



# PENN STATE LAW REVIEW

## The Pinkerton Problem

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### I. INTRODUCTION

In the unlikely event that any junior faculty member should ever ask me for advice about how to write a law review article, I would give them this highly non-academic bit of counsel. First, find a real problem in the law, one that affects real people and one that can be addressed by judges and practitioners in the area. Second, help them find a way to solve it. Granted, this flies in the face of the conventional wisdom that law review articles should be laborious expositions of exhaustive research into esoteric points, grandiosely displayed, and targeted solely for other academics in a display reminiscent of peacocks flashing their plumage at the zoo. But as I am neither peacock nor traditional academic, my advice stands, and I seek to follow it here.

Indeed, if I am any animal, I am an old criminal law warhorse who cares deeply that the system do its vital work in the way the Constitution intended. The problem addressed in this article strikes at these concerns. It was first brought to my attention when a member of a Committee I chair to draft and revise the Pennsylvania Criminal Jury Instructions complained that the current Pennsylvania instruction on the liability of a conspirator for substantive crimes committed by a co-conspirator (something we all know as the *Pinkerton*<sup>1</sup> charge) was wrong or, minimally, incomplete.<sup>2</sup> The Committee had to conclude, however, that since that instruction accurately reflects the teachings of the

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1. *Pinkerton v. United States*, 328 U.S. 640 (1946).

2. This individual is Professor Jules Epstein of Widener University School of Law. I thank him and Professor Rona Kaufman Kitchen, of Duquesne Law School for their insightful comments on an earlier draft of this article. While I am at the business of thanking, I recognize the fine work initially done on this problem by James Pollock, a recent graduate of Duquesne Law School who prepared a seminar paper on this point, and my able research assistants, Megan Will and Darren Belajdaci. Finally, I deeply appreciate the selfless efforts and counsel of all members of the Pennsylvania Suggested Standard Criminal Jury Instructions Committee for their wisdom, counsel and patience with their Chairman.

Pennsylvania Supreme Court on the matter, no change could be made. A change, however, should be made once the courts of Pennsylvania and virtually every other place where a *Pinkerton* charge is used realize what a serious constitutional problem the *Pinkerton* doctrine presents.

As always, a simple, concrete example will help frame the issue. Moe and Larry agree to burglarize Curly's house to steal his baseball card collection.<sup>3</sup> They agree to meet at the front of Curly's house at 9 P.M. (when they know Curly is not home) and plan to force in the back door to gain entry. When Moe gets there at 9 P.M., he does not see Larry. A moment later, Larry walks out of the front door of Curly's house, explaining that on his way there, he stopped and stole a ladder from a hardware store. He used the ladder to climb in through an open window on the second floor in the back of the house. Moe tells Larry to go back in the house to search for the baseball cards while he stays out front as a look-out in case police come. Larry finds the card collection and climbs out the back window and down the ladder. By the time he reaches the back yard, Shemp, a neighbor, runs over, yells and tries to grab him. Larry runs by Shemp, giving him a hard push as he goes by. Shemp falls, striking his head against a garden gnome, suffering a serious concussion.

Larry is guilty of conspiracy to commit burglary, burglary, the intentional theft of the ladder and the reckless infliction of serious bodily harm on Shemp (aggravated assault). Moe is clearly guilty of the first two offenses, but is he guilty of the last two as he had neither direct knowledge of nor direct involvement in the acts of Larry that constituted those substantive crimes?

The Pennsylvania jury considering Moe's guilt would, in accord the teachings of the Pennsylvania Supreme Court, receive this instruction:

1. There are two basic ways that one defendant may be criminally responsible for conduct committed by another person or persons. These two ways may apply even if the defendant in question was not present at the time and place when the particular act occurred.
2. The first way is for the defendant to be a member of a conspiracy. . . .
3. As applied in this case, if it is proved beyond a reasonable doubt that the defendant, Moe, was indeed a member of a conspiracy, he

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3. I credit James Pollock, *supra* note 2, for suggesting these names. If the reader does not recognize them, the reader has missed out on something important in this life.

may be held responsible for the act or acts of Larry if each of the following elements is proved beyond a reasonable doubt:

- a. that Larry was also a member of the same conspiracy;
- b. that the crime in question was committed while the conspiracy was in existence; and
- c. that the crime in question was committed to further the goals of the conspiracy.<sup>4</sup>

Those generally familiar with *Pinkerton* instructions in almost every other jurisdiction that embraces the doctrine will already sense an issue here, as this language omits the element that Larry's theft and assault must also have been *reasonably foreseeable* to Moe.<sup>5</sup> Reasonable foreseeability was, after all, part of *Pinkerton* from the outset. The United States Supreme Court derived *Pinkerton* from the simple syllogism that since one conspirator can commit the overt act and complete the crime of conspiracy as to all, there is no reason why "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."<sup>6</sup> This newly found (and vast) theory of liability, however, needed specific limits:

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

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4. PA. CRIM. JURY INSTRUCTIONS, § 8.306(a) (2005). This Instruction is drawn from cases such as Commonwealth v. Wayne, 720 A.2d 456 (Pa. 1998) and Commonwealth v. Simpson, 754 A.2d 1264, 1274 (Pa. 2000). It goes on to indicate that the second way for such liability to attach is via the accomplice liability doctrine.

There is a basic difference between being an accomplice and being a conspirator. In a conspiracy, people agree to act jointly. 18 Pa. C.S.A. § 903 (2010). To be an accomplice, a person does not have to agree to help someone else; the person is an accomplice if he or she, on his or her own, acts to help the other person commit a crime. 18 Pa. C.S.A. § 306 (2010). More specifically, the defendant is an accomplice of another for a particular crime if the following two elements are proved beyond a reasonable doubt:

- a. that the defendant had the intent of promoting or facilitating the commission of that crime; and
- b. [the defendant] [solicits] [commands] [encourages] [requests] the other person to commit it [or] [[aids] [agrees to aid] [or] [attempts to aid]] the other person in planning or committing it].

It is important to understand that a person is not an accomplice merely because he or she is present when a crime is committed, or knows that a crime is being committed. *Id.*

5. See discussion, *infra*.

6. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946).

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.<sup>7</sup>

Pennsylvania's charge contains the *in furtherance of* limit and the limit relating to the *scope* of the unlawful plan, but omits reasonable foreseeability.<sup>8</sup> As Moe cannot argue that he could not reasonably foresee that Larry would steal a ladder or violently push Shemp, Moe is in big trouble in Pennsylvania.

To be sure, the plight of Moe the burglar is hardly something to occasion anyone to engage in an outpouring of compassion or condolence on a personal level. But we are lawyers and, where due process is concerned, the Constitution requires an exercise of professional dispassion. As we will see, convicting Moe under a theory that operates outside the confines of the Constitution is a problem of significant proportions that merits our concern, personal feelings to one side notwithstanding.

Here, that problem exists on two levels. On the first, if Professor Alex Kreit is correct in his recent article that the *in furtherance of* and *reasonably foreseeable* components of *Pinkerton* are the due process limits the federal Constitution imposes on conspirator liability,<sup>9</sup> then the Pennsylvania instruction violates the Fourteenth Amendment's guarantees of individual deprivation of "life, liberty or property without due process of law."<sup>10</sup> Any jurisdiction that omits one of these limits will face the compelling argument that half of due process is no due process at all. I will address this first level problem by pointing out that the Pennsylvania's omission of reasonable foreseeability is inconsistent with almost every other jurisdiction in this regard and by recapping Professor Kreit's analysis that such an omission violates due process.

But the real *Pinkerton* problem runs much deeper. It exists regardless of whether a jurisdiction embraces it with all of its conditions and caveats in place. In any jurisdiction that has not adopted the *Pinkerton* doctrine by statute, that is, where it exists solely as a judicially created theory of liability, the *Pinkerton* doctrine operates to violate, a) the basic principles of separation of powers, and, b) the most fundamental precepts of criminal due process by allowing the

7. *Id.* at 647-48.

8. The jury Instruction quoted above, PA. CRIM. JURY INSTRUCTIONS, § 8.306(a) (2005), contains no reference to foreseeability, consistent with the cases from which the Instruction is drawn. *See supra* note 4.

9. Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton*, 57 AM. U.L. REV. 585, 586-87, 592, 604-15 (2008).

10. U.S. CONST. amend. XIV, § 1.

government to convict someone without having to prove all of the statutory elements of the crime beyond a reasonable doubt. Through *Pinkerton*, courts dilute and radically alter the elements of a substantive offense (especially its *mens rea*) in violation of the legislative will and a cornucopia of constitutional rights the United States Supreme Court has championed during the last twenty years.<sup>11</sup> It is a problem others have sensed already,<sup>12</sup> and it is time to confront it once and for all.

The resolution of the problem, however, must not create problems of its own. While *Pinkerton* should be shelved as a separate and distinct theory of liability,<sup>13</sup> care must be taken not to adopt the notion that membership in a conspiracy is irrelevant to a defendant's guilt for substantive crimes committed by those with whom he acts in concert. Defendants join conspiracies intentionally and knowingly, not recklessly or impulsively. Their actions after joining a scheme may well allow a jury to infer that they intended crimes secondary to the ultimate object offense or that, by their conduct, they knowingly created the sort of risks that would support a finding of criminal recklessness.<sup>14</sup> Properly instructing a jury on how to assess those matters is the key practical and constitutional goal for courts, practitioners and the system as a whole.

It is the kind of thing a law review article really should address.

## II. THE PENNSYLVANIA RULE: *PINKERTON LIGHT*

The clearest statement of the conspirator liability doctrine in Pennsylvania is found in *Commonwealth v. Wayne*:<sup>15</sup>

11. These rights are delineated in my discussion of the application of the *Apprendi* doctrine to this area, discussed at length, *infra* note 96 et. seq. The jurisdictions which have undertaken to dilute the rights involved would include all courts within the federal system and the state courts set forth *infra* note 35.

12. Professor Kreit has pointed out that while there is relatively little discussion of the current methodology in this area in the courts and literature, confusion on the issue is evident. *See Kreit, supra* note 9, at 587-89.

