Towards Attenuation: A 'New' Due Process Limit on Pinkerton Conspiracy Liability

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Table of Contents

I. Introduction ................................................................................................. 92

II. The Pinkerton Rule of Vicarious Conspiracy Liability ......................................... 94
   A. United States v. Pinkerton ............................................................................. 94
   B. Theoretical Justifications for Vicarious Liability ........................................... 95
   C. Theoretical Justifications for Vicarious Conspiracy Liability ......................... 98
      1. Retributive Justifications ......................................................................... 98
      2. Utilitarian Justifications .......................................................................... 100

III. “Reasonable Foreseeability” and Due Process .................................................. 104

IV. Theoretical Justifications for Due Process Limits .............................................. 105
   A. History of the Due Process Clause ............................................................... 105
   B. Procedural Due Process Concerns ............................................................... 108
   C. Unlimited Scope of Vicarious Liability ......................................................... 111
      1. The Federal Sentencing Guidelines Approach .......................................... 113
   D. Guilt by Association ..................................................................................... 116

V. Pinkerton and Due Process in the Lower Courts .................................................. 120
   A. “Reasonable Foreseeability” Applied ............................................................. 120
   B. Early Cases: “Attenuation” Introduced ......................................................... 124
   C. “More than Minor Participation” ................................................................. 128
      1. United States v. Alvarez ............................................................................ 128
      2. Federal Courts After Alvarez .................................................................... 130
      3. State Courts After Alvarez ....................................................................... 134
   D. “Reasonable Foreseeability” as a Due Process Limit ..................................... 138

I. Introduction

Pinkerton v. United States is reputedly one of the most venerable, well-settled, and unexamined precedents in American criminal law. Since 1946, under Pinkerton, a defendant can be held vicariously liable for the crimes of his co-conspirators, so long as they are "reasonably foreseeable." Otherwise, Pinkerton's scope is unlimited. The defendant's level of participation matters little.

Pinkerton has thus given federal prosecutors a powerful tool to induce guilty pleas and cooperation by wielding the specter of vicarious convictions over the heads of minor participants in conspiracies. As the U.S. government prosecutes criminals involved in large conspiratorial organizations—namely, corporate criminals and terrorists—Pinkerton assumes an ever-increasing importance. Published caselaw doesn't begin to reveal its impact, as Pinkerton's real influence is to tip the balance of pre-trial plea-bargaining.

Yet, quietly but steadily, a constitutional reassessment of Pinkerton is afoot. Over the last thirty years, as the power of the federal prosecutorial branch has grown, courts have developed a guilty conscience where a defendant is vicariously convicted for a crime that he didn't know of, didn't intend, and wasn't near. Courts now recognize due process limits on Pinkerton liability where the defendant was "attenuated" from his co-conspirator's crime. A handful of courts have even reversed convictions. These courts reassert lingering notions of fundamental fairness and "personal guilt" that have lay dormant since Pinkerton's inception. For sixty years, the Supreme Court has remained silent on Pinkerton, but as conspiracy cases work their way towards the Court, that might well change.

In Part I of this Article, I outline the rationale behind vicarious conspiracy liability, examining Pinkerton and the common-law and theoretical justifications it rests upon. In Part II, I examine the Pinkerton Court's suggested limit of "reasonable foreseeability," and the dissent's critique that
"reasonable foreseeability" is inadequate to protect due process, providing the touchstone for the later reassessments. In Part III, I examine the dissent's three concerns—looser evidentiary standards, the potentially unlimited scope of vicarious liability, and guilt by association—and their relationship to the Due Process Clause. Part IV examines the lower court reassessments of Due Process limits on Pinkerton liability. In Part V, I articulate this "new due process limit" of "attenuation," examine its theoretical justifications, and consider its practical implications, as well as whether the Supreme Court might adopt such a standard.

Before starting, it is important to note what this Article is not—a general call for less punishment for conspirators. This Article deals only with vicarious liability, not liability for conspiracy itself. Convicted conspirators still receive serious punishment for the crime of conspiracy—in most cases, as serious as the crime they conspire to commit, and potentially including death. This article, rather, addresses the justifications for imposing additional punishment through vicarious liability for crimes that


3. The Supreme Court has never ruled whether conspirators, convicted of conspiracy alone, can receive the death penalty. The Court has held for the non-homicidal crimes of rape, kidnapping, and armed robbery that absent the intent to kill, the death penalty is disproportional under the Eighth Amendment. See Coker v. Georgia, 433 U.S. 584 (1977); Eberheart v. Georgia, 433 U.S. 917 (1977); Enmund v. Florida, 458 U.S. 782, 797 (1982). On the other hand, the Court has not foreclosed the possibility that non-homicidal crimes such as treason, not involving an intent to kill, might today receive the death penalty. See United States v. Rosenberg, 195 F.2d 583, 603-09 (2d Cir. 1952), cert denied, 344 U.S. 838 (upholding death sentence for espionage as not cruel and unusual under Eighth Amendment); Harmelin v. Michigan, 501 U.S. 957, 967-68, 978 n.8, 980 (1991) (Scalia, J., plurality) (discussing history of punishments for treason in England and America). Nor has the Court considered whether terrorism crimes are analogous to crimes against the state such as treason.

The Court has considered whether accomplices to murder can receive the death penalty, but never conspirators. In considering the death penalty for accomplices to felony-murder, the Court's Eighth Amendment jurisprudence focuses on the defendant's "intent to kill." See Enmund, 458 U.S. at 801 ("Putting [defendant] to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute . . . to just deserts."); see also Tison v. Arizona, 481 U.S. 137, 158 (1987) (holding that for a defendant convicted vicariously of felony-murder, "major participation" in the underlying felony and a "reckless indifference to human life" sufficed to meet Enmund's "intent to kill" requirement). By analogy, a conspirator to murder, or terrorism, might receive the death penalty if he showed a sufficient intent to kill. See Tison v. Arizona, 481 U.S. at 150 (defining "intent to kill" as "desir[ing] that his acts cause killing," or "know[ing] that killing is substantially certain to result from his acts.")

the conspirator did not actually commit.

II. The *Pinkerton* Rule of Vicarious Conspiracy Liability

A. United States v. Pinkerton

Daniel and Walter Pinkerton were brothers and partners in an ongoing liquor-bootlegging conspiracy. 4 Both lived on Daniel's farm, in houses about two hundred yards apart. 5 Both were charged with a conspiracy to violate the Tax Code, as well as substantive violations of the Tax Code stemming from Walter's conduct. 6 There was no evidence that Daniel participated directly in the substantive crimes committed by Walter, aided or abetted them, or even knew of their commission. 7

The *Pinkerton* Court still upheld Daniel's convictions for Walter's substantive crimes. The Court explicitly overruled a lower court case requiring "direct participation in the commission of the substantive offense" "even though it was committed in furtherance of the conspiracy." 8 The *Pinkerton* Court reasoned that, under conspiracy law, if an "overt act [by] one partner in crime is attributable to all," then any act in furtherance of the conspiracy is "attributable to others for the purpose of holding them responsible for the substantive offense." 9 Regarding mens rea, "[t]he 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." 10 (The Court analogized to aiding and abetting liability, noting that "[t]he rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle." 11)

The *Pinkerton* majority did suggest limits on the rule. The Court

5. *Pinkerton*, 151 F.2d at 500. The lower court opinion states that "there was frequent association between the two. On one occasion when officers of the law were making an investigation at Dan Pinkerton's place, Walter Pinkerton drew a gun on the sheriff and threatened to kill him. Whenever Walter Pinkerton was arrested in the State courts of Fayette County, his brother Dan would make his bond." 12
6. *Pinkerton*, 328 U.S. at 641, 646-48. Some of Walter's acts comprising the substantive offenses were also the overt acts charged in the conspiracy. 13
7. *Id.* at 648 (Rutledge, J., dissenting). Walter committed some of the crimes while Daniel was in the penitentiary on other charges. 14
8. *Id.* at 646.
9. *Id.* at 647.
10. *Id.*
11. *Id.*
noted that a “different case” arose where the substantive offense committed by the co-conspirator either was “not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project,” or was not “reasonably foreseeable as a necessary or natural consequence of the unlawful agreement.”

B. Theoretical Justifications for Vicarious Liability

Commentators and courts frequently refer to “personal guilt” as a fundamental concept in criminal jurisprudence. However, vicarious liability—at least for accomplices—is as old as the common law. At common law, certain accomplices were traditionally punished for the crimes of the perpetrator, such as a defendant who through fraud, coercion, or manipulation consummates the crime through another person. But, Professor Dressler argues that at common law, “principal” accomplices—those who were at the scene of the crime—were treated differently, and generally more harshly, than “accessories” to the crime. These differences created logical inconsistencies. For example, accessories before the fact could not be convicted of the crime if the perpetrator was not convicted—even if the perpetrator fled from justice or died. Eventually, British and American legislators solved the inconsistencies by adopting legislative reforms abol-

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12. Id. at 647–48.

13. See Joshua Dressler, Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem, 37 HASTINGS L.J. 91, 103 (1985) [hereinafter Dressler, Reassessing] (“The common law is wedded to the concept of personal, rather than vicarious, responsibility for crimes.”); Francis Sayre, Criminal Responsibility for the Acts of Another, 43 HARV. L. REV. 689, 702 (1930) (noting the “fundamental, intensely personal, basis of criminal liability” as part of “the most deep-rooted traditions of criminal law”); People v. McGee, 399 N.E.2d 1177, 1182 (N.Y. 1979) (declining to follow the Pinkerton rule, the state court calls it “repugnant to our system of jurisprudence, where guilt is generally personal to the defendant.”). See also Section IV. D, infra.

14. See Dressler, Reassessing, supra note 13 at 94–95.

Conspiracy, however, as opposed to accomplice liability, is not a common-law doctrine, although it has existed for so long that it has assumed that status in American law. Conspiracy doctrine developed from a series of statutes dating from the time of Edward I, and has existed in its modern form since the beginning of the seventeenth century, when the Star Chamber decided that “the agreement itself was punishable even if its purpose remained unexecuted.” Note, Developments In the Law, Criminal Conspiracy, 72 HARV. L. REV. 922, 923 (1959); see generally, Francis Sayre, Criminal Conspiracy, 35 HARV. L. REV. 393, 394–409 (1922) (providing an overview of history of development of conspiracy laws). Sayre argues strongly that although the crime of conspiracy was traditionally thought of as one that developed at common law, it was entirely and always enacted by statutes. See id at 394–409. Sayre argues that the ambiguous statement, “all confederates whatsoever, wrongfully to prejudice a third person, are highly criminal at common law,” made by Hawkins in Pleas of the Crown, published in 1716, served to propagate the mistaken belief that conspiracy developed at common law. Id. at 402.

15. Dressler, Reassessing, supra note 13 at 94 n.12.

16. For example, the accessory before the fact could not be convicted of a higher degree of crime than the principal. Dressler, Reassessing, supra note 13 at 95 n.18.

17. Dressler, Reassessing, supra note 13, at 95 n.18. These rules did not apply to principals. Today, through Pinkerton doctrine, a conspirator could be convicted of a higher degree of crime than the perpetrator (see WAYNE LAFAVE, CRIMINAL LAW 662 (4th ed. 2003) (citing Clune v. United States, 159 U.S. 590 (1895)), and can be convicted if he is acquitted. See LAFAVE at 656.
ishing the distinctions between perpetrators and secondary criminals. ¹⁸

Professor Dressler noted three traditional theoretical justifications for vicarious accomplice liability. The first, causation, is not truly vicarious liability; for example, if an accomplice "causes" the crime by hiring someone to perform a killing, it is his personal culpability that is at issue, not the perpetrator’s. ¹⁹ Additionally, those who argue that "causation" provides a rationale for vicarious liability are generally referring to something less than "but-for" causation. ²⁰ For example, in the conspiracy context, Professor Paul Robinson notes that under Pinkerton, conspirators "cause" the substantive crime in the sense that they "created or helped create the situation in which the offense occurs."²¹

The second is agency theory, in which the accomplice is thought to vest the principal with authority to act on his behalf.²² However, agency theory rests on the utilitarian policy justification of protecting businessmen who reasonably rely on an agent’s representations, not any moral or retributive sense of blame.²³ Additionally, civil agency law typically requires a party to consent to control of another, whereas criminal accomplice liability (and even more pronounced, Pinkerton liability) does not.²⁴ Pinkerton es-


19. See Dressler, Reassessing, supra note 13 at 109.

20. Dressler notes that scholars who argue that "causation" provides a rationale for vicarious liability are defining "causation" more broadly than the traditional understanding of "but-for" causation. See Dressler, Reassessing, supra note 13 at 109 n.98 (citing Sayre, Criminal Responsibility for the Acts of Another, supra note 13 at 702 (stating that causation may be proved by "authorization, procurement, incitement, or moral encouragement, or... by knowledge plus acquiescence") and also citing George Fletcher, Rethinking Criminal Law 680 (1978) (stating "[(t)hat one can contribute to a result without causing it to lie at the foundation of accessoril liability]").

21. See Paul Robinson, Imputed Criminal Liability, 93 Yale L.J. 609, 633 (1984); Pinkerton v. United States, 328 U.S. 640, 647 (1946) (finding that "[e]ach 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"). In this way, Pinkerton liability is somewhat similar to the "defense" of intoxication, in that the defendant is still held liable for creating a risk of harm and being causally responsible for the harm that ensues. This is "imputation based on causal responsibility for creating the dangerous situation in which the harm or evil can occur absent the culpable state of mind normally required by offense." Robinson, 93 Yale L.J. at 642–43. However, Robinson criticizes Pinkerton doctrine as overly broad. See infra notes 44–49 and accompanying text.

22. See Dressler, Reassessing, supra note 13 at 109–10. Agency doctrine developed from the common-law doctrine of holding masters responsible for the actions of their slaves. See Sayre, supra note 13 at 691 n.11.

23. See Restatement (Second) of Agency § 1 (defining agency as a "fiduciary relation"); see also Sanford Kadish, Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine, 73 Cal. L. Rev. 323, 354 (1985).

24. See Restatement (Second) of Agency § 1(1) (stating that "[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to act.") "In conspiracy law, such control may be even more remote and fictional." Dressler, Reassessing, supra note 13, at 111 n.111. Even tort law requires some measure of control. "This is another instance in which Anglo-American tort law reflects greater sensitivity to individual justice than does criminal law." Fletcher, supra note 20, at 663, cited in Dressler, Reassessing, at 111 n.111. Fletcher's point underscores a fundamental inconsistency in Pinkerton doctrine—that in incorporating "reasonable foreseeability" into the criminal law, Pinkerton
sentially assumes that the criminal agreement provides that consent. Yet under *Pinkerton*, a conspirator can be liable for the acts of other conspirators whom he did not know and did not authorize. This is perhaps the heart of the requirement that the acts be "within the scope of the agreement" and "reasonably foreseeable."

Lastly, and perhaps most accurately, vicarious liability can be justified on a theory of "forfeited personal identity." Forfeited identity is often invoked against moral wrongdoers. For example, it explains why it is legal to kill in self-defense, or why those who plead guilty lose many constitutional rights. Professor Dressler argues that under complicity principles, "when an accomplice chooses to become a part of the criminal activity of another, she says in essence, 'your acts are my acts.'" However, Dressler argues forfeited personal identity goes too far, because when you forfeit personal identity, you lose your *entire* panoply of constitutional rights. This ignores the traditional common-law method of tailoring punishment to individual culpability and harm, and raises the possibility that fundamental rights may be denied.

These justifications apply to vicarious liability for traditional aiders and abettors—those involved directly in the crime. Conspiracy liability, however, is different. Conspiracy laws were passed primarily for the utilitarian concern of deterring crime before it happened. For a conspiracy, the agreement itself is the actus reus; thus, any retributive conceptions of punishment depend solely on that agreement, rather than participation in or a causal connection to the substantive crime. The differing justifica-

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25. See *Pinkerton*, 328 U.S. at 647 ("[The criminal intent to do the act is established by the formation of the conspiracy."); see also Kadish, *supra* note 23, at 354 (citing the "notion of agreement as the paradigm mode by which a principal in agency law (the secondary party in the terminology of criminal law) becomes liable for the acts of another person.")

26. See *Dressler, Reassessing*, supra note 13 at 111, 115–18.

27. *Id.* at 115.

28. *Id.* at 111. Dressler notes that accomplice law is not pure forfeiture doctrine, because it is based somewhat on personal culpability for actual assistance to a crime. *Id.* at 117. Conspiracy law, however, may be closer to pure forfeiture doctrine, in that we implicitly assume that when you join the conspiratorial group, you forfeit your entire personal identity to the group.

29. *Id.* at 116–17.

30. Matthew Pauley effectively argues that conspiracy is not so different; that *Pinkerton* does not establish vicarious liability, but rather builds upon the law of complicity by treating participation in the conspiracy as sufficient evidence, in law, for complicity in the substantive crimes that were the objects of that conspiracy. *Pauley, supra* note 4, at 17 (["[T]he Pinkerton decision is much narrower and less fearsome than either Justice Rutledge or its many other detractors have argued."]).

31. See *Scales v. United States*, 367 U.S. 203, 224–26 (1961) ("While [conspiracy and complicity] both are commonplace in the landscape of the criminal law, they are not natural features of the law. Rather, they are particular legal concepts manifesting the more general principle that society, having the power to punish dangerous behavior, cannot be powerless against those who work to bring about that behavior.").

32. "[T]here is a difference between the real participation contemplated in aiding or abetting, and the remote more plotting embraced by simple 'conspiracy'..." *Nye & Nissen v. United States*, 336 U.S. 613, 630 (1949) (Murphy, J. dissenting). In *Nye & Nissen*, the majority upheld the conviction under aiding and abetting liability, while the appeals court had upheld the conviction under *Pinkerton*.
C. Theoretical Justifications for Vicarious Conspiracy Liability

1. Retributive Justifications

The theoretical justifications for vicarious conspiracy liability rest almost entirely on utilitarian, rather than retributive, concerns. It is difficult to find commentators or courts who defend Pinkerton liability, or conspiracy liability in general, on moral or retributive grounds. Indeed, the leading recent article supporting Pinkerton doctrine does not attempt to justify it on retributive grounds.

Professor Dressler implies that vicarious Pinkerton liability for conspiracy has no retributive basis, insofar as it is not based on culpability for traditional aiding and abetting. Dressler argues for the moral importance of causation—that without a causal link from the defendant to the harm caused, vicarious liability has no retributive basis. Additionally, to the extent that that harm exists, the level of retribution should be proportional to the harm caused, thus arguing against punishing conspirators as severely as the actual criminals.

Some commentators argue, however, that entering the criminal agreement provides a manifestation of criminal intent that forms a basis of retributive punishment. The original Pinkerton decision followed this reasoning. This criminal intent, however, can be a general intent, not the

Justice Murphy criticized the trial judge for confusing the two and the majority for not remanding for a new trial with clear instructions on one or the other. Id. at 627–30.

33. No court which has taken the Pinkerton approach has offered an adequate rationale for convicting a conspirator for the crimes of his associates.” Note, Developments in the Law, Criminal Conspiracy, supra note 14, at 998; see also Phillip E. Johnson, The Unnecessary Crime of Conspiracy, 61 CAL. L. REV. 1137, 1147 (1973).


35. See Dressler, Reassessing, supra note 13, at 115–20.

36. “[A]ny nonutilitarian juridical conception of blame focuses initially and primarily on the external harm caused by the criminal actor. The harm or actus reus of the crime is the indispensable justification for punitive intervention.” Id. at 104 (citing FLETCHER, supra note 20, at 466–69; Joshua Dressler, New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking, 32 U.C.L.A. L. REV. 61, 79, 83 (1984)).

37. See Dressler, Reassessing, supra note 13, at 105 n.81 (noting that inchoate crimes such as attempt are traditionally punished less than the completed crime). See also Stephen Schulhofer, Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law, 122 U. PA. L. REV. 1497, 1501 (1974).

38. See Note, Developments in the Law, Criminal Conspiracy, supra note 14 at 924 (“The agreement itself, in theory at least, provides a substantially unambiguous manifestation of intent . . . ”)

39. “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.” Pinkerton v. United States, 328 U.S. 640, 647 (1946).
specific intent to achieve the object of the conspiracy. Additionally, regarding vicarious liability, specific intent towards a co-conspirator’s substantive crime is not required today for vicarious liability under Pinkerton.

The Pinkerton Court did appear to envision a situation, like Daniel and Walter Pinkerton’s, in which some specific intent towards the substantive crime existed. In the Pinkertons’ case, there was a longstanding conspiracy, and perhaps if one brother didn’t commit the tax violation one day, the other would have the next day. This apparent requirement of some specific intent forms the heart of the Pinkerton Court’s limit that the substantive crime be within the scope of the conspiracy, in furtherance of the conspiracy, and “reasonably foreseeable.” Since Pinkerton, however, circuit courts have specifically extended Pinkerton to crimes that were unintended consequences of a conspiracy, so long as the crimes were “reasonably foreseeable” and the defendants were “more than ‘minor’ participants” in the conspiracy.

Professor Robinson argues that for a defendant to be convicted vi-

40. “[T]here are really two intents required for the crime of conspiracy: an intent to agree and an intent to achieve the object of the agreement . . .” Note, Developments in the Law, Criminal Conspiracy, supra note 14 at 935. Regarding the specific intent to achieve the object of the agreement, “It is difficult to conceive of any crime in which the intent is less specific.” Id.

The definition of “general intent” in criminal law is famously unclear. See WAYNE LAFAVE, supra note 17, at 253–54:

“General intent” is often distinguished from “specific intent,” although the distinction being drawn by the use of these two terms often varies. Sometimes “general intent” is used in the same way as “criminal intent” to mean the general notion of mens rea, while “specific intent” is taken to mean the mental state required for a particular crime. Or, “general intent” may be used to encompass all forms of the mental state requirement, while “specific intent” is limited to the one mental state of intent. Another possibility is that “general intent” will be used to characterize an intent to do something on an undetermined occasion, and “specific intent” to denote an intent to do that thing at a particular time and place. However, the most common usage of “specific intent” is to designate a special mental element which is required above and beyond any mental state required with respect to the actus reus of the crime.

LaFave then gives examples of that “special mental element” such as the larcener’s intent to steal in larceny, or the burglar’s intent to commit a felony inside.

Here, the general intent I refer to in the context of Pinkerton liability is at times general criminal intent, and at times the intent to do something at an undetermined time and place. For Pinkerton liability to attach, the conspirator must commit the crime of conspiracy—which requires the intent to achieve the object of the agreement at an undetermined time and place. Once Pinkerton liability attaches, though, only general criminal intent in the broad sense towards a co-conspirator’s crime is required. It is not required that the defendant intend for his co-conspirator to commit the crime, albeit at an undetermined time and place—it is only required that the co-conspirator’s crime be “foreseeable.” Essentially, defendant is punished for his criminal negligence in associating himself with an enterprise in which he should know a co-conspirator might commit such a crime.

