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# A Common Law Crime Analysis of Pinkerton V. United States: Sixty Years of Impermissible Judicially-Created Criminal Liability

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# COMMENT

## A COMMON LAW CRIME ANALYSIS OF *PINKERTON V. UNITED STATES*: SIXTY YEARS OF IMPERMISSIBLE JUDICIALLY-CREATED CRIMINAL LIABILITY

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### I. INTRODUCTION

Gary, Indiana was named the homicide capital of America many times in the 1980s and 1990s.[1] More than 70% of the murders in Gary are drug-related, and crack cocaine is especially prevalent.[2] Thus, it is probably not particularly noteworthy that William Curtis and Jamell Rouson, two young men from Gary, joined a gang and began distributing crack cocaine. They were eventually arrested and convicted for their drug activity. Curtis' involvement in the drug trade was limited to the drugs, but Rouson's involvement included committing two murders. One would expect Curtis to be punished for distributing cocaine and Rouson to be punished for both distributing cocaine and committing murder. It seems almost illogical to suggest that Curtis could

* J.D. Candidate, University of Montana School of Law, 2006. I would like to thank Mark Parker for being kind enough to let me take his idea of *Pinkerton* as a common law crime and run with it. The theory is his, I simply explored it further. I would also like to thank Andrew King-Ries for taking time out of his schedule to work with me. His help and suggestions were invaluable. Finally, I would like to thank my parents, John and Robin Manning, for their unwavering support in whatever I do.

1. OFFICE OF NAT'L DRUG CONTROL POLICY, DRUG POLICY INFORMATION CLEARINGHOUSE: GARY, INDIANA, PROFILE OF DRUG INDICATORS (2003), http://www.whitehousedrugpolicy.gov/statelocal/in/ingary.pdf (January, 2003).

2. *Id.*

be convicted of murders in which he took no part simply because he and Rouson dealt drugs together. However, this is precisely the result under a troubling conspiracy doctrine created by the United States Supreme Court.[3]

In 1946, the United States Supreme Court decided *Pinkerton v. United States*[4] and drastically altered federal conspiracy law. The Court created what is now commonly referred to as the "*Pinkerton* theory of liability,"[5] "*Pinkerton* liability,"[6] or simply the "*Pinkerton* theory."[7] *Pinkerton* liability allows for a party to a conspiracy to be found guilty of substantive offenses committed by a co-conspirator that were committed in furtherance of the conspiracy.[8]

In the nearly sixty years since *Pinkerton* was decided, the theory has become well-established and widely used, although it is used almost exclusively in the federal system.[9] Today, courts often enumerate three specific elements that the government must prove to meet its burden of proof for *Pinkerton* liability.[10] The elements are:

> (1) [t]hat a conspiracy existed in that there was an agreement between individuals to align themselves with others in a criminal venture; (2) [t]hat having so aligned themselves together, one or more of them acted to commit the substantive offense; and (3) [t]hat the substantive offense was committed in furtherance of the criminal venture in which the defendant had aligned himself with others.[11]

Additionally, the substantive acts must be reasonably foreseeable as a "necessary or natural consequence of the conspiracy."[12]

*Pinkerton* has been written about extensively and attacked on a number of grounds.[13] However, very little, if anything at all, has been written about the possibility that the United States Supreme Court created a federal common law crime when announc-

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3. United States v. Curtis, 324 F.3d 501 (7th Cir. 2003).

4. 328 U.S. 640 (1946).

5. *See, e.g.*, United States v. Brown, 356 F. Supp. 2d 470, 474 (M.D. Pa. 2005).

6. *See, e.g.*, United States v. Silvestri, 409 F.3d 1311, 1336 (11th Cir. 2005).

7. *See, e.g.*, Cephas v. Nash, 328 F.3d 98, 101 n.3 (2d Cir. 2003).

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

9. Westlaw reveals that *Pinkerton* has been cited by courts over 4,000 times, Westlaw Home Page, http://www.westlaw.com (enter citation for *Pinkerton*, then follow "Citing References" hyperlink).

10. *See, e.g.*, United States v. Lopez, 271 F.3d 472, 480 (3d Cir. 2001).

11. *Id.*

12. *Id.*

13. Westlaw's "KeyCite" function indicates that 258 law review articles cite *Pinkerton*, as do 3 ALR annotations and over 2,200 other secondary sources. A Westlaw search for "Pinkerton" in Journals and Law reviews returned nearly 1,300 results.

ing the *Pinkerton* theory of liability. A common law crime is a crime created or defined by a judge rather than by a legislature.[14] Though a minority of states have retained common law crimes in some form,[15] common law crimes have long been deemed impermissible in the federal system.[16]

Without delving into the debate about federal common law crimes[17] or attacking *Pinkerton* on other grounds, this Comment takes the view that *Pinkerton* impermissibly creates criminal liability when Congress has not done so and thus violates the prohibition on federal common law crimes. Part II of the Comment will first look at the *Pinkerton* case itself, as well as Justice Rutledge's strong dissent. Part III will examine the various ways *Pinkerton* liability is applied in practice today. Part IV will offer a brief look at the history of the applicable criminal law, particularly federal common law crimes. Finally, Part V will examine whether *Pinkerton* liability is itself a common law crime, and argue that for all intents and purposes it is indistinguishable from such and the ultimate result is the same.

## II. *PINKERTON V. UNITED STATES*

### A. *Facts of the Case*

Walter and Daniel Pinkerton were brothers indicted for violations of the Internal Revenue Code.[18] Each was indicted on one count of conspiracy and ten substantive counts.[19] The Pinkertons were tried before a jury and found guilty. Walter was convicted of conspiracy and nine of the substantive counts.[20] Daniel was convicted of conspiracy and six of the substantive counts.[21]

The Pinkerton brothers were bootleggers. The evidence showed that Walter and Daniel had conspired to illegally possess and transport whiskey and they were convicted of conspiracy

14. BLACK'S LAW DICTIONARY 399 (8th ed. 2004).

15. *See, e.g.*, IDAHO CODE § 18-303 (2004); FLA. STAT. ANN. § 775.01 (2005); and VA. CODE ANN. § 18.2-16 (2004).

16. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

17. At least one author has recently made an argument that there is a substantial variance between the supposed blanket prohibition of federal common law crimes and the reality of the development of the law. Ben Rosenburg, *The Growth of Federal Criminal Common Law*, 29 AM. J. CRIM. L. 193, 194 (2002).

18. *Pinkerton*, 328 U.S. at 641.

19. *Id.*

20. *Id.*

21. *Id.*

based on this evidence.[22] Walter "was the direct actor in some of the substantive offenses" and committed the offenses in furtherance of the brothers' conspiracy.[23] Walter alone committed these offenses.[24] There was no evidence to show that Daniel participated in the commission of any of the substantive offenses for which he was convicted.[25] In addition, no evidence indicated that Daniel aided or abetted Walter in committing these offenses or that he even knew Walter committed them.[26] In fact, Daniel was incarcerated at the time Walter committed some of the substantive offenses.[27]

### *B. Majority Decision*

Though not specifically enumerated, the *Pinkerton* Court decided two issues. The first was whether the Pinkerton brothers could be convicted of conspiracy and the substantive offenses when all of the substantive offenses were committed in furtherance of the conspiracy.[28] The Court concluded that separate convictions for the conspiracy charge and the substantive charges were appropriate.[29] This holding sets forth the hallmark rule of conspiracy: a conspiracy is a separate offense from the substantive crime that was the object of the conspiracy.

