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Pinkerton v. United States Revisited: A Defense of Accomplice Liability

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Abstract

On May 4, 1982, the Florida Third District Court of Appeal upheld the robbery and kidnapping conviction of Eugene Martinez even though Martinez had not actually taken part in a robbery or a kidnapping.

KEYWORDS: revisited, liability, defense

Pinkerton v. United States Revisited: A Defense of Accomplice Liability

by Jon May*

I. Introduction

On May 4, 1982, the Florida Third District Court of Appeal upheld the robbery and kidnapping conviction of Eugene Martinez even though Martinez had not actually taken part in a robbery or a kidnapping.¹ What Martinez had done, however, was to introduce a prospective buyer of marijuana to two sellers who subsequently kidnapped and robbed the buyer when it came time to produce the drug. Martinez' liability for these acts was predicated solely on the legal theory which holds conspirators responsible for the natural and probable consequences of their acts.² The court stated, "[g]iving appropriate consideration to experience in this community, we think . . . that robbery and kidnapping are a foreseeable consequence of conspiracy to effect a large drug transaction. . . ."³

This principle of accomplice liability, popularly known as the *Pinkerton* rule,⁴ has been almost universally condemned by the academic community.⁵ Yet since the early 1970s it has been applied with increasing frequency, particularly in the context of narcotics prosecutions.⁶ Al-

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1. *Martinez v. State*, 413 So. 2d 429 (Fla. 3d Dist. Ct. App. 1982).

2. *Id.* at 430.

3: *Id.*

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

5. Note, *Vicarious Liability For Criminal Offenses of Co-Conspirators*, 56 *YALE L.J.* 371 (1947); Note, *Developments in the Law-Criminal Conspiracy*, 72 *HARV. L. REV.* 920, 998 (1959); W. LAFAYE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 515 (1972); Note, *Liability for Co-Conspirators Crimes in the Wisconsin Party to a Crime Statute*, 66 *MARQUETTE L. REV.* 344 (1983).

6. When W. Lafave and A. Scott published their *HANDBOOK ON CRIMINAL LAW* in 1972, they reported at page 515 that the *Pinkerton* rule had "never gained broad acceptance." This assertion is no longer correct. The *Pinkerton* rule has become entrenched in federal law. *See, e.g., United States v. Raffone*, 693 F.2d 1343, 1346 (11th

though the principle applied in *Martinez* was known at common law, it was not widely recognized until the United States Supreme Court decided *Pinkerton v. United States* in 1946.⁷ In that case, two brothers, Walter and Daniel Pinkerton, were charged with conspiring to evade the payment of taxes on whiskey and, additionally, with numerous spe-

Cir. 1982) (prosecution for conspiracy to possess and possession with intent to distribute marijuana. The court held that liability cannot rest upon *Pinkerton* unless jury is given a *Pinkerton* charge); *Government of Virgin Islands v. Dowling*, 633 F.2d 660, 666 (3d Cir.), *cert. denied*, 449 U.S. 960 (1980) (prosecution for conspiracy to commit bank robbery and assault occurring as a result of the bank robbery); *United States v. Rosado-Fernandez*, 614 F.2d 50, 53 (5th Cir. 1980) (prosecution for conspiracy to possess and possession with intent to distribute cocaine. The court notes that responsibility extends even to those co-conspirator acts of which the defendant has no knowledge.); *United States v. Wilner*, 523 F.2d 68 (2d Cir. 1975) (prosecution for conspiracy to possess and possession with intent to distribute marijuana. “[W]here there is a continuing conspiracy which contemplates and encompasses the illegal act performed, each conspirator is responsible for the acts of his co-conspirator.” *Id.* at 72-73.); *Poliafico v. United States*, 237 F.2d 97, 116 (6th Cir. 1956) (prosecution for conspiracy to possess and possession of heroin.).

The doctrine of accomplice liability has also been widely accepted by the states. *See, e.g.*, *Martinez v. State*, 413 So. 2d 429, 430-31 (Fla. 3d Dist. Ct. App. 1982) (defendant marijuana broker held responsible where sellers of marijuana robbed buyer of funds to be used for purchase); *State v. Barton*, 424 A.2d 1033, 1038 (R.I. 1981) (conspiracy to break into building and steal precious metals. Defendants held liable for destruction of communication lines by co-conspirators done in furtherance of the conspiracy.); *Commonwealth v. Roux*, 350 A.2d 867, 871-72 (Pa. 1976) (defendant held responsible for murder where he conspired with others to rob and beat victim); *State v. Stein*, 70 N.J. 369, 360 A.2d 347, 359 (1976) (defendant, an attorney, held responsible for robbery and assault, where he provided information to robbers for what he believed would be a burglary of an unoccupied residence); *Pendleton v. State*, 329 So. 2d 145, 149 (Ala. Ct. App. 1976) (conspiracy to commit murder. Defendant held responsible for murder based on prearrangement and presence alone); *Johnson v. State*, 482 S.W.2d 600, 605 (Ark. 1972) (defendant held vicariously liable for death of little girl during burglary attempt); *State v. Nutley*, 24 Wis. 2d 527, 129 N.W.2d 155, 169 (1964) (presence of weapons supports inference that defendants wanted to avoid any contact with police and thus assault on police officer was a natural consequence of their unlawful agreement); *Lusk v. State*, 64 Miss. 845, 2 So. 256 (1897) (defendant held responsible for arson where he combined with two others to frighten a man and his wife away from their house); *The Anarchist's Case*, 122 Ill. 1, 12 N.E. 865 (1887) (defendant held responsible for death resulting from conspiracy to overthrow government).

North Carolina and New York have rejected the doctrine. *See State v. Small*, 272 S.E.2d 128 (N.C. 1980); *People v. McGee*, 49 N.Y. 2d 48, 399 N.E.2d 1177 (1979). Massachusetts has never ascribed to the doctrine; *see Commonwealth v. Stasium*, 349 Mass. 38, 206 N.E. 2d 672 (1965).

