of associational rights, on the theory that virtually all associations have both legal and illegal aims. *See* Cole, *supra* note 20, at 222 ("[I]t is undoubtedly the rare gang that engages exclusively in illegal behavior. Gangs also provide social activities and networks of support to their members.").

130. *Scales*, 367 U.S. at 224–25.

131. *Id.* (emphasis added).

132. *Id.* at 225.

133. *See, e.g.*, *id.* at 227 n.18 (noting that personal guilt problems in ascribing criminal acts to an organization were "certainly cured, so far as any particular

relationship between a defendant and another's criminal activity must be based on a minimally culpable mental state and a level of active assistance or influence in order for it to be sufficiently substantial for personal guilt.

As an initial matter, the *Scales* Court compared the Smith Act with conspiracy and complicity law and found that those doctrines dispel "[a]ny thought that due process puts beyond the reach of the criminal law all individual associational relationships, unless accompanied by the commission of specific acts of criminality . . . ."[134] Punishment for involvement in an associational relationship does not impermissibly constitute guilt by association, the Court explained, so long as the defendant "knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegal activities . . . ."[135] But, knowledge or intent to assist in another's illegal acts is not by itself sufficient to permit punishment. There must be something more concrete. Again, drawing from the law of conspiracy, the Court pointed to its requirement that a conspirator commit to act in furtherance of the illegal aims of the enterprise.[136] Requiring a commitment to act to help bring about the prescribed conduct prevents punishment for knowledge of illegal activity or the "mere[] . . . expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action."[137] In other words, in order to establish personal guilt for another's illegal acts, a defendant must influence or attempt to influence the illegal conduct, not just know about or sympathize with it. The *Scales* Court concluded that the trial court's interpretation of the Smith Act, which limited application to active members, satisfied this requirement.[138]

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defendant is concerned, by the requirement of proof that he knew that the *organization* engages in criminal advocacy, and that it was his purpose to further that criminal advocacy"); *id.* at 226–27 ("[W]e can perceive no reason why one who actively and knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegal activities, should be any more immune from prosecution than he to whom the organization has assigned the task of carrying out the substantive criminal act.").

134. *Id.* at 225.

135. *Id.* at 227.

136. *Id.* at 227–28 ("It may indeed be argued that such [moral] assent and encouragement do fall short of the concrete, practical impetus given to a criminal enterprise which is lent for instance by a commitment on the part of a conspirator to act in furtherance of that enterprise.").

137. *Id.* at 228.

138. *See id.* (noting that constitutional concerns "are duly met when the statute is found to reach only 'active' members having also a guilty knowledge and intent").

At first blush, one might wonder whether *Scales* mandates significantly stricter standards than *Pinkerton*'s for vicarious criminal liability: namely, intent to contribute to and actively assist each substantive offense. After all, as with liability under the Smith Act, vicarious criminal liability in any setting is "justified by reference to the relationship of . . . [a defendant's] status or conduct to other concededly criminal activity"[139] and accordingly might implicate personal guilt in the same way as in *Scales*. Of course, such strict requirements would be dramatically inconsistent not just with *Pinkerton* but also with traditional accomplice liability rules, which permitted liability for substantive crimes that a defendant knew his accomplice was likely to commit, but which he did not intend to assist.[140] A key distinction between the Smith Act and true vicarious liability, however, indicates that personal guilt is unlikely to require nearly so much in most settings.

The Smith Act, like the crime of conspiracy, punished the act of associating with others for a criminal purpose. It did not hold defendants liable for another's "specific acts of criminality,"[141] but for participating in an illegal enterprise.[142] This, of course, is not true vicarious liability. In *Scales*, the conviction was "justified by reference"[143] to others' criminal activity only in the sense that that activity is what made Scales' own act of knowing and intentional participation in the organization a crime. If the organization had not been engaged in "concededly illegal activity,"[144] then Scales' active and knowing membership would have been entirely innocent. Thus, to ensure convictions meet with personal guilt limits in a Smith Act or substantive conspiracy setting, there must be a strict requirement. Otherwise, people could be punished simply for being friends or associates with someone who turns out to have been committing crimes.

True vicarious criminal liability as it currently exists presents a related, but distinct, personal guilt problem. Rules like the *Pinkerton* doctrine, the natural and probable consequences rule of accomplice liability, and the felony murder doctrine, explicitly base criminal

139. *Id.* at 224–25.
140. *See Criminal Conspiracy*, *supra* note 10, at 995–96 (describing traditional rules of complicity and vicarious liability).
141. *Scales*, 367 U.S. at 225.
142. *See id.* at 227 n.18 ("Understood in this way, there is no great difference between a charge of being a member in a group which engages in criminal conduct and being a member of a large conspiracy, many of whose participants are unknown or not before the court.").
143. *Id.* at 224.
144. *Id.* at 225.

liability on another's actions. But, they do so only after the defendant has already intentionally become involved in a criminal enterprise. As a result, under current criminal vicarious liability rules there is already at least some punishable relationship between the defendant and the third party that commits the underlying substantive offense.[145] Needless to say, this fact does not eliminate guilt by association concerns in these settings—for example, punishing someone involved in a criminal enterprise for another member's crimes that were entirely unrelated to the enterprise would surely be impermissible—but it helps explain why stringent requirements like those imposed in *Scales* may not be required to establish personal guilt in the context of standard vicarious criminal liability. The central question is whether there is a substantial relationship between the defendant's criminal conduct or agreement and the particular substantive offense.

Before more closely examining *Pinkerton*'s limits in light of the personal guilt requirement, it is worth noting that the *Scales* Court did briefly, albeit in passing, observe the problem vicarious liability in the conspiracy setting may pose for personal guilt. Specifically, in a footnote on the law of complicity and conspiracy, the Court noted that "genuine [personal guilt] problems arise as to whether a conspirator is, by reason of his conspiracy to be considered an accomplice and therefore guilty also of the substantive offense."[146] Though the Court did not elaborate on this somewhat cryptic remark,[147] it supported the assertion by citing two authorities that had been highly critical of the expansive application of *Pinkerton*:[148] a draft of the Model Penal Code, which rejected *Pinkerton* liability entirely,[149] and a section of a *Harvard Law Review* piece that argued, among other things, that "[n]o court which has taken the *Pinkerton* approach has offered an adequate rationale for convicting a conspirator for the crimes of his associates."[150] Though this passage does not offer much help for determining how the personal guilt

145. Needless to say, a different case would arise if vicarious criminal liability were imposed without an existing criminal relationship.

146. *Id.* at 227 n.17.

147. *Id.* ("But we are solely concerned here with pointing up the accepted limits of imputation of guilt, not with exploring the problems created by the various provisions by which such imputation is effected.").

148. *See id.* (*citing* MODEL PENAL CODE 20–33 (Tentative Draft No. 1 1953)); *Criminal conspiracy*, *supra* note 10, at 993–1000.

149. *See* MODEL PENAL CODE § 2.06 cmt. (Proposed Official Draft 1962) (reaffirming that criminal liability is based on conduct, but that liability can still be applied to situations where the conduct is that of another).

150. *Criminal Conspiracy*, *supra* note 10, at 998.

requirement might apply to *Pinkerton*, it does indicate that the *Scales* Court believed that some due process constraints would apply to vicarious liability in the conspiracy setting.

As discussed above, the due process personal guilt requirement is satisfied only if there is a "sufficiently substantial" relationship between the defendant's conduct and the "other concededly criminal activity."[151] In a *Pinkerton* case, the relevant inquiry is the relationship between the defendant's agreement or participation in the conspiracy and the substantive crimes. The two factors that established this relationship in *Scales*—(1) specific intent and (2) active assistance[152]—closely track the two *Pinkerton* factors, which require a knowing agreement in combination with negligence for crimes that further the agreement and a minimum "causal" or influential link between the defendant's participation in the conspiracy and each substantive crime.[153]

Most of the courts that have interpreted *Pinkerton*'s test as a constitutional minimum have focused on the requirement that the substantive crime have been "reasonably foreseeable" to the defendant.[154] This element, in effect, sets a mens rea of negligence

151. *Scales*, 367 U.S. at 224–25.

152.

> We think, however, [the personal guilt requirement is] duly met when the statute is found to reach only "active" members having also a guilty knowledge and intent, and which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.

Id. at 228.

153. As discussed above, the *Scales* Court's requirements of knowledge, specific intent, and "significant action . . . or [a] commitment to undertake such action" in support of the concededly criminal conduct, are more stringent than the *Pinkerton* requirements. *Id.* This difference appears to be adequately explained by the fact that *Pinkerton* vicarious liability attaches only after an individual has already committed a crime by knowingly entering the conspiracy, whereas *Scales* concerns liability for entering into the forbidden association in the first instance. Of course, one might argue that personal guilt or theories of punishment warrant stricter mens rea and causation requirements in all cases. *See* Noferi, *supra* note 5, at 124–33, 147–55 (arguing that the Constitution requires an "attenuation" limit on vicarious liability under *Pinkerton*); *cf.* Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 120–40 (arguing for a stricter causation requirement in the imposition of accomplice liability); Robinson, *supra* note 10, at 638 ("Under the complicity aspect of felony murder, the *Pinkerton* doctrine, and the natural and probable consequences rule, a defendant may be held liable for an offense even though he does not satisfy the [mental state] culpability requirements of the offense."). For purposes of analyzing cases holding *Pinkerton*'s requirements to be rooted in due process, however, it is sufficient to point out that the mental and causal components of the *Pinkerton* requirements are similar in nature to the elements in *Scales*.

