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Of Complicity and Enterprise Criminality: Applying Pinkerton Liability to RICO Actions

Susan W. Brenner*

He who profits by a crime commits it.¹

I. INTRODUCTION

The Pinkerton doctrine is a judicially-created rule that makes each member of a conspiracy liable for crimes that other members commit to further their joint criminal design.² It is generally accepted in federal criminal law, was rejected by the drafters of the Model Penal Code and enjoys a mixed reaction among the states. This Article analyzes the rationale for co-conspirator liability and considers whether it can be enforced under the federal Racketeer Influenced and Corrupt Organizations statute, known as "RICO."³ Section II(A) outlines the law of complicity, a related doctrine that imposes liability for crimes committed by another under circumstances different from those involved in Pinkerton. Section II(B) traces the origins of the Pinkerton rule and analyzes the premises of Pinkerton liability. The analysis reveals that the Pinkerton doctrine shares an empirical rationale with complicity, so that they are distinct varieties of a single phenomenon which is denominated as "affiliative liability." Section II(C) summarizes RICO law and practice, and Section III considers whether Pinkerton liability should apply in RICO cases. Section IV offers a brief summary and conclusion.

II. CONTEXT: COMPLICITY, PINKERTON AND RICO

Whenever persons join for the purpose of executing a common criminal purpose, each one is the agent of the other as to all acts in furtherance thereof, and each is criminally liable for such acts of the others.⁴

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3. See infra section II(C) of this Article, pp. 506-514.

Complicity is defined as "participation in guilt." In the law of crimes, it is a principle that allows one who did not commit an offense to be held liable for the conduct of an associate who physically perpetrated the crime. This section outlines the basic tenets of complicity as an introduction to the Pinkerton doctrine, because it is generally regarded as a rule of complicity.

A. Complicity

Common law divided participants in crime into principals and accessories, and then split these categories into subdivisions, each of which denoted a particular degree of participation in criminal activity. "Principals" became "principals in the first degree" and "principals in the second degree." A principal in the first degree was someone who physically committed a criminal act. A principal in the second degree was present when a criminal act was committed and "aided, counseled, commanded or encouraged" its commission. The distinction between principals was a matter of form rather than substance, because their liability was the same. "Accessories" were those

7. See, e.g., R. Perkins & R. Boyce, supra note 6, at 722; see also 1 F. Wharton, A Treatise On Criminal Law 309-61 (11th ed. 1912); G. Williams, Criminal Law 346-427 (2d ed. 1961). The system described above applied to felonies; misdemeanors were governed by a similar but distinct system of classification. See W. LaFave & A. Scott, Jr., Criminal Law 569 (2d ed. 1986); R. Perkins & R. Boyce, supra note 6, at 722.
8. See, e.g., F. Wharton, supra note 7, at 311-58.
9. See id. at 311-35; W. LaFave & A. Scott, supra note 7, at 569-71; G. Williams, supra note 7, at 346-49, 353-60.
10. See F. Wharton, supra note 7, at 311 ("A principal in the first degree . . . is the actual perpetrator of the criminal act"); see also W. LaFave & A. Scott, supra note 7, at 569; G. Williams, supra note 7, at 346-47.
11. R. Perkins & R. Boyce, supra note 6, at 738. Accord W. LaFave & A. Scott, supra note 7, at 571; F. Wharton, supra note 7, at 314-15; see also W. Clark, supra note 4, at 102-03 (second degree principal "aid[s] or abet[s]" the criminal act). "Presence" encompassed actual and "constructive" presence. "Constructive presence" meant one was working with the perpetrator and in a position to assist him in successfully committing the offense. See R. Perkins & R. Boyce, supra note 6, at 741; see also 1 J. Bishop, New Commentaries On The Criminal Law 399-400 (8th ed. 1892); 4 W. Blackstone, Commentaries On The Laws Of England 31 (1962); W. Clark, supra note 4, at 102-03; F. Wharton, supra note 7, at 322-23.
12. Accord 1 J. Bishop, supra note 11, at 396; see R. Perkins & R. Boyce,
whose involvement was not sufficient to make them principals. Early common law divided accessories into accessories "before the fact," "at the fact," and "after the fact," but "accessory at the fact" was later reclassified as a principal. An accessory "before the fact" was not present when a crime was committed but had "procured, counseled, commanded, or abetted the principal" in committing it. The accessory was liable for the probable consequences of his "counsel or command" to commit a crime but not for acts that were "essentially different from that counseled or commanded." Common law regarded post-offense assistance as participation in the original crime and punished it as such.

Though common law distinguished degrees of participation, it imposed the same penalties upon principals in the first and second degree, and accessories "suffer[ed] the same punishment as their principals." The distinctions were important procedurally but irrelevant to culpability and punishment.

American criminal law has replaced these categories with a paradigm from the Model Penal Code ("Code"). Section 2.06 of the Code provides

supra note 6, at 738 ("guilt is exactly the same"). It was procedurally relevant in some jurisdictions. See W. CLARK, supra note 4, at 108.

13. See 1 J. BISHOP, supra note 11, at 405 (accessory "participates in a felony too remotely to be deemed a principal"); W. BLACKSTONE, supra note 11, at 32 (accessory is "not the chief actor in the offence . . . but is some way concerned . . . either before or after the fact committed") (author's emphasis).


15. Id. at 727; 12 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 230 (1883).

16. W. CLARK, supra note 4, at 109 (footnotes omitted). See also 1 J. BISHOP, supra note 11, at 410; F. WHARTON, supra note 7, at 336.


18. 4 W. BLACKSTONE, supra note 11, at 34. Accord W. CLARK, supra note 4, at 113; 12 J. STEPHEN, supra note 15, at 231.

19. G. WILLIAMS, supra note 7, at 409-10. See also 12 J. STEPHEN, supra note 15, at 233.

20. 4 W. BLACKSTONE, supra note 11, at 35 (footnote omitted). See also W. CLARK, supra note 4, at 115; R. PERKINS & R. BOYCE, supra note 6, at 729.

21. See, e.g., 4 W. BLACKSTONE, supra note 11, at 35-36; see also R. PERKINS & R. BOYCE, supra note 6, at 730, 735.

22. The old terms emerge on occasion. See J. DRESSLER, supra note 6, at 411. The Code was created as a model to be used in revising criminal codes based on common law. See W. LAFAVE & A. SCOTT, supra note 7, at 2-6.

that one is guilty of a crime if it is committed by the conduct of a person "for which he is legally accountable." To be accountable for another's conduct, one must cause an innocent party to engage in that conduct, or be made otherwise responsible for it. The latter alternative authorizes "vicarious liability," while another provision introduces the concept of "accomplice." An accomplice solicits another to commit a crime, aids or attempts to aid another in planning or committing it, or has a legal duty to prevent its commission and fails to do so. One is an accomplice if a statute defines her conduct as such or if she participates in causing a result that is an element of an offense. A victim is not an accomplice, nor is one whose conduct was an "inevitable incident" of an offense.

The Code formulation differs from common law by eliminating the distinction between principals and accessories and making all participants in an offense principals. The Code also rejects the common law rule that a participant is liable for the "natural and probable consequences of her acts." Under this rule one is liable for consequences that "might reasonably be expected to result from" a crime as well as for the crime itself. Under the Code, one is not liable for conduct that is outside one's "criminal purpose." Its drafters believed an accomplice should be liable only for "the purposes that he shares." They felt that using probabilities was inconsistent with the premise that criminal liability is reserved for those who act with heightened culpability.

24. *Id.* § 2.06(1). Conduct that made one an accessory after the fact is treated separately. See *id.* § 2.06 commentary at 298-99. Federal criminal law retains the concept of accessory after the fact. See 18 U.S.C. § 3 (1988) (accessory after the fact knows an offense has been committed and "assists the offender . . . to . . . prevent his apprehension").

25. MODEL PENAL CODE § 2.06 commentary at 300 (1985).

26. *Id.* § 2.06(2).

27. *Id.* § 2.06 commentary at 305. See also infra section II(B)(2) of this Article, pp. .

28. MODEL PENAL CODE § 2.06 commentary at 306 (1985) (chosen because it had "no special meanings under either common law or modern legislation").

29. *Id.* § 2.06(3).

30. *Id.* § 2.06(3)(b).

31. *Id.* § 2.06(4).

32. *Id.* § 2.06(6).


34. *Id.* at 745 (citing 4 W. BLACKSTONE, *supra* note 11, at 37) (footnote omitted). See also supra note 17 and accompanying text.

35. MODEL PENAL CODE § 2.06 commentary at 311 (1985) (footnote omitted).

36. *Id.* at 312.
Complicity in federal criminal law is governed by 18 U.S.C. section 2,38 which does not follow the Code;39 it adopts general principles of common law complicity while rejecting the accessory-principal distinction.40 This statute does not define a distinct offense but merely identifies circumstances under which the aider and abettor of an offense can be punished as a principal in its commission.41

B. Pinkerton Liability

Pinkerton v. United States42 was a tax case—Walter and Daniel Pinkerton were accused of evading liquor taxes.43 Each was charged with ten substantive counts and conspiracy.44 Both were convicted of conspiracy; Walter was convicted of nine substantive counts and Daniel of six.45 The Fifth Circuit affirmed, and the Supreme Court granted certiorari because that decision conflicted with the Third Circuit’s decision in United States v. Sall.46

The conflict arose from an instruction that told the Pinkerton jury it could convict the brothers of the substantive offenses if it found that these offenses were committed to advance a conspiracy between them.47 Daniel challenged

39. One is liable as a principal if he (a) "aids, abets, counsels, commands, induces or procures" the commission of an offense, or (b) "willfully causes an act to be done which if directly performed by him ... would be an offense." 18 U.S.C. § 2 (1988). This statute is based upon 18 U.S.C. § 550 (1988), which was added to the federal criminal code in 1909. See United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).
40. See, e.g., United States v. Kegler, 724 F.2d 190 (D.C. Cir. 1984) (abolishes distinction between principal and accessory); Morei v. United States, 127 F.2d 827, 831 (6th Cir. 1942) (uses "almost the identical language by which the common law defined aiders, abettors, and accessories"); accord Colosacco v. United States, 196 F.2d 165 (10th Cir. 1952). Aiders and abettors are punished as principals under section 2 but are subject to less severe punishment under the Code. See MODEL PENAL CODE § 242.4 (1985).
41. See, e.g., United States v. Sellers, 871 F.2d 1019 (11th Cir. 1989); Kegler, 724 F.2d at 190; United States v. Oates, 560 F.2d 45 (2d Cir. 1977).
42. 328 U.S. 640 (1946).
43. Id. at 648 (Rutledge, J., dissenting) ("unlawful possession, transportation, and dealing in whiskey"); id. at 641 n.1 (violating Internal Revenue Code § 3321). Walter and Daniel were brothers who lived on Daniel’s farm: "[B]oth ... [sold] whiskey and [were] arrested and convicted many times for violating the liquor laws." Owens v. United States, 151 F.2d 498, 500 (5th Cir. 1945). See also Pinkerton, 328 U.S. at 641.
44. Pinkerton, 328 U.S. at 641.
45. Id.
46. Id. at 642. See United States v. Sall, 116 F.2d 745 (3d Cir. 1940).
47. See Pinkerton, 328 U.S. at 645 n.6. Daniel’s liability was not considered
this instruction by relying upon Sall.\textsuperscript{48} The Sall court had held that participation in a conspiracy could not support liability for substantive crimes even though the crimes were committed to "further" the conspiracy.\textsuperscript{49} It held that substantive liability could be imposed only upon "evidence of direct participation" in the substantive offenses or evidence from which "participation might fairly be inferred."\textsuperscript{50} Daniel argued that his conviction on the substantive counts was improper under Sall because there was no evidence that he had participated in committing the substantive offenses.\textsuperscript{51}

The Supreme Court disagreed. Writing for the Court, Justice Douglas found that the Pinkertons had joined in a conspiracy from which Daniel made no effort to extricate himself.\textsuperscript{52} Douglas cited his opinion in \textit{United States v. Socony-Vacuum Oil Co.}\textsuperscript{53} for the proposition that a "consortium is a partnership in crime,"\textsuperscript{54} and cited \textit{Hyde v. United States}\textsuperscript{55} as establishing that once one joins a conspiracy, he is a member and an offender until and unless "he

under the complicity statute. \textit{Id.} (citing 18 U.S.C. § 550 (1944)).

\textsuperscript{48} Walter could not raise this issue because it was clear that he had committed the substantive offenses. \textit{Pinkerton}, 328 U.S. at 645 n.5. Daniel argued that no evidence showed that he had participated in the offenses; indeed, he was in jail when Walter committed some of them. \textit{Id.} at 648 (Rutledge, J., dissenting).

\textsuperscript{49} \textit{Id.} at 646. Harry Sall and his co-defendants were charged with conspiring to evade federal liquor taxes and seven counts of the substantive offense at issue in \textit{Pinkerton}. \textit{Sall}, 116 F.2d at 746. Government evidence showed that Sall leased premises on which agents found stills and had bought and operated a truck used by the operation. \textit{Id.} at 746-47. Sall argued that this was insufficient to prove his involvement. \textit{Id.} at 747. The government maintained that having become an accomplice in a still, Sall was liable for all crimes committed in furtherance of that enterprise regardless of "personal participation in or even knowledge of the precise details." \textit{Id.} The court held that while the government did not have to show Sall was present when the crimes were committed, it had to prove that he "aid[ed], abet[ted], counsel[ed], command[ed], induce[d] or procure[d]" concealment of alcohol. \textit{Id.} "It was not sufficient . . . to prove that he was a member of the conspiracy . . . and that . . . those . . . crimes were committed by other conspirators." \textit{Id.} (Holding otherwise would allow prosecutors "to convict a conspirator of every . . . offense committed by any other member of the group even though he had no part in it or even knowledge of it." \textit{Id.} at 747-48). The federal conspiracy statute then made it an offense to conspire to commit a federal offense or defraud the United States and to commit any act to "effect the unlawful object of the conspiracy." \textit{Id.} at 747.

\textsuperscript{50} \textit{Pinkerton}, 328 U.S. at 646. \textit{See also Sall}, 116 F.2d at 747-48.

\textsuperscript{51} \textit{Pinkerton}, 328 U.S. at 651 (Rutledge, J., dissenting). \textit{See also supra} note 47; Note, \textit{supra} note 2, at 372 n.13.

\textsuperscript{52} \textit{Pinkerton}, 328 U.S. at 642, 646.

\textsuperscript{53} 310 U.S. 150 (1940).

\textsuperscript{54} \textit{Pinkerton}, 328 U.S. at 644 (citing \textit{Socony-Vacuum}, 310 U.S. at 253.)

\textsuperscript{55} 225 U.S. 347 (1912).
does some act to disavow or defeat" its criminal purpose.\textsuperscript{56} Since Daniel had done nothing to abandon his conspiracy with Walter, he remained an offender "through every moment of its existence."\textsuperscript{57}

Douglas then enunciated what has become known as the \textit{Pinkerton} doctrine: Because members of a conspiracy are "partners in crime," they are liable for each other's acts as long as those acts are taken to further the conspiracy's criminal purposes.\textsuperscript{58} Because of this, Daniel Pinkerton was liable for offenses that were committed solely by his brother.\textsuperscript{59} Justice Rutledge dissented because he was concerned about the doctrine's potential for abuse,\textsuperscript{60} and because he contended that it was not based upon existing law.\textsuperscript{61}

1. Sources of the Doctrine

The best indicator of whether \textit{Pinkerton} applied extant law is the authority cited as supporting the holding. In enunciating the doctrine, Justice Douglas relied upon \textit{United States v. Kissel},\textsuperscript{62} and five circuit court decisions.\textsuperscript{63}

\begin{itemize}
  \item \textsuperscript{56} \textit{Pinkerton}, 328 U.S. at 646 (quoting \textit{Hyde}, 225 U.S. at 369).
  \item \textsuperscript{57} \textit{Id.} (quoting \textit{Hyde}, 225 U.S. at 369). See supra note 50 and accompanying text.
  \item \textsuperscript{58} [S]o long as the partnership in crime continues, the partners act for each other in carrying it forward . . . . Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise . . . . \textit{Pinkerton}, 328 U.S. 646-47 (citations omitted). This is not true if a substantive offense "was not in fact done in furtherance of the conspiracy, did not fall within" its scope or was "a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." \textit{Id.} at 647-48.
  \item \textsuperscript{59} \textit{Id.} at 651 (Rutledge, J., dissenting). See also Note, supra note 2, at 372 n.13.
  \item \textsuperscript{60} \textit{Pinkerton}, 328 U.S. at 650 (possible abuse of "the almost unlimited . . . vicarious responsibility for others' acts which follows once agreement is shown").
  \item \textsuperscript{61} \textit{Id.} at 651. For Justice Rutledge's views on this issue, see infra notes 102-03 and accompanying text.
  \item \textsuperscript{62} 218 U.S. 601 (1910).
  \item \textsuperscript{63} \textit{Pinkerton}, 328 U.S. at 647. Earlier in the opinion Douglas cited \textit{Socony-Vacuum} for the proposition that members of a conspiracy are "partners in crime." \textit{Id.} at 644 (quoting \textit{Socony-Vacuum}, 310 U.S. at 253). The citation referenced the statement that "a conspiracy is a partnership in crime; and an 'overt act of one partner may be the act of all.'" \textit{Socony-Vacuum}, 310 U.S. at 253-54 (quoting Kissel, 218 U.S. at 608). The \textit{Socony-Vacuum} statement was part of a finding that an overt act had been committed in the district of the trial court. \textit{Id.} at 252-53. The circuit court
Kissel was a prosecution under the Sherman Anti-Trust Act. The defendants argued that it was time-barred on the theory that conspiracy is a completed offense once an agreement is made, so the applicable period of limitations begins to run at that moment. Writing for the Court, Justice Holmes disagreed, and in so doing distinguished a conspiracy from the agreement that brings it into existence: "A conspiracy is . . . the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it . . . . A conspiracy is a partnership in criminal purposes."

Because Holmes cited no authority for the last statement, and because the imputation of co-conspirator liability was not at issue, it seems the premises of the Pinkerton doctrine must appear in the circuit court decisions Justice Douglas cited in enunciating it.

A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy. Cochran v. United States, 41 F.2d 193, 199-200. Yet all members are responsible, though only one did the mailing. Cochran v. United States, supra; Mackett v. United States, 90 F.2d 462, 464; Baker v. United States, 115 F.2d 533, 540; Blue v. United States, 138 F.2d 351, 359. The governing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project.

Johnson v. United States, 62 F. 2d 32, 34. Pinkerton, 328 U.S. at 647. Seeking the premise of Pinkerton liability in the authority cited in the opinion may be an exercise in futility. A recent analysis of Justice Douglas’ tenure on the Court argues that he paid little attention to the "doctrinal dimensions of judging . . . what counted were the results." While, The Anti-Judge: William O. Douglas and the Ambiguities of Individuality, 74 VA. L. REV. 17, 46 (1988). The article suggests that this tendency was exacerbated in the opinions he wrote between 1939 and 1949. See id. at 47 n.159 (analysis in a sample of opinions from this period was "sketchy" and "assertive").

64. Kissel, 218 U.S. at 605-06 ("unlawful conspiracy in restraint of trade in refined sugar among the . . . states").

65. Id. at 607.

66. Holmes rejected the defendant’s argument because he concluded that a conspiracy may require a period of continuous existence to achieve its goals. Id. at 608.

67. Id. at 607-08 (emphasis added). Holmes’ description was later criticized. See, e.g., Krulewitz v. United States, 336 U.S. 440, 447 n.4 (1949) (Jackson, J., concurring) ("Justice Holmes supplied an oversimplified working definition" of conspiracy).

68. See Kissel, 218 U.S. at 608.

69. Pinkerton, 328 U.S. at 647. The decisions are Blue v. United States, 138 F.2d 351 (6th Cir. 1943), cert. denied, 322 U.S. 736 (1944); Baker v. United States, 115 F.2d 533 (8th Cir.), cert. denied, 312 U.S. 692 (1940); Mackett v. United States, 90 F.2d 462 (7th Cir. 1937); Johnson v. United States, 62 F.2d 32 (9th Cir. 1932);
Four of these decisions—Cochran,70 Mackett,71 Baker72 and Blue73—issued in mail fraud prosecutions.74 Defendants were convicted and appealed, arguing that they had not "caused" the mail to be used in perpetrating a scheme to defraud.75 In each case, the court found that the defendant(s) had caused the mailings.76 While the opinions feature agency terminology, they did not impose Pinkerton liability;77 Cochran used an aiding and abetting rationale,78 while the others relied upon proximate causation.79

A law note from this era reported that courts found causation in these cases under either of two theories—"fictitious agency" and "proximate causation."80 But if one examines the cases cited as applying each, it becomes apparent that they all used a proximate cause analysis.81 United

Cochran v. United States, 41 F.2d 193 (8th Cir. 1930). See also supra note 63 and accompanying text.

70. Cochran, 41 F.2d at 195-96.
71. Mackett, 90 F.2d at 463.
72. Baker, 115 F.2d at 536.
73. Blue, 138 F.2d at 353.
74. Then, as now, the statute made it an offense to use the mails to execute a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses . . . or promises." 18 U.S.C. § 1341 (1988).
75. Blue, 138 F.2d at 358-59; Baker, 115 F.2d at 540; Mackett, 90 F.2d at 463-64; Cochran, 41 F.2d at 197.
76. Blue, 138 F.2d at 358-59; Baker, 115 F.2d at 540; Mackett, 90 F.2d at 463-64; Cochran, 41 F.2d at 197.
77. See Baker, 115 F.2d at 540; Cochran, 41 F.2d at 199-200. See generally Mackett, 90 F.2d at 464 (all "partners" in the scheme "were responsible for the use of the mail").
78. Cochran, 41 F.2d at 204-05. See also id. at 197 (defendant liable as a principal if he aided and abetted the offense).
79. This rationale is apparent in this excerpt from Blue:
Where a party . . . presents a check to a branch bank . . . and it can be reasonably foreseen that the check will pass through the mails to be paid . . . the party . . . "causes" the mails to be used . . . and where those connected with a scheme . . . must have anticipated . . . that the mails would be used in its execution . . . the use of the mails by one or more . . . becomes the act of each . . .
Blue, 138 F.2d at 359 (citations omitted). Accord Baker, 115 F.2d at 540; Mackett, 90 F.2d at 464 ("Hanecy placed the . . . check . . . with the . . . Bank . . . and by so doing the bank became his agent and he became responsible for any use of the mail which the bank employed in making collection . . .").
80. Recent Case, 21 MINN. L. REV. 342, 343 (1937).
81. The Note implicitly recognizes this in its conclusion. See id. at 343-44 (foreseeability analysis under each).
States v. Kenofskey\textsuperscript{82} illustrates the truth of this statement, as well as how this confusion arose.