7. 328 U.S. 640.

cific acts of tax evasion. Although the evidence at trial established the existence of a conspiracy, there was no evidence that Daniel Pinkerton participated directly in the commission of any of the substantive offenses and, in fact, he was in jail when some of these acts took place.⁸

At trial the court instructed the jury that if they found that the defendants had been engaged in a conspiracy they could also find the defendants guilty of any substantive offense which was a natural and probable consequence of that conspiracy.⁹ Daniel Pinkerton was found guilty of conspiracy and six substantive counts of tax evasion. His conviction was upheld by the Fifth Circuit¹⁰ and the Supreme Court affirmed in an opinion written by Justice Douglas. The Supreme Court held that a party to a conspiracy may be prosecuted for the substantive crimes of a co-conspirator, committed in furtherance of the conspiracy, even though the person did not participate in the crime and even if he did not intend for that specific crime to occur.¹¹

This rationale, known as the doctrine of accomplice liability, was rarely utilized until the 1970s, when it became extremely popular among state and federal prosecutors. Critics have argued that the rationale of *Pinkerton* represents an unwarranted extension of the civil doctrine of *respondeat superior* into criminal jurisprudence;¹² that it violates the basic tenet of criminal law which holds that persons are responsible only for their own conduct and not that of others;¹³ that the decision itself is flawed because Justice Douglas confused a rule of evidence with a rule of criminal responsibility and relied on authorities which upon close inspection do not stand for the broad proposition for

8. *Id.* at 648 (J. Rutledge dissenting).

9. *Id.* at 646 n.6.

10. 151 F.2d 499 (5th Cir. 1945).

11. 328 U.S. at 647-48.

12. Justice Rutledge, in his dissent in *Pinkerton*, complained that holding Daniel Pinkerton liable for the acts of his brother amounts to "vicarious criminal responsibility as broad as, or broader than, the vicarious civil liability of a partner for acts done by a co-partner in the course of the firm's business." *Id.* at 651.

13. "[I]t seems clear that the doctrine of *respondeat superior* must be repudiated as a foundation for criminal liability. For it is of the very essence of our deep-rooted notions of criminal liability that guilt be personal and individual; and in the last analysis the inarticulate subconscious sense of justice of the man on the street is the only sure foundation of law." Sayre, *Criminal Responsibility For The Acts of Another*, 43 HARV. L. REV. 689, 717 (1930); "[A]ny doctrine of vicarious criminal liability is repugnant to common law concepts." Note, *Vicarious Liability For Criminal Offenses of Co-Conspirators*, 56 YALE L.J. 371, 374 (1947).

which they were cited.¹⁴ Finally, it has been said that no court has put forth an adequate rationale for the doctrine,¹⁵ and that because of the real danger that jurors may confuse the issues in a conspiracy prosecution, the doctrine should be abandoned.¹⁶

This article argues that the critics of *Pinkerton* have confused the civil doctrine of vicarious liability¹⁷ with the criminal doctrine of accomplice liability. It first explores how the common law treated various parties to a criminal act and how some courts have recently analyzed these common law precepts. It examines the relationship between these precepts and the law of conspiracy. It then addresses the various critics of *Pinkerton*, concluding that the doctrine of accomplice liability is not an aberration, but rather, a reaffirmation of some basic tenets of the common law.

II. The Parties to a Crime

A. At Common Law

The terms used at common law to describe the parties to a crime arise naturally from the roles played by the various participants in the commission of a criminal act. At common law there can be only three parties to a crime—the principal in the first degree, the principal in the second degree, and the accessory before the fact. Each is responsible for the natural and probable consequences of his actions. The individual most directly responsible for the commission of a criminal act is known as the *principal in the first degree*. Generally he is the person who pulls the trigger or who utters the forged instrument; “the actor,

14. Recent Decisions, *Criminal Law - Conspiracy and Substantive Offenses - Distinctions Between Conspirators and Accomplices - Conviction of Conspirators for Substantive Offenses, Although He Did Not Actually Participate in Them*, 16 FORDHAM L. REV. 275 (1947) [hereinafter cited as Recent Decisions].

15. Note, *Developments in the Law - Criminal Conspiracy*, 72 HARV. L. REV. 920, 998 (1959).

16. Note, *supra* note 13, at 377 (The author of this article believes that conspiracy prosecutions are likely to confuse the jury because of the greater number of defendants and the admissibility of the co-conspirator statements to show membership in the conspiracy. Attenuated theories of liability therefore increase the chances of prejudicial error.).

17. The tort doctrine of vicarious liability holds persons responsible for the acts of others solely on the basis of their relationship as principal and agent. W. PROSSER, *THE LAW OF TORTS* 467 (4th ed. 1971).

or absolute perpetrator of the crime."¹⁸ At common law, an individual who employed an intermediary to commit a crime could not be considered a principal, even though he might have been the one most responsible for the crime in the sense of having originated or initiated it.¹⁹ This did not mean that an individual who employed an intermediary would be without criminal liability. As an accessory or a principal in the second degree he would be subject to the same punishment as the principal in the first degree.²⁰ What it did mean, however, was that common law jurists distinguished criminal actors, not in terms of their ultimate legal or moral responsibility, but in terms of the specific acts they performed.

Frequently a principal in the first degree is present at the time that an offense is committed. Presence, however, is not required. If A employs a child to pass a counterfeit check,²¹ or if A leaves poison for another who subsequently drinks it,²² A is considered a principal in the first degree under a theory of constructive presence.²³ Similarly, if A and B combine together to forge an instrument, each individually forging a separate part, both are principals in the first degree, even if they were not present together when the instrument was completed.²⁴

One who aids, counsels, commands, or encourages the principal in the first degree is a *principal in the second degree*, more frequently known as an aider and abettor.²⁵ Fundamentally, what distinguishes a principal in the second degree from a principal in the first degree is the fact that without the acts taken by the principal in the first degree, the

18. 4 W. BLACKSTONE, COMMENTARIES *34. "A principal in the first degree may simply be defined as the criminal actor. He is the one who, with the requisite mental state, engages in the act or omission concurring with a mental state which causes the criminal result." W. LAFAVE & A. SCOTT, 496 (1972).

19. W. LAFAVE & A. SCOTT, *supra* note 18, at 496-7 (an exception to this rule is where the intermediary is a child, is insane, or has been misled as to the true nature of his acts.) See 4 W. BLACKSTONE, *supra* note 18, at 35.

20. W. LAFAVE & A. SCOTT, *supra* note 18, ("[A]ccessories shall suffer the same punishment as their principal.") 4 W. BLACKSTONE, *supra* note 18, at 39.

21. Commonwealth v. Hill, 11 Mass. 136 (1814).

22. Rex v. Harley, 172 Eng. Rep. 744 (1830).

23. W. LAFAVE & A. SCOTT, *supra* note 18, at 497; State v. Deyo, 358 S.W.2d 816, 821 (Mo. 1962); W. BLACKSTONE, *supra* note 18, at 34, 35.