154. *See, e.g.*, United States v. Castaneda, 9 F.3d 761, 766–68 (9th Cir. 1993) (discussing the due process limits of *Pinkerton*).

for substantive crimes committed in furtherance of the agreement.[155] Many commentators and some courts have strongly criticized this fact and argued that negligence "is not a usual criminal law concept and surely not a concept that puts meaningful due process limits on criminal liability."[156] While the critique of negligence in the area of vicarious liability is persuasive in many ways, limiting application to crimes that were a foreseeable result of a knowing and unlawful agreement arguably has a footing in the "ancient" principle that "an actor is responsible for the unintended harms resulting from an unlawful act."[157] In any event, whether or not the Due Process Clause may possibly require more, it seems that *Scales*' personal guilt requirement, at a minimum, would require negligence with respect to others' crimes for vicarious liability.[158] If a defendant could not reasonably have foreseen that one of her co-conspirators would commit the substantive crime in furtherance of their jointly undertaken agreement, then her relationship to that crime would be at least as "tenuous"[159] as the types of links rejected in *Scales*.[160] Under a strict liability standard, a defendant could be held liable for crimes she did not in any way "aid and encourage[]"[161] and, indeed, had no reason to think would occur. If the concept of "personal guilt" and the "substantial relationship" requirement mean anything in the context of *Pinkerton*, presumably they mean that a defendant must

155. *See* United States v. Hansen, 256 F. Supp. 2d 65, 67 n.3 (D. Mass. 2003) ("'Foreseeability' is the language of negligence law."); Pauley, *supra* note 11, at 6 ("The 'reasonably foreseeable' component of the *Pinkerton* doctrine in effect imputes criminal liability for what the Model Penal Code calls negligence."). *But see* Wilkins & Steer, *supra* note 53, at 512 (arguing that it is not settled whether the reasonably foreseeable standard is an "objective of subjective" standard).

156. *See Hansen*, 256 F. Supp. 2d at 67–68 n.3; *see also* Paul Silvio Berra, Jr., *Co-Conspirator Liability under 18 U.S.C. 924(c): Is It Possible to Escape*, 1996 WIS. L. REV. 603, 630 (arguing that "the reasonable foreseeability standard is not an appropriate basis for assessing co-conspirator guilt, as it punishes for mere negligence"); *supra* note 10 (discussing the major articles on conspiracy since 1959).

157. Binder, *supra* note 3, at 73.

158. *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 136 (Oxford Univ. Press 1968) (noting that there is "a world of difference between punishing people for the harm they unintentionally but carelessly cause, and punishing them for the harm which no exercise or reasonable care on their part could have avoided").

159. Scales v. United States, 367 U.S. 203, 226 (1961) ("[T]he enquiry here must direct itself to an analysis of the relationship between the fact of membership and the underlying substantive illegal conduct, in order to determine whether that relationship is indeed too tenuous to permit its use as the basis of criminal liability.").

160. *See id.* at 228 (rejecting vicarious liability based on "merely an expression of sympathy" with another's crimes).

161. *Id.* at 227.

have some minimally culpable mental state with respect to the "other concededly criminal activity."[162]

Though courts holding that the *Pinkerton* test is rooted in due process have generally focused on its "reasonably foreseeable" prong, the "in furtherance of" requirement touches on an equally important aspect of the relationship between a defendant's conduct and the third party's crimes: actus reus and causation. In the area of vicarious liability, causation is perhaps even more closely wedded to personal guilt than mens rea[163] because it "links the actor to the [third party's act and resulting] harm."[164] Accordingly, in *Scales*, the Court required active membership to prevent against liability based on a "mere[] expression of sympathy"[165] with another's criminal acts. Of course, the "in furtherance of" standard, like "active assistance," is a far cry from true but-for causation. A defendant can be convicted under *Pinkerton* of a substantive crime that would have been committed exactly as it was without her participation.[166] Still, the "in

162. *See id.* at 225; *see also* United States v. Christian, 942 F.2d 363, 367 (6th Cir. 1991) ("The foreseeability concept underlying Pinkerton is also the main concern underlying a possible due process violation.").

163. *See* Dressler, *supra* note 153, at 103 ("Causation, then, is the instrument we employ to ensure that responsibility is personal."). Another possible account of vicarious criminal liability is as an exception to the rule that one does not have a "duty to act" to prevent a crime or harm from occurring. One might argue that by entering into a criminal agreement, an individual creates the risk that additional crimes will be committed in furtherance of that agreement and, as a result, can justly be punished for the "omission" of preventing those crimes. *Cf.* Jones v. Indiana, 43 N.E.2d 1017, 1018–19 (Ind. 1942) (defendant had a duty to rescue a woman who jumped or fell into a creek after he raped her because he created the risk that led to her death).

164. Dressler, *supra* note 153, at 103; *see* Sayre, *supra* note 55, at 702 (noting causation as a key element of "the fundamental, intensely personal, basis of criminal liability"); *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 588–89 (2d ed. 1991) ("Criminal acts done in furtherance of a conspiracy may be sufficiently dependant upon the encouragement and material support of the group as a whole to warrant treating each member as a causal agent to each act."). There is a persuasive argument that results cannot form the basis of moral blameworthiness and that culpability should be based on intentional actions that risk a harmful result. *See* Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 366 ("[T]he consequences of action cannot be fully guided and are thus not appropriate predicates for desert. Full culpability and desert are established by intentional action that risks a harmful result."). This Article, however, explores the concept of personal guilt as it relates to *Pinkerton* and a traditional understanding of vicarious liability in criminal law. Accordingly, an examination of the argument against the use of results in criminal law is beyond the scope of this Article.

165. *Scales*, 367 U.S. at 228.

166. *See* Dressler, *supra* note 153, at 102 (observing that in the area of accomplice liability, an accomplice "is accountable for the actions of the perpetrator even if the desired consequences would have occurred precisely when they did without her conduct"); Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 446–48 (2007) (explaining that "vicarious accomplices" do not causally contribute to the result of the underlying offense).

furtherance of" requirement addresses the same underlying concern as causation, despite the fact that it is less rigorous. It ensures that the defendant *influenced* or attempted to influence[167] the substantive crime. Indeed, without the "in furtherance of" requirement, a conspirator could be convicted of substantive crimes that had *no* relationship (beyond mere coincidence) to his actions. For example, returning to the hypothetical example from the beginning of this Article, if I knew that my co-conspirator enjoyed smoking marijuana, I could certainly have "reasonably foreseen" that he would purchase some during the course of planning our bank robbery, but that would not establish a relationship between our agreement and his purchase. The "in furtherance of" requirement, like the "active assistance" requirement in *Scales*, ensures there is a link between the defendant's conduct and the third party's crime not just between the defendant and the third person.

The above discussion helps to fill in some of the holes left by the courts that have held that *Pinkerton* establishes a constitutional floor for vicarious criminal liability. In *Scales*, the Supreme Court held that in order to establish personal guilt for another's actions, there must be a substantial relationship between the defendant and the third party's conduct. This substantial relationship rule clarifies why the *Pinkerton* test might provide a due process limit on vicarious criminal liability. By requiring that a defendant at least have been able to foresee that his co-conspirator would commit a particular crime to further their illegal agreement, the *Pinkerton* doctrine ties the crime to the defendant's illegal conduct—the agreement. Without these limits on liability, a person could be held liable for another's substantive crimes based exclusively on a "guilt by association" theory because conspirators could be convicted of crimes committed by one another that were entirely unrelated to the conspiracy, simply by virtue of the fact that they were co-conspirators. In short, *Scales* appears to provide a strong foundation for the consistent but often hollow string of cases finding that due process requires the *Pinkerton*

167. For example, Neal Kumar Katyal defends *Pinkerton* liability because it accounts for the influence a conspirator has in bringing about her partners' crimes. *See* Katyal, *supra* note 9, at 1372 ("[A] broad range of evidence suggests that conspirators often do influence, in profound ways, each other's behavior, not simply through their direct commands but also by their mere presence."). This relationship of influence is non-existent for crimes that are independent of, and do not further, the conspiratorial agreement. *See Pauley*, *supra* note 11, at 6 (quoting the President of the National Association of Criminal Defense Lawyers' statement that *Pinkerton* "permits the government to hold a defendant criminally liable for all reasonably foreseeable acts of co-conspirators regardless of actual knowledge, intent, or participation").

limits. More importantly for our purposes, however, this understanding of the personal guilt concept is helpful in exploring some of the ways in which that line of cases might impact other areas of criminal law if courts were to apply them seriously and consistently.

IV. VICARIOUS LIABILITY AND PERSONAL GUILT IN OTHER AREAS OF CRIMINAL LAW

Whether or not one agrees with the decisions that have found the *Pinkerton* limits to be constitutionally required, if courts that have adopted this position begin to apply it in other areas of criminal law, it could have a potentially significant impact on a wide range of areas of criminal law: from strict liability to the willful blindness doctrine. The most likely areas of impact, however, are in the context of other vicarious liability rules. This section analyzes three vicarious liability doctrines: (1) the definition of the "scope" of an agreement in conspiracy law, (2) the felony murder rule as applied to killings by co-felons, and (3) the "material support" provision of the Antiterrorism and Effective Death Penalty Act. Cases recognizing *Pinkerton* as a due process minimum pose difficult challenges in each area and indicate that important adjustments may be needed in order to be consistent with the requirement of personal guilt.