An insurance investigator, Kenofskey, supplied proof of the deaths of insureds to a supervisor, who mailed the information to a home office.\textsuperscript{83} When Kenofskey filed a false claim, his supervisor sent it in, unaware it was fraudulent.\textsuperscript{84} Kenofskey knew the claim would be sent through the mails, but did not actually mail it.\textsuperscript{85} He was indicted for mail fraud but the court dismissed the charge and found that Kenofskey had not "caused" the mailing.\textsuperscript{86} The Supreme Court disagreed, holding that "causation" meant "bringing about" and that Kenofskey brought about the mailing by calculating "the effect of giving the false proofs to his superior."\textsuperscript{87} The Court then noted that the superintendent "became Kenofskey's agent . . . the means by which he" committed the offense.\textsuperscript{88}

This statement seems unnecessary because the holding is based upon proximate causation.\textsuperscript{89} It was prompted by a comment from the trial court,\textsuperscript{90} and illustrates how these courts juxtaposed agency and proximate cause

\textsuperscript{82} 243 U.S. 440 (1917).
\textsuperscript{83} 243 U.S. 440 (1917).
\textsuperscript{84} Id. at 441.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 442 ("The defendant did not mail the letter, and the local superintendent . . . was not his agent . . . .").
\textsuperscript{87} Id. at 443 ("the effect followed, demonstrating the efficacy of his selection of means").
\textsuperscript{88} Id. (citing Demolli v. United States, 144 F. 363 (8th Cir. 1906) (used proximate cause)). See Demolli, 144 F. at 365.
\textsuperscript{89} See Kenofskey, 243 U.S. at 441. Under this theory, a defendant is liable if he sets forces in motion that cause the mails to be used in furtherance of a scheme to defraud; causation exists even when the mailings are undertaken by persons who are not aware of their contribution to the fraudulent scheme. See, e.g., United States v. Bruckman, 874 F.2d 57 (1st Cir. 1989) (causation exists when innocent third person sends mailings that further scheme to defraud if use of mails would foreseeably follow in ordinary course of business); United States v. Leyden, 842 F.2d 1026, 1028 (8th Cir. 1988) (causation exists if there was a scheme to defraud, it was foreseeable the mails would be used and they were used "for the purpose" of carrying out the scheme; defendant need not personally use the mails, and it is sufficient that use by others was foreseeable); United States v. Draiman, 784 F.2d 248, 251 (7th Cir. 1986) (defendant "causes" mailing when he does an act knowing that use of mails will follow in ordinary course of business or where use can reasonably be foreseen even though not actually intended); United States v. Contenti, 735 F.2d 628 (1st Cir. 1984) (same). Kenofskey "caused" the use of the mails, therefore, when he submitted a false claim, knowing that his supervisor would mail it to the home office. Kenofskey, 243 U.S. at 441.
terminology in this context. When decisions speak of causation due to the operation of an "agent," they do not use this term to denote a formal agency relationship but, instead, use it to indicate that a defendant set certain forces in motion and thereby assumed responsibility for the foreseeable consequences of those forces. 91 This is why four of the decisions Justice Douglas cited in Pinkerton used agency terminology to analyze causation in actions under the federal mail fraud statute. 92

These decisions provide one part of the Pinkerton rationale, a theory of causation the consequences of which are explored in the section immediately below. Before proceeding with that discussion, however, it is necessary to consider the contribution made by the last decision Justice Douglas cited—Johnson v. United States. 93

The Johnson defendants were convicted of conspiracy and three substantive offenses and appealed, challenging the sufficiency of the evidence. 94 The Ninth Circuit affirmed. 95 Its analysis of the conspiracy count resembles the analysis in Pinkerton, 96 but its discussion of the substantive offenses is more detailed. 97 This comment illustrates the tenor of that discussion: "[t]he . . . parties were associated together for the illegal purpose of manufacturing intoxicating liquor, and any act done . . . to accomplish that purpose was the act of all." 98 The court upheld liability for the substantive offenses on the premise that would be rejected in United States

91. See, e.g., Shea v. United States, 251 F. 440 (6th Cir.), cert. denied, 248 U.S. 581 (1918); Recent Case, supra note 80, at 343 (if defendant sets "in motion an agency, and it is foreseeable that the natural and probable result of that agency will be the use of the mails, then the defendant has 'caused' the use of the mails") (citing Demolli, 144 F. at 363; see also 1 J. Bishop, supra note 11, at 392 ("One is responsible for what of wrong flows directly from his corrupt intention . . . . If he set in motion the physical power of another, he is liable for its result.").

92. See supra notes 70-79 and accompanying text.

93. 62 F.2d 32 (9th Cir. 1932). See supra note 69.

94. Johnson, 62 F.2d at 33. The first count of the indictment charged a conspiracy to violate "prohibition laws;" the other three counts charged substantive offenses. Id.

95. Id. at 35.

96. Id. at 34 ("at no time did appellants withdraw from the unlawful agreement . . . and they therefore remained liable for the acts of their coconspirators"). See supra notes 52-57 and accompanying text. Johnson and Stickels were former prohibition agents who conspired with others to manufacture illegal liquor. Johnson, 62 F.2d at 33.

97. See supra notes 58-59 and accompanying text, for the Pinkerton analysis of this issue.
v. Sall, i.e., that their membership in the conspiracy made the defendants liable as aiders and abettors of the substantive offenses.

It seems, therefore, that Justice Douglas based the Pinkerton doctrine on two sources—a rule of proximate causation and a rule of complicity among co-conspirators. In dissenting, Justice Rutledge contended that the

99. 116 F.2d 745 (3d Cir. 1940).

100. Johnson, 62 F.2d at 35. The court relied upon 18 U.S.C. § 550 (1930) in upholding liability on these counts. Id. at 34. See also Sall, 116 F.2d at 745. In Sall, the state argued that Johnson supported liability for the substantive counts at issue in that prosecution. Id. at 748. See supra notes 46-47. The Sall court distinguished Johnson on the basis that while the evidence in that case was sufficient to establish the defendants’ participation in the commission of the substantive offenses, the evidence against Harry Sall was not sufficient for this purpose. Id.

101. These rules are distinct, and while the same result can ensue under either, it need not. Two hypotheticals illustrate the differences between them:

Hypothetical #1: The perpetrator "causes" an item to be mailed in furtherance of a scheme to defraud by supplying it to an innocent party; the perpetrator knows the latter will send it through the mails. The rule of complicity among conspirators does not apply because there is no conspiracy between the perpetrator and the party who actually uses the mails. The perpetrator will be convicted because he proximately caused the mails to be used in furthering an unlawful scheme to defraud. Here, the innocent party was merely the means by which he completed his crime.

Hypothetical #2: A and B conspire to distill and sell illegal liquor. A is a police officer whose role is to ignore B’s distilling and selling the liquor. They are discovered and each is charged with conspiracy to violate the liquor laws and substantive violations of those laws. Under Johnson, A is liable for the latter as well as for the conspiracy, even though he was not present when B committed the acts that gave rise to these charges and had no specific knowledge of their commission. A is liable because by joining the conspiracy and performing the role assigned to him, he aided and abetted B in committing these offenses. His liability for the substantive offenses vested when he joined the conspiracy, as it is not necessary that he have performed any other act to advance the purposes of the conspiracy. Under either scenario, he is subject to the same liability and the same punishment as the person who physically executed the criminal acts—B, in this instance.

The effects of the two can be more difficult to distinguish, as in the following hypothetical based upon the facts in Hume v. United States, 118 F. 689 (5th Cir. 1902), cert. denied, 189 U.S. 510 (1903). A and B enter into a scheme to defraud individuals by persuading them to invest in worthless securities. A serves as the "front man," manning an office and making personal contacts with investors and would-be investors; B has a brochure soliciting investments printed and mailed to a large number of persons. Their scheme is discovered and a prosecutor charges each with multiple counts of mail fraud. A challenges these charges, arguing that he was not directly involved in using the mails.

Some courts have rejected such challenges by holding that a scheme to defraud is not a conspiracy under another name, so liability is proper under the co-conspirator
majority's use of the latter ignored a basic distinction between substantive offenses, "aiding, abetting or counseling another to commit them," and conspiracy. He also maintained that the doctrine abrogated a fundamental

Complicity rule. See, e.g., Chambers v. United States, 237 F. 513 (8th Cir. 1916); Blanton v. United States, 213 F. 320 (8th Cir. 1914). Others have upheld charges on the premise that the defendant "caused" the mails to be used by joining a scheme to defraud, though a scenario such as this lacks the instrumental character of the conduct at issue in the first hypothetical given above. See, e.g., Burton v. United States, 142 F. 57 (8th Cir. 1906). Others have found that the defendant aided and abetted the mailings and thereby became liable as an accomplice, which supports the imposition of liability as a principal under the federal complicity statute. See, e.g., Hume, 118 F. at 689 ("where several acts constitute together one crime, if each is separately performed by a different individual in the absence of the rest, all are principals as to the whole.") (citations omitted). For the rationale of this result, see infra pp. 964-66. Even after Pinkerton, there has been confusion as to whether merely joining a scheme to defraud, or a conspiracy, is sufficient to trigger accomplice liability or whether it is necessary that a defendant also commit an act designed to further the affairs of the criminal venture. For a discussion of this issue, see infra pp. 973-74.

In Pinkerton, Justice Douglas also cited a common law rule under which overt acts of one member of a conspiracy were attributed to all members. Pinkerton, 328 U.S. at 647 ("the overt act of one partner in crime is attributable to all"). He has been criticized for this: the overt act "is not attributed to each defendant . . . to hold him responsible for its effects, but is rather meant to show something concerning the grouping as a whole—either that [it] existed, or that it had reached a stage of development dangerous to society." Developments in the Law, supra note 2, at 998 (footnotes omitted). See also May, Pinkerton v. United States Revisited: A Defense of Accomplice Liability, 8 NOVA L.J. 21, 35 (1983) ("To the extent that Douglas relied upon the overt act rule, the opinion is flawed."). Because this aspect of the holding is questionable, it is not considered in the discussion above.

102. Pinkerton, 328 U.S. at 649 (Rutledge, J., dissenting) (footnotes omitted). "The gist of conspiracy is the agreement; that of aiding [and] abetting is . . . advising or assisting another . . . that of substantive crime, going a step beyond . . . to completion of the offense." Id. at 649. See also Krulewitch v. United States, 336 U.S. 440, 451 (1949) (Jackson, J., concurring); Sall, 116 F.2d at 747-48 ("To hold otherwise would . . . ignore the difference . . . between . . . conspiracy and the substantive crimes which may result from it . . .").
principle of criminal law, namely, that guilt is "personal, not vicarious."\textsuperscript{103} The merits of these contentions are considered in the next section.

2. Rationale: Mediate Causation

\textit{Pinkerton} is a discomforting doctrine because it is not intuitively obvious why members of a conspiracy should be liable for crimes committed by their fellows. Furthermore, the opinion's cursory discussion of the issue has certainly contributed to the doctrine's being regarded as problematic and inconsistent with traditional principles of criminal liability.\textsuperscript{104} While other

\textsuperscript{103} \textit{Pinkerton}, 328 U.S. at 651:
The Court's theory seems to be that Daniel and Walter became general partners in crime by virtue of their agreement and because of that agreement ... Daniel became criminally responsible as a principal for everything Walter did ... in the nature of a criminal offense of the general sort the agreement contemplated, so long as there was not clear evidence that Daniel had withdrawn from or revoked the agreement ... [T]he result is a vicarious criminal responsibility as broad as, or broader than, the vicarious civil liability of a partner for acts done by a co-partner in the course of the firm's business.

Such analogies from private commercial law and the law of torts are dangerous, in my judgment, for transfer to the criminal field. Guilt there ... remains personal, not vicarious, for the more serious offenses. It should be kept so.

\textit{Id.} at 651 (citations omitted). Others agreed that the decision was an unwonted extension of vicarious liability and ignored the distinction between substantive offenses, complicity and conspiracy. See Note, \textit{supra} note 2, at 374, 376-78 ("vicarious criminal liability is repugnant to common law concepts") (citing Sayre, \textit{Criminal Responsibility for the Acts of Another}, 43 HARV. L. REV. 689, 719 (1930)); see also Developments in the Law, \textit{supra} note 2, at 994-1000; Recent Decision, 16 FORDHAM L. REV. 275, 277 (1947). One author conceded the existence of a rule under which "the act of one conspirator is the act of all when committed within the scope of the conspiracy," but argued it was only used to attribute an overt act in furtherance of a conspiracy to all members, to show the extent and duration of a conspiracy and "as a rule of evidence to connect all the defendants with the crime charged." Note, \textit{supra} note 2, at 375-76 (footnotes omitted) (before \textit{Pinkerton}, no rule imposed "vicarious liability for substantive offenses committed by co-conspirators"). See also Johnson v. United States, 62 F.2d 32, 34 (9th Cir. 1932). An article published thirteen years after the decision stated that no court had yet "offered an adequate rationale for convicting a conspirator for the crimes of his associates." Developments in the Law, \textit{supra} note 2, at 998.

\textsuperscript{104} See, e.g., Note, \textit{supra} note 2, at 374; \textit{Developments in the Law, supra} note 2, at 998; Recent Decision, \textit{supra} note 103, at 275. Douglas was equally uninformative, in a dissent issued the same day \textit{Pinkerton} was decided, June 10, 1946. See
theories can be offered to explain his perfunctory treatment of this question, it may be that Justice Douglas felt his discussion was adequate because co-conspirator liability already seemed to be well-entrenched in American criminal jurisprudence. For example, a federal judge cited this "familiar rule" in 1885:

[W]here ... men combine ... to do an unlawful thing, and in the prosecution of that unlawful intent one ... does acts which the balance do not themselves perform, all are responsible for what the one does ... [T]here must be ... an agreement to do some unlawful thing. If there is no such agreement ... then each individual is responsible simply for what he does.

Similar references appear in decisions dating at least as far back as 1807.

Kotteakos v. United States, 328 U.S. 750, 779 (1946) (Douglas, J., dissenting) ("When the jury found that each of the petitioners had entered into a conspiracy with Brown, it made a complete determination of guilt as to that petitioner.").

105. A 1902 treatise noted that a conspirator "is liable for the acts of ... all who participate ... in the ... unlawful purpose. Each conspirator is the agent of the other, and the acts done are ... the acts of each and all." W. CLARK, supra note 4, at 149 (footnotes omitted).

106. United States v. Kane, 23 F. 748, 751 (C.C.D. Colo. 1885). Judge Brewer observed that the rule was intended to "prevent combinations or conspiracies" and was needed because "where there are many together it is often difficult to distinguish the one who does any particular act." Id. at 752.

107. Accord Coates v. United States, 59 F.2d 173 (9th Cir. 1932); Burns v. United States, 279 F. 982 (10th Cir. 1922); Samara v. United States, 263 F.2d 12 (2d Cir. 1920); Jung Quey v. United States, 222 F. 766 (9th Cir. 1915); United States v. Butler, 25 F. Cas. 213 (C.C.D.S.C. 1877) (No. 14,700); United States v. Babcock, 24 F. Cas. 913 (C.C.E.D. Mo. 1876) (No. 14,487); United States v. Mitchell, 26 F. Cas. 1283 (C.C.D.S.C. 1871) (No. 15,790); see United States v. Debs, 64 F. 724, 764 (C.C.N.D. Ill. 1894) (When parties combine for an unlawful purpose, if one commits a crime, "all are liable."). See generally Ex parte Bollman, 8 U.S. (4 Cranch) 75, 126 (1807) (when men combine for treason, all "who perform any part, however minute" are traitors). Bollman used common law principles of "accessorial agency." See id. at 115-16; see also United States v. Burr, 25 F. Cas. 55, 146, 150, 153, 154 (C.C.D.VA. 1807). See also id. at 150 ("if one advise or encourage another to commit [treason], or furnish him means for that purpose ... the adviser will ... be a principal"). See generally infra note 118 and accompanying text.

For state decisions, see Hanna v. People, 86 Ill. 243, 245 (1877) (if defendants "had a common design" to commit a crime, any act done in furtherance "of the original design is the act of all, and all are equally guilty of" it); Pollack v. State, 215 Wis. 200, 211, 253 N.W. 560, 565, aff'd, 215 Wis 200, 254 N.W. 471 (1934), overruled on other grounds. State v. rel Goodchild v. Burke, 27 Wis. 2d 244, 262, 133 N.W.2d
Fourteen years before *Pinkerton* was decided, the Ninth Circuit held that "conspirators were partners in crime, and each was the agent of the other, and each was bound by the act of the other in furthering the unlawful enterprise."\(^{108}\)

Although the rule applied in these decisions resembles the *Pinkerton* doctrine, it differs from that doctrine in at least one important respect. To understand this difference, it is necessary to clarify the premises of the older rule. *Spies v. People*,\(^ {109}\) a decision which was often cited in applying it, illustrates the basis of this rule.\(^ {110}\) The *Spies* defendants appealed their

753, 762 (1965) (conspirators "criminally responsible for the acts of [their] associates committed in the prosecution of the common design"). *Accord* Williams v. State, 81 Ala. 1, 1 So. 179 (1887); People v. Bringhamust, 192 Cal. 748, 221 P. 897 (1923); People v. Creeks, 170 Cal. 368, 149 P. 821 (1915); People v. Kauffman, 152 Cal. 331, 92 P. 861 (1907); McMahon v. People, 189 Ill. 222; 59 N.E. 584 (1901); State v. McCaib, 72 Iowa 111, 30 N.W. 553 (1886), *aff'd*, 72 Iowa 111, 33 N.W. 599 (1889); Commonwealth v. Campbell, 89 Mass. (7 Allen) 541 (1863); People v. Foley, 59 Mich. 553, 26 N.W. 699 (1886); Odom v. State, 172 Miss. 687, 161 So. 141 (1935); Lusk v. State, 64 Miss. 845, 2 So. 256 (1887); State v. Miller, 52 R.I. 440, 161 A. 222 (1932); Kirby v. State, 23 Tex. Crim. 13, 4 S.W. 165 (1887); White v. Commonwealth, 174 Va. 528, 6 S.E.2d 647 (1940); Miller v. State, 25 Wis. 384 (1870); see also Adams v. State, 51 Ga. App. 30, 179 S.E. 417 (1935) (hog's death was the act of all who conspired to steal it even though some were not present when it was killed).

The rule of co-conspirator liability appears in several pre-*Pinkerton* treatises. See 1 J. Bishop, *supra* note 11, at 390; W. Clark, *supra* note 4, at 149-50; 1 Warren on Homicide 232 (1938); 2 F. Wharton, A Treatise on Criminal Law 1830 (11th ed. 1912). It was also used in civil cases. See, e.g., Mendenhall v. Stewart, 18 Ind. App. 262, 47 N.E. 943 (1897); Breedlove v. Bundy, 96 Ind. 319 (1884); Shoemaker v. Jackson, 128 Iowa 488, 104 N.W. 503 (1906); Page v. Parker, 43 N.H. 363 (1861); Kellogg v. Sowerby, 32 Misc. 327, 66 N.Y.S. 542 (N.Y. Sup. Ct. 1900), *aff'd*, 100 N.Y.S. 1123 (App. Div. 1906), rev'd on other grounds, 190 N.Y. 370, 83 N.E. 47 (1907); Warshauer v. Webb, 9 N.Y. 529 (1887); F.R. Patch Mfg. Co. v. Protection Lodge, No. 215 Int'l Ass'n of Machinists, 77 Vt. 294, 60 A. 74 (1906). In 1935, the Supreme Court held that Maxime Furlaud, president and principal shareholder of Furlaud & Company and its subsidiary, Kingston Corporation, was personally liable for wrongs committed by either entity because he "was the head and front of the conspiracy. For anything done in fulfillment of the common purpose . . . he and his confederates are liable in solido." McCandless v. Furlaud, 296 U.S. 140, 165 (1935).

108. Coates v. United States, 59 F.2d 173, 174 (9th Cir. 1932). *Accord* Braatien v. United States, 147 F.2d 888 (10th Cir. 1945) (conspirator is "a partner and agent of every other conspirator").


110. *Id.* at 101-102, 12 N.E. at 915. For decisions citing *Spies*, see, e.g., Myers v. State, 13 Fl. 360, 517, 1 So. 275, 280 (1903); People v. McKane, 143 N.Y. 455,
convictions for murdering a policeman killed by a bomb. Because none of them threw the bomb, they were charged and convicted as accessories before the fact. In affirming, the Illinois Supreme Court explained that this charge was proper because the defendants had joined together to encourage

the murder of... policemen... [C]onsspiracy... may be introduced [to establish]... members of the combination as accessories to and principals; by it all accessories before the fact are made principals. As the acts of the principal are thus made the acts of the accessory, the latter may be charged as having done the acts himself, and... punished accordingly.

As this reveals, the pre-Pinkerton rule is merely an application of common law complicity: participation in a conspiracy is used as evidence to establish a defendant's liability as an accessory, or as a principal in jurisdictions that no longer distinguish between principals and accessories, for offenses perpetrated by other members of that conspiracy.

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470, 38 N.E. 950, 954 (1894). See also W. CLARK, supra note 4, at 99.

111. Spies, 122 Ill. at 100, 12 N.E. at 914. On May 4, 1886, the "workingmen of Chicago" were meeting at the Haymarket. Id.

This meeting was addressed by the defendants Spies, Parsons and Fielden... [S]everal companies of policemen... marched into the crowd... and ordered the meeting to disperse. As soon as the order was given, some one threw among the policemen a dynamite bomb, which struck Degan, who was one of the police officers, and killed him.

Id.

112. Id. at 101, 12 N.E. at 914. ("It is conceded that no one of the convicted defendants threw the bomb with his own hands."). They were charged under a statute which defined an accessory as one who had "advised, encouraged, aided or abetted the perpetration of the crime." Id., 12 N.E. at 915 (quoting ILL. REV. STAT. ch. 38, div. 2, § 2 (1986)). Under this statute, an accessory was treated as a principal "and punished accordingly." Id., 12 N.E. at 915. For a summary of the facts that supported the charges, see supra note 111.