24. Rex v. Bingley, 168 Eng. Rep. 890, 891 (1821).

25. W. BLACKSTONE, *supra* note 18 at 34 ("A principal, in the first degree, is he that is the actor, or absolute perpetrator of the crime; and, in the second degree, he who is present, aiding, and abetting the act to be done." *Id.*).

conduct of the principal in the second degree would not be criminal.²⁶ Thus, if A provides B with a ride to a bank, knowing that B intends to rob the bank, A would not be guilty as an aider and abettor unless a robbery actually took place.²⁷

It is easy to identify the principal in the second degree when one person acts while the other merely encourages. But when an individual's involvement is extensive, as where B restrains C so that A can shoot C, the distinctions become blurred.²⁸ Generally, one must be present at the commission of a criminal offense to be an aider and abettor.²⁹ Presence, however, may be constructive as well as actual. Thus, where B is in a position to alert A³⁰ or prevent others from interfering with A³¹ or where B's actions are such as to make A's job easier,³² B is held to be constructively present, no matter how far away he is from

26. *United States v. Rodgers*, 419 F.2d 1315, 1317 (10th Cir. 1969) (the government's failure to show that anyone instigated a riot precluded the defendants' convictions for aiding and abetting in the instigation of a riot); *Shuttlesworth v. City of Birmingham, Ala.*, 373 U.S. 262, 265 (1963) (where trespass conviction of principal was held to be constitutionally infirm, conviction of aider and abettor was likewise infirm); *United States v. Horton*, 180 F.2d 431, 437 (7th Cir. 1950) (the government's failure to show that the principal was not registered to distribute marijuana precluded the defendants' conviction for aiding and abetting in an unlawful distribution).

27. Today persons who engage in a conspiracy, solicit others to commit an offense, or attempt to commit an offense themselves, may be subjected to punishment even when no substantive crime has occurred; this was not so at common law. Because ancient law exacted reparations for harm done, no punishment was exacted where harm was attempted, but none occurred. Reparations consisted of a fine paid to the injured party and to the king. Thus, early criminal law shared the same purpose and origin as early tort law. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 509 (1898).

28. Consequently, most jurisdictions have abolished the distinctions between accessories and principals in the first and second degrees. *See, e.g.*, 18 U.S.C. § 2 (1981) which defines principals as "[W]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

29. *United States v. Molina*, 581 F.2d 56, 61 n.8 (2d Cir. 1978); W. LAFAVE AND A. SCOTT, *supra* note 18, at 497.

30. *Vincent v. State*, 220 Md. 232, 239, 151 A.2d 898, 903 (1959); *Mitchell v. Commonwealth*, 33 Va. (1 Gratt) 845, 867 (1880).

31. *State v. Tally*, 102 Ala. 25, 76, 15 So. 722 (1894); W. LAFAVE & A. SCOTT, *supra* note 18, at 498.

32. *Dean v. State*, 85 Miss. 40, 42, 37 So. 501, 502 (1904); *State v. Tally*, 102 Ala. 25, 76-76, 15 So. 722, 740 (1894); *State v. Poynoir*, 36 La. Ann. 572, 575 (1884); *State v. Hamilton*, 13 Nev. 386, 391 (1878).

the scene of the crime.³³ One who enters into an agreement which counsels, commands or encourages the commission of a crime but who is not present at the crime, either constructively or actually, is known as an *accessory before the fact*.³⁴

What distinguishes the accessory before the fact from the principal in the second degree is primarily the lack of presence. In some circumstances, however, the two are distinguishable on the basis of the existence of an agreement.³⁵ It is always necessary for there to be an agreement between an accessory and a principal in order to hold the accessory liable.³⁶ A principal in the second degree, however, may be held liable based on his intent and his actions independent of any intercourse between him and the principal.³⁷ It is sometimes said that what the principal in the second degree shares with the principal in the first degree is a "community of unlawful intent."³⁸ But as the Fifth Circuit has observed, community of unlawful intent, while similar to an agreement, is not the same.³⁹ A defendant may voluntarily aid the principal in the commission of a criminal act and be liable as principal in the second degree, but not be liable as a conspirator or an accessory before the fact because of the absence of an actual agreement to do an unlaw-

33. W. LAFAVE & A. SCOTT, *supra* note 18, at 497-98.

34. An accessory before the fact is one "who being absent at the time of the crime committed doth yet procure, counsel, or command another to commit a crime." 4 BLACKSTONE, *supra* note 18, at 36.

35. *Sams v. Commonwealth*, 294 Ky. 393, 396, 171 S.W.2d 989, 991 (1943).

36. *See, e.g., Morei v. U.S.*, 127 F.2d 827, 830 (6th Cir. 1942) (where the absence of an agreement between the defendant and the principal led the Sixth Circuit to hold that the defendant was not responsible for the principal's sale of narcotics even though the defendant's actions enabled the buyer to contact the seller).

37. In *State v. Tally*, R. C. Ross made the fatal mistake of seducing Anne Skelton. Skelton's three brothers became enraged at what had happened to Anne and set out to murder Ross, who lived nearby. The whole community was aware of what the Skelton clan had set out to do and Ed Ross, a relative of R. C. Ross, sent him a telegram, stating, "[f]our men on horseback with guns following. Look out." John B. Tally, a judge of the Ninth Judicial Circuit of Alabama who was Anne's brother-in-law became aware of Ed's telegram and sent his own telegram to the telegraph officer who was a personal friend. "Do not let warned party get away. Say nothing." As a result of this telegram R. C. Ross never received Ed Ross's warnings. Even though the Skeltons were not aware of his assistance Tally was still held to be an aider and abettor. 102 Ala. at 70, 15 So. at 739.

38. *U.S. v. Bright*, 630 F.2d 804,813 (5th Cir. 1980).