A. Scope

Determining the "scope" of a conspiracy has historically been one of the most confusing and frustrating tasks in conspiracy law.[168] Rarely is a criminal enterprise organized like a legitimate business, with clearly delineated lines and participants. And, even in cases where conspirators have readily defined roles, there is still no bright line test for determining whether a given defendant—particularly one with minimal involvement in the group—should be prosecuted as part of a single far-reaching "conspiracy" or as part of a smaller conspiratorial group.[169] The guidelines that courts have adopted to resolve these problems pre-date the rise of *Pinkerton* and were shaped

168. *See* MODEL PENAL CODE § 5.03 cmt. at 422–23 (1985) ("Much of the most perplexing litigation in conspiracy has been concerned less with the essential elements of the offense than with the scope to be accorded to a combination . . . ."); *see also* United States v. Evans, 970 F.2d 663, 668 (10th Cir. 1992) (describing the "age-old problem of what constitutes a [single] conspiracy").

169. *See* Scott v. United States, 255 F.2d 18, 20 (4th Cir. 1958) ("[I]t is not always easy to determine the proper unit for purposes of prosecution. In some instances each day's action or inaction is made a separate offense; in others a longer course of action constitutes a single offense . . . . Where to draw the line, in the absence of clear statutory delineation, presents a problem to one's judgment and sense of fairness.").

primarily by evidentiary and practical concerns[170] at a time when the scope of a conspiracy was largely irrelevant to a defendant's sentence or substantive criminal liability.[171] Cases were brought under the general federal conspiracy statute, which did not link the severity of the offense to the scope or object of the conspiracy.[172] Thus, a defendant's punishment was generally the same whether she was convicted as part of one large trial of a broadly defined conspiracy or as part of a more narrowly defined conspiracy that focused on her specific agreement.[173] Indeed, before the rise of "*Pinkerton* liability," a broadly defined conspiracy was arguably favorable to defendants because it ensured that parties to the original agreement were not charged with separate conspiracy counts "every time a new party enters or an old one withdraws."[174] Thus, when defendants objected to broadly defined conspiracies, they did so on the basis that "mass trials" of loosely connected defendants might lead to "unwarranted

170. *See* Marie E. Siesseger, Note, *Conspiracy Theory: The Use of the Conspiracy Doctrine in Times of National Crises*, 46 WM. & MARY L. REV. 1177, 1189 (2004) ("The evidentiary implications of conspiracy have been critically important in shaping the current doctrine.").

171. *See* Johnson, *supra* note 10, at 1165–66 ("From the viewpoint of the substantive criminal law, the duration and scope of a conspiratorial relationship are not of great significance. . . . Issues of scope and duration are of practical significance only as they affect the resolution of procedural questions."). As late as 1973, nearly twenty years after *Pinkerton*, this remained the case as judges generally did not set a defendant's "prison term upon so abstract a basis." *Id.*

172. *See* Blumenthal v. United States, 332 U.S. 539, 541 (1947) (noting that "[t]he charge was made pursuant to the general conspiracy statute, § 37 of the Criminal Code"); Kotteakos v. United States, 328 U.S. 750, 752 (1946) (explaining "[p]etitioners were convicted under the general conspiracy section of the Criminal Code").

173. Indeed, to this day, culpability for a conspiracy conviction itself is not linked to the object or scope of the conspiracy under the general conspiracy statute. *See* Katyal, *supra* note 9, at 1337 (noting that "conspiracy law employs a blunt punishment, such as the five-year prison term in the general federal conspiracy statute, instead of always calibrating punishment to the object of the illegal agreement"). Of course, this is changing as a number of federal conspiracy statutes now calibrate culpability to the scope of the conspiracy. *See infra* notes 209–214 and accompanying text (discussing drug sentencing under 21 U.S.C. § 846 (2000), which provides that a defendant is "subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy").

174. *See Criminal Conspiracy*, *supra* note 10, at 928 ("[T]he courts seem to be using the word conspiracy to refer not to a crime, which by definition must be an act, but rather to a group," and noting that, though defining a conspiracy with respect to a group rather than each individual's agreement is logically unsound, "[t]he effects which follow from the use of the word in that sense are not always harmful"); *see also* United States v. Braverman, 317 U.S. 49, 53 (1942) (reversing convictions on seven counts of conspiracy because "[t]he one agreement cannot be taken to be several agreements").

imputation of guilt from others' conduct" and unfair application of the relaxed hearsay and venue rules in conspiracy law.[175]

It was in this setting that the Supreme Court held that a defendant could be convicted of participating in a single conspiracy so long as he knew "the essential nature of the plan and [his] connections with it, without requiring evidence of knowledge of all its details or of the participation of others."[176] Under this practical evidentiary-based model, courts generally focus on qualities and characteristics of the group as a whole in determining a conspiracy's scope, such as the nature of the criminal activity, the number of defendants, and the extent to which the alleged co-conspirators' activity was interdependent.[177] The question of whether a particular defendant was a member of the "conspiracy" is addressed only after the conspiratorial group has been thusly defined. On this point, courts ask only whether the defendant knowingly and voluntarily became part of the group, but do not require that the defendant knew of or agreed to each of the group's aims.[178] An individual is guilty of joining a conspiracy so long as she "knew at least [its] essential objectives" and "knowingly and voluntarily became a part of it"[179]—"a person does not need to know or participate in every detail of the conspiracy, or to know all the conspiracy's members."[180] As a result, the scope of each defendant's agreement or participation can become only minimally relevant to her ultimate liability if the scope determination is used for more than procedural or practical purposes.

The rise of "*Pinkerton* liability" has dramatically changed the effect of loosely defining the scope of a conspiracy.[181] Before *Pinkerton*, the

175. *Kotteakos*, 328 U.S. at 776–77; *see Blumenthal*, 332 U.S. at 559 ("The danger rested . . . in the risk that the jury, in disregard of the court's direction, would transfer, consciously or unconsciously, the effect of the excluded admissions [from two defendants] to the other three defendants.").

176. *Blumenthal*, 332 U.S. at 557; *see id.* at 558 ("By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal.").

177. *See* DRESSLER, *supra* note 18, at 483; *see also* United States v. Evans, 970 F.2d 663, 668 (10th Cir. 1992) (noting the issue of interdependence).

178. *See* United States v. Brooks, 957 F.2d 1138, 1147 (4th Cir. 1992) ("[O]nce it has been shown that a conspiracy exists, the evidence need only establish a slight connection between the defendant and the conspiracy to support conviction.").

179. United States v. Fox, 902 F.2d 1508, 1514 (10th Cir. 1990).

180. United States v. Sophie, 900 F.2d 1064, 1080 (7th Cir. 1990); *see* United States v. Byerley, 999 F.2d 231, 234 (7th Cir. 1993) ("As long as the conspiracy continues and its goal is to achieve a common objective, it is sufficient that a party have reason to know that others were involved in the conspiracy.").

181. *Criminal Conspiracy*, *supra* note 10, at 929 ("When, however, additional criminal liability will be imposed by holding a defendant to be a member of the

scope definition primarily impacted issues like application of the co-conspirator hearsay exception and satisfaction of the overt act requirement.[182] Accordingly, the central constraint on how broadly to define a conspiracy was whether a broad definition, in combination with the use of these doctrines, prejudiced the defendant by failing to guard against "[t]he dangers of transference of guilt from one to another across the line separating conspiracies."[183] By contrast, in combination with vicarious liability under *Pinkerton*, a broadly defined conspiracy has the potential to significantly increase a defendant's *substantive* criminal liability. Nevertheless, most courts continue to treat the issue of scope as an evidentiary issue[184] and find that "a defendant may be convicted of conspiracy with little or no knowledge of the entire breadth of the criminal enterprise . . . ."[185] By broadly defining a single conspiracy, one court went so far as to hold, for example, that a defendant could be vicariously liable for substantive crimes that were committed *before* he even joined the conspiracy, so long as they were reasonably foreseeable and in furtherance of the conspiracy *as a whole*.[186] Even courts that employ a relatively measured approach to defining the scope of a conspiracy continue to hold that a defendant does not need to know the "full extent of the conspiracy"

'same' conspiracy, it seems that courts should be careful to use the word to refer to the crime of conspiracy rather than the [conspiratorial] group.").

182. *See id.* at 928–29 (discussing effect of focusing on the conspiratorial group rather than each conspirator's agreement).

183. Kotteakos v. United States, 328 U.S. 750, 774 (1946); *see id.* at 752 ("The only question is whether petitioners have suffered substantial prejudice from being convicted of a single general conspiracy by evidence which the Government admits proved not one conspiracy but some eight or more different ones of the same sort executed through a common key figure, Simon Brown."); Berger v. United States, 295 U.S. 78, 82 (1933) ("The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused.").

184. *See, e.g.*, United States v. Dicesare, 765 F.2d 890, 900 (9th Cir. 1985) ("The existence of separate conspiracies is a question of fact, not of law, to be determined by the jury.").