113. Spies, 122 Ill. at 102, 12 N.E. at 915.

114. See, e.g., Robinson v. United States, 94 F.2d 752 (5th Cir. 1938). The defendants were charged with conspiracy and with substantive violations of federal liquor laws. Id. at 753. According to the government, because they were parties to the conspiracy and the substantive offenses were committed in furtherance of it, they were "accomplices and responsible as principals" even if they did not actually participate in committing the offenses. Id. The Fifth Circuit agreed. Id. at 753-54. See also People v. McKane, 143 N.Y. 455, 465, 38 N.E. 950, 952 (1894) (conspiracy was evidence "from which the jury might find... that the defendant did counsel, advise, and abet the unlawful acts"). For a statute abolishing the principal-accessory distinction, see supra note 112. At common law, an aider and abettor could be charged as an accessory before the fact or as a principal in the second degree. See e.g.
This rule is not based in conspiracy law but is simply a means of proving complicity in the commission of substantive offenses.\textsuperscript{115} \textit{Pinkerton} is a derivation of this rule.\textsuperscript{116} Rather than announcing a "theory of conspiratorial


During the nineteenth and early twentieth centuries, it was not common to charge both conspiracy to commit substantive offenses and substantive offenses. The major reason was the common law doctrine of merger, under which conspiracy merged into, or was subsumed by, substantive offense. \textit{See, e.g., 1 J. Bishop, supra} note 11, at 492; 2 \textit{F. Wharton, supra} note 107, at 1752; \textit{F. Wharton, supra} note 4, at 43-44. Merger prevailed for much of the nineteenth century but was almost universally rejected during the early decades of this century. \textit{See, e.g., United States v. Rabinowich, 238 U.S. 78 (1915) (no merger); Commonwealth v. Kingsbury, 5 Mass. 106 (1809) (same); People v. Palmisano, 132 Misc. 244, 229 N.Y.S. 462 (1928) (rejecting merger); Lambert \textit{v. People}, 9 Cow. 578 (1827) (upholding merger). Another reason was the dilatory development of conspiracy law. \textit{See, e.g., R. Wright, THE LAW OF CRIMINAL CONSPIRACIES (1873); Sayre, Criminal Conspiracy, 35 HARV. L. REV. 393 (1922). As long as this reluctance existed, it was not necessary to develop rules such as the \textit{Pinkerton} doctrine that articulated the relationship between liability for conspiracy and substantive offenses.}

\textsuperscript{115} \textit{See, e.g., People v. Creeks, 170 Cal. 368, 149 P. 821 (1915); Whited \textit{v. Commonwealth, 174 \textit{Va.} 528, 6 S.E.2d 647 (1940); see also Commonwealth \textit{v. Knapp, 26 Mass. (9 Pick.)} 495, 518 (1830) (conspiracy is evidence proving "that the prisoner aided, but it is not in itself . . . a legal presumption of his having aided"). In 1924, Judge Learned Hand noted the disagreement that often existed in this area: "[M]y brothers . . . invoke the principle that when once a man is shown to have engaged in a conspiracy to commit some illegal act he becomes . . . liable for everything which his accomplices may do in its execution . . . I understand no more than that their conduct will be competent proof against him." \textit{Becher v. United States, 5 F.2d 45, 50-51 (2d Cir. 1924).} The evidentiary rule is still used. \textit{Accord United States \textit{v. Jackson, 627 F.2d 1198, 1216 n.36 (D.C. Cir. 1980); United States \textit{v. Hoffa, 349 F.2d 20, 41 (6th Cir. 1965), aff'd, 385 U.S. 293 (1966); United States \textit{v. Papia, 409 F. Supp. 1307, 1316 (E.D. Wis. 1976), aff'd, 560 F.2d 827 (7th Cir. 1977); see United States \textit{v. Thirion, 813 F.2d 146, 153 (8th Cir. 1987) ("conspiracy may be shown as an evidentiary fact to prove participation in the substantive crime") (citation omitted); see also infra\textsuperscript{ note 120 and accompanying text.}}}

\textsuperscript{116} \textit{See, e.g., Developments in the Law, supra note 2, at 994-95.} [\textit{In . . . Sall . . . the Government argued that the conviction on the substantive counts should stand because the proof that the accused had entered the conspiracy amounted to proof that he had 'aided and abetted' the commission of the substantive crimes . . . . The court rejected the idea, apparently now accepted here, that 'aiding and abetting' and 'conspiring' were the same thing, differing only in the form of the descriptive words.}}
liability" independent of common law complicity,117 it merely overruled Sall, and held that membership in a conspiracy is sufficient, by itself, to establish the "accessorial agency" necessary for the imposition of complicitous liability.118 The major difference between Pinkerton and the older rule is

Sall, 328 U.S. at 650-51 n.4 (emphasis added); see also supra note 99 and accompanying text; Hearings On Reform Of Federal Criminal Law Before The Subcommittee On Criminal Law And Procedures Of The Senate Committee on The Judiciary, 92d Cong., 1st Sess. pt. 1 at 225 (1971) [hereinafter Hearings on Reform of Federal Criminal Law] (Pinkerton described as imposing "complicity liability based solely upon membership in the conspiracy"); infra note 118 and accompanying text.

The drafters of the Model Penal Code rejected Pinkerton because they concluded that "liability for a substantive crime as an accomplice cannot be predicated on the sole fact of having been party to a conspiracy to commit that crime." MODEL PENAL CODE § 5.03(6) commentary at 143 (Tent. Draft No. 10, 1960). Accord MODEL PENAL CODE § 2.06 commentary at 307-09 (Proposed Official Draft 1962). Under the Model Penal Code, evidence of conspiracy is admissible to prove complicity, but whether it is sufficient to do so is left to the jury. MODEL PENAL CODE § 2.06 commentary at 309 ("they should not be told that it establishes complicity as a matter of law").


118. "In Pinkerton ... [w]e held [t]hat a conspirator could be held guilty of the substantive offense even though he did no more than join the conspiracy." Nye & Nissen v. United States, 336 U.S. 613, 618, 621 (1949) (Frankfurter, J., dissenting) (Under Pinkerton, a jury can use evidence of a conspiracy "to supply the lack of direct evidence of participation in the substantive offenses"); Krulewitch v. United States, 336 U.S. 440, 451 (1949) (Jackson, J., concurring) (Pinkerton applied "the novel and dubious theory that conspiracy is equivalent in law to aiding and abetting"); United States v. Alvarez, 610 F.2d 1250, 1253 (5th Cir.), cert. denied, 451 U.S. 938 (1981): [Pinkerton] 'collapses the distinction between accessories and perpetrators' through the doctrine of conspiratorial complicity, which punishes conspirators as principals in any substantive offense committed in furtherance of the conspiracy, whether or not they directly participated in that offense. . . . Thus, if a conspiracy is charged, the prosecution need not analyze whether a . . . conspirator's actions would ordinarily be sufficient to create liability as an abettor of an offense; all that is necessary is proof that the defendant joined in an unlawful agreement. Id. (citations omitted). The reference to "accessorial agency" in the text is taken from United States v. Burr, 25 F. Cas. 55 (C.C.D. Va. 1807) (no. 14,693); State v. Small, 301 N.C. 407, 416 n.6, 272 S.E.2d 128, 134 n.6 (1980) (a "finding that defendant conspired to commit the substantive offense is legally equivalent to a finding that defendant counseled, procured, aided, or abetted" commission of that offense); Hearings on Reform of Federal Criminal Law, supra note 116, at 225 (Pinkerton "imposes complicity liability based solely upon membership in the conspiracy"); May,
that *Pinkerton* effectively creates a presumption of aiding and abetting offenses committed in furtherance of the goals of a conspiracy from membership in that conspiracy.\(^\text{119}\) Under the older rule, membership was

\(^{\text{supra}}\) note 101, at 35, 39-41 ("restatement of the common law doctrine" of accessorial liability).

119. See, e.g., *Nye & Nissen*, 336 U.S. at 625 (Frankfurter, J., dissenting):

The Court . . . seems to [infer] that the defendant, because of his . . . connection with the conspiracy, must . . . have been . . . an aider and abettor in the . . . substantive crimes. . . . [T]o draw such an inference is to . . . create . . . a presumption that whenever A has been found guilty of conspiring with B and C to bring X, Y and Z to pass, and A and B commit the substantive offenses L, M and N, during the . . . conspiracy, C is an aider and abettor . . . in the commission of L, M and N.

*See also* Robinson, *Imputed Criminal Liability*, 93 *Yale L.J.* 609, 614-15 n.14 (1984) (*Pinkerton* presumption frequently results in liability because a defendant "is unable to rebut it"); Note, *supra* note 2, at 376 ("conclusive presumption that each conspirator aids and abets every act within the scope of the conspiracy").

For a decision upholding *Pinkerton* against the argument that it "unconstitutionally creates a mandatory presumption," see United States v. Deluna, 763 F.2d 897, 918 (8th Cir.), cert. denied sub. nom. Thomas v. United States, 474 U.S. 980 (1985). *See also* United States v. Thirion, 813 F.2d 146, 152 n.6 (8th Cir. 1987) (similar argument rejected); United States v. Curcio, 712 F.2d 1532, 1540-41 (2d Cir. 1983).

*Pinkerton* liability is submitted to the jury by tendering an instruction to this effect:

A member of a conspiracy who commits another crime during the . . . conspiracy . . . may be . . . acting as the agent of the other members of the conspiracy . . . [A]ctions of this person . . . may be attributed to other . . . members . . .

If you find . . . defendant _________ guilty of conspiracy . . . you may also find defendant _________ guilty of the crime alleged in any other count of the indictment in which [he][she] is charged, provided you find that the . . . elements of that count . . . have been established beyond reasonable doubt and . . .

One, that the substantive offense . . . was committed by a member of the conspiracy . . .

Two, that the substantive crime was committed during the existence or life of and in furtherance of the goal(s) or objective(s) of the conspiracy; and

Three, at the time this offense was committed, defendant _________ was a member of the conspiracy.

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evidence of complicity but did not give rise to a presumption.\footnote{120}

The relationship between the two principles is illustrated by a hypothetical. Assume that X conspires with A, B, and C to import illegal drugs into the United States. Assume that X does nothing thereafter to further the goals of the conspiracy, but also does nothing to terminate her involvement in it. Under *Pinkerton*, if A, B and/or C carry out their plan and actually import illegal drugs into this country, X can be convicted of substantive drug offenses based upon that importation even though she did not personally participate in it. The rationale for this liability remains to be considered, but her liability under *Pinkerton* is assured because (a) she joined a conspiracy to import illegal drugs, and (b) the substantive offenses were committed in furtherance of the goals of that conspiracy.\footnote{121}

Under the older rule, her membership in the conspiracy could be used as evidence to prove her complicity in the commission of the substantive

(\"if you find ... that ... his fellow conspirator(s) committed the offense(s) charged in Count(s) ____ in furtherance of or as a natural consequence of that conspiracy, then you should find him guilty of Count(s) ____\") (emphasis added). *See also* United States v. Rosenberg, 888 F.2d 1406, 1417 (D.C. Cir. 1989) (Williams, J., concurring) (*Pinkerton* alters the elements of an offense and respecifies them as "(1) the defendant's membership in the conspiracy, and (2) commission of the substantive offense by any member(s) acting pursuant to the conspiracy"); United States v. Sampol, 636 F.2d 621, 676 (D.C. Cir. 1980) ("Once the conspiracy and the defendant's knowing participation in it have been established ... the defendant will be vicariously liable for the substantive acts committed in furtherance of the conspiracy ... .")

120. *See, e.g.*, *supra* notes 115-16; *Model Penal Code* § 2.04 commentary at 23 (Tent. Draft No. 1, 1953) ("Conspiracy may prove command, encouragement, assistance. ... But whether it suffices ought to be decided by the jury; they should not be told that it establishes complicity as a matter of law."); *see also* State v. Small, 301 N.C. 407, 418-21, 272 S.E.2d 128, 135-37 (1980) (conspiracy may establish complicity).

121. *See Nye & Nissen*, 336 U.S. at 618 (Douglas, J.) (*Pinkerton* "held that a conspirator could be held guilty of the substantive offense even though he did no more than join the conspiracy, provided that the substantive offense was committed in furtherance of the conspiracy and as a part of it."); *see also* United States v. Alvarado, 898 F.2d 987, 993 (5th Cir. 1990); United States v. Vasquez, 858 F.2d 1387, 1393 n.3 (9th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989); United States v. Basey, 816 F.2d 980, 998-99 (9th Cir. 1987); United States v. Manzella, 791 F.2d 1263, 1268 (7th Cir. 1986); United States v. Acosta, 763 F.2d 671, 681-82 n.7 (5th Cir.), *cert. denied*, 474 U.S. 863 (1985); United States v. Gallo, 763 F.2d 1504, 1520 n.23 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986); United States v. Molina, 581 F.2d 56, 60 n.7 (2d Cir. 1978); United States v. LeFavre, 507 F.2d 1288, 1298-99 (4th Cir. 1974). *See generally Nye & Nissen*, 336 U.S. at 621 (Frankfurter, J., dissenting) (*Pinkerton* liability exists only if "there is a connection between the conduct of the conspiracy and the commission of the substantive offenses").
offenses. This alone, however, would not suffice under the standard used in federal prosecutions. Judge Learned Hand enunciated this standard in *United States v. Peoni*. To qualify as an aider and abettor under *Peoni*, one must associate herself with a criminal venture and commit an affirmative act by which she intends to promote the success of that venture. Although X did associate herself with a criminal venture, she took no action to further its success. Consequently, her liability for substantive offenses must be determined under *Pinkerton*.

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123. 100 F.2d 401 (2d Cir. 1938). To be an accomplice, one must "associate himself with the venture . . . participate in it as in something that he wishes to bring about." *Id.* at 402. The *Peoni* standard is also used in various states. See, e.g., *Hill v. State*, 348 So.2d 848 (Ala. Cr. App.), *cert. denied sub nom. Ex parte State ex rel Attorney General*, 348 So.2d 857 (Ala. 1977); *State v. Harper*, 365 S.E.2d 69 (W. Va. 1987); *Jahnke v. State*, 692 P.2d 911 (Wyo. 1984); *Miller v. United States*, 479 A.2d 862 (D.C. 1984).

124. *See, e.g., United States v. Gonzalez*, 933 F.2d 417, 436, (7th Cir. 1991) ("To prove association, the state must prove that the defendant had the state of mind required for the statutory offense; to prove participation . . . there must be evidence to establish that the defendant engaged in some affirmative conduct . . . designed to aid in the success of the venture." (quoting United States v. *Beck*, 615 F.2d 441, 448 (7th Cir. 1980); United States v. *Longoria*, 569 F.2d 422, 425 (5th Cir. 1978)); see also *Peoni*, 100 F.2d at 402 (to be an aider and abettor of a criminal venture, one must "seek by his action to make it succeed").

Imposing liability under *Pinkerton* when a defendant's conduct is insufficient for the imposition of liability under *Peoni* gives rise to an apparent paradox: by allowing complicity in substantive offenses to be presumed from membership in a conspiracy, *Pinkerton* seems to abrogate one prong of the *Peoni* standard and predicate liability upon the mere act of associating oneself with a criminal venture. Because *Peoni* requires association plus an affirmative act of participation in the venture's criminal affairs, *Pinkerton* seems open to the objection that it implements a crippled form of aiding and abetting liability, a kind of "guilt by association."\(^{126}\)

That objection can be overcome, and *Pinkerton* and *Peoni* can be reconciled, if they are construed as addressing two different forms of complicitous liability. In this perspective, one can incur complicitous liability in either of two ways: (a) by engaging in conduct that is designed to further the success of a criminal venture, or (b) by entering into the agreement that constitutes such a venture.\(^{127}\) The gravamen of complicitous liability is the

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126. See, e.g., Nye & Nissen v. United States, 336 U.S. 613, 626 (1949) (Frankfurter, J., dissenting) (improper to use conspiracy "to establish guilt, not on the basis of personal responsibility, but by association"); see also Scales v. United States, 367 U.S. 203, 225 (1961) ("guilt is personal, and when . . . punishment . . . [is] justified by . . . the relationship of . . . status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment"); People v. Lloyd, 304 Ill. 23, 88, 136 N.E. 505, 530 (1922) ("guilt by association" is inconsistent with the fundamental principle "of American jurisprudence . . . that 'guilt is personal'"); cf. Whitney v. People of California, 274 U.S. 357 (1927) (conviction for violating state Criminal Syndicalism Act). See generally Goldstein, *The Krulewitch Warning: Guilt by Association*, 54 GEO. L.J. 133 (1965).

127. See, e.g., *Nye & Nissen*, 336 U.S. at 620:

*Pinkerton* . . . does service where the conspiracy was one to commit offenses of the character described in the substantive counts. Aiding and abetting has a broader application. It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy. . . . Aiding and abetting . . . states a rule of criminal responsibility for acts which one assists another in performing.

*See also* United States v. Rosenberg, 888 F.2d 1406, 1426 (D.C. Cir. 1989) (Edwards, J., dissenting in part and concurring in part) (policies underlying *Pinkerton* and complicity "very similar"). "[T]he *Pinkerton* and the aider-and-abettor doctrines embody the same principle: a defendant who willingly enters into a confederacy of crime can legitimately be held accountable for all reasonably foreseeable offenses committed by his confederates." *Id.* at 1426 n.14.
act of affiliating oneself with a criminal endeavor. *Pinkerton* and *Peoni* enunciate the tests used to determine if there has been such an act under either of the alternatives given above:128 *Peoni* addresses the first—affiliation by conduct designed to aid the venture; *Pinkerton* addresses the second—affiliation by agreement.

Under *Pinkerton*, a prospective defendant explicitly indicates her desire to affiliate with a criminal venture; the process is analogous to executing a contract, although usually not so formal. In the hypothetical above, X incurs *Pinkerton* liability by entering into a criminal contract with A, B, and C, and this contract defines the limits of her liability for substantive offenses. Because these contracts are by definition sub rosa, the government is unlikely to be able to offer direct proof of their terms. Once it proves the existence and general tenor of such an agreement, however, it is reasonable to put the onus on a defendant to show that particular crimes were outside the scope of her agreement.

Under *Peoni*, there is no contract—the act of affiliating with a criminal undertaking is implicit in conduct that is engaged for the purpose of supporting the affairs of such an undertaking. The factual predicate for this type of liability is more ambiguous, as it is possible to engage in conduct that promotes the goals of a criminal undertaking without meaning to do so. For that reason, this type of complicitous liability requires that one "associate" herself with a criminal venture and that she, herself, perform some affirmative act "in furtherance" of the goals of that venture as the predicate for liability.129 Requiring both is intended to overcome the ambiguity inherent in

128. See, e.g., *Pinkerton*, 328 U.S. at 647 ("Each conspirator instigated the commission of the crime. The unlawful agreement . . . was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle."). As to the distinctions between the two types of affiliative liability, see, e.g., United States v. Alvarez, 610 F.2d 1250, 1253 (5th Cir. 1980) ("[I]f a conspiracy is charged, the prosecution need not analyze whether a . . . conspirator's actions would ordinarily be sufficient to create liability as an abettor of an offense; all that is necessary is proof that the defendant joined in an unlawful agreement."); see also United States v. Acosta, 763 F.2d 671, 681 (5th Cir. 1985) ("a party to a continuing conspiracy may be responsible for a substantive offense committed by a co-conspirator in furtherance of the conspiracy, even though that party does not participate in the substantive offense or have any knowledge of it"). *Pinkerton* liability will not attach, however, unless the substantive offense was committed in furtherance of the goals of the conspiracy. See, e.g., *Nye & Nissen*, 336 U.S. at 628 (Murphy, J., dissenting) ("A . . . mere joiner is not guilty of the substantive offense unless the substance was part of the conspiracy and in furtherance of it").

129. See, e.g., United States v. Mehtala, 578 F.2d 6, 10 (1st Cir. 1978) (citations omitted) ("Mere association between the principal and those accused of aiding and
predicating criminal liability upon conduct that may or may not be criminal in and of itself.\footnote{130} This is why juries are not allowed the luxury of a

abetting is not sufficient to establish guilt; nor is mere presence at the scene and knowledge that a crime was to be committed sufficient to establish aiding and abetting.

"'Association' means that the defendant shared in the criminal intent of the principal. 'Participation' means that the defendant engaged in some affirmative conduct designed to aid the venture. . . . Thus, an aiding and abetting offense has two components: (1) an act by a defendant which contributes to the execution of the criminal activity, and (2) the intent to aid in its commission." United States v. Triplett, 922 F.2d 1174, 1178 (5th Cir.), cert. denied, 111 S. Ct. 2245 (1991) (citing United States v. Ortiz-Loya, 777 F.2d 973, 980 (5th Cir. 1985)); United States v. Kaufman, 858 F.2d 994, 1002 (5th Cir. 1988); United States v. Manotas-Mejia, 824 F.2d 360, 367 (5th Cir.), cert denied sub nom. Ramirez-Rios v. United States, 484 U.S. 957 (1987); United States v. Weddell, 800 F.2d 1404, 1408 (5th Cir. 1986); United States v. Stovall, 825 F.2d 817, 827 (5th Cir. 1987). Accord United States v. Escruceria-Delgado, 887 F.2d 1081 (4th Cir. 1989); see also United States v. Beck, 615 F.2d 441, 448 (7th Cir. 1980).

To prove association, the state must prove that the defendant had the state of mind required for the . . . offense; to prove participation . . . 'there must be evidence to establish that the defendant engaged in some affirmative conduct; that is, there must be evidence that [the] defendant committed an overt act designed to aid in the success of the venture.'

\textit{Id.} at 449 (quoting United States v. Longoria, 569 F.2d 422, 425 (5th Cir. 1978)). For a case distinguishing the factual predicates for these two forms of complicity, see United States v. Garcia-Flores, 925 F.2d 1471 (9th Cir. 1991) which stated the following:

Garcia-Flores need not actually distribute the heroin to be liable for its distribution under an aiding and abetting theory. . . . We may uphold the conviction if [he] associated with the criminal venture, participated in it, and sought by his actions to make it succeed. . . . [T]he government may prove liability under a co-conspirator theory. Based on \textit{Pinkerton} . . .

Garcia-Flores may be guilty even if he did not directly participate in the drug transaction . . .

\textit{Id.} (citing United States v. Savinovich, 845 F.2d 834, 838 (9th Cir.), cert. denied, 488 U.S. 943 (1988); United States v. Crespo de Llano, 838 F.2d 1006, 1019 (9th Cir. 1987); United States v. Anderson, 813 F.2d 1450, 1460 (9th Cir. 1987)).

Many conspiracy statutes do not require performance of an overt act as an element of the offense. \textit{See}, e.g., 18 U.S.C. § 1962(d) (1988) discussed \textit{infra} section III(C) of this Article, pp. 983-85. Those that do require such an act only insist that it have been committed by some member of the conspiracy; there is no need to prove that each defendant committed such an act. \textit{See}, e.g., Bannon v. United States, 156 U.S. 464 (1895); Onderdonk v. United States, 16 F.2d 116 (5th Cir. 1926).

130. For example, consider the facts in United States v. Sall, 116 F.2d 745 (3d Cir. 1940), described \textit{supra} note 49. It is not a crime to lease premises or to purchase.
Pinkerton-style presumption in determining accomplice liability; instead, they must weigh the evidence of "association" plus "participation" and decide whether it is sufficient to establish this type of liability as to certain offenses. 131

Although American law is loath to predicate criminal liability upon "affiliation," this concept accurately denotes the concern that underlies and operate a truck. If, however, these actions are taken by one who has "associated" himself with a criminal venture, they become indicia of complicity and can result in the imposition of substantive criminal liability. Id. See also United States v. Petersen, 777 F.2d 482 (9th Cir. 1985), cert. denied, 479 U.S. 843 (1986) (container of yellow Forest Service tracer paint under driver's seat of defendant's truck was sufficient to show aiding and abetting offense of removing healthy trees from United States forest). By the same token, conduct that seems inherently unlawful cannot support imposition of such liability absent a demonstrable link between it and the offense(s) charged. See, e.g., United States v. Smith, 631 F.2d 391 (5th Cir. 1980) (wiping fingerprints off car purchased with stolen check insufficient to support inference of aiding and abetting possession of check); United States v. Jones, 608 F.2d 1004 (4th Cir. 1979), cert. denied, 444 U.S. 1086 (1980) (providing hospitality to robbers was not sufficient to support aiding and abetting liability absent proof that host participated in the planning and/or execution of the robbery).