Professor Robinson proposes raising the standard for vicarious liability from negligence to knowledge—that is, at least defendant’s knowledge of his causal connection to the harm caused by the co-conspirator’s crime. See notes 43–48 and accompanying text.

41. Pinkerton, 328 U.S. at 647.

42. As the Pinkerton Court noted when setting its three limits, “A different case would arise . . . But as we read this record, that is not this case.” Id. at 647–48.

43. See infra United States v. Alvarez, 755 F.2d 830, 849–50 (11th Cir. 1985), discussed in Section V.C..
cariously under *Pinkerton*, he should possess a minimum culpable state of mind as to the causal connection to the harm caused and the culpable state of mind required by the offense.\(^{44}\) He recognizes that the state of mind required by the offense is currently imputed under *Pinkerton* doctrine.\(^{45}\) However, he notes that the "state of mind as to whether one's conduct will assist the perpetrator in causing a result . . . is distinguishable from one's state of mind as to the result of the perpetrator's conduct."\(^{46}\) "One may want to assist the perpetrator, but also wish that a harmful result not occur."\(^{47}\) For example, someone may want to assist a robbery but not want the victim to be shot.\(^{48}\) Robinson appears to propose that although *Pinkerton*'s "reasonably foreseeable" rule effectively imposes a negligence standard for a co-conspirator's crime, a defendant should at least possess knowledge that his conduct will increase the chances of the co-conspirator committing his specific crime. Thus, Daniel Pinkerton is guilty because from his actions in the liquor conspiracy, he objectively knows (or should know) that he is increasing the chances that his brother will violate the tax laws. However, a low-level drug runner in a drug conspiracy, depending on his level of participation, might not objectively know (or should not be charged with knowing) that his actions are contributing to a co-conspirator's murder. Robinson argues that this construction "accords with our intuitive sense of justice."\(^{49}\)

2. Utilitarian Justifications

The utilitarian justifications for *Pinkerton* liability are much stronger. Courts and commentators focus on the dangerous nature of group action.\(^{50}\) In *Callanan v. United States*,\(^{51}\) the Supreme Court articulated an enduring rationale for conspiracy liability:

Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of crimi-

\(^{44}\) See Robinson, *supra* note 21, at 646. "While each of these instances of impaired mental elements may have some foundation in casual theory of risk creation, [it] does not follow that each is justifiable in the form now applied by the courts." *Id.* at 645–46. "Using an actor's causal responsibility as the basis for imputation should require more than a showing of simple causal connection. By analogy to complicity and to causing crime by an innocent, the defendant should also possess a minimum culpable state of mind as to the causal connection and the culpable state of mind required by the definition of the offense." *Id.* at 645.

\(^{45}\) *Id.* at 646.

\(^{46}\) *Id.* at 636–37.

\(^{47}\) *Id.* at 637 n.99.

\(^{48}\) *Id.*

\(^{49}\) *Id.* at 639.

\(^{50}\) See Note, *Developments in the Law, Criminal Conspiracy*, *supra* note 14, at 923–24 ("The heart of this rationale lies in the fact—or at least the assumption—that collective action towards an anti-social end involves a greater risk to society than individual action toward the same end.")

Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise. 52

Group action, according to this rationale, results in four generally categorizable dangers. First, group action, through the division of labor, makes bigger crimes possible. 53 "It would have been impossible for a single individual to bring down the Twin Towers," 54 Professor Katyal, drawing heavily on economic and organizational theory, argues strongly that the division of labor of a large criminal organization helps it achieve its goals. 55 For example, "a criminal enterprise can hire specialists and use its size to obtain benefits that uncoordinated individuals cannot." 56

Secondly, group action, through that division of labor, increases the chances of success of those crimes. 57 Katyal argues that conspiracies can reduce the probability of detection by assigning some members as "lookouts," and having more resources with which to bribe law enforcement. 58 Although the social science research is mixed, Katyal also raises the possibility that groups may be psychologically better motivated to achieve goals than individuals. 59

Third, group action decreases the chances that conspirators, once in the group, will depart from their criminal path. Conventional wisdom, and

52. Id. at 593-94.

53. See also Note, Developments in the Law, Criminal Conspiracy, supra note 14 at 924 ("[T]he existence of numbers . . . facilitates a division of labor which makes possible the attainment of objects more elaborate and ambitious than would otherwise be attainable"). Katyal also argues that, although the social science research is mixed, psychological studies of group activity show that groups may be psychologically better motivated to achieve goals than individuals. Because groups "encourage participants to define themselves in terms of a shared sense of self, group productivity can match that of isolated individuals and may also exceed it." Katyal, supra note 34 at 1325 (citing S. ALEXANDER HASLAM, PSYCHOLOGY IN ORGANIZATIONS: THE SOCIAL IDENTITY APPROACH 243, 259 (2001)).


55. See generally Katyal, supra note 34 at 1325-28.

56. Id. at 1325. In addition, Katyal argues a large criminal organization has created a "framework of trust" that reduces the transaction costs of forming new criminal contacts. Large organizations also make punishment more difficult through diffusion, where leaders evade responsibility by splitting up criminal tasks among different members. Id.

57. See Note, Developments in the Law, Criminal Conspiracy, supra note 14 at 924 ("[T]he existence of numbers . . . promotes the efficiency with which a given object can be pursued.").

58. Katyal, supra note 34 at 1326. Additionally, conspiracies can commit numerous crimes within a short period of time in one jurisdiction and overpower investigators' limited resources. Id.

59. Because groups "encourage participants to define themselves in terms of a shared sense of self; group productivity can match that of isolated individuals and may also exceed it." Katyal, supra note 34 at 1325, citing Haslam, supra note 53, at 259.
some social science research, holds that “the encouragement and moral support of the group strengthens the perseverance of each member.”

Fourth, the existence of the group makes unrelated crimes more likely. “The existence of a grouping for criminal purposes provides a continuing focal point for further crimes either related or unrelated to those immediately envisaged.” This would particularly apply to a large criminal organization such as the Mafia, a global terrorist organization such as Al Qaeda, or arguably, a corporate organization such as Enron. This rationale was cited by the Pinkerton Court. “For two or more to confederate . . . [involves] educating and preparing the conspirators for further and habitual criminal practices.”

Academic commentators have traditionally rebutted that there is no empirical evidence to support this rationale, although Professor Katyal’s article, relying on economic analysis and social science research, sought to fill in the gaps.

Following the “group danger” rationale, increased punishment for conspirators through vicarious Pinkerton liability is viewed as an important deterrent in several ways. First, it deters would-be criminals from joining the group in the first place. Secondly, it encourages conspirators to turn

60. See Note, Developments in the Law, Criminal Conspiracy, supra note 14, at 924. See also Katyal, supra, note 34 at 1337 (“[O]nce an individual makes an agreement, cognitive dissonance manifests itself, making it difficult to dissuade an individual from her chosen path. Psychologists have shown that people conform their choices to decisions they have already made, creating a ‘sink-cost trap’ that locks in and escalates previous behavior.”) (citing ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION 57 (rev. ed. 1993)); Donald C. Langevoort, Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review, 51 VAND. L. REV. 1499, 1501 n.5 (1998) (discussing legal implications of cognitive dissonance). Psychologically too, the conspirator who does a small portion of one task may be more willing to undertake it because she is shielded by the group from the results of her actions. “A person who ‘bags’ cocaine for individual consumption may not consider herself responsible for the cocaine dependence of buying.” Katyal, supra note 34, at 1327.

61. See Note, Developments in the Law, Criminal Conspiracy, supra note 14 at 924–25 (citing United States v. Rabinowich, 238 U.S. 78, 88 (1915)). See also Abraham S. Goldstein, Conspiracy to Defraud the United States, 68 YALE L.J. 405, 413 (1959) (“[T]he group’s planning will have a long-term educative effect on its members, with schooling in crime the deterrent in several ways. First, it deters would-be criminals from joining the group in the first place. Secondly, it encourages conspirators to turn
state’s evidence to evade the ultimate responsibility they face for the crimes of the criminal organization, and hopefully frustrating the plans of the criminal organization.  

Professor Dressler argues, however, that once in the conspiracy, punishing accomplices or conspirators as severely as the principals provides no disincentive not to commit the ultimate crime. Katyal recognizes this concern, noting that “if one will be held liable for the drug dealing of leaders even when the person is a small fry, the person might as well try to be a leader or ratchet up her activity level.” Katyal’s counter-argument is that since Pinkerton only creates liability for “reasonably foreseeable” crimes within the scope of the agreement, Pinkerton encourages criminal organizations to reduce the scope of their conspiracies, thus reducing the likelihood of future crimes unrelated to the original conspiracy. Of course, Katyal’s

members (Pinkerton liability). The high price is necessary to deter people from entering conspiracies in the first place.” Id. at 1336. “Because even single agreements have the potential to cascade into repeat ones, some sanction on criminal agreement is appropriate to further deterrence at an early stage, before group identity has taken root. . . . [E]ven ‘minimal groups’ can form a group identity that leads them down a path of escalation.” Id. at 1335. Katyal also argues that Pinkerton liability may generate social norms against joining conspiracies. See id. at 1334 n.107 (citing Neal Kumar Katyal, Deterrence’s Difficulty, 95 Mich. L. Rev. 2385, 2449-50 (1997)). “Because people are less likely to know the full extent of their liability under Pinkerton . . . uncertainty increases and the conditions for trust thus diminish.” See id. at 1373.

67. “Once someone has joined a conspiracy . . . . the law attempts to provide a conspirator with incentives to turn evidence over to the government . . . . Accordingly, prosecutors need the ability to make credible threats of large penalties and credible promises of low ones.” Id. at 1336; see generally id. at 1328-32. See also Daryl J. Levinson, Collective Sanctions, 56 Stan. L. Rev. 345, 398-400 (arguing that collective sanctions against groups provide informational benefits to society, and agreeing with Katyal in the context of Pinkerton doctrine). “Harvesting information from criminal groups by ‘flipping’ conspirators is analogous to threatening collective sanctions against frankpledge groups or the Brownsville soldiers in order to induce them to snitch on primary wrongdoers.” Id. at 399. Katyal also argues that the potential of “flipping” will require organizations to spend more time and effort monitoring their own members, thus mitigating the advantages of organizational efficiency and decreasing the chances of achieving their criminal goals. Katyal, supra note 34, at 1374.

68. “[T]he system of punishment should convince the rational criminal to serve in a secondary rather than a primary role.” Dressler, Reassessing, supra note 13, at 114. Dressler argues that this concern motivated early framers of the law to punish accessories less severely than principals. See id. at 96 (citing William Blackstone, 4 Commentaries *39-40):

And perhaps if a distinction were constantly to be made between the punishment of principals and accessories, even before the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would be greater than that of his accomplices, by reason of the differences of his punishment.

69. Katyal, supra note 34 at 1374.

70. Katyal argues secondarily that:

other provisions in federal law, such as the sentencing enhancements for organizers, leaders, and managers, and the reductions for minimal and minor participants, produce marginal deterrence. Pinkerton increases the punishment base, but the degree of liability within that base differs markedly due to one’s role in the offense. Third . . . the withdrawal defense provides clear incentives for participants to minimize their conduct and to weaken group identity, and thereby promotes marginal deterrence. Conspiracy law could build on this idea and permit partial withdrawal defenses. It could permit, for example, a defense to Pinkerton liability for those acts that a defendant made a genuine and honest attempt to prevent.
arguments, and deterrence theory in general, assumes that criminals are rational actors with full knowledge—that "criminals know the contours of conspiracy law."  

III. “Reasonable Foreseeability” and Due Process

Justice Rutledge dissented from the original Pinkerton decision, calling it a “dangerous precedent.” He criticized its constitutionality on three grounds. First, Rutledge cited evidentiary concerns (in his words, “[t]he looseness with which the charge may be proved”). Second, Rutledge cited the limitless scope of liability (in his words, “the almost unlimited scope of vicarious responsibility for others’ acts which follows once agreement is shown”). Third, Rutledge cited guilt by association. (In Judge Rutledge’s words, “the psychological advantages of such trials for securing convictions by attributing to one proof against another.”) Although Justice Rutledge did not explicitly mention the Due Process clause, or any other constitutional provision, he argued, “If [defendant’s conviction] does not violate the letter of constitutional right, it fractures the spirit.”

Justice Rutledge criticized the “foreseeability” limit as inadequate:

The Court’s theory seems to be that Daniel and Walter became general partners in crime by virtue of their agreement and because of that agreement without more on his part Daniel became criminally responsible as a principal for everything Walter did.

71. Id. at 1333. “For example, if Pinkerton liability is to deter additional criminal acts, in general, conspirators must understand the doctrine.” Id. at 1333–34.

In situations involving intracorporate conspiracies—where a corporation is held to “conspire” with its employees and thus held liable under Pinkerton—Professor Shaun Martin argues that holding the corporation liable, as well as the individual, serves little, if any, additional deterrent impact. See Shaun P. Martin, Intracorporate Conspiracies, 50 STAN. L. REV. 399, 461–62 (1998).


73. Id. at 650.

74. In Nye & Nissen v. United States, 336 U.S. 613 (1949), three years later, Justice Frankfurter echoed his concern:

There seems to be an increasing tendency in recent years for public prosecutors to indict for conspiracies when crimes have been committed. A conspiracy to commit a crime may be a sufficiently serious offense to be properly punished; but, when a crime has been actually committed by two or more persons, there is usually no proper reason why they should be indicted for the agreement to commit the crime, instead of for the crime itself . . . .

Id. at 626. Courts have occasionally echoed Rutledge’s concern of excessive prosecutorial discretion. See United States v. Alvarez, 755 F.2d 830, 850 n.25 (“the [vicarious] liability of . . . ‘minor’ participants must rest on a more substantial foundation than the mere whim of the prosecutor.”).

75. Pinkerton, 328 U.S. at 650. Justice Rutledge, however, recognized that these concerns might not rise to the level of constitutional scrutiny. He argued that even if it did not, the Court could reverse the conviction under its common law authority, citing McNabb v. United States, 318 U.S. 332 (1943). See Pinkerton, 328 U.S. at 650.
thereafter in the nature of a criminal offense of the general sort the agreement contemplated . . . 76

Rutledge implied such a broad vicarious liability was contrary to fundamental principles of criminal law. Specifically, he criticized the reliance on agency theory:

[T]he result is a vicarious criminal responsibility as broad as, or broader than, the vicarious civil liability of a partner for acts done by a copartner in the course of the firm's business. Such analogies from private commercial law and the law of torts are dangerous, in my judgment, for transfer to the criminal field. Guilt there with us remains personal, not vicarious, for the more serious offenses. 77

Justice Rutledge's dissent laid the theoretical groundwork for future courts' articulations of Due Process limits on the Pinkerton doctrine. It is unlikely he recognized his dissent had an impact. 78 Courts would not articulate due process limits on Pinkerton for nearly another thirty years, 79 long after Rutledge's death in 1949.

IV. Theoretical Justifications for Due Process Limits

Justice Rutledge implied that his three concerns—evidentiary concerns, the unlimited scope of vicarious liability, and guilt by association—were rooted in the Due Process Clause. Future courts, at least, assumed that they were. 80 Yet there is little evidence the Founding Fathers considered vicarious liability when drafting the Due Process Clause. Courts' articulations of "Due Process limits" on Pinkerton rest more directly on conceptions of fundamental fairness that predate and inform the Constitution, rather than a textual or historical interpretation of the Due Process Clause. As such, the due process limits courts refer to represent a mix of procedural and substantive due process concerns.

A. History of the Due Process Clause

If the concept of vicarious liability troubled the Framers, none appeared to mention it while drafting the Due Process Clause. Originally, the Framers envisioned the Due Process Clause more narrowly than today, as a

76. Id. at 651.
77. Id.
78. There is no evidence that Justice Rutledge considered the Pinkerton issue again after the decision. For complete accounts of Justice Rutledge's life, see John M. Ferren, Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge (2004); Fowler V. Harper, Justice Rutledge and the Bright Constellation (1965).
79. See supra Section V.
80. See supra Section V.
check against arbitrary and capricious acts of the legislature. For example, Alexander Hamilton intended "due process" to "make it plain that 'no man shall be disenfranchised or deprived of any right he enjoys under the Constitution' by a mere act of the legislature." As such, the Framers of the Due Process Clause were likely thinking only of procedural due process.

That said, at heart, the "roots of due process grow out of a blend of history and philosophy." One commentator called it an "assurance of nonarbitrariness," "grounded in a conception of the moral requirements of legitimacy for social institutions." Courts that cite concerns of fundamental fairness in articulating due process limits on vicarious conspiracy liability find support in such a broader substantive view of the Due Process Clause. Eventually, if the theoretical net of conspiracy liability is cast wide enough, the connection between one's actions and one's punishment is so attenuated that punishment becomes arbitrary. This arbitrariness is, at heart, the fundamental concern courts address in drawing a line beyond which vicarious punishment goes too far.

81. The fact that conspiracy is a statutory, not common-law, doctrine might support that protection against vicarious conspiracy liability was intended to be encompassed by Due Process—if one accepts that conspiracy law is "arbitrary and capricious," a concern the Founding Fathers do not appear to have expressed. Moreover, Pinkerton doctrine is a judge-made interpretation of statutory law.

82. BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 152-53 (1992). The federal Constitution's Due Process Clause was proposed by the New York Constitutional Convention, based on a 1787 New York statute guaranteeing that "no one shall be deprived of any right, but by due process of law." Id. The New York Constitutional Convention apparently passed the due process provision without debate. Madison later included the Due Process Clause in his proposed amendments to the Bill of Rights on June 8, 1789, albeit without much explanation. Id. at 170-71:

We do not know what led Madison to use the New York due process language. Perhaps it was Hamilton, with whom he was in close contact at this time . . . . [I]t may be doubted that Madison (any more than Lansing and Hamilton in New York before him) realized anything like the full import of what he was doing in writing the Due Process Clause into the Constitution.

Hamilton was clear about his articulation of "due process" as a right against legislative prerogatives. "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature." SCHWARTZ, supra note 83, at 153. Hamilton's construction derives from the English understanding of due process as a restraint on the sovereign. JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 8 (2003).

83. See SCHWARTZ, supra note 82, at 153 ("We should not assume that the draftsman of the 1787 New York statute used the term "due process" in anything like the broad meaning it has since acquired in our constitutional law.")


85. T.M. Scanlon, Due Process, in DUE PROCESS, supra note 84, at 94, 96. Scanlon sets out four factors to consider whether due process is necessary:

How likely is it that a given form of power—if unchecked—will be used outside the limits of its justification? How serious are the harms inflicted by its misuse? Would due process be an effective check on the exercise of this power? Would the costs of a requirement of due process in cases of this kind be excessive?

Id. at 98-99.

Although the Framers envisioned Due Process procedurally, courts have since expanded Due Process into substantive areas as well. Vicarious liability implicates a mix of substantive and procedural concerns. As Justice Rutledge framed the issues, evidentiary concerns affect procedural due process. The unlimited scope of vicarious liability implicates substantive due process; someone could be vicariously convicted on procedurally fair evidence, but imposing liability for another’s crimes might violate our “intuitive sense of justice.” Guilt by association implicates both. The psychological benefits of multiple trials implicate procedural concerns, while the concept of “personal guilt” is a substantive one. Although little evidence exists that the Framers considered vicarious conspiracy liability to implicate Due Process, that does not foreclose the inquiry into whether a Due Process right exists. One argument in favor is that “personal guilt” is a right “so fundamental” that there could be no due process without it—that it predates and informs the constitutional conception of Due Process. Similarly, the concept of “personal guilt” may have been so fundamental to the Framers that they wouldn’t have thought to mention it when writing the Due Process Clause. This argument finds support in Justice Rehnquist's expansive formulation of Eleventh Amendment sovereign immunity, articulated in the Seminole Tribe line of cases, or in

87. See Thomas Grey, Procedural Fairness and Substantive Rights, in DUE PROCESS, supra note 84, at 183 (“Procedural fairness has both a loose and a strict sense.”). 
88. See Robinson, supra note 21 at 639 n.48. 
89. The Supreme Court has since construed “personal guilt” to be a substantive due process interest. See Section IV.D, infra. 
90. See Twining v. New Jersey, 211 U.S. 78, 106-07 (1908). One aid to the solution of the question is to inquire how the right was rated during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law. Did those who then were formulating and insisting upon the rights of the people entertain the view that the right was so fundamental that there could be no due process without it? Such a view, as noted above, presupposes that the concept of personal guilt—retributive punishment for one's actions—was so fundamental to the Framers', and society’s, conception of criminal law that they wouldn’t have thought to explicitly reference it in the Constitution. This argument is problematic, however. Vicarious liability was deep-rooted in the common law at the time. That said, vicarious liability traditionally attached to aiding and abetting, where there exists some causal link between the defendant’s actions and harm, rather than conspiracy. The argument may depend on whether one believes conspiracy is of such a degree removed from accomplice liability that vicarious liability is, and was, fundamentally inappropriate in attenuated situations. (As noted, 20th-century courts and commentators have held that conspiracy poses special dangers that make vicarious liability particularly appropriate from a utilitarian standpoint. See Section II.B.2, supra.) 
91. “[B]lind reliance upon the text of the Eleventh Amendment is to strain the Constitution and the law to a construction never imagined or dreamed of.” Seminole Tribe v. Florida, 517 U.S. 44, 69 (1996). “[W]hat is notably lacking in the Framers' statements is any mention of Congress’ power to abrogate the States’ immunity. The absence of any discussion of that power is particularly striking . . .” Id. at 70 n.13. Interestingly, Justice Scalia’s formulation of “fundamental rights” as those “traditionally protected by society” at its “most specific level” could be read to support limits on Pinkerton liability. See Michael H. v. Gerald D., 491 U.S. 110, 122, 127 n.6 (1989) (Scalia, J., plurality) (“We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”). Vicarious liability is deep-rooted in the common law. But, more specifically, vicarious liability for conspirators, as opposed to accomplices, is not. In fact, history suggests that secondary ac-
the Court’s formulation of the First Amendment “right of association.”

Or, one could argue that personal guilt is a substantive due process right stemming from “penumbras, formed by emanations from . . . specific guarantees in the Bill of Rights” — in this case, the penumbras emanating from the Fifth and Sixth Amendments.

B. Procedural Due Process Concerns

There are several potential procedural due process issues raised by imposing vicarious liability on conspirators.