185. United States v. Burgos, 94 F.3d 849, 858 (4th Cir. 1996).

186. *See, e.g.*, United States v. Miranda-Ortiz, 926 F.2d 172, 178 (2nd Cir. 1991) (holding that defendant can be held liable for drug weight in a conspiracy based on the prior acts of co-conspirators if he "knew or reasonably should have known" of the acts when he joined the conspiracy). *But see* United States v. Carrascal-Olivera, 755 F.2d 1446, 1452 n.8 (11th Cir. 1985) ("The courts' refusal to extend *Pinkerton* liability for substantive criminal acts to co-conspirators who were not part of the conspiracy when the crime was completed may stem from due process concerns about vicarious guilt in attenuated circumstances."); Robert R. Arreola et al., *Federal Criminal Conspiracy*, 34 AM. CRIM. L. REV. 617, 628–29 (1997) ("In establishing liability for the conspiracy charge, the circuit courts generally find conspirator liability for *acts* committed by co-conspirators both prior to, as well as during the defendant's participation. However, a defendant cannot be held criminally liable for *substantive offenses* committed by others involved in the conspiracy before joining it or after ending participation in the conspiracy.") (emphasis added) (footnotes omitted).

and that "a general awareness" of the scope and object of the conspiracy is sufficient "to be regarded as a co-conspirator."[187] Many courts and commentators have pointed to the interplay between the scope of a conspiracy and vicarious liability in criticizing *Pinkerton*.[188] The drafters of the Model Penal Code cited this concern as one of their primary reasons for rejecting the *Pinkerton* doctrine.[189] While the application of *Pinkerton* to a broadly defined conspiracy is no doubt problematic and has the potential to lead to nearly unlimited vicarious liability in extreme circumstances,[190] critics and courts alike have taken as a given that the scope of the conspiracy determination is the same for purposes of applying *Pinkerton* as it is for the evidentiary and practical trial issues that shaped the scope doctrine.[191]

If *Pinkerton*'s two-part test is a constitutionally based limit, however, then it would seem to require courts to take significantly more care in defining the scope of a conspiracy. Basing vicarious liability on the scope of the conspiracy as a whole is at odds with the constitutional view of *Pinkerton* because it eliminates the relationship between the defendant's acts or agreement and the third party's substantive offense from the analytical equation. By focusing on the "scope" of the conspiracy overall, a defendant may be held liable for substantive offenses he could not have reasonably foreseen and that were not done in furtherance of his agreement based entirely on the size of the amorphous "scope" of the conspiracy. In these circumstances, a defendant's liability for other's acts will depend on an ex-post characterization of the group he joined, rather than whether his

187. United States v. Evans, 970 F.2d 663, 669–70 (10th Cir. 1992) (citations omitted); *see id.* at 674 ("[W]e must be particularly vigilant when the government seeks to bring many individuals under the umbrella of a single conspiracy.").

188. *See, e.g.*, Robinson, *supra* note 10, at 635 ("The *Pinkerton* doctrine has been used to hold an actor liable for a series of abortions performed without her knowledge by a doctor to whom she had on other occasions referred women for abortions."); *see also* United States v. Hansen, 256 F. Supp. 2d 65, 67–68 n.3 (D. Mass. 2003) ("Yet one must wonder where the outer limits of accomplice liability [under *Pinkerton*] lie. If a person merely had loaned the robbers a ski mask that was then used in the robbery, could he or she likewise be held responsible for murder?").

189. *See* MODEL PENAL CODE § 2.06 cmt. at 307 (1985) (stating the law "lose[s] all sense of just proportion if simply because of the conspiracy itself each [conspirator is] held accountable for thousands of additional offenses of which he was completely unaware and which he did not influence at all").

190. *See, e.g.*, Siesseger, *supra* note 170, at 1204 (noting that, in the context of a post-9/11 terrorism case, the government "broadly characterized" a conspiracy as "al Qaeda's conspiracy to attack the United States") (quotations and citations omitted). For an insightful and illuminating analysis of some of the problems posed by broadly defined scope in terrorism prosecutions see Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 469–74 (2007) (discussing prosecutions defining the scope of a conspiracy as the global jihad movement).

191. *See supra* Part I (discussing the rise of the two-part *Pinkerton* test).

conduct or agreement was actually linked to those additional crimes.[192] If the due process view of *Pinkerton* is meant to protect personal guilt, rather than set arbitrary limits tied to a court's evidentiary characterization of the breadth of a conspiracy, the current, imprecise approach to scope is terribly problematic.

The well-known case *Anderson v. Superior Court*,[193] frequently cited by *Pinkerton* critics as an example of how a broad application of the doctrine can result in potentially unbounded vicarious liability,[194] helps illustrate how basing vicarious liability on the scope of the conspiracy, rather than the defendant's conduct, is inconsistent with *Pinkerton* as a due process limit. The defendant in *Anderson* referred pregnant women who were seeking an abortion to a doctor in exchange for a fee for each woman on whom he performed the procedure.[195] The doctor had a similar arrangement with sixteen other individuals and all were jointly indicted for conspiracy as well as, vicariously, for every abortion performed by the doctor.[196] Anderson challenged her indictment on the ground that each agreement between the doctor and the referring party was a separate conspiracy.[197] The court rejected this claim and held that there was a single conspiracy, likening it to a business with a "common design" in which each party plays a role in an ongoing enterprise.[198] Accordingly, it found that Anderson could be held vicariously liable for *all* of the abortions performed in furtherance of the conspiracy, including abortions based on referrals by other defendants in which she played no part.[199]

The result in *Anderson* demonstrates how applying *Pinkerton* based on a court's definition of a conspiracy, rather than each defendant's individual agreement or actions, can divorce liability from personal guilt. First, though the defendant may have been able to foresee that

192. *See supra* Part III (discussing the personal guilt requirement that there be a substantial relationship between a defendant's conduct or agreement and the third parties substantive crimes).

193. 177 P.2d 315 (1947) (limiting vicarious liability for the substantive offenses of co-conspirators to crimes committed after the defendant joined the conspiracy), *overruled in part by* People v. Weiss, 327 P.2d 527, 545 (1958).

194. *See, e.g.*, Johnson, *supra* note 10, at 1147 (criticizing *Anderson* as an example of "the tendency of courts to regard a conspiracy as an ongoing business relationship of indefinite scope and duration" in applying vicarious liability in a conspiracy); Robinson, *supra* note 10, at 635 (describing the case as one "where the defendants' causal connection to the harm is tenuous at best").

195. *Anderson*, 177 P.2d at 315–16.

196. *Id.* at 315.

197. *Id.* at 316.

198. *Id.*

199. *Id.* at 316–17.

the doctor was performing other abortions in general,[200] there is no indication she could have foreseen the extent of his business or any particular abortion apart from the ones that resulted from her referrals. By holding her liable for all of the doctor's abortions based on the scope of the "conspiracy" defined from the perspective of its ringleader, the doctor, the court in effect made the defendant strictly liable for the size of the operation without regard to what may have been foreseeable to her. If *Pinkerton* is a constitutional floor based on personal guilt, however, the inquiry must focus on what was reasonably foreseeable to each defendant. Similarly, and perhaps more importantly in this case, the defendant's actions did not have a causal relationship with any of the abortions that resulted from referrals by other women.[201] Those abortions may have furthered the broadly defined "conspiracy" from the perspective of the doctor, but had at most a "tenuous," circumstantial relationship with the defendant's agreement and conduct.[202] Anderson did not directly benefit from, or contribute to, the abortions resulting from referrals to the doctor by other women. Her only connection to them was her association with the doctor in general, but personal guilt requires a substantial relationship between her *agreement* and the substantive offense.

In short, as the drafters of the Model Penal Code observed, applying the *Pinkerton* test to a broadly defined conspiracy, without regard to each defendant's knowledge of the breadth of the conspiracy, separates vicarious liability from a defendant's culpability and makes him strictly liable for potentially "thousands of additional offenses of which he was completely unaware and which he did not influence at all."[203] Unless vicarious liability under *Pinkerton* is limited to substantive offenses that were reasonably foreseeable and in furtherance of each defendant's conspiratorial agreement or

200. *See id.* at 317 ("The inference is almost compelled, if the evidence is believed, that this petitioner knew that Stern was engaged in the commission of abortions not casually but as a regular business and that others, like herself, had conspired with him to further his operations.").

201. *See supra* Part III (discussing causal relationship).

202. Scales v. United States, 367 U.S. 203, 226 (1961) ("[T]he enquiry here must direct itself to an analysis of the relationship between the fact of membership and the underlying substantive illegal conduct, in order to determine whether that relationship is indeed too tenuous to permit its use as the basis of criminal liability."). This is not to say that the abortions were *entirely* unrelated as, arguably, by participating in the conspiracy, the defendant helped sustain the doctor's business, which in turn helped make the other abortions possible, but this attenuated relationship is far from the substantial relationship between the substantive crime and the defendant's conduct necessary to satisfy personal guilt under *Scales*.

203. MODEL PENAL CODE § 2.06 cmt. at 307 (1985).

participation, the evidentiary and practical inquiry into the scope of the conspiracy will improperly dictate substantive liability. This result is far from the narrow category of vicarious liability at issue in *Pinkerton*, where the substantive offenses were the actual object of the defendant's conspiratorial agreement.[204] More importantly, it is incompatible with the practice of treating *Pinkerton* as a due process floor based in personal guilt. It would be meaningless to speak of *Pinkerton* as a constitutionally based rule if vicarious liability under its test depends on a court's arbitrary definition of a "conspiracy" from its ringleader's view rather than the defendant's agreement. Indeed, the notion of *Pinkerton* as a due process-based test only makes sense if it focuses on the relationship between the defendant's actual agreement or conduct and the substantive offense.

One might argue that a broadly defined conspiracy still ensures there is a minimum link between the defendant and each substantive offense in as much as each offense was reasonably foreseeable and in furtherance of the broader conspiracy of which the defendant was a part. But this claim misses the mark. Premising vicarious liability on the defendant's association alone is the precise "guilt by association" approach that the personal guilt concept forbids. If *A*'s only connection to *C*'s crimes is that she had an illegal agreement with *B*, who simultaneously had a similar illegal agreement with *C*, the only relationship between *A* and *C*'s crimes is *A*'s remote association with *C*. This is not to say that because *A* and *C* never met and did not know of each other *A* could never be liable for *C*'s crimes. There must, however, be a substantial relationship between *A*'s agreement and *C*'s criminal conduct in order for *A* to be vicariously liable, not merely an independently punishable association between *A* and *B*, who is separately linked to *C*.