131. See, e.g., United States v. Cole, 704 F.2d 554 (11th Cir. 1983) (evidence sufficient to establish aiding and abetting interstate travel for purposes of prostitution); United States v. Campbell, 702 F.2d 262 (D.C. Cir. 1983) (evidence insufficient to establish aiding and abetting the giving of an illegal gratuity). See generally MODEL PENAL CODE § 5.03 commentary at 388 (1985) ("The act of agreeing with another to commit a crime . . . is concrete and unambiguous. . . . The danger that truly equivocal behavior may be misinterpreted as preparation to commit a crime is minimized; purpose must be relatively firm before the commitment involved in agreement is assumed.") (footnote omitted).

132. Its use seems to have been limited to prosecutions for falsely denying an affiliation with the Communist Party. See, e.g., Bryson v. United States, 396 U.S. 64 (1969) (prosecution under § 9(h) of National Labor Relations Act, 29 U.S.C. § 159(h) (1988)); Killian v. United States, 368 U.S. 231 (1961) (same); Jencks v. United States, 353 U.S. 657 (1957) (same); Travis v. United States, 269 F.2d 928 (10th Cir. 1959), rev'd on other grounds, 364 U.S. 631 (1961) (same); Lohman v. United States, 251 F.2d 951 (6th Cir. 1958) (same). Many of these cases required a definition of "affiliation." See, e.g., Bryson, 396 U.S. at 369 n.7, which stated the following:

[A]ffiliated . . . means a relationship short of . . . membership in the Communist Party, but more than . . . sympathy for the aims and objectives of the Communist Party. A person may be found to be 'affiliated' with an organization . . . when there is . . . a close working alliance or association between him and the organization, together with a mutual understanding . . . that the organization can . . . depend upon him to cooperate with it, and to work for its benefit . . . [A]ffiliation . . . means a relationship which is equivalent or equal to that of membership in all but name.
both Peoni and Pinkerton. That concern is with a peculiar type of criminal act—the act of aligning with another or others to achieve some unlawful purpose. This concern was not created by the forces that shaped federal criminal law in this century, but it has been exacerbated by them.

Accord Killian, 368 U.S. at 256 n.13; Travis, 269 F.2d at 946; see also Scales v. United States, 367 U.S. 203, 206 (1961) (prosecution under the Smith Act which made it an offense to affiliate with "any society, group, or assembly of persons who teach, advocate, or encourage the overthrow . . . of . . . government by force or violence"). Scales is discussed at infra note 133. For a critique of predicing criminal liability upon one's associations, see, e.g., Nathanson, Freedom of Association and the Quest for Internal Security: Conspiracy from Dennis to Dr. Spock, 65 NW. U.L. REV. 153 (1970). For definitions of "affiliate," see BLACK'S LAW DICTIONARY 80 (rev. 4th ed. 1968) ("a condition of being united, being in close connection, allied, or attached as a member. . . . to associate with"); WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 43 (2d ed. unabr. 1955) ("To band together . . . [t]o connect or associate oneself"). See generally Jencks, 353 U.S. at 679 (Burton, J., concurring in result).

Any thought that due process puts beyond the reach of the criminal law all . . . associational relationships, unless accompanied by . . . specific acts of criminality, is dispelled by . . . the law of conspiracy and complicity. While both are commonplace in the landscape of the criminal law, they are not natural features. Rather they are particular legal concepts manifesting the more general principle that society, having the power to punish dangerous behavior, cannot be powerless against those who work to bring about that behavior.

Scales, 367 U.S. at 225. Accord id. at 225 n.17 ("considerable overlap" between "the law of complicity and the law of conspiracy"); see also Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (statute directed "not at the practice of criminal syndicalism . . . but at association with those who propose to preach it").


Conspiracy began with a statute enacted in 1285 to penalize the bringing of false prosecutions and slowly evolved into its modern form. Sayre, supra note 114, at 393-409; see also Pollack, Common Law Conspiracy, 35 GEO. J. 328, 338-352 (1947); Winfield, Early History of Criminal Conspiracy, 36 LAW Q. REV. 240 (1920). In 1611, the Court of Star Chamber held that an "agreement to commit a crime [was]
Since 1960, federal criminal law has adopted new and more expansive rules for imposing liability because of the perception, if not the reality, that criminal activity has increasingly assumed a new and more dangerous form—"organized crime."\(^{135}\) The notion that organized criminal activity poses special dangers has existed for centuries,\(^{136}\) but the perception of the incidence and magnitude of that activity in this country grew exponentially in the years after World War II, as Americans discovered "racketeering" and "the mob."\(^{137}\)

A substantive crime in itself, and conspiracy evolved into an offense in its own right. Accord Sayre, supra note 114, at 398; Blair, Judge Made Law of Conspiracy, 37 Am. L. Rev. 33, 54 (1903); see Pollack, supra, at 341; Poulterers' Case, 9 Co. Rep. 55b, 77 Eng. Rep. R.813 (1611). For a discussion of the history of complicity, see supra section II(A) of this article, pp. 932-35; see also United States v. Peoni, 100 F.2d 401 (2d Cir. 1938).

135. See, e.g., Callanan v. United States, 364 U.S. 587 (1961). [C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes . . . makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger . . . limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed.

Id. at 593-94. Accord Jeffers v. United States, 432 U.S. 137, 157 (1977) ("additional dangers posed by concerted activity"); United States v. Escobar de Bright, 742 F.2d 1196, 1199 (9th Cir. 1984); State v. Barton, 424 A.2d 1033, 1036 (R.I. 1981) ("criminals will engage in more elaborate and complex schemes than they would attempt if working alone"); Developments in the Law, supra note 2, at 923-25; Pollack, supra note 134, at 339 ("danger from the increased power" of "a combination of many individuals").

136. See supra notes 132-35.

137. See infra section II(C) of this Article, pp. 979-81; see also BRADLEY, RACKETEERING AND THE FEDERALIZATION OF CRIME 235-42 (1975).

Early in 1950 an accumulation of events highlighted the desperate need for learning . . . about crime in America. The American Municipal Association, alarmed by the effects of interstate crime operations on local governments, had passed a resolution calling for federal consideration of the problem. Newspapers . . . were making startling disclosures about the power of modern crmesters, . . . successors to the Al Capones of an earlier era. The Conference on Organized Crime, called by Attorney General J. Howard McGrath in February 1950, focused additional attention on the cancer of organized crime.
This discovery led to the enactment of federal statutes that were designed to give prosecutors new weapons to use against what was regarded as a flourishing, increasingly-sophisticated evil. The consequence was that

_id_; E. Kefauver, Crime in America 2 (1951). During 1950 and 1951, Kefauver chaired a Senate Committee that investigated what he characterized as a "national crime syndicate." _Id._ at xi, 331. The work of this committee influenced the enactment of the measures noted above. See _infra_ section II(C) of this Article, pp. 979-85; see also S. Rep. No. 307, 82d. Cong., 1st Sess. 150 (1951) (THIRD INTERIM REPORT OF THE SPECIAL COMMITTEE TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE); E. Kefauver _supra_, at 1 ("[t]here is a Nation-wide crime syndicate known as the Mafia, whose tentacles are found in many large cities"). See generally W. Moore, The Kefauver Committee And The Politics Of Crime 1950-52, 200 (1974) (public response to the Kefauver report "amounted to an unprecedented frenzy").

138. See _infra_ section II(C) of this Article, pp. 979-81. In a 1961 speech, Attorney General Robert Kennedy claimed that "the situation is worse than it was 10 years ago in terms of the financial power of the racketeers, the extent of their operations, the number of people involved and their political power." He proposed several statutes which he claimed

would be a mortal blow to their operations. . . . All . . . were enacted. . . .

[T]hese bills reached out to punish acts that were on their face completely innocent, but became wrongful because they aided activities that were unlawful under state law. Thus, making a telephone call or driving across state lines with the requisite intent was now a crime.


One of the statutes that came out of this era was the Racketeer Influenced and Corrupt Organizations Act of 1970, which is discussed _infra_ section II(C) of this Article, pp. 979-85. The apprehensions that gave rise to these enactments survived through the 1970's and were exacerbated by the "war on drugs" during the 1980's. See generally Schuler & McBride, Notes from the Front: A Dissident Law-enforcement Perspective on Drug Prohibition, 18 HOFSTRA L. REV. 893 (1990); Note, User-Accountability Provisions in the Anti-drug Abuse Act of 1988: Assaulting Civil Liberties in the War on Drugs, 40 HASTINGS L.J. 1223 (1989). Federal statutes were enacted to combat organized crime because of a perception that states were unable to deal with the problem. See e.g., Bradley, _supra_ note 137, at 242-54.
federal criminal law acquired a tolerance for doctrines that expand criminal liability beyond the confines established by the common law.\(^{139}\) While the Pinkerton doctrine may have been based in common law, it was fortuitously enunciated at the moment when American criminal law was discovering the threat of organized crime and the need to develop sophisticated weapons with which to combat it.

Pinkerton seemed unproblematic and was compatible with the weapons that were devised for this purpose, so courts saw no need to scrutinize its doctrinal provenance. Consequently, although the doctrine is employed reasonably often, at least in federal law, its rationale remains undefined.\(^{140}\) Decisions enforcing co-conspirator liability methodically recite Justice Douglas’ aphorism about partnership and agency without explaining why civil law principles should support the imposition of criminal liability.\(^{141}\)

The first step in remedying this omission is to clarify what Pinkerton is not: it is not a rule of vicarious liability, despite being characterized as such.\(^{142}\) In civil law, vicarious liability doctrines hold one person liable for the acts of another; the most common instance is holding an employer liable for the acts of her employee(s).\(^{143}\) While these rules have their own ambiguities, it is clear that they reflect a policy of allocating the risks that inhere in certain lawful activities to those who are best able to bear them.\(^{144}\)

\(^{139}\) See, e.g., Bradley, supra note 137, at 242-54.

\(^{140}\) See, e.g., Developments in the Law, supra note 2, at 998; see also State v. Barton, 424 A.2d 1033, 1036 (R.I. 1981) ("Pinkerton rule has found favor... under a variety of theories").

\(^{141}\) See supra notes 57-58 and accompanying text; see also State v. Burns, 215 Minn. 182, 9 N.W.2d 518 (1943) (criminal law rejected respondeat superior); Sayre, Criminal Responsibility for the Acts of Another, 43 HARV. L. REV. 688, 694-701 (1930).

\(^{142}\) See, e.g., Developments in the Law, supra note 2, at 993-1000; see also United States v. Lucas, 932 F.2d 1210, 1219 (8th Cir. 1991) ("vicarious liability for crimes committed by one’s co-conspirator is set forth in Pinkerton"); United States v. Meester, 762 F.2d 867, 878 (11th Cir.), cert. denied, 474 U.S. 1024 (1985) ("the Pinkerton theory of vicarious liability").

\(^{143}\) See, e.g., W. LAFAVE & A. SCOTT, supra note 7, at § 3.9; R. PERKINS & R. BOYCE, supra note 6, at 911-14; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 69 (4th ed. 1971). This is common in tort law and can extend to imposing liability upon an artificial entity, such as a corporation, for the acts of its agents or employees. See, e.g., 1 K. BRICEY, CORPORATE CRIMINAL LIABILITY §§ 3.01-.08 (1984).

\(^{144}\) See, e.g., Commonwealth v. Koczwar, 397 Pa. 575, 155 A.2d 825 (1959), cert. denied, 363 U.S. 848 (1960); RESTATEMENT (SECOND) OF AGENCY § 219 (1968) (master's liability for servant) comment on Subsection (1) (Rationale of liability); Douglas, Vicarious Liability and Administration of Risk I & II, 38 YALE L.J. 584, 720 (1929). It is interesting to note that Douglas' interest in vicarious liability preceded
Because this liability is grounded in social utility concerns, it is considered reasonable to impose liability upon a party even though no act of that party actually caused the injury for which redress is sought.\textsuperscript{145}

Criminal law has been hesitant to accept vicarious liability because criminal accountability has traditionally been based upon one's own wrongful conduct.\textsuperscript{146} Because Justice Douglas couched it in agency terms, \textit{Pinkerton} has been construed as imposing vicarious liability\textsuperscript{147}—but it does not. Instead of abrogating "the need for a personal \textit{actus reus}" as an element of liability,\textsuperscript{148} the \textit{Pinkerton} doctrine holds a party liable for the consequences of a specific personal act—affiliating with another for criminal purposes. This act permits imposition of liability for crimes committed by those with whom one shares such a relationship. The non-acting party is liable for these offenses

\textit{Pinkerton}. See Douglas, supra. In analyzing its use in civil cases, he considered the rationale for imposing liability upon partnerships and, in so doing, emphasized the importance of voluntary association, control and the capacity to distribute risks as factors warranting the imposition of such liability. \textit{Id.} at 720-39.

\textsuperscript{145} See, e.g., \textit{RESTATEMENT (SECOND) OF AGENCY} § 219 comment on Subsection (1) (1968); see also infra note 146 (noting that civil actions seek an award of damages). In civil law, especially tort law, liability is rationalized under this premise: One party—the "principal"—is liable for the acts of another—his "agent"—because the principal has a duty to exercise some form of control over the agent. The principal's liability is regarded as resulting from an act of omission, i.e., failing to exert the necessary control, which proximately caused the complained-of injury to occur. Sayre, supra note 141, at 689-94; R. PERKINS & R. BOYCE, supra note 6, at 911-12 ("On this basis, the publisher of a newspaper may be guilty of a libel appearing in its pages without his knowledge.").

\textsuperscript{146} See, e.g., Sayre, supra note 141, at 694-96, 717 n.102 (law imposing a fine on "residents of a city ward in which a murder occurred would be held unconstitutional"). Another reason for the hesitance in this regard is the consequence of conviction: An employer who is held civilly liable for acts of an employee will be forced to pay damages but one found criminally liable faces severe penalties, including imprisonment. See \textit{id.} at 695; J. HALL, \textit{GENERAL PRINCIPLES OF CRIMINAL LAW} 254-55 (2d ed. 1960).

\textsuperscript{147} See, e.g., \textit{RESTATEMENT (SECOND) OF AGENCY} § 219(1) (1968) (master is liable for "the torts of his servants committed while acting in the scope of their employment"). See United States v. Troop, 890 F.2d 1393, 1399 (7th Cir. 1989) ("conspirators are agents of each other and just as a principal is bound by the acts of his agents within the scope of the agency, so is a conspirator bound by the acts of his co-conspirators"). The opinion uses language that is reminiscent of civil doctrines of \textit{respondeat superior}, especially in limiting liability to crimes that are within the "scope of the conspiracy."

\textsuperscript{148} W. LAFAVE & A. SCOTT, supra note 7, at 250. Vicarious liability eliminates the need for a personal act as a prerequisite for criminal liability. See \textit{id.} at 193-95; infra note 140; W. PROSSER, supra note 143, § 69.
because her criminal act of allying herself with the acting party "caused" them to be committed. 149

149. "[O]ne who contributes his will to a crime, by whomsoever the physical act of wrong is done, is guilty of the crime." 1 J. BISHOP, supra note 11, at 385. The causal premise noted above is analogous to the duty-fictive or otherwise—that provides the predicate for vicarious liability in tort law. See supra note 143 and accompanying text. Both use conduct of the non-acting party that was not the immediate cause of the harm complained of as the basis for liability. Both construe this conduct as "causing" the harm in question. See RESTATEMENT (SECOND) OF AGENCY § 219, comment on Subsection (1) (1968); R. PERKINS & R. BOYCE, supra note 6, at 911-12. And in both contexts the non-actor's conduct is seen as the "proximate" cause of the harm. See generally W. LAFAVE & A. SCOTT, supra note 7, at 281-82.

Proximate cause becomes an issue when the precipitating relationship between an act and a result is ambiguous. See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 430-432 (1976); R. PERKINS & R. BOYCE, supra note 6, at 774 (proximate cause is "a cause of which the law will take notice"). Holding one party liable—civilly or criminally—for another's acts implicates proximate cause because that person is being held liable for actions that were at least the immediate result of another individual's free will. Because coercion is not applied to ensure that the actor performs in a certain manner, it is difficult to say that the non-actor's conduct was the "but-for" cause of the resulting harm. See J. HALL, supra note 146, at 234-37, 247-57, 261-70. See generally W. LAFAVE & A. SCOTT, supra note 7, at 279 (conduct causes a result when that result would not have occurred "but for" the conduct); MODEL PENAL CODE § 2.03(1) (1985) (causal conduct is "an antecedent but for which the result in question would not have occurred"). Tort law uses social utility considerations to justify imposing liability on non-actors, which gives it more leeway in determining the consequences for which liability will be imposed. See, e.g., W. LAFAVE & A. SCOTT, supra note 7, at 282 (tort law requires a non-actor "to pay for the damage actually caused without regard to likelihood "on the theory that . . . he . . . should bear the cost"); see also Beale, The Proximate Consequences of an Act, 33 HARV. L. REV. 633 (1920). For various reasons, arguably criminal law requires "a closer relationship between the result achieved and that intended or hazardized." W. LAFAVE & A. SCOTT, supra note 7, at 282 (footnotes omitted); see also J. HALL, supra note 146, at 254-57. But it does incorporate the concept of proximate cause, so liability can be imposed even when it is not possible to show that there was a direct, immediate relationship between an actor's conduct and a given result. See, e.g., W. LAFAVE & A. SCOTT, supra note 7, at 281-99; R. PERKINS & R. BOYCE, supra note 6, at 776-85. Because proximate cause in criminal law is also a function of social policy, the standard for its assessment can vary across offenses. See, e.g., R. PERKINS & R. BOYCE, supra note 6, at 777. See generally J. HALL, supra note 146, at 284-95. Pinkerton applied a standard of proximate causation used in mail fraud cases to conspiracy. See supra notes 70-79 and accompanying text. In mail fraud, it was used to determine causation for the purpose of imposing complicitous liability. See, e.g., Blue v. United States, 138 F.2d 351, 362 (6th Cir.), cert. denied, 322 U.S. 736 (1943); United States v. Weisman, 83 F.2d 470, 474 (2d Cir.), cert. denied, 299 U.S. 560 (1936); Van Riper v. United
This act satisfies the criteria for imposing accountability under the traditional criminal law standard of personal liability: affiliating with another for criminal purposes is a voluntary act committed with a culpable mental state, or mens rea, that causes a prohibited social harm. In either of its guises, as Pinkerton liability or as complicitous liability, this act is clearly more culpable than the act that suffices for imposition of vicarious liability in civil law. In torts, for example, one is liable for failing to prevent a harm; in affiliative liability, one is liable for engaging in affirmative conduct that is

States, 13 F.2d 961, 967 (2d Cir.), cert. denied, 273 U.S. 702 (1926); Murray v. United States, 10 F.2d 409, 411 (7th Cir. 1925); Dalton v. United States, 154 F. 461, 462 (7th Cir. 1907); Burton v. United States, 142 F. 57, 62 (8th Cir. 1906); Hume v. United States, 118 F. 689, 697-98 (5th Cir.), cert. denied, 189 U.S. 510 (1903). One who had not personally used the mails to further a scheme to defraud could be held liable for another's use on the theory that she "caused" that use by participating in the scheme. See, e.g., Demolli v. United States, 144 F. 363, 366 (8th Cir. 1906) (causation is present if one "does an act, the natural and probable consequence of which... is" use of the mails).

The mail fraud standard is a particular application of the generally attenuated causation requirements that are used for complicitous liability. See, e.g., Dressler, Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem, 37 HASTINGS L.J. 91, 102 (1985) ("The most trivial assistance is sufficient basis to render the secondary actor accountable for the actions of the primary actor."). Since Pinkerton and accomplice liability share an underlying rationale—the concept of criminal affiliation—it was reasonable to apply the standard of causation used for accomplice liability to Pinkerton liability. See infra notes 166-194 and accompanying text.

150. Generally criminal liability is considered to require four elements—a voluntary act (actus reus), a guilty mind (mens rea), causation and some prohibited social harm. See W. LAFAVE & A. SCOTT, supra note 7, at 193-94; Hall, supra note 146, at 70-104, 171-80, 212-22, 247-81. Consummating a criminal affiliation satisfies all four elements. (1) Actus reus—this is the uncoerced act of aligning with another or others to pursue a criminal design. See, e.g., W. LAFAVE & A. SCOTT, supra note 7, at 195-200; see also infra note 151 and accompanying text. (2) Mens rea—in aligning with others, the individual acts with the purpose of facilitating achievement of the criminal design; this purpose constitutes the necessary "guilty mind." See, e.g., W. LAFAVE & A. SCOTT, supra note 7, at 216-231; see also infra note 186 and accompanying text. (3) Causation—this is considered supra note 149 and accompanying text. See generally J. HALL, supra note 146, at 279 ("Causation concerns a relationship, and in criminal law one of the relata is a definitely described harm."). (4) Harm—"harm" has different meanings with regard to different offenses. See J. HALL, supra note 146, at 212-22; W. LAFAVE & A. SCOTT, supra note 7, at 530-31; Model Penal Code § 5.03, commentary at 387 (1985); see also R. PERKINS & R. BOYCE, supra note 6, at 12 ("Crime is any social harm defined and made punishable by law."). In this context, the "harm" is the creation of a combination that is dedicated to achieving an unlawful purpose.
intended to result in perpetration of a harm the consequences of which are likely to be far more sinister than the harms encountered in tort law. 151 The culpability of the affiliative criminal act is enhanced not only by its foreseeable consequences but also by its purposiveness. As opposed to the act that gives rise to civil liability, this act is taken for the purpose of promoting commission of a criminal act. 152 The only element of criminal liability that is attenuated under Pinkerton is causation, which receives the same treatment accorded it under the kindred doctrine of accomplice liability. 153 Liability can attach under either form of affiliative liability without showing

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151. In complicity, the affirmative act is, e.g., aiding, abetting, counseling, commanding, procuring, inducing or causing the commission of a criminal act or an attempt to commit such an act. See 18 U.S.C. § 2 (1988); supra notes 38-40 and accompanying text; supra note 118 (attempted aiding and abetting). Complicitous liability also attaches to attempts to aid or abet commission of a criminal act. See, e.g., MODEL PENAL CODE § 2.06(3)(a)(ii) (1985) (accomplice "aids or agrees or attempts to aid" another in committing a criminal act); see also supra note 118. Under Pinkerton, the affirmative act is that of conspiring to accomplish some criminal purpose. Pinkerton, 328 U.S. at 646-47.