13. *See MODEL PENAL CODE § 2.06 (1962); LaFave, Criminal Law, 5<sup>th</sup> Edition, § 13.3, at 722-24 (2009).*

14. For example, in *Commonwealth v. Weimer*, 977 A.2d 1103, 1105 (Pa. 2009), a defendant participated with several others in a violent assault on her old boyfriend, resulting in her conviction for third degree murder. While the Court would come to the odd conclusion that there is an offense of conspiracy to commit criminal homicide, the defendant's acts as a member of a conspiracy to commit aggravated assault might clearly lead to her satisfying the recklessness/malice element of third degree murder. *Id.* at 1106; *but see id. at 1107-1110* (indicating that conspiracy is a crime requiring specific intent and some degrees of homicide are not specific intent crimes); *see also Commonwealth v. King*, 990 A.2d 1172 (Pa. Super. 2010); *Commonwealth v. Marquez*, 980 A.2d 145 (Pa. 2009).

15. *Commonwealth v. Wayne*, 720 A.2d 456 (Pa. 1998). Wayne was a "set-up" man in a killing accomplished directly by his conspirators. He argued that the Pennsylvania

The general rule of law pertaining to the culpability of conspirators is that each individual member of the conspiracy is criminally responsible for the acts of his co-conspirators committed in furtherance of the conspiracy. The co-conspirator rule assigns legal culpability equally to all members of the conspiracy. All co-conspirators are responsible for actions undertaken *in furtherance of* the conspiracy *regardless of their individual knowledge of such actions* and regardless of which member of the conspiracy undertook the action. The premise of the rule is that the conspirators have formed together for an unlawful purpose, and thus, they share the intent to commit any acts undertaken in order to achieve that purpose, *regardless of whether they actually intended any distinct act* undertaken in furtherance of the object of the conspiracy. It is the existence of shared criminal intent that “is the sine qua non of a conspiracy.”<sup>16</sup>

*Wayne* carved out only one exception to this rule. Just as in cases involving accomplice liability,<sup>17</sup> a defendant cannot be found guilty of first degree murder under conspiratorial liability unless he personally shared the specific intent to kill the victim.<sup>18</sup> The reasons for this exception are critical to our more extensive analysis of the *Pinkerton* problem, but for now, simply note that for all other crimes, the basic rule of *Wayne* applies. It assigns guilt to conspirators for the substantive crimes of their confederates regardless of whether they knew, intended, or foresaw those crimes.

*Wayne* is plainly inconsistent with *Pinkerton* insofar as reasonable foreseeability is concerned. But a Pennsylvania prosecutor confronted with that assertion can readily retort that *Wayne* is not derived from *Pinkerton* at all. In fact, *Pinkerton* has only been cited three times in Pennsylvania, and never for the rule articulated in *Wayne*.<sup>19</sup>

Unfortunately for the prosecutor, however, the retort rings hollow because *Wayne* actually evolved from cases that are not really authority for the broad rule *Wayne* derives from them. Those cases involved

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rule wrongly exposed him to liability for first degree murder as he could be convicted without proof he shared the specific intent to kill the victim. The Supreme Court agreed, although it denied him relief based on a harmless error finding. *Id.* at 465.

16. *Id.* at 463-64 (internal citations omitted) (emphasis added).

17. See Commonwealth v. Huffman, 638 A.2d 961 (Pa. 1994).

18. *Id.* at 962.

19. *Wayne* was cited in two cases dealing with the minor issue in *Pinkerton* of whether the penalty for the conspiracy merges with the penalty for the substantive crime the conspiracy intended (it does not). See Commonwealth v. Boerner, 422 A.2d 583 (Pa. Super. 1980); Commonwealth v. Belgrave, 269 A.2d 317 (Pa. Super. 1970). See also Commonwealth v. Dutrieuille, 17 Pa. D. & C. 4<sup>th</sup> 321 (1982) (discussing *Pinkerton* in connection with “Wharton’s rule”).

situations where the substantive crime attributed to the defendant was the *object* crime of the conspiracy itself, not some secondary offense that was the primary responsibility of a co-defendant.<sup>20</sup> Nonetheless, the cases anointed the broader conspirator rule as “hornbook law,” relying on the 1955 *Burdell* case,<sup>21</sup> which in turn relied on the wellspring of this jurisprudence in Pennsylvania, *Commonwealth v. Strantz*.<sup>22</sup> But, upon closer examination, *Strantz* is not authority for the broad rule of *Wayne* that excludes foreseeability from the *Pinkerton* equation and generally makes conspirators liable for crimes in which they did not share the requisite *mens rea* with the one who performed the *actus reus* of the charged crime. We will undertake that examination as soon as we have recounted the grisly tale of Walter Strantz and his sidekick, Joe Yircavage.

Strantz and Joe Yurcavage were true partners in crime, setting out on an April 1937, crime spree of “robbery, murder, attempted murder and general deviltry.”<sup>23</sup> In all, *and in one evening*, they murdered two people, shot two others, shot at several more (including a State Trooper who was shot “through the hat”), threatened a half dozen other citizens, and committed four robberies.<sup>24</sup> The evidence was so strong against them that the Court said that if it was insufficient, then “all human evidence has lost its potency.”<sup>25</sup>

The *Strantz* Court did not have before it a classic conspirator liability issue at all, however, as both men were partners in each bit of malfeasance. It was a classic circumstance of accomplice liability, and while the Court saw that, it unfortunately conflated that doctrine with conspiracy law in this critical passage of the opinion:

If one aids and abets in the commission of a crime, he is guilty as a principal. One is an aider and abettor in the commission of any crime, i.e., he has “joined in its commission,” if he was an active partner in the intent which was the crime’s basic element. Chief Justice Gibson in *Rogers v. Hall*, 4 Watts 359, said: “The least degree of concert or collusion between parties to an illegal transaction makes the act of one the act of all.” No principle of law is more firmly established than that when two or more persons conspire

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20. See *Commonwealth v. Jackson*, 485 A.2d 1102 (Pa. 1984); *Commonwealth v. Roux*, 350 A.2d 867 (Pa. 1976); *Commonwealth v. Bryant*, 336 A.2d 300 (Pa. 1975).

21. *Commonwealth v. Burdell*, 110 A.2d 193 (Pa. 1955).

22. *Commonwealth v. Strantz*, 195 A. 75 (Pa. 1937).

23. *Id.* at 77. The penalty for general deviltry is unknown but it undoubtedly was set to run consecutively with Strantz’s death sentence. It would also be imposed in a court from which there is no appeal.

24. *Id.*

25. *Id.* at 80.

or combine with one another to commit any unlawful act, each is criminally responsible for the acts of his associate or confederate committed in furtherance of the common design. In contemplation of law the act of one is the act of all. See *Collins v. Com.*, 3 S. & R. 220; *Com. v. Brown*, 58 Pa. Super. Ct. 300; and *Com. v. Snyder*, 40 Pa. Super. Ct. 485.<sup>26</sup>

Note how once the Court quoted from a *civil* case (*Rogers v. Hall*) the wheels came off of this analysis as it wildly diverted from talk of simple accomplice liability to conspirator liability as if that transition was seamless.<sup>27</sup> Moreover, the three criminal cases the Court cited for this “firmly established” principle were not classic *Pinkerton* situations either as the issue in each was simply whether the Commonwealth proved its conspiracy count by showing that one conspirator accomplished an overt act.<sup>28</sup>

Thus, none of the significant older cases that preceded *Wayne* speak of reasonable foreseeability because the limited factual contexts in which they arose did not present that issue. When the more recent ones did not pick up on it either,<sup>29</sup> Pennsylvania ended up with a rule that placed it on an island insofar as conspirator liability rules are concerned.

Of the nine federal circuits that publish standard jury instructions, six explicitly require proof that the crime of the conspirator not only be committed during the course of and in furtherance of the conspiracy, but that the defendant must have been able to reasonably foresee its commission.<sup>30</sup> Two more (the Fifth and Tenth Circuits) require either that the crime was in furtherance or that it was reasonably foreseeable to the defendant.<sup>31</sup> The Eighth Circuit requires the “in furtherance of”

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26. *Id.* at 79.

27. *Id.*

28. See *Commonwealth v. Brown*, 58 Pa. Super. 300, 309 (1914); *Commonwealth v. Snyder*, 40 Pa. Super. 485, 523 (1909); *Collins v. Commonwealth*, 3 Serg. & Rawle. 220, 223 (1817).

29. *Strantz* was, for example, an authority relied upon by *Commonwealth v. La*, a case heavily relied upon by *Wayne*. See *Commonwealth v. Hannibal*, 753 A.2d 1265 (Pa. 2000); *Commonwealth v. Simpson*, 754 A.2d 1264 (Pa. 2000); *Commonwealth v. La*, 640 A.2d 1336, 1345 (Pa. Super. Ct. 1994).

30. See *MANUAL OF FED. CRIM. JURY INSTRUCTIONS FOR THE FIRST CIRCUIT* § 4.03 (1998); *MANUAL OF FED. CRIM. JURY INSTRUCTIONS FOR THE THIRD CIRCUIT* § 7.03 (2001); *MANUAL OF FED. CRIM. JURY INSTRUCTIONS FOR THE SIXTH CIRCUIT* § 3.10 (2005); *MANUAL OF FED. CRIM. JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT* § 5.09 (1999); *MANUAL OF FED. CRIM. JURY INSTRUCTIONS FOR THE NINTH CIRCUIT* § 8.20 (2003); *MANUAL OF FED. CRIM. JURY INSTRUCTIONS FOR THE ELEVENTH CIRCUIT* § 13.5 (2003).

31. See *FIFTH CIRCUIT DISTRICT JUDGES ASSOCIATION PATTERN JURY INSTRUCTIONS (CRIMINAL CASES)* § 2.22 (2001), available at <http://www.lb5.uscourts.gov/juryinstructions/fifth/crim2001.pdf>; *CRIMINAL PATTERN JURY INSTRUCTIONS FOR THE TENTH CIRCUIT* § 2.21 (2006), available at <http://www.ca10.uscourts.gov/downloads/pji10-cir>.

proof plus either a showing that the crime was within the scope of the agreement or that it was reasonably foreseeable.<sup>32</sup> The three circuits that do not publish standard instructions nonetheless all speak in their case law of the “reasonable foreseeability” requirement as an inherent part of *Pinkerton* liability.<sup>33</sup>

A significant number of states also employ *Pinkerton*.<sup>34</sup> Those states almost universally require the government to prove both that the crime was done in furtherance of the unlawful agreement and that it was reasonably foreseeable to the defendant.<sup>35</sup> Indiana approves a charge that does not necessarily use the “in furtherance of” language but does require that the act be one that is the “natural and probable” consequence of the agreement.<sup>36</sup> And while there is some debate about the exact formulation of the rule in Illinois,<sup>37</sup> it seems to mirror the Indiana treatment.<sup>38</sup>

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crim.pdf. If Professor Kreit is right, this alternative rendering is constitutionally suspect. See Kreit, *supra* note 9.