First, Justice Rutledge cited “the looseness with which the charge may be proved” as one consequence of the Pinkerton rule. It is well-settled that looser evidentiary rules apply to conspiracy crimes. Because presumably, the criminal agreement by its nature tends to be secret, normally inadmissible evidence can be used to prove the existence of the conspiracy. If one of the conspirators does not turn state’s evidence, circum-

tors, as conspirators are more likely to be than accomplices, are generally less culpable than principals. Justice Scalia looks to whether legislative enactments form a “societal tradition of enacting laws denying the interest.” See Michael H., 491 U.S. at 122 n.2. But Congress has not provided for vicarious conspiracy liability — it is judge-made law. See Pinkerton v. United States, 328 U.S. 640, 649 (1946) (Rutledge, J., dissenting) (“I think this ruling violates both the letter and spirit of what Congress did when it defined the three classes of crime, namely 1) completed substantive offenses, 2) aiding, abetting, or counseling another to commit them, and 3) conspiracy to commit them.”). If anything, legislative enactments in the states have tended to outlaw Pinkerton liability. See note 120, infra. If one could make the argument that “personal guilt,” as it applies to conspirators, not accomplices, is a right deep-rooted in tradition and history, Scalia’s formulation lends support.

92. See generally David Cole, Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association, 1999 SUP. CT. REV. 203, 227–28 (“The right of association ... was so accepted by the Framers that the only objection to including the right to assemble in the First Amendment was that the right was so obvious that it did not need to be mentioned.”) (citing United States v Cruikshank, 92 U.S. 542, 552 (1876)).


94. And potentially the Eighth Amendment; see Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987). (Although the Eighth Amendment has rarely been held to apply to non-death penalty cases, but see United States v. Weems, 217 U.S. at 357–58 (1910) overturning a 15-year sentence for falsifying a government record as “cruel and unusual” under the Eighth Amendment.)

95. See generally LAFAVE, supra note 17, at 615–20. Note that these procedural issues at heart implicate substantive rights. As such, they are what Professor Grey considers to be “loose procedural due process.” “Unlike rules and principles of procedural fairness in the strict sense, they are not aimed at producing more accurate or fair decisions of those disputes. They are rather designed to protect various substantive rights and interests from invasions ... .” Grey, supra note 84, at 183. For example, Rutledge’s concern of the “psychological advantages” of joint trials has both procedural and substantive due process implications.

96. Pinkerton, 328 U.S. at 650. See also Nye & Nisen, 336 U.S. 613, 626 (1949) (Frankfurter, J., dissenting) (“Prosecutors seem to think that by this practice all statutes of limitations and many of the rules of evidence established for the protection of persons charged with crime can be disregarded. But there is no mysterious potency in the word ‘conspiracy.’”).

97. See LAFAVE, supra note 17, at 619 (citing Blumenthal v. United States, 332 U.S. 539, 557 (1947) (“Secrecy and concealment are essential features of a successful conspiracy ... . Hence the law rightly gives room for ... conviction of those discovered ... . Otherwise conspirators would go free by their very ingenuity.”)); see also Note, Developments in the Law, Criminal Conspiracy, supra note 14, at 984.
stantial evidence\textsuperscript{98} or hearsay evidence—the out-of-court declarations of a co-conspirator or the defendant himself—can be used to prove the existence of the conspiracy.

The co-conspirator hearsay exception deserves special note. Any act or declaration by one conspirator, committed in furtherance of the conspiracy, is admissible against each co-conspirator if independent proof of the conspiracy provides a foundation for its admission.\textsuperscript{99} The requirement of “in furtherance of the conspiracy” is construed broadly.\textsuperscript{100} Moreover, the requirement that the declaration be “in furtherance of the conspiracy” can be circular, since the declaration itself can serve to prove the conspiracy that the declaration is in furtherance of.\textsuperscript{101}

The relaxed evidentiary standards present in any conspiracy trial pose special concerns when Pinkerton vicarious liability is alleged. Normally inadmissible evidence can be used to prove the existence of a conspiracy; but the existence of that conspiracy, in turn, can be used to hold the defendant liable for other substantive crimes.\textsuperscript{102} Effectively, under Pinkerton, by admitting evidence against one to convict another, vicarious liability serves to lower the functional standard of proof.\textsuperscript{103} A court could vicariously convict a defendant for murder under looser evidentiary rules than normally present at a murder trial.

\textit{Pinkerton} doctrine might allow prosecutors to get around a statute of limitations, by convicting the defendant for the crimes of another after the statute of limitations for the substantive crime has passed, but before the statute of limitations for conspiracy has passed.\textsuperscript{104} It certainly allows

\begin{itemize}
\item \textsuperscript{98} “[I]t is within the discretion of the trial court to admit evidence which even remotely tends to establish the conspiracy charged.” Note, \textit{Developments in the Law, Criminal Conspiracy}, supra note 14, at 984.
\item \textsuperscript{99} See generally \textit{LAFAVE}, supra note 17, at 617. See also Note, \textit{Developments in the Law, Criminal Conspiracy}, supra note 14, at 985; \textit{Logan v. United States}, 144 U.S. 263 (1892).
\item \textsuperscript{100} See generally \textit{LAFAVE}, supra note 17, at 618 (“[T]he result [is that] any evidence somehow relating to the conspiracy comes in.”) (citing \textit{Allen v. United States}, 4 F.2d 688 (7th Cir. 1925)).
\item \textsuperscript{102} “Under Pinkerton, the undesirable laxity which permits a prosecutor to establish membership in a conspiracy solely by means of a network of circumstantial evidence through testimony inadmissible under normal evidentiary rules is injected also into the trial of substantive offenders.” Note, \textit{Developments in the Law, Criminal Conspiracy}, supra note 14, at 999–1000. See also Paul Marcus, \textit{Conspiracy: The Criminal Agreement in Theory and in Practice}, 65 Geo. L. J. 925, 928 (1977) (“Legitimate protest goes not to the definition of the crime, but . . . its application and to the evidence necessary to prove the existence of the agreement.”).
\item \textsuperscript{103} See \textit{LAFAVE}, supra note 17, at 619 n.67 (citing \textit{United States v. Alvarez}, 548 F.2 542 (5th Cir. 1977) (“[W]here as here, the question is whether a defendant was connected with the conspiracy at all, to apply [the ‘slight evidence’] rule is to risk convicting him of the crime itself upon ‘slight evidence.’”).
\item \textsuperscript{104} Note, \textit{Developments in the Law, Criminal Conspiracy}, supra note 14 at 996–97. See \textit{Martin supra note 71, at 404–05} (citing \textit{Fiswick v. United States}, 329 U.S. 211, 216 (1946) (holding that the statute of limitations does not begin to run until the date of the last overt act committed in furtherance of the conspiracy)); \textit{United States v. Portner}, 462 F.2d 678, 678 (2d Cir. 1972) (resurrecting substantive
prosecutors to try a defendant in an unfamiliar venue for his co-conspirators’ crime.  

Justice Rutledge criticized *Pinkerton* because of “the psychological advantages of such trials for securing convictions by attributing to one proof against another.” Conspirators are often tried during the same trial, raising the possibility that a jury might confuse the evidence against the two defendants. Justice Murphy addressed this concern three years later in *Nye & Nissen*, noting, “Guilt by association is a danger in any conspiracy prosecution. Its consequences are more serious when a substantive crime is also charged. But when the magic words ‘counseling’ or ‘induc­ing’ are injected to ‘define’ the substantive crimes, the danger and its con­sequences reach a new high.” In effect, when *Pinkerton* liability is at issue and a co-conspirator has committed particularly heinous crimes, the jury might be tempted to construe the scope of the conspiracy more broadly than factually verifiable in order to ensnare other defendants in the web. Or, in a case with unindicted co-conspirators, the jury might construe the conspiracy broadly in order to hold “someone” accountable for the heinous crimes.

Fundamentally, though, it is unclear such a looser evidentiary standard by itself violates the Due Process Clause. Defendants have argued that under *In re Winship*, the prosecution has to prove beyond a reasonable doubt “every fact necessary to constitute the crime with which [the defendant] is charged,” and that because looser evidentiary rules in conspiracy trials have dropped the standard below “beyond a reasonable doubt,” due

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105. See LAFAYE, supra note 17, at 617 (“[I]t is clear that the prosecution may also elect to have the trial in any locale where any overt act by any of the conspirators took place.”) (citing *Hyde v. United States*, 225 U.S. 347 (1912)); see also Johnson, supra note 33, at 1174.


Conviction of the guiltless bystander is, of course, the great danger when conspir­acy counts and substantive counts are tried together. A letter is written, a call is made, and the foundation is laid. The jury is subject to the temptation of general­izing; its confusion makes that temptation harder to resist. *Pinkerton*, as inter­preted today, attempted to place limitations on this process. A conspiracy’s mere joiner is not guilty of the substantive offense unless the substance was part of the conspiracy and in furtherance of it. The trial judge must so warn the jury. The policy which required cautions in the *Pinkerton* case requires the same cautions here. This voluminous record, and the judge’s instructions in particular, are re­plete with possibilities of confusion for the juror.

*Id.* at 628–29. “It is hard to assess the effect of a trial judge’s charge upon a jury’s unsophisticated be­lief in defendants’ bad conduct. But it is our duty to do what we can by way of warning. Clarity is indis­pensable.” *Id.* at 630.

process has been violated.\textsuperscript{110} Such arguments have been rejected, however.\textsuperscript{111}

It appears well-settled that a looser standard is justified for conspiracy crimes because of the difficulty in procuring evidence and the possibility that dangerous members of society might evade punishment.\textsuperscript{112} Essentially, if one believes the \textit{Pinkerton} rationale that group action poses special dangers to society that require extra punishment, that extra punishment is subjected to looser evidentiary standards as well.

C. Unlimited Scope of Vicarious Liability

“The history of conspiracy,” Justice Jackson once noted, “exemplifies the ‘tendency of a principle to expand itself to the limit of its logic.”\textsuperscript{113} This serves as the backdrop for Justice Rutledge’s concern for the “almost unlimited scope of vicarious responsibility for others’ acts which follows once agreement is shown . . . .”\textsuperscript{114}

Under the \textit{Pinkerton} rule, the scope of the agreement becomes the key inquiry—both in substance, and in size. The broader and larger the conspiracy is defined, the greater the conspirator’s liability is for “reasonably foreseeable acts in furtherance” of the conspiracy, by a greater number of people.\textsuperscript{115} Large organizations particularly lend themselves to a broad definition of “conspiracy.”\textsuperscript{116} For example, in the terrorism context, the U.S. government has arguably defined a criminal conspiracy as large as “Al

\begin{itemize}
\item[\textsuperscript{110}]\textit{In re Winship}, 397 U.S. 358, 364 (1970). Robinson cites and explains the same:
\begin{quote}
The due process clause, for example, requires the prosecution to prove beyond a reasonable doubt “every fact necessary to constitute the crime with which [the defendant] is charged.” If one interprets this to mean that every element of the definition of the offense charged must be proven, every form of imputed liability discussed in this Article could be unconstitutional unless written into the definition of the particular offense. The constitutionality of most of these doctrines, however, is undisputed.
\end{quote}

\item[\textsuperscript{111}]\textit{See State v. Coltherst}, 820 A.2d 1024, 1036–37 (Conn. 2003):
\begin{quote}
The United States Supreme Court in \textit{Pinkerton} itself acknowledged that \textit{Pinkerton} rests on the same principles as those governing accessory liability, which allow conduct to be imputed to a defendant. . . . [No] court has suggested that accessory liability offends due process. We fail to see, therefore, why the imputation of intent under \textit{Pinkerton} would do so.
\end{quote}

\item[\textsuperscript{112}]\textit{See LAFAVE, supra note 17, at 620–21; see also Note, Developments in the Law, Criminal Conspiracy, supra note 14, at 989.}

\item[\textsuperscript{113}]Krulewitch v. United States, 336 U.S. 440, 445 (1946) (Jackson, J., concurring) (quoting Benjamin Cardozo, \textit{The Nature of the Judicial Process} 51 (1921)).

\item[\textsuperscript{114}]\textit{Pinkerton} v. United States, 328 U.S. 640, 650 (1946).

\item[\textsuperscript{115}]For a detailed analysis of how courts define the “scope” of a conspiracy, see Marie E. Siessegger, \textit{Conspiracy Theory: The Use of the Conspiracy Doctrine in Times of National Crisis}, 46 WM. & \textit{MARY L. REV.} 1177, 1182–89 (2004) (noting trend towards broadly defined conspiracies in national security-related cases).

\item[\textsuperscript{116}]The “difficulty lies not in the conspiracy-complicity rule itself, but in the tendency of courts to regard a conspiracy as an ongoing business relationship of indefinite scope and duration, and to consider the conspirators . . . as ‘general partners in crime.’” Johnson, \textit{supra} note 33, at 1147.
\end{itemize}
Qaeda."^{117} Notably, in John Walker Lindh and Zacarias Moussaoui’s cases, the Government effectively defined the conspiracy as “an ongoing conspiracy to kill Americans.”^{118}

Because of the potentially unlimited nature of vicarious liability, the Model Penal Code rejects Pinkerton doctrine. “Law would lose all sense of proportion if in virtue of that one crime (conspiracy), each were held accountable for thousands of offenses that he did not influence at all.”^{119} Several states reject Pinkerton as well.^{120} One academic commentator called this the “absurdity of considering each of the pawns to be conspiring with the king to play the chess game.”^{121}

Presumably, “reasonable foreseeability” would serve as a limit on vicarious liability. In practice, though, partly because “reasonable foreseeability” would serve as a limit on vicarious liability. In practice, though, partly because

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117. The Government’s position has merit.

The fatwah issued by Osama bin Laden and the leaders of Jihad groups in Egypt, Pakistan, and Bangladesh states as follows: “To-kill Americans and their allies, both civil and military, is an individual duty of every Muslim who is able, in any country where this is possible, until the Aqsa mosque [in Jerusalem] and the Haram mosque [in Mecca] are freed from their grip, and until their armies, shattered and broken-winged, depart from all the lands of Islam, incapable of threatening any Muslim.”


118. “There is no suggestion in the indictment that everything was directed at September 11 . . . and once September 11 passed, the conspiracy dissolved and everybody went home and they satisfied their obligations. This was an ongoing conspiracy . . . for years that involved killing Americans.” See Transcript of Oral Argument at 23, United States v. Moussaoui, 333 F.3d 509 (4th Cir. June 3, 2003) (Nos. 03-4262, 03-4261), cited in McDonnell, supra note 117, at 367 n.68.

Lindh was a member of a conspiracy to kill Americans. Members of that conspiracy took it upon themselves to murder Johnny Michael Spann, a CIA officer who was in Afghanistan specifically as part of our nation’s efforts to fight Al Qaeda and the Taliban and stop terrorism. By well-established conspiracy law, the murder of Mr. Spann . . . is attributable to all conspirators, and that is true whether they fired guns themselves or even knew that the uprising would take place.


120. See, e.g., People v. McGee, 399 N.E.2d 1177, 1182 (N.Y. 1979). “[W]e do not support extending the agency rationale to impose liability for the substantive offense solely on the basis of liability for the agreement.” Id. at 1182 n.3. “[I]t is repugnant to our system of jurisprudence, where guilt is generally personal to the defendant . . . to impose punishment, not for the socially harmful agreement to which the defendant is a party, but for substantive offenses in which he did not participate.” Id. at 1182. At least eight states have rejected Pinkerton outright—some by statute, and some by judicial construction. See generally McDonnell, supra note 117, at 365 n. 60 (citing ALA. CODE 13A-2-23 & Commentary (1999); 720 ILL. COMP. STAT. 5/5-2 (1999); N.D. CENT. CODE 12-1-03-01(c) (1999); State v. Stein, 27 P.3d 184, 187–89 (Wis. 2001); Woods v. Cohen, 844 P.2d 1147, 1148 (Ariz. 1992); State v. Small, 272 S.E.2d 128, 135 (N.C. 1980); Commonwealth v. Stasiun, 206 N.E.2d 672, 680 (Mass. 1965)). See also Peter Buscemi, Note, Conspiracy: Statutory Reform Since the Model Penal Code, 75 COLUM. L. REV. 1122, 1151 (1975).

121. Johnson, supra note 33, at 1148.
ability” effectively changes the standard from subjective foreseeability to objective foreseeability, “reasonable foreseeability” has been construed quite broadly. 122 For example, courts have construed Pinkerton to encompass “reasonably foreseeable” but unintended consequences of the conspiracy, 123 or to establish an automatic presumption that firearms are “reasonably foreseeable” in drug conspiracies, 124 regardless of the intent of the defendant. If the type of crime is “reasonably foreseeable,” although not the specific crime or victim itself, that can suffice as “reasonably foreseeable” under Pinkerton. 125 As such, courts have criticized the “reasonably foreseeable” requirement as providing no meaningful limits on vicarious liability. “Foreseeability” is the language of negligence law. It is not a usual criminal law concept and surely not a concept that puts meaningful due process limits on criminal liability. . . . Surely any participant in a drug conspiracy, major or marginal, could foresee that firearms might come into play.” 126

The potential scope of Pinkerton liability is undoubtedly broad. However, the question of whether Pinkerton’s scope, in and of itself, renders it unconstitutional is far less clear. The answer depends largely on the historical reading of vicarious liability, and whether the concept of “personal guilt” for those not aiding and abetting is so fundamental as to be a substantive (or procedural) due process right. 127 Or conversely, as Professor Dressler points out, perhaps the concepts of agency theory or forfeited identity, when applied to conspirators, run counter to fundamental notions of criminal law embedded in the Constitution. 128

1. The Federal Sentencing Guidelines Approach

Interestingly, “the scope of conduct for which a defendant can be held accountable under the sentencing guidelines is significantly narrower

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[It has not been disputed that Pinkerton purported to impose vicarious liability on each conspirator for the acts of others based on an objective standard of reasonable foreseeability. . . . [The] liability of a co-conspirator under the objective standard of reasonable foreseeability would be broader than that of an accomplice, where the defendant must actually foresee and intend the result of his or her acts. That understanding of Pinkerton is also widely accepted by commentators and treatises, whether they are critical of its rule, or only expounding the existing law.

123. See United States v. Alvarez, 755 F.2d 830, 849–50 (11th Cir. 1985), discussed in Section V.C.1, infra.


125. See United States v. Mothersill, 87 F.3d 1214, 1218–19 (11th Cir. 1996), discussed in Section V.C.2, infra.


127. See Section IV.A, supra.

128. See Dressler, Reassessing, supra note 13, at 109.
than the conduct embraced by the law of conspiracy." 129 The Federal Sentencing Guidelines check the broad scope of Pinkerton by limiting defendants’ liability to the "scope of the specific conduct and objectives embraced by the [particular] defendant’s agreement." 130

The Guidelines require that judges set defendant’s base offense level based on "relevant conduct," and they define "relevant conduct" for conspirators in terms nearly identical to the Pinkerton rule. "[I]n the case of a jointly undertaken criminal activity," relevant conduct is "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." 131 However, the then-Chair of the Sentencing Commission, William Wilkins, and his coauthor stated that subsection (a)(1)(B) is a "sentencing rule and not necessarily co-extensive with the Pinkerton rule of co-conspirator liability." 132 "[I]n a broad conspiracy the relevant conduct considered in constructing the guideline range may not be the same for every defendant in the conspiracy, although each may be equally liable for conviction under Pinkerton." 133

Wilkins’ and Steer’s article is illuminating, in that the head of the U.S. Sentencing Commission explicitly recognized Rutledge’s concerns about the "unlimited scope of vicarious liability":

"The authors of the Model Penal Code pointed out that "law would lose all sense of just proportion if one might, by virtue of his one crime of conspiracy, be ‘held accountable for thousands of additional offenses of which he was completely unaware and which he did not influence at all.” 134 "Thus, in applying the Relevant Conduct guideline, the Commission intended that courts would, in necessary instances, make differing determinations among co-conspirators. . . . If the Pinkerton rule of conviction liability were strictly mirrored at sentencing . . . the retailer in

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129. United States v. Perrone, 936 F.2d 1403, 1416 (2d Cir. 1991); see also United States v. Swiney, 203 F.3d 397, 402 (6th Cir. 2000). "[I]t is clear that the Sentencing Guidelines have modified the Pinkerton theory of liability so as to harmonize it with the Guidelines' goal of sentencing a defendant according to the ‘seriousness of the actual conduct of the defendant and his accomplices.’" Swiney, 203 F.3d at 403 (citing William W. Wilkins, Jr. & John R. Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C. L. REV. 495, 502 (1990)).

130. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3, cmt. n.2 (2004). See generally THOMAS HUTCHINSON ET. AL., FEDERAL SENTENCING LAW AND PRACTICE 74-85, 105-12 (2004). See also United States v. Evbomwan, 992 F.2d 70, 74 (5th Cir. 1993): [M]ere knowledge that criminal activity is taking place is not enough for sentence enhancement under § 1B1.3. The rule does not hold accountable any person who reasonably suspects that criminal activity is taking place, regardless of their own involvement. To hold a defendant accountable for the crime of a third person, the government must establish that the defendant agreed to jointly undertake criminal activities with the third person, and that the particular crime was within the scope of that agreement.


133. Id. "The propriety of drawing distinctions among co-conspirators . . . is consistent with the multiple purposes of sentencing articulated in the Sentencing Reform Act." Id.

134. Id. at 510 (quoting Model Penal Code § 2.06 comment, at 307 (1985)).
an extensive narcotics ring could be held accountable as an accomplice to every sale of narcotics made by every other retailer in that vast conspiracy. Such liability might be justified for those who are at the top directing and controlling the entire operation, but it is clearly inappropriate to visit the same results upon the lesser participants in the conspiracy. 135

As Wilkins and Steer point out, 136 the Comments to the Guidelines give examples incorporating this limiting construction of "reasonable foreseeability." For example, "if A is in charge of an ongoing conspiracy to import marijuana that brings in a boat load a week, and B agrees to help unload marijuana from a single boat, the Mary Jane, B's offense level would be determined on the basis of the marijuana in the Mary Jane. The other boat loads of marijuana that A brought in would not be used to determine B's offense level because the marijuana in those boats was not a part of the criminal activity that B jointly undertook with A." 137 This runs directly counter to Pinkerton doctrine that allows defendants to be vicariously liable for the other shipments. 138

Thus, in the federal system, the Guidelines potentially check the unlimited vicarious liability that stems from Pinkerton by requiring an individualized determination of the scope of the conspiracy that each defendant joined. 139 Wilkins, in his article, notes that the Guidelines still allow for the possibility that punishment could be as severe as Pinkerton liability, if a conspirator's conduct was "reasonably foreseeable" and "within the scope of the conspiracy." But, the courts must decide on a "case-by-case basis." 140 To this end, the Second Circuit identified three factors to consider.

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135. Id. at 510–11

136. "The examples in Application Note 1 of the commentary illustrate various situations in which the 'reasonably foreseeable' standard under Relevant Conduct either attributes or precludes attribution of criminal activity of others to a particular defendant." Id. at 511.

137. Hutchinson et al., supra note 130, at 106–07 (summarizing U.S. SENTENCING GUIDELINES § 1B1.3, cmt. n.2(c)(3) (2004)). The comments to the Guidelines, extrapolating several hypothetical applications of Pinkerton doctrine under the "relevant conduct" guideline, are quite detailed, quite instructive, and too long to print here in their entirety. See U.S. SENTENCING GUIDELINES § 1B1.3, cmt. n.2(c)(1)-(8) (2004).