It is also possible to characterize the blameworthy act in civil vicarious liability as affirmative. Using tort law as an example, instead of censuring an employer for failing to control an employee, one could hold the former liable based upon affirmative conduct such as hiring an employee whom he knew required supervision or deciding to maximize profits by eliminating the position of a supervisor who would have taken steps to ensure that the harm did not ensue. See generally R. Perkins & R. Boyce, supra note 6, at 911-13.

"Affiliative liability" is used to denote the general class of liability that encompasses complicitous liability and Pinkerton liability. See infra notes 153-168 and accompanying text.

152. Both forms of affiliative liability require that the act be motivated by the purpose of achieving other criminal ends. See, e.g., United States v. Peoni, 100 F.2d 401 (2d Cir. 1938) (aiding and abetting implies a "purposive attitude" toward commission of the target crime); MODEL PENAL CODE § 5.03(1) (1985) (conspirator acts purposely to promote commission of target crime); id. § 2.06(3)(a) (accomplice acts "with the purpose of promoting" the offense); W. LaFave & A. Scott, supra note 7, at 536-37 (conspiracy requires intent to achieve target crime); W. LaFave & A. Scott, supra note 7, at 579-80 (accomplice liability requires purpose to bring about commission of the target crime); R. Perkins & R. Boyce, supra note 6, at 697 (conspiracy requires "specific intent" to cause commission of a crime).

Civilly, vicarious liability can be based upon a finding of some fault, such as recklessness or negligence, but it can also be predicated upon "strict liability," which means no showing of fault is required for the imposition of liability. See, e.g., W. LaFave & A. Scott, supra note 7, at 250; R. Perkins & R. Boyce, supra note 6, at 911-13; W. Prosser, supra note 143, § 69.
that the affiliative act actually caused commission of certain crimes. 154 And because the affiliative act is a wrong in itself, liability can attach even though the target crime was not accomplished. 155

To explain why causation is attenuated in this context, it is first necessary to identify the available categories of affiliative liability. Federal law recognizes six varieties of affiliative liability: (a) aiding and abetting commission of a substantive offense; (b) attempting to aid and abet commission of a substantive offense; (c) aiding and abetting an attempt to commit a substantive offense; (d) conspiring to commit a substantive offense; (e) conspiring to aid and abet the commission of a substantive offense; and (f) Pinkerton liability. 156 Only the first and last categories require the commis-

154. See, e.g., Peoni, 100 F.2d at 402 (complicity has nothing "to do with the probability that the forbidden result would follow upon the accessory's conduct"); Dressler, supra note 149, at 102-05; Kadish, supra note 125, at 357. The Pinkerton facts illustrate the irrelevance of causation under that doctrine. Daniel was liable for substantive offenses even though no evidence showed he "caused" them to be committed. It was sufficient, according to Douglas, that the commission of those offenses was a foreseeable consequence of Daniel’s unlawful alliance with Walter. See supra notes 52-57 and accompanying text; see also United States v. Lucas, 932 F.2d 1210 (8th Cir. 1991) (offense was reasonably foreseeable). For a comparison of the standards, see United States v. Powell, 929 F.2d 724, 726 (D.C. Cir. 1991).

155. See supra note 149 and accompanying text; see also supra notes 118, 141; infra note 158 and accompanying text.

If the agreement was to aid another to commit a crime or if it otherwise encouraged the crime’s commission, complicity would be established in the commission of the substantive offense. It would be anomalous to hold that conduct that would suffice to establish criminality, if something else is done by someone else, is insufficient if the crime is never consummated.

MODEL PENAL CODE § 5.03 commentary at 388 (1985) (footnote omitted).

156. See, e.g., supra note 122. Although the text does not discuss it as such, conspiracy is also a form of affiliative liability. See generally MODEL PENAL CODE § 5.03 commentary at 386-93 (1985) ("sanction against group activity"). Federal law recognizes various conspiracy offenses. See, e.g., 18 U.S.C. § 371 (1988) (general conspiracy); 21 U.S.C. § 846 (1988) (drug conspiracy); 18 U.S.C. § 1962(d) (1988) (RICO conspiracy). Aside from conspiracy, the text and notes have addressed each category of affiliative liability identified above except for conspiracy to aid and abet the commission of a substantive offense. For cases on this type of activity, see United States v. Bosch, 914 F.2d 1239, 1241 (9th Cir. 1990) (conspiracy to aid and abet cocaine distribution); United States v. Frink, 912 F.2d 1413, 1416 (11th Cir. 1990) (conspiracy to aid and abet possession of a controlled substance); United States v. Nealy, 840 F.2d 11 (4th Cir. 1988) (conspiracy to aid preparation and presentation of false tax returns); United States v. Marino, 617 F.2d 76, 78 (5th Cir.), cert. denied, 449 U.S. 1015 (1980) (conspiracy to aid and abet bail jumping). One can be convicted of conspiracy to aid and abet a substantive offense and aiding and abetting commission
sion of a substantive offense as a condition for liability. They do so because both categories are devices for imposing substantive liability upon one who did not personally execute a substantive offense, but who somehow "caused" it to be executed.157 The four remaining categories do not require the commission of a substantive offense as a condition for liability because they are inchoate offenses; they reach conduct that is "designed to culminate in the commission of a substantive offense" but has not actually done so.158

Because the inchoate offense categories reach conduct preatory to commission of a substantive offense, they cannot require proof of a causal nexus between a defendant's conduct and the commission of such an offense.159 Because the remaining two categories punish commission of a


Both the federal law and Model Penal Code recognize a separate offense of "solicitation." See 18 U.S.C. § 211 (1988) ("solicitation to obtain appointive public office"); 18 U.S.C. § 373 (1988) ("solicitation to commit a crime of violence"); MODEL PENAL CODE § 5.02 (1985). Solicitation reaches conduct that would otherwise represent "an attempt to conspire." MODEL PENAL CODE § 5.02 commentary at 365-66 (1985); see also Robbins, Double Inchoate Crimes, 26 HARV. J. ON LEGIS. 1, 54-55 (1989). It is an offense only if the effort to convince another to commit a crime is unsuccessful. See, e.g., id. at 29-34. Because it represents merely an "attempt to affiliate" for criminal purposes, it is not considered as a separate category in the discussion above. Id.

157. For a discussion of this issue see infra notes 187-90 and accompanying text.

158. Robbins, supra note 156, at 6. "Inchoate offenses allow punishment of an actor even though he has not consummated the crime that is the object of his efforts." Id. at 3 (footnote omitted). The inchoate crimes are conspiracy, attempt and solicitation. See also MODEL PENAL CODE § 5.0 commentary at 387 (1985). There are arguments for denoting conspiracy and attempt as substantive crimes. See id. ("the prevalent view is that attempt, conspiracy, and solicitation are substantive crimes in that they proscribe a specific category of acts"). This Article, however, uses "substantive offense" to denote a crime that is the target of an affiliative act such as conspiracy or aiding and abetting. This convention preserves the conceptual distinction between acts that sustain affiliative liability (e.g., conspiracy) and acts that are themselves the goals of an affiliative undertaking (e.g., drug distribution). It also conforms to federal practice.

At least one state distinguishes between "inchoate" and "choate" conspiracies. See Comment, Wisconsin's Party to a Crime Statute, 1984 Wis. L. REV. 769, 790. In this paradigm, "inchoate" conspiracies have not resulted in the commission of substantive offenses, while choate offenses have produced the commission of a substantive offense. Id. Pinkerton liability is, therefore, an example of "choate conspiracy." See id.

159. See, e.g., DEVITT, C. BLACKMAR & K. O'MALLEY, supra note 119, § 21.03
substantive offense, they require proof of such a nexus. But as they hold defendants liable for offenses that are executed by someone else, neither can insist on the direct causal relationship that is needed to hold one accountable for her own acts. Instead, they employ a compromise. In Pinkerton, Justice Douglas cited a rule that was used to impute causation in mail fraud cases as the basis for attributing causation among co-conspirators. This rule applied the common law test for calculating the scope of complicitous liability to a particular context—offenses under the mail fraud statute. Under the common law test, one was liable for another's criminal act if she had somehow promoted commission of that act or if it was a "proximate consequence" of acts she had promoted. One was not liable for acts that

(attempt). To convict for attempt in federal law, a jury must find that a defendant intended to commit a particular substantive offense, and took a "substantial step" toward its commission. See id; see also MODEL PENAL CODE § 5.01 (1985). Attempt is an inchoate offense, which means it is "a prohibited act performed in anticipation of committing" a substantive offense. Robbins, supra note 156, at n.3. If conduct that would otherwise constitute an attempt matures into commission of a substantive offense, the defendant will be charged with the substantive offense because the attempt merges into it. See id. at 9. As noted above, conspiracy no longer merges into a completed crime, so a defendant can be charged with conspiracy and the substantive offense. See, e.g., Pinkerton, 328 U.S. at 643 ("commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses").

160. See, e.g., MODEL PENAL CODE § 2.06 commentary at 306-313 (1985) (scope of accomplice liability). Pinkerton implements this by requiring that substantive offenses have been committed "in furtherance of the conspiracy" or have been foreseeable "as a necessary or natural consequence of the unlawful agreement." Pinkerton, 328 U.S. at 647-48.

161. Compare E. DEVITT, C. BLACKMAR & K. O'MALLEY, supra note 119, § 28.10 (causation in Pinkerton liability) with, id. § 49.03 (causation in bank robbery) and, id. § 43.03 (causation in perjury). See also id. at 717 ("Where the offense is . . . a true crime, that is, where it involves moral delinquency or is punishable by imprisonment or a serious penalty . . . the doctrine of respondeat superior must be repudiated."). See generally Sayre, supra note 103, at 719 ("Criminal liability in the case of all true crimes should be based exclusively upon causation.").

162. See supra notes 70-79; see also Pinkerton, 328 U.S. at 647 (all who join a scheme to defraud are responsible for any use of the mails in furtherance thereof). At least one case used Pinkerton to impose liability on participants in a mail fraud scheme. See United States v. Spudic, 795 F.2d 1334 (7th Cir. 1986).

163. He who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act." 4 N. BLACKSTONE, supra note 11, at 38. See also Sayre, supra note 103, at 694-701.

164. See supra section II(A) of this Article, pp 932-34; see also 1 J. BISHOP, supra note 11, at 388 (one who combines with others to commit an unlawful act "has the evil motive which justifies punishing him for any other resulting crime"); W.
"could not have probably or naturally resulted from" efforts to commit a crime she had facilitated or procured.\textsuperscript{165}

\textit{Pinkerton} imported the common law rule of imputed causation amongst accomplices into a new context—conspiracy. This is what led Justice Rutledge to criticize the majority opinion as blurring the basic distinction between substantive offenses, complicity and conspiracy; he regarded it as implementing the paradox noted above by equating conspiracy with complicity.\textsuperscript{166} But in this he erred. Rather than melding conspiracy and complicity

\begin{quote}
CLARK, supra note 4, at 110 (liable for all "probable consequences" of counseling an unlawful act); Sayre, supra note 103, at 703-704.
\end{quote}

165. Sayre, supra note 103, at 704-05 n.57 (quoting State v. Kennedy, 85 S.C. 146, 149-150, 67 S.E. 152, 154 (1910)). Accord W. CLARK, supra note 4, at 110 (not liable if the act differs "from that counseled or commanded"); 1 F. WHARTON, supra note 7, at 323-24 (act "must be the result and in execution of the confederacy"); see also 1 J. BISHOP, supra note 11, at 392-93. Federal law uses this test to determine the scope of complicitous liability under 18 U.S.C. § 2 (1988). Accord United States v. Vaden, 912 F.2d 780, 782 (5th Cir. 1990) (liable for crimes "that are the natural or probable consequence of the crime that he counseled, commanded, or otherwise encouraged"); United States v. Barnett, 667 F.2d 835, 841 (9th Cir. 1982) (liable for any crime that "was the natural or probable consequence of the crime that he advised or commanded, although such consequence may not have been intended by him") (quoting Russell v. United States, 222 F.2d 197, 199 (5th Cir. 1955)); United States v. Jones, 517 F.2d 176, 181 (D.C. Cir. 1975) (accessory guilty of any "crimes occurring as the 'natural and probable consequences' of the crime he himself commits"); see also United States v. Powell, 929 F.2d 724, 726 (D.C. Cir. 1991) (liable for acts "'that are a natural and probable consequence of the criminal scheme the accomplice encouraged or aided'") (quoting W. LAFAVE & A. SCOTT, supra note 7, at 590). Justice Douglas referred to this test in \textit{Pinkerton}. See \textit{Pinkerton}, 328 U.S. at 647 ("The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle"—i.e., that members of an illegal combination instigate commission of unlawful acts.).

166. See \textit{Pinkerton}, 328 U.S. at 651 (Rutledge, J., dissenting in part) ("Without the agreement Daniel was guilty of no crime. . . . With it and no more . . . he was guilty of two."). This perspective sees \textit{Pinkerton} as violating what can be characterized as a principle of additive liability in criminal law: Conspiratorial liability is imposed on those who agree to the commission of substantive offenses. Attempt liability is imposed upon those who endeavor to commit such offenses but are unsuccessful in doing so. Complicitous liability is imposed upon those who support others who commit offenses or attempt to do so. Substantive liability is reserved for those who successfully commit substantive offenses. Arguably, each type of liability is based upon an additional increment of "badness," so that, for example, it is more culpable to attempt to commit an offense than merely to agree to its commission. \textit{Pinkerton} critics contend that it ignores the principle of additive liability and impermissibly equates the act of agreeing that an offense will be committed with (a) successfully committing it and/or (b) providing aid and comfort to those who do so.
so that the former becomes merely another means of aiding and abetting, *Pinkerton* identified a new species of affiliative liability. While this variety of affiliative liability probably existed prior to the *Pinkerton* opinion, Justice Douglas gave it the imprimatur of the Supreme Court and, more importantly, distinguished it from related doctrines, such as the evidentiary rule noted above and the rule that allows the acts and declarations of conspirators to be used as evidence against their colleagues in crime.\(^{167}\)

The liability recognized by *Pinkerton* is conceptually related to complicity but rests upon a distinct factual premise. Before discussing the extent to which they are related, it is helpful to review their factual differences.

Under *Pinkerton*, an agreement to commit a crime or crimes is a prerequisite for liability. If such an agreement existed, anyone who joined it is liable for offenses other conspirators commit to "further" the goals of their agreement.\(^{168}\) The act of agreeing to the commission of certain crimes suffices; it is not necessary that one commit any affirmative act to advance the realization of the goals of the conspiracy.\(^{169}\) Complicity differs in two respects. First, one can "aid and abet" the commission of a crime without entering into an agreement to this effect.\(^{170}\) Second, to incur aiding and

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167. See supra notes 107 & 113 and accompanying text.

168. See, e.g., *Pinkerton*, 328 U.S. at 647.

169. See supra note 114 and accompanying text.

170. Accord United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976); see Iannelli v. United States, 420 U.S. 770 (1975) (agreement distinguishes conspiracy from aiding and abetting); United States v. Phillips, 664 F.2d 971 (11th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); (aiding and abetting does not require proof of an agreement); United States v. Beck, 615 F.2d 441, 449 & n.9 (7th Cir. 1980) (quoting United States v. Co-art, 595 F.2d 1023 (5th Cir. 1979)) (conspiracy "requires proof of agreement, aiding and abetting does not"); United States v. Bright, 630 F.2d 804 (5th Cir. 1980) (same); United States v. Krogstad, 576 F.2d 22 (3d Cir. 1978) (same); see also Perkins, The Act of One Conspirator, 26 Hastings L.J. 337 (1974). Perkins gives the following example of complicity without conspiracy:

D . . . planned to murder X. Y . . . sent a telegram to X to warn him . . . A . . . sent a telegram . . . to prevent the delivery of Y's wire. And A's telegram delayed Y's warning so that the latter . . . was not delivered in time, and X was murdered. A's complicity in X's murder is clear because he gave important aid to D, but there was no conspiracy because D was not even aware of the help he was receiving.

*Id.* at 340 (describing the facts of State ex rel. Martin v. Tally, 102 Ala. 25, 15 So. 722 (1894)). See generally Comment, Agreement as an Element in Conspiracy, 23 Va. L. Rev. 898, 910 (1937).
Abetting liability, it is not sufficient to associate oneself with a criminal venture; it is also necessary to commit an affirmative act that is intended to advance the commission of a substantive offense.\(^{171}\)

These differences in factual predicates mean that a course of conduct can support liability under either doctrine.\(^ {172}\) But the same conduct cannot be used to establish liability under both, as is illustrated by this example: X is charged with conspiring to import illegal drugs into this country, with aiding and abetting such importation, and with five substantive counts of distributing illegal drugs. The charges are based on the following conduct: (a) on January 1, X agreed to join Y, Z, and A in importing and selling illegal drugs; (b) on February 1, she rented a plane, which A used to bring a shipment of illegal drugs into this country; (c) X did nothing else to further the goals of the conspiracy but A, Y, and Z sold these drugs to "street dealers."

171. See supra notes 115-18 and accompanying text. This element generates permutations such as "conspiracy to aid and abet" and "aiding and abetting a conspiracy." In the former, one agreed to commit an act that would advance the goals of a criminal venture but never did; the agreement satisfies the requirement for conspiratorial liability. However, complicitous liability cannot attach because she committed no affirmative act to aid the success of that venture. See id; see also supra note 146. Therefore, she can be charged with "conspiracy to aid and abet." One aids and abets a conspiracy by taking some affirmative act to further the goals of that conspiracy without, however, joining in the agreement that constitutes it. See, e.g. supra note 146; see also United States v. Galiffa, 734 F.2d 306, 311 (7th Cir. 1984) (aiding and abetting a conspiracy).

172. See, e.g., United States v. Gonzalez, 933 F.2d 417 (7th Cir. 1991) (convictions proper under Pinkerton or an aiding and abetting theory); supra note 146; see also supra notes 116-18. A course of conduct can be apportioned to impose both Pinkerton and aiding and abetting liability. For example, Jane Doe joins a conspiracy to conduct an illegal gambling venture. The venture operates for six months, during which she notices that another conspirator, John Smith, is selling drugs to gambling patrons. She sends patrons who ask about such drugs to Smith. The gambling operation is discovered and all its members are arrested. Under Pinkerton, Jane Doe is liable for substantive offenses that were committed by members of the gambling conspiracy in furtherance of their agreement. Her liability extends to crimes other than gambling. Assume, for example, that other members of the conspiracy killed a gambling patron who had not been able to pay what he had lost. Because this criminal act was a foreseeable consequence of the conspiracy Jane entered, she can be held liable for it under Pinkerton. Neither she nor the other members of the gambling conspiracy are liable under Pinkerton for drug offenses based upon John Smith's conduct because this conduct was outside the scope of the conspiracy they joined. Although Jane Doe did not enter into a separate drug conspiracy with John Smith, she can be liable as an aider and abettor of drug offenses that he committed with her assistance.
Under Pinkerton, X can be convicted of the five substantive counts because they were committed by her co-conspirators within the scope of a conspiracy that she joined prior to their commission.\textsuperscript{173} She can be convicted of these offenses under a complicity theory because she associated herself with a criminal venture and took an affirmative step—renting the airplane—to advance achievement of its illegal designs.\textsuperscript{174} Under either theory, she can be convicted of the five substantive counts \textit{and} conspiracy because the latter is an offense separate from the substantive offense.\textsuperscript{175} She cannot, however, be convicted of the five substantive counts under \textit{both} theories because the same conduct is used to support liability under each doctrine.

As explained earlier, federal accomplice liability requires that one associate herself with a criminal venture and participate in efforts to achieve its goals by committing some affirmative act to that purpose, while Pinkerton liability requires that one join an agreement to accomplish certain criminal ends.\textsuperscript{176} X's act of joining the conspiracy would sustain Pinkerton liability and is the act by which she associated herself with the criminal venture for purposes of aiding and abetting liability.\textsuperscript{177} Renting the plane qualifies either as an overt act in furtherance of the conspiracy or as "participation" that would support liability for aiding and abetting the venture with which she associated herself. Because an act in furtherance of a conspiracy is not needed for Pinkerton liability, it seems that such liability \textit{can} be a lesser included offense of complicity.\textsuperscript{178}

Here, Pinkerton liability is a lesser included offense of accomplice liability because it is established by proving "less than all the facts required to establish" accomplice liability. That is, if X had done nothing more than

\textsuperscript{173} The major difference between imputing liability in criminal law and vicarious liability in civil law is that the latter allows liability to be imposed for prior "bad acts" that one subsequently adopts, or "ratifies," while the former does not. \textit{See, e.g.,} Sayre, supra note 103, at 708.

\textsuperscript{174} \textit{See supra} notes 114 & 161 and accompanying text.

\textsuperscript{175} \textit{See, e.g.,} Pinkerton, 328 U.S. at 641 (Daniel and Walter Pinkerton were each convicted of the substantive offenses plus conspiracy.). One can argue that this result is improper because conspiracy is a lesser included offense of the substantive offenses; it is the means by which the defendant "committed" those offenses. \textit{See infra} note 180.

\textsuperscript{176} \textit{See supra} notes 116-18 and accompanying text.

\textsuperscript{177} \textit{See, e.g.,} United States v. Rosenberg, 888 F.2d 1406, 1413 (D.C. Cir. 1989) (conspiracy could as "evidence that the appellees aided and abetted" substantive offenses); United States v. Whitehorn, 710 F. Supp. 803, 850 (D.D.C. 1989) (same).

\textsuperscript{178} \textit{See, e.g.,} MODEL PENAL CODE § 1.07(4)(a) (1985) (one offense is included in another when "it is established by proof of the same or less than all the facts required to establish" the other offense); \textit{see also infra} note 180.
join the conspiracy, she would be liable for the substantive offenses under *Pinkerton* but could not be convicted as an aider and abettor. Although joining the conspiracy would qualify as associating herself with a criminal venture, she committed no act of "participation." But *Pinkerton* liability will not always be a lesser included offense of aiding and abetting because it is possible to associate oneself with a criminal venture without joining in a conspiratorial agreement. It is also important to remember that on these facts, X could be convicted of the substantive offenses under either a *Pinkerton* theory or a complicity theory and could also be convicted of conspiracy. As noted earlier, conspiracy is a distinct offense, while complicity is not.

*Pinkerton* and accomplice liability are different means for holding a party liable for substantive offenses that were executed by someone with whom that party shared an affiliative relationship. When identical conduct supports liability under either principle, it is necessary to elect between them because, as is explained in more detail below, they are merely different ways of finding that an individual "committed" certain substantive offenses. To hold otherwise would be to find that a defendant had committed the same offenses twice, which would offend the prohibition against double jeopardy.