39. *United States v. Bright*, 630 F.2d 804, 813 (5th Cir. 1980). *But see* *Russell v. United States*, 222 F.2d 197, 199 (5th Cir. 1955) (where the court confuses community of unlawful intent with agreement.).

ful act. For example, where C encourages B to murder X and A decides to help B independent of any encouragement by C or communication with B and B does in fact murder X with A's aid, A is a principal in the second degree because he was present, he aided B, and he shared in B's intent. C is an accessory before the fact because he was not present and because he entered into an agreement with B. A, though present at the scene, is not a principal in the first degree because his liability is dependent upon B actually killing X.⁴⁰

The distinctions made by the common law based on the roles played by the participants in a crime do not explain, however, *why* the common law treated accessories differently from principals. Although each was held equally liable for an offense, and subject to the same penalty, common law jurists erected numerous barriers to the prosecution of accessories. Some of these barriers were undoubtedly designed to limit the imposition of the death penalty, which was the punishment for all felonies at common law.⁴¹ An accessory, for instance, could only be tried in the jurisdiction where the crime of accessoryship occurred.⁴² Thus, the accessory who committed his acts in France could not be prosecuted for the resultant crime in England because venue for him lay only in France.⁴³ Similarly, an accessory could not be convicted under an indictment charging him as a principal. Where the extent of an individual's participation was unknown, this rule operated to relieve the party of any liability at all.⁴⁴

The rule that an accessory could not be convicted unless the principal was also convicted probably had a different and more ancient origin. Since, at early common law, guilt or innocence was determined by a supernatural process, such as trial by water, the medieval mind could not risk the contradiction that would occur if any accessory were found guilty where the principal was found innocent.⁴⁵ "What should we think of the God who suffered the principal to come clean from the

40. If A's assistance was solicited by C but his presence in no way aided B, that is, if A with no intent to aid B goes to the scene of the crime and, unknown to B, watches as B murders X, A would not be an aider and abettor. His liability, if any, would rest upon his prior agreement with A and would be that of an accessory. W. LAFAVE & A. SCOTT, *supra* note 18, at 498, 503.

41. W. BLACKSTONE, *supra* note 18, at 18.

42. *People v. Hodges*, 27 Cal. 340, 341 (1865).

43. W. LAFAVE & A. SCOTT, *supra* note 18, at 499.

44. *Id.* at 499-500.

45. 2 F. POLLOCK & F. MAITLAND, *supra* note 27, at 509.

ordeal after the accessory had blistered his hand.”⁴⁶ Modern legislatures, less troubled by such contradictions, have for the most part eliminated these rules. Nevertheless, most statutes still employ common-law terms to describe parties to a crime. When a statute uses a common-law term without defining it, the legislature is presumed to have intended the common law meaning.⁴⁷ Therefore, “it is still necessary to apply the common law rules in order to determine whether a person, who is absent when a crime is committed by another, is guilty as a principal.”⁴⁸

B. Some Modern Interpretations of the Common-Law Concepts of Parties to a Crime

In *Morei v. United States*,⁴⁹ a physician, Dr. Matthew Platt, was convicted of various charges arising out of the sale of heroin to an informer. Dr. Platt, who was well known for his interest in horse racing, was approached by Paul Beach, who was acting under the direction of government narcotics agents. Beach asked Platt if he would supply heroin to stimulate horses. Platt told Beach that he did not have any heroin but gave Beach the name of Louis Morei.⁵⁰ Platt instructed Beach to tell Morei that the doctor had sent him; and Platt assured Beach that Morei would take care of him.⁵¹ On appeal to the Sixth Circuit the doctor contended that he was not guilty of any crime and the court agreed. It rejected the government’s argument that Platt was a principal because Morei could not have been in contact with Beach except for Platt’s actions. The court reasoned that this theory would open up “a vast field of offenses that have never been comprehended within the common law.”⁵² It cited to the decision by Judge Learned Hand in *United States v. Peoni*,⁵³ and concluded that the definitions of aid, abet, induce, and procure have nothing to do with the probability that a result will flow from certain conduct.⁵⁴ Rather, these terms refer to the

46. *Id.* at 509.

47. *U.S. v. Turley*, 352 U.S. 407, 411 (1957).

48. *Morei v. United States*, 127 F.2d 827, 830 (6th Cir. 1942).

49. 127 F.2d 827 (6th Cir. 1942).

50. *Id.* at 829.

51. *Id.* at 830.

52. *Id.* at 831.

53. 100 F.2d 401 (2d Cir. 1938).

54. *Morei v. United States*, 127 F.2d at 831.

specific conduct of the accused.⁵⁵

There was no evidence of an agreement between Platt and Morei (which would have made Platt an accessory) nor was Platt actually or constructively present when the crime was committed (which would have made him an aider and abettor). Platt's actions, which undoubtedly contributed to the crime, were insufficient, in the eyes of the *Morei* court, to establish the doctor's criminal responsibility. Thus, in the court's view assistance alone may not be sufficient to make one accountable for the commission of an offense. Assistance must be joined with some sort of mental element. In *Morei*, Dr. Platt clearly knew that Beach wanted heroin. But the court did not believe that merely knowing that one's services or products would be used for illicit purposes was sufficient to establish liability.⁵⁶ To be held accountable, it ruled, the accomplice must have the same intent as the principal.⁵⁷

Fundamentally, what was missing in *Morei* was any evidence of an agreement on Platt's part to aid Morei in distributing heroin. Such evidence was required since Platt was charged only with being an accessory to Morei's crime. But what if Beach had been charged with an offense? That is, what if Platt had been accused of being an accessory to Beach's crime? There were, after all, direct talks between Platt and Beach.⁵⁸ The Ninth Circuit faced this very situation in *Robinson v. United States*.⁵⁹ The defendant, Jesse Robinson, was charged as an aider and abettor to the purchase of heroin by Tom Lowe. Robinson's only involvement, however, was providing Lowe with a telephone number.⁶⁰ The government argued that providing the telephone number made it easier for Lowe to commit his crime.⁶¹ Relying on *Morei*, the Ninth Circuit rejected this argument. According to the court, Robinson's aid was no different from the aid given Lowe by the telephone company or even by the company that manufactured Lowe's automobile.⁶² The *Robinson* court conceded that these acts could be considered links in the chain of causation, but refused to extend criminal liability to such acts.⁶³

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 829.

59. 262 F.2d 645 (9th Cir. 1959).

60. *Id.* at 647.

61. *Id.* at 649.

62. *Id.*

63. *Id.*

Surely there is a difference between a person who knowingly provides the telephone number of a source of heroin and a person who ignorantly provides a service to one who, in part aided by that service, goes out and commits a crime. The analogy in *Robinson* is faulty because there was no evidence that the telephone company *knew* that Lowe intended to use their equipment to purchase heroin. Where a vendor knows that his goods or services will be used for an illegal purpose his liability depends upon whether that knowledge can be equated with intent.⁶⁴ This is because society holds liable only those accessories who actually intend for a crime to occur.⁶⁵ A better rationale for absolving Robinson of responsibility would be that the act of giving Lowe a telephone number, even with the knowledge of how Lowe intended to use it, was not sufficient to show that he wanted Lowe to purchase heroin.⁶⁶ Lowe's actions were insufficient evidence of an agreement between the two. Where a crime occurs as the result of a criminal conspiracy, however, the situation is quite different. There, at least for some purposes, the conspirator does share the same criminal intent as the principal in

64. *Peoni*, 100 F.2d at 403.