32. See MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT § 5.06J (2009), available at [http://www.juryinstructions.ca8.uscourts.gov/crim\\_man\\_2009.pdf](http://www.juryinstructions.ca8.uscourts.gov/crim_man_2009.pdf). Again, this opens a constitutional challenge here.

33. See United States v. Ledbetter, 381 F. App’x 292, 296-97 (4th Cir. 2010); United States v. Shaw, 354 F.App’x 439, 445 (2d Cir. 2009); United States v. Hemphill, 514 F.3d 1350, 1363 (D.C. Cir. 2008).

34. Kreit, *supra* note 9, at 597-99. Professor Pauley provides a wonderful discussion of the history of the growth and acceptance of *Pinkerton*. See Matthew A. Pauley, *The Pinkerton Doctrine and Murder*, 4 PIERCE L. REV. 1, 4-6 (2006).

35. In *Bolden v. State*, the Nevada Supreme Court identified the following states as adopting this rule: Arkansas, Connecticut, Kansas, Florida, Georgia, Rhode Island, and Texas. *Bolden v. State*, 124 P.3d 191, 197 n.27 (Nev. 2005) (citing *Matthews v. State*, 940 S.W.2d 498 (Ark. Ct. App. 1997)); *State v. Walton*, 630 A.2d 990 (Conn. 1993); *State v. Tyler*, 840 P.2d 413 (Kan. 1992); *Martinez v. State*, 413 So. 2d 429 (Fla. Dist. Ct. App. 1982); *Everritt v. State*, 588 S.E.2d 691, 693 (Ga. 2003); *State v. Harnois*, 853 A.2d 1249 (R.I. 2004); *Barnes v. State*, 56 S.W.3d 221 (Tex. App. 2001). To this list we may at least add the District of Columbia, Nebraska, New Jersey, California, Colorado, Maryland, and Virginia. See *Perez v. United States*, 968 A.2d 39 (D.C. 2009), *Castillo-Campos v. United States*, 987 A.2d 476 (D.C. 2010); *State v. Thomas*, 314 N.W.2d 15 (Neb. 1981); *State v. Bridges*, 628 A.2d 270 (N.J. 1993); *People v. Zielesch*, 101 Cal. Rptr. 3d 628 (Cal. Ct. App. 2009); *People v. Trujillo*, 509 P.2d 794 (Colo. 1973); *Grandison v. State*, 506 A.2d 580 (Md. 1986); *Owens v. Commonwealth*, 675 S.E.2d 879 (Va. Ct. App. 2009). Connecticut and Rhode Island have both recently affirmed *Pinkerton*. *State v. Coward*, 972 A.2d 691 (Conn. 2009); *State v. Berroa*, No. 2008-53-C.A., 2010 R.I. LEXIS 102 (R.I. 2010).

36. See *Wright v. State*, 690 N.E.2d 1098, 1110 (Ind. 1998).

37. Responsibility for Crimes of Co-Conspirators, 1-4 ILL. CRIM. LAW § 4.10, (LEXIS 2010).

38. See *People v. Vettese*, 377 N.E.2d 1168, 1170 (Ill. 1978) (citing *People v. Tate*, 345 N.E.2d 480, 483. (Ill. 1976)). The Tate court stated: “Where one attaches himself to a group bent on illegal acts . . . he becomes criminally liable for any wrongdoings committed by other members of the group in furtherance of the common purpose, or as a

Pennsylvania thus appears unique in having a rule that takes reasonable foreseeability completely out of the equation. If Professor Kreit is correct in his central thesis, the Pennsylvania rule thus offends due process.

### III. THE PENNSYLVANIA RULE AND DUE PROCESS

Professor Kreit ably supports his conclusion that from the time of its first articulation in *Pinkerton*, the “in furtherance of” and “reasonably foreseeable” limitations were seen as the constitutional *sine qua non* for attributing a crime to a defendant under a vicarious liability theory.<sup>39</sup> These limits are more than just a nuance of the federal system, inapplicable to a state like Pennsylvania that traces its conspirator liability theory to a source other than *Pinkerton*. Kreit’s review of relevant case law over an extended period demonstrates that “in furtherance of” and “reasonably foreseeable” are the due process baselines for criminal liability in this area.<sup>40</sup>

He points out that, in the wake of cases like *United States v. Alvarez*<sup>41</sup> and *United States v. Castenada*,<sup>42</sup> the Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits all specifically embraced the idea that foreseeability is “the main concept underlying a due process analysis” of a *Pinkerton* type case.<sup>43</sup> As our review of circuit practices demonstrates, whether the circuits specifically embrace foreseeability as a constitutional component or not, all circuits include it as part of a *Pinkerton* charge in one form or another. Reasonable foreseeability is a due process necessity because to support the defendant’s guilt for the substantive crime requires at least a finding of criminal negligence. Without at least that finding, the defendant’s relation to the substantive crime would be too tenuous to withstand a challenge under the Due Process clause.<sup>44</sup>

The Connecticut Supreme Court recently articulated the importance of foreseeability in the *Pinkerton* rule. In *State v. Coward*, the court acknowledged that *Pinkerton* attributes liability for a substantive offense to a defendant who did not personally have the *mens rea* that offense

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natural or probable consequence thereof, even though he did not actively participate in the overt act itself.” *Tate*, 345 N.E.2d at 483.

39. Kreit, *supra* note 9, at 599.

40. *Id.* at 603-06. See also Mark Noferi, *Towards Attenuation: A “New” Due Process Limit on Pinkerton Conspiracy Liability*, 33 AM. J. CRIM. L. 91, 104-05 (2006).

41. *United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985).

42. *United States v. Castaneda*, 9 F.3d 761 (9th Cir. 1993).

43. Kreit, *supra* note 9, at 601-06.

44. *Id.* at 612-13.

requires.<sup>45</sup> The court justified that attribution on the theory that, by conspiring, a defendant did more than bring the object crime of the agreement closer to fruition. By his negligence in failing to reasonably foresee the acts of his confederates, he also increased the risk that other crimes necessarily attendant to the object crime's commission would occur:

Thus, the focus in determining whether a defendant is liable under the *Pinkerton* doctrine is whether the coconspirator's commission of the subsequent crime was reasonably foreseeable, and not whether the defendant could or did intend for that particular crime to be committed. In other words, the only mental states that are relevant with respect to *Pinkerton* liability are that of the defendant in relation to the conspiracy itself, and that of the coconspirator in relation to the offense charged. If the state can prove that the coconspirator's conduct and mental state satisfied each of the elements of the subsequent crime at the time that the crime was committed, then the defendant may be held liable for the commission of that crime under the *Pinkerton* doctrine if it was reasonably foreseeable that the coconspirator would commit that crime within the scope of and in furtherance of the conspiracy.<sup>46</sup>

By omitting foreseeability, the Pennsylvania rule allows for vicarious liability to be assessed without any proof that the defendant was criminally negligent with respect to the substantive crime his conspirator committed. As long as Larry committed a crime during the course and in furtherance of the conspiracy, Pennsylvania renders Moe's guilt a matter that is essentially one of strict liability.

#### IV. THE DEEPER PROBLEM: *PINKERTON* AND THE JURY RIGHT

This would be a short and quite parochial article if the only problem were that Pennsylvania needed to insert reasonable foreseeability into its conspirator liability formula. But the problem with *Pinkerton* runs much deeper and is not confined to the jurisprudence of Pennsylvania.

##### A. *Pinkerton and the Failed Search for Limits*

This deeper problem begins to emerge when we realize that courts have nervously and clumsily layered additional limits on *Pinkerton* with unstructured rules that call for little more than "fairness" in its

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45. State v. Coward, 972 A.2d 691, 700-01 (Conn. 2009).

46. *Id.* at 701.

application.<sup>47</sup> In other words, the courts seem to sense that there is a bigger problem but just cannot figure out what it is or how to deal with it. If *Pinkerton* were perfectly consistent with the constitutional protections of due process, then the application of its internal components (the “in furtherance of” and “reasonable foreseeability” aspects) should be enough to satisfy that end. But it is not, as courts consistently hold.

As Professor Kreit points out, the same courts that have propounded the need for the two primary *Pinkerton* limits have recognized in each case that a further check is also required.<sup>48</sup> The *Coward* Court recognized this as well:

We also have concluded, however, that “there may be occasions when it would be unreasonable to hold a defendant criminally liable for offenses committed by his coconspirators even though the state has demonstrated technical compliance with the *Pinkerton* rule. . . . For example, a factual scenario may be envisioned in which the nexus between the defendant’s role in the conspiracy and the illegal conduct of a coconspirator is so attenuated or remote, notwithstanding the fact that the latter’s actions were a natural consequence of the unlawful agreement, that it would be unjust to hold the defendant responsible for the criminal conduct of his coconspirator. In such a case, a *Pinkerton* charge would not be appropriate.”<sup>49</sup>

Federal courts too have recognized that, even when the act was in furtherance and was reasonably foreseeable, “due process constrains the application of *Pinkerton* where the relationship between the defendant and the substantive offense is slight.”<sup>50</sup>

But while these courts speak of the need for a second layer of due process analysis in *Pinkerton* cases, they do not suggest the make-up of that critical methodology. In *United States v. Hansen*,<sup>51</sup> a district court recognized this odd state of affairs and the judiciary’s failure to find a meaningful outer limit to *Pinkerton*.

Certainly, the *Hansen* court observed, this second, outer layer is not made of “reasonable foreseeability,” as “it is quite simply illogical to say that *Pinkerton*, which is defined by foreseeability, could somehow be *more* narrowly ‘constrained’ by due process if due process requires

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47. See generally *id.* at 691.