179. See supra note 161 and accompanying text.

180. See supra note 41 and accompanying text. At least one decision has suggested that conspiracy can be a lesser included offense of substantive offenses for which liability is imposed under a *Pinkerton* theory. See United States v. Marden, 872 F.2d 123, 126 (5th Cir. 1989) (no double jeopardy when conspirator is convicted of a substantive offense under *Pinkerton* and convicted of conspiracy to commit that offense); United States v. Larkin, 605 F.2d 1360, 1367 n.19 (5th Cir.), withdrawn in part, 611 F.2d 585 (5th Cir. 1979), cert. denied, 446 U.S. 939 (1980) (conspiracy a lesser included offense of the *Pinkerton* vicarious liability offenses). Double jeopardy commonly arises as to successive prosecutions, which are beyond the scope of this Article. See, e.g., United States v. Edmond, 924 F.2d 261 (D.C. Cir. 1991); Larkin, 605 F.2d at 1360-61.

181. It would be possible to develop yet another category, since *Pinkerton* does not differentiate between "the defendant who was active in the substantive offenses and the one who was not." United States v. Rosenberg, 888 F.2d 1406, 1418 (D.C. Cir. 1989) (Williams, J., concurring). Under *Pinkerton*, one who did no more than join a conspiracy is exposed to the same liability as one who joined and actively participated in the commission of substantive offenses. Since they clearly differ both in terms of moral culpability and their respective potentials for "dangerousness," it might be advisable to define a standard by which the former is subjected to a lesser quantum of liability than the latter.

182. See U.S. CONST. amend. v (no one "shall be . . . for the same offense . . . twice put in jeopardy of life or limb"). The prohibition prevents subsequent prosecution for an offense following an acquittal of it, or a conviction for it, and protects against multiple punishments for a single offense. See Brown v. Ohio, 432
Conceptually, both doctrines are devices for finding that an individual can be deemed to have "committed" a substantive offense even though that person was not present at its commission and did not physically consummate it.\textsuperscript{183} The obstacle in this scenario is causation; though it may be possible to prove the other elements of criminal liability,\textsuperscript{184} it is extraordinarily difficult, if not impossible, to prove that one person "caused" another's acts. In the example above, did X "cause" the actions of Y, Z, and/or A? It would be possible to prove (a) that X committed a voluntary act (or acts) with the purpose of bringing about the commission of a crime, which is a prohibited social harm; and (b) that such a crime, or harm, occurred.\textsuperscript{185} But the crime was physically perpetrated, in varying degrees, by Y, Z, and A. To hold X liable for their conduct, it is necessary to articulate a concept that allows their acts to be attributed to her without abrogating causation or any other elements of criminal liability.\textsuperscript{186}

U.S. 161, 165 (1977); see also Blockburger v. United States, 284 U.S. 299, 304 (1932) ("where the same act" can constitute two offenses "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not"); MODEL PENAL CODE § 1.07 commentary at 104-12 (1962) ("Conviction of both an offense and an 'included offense' . . . is barred by the double jeopardy clause."). "[C]onviction of a lesser included offense bars prosecution for the greater, and vice versa." See, e.g., Harris v. Oklahoma, 433 U.S. at 682 (1987); Brown, 432 U.S. at 161-62.

Some argue that Pinkerton violates the double jeopardy prohibition because it imposes double punishment for a single wrongful act. The mere act of agreeing to the commission of certain crimes allows one to be convicted of conspiracy and of any substantive offenses committed as a proximate result of that agreement. This result holds even if a conspiracy offense requires the commission of an overt act in furtherance of the agreement as a condition of liability. Because a crime committed by another conspirator qualifies as an overt act, a defendant can be convicted of substantive offenses based upon conspiracy and of conspiracy based upon another's committing substantive offenses. "[T]his makes the former a lesser-included offense within the latter, in violation of Blockburger." Rosenberg, 888 F.2d at 1419 (Williams, J., concurring); see also Larkin, 605 F.2d at 1367.

\textsuperscript{183} This discussion assumes that Pinkerton and/or complicitous liability is imposed on an individual rather than a collective and/or artificial entity. The assumption is made to eliminate the cumbersome locutions that would be needed to incorporate the imposition of liability upon such an entity.

\textsuperscript{184} See supra note 141 and accompanying text.

\textsuperscript{185} See id.

\textsuperscript{186} Causation is the only issue in this example, as it is clear that X at all times acted voluntarily and with the purpose of bringing about the commission of the target crimes. Mens rea becomes an issue if crimes are committed that are outside the criminal purposes that animated a particular actor. Both Pinkerton and complicity attempt to resolve this issue by limiting liability to crimes that were a foreseeable
Both the *Pinkerton* doctrine and rules of complicity accomplish this through a single device: they attribute causation for crimes that are physically perpetrated by another on the basis of a unique "bad act"—that of entering into a criminal affiliation. The often-unarticulated premise of these doctrines is that the act of aligning oneself with others to pursue a criminal purpose has causal significance. The causal import of this act is an instance of "mediate causation." "Mediate causation" denotes instances in which an individual's actions can be deemed to have exerted some causal effect upon another's conduct. It resolves the problem of attempting to identify the extent to which one person's acts actually affected another's conduct by making it possible, under certain circumstances, to assume a causal effect that is sufficient to support imposition of criminal liability.

result of an affiliative act. *See, e.g., Pinkerton*, 328 U.S. at 647-48 (conspirators are liable for acts that could be "reasonably foreseen as a necessary or natural consequence of the unlawful agreement"); United States v. Powell, 929 F.2d 724, 726 (D.C. Cir. 1991) (accomplice liability "encompasses acts . . . that are a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided") (citing W. LAFAVE & A. SCOTT, *supra* note 7, § 6.8, at 590).

For a discussion of imputing causation in accomplice liability, see, e.g., Dressler, *supra* note 149, at 105-07; *supra* notes 36-57 and accompanying text; Kadish, *supra* note 125.

187. In this they differ from the related doctrine of conspiracy. Conspiracy is based upon the proposition that affiliating with others for criminal purposes is a "bad act," but it makes this act a wrong in and of itself, without regard for any causal consequences it may have. The explanation for this lies in the dual nature of conspiracy. It is condemned both as an inchoate crime and because it poses the "special danger" of concerted activity. *See, e.g., Model Penal Code* § 5.03 commentary at 387 (1962); *supra* notes 149-50 and accompanying text.

188. "Mediate" is used here as an antonym of immediate. *See, e.g., WEBSTER'S, supra* note 132, at 1526 (mediate denotes "an intervening cause . . . not direct or immediate"). Outside this context, criminal law, like torts, insists that causal relationships be "immediate." *See supra* notes 144-45 and accompanying text.

189. The concept of mediate causation reflects the impossibility of analyzing person-to-person causation in the objective fashion that can be used when causation involves the interaction of two inanimate objects, the interaction of human beings and inanimate objects or even the interaction of non-sentient animate objects. *See, e.g., Kadish, supra* note 125, at 360 (*Sine qua non* in the physical causation sense . . . does not exist in . . . human actions . . ."); *see also infra* note 190.

190. [E]very volitional actor is a wild card; he need never act in a certain way. . . . It may be in a given case that the principal would not have chosen to act without the influence of the accomplice. But this is never necessarily so, in the sense, for example, that my volitionary chair is a necessary condition of its
The circumstances that support this assumption implicate what Jerome Hall called "causation by motivation." In "causation by motivation" one does not personally commit a crime "but his conduct ... foreseebly motivates another" to do so. Professor Hall primarily focused on instances in which one party supplies another with the motivation to commit a criminal act by employing some form of coercion. Although both are instances of mediate causation, this version of "causation by motivation" is broader than the variety that sustains Pinkerton and accomplice liability and far less useful in the context from which they arose.

The differences between them can be illustrated by an example. Imagine that an individual—the "prime mover"—wishes to induce certain others—the "actors"—to commit a crime. In the version Professor Hall discussed, the "actors" lack any motivation to commit the offense until they are influenced by the "prime mover," who supplies them with the incentive to do so. Assume the "actors" commit an offense in accordance with the desires of the "prime mover." If the "prime mover" supplied their motivation in this regard by using coercive techniques, then the "actors" will have a defense and liability will be imposed upon the "prime mover."
This result follows because the "prime mover" was clearly the "but for" cause of the offenses perpetrated by the "actors." "But for" his providing them with the motivation to engage in criminal acts, they would not have done so; he used other human beings as an instrument by which to commit crimes. Because the "actors" merely implemented the "prime mover's" criminal designs, it is proper to relieve them of liability and impose it only upon him.

Human beings, however, unite to commit crimes far more often than they become another's instrumentality for doing so. It is this circumstance which the Pinkerton doctrine and rules of complicity address. Here, "causation by motivation" operates in a more refined form. The Pinkerton doctrine and rules of complicity both target the act of affiliating with another or others to achieve a criminal purpose on the premise that this act reinforces and/or exacerbates motivation that already exists on some level. Because it operates on a predisposition to engage in criminal conduct, the affiliative act at issue in these doctrines cannot be a "but for" cause of any criminal results. It can, however, be a "contributing cause" of crimes that result from such an affiliation.

A contributing cause is a force that combines with another cause to produce a given result. The concept of "contributing cause" is not well-

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195. See generally G. FLETCHER, RETHINKING CRIMINAL LAW 681 (1978) ("As contrasted with merely aiding an existing criminal plan, instigation arguably satisfies the 'but for' criteria of causation . . . .").

196. J. HALL, supra note 146, at 272.

197. See, e.g., Pinkerton, 328 U.S. at 647 ("Each conspirator instigated the commission of the crime . . . .").

198. See, e.g., Kadish, supra note 125, at 343 ("If one . . . encourages another to commit a criminal act . . . by giving him emotional support and approval . . . one has not caused the principal to act in the physical sense of cause . . . for he was free to act as he chose.").

199. See, e.g., Robinson, Imputed Criminal Liability, 93 YALE L.J. 609, 633 (footnotes omitted) (1984) ("Even one who makes no direct contribution to the conduct constituting the offense may be held criminally liable if he is . . . causally connected to the act . . . in the sense that he has created or helped create the situation in which the offense occurs.").

200. See, e.g., R. PERKINS & R. BOYCE, supra note 6, at 782-85 (if two or more join in committing "an unlawful act . . . the act of each . . . is . . . the act of both"). The federal complicity statute imposes liability for causing another's criminal acts, but the concept of contributing cause has seldom been used in federal criminal law. See supra note 38. But see United States v. Maselli, 534 F.2d 1197, 1200 (6th Cir. 1976) (statute encompasses acts that "contribute to the commission of offenses"). And though it is used in state prosecutions, such cases involve causation due to the operation of objective forces, rather than the type of causation that is discussed in the
developed in criminal law for two reasons. One is that criminal law requires a closer fit between cause and effect than tort law does. The other is that law has historically employed a "mechanical" approach to causation that emphasizes the operation of objective forces and effectively ignores subjective causation. In analyzing "causation by motivation," Professor Hall attempted to introduce subjective causation into criminal law without abrogating the requirement that there be a demonstrably linear relationship between an act and a criminal result. It is possible to achieve this in instances in which one person's will supplants another's to become the "but for" cause of a criminal act. It is, however, impossible to achieve this when subjective causation is considered as an additive, rather than an overriding, force; this, of course, is the phenomenon that both the Pinkerton doctrine and rules of complicity address.

Both doctrines are based upon a realization that the act of affiliating with others for criminal purposes can be a contributing cause of subsequent criminal acts by bolstering motivation that already existed and/or by making it more difficult to withdraw from the criminal venture that produced those acts. It is likely to be extraordinarily difficult or even impossible to demonstrate the extent to which a particular affiliative act actually "caused" commission of given criminal act. Therefore, both use generic categories of affiliation as the basis for what is at least an inference, and at most a presumption, of an attenuated form of "causation by motivation" which will be referred to as "causation by affiliation." "Causation by affiliation" is an instance of mediate causation arising from an affiliation between persons who were privy to the commission of criminal acts. It applies to situations in which it is not possible to demonstrate that one person was the "but for" cause of another's criminal conduct. It attributes causation to non-actors on the basis of their having affiliated themselves with the actors. The affiliations are those that have been determined, with at least an intuitively high confidence level,
to bear a significant potential for inducing others to engage or persist in
criminal activity. For *Pinkerton*, the affilative act is agreeing that crimes will
be committed; for complicity, the affilative act can take various forms as long
as it reliably evinces a desire to support the commission of criminal acts.

C. RICO — Overview

Before 1970, prosecutors relied on conspiracy charges to join large numbers
of defendants in a single trial and to obtain convictions based upon weak
circumstantial evidence. 203

Since 1970, prosecutors have increasingly relied on charges under the
Racketeer Influenced and Corrupt Organizations statute, commonly known as
"RICO," as a superior means of achieving the advantages traditionally
associated with conspiracy charges. 204 RICO was enacted as Title IX of the
Organized Crime Control Act of 1970. 205 Prompted by the concern that
swept this country during the 1950's and 1960's, 206 the Act sought to
eradicate organized crime by creating "enhanced sanctions and new remedies"
to be used against it. 207 RICO was one of three offenses created by the Act,
the remaining titles of which attempted to improve the government's ability
to investigate crime and enhanced the sanctions that could be imposed on
offenders. 208 Its legislative history suggests RICO was meant to be used

203. Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM

204. See, e.g., Blakey & Gettings, *Racketeer Influenced & Corrupt Organizations
(RICO): Basic Concepts—Criminal & Civil Remedies*, 53 TEMP. L.Q. 1009, 1011
(1980) (footnote omitted).

under the following sections and headings, all of which appear in title 18 of the U.S.
Code: § 1961—Definitions; § 1962—Prohibited activities; § 1963—Criminal
Penalties; § 1964—Civil remedies; § 1965—Venue and process; § 1966—Expedition
of actions; § 1967—Evidence; § 1968—Civil investigative demand.

206. "The hearings that preceded the Act . . . led to a nationwide fear that our
society's basic institutions were being eroded by this evil force. The popular reaction
was not unlike the 'red scares' that swept the nation in the 1920s and again in the
1950s." Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65
IOWA L. REV. 837, 837 (1980) (footnotes omitted). See also supra § II(B)(2) of this
article, pp. 959-61.

See also Blakey & Gettings, supra note 204, at 1014-21.

208. RICO was Title IX of the Act; Title VIII defined a gambling offense and
Title XI contained the use of explosives. See United States v. Turkette, 452 U.S.
against organized criminals who infiltrate and capture legitimate businesses, but it has not been restricted to this context. It has been used against a wide variety of individuals and entities, many of whom have no connection with the activity that ostensibly led to its enactment. Though many express concern about this expansive use of the statute, others defend it as implementing Congress' desire that RICO "be liberally construed to effectuate its remedial purposes." Despite reservations about how it is used, even RICO's critics concede that it is uniquely adapted for use in a variety of factual contexts.


209. In the early years of RICO jurisprudence, Barry Tarlow noted that most defendants "could not conceivably be included within the traditional or newly expanded definitions of organized crime." Tarlow, supra note 203, at 170 (footnotes omitted). It has been used against "defendants who committed three robberies, a defendant who defrauded Medicare through his hospital supply business, and a group who operated a 'weekend dice and card game' in a trailer park." Bradley, supra note 206, at 257 (footnotes omitted). See Blakey & Gettings, supra note 204, at 1013 n.15 ("Organized Crime Control Act was not limited to . . . 'organized crime'"); see also Blakey & Gettings, supra note 204, at 1011-12; Blakey & Perry, An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?", 43 VAND. L. REV. 851, 860-68 (1990); Dennis, Current RICO Policies of the Department of Justice, 43 VAND. L. REV. 651, 653-54 (1990) (used against corruption and white-collar crimes). Some do not agree that RICO was meant to target organized crime. Cf. Coffey, The Selection, Analysis, and Approval of Federal RICO Prosecutions, 65 NOTRE DAME L. REV. 1035 (1990) ("spectacular successes against organized crime").

210. For discussions of this issue, see, e.g., Califa, RICO Threatens Civil Liberties, 43 VAND. L. REV. 805 (1990); Crovitz, How the RICO Monster Mauled Wall Street, 65 NOTRE DAME L. REV. 1050 (1990); Reed, The Defense Case for RICO Reform, 43 VAND. L. REV. 691 (1990); Tarlow, RICO Revisited, 17 GA. L. REV. 291, 298-300 (1983); cf. Blakey & Perry, supra note 209, at 868-924.

RICO was used very little during the first decade of its existence. See, e.g., Dennis, supra note 209, at 652-53. But in "1983 and 1984 an explosion of RICO cases occurred that is still being felt." Id. at 653. RICO supports both civil and criminal actions. See infra notes 215-18 and accompanying text.

211. Organized Crime Control Act of 1970, Pub. L. No. 91-452, Title IX, § 904, 84 Stat. 947. For critiques of this approach, see sources cited supra note 210. For a defense, see Blakey & Gettings, supra note 204, at 1031-33; Coffey, supra note 209, at 1049 ("Congress has mandated that RICO be liberally construed"); Note, RICO and the Liberal Construction Clause, 66 CORNELL L. REV. 167 (1980).

212. See generally Tarlow, supra note 210, at 293-302; other sources cited supra note 210.
Its flexibility results from a novel conception of criminal behavior—"enterprise criminality." Though sometimes construed as synonymous with "organized crime," "enterprise criminality" properly denotes criminal activity occurring "in the context of an organization," which can be a corporation, a Mafia family, or almost anything in between. RICO authorizes both criminal sanctions and civil remedies for such activity.

One who has been criminally convicted of violating RICO can be punished by a fine, imprisonment for up to twenty years or life, or by both a fine and imprisonment. Offenders can also be required to forfeit any property acquired or maintained by means of a RICO violation. Anyone whose "business or property" was injured by a violation has a civil remedy; RICO victims can file suit in federal court and seek treble damages plus costs and attorneys' fees.

These sanctions are triggered by conduct that is remarkably straightforward when considered in the abstract. To violate RICO, a "person" must do one of the following as to an "enterprise" that engages in or affects interstate or foreign commerce: (a) acquire or maintain an interest in it; (b) acquire or maintain control of it; (c) establish it; (d) operate it; or (e) conduct or participate in the conduct of its affairs. "Person" and "enterprise" are terms of art: a RICO "person" is an "individual or entity capable of holding a legal or beneficial interest in property." The "enterprise" is an

213. See, e.g., Blakey & Gettings, supra note 204, at 1013-14 (RICO created new "remedies for all types of organized criminal behavior, that is, enterprise criminality").


215. See infra note 218 and accompanying text.

216. 18 U.S.C. § 1963(a) (1988). Life imprisonment is available when "the violation is based on a racketeering activity for which the maximum penalty includes imprisonment." Id.

217. Id. § 1963(a)-(b).

218. Id. § 1964(c). The statute also creates civil remedies available to the government. See id. § 1964(a).

219. See id. § 1962(a)-(c). Under § 1962(a), it is an offense to "use or invest, directly or indirectly," income derived from racketeering or collection of unlawful debt to acquire an interest in, or establish or operate an enterprise. The section 1962(b) offense is using such income "to acquire or maintain, directly or indirectly" an interest in or control of an enterprise. The section 1962(c) offense is using racketeering or collection of unlawful debt to "conduct or participate, directly or indirectly, in the conduct of" the enterprise's affairs. The section 1962(d) conspiracy offense is discussed infra notes 239-243 and accompanying text.

220. 18 U.S.C. § 1961(3) (1988). The categories are merely illustrative, as the definition as a "person" includes "the estates, successors in interest, agents,分支机构, See Blakey & Gettings, supra
"individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." RICO reaches "illegal" as well as "legal" enterprises. In United States v. Turkette, the Supreme Court held that a group of persons "associated in fact" for purely illegal purposes can constitute a RICO enterprise. The Court found that an "association in fact" can be an "enterprise" even though it exists for no purpose other than the commission of unlawful acts.

A "person" violates RICO by using either the collection of unlawful debt or a pattern of racketeering activity to engage in the activities listed above. "Unlawful debt" is the result of illegal gambling or "loan-sharking." This option is seldom used. Most RICO actions accuse defendant(s) of using a pattern of racketeering activity to engage in the proscribed activities. The "pattern of racketeering activity" requires commission of "at least two acts of racketeering activity" within ten years of each other, excluding "any period of imprisonment." "Racketeering activity" is defined by incorporating conduct prohibited by state and other federal statutes. Under 18 U.S.C. section 1961(1)(A), it is "any act or threat

\textsuperscript{221} 18 U.S.C. § 1961(4) (1988). This definition "includes" these entities. "Here, too, the definition works by illustration, not by limitation." Blakey & Gettings, supra note 204, at 1023 (footnote omitted). It is possible for the "person" and "enterprise" to be the same. The generally accepted view is that they must be distinct for actions under 18 U.S.C. § 1962(c) (1988), but need not be under 18 U.S.C. § 1962(a) or (b) (1988). For cases involving section 1962(c), see Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 400 (7th Cir. 1984), aff'd on other grounds, 473 U.S. 606 (1985) (separation required); cf. United States v. Hartley, 678 F.2d 961, 987-90 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983) (separation not required). For cases under sections 1962(a) and (b), see Official Publications, Inc. v. Kable News Co., 884 F.2d 664 (2d Cir. 1989); Petro-Tech Inc. v. The Western Co., 824 F.2d 1349 (3d Cir. 1987); Medallion TV Enter., Inc. v. SelectTV of Cal., Inc., 627 F. Supp. 1290 (C.D. Cal. 1986), aff'd, 833 F.2d 1360 (9th Cir. 1987), cert. denied, 109 S. Ct. 3241 (1989). For a critique of cases in which both are a single individual, see Tarlow, supra note 210, at 344-45 ("an absurd notion"). They are usually alleged as distinct entities. See generally, Note, Functions of the RICO Enterprise Concept, 64 Notre Dame L. Rev. 646, 664-69 (1989); J. RAKOFF & H. GOLDSTEIN, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY § 5.09[4] (1991).
involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year." The remainder of section 1961(1) assimilates a "laundry list" of federal offenses as "racketeering activity." 229

Under the statute, a "pattern" exists if a person commits two acts of "racketeering activity" within ten years of each other. 230 In Sedima v. Imrex Co., Inc., 231 the Supreme Court held that "continuity plus relationship" between racketeering acts is needed for a "pattern." 232 It returned to the issue in H.J., Inc. v. Northwestern Bell Telephone. 233

Writing for the Court, Justice Brennan parsed Sedima. 234 He held that "relationship" exists if racketeering acts "have the same or similar purposes, results, participants, victims, or methods of commission" or are otherwise interrelated and not isolated. 235 As to "continuity," he held that it denotes either "a closed period of repeated conduct" or conduct that poses a danger of repetition. 236 Though not a model of clarity, H.J., Inc. is the present standard for identifying patterns of racketeering activity in RICO actions. 237

RICO creates three substantive offenses, but the majority of actions alleging substantive violations are brought under section 1962(c), which prohibits using a pattern of racketeering activity to conduct or participate in conducting the affairs of an enterprise. 238 The other widely-used provision

229. See id. § 1961(1)(B)-(E). The federal offenses include bribery (id. § 201), counterfeiting (id. §§ 471-473), embezzling pension and welfare funds (id. § 664), mail and wire fraud (id. §§ 1341, 1343), obscenity (id. § 1461-1465), obstruction of justice (id. §§ 1503, 1510-1513), interference with commerce (id. § 1951), money laundering (id. §§ 1956-1957), and labor offenses, bankruptcy fraud, securities fraud, federal drug offenses and violations of the Currency and Foreign Transactions Reporting Act. See id. § 1961(1).