65. *Id.*

66. Where a vendor knowingly profits from the use of his goods or services for the commission of a crime it seems reasonable for that vendor to be subject to some form of liability. Lafave and Scott, *citing* *Jindra v. United States*, 69 F.2d 429 (5th Cir. 1934) and *Vukich v. United States*, 28 F.2d 666 (9th Cir. 1928), discuss the liability of the vendor who "sells with knowledge that the subject of the sale will be used in commission of a crime," and note that, "The earlier decisions generally held that aid with knowledge was enough. . . ." They argue, however, that the better view, as expressed in *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938), is that the vendor must himself wish the crime to occur. W. LAFAVE & A. SCOTT, *supra* note 18, at 508.

Not everyone subscribes to this view. *See, e.g., Backum v. United States*, 112 F.2d 635 (4th Cir. 1940) ("The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun. . .") *Id.* at 637.

A compromise between these two views is reflected in the Criminal Code Reform Act of 1981. If enacted it would create a new category of offense which would punish those who knowingly (as opposed to intentionally) facilitate the commission of an offense by providing substantial assistance to the principal. This offense applies only to persons who provide substantial assistance and limits punishment to that applicable to offenses two grades below the offenses facilitated. Report of the Committee on the Judiciary, United States Senate, To Accompany § 1630, Criminal Code Reform Act of 1981, S. REP. NO. 97-307, 97th Cong., 1st Sess. (1981).

the first degree.

III. The Law of Conspiracy

Most jurisdictions define a conspiracy as a combination between two or more persons formed for the purpose of doing either an unlawful act or a lawful act by unlawful means.⁶⁷ The gist of the offense is the agreement and thus conspirators may be punished even where the purpose of the conspiracy is not achieved.⁶⁸ What distinguishes the accessory before the fact from the conspirator is that the accessory's liability depends upon the completion of a substantive offense while the conspirator's liability begins from the moment that he enters into an unlawful agreement.⁶⁹ The terms *accessory* and *principal* are therefore merely descriptive of a role played by a party to a crime, while the term *conspiracy* describes a crime itself. An accessory before the fact will always be chargeable as a conspirator although not every conspirator will be chargeable as an accessory. This fact is significant for two reasons. From the standpoint of prosecutorial discretion, it means that whenever the purpose of a conspiracy is achieved, an individual conspirator may be charged with two offenses; a substantive offense, based upon his role as an accessory to a completed crime, and a conspiracy by virtue of his entry into an unlawful agreement. From an evidentiary standpoint, it means that in establishing an individual's liability for the commission of a crime, a finder of fact may consider an individual's membership in a conspiracy in order to determine whether that individual is an accessory before the fact. In other words, liability for the commission of a substantive offense does not flow from membership in a conspiracy, but rather *evidence* of one's membership in a conspiracy may establish one's role as an accessory before the fact.

Although closely related, there exists a fundamental difference between the liability of the conspirator and that of the accessory. A con-

67. W. LAFAVE & A. SCOTT, *supra* note 18, at 454; *United States v. Hutto*, 256 U.S. 524, 528-29 (1921).

68. W. LAFAVE & A. SCOTT, *supra* note 18, at 454; *United States v. Rabinowich*, 238 U.S. 78, 86 (1915).

69. *Compare* *United States v. Rabinowich*, 238 U.S. 78 (holding that a conspirator may be punished even when the purpose of the conspiracy is not achieved) and *Fiswick v. United States*, 329 U.S. 211 (1945) (noting that an overt act was not required at common law) *with* *United States v. Rodgers*, 419 F.2d 1315 (10th Cir. 1969) (holding that the failure to show that anyone had instigated a riot precluded the defendants' convictions for aiding and abetting).

spirator's liability attaches from the moment he enters into the conspiratorial agreement.⁷⁰ Although a jurisdiction may require the commission of some overt act⁷¹ as a condition for a conspiracy prosecution, and although, as an evidentiary matter, the acts and statements of co-conspirators (even those occurring before the defendant joined the conspiracy) may be introduced against other co-conspirators, it is the *agreement* and nothing else which society finds offensive.⁷² An accessory's liability, however, depends upon the completion of an *actual crime*.⁷³ Contrary to what most critics of accomplice liability maintain, an accessory is responsible only for the acts of his confederates which occurred subsequent to and as a result of the accessory's actual assistance or encouragement.

The relationship between conspiracy and accessories before the fact was recognized by the Supreme Court of Illinois in a case which arose out of the infamous Haymarket Square Massacre. In *The Anarchist Case*,⁷⁴ the defendants, members of a revolutionary society, convened an open air meeting near Haymarket Square in Chicago. Bombs were manufactured and distributed by one of the defendants before the meeting and speeches began.⁷⁵ The crowd became excited and when the police attempted to disperse them a bomb exploded, killing a large number of police. There was no evidence that any of the defendants threw the bomb.⁷⁶ Nevertheless, each was convicted of murder. In upholding the defendants' convictions, the court first noted that each was a member of a conspiracy which preached the overthrow of the government and which manufactured bombs to be used in the revolution.⁷⁷ The defendants' liability, however, did not flow from their membership in the conspiracy. Rather, the evidence of the conspiracy was used to show a common design to encourage the violence which occurred. Its purpose at trial was to establish the position of the mem-

70. W. LAFAYE & A. SCOTT, *supra* note 18, at 459.

71. While the common law did not predicate conspiratorial liability on the commission of an overt act, *see, e.g.*, *Fiswick v. U.S.*, 329 U.S. 211, 216 n.4 (1946), many modern statutes do. *Compare* 18 U.S.C. § 371 (1981), which predicates liability on the doing of any act to effect the object of the conspiracy, *with* 21 U.S.C. § 846 (1981) which has no such requirements.

72. *U.S. v. Rabinowich*, 238 U.S. at 88.

73. *See supra* note 26.

74. 122 Ill. 1, 12 N.E. 865, *aff'd on other grounds*, 123 U.S. 131 (1887).

75. *Id.* at 100, 12 N.E. at 914.