To reach this result, the Court reasoned that there are several instances when it is inappropriate to add a conspiracy charge to a substantive offense.[30] The first is when there is "no ingredient in the conspiracy which is not present in the completed crime."[31] The second is when the definition of the substantive offense specifically excludes one who participates in another's crime from punishment for conspiracy.[32] After describing these two situations, the Court noted that their applicability is limited and stated, "[i]t has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit

22. *Id.* at 648 (Rutledge, J., dissenting).
23. *Id.* at 645 & n.5 (majority opinion).
24. *Pinkerton*, 328 U.S. at 648 (Rutledge, J., dissenting).
25. *Id.* at 645 (majority opinion).
26. *Id.* at 648 (Rutledge, J., dissenting).
27. *Id.*
28. *Id.* at 642 (majority opinion).
29. *Id.* at 642-44.
30. *Pinkerton*, 328 U.S. at 643.
31. *Id.* (citing United States v. Katz, 271 U.S. 354, 355 (1926); Gebardi v. United States, 287 U.S. 112, 121 (1932)).
32. *Id.* (citing *Gebardi*, 287 U.S. 112).

it are separate and distinct offenses. The power of Congress to separate the two and affix to each a different penalty is well established."[33] Citing numerous cases in support of this rule and general conspiracy law, the Court concluded that the Pinkertons could be convicted for both conspiracy and the substantive offenses because the agreement to do an unlawful act is distinct from the actual doing of the act, and both are punishable.[34]

Having decided the first issue, the Court turned to the second issue and the one with which this Comment is primarily concerned. The second issue facing the Court was whether Daniel Pinkerton could be convicted of substantive offenses when there was no evidence that he participated in their commission, but the evidence showed that Walter Pinkerton committed them in furtherance of the conspiracy.[35] The majority concluded that because Daniel was a member of the conspiracy and the substantive offenses were committed in furtherance of the conspiracy, Daniel could be held responsible even though he did not directly commit the offenses.[36]

At the time *Pinkerton* was decided, the United States Court of Appeals for the Third Circuit had previously determined in *United States v. Sall* that merely being a member of a conspiracy was not enough to warrant punishment for substantive offenses committed in furtherance of the conspiracy.[37] However, the *Pinkerton* Court overruled *Sall* and instead combined general conspiracy law with a Ninth Circuit case applying these general principles to substantive offenses to create an opposite rule.[38] Among the general principles upon which the Supreme Court relied was that an overt act of one conspirator may be an overt act of all without a new agreement,[39] motive or intent may be proved by acts of some conspirators in furtherance of the conspiracy,[40] and all members are responsible for a conspiracy even though only one member committed the act which was the purpose of the conspiracy.[41] The

33. *Id.* (citing Clune v. United States, 159 U.S. 590, 594-95 (1895)).

34. *Id.* at 644.

35. *Id.* at 645.

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

37. 116 F.2d 745, 747 (3d Cir. 1940).

38. *Pinkerton*, 328 U.S. at 647 (citing Johnson v. United States, 62 F.2d 32, 34 (9th Cir. 1932)).

39. *Id.* at 646-47 (citing United States v. Kissel, 218 U.S. 601, 608 (1910)).

40. *Id.* at 647 (citing Wiborg v. United States, 163 U.S. 632, 657-58 (1896)).

41. *Id.* (citing Cochran v. United States, 41 F.2d 193, 199-200 (4th Cir. 1930); Mackett v. United States, 90 F.2d 462, 464 (7th Cir. 1937); Baker v. United States, 115 F.2d 533, 540 (8th Cir. 1940); Blue v. United States, 138 F.2d 351, 359 (6th Cir. 1943)).

Court also noted that the conspiracy was ongoing and there was no evidence that Daniel withdrew from the conspiracy.[42]

Relying on these principles, the Court reasoned that criminal intent is established by the formation of the conspiracy and the commission of an act in furtherance of the conspiracy.[43] The Court also cited 18 U.S.C. § 88 for the proposition that an overt act is required for a conspiracy and further noted that for purposes of conspiracy law, an overt act of one conspirator is an overt act of all conspirators.[44] Based on this reasoning, the Court concluded, "[i]f [the overt act] can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense."[45] The Court did, however, distinguish substantive offenses not committed in furtherance of the conspiracy or which were not foreseeable.[46]

### *C. The Dissent*

Justice Rutledge disagreed with the majority that Daniel could be convicted for Walter's substantive crimes and argued that such a holding subjected Daniel to double jeopardy.[47] Justice Frankfurter joined Justice Rutledge's dissent as to the issue of whether Daniel could be convicted of the substantive offenses.[48]

Justice Rutledge offered several compelling arguments as to why it should be impermissible to convict Daniel for Walter's crimes. The first and most compelling was that such a holding "violates both the letter and spirit" of Congress' separate classification of the following crimes: "(1) completed substantive offenses; (2) aiding, abetting, or counseling another to commit them; and (3) conspiracy to commit them."[49] These three classes of crimes are not identical.[50] Justice Rutledge argued that allowing a conspirator to be convicted of a co-conspirator's crimes "either convicts one man for another's crime or punishes the man convicted twice for

42. *Id.* at 646.
43. *Id.* at 647.
44. *Pinkerton*, 328 U.S. at 647.
45. *Id.*
46. *Id.*
47. *Id.* at 648-54 (Rutledge, J., dissenting).
48. *Id.* at 654 (Frankfurter, J. substantially concurring with J. Rutledge's dissent).
49. *Pinkerton*, 328 U.S. at 649 (Rutledge, J., dissenting).
50. *Id.* (citing Bollenbach v. United States, 326 U.S. 607, 611 (1946); United States v. Sall, 116 F.2d 745 (3d Cir. 1940)).

the same offense."[51] He believed that the differences between the three classes of crimes are easily disregarded, and when such a disregard occurs, a person may be convicted of one offense based on proof of another, or multiple punishments may be imposed.[52]

Justice Rutledge's second misgiving was that the law of conspiracy was moving toward broad discretion for prosecuting offenses that included a "looseness which with the charge may be proved" and an "almost unlimited scope of vicarious responsibility for other's acts which follows once agreement is shown."[53] He was concerned that the majority's holding was an expansion of this power, and that in Daniel's case, this expansion violated at least the spirit, if not the letter, of a "constitutional right."[54]

Rutledge agreed with the Third Circuit's reasoning in *Sall* that aiding and abetting and conspiring were not intended by Congress to be the same thing and differ only in descriptive wording.[55] He noted if the only difference between aiding and abetting and conspiring was in the descriptive wording, the result would be double punishment for the same act.[56] In *Pinkerton*, there was evidence to show that Daniel and Walter conspired to commit acts of the same general character as that of Walter's substantive acts.[57] There was no evidence to show that Daniel committed the substantive acts or that he counseled, advised or even had knowledge of the acts.[58] As Justice Rutledge points out, without the conspiratorial agreement, Daniel was guilty of no crime. However, under the majority's reading, the existence of the conspiratorial agreement made Daniel guilty of two or more crimes. He was directly liable for conspiracy and vicariously liable for the substantive offenses.[59] Essentially, Justice Rutledge reiterated his argument that the majority blurred the line between the three classes of crimes and convicted Daniel of both conspiracy and substantive offenses based only on evidence that he was guilty of conspiracy.

Justice Rutledge also took issue with the convictions for the substantive offenses because a previous indictment charging only

51. *Id.*
52. *Id.* at 649-50.
53. *Id.* at 650.
54. *Id.*
55. *Pinkerton*, 328 U.S. at 651 n.4 (Rutledge, J., dissenting).
56. *Id.*
57. *Id.* at 651.
58. *Id.*
59. *Id.* at 651-52.

conspiracy was dismissed.[60] Following the dismissal, the Pinkerton brothers were indicted again for many of the same acts.[61] The Government, and presumably the majority (which did not address this issue), contend that the indictments charged two different conspiracies, alleviating any double jeopardy issues.[62] Justice Rutledge agreed that to avoid double jeopardy, the two conspiracies charged must have been "separate and distinct."[63] However, he noted that for Daniel to be convicted of Walter's substantive offenses, there could have been only one conspiracy spanning the entire time frame.[64]

## III. *PINKERTON* LIABILITY IN PRACTICE TODAY

The Supreme Court's ruling that Daniel Pinkerton was responsible for his brother's bootlegging opened the door for prosecutors to charge conspirators with any number of additional substantive offenses based on the actions of co-conspirators. Today, *Pinkerton* liability is used to convict defendants of substantive offenses in a wide variety of contexts. Technically, a defendant can be charged for a substantive offense via *Pinkerton* liability any time a co-conspirator commits a foreseeable substantive offense in furtherance of the conspiracy. The general rule of *Pinkerton* liability is often stated something like the following:

> [The] *Pinkerton* doctrine . . . permits the government to prove the guilt of one defendant through the acts of another committed within the scope and in furtherance of a conspiracy of which the defendant is a member, provided the acts are reasonably foreseeable as a necessary or natural consequence of the conspiracy.[65]

Thus, under *Pinkerton*, a defendant may be found "guilty on a substantive count without specific evidence that he committed the act charged if it is clear that the offense had been committed, that it had been committed in the furtherance of an unlawful conspiracy, and that the defendant was a member of that conspiracy."[66]

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60. *Id.* at 652.