230. See, e.g., supra note 228 and accompanying text.


232. Id. at 497 n.14.


234. Id. at 237-38. Under RICO, the offenses that define "racketeering activity" are known as "predicate offenses." See Coffey, supra note 209, at 1036 (18 U.S.C. § 1961(1) (1988) "cites as predicate statutes fifty-two other federal statutes . . . federal labor and securities laws, and nine state offenses").


236. Id. at 241.

237. For critiques of the opinion, see Note, "Mother of Mercy—Is This the End of Rice?", 65 NOTRE DAME L. REV. 1106 (1990); Dennis, supra note 209, at 653-55.

238. See supra note 219; J. RAKOFF & H. GOLDSTEIN, supra note 221, at 1-36; see also Takayama, supra note 219, at 424.
is section 1962(d), which makes it an offense to conspire to violate 18 U.S.C. section 1962(a), (b), or (c).

RICO conspiracies are a matter of ambiguity. Many courts hold that the offense occurs with the agreement to commit substantive violations; others also require an overt act in furtherance of the agreement.239 The agreement is also a source of confusion. In most circuits, a defendant merely needs to agree that some member(s) of the conspiracy will commit substantive violations.240 Some, however, require that the defendant personally agree to commit such violations.241 Conspirators must agree to use a pattern of racketeering activity or collection of unlawful debt to engage in activities prohibited by section 1962(a), (b) or (c).242 There is no merger under the statute, so one can be convicted of both conspiracy and substantive offenses; cumulative penalties can be imposed in accordance with Congress' desire to impose enhanced sanctions on organized crime.243

RICO did not add to the categories of prohibited conduct; the conduct that supports RICO charges was already defined as illegal by other statutes.244 RICO attempts to strike at "organized crime" by attacking the structures within which it flourishes.245 To that end, RICO prohibits using


242. See, e.g., J. RAKOFF & H. GOLDSTEIN, supra note 221, § 1.04[4].

243. See, e.g., United States v. Rone, 598 F.2d 564, 572 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980) (20-year consecutive sentences for convictions under § 1962(c) & (d)). See 1 K. BRICKY, CORPORATE CRIMINAL LIABILITY 292-93 (1984); see also infra note 287 and accompanying text.

244. Blakey & Gettings, supra note 204, at 1021 n.71.

245. See Note, supra note 221, at 650-53. "Criminalizing" organized crime entailed "'defining illicit business in organizational terms'" and making "'participation in such divisions of labor a violation of criminal law.'" Id. at 652 (quoting Cressy, The Functions and Structure of Criminal Syndicates, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT:

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otherwise-proscribed conduct to have some "impact" on an organization, or "enterprise." The organization can be "legal" or purely "illegal." The "impact" is one of the activities proscribed by section 1962.

RICO makes it a federal crime to commit certain crimes within an organizational configuration. If these offenses are committed outside such a configuration, RICO does not apply and they must be prosecuted as discrete offenses. If committed in this context, however, they support criminal charges and/or civil actions under RICO.

III. CAN PINKERTON LIABILITY BE ENFORCED IN RICO ACTIONS?

Pinkerton defines an affiliative liability that is generally enforced in federal criminal law. RICO is a federal statute that imposes criminal and civil liability for criminal activity occurring within an organization, or "enterprise." Because federal criminal law generally imposes Pinkerton liability, it seems such liability should also apply to RICO actions.

Unfortunately, this issue has yet to be resolved. Pinkerton has been cited and even applied on occasion, but no cases analyze the permissibility of using Pinkerton liability under RICO. No law review articles have tackled this

ORGANIZED CRIME 57 (1967)). Cressy argued that this approach was needed because aside from conspiracy, there was no means of attacking those who used a division of labor to perpetrate crimes. See Cressy, supra.

246. See supra notes 219-29 and accompanying text.
247. See supra notes 221-23 and accompanying text.
248. See supra note 219 and accompanying text. In other words, "impact" is establishing an organization, acquiring or maintaining an interest in or control of it, operating it or conducting its affairs by prohibited means.
249. This section considers whether it is doctrinally permissible to enforce Pinkerton liability in RICO actions. It does not address the advisability of doing so.
250. See supra Section II(B)(2) of this article, pp. 959-67.
251. See supra Section II(C) of this article, pp. 980-85.
252. Pinkerton was used in United States v. Caliendo, 910 F.2d 429 (7th Cir. 1990). In Caliendo, the defendants were charged with RICO conspiracy and with twenty-six counts of violating the Travel Act, 18 U.S.C. § 1952 (1988). Id. at 431. Each was convicted of the conspiracy and of several Travel Act counts. Id. Over objections, the trial court gave a Pinkerton instruction that allowed the jury to use defendants' membership in the RICO conspiracy as the basis for imposing substantive liability under the Travel Act counts. Id. at 439 n.7. In her appeal, one defendant challenged this instruction, arguing that using Pinkerton in connection with RICO conspiracy "resulted in an unwarranted extension of criminal liability." Id. at 439 (citing United States v. Neapolitan, 791 F.2d 489 (7th Cir.), cert. denied, 479 U.S. 939 (1986)). The Seventh Circuit rejected her argument because it found the evidence was sufficient to support her conviction on the Travel Act counts. "In light of this...
fail to see how the Pinkerton instruction jeopardized any evidentiary determinations made by the jury." Id. at 439.

The case cited in Caliendo is Neapolitan, 791 F.2d at 504-05 n.7 ("[restraint [should] be applied with regard to Pinkerton in this context]." For a recent Seventh Circuit decision, see United States v. Campione, 942 F.2d 429, 437-38 (7th Cir. 1991). Campione is discussed infra note 266. For other cases dealing with Pinkerton and RICO, see United States v. Pungitore, 910 F.2d 1084, 1147 n.91 (3d Cir. 1990) (no "Pinkerton problem" with instructions in criminal RICO case); United States v. Campione, No. 89 CR 166 (N.D. Ill. Aug. 15, 1989) (WESTLAW, Allfeds database) ("not legally incorrect to use a Pinkerton instruction in a RICO case"); Feminist Women's Health Center v. Roberts, No. C86-161Z (W.D. Wash. May 5, 1989) (WESTLAW, Allfeds database) (plaintiffs "have not provided any case in which the Pinkerton doctrine was applied under RICO § 1962(c) to hold a RICO defendant chargeable with a predicate offense of a co-conspirator, even if he did not specifically enter into a conspiracy to commit that particular act, and this Court has found none"); United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279, 335 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986) ("culpability under § 1962(c) has been established . . . under Pinkerton, by the conduct of their co-conspirators").

253. Two articles analyze "vicarious liability" in RICO actions, but neither considered Pinkerton as a means of imputing liability for substantive offenses. See Dwyer & Kiely, Vicarious Civil Liability under the Racketeer Influenced and Corrupt Organizations Act, 21 CALIF. W.L. REV. 324 (1985); Note, Judicial Efforts to Redirect an Errant Statute: Civil RICO and the Misapplication of Vicarious Corporate Liability, 65 B.U.L. REV. 561 (1985). As was explained earlier, Pinkerton is not a rule of vicarious liability. See supra Section II(B)(2) of this Article pp. 961-66. Another article has examined the related issue of enforcing accomplice liability under RICO. See Comment, Aiding and Abetting Liability for Civil Violations of RICO, 61 TEMP. L. REV. 1481 (1988).

254. See, e.g., U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS 73-74 (1985) ("the combination of RICO and Pinkerton could lead to unwarranted extensions of criminal liability"). This policy, of course, accounts for the fact that there is functionally no case law on the use of Pinkerton liability in RICO actions. See also infra note 264 & 266 and accompanying text; cf. Neapolitan, 791 F.2d at 505 (government argued for Pinkerton liability in RICO case).

255. Although the Justice Department's policy does not bind civil RICO litigants, it is at least arguable that the contours of civil RICO cases are shaped by the concepts utilized in RICO prosecutions. See generally Dwyer & Kiely, supra note 253, at 325 (RICO "impose[s] civil liability for criminal acts").
This matter, however, should be resolved. Even if the Justice Department persists in its policy of restraint, *Pinkerton* liability can become an issue in civil actions; also, the resolution of this issue may provide insights into the role of affiliative liability in federal criminal law.256

For these reasons, the remainder of this Article endeavors to resolve the extent to which it is doctrinally acceptable to enforce *Pinkerton* liability in RICO cases. Section A analyzes objections that can be made to using *Pinkerton* under RICO and considers how it can be used in RICO prosecutions if these objections are overcome. Section B examines the doctrine's use in civil RICO cases.

A. Criminal RICO

RICO is primarily a criminal statute, though it includes a civil remedy for victims of the activities it proscribes.257 As a criminal statute, it imposes both substantive and conspiratorial liability.258 This liability can be coupled with liability for the predicate offenses, commission of which give rise to substantive RICO liability.259 The as-yet unresolved issue is whether the *Pinkerton* doctrine can be used to impose liability for substantive RICO violations upon one who agreed to their commission but was not personally involved in their execution.

1. Objections

The critical inquiry in resolving this issue is whether there is any doctrinal reason not to enforce *Pinkerton* liability in RICO cases. RICO creates four distinct offenses—a RICO conspiracy and three substantive offenses.260 The question is, then, "is there any principled reason why the affiliative act that gives rise to *Pinkerton* liability as to other substantive offenses in federal criminal law should not also do so with regard to RICO offenses?"

This question can be answered by analyzing two related issues: (1) whether other forms of affiliative liability apply under RICO; and (2) whether *Pinkerton* liability is enforced under statutes that are analogous to RICO in

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256. For instances in which this issue has arisen in civil RICO litigation, see infra pp. 1007-10.
257. See supra section II(C) of this Article, pp. 980-81.
258. See, e.g., 1 K. BRICE, supra note 243, at 293 (defendant can be punished "for both conspiring to commit and for committing substantive RICO violations").
259. See supra section II(C) of this Article, pp. 982-83 (explanation of predicate offenses); see also K. BRICE, supra note 243, at 313-14.
260. See supra section II(C) of this Article, pp. 981-83.
their purpose and effect. If other types of affilative liability do not apply under RICO, and/or Pinkerton liability is not imposed under RICO analogues, then there may be a doctrinal impediment to using affilative liability under RICO. If other types of affilative liability do apply under RICO, and Pinkerton liability is imposed under analogous statutes, however, then there must be no doctrinal obstacle to enforcing Pinkerton liability in RICO prosecutions.

As to the applicability of affilative liability, an earlier section demonstrated that Pinkerton liability is conceptually akin to liability for complicity, a form of affilative liability that is often referred to as "aiding and abetting" the commission of an offense. Because complicity is a form of affilative liability, if it applies to RICO actions the statute cannot contain an innate bar to incorporating at least the general concept of affilative liability in its enforcement.

As a recent case noted, "[i]t is beyond dispute that a RICO conviction may rest upon the defendant's aiding and abetting of charged predicate offenses." Aiding and abetting a predicate offense is, in effect, the

261. See supra section II of this Article, pp. 970-78.

262. Although the aiding and abetting liability defined by 18 U.S.C. § 2 (1988) routinely applies to federal offenses, two cases have held that it does not apply to an offense the structure of which is analogous to RICO. See infra note 274; see also United States v. Pino-Perez, 870 F.2d 1230, 1233 (7th Cir. 1989) ("No cases other than Amen and Benevento hold section 2(a) totally inapplicable to a federal criminal statute . . . ."). Because, however, this has been recognized as a possibility under a very similar statute, the issue is addressed in the text above.

One can argue that RICO is itself a form of affilative liability in that its proscriptions only attach to conduct that occurs within an organizational context. If RICO does require an "affiliation" as a prerequisite for incurring liability under its substantive or conspiracy provisions, then one can argue that the imposition of Pinkerton liability would impermissibly impose double punishment for a single act of affiliation. See, e.g., United States v. Neapolitan, 791 F.2d 489, 504-05 n.7 (7th Cir.), cert. denied, 479 U.S. 939, 940 (1986) ("Given that implicit within the compound nature of RICO is a concept of punishment for substantive offenses, the commission of which was agreed to by the defendant, it is difficult to see why the government needs to invoke a second cumulative punishment device in the form of Pinkerton liability."); see also infra note 266 and accompanying text.

commission of such an offense. Because aiding and abetting is a form of affiliative liability and because it supports imposition of substantive criminal RICO liability, there is no categorical impediment to using affiliative liability in RICO cases. This suggests that Pinkerton liability may be permissible under RICO. Indeed, the use of complicitous liability in RICO actions indicates that general federal criminal doctrines can apply under the statute, which at least inferentially supports using the Pinkerton doctrine in this context.

Though RICO's use of complicity establishes its tolerance for one type of affiliative liability, the crucial question is whether this tolerance extends to the type of affiliative liability imposed by the Pinkerton doctrine. It may be that the unique structure of RICO presents some impediment to its use of Pinkerton liability. One way to determine the existence of such an impediment is to examine an analogous statute. If Pinkerton liability is enforced under an analogous statute, there should be no reason why it cannot be enforced under RICO; conversely, if Pinkerton liability is not enforced under a RICO analogue, this suggests that these statutes may be innately intolerant to this type of liability.

Before undertaking this analysis, it is necessary to clarify what would constitute an impediment to using Pinkerton liability in this context. Pinkerton imposes liability for substantive offenses based upon the affirmative act of agreeing to the commission of those and/or related offenses. The "bad act" that triggers substantive liability is the act of affiliating with another

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provision of Federal, State, or other law imposing criminal penalties . . . in addition to those it creates). A RICO conspiracy charge can be based upon an agreement to aid and abet the commission of substantive RICO offenses. See, e.g., Rastelli, 870 F.2d at 831-32; Cauble, 706 F.2d at 1339-41. See generally United States v. Jones, 678 F.2d 102, 105 (9th Cir. 1982) (18 U.S.C. § 2 "is applicable to the entire [federal] criminal code").

264. See generally cases cited supra note 263. See also J. RAKOFF & H. GOLDSTEIN, supra note 221, at 12-27. Conduct which would render one an "accessory after the fact" in traditional complicity parlance also qualifies as a RICO predicate. See, e.g., United States v. Gallo, 763 F.2d 1504, 1530 n.34 (6th Cir. 1985), cert. denied, 474 U.S. 1068 (1986); see also supra section II(C) of this Article, p. 982.

265. See supra section II(B) of this Article, pp. 970-74. As explained earlier, under Pinkerton one incurs liability for substantive offenses by joining a conspiracy that contemplates the commission of those or similar offenses. See id. Liability is imposed both for the substantive offenses and for conspiracy as a separate offense. If Pinkerton liability applies under RICO, it would operate as follows: proof that one had joined a RICO conspiracy, which is a conspiracy that contemplates commission of substantive RICO offenses, would permit imposition of criminal liability for conspiracy under 18 U.S.C. § 1962(d) (1988), and for any substantive RICO offenses committed in furtherance and/or as a foreseeable consequence of that conspiracy.
or others for criminal purposes; under Pinkerton, one is held to the foreseeable consequences of such a criminal bargain.

The imposition of Pinkerton liability will not be permissible under RICO if RICO itself imposes liability for the act of agreeing to the commission of substantive offenses. If RICO does this, then enforcing Pinkerton liability in RICO prosecutions would impose double liability for a single "bad act" of criminal affiliation. One court has suggested that this is a reason for not enforcing Pinkerton liability under RICO:

Unlike a "standard" conspiracy, a section 1962(d) conspiracy provides for enhanced penalties based, at least in part, on involvement in the predicate crimes defining the conspiracy. Thus, a RICO conspiracy is . . . a cumulative punishment device, allowing for penalties a quantum harsher than those for other conspiracies. Given that complaint with the compound value of RICO is a concept of punishment for substantive offenses . . . it is difficult to see why the government needs to invoke a second cumulative punishment device in the form of Pinkerton [liability].

Although this court did not suggest that Pinkerton liability cannot be used under RICO, its comments raise valid concerns about the imposition of this type of affiliative liability in the context of complex federal criminal statutes. Before addressing the extent to which these concerns are valid with regard to RICO, it is useful to consider whether Pinkerton liability is enforced under a statute the structure and operation of which is analogous to RICO.

Its closest analogue is the "Continuing Criminal Enterprise" statute—21 U.S.C. section 848—which RICO architect G. Robert Blakey has described as "RICO's sister provision." The Continuing Criminal Enterprise, or CCE,

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266. Neapolitan, 791 F.2d at 504-05 n.7 (government argued for Pinkerton liability in RICO case). The court was careful to note that Pinkerton liability is not forbidden under RICO: "This is not to say that the use of Pinkerton instructions in RICO conspiracy cases is 'wrong or improper' but only to caution that restraint be applied with regard to Pinkerton in this context." Id. In United States v. Campione, 942 F.2d 429 (7th Cir. 1991), the Seventh Circuit construed Neapolitan as holding that the "use of Pinkerton instructions in RICO conspiracy cases is not 'wrong or improper.'" Id. at 437 (quoting Neapolitan, 791 F.2d at 505 n.7). The Campione instruction told the jury that if it found a defendant guilty of participating in a RICO conspiracy, then it could also find that defendant guilty of substantive Travel Act offenses committed pursuant to that conspiracy. Id. at 437-38.

statute makes it a federal crime to "engage[] in a continuing criminal enterprise".\textsuperscript{268} A "continuing criminal enterprise" is the commission of a "continuing series" of drug felonies "in concert with five or more other persons with respect to whom" one "occupies a position of organizer, a supervisory position, or any other position of management" and "from which such person obtains substantial income or resources."\textsuperscript{269}

The Supreme Court has held that CCE is a conspiracy offense because "conviction would be impossible unless concerted activity were present."\textsuperscript{270} As with RICO conspiracies, CCE is "greater" than simple conspiracy so one can be acquitted on a CCE charge and still be convicted of conspiracy under another federal statute.\textsuperscript{271} Like RICO offenses, CCE is distinct from its predicates, so one can be convicted and punished for both.\textsuperscript{272} Punishment

\textsuperscript{269} Id. § 848(b). \textit{See also infra} note 284. A CCE "series" includes three or more felony drug offenses. \textit{See, e.g.,} United States v. Young, 745 F.2d 733, 747 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985). The penalty is imprisonment for from 20 years to life plus a fine of up to $100,000 and forfeiture of all profits and property obtained as a result of the offense. 21 U.S.C. § 848(a)(1) (1988).

Section 848(b)(2)(A) restricts the definition of the crime to a continuing series of violations undertaken by the accused in concert with five or more other persons . . . . Even if § 848 were read to require individual agreements between the leader of the enterprise and each of the other five necessary participants, enough would be shown to prove a conspiracy . . . .

\textit{Id.}


cannot, however, be imposed for a predicate conspiracy offense and CCE because doing this would punish the same conduct twice. 273

Though both target concerted criminal activity, CCE is more stringent than RICO in this regard. An individual acting alone can violate RICO, but not CCE. 274 If the objection given above as to why Pinkerton liability is inappropriate under RICO is well-taken, such liability would be equally inappropriate under CCE because it, too, is a "compound" offense that punishes crimes, "the commission of which was agreed to by the defendant." 275

273. "[A] defendant convicted under § 848 may not also be convicted for any predicate conspiracy charges proved as elements of the CCE offense." United States v. Lyles, 929 F.2d 695 (4th Cir. 1991). Accord United States v. Paulino, 935 F.2d 739 (6th Cir. 1991) ("defendant cannot be subjected to cumulative punishment for both a conspiracy violation under [21 U.S.C. §] 846 and a CCE violation"); see also United States v. English, 925 F.2d 154, 159-60 (6th Cir.) (per curiam), cert. denied, 111 S. Ct. 2810 (1991); United States v. Butler, 885 F.2d 195, 202 (4th Cir. 1989); United States v. Schuster, 769 F.2d 337, 344-45 (6th Cir. 1985), cert. denied, 475 U.S. 1021 (1986). Section 846 of title 21 of the United States Code makes it an offense to conspire to commit certain drug offenses. If it were used as a CCE predicate and punishment were to be imposed for both offenses, the defendant would be punished twice for a single act of agreeing to commit drug offenses. See, e.g., Jeffers, 432 U.S. at 150-54. But see infra notes 298-99 and accompanying text (using lesser conspiracy charge and Pinkerton to establish CCE offense).

One can be convicted of RICO conspiracy and conspiracy to commit drug offenses without offending the rule against double jeopardy. See, e.g., United States v. Benevento, 836 F.2d 60, 72-73 (2d Cir. 1987), cert. denied, 484 U.S. 1043 (1988) (different offenses). One can also be convicted of both RICO and CCE without violating this prohibition. See, e.g., United States v. Muhammad, 824 F.2d 214, 218 (2d Cir. 1987), cert. denied, 484 U.S. 1013 (1988) (CCE "targets supervisors of narcotics enterprises; RICO is aimed at all those who, through an enterprise, participate in acts of racketeering activity, whether those acts be narcotics offenses or other specified crimes").

274. See, e.g., United States v. Benny, 559 F. Supp. 264, 270-71 (N.D. Cal. 1983), aff'd, 786 F.2d 1410 (9th Cir.), cert. denied, 479 U.S. 1017 (1986) (single individual RICO offense); see also Tarlow, supra note 210, at 344-45; supra note 269 and accompanying text.

275. United States v. Neapolitan, 791 F.2d 489, 504-05 (7th Cir.), cert. denied, 479 U.S. 939 (1986). See supra note 266; see also Garrett, 471 U.S. at 789 (RICO and CCE as "compound-complex felonies"). The objection to Pinkerton liability may be even stronger for CCE than for RICO, since one court has held that complicity, in the form of aiding and abetting liability, does not apply to CCE. Accord United States v. Marshall, 908 F.2d 1312, 1323 (7th Cir.), cert. denied, 111 S. Ct. 579 (1990); Benevento, 836 F.2d 60 at 71-72; United States v. Amen, 831 F.2d 373, 381-82 (2d Cir. 1987), cert. denied, 485 U.S. 1021 (1988) (participants in drug offenses cannot be convicted of CCE as aidsers and abettors of that offense; cf. United States v. Pino-Perez, 870 F.2d 1230 (7th Cir.), cert. denied, 110 S. Ct. 260 (1988) (aiding and

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But Pinkerton liability applies to CCE: In United States v. Graewe,276 the Sixth Circuit held that CCE "is a conspiracy charge, and one convicted of a CCE is subject to Pinkerton liability."277 In United States v. Michel278 the Fifth Circuit agreed, holding that Pinkerton applies because a CCE offense implicates the agreement that gives rise to Pinkerton liability.279 No reported cases hold to the contrary.

This plus the application of aiding and abetting liability suggests that the question posed above should be answered in the negative, that, in other words, there is no principled reason why Pinkerton liability cannot be used in RICO prosecutions. Because RICO and CCE are different statutes, however, Pinkerton's application under CCE cannot conclusively establish its acceptability under RICO. To do this, it is necessary to analyze RICO's peculiar abetting liability applies to CCE). But see United States v. Aiello, 864 F.2d 257, 264 (2d Cir. 1988) (supervisor's CCE liability based upon aiding and abetting CCE predicates).