76. *Id.*

77. *Id.* at 119-20, 133-34, 12 N.E. 923-24, 930-31.

bers of the conspiracy as accessories so that they could be found liable for the crime of murder under an accomplice liability theory.⁷⁸

IV. An Analysis of the Pinkerton Rule

Although the evidence presented at trial in *Pinkerton v. United States*⁷⁹ demonstrated the existence of a conspiracy, there was no evidence to connect Daniel Pinkerton to any action taken in regard to the untaxed whiskey.⁸⁰ Nevertheless, the jury was instructed that if they found the defendants to be members of a conspiracy they could, on that basis alone, convict the defendants of any substantive act committed in furtherance of the conspiracy.⁸¹ In upholding Daniel Pinkerton's convictions for substantive violations of the Internal Revenue Code, Justice Douglas focused upon that body of conspiracy law which holds that the overt act of one partner to a crime is attributable to all.⁸² Since an overt act is an essential ingredient in the crime of conspiracy, the Court did not "see [any reason] why the same or other acts in furtherance of the conspiracy . . . [should not be] attributable to the others for the purpose of holding them responsible for the substantive offense."⁸³

The Court's reliance on those authorities that attribute to all members of a conspiracy the overt acts of any one conspirator has been severely criticized.⁸⁴ As critics of *Pinkerton* have correctly pointed out, the purpose of the overt act rule is simply to establish that a conspiracy has passed beyond mere words; that it has reached a point where it poses a sufficiently real threat to society that sanctions should be imposed.⁸⁵ Its function is solely to prevent persons from being prosecuted for making assertions that they had no intention to act upon. The overt act, which may be purely innocent and lawful in itself, is wholly separate from the conspiracy.⁸⁶ Contrary to the dicta in *Pinkerton*,⁸⁷ it is

78. *Id.* at 102, 225-26, 12 N.E. at 915, 974.

79. 328 U.S. 640 (1946).

80. *Id.* at 645.

81. *Id.* at 645, n.6.

82. *Id.* at 647.

83. 328 U.S. at 647.

84. Note, *supra* note 15, at 998; Recent Decisions, *supra* note 14, at 277.

85. Recent Decisions, *supra* note 14 at 277. *People v. McGee*, 49 N.Y.2d 48, 58, 399 N.E.2d 1177, 1182 (1979), *cert. denied sub nom. Quamina v. New York*, 446 U.S. 942 (1980).

86. Recent Decisions, *supra* note 14, at 277.

87. While the court's statement at page 647 that "an overt act is an essential

not even an essential element of a conspiracy.⁸⁸ To the extent that Douglas relied upon the overt act rule, the opinion is flawed. But Douglas relied as well on “[t]he rule which holds responsible one who counsels, procures, or commands another to commit a crime. . . .”⁸⁹ This second ground is the real authority for the *Pinkerton* rule and is merely a restatement of the common law doctrine which holds accessories liable for the natural and probable consequences of their acts.

Many critics claim that the doctrine of accomplice liability is an extension of the doctrine of vicarious liability to criminal prosecution and that this is foreign to the common law. But these two doctrines differ substantially from each other. The tort doctrine of *respondeat superior* did not develop in its present form until just prior to the end of the seventeenth century.⁹⁰ Between 1300 and 1700 a master’s liability for the acts of his servant was confined to those situations where the master specifically commanded or authorized a servant to commit a tortious act.⁹¹ After *Boson v. Sanford*⁹² and *Turberville v. Stamp*,⁹³ the requirement of an express or implied command disappeared. From 1700 on, the doctrine was expanded to hold principals civilly liable for any tortious act of their agents committed within the scope of their employment and during the course of business.⁹⁴ But in 1730, not long after the development of the doctrine of *respondeat superior*, an English court determined in *Rex v. Huggins*⁹⁵ that this doctrine had no place in criminal law. A warden was held not to be criminally responsible for the death of a prisoner where the death resulted from the acts of a deputy warden who acted without the command or knowledge of the defendant.⁹⁶

It is important to distinguish the doctrine of vicarious liability,

ingredient of the crime of conspiracy under § 37 of the Criminal Code, 18 U.S.C. § 88” was literally correct it cannot be said that this requirement bears any relation to the doctrine of accomplice liability, a doctrine which developed at a time when there was no overt act requirement.

88. It was not required at common law and it is not required under federal law unless specified by statute. *Fiswick v. United States*, 329 U.S. 211, 216 (1945); *United States v. Cuni*, 689 F.2d 1353, 1356 (11th Cir. 1982).

89. *Pinkerton v. United States*, 328 U.S. at 647.

90. Sayre, *supra* note 13, at 692.

91. *Id.* at 691.

92. 91 Eng. Rep. 382 (1689).

93. 92 Eng. Rep. 944 (1697).

94. Sayre, *supra* note 13, at 693.

95. 92 Eng. Rep. 518 (1730).

96. Sayre, *supra* note 13, at 700-01.

which holds persons responsible solely on the basis of their business relationship, from the doctrine of accomplice liability, which holds persons liable only for those events which occur as a foreseeable consequence of a criminal agreement.⁹⁷ Those critics of *Pinkerton* who have failed to understand this distinction have failed in part because of Judge Hand's faulty analysis in *Peoni*. Judge Hand erred when he concluded that common law jurists did not intend for accomplice liability to include results which were the probable consequence of a criminal agreement.⁹⁸ His conclusion appears to be based solely upon his own understanding of the words used to describe the accomplice's acts and not upon a consideration of actual cases. An examination of case law reveals that over a hundred years before the doctrine of *respondeat superior* appeared, the principle of accomplice liability was well developed.

In *Regina v. Saunders*,⁹⁹ decided in 1573, two individuals, Saunders and Archer, were charged with the murder of Saunders' daughter. Saunders, who wanted to kill his wife, confided in Archer, who suggested that Saunders poison her and who then procured the poison for his friend. The poison was placed in an apple intended for the wife but eaten instead by the daughter. Upholding the conviction of Saunders, the court acknowledged that he did not intend for his daughter to die. Nevertheless, ". . . it is every man's business to foresee what wrong or mischief may happen from that which he does with an ill intention, and it shall be no excuse for him to say that he intended to kill another, and not the person killed."¹⁰⁰ The court, however, reversed the conviction of Archer, finding that the death of the daughter was never intended by Archer and was distinct from the agreement to which he was privy.¹⁰¹ While Judge Hand would undoubtedly have approved of this result, the court's reasoning was very different from what he would have expected. Plowden, who reported the decision in *Saunders*, analyzed the case in unmistakably causative terms, "it seems to me reasonable that he who advises or commands an unlawful Thing to be done shall be adjudged Accessory to all that follows from the same Thing, but not from any other distinct Things."¹⁰²

97. Sayre, *supra* note 13, at 703-04.

98. *United States v. Peoni*, 100 F.2d at 402.