48. Kreit, *supra* note 9 at 603-06. See also Noferi, *supra* note 40, at 147-55.

49. *Coward*, 972 A.2d at 701 (internal citation omitted).

50. *United States v. Castenada*, 9 F.3d 761, 766 (9th Cir. 1993).

51. *United States v. Hansen*, 256 F. Supp. 2d 65 (D. Mass. 2003). Professor Kreit discusses *Hansen* as well. See Kreit, *supra* note 9, at 613 n.155-56.

nothing more than foreseeability.<sup>52</sup> Foreseeability, after all, is a term from the vocabulary of torts, and the restraints of due process in the criminal realm should require a harness made of sterner stuff.<sup>53</sup> But a closer inspection of precedent allowed the *Hansen* court to conclude only that while “something more than mere foreseeability is at work,”<sup>54</sup> and that the “something more” was “deeper and more visceral”<sup>55</sup> than foreseeability, “the law has not yet developed clear and cogent standards to assess the outer due process limits of *Pinkerton*.<sup>56</sup>

The *Pinkerton* doctrine has been around for a long time. Yet a court can do no better to limit it than to say that it should not be applied when its application would be “unreasonable” or “unjust” or “not . . . appropriate.”<sup>57</sup> The only yardstick a court has fashioned to gauge when a defendant’s relationship to a substantive crime is not enough to hold him liable for it is calibrated with terms like “slight.” Methodologically, a judicial solution using language that invites arbitrary and capricious application is a telltale sign that the true problem lies at levels deeper than the solution-maker appreciates. Perhaps, then, the courts are admitting that they do not understand the underlying problem these “limits” seek to address.

But the failed methodology of this “second layer” of *Pinkerton* due process protection contains a further telltale sign of the real problem: it assumes that a jury is too stupid to apply it. The second layer is meant only for *judicial* application. This ignores the fact that not only are juries capable of affixing criminal liability by applying facts to the elements of an offense, but also they are the body constitutionally mandated to fulfill that role.<sup>58</sup> Just as the due process violations *Pinkerton* causes cannot be avoided merely by hoping that prosecutors will charge cases in ways that will never let those problems arise,<sup>59</sup> courts alone cannot be expected to cure those problems with a dose of “fairness” after the fact.

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52. *Hansen*, 256 F. Supp. 2d at 67 n.3.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *State v. Coward*, 972 A.2d 691, 701 (Conn. 2009) (quoting *State v. Diaz*, 679 A.2d 902, 911 (Conn. 1996)).

58. I have discussed the role of the jury with respect to various findings it is required to make. See Bruce A. Antkowiak, *The Irresistible Force*, 18 TEMP. POL. & CIV. RTS. L. REV. 1 (2008) [hereinafter Antkowiak, *Irresistible Force*]; Bruce A. Antkowiak, *The Art of Malice*, 60 RUTGERS L. REV. 435 (2008) [hereinafter Antkowiak, *Art of Malice*]; Bruce A. Antkowiak, *The Ascent of an Ancient Palladium: The Resurgent Importance of Trial by Jury and the Coming Revolution in Pennsylvania Sentencing*, 13 WIDENER L. J. 11 (2003) [hereinafter Antkowiak, *Ascent of an Ancient Palladium*].

59. See *United States v. Alvarez*, 755 F.2d 830, 850 n.25 (11th Cir. 1985).

Of course, the courts' effort to find a sensible second layer of protection for *Pinkerton* issues was doomed from the start. It assumed, *a priori*, the validity of *Pinkerton* and failed to take a critical look at what *Pinkerton* is and how it operates.<sup>60</sup> With that critical reflection, however, the real problem reveals itself. As a judicially created theory of liability, *Pinkerton* represents a frontal assault on both principles of separation of powers and the essential equation of criminal due process. It is a relic of a common law system in a criminal law world now governed by statute. It is antagonistic to the organizing and fundamental Constitutional principle of that world that once elements of an offense are established by statute, no court may dilute or defeat the requirement that those elements be proven to a jury beyond a reasonable doubt before a defendant may be convicted of the crime. The *Coward* Court's acknowledgment that *Pinkerton* negates the elements of an offense is a fatal admission that it works a constitutional violation into every case that the mere contrivance of reasonable foreseeability cannot cure.

In the end, like all relics of a bygone age, *Pinkerton*'s place is in a museum, not the criminal courts of the United States.

#### B. *Pinkerton as the Ghost of the Common Law Past*

The first key to understanding *Pinkerton* lies in recognizing that, in virtually all jurisdictions that use it, it is not a creature of statute but is purely a judicial invention.<sup>61</sup> Combined with how it operates, this creates an unconstitutional tension between the courts and legislatures in those jurisdictions.

In a roundabout way, the Pennsylvania Supreme Court acknowledged this in *Wayne*.<sup>62</sup> *Wayne* was not a case where that Court set out to articulate its conspirator liability rule, but, instead, to state a clear exception to it in a case of first degree murder.<sup>63</sup> A few years earlier, in *Commonwealth v. Huffman*<sup>64</sup> the Court decided that for a defendant to be found guilty of first degree murder under an *accomplice* liability theory he had to be shown to have shared the specific intent to kill the victim. In *Wayne*, the Court adopted the same rule for conspiratorial liability and held that a conspirator would be guilty of first

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60. The Pennsylvania experience of extrapolating the *Wayne* rule from precedent which truly does not support it is an illustration of this lack of critical approach. See *supra* notes 15-20 and accompanying text.

61. New Jersey and Texas are two examples where *Pinkerton* exists by statute. See N.J. STAT. ANN. § 2C:2-6 (West 2010); TEX. PENAL CODE ANN. § 7.02(b) (West 2003).

62. *Commonwealth v. Wayne*, 720 A.2d 456, 464 (Pa. 1998).

63. *Id.* at 460-62.

64. *Commonwealth v. Huffman*, 638 A.2d 961 (Pa. 1994).

degree murder in a death his partner caused only if he shared the specific intent to kill the victim.<sup>65</sup>

The premise of both *Huffman* and *Wayne* is that the legislature definitively delineated first degree murder as a crime requiring proof that the defendant specifically intended the death of the victim and that application of vicarious liability rules would improperly water down that statutory element of the crime.<sup>66</sup> The *Wayne* Court held that the “simple application of the co-conspirator rule to cases of first degree murder would alleviate the Commonwealth’s burden of proving an essential element of the crime,”<sup>67</sup> and “[s]uch a result was clearly not contemplated by the legislature when it delineated the elements distinguishing the various degrees of homicide.”<sup>68</sup> Allowing a conviction for first degree murder without requiring proof that the defendant personally intended the victim’s death would be “unconscionable.”<sup>69</sup>

The Court’s reasoning is compelling and inescapable. Indeed, it should have been an “A-ha” moment for all of vicarious liability jurisprudence everywhere. Unfortunately, however, the *Wayne* Court did not realize how truly compelling and pervasive this insight is or that its reasoning inevitably applies to *any* crime the legislature designates for a *mens rea* above strict liability. The “exception” pronounced in *Wayne* should have swallowed the “rule” *Strantz* improperly begat.<sup>70</sup>

This point was reinforced, albeit in back-handed fashion, by the Chief Justice of Pennsylvania in arguing in later cases that the *Wayne* exception should be overturned. In concurring opinions in *Commonwealth v. Hannibal*<sup>71</sup> and *Commonwealth v. Simpson*,<sup>72</sup> Chief Justice Castille advocated embracing the *Strantz* (*Pinkerton*) rule for all crimes, arguing in *Hannibal* that *Wayne* was an aberrational judicial modification of the Crimes Code of the Commonwealth. He claimed:

The Crimes Code certainly does not require the *Wayne* exception to conspiracy liability. Generally, there is no requirement that conspirators must specifically contemplate each particular crime that may occur in furtherance of the conspiracy before liability may attach. I certainly see no principled basis for this Court’s revision of

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65. *Wayne*, 720 A.2d at 464.

66. *Id.*; *Huffman*, 638 A.2d at 964.

67. *Wayne*, 720 A.2d at 464.

68. *Id.* (citing 18 PA. CONS. STAT. §§ 2502(a)-(b) (2010)).

69. *Id.*

70. *Commonwealth v. Strantz*, 195 A. 75, 79 (Pa. 1937); *see also Commonwealth v. Burdell*, 110 A.2d 193 (Pa. 1955).

71. *Commonwealth v. Hannibal*, 753 A.2d 1265, 1274 (Pa. 2000).

72. *Commonwealth v. Simpson*, 754 A.2d 1264 (Pa. 2000).

the law of conspiracy simply because the charge involved is first degree murder.<sup>73</sup>

In making this argument, one would expect that the Chief Justice would quote the section of the Pennsylvania Crimes Code that he believed requires conspiracy liability for crimes that he feared the Court violated by not upholding it in cases of first degree murder. He does not because *no such section exists* in the Pennsylvania Crimes Code. Indeed, the section dealing with "Liability for Conduct of Another"<sup>74</sup> is drawn from the Model Penal Code section on point that openly repudiated *Pinkerton* as a basis for liability.<sup>75</sup> No other section of the Pennsylvania Crimes Code permits it or, for that matter, authorizes the Court to rewrite the Code to put it in.

While the common law of Pennsylvania embraced conspirator liability before *Wayne*, the Legislature passed the Crimes Code in 1972 and included an important section barring the Court from creating criminal liability where none existed on the pages of that Code. Section 107(b) states: "No conduct constitutes a crime unless it is a crime under this title or another statute of the Commonwealth."<sup>76</sup> Since neither that

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73. *Hannibal*, 753 A.2d at 1274-75.

74. The principal sections of 18 PA. CONS. STAT. § 306 (2010) speak only to accomplice liability, as set forth below:

§ 306. Liability for conduct of another; complicity

(a) GENERAL RULE—A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

(b) CONDUCT OF ANOTHER—A person is legally accountable for the conduct of another person when:

(1) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct;

(2) he is made accountable for the conduct of such other person by this title or by the law defining the offense; or

(3) he is an accomplice of such other person in the commission of the offense.

(c) ACCOMPLICE DEFINED—A person is an accomplice of another person in the commission of an offense if:

(1) with the intent of promoting or facilitating the commission of the offense, he:

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

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

(2) his conduct is expressly declared by law to establish his complicity.