61. *Pinkerton*, 328 U.S. at 652 (Rutledge, J., dissenting).

62. *Id.* at 652-53. Although the double jeopardy implications are not particularly important to the argument set forth here, this point of the dissent is worth noting as it provides yet another argument against convicting Daniel Pinkerton for his brother's substantive offenses.

63. *Id.* at 653.

64. *Id.*

65. United States v. Lopez, 271 F.3d 472, 480 (3d Cir. 2001).

66. United States v. Miley, 513 F.2d 1191, 1208 (2d Cir. 1975).

Based on recent published case decisions, it appears that *Pinkerton* liability is most often used in practice today in conjunction with drug and firearm offenses, though its application is certainly not limited to such offenses.

### A. *Drug Offenses*

*Pinkerton* is regularly applied to drug conspiracies.[67] The application of *Pinkerton* liability in drug conspiracies, and in all other cases in which *Pinkerton* is applied, normally takes place through a jury instruction, appropriately named the "*Pinkerton* instruction."[68]

When given a *Pinkerton* instruction in a drug conspiracy case, the jury is free to use *Pinkerton* as a vehicle to convict a defendant of possession of controlled substances, possession with intent to distribute, or some other substantive offense even when the defendant never actually possessed any drugs. A good example of such a conviction is found in *United States v. Navarrete-Barron*.[69]

In *Navarrete-Barron*, law enforcement officers arrested Jaime Garcia and found fourteen ounces of crack cocaine in his possession.[70] Officers also found more than fifty grams of cocaine base in Garcia's possession.[71] Based on their investigation of Garcia, police officers were soon led to Luis Jesus Navarrete-Barron and arrested him as well.[72] At trial, evidence indicated that Navarrete-Barron had participated in numerous drug transactions and conspired with Garcia to possess and distribute both cocaine and marijuana.[73] Although Navarrette-Barron was not in possession of the cocaine base, he was convicted for possession of cocaine base with intent to distribute. He then appealed that conviction.[74]

The Eighth Circuit upheld Navarrete-Barron's conviction based on *Pinkerton* liability.[75] The court found that there was suf-

67. United States v. Smith, 223 F.3d 554, 567 (7th Cir. 2000).

68. The *Pinkerton* instruction simply restates the law discussed above. *See supra* text accompanying note 65. For example, the *Pinkerton* instruction in *Smith* read, "[a] conspirator is responsible for the acts of any other member of the conspiracy if he was a member of the conspiracy when the act was committed, and if the act was committed in furtherance of or as a natural consequence of the conspiracy." *Smith*, 223 F.3d at 567.

69. 192 F.3d 786 (8th Cir. 1999).

70. *Id.* at 789.

71. *Id.* at 792-93.

72. *Id.* at 789.

73. *Id.*

74. *Id.* at 792.

75. *Navarrete-Barron*, 192 F.3d at 792-93.

ficient evidence that Garcia possessed the cocaine base, and also sufficient evidence that Navarrete-Barron and Garcia were members of a conspiracy.[76] In addition, the court found that Garcia possessed the cocaine base in furtherance of the conspiracy with Navarette-Barron and that Garcia's possession was foreseeable to Navarrete-Barron.[77] These findings were based largely on Garcia's testimony that Navarrete-Barron handled the cocaine base the previous day.[78] Even though Navarrete-Barron was never found to be in possession of cocaine base, his convictions for both conspiracy and possession with intent to distribute were upheld based solely on *Pinkerton* liability.

Another excellent example of the application of *Pinkerton* liability in a drug case is *United States v. Hayes*,[79] a case that relies on *Navarrete-Barron*. In *Hayes*, Elijah Hayes was convicted of one count of conspiracy to distribute and possess with intent to distribute crack cocaine and one count of possession with intent to distribute crack cocaine.[80] His conviction for conspiracy was largely based on testimony that he was part of a drug selling operation with Fred Dodd from 1992 until 2003.[81] A number of witnesses testified that Hayes received drugs from Dodd, sold drugs for Dodd and helped Dodd divide and package cocaine.[82]

Hayes' conviction for the substantive crime of possession with intent to distribute, on the other hand, was based entirely on Dodd's actions. Hayes was arrested as a result of police surveillance of a residence in Davenport, Iowa.[83] Police observed Hayes and Dodd leave the residence in Dodd's car.[84] The police pulled over the vehicle in an area known for drug trafficking and arrested both Hayes and Dodd.[85] A police officer observed clear plastic in Dodd's hand and later testified that seven baggies containing crack cocaine found in the car were the same baggies he observed in Dodd's hand.[86] Hayes was not carrying any drugs.[87]

76. *Id.*
77. *Id.* at 793.
78. *Id.*
79. 391 F.3d 958 (8th Cir. 2004).
80. *Id.* at 959.
81. *Id.* at 961-62.
82. *Id.*
83. *Id.* at 960.
84. *Id.*
85. *Hayes*, 391 F.3d at 960.
86. *Id.*
87. *Id.*

After the arrest, police also searched the Davenport residence and found cocaine.[88] The apartment did not belong to Hayes.[89]

On appeal, the Government conceded that Hayes did not have actual or constructive possession of the cocaine found at the Davenport residence for which he was convicted.[90] Nevertheless, relying on the trial court's proper *Pinkerton* instruction to the jury and the reasoning in *Navarrete-Barron*, the Eighth Circuit upheld Hayes' conviction for possession of cocaine. The court held that the "elements" required for Hayes' conviction were all met: 1) Dodd possessed cocaine; 2) Hayes and Dodd were members of the same conspiracy at the time of the possession; 3) Dodd's possession was in furtherance of the conspiracy; and 4) Dodd's possession was reasonably foreseeable to Hayes.[91]

### *B. Firearm Offenses*

The use of *Pinkerton* liability to hold conspirators responsible for the actions of their co-conspirators may be most prevalent in the context of firearm offenses. More specifically, *Pinkerton* liability is often applied to increase a defendant's sentence via 18 U.S.C. § 924(c) when a gun is used in a drug offense.[92] Before examining examples of *Pinkerton* liability in this area, it is important to note that the mandatory minimum sentence found in 18 U.S.C. § 924(c) has been declared an unconstitutional violation of the Sixth Amendment by the Sixth Circuit in *United States v. Harris*.[93] However, the holding in *Harris* does not substantially change the use of *Pinkerton* liability in this area. *Harris* merely

88. *Id.*

89. *Id.*

90. *Id.* at 962.

91. *Hayes*, 391 F.3d at 963.

92. 18 U.S.C. 924(c)(1)(a) (2005) provides:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime – (i) be sentenced to a term of imprisonment of not less than 5 years.

93. 397 F.3d 404, 412-14 (6th Cir. 2005). In *Harris*, the court held that after the United States Supreme Court's holding in United States v. Booker, 125 S. Ct. 738 (2005), "the [f]irearm-[t]ype [p]rovision enhancements [must] be charged in the indictment and proved to a jury beyond a reasonable doubt." *Id.* at 413-414.

requires that any "firearm-type" enhancement be found beyond a reasonable doubt by a jury instead of a sentencing judge.[94]

The Second Circuit has held that the "carry" provision of 18 U.S.C. § 924(c) is directly violated under *Pinkerton* if "a firearm is carried by, or within the reach of," a co-conspirator during a predicate drug offense.[95] In *United States v. Giraldo*, the defendant was convicted of conspiracy to distribute narcotics and use of a firearm during and in relation to narcotics trafficking.[96] These convictions stemmed from a cocaine transaction during which the defendant was arrested.[97] During the attempted transaction, the defendant was in a car with two other co-conspirators.[98] He was not driving the car nor did he own the car.[99] In a later search of the car at police headquarters, an officer discovered a loaded firearm.[100] Each conspirator was convicted of a firearm violation based on the presence of this gun, although it was only found in a later search of the car and never in the actual possession of any conspirator.[101]

For a firearm conviction under *Pinkerton*, the "co-conspirator's carrying of the gun must merely have been foreeseably in fur-

94. *Harris*, 397 F.3d at 413-414.