99. 75 Eng. Rep. 706 (1573).

100. *Id.* at 708.

101. *Id.* at 709.

102. *Id.*

Nearly 125 years later *Saunders* was cited in *Rex v. Plummer*.¹⁰³ In *Plummer*, eight persons attempted to smuggle a quantity of wool from England to France. Before they could get this wool aboard ship, they were stopped by a company of the king's officers. A weapon was fired and one of the smugglers was killed. It was not known which of the eight fired a weapon; nevertheless Plummer was found guilty under an accomplice liability theory. In reviewing the defendant's conviction, the court noted that:

[t]he design of doing any act makes it deliberate; and if the fact be deliberate, though no hurt to any person can be foreseen, yet if the intent be felonious, and the fact designed, if committed, would be felony, and in pursuit thereof a person is killed by accident, it will be murder in him and all his accomplices.¹⁰⁴

It was not known whether the smuggler was shot by a bullet meant for one of the king's men or because of some motive unconnected with the smuggling operation. The court held that it could not determine whether the killing was a natural and probable consequence of the crime, and therefore, Plummer's conviction was reversed.¹⁰⁵ It was reversed not because the common law did not view accomplice liability in terms of probabilities, but precisely because it did. It was this principle, long recognized at common law, which led the Supreme Court of Illinois in *The Anarchist Case*,¹⁰⁶ to conclude that the defendants were guilty of murder, not merely because of their membership in a conspiracy, but by virtue of their status as accessories before the fact, established through evidence of their conspiracy.¹⁰⁷

Commentators Lafave and Scott, two of the severest critics of *Pinkerton*, claim that the main justification in support of accomplice liability lies in the fact that crimes occurring as a result of a conspiracy are frequently performed as part of a larger division of labor; by declaring allegiance to a particular common object, a conspirator has implicitly assented to the commission of foreseeable crimes in furtherance of the object.¹⁰⁸ Critical of this rationale, they argue that criminal responsibility should depend upon "something more than the attenuated connec-

103. 84 Eng. Rep. 1103 (1701).

104. *Id.* at 1107.

105. *Id.*

106. *See The Anarchist Case*, 122 Ill. 1, 12 N.E. 865 (1887).

107. *Id.* at 915.

108. W. LAFAVE & A. SCOTT, *supra* note 18, at 514.

tion resulting solely from membership in a conspiracy and the objective standard of what is reasonably foreseeable. [Otherwise, the] . . . law would lose all sense of just proportion."¹⁰⁹

[E]ach prostitute or runner in a large commercialized vice ring could be held liable for an untold number of acts of prostitution by persons unknown to them and not directly aided by them. Each retailer in 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.¹¹⁰

This critique, however, assumes that a conspirator's liability for a substantive offense flows solely from his role as a member of a conspiracy. Membership in a conspiracy, however, is merely evidence tending to establish the conspirator's status as an accessory before the fact.¹¹¹ It serves as evidence of an agreement connecting the accessory to the principal. Absent that direct connection, one can be in a conspiracy with the principal but not be an accessory to a crime committed by the principal.

Critics of *Pinkerton* frequently misinterpret the case as having announced a doctrine of liability predicated upon one's mere membership in a conspiracy.¹¹² For example, in *State v. Small*,¹¹³ the defendant

109. *Id.* (quoting from 1 National Comm'n on Reform of Federal Criminal Law Working Papers 156 (1970)).

110. *Id.*

111. *State v. Small*, 272 S.E.2d 128, 136, 139 (N.C. 1980). The National Comm'n on Reform of Federal Criminal Laws has recommended that the *Pinkerton* Rule be abandoned because it raises problems which could otherwise be avoided: (a) Is the co-conspirator liable for crimes committed before he joined the conspiracy, as he is for overt acts (a principle which serves another purpose)? (b) Do different rules of evidence apply to his liability for conspiracy and his liability for the specific offense? (c) Can he be acquitted for conspiracy and re-tried for the specific offense? (d) Should the test of withdrawal from the conspiracy be the same as for terminating liability for the specific offense?

National Comm'n on Reform of Federal Criminal Laws, Working Papers 157 (1970) as quoted in W. LAFAVE & A. SCOTT, *supra* note 18, at 514 n.14.

Each of these objections is the result of the Commission's faulty understanding of *Pinkerton*. The doctrine of accomplice liability flows from one's status as an accessory before the fact as evidenced by one's membership in a conspiracy. Properly understood, the doctrine is not susceptible to any of these objections.

112. In his dissent in *Pinkerton*, Justice Rutledge argued that the majority had violated both the letter and spirit of what Congress did when it separately defined the three classes of crime. According to Justice Rutledge, "[t]he gist of conspiracy is the

solicited someone to murder his wife. Although the defendant was not present when the killing took place, he was indicted for first degree murder. Under North Carolina law an accessory before the fact is held to be distinct from the principal in the first and second degree.¹¹⁴ One must be specifically indicted as an accessory, and an accessory to murder can only be sentenced to a maximum of life imprisonment.¹¹⁵ Although Small was unquestionably an accessory before the fact, the jury was charged that if they found the killing to have been in furtherance of the agreement, it was their duty to return a verdict of first degree murder.¹¹⁶ Small was found guilty as charged and sentenced to death. On appeal, the Supreme Court of North Carolina was asked to consider whether the doctrine of accomplice liability could render a party, whose conduct would otherwise be that of an accessory before the fact, a principal in the first degree. The court said no and reversed the conviction. To the extent that *Pinkerton*, as well as its own decisions, had announced an independent principle of substantive liability, the court held that those cases were inconsistent with traditional common law limitations on liability.¹¹⁷ Thus, under no acceptable theory could the court consider Small to be a principal. Although finding the *Pinkerton* rule to be unsound,¹¹⁸ the court correctly held that, to the extent that

agreement . . .” While “that of aiding, abetting or counseling is consciously advising or assisting another to commit particular offenses But when conspiracy has ripened into completed crime, or has advanced to the stage of aiding and abetting, it becomes easy to disregard their differences and loosely to treat one as identical with the other” 328 U.S. at 649.