Though the practice of broadly defining a conspiracy is perhaps most problematic when it is used as the launching point for determining vicarious liability for additional substantive crimes, it can also lead to strict vicarious liability for a conspiracy charge itself under statutes that link liability to the scope or object of the illegal agreement. As noted above, the law of determining the scope of a conspiracy developed at a time when, "[f]rom the viewpoint of substantive criminal law, the duration and scope of a conspiratorial relationship [were] not of great significance" and instead were important "only as they affect[ed] the resolution of procedural

204. *See supra* Part I (discussing how the liability at issue in *Pinkerton* was much narrower than the doctrine as it is currently applied).

questions."[205] This remains largely true to this day under federal law[206] with respect to liability for the conspiracy offense itself. The general federal conspiracy statute provides for a standard maximum five-year prison term for any offense regardless of the object or scope of the conspiracy, unless the object of the conspiracy is a misdemeanor, in which case the maximum term is tied to the object of the offense.[207] There are, however, a handful of key federal statutes that have abandoned this approach by tying a defendant's sentence for a conspiracy conviction to the object of the conspiracy.[208]

Perhaps the most frequently employed statute in this category is the drug conspiracy statute, which bases the maximum sentence for a conspiracy conviction on the weight of the drugs that were the object of the conspiracy.[209] Circuit courts are currently split over the question of how to calculate drug weight under the conspiracy statute.[210] The debate has recently gained renewed energy in the wake of cases following *Apprendi v. New Jersey*,[211] which established that juries, not judges, must determine drug quantity as an element of a conspiracy conviction under the federal drug conspiracy statute.[212]

205. Johnson, *supra* note 10, at 1165–66.

206. The Model Penal Code, by contrast, generally grades punishment for the conspiracy the same as for the object of the offense. MODEL PENAL CODE § 5.05(1) (1985). However, the Model Penal Code also "excludes from an agreement's objectives any consequences that are not actually desired by the conspirators" and rejects *Pinkerton* liability. Patrick A. Broderick, *Conditional Objectives of Conspiracies*, 94 YALE L.J. 895, 903 (1985). An analysis of how the constitutional dimensions of *Pinkerton* might impact the Model Penal Code's approach to the definition of a conspiracy's object is beyond the scope of this Article.

207. 18 U.S.C. § 371 (2000).

208. *See, e.g.*, 18 U.S.C. § 1956(h) (2000) ("Any person who conspires to commit any [money laundering] offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."); Whitfield v. United States, 543 U.S. 209, 212–14 (2005) (discussing statutes that specify conspiracy liability for particular offenses as opposed to the general conspiracy statute).

209. *See* 21 U.S.C. § 841 (2000) (setting forth statutory maximum sentences for offenses based on drug weights); *see also* 21 U.S.C. § 846 (2000) (providing that individuals convicted are "subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy"); United States v. Collins, 415 F.3d 304, 311–12 (4th Cir. 2005) (explaining the relationship between §§ 846 and 841).

210. *Infra* notes 213–214and accompanying text.

211. 530 U.S. 466 (2000).

212. *Id.* at 490. In *Apprendi*, the Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Before *Apprendi*, the standard practice was for the district court to determine drug quantity for purposes of applying 21 U.S.C. § 841 and the sentencing guidelines simultaneously. Following *Apprendi*, however, courts have held that the jury, rather than the district court, must make the drug quantity determination under § 841. *E.g.*, United States v. Promise, 255 F.3d 150 (4th Cir. 2001). In *Promise*, the court stated, "*Apprendi* dictates that in order to authorize the imposition of a sentence exceeding the maximum allowable

Some courts hold that drug weight must be calculated based on the amount that was reasonably foreseeable and within the scope of each defendant's agreement, consistent with the approach taken by the federal sentencing guidelines.[213] Others, however, have found that the relevant quantity is the amount of drugs attributable to the conspiracy as a whole.[214]

Courts on both sides of this issue have treated the question purely as a matter of statutory interpretation,[215] but if *Pinkerton*'s test is rooted in due process, there may be a constitutional basis for calculating drug quantity for each defendant rather than the conspiracy as a whole. One proponent of applying the drug conspiracy provision based on the scope of the entire conspiracy, Judge Niemeyer of the Fourth Circuit, recently argued in a dissenting opinion that an individualized approach would "systematically undermine[] the deterrent effects of the federal drug laws."[216] Specifically, he claimed that if "the punishment relates only to the extent of the harm *foreseeable* to the individual, not the extent of the harm the conspiracy actually poses," conspiratorial conduct would go "underpunish[ed]."[217] Judge Niemeyer's argument, however, reveals

without a jury finding of a specific threshold drug quantity, the specific threshold quantity must be treated as an element of an aggravated drug trafficking offense, i.e., charged in the indictment and proved to the jury beyond a reasonable doubt." *Id.* at 156–57 (footnotes omitted); *see also Collins*, 415 F.3d at 312–14 (reassessing the method for calculating drug weight for purposes of § 846 in light of *Apprendi*).

213. *See, e.g.*, *Collins*, 415 F.3d at 314 (finding that "the jury must determine what amount of cocaine base [is] attributable to [a defendant] using *Pinkerton* principles"); United States v. Banuelos, 322 F.3d 700, 704–05 (9th Cir. 2003) (requiring threshold drug quantity in conspiracy cases to be individualized by the jury using *Pinkerton*).

214. *See, e.g.*, United States v. Stiger, 413 F.3d 1185, 1192–93 (10th Cir. 2005) (citing *Derman v. United States*, 298 F.3d 34 (1st Cir. 2002), for the proposition that the finding of the amount of drugs for the conspiracy establishes the maximum sentence for the conspirators); Derman v. United States, 298 F.3d 34, 42–43 (1st Cir. 2002) (holding that a jury should determine the quantity of drugs attributable to a conspiracy as a whole and then the district court should determine the amount attributable to each defendant in applying the sentencing guidelines).

215. *See, e.g.*, United States v. Irvin, 2 F.3d 72, 78 (4th Cir. 1993) ("[I]n order to apply § 841(b) properly, a district court must first apply the principles of *Pinkerton* as set forth in the relevant conduct section of the sentencing guidelines . . . to determine the quantity of narcotics reasonably foreseeable to each co-conspirator within the scope of his agreement.").

216. United States v. Ferguson, No. 05-4460, 2007 U.S. App. LEXIS 18831, at *33 (4th Cir. Aug. 8, 2007) (Niemeyer, J., dissenting).

217. *Id.* With respect to deterrence, Judge Niemeyer curiously argued that calculating drug quantity for each co-conspirator would "allow conspiracies to decrease their exposure by compartmentalizing their operations, segmenting responsibilities, and otherwise keeping members from knowing the full extent of the conspiracy." *Id.* at *33–34. As Professor Katyal has noted, however, one of the chief utilitarian aims and benefits of conspiracy law is to "reduce[] the efficiency of criminal enterprises and combat[] group identity by creating incentives for members

exactly why basing culpability on a broadly defined conspiracy is problematic under the due process view of *Pinkerton*. Under his approach, a defendant would be held strictly liable for the scope of the conspiracy as a whole, without regard to what was "foreseeable" to him or whether his actions influenced others' conduct. In the case of a completed conspiracy, this method would effectively supplant *Pinkerton*'s test for substantive drug offenses, as any drug offense committed by a co-conspirator would be subsumed into the determination of the "scope" of the conspiracy. The impact in the case of an uncompleted conspiracy would be even more pernicious, as it would expand a defendant's criminal liability based on nothing more than the mere *agreements* of other members in the broadly defined conspiracy.

To be sure, *Pinkerton*'s test may be an imperfect fit when determining the scope of uncompleted conspiracies.[218] If a drug conspiracy has not yet distributed any drugs, for example, it is difficult to say which particular acts of distribution contemplated by other conspirators are "reasonably foreseeable" or "in furtherance" of the defendant's agreement. However, this fact weighs in favor of limiting the relevant scope of the conspiracy to the defendant's actual agreement, for convictions under statutes that base the severity of punishment on the scope determination. As an inchoate crime, the "gravamen of conspiracy is [the] agreement to commit a crime or series of crimes"[219] and it is difficult to see how a defendant can be said to have agreed to illegal conduct about which he was completely unaware (much less, conduct that he could not even have foreseen).[220] Under traditional conspiracy statutes, which provide for a single maximum penalty regardless of the scope or object of the conspiracy, a broadly defined conspiracy may be permissible as the most efficient and sensible method for prosecuting the participants. But, where the extent of criminal liability is linked to the definition of the scope of the agreement, *any* expansion beyond each defendant's

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of organizations not to share information with each other." Katyal, *supra* note 9, at 1353.

218. *Ferguson*, 2007 U.S. App. LEXIS 18331, at *33 ("Because drug quantity must often be calculated on a forward-looking basis in conspiracy cases, the jury must evaluate that quantity based on the scope of the conspiratorial agreement and could not undertake the [*Pinkerton*] inquiry required by *Collins*.").

219. *Id.* at *22.

220. *See Criminal Conspiracy*, *supra* note 10, at 928 (footnote omitted) ("Courts generally consider that a person who joins an existing criminal group becomes a party to the same conspiracy. But if a conspiracy consists of the continuing act of the agreement, it is difficult to see how this can be so, since the act of agreement in which an individual participates cannot logically begin before he enters or continue after he leaves.").

agreement would seem to improperly enlarge the agreement, as a matter of statutory interpretation.[221] In any event, as a matter of personal guilt under the Due Process Clause, a defendant should at least be able to reasonably foresee the extent of that to which he is agreeing.