138. See United States v. Irvin, 2 F.3d 72, 75 (4th Cir. 1993) ("[A] district court must apply the principles of Pinkerton to determine the quantity of narcotics reasonably foreseeable to an individual coconspirator, rather than automatically rely on the quantity attributed to the conspiracy as a whole.")

139. See United States v. Thompson, 944 F.2d 1331, 1344 (7th Cir. 1991) ("Unquestionably, [Defendants] are liable for the quantities of drugs they agreed to distribute, whether or not they were personally involved in each transaction. But the nature of this derivative liability makes it imperative to determine the scope of the conspiratorial agreement each joined ... ").

140. "The precise contours and outer limits of criminal activity that should be attributed under the Relevant Conduct 'reasonably foreseeable' standard must be decided by the courts on a case-by-case basis." Wilkins & Steer, supra note 129, at 511–12. For example, the Fourth Circuit found that a defendant in a drug distribution conspiracy could be liable for a heroin overdose caused by a coconspirator's distribution, if defendant was "part of the distribution chain that lead to [the victim's] death" and the distribution was "reasonably foreseeable." United States v. Swiney, 203 F.3d 397, 406 (2000). There, effectively, the question was whether defendant was part of the particular conspiracy to deal drugs leading to defendant's death. See also United States v. Evbuomwan, 992 F.2d 70, 73–74 (5th
in determining the scope of the conspiracy: a) whether participants in the activity pooled their resources, b) whether the defendant assisted in designing or executing the scheme, and c) the role that the defendant agreed to play in the scheme. 141 In effect, the Second Circuit imposed a “substantial participation” test at sentencing.

The limiting role of the Guidelines has several consequences. One is that the codification of Justice Rutledge’s concerns in the Sentencing Guidelines may lend them weight as procedural due process claims, rather than substantive claims. “What might be considered hairsplitting in another context is simply due process where the consequences of factual determinations at sentencing are as substantial as they are under the present guidelines.” 142 That said, following Booker, it is questionable whether “advisory Guidelines” might still retain the formalistic trappings of “due process.” 143

D. Guilt by Association

Justice Rutledge raised the concern, grounded in the Fifth Amendment’s Due Process Clause, that guilt should be “personal”—that juries should not attribute proof of one’s crimes to another. 144 A related concern, grounded in the First Amendment, is “guilt by association”—that one’s association with another, in and of itself, is made criminal. When a conspiracy involves a large organization, both Fifth Amendment “personal guilt” and First Amendment “guilt by association” can be implicated. The Supreme Court, on separate occasions, has articulated a notion of “personal guilt” grounded in the Due Process Clause; although on each occasion, First Amendment rights of free speech or association have been implicated as well. 145

In Scales v. United States, the Court broadly formulated “personal guilt” as a fundamental Due Process interest. 146 The Court considered the

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141. See Hutchinson et al., supra note 130, at 107 (citing United States v. Studley, 47 F.3d 569, 575 (2d Cir. 1995)).
146. Scales v. United States, 367 U.S. 203 (1961). Sixteen years earlier, in Bridges v. Wixon, Justice Murphy articulated the concept of “personal guilt” in a concurring opinion. Bridges v. Wixon, 326 U.S. 135, 163 (1945) (Murphy, J., concurring). Union organizer Harry Bridges, a resident alien from Australia, was ordered deported under a statute that provided for the deportation of aliens who were either affiliated with or members of organizations that advocated the violent overthrow of the U.S. Government. Id. at 137–41. Although Bridges’ union was originally chartered by a Communist organiza-
case of a Communist Party member prosecuted under a statute that criminalized his membership in an organization advocating violent overthrow of the U.S. government.147 "In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment."148

Still, the Court upheld the statute as constitutional, under both the First and Fifth Amendments.149 In "pointing up the accepted limits of imputation of guilt," the Court cited the law of conspiracy as evidence that Congress has power under the Due Process Clause to regulate some associational relationships.150 The Court's analysis focused on the relationship between "membership" and the "underlying substantive illegal conduct," and "whether that relationship is indeed too tenuous" to impose vicarious liability.151 In a situation involving an organization "engage[ing] in criminal activity," however, the Court saw "no reason why one who actively and knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegal activities, should be . . . immune from prosecution," if he is an "'active' member having also a guilty knowledge and intent."152

Essentially, the Scales Court analogized to conspiracy law in framing Due Process limits on "personal guilt." "[T]here is no great difference between a charge of being a member in a group which engages in criminal conduct and being a member of a large conspiracy, many of whose partici-

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148. Id at 224-25.
149. Id. at 219-30. See also Kotteakos v. United States, 328 U.S. 750, 772 (1946). ("Guilt with us remains individual and personal, even as respects conspiracies.")
150. Scales, 367 U.S. at 225 n.17. Any thought that due process puts beyond the reach of the criminal law all individual associational relationships, unless accompanied by the commission of specific acts of criminality, is dispelled by familiar concepts of the law of conspiracy and complicity. While both are commonplace in the landscape of the criminal law, they are not natural features. Rather they are particular legal concepts manifesting the more general principle that society, having the power to punish dangerous behavior, cannot be powerless against those who work to bring about that behavior.
151. Id. at 226. "[T]he enquiry here must direct itself to an analysis of the relationship between the fact of membership and the underlying substantive illegal conduct, in order to determine whether that relationship is indeed too tenuous to permit its use as the basis of criminal liability." Id.
152. Id. at 226-27, 228.
pants’ are unknown or not before the court.” 153 The Scales Court saw no problem in defining a large organization as “the conspiracy.” 154 So long as the organization is a criminal one—and the defendant “knew” and “it was his purpose to further that criminal advocacy”—then traditional conspiracy law principles apply, principles that allow for imputation under the Due Process Clause.

Yet the Scales court recognized that “personal guilt” implies two potential limits on vicarious conspiracy liability. First, the Court recognized the distinction between accomplice and conspiracy liability—and defined vicarious liability as germaine to accomplices, not conspirators. It noted that “genuine problems arise as to whether a conspirator is, by reason of his conspiracy, to be considered an accomplice and therefore guilty also of the substantive offense,” but refrained from deciding the issue. 155 Secondly, the Court recognized that participation in the criminal activity—or put another way, attenuation from the criminal activity—is the relevant inquiry for Due Process limits on imputing guilt. It noted “the argument that membership, even when accompanied by the elements of knowledge and specific intent, affords an insufficient quantum of participation in the organization’s alleged criminal activity . . . .” 156 However, it held the statute constitutional as applied to “active’ members having also a guilty knowledge and intent . . . which therefore prevents a conviction on . . . an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.” 157 Essentially, the Court held vicarious liability to be constitutional where mens rea could be implied from the defendant’s level of participation—an approach echoed by later courts interpreting the

153. Id. at 226 n.18.
154. Id.

The problems in attributing criminal behavior to an abstract entity rather than to specified individuals, though perhaps difficult theoretically, as a practical matter resolve themselves into problems of proof. Whether it has been successfully shown that a particular group engages in forbidden advocacy must depend on the nature of the organization, the occasions on which such advocacy took place, the frequency of such occasions, and the position within the group of the persons engaging in the advocacy. . . . Whatever difficulties might be thought to inhere in ascribing a course of criminal conduct to an abstract entity are certainly cured, so far as any particular defendant is concerned, by the requirement of proof that he knew that the organization engages in criminal advocacy, and that it was his purpose to further that criminal advocacy.

155. Id. at 225 n.17 (“[W]e are solely concerned here with pointing up the accepted limits of imputation of guilt, not with exploring the problems created by the various provisions by which such imputation is effected.”), citing MODEL PENAL CODE § 2.04(3), tentative draft No.1 (1953); Note, Developments at 993–1000.
156. Id. at 227 (emphasis added). “[S]uch assent and encouragement [may] fall short of the concrete, practical impetus given to a criminal enterprise which is lent for instance by a commitment on the part of a conspirator to act in furtherance of that enterprise.” Id. at 227–28. “In an area of the criminal law which . . . demands . . . watchful scrutiny these factors have weight . . .” Id. at 228 (citations omitted).
157. Id. at 228.
limits of *Pinkerton* doctrine.\textsuperscript{158}

Building upon *Scales*, lower courts have occasionally found "personal guilt" to be a fundamental substantive due process interest, although generally outside the criminal field.\textsuperscript{159} More recently, courts have revived the doctrine of "personal guilt" to declare unconstitutional a statute prohibiting "material support" to designated terrorist organizations.\textsuperscript{160} In *Humanitarian Law Project v. United States Dep't of Justice*,\textsuperscript{161} the Ninth Circuit, following *Scales*, required that a defendant convicted for providing material support to a terrorist organization at least know of the organization's unlawful activities.\textsuperscript{162}

\textsuperscript{158} See Part V, infra.

\textsuperscript{159} For example, in *St. Ann v. Palisi*, the Fifth Circuit struck down as unconstitutional a school regulation that suspended students if their parents misbehaved in parent-teacher conferences, 495 F.2d 423, 426 (5th Cir. 1974). *See also* Tyson v. New York City Housing Auth., 369 F. Supp. 513, 518–19 (S.D.N.Y. 1974) (applying the notion of "personal guilt" to the termination of tenants' public housing leases for the acts of the tenants' adult children); United States v. One 1971 Ford Truck, 346 F. Supp. 613, 619 (C.D. Ca. 1972) (applying the notion of "personal guilt" to a case involving the Takings Clause, in which the federal government seized a truck because of the illegal activities of the owner's son). *But see* Ferguson v. Estelle, 718 F.2d 730, 735–36 (5th Cir. 1983) (upholding Texas Anti-Riot Act as constitutional where it imposes vicarious liability on a member of a riotous assembly for the acts of the other members of the group, noting that the statutory phrase "in furtherance of the purpose of the assembly" parallels the phrase "in furtherance of the purpose of the conspiracy" in *Pinkerton*). *See generally* Bryant v. City of New York, 2003 U.S. Dist. LEXIS 21642 at *25–26 (S.D.N.Y. 2003) (collecting due process and personal guilt cases; rejecting plaintiffs' due process claim to be issued desk appearance tickets after being arrested during protest). *See also* State v. Gunninga, 395 N.W.2d 344, 346–47 (Minn. 1986) (holding that vicarious criminal liability for an owner of a restaurant for his waitress selling liquor to a minor violates substantive due process under the Minnesota state constitution); *see generally* Neil Colman McCabe, *State Constitutions and Substantive Criminal Law*, 71 TEMPLE L. REV. 521, 536–42 (1998).


\textsuperscript{161} 352 F.3d 382 (9th Cir. 2003).

\textsuperscript{162} Id. at 396–97, 405. "[S]erious due process concerns would be raised were... a person who acts without knowledge of critical information about a designated organization presum[ed to] act consistently with the intent and conduct of that designated organization." *Id.* at 396. The Ninth Circuit specifically rejected the Government's argument that someone who gave money to a door-to-door canvasser, thinking the canvasser represented a charitable organization, would be guilty of providing material support. "[W]e believe that to attribute the intent to commit unlawful acts punishable by life imprisonment to persons who acted with innocent intent—in this context, without critical information about the relevant organization—contravenes the Fifth Amendment's requirement of 'personal guilt.'" *Id.* at 397.

*Humanitarian Law Project* is distinguishable from *Pinkerton* doctrine, however. *Where Humanitarian Law Project* essentially echoes the requirement of general unlawful intent to enter the criminal agreement, *Pinkerton* imposes specific vicarious liability once general intent to enter the agreement is established. It is important to remember, though, that the intent to enter the criminal agreement under *Pinkerton* is still subjective, even though once entering, "reasonable foreseeability" of others' acts is objective. *See* United States v. Al-Arian, 329 F. Supp. 2d 1294 (M.D. FL 2004) (interpreting the material support statute, holding that "personal guilt" under Due Process precludes vicarious liability without subjective intent); *but see* United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (rejecting Al-Arian's requirement of subjective intent and upholding the statute because of compelling government interests. The Fourth Circuit noted that Congress explicitly found that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.") *Hammoud*, 381 F.3d 316, 329 (citing Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (1996).)
V. Pinkerton and Due Process in the Lower Courts

A. "Reasonable Foreseeability" Applied

Pinkerton's "reasonable foreseeability" standard applies across a wide range of cases. Particularly, Pinkerton can be helpful in crimes involving large organizations, where it is difficult to establish proof of direct involvement in a particular crime.

Pinkerton is often used in corporate crimes. Conspiracy is "especially helpful in connection with financial crimes, as such crimes often involve multiple defendants joining together to engage in market abuses."¹⁶³ For example, the treasurer of a corporation could be held liable for filing a false tax return, even though he did not prepare it or sign it.¹⁶⁴ Or, a corporate director in a scheme to inflate earnings could be held liable for another director's fraudulent use of the company's name to guarantee a loan to himself, even though the defendant was not personally involved.¹⁶⁵ Or, a corporate board member who voted to approve loans he knew were overvalued, who claimed he cooperated with the CEO because he did not want to lose his job, could be convicted of the CEO's substantive bank fraud crimes.¹⁶⁶ Pinkerton can also be used to impose vicarious liability for strict liability offenses. For example, three corporate officers who reached a "tacit agreement" to violate federal environmental laws could all be held for the others' substantive violations of those laws.¹⁶⁷


¹⁶⁴. United States v. Wilson, 887 F.2d 69, 72 (5th Cir. 1989). See also United States v. Schlei, 122 F.3d 944, 971–72 (11th Cir. 1997) (corporate director in conspiracy to sell forged bank notes responsible for co-conspirators' sales); United States v. Richards, 204 F.3d 177, 210–12 (5th Cir. 2000) (finding use of mail and wire facilities in fraudulent investment scheme, plus inducement to travel interstate with intent to defraud, was "reasonably foreseeable" under Pinkerton); United States v. Ciccono, 219 F.3d 1078, 1084–85 (9th Cir. 2000) (finding fraudulent calls made to clients were reasonably foreseeable where defendant as company president provided his employees with lists of people who had fallen prey to other telemarketing schemes and wrote sales pitch used to deceive clients).


¹⁶⁶. United States v. Henning, 286 F.3d 914; 918–19 (6th Cir. 2002). In Henning, the appeals court subsequently reversed defendant's conspiracy conviction, but held that if the conspiracy conviction had stood, the substantive crimes would have as well. Id. at 920.

¹⁶⁷. United States v. Hansen, 262 F.3d 1217 (11th Cir. 2001). In Hansen, three defendants—the President and CEO of a company, the vice-president who received daily reports on plant operations, and the plant manager—were convicted under the general federal conspiracy statute of conspiring "to knowingly act in violation of the environmental laws by 'continuing to operate the Brunswick facility' after learning that they were in violation, storing and disposing of hazardous wastes without a permit, and submitting 'incomplete, inaccurate, and misleading information' in their reports to the various state and federal regulatory agencies." Id. at 1225–30, 1247. The defendants were then convicted under Pinkerton of substantive violations of the Clean Water Act, Resource Conservation Recovery Act, and the Superfund Act (CERCLA). Id. at 1225. The court found a "tacit agreement to operate the plant in violation of environmental laws until a buyer could be found." Id. at 1247. "The defendants knew of the violations from either personal observation or from information that they received from the plant employees, and frequently communicated with each other regarding operation of the plant despite the
Importantly, *Pinkerton* can also be used to find corporations vicariously liable as conspirators for the substantive crimes of their co-conspirators. This raises the question of whether a corporation could be held liable for the acts of its employees who conspire with each other. Generally, courts have held that the corporation can be liable. Or, a corporation can theoretically be held liable for the acts of a single employee because the employee “conspired with the corporation”—something akin to the sound of one conspiratorial hand clapping. Currently, according to one commentator, there is a “clear consensus” that the corporation is not liable unless there are two human co-conspirators, although that has not always been the case.

Increasingly, the U.S. Government is using the *Pinkerton* theory in terrorism cases. For example, in the prosecutions arising from the 1993

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continuous environmental concerns. The defendants failed to provide the corporate board with information about the violations, and failed to accurately present the plant’s inability to comply with the regulations to the Georgia EPD.” Id. Thus, “[e]ach of the substantive offenses were foreseeable consequences of the agreement to continue operating the plant in violation of the environmental statutes.” Id.

Conservative commentators have criticized the extension of *Pinkerton* to regulatory offenses. See Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, CHAMPION August 2003, 28 at 29. “[N]o effective judicial constraint currently limits the extent to which individual conduct that bears no causal relationship to a societal harm may be criminalized.” Id at 35. “There is no better way to dissuade those who work to produce goods and services for society from continuing to do so than to criminalize their conduct without reference to whether or not they have personally acted in a culpable manner.” Id.

168. See generally Martin, supra note 71, at 399, for a thorough discussion of the doctrine, history, and jurisprudence regarding corporations as conspirators.

169. See, e.g., United States v. Hartley, 678 F.2d 961, 970–72 (11th Cir. 1982); see generally Martin, supra note 71, at 410–16.

The rule in the overwhelming majority of federal courts is that even wholly intra-corporate agreements, so long as they involve multiple natural persons, can create a conspiracy for which a corporation may be found criminally liable. This majority view commands the support not only of the federal judiciary, but also of the few academic commentators who have addressed the issue.

Id. at 416.

170. See, e.g., United States v. Gold, 743 F.2d 800, 826 (11th Cir. 1984). Here, managers of a corporation came up with a scheme to increase business by filing false Medicare claims. The president of the corporation did not make the sales or file the claims himself, but “was fully aware,” put pressure on other employees to emulate the managers’ success, and asked an employee to get rid of the Medicare records before the sale of his company went through. Id. at 807, 808, 811. The corporation was held liable for filing false Medicare claims under *Pinkerton*. Id. at 826–27.

171. See generally Martin, supra note 71, at 416–22; see also Eliezer Lederman, *Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle*, 76 J. CRIM. L. & CRIMINOLOGY 285, 298–300 (1985) (“Many jurists agree that a corporation cannot be convicted for conspiracy with its organ or agent, nor can it be convicted for conspiracy with another corporation through a common agent.”) (citing Union Pacific Co. v. United States, 173 F. 737, 745 (8th Cir. 1909)). Martin criticizes the unlimited scope of conspiracy that results from such a rationale. “Were intra-corporate conduct to satisfy the plurality requirement of conspiracy law, nearly every corporate activity would qualify as a ‘conspiracy.’ This view of corporate conduct broadens the scope of conspiracy law beyond its rational limits.” Martin at 464–65 (citing Travis v. Gary Community Mental Health Ctr., 921 F.2d 108, 111 (7th Cir. 1990)).

172. See United States v. Stevens, 909 F.2d 431, 432–33 (11th Cir. 1990). Defendant in *Stevens* was a stockholder convicted of conspiring with a corporation that he wholly owned.

173. See, e.g., Hartley, 678 F.2d at 970–72; see generally Martin, supra note 71, at 416–22.

174. This strategy is not new. See United States v. Rosenberg, 281 U.S. App. D.C. 209 (D.C. Cir. 1989) (prosecuting defendants in conspiracy to bomb government buildings in Washington area for sub-
World Trade Center bombing, defendant conspirators were convicted vicariously for the substantive crimes of bombing the World Trade Center. In the recent John Walker Lindh and Zacarious Moussaoui cases, the Government appeared to put forth a *Pinkerton* theory in pretrial motions; because the cases never reached trial, it is difficult to guess whether the theories would have been accepted by a jury and upheld on appeal.

Because of the large nature of organizations such as Al Qaeda currently involved in international terrorism, questions as to the scope of liability logically arise. One commentator noted that "[t]aking *Pinkerton* to its logical conclusion supports imposing liability on any then active members of al Qaeda for the crimes of September 11 even if these members never agreed to, participated in, or knew of the attacks and did nothing, other than join al Qaeda, to further them." Of course, the larger question is then whether *Pinkerton* liability is justified as a utilitarian deterrent to potential conspirators joining Al Qaeda.

The use of *Pinkerton* is well-established against more traditional organized crime, such as large criminal drug conspiracies. Most typically, *Pinkerton* has been used to find a defendant liable for a co-

175. United States v. Salameh, 152 F.3d 88, 149-50 (2d Cir. 1998). Defendant Abouhalima appeared to be highly involved in the conspiracy, if not his conspirators' actions on the actual day of the bombing. See id.

176. See Part IV.C, infra.

Lindh was a member of a conspiracy to kill Americans. Members of that conspiracy took it upon themselves to murder Johnny Michael Spann, a CIA officer who was in Afghanistan specifically as part of our nation's efforts to fight Al Qaeda and the Taliban and stop terrorism. By well-established conspiracy law, the murder of Mr. Spann ... is attributable to all conspirators, and that is true whether they fired guns themselves or even knew that the uprising would take place.


177. See generally McDonnell, supra note 117, at 364–71 (examining Moussaoui's liability under *Pinkerton*); supra note 3 (addressing Moussaoui's eligibility for death sentence).

178. As noted, Moussaoui pled guilty to the charges against him, but was spared the death penalty by the jury at sentencing. See supra note 3. Interestingly, the jury appeared to cite his lack of direct participation in the September 11 attacks in sparing his life. See Jerry Markon & Timothy Dwyer, Jurors Reject Death Penalty for Moussaoui, WASH. POST, at A1; Special Verdict Form for Phase II (jury verdict form), U.S. v. Moussaoui, May 3, 2006, available at http://news.findlaw.com/hdocs/docs/moussaoui/jv2phase.html.

It should be noted, however, that the due process limits described in this Article are not particularly relevant to Moussaoui. Although Moussaoui's exact role in the September 11 attacks remains unclear, it seems clear from all accounts that he was an active and willing participant in the larger conspiracy to fly airplanes into American buildings. His activities of taking flying lessons and communicating with Al Qaeda operatives establish that he was not "attenuated" from that conspiracy in a way that would constitutionally preclude vicarious guilt. His eligibility for the death penalty is a different matter, in part because of Supreme Court jurisprudence requiring an "intent to kill," see supra note 3, and in part due to federal statutory requirements that a victim dies as a "direct result of [defendant's] act." See Lithwick & Weisberg, supra note 3.


180. See generally Manning, supra note 4, at 97–99.
conspirator’s possession of a firearm, and thus an automatic five-year sentence enhancement under 18 U.S.C. § 924(c) for “using or carrying” a firearm in connection with a drug crime. Pinkerton liability can also be imposed on conspirators to violate RICO, thus potentially creating a sort of super-conspiracy linking all the members of an organization.

The Pinkerton concept of liability for a co-conspirator’s acts has been extended to impose civil liability in a host of areas as well. For example, corporations are liable for the acts of their co-conspirators when conspiring to violate antitrust law. Traditionally, corporations or individuals could also be held liable for a co-conspirator’s actions in conspiracies to violate securities laws. However, after the Supreme Court’s decision in Central Bank of Denver v. First Interstate Bank of Denver, which held that aiding and abetting could not form a basis for private liability under the 10b-5 antifraud provisions, it is unclear whether conspiracy liability could as well. Or, a debtor declaring bankruptcy cannot have debt discharged

181. See also United States v. Matta-Ballesteros, 71 F.3d 754, 765 (9th Cir. 1995) (member of Honduran drug cartel convicted under Pinkerton for murder of DEA agent by co-conspirator).