95. United States v. Giraldo, 80 F.3d 667, 676 (2d Cir. 1996), *cert. denied*, 519 U.S. 847 (1996).

96. *Id.* at 671.

97. *Id.* at 672.

98. *Id.*

99. *Id.*

100. *Id.*

101. There was a split in the Circuits as to the proper definition of the term "carry." The Second, Sixth and Ninth Circuits required that a gun be immediately accessible to be "carried." *Giraldo*, 80 F.3d at 676-77; United States v. Riascos-Suarez, 73 F.3d 616, 623 (6th Cir. 1996); United States v. Hernandez, 80 F.3d 1253, 1258 (9th Cir. 1996). Some Circuits took the Second Circuit's application of the "carry" provision of 924(c) one step further. *See, e.g.*, United States v. Cleveland, 106 F.3d 1056 (1st Cir. 1997) (agreeing with the Fourth, Seventh, and Tenth Circuits that a gun may be "carried" in a vehicle even if it is not immediately accessible to the defendant); United States v. Quinn, 123 F.3d 1415 (11th Cir. 1997).

The United States Supreme Court resolved this split and adopted the more liberal view of the term "carry." Muscarello v. United States, 524 U.S. 125 (1998) (holding that "carrying a firearm" is not limited to carrying firearms on one's person and that both carrying weapons in the trunk of a vehicle and in a locked glove compartment constitutes "carrying a firearm" under the statute).

Thus, if a defendant in a drug conspiracy is riding in a car owned and driven by a co-conspirator and the co-conspirator has a gun in the trunk, the defendant could be convicted under *Pinkerton* of carrying a firearm as long as it was reasonably foreseeable that a gun would be carried in furtherance of the conspiracy. This is true whether or not the defendant knew that the co-conspirator had a gun in the trunk.

therance of the conspiracy."[102] In *Rodriguez v. United States*, evidence at trial showed that Raul Rodriguez was a member of a cocaine conspiracy, stored cocaine in his apartment, transported cocaine, sold cocaine directly to customers, and prepared cocaine for sale.[103] There was also evidence that a co-conspirator acted as an armed lookout during these transactions.[104] Based on this evidence, the court noted that the evidence "clearly allowed a jury to conclude that Rodriguez knew, or foresaw, that a gun was carried in connection with his narcotics activities."[105] Thus, although Rodriguez was involved only in the drug activity and did not actually carry a gun, he was found guilty of carrying a firearm because of the mere presence of an armed co-conspirator.

Although Rodriguez actually knew that a gun was present, knowledge of the presence of a firearm is not required. Other courts have applied the foreseeability standard that the *Rodriguez* court recognized but did not actually apply. *In United States v. Alvarez-Valenzuela*,[106] Miguel Alvarez-Valenzuela (Alvarez) was involved in a one day marijuana conspiracy.[107] He was passing by a friend's house in Mexico and the friend asked him to help carry marijuana into the United States.[108] Alvarez knew that the destination was the United States and knew that they would drop off the marijuana near a fast food restaurant.[109] Border patrol agents stopped Alvarez and two co-conspirators and found eighty-three pounds of marijuana and a .380 caliber pistol on the ground near the three men.[110] Alvarez was subsequently convicted of various drug counts and one count of possession of a gun in relation to a drug trafficking crime.[111] On appeal, Alvarez contested the firearm conviction, claiming he did not know anyone had a gun until the federal agents appeared.[112] The court held that under *Pinkerton*, the jury need not have found that the defendant actually knew that guns were being used, only that Alvarez could have

102. Rodriguez v. United States, No. 97 Civ. 2545, 2005 WL 887142, at *5 (S.D.N.Y. Apr. 15, 2005).
103. *Id.* at *5 n.5.
104. *Id.*
105. *Id.*
106. 231 F.3d 1198 (9th Cir. 2000).
107. *Id.* at 1203.
108. *Id.*
109. *Id.*
110. *Id.* at 1200.
111. *Id.*
112. *Alvarez-Valenzuela*, 231 F.3d at 1204.

reasonably foreseen the use of firearms.[113] The court found that Alvarez could have foreseen the use of firearms due to the value of the marijuana and violence of the drug trade and illegal border crossings, as well as the fact that it was unlikely he did not know that his co-conspirator had a gun.[114]

In a similar holding, the Seventh Circuit held that Reynaldo Diaz could be sentenced to an additional five years for use of a firearm in a drug trafficking crime when his co-conspirator possessed the gun.[115] Concluding that Diaz could be convicted under a *Pinkerton* theory of liability, the court stated, "the illegal drug industry is, to put it mildly, a dangerous, violent business. When an individual conspires to take part in a street transaction involving a kilogram of cocaine worth $39,000, it certainly is quite reasonable to assume that a weapon of some kind would be carried."[116]

*Pinkerton* liability is also used to obtain firearm convictions for far more serious offenses. For example, in *United States v. Curtis*,[117] William Curtis was convicted of conspiracy to distribute crack cocaine.[118] During the conspiracy, one of Curtis' co-conspirators committed two violent murders.[119] Testimony indicated that these murders were connected to the conspiracy and that members of the conspiracy frequently used violence to achieve their goals.[120] As a result, the court found that the murders were in furtherance of the conspiracy and it was foreseeable that murder would be committed.[121] Thus, Curtis' additional convictions for two counts of using a firearm to commit murder in furtherance of a drug conspiracy were upheld, though Curtis did not actually commit either murder.[122] Although a severe example, *Curtis* provides an excellent illustration of *Pinkerton's* implications. William Curtis was guilty of a drug conspiracy, but did not kill anyone. However, due only to his involvement in the drug conspiracy, he was held responsible for two murders that he did not commit.

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113. *Id.* at 1203.
114. *Id.* at 1203-05.
115. United States v. Diaz, 864 F.2d 544, 547-49 (7th Cir. 1988).
116. *Id.* at 549.
117. 324 F.3d 501 (7th Cir. 2003).
118. *Id.* at 503.
119. *Id.* at 503-06.
120. *Id.* at 506.
121. *Id.*
122. *Id.* at 503.

### C. *Other Offenses*

Although drug and firearm offenses are probably the two most prevalent applications of *Pinkerton* liability in practice, *Pinkerton* is also used to convict defendants of a number of other substantive offenses. Other examples of the wide range of substantive convictions via *Pinkerton* include money laundering,[123] aiding and abetting the possession of stolen checks,[124] violations of the Lacey Act's false-records provision,[125] mail and wire fraud,[126] and assault on a federal agent.[127] These cases are not particularly noteworthy to a discussion of *Pinkerton* and common law crime other than to show the broad spectrum of offenses for which *Pinkerton* holds defendants vicariously liable. Indeed, if the elements of *Pinkerton* are met, a defendant may be convicted substantively of any federal offense without having personally committed the offense.

## IV. Background Information on Applicable Criminal Law

Before making any argument that *Pinkerton* creates a rule that violates the prohibition on federal common law crimes, it is necessary to provide a brief background on applicable criminal law. This includes the law of conspiracy, and more importantly, federal common law crimes.

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123. *See, e.g.*, United States v. Silvestri, 409 F.3d 1311 (11th Cir. 2005); United States v. Tokars, 95 F.3d 1520 (11th Cir. 1996); United States v. Mathison 157 F.3d 541 (8th Cir. 1998).

124. United States v. Collazo, 815 F.2d 1138 (7th Cir. 1987).

125. United States v. Fountain, 277 F.3d 714 (5th Cir. 2001) (defendant was convicted of violation of 16 U.S.C. § 3372(d) for creating false records to cover up violations of Louisiana oyster laws). 16 U.S.C. § 3372(d) (2000) is the false records provision of the Lacey Act and provides:

> It is unlawful for any person to make or submit any false record, account, or label for, or any false identification of, any fish, wildlife, or plant which has been or is intended to be
>
> (1) imported, exported, transported, sold, purchased, or received from any foreign country; or
>
> (2) transported in interstate or foreign commerce.