What Justice Rutledge failed to recognize, however, is that Congress itself blurred the distinctions when it placed aiders and abettors and accessories before the fact within the same statute. See 18 U.S.C. § 2 (1981). While it is true that the gist of conspiracy is the agreement and that there are significant differences between a conspirator and an aider and abettor there is no difference between what a conspirator does and what an accessory does. A distinction arises only when a substantive crime is committed as a result of an agreement.

113. 272 S.E.2d 128 (N.C. 1980).

114. *Id.* at 132-133.

115. *Id.* at 131 n.2.

116. *Id.* at 131.

117. *Id.* at 134.

118. *Id.* at 134.

“Such a broad reading [of *Pinkerton*] leads to the rather startling result that a conspirator’s criminal liability for the act of another may be based less upon the circumstances of his personal participation than upon his presumed status as ‘partner’ in all actions which proximately result from the venture originally agreed upon. Fictions and presumption derived from

an individual's membership in a conspiracy is evidence of that individual's status as an accessory before the fact, he may be held responsible for the acts of the principal committed in furtherance of the criminal agreement.¹¹⁹

In a dramatic fashion *Small* demonstrates the importance of understanding the true nature of accomplice liability. At common law there are only three parties to a crime. Each party is responsible for the natural and probable consequences of his acts. A principal in the first degree is responsible for the death of any human being if that death results from his attempt to kill a specific human being. A principal in the second degree is likewise held responsible for any act done by the principal in the first degree with his assistance. An accessory before the fact is held responsible for any act taken by the principals which is a natural and probable consequence of their criminal agreement. This is the doctrine of accomplice liability. Membership in a conspiracy does not make a conspirator automatically a party to a substantive offense. Membership in a conspiracy, however, is evidence of his status as an accessory before the fact and, to the extent that he is an accessory before the fact, he is responsible for the natural and probable consequence of his actions.¹²⁰

the civil law of agency and partnership thus commingle with tort law notions of foreseeability and proximate cause to provide a stew of expanded criminal liability."

Id.

119. *Id.* at 136-37.

In sum, a defendant's conspiratorial involvement may often be strong evidence of his liability as a party to a crime which arose out of the conspiracy. His status as a party- whether he is to be deemed a principal or an accessory before the fact - will nevertheless turn upon his presence at or absence from the place of the crime's commission. His involvement in conspiracy itself will not alone make him a principal, or, for that matter, an accessory either. . . . For reasons stated earlier and for those which follow, we conclude that the co-conspirator rule in this state is not and has never been intended to be taken as a separate rule of substantive liability which erases the common law distinctions among criminal parties. Any indications in our case law to the contrary are expressly disapproved.

Id.

120. The critics of *Pinkerton* are not the only ones who have made this mistake. The Criminal Reform Act of 1981, § 1630 codifies *Pinkerton* on the belief that *Pinkerton* announced a theory of conspiratorial liability independent of the common law doctrine of accomplice liability. The Committee's conclusion that, "the *Pinkerton* rule . . . is firmly rooted in the principles underlying the law of conspiracy. . . ." Report of the Committee on the Judiciary, *supra* note 66, though understandable, is fundamentally

V. Conclusion

Pinkerton does no more than restate the outer limits of criminal responsibility, limits which were explored as early as 1573. Should these limits be constricted? Lafave and Scott argue that criminal liability should not attach where a criminal act was not specifically contemplated and intended by the accused.¹²¹ But there exists a fundamental difference between an individual who with knowledge of a crime provides a service to a criminal and one who intentionally enters into a criminal agreement. The argument that *Pinkerton* makes persons criminally liable as a result of their negligence ignores the fact that persons who voluntarily enter into a criminal conspiracy do not do so through any act of negligence. The *Pinkerton* rule limits liability to those acts which are done in furtherance of the criminal agreement and this provision protects accessories from the acts of principals done independently of the conspiracy.¹²² Where, however, the principal commits an act which was both foreseeable and in furtherance of the unlawful agreement, the doctrine of accomplice liability does no more than hold the accessory accountable for initiating or maintaining an otherwise avoidable chain of events.

In *Martinez v. State*,¹²³ although the defendant may not have intended for a robbery and a kidnapping to occur, it is not likely that he would contest the observation that violence is a foreseeable consequence of a narcotics conspiracy.¹²⁴ Of course, foreseeability is not the same as intent, and to equate the two may be a fiction, but it is no

flawed.

121. W. LAFAVE & A. SCOTT, *supra* note 18, at 516.

122. The felony murder rule is both a descendant and a mutation of the doctrine of accomplice liability. Where the doctrine of accomplice liability requires a jury to find that the crime was a natural and probable consequence of the criminal agreement, the felony murder rule irrebutably presumes that death is a foreseeable consequence of certain violent felonies. Where the doctrine of accomplice liability requires a jury to find that the crime was committed in furtherance of the criminal agreement, the felony murder rule will in some circumstances hold accomplices liable for a killing done by a third party. The felony murder rule is thus susceptible to far more serious objections. W. LAFAVE & A. SCOTT, *supra* note 18, at 560.

123. *Martinez v. State*, 413 So. 2d 429 (Fla. 3d Dist. Ct. App. 1982).

124. Indeed as the Second Circuit has observed: "Experience on the trial and appellate benches has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade almost to the same extent that they keep scales, glassine bags, cutting equipment and other narcotics equipment." *U.S. v. Weimer*, 534 F.2d 15, 18 (2d Cir. 1976).

more a fiction than the principle which holds one responsible for murder when the person killed was not the person intended.¹²⁵

Fundamentally, where Lafave and Scott and other commentators have erred is in their attempt to apply the principle of personal responsibility to crimes committed as a result of a criminal agreement. The general rule that persons are accountable only for those acts which they intend and in which they participate makes sense when an individual takes it upon himself to bring about a certain result. But where an individual associates with others and his associates commit acts which are a foreseeable consequence of their agreement, that individual should not be permitted to hide behind his associates and escape liability. Critics who have claimed that there is no sound rationale for the *Pinkerton* rule fail to understand that society has the right to establish the highest standards of accountability. The fact that this principle of accomplice liability has been a part of our jurisprudence for over four hundred years demonstrates not only its endurance but its position as a fundamental tenet of the common law. Far from a radical departure, *Pinkerton v. United States* is a reaffirmation of this principle. The *Pinkerton* rule continues to be a viable theory of criminal liability.

125. *Regina v. Saunders*, 75 Eng. Rep. 706 (1573).