In sum, imposing additional criminal liability by reference to the broadly defined scope of a conspiracy relates to the same concerns under the personal guilt requirement as the *Pinkerton* test itself. If the Due Process Clause limits vicarious liability, in accordance with *Pinkerton*, the limit only makes sense as a means of ensuring a minimally substantial relationship between the defendant's conduct and the conduct of others. But if individuals can be held liable for crimes and acts that they did not foresee and did not influence, based entirely on an abstract post-hoc definition of the conspiracy as a whole, liability would be divorced from personal guilt. Indeed, it would be strange to speak of a "due process" limit that constrained liability based on arbitrary factors, like a court's determination of how broadly evidentiary and practical considerations permit a conspiracy to be defined. Thus, if *Pinkerton*'s test is indeed a constitutional minimum, it would only seem to be a coherent one if it similarly limits the definition of the scope of a conspiracy in instances where the determination will lead to additional criminal liability. To ensure a substantial relationship between the defendant's conduct and his co-conspirator's actions, courts should require a particularized determination of the scope of each defendant's agreement and participation in any situation where additional criminal liability is imposed on a defendant based on the "scope" definition.

B. Felony Murder

Perhaps the area of law that first comes to mind as potentially inconsistent with *Pinkerton*'s test as a due process minimum for vicarious liability is the felony murder rule. The parallels between the two doctrines are especially strong when the felony murder rule is employed based on another person's acts (whether a co-felon's or

221. United States v. Feola, 420 U.S. 671 (1975). Indeed, *Feola* indicates that this result is required where the scope or object of the conspiracy might affect a defendant's substantive liability. *Id.* at 695. The Court explained that "the knowledge of the parties is relevant to the same issues and to the same extent as it may be for conviction of the substantive offense." *Id.* The Court also stated that its "decisions establish that in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself." *Id.* at 686.

those of a person unaffiliated with the felony).[222] Under the classic formulation, the felony murder doctrine began as a harsh common law rule that "declare[d] that one is guilty of murder if death results from conduct during the commission or attempted commission of any felony" and thus "operated to impose liability for murder based on . . . strict liability."[223] Recently, in a persuasive and exhaustively researched article, Professor Guyora Binder argued that the "harsh 'common law' felony murder rule" premised on strict liability is "a myth"[224] and that "the felony murder rule eventually adopted in England was at least as mild as the 'reformed' law of felony murder prevailing in contemporary America."[225] Indeed, Professor Binder's research indicates that the English common law and early American approach was likely *more* protective of linking murder liability to each individual's culpability than the current approach.[226] In any event, today, most modern felony murder statutes limit liability to deaths

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> A defendant may be convicted of felony murder for a death caused by himself or another when the death occurs during the commission of one of a number of specified felonies, even if neither the defendant nor his confederate had any intent to kill. Under the *Pinkerton* doctrine, however, a defendant may not be convicted of murder unless one of his criminal associates, acting foreseeably and in furtherance of the conspiracy, caused the victim's death with the intent to do so.

State v. Diaz, 679 A.2d 902, 911 (Conn. 1996). Robinson discusses similar theoretical justifications for *Pinkerton* and felony murder accomplice liability. Robinson, *supra* note 10, at 665–68. For an example of liability under the felony murder doctrine for the acts of someone who was not a co-felon, see *People v. Hickman*, 297 N.E.2d 582 (Ill. App. Ct. 1973). *Hickman* held that defendants could be held liable under the felony murder rule where they attempted to burglarize a liquor warehouse after hours, fled after being seen by the police, and during the ensuing foot-chase one police officer shot and killed another police officer after mistaking the officer for one of the defendants. *Id.* at 583, 586.

223. *See* MODEL PENAL CODE § 210.2 cmt. 6, at 30–31 (1980); *see also* People v. Stamp, 82 Cal. Rptr. 598, 603 (Cal. Ct. App. 1969) ("The doctrine is not limited to those deaths which are foreseeable. Rather a felon is held strictly liable for *all* killings committed by him or his accomplices in the course of the felony.") (citations omitted); Pauley, *supra* note 11, at 37 ("It is, of course, true that, in its strict common-law form, felony murder is based on strict liability, not on negligence."). *See generally* Binder, *supra* note 3, at 60–62 (describing the traditional account of the felony murder doctrine).

224. Binder, *supra* note 3, at 63.

225. *Id.* at 64.

226. *Compare id.* ("Prior to the American Revolution, English courts had gone no further than to impose murder liability on persons who (1) mistakenly killed one person in an attempt to kill or wound another; (2) killed while defending themselves against resistance to a crime; or (3) agreed with others to kill or wound for a criminal purpose, one of whom then killed for that purpose."), *and id.* at 65-66 (noting that early American courts "usually required that felons kill their victims by intentionally battering them or by engaging in some destructive act manifestly dangerous to life, such as deliberately wrecking a train"), *with Stamp*, 82 Cal. Rptr. at 603 (explaining that the felony murder rule is a strict liability rule and it does not matter whether "the death was a natural or probable consequence" of the felony).

that result from the commission of an enumerated felony or an inherently dangerous felony; many others restrict the doctrine to deaths that result from the act of a co-felon.[227] Within these restrictions, however, courts generally hold that the rule applies to completely accidental deaths and thus "authorizes strict liability for a death that results from commission of a felony."[228] Accordingly, felony murder, as applied in many states, may permit liability that is inconsistent with the due process concept of personal guilt.

In the California case *People v. Fuller*,[229] for example, an officer observed two men in the lot of a car dealership rolling two tires apiece toward a Plymouth early on a Sunday morning.[230] As the officer drove past the Plymouth, the men got inside and quickly took off.[231] A high-speed chase ensued, which ended when the Plymouth ran a red light and collided with another vehicle, killing its driver.[232] An investigation revealed that the men had forcibly entered four locked Dodge vans at the car lot and removed the spare tires from each.[233] They were both charged with burglary and felony murder.[234] Burglary was an enumerated felony under California's first degree felony murder statute, but the defendants argued that the law should not apply in the case of flight from a burglary that was not itself dangerous.[235] The court held that the plain language of the statute permitted prosecution of the both defendants for first degree felony murder.[236] However, the court went on to discuss what it called "the irrationality of applying the felony murder rule in the present case."[237] The court explained that applying the felony murder rule for all deaths occurring during a set of enumerated crimes was too broad and encompassed felonies, like the one in *Fuller*, that were not actually dangerous.[238] As the court noted, the defendants committed

227. *See, e.g.*, State v. Canola, 374 A.2d 20, 23, 30 (N.J. 1977) (citing supporting cases and agreeing that felony murder "does not extend to a killing, although growing out of the commission of the felony, if directly attributable to the act of one other than the defendant or those associated with him in the unlawful enterprise"). *But see Hickman*, 297 N.E.2d at 586 (holding that defendants could be held liable under felony murder rule where the killing was by a police officer who shot and killed another police officer after mistaking the officer for one of the defendants).
228. DRESSLER, *supra* note 18, at 557.
229. 150 Cal. Rptr. 515 (Cal. Ct. App. 1978).
230. *Id.* at 516.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.* at 517.
236. *Id.*
237. *Id.* at 518.
238. *Id.* at 518–20.

the burglary unarmed, on a Sunday morning when the dealership was closed, and there was no sign they expected to use violence during the crime.[239] In other words, the death was hardly a foreseeable result of the defendants' planned burglary.[240]

Though the *Fuller* court did not address the issue of vicarious liability, its decision is particularly problematic for the co-felon who was not driving the vehicle. The driver of the car was recklessly driving the Plymouth when he collided with the oncoming car and killed its driver, but his co-felon could have been prosecuted under the felony murder rule even if he had not been involved in the getaway.[241] This point was highlighted in a subsequent California case, *People v. Thongvilay*,[242] where, on similar facts, two defendants were convicted of felony murder.[243] The defendants argued that the death did not occur during the commission of the burglary because the car chase took place after they had already left the scene and reached a place of relative safety.[244] The majority rejected this claim and upheld the defendants' conviction.[245] However, a dissenting judge observed the particularly troublesome impact of applying the felony murder rule to the non-driver co-felon. "The [State], however," the judge explained,

> chose to prosecute this case only on a first-degree felony murder theory, presumably because that was the only homicide theory that would also include the passenger . . . . Because he had no control over the car in which he was riding as a passenger, to hold [him] responsible for first-degree felony murder based on his

239. *Id.* at 519.

240. *Id.* at 519–20 (observing that "treating the flight as part of the burglary to bootstrap the entire transaction into one inherently dangerous to human life simply begs the issue; flight from the scene of any crime is inherently dangerous").

241. *Id.* at 520–21 (noting in dicta that the defendants could be prosecuted for second degree murder). Though the *Fuller* court did not differentiate the driver and passenger in its discussion of the second degree murder issue—likely because the defendants did not raise any argument with respect to second degree murder—the passenger could not have been prosecuted individually for second degree murder. *See* People v. Thongvilay, 72 Cal. Rptr. 2d 738 (Cal. Ct. App. 1998).

242. 72 Cal. Rptr. 2d 738.

243. *Id.* at 741. In *Thongvilay*, the two defendants stole a car radio and were pursued by the boyfriend of the owner of the burglarized car. The defendants drove through a red light attempting to elude the boyfriend and ran into another car, killing its driver. *Id.*

244. *Id.* at 750 (McKinster, J., dissenting) (explaining that although only a few minutes separated the defendants from the commission of the burglary and the chase by the boyfriend, it was sufficient to sever the burglary from the car crash).