The remaining sections of this statute speak to further aspects of accomplice liability; the concept of conspiratorial liability is nowhere to be found.

75. WAYNE R. LAFAVE, CRIMINAL LAW, § 13.3, p. 722-24 (5<sup>th</sup> ed. 2009).

76. 18 PA. CONS. STAT. § 107(b) (2010).

title nor any or other Pennsylvania statute provides for anything like *Pinkerton* liability, *Strantz* and its progeny should have died in 1972.

The Chief Justice was thus right when he argued that “[t]here is no logical reason to single out first degree murder from other crimes in determining the reach of conspiracy liability,”<sup>77</sup> but he is right because there is no conspirator liability under the Pennsylvania Crimes Code at all. In a sense, the Chief Justice recognized this one month after his opinion in *Hannibal* when, in *Simpson*, he called upon the Legislature to repeal *Wayne* by statute.<sup>78</sup>

But until the Pennsylvania General Assembly acts, not just to repeal *Wayne* but to enact conspirator liability in the Commonwealth, the judicially created *Strantz/Pinkerton* rule will do in every case exactly what the *Wayne* majority says it does in first degree murder, that is, “alleviate the Commonwealth’s burden of proving an essential element of the crime”<sup>79</sup> and achieve “a result [that] was clearly not contemplated by the legislature when it delineated the elements.”<sup>80</sup>

Other states have recognized this issue by examining their statutes. In *State v. Stein*,<sup>81</sup> the Washington Supreme Court rebuked a trial court for instructing a jury alternatively on theories of accomplice liability and *Pinkerton* conspirator liability.<sup>82</sup> The statutes in Washington (like Pennsylvania’s) are drawn from the MPC and as they did not provide for conspiratorial liability, the Washington Supreme Court found that instructions permitting a *Pinkerton* finding were simply “incompatible with Washington law.”<sup>83</sup> The highest courts of Arizona, Nevada and New York reached similar conclusions, holding that their statutory schemes require proof of accomplice liability, that is, a defendant must have the requisite knowledge and *mens rea* required of the substantive crime his confederate committed in his absence.<sup>84</sup>

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77. *Hannibal*, 753 A.2d at 1275 (Castille, J., concurring).

78. Commonwealth v. Simpson, 754 A.2d 1264, 1280 (Pa. 2000) (Castille, J., concurring).

79. Commonwealth v. Wayne, 720 A.2d 456, 464 (Pa. 1998).

80. *Id.*

81. *State v. Stein*, 27 P.3d 184 (Wash. 2001).

82. *Id.* at 185.

83. *Id.* at 189.

84. See *Evanchyk v. Stewart*, 47 P.3d 1114 (Ariz. 2002); *People v. McGee*, 399 N.E.2d 1177 (N.Y. 1979). The analysis of the issue by the Supreme Court of Nevada is truly extensive and noteworthy. See *Bolden v. State*, 124 P.3d 191, 196-200 (Nev. 2005), *rev’d on other grounds*; *Cortinas v. State*, 195 P.3d 315 (Nev. 2008). While concluding that there was simply no statutory basis for *Pinkerton* liability in Nevada, the *Bolden* Court made a point that will become quite relevant in a matter we will discuss later. That is, while the acts that constitute joining a conspiracy are not enough, by themselves, to automatically hold a defendant guilty of the *mens rea* necessary to commit the specific intent crimes of his conspirators, those same actions may be enough to hold him

Where legislatures want to include *Pinkerton* liability in their Crimes Codes, they know how to find the words to do so. The New Jersey Supreme Court recognized that *Pinkerton* liability is proper there because its legislature carefully added language to its “Liability for Conduct of Another”<sup>85</sup> section to include it.<sup>86</sup> Texas also specifically provides for such liability with respect to substantive offenses graded as felonies.<sup>87</sup>

Of course, the Pennsylvania Supreme Court is not the only Supreme Court to adopt a theory of criminal liability on its own where none exists in the statutes that define crimes in the first place. The United States Supreme Court did the same thing in *Pinkerton* itself. The liability there was created without an act of Congress or even an attempt to discern legislative intent.<sup>88</sup> Yet *Pinkerton* is not simply a rule of procedure or evidence that structures a court’s exercise of discretion. It is a substantive doctrine concocted by a court that extends criminal liability in a way that supersedes the legislature’s judgment. As long as we value separation of powers as a foundational aspect of constitutional governance,<sup>89</sup> the use of *Pinkerton* without an enabling statute is, and should be, deeply problematic.

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accountable for their general intent crimes where outcomes need not be intended, just foreseeable on some level. *Bolden*, 124 P.3d at 200. Professor Pauley indicates that the North Carolina Supreme Court has also rejected *Pinkerton*, that Alaska, Maine and North Dakota reject it by statute and that Massachusetts has not adopted it. See Pauley, *supra* note 34, at 4-6 n.9.

85. N.J. STAT. ANN. § 2C:2-6 (West 2010).

86. State v. Bridges, 628 A.2d 270, 275-76 (N.J. 1993).

87. The Texas Penal Code provides as follows:

If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

TEX. PENAL CODE ANN. § 7.02(b) (West 2003).

88. Kreit, *supra* note 9, at 596. The Court has sometimes gone to remarkable lengths to find legislative intent, but *Pinkerton* does not purport to be founded on any basis originating with the will or intention of Congress. See Antkowiak, *supra* note 58, at 10 (2008) (discussing the Court’s interpretation in *United States v. Dixon*, 548 U.S. 1 (2006)). As the Third Circuit held in applying *Pinkerton* liability in the Virgin Islands, *Pinkerton* is simply an accepted part of federal, conspiracy jurisprudence. See *United States v. Lopez*, 271 F.3d 472, 481 (3d Cir. 2001). Whether that squares with Article 1, § 8 of the Constitution is an unanswered question at present.

89. See Bruce A. Antkowiak, *Courts, Judicial Review and the Pursuit of Virtue*, 45 DUQ. L. REV. 467 (2007); Bruce A. Antkowiak, *Contemplating Brazilian Federalism: Reflections on the Promise of Liberty*, 43 DUQ. L. REV. 599 (2005). Note that the state of Connecticut, by statute, apparently does authorize its courts to add theories like *Pinkerton*. See *State v. Walton*, 630 A.2d 990, 998 (Conn. 1993).

### C. The Irreconcilability of *Pinkerton* and the Rudiments of Due Process

That *Pinkerton* offends separation of powers principles in jurisdictions that have not adopted it by statute is bad enough. But what it does to those systems after that is much worse. Stripping away all of its niceties and particulars, *Pinkerton* is a judicially created device to dilute the elements of an offense and lessen the government's burden to prove those elements beyond a reasonable doubt. As we now use it, with or without reasonable foreseeability, it represents a wholesale assault on the very core of criminal due process.

Consider how it operates in practice. The jury in Moe's trial has to answer the question of whether Moe is guilty of stealing the ladder and assaulting Shemp. They will be instructed on the elements of those crimes as the legislature has set them out, including the *mens rea* of each, to wit, specific intent for the theft and recklessness for the aggravated assault.

But what the court gives by defining the elements, it takes away with the *Pinkerton* charge. In Pennsylvania, the jury will be told that Moe is guilty of those substantive crimes regardless of his *mens rea* with respect to them. His conviction hinges merely upon the fact that he was Larry's conspirator at the time Larry committed them in furtherance of their plot to burglarize the home.<sup>90</sup> In other jurisdictions that use *Pinkerton*, the Court will simply add that the issue is not whether Moe "could or did intend for that particular crime to be committed"<sup>91</sup> but "whether [Larry's] commission of the subsequent crime was reasonably foreseeable" to Moe.<sup>92</sup>

Thus, by judicial fiat, Pennsylvania completely negates the *mens rea* element of intent or recklessness the legislature requires, and, in other venues, *Pinkerton* dilutes the statutory *mens rea* by substituting its objective standard of reasonable foreseeability, making Moe guilty as long as he was *merely negligent* with respect to those offenses.<sup>93</sup> As the *Coward* Court and others admit, the state no longer has to prove that Moe acted with the intent to deprive the owner of his ladder or recklessly

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90. Commonwealth v. Wayne, 720 A.2d 456, 463-64 (Pa. 1998) (internal citations omitted).

91. *Id.*

92. State v. Coward, 972 A.2d 691, 701 (Conn. 2009).

93. See State v. Bridges, 628 A.2d 270 (N.J. 1993); People v. Zielesch, 101 Cal. Rptr. 3d 628 (Cal. Ct. App. 2009); United States v. Hansen, 256 F. Supp. 2d 65, 67 n.3 (D. Mass. 2003).

caused serious bodily injury to Shemp.<sup>94</sup> Moe goes to the penitentiary for these crimes because the judge, without authorization from the statute, lessened the elements of the offense of conviction.

This is not a process the Constitution permits. Within the past two decades, the United States Supreme Court has carefully and consistently articulated a jurisprudence that defines the rudiments of due process in criminal cases. That jurisprudence coalesced in a line of cases superficially dealing with the attempt of legislatures to take from the jury the authority to make findings relevant to the fixing of a maximum sentence and vest that authority with a judge. The leading case in that line is *Apprendi v. New Jersey*.<sup>95</sup> In prior articles, I have analyzed the broader impact and importance of the *Apprendi* line in great detail.<sup>96</sup> Rather than recapitulating the entirety of that work here, or burdening you with huge block quotes from it, let me summarize what I hope you would find if you digested this previous analysis:

- At the very core of due process in criminal cases is the recognition of the interrelated concepts of the right to trial by jury, the presumption of innocence and the demand that the government prove all elements of an offense beyond a reasonable doubt.<sup>97</sup> I call this the “jury right,” and to the Supreme Court, it is a principle of “surpassing importance.”<sup>98</sup>
- This principle animates a Constitutional process that justifies the imposition of punishment. That process assigns a defined role to each of three distinct government entities:
  - the legislature sets out the elements of an offense,
  - the executive bears the burden of proving those elements beyond a reasonable doubt against a presumptively innocent defendant, and
  - the judiciary presides over the effort to prove the elements and imposes the authorized punishment if the proof succeeds.<sup>99</sup>

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94. *Coward*, 972 A.2d at 701; see *Bridges*, 628 A.2d at 270; *Zielesch*, 101 Cal. Rptr. 3d at 628; *Hansen*, 256 F. Supp. 2d at 67 n.3. See also *Kreit*, *supra* note 9, at 589, 613.