183. See United States v. Neapolitan, 791 F.2d 489, 504-05 n.7 (7th Cir. 1986) (“This is not to say that the use of Pinkerton instructions in RICO conspiracy cases is ‘wrong or improper’ but only to caution that restraint be applied with regard to Pinkerton in this context.”); United States v. Campione, 942 F.2d 429, 437 (7th Cir. 1991); United States v. Pungitore, 910 F.2d 1084, 1147 n.91 (3d Cir. 1990); Susan W. Brenner, Of Complicity and Enterprise Liability: Applying Pinkerton Liability to RICO Actions, 56 Mo. L. Rev. 931, 985-1005 (1991) (arguing for the use of Pinkerton in criminal RICO actions). See also United States v. Griffin, 660 F.2d 996 (4th Cir. 1981).

As of 1993, the Department of Justice was choosing not to pursue Pinkerton liability in criminal RICO cases because the “combination of RICO and Pinkerton could lead to unwarranted extensions of criminal liability.” Brenner, supra, at 401 (citing ORGANIZED CRIME AND RACKETEERING SECTION, U.S. DEPT OF JUSTICE, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS 73-74 (1985)). It does not appear that that is the case today. See, e.g., United States v. Shyrock, 342 F.3d 948, 987 (9th Cir. 2003) (holding that Pinkerton instruction for RICO conspiracy charge was not improper).


187. See generally James D. Cox, Just Deserts for Accountants and Attorneys after Bank of Denver, 38 ARIZ. L. REV. 519, 528-32 (1996). "After Bank of Denver, there is much more doubt that pri-
if it arises from the wrongful acts of his co-conspirators. 188

More recently, private litigants have begun to use Pinkerton to sue parties civilly for the "reasonably foreseeable" actions stemming from their provision of material support to terrorists. For example, in Ungar v. Islamic Republic of Iran, 189 the estate of a man gunned down by Palestinian terrorists sued Iran for providing support to Hamas, who provided support to the gunmen. 190 Additionally, some courts have allowed the use of Pinkerton to impose vicarious liability for civil RICO violations (thus providing for treble damages). 191

B. Early Cases: "Attenuation" Introduced

The idea that Pinkerton liability might raise due process concerns lay dormant for nearly thirty years until a series of courts in the mid-seventies and early eighties revisited the concept in dissents and dicta. Courts were far more willing, though, to recognize that theoretical due process limits might exist than to articulate where to draw the line. And in these early cases, where defendants were highly involved in the conspiracy, the distinction mattered little in the final analysis.

In Park v. Huff, 192 defendant Park ran a liquor conspiracy. 193 The evidence showed that he had paid others to kill the county Solicitor General, who had raided his operations and seized his alcohol, and he was (ap-

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188. See In re Markarian, 228 B.R. 34, 40 (B.A.P. 1st Cir. 1998).
190. The district court dismissed the suit against Iran for lack of evidence of a conspiracy, while implying that such a suit could go forward on sufficient evidence. See id. at 99–100 (citing Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983)). See also Boim v. Quranic Literacy Inst., 127 F. Supp. 2d 1002 (N.D. Ill. 2001) (holding that private groups can be liable as aiders and abettors for providing material support or resources to terrorist organizations under 18 U.S.C. § 2333), aff'd 291 F.3d 1000 (7th Cir. 2002).
192. 506 F.2d 849 (5th Cir. 1975).
193. Id. at 852.
parently), convicted of murder under *Pinkerton*. However, the out-of-court statements of his co-conspirators in the murder formed the basis of that evidence, and Park challenged them under the Confrontation Clause. The Fifth Circuit upheld his conviction, reasoning that since the murder was in furtherance of the liquor conspiracy, out-of-court statements of co-conspirators relating to the murder were in furtherance of the conspiracy and thus admissible as an exception to the hearsay rule. Essentially, it was irrelevant whether there was one conspiracy to sell liquor and commit murder, or two conspiracies to do both separately.

Judge Thornberry dissented. He argued that if the lower court had relied on a *Pinkerton* theory, there was no Confrontation Clause issue—the State simply had to prove Park’s involvement in the liquor conspiracy, thus establishing his vicarious guilt for the murder, and the out-of-court statements then were irrelevant to his defense. However, he noted, “I think Park might raise due process objections to the validity of his murder conviction on the *Pinkerton* theory.” He added no explanation.

In *United States v. Decker*, the Fifth Circuit held *Pinkerton* to hold conspirators in a drug distribution scheme liable for remote sales of the drugs in the conspiracy. Citing the *Park v. Huff* dissent, the court stated, “[w]hile holding one vicariously liable for the criminal acts of another may raise obvious due process objections, it has received considerable support in this Circuit in the conspiracy context.” This marked the first time a majority opinion connected *Pinkerton* to the Due Process clause. The court did not explain why the objections were “obvious,” a pattern that would repeat itself throughout *Pinkerton* due process jurisprudence.

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194. *Id.* at 854–55.
195. *Id.* at 855.
196. *Id.* at 857.
197. *Id.* at 863–64 (Thornberry, J., dissenting).
198. *Id.* at 864 (citing Note, *Developments in the Law of Criminal Conspiracy*, supra note 14, at 993–98. Judge Thornberry went on to argue that the lower court did not decide the case on *Pinkerton*, and instead charged a conspiracy to commit murder, rather than a conspiracy to distribute liquor, thus rendering the statements crucial and requiring cross-examination under the Sixth Amendment. *Park v. Huff*, 506 F.2d at 864–65.
199. 543 F.2d 1102, 1103–04 (5th Cir. 1976). Note that under the Federal Sentencing Guidelines today, the “relevant conduct” standard would likely restrict such a broad application. See Section IV.C.1., supra.
200. *Id.* at 1103 (citing *Park v. Huff*, 506 F.2d at 864.) The *Decker* court also cited *United States v. Falco*, 496 F.2d 1359, 1361 (5th Cir. 1974), a case in which the Fifth Circuit explicitly rejected the argument that admitting evidence pursuant to a conspiracy that would not be admissible otherwise violated due process.
201. The *Decker* Court also cited “division of labor” as a justification for *Pinkerton* liability:

The “chain” conspiracy has as its ultimate purpose the placing of the forbidden commodity into the hands of the ultimate purchaser... That form of conspiracy is dictated by a division of labor at the various functional levels—exportation of the drug from Europe and importation into the United States, adulteration and packaging, distribution to reliable sellers, and ultimately the sale to the narcotics user. *Decker*, 543 F.2d at 1104 (citing United States v. Agueci, 310 F.2d 817, 826 (2d Cir. 1962)). “It appears then that the theory of vicarious liability is particularly applicable in narcotics distribution conspiracies.”
In *United States v. Blitz*, the Second Circuit considered a conspiracy to manipulate the stock price of a company, run by one mastermind, with two concurrent operations—a "boiler room" operation pressuring buyers through violence, and a broker separately selling shares to clients, realizing illegally high commissions. The two operations had not met each other, but defendants in one were convicted for the securities fraud and mail fraud violations of the other, and vice versa. The court, calling it a "large scale, brazen conspiracy," upheld the convictions under an aiding and abetting theory, but noted that it believed the evidence was sufficient under *Pinkerton* as well.

The dissent argued for reversal of the convictions of one set of defendants for the others' actions. His reasoning echoed Justice Rutledge's criticism of agency theory in the criminal context. "Although such a foreseeability test might provide a basis for tort liability, the relationship strikes me as too attenuated to support a criminal conviction on the theory of aiding and abetting." He went on to also criticize the unlimited scope of liability that followed from the *Pinkerton* rule (or the traditional aiding and abetting rule). "Under this theory a minor figure could be penalized for the acts of others over whom he had no control and with whom he had no real connection, merely because they were members of a broad, loosely-knit conspiracy."

In *United States v. Moreno*, the Fifth Circuit again recognized potential due process objections but upheld the conviction. Defendant was the "planner and expediter" of the beachhead part of a drug smuggling operation and an "active participant at the landing," bribing the manager of a warehouse to cooperate in a boat landing. He was convicted for conspiracy to possess drugs with intent to distribute, and the substantive possession crimes, even though he never possessed the drugs physically. The Fifth Circuit, citing *Park v. Huff*, noted that although "several of our judges have noted their concern that vicarious guilt may have due process limitations . . . attributing the acts of these [conspirators] to [defendant] is not so attenuated as to give us due process concerns."

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202. 533 F.2d 1329 (2d Cir. 1976).
203. Id. at 1332–38.
204. Id. at 1346. The court found evidence that the boiler room manager "believed that brokers were being paid off to help raise the price," and that the broker "solicited purchases with positive assurances of quick profits" that "could not have been based on good faith business judgment" alone. Id. at 1339, 1340.
205. Id. at 1338.
206. Id. at 1340.
207. Id. at 1346–47 (Mansfield, J., dissenting) (citations omitted).
208. Id. at 1347.
209. 588 F.2d 490, 493 (5th Cir. 1979).
210. Id. at 492–93.
211. Id. at 492.
212. Id. at 493.
In doing so, the *Moreno* court was the first majority opinion to articulate the “attenuation” standard for evaluating Due Process claims under *Pinkerton*. An “attenuation” standard made sense in the context of the facts. Defendant was the mastermind of the drug distribution operation and at the scene that night; he probably could have been convicted on an aiding and abetting theory, without resorting to *Pinkerton*. He falls squarely within the *Pinkerton* construction of “reasonably foreseeable”; like Daniel Pinkerton, although he didn’t possess the drugs that night, he might have another night, and certainly he intended that one of his cohorts would to ensure success of the deal. His intent towards the substantive crime of possession can be inferred from his acts as knowledge rather than negligence.

In *United States v. Johnson*, the Eleventh Circuit affirmed *Moreno*’s “attenuation” construction of Due Process while also upholding defendant’s conviction. There, Defendant was president of a bank and the officer in charge of loans. He processed a co-conspirator’s Small Business Administration applications knowing that they included false information. He was convicted of both conspiracy to submit false statements to a federal agency, and vicariously for his co-conspirator’s substantive crimes of submitting false statements. The Eleventh Circuit upheld his conviction, citing *Moreno*.

"As in *Moreno*, however, attributing the acts of Hill and Johnson to [the bank president] is not so attenuated that such due process concerns would apply here." As in *Moreno*, Defendant’s mens rea towards the substantive crime is high, and his participation is direct—enough to likely constitute aiding and abetting.

The early cases are easy ones for vicarious liability. Defendants were highly involved in the conspiracy. Save for *Blitz*, the defendants clearly knew the co-conspirator’s substantive crime was “in furtherance of the agreement.” For the most part, these defendants could have been convicted as easily of aiding and abetting as conspiracy. Courts did not yet need to address when, exactly, due process might prevent vicarious conspiracy liability for attenuated participants, or those lacking mens rea towards the substantive crime.

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213. 730 F.2d 683, 690 (11th Cir. 1984).
214. Id. at 685.
215. Id.
216. Id. at 690 n.8.
217. As *Pinkerton* articulated, “the unlawful agreement contemplated precisely what was done.” *Pinkerton* v. United States, 328 U.S. 640, 647 (1946). Even in *Park v. Huff*, it seems clear that the murder of the county Solicitor stemmed directly from his investigation of the liquor conspiracy. See 506 F.2d 849, 854–55 (5th Cir. 1975). In *Blitz*, defendants were convicted on an aiding and abetting theory, rendering strict application of *Pinkerton* unnecessary. *United States v. Blitz*, 533 F.2d 1329, 1340 (2d Cir. 1976).
C. “More than Minor Participation”

1. United States v. Alvarez

In United States v. Alvarez,218 the Eleventh Circuit expanded Pinkerton to impose vicarious liability on unintended—but reasonably foreseeable—consequences of a conspiracy. In expanding Pinkerton to the logical extension of its limits, however, the Alvarez court more clearly articulated those Due Process limits.

In Alvarez, a shootout resulted from a drug deal and an undercover agent was killed. Three defendants, with varying degrees of involvement in the conspiracy, were convicted vicariously of murder under Pinkerton and challenged their convictions.219

The Alvarez court delineated three general situations in which Pinkerton liability arises. The first is where the co-conspirator’s substantive crime is also one of the primary goals of the alleged conspiracy—for example, a conspiracy to distribute drugs in which a defendant is held liable for a co-conspirator’s crime of distributing drugs.220 The second is where the co-conspirator’s substantive crime directly facilitates the achievement of one of the primary goals of the conspiracy—for example, a conspiracy to distribute drugs in which a firearm is used.221 The third—the case in Alvarez—is where the substantive crime is “reasonably foreseeable” but “not within the originally intended scope of the conspiracy.”222

The Alvarez court held that the third case fell under Pinkerton—but recognized limits. It tied those limits to two concerns. First, it focused on the “individual culpability” of the defendant, implying that some mens rea was necessary. “We have not found . . . any authority for the proposition that all conspirators, regardless of individual culpability, may be held re-

218. 755 F.2d 830 (11th Cir. 1985).

219. Id. at 837–39. The first, Portal, arranged the drug sale, was initially present at the sale as a lookout, carried a gun with him, but left before the shootout. The second, Concepcion, helped arrange the sale, was initially present at the sale to the agents, physically handled the drugs and gave them to the agents, and was present when the shootout broke out, but escaped out the window. The third, Hernandez, helped arrange the sale, which happened in his apartment that he shared with Alvarez, the apparent mastermind of the operation, and translated for Alvarez at the sale, but left before the shootout.

220. Id. at 850 n.24 (citing United States v. Luis-Gonzalez 719 F.2d 1539, 1545 n.4 (11th Cir.1983) (involving a conspiracy to possess with intent to distribute marijuana; substantive crime of possession of marijuana); United States v. Harris, 713 F.2d 623, 626 (11th Cir. 1983) (involving a conspiracy to distribute cocaine; substantive crimes of possession and distribution of cocaine); United States v. Tilton, 610 F.2d 302, 309 (5th Cir. 1980) (involving a conspiracy to commit mail fraud; substantive crime of mail fraud).

221. Id. at 850 n.24 (citing Shockley v. United States, 166 F.2d 704, 715 (9th Cir. 1948) (involving a conspiracy to escape by violent means from federal penitentiary; substantive crime of first degree murder of prison guard); United States v. Brant, 448 F. Supp. 781, 782 (W.D.Pa.1978) (involving a narcotics conspiracy; substantive crime of possession of a firearm during commission of a felony)). “In either of these [first] two categories, Pinkerton liability can be imposed on all conspirators because the substantive crime is squarely within the intended scope of the conspiracy.” Alvarez, 755 F.2d at 850 n.24.

222. Alvarez, 755 F.2d at 850
sponsible under *Pinkerton* for reasonably foreseeable but originally unintended substantive crimes.”

Secondly, the court reiterated the connection between “attenuation” and due process, as the Second, Fifth, and Eleventh Circuits had. “Furthermore, we are mindful of the potential due process limitations on the *Pinkerton* doctrine in cases involving attenuated relationships between the conspirator and the substantive crime.”

Based on these limits, the *Alvarez* court imposed a “more than minor participation” standard for defendants convicted under *Pinkerton* of reasonably foreseeable but originally unintended substantive crimes. In the instant case, it found that all three defendants met that standard. As to their “individual culpability,” “all three were more than ‘minor’ participants in the drug conspiracy.” Plus, “all three appellants had actual knowledge of at least some of the circumstances and events leading up to the murder,” implying a higher mens rea than negligence. Addressing the “attenuation” concern, the court concluded that “the relationship between the three appellants and the murder was not so attenuated as to run afoul of the potential due process limitations on the *Pinkerton* doctrine.” The *Alvarez* court specifically noted that its extension of *Pinkerton* was within “narrow confines”—limited to situations like this where individual culpability could be established through “more than minor” participation, or “actual knowledge of at least some of the circumstances and events culminating in the reasonably foreseeable but originally unintended substantive crime.”

Essentially, then, the *Alvarez* court created a two-step inquiry for

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223. *Id.*

224. *Id.* (citing United States v. Johnson, 730 F.2d 683, 690 n.8 (11th Cir. 1984); United States v. Moreno, 588 F.2d 490, 493 (5th Cir. 1979); *Blitz*, 533 F.2d at 1346-47).

225. *Id.* at 850-51.

Portal served as a look-out in front of the Hurricane Motel during part of the negotiations that led to the shoot-out, and the evidence indicated that he was armed. Concepcion introduced the agents to Alvarez, the apparent leader of the conspiracy, and was present when the shoot-out started. Finally, Hernandez, the manager of the motel, allowed the drug transactions to take place on the premises and acted as a translator during part of the negotiations that led to the shoot-out.

*Id.* The *Alvarez* court cited *Park v. Huff* as an example of where liability was imposed for major participants in “reasonably foreseeable but originally unintended” crimes. *Id.* (citing *Park v. Huff*, 506 F.2d 849, 859 (5th Cir. 1975)). This seems to miscast *Park*, as the *Park* court found ample evidence the defendant paid for the murder, thus establishing intent.

226. *Id.* at 851:

In addition, all three appellants had actual knowledge of at least some of the circumstances and events leading up to the murder. The evidence that Portal was carrying a weapon demonstrated that he anticipated the possible use of deadly force to protect the conspirators’ interests. Moreover, both Concepcion and Hernandez were present when Alvarez stated that he would rather be dead than go back to prison, indicating that they, too, were aware that deadly force might be used to prevent apprehension by Federal agents.

227. *Id.* at 851.

228. *Id.* at 851 n.27. This construction arguably contradicts Supreme Court precedent interpreting *Pinkerton*. In *Nye & Nissen*, the majority stated: “*Pinkerton* applies where ‘the conspiracy was one to commit offenses of the character described in the substantive counts.’” *Nye & Nissen*, 336 U.S. 613, 620 (1949). “*Pinkerton v. United States* is narrow in its scope. Aiding and abetting rests on a broader base; it states a rule of criminal responsibility for acts which one assists another in performing.” *Id.*
vicarious *Pinkerton* liability. First, a defendant must have some "individual culpability"—i.e. mens rea—towards the substantive crime. Mens rea can be inferred, objectively, by a defendant's actions. Where the substantive crime is foreseeable, but unintended, a defendant's actions can substitute for mens rea—if he is a "more than minor participant," and the inference of his "general" criminal intent is strong enough to render him sufficiently culpable, even if his "specific" criminal intent towards the substantive crime is negligence, rather than knowledge. Such "participation" in the conspiracy would approximate the *Pinkerton* rationale that the conspiracy itself "establishe[s]" "the criminal intent to do the act." This "participation" standard also echoes the *Scales* Court's requirement of a "quantum of participation" in "personal guilt" cases.

Implicit in that formulation, though, is that there is a certain level of "attenuation" from the crime beyond which "due process"—or perhaps more accurately, our intuitive and historical notions of justice and "personal guilt"—prevents a conviction under *Pinkerton* liability. Put another way, no reasonable jury could find that such an "attenuated" defendant could have a sufficiently guilty mens rea towards his co-conspirator's substantive crime. Or, perhaps, that other due process concerns come into play. As Justice Rutledge referenced, in "attenuated" situations, perhaps vicarious guilt is really "guilt by association," "attributing to one proof against another," rather than personal guilt, established through traditional rules of evidence.

2. Federal Courts After *Alvarez*

After *Alvarez*, the landscape of *Pinkerton* and due process jurisprudence changed. Now, courts had a reference point to determine due process analysis. That reference point was "attenuation" (or, the related concept of...

229. The *Alvarez* court allowed that subjective foreseeability could suffice as well, in a test similar to Professor's Robinson's that defendant should possess a minimum culpable state of mind as to the "causal connection to the harm caused." See Robinson, *supra* note 21, at 646. A defendant who knows "some of the circumstances and events culminating in the reasonably foreseeable but originally unintended substantive crime"—such as the lookout for the drug deal—knows (or should know) that his conduct will increase the chances of someone being shot. See *Alvarez*, 755 F.2d at 851 ("The evidence that Portal was carrying a weapon demonstrated that he anticipated the possible use of deadly force to protect the conspirators' interests. Moreover, both Concepcion and Hernandez were present when Alvarez stated that he would rather be dead than go back to prison, indicating that they, too, were aware that deadly force might be used to prevent apprehension by Federal agents."). He may be negligent as to the shooting, but knowledgeable—or at least reckless—to the possibility that he's contributing to it. This somewhat echoes the *Scales* Court's admonition that "an expression of sympathy with the alleged criminal enterprise" is not enough, as interpreted by the Ninth Circuit in *Humanitarian Law Project* that "attribut[ing] the intent to commit unlawful acts... to persons who acted with innocent intent... contravenes the Fifth Amendment's requirement of personal guilt." See *Scales* v. United States, 367 U.S. 203, 228 (1961); *Humanitarian Law Project* v. United States Dept of Justice, 352 F.3d 382, 397 (9th Cir. 2003).


231. Such a standard is met by "active participants" who take "significant action" in support of the criminal enterprise, in addition to a "guilty knowledge and intent," and thus the relationship is not "too tenuous" to impose vicarious liability. *Scales*, 367 U.S. at 226, 227–28.
"more than minor participation"). Courts generally upheld the Alvarez court’s extension of Pinkerton to unintended but foreseeable crimes, while conducting a perfunctory “attenuation” analysis to satisfy due process.

In United States v. Chorman,232 the Fourth Circuit upheld the conviction of two defendants in a stolen car “salvage/switch” operation.233 One defendant, Chorman, bought the cars at auction to be used in the stolen-car scheme; the other, Erdman, served as the president of a “front” company that purchased the cars.234 Both defendants were convicted of conspiracy to transport stolen cars interstate,235 and through Pinkerton liability, their co-conspirator’s substantive crimes of transporting stolen cars interstate and tampering with the vehicles’ VIN numbers.236

The Fourth Circuit implied that the co-conspirator’s substantive crime of transporting stolen cars was squarely in Alvarez’s first category—the crime being the same as the goal of the conspiracy—and thus allowable under Pinkerton.237 As to the obstruction of justice through VIN tampering, it appeared to fall in Alvarez’s second category—facilitating the achievement of the goal of the conspiracy.238 The court then echoed Alvarez in upholding the VIN tampering convictions as not “so attenuated as to run afoul of possible due process limitations.”239

232. 910 F.2d 102 (4th Cir. 1990).
233. Id. at 104–07. The court described a “salvage/switch” operation as such:
   In a salvage/switch operation, the public vehicle identification number (VIN) from a salvage auto, usually purchased at an insurance company auction, is removed from the dashboard of the auto. Each automobile’s VIN is unique, consisting of seventeen letters and numerals which identify, inter alia, the manufacturer, the make and model, and the year and plant of assembly. New title is obtained for the salvage vehicle, ostensibly after repairs have made it roadworthy. A car closely resembling the salvage auto is then stolen (or a stolen car resembling the salvage auto is already available), that car’s public VIN is replaced with the salvage auto’s public VIN, and the VINs located elsewhere on the stolen vehicle are obliterated or stamped over with the salvage auto’s VIN. The stolen car is finally sold as a legitimate used car with the new title.