245. *Id.* at 743 (majority opinion).

> participation in a felony that is not inherently dangerous is a manifest injustice.[246]

Fuller and *Thongvilay* demonstrate the potential, even under prevailing constraints on the felony murder rule, for a co-felon to be held vicariously liable for a death that was not reasonably foreseeable to him. If *Pinkerton*'s test is the constitutional minimum for vicarious liability in a conspiracy, it is difficult to see why it should not also require reasonable foreseeability for vicarious felony murder liability. One might argue that the felony murder doctrine is inherently more constrained than *Pinkerton* because a felony is usually more limited in duration and number of participants than a conspiracy. While this fact undoubtedly accounts for the relatively small number of instances where felony murder is imposed for a killing that was not foreseeable, it does not ensure a connection between the personal guilt of each felon and the resulting death in every case. The *Pinkerton* test and *Scales*' personal guilt requirement are concerned with constraining the relationship between the individual's actions and the wrongful act with which they are vicariously charged. The smaller number of participants and shorter time period in a felony may limit the reach of felony murder overall, but these limits, like the enumerated felony limitation, are ultimately arbitrary from the perspective of personal guilt. They do not prevent accomplices from being held strictly liable for accidental and unforeseeable deaths that were caused by others in all instances.

A related and more persuasive argument is that what felony murder lacks in the way of limits based on foreseeability, it makes up for in the area of causation. The felony murder rule generally requires a causal relationship between the felony and resulting death.[247] For example, in *King v. Commonwealth*,[248] King and his accomplice, Bailey, were flying an airplane containing over 500 pounds of marijuana through thick fog when the plane crashed into a mountain, killing Bailey.[249] King was convicted of felony murder for Bailey's death but the Virginia Court of Appeals reversed, finding that the death had not been caused by the felony.[250] Though the court acknowledged that King and Bailey were only flying the

246. *See id.* at 752 (McKinster, J., dissenting); *see also id.* (noting that "[a]s to [the driver], the evidence might support a second degree murder conviction on an implied malice theory and clearly supports a vehicular manslaughter charge").
247. *See* DRESSLER, *supra* note 18, at 567 ("There must also be a causal relationship between the felony and the homicide.").
248. 368 S.E.2d 704 (Va. Ct. App. 1988).
249. *Id.* at 705.
250. *Id.*

airplane as part of their felonious activity, it found that the accident itself "stemmed not from the possession or distribution of drugs, but from fog, low cloud cover, pilot error, and inexperience."[251] Unlike cases involving accidental deaths during flight from a felony, there was no indication that King and Bailey were flying recklessly to avoid detection and, accordingly, the causation requirement was not satisfied.[252] It is worth noting that this causal requirement is analyzed based on the felony generally rather than each felon's participation, and that rules like the flight doctrine expand the causal reach beyond the felony itself.[253] Still, even in flight cases, the causation requirement in felony murder seems at least as robust as *Pinkerton*'s "in furtherance of" requirement in limiting liability. In *Fuller*, for example, the reckless getaway was the direct result of the burglary and certainly furthered the pair's efforts to complete the crime without being caught.[254] To be sure, the death may have occurred even without the passenger's participation in the felony, but the same is true of vicarious liability under *Pinkerton* and *Scales*. Personal guilt under *Scales* does not require but-for causation; so long as the defendant influenced or attempted to influence the crime, the "causal" relationship between the defendant and the third party's crime will be satisfied.

Though the "causal" link in felony murder seems at least as strong as under *Pinkerton*, it is unlikely that this fact alone could save broad applications of felony murder under the view that *Pinkerton*'s vicarious liability limits are rooted in due process. As discussed above, most courts that have held the *Pinkerton* test to be a constitutional floor have focused on the foreseeability prong. As the Sixth Circuit put it, "[t]he foreseeability concept underlying *Pinkerton* is also the main concern underlying a possible due process violation."[255] The effect is to forbid liability where a third party unilaterally takes unusual measures to "further" the group's goals. This result makes sense from the perspective of personal guilt. Without this limit, vicarious liability would depend on a co-felon or co-conspirator's quirky behavior rather than a relationship to the defendant's own wrongful conduct and state of mind. Accordingly,

251. *Id.* at 707–08.
252. *Id.* ("Had the plane been flying low or recklessly to avoid detection, for example, the crash would be a consequence or action which was directly intended to further the felony and a different result might obtain.").
253. *C.f.* People v. Fuller, 150 Cal. Rptr. 515, 519–20 (Cal. Ct. App. 1978) ("[F]light from the scene of any crime is inherently dangerous.").
254. *Id.* at 516, 521.
255. United States v. Christian, 942 F.2d 363, 367 (6th Cir. 1991).

though in most felony murder cases there may be a sufficient relationship between each felon's personal guilt and the resulting death, the relatively small number of vicarious felony murder convictions that are based on strict liability and involve purely accidental unforeseeable deaths[256] seem irreconcilable with *Pinkerton*'s due process limits.

Of course, this does not necessarily mean that vicarious liability for unforeseeable deaths under the felony murder doctrine is unconstitutional. One might argue that a conflict between *Pinkerton* liability and felony murder only indicates that it is erroneous for courts to treat the *Pinkerton* test as a due process floor for vicarious liability. After all, felony murder has been around much longer than *Pinkerton* and, under the traditional account of the felony murder rule, it is said to been have applied even more broadly at common law. While this Article leaves for another day the question of what limits, if any, on vicarious criminal liability are deeply rooted in this nation's history and traditions,[257] it is worth noting that Professor Binder's revisionist account of the felony murder rule indicates its application to accomplices at common law and in early American law was as constrained, if not more, than *Pinkerton* liability. His review of nineteenth century American cases where vicarious liability was imposed under the felony murder rule revealed that all but one case involved instances where either "(1) some cofelons participate[d] in a violent assault but [did] not all strike a fatal blow; [or] (2) some cofelons participate[d] in a felony necessarily involving violence or the imposition of risk [of death], but [did] not personally participate in the fatal violence."[258] In other words, early American courts generally limited felony murder liability for accomplices to those "participating in felonies foreseeably involving acts of violence that resulted in death."[259] Thus, though the argument that the

256. *See, e.g.*, Hickman v. Commonwealth, 398 S.E.2d 698, 699 (Va. Ct. App. 1990) (upholding a defendant's felony murder conviction for an accidental death based on the felony of aiding and abetting cocaine possession by placing cocaine onto a mirror).

257. *See* Montana v. Egelhoff, 518 U.S. 37, 43 (1996) (plurality opinion) (noting that a state's ability to carry out and define crimes "is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental") (citations and internal quotations omitted).

258. Binder, *supra* note 3, at 199–200; *see id.* at 200 (noting all but one case fell into one of these two categories).

259. *Id.* at 201. The common law approach to vicarious liability for felony murder appeared to be even more limited. According to Binder, one early English case that found vicarious murder liability was limited by requirements that

> (1) the abettor must know of the malicious design of the party killing, (2) the killing must be in pursuance of that unlawful act, and not collateral

Constitution permits broader vicarious liability may ultimately carry the day, the early history of the felony murder rule does not appear to undercut the courts that have held that *Pinkerton*'s limits are required by due process.[260]

C. The Antiterrorism and Effective Death Penalty Act

An understanding of the constitutional dimensions of *Pinkerton* also sheds new light on the most recent line of cases to draw directly upon the due process personal guilt requirement. A provision of the Antiterrorism and Effective Death Penalty Act ("AEDPA") makes it a crime to knowingly provide "material support" to a designated "foreign terrorist organization."[261] A person convicted of violating the provision is subject to a maximum sentence of fifteen years, but the penalty is raised to a maximum life term "if the death of any person results."[262] Though the law has been in effect since 1996, before September 11, 2001, the government only brought a handful of charges under it.[263] Since then, the government has aggressively employed the law and included an AEDPA "material support" charge in "virtually every criminal 'terrorism' case that [it] has filed."[264] Critics of the provision have argued that it is unconstitutional in a

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> to it, (3) the unlawful act ought to be *deliberate*, and (4) it ought to be such an act as may tend to the hurt of another either, immediately, or by necessary consequence.

Id. at 88–89. (quotations and citations omitted). Binder also discusses how early felony murder cases "conditioned its application on some form of culpability," such as a requirement that each defendant actually participate in a foreseeably dangerous act. *Id.* at 101–04.

260. *See* Sayre, *supra* note 55, at 697 (arguing that early common law "narrowly . . . restricted criminal liability within the scope of the express command or procurement of the accessory").

261. 18 U.S.C. § 2339B (2000). Material support is defined under § 2339A(b)(1) as

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b)(1).

262. 18 U.S.C. § 2339B.

263. *See* Robert M. Chesney, *The Sleeper Scenario: Terrorism Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 18–29 (2005) (noting that only six people have been prosecuted for material support of terrorism between April 1996 and September 2001).

264. *See* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 9 (2003); *see also* Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT'L SECURITY L. & POL'Y 5, 5–6 (2005) (noting that the provision has "been frequently charged in prosecutions since September 11, 2001, becoming key elements in the government's anti-terrorism efforts").

number of respects, including that it violates the substantive due process personal guilt requirement.[265] Courts and commentators that have addressed the personal guilt issue have focused on the level of mens rea that should be required regarding the aims of the organization as a whole, without separately addressing the "if death results" section of the statute.[266] Although some courts have pointed to that part of the statute as a particular area of concern, they have assumed that the only personal guilt question presented by the law concerns the relationship between the defendant's material support and the general nature of the organization. Looking at AEDPA's material support provision through the lens of the *Pinkerton* limits, however, indicates that the "if death results" part of the statute poses distinct vicarious liability due process problems. Isolating this issue may help alleviate some of the confusion surrounding the material support provision's constitutionality under the Due Process Clause.