95. *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000).

96. See Antkowiak, *The Irresistible Force*, *supra* note 58, at 21; *The Art of Malice*, *supra* note 58, at 462-64; see generally Antkowiak, *Ascent of an Ancient Palladium*, *supra* note 58.

97. Antkowiak, *The Irresistible Force*, *supra* note 58, at 2.

98. *Apprendi*, 530 U.S. at 476-77.

99. Antkowiak, *The Irresistible Force*, *supra* note 58, at 16-18, 21-23, 27.

- No one government entity (and no combination of them), however, are empowered to actually *authorize* the imposition of punishment. The act of *authorization* is retained by the people in the institution of the jury.<sup>100</sup> Thus, the Constitution “require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.”<sup>101</sup>
- The legislatures, then, may define the elements of the crime, but may neither usurp the province of the jury by letting a judge decide any element nor lessen the government’s burden before the jury through any procedural nuance.<sup>102</sup> The necessary corollary to this is that just as the legislature cannot negate the jury right, judges cannot do it either by any judicially created device.<sup>103</sup>

*Pinkerton* violates the jury right at its most fundamental level. While the legislature initially fixes the element of *mens rea* at intent or recklessness, the court’s *Pinkerton* instruction re-fixes it by reducing it to negligence or less. *Pinkerton* also assumes the defendant’s entry into the conspiracy is *ipso facto* enough to prove proof of causation. Through *Pinkerton*, the court intrudes into the legislative realm by amending the statute, discounts the burden the prosecution is otherwise required to bear under the Constitution to prove all the elements of the crime charged, and strips the jury of its power to properly authorize the imposition of punishment. *Pinkerton* may have been around a long time, but it is irreconcilable with the modern rule of *Apprendi*.

And from a law enforcement perspective, *Pinkerton* is so unnecessary. *Apprendi* affords great deference to a legislature to fashion elements of an offense.<sup>104</sup> For example, if Shemp died from his head

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100. *Id.*

101. United States v. Gaudin, 515 U.S. 506, 510 (1995).

102. See Antkowiak, *The Irresistible Force*, *supra* note 58, at 4 n.24.

103. See *id.* at 24-26. After all, the Framers feared judicial tyranny every bit as much as they did oppression by the legislature, and set the jury right as the fundamental bulwark against each. See *id.* Since the publication of these articles, the *Apprendi* line has continued. See United States v. O’Brien, 130 S.Ct. 2169 (2010) (reaffirming the principles of fear of judicial tyranny and jury right as a fundamental protection).

104. I have discussed the great deference paid to legislatures in defining elements of offenses within Constitutional boundaries and the requirement of the right to trial by jury. Antowiak, *The Irresistible Force*, *supra* note 58, at 5-10. Deference afforded in statutory

injury instead of just sustaining a bad concussion, Moe would be an excellent candidate for a conviction under the felony murder rule, what Pennsylvania calls Second Degree Murder.<sup>105</sup> By statute, Moe would be guilty because a homicide was committed while he was engaged as an accomplice in the commission of one of the enumerated felonies, to wit, burglary, and the homicide was committed in furtherance of that crime.<sup>106</sup> Malice (*mens rea*) is required for second degree murder but, by statute, it is supplied wholly by proof of Moe's intentional participation with Larry in the dangerous enterprise of burglary.<sup>107</sup> No judicially created form of *Pinkerton* is needed and the jury deliberates on the elements as the legislature set them out. The jury right and the process it animates are honored.

But where the legislature insists on a *mens rea* as a stand-alone element (intent or otherwise), the *Wayne* Court was right that the "simple application of the co-conspirator rule" operates to "alleviate the Commonwealth's burden of proving an essential element of the crime."<sup>108</sup> That alleviation is "clearly not contemplated by the legislature."<sup>109</sup> To hold a defendant guilty in such a circumstance is not just "unconscionable."<sup>110</sup> Under *Apprendi*, it is fundamentally unconstitutional.

## V. A NEW ROLE FOR *PINKERTON*

Say what you will about *Pinkerton*, it does make life easy. The system is seduced into a comfortable formula for effortless convictions by saying that Moe's guilt as a conspirator along with his negligence in not reasonably foreseeing Larry's conduct confederate *ipso facto* supplies the *mens rea* and causation elements of the theft and assault

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sentencing schemes is also evident. See *Ewing v. California*, 538 U.S. 11, 29 (2003); *Smith v. Doe*, 538 U.S. 84, 93 (2003); *Gregg v. Georgia*, 428 U.S. 153, 175 (1976). *Apprendi*, after all, never disputed the authority of the New Jersey legislature to make the hate crime aspect of an offense a relevant matter for sentencing but simply imposed Constitutional limits on how that aspect could be determined consistent with the jury trial right. *Apprendi v. New Jersey*, 530 U.S. 466, 490-97 (2000); see also *O'Brien*, 130 S.Ct. at 2175 ("Subject to this constitutional constraint, [Apprendi] whether a given fact is an element of the crime itself or a sentencing factor is a question for Congress.").

105. 18 PA. CONS. STAT. § 2502(b) (2008) (defining a criminal homicide as constituting murder of the second degree "when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony").

106. PA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502B (2d. ed. 2006).

107. 18 PA. CONS. STAT. § 2502(b) (2008).

108. *Commonwealth v. Wayne*, 720 A.2d 456, 464 (Pa. 1998).

109. *Id.*

110. *Id.*

offenses.<sup>111</sup> The problem, of course, is that a lot of things in law enforcement would be easier if the Constitution did not intrude as it does here to call for the end of *Pinkerton* as we now know it.

If a jurisdiction really wants all conspirators to be convicted of all crimes their confederates commit during the course of and in furtherance of the conspiracy, at least let its legislature say so. While that would be in disregard of advice given by various members of the United States Supreme Court,<sup>112</sup> a statute that explicitly incorporates *Pinkerton* and its minimum due process components would more easily survive a constitutional challenge.<sup>113</sup> However, no jurisdiction that currently embraces *Pinkerton* by judicial invention alone will turn to the statutory option until and unless a court agrees with the thesis of this article that *Pinkerton* and *Apprendi* cannot exist side by side.<sup>114</sup>

But do we really need *Pinkerton* for effective and just law enforcement? While courts cannot wave a judicial wand and smooth out the road to conviction by making *Pinkerton* liability automatically equate with proof of a defendant's *mens rea* for substantive offenses, a defendant's conduct in joining a conspiracy need not be disregarded when the issue is his guilt for a crime committed by another. We need a new perspective on this, one not as easy as *Pinkerton*, but one resting on a much firmer Constitutional footing.

First, let us recognize the reality of conspiracy. Realistically, how many conspirators do no more than say "I agree" and then do nothing to help the project along? Deadwood is rare in a conspiracy as conspirators

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111. See *supra* notes 4-9 and accompanying text.

112. While Justice Rutledge was critical of the extension of conspiracy liability in *Pinkerton v. United States*, 328 U.S. 640, 648 (1946), and Justices Murphy and Frankfurter shared similar views in *Nye & Nissen v. United States*, 336 U.S. 613, 621, 628 (1949), the strongest condemnation came from Justice Jackson in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 445 (1949). Fresh from his experiences as the chief United States prosecutor at Nuremberg, Jackson nonetheless decried the expansion of the conspiracy doctrine as one representing a "serious threat to fairness in our administration of justice." *Krulewich*, 336 U.S. at 446. He traced its origin to Star Chamber and labeled its *Pinkerton* principle one both "novel and dubious." *Id.* at 450-51. Jackson concluded by issuing a stern warning against judge-made law generally, arguing that "few instruments of injustice can equal that of implied or presumed or constructive crimes. The most odious of all oppressions are those which mask as justice." *Id.* at 456-58.

113. New Jersey has done this with its statute. See *State v. Bridges*, 628 A.2d 270, 275-76 (N.J. 1993).

114. For a Court to agree would call into question the validity of convictions pending on appeal in which that issue was raised, of course, but its retroactive impact on other cases is certainly not clear at this point. See *Danforth v. Minnesota*, 552 U.S. 264 (2008). The Court has decided that the *Apprendi* line does not require retroactive application. See *Schriro v. Summerlin*, 542 U.S. 348 (2004).

seldom assume a state of repose after they utter the words “I’m in.” To conspire usually requires engaging in a range of dangerous activities as the *Pinkerton* Court itself noted:

For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.<sup>115</sup>

Chief Justice Castille articulated this as well:

There is a synergy that arises from criminal confederations. People who might not have the individual courage, the ability, or the ill judgment to commit a crime on their own become emboldened when they join with confederates to plan and launch a criminal enterprise. In recognition of the distinct dangerousness of this criminal phenomenon, the legislature has codified conspiracy itself as a separate crime—i.e., conspiracy is not just a theory of liability, it is a distinct crime.<sup>116</sup>

The range of knowledge Moe had by conspiring and the intent with which he performed actions in support of the scheme are relevant to the question of whether he is responsible for the intentional theft of the ladder and the reckless injury to Shemp. The trick is finding the proper legal framework in which the jury should assess that relevant evidence.

#### A. *Mens Rea—Post-Pinkerton*

With respect to substantive crimes carrying a *mens rea* of intent (the theft), the legislatures have provided that a defendant’s vicarious liability must be assessed solely under an accomplice theory.<sup>117</sup> But Professor Matthew Pauley is correct that *Pinkerton* should be understood as a way to explain (he says expand) accomplice liability in the context of a multi-

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115. *Pinkerton*, 328 U.S. at 644 (quoting *United States v. Rabinowich*, 238 U.S. 78, 88 (1915)).

116. *Commonwealth v. Hannibal*, 753 A.2d 1265, 1275 (Pa. 1998); *see also State v. Coward*, 972 A.2d 691, 700-01 (Conn. 2009).