234. Id. at 104–07.
235. Id. at 103–04,109.
236. Id. at 110. Their co-conspirator had removed the “new” VIN numbers in an effort to obstruct the investigation. Id. at 105.

Notably, both statutes required specific intent on the part of the defendant. “Section 2312 prohibits ‘transport[ing] in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen.’ Conviction under this statute requires proof that there was a stolen vehicle, that the defendant knew the vehicle was stolen, and that the defendant transported the vehicle in interstate commerce. Section 511(a) prohibits a person from ‘knowingly’ removing, obliterating, tampering with, or altering an identification number for a motor vehicle or motor vehicle part. ‘Knowingly’ in this context means only ‘knowing action’ by the defendant.” Id. at 110 (citations omitted).

237. “The criminal intent to commit the substantive offenses was ‘established by the formation of the conspiracy.’” Id. at 112 (citing Pinkerton v. United States, 328 U.S. 640, 647 (1946)).

238. “McLaurin’s obliteration of the salvage VINs on the ten identified ‘switch’ vehicles, though perhaps not an anticipated act, nevertheless was certainly in furtherance of the conspiracy’s purposes.” Id. at 112, citing United States v. Alvarez, 755 F.2d 830, 850 & nn.24 & 25 (11th Cir. 1985).

239. Id. at 112, citing United States v. Johnson, 886 F.2d 1120, 1123 (9th Cir. 1989); Alvarez, 755 F.2d at 850–51.
In *United States v. Mothersill*, the Eleventh Circuit applied its own *Alvarez* standard to again uphold convictions for "reasonably foreseeable but originally unintended substantive crimes." In *Mothersill*, four participants in a large-scale drug conspiracy were found liable under *Pinkerton* for the death of a state trooper. One of their co-conspirators built a bomb, intended to kill a possible witness; when the state trooper pulled over the car carrying the bomb and opened the trunk, the bomb went off and killed him. Defendants were described as playing "important roles" in the drug conspiracy; three of the four had played some role in the previous murder of another drug dealer.

The Eleventh Circuit reiterated the *Alvarez* extension to "reasonably foreseeable but originally unintended substantive crimes," but recognized it "must be limited by due process as *Alvarez* realized." It reaffirmed that due process was satisfied by "more than minor participation," or actual, subjective knowledge of "some of the circumstances and events culminating in the reasonably [foreseeable] but unintended substantive crime." The *Mothersill* court construed "reasonable foreseeability" broadly, framing the inquiry as whether the "killing of individuals" in general was "reasonably foreseeable," not whether the specific person killed or the method of killing was "reasonably foreseeable." The court cited "the frequency with which weapons and violence, actual or threatened, were used in order to further the interests of the conspiracy." Based on this, the *Mothersill* court, "[c]ognizant of the due process considerations promoted by *Alvarez*, and bound by its narrow holding," found defendants' "individual culpability . . . sufficient" for *Pinkerton* liability.

240. 87 F.3d 1214 (11th Cir. 1996).
241. Id. at 1218.
242. A fifth participant, Paul Howell, was also convicted under *Pinkerton* for building the bomb that caused the trooper's death. Id. at 1216. Because his liability seems closer to aiding and abetting liability, I will not discuss it here.
243. Defendants were convicted under 18 U.S.C. § 844(1) and (2) (maliciously destroying with explosives property in interstate commerce, resulting in the death of a public safety officer). Id. at 1216 n.2.
244. Michael Morgan was described as a "principal leader" of the drug operation and previously killed the drug dealer. Id. at 1217, 1220. Patricia Clarke was a "major player" in the drug operation, was present when Morgan acquired the car and weapon for the murder, and helped clean up the murder scene. Id. at 1217, 1220. Egnatius Johnson was a "principal leader" in the drug operation and was present when Morgan acquired the car and weapon for the murder. Id. Norris Mothersill is the only defendant who did not seem to be directly involved in the prior murder; he was described as an assistant to a "major player" in the operation and played an "important role." Id.
245. Id. at 1218.
246. Id. at 1218 (citing *United States v. Alvarez*; 755 F.2d 830, 851 n. 27 (11th Cir. 1985)).
247. Id. at 1219.
248. Id. at 1219. The *Mothersill* court cited defendants' past involvement in similar crimes as evidence of a guilty mens rea towards their co-conspirator's crime. "One need not look further than the [prior] murder to support [this] conclusion. Moreover, the record is replete with references to the conspirators being continuously armed and using such weapons either to protect or advance their interest, most notably by armed robberies." Id.
249. Id. at 1219.
varez court did, the Mothersill court addressed “attenuation” separately, and found the trooper’s death “not so attenuated as to transgress the due process limitations on Pinkerton.”

Not every court, however, has held that vicarious liability for such an unintentional killing satisfies due process. In United States v. Cherry,\textsuperscript{251} the Tenth Circuit, in dicta, explicitly declined to adopt the Alvarez court’s extension of Pinkerton to “reasonably foreseeable but unintended substantive crimes.”\textsuperscript{252} “[W]e have never extended [Pinkerton] doctrine to hold co-conspirators liable for first-degree murder that was not the original object of the conspiracy.”\textsuperscript{253}

First, the Cherry court questioned whether sufficient individual culpability would be present. “Although intimidation and violence may or may not be foreseeable results of a particular drug conspiracy, first-degree murder liability incorporates a specific intent requirement far more stringent than mere foreseeability.”\textsuperscript{254} Essentially, it implied that the general criminal intent evinced by “more than minor participation” in the conspiracy was simply insufficient to satisfy the specific intent requirement of the substantive crime (at least, for a crime as serious as murder.)

Secondly, the Cherry court questioned the unlimited scope of liability. “To extend substantive Pinkerton liability [in this manner] would apparently render every minor drug distribution co-conspirator, regardless of knowledge, the extent of the conspiracy, its history of violence, and like factors, liable for first-degree murder. Such a result appears incompatible with the due process limitations inherent in Pinkerton.”\textsuperscript{255}

\textsuperscript{250} Id.

\textsuperscript{251} 217 F.3d 811 (10th Cir. 2000). In Cherry, the Tenth Circuit considered the applicability of Pinkerton by analogy to Confrontation Clause waiver. Defendant Cherry was involved in a drug conspiracy. When one of her co-conspirators was discovered to be cooperating with federal agents, two other co-conspirators killed the potential witness. There was no evidence that defendant participated in the murder. \textit{Id.} at 813. Defendant, citing the Confrontation Clause, moved to exclude the out-of-court statements of the dead conspirator. \textit{Id.} at 814. The Government argued that under Pinkerton, since she was liable for the acts of her co-conspirator, she vicariously waived her Confrontation Clause rights through misconduct. \textit{Id.} at 815–16.

The Cherry court adopted Pinkerton as a proper analogy for the Confrontation Clause waiver issue. “It would make little sense to limit forfeiture of a defendant’s trial rights to a narrower set of facts than would be sufficient to sustain a conviction and corresponding loss of liberty.” \textit{Id.} at 818. In doing so, the court specifically rejected “agency theory” as “too broad,” citing the “potential windfall to defendants and the fundamental principle that ‘courts will not suffer a party to profit by his own wrongdoing.’” \textit{Id.} at 820. The Cherry court remanded to the district court to consider waiver under Pinkerton. \textit{Id.} at 821.

\textsuperscript{252} “This Circuit has not, like the Eleventh Circuit, gone as far as extending the doctrine to ‘substantive crimes occurring as a result of an unintended turn of events.’” \textit{Id.} at 817 (citing Mothersill, 87 F.3d 1214 at 1218 (quoting United States v. Alvarez, 755 F.2d 830, 850 (11th Cir. 1985))).

\textsuperscript{253} \textit{Id.} at 818.

\textsuperscript{254} \textit{Id.} at 818.

\textsuperscript{255} \textit{Id.} at 818. That said, the Tenth Circuit declined to decide the issue. “We express no opinion as to whether a person can be liable for first-degree murder pursuant to Pinkerton.” \textit{Id.}
3. State Courts After Alvarez

Some of the more considered and detailed treatments of the Pinkerton doctrine have emanated from state courts in states that follow Pinkerton. Although they draw on state law precedent as well, the cases follow and amplify the theoretical approaches that federal courts have taken toward Pinkerton and due process.

In Everitt v. State,256 the Georgia Supreme Court, following Pinkerton, declined to hold defendant responsible for a co-conspirator’s murder stemming out of an arson conspiracy.257 Defendant Everitt hired a co-conspirator to burn down his gas station for the insurance. His co-conspirator hired another man to help him, and then later killed that man for fear he would expose the conspiracy.258

The Georgia Court overturned defendant’s conviction under Pinkerton. In construing “reasonable foreseeability” less broadly, the Court appeared to require a causal link between the defendant’s conspiracy (here, a conspiracy to commit arson) and the co-conspirator’s crime. “[A] defendant can be held criminally responsible for such collateral acts only if it can be said that they are a natural and probable consequence of the conspiracy.”259 The Georgia Court appears to be the first to give a limiting construction to the original Pinkerton language that the crime be “reasonably foreseeable as a necessary or natural consequence of the unlawful agreement.”260 “Under the facts of this case, it cannot be said that the murder

256. 588 S.E.2d 691 (Ga. 2003).
257. Georgia follows Pinkerton doctrine, but construed “reasonable foreseeability” differently in this case.
258. Id. at 691–92.
259. Id. at 693. See also United States v. Powell, 929 F.2d 724, 726 (D.C. Cir. 1991) (citing Pinkerton v. United States, 328 U.S. 640, 647–48 (1946) (equating “natural and probable consequence” language to Pinkerton’s “necessary and natural consequence” language)).

The phrase “natural and probable consequences” by no means communicates just how likely the forbidden act must have appeared to the accomplice. It could signify any position within a broad range: for example, all acts with a substantial probability of occurrence (e.g., one chance in five); acts that are more probable than not to occur; acts of very high probability (e.g., 90%); and acts so likely that their occurrence is a practical certainty. Given the imperfection of human knowledge, the latter is the equivalent of knowledge; an accomplice “knows” an act will happen if he is “practically certain” it will.

Id. at 726 (citing MODEL PENAL CODE § 2.02, at 236–37 n.13 (1985)). The Powell court then required “knowledge” of an accomplice’s gun to support a conviction under 924(c). Id. at 728. Comparing cases in which defendants were convicted vicariously for co-conspirator’s gun crimes, the Court stated:

In [previous cases] each accomplice crossed a moral divide by setting out on a project involving either the certain or contingent use of deadly force. . . . But the courts’ references to “natural and probable consequences” in those contexts hardly mean that the phrase should entail the same degree of probability whenever an accomplice helps in the commission of one crime and the principal commits another.

Id. at 727.

260. Pinkerton, 328 U.S. at 647–48 (emphasis added). Although the Georgia Court, as a state court, was not bound to follow Pinkerton, it appeared to undertake an analysis of its language that any federal court could follow.
... could be reasonably foreseen as a necessary, probable consequence of the conspiracy to commit arson.\textsuperscript{261} "Were we to rule otherwise, we would be forced to confront serious due process concerns."\textsuperscript{262}

The Eleventh Circuit rejected such a "natural and probable" construction in \textit{Mothersill}.\textsuperscript{263} Perhaps a conspiracy to distribute drugs, more so than arson, involves violence as a "necessary or natural" consequence;\textsuperscript{264} or perhaps the \textit{Mothersill} defendants, because of their particular involvement in prior violent murders, were more individually culpable towards this murder, enough so to be reckless or negligent.

In \textit{State v. Coltherst},\textsuperscript{265} the Connecticut Supreme Court upheld the \textit{Alvarez} line of reasoning, and specifically rejected the "necessary and natural" line of reasoning. Defendant Coltherst and a friend decided to carjack someone. Although defendant's friend owned the gun and initially used it to carjack the victim, defendant was aware of it as they planned the crime and possessed it at one point while driving. Defendant's friend eventually shot the victim, and defendant was convicted of, among other things, mur-

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\item \textsuperscript{261} \textit{Everitt}, 588 S.E. 2d at 693 (citing United States v. Alvarez, 755 F.2d 830, 848-49 (11th Cir. 1985)).
\item \textsuperscript{262} \textit{Id.} at 693 (citing \textit{Alvarez}, 755 F.2d at 850; United States v. Johnson, 730 F.2d 683, 690 n.8 (11th Cir. 1984)); WAYNE LAFAYE, SUBSTANTIVE CRIMINAL LAW § 13.3(a) p.358 (2d ed. 2003) ("As the draftsmen of the Model Penal Code have pointed out, 'law would lose all sense of just proportion' if one might, by virtue of his one crime of conspiracy, be 'held accountable for thousands of additional offenses of which he was completely unaware and which he did not influence at all.'"). A Massachusetts federal district court had previously called attention to this possible limiting construction. "I. . . have not seen any court decisions that consider the significance of the 'necessary' and 'natural' language." United States v. Hansen, 256 F. Supp. 2d 65, 67 n.3 (D. Ma. Feb. 14, 2003). \textit{But see} State v. Coltherst, 820 A.2d 1024, 1039 (Conn. May 6, 2003) (suggesting that "natural and probable consequences" language does not further limit "foreseeability"), discussed \textit{infra}; Pauley, \textit{supra} note 4, at 31-35 (concluding that \textit{Pinkerton} merely follows traditional complicity liability in requiring "natural and probable consequences").
\item \textsuperscript{263} \textit{See} United States v. Mothersill, 87 F.3d 1214, 1219 (11th Cir. 1996): Appellants argue that the bombing was an attenuated, unintended act, and that it does not compare, for example, to the use of firearms for stealing or protecting drugs and monies derived from a conspiracy to distribute drugs. Appellants also maintain that Trooper Fulford's death was the result of an irrational act by Paul Howell which could not have been reasonably foreseen as a natural and probable consequence of the alleged conspiracy. . . . A review of the record supports that . . . conversely . . . deadly force and violence were more than peripheral possibilities; rather, they were routine practices and central to the goals and implementation of the conspiracy.

On the other hand, the cases may be distinguished on the facts; in \textit{Everitt}, there was no evidence of the defendant's involvement in prior murders or violence as in \textit{Mothersill}. (However, there was evidence that Everitt helped conceal the murder after the fact.) \textit{Everitt}, 588 S.E. 2d at 692: Jamie Weeks [another co-conspirator], who was 26 years old at the time of trial, testified that shortly after the murder, Everitt gave McDuffie a set of tires to conceal the fact that McDuffie used his truck to transport the victim's body. He also testified that Everitt later warned Weeks to keep his mouth shut.

\item \textsuperscript{264} \textit{Everitt}, 588 S.E. 2d at 693 ("Simply put, a conspiracy to commit arson, without more, does not naturally, necessarily, and probably result in the murder of one co-conspirator by another.")
\item \textsuperscript{265} 820 A.2d 1024 (Conn. 2003). The Connecticut Supreme Court appears to be the leader among states in explicating \textit{Pinkerton} doctrine. \textit{See also}, e.g., State v. Walton, 630 A.2d 990 (Conn. 1993); State v. Diaz, 679 A.2d 902 (Conn. 1996); State v. Garner, 853 A.2d 478 (Conn. 2004); State v. Peeler, 857 A.2d 808 (Conn. 2004).
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Citing Alvarez, the Connecticut Court upheld defendant’s conviction, while recognizing the “attenuation” limit Alvarez set out. “[U]nder Pinkerton, a coconspirator’s intent to kill may be imputed to a defendant who does not share that intent, provided, of course, that the nexus between the defendant’s role and his coconspirator’s conduct was not ‘so attenuated or remote . . . that it would be unjust to hold the defendant responsible . . . .’”267

The Connecticut Court went further, though, in specifically rejecting that the “necessary or natural” language could serve any role in limiting Pinkerton. Citing the “group danger” rationale that conspiracies serve as loci for future crimes, the Court held that “one natural and probable result of a criminal conspiracy is the commission of originally unintended crimes.”268 “When the defendant has ‘played a necessary part in setting in motion a discrete course of criminal conduct’ . . . it is [not] unfair to hold him vicariously liable, under . . . Pinkerton . . . , for the natural and probable results of that conduct that, although he did not intend, he should have foreseen.”269 The Connecticut Court hearkened back to Pinkerton’s original language that “the criminal intent to do the act is established by the formation of the conspiracy.”270

The Connecticut construction of “individual culpability” thus seems broader than Professor Robinson’s. Although defendant Coltherst undoubtedly knew that his conduct increased the chances the victim would be shot, the Connecticut interpretation could imply that any defendant entering a conspiracy should be aware that he increases the chances of unrelated crimes arising.271

266. Coltherst, 820 A.2d at 1029-33. From the facts, it appears he could have just as easily been convicted as an aider and abettor, although defendant did apparently ask his friend why he shot the victim after the killing. Id. at 1032.

267. Id. at 1036 (citing State v. Diaz, 679 A.2d 902, 911 (Conn. 1996)). See also State v. Garner, 853 A.2d 478 (Conn. 2004) (citing Coltherst, rejecting defendant’s argument that he was too attenuated, noting defendant’s “assistance in planning the conspiracy, his awareness of what was about to take place when Adrian approached the Clarke house, and his assistance as a lookout during the murders.”).

268. Coltherst, 820 A.2d at 1039. “[C]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.” Id. (citing State v. Robinson, 567 A.2d 1173 n.6 (Conn. 1989), overruled on other grounds, State v. Colon, 778 A.2d 875 (Conn. 2001)).

269. Id. at 1039.

270. Pinkerton v. United States, 328 U.S. 640, 647 (1946); see also Diaz, 679 A.2d at 910 (“[T]he rationale of Pinkerton liability . . . is essentially that, because the conspirator played a necessary part in setting in motion a discrete course of criminal conduct, he should be held responsible, within appropriate limits, for the crimes committed as a natural and probable result of that course of conduct.” Diaz then went on to cite the above-mentioned language from Pinkerton.)

271. The Connecticut reference to “discrete conduct” does cut against this construction. See also Diaz, 679 A.2d at 910 (citing United States v. Jordan, 927 F.2d 53, 56 (2d Cir. 1991)): Though it is sometimes mischaracterized, Pinkerton [liability] is not a broad principle of vicarious liability that imposes criminal responsibility upon every co-conspirator for whatever substantive offenses any of their confederates commit. On the contrary, in the very decision in which the principle was articulated, co-
In *State v. Bridges*, the New Jersey Supreme Court explicitly addressed several of the theoretical strands running through *Pinkerton* doctrine. In *Bridges*, the defendant and his friends brought guns to a party. Defendant started a fight, and his friends pulled out guns and started shooting. An onlooker was shot and killed, and defendant was convicted of, among other things, conspiracy to possess a weapon for an unlawful purpose and without a permit, conspiracy to commit aggravated assault, and murder under *Pinkerton*.

First, the New Jersey Court reaffirmed that co-conspirator liability rests on agency principles. Secondly, the New Jersey Court reaffirmed that "reasonable foreseeability" under *Pinkerton* liability follows an objective standard, not subjective. "[T]he Court has not been disputed that *Pinkerton* purported to impose vicarious liability on each conspirator for the acts of others based on an objective standard of reasonable foreseeability." Third, the New Jersey Court echoed the "attenuation" standard of *Alvarez* and prior federal cases. It held that *Pinkerton* liability for unintended substantive crimes, as in *Alvarez*, did not violate due process, so long as the consequences were "closely connected with the original conspiracy." The New Jersey Court did acknowledge that applying the standard would be "difficult and complicated because it is necessarily fact-sensitive."

Lastly, the New Jersey Court explicitly addressed the issue of co-

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273. Id. at 271–72.
274. Id. at 272.
275. Id. at 273–74 (citing *State v. Carbone*, 91 A.2d 571 (N.J. 1952) (citing "mutual-agency theory").
276. Id. at 274.
277. Id. at 278 (citing *State v. Stein*, 360 A.2d 347 (N.J. 1976)). "*Stein* formulated a standard for vicarious criminal liability of a co-conspirator based on objective foreseeability that is circumscribed by the requirement that the substantive crime be closely connected to the conspiracy." Id. at 279 (citing *Stein*, 360 A.2d at 358–59).
278. Id. at 280:

Consequently, trial courts must endeavor to explain to juries, as part of their instructions, that when determining criminal liability under that standard, they should consider whether the commission of the substantive crime is actually beyond the scope of the original conspiracy, and if so, whether it is objectively foreseeable or reasonably to be anticipated that the substantive crime would be committed in view of the obvious risks surrounding the attempts to execute the conspiracy, and whether the substantive crime occurred or was committed in a manner that was too far removed or too remote from the objectives of the original conspiracy.
A section of the New Jersey criminal code, apparently based on the Model Penal Code, states that “[w]hen the offense requires that the defendant purposely or knowingly cause a particular result, the actual result must be within the design or contemplation, as the case may be, of the actor, or, if not, the actual result must involve the same kind of injury or harm as that designed or contemplated and not be too remote, accidental in its occurrence, or dependent on another’s volitional act to have a just bearing on the actor’s liability or on the gravity of his offense.” The Court relied on this statute in formulating its “closely connected” limit. Interestingly, it did not rely on the statute to completely foreclose vicarious liability for conspirators, citing the “group danger” rationale, and a concurrent New Jersey statute explicitly supporting vicarious conspirator liability.

D. “Reasonable Foreseeability” as a Due Process Limit

While courts, following Alvarez, were applying the “attenuation” due process limit (and/or “more than minor participation”) to Pinkerton “reasonable foreseeability,” some federal courts were construing “reasonable foreseeability” itself as a due process limit. These courts did so in the context of whether drug conspirators could be vicariously liable for a co-conspirator’s use of a firearm under 18 U.S.C. § 924(c) (and thus an automatic five-year sentence enhancement). Although these courts used the language of “attenuation,” the “attenuation” they referred to was attenuation in kind between drug crimes and gun crimes, rather than attenuation in fact between the defendant and his co-conspirator’s substantive crime. As such, these courts generally upheld vicarious liability as “foreseeable.”

In United States v. Johnson, the Ninth Circuit upheld defendant’s conviction under Pinkerton for a co-conspirator’s use of a firearm

279. N.J. STAT. ANN. § 2C:2-3b (West 2006).
280. Bridges, 628 A.2d at 279: “[I]t is essential theme is that the result of criminal conduct be closely connected to that conduct through ties of culpability. Those ties do not demand identical culpable mental states for the criminal conduct and the criminal result. They do require, however, that a result ‘not be too remote or accidental in its occurrence in relation to the conduct.’”
281. “Although conspirator liability is circumscribed by the requirement of a close causal connection between the conspiracy and the substantive crime, that standard conceded is less strict than that defining accomplice accountability. It is, however, evident that the Legislature chose to address the special dangers inherent in group activity and therefore intended to include the crime of conspiracy as a distinctive basis for vicarious criminal liability. The legislative history supports the conclusion that the liability for conspirators was intended to be broader than other measures of criminal accountability for vicarious crimes.” Id. at 279–80 (citing N.J. STAT. ANN. § 2C:2-6b(4) (West 2006) (“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 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 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 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; (3) He is an accomplice of such other person in the commission of an offense; or (4) He is engaged in a conspiracy with such other person.”)).
283. 886 F.2d 1120 (9th Cir. 1989).
under 924(c). Defendant was found in a crack house. The police found a gun in the house, a gun thrown out the window by her co-conspirator, and a gun in the car of the other co-conspirator. Defendant was convicted of conspiracy to possess cocaine with intent to distribute, and through *Pinkerton*, knowingly using a firearm.