126. United States v. Boyd, 222 F.3d 47 (2nd Cir. 2000).

127. United States v. Flores-Rivera, 56 F.3d 319 (1st Cir. 1995).

### A. *Conspiracy Law*

#### 1. *History*

Conspiracy developed due to the enactment of three statutes during the reign of Edward I in England.[128] Although not rooted in common law, much of the law of conspiracy was shaped by judges. Today, the definition of conspiracy sometimes differs by jurisdiction depending on whether the jurisdiction retains common law crimes.[129] As discussed more thoroughly below, the United States does not retain common law crimes, although some of the states do.[130]

Because the United States does not retain common law crimes, the crime of conspiracy is necessarily codified. The general federal conspiracy statute is found at 18 U.S.C. § 371 and reads in part:

> [i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned to not more than five years, or both.[131]

Thus, a conspiracy conviction under this general statute requires proof of three essential elements: 1) an agreement between two or more persons, the object of which is an offense against the United States or to defraud the United States; 2) the defendant knowingly and willingly joined the conspiracy; and 3) at least one of the co-conspirators committed an overt act in furtherance of the conspiracy.[132] It is important to note that 18 U.S.C. § 371 is only one of the federal statutes under which conspiracy may be charged. There are a number of additional federal statutes that attach conspiracy to particular substantive offenses.[133]

The development of conspiracy law has been and continues to be a controversial subject. Professor Wayne R. LaFave notes "the

128. 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 12.1(a) (2d ed. 2003).
129. *Id.*
130. *See infra* text accompanying note 158.
131. 18 U.S.C. § 371 (2000).
132. United States v. Svoboda, 347 F.3d 471, 476 (2d Cir. 2003).
133. *See, e.g.*, 15 U.S.C. § 1 (2000) (conspiracy to restrain trade); 18 U.S.C. § 224 (2000) (conspiracy to bribe in a sporting event); 18 U.S.C. § 286 (2000) (conspiracy to defraud the federal government with fraudulent claims); 21 U.S.C. § 846 (2004) (conspiracy to violate the Controlled Substances Act); 21 U.S.C. § 963 (2004) (conspiracy to import or export a controlled substance).

elusive quality of conspiracy as a legal concept" and argues that the prosecution has a distinct advantage in conspiracy cases.[134] Professor LaFave lists five factors that he believes are responsible for the prosecutor's advantage: 1) the inherent vagueness in the crime of conspiracy; 2) the broad venue rules permitting prosecution to be at the place of agreement or at any place where an overt act was committed; 3) the co-conspirator exception to the hearsay rule; 4) the wide latitude given to the prosecution to introduce any evidence which even remotely tends to establish a conspiracy; and 5) the disadvantages for defendants of a joint trial.[135]

However, as Professor LaFave notes, despite many commentators' skepticism over the development of conspiracy, most will agree that conspiracy serves as a preventative means against those with a disposition to commit crimes and as a means of combating the unique danger of group criminal activity.[136]

### 2. *General Principles*[137]

Conspiracy has been described as a partnership in crime.[138] Conspiracy is distinct from the substantive crime contemplated and is charged as a separate offense.[139] Thus, one can be charged and convicted of conspiracy without ever being charged with a substantive crime.

A conspiracy is the result of an agreement, not the agreement itself.[140] For conspiracy to exist, there must be an agreement to commit an unlawful act, but the agreement does not have to be formal, there need only be an understanding between the parties.[141] However, mere presence at the scene of a crime or knowledge of the conspiracy does not constitute an agreement.[142]

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134. LAFAVE, *supra* note 128, § 12.1(b). At least one prominent jurist agreed with this argument. As Professor LaFave notes, Judge Learned Hand referred to conspiracy as "the darling of the modern prosecutor's nursery." *Id.* (citing Harrison v. United States, 7 F.2d 259 (2d Cir. 1925)).

135. *Id.*

136. *Id.* § 12.1(c).

137. A detailed overview of conspiracy law is not necessary, but knowledge of some general principles is helpful to understanding the argument that follows. For a comprehensive overview of federal conspiracy law, *see* Kathy Diener & Teisha C. Johnson, *Federal Criminal Conspiracy*, 42 AM. CRIM. L. REV. 463 (2005).

138. Fiswick v. United States, 329 U.S. 211, 216 (1946).

139. Diener & Johnson, *supra* note 137, at 463-64.

140. United States v. Kissel, 218 U.S. 601, 608 (1910).

141. 4 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 679 (15th ed. 2004).

142. Diener & Johnson, *supra* note 137, at 468.

Conspiracy also requires a dual mental state.[143] This means that defendants must have both the intent required to commit the crime contemplated and the intent to act together in carrying out the common purpose.[144] Stated another way, in order to convict a defendant of conspiracy, the government must prove that the defendant knew of and joined the conspiracy with the intent to commit the offenses that were its objectives.[145]

In the federal system, most conspiracy statutes require an overt act to be committed.[146] Only one conspirator must commit an overt act, and the act need not be the substantive crime that the conspiracy contemplated.[147] In fact, the overt act need not be unlawful.[148] Nearly any action in furtherance of the agreement will be considered an overt act. Examples include standing as a lookout, taking a trip, making a telephone call and mailing a letter.[149]

Not all federal conspiracies require an overt act. In *United States v. Shabani*,[150] the United States Supreme Court found in federal drug conspiracy statutes the agreement to conspire is the act. The government is not required to also prove that a conspirator committed an additional overt act.[151]

As noted earlier, an important distinction in conspiracy law is that the conspiracy is a separate and distinct offense from the substantive offense that was the purpose of the conspiracy.[152] A person may be convicted of both conspiracy and the substantive offense, even though the substantive offense was alleged as the overt act necessary to convict of conspiracy.[153] It does not matter that the purpose of the conspiracy was not accomplished nor does it matter if the purpose of the conspiracy was impossible to be accomplished.[154]

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143. 4 TORCIA, *supra* note 141, § 680.
144. *Id.*
145. United States v. Ceballos, 340 F.3d 115, 123 (2d Cir. 2003).
146. Diener & Johnson, *supra* note 137, at 474.
147. *Id.*
148. 4 TORCIA, *supra* note 141, § 680.
149. *Id.*
150. 513 U.S. 10 (1994).
151. *Id.* at 11.
152. Braverman v. United States, 317 U.S. 49, 54 (1942).
153. Pinkerton v. United States, 328 U.S. 640, 644 (1946).
154. United States v. Jimenez Recio, 537 U.S. 270 (2003).

### B. *Common Law Crimes*

#### 1. *History*

A common law crime is simply a crime "punishable under the common law, rather than by force of statute."[155] In other words, a common law crime is defined by judges via case law instead of by legislatures via statutes.

Development of criminal common law in this country began, as did most American law, when colonists brought English common law with them to America.[156] Most states originally had common law crimes, but soon began to enact criminal statutes.[157] Many states eventually enacted comprehensive criminal codes with some states retaining common law crimes and some expressly abolishing them.[158]

The principal reason for common law crimes was that legislatures in England sat infrequently and created little legislation.[159] This rationale for allowing judges to define crimes is no longer applicable. Today, a major argument in favor of retaining common law crimes is that such a retention allows courts to "plug loopholes" in cases where the legislature did not criminalize something that ought to be a crime.[160] This argument is tempered somewhat because few "loopholes" actually exist and legislatures can generally remedy any oversights relatively quickly.[161]

The principal arguments that common law crimes should not be retained are based on Constitutional concerns. One such concern is that the criminal law ought to be certain, and allowing judges to define criminal activity creates both due process and *ex post facto* issues.[162] Another concern is that common law crimes

155. BLACK'S LAW DICTIONARY 399 (8th ed. 2004).

156. 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 9 (15th ed. 2005).

157. *Id.*

158. For examples of states retaining common law crimes see IDAHO CODE ANN. § 18-303 (2004); FLA. STAT. ANN. § 775.01 (West 2005); and VA. CODE ANN. § 18.2-16 (West 2004). For examples of states expressly abolishing common law crimes see ALA. CODE § 13A-1-4 (2004); COLO. REV. STAT. ANN. § 18-1-104 (West 2004); and MO. ANN. STAT. § 556.031 (West 2004).