117. This is the Model Penal Code position. *See MODEL PENAL CODE § 2.06 (1962); LaFave, CRIMINAL LAW, § 13.3, at 722-724 (5th. ed. 2009).*

defendant case.<sup>118</sup> To be sure, while accomplices and conspirators are distinct creatures, they certainly share much of the same DNA. Not all accomplices are conspirators,<sup>119</sup> but the acts and intent that make someone an accomplice certainly walk them a long way down the path to being in a conspiracy. And while not all conspirators are necessarily accomplices in the substantive crimes committed by their confederates, the specific intent conspirators share and their active support to the common criminal end draws each much closer to being an accomplice in those related criminal acts.

Speaking of *Pinkerton* in accomplice liability terms turns out to be far more faithful to its historical origins than is seeing it as a distinct theory for convicting people.

Just as the precursor cases for the *Strantz* version of *Pinkerton* in Pennsylvania are all rooted in accomplice liability,<sup>120</sup> so is *Pinkerton*. It held:

The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. *The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle.*<sup>121</sup>

Indeed, in one of the first applications of *Pinkerton*, the United States Supreme Court viewed it as a subset of accomplice liability.

In *Nye & Nissen v. United States*, a company and its chief officer (Moncharsh) were convicted of making fraudulent sales to the military during the Second World War.<sup>122</sup> The officer claimed that the only basis for his conviction was a misapplied *Pinkerton* charge.<sup>123</sup> While the Supreme Court agreed that the lower court gave a faulty *Pinkerton* instruction, it sustained the conviction because Moncharsh was also properly convicted under an aiding and abetting (accomplice) theory.

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118. Pauley, *supra* note 34, at 17; see also Susan Brenner, *Civil Complicity: Using the Pinkerton Doctrine to Impose Vicarious Liability in Civil RICO Actions*, 81 KY. L.J. 369, 384 (1992-93).

119. See *Commonwealth v. Murphy*, 844 A.2d 1228, 1238-39 (Pa. 2004) (discussing the concept of not all accomplices being conspirators); *Commonwealth v. Marquez*, 980 A.2d 145, 154 (Pa. Super. Ct. 2009) (Cleland, J., dissenting).

120. See *Commonwealth v. Strantz*, 195 A.75, 79 (Pa. 1937).

121. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946) (emphasis added).

122. *Nye & Nissen v. United States*, 336 U.S. 613, 616 (1949).

123. *Id.* at 616-17.

While there was “no direct evidence” tying him to six substantive counts of submitting false invoices,<sup>124</sup>

there is circumstantial evidence wholly adequate to support the finding of the jury that Moncharsh aided and abetted in the commission of those offenses. Thus there is evidence that he was the promoter of a long and persistent scheme to defraud, that the making of false invoices was a part of that project, that the makers of the false invoices were Moncharsh’s subordinates, that his family was the chief owner of the business, that he was the manager of it, that his chief subordinates were his brothers-in-law, that he had charge of the office where the invoices were made out.<sup>125</sup>

The fact that this evidence did “double duty” in proving him guilty of the conspiracy did not exclude the jury from inferring from the evidence Moncharsh’s knowing participation in the submission of those invoices as an accomplice.<sup>126</sup>

The Court then explained how a proper *Pinkerton* instruction would have fit this scenario because “[t]he rule of that case does service where the conspiracy was one to commit offenses of the character described in the substantive counts,” making its relationship to accomplice liability more apparent.<sup>127</sup> The “service” *Pinkerton* does identifies a subset of accomplice liability in which the parties not only consciously share in the commission of the criminal act but have reached a prior agreement to accomplish it. This type of accomplice liability is more “narrow in its scope”<sup>128</sup> than pure accomplice liability, which can occur regardless of whether that sharing reaches the point of conspiracy. Where a conspiracy is formed and a defendant’s role is like that of Moncharsh (overseer, director, kingpin), a jury could readily conclude that his knowledge of the scheme and his acts in furtherance of the conspiracy apply to hold him guilty for substantive crimes “of the character described in the substantive counts,” even though he had no direct personal involvement in them.<sup>129</sup>

Although dissenting in the case, Justice Frankfurter reinforced this understanding of *Pinkerton*, reading the majority’s treatment of the doctrine to apply only if “there is a connection between the conduct of the conspiracy and the commission of the substantive offenses,” and the

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124. *Id.* at 619.

125. *Id.*

126. *Id.* at 619-20.

127. *Id.* at 620 (emphasis added).

128. *Id.*

129. *Id.* (emphasis added); see *State v. Soto*, 2010 U.S. App. LEXIS 20949, at \*1 (11th Cir. 2010).

jury is instructed to convict on the substantive counts only if “the necessary connection” is found.<sup>130</sup> The Nevada State Supreme Court has found the “necessary connection” in cases where the substantive crime requires proof of intent must be accomplice liability;<sup>131</sup> but evidence that flows from a defendant’s involvement in a conspiracy is relevant to that point.

Juries could be given guidance on this. Consider the language in bold below as an addition to the standard Pennsylvania charge on accomplice liability:

A defendant may be criminally responsible for an act committed by another person or persons if the defendant is an accomplice of another for a particular crime. In this case, you may find that Moe was an accomplice of Larry with regards to the theft of the ladder if the following two elements are proved beyond a reasonable doubt:

- a. that Moe had the intent of promoting or facilitating the commission of that crime; and
- b. Moe [solicited] [commanded] [encouraged] [requested] Larry to commit it [or] [[aided] [agreed to aid] [or] [attempted to aid] Larry in planning or committing it].

**In determining whether the Commonwealth has proved these two elements, you should consider:**

- 1. the nature of any agreement you find Moe had with Larry on a plan of joint action;**
- 2. any actions Moe took to further or carry out that agreement; and,**
- 3. any knowledge Moe acquired of Larry’s anticipated conduct from those actions and agreement.<sup>132</sup>**

Under such an instruction, a conspirator such as Moncharsh who is a central planner and motivating force behind the enterprise may readily be found to have intended the commission of crimes by his underlings committed in furtherance of the scheme he hatched and directed. A

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130. *Nye and Nissen*, 336 US at 621 (Frankfurter, J., dissenting).

131. *State v. Bolden*, 124 P.3d 191, 201 (Nev. 2005).

132. PA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 8.306(a) (2d. ed. 2005).

lesser conspirator may not be. The facts will be determinative in each case and the jury should be allowed to consider the applicability of the relevant reasonable inferences in each circumstance.

But where recklessness is the requisite *mens rea* of the substantive crime, accomplice liability has no place since, as the Superior Court of Pennsylvania pointed out in *Commonwealth v. King*,<sup>133</sup> where an unintentional act is charged, accomplice liability is “not logically possible.”<sup>134</sup> To win a conviction, the government need only prove that the defendant consciously disregarded a substantial and unjustifiable risk of the harm that his conduct created.<sup>135</sup>

Applying Nevada law to the Moe and Larry hypothetical, Moe’s level of involvement and his knowledge of his conspirator’s actions and propensities<sup>136</sup> may well permit an inference that he knew the sort of risk he was creating by engaging in the dangerous business of conspiracy to burglarize a home.<sup>137</sup> In this regard, the Pennsylvania instruction on reckless conduct<sup>138</sup> to support an aggravated assault conviction could be supplemented in a case like Moe’s with the following additional language, in bold:

A person acts recklessly with respect to serious bodily injury when he or she consciously disregards a substantial and unjustifiable risk that such injury will result from his or her conduct. The risk must be of such a nature and degree that, considering the nature and intent of the defendant’s conduct and the circumstances known to him or her, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the defendant’s situation. It is shown by the kind of reckless conduct from which a life-threatening injury is almost certain to occur.

**In considering whether the defendant acted recklessly in this case, you may consider whether he acted in concert with another person to commit a criminal offense, and, in doing so, consciously disregarded a substantial and unjustifiable risk that serious bodily injury to another would result from their joint conduct.**

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133. *Commonwealth v. King*, 990 A.2d 1172 (Pa. Super. 2010).

134. *Id.* at 1178 n.1.

135. 18 Pa.C.S. § 302(b)(3) (2010).

136. Pauley, *supra* note 34, at 24.

137. While specifically rejecting *Pinkerton* liability for crimes involving specific intent, Nevada allowed for it where the substantive crime was only one of general intent. *State v. Bolden*, 124 P.3d 191, 201 (Nev. 2005). This principle proved to be a point of undoing for defendant O.J. Simpson, whose robbery conviction was upheld under a *Pinkerton* theory given that robbery in Nevada is a crime of general intent. *State v. Simpson*, 2010 WL 4226452, at \*7 (Nev. 2010) (unpublished opinion).

138. PA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2702B (2006).

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**In this regard, you may consider the nature of the criminal offense you find they joined in committing or attempting to commit, and the defendant's knowledge of the actions and propensities of the person or persons with whom he acted in concert.**

Thus, when the dust clears after we recognize that *Apprendi* no longer allows us to indulge the unconstitutionality of judicially created *Pinkerton* liability, defendants like Moe will not automatically be running free of the crimes their conspirators commit. Responsibility for specific intent crimes committed by a confederate will be confined to an informed version of accomplice liability and crimes carrying a lesser form of *mens rea* may still be proven when the nature of the object crime and the degree of the defendant's involvement allow a finding that he knew (or should have known) the danger his conduct and agreement created. The "synergy" Justice Castille spoke of in conspiracy may operate in a given case not only to invigorate the co-defendant but enlighten the defendant about the scope of the risk his joint actions have created. A well instructed jury can determine this without the automatic attribution of liability *Pinkerton* unconstitutionally prescribes, and without an amorphous second layer of due process protections that will no longer be needed.

But we have one more stop to make. Issues of causation are inextricably intertwined with problems of *mens rea* and we should note what causation will look like in multi-defendant cases in the world after *Pinkerton*.

#### B. Causation Post-*Pinkerton*<sup>139</sup>

Once again, assume that Shemp dies from the wound he received when Larry pushed him and he hit his head on the gnome. However, amend the felony murder statute and remove burglary as one of the designated felonies that would make Moe's murder conviction almost a foregone conclusion, because the rule of causation in second degree murder cases in Pennsylvania is very broad.<sup>140</sup> In such a scenario, Moe would be a candidate for conviction of either Third Degree Murder

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139. For a wonderful discussion of causation in cases involving multiple defendants, see Joshua Dressler, REASSESSING THE THEORETICAL UNDERPINNINGS OF ACCOMPLICE LIABILITY: NEW SOLUTIONS TO AN OLD PROBLEM, 37 HASTINGS L.J. 91, 91 n.1 (1985) (speaking of causation in terms of accomplice liability, but adding that all of his arguments there "apply even more forcefully to *Pinkerton* conspiracy theory").