The debate over the "material support" provision and personal guilt has revolved around the level of knowledge or intent an individual should be required to possess with respect to the illegal aims of the designated foreign terrorist organization. Originally, the government argued that the statute required only that an individual know the *identity* of the organization she was contributing to, and would permit strict liability if the organization was engaged in terrorist activities or was officially designated as a terrorist group.[267] Under this approach, the government could

> convict an individual who gives money to a designated organization that solicits money at their doorstep so long as the organization identifies itself by name. It [would be] no defense, according to the government, that the organization describes to the donor only its humanitarian work to provide basic services to support victims displaced and orphaned by conflict, or to defend the cultural and linguistic rights of ethnic minorities.[268]

265. *See* David Henrik Pendle, Comment, *Charity of the Heart and Sword: The Material Support Offense and Personnel Guilt*, 30 SEATTLE U. L. REV. 777, 786–87 (2007) (noting that other arguments have included that the law is vague, overbroad, and infringes on the right of freedom of association). For an analysis of the potential First Amendment issues implicated by the provision, see Cole, *supra* note 20, at 246–50.

266. *See generally* Pendle, *supra* note 265, at 793–807 (analyzing the "material support" provision and arguing that the statute should be amended to a recklessness standard in light of the due process concerns under *Scales*).

267. *See id.* at 784–85 (describing the three competing interpretations of the statute); *see also* Randolph N. Jonakait, *The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization*, 56 BAYLOR L. REV. 861, 872–74 (2004) (describing the government's position).

268. Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382, 397 (9th Cir. 2003), *vacated*, 393 F.3d 902 (9th Cir. 2004).

In December 2004, Congress amended the law to clarify that "[t]o violate [the material support law] a person must have knowledge that the organization is a designated terrorist organization . . ., that the organization has engaged or engages in terrorist activity . . ., or that the organization has engaged or engages in terrorism."[269] Opponents of the law argue, however, that knowledge is insufficient to meet the personal guilt requirement and that, as was done in *Scales*, courts should interpret the provision to include a "specific intent to further the terrorist activities of foreign terrorist organizations."[270] On this view, because many designated organizations engage in both illegal and legal activity (such as providing humanitarian aid), a specific intent requirement is necessary to ensure that individuals are not punished on the basis of their association with, and support of, the legal and protected aims of a designated organization.[271]

Though *Scales* appears to provide strong support for the critics' view, only one court has adopted the position that personal guilt requires specific intent under AEDPA's material support law. In *United States v. Al-Arian*,[272] the Middle District of Florida considered a challenge to the law by alleged members of the Palestinian Islamic Jihad (PIJ).[273] The defendants were alleged to have engaged in fundraising efforts in the United States on behalf of the PIJ, a designated terrorist organization that uses violence and threats of violence to pressure Israel to cede territory to the Palestinian people.[274] The court pointed to the potential severity of the "if death results"[275] provision as one of the main reasons for adopting the specific intent approach.[276] Under a knowledge standard, an

269. *See* 18 U.S.C. § 2339B(a)(1) (2000); *see also* Pendle, *supra* note 265, at 784–86 (providing a history of Congress' amendment in light of the strict liability position).

270. Humanitarian Law Project v. Gonzales, 380 F. Supp. 2d 1134, 1142 (C.D. Cal. 2005).

271. *See* United States v. Hammoud, 381 F.3d 316, 376–80 (4th Cir. 2004) (Gregory, J., dissenting) (discussing Hammoud's and the government's arguments and finding a need for a specific intent requirement); United States v. Al-Arian, 329 F. Supp. 2d 1294, 1300 (M.D. Fla. 2004) (concluding that a specific intent requirement is necessary to satisfy due process concerns); Jonakait, *supra* note 267, at 913–14 (discussing the consequences of not having a specific intent requirement).

272. 329 F. Supp. 2d 1294.

273. *Id.* at 1295

274. *Id.* at 1295.

275. 18 U.S.C. § 2339B(a)(1) (2000).

276. *Al-Arian*, 329 F. Supp. 2d at 1300 (footnote omitted) ("[T]his Court has to look no further than the text of the provision to see that the severe punishments provided for in [the material support provision] are justified by and explicitly tied to the criminal activity of the FTO. For example, [the law] provides for a sentence of up to life imprisonment if the provision of material support results in the death of any person."). The court also emphasized the fact that *Scales* required specific intent

individual who is a member of a designated organization, but opposes its illegal activity, could be held vicariously liable for another's death and face life in prison if the member was a fundraiser thinking the money would be used solely for humanitarian or educational purposes.[277] The court concluded that, under the law: "A's criminal liability is inextricably connected to his association with B and the [Foreign Terrorist Organization]. Further, the level of A's criminal punishment is totally dependent on B's, and other members of the FTO's, criminal conduct."[278] Though the Ninth Circuit held that a knowledge standard was sufficient to satisfy *Scales*, it similarly pointed to the "if death results" term as one of the "more troubling" parts of the statute and noted that "[i]t is difficult to believe that Congress intended to impose a life sentence on a person who did not know that his or her support could go toward unlawful activities."[279] Neither court, however, considered whether this troublesome part of the law presents distinct personal guilt issues.

Viewing *Pinkerton* as a due process requirement indicates that the "if death results" portion of the statute presents a personal guilt problem distinct from the act of material support itself. Under the material support provision, the relevant personal guilt question is what level of mens rea is required to link the defendant to the general illegal aims or acts of the group, in order for her conduct to constitute a substantive offense.[280] The "if death results" part of the statute, however, makes a defendant who already has a punishable link to the group vicariously liable for others' conduct. The statute's ambiguous wording does not clearly indicate what relationship between the defendant's "material support" and the death is required to meet this element. For example, the provision could arguably be interpreted to require a strict causal relationship, where the material support was a but-for cause of the death. Alternatively, one might argue that all that is required is that the organization use the support given by the defendant to help it carry out a killing. In either case, however, if the statute merely requires knowledge of the group's illegal activity there appears to be a significant danger that a defendant could be convicted for deaths that were not reasonably

and referred to "conduct" in addition to membership in its discussion. *Id.* at 1299–1300.

277. The court employed a similar but more elaborate hypothetical. *Id.* at 1300.

278. *Id.*

279. Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382, 401 (9th Cir. 2003), *vacated*, 393 F.3d 902 (9th Cir. 2004).

280. Abrams, *supra* note 264, at 8 (noting that, though the provision has certain characteristics of traditional complicity, it is a substantive offense).

foreseeable to her. Returning to the Florida court's example, a defendant who knew an organization was engaged in some illegal conduct, or was aware of its classification by the government as a terrorist organization, could be held vicariously liable for a death under this statute, even if he believed his support would be used only for humanitarian purposes. Regardless of whether personal guilt requires intent or merely knowledge to criminalize when providing material support for an organization, it would seem to prohibit holding a defendant strictly and vicariously liable for others' murders. To be sure, interpreting the material support provision to require an intent to assist in the group's illegal activity would likely cure this concern because, if a defendant intended to provide material support for terrorist activity, it would presumably be reasonably foreseeable in almost any instance that death could result. However, the majority of courts, which have applied the knowledge standard to the material support provision, should require more under the "if death results" element of the law. Otherwise, a defendant who believed she was supporting humanitarian aims of a group that was also engaged in illegal conduct could be held strictly liable for killings that were not reasonably foreseeable to her or done in furtherance of her agreement or conduct.

CONCLUSION

Vicarious liability in criminal law, from *Pinkerton* liability to felony murder, has been consistently and strongly criticized; courts and commentators, however, have paid surprisingly little attention to the question of what constraints, if any, the Constitution places on vicarious criminal liability. This omission is all the more curious in light of the sparse but consistent line of cases that hold that *Pinkerton*'s limits constitute a due process minimum for vicarious liability in a conspiracy, as well as the personal guilt doctrine, which appears to bolster that approach. While the personal guilt requirement may not adequately address all of the objections to vicarious liability in criminal law, it might at least eliminate some of the most egregious and troubling applications of vicarious liability. At the same time, while cases that have treated *Pinkerton*'s limits as constitutionally based help illuminate some of the key issues in assessing personal guilt in other vicarious liability contexts, the true limits and nature of personal guilt under the Constitution are far from clear. It is almost certain that the Due Process Clause would

forbid sending *A* to prison for *B*'s crimes based entirely on the fact that *A* and *B* are cousins.[281] However, there is no coherent framework for analyzing even moderately close questions in the area of vicarious liability and personal guilt. This Article aims to begin addressing these issues by providing a thorough account of the cases that have held *Pinkerton* to be constitutionally required and asking how these cases might impact other vicarious liability criminal law doctrines. The analysis indicates that the personal guilt requirement may pose important challenges to vicarious criminal liability in a number of areas, including the current approach to defining "scope" in conspiracy law, broad applications of the felony murder rule, and the material support provision of AEDPA. The law still has a long road to travel, however, to reach a consistent approach to personal guilt that would allow a more definitive and reliable analysis of vicarious criminal liability. It is my hope that this Article will help to spark a dialogue about these important but under-examined questions.

281. *Cf.* New Hampshire v. Akers, 400 A.2d 38, 40 (1979) ("[W]e have no hesitancy in holding that any attempt to impose [criminal] liability on parents simply because they occupy the status of parents, without more, offends the due process clause of our State Constitution.").