The Ninth Circuit upheld defendant’s conviction citing the presumption that the “drug industry is a dangerous, violent business.” The Ninth Circuit did cite *Alvarez* in “recogniz[ing] the potential due process limitations on the *Pinkerton* doctrine in cases involving attenuated relationships between the conspirator and the substantive crime.” However, the court’s analysis rested solely on the presumption of foreseeability in the drug business. The court appeared to construe “attenuation” as attenuation in kind between drug crimes and gun crimes, not as factual attenuation. Since drug dealing is presumptively violent, in this context, the so-called “attenuation” limit is illusory.

The Sixth Circuit codified this reasoning in *United States v. Christian*. “The foreseeability concept underlying *Pinkerton* is also the main concern underlying a possible due process violation.” “Foreseeability is not too attenuated in this case. The ‘well-recognized nexus between drugs and firearms’ is acknowledged . . .”

More recently, though, the Sixth Circuit reversed a defendant’s firearm conviction as “not reasonably foreseeable” under *Pinkerton*. In *United

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284. *Id.* at 1123.
285. *Id.* at 1121-22.
286. *Id.*
287. *Id.* at 1123 (citing *United States v. Dias*, 864 F.2d 544, 549 (7th Cir. 1988). Not all circuits adopt this automatic presumption. See *United States v. Gonzalez*, 918 F.2d 1129, 1135 (3d Cir. 1990) (declining to find that using a firearm during a drug deal is automatically “foreseeable” under *Pinkerton*).

We . . . recognize that the very term “foreseeability” implies a prediction about uncertain events in terms of probability. In that sense, we may already be dealing with a presumption. We should, however, be wary of importing into criminal law the expansive notions the term foreseeability has acquired from its talismanic use in defining duty for purposes of liability in tort. *Id* at 1136 n.5.

288. *Johnson* 886 F.2d at 1123 (citing *United States v. Alvarez*, 755 F.2d 830, 850 (11th Cir. 1985)).
289. *Id.* at 1123 (“When an individual conspires to sell cocaine in a ‘crack house’ operation, it is reasonable to assume that a weapon of some kind would be carried.”).
290. 942 F.2d 363 (6th Cir. 1991). In *Christian*, defendant arranged a drug deal and met his three buyers at the deal. One of the buyers had a gun under his car seat (a separate car from the one Christian drove). *Id.* at 365. Defendant was convicted for conspiracy to distribute and vicariously for the 924(c) firearm violation. *Id.*
291. *Id.* at 367. “Other circuits have indicated that the *Pinkerton* doctrine might be limited by the due process clause because of a strained relationship between the conspirator and the substantive crime. [Citing *Johnson*, 886 F.2d at 1120]. However, the parties have not cited nor do we find any case so limiting the *Pinkerton* doctrine.”
292. *Id.* at 368 (citation omitted). *But see United States v. Powell*, 929 F.2d 724, 728 (D.C. Cir. 1991) (reversing a 924(c) conviction, and requiring, for an aider or abettor, that defendant “know” the co-conspirator was carrying a gun, or the act of carrying a gun was so likely its occurrence was a “practical certainty.”).
States v. Wade, defendant drove to a drug deal and was convicted of the firearm violation when the police found a gun under one of his passenger's seats. The court reversed the firearm conviction, holding that there "must be more than a generalized presumption that drug transactions involve guns." Given the small amount of drugs being sold and defendant's lack of experience in the drug trade, the court found insufficient evidence of "foreseeability."

The Wade court, citing Christian, framed its foreseeability inquiry as a "due process" argument. Yet its inquiry did not focus on the constitutionality of vicarious liability, but rather on the sufficiency of the evidence. The question was not whether Pinkerton meets due process, but whether defendant met Pinkerton. The cases equating "foreseeability" with "due process" appear misleading—because due process is not the issue. Judge Gertner of Massachusetts made this criticism in dicta:

The suggestion . . . that "the foreseeability concept underlying Pinkerton is also the main concern underlying a possible due process violation" is not satisfying. Indeed, 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 nothing more than foreseeability. "Foreseeability" is the language of negligence law. It is not a usual criminal law concept and surely not a concept that puts meaningful due process limits on criminal liability... At least one court has treated the foreseeability and due process inquiries separately.

Following Alvarez and Christian, we appear to have two competing definitions of "attenuation" as a due process limit. One is the Alvarez court's attenuation in fact—temporal or geographical distance between the defendant's actions and the co-conspirator's substantive crime. The other is the Christian definition of attenuation in kind—attenuation between the

293. 318 F.3d 698 (6th Cir. 2003).
294. Id. at 700.
295. Id. at 702.
296. Id. at 702–04.
297. Id. at 701.
298. Id. at 701 (citing United States v. Christian, 942 F.2d 363, 367 (6th Cir. 1991)); Wade argues that his due process rights were violated when he was convicted of firearm possession based on Pinkerton liability. Under Pinkerton, a defendant can be convicted for the criminal acts of a coconspirator so long as the crime was foreseeable and committed in furtherance of the conspiracy. Here, however, there was insufficient evidence to find that Wade should reasonably have foreseen that one of his co-conspirators would carry a firearm.
299. United States v. Hansen, 256 F. Supp. 2d 65, 67 n.3 (Mass. Dist. Ct. 2003) (citing Alvarez). In Hansen, defendant stole a van which was later used to rob an armored car, in which a security guard was shot, and was held liable under Pinkerton for the killing. Defendant did not raise due process arguments at trial, however. Id. at 66–67. Judge Gertner's criticism echoed the Blitz dissent. See United States v. Blitz, 533 F.2d 1329, 1346–47 (2d Cir. 1976) (Mansfield, J., concurring and dissenting).
type of conspiracy the defendant joined and the type of crime the co-conspirator committed. However, the second definition appears to be little more than a restatement of Pinkerton's "foreseeability" test.

E. "Attenuation" Imposed

1. United States v. Castaneda

In United States v. Castaneda, the Ninth Circuit became the first court to reverse a Pinkerton conviction on due process grounds. Yet the Ninth Circuit muddled the two definitions of attenuation, basing its decision on a hybrid of attenuation in kind and attenuation in fact.

Defendant Leticia Castaneda's husband, Victor, played a "strong supporting role" in a large-scale heroin and cocaine distribution operation. (Victor's brother Uriel was a supplier). From the court's description, it appears Leticia was only part of the operation insofar as she married into it. The court described her role as "slight" and "passive." The Government's evidence against her consisted of six conversations between her and the other co-conspirators. In one, for example, her husband placed a call to a co-conspirator about a drug sale, and then handed the phone to Leticia, who then began to talk socially. At one point, Leticia's husband asked her to tell the co-conspirator information about drugs; she did, and then resumed talking socially.

300. This definition could be read to roughly track Alvarez's first two situations—where the co-conspirator's crime is the same as the goal of the conspiracy, and where the co-conspirator's crime is in furtherance of the goal of the conspiracy. See United States v. Alvarez, 755 F.2d 830, 850 (11th Cir. 1985), discussed in Part V.C.1, supra.
301. 9 F.3d 761 (9th Cir. 1993).
302. Id. at 764.
303. "Leticia 'assisted' Uriel only insofar as she acted as his spouse: answering her home phone, taking messages from callers and answering his questions when he called." Id. at 767.
304. Id. at 764, 767.
305. Id. at 767. The court's description of the phone evidence reads in full:

The government argues that in one conversation, Leticia sought 'assurances' from Meras that Barron wanted to purchase Uriel's drugs. This grossly mischaracterizes that call. In fact, Uriel placed the call, spoke to Meras about a drug transaction, handed the telephone to Leticia, who then began a social conversation with Meras. At one point, Uriel interrupted this conversation, directing Leticia to tell Meras that, if Barron did not want the drugs, he would sell them to someone else. Leticia repeated Uriel's remarks verbatim, then concluded the conversation. This does not show that she "sought assurances" from Meras.

The government also points to two phone conversations between Leticia and a suspected drug dealer, Victor Zamora ("Zamora"). Zamora had called Uriel at home, and each time Leticia told him that her husband was not there. In one call, Zamora asked her several questions about who had called the house and seemed confused by instructions that he had received from Uriel. Leticia engaged in no conversation, offered no help, and answered, in few words, the direct questions put to her about when Uriel would return. In the other conversation, she volunteered that a street-level dealer had been arrested and that a deal involving Uriel had fallen through. This one call is the only evidence of Leticia's active participation: volunteering information about past events and the dealings of others.
Leticia was convicted of conspiring to distribute cocaine and heroin, and vicariously through Pinkerton, seven counts of using a firearm in connection with a drug crime, based on four different co-conspirators’ use of guns. For one of the firearm charges, the predicate offense was her conspiracy conviction; for the other six, the predicate offense was a co-conspirator’s possession offense.\footnote{306} For those six, Pinkerton was effectively used to impose two levels of vicarious liability—both for another conspirator’s crime (possession, uncharged to her), and a sentence enhancement based on that conspirator’s actions, relating back to that conspirator’s crime (924(c) firearm violation, charged to her).

Regarding the six firearm charges based on vicarious possession offenses, the Castaneda court held that “the due process line has been crossed.”\footnote{307} The court quoted both the Alvarez and Christian line of cases in formulating its due process construction. Rather than framing due process as “attenuation,” the court stated the inquiry as whether “the relationship between the defendant and the substantive offense is slight.”\footnote{308} Quoting Christian, the court reiterated, “The foreseeability concept underlying Pinkerton is also the main concern underlying a possible due process violation.”\footnote{309} The Castaneda court appeared to follow the Christian analysis of examining “attenuation in kind,” holding that the central question was “was it reasonably foreseeable to the defendant that a firearm would be used in relation to the predicate offense?”\footnote{310}

Yet the Castaneda court based its reversal on Leticia’s factual attenuation from that predicate offense. It distinguished Leticia’s situation from previous cases where “substantial evidence link[ed] the defendant with the predicate offense.”\footnote{311} The court examined the evidence connect-

\footnote{306. Id. at 764, 765.  
307. Id. at 766.  
308. Id. at 766 (citing United States v. Johnson, 886 F.2d 1120, 1123 (9th Cir. 1989); United States v. Chorman, 910 F.2d 102, 112 (4th Cir. 1990); United States v. Moreno, 888 F.2d 490, 493 (5th Cir. 1979); United States v. Alvarez, 755 F.2d 830, 850–51 (11th Cir. 1985)).  
309. Id. (citing United States v. Christian, 942 F.2d 363, 367 (6th Cir. 1991)).  
310. Id. The Castaneda court declined to follow the presumption that guns are automatically foreseeable from drugs. Id. at 767. Interestingly, it held that guns were less foreseeable in a large-scale drug operation, at least to Leticia, given her level of participation. “A crack house is a fixed-location retail operation, selling small daily amounts of drugs to dozens of unstable, volatile, desperate street junkies. Potentially it is far more violent each day. Consequently, gun use is very foreseeable.” Id. at 766–67. “But a crack house is quite different from the high-level import and distribution operation of the Castaneda clan. Their network was sophisticated, diversified and mobile. There was no need for firearms except during prearranged ‘deals’ (none of which were predicate offenses for Leticia’s convictions).” Id. at 766.  
311. Id. at 767 (citing Christian, 942 F.2d at 368; United States v. Gutierrez, 978 F.2d 1463, 1468 (7th Cir. 1992); Alvarez, 755 F.2d at 830; Chorman, 910 F.2d at 105–06).}
ing Leticia to the conspiracy, and concluded, “given Leticia’s lack of participation in the conspiracy and her lack of involvement with the predicate offenses, the use of firearms by the other conspirators in relation to these offenses was not reasonably foreseeable to her.”

Guilt by association played a role in the Castaneda court’s reasoning as well. The court expressed concern that “the only evidence that connects Leticia to the predicate offenses appears to be her marriage.”

“It is difficult to neatly categorize the Castaneda court’s decision. On one level, the Castaneda court appears to impose a sort of “attenuation in fact” standard, holding that because the “relationship between the defendant and the substantive offense” is remote, due process applies. (The court focuses on Leticia’s participation, as well, echoing the Alvarez “more than minor participation” test.) Yet importantly, the Castaneda court did not reverse Leticia’s firearm conviction where the predicate offense was her conspiracy charge. If due process equaled “attenuation in fact,” or rested on “minor participation,” it did not stand in the way of Leticia’s vicarious liability here.

Another interpretation is that Castaneda was merely following the Christian reasoning that “foreseeability” equals “due process,” and holding based on the sufficiency of the evidence that the firearm crimes were not foreseeable. But again, the court found no “foreseeability” problem where the predicate offense was conspiracy to distribute drugs; there, essentially, the Castaneda court ruled as Christian did and held the defendant vicariously liable.

The Castaneda reasoning appears to rest on a strange hybrid of constitutional and statutory concerns. The court overturned only the convictions based on two levels of vicarious liability—for both her co-conspirator’s predicate offense of drug possession and the sentence enhancement of using a firearm. As such, the court echoed the Christian focus on “attenuation in kind,” in its examination of the relationship between the predicate offense and the vicarious crime. Yet under Pinkerton conspiracy law, the two levels of vicarious liability appear irrelevant. If an “overt act of one partner in crime is attributable to all,” and that act of using a firearm while possessing drugs happens to establish liability for two crimes—so long as the act is “reasonably foreseeable,” there appears to be no prob-

312. See supra notes 304–07 and accompanying text.
313. Id. at 768.
314. Id. at 768 (“[F]inding her guilty based solely upon her marital relationship . . . is impermissible.”) (citing United States v. Ritz, 548 F.2d 510, 522 (5th Cir. 1977)).
315. Id.
316. See id. at 766 (“Although Leticia has not framed her challenge in due process sufficiency of the evidence terms, this court has the authority, ‘especially in criminal cases . . . [to] notice errors to which no exception has been taken . . . ’.”)
lem in imposing vicarious liability for both crimes.\(^ {317} \) The Castaneda court explicitly declined to decide the issue of whether foreseeability could establish liability for both the predicate offense and sentence enhancement,\(^ {318} \) saying, "Our holding today is narrow."\(^ {319} \) Yet if that was not the issue, why would Leticia’s conviction based on her conspiracy charge stand but the convictions based on the co-conspirator’s possession offenses fall?

The Castaneda court implied that some "attenuation" due process standard existed. But if it imposed such a standard, it did not define it clearly nor impose it meaningfully. The only logical impact of Castaneda would be to require prosecutors to charge the predicate offenses for vicarious sentence enhancements as the conspiracy itself, not another vicariously imposed offense.

Castaneda has been cited approvingly, but its impact seems unclear. In United States v. Collazo-Aponte,\(^ {320} \) the First Circuit upheld a defendant’s vicarious conviction under 924(c) stemming out of a drug conspiracy. Defendant Collazo-Aponte was part of a decade-long extensive drug conspiracy, and sold large quantities of drugs after a gang war had broken out.\(^ {321} \) He was convicted of conspiracy to possess drugs with intent to distribute, and vicariously under Pinkerton for using a firearm.\(^ {322} \) (Thus, the prosecutors avoided the two levels of vicarious liability present in Castaneda.)

The Collazo-Aponte court adopted the hybrid Castaneda formulation of due process, i.e. "was it reasonably foreseeable to the defendant that a firearm would be used in relation to the predicate offense?"\(^ {323} \) The Collazo-Aponte court cited wholesale the Castaneda analysis of Leticia’s minor

317. This concept is supported by the Federal Sentencing Guidelines’s definition of vicarious liability as applying to "jointly undertaken criminal activity... whether or not charged as a conspiracy." U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(B) (2004); see generally HUTCHINSON ET. AL., supra note 130, at 105–06; see also United States v. Joyner, 924 F.2d 454, 458 (2d Cir. 1991) ("The 1989 revision of the commentary made clear that the foreseeability standard applied, whether or not a conspiracy was charged, i.e., it applied to all activity undertaken in concert with others.")

318. Castaneda 9 F.3d at 765–66:

The question of whether liability for the predicate offense prong, as well as the weapon prong, of § 924(c) may be based upon foreseeability alone presents a novel question of law. We need not, however, decide this question. Assuming, under Pinkerton, that responsibility for both the predicate offense prong and use of a weapon prong of § 924(c) may be established on the basis of foreseeability alone, in Leticia’s case, foreseeability has been stretched beyond the limits of due process.

319. "We do not address whether foreseeability continues to suffice for the predicate offense prong of § 924(c). Rather, we hold that we cannot conclude, without violating the fundamental precepts of due process, that Leticia could have foreseen the other conspirators’ use of firearms in relation to the predicate offenses." Id. at 768.

320. 216 F.3d 163 (1st Cir. 2000).

321. Id. at 173.

322. Id. at 174.

323. Id. at 196. The Collazo-Aponte court cited both strands of Pinkerton due process analysis. "[D]ue process constrains the application of Pinkerton where the relationship between the defendant and the substantive offense is slight... However, the foreseeability concept underlying Pinkerton is also the main concern underlying a possible due process violation." Id.
role in the conspiracy, but held, "[u]nlike Castaneda, this is not a case involving an attenuated relationship between the conspirator and the substantive crime." It was unclear whether the court considered "attenuation" as attenuation in kind or in fact, as defendant Collazo-Aponte was not attenuated in either sense. If anything, the Collazo-Aponte analysis, like the Christian line of cases equating "foreseeability" to "due process," echoed standard Pinkerton analysis in holding that the co-conspirators’ substantive crimes were objectively foreseeable to this defendant.

2. United States v. Walls

In United States v. Walls, the Seventh Circuit became the second court to overturn a Pinkerton conviction on due process grounds. The Walls court considered an offshoot of Castaneda’s situation of two levels of vicarious liability. The Walls court held that due process prevented a conviction based on a combination of the predicate status of defendant and her vicarious Pinkerton liability for a co-conspirator’s acts.

Defendant Williams was arrested for picking up a package of drugs sent to her co-conspirator’s address. When she was arrested, the police found a gun in her roommate’s room. Defendant, a convicted felon, was convicted, among other things, for conspiracy to possess drugs with intent to distribute, and vicariously under Pinkerton, for knowingly possessing a firearm as a felon. Although there was no evidence linking her to possession of the gun, the conviction rested on the fact that the roommate was a co-conspirator in the drug conspiracy. Importantly, however, her roommate was not a felon.

Thus, the conviction for a co-conspirator’s substantive crime rested upon co-conspirator’s acts that did not constitute, in and of themselves, that crime. The court called it a “cut-and-paste approach, taking the firearm possession by one conspirator, adding it to the felon status of another conspirator, and thereby creating a substantive offense for that second conspirator.” The court held, “[i]t is a significant expansion of the Pinkerton doctrine that appears to be difficult to limit.”

The Walls court’s concerns centered on the unlimited scope of liability that might arise. Since “lawful possession of a firearm by a conspirator could presumably be used to establish a § 922(g)(1) violation for a co-conspirator who is a felon,” “one can easily imagine a large-scale con-

324. Id. at 197. “Here, appellants were personally involved in numerous transactions involving large quantities of cocaine, crack, and other illegal drugs... Accordingly, we hold that it was reasonably foreseeable to appellants that a firearm would be used in relation to the predicate drug trafficking offense and reject Collazo-Aponte’s due process argument.” Id.
325. 225 F.3d 858 (7th Cir. 2000).
326. Id. at 860–61.
327. Id. at 864.
328. Id. at 865.
329. Id.
sporacy, in which a conspirator’s possession of a firearm in California is used to obtain a felon-in-possession conviction of a co-conspirator in Illinois.\textsuperscript{330} Or, conversely, “a non-felon could be deemed guilty of being a felon in possession of a firearm.”\textsuperscript{331} Citing Castaneda, the Walls court called this an “unwarranted, and possibly unconstitutional, expansion of the Pinkerton doctrine.”\textsuperscript{332}

Because the felon-in-possession statute is a status statute, the Walls court found the use of Pinkerton here especially troubling.\textsuperscript{333} The Walls court cited Congressional intent to “keep firearms out of the hands of those persons whose prior conduct indicated a heightened proclivity for using firearms.”\textsuperscript{334} Applied to the acts of non-felons, though, the statute would lack constitutional justification, perhaps even under rational basis review.\textsuperscript{335} “Because [the felon-in-possession statute] defines the offense in terms of the status of the individual possessing the firearm, the vicarious liability provisions of Pinkerton are inappropriate for such an offense.”\textsuperscript{336}

The Walls court appeared to adopt the reasoning that due process requires some “personal guilt”—at least as applied to crimes for which status is a predicate. Castaneda can be read to require “personal guilt” as well, at least for the predicate crime to a sentence enhancement. The situations are distinct though. In Walls, the predicate status was already satisfied by the defendant; the court implied that, at least for a crime based on predicate status, some “personal guilt” was required for a co-conspirator’s acts to be imputed. In Castaneda, however, the predicate itself was imputed—although the predicate was an act, not a status of conviction. As such, the Castaneda court implied that if predicate status is to be satisfied through vicarious liability, some “attenuation in fact” standard applies. (Echoing this, the Walls court implied that satisfying predicate status through vicarious liability could not be done—that a non-felon could not be convicted for being a felon-in-possession. The Walls court rejected the argument that it might be “foreseeable” that a co-conspirator would be a felon and possess a firearm, calling it a “ridiculous prospect.”)\textsuperscript{337}

\textsuperscript{330} Id.
\textsuperscript{331} Id. at 866.
\textsuperscript{332} Id. at 865.
\textsuperscript{333} Id. (“[T]he felon-in-possession statute seems a particularly inappropriate vehicle for such an expanded use of Pinkerton liability. It criminalizes conduct that could otherwise be lawful based upon the status of the person engaging in that conduct.”)
\textsuperscript{334} Id. (citing United States v. Jester, 139 F.3d 1168, 1171 (7th Cir. 1998)).
\textsuperscript{335} See id. at 865 (discussing the equal protection rationale). Professor Katyal might argue, however, that Pinkerton liability here would encourage conspirator felons from associating with co-conspirators who possess guns, or perhaps encourage conspirator felons to deter their co-conspirators from possessing guns. See generally Katyal, supra note 34, discussed in Section II.C.2, supra.
\textsuperscript{336} Walls, 225 F.3d at 866.
\textsuperscript{337} Id. at 866.
VI. Defining a "New" Due Process Limit

Over the last thirty years, courts have moved haltingly towards articulating a constitutional "attenuation" limit on vicarious Pinkerton liability. Yet courts have been far more willing to admit that such a limit exists than to define exactly what it is. All agree a line must be drawn somewhere; few wish to be the first to draw it.