140. See, e.g., Commonwealth v. Cotton, 487 A.2d 830 (Pa. Super. 1984) (finding that robbers caused the death of their victim based upon a heart attack he suffered from the stress of the event).

(where malice is found in a heightened degree of recklessness)<sup>141</sup> or Involuntary Manslaughter (which requires either recklessness of a lesser degree than Third Degree Murder or criminal negligence)<sup>142</sup> as long as the jury also finds that Moe “caused” the death of Shemp.

Just as his *mens rea* for those crimes cannot be automatically supplied by the judicially created *Pinkerton* rule, Moe’s membership in the conspiracy must not, on constitutional grounds, automatically supply the causation element either. But his actions as a conspirator are nonetheless relevant to the causation issue inherent in each of these substantive offenses.

Pennsylvania’s statute<sup>143</sup> on causation is identical to the MPC.<sup>144</sup> Its first section deals with whether the defendant’s conduct is “an antecedent but for which the result in question would not have occurred.”<sup>145</sup> While some commentators argue that the “but for” language may make proving

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141. The Pennsylvania Jury Instruction on malice to support Third Degree Murder states that

[f]or murder of the third degree, a killing is with malice if the perpetrator’s actions show his or her wanton and willful disregard of an unjustified and extremely high risk that his or her conduct would result in death or serious bodily injury to another. In this form of malice, the Commonwealth need not prove that the perpetrator specifically intended to kill another. The Commonwealth must prove, however, that the perpetrator took action while consciously, that is, knowingly, disregarding the most serious risk he or she was creating, and that, by his or her disregard of that risk, the perpetrator demonstrated his or her extreme indifference to the value of human life.

PA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502C (2d. ed. 2005).

142. The Pennsylvania Model Jury Instructions state,

[a] defendant’s conduct [including any failure to perform a legal duty,] is reckless when he or she is aware of and consciously disregards a substantial and unjustifiable risk that death will result from his or her conduct, the nature and degree of the risk being such that it is grossly unreasonable for him or her to disregard it. A defendant’s conduct is grossly negligent when he or she should be aware of a substantial and unjustifiable risk that death will result from his or her conduct, the nature and degree of the risk being such that it is grossly unreasonable for him or her to fail to recognize the risk. In deciding whether the defendant’s conduct was reckless or grossly negligent, you should consider all relevant facts and circumstances, including the nature and intent of the defendant’s conduct and the circumstances known to [him] [her]. As the definitions I just gave you indicate, the recklessness or gross negligence required for involuntary manslaughter is a great departure from the standard of ordinary care. It is a departure that shows a disregard for human life or an indifference to the possible consequences of one’s conduct. Compared with recklessness and gross negligence, the malice required for third-degree murder is a more blameworthy state of mind. The essence of malice is an extreme indifference to the value of human life.

PA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2504 (2010).

143. 18 PA. CONS. STAT. § 303 (LEXIS 2010).

144. MODEL PENAL CODE § 2.03 (1962).

145. 18 PA. CONS. STAT. § 303(a)(1) (LEXIS 2010).

causation by a conspirator very difficult,<sup>146</sup> the height of that particular hurdle is not that daunting.

The Superior Court of Pennsylvania has described it this way: “Thus, if the victim’s death is attributable *entirely* to other factors and not at all brought about by the defendant’s conduct, no causal connection exists and no criminal liability for the result can attach.”<sup>147</sup> This means that to avoid being a “but for” cause, the act of conspiring must be wholly irrelevant to the occurrence of the substantive criminal act.<sup>148</sup>

There are surely conspiracy cases in which the defendant was such a low level individual performing such a minor part of the overall operation that he was truly outside the links of causation that led to a particular offense.<sup>149</sup> But I would argue with some confidence that Moe’s actions did form a “but for” link in the fatal injury to Shemp. A jury might readily conclude that Larry lacked the “individual courage, the ability, or the ill judgment to commit [these] crime[s] on [his] own” and that he became “emboldened when [he] join[ed] with [Moe] to plan and launch a criminal enterprise.”<sup>150</sup> Given what “but for” really means, Moe’s agreement, conduct and direction to Larry may certainly have forged a link in the “but for” chain of the assault offense here.

The second aspect of causation relates to situations where the harm that was intended or the harm the defendant consciously risked (or negligently failed to foresee) did not occur but some other harm did.<sup>151</sup> In both cases, causation will still be present where the actual harm caused is less severe than intended (or portended), where it is inflicted on

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146. See Pauley, *supra* note 34, at 28; Kreit, *supra* note 9, at 614-15.

147. See Commonwealth v. Rementer, 598 A.2d 1300, 1305 (Pa. Super. 1991); Commonwealth v. Nunn, 947 A.2d 756, 760 (Pa. Super. 2008).

148. My personal experience with causation in Pennsylvania convinced me that it creates a nominal barrier to conviction in all but the most unusual of cases. I was counsel for the defendant in *In Interest of Hyduke*, 538 A.2d 66 (Pa. Super. 1988), a case which featured the following bizarre set of facts. Hyduke was driving north on a two lane country road when, for reasons unclear, he lost control of his car and found himself sliding across the road and onto the berm of the southbound lane. His car sheared off a telephone pole and, while his car continued into a field, the pole fell across the highway. A driver of a pickup truck coming southbound came over the crest of a hill, saw the pole and tried to stop. There was some indication that the trucks tires were mostly bald, but, in any event, the pickup hit the pole, rode up on it, and was directed by the pole to a stop in the northbound lane. A third car, proceeding north and travelling at a high rate of speed, then rounded a curve. The driver was going too fast to stop before slamming into the pickup, killing both occupants of the third car. *Id.* at 67-68. The Superior Court held that Hyduke caused their death. *Id.* at 71.

149. E.g., the day laborer who agrees to help off load the marijuana boat for \$500 would likely have had no causal effect on the decision by the drug kingpin and his assassins to kill the person they thought was an informant.

150. Commonwealth v. Hannibal, 753 A.2d 1265, 1275 (Pa. 1998).

151. 18 PA. CONS. STAT. § 303(b)-(c) (LEXIS 2010).

a different intended (or probable) victim, or where “the actual result involves the same kind of injury or harm (as that designed or contemplated) [or] (as the probable result) and is not too remote or accidental in its occurrence to have a bearing on the actor’s liability or on the gravity of his offense.”<sup>152</sup>

The Pennsylvania charge on causation properly puts this matter in the hands of the jury without reference to any form of *Pinkerton* liability by instructing that before a defendant can be found guilty of any degree of homicide, his acts must be found to have been a “direct cause” of the death. Direct cause is explained like this:

1. The defendant has been charged with [killing] [causing the death of] *[name of victim]*. To find the defendant guilty of this offense, you must find beyond a reasonable doubt that the defendant’s conduct was a direct cause of [his] [her] death.
2. In order to be a direct cause of a death, a person’s conduct must be a direct and substantial factor in bringing about the death. There can be more than one direct cause of a death. A defendant who is a direct cause of a death may be criminally liable even though there are other direct causes.
3. A defendant is not a direct cause of a death if [the actions of the victim] [the actions of a third person] [the occurrence of another event] *[event]* plays such an independent, important, and overriding role in bringing about the death, compared with the role of the defendant, that the defendant’s conduct does not amount to a direct and substantial factor in bringing about the death.
4. A defendant’s conduct may be a direct cause of a death even though his or her conduct was not the last or immediate cause of the death. Thus, a defendant’s conduct may be a direct cause of a death if it initiates an unbroken chain of events leading to the death of the victim.
5. A defendant whose conduct is a direct cause of a death cannot avoid liability on the grounds that the victim’s

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152. 18 PA. CONS. STAT. § 303(b)(2)-(c)(2) (2010). The language that demands consideration of whether the injury or harm is “not too remote or accidental in its occurrence to have a bearing on the actor’s liability or on the gravity of his offense” seems to be the *exact* sort of consideration Professor Noferi calls the “new” due process limit on *Pinkerton* except that it may be enforced by a jury as part of its deliberation. See generally Mark Noferi, *Towards Attenuation: A New Due Process Limit on Pinkerton*, 33 AM. J. CRIM. L. 91 (2006).

preexisting physical infirmities contributed to his or her death.<sup>153</sup>

This instruction allows the jury to consider all of Moe's personal actions as well as his knowledge of Larry generally and Larry's acts and propensities in judging whether Moe, along with Larry, caused Shemp's death. If they so found, the jury would then consider instructions on the various kinds of non-intentional *mens rea* that could support a verdict of Third Degree Murder or Involuntary Manslaughter. Even with *Pinkerton* out of the picture, there is no guarantee that Moe would escape a homicide conviction here.<sup>154</sup>

## VI. CONCLUSION

There is a *Pinkerton* problem in Pennsylvania and everywhere the doctrine has not been adopted by statute. It cannot be cured simply by including reasonable foreseeability in its formula or by conjuring up a second layer of due process protection that is based on little more than the gut instinct of a court that the doctrine should not apply in a given case.

In every place where *Pinkerton* lives by the will of the courts alone, the doctrine should be retired given its impact on the jury right and the grave due process problems it creates. In retiring it, however, the system must not ignore the fact that traditional, constitutionally acceptable *mens rea* and causation analyses are not offended by reference to the conduct a defendant undertakes when he joins and operates within a conspiracy. Simple modifications to existing jury instructions can make that all reasonably clear.

That is the help to the judges and practitioners this old warhorse's best efforts at wisdom can give today. For an elaborate display of plumage, visit your local zoo.

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153. PA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2501C (2d ed. 2005).

154. See, e.g., Commonwealth v. King, 990 A.2d 1172 (Pa. Super. 2010) (non-shooter defendant in an armed robbery in which the victim was killed acquitted of robbery, conspiracy and second degree murder, but convicted of third degree murder under a *Pinkerton* theory). But even without *Pinkerton*, did he not, by participating so actively in an armed robbery of a drug dealer, knowingly create a substantial risk of death and, when the death occurred, did he not play enough of a role in causing it that his conviction should be upheld?