159. 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 2.1(f) (2d ed. 2003).

160. *Id.*

161. *Id.*

162. *Id.* The obvious concern is that a person may engage in activity not previously defined as criminal, only to have a judge decide that such activity is criminal after the fact.

create separation of powers problems by allowing judges to both create law and interpret it.[163]

Based largely on such concerns, in 1812 the United States Supreme Court declared that there can be no federal common law crimes.[164] Although the history of federal common law crimes is a long and contentious one that the Court chose largely to ignore, the abolition announced in *Hudson & Goodwin* has remained good law for nearly 200 years.[165]

In *Hudson & Goodwin*, the Court held that there was no jurisdiction in federal courts to try criminal charges based on the common law, thus breathing life into the rule that all federal crimes must be based on a statute of Congress.[166] This rule has been restated numerous times by federal courts. The United States Supreme Court wrote that "[l]egislatures and not courts should define criminal activity."[167] The Seventh Circuit described a federal common law crime as "a beastie that many decisions say cannot exist."[168] Quoting the Supreme Court, the Second Circuit noted that the Due Process Clauses of the Fifth and Fourteenth Amendments require legislatures to specify the elements of criminal offenses, writing, "[t]here are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute."[169]

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163. John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545, 573 n.179 (2005).

164. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812). "By holding that the federal courts lacked inherent common law powers, the Court gave formal definition to the notion that the common law would operate only within the interstices of the Constitution's structure." Gary D. Rowe, *The Sound of Silence:* United States v. Hudson & Goodwin, *The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919, 923 (1992).

165. *See* Rowe, *supra* note 164 for a detailed discussion of the history behind the abolition of common law crimes. Rowe quotes Thomas Jefferson as describing the battle over common law crimes as "the most formidable of doctrines" that had "ever been broached by the federal government." *Id.* at 919. For purposes of this Note, it is sufficient to know that there are no federal common law crimes, whatever the reason for their abolition.

166. *Hudson & Goodwin*, 11 U.S. at 34.

167. United States v. Bass, 404 U.S. 336, 348 (1971).

168. United States v. Bloom, 149 F.3d 649, 654 (7th Cir. 1998).

169. United States v. Handakas, 286 F.3d 92, 101 (2d Cir. 2002), *overruled by* United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003) (quoting Fasulo v. United States, 272 U.S. 620, 629 (1926)). *Rybicki* overruled the *Handakas* court's holding that a mail fraud statute was unconstitutionally vague, but did not take issue with the court's description of the rules regarding common law crimes. *Rybicki*, 354 F.3d at 144.

*2. Case Law Examining Common Law Crimes*

Although federal courts rarely analyze whether a common law crime has been created, both the Seventh and Eighth Circuits have addressed the issue in some fashion. In *United States v. Lee*,[170] the defendant asserted that the Federal Death Penalty Act (FDPA) was unconstitutional because the United States Supreme Court in effect created a common law crime when it interpreted the Act in *Ring v. Arizona*.[171] The FDPA required aggravating factors for the death penalty to be applied, and the Eighth Circuit interpreted the factors to be functional equivalents of the elements of an offense, thus requiring the factors to be found beyond a reasonable doubt before the death penalty could be imposed.[172] The *Lee* court rejected the argument that the United States Supreme Court created a new common law crime by adding elements to the offense.[173] The Eighth Circuit reasoned that *Ring* did not add elements to the offense but simply acknowledged the legislature's requirement that both the aggravated factors and elements of the offense be found beyond a reasonable doubt for the death penalty to be imposed.[174]

The Seventh Circuit has also commented on the creation of common law crimes in the context of mail and wire fraud statutes. In *Reynolds v. East Dyer Development Co.*,[175] the Seventh Circuit cautioned that giving mail and wire fraud statutes such broad definitions as to include all conduct that strikes a court as "sharp dealing or unethical conduct"[176] would "put federal judges in the business of creating what would in effect be common law crimes" due to the pervasive use of mail and telephone services and the ease with which the mailing and wiring requirements in the statutes are met.[177]

## V. The Supreme Court Impermissibly Created Criminal Liability in *Pinkerton*

When the United States Supreme Court decided *Pinkerton*, it created criminal liability for the substantive offenses of co-con-

170. 374 F.3d 637 (8th Cir. 2004).
171. *Id.* at 648 (citing Ring v. Arizona, 536 U.S. 584 (2002)).
172. *Id.* (citing *Ring*, 536 U.S. at 609).
173. *Id.* at 648-49.
174. *Id.* at 649.
175. 882 F.2d 1249 (7th Cir. 1989).
176. *Id.* at 1252.
177. *Id.* (quoting United States v. Holtzer, 816 F.2d 304, 309 (7th Cir. 1987)).

spirators when Congress had not done so. Because the *Pinkerton* theory imposes judge mandated criminal liability, it violates the long-standing prohibition on federal common law crimes.

### *A. Is* Pinkerton *Liability a Common Law Crime?*

The obvious place to begin an argument that *Pinkerton* liability violates the prohibition on federal common law crimes is to assert that the *Pinkerton* theory itself is a common law crime. Logically, to be considered a common law crime, the *Pinkerton* theory must arise from the common law rather than from statute and must constitute a crime.

The *Pinkerton* theory is clearly a common law doctrine and not statutory in nature. A search of the United States Code will reveal no statute prescribing that a conspirator may be held criminally responsible for the substantive offenses of his or her co-conspirators. In addition, the Supreme Court relied almost solely on common law in formulating the rule in *Pinkerton*. In its analysis, the majority cited only a general conspiracy statute requiring an overt act.[178] Courts openly acknowledge that the *Pinkerton* theory is a judicial rule. The Ninth Circuit has described the *Pinkerton* theory as, "a judicially-created rule that makes a conspirator criminally liable for the substantive offenses committed by a co-conspirator when they are reasonably foreseeable and committed in furtherance of the conspiracy."[179]

The issue of whether the *Pinkerton* theory is a crime is less clear. A crime is an "act that the law makes punishable" or "the breach of a legal duty treated as the subject matter of a criminal proceeding."[180] A crime requires that a defendant commit an unlawful act and have the requisite mental state or wrongful intent (mens rea).[181]

Concededly, *Pinkerton* liability is not a crime in the traditional sense. Prosecutors do not actually charge defendants with *Pinkerton* liability as they would charge a defendant with murder,

178. Pinkerton v. United States, 328 U.S. 640, 647 (1946). The Court cited 18 U.S.C. § 88 (1940) (current version at 18 U.S.C. § 371 (2004)). 18 U.S.C. § 371 (2004) is the general conspiracy statute quoted in the text above. *See supra* text accompanying note 131. In 1948, Congress consolidated 18 U.S.C. § 88 and 18 U.S.C. § 294 into the general statute, which no longer contains a requirement for an overt act. Act of June 25, 1948, ch. 645, 62 Stat. 701.

179. United States v. Long, 301 F.3d 1095, 1103 (9th Cir. 2002).

180. BLACK'S LAW DICTIONARY 1006-1007 (8th ed. 2004).

181. 21 AM. JUR. 2D *Criminal Law* § 4 (2005).

assault, or any other substantive offense. Rather, a defendant is charged with conspiracy and also charged with a substantive offense via *Pinkerton* liability. The distinction is important; a defendant is not punished *for* Pinkerton liability, he or she is punished for a substantive offense *because* of *Pinkerton* liability.

An analysis of the act and mental state required for *Pinkerton* liability does not neatly conform to a traditional analysis. The elements of *Pinkerton* liability can be restated as: 1) a conspiracy existed; 2) one of the co-conspirators committed a substantive offense; 3) the substantive offense was committed in furtherance of the conspiracy; and 4) the commission of the substantive offense was reasonably foreseeable.[182] Thus, two acts are required for a person to be held liable for a substantive offense via *Pinkerton*. First, an act constituting conspiracy must occur. That is, two or more people must agree to commit an unlawful act.[183] Additionally, an act constituting some substantive offense must be committed by one of the conspirators.