Even the courts that have imposed "attenuation" as a due process limit have been frustratingly unclear in defining its fundamental nature. Some call the limit "attenuation," implying attenuation in fact between the conspirator and the crime. Some call it "attenuation," implying attenuation in kind between the type of conspiracy and the type of crime. Castaneda implied that "attenuation" is a hybrid of both, yet ultimately based its reversals on the relationship between the predicate offense and the substantive crime—a distinction without a difference under Pinkerton principles. Walls' focus on predicate status leaves unclear what the impact of its decision will be on traditional Pinkerton situations where predicate status is not an issue.

Additionally, although the Alvarez formulation of "more than minor participation" (or put more strictly, "substantial participation") is closely related to "attenuation in fact," there are more than semantic differences between the two standards. More fundamentally, a few courts and commentators have suggested that the due process limit stems from principles of causation—that there must be some causal link between the criminal's actions and the harm he is punished for.

I will now examine the three potential Due Process limits—attenuation, substantial participation, and causation. Ultimately, I will recommend the "attenuation in fact" standard as the most workable in imposing constitutional limits on vicarious liability while preserving society's ability to punish deserving criminals.

A. Attenuation

1. Attenuation In Kind

It appears that the "attenuation in kind" standard is little more than a restatement of Pinkerton's foreseeability limit. Thus, an "attenuation in kind" limit is not new—nor, quite likely, does it serve a functional role in safeguarding any Due Process interests in "personal guilt."

As courts and commentators have noted, once "foreseeability" becomes the rationale, the effective standard for criminal liability is negligence.338 The relevant inquiry then becomes the scope of the conspiracy, because under an objective foreseeability standard, even a minor actor in a

conspiracy should reasonably foresee consequences similar to the goal of the conspiracy.

As noted before, the Government has recently charged conspiracies in broad, general terms—for example, describing Al Qaeda as an “ongoing conspiracy to kill Americans.” For example, under such a conspiracy, a cook at an Al Qaeda training camp in Pakistan could be considered to have joined the “conspiracy to kill Americans.” He may or may not subjectively share the goal of the conspiracy of killing Americans, but he likely would have heard speeches in the camp talking about the conspiracy’s goals. It would objectively be reasonably foreseeable to him that Americans would be killed. Yet does it comport with our intuitive sense of justice that he should be guilty of not just conspiracy, but murder? Here, retributive and utilitarian justifications are directly in tension. Depending on his involvement, convicting a cook of murder might seem disproportional. In the context of terrorism, however, the utilitarian justifications of deterring any means of structural support for terrorism (even providing food), or gaining information that might serve to prevent future crimes against society, are as compelling as any could be. Still, there appears to be some level of participation under which convicting a conspirator who did not personally kill of murder is untenable.

Corporate crimes pose a more compelling case for an “attenuation” limit because the value of deterrence and information is not as starkly life and death. For example, suppose Enron’s public relations director, as part of a “conspiracy to defraud investors,” put out a press release detailing arguably legal but complex financing arrangements. If, unbeknownst to him, Andy Fastow also embezzles money, should that director be responsible for his frauds as well? What if Jeffrey Skilling testifies before Congress about the same financing arrangements, creating obstruction of justice charges? All these things fall under the rubric of “defrauding investors,” and might be reasonably foreseeable to a smart, well-educated corporate worker, privy to internal discussions, and familiar with the methods of Enron management. But these vicarious crimes require very little in the way of individual culpability.

339. See McDonnell, supra note 117, at 367 n. 68.
340. He might be an aider and abettor, rather than a conspirator. See Alexander v. State, 102 So. 597 (Ala. 1925) (holding wife who prepared lunch for husband guilty of aiding and abetting his bootlegging crimes), cited in Dressler, Reassessing, supra note 13, at 92.
341. He would fit squarely into Alvarez’s first category—the substantive crime being the goal of the conspiracy. See United States v. Alvarez, 755 F.2d 830, 850 n.24 (11th Cir. 1985).
342. See United States v. Cherry, 217 F.3d 811, 818 (10th Cir. 2000) (“[F]irst-degree murder liability incorporates a specific intent requirement far more stringent than mere foreseeability.”). Notably, it is not clear that the crime of conspiracy to commit terrorism carries extra punishment over terrorism itself. See supra note 3.
343. Put another way, were there not such a line, then Pinkerton is legally limitless. There is no level of participation too small to preclude conviction for another’s crime. It seems logical that such a line exists, at least in theory, and more recently in practice.
If there is a line to be drawn somewhere, the “attenuation in kind” test fails to provide a basis on which those distinctions.

2. Attenuation in Fact

Attenuation in fact does serve as a real check on the scope of the conspiracy. A conspiracy can be drawn as wide as the globe—but some line has to be drawn to satisfy our notions of personal guilt. Attenuation provides that line. Additionally, “attenuation in fact” provides a check on the inherently objective nature of “foreseeability” by requiring extra focus on the defendant’s actions, as a proxy for his mens rea.

Most courts that have articulated an “attenuation” limit have done so as “attenuation in fact”—either implicitly, in holding that a defendant who actively participated was “not so attenuated,” or explicitly, as Alvarez did, in articulating a “more than minor participation” test.

The Alvarez court actually required a two-step inquiry. The court determines individual culpability (i.e. mens rea), often by examining the defendant’s actions. But, there is a certain level of “attenuation” from the substantive crime that cannot suffice to objectively establish that mens rea, as a matter of law.

Effectively, the Alvarez court required both attenuation in kind and attenuation in fact before reversing a conviction on due process grounds. The Alvarez court only applied the “attenuation in fact” inquiry to situations where the substantive crime was an unintended consequence of the conspiracy—essentially, where there existed no “attenuation in kind” between the type of conspiracy the defendant joined and the type of crime the co-conspirator committed.

Yet, by the Alvarez reasoning, the “attenuation in fact” standard should apply even where “attenuation in kind” is not present. If “potential due process limitations” exist “in cases involving attenuated relationships,” due process encompasses broader procedural and substantive concerns than just the inquiry into individual culpability and mens rea. Castaneda implied this, focusing on the factual attenuation between the defendant and the co-conspirators’ crimes, even in a situation where the drug conspiracy defendant joined was not far attenuated in kind from the drug crimes. If the “attenuation in fact” standard only applies where “attenuation in kind” exists as well, then Justice Rutledge’s concern of “the unlimited scope of vicarious responsibility” still remains unchecked.

345. See, e.g., United States v. Moreno, 588 F.2d 490, 493 (5th Cir. 1979).
347. See supra Part V.C.I., citing Id. at 850-51.
348. See id. at 850 n.24 (noting that in cases where the substantive crime is a goal of the conspiracy, or the substantive crime facilitates the goal of the conspiracy, “Pinkerton liability can be imposed on all conspirators because the substantive crime is squarely within the intended scope of the conspiracy.”)
349. See supra Section V.E.1.
B. “Substantial Participation”

The attenuation in fact limit overlaps considerably with a “substantial participation” limit (such as the Alvarez court adopted, ratcheted down to “more than minor participation”). Although the Alvarez court was the first to explicitly adopt a “more than minor participation” test, nearly every court has considered the defendant’s level of participation in the conspiracy either explicitly or implicitly.350

Professor Dressler considered a “substantial participation” test in the context of vicarious accomplice liability. He called it the “test most similar to the current system and therefore, most likely to be acceptable.”351

[T]he most peripheral participants, particularly those whose assistance may be little more than psychological encouragement, would be filtered out. . . . [I]t excludes from full punishment those for whom, according to our clearest moral intuitions, full punishment is inappropriate. It would also separate out those least likely to be dangerous.352

Dressler’s test was even more restrictive than the Alvarez court’s “more than minor participation” test. While Alvarez referred to participation in the conspiracy, Dressler focused on participation in the substantive crime, else “people are punished for their decision to join the criminal enterprise.”353 That is, of course, the heart of the Pinkerton decision.354 A substantial participation test, such as Alvarez proposed and I address here, would serve to check Pinkerton, not overrule it.

Dressler notes that a substantial participation test is still, at heart, based on forfeiture theory.355 It is also necessarily fact-specific (as “at-
tenuation, in fact” is as well). Yet it still comports with our intuitive sense of justice. Courts, particularly, seem to have settled on a substantial participation test because it reflects a tangible, factually ascertainable degree of individual culpability higher than negligence rather than participation in a conspiracy alone. The substantial participation test echoes too the Scales Court’s concern that “attribut[ing] the intent to commit unlawful acts . . . to persons who acted with innocent intent . . . contravenes the Fifth Amendment’s requirement of personal guilt.”

Substantial participation, in many cases, also might serve as objective evidence of the “knowledge of causation” that Professor Robinson referred to. In some ways, Professor Robinson’s is a halfway approach. Instead of requiring full knowledge (as the crime usually does), or full causation (as Dressler would recommend), Robinson proposes requiring some knowledge of causation. Yet, Robinson’s proposal bridges the gap between the general intent of a conspirator and the specific intent required by the substantive crime to an extent that we feel comfortable vicariously punishing the defendant (or imposing extra utilitarian deterrent on him). For example, the defendant serving as a lookout in Alvarez objectively should have known that he would increase the chances of a shootout happening. Similarly, the cook in an Al Qaeda camp is intuitively more culpable if he objectively knows that he is increasing the chances of Americans dying.

Notably, the Supreme Court has adopted a similar test to “substantial participation” in death penalty jurisprudence. In Enmund and Tison, for felony-murderers who do not actually kill, attempt to kill, or intend to kill their victims, the Court has required at least “major participation in the underlying felony” combined with “reckless indifference to human life” for a defendant to receive the death penalty. The inquiry focuses on the level of culpability of the defendant for the individual actions he has taken. That said, the Supreme Court has repeatedly held that “death is different,” requiring a higher level of personal culpability to receive the ultimate punishment. It is unclear whether the Supreme Court would hold that the same test applies to conspirators punished under Pinkerton, or conspirators not facing the death penalty.

Although “attenuation” and “substantial participation” overlap greatly, they are not completely identical. “Substantial participation” cap-

356. “It is true, of course, that no bright line separates the ‘substantial’ participant from the ‘insubstantial’ one. Juries frequently are required, however, to draw distinctions without any more guidance than their collective common sense.” Id. at 122.
357. Humanitarian Law Project v. U. S. Dep’t of Justice, 352 F.3d 382, 397 (9th Cir. 2003).
358. Robinson, supra note 21, at 639.
360. See Tison, 481 U.S. at 157–58.
362. The issue regarding the death penalty might well have arise in Zacarius Moussaoui’s case if he had not been spared the death penalty at sentencing. See supra note 178.
tures the defendant's individual culpability more accurately than "attenuation" does. For example, one could be "attenuated" but still a "substantial participant." Dressler's example of a street drug maker might be attenuated in fact from the substantive crime, but a substantial participant in the conspiracy. On the other hand, one could be not attenuated, but not a substantial participant. For example, had her husband made a drug deal in her apartment, Leticia Castaneda would certainly not be attenuated if a shootout broke out while she was present. But she would probably not be a substantial participant in the conspiracy, since her only participation was tangential, by marriage.

That said, "attenuation" can be defined to encompass "substantial participation" semantically. More fundamentally, "attenuation" captures the heart of the due process concerns at work—that in situations where extreme temporal or geographical distance exists between the defendant and someone else's crime, problems of proof and the specters of unlimited liability or guilt by association make us uncomfortable imposing vicarious liability. For example, the hypothetical Al Qaeda cook, or Enron PR director, might both be "more than minor participants" in their respective conspiracies. But it is the "attenuation" from their co-conspirators crimes that potentially troubles us (as it troubled the Castaneda court).

It is true that either a "substantial participation" test or "attenuation" test, is subjective and could lead to jury confusion—perhaps even more so when termed as "more than minor participation." It is true that either a "substantial participation" test or "attenuation" test, is subjective and could lead to jury confusion—perhaps even more so when termed as "more than minor participation." At heart, though, either "attenuation in fact" or "substantial participation" makes some distinction as to relative culpability of conspirators. That is a distinction that foreseeability alone does not reach.

C. Causation

A third possibility is a "causation" limit requiring some causal link between the conspirator and the harm caused by the substantive crime. Dressler proposes that all vicarious liability be linked to causation. Under Dressler's test, he would divide accomplices into two categories: "causal accomplices" and "non-causal accomplices," with the "non-causal accomplice" responsible only for the harm he actually caused.

363. Dressler, Reassessing, supra note 13, at 122.

364. The New Jersey Court recognized that causation played a role in formulating its "attenuation" standard (which it framed as requiring a "close connection" between conspirator and crime). State v. Bridges, 628 A.2d 270, 280 (N.J. 1993).

365. "Sine qua non causation ... assur[es] that those who are legally blameworthy are given their retributively deserved punishment. ... [It] serves as the link between the indispensable factor of harm and the actor responsible for it." Dressler, Reassessing, supra note 13, at 106.

366. Id. at 124–25:

A causal accomplice is one but for whose acts of assistance the social harm would not have occurred when it did. In effect, the causal accomplice is held accountable for the own crime and not for another's. She is a co-perpetrator because all of the essential elements of the crime—a voluntary act, the requisite mens rea, the social harm, and the causal connection—are provable directly against her. Con-
Such a standard would be far more restrictive than current *Pinkerton* liability, in effect overruling the traditional rule in conspiracy law that "one overt act is attributable to all."\(^{367}\)

A causation-based limit has several flaws, which Dressler admits. First, causation is often a matter of luck.\(^{368}\) Then again, inchoate crimes are often a matter of luck as well, and those are generally punished less severely than the completed crime.\(^{369}\) (Dressler notes that accomplices would still receive punishment, and that one theory of deterrence is to "reward" accomplices or conspirators for *not* following through with the completed crime.)\(^{370}\)

More fundamentally, though, causation is entirely irrelevant to traditional concepts of vicarious liability.\(^{371}\) Because humans have free will, it is impossible to predict how a chain of events will occur. For example, a tree falling onto a road might "cause" a car crash. But even if a defendant pays a co-conspirator to kill someone, we cannot say that the co-conspirator wouldn't have killed that person anyway.\(^{372}\) "[E]very volitional actor is a wild card."\(^{373}\) Put another way, by definition, all accomplices "cause" the crime—or play some role in contributing to it.\(^{374}\) Thus, left with little choice, we ignore the causal link played by defendant and focus our inquiry on moral culpability. This hearkens back to the original *Pinkerton* language that criminal intent is "established by the formation of the conspiracy."\(^{375}\) (Professor Robinson essentially tries to craft a middle ground between culpability and causation by taking into account defendant’s knowledge of his role of his causal link to the crime.)\(^{376}\)

A causation-based limit does have one strong justification. It appears to be the only standard that draws support from *Pinkerton*’s language itself. The courts who focus on *Pinkerton*’s "necessary or natural consequence" language imply that, following *Pinkerton*, some causal link must exist between defendant’s joining of the conspiracy and the substantive

\(^{367}\) *Pinkerton v. United States*, 328 U.S. 640, 647 (1946).


\(^{369}\) Id.

\(^{370}\) Id.; see generally supra Section II.C.2.

\(^{371}\) Id. at 126–27.

\(^{372}\) Id. at 126 (citing Kadish, supra note 23, at 355–61).

\(^{373}\) Id. at 126–27 (quoting Kadish, supra note 23, at 360).

\(^{374}\) Id. at 127 (quoting Kadish, supra note 23, at 359 ("In judging accomplices, we really ask whether an accomplice’s behavior ‘could have contributed to the criminal action of the principal...[and whether] without the influence or aid [of the accessory] it is possible that the principal would not have acted as he did.’"); see also Pauley, supra note 4, at 41–42.

\(^{375}\) *Pinkerton v. United States*, 328 U.S. 640, 647 (1946).

\(^{376}\) See supra Part II.C.1.
The causation-based limit in these cases is not Professor Dressler’s “but-for causation,” but rather, closer to Professor Robinson’s proposal that the defendant possess knowledge as to his causal link to the crime. However, other courts have vigorously rejected such a “causation” requirement, suggesting that originally unintended crimes are de facto “necessary and natural” consequences of conspiracies, and to impose a “causation” requirement would eviscerate the rationale of Pinkerton.\(^{378}\)

It is unlikely such a causation requirement would be adopted by the courts. Nor, most likely, would it come closer to reflecting our intuitive sense of justice. Injecting causation into the analysis would mean that some morally blameworthy actors, who actually intended to play a part in their co-conspirator’s crime, would be absolved of that crime by luck or happenstance. “Attenuation” or “substantial participation” comes closer to separating out those conspirators whose “personal guilt” does not warrant vicarious punishment, or whose attenuation from the crime raises procedural and substantive due process concerns.

VII. Conclusion

An “attenuation in fact” (or a “substantial participation”) limit would serve to impose some constitutional personal culpability requirement on conspirators vicariously liable for other crimes, and check the due process concerns that arise from a doctrine without limits. The terms “attenuation,” or “substantial participation,” are undeniably fuzzy, and might be expanded to their limits just as “foreseeability” has been. “Attenuation” does not tell us very clearly where to draw the line. Yet it provides a framework to do so, in a way that strikes a balance between retributivist and utilitarian concerns and squares with our intuitive sense of justice.\(^{379}\)

An “attenuation” test punishes people who public justice demands should be accountable for their actions in cases where we feel they contributed—meaningfully, perhaps causally—to the actual crime and should face equal punishment for it. But, it serves as a check on the true outliers to crime, and on the potential power of government to hold minor actors liable


\(^{378}\) State v. Coltherst, 820 A.2d 1024, 1039 (Conn. 2003); see also United States v. Mothersill, 87 F.3d 1214, 1219 (11th Cir. 1996).

\(^{379}\) Note that Professor Sayre “explains why we reject the concept of vicarious responsibility: it is the result of the ‘inarticulate, subconscious sense of justice of the man on the street [that] is the only sure foundation of the law.’” Dressler, Reassessing, supra note 13, at 105 n.81 (quoting Sayre, Criminal Responsibility for the Acts of Another, supra note 13, at 717.).
for crimes they didn’t do and couldn’t possibly foresee.

"Attenuation" checks prosecutorial charging power as well, and raises the concern that prosecutors, without Pinkerton, may have less power to gain information from minor actors than they did before. That said, it is a fair question whether minor actors that are truly "attenuated" would have much valuable information to the government anyway. Courts have recognized that some due process limit on Pinkerton has existed for thirty years, and prosecutorial power has not diminished in that time. Most likely, "attenuation" would not encompass a substantial amount of defendants actually charged (particularly if the standard is set as "more than minor participation.") Rather, "attenuation" would serve to codify in practice what courts and commentators have known in theory—that there is some ascertainable limit to "Pinkerton" vicarious liability where courts say, "This simply goes too far."

It is difficult to predict how the Supreme Court might rule on an "attenuation" limit—largely because the Court has not questioned Pinkerton in nearly sixty years. The closest analogy is the Enmund/Tison line of jurisprudence, holding that an accomplice to felony-murder can be a "more than minor participant," combined with a mens rea of recklessness, to be eligible for the death penalty. In one sense, the mens rea required under Tison is stricter than Pinkerton—recklessness, instead of the implied negligence of "foreseeability." However, "death is different." It's not clear that the Eighth Amendment comes into play for non-death penalty crimes. (Politically speaking as well, Tison was a decision expanding the reach of criminal liability. Any new decision on Pinkerton would be restricting the reach of criminal liability, a goal the Roberts Court does not seem to have wholeheartedly embraced.)

Any decision supporting "attenuation" would rest heavily on the Scales conception of "personal guilt," perhaps the only time the Court has addressed related issues in a way restricting criminal liability. In Scales, the Court did imply that vicarious liability traditionally applies to accomplices—i.e. aiders and abettors—rather than conspirators. "[G]enuine problems arise as to whether a conspirator is, by reason of his conspiracy, to be considered an accomplice and therefore guilty also of the substantive offense." But the Scales Court was quick to distinguish joining a legitimate organization from joining an explicitly criminal organization.

380. See supra note 4.
382. That said, perhaps an argument could be made that the concept of "personal guilt" stems from the "penumbras and emanations" of not only the Fifth and Sixth, but Eighth Amendment as well.
383. Scales v. United States, 367 U.S. 203, 225 n.17 (1961). See also United States v. Nichols, 169 F.3d 1255, 1274 (10th Cir. 1999) (holding that "[w]e understand there are degrees of inchoate offenses, and conspiracy requires much less than attempt"). The Tenth Circuit noted, however, that "given the allegations of overt acts stated in the indictment, we are persuaded Mr. Nichols’ actions were more akin to attempt and should not be treated any differently at sentencing." Id.
384. Scales, 367 U.S. at 226 n.18 (holding that "whatever difficulties might be thought to inhere in ascribing a course of criminal conduct to an abstract entity are certainly cured, so far as any particular
Also, the Supreme Court has repeatedly upheld the dangers of conspiracy over the decades, supporting utilitarian concerns of "group danger" over concerns of moral retribution. Because conspiracy can make possible criminal ends which one person alone could not accomplish, "collective criminal agreement... presents a greater potential threat to the public than individual delicts." A formulation of an "attenuation" doctrine necessarily checks the deterrent power of Pinkerton—or at least, recognizes that in some outlier cases, retributivist concerns may so far outweigh utilitarian justifications that vicarious liability is not appropriate. Given the Supreme Court's traditional concern with upholding the utilitarian reach of conspiracy law, it might well find it easier to leave any limits on Pinkerton in a theoretical state.

Most likely, the particular defendant and the nature of the conspiracy might force the Court to define the constitutional dimensions of Pinkerton. Even if the Court reiterated "personal guilt" as a substantive due process right, vicarious liability might be justified under strict scrutiny if the conspiracy was a conspiracy to commit terrorism crimes against the United States. The dangerous nature of conspiracies for future actions against America and the societal value of gaining information might justify upholding a vicarious conviction over a minor conspirator even if an "attenuation" limit existed. In the corporate context, one could argue as well that the enormous losses caused by frauds like Enron justifies broad deterrence; yet, the retributivist justifications seem far less when only money is at stake, even huge sums. If Pinkerton is to be reappraised by the Court, it is likely to happen in the context of corporate crimes, rather than terrorism and national security.

defendant is concerned, by the requirement of proof that he knew that the organization engages in criminal advocacy, and that it was his purpose to further that criminal advocacy.

385. See Bifulco v. United States, 447 U.S. 381, 399 (1980) (citing Iannelli v. United States, 420 U.S. 770, 778 (1975) (holding that "we have recognized the logic... in other contexts... that the conspiracy to engage in drug trafficking presents at least as great a threat, if not a greater one, to the community as does an isolated act of distribution").

386. Iannelli, 420 U.S. at 778 (citing Callanan v. United States, 364 U.S. 587, 593–94 (1961)).