Multiple mental states are also required for punishment under the *Pinkerton* theory. First, the defendant must have the requisite mental state for conspiracy. The conspirator committing the substantive offense must also have the requisite mental state for the substantive offense. The requirement that the substantive offense be reasonably foreseeable also contains a mental state requirement. Essentially, the reasonably foreseeable requirement seems to mean that if it would be negligent for a defendant not to know that a substantive offense of the kind committed might be committed in furtherance of the conspiracy, the defendant can be held responsible.

These factors convolute the analysis of *Pinkerton* liability as a crime in a number of ways. The defendant does not commit the act or have the mental state required for the substantive offense. However, those requirements must be met by a co-conspirator for the defendant to be punished. The defendant need only commit the act and have the mental state necessary for conspiracy. This means that the defendant commits conspiracy, a crime in and of itself, and then sits back and waits. If a co-conspirator commits a substantive offense in furtherance of the conspiracy, the defendant is also punished for it simply because he or she committed the crime of conspiracy.

182. United States v. Lopez, 271 F.3d 472, 480 (3d Cir. 2001); United States v. Hayes 391 F.3d 958, 963 (8th Cir. 2004); *Long*, 301 F.3d at 1103.

183. 4 TORCIA, *supra* note 141, § 679.

The reasonably foreseeable element is also problematic. Although the element contains shades of negligent mental state requirements as argued above, it is not truly a mental state required for punishment. The focus is on whether the substantive offense was reasonably foreseeable, an objective standard. Thus, there is no additional mental state requirement, but there is an objective requirement that the substantive offense be reasonably foreseeable. This additional requirement for liability under *Pinkerton* certainly exists, but is difficult to incorporate into an analysis of act and mental state because it is truly neither.

For these reasons, it seems fair to conclude that *Pinkerton* liability itself is not actually a crime. Although the *Pinkerton* theory has elements that must be met just like elements of a traditional crime, the lack of a requirement for an additional act or mental state takes *Pinkerton* liability outside the definition of a crime. Since *Pinkerton* liability is not a crime, it logically cannot be a common law crime. However, the analysis of whether or not *Pinkerton* liability violates the prohibition of federal common law crimes cannot end here.

### *B.* Pinkerton *Liability is Sufficiently Analogous to a Common Law Crime that it Violates the Prohibition Against Federal Common Law Crimes*

Although not a common law crime, *Pinkerton* liability violates the spirit of the prohibition against federal common law crimes. The prohibition prevents judges from creating criminal liability where the legislature has not done so. If nothing else, the *Pinkerton* theory creates criminal liability.

Citing 18 U.S.C. § 88 and various case law, the Supreme Court concluded in *Pinkerton* that:

> [i]f [the overt act statutorily required for the crime of conspiracy] can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense.[184]

Unfortunately, what the Court failed to see is that a conspirator cannot be criminally liable for the substantive offenses of a co-conspirator because Congress has not statutorily created such criminal liability.

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

In *United States v. Bass*, the Supreme Court interpreted 18 U.S.C. § 1202(a) (1968) to determine whether it was a crime for a convicted felon to possess a gun.[185] The statute created federal criminal liability for a felon receiving, possessing or transporting "in commerce or affecting commerce" a firearm.[186] The Court held that Congress had not "plainly and unmistakably made it a federal crime for a convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce."[187] To support its interpretation of the statute, the Court noted that "legislatures and not courts should define criminal activity" and that the reason for this policy was that individuals should not "languish[ ] in prison unless the lawmaker has clearly said they should."[188]

An examination of *Pinkerton* differs from *Bass* significantly as statutory interpretation is not involved. The Court's interpretation in *Bass* does, however, provide the reasons that the *Pinkerton* theory must be codified if it is to exist. The most obvious of these reasons is that legislatures and not courts should define criminal activity. The *Pinkerton* theory was defined by the Supreme Court and Congress has never codified the Court's rule. If one looks further in *Bass* to the Court's statement that the policy behind this rule is that individuals should not be imprisoned without a clear legislative statement, it becomes clear that the Court is concerned with judicially-defined criminal liability. Under *Pinkerton*, many defendants are languishing in prison even though no lawmaker has said they should.

The case of William Curtis, examined earlier,[189] clearly illustrates this argument. Curtis was convicted of a conspiracy to possess with intent to distribute more than fifty grams of crack cocaine,[190] a crime for which the legislature has clearly stated he should be imprisoned.[191] Curtis was also convicted of two counts

185. 404 U.S. 336 (1971).

186. 18 U.S.C. § 1202(a) (1968).

187. *Bass*, 404 U.S. at 348-49 (citing United States v. Gradwell, 243 U.S. 476, 485 (1917)).

188. *Id.* at 348.

189. *See supra* text accompanying notes 117-22.

190. United States v. Curtis, 324 F.3d 501, 503 (7th Cir. 2003).

191. Curtis was convicted of conspiracy under 21 U.S.C. § 846. That statute provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of with was the object of the attempt or conspiracy.

21 U.S.C. § 846 (2004). The penalties for possession with intent to distribute more than fifty grams of crack cocaine are found in 21 U.S.C. § 841 (2004). Curtis was sentenced to life for the conspiracy. *Curtis*, 324 F.3d at 504.

of using a firearm to commit murder in furtherance of a drug conspiracy.[192] Curtis did not actually commit either of the two murders for which he was convicted, but one of his co-conspirators did.[193] Thus, Curtis' convictions for the murders were based solely on *Pinkerton*. Curtis was sentenced to two life sentences plus sixty years for the murders under 18 U.S.C. § 924(j).[194] No legislature has ever stated that Curtis should be punished for murders he did not commit. He was punished for the murders because the United States Supreme Court's *Pinkerton* reasoning dictated he should be punished. This court-created criminal liability clearly violates the spirit and policy behind the prohibition of federal common law crimes. Theoretically, William Curtis could languish in prison for two lifetimes plus sixty years based on the *Pinkerton* theory because a court, not a legislature, defined the criminal liability.

The troubling aspects of *Pinkerton* are most obvious in an example such as *Curtis*. Most people dislike the idea that a person could be convicted of murders he did not commit simply because the person was involved in a drug conspiracy. However, more common applications of *Pinkerton* are no less troubling. For example, Person A and Person B conspire to distribute drugs. Person A buys the drugs from a supplier, stores them and then sells them. Person B serves as the lookout for the transactions. Both Person A and Person B are certainly guilty of conspiracy. Person A is also guilty of possession with intent to distribute. However, due to *Pinkerton*, Person B is also guilty of possession with intent to distribute.

This result may not seem particularly worrisome at first glance. A natural reaction is that Person B should be just as guilty as Person A and that possession of drugs is a natural part of a drug conspiracy. The problem is that Person B never committed the offense of possession with intent to distribute because Person B never possessed the drugs. Thus, B is being punished for an offense he did not commit, just like William Curtis. Person B committed only the offense of conspiracy and should be punished only for conspiracy. Conspiracy is a separate and distinct offense from any underlying substantive offense. The only reason that Person B is also punished for the substantive offense of possession with intent to distribute is that *Pinkerton* created such criminal liabil-

192. *Curtis*, 324 F.3d at 503, 506.
193. *Id.* at 503-06.
194. *Id.* at 504-05.

ity. Although less eye-catching than the *Curtis* example, application of *Pinkerton* in this fashion is far more common and equally as troubling.

*Pinkerton* can be clearly distinguished from *Lee*, the case in which the Eighth Circuit found that the United States Supreme Court had not created a common law crime when interpreting the Federal Death Penalty Act.[195] In *Lee*, the Eighth Circuit reasoned that the Supreme Court did not create a federal common law crime because the Court did not add elements to the Act, it simply acknowledged that the legislature required enumerated aggravated factors to be found beyond a reasonable doubt, just like elements of the offense.[196] The *Pinkerton* Court did no such thing. In *Pinkerton*, the Court took the general conspiracy idea that an overt act can be supplied by the act of one conspirator and extended the rule to mean that acts in furtherance of the conspiracy can be attributed to all conspirators to hold them responsible for substantive offenses.[197] The Court did not merely enforce a codified statute, it extended criminal liability far beyond that proscribed by Congress.

The Seventh Circuit's caution against creating common law crimes in a mail and wire fraud context is equally applicable to *Pinkerton*. In *Reynolds*, the Seventh Circuit cautioned that extending mail and wire fraud statutes to include anything a court deems unethical would create common law crimes because of the ease with which the statutes are met.[198] The same caution inheres in extension of conspiracy law.

The Sixth Circuit explored this issue to some extent in *United States v. Minarek*.[199] The *Minarek* court relied largely on language from Justice Jackson's concurring opinion in *Krulewitch v. United States*.[200] The court noted that Justice Jackson argued:

> '[t]he modern crime of conspiracy is so vague that it almost defies definition'—that the charge of conspiracy was so 'elastic, sprawling and pervasive' that, if not given judicially defined limits, it would 'constitute [ ] a serious threat to fairness in our administration of justice.'[201]

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195. United States v. Lee, 374 F.3d 637 (8th Cir. 2004). *See also supra* text accompanying notes 170-74.

196. *Lee*, 374 F.3d at 649.

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

198. Reynolds v. East Dyer Dev. Co., 882 F.2d 1249, 1252 (7th Cir. 1989).

199. 875 F.2d 1186 (6th Cir. 1989).

200. 336 U.S. 440 (1949).

201. *Minarek*, 875 F.2d at 1192 (quoting *Krulewitch*, 336 U.S. at 445-46 (Jackson, J., concurring)).

Justice Jackson also noted that although modern conspiracy law has largely been shaped by judges, judges can not make offenses against the United States.[202] The *Minarek* court then proceeded to interpret the general conspiracy statute cautiously, so as not to extend it and create a common law crime.[203]

*Pinkerton* differs from *Reynolds* and *Minarek* because no statutory interpretation was involved. However, the caution urged by both cases is quite applicable to *Pinkerton*. The underlying concern in both *Reynolds* and *Minarek* is that if a court extends a broad or vague area of criminal law too far, the court will create what in effect would be impermissible common law crime. This situation is precisely what happened in *Pinkerton*. The *Pinkerton* Court took conspiracy, a vague and broad area of criminal law, and extended it so far that the Court created criminal liability.

Also telling is that Congress has created at least one statute which defines collateral manners in which criminal responsibility can be assessed. Congress has declared that any person who "aids, abets, counsels, commands, induces or procures" the commission of a federal offense is punished as the principal, even though that person did not actually commit the crime.[204] Misprision of felony, an offense in which a person is punished if he knows of the commission of a federal felony offense and does not disclose it to a judge or federal law enforcement, is also a somewhat collateral manner of assessing criminal liability.[205]

As demonstrated by 18 U.S.C. § 2, Congress realized that it has the authority to punish a person as a principal although the person did not actually commit the offense. Yet Congress has never chosen to prescribe punishment of a conspirator for the substantive offenses of a co-conspirator. None of the conspiracy statutes contained in the United States Code allow for punishment of a co-conspirator's substantive offenses. Both 18 U.S.C. § 371, the general conspiracy statute, and 21 U.S.C. § 846, the drug conspiracy statute, provide punishments for conspiracy and conspiracy alone.[206] Neither these nor any other federal statute provides that a person convicted of conspiracy can also be held liable for substantive offenses they did not commit.

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202. *Id.* (citing *Krulewitch*, 336 U.S. at 456-57 (Jackson, J., concurring)).

203. *Id.* at 1192-96 (interpreting 18 U.S.C. § 371).

204. 18 U.S.C. § 2 (2004).

205. 18 U.S.C. § 4 (2004).

206. *See supra* text accompanying note 131 and *supra* note 178.

In fact, such a rule violates the long-standing principle of conspiracy law that conspiracy is an offense separate and distinct from the substantive offense. Justice Rutledge notes this discrepancy in his *Pinkerton* dissent.[207] One of the key points of Justice Rutledge's dissent is that if Daniel Pinkerton had never joined the conspiracy, he would be guilty of no offense. Under the majority rule in *Pinkerton*, Daniel was guilty of both conspiracy and multiple substantive offenses simply because he joined the conspiracy.[208] The same is true for all defendants convicted of substantive offenses under *Pinkerton*.

It is difficult to reconcile this result with the principle that conspiracy is a separate offense. If conspiracy is truly a separate and distinct offense from the underlying substantive offense, joining a conspiracy should only make a defendant guilty of the offense of conspiracy. To be held liable for a substantive offense, the defendant should necessarily commit a substantive offense. Under the *Pinkerton* theory, a defendant who commits the offense of conspiracy is guilty of not only conspiracy, but also of any foreseeable substantive offenses committed by a co-conspirator in furtherance of the conspiracy. This punishment for substantive offenses simply by virtue of committing the "separate" offense of conspiracy hardly seems to embody the concept that conspiracy is a separate and distinct offense. Perhaps it is this inherent conflict in the *Pinkerton* theory that has prevented Congress from codifying it.

Whatever the reason, the *Pinkerton* theory is sufficiently analogous to a common law crime that its application violates the prohibition on federal common law crimes. There is no doubt that the *Pinkerton* theory is judge made. It is impossible to examine the legislative history of *Pinkerton* because it does not exist. Pattern jury instructions for *Pinkerton* make no reference to any statute because there is none to reference.[209] Courts openly recognize that the *Pinkerton* theory is a judicially created rule.[210]

There can also be no doubt that *Pinkerton* created criminal liability where none previously existed. Without *Pinkerton*, a defendant who entered a conspiracy could only be charged with, convicted of and punished for conspiracy. Unless the defendant actually committed a substantive offense, he could not be charged with

207. Pinkerton v. United States, 328 U.S. 640, 652 (1946) (Rutledge, J., dissenting).
208. *Id.* (Rutledge, J., dissenting).
209. *See, e.g.*, NINTH CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS § 8.20 (2003).
210. United States v. Long, 301 F.3d 1095, 1103 (9th Cir. 2002).

one. However, because the *Pinkerton* theory exists, a defendant who enters a conspiracy can not only be punished for conspiracy, but prosecutors may charge the defendant with substantive offenses he did not commit.

The effect of the *Pinkerton* theory is exactly the result that the prohibition on federal common law crimes seeks to prevent. When the United States Supreme Court created the rule in *Pinkerton*, it created criminal liability where Congress had not done so. Under the *Pinkerton* theory, defendants are punished under criminal liability defined by courts instead of legislatures.

## VI. CONCLUSION

In 1946, the United States Supreme Court announced the *Pinkerton* theory, a rule allowing conspirators to be charged with and convicted of the substantive offenses of co-conspirators if those offenses were reasonably foreseeable and committed in furtherance of the conspiracy.[211] At the time, this rule did not exist in any statute and Congress has not codified the rule in the nearly sixty years since it was announced. Despite various challenges, the *Pinkerton* theory has become widely accepted and is employed often by federal prosecutors around the country.

The *Pinkerton* theory is probably most often used today to convict defendants involved in drug conspiracies of substantive drug and gun charges. It is also used to convict defendants of other substantive offenses they did not commit, such as murder and assault. Prosecutors may use the *Pinkerton* theory to convict a defendant of any substantive offense they did not commit as long as the defendant was a member of the conspiracy and the substantive offense was reasonably foreseeable and committed by a co-conspirator in furtherance of the conspiracy.

The *Pinkerton* theory is doubtless a judicially created rule. It also clearly creates criminal liability where Congress has not done so. As a result, the *Pinkerton* theory violates the prohibition on federal common law crimes, a prohibition that has been in place since 1812.[212] Though not actually a common law crime, the *Pinkerton* theory accomplishes the exact result sought to be prohibited: criminal liability prescribed by courts instead of legislatures.

There is no good explanation for this judicially created manner of assessing criminal liability by common law instead of stat-

211. *Pinkerton*, 328 U.S. 640.

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

ute. Congress, not the United States Supreme Court, should create such a rule if it is to exist. Congress, in fact, is free to do so. The Supreme Court has repeatedly upheld *Pinkerton* over the years, so it seems exceedingly unlikely that the Court would strike down a statute that embodies the *Pinkerton* theory. Until Congress sees fit to create such a statute, however, the *Pinkerton* theory is an impermissible manner of assessing criminal liability. Defendants should not be made to "languish in prison"[213] due to a judicial rule that is the equivalent of a federal common law crime.

213. United States v. Bass, 404 U.S. 336, 348 (1971).