276. 774 F.2d 106 (6th Cir. 1985).


278. 588 F.2d 986 (5th Cir. 1979), cert. denied, 444 U.S. 825 (1980).

279. Id. at 999. The court noted that Pinkerton applies to other drug offenses and should, therefore, be used to hold the organizer or supervisor of a criminal enterprise responsible for the acts of his co-conspirators done in furtherance of the operation he manages. ... Pinkerton ... is based upon an agreement.... This element is also present in ... a continuing criminal enterprise.... The statute requires that a defendant must act "in concert" with five or more persons. The Supreme Court ... [has] interpreted this to encompass the agreement required to prove a conspiracy.... Therefore, we hold Pinkerton ... applicable to defendants charged with ... a § 848 continuing criminal enterprise.

Id. (citations omitted). See generally Jones, 763 F.2d at 525 ("jury properly using substantive Pinkerton counts as predicate violations, convicted Jones of operating a continuing criminal enterprise").
structure to determine if it presents an obstacle to *Pinkerton* liability that does not exist under CCE.

One possibility in this regard is the conduct each addresses. Though both target organized criminal activity, CCE is limited to drug offenses while RICO sweeps much more broadly.\textsuperscript{280} From this and from contemporary attitudes toward drug trafficking, one can argue that *Pinkerton* liability is appropriate under CCE because it provides an additional weapon against a particularly heinous evil, but is inappropriate under RICO because RICO can be used in so many different circumstances against such a variety of defendants.\textsuperscript{281} This argument, however, fails. Aside from projecting current law enforcement priorities onto statutes that are the products of a very different climate,\textsuperscript{282} it ignores RICO's use in drug cases.\textsuperscript{283}

Another possibility lies in the structure of their respective prohibitions. Each addresses concerted criminal activity occurring in an organizational setting.\textsuperscript{284} CCE attacks "managers" of drug enterprises; RICO attacks those who combine to use racketeering to have a defined impact upon an enterprise, which can be legitimate or illegitimate in nature.\textsuperscript{285} CCE makes commission of substantive violations an element of its offense; RICO conspiracy penalizes the act of agreeing to commit substantive violations.\textsuperscript{286} This suggests that

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\textsuperscript{280} See supra section II(C) of this Article, pp. 979-85.

\textsuperscript{281} Here, one can also invoke RICO's use against white-collar defendants to argue that *Pinkerton* liability is especially inappropriate in this context. For critiques of RICO's use against white-collar crimes, see supra note 210.

\textsuperscript{282} See supra section II(C) of this Article, pp. 979-81; see also supra notes 267-69 and accompanying text.

\textsuperscript{283} See, e.g., Dennis, supra note 209, at 654 & n.23 ("There have been scores of successful RICO prosecutions of narcotics rings, including major South American traffickers such as Carlos Lehder . . . ." (citing United States v. Lehder-Rivas, 669 F. Supp. 1563 (M.D. Fla. 1987))); cf. Coffey, supra note 209, at 1036-42. (Justice Department "ordinarily discourages RICO prosecutions where the pattern of crimes consists entirely of narcotics trafficking . . . [as] these activities are already addressed by less complicated federal statutes," such as CCE.).

\textsuperscript{284} See supra notes 251 & 271 and accompanying text. While CCE has been interpreted as creating a conspiracy offense, RICO explicitly does so. See supra note 270 and accompanying text; supra section II(C) of this Article, pp. 980-85.

\textsuperscript{285} See supra section II(C) of this Article, pp. 980-85; see also supra notes 268-73 and accompanying text.


There are five elements in a continuing criminal enterprise offense: (1) a felony violation of the federal narcotics law; (2) as part of a continuing series of violations; (3) in concert with five or more persons; (4) for whom the defendant is an organizer or supervisor; and (5) from which he derives
Pinkerton liability is more appropriate for CCE than for RICO because CCE includes a heightened level of criminal involvement as a prerequisite for the imposition of Pinkerton liability, in that one must have committed a substantive offense to be convicted of a CCE "conspiracy."^{287}

This erroneously assumes that a CCE/RICO conviction is needed for Pinkerton liability. No reported RICO cases apply Pinkerton, but under CCE it is submitted to the jury as a separate issue; to impose liability for substantive offenses, they must find that a defendant joined a conspiracy and that the offenses were committed in furtherance of that conspiracy.^{288} In other

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substantial income.

Id. at 156. For RICO’s conspiracy provisions, see supra section II(C) of this Article, pp. 983-85.

287. This statement assumes that Pinkerton liability is used under CCE as it has traditionally been used—to impute liability for substantive offenses committed in furtherance of a conspiracy. For a discussion of its use to establish the elements of a CCE charge, see supra notes 276-77 and accompanying text.

The aspect of a CCE offense noted above can also be used to argue that Pinkerton liability is less appropriate in this context because a CCE offense already incorporates at least an element of substantive liability. Though logically appealing, this argument ignores legislative history which indicates that CCE was intended as a cumulative punishment device, one aspect of which permits the imposition of penal sanctions both for the CCE offense itself and for the substantive offenses that are its components. See, e.g., Garrett v. United States, 471 U.S. 773, 793-95 (1985); Jeffers v. United States, 432 U.S. 137, 149-50 n.14 (1977) ("Congress was concerned with providing severe penalties for professional criminals when it included the continuing-criminal-enterprise section in the statute.").

288. In United States v. Michel, 588 F.2d 986 (5th Cir.), cert. denied, 444 U.S. 825 (1979), the Fifth Circuit described this inquiry as whether the government’s evidence would allow a jury to find

that an agreement or common purpose to violate the Drug Control Act existed. If this concert of action has been proved, all members of the enterprise, including the organizer, manager, or supervisor, are responsible for the substantive offenses committed by each member during the course of and in furtherance of the plan.

Id. at 999. Accord United States v. Graewe, 774 F.2d 106, 108 (6th Cir. 1985), cert. denied, 474 U.S. 1068 (1986) ("In finding Lonardo guilty of the CCE and the substantive offenses the jury . . . found that a conspiracy existed, that Angelo Lonardo was a member . . . and that the substantive offenses were committed in furtherance of . . . [it]"; see also supra notes 267, 276; United States v. Gallo, 763 F.2d 1504, 1520 (6th Cir.), cert. denied, 475 U.S. 1017 (1986) ("Since copious evidence against the other co-conspirators . . . shows their involvement in the CCE and . . . substantive offenses, the evidence only need show that Lonardo was also a member of the CCE conspiracy.").

For one case that used Pinkerton with a RICO conspiracy, see United States v. Caliendo, 910 F.2d 429 (7th Cir. 1990). Pinkerton was also used in another case that
words, they apply the general *Pinkerton* standard. The heightened involvement postulated above is irrelevant because the imposition of *Pinkerton* liability in CCE cases conforms to the requirements for imposing liability under "traditional conspiracy law." Because heightened involvement is not a consideration in using *Pinkerton* under CCE and because RICO's conspiracy provision retains "traditional conspiracy law," the structural differences between CCE and RICO offenses do not indicate any reason why *Pinkerton* liability cannot attach under the latter.

The final objection that can be postulated to using *Pinkerton* liability under RICO implicates issues of punishment—the potential for "compound" punishment and the difficulty of segregating "major" and "minor" offenders. Apportioning fault among offenders is a factual problem, and so is considered in section III(A)(2), below. The problem of inflicting "compound" punishment for a single course of conduct was noted earlier.

The objection here is that *Pinkerton* liability becomes an unnecessary redundancy under statutes such as RICO because they already include "enhanced penalties based, at least in part, on involvement in the predicate crimes defining the conspiracy." This presumably refers to the harsher

included RICO charges, though it was apparently not used in conjunction with those charges. *See* United States v. McClain, 934 F.2d 822 (7th Cir. 1991). In McClain, *Pinkerton* was used to attribute liability for attempted extortion. *See* id. at 824. But in discussing a *Pinkerton* instruction, the prosecutor seems to have at least intimated that it might apply to the RICO charges.

At first the instruction was discussed by counsel and the district judge as if it were offered to facilitate the codefendants' conviction for the RICO conspiracy violation. . . . When pressed by defense counsel as to whether combining a *Pinkerton* instruction with a RICO conspiracy charge would be permissible, the government apparently altered its strategy, claiming alternatively that the instruction was proper to allow the jury to convict Morgan Finley of the substantive acts of his alleged coconspirator . . . .

*Id.* at 826 n.3. *See also* supra note 266.

289. *See supra* section II(B) of this Article, pp. 948-52; *see also* supra note 119 (general *Pinkerton* instruction).


291. *See* supra note 266 and accompanying text.

292. *Neapolitan*, 791 F.2d at 504-05. If this objection were valid, *Pinkerton* liability should not apply under CCE. *See* supra note 286 and accompanying text.
sentences that apply to RICO conspiracy versus those that apply under the general federal conspiracy statute.\textsuperscript{293} Even assuming, \textit{arguingo}, that the sanction for RICO conspiracy presupposes a level of involvement in predicate offenses,\textsuperscript{294} this is not an obstacle to using \textit{Pinkerton}. Cumulative punishments can be imposed for a RICO conspiracy and substantive offenses,\textsuperscript{295} so the penalty for the former cannot have been intended to supersede liability, and punishment, for substantive offenses. If RICO substance and conspiracy can be punished additively, there is no reason why \textit{Pinkerton} liability cannot be used to accomplish this end by holding those who enter into a RICO conspiracy to the consequences of their criminal bargain.\textsuperscript{296}

\textsuperscript{293} For RICO penalties, see \textit{supra} section II(C) of this Article, pp. 980-85. See also U.S. SENTENCING COMMISSION, GUIDELINES MANUAL § 2E1.1 (RICO sentencing), § 2T1.9 (tax conspiracy sentencing), § 2X1.1 (general conspiracy sentencing) (1991). For comments on the general federal conspiracy statute, see \textit{supra} section II(B) of this Article, pp. 966-73.

\textsuperscript{294} This assumption seems inconsistent with the nature of the RICO conspiracy offense, as it requires neither the commission of a substantive offense nor an overt act in furtherance of the conspiracy for the consummation of the offense. See, \textit{e.g.}, \textit{Neapolitan}, 791 F.2d at 489.

Nothing . . . [in] the statute or its legislative history supports the imposition of a more stringent level of personal involvement in a conspiracy to violate RICO as opposed to a conspiracy to violate anything else. . . . [I]t seems more likely that Congress . . . intended section 1962(d) to be broad enough to encompass those persons who, while intimately involved in the conspiracy, neither agreed to personally commit nor actually participated in the commission of the predicate crimes.


\textsuperscript{295} See \textit{supra} section II(C) of this Article, pp. 983-85. United States v. Pungitore, 910 F.2d 1084, 1115-17 (3d Cir.), \textit{cert. denied sub nom.} Scarfo v. United States, 111 S. Ct. 2009 (1991) ("consecutive sentences for RICO substantive and conspiracy offenses are permissible under the Double Jeopardy Clause because they are statutorily authorized"). RICO differs from CCE in that cumulative sentences can be imposed for RICO conspiracy and for other conspiracy offenses that constitute the predicates for substantive RICO charges. See \textit{id.} at 1108 n.24.

\textsuperscript{296} Arguably, it may be less objectionable to use \textit{Pinkerton} under other criminal statutes because the RICO conspiracy provision was clearly intended to allow cumulative punishments for conspiracy and substantive offenses. See, \textit{e.g.}, United States v. Barton, 647 F.2d 224, 236 (2d Cir.), \textit{cert. denied}, 454 U.S. 857 (1991) (in RICO, Congress created an offense different from that defined by the general federal conspiracy statute "and intended to allow cumulative punishments").

One case holds that imposing joint and several liability in RICO forfeitures does not offend "traditional concepts of criminal law and individual responsibility." United States v. Caporale, 806 F.2d 1487, 1508 (11th Cir. 1986), \textit{cert. denied}, 482 U.S. 917,
To do otherwise ignores the premise of Pinkerton liability, namely, that the act of joining a conspiracy can have causal significance. If one joins a RICO conspiracy and no substantive offenses are committed, punishment for conspiracy is commensurate with the harm inflicted; but if one joins a RICO conspiracy and substantive offenses are committed, a greater harm has resulted and it is reasonable to hold those who "caused" this harm responsible for it. There is no principled reason to treat those who join a RICO conspiracy that produces the commission of substantive RICO offenses differently than Daniel Pinkerton was treated. In both instances, a defendant is held liable for the harm that proximately resulted from his act of joining with others for criminal purposes. Also, the "compound punishment" objection ignores Pinkerton's use under CCE, the other "compound crime-within-a-crime" statute. If Pinkerton liability can be used under CCE, which clearly bases its enhanced penalties on involvement in substantive drug offenses, there is no conceptual reason why it cannot be used under RICO.

2. Application

The obvious source of guidance for deciding how Pinkerton liability can be used in RICO prosecutions is its application in CCE cases. It has been used two different ways in such cases. One use is conventional—holding members of a conspiracy liable for crimes committed by their colleagues. Here, the combination that gives rise to CCE liability also supports imposition of liability for substantive offenses that were committed as a concomitant of that concerted activity. In this version, participation in a CCE drug enterprise replaces the usual conspiracy charge.

483 U.S. 1021 (1987) (citing Pinkerton, 328 U.S. at 647). Despite defense arguments contra, the court held that such liability was permissible under RICO because "RICO itself by design is not traditional criminal law: it represents a radical departure from common law notions of liability and punishment in criminal law in a number of respects." Id. at 1508 (citing United States v. Russo, 796 F.2d 1443 (11th Cir. 1986)); United States v. Cauble, 706 F.2d 1322, 1345 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984).


298. See supra note 277.

299. For the elements of a CCE offense, see supra notes 268-69, 286 and accompanying text. United States v. Michel, 588 F.2d 986 (5th Cir.), cert. denied, 444 U.S. 825 (1979), illustrates this approach. Robert Belmares was convicted, inter alia, of CCE and two substantive counts of importing marijuana. Id. at 1000. He contended that the evidence was insufficient to establish his guilt on these substantive counts, but the Fifth Circuit affirmed, relying on the Pinkerton doctrine. Id. at 999 ("Belmares, as supervisor, shares equal responsibility for those offenses").
The other version uses Pinkerton to establish a CCE offense. In this approach, the doctrine is employed to attribute liability for substantive offenses to someone who is charged with CCE; the attribution of liability for these offenses establishes the requisites for CCE liability, i.e., that the accused committed a substantive violation as part of a series of violations committed in concert with five or more other persons. This is almost a "reverse Pinkerton" doctrine in that it uses a lesser conspiracy offense to attribute Pinkerton liability for substantive offenses, which are CCE predicates, and uses those predicates to establish liability for CCE, a "greater" conspiracy offense.

As explained below, it is difficult to transpose this "reverse Pinkerton" doctrine to RICO, but applying the traditional doctrine is relatively unproblematic. Under the latter, a finding that a defendant joined a RICO conspiracy would support the imposition of liability for substantive RICO offenses committed in the course of that conspiracy. The imposition of such

300. See supra note 269 and accompanying text. This approach was used in United States v. Jones, 763 F.2d 518, 525 (2d Cir.), cert. denied, 474 U.S. 981 (1985) ("jury properly using substantive Pinkerton counts as predicate violations, convicted Jones of operating a continuing criminal enterprise"). Jones was charged with drug conspiracy under 21 U.S.C. § 846 (1988), which is a lesser-included offense of CCE, substantive drug violations and CCE. Id. at 526. Because Jones had not personally committed the substantive offenses, the prosecution used the drug conspiracy charge to impute liability for those offenses under Pinkerton and, having done so, argued that they should be used as predicates to establish Jones' CCE liability. See id. at 524-26. The trial court felt it was improper to use Pinkerton in this manner, so it set aside the CCE conviction. Id. at 524 (incorrect to use "substantive narcotics violations that Jones himself did not commit, but of which he was guilty because of involvement in a conspiracy" as predicates). The Second Circuit held that this was error and reinstated the conviction. See id. at 525 (court 'incorrectly instructed the jury not to consider . . . predicate violations on a Pinkerton theory'); see also Jones v. United States, No. 88 Civ. 3999, (S.D.N.Y. Jan. 24, 1990) (WESTLAW, Allfeds database) (Jones' liability on the "substantive offenses was predicated on the acts of his co-conspirators and, as such, were Pinkerton offenses").

301. For the distinction between "lesser" conspiracies and CCE, see supra notes 270-73 and accompanying text. While one can be convicted of CCE and a lesser conspiracy, punishment cannot be imposed for both. See supra note 273 and accompanying text. But because CCE and its substantive predicates are different offenses, they can be punished separately. See supra note 272 and accompanying text.

302. A RICO conspiracy requires two agreements which, in the case of a conspiracy to violate 18 U.S.C. § 1962(c) (1988), would include "an agreement to conduct or participate in the affairs of an enterprise and an agreement to the commission of at least two predicate acts." United States v. Neapolitan, 791 F.2d 489, 503 (7th Cir.), cert. denied, 479 U.S. 940 (1986). A party must agree to both. One who affiliated with a RICO enterprise but did not agree to the commission of a pattern
liability can, however, implicate the problem noted above, of apportioning liability among "major" and "minor" players in a RICO scenario. This problem varies in the extent to which it applies to particular cases, as is demonstrated by two hypotheticals.

First, assume that A, B, C, D, E, F, and G conspire to conduct the affairs of a legitimate corporate enterprise through a pattern of racketeering activity; the object of the agreement is to engage in conduct that constitutes a substantive RICO violation under section 1962(c). Assume that A is the head of the corporation and that his role is the relatively passive one of agreeing to allow B, C, D, E, F, and G to exploit the enterprise without his interference. Though he does not personally engage in racketeering activity, he is fully apprised of their conduct and acquiesces in it. Further assume that they would be unable to gain and maintain access to the enterprise but for A's acquiescence and non-interference. Assume, finally, that B, C, D, E, F, and G take advantage of the opportunity provided by their agreement with A to engage in various acts that collectively qualify as a "pattern of racketeering activity."

The operation is discovered and prosecutors prepare to bring charges against the perpetrators. B, C, D, E, F, and G can clearly be charged with conspiracy under section 1962(d) and with a substantive violation under section 1962(c). Absent the Pinkerton doctrine, A can be charged only with RICO conspiracy because he did not personally engage in racketeering activity. Using the Pinkerton doctrine, he can be charged with RICO conspiracy and can also be held liable for the substantive offenses perpetrated of racketeering activity is not a RICO conspirator, nor is one who agrees to the commission of two criminal acts but does not consent to the involvement of an enterprise.

It is possible that the Pinkerton doctrine can be used to impose liability for the offenses that are the predicates of RICO substantive offenses in addition to attributing liability for the RICO substantive offenses, at least when the predicate offenses are federal crimes. Liability can be imposed for RICO predicates absent Pinkerton, so there seems no reason why it could not be imposed by using the doctrine. See supra section II(C) of this Article, pp. 983-85. This issue is, however, outside the scope of this discussion and so is not considered in the text above.

303. See supra note 301 and accompanying text.
304. See supra section II(C) of this Article, pp. 983-85.
305. See id.
306. Depending on the details of their activities, it may also be possible to charge them with additional substantive counts.
by his colleagues in crime. Here, the imposition of Pinkerton liability clearly accords with Congress’ purpose in enacting RICO.

Now, assume a very different RICO scenario: K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, and Z have confederated for the purpose of engaging in various illegal, highly-profitable activities; they jointly constitute an illegitimate, "association in fact" RICO enterprise. They have a structure and a division of labor. M, N, and O run an illegal gambling operation, while P, Q, R, S, and T import and sell illegal drugs; W and X are "loan sharks." U and V are the group’s "enforcers"; they use violence as necessary to deal with competition or internal strife; they have committed three murders and two attempted murders in the past two years. K, Y, and Z are the "administrators"; they direct and coordinate the activities of the others and handle the finances.

O recently joined the gambling operation, where he is "low man on the totem pole." M and N have more authority over this activity than he does, and both coordinate the gambling operation with K, Y, and Z. O was hired by M and N and has had no contact with anyone else, although he knows about K, Y, and Z and their role in the enterprise; he also knows of the other activities in which it engages and of the other participants in it.

Assume the government has recently concluded an investigation of this operation and is preparing to bring charges against its participants. O can be charged with RICO conspiracy, as he agreed that acts constituting a pattern of racketeering activity would be committed to have a specific impact upon an enterprise. Clearly, K, L, M, N, P, Q, R, S, T, U, V, W, X, Y, and Z can be charged with RICO conspiracy and with one or more RICO substantive

307. The mechanics of imposing Pinkerton liability are explained at section II(B) of this Article, pp. 948-52.


309. See supra section II(C) of this Article, pp. 981-82. This scenario is loosely based on the facts in United States v. Pungitore, 920 F.2d 1084, 1097-1102 (3d Cir. 1990), cert. denied sub nom. Scarfo v. United States, 111 S. Ct. 2009 (1991). All the activities attributed to the enterprise are predicate offenses under RICO. See supra section II(C) of this Article, pp. 982-85.

310. See infra note 311.
offenses. Assume, for the purposes of discussion, that these defendants are charged with RICO conspiracy and with substantive violations under section 1962(a), (b) and (c).

This configuration raises a difficult issue as to the scope of O's liability. Given his involvement in the RICO conspiracy, to what extent, if any, should the Pinkerton doctrine be used to hold him liable for substantive RICO offenses committed by his co-conspirators? Assume that his association with the enterprise was of such recent origin and so de minimis in nature that it will not permit the imposition of substantive liability absent the use of Pinkerton liability. This brings the "compound punishment" objection noted above sharply into focus. Is it reasonable to hold O to the rather horrific consequence of his criminal bargain? Or should Pinkerton's application be limited in cases such as this, in which it can result in the infliction of liability, and punishment, that at least initially seem egregiously disproportionate to the "harm" inflicted by a particular "bad act"?

Supporters of the latter view would contend that the sanction for RICO conspiracy already reflects the magnitude of the "harm" resulting from O's act of associating himself with this enterprise. The sanction for RICO conspiracy is more severe than the sanctions for conspiring to violate other provisions of federal law, so one can argue that this should be the only sanction imposed.

311. As to the conspiracy, while K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y and Z may not have specifically agreed with each other that they would engage in activity violating RICO, each clearly agreed to associate with the others to commit acts that constituted a pattern of racketeering activity and that had an impact on the enterprise that is cognizable under one or more of RICO's substantive provisions. See supra section II(C) of this Article, pp. 980-85. As to the substantive charges, depending on the length of time in which the enterprise has operated and on certain other facts, it might be possible to charge substantive violations of 18 U.S.C. § 1962(a)-(c) (1988).

312. For the criteria used to decide if multiple substantive RICO counts can be brought in connection with the operation of a single enterprise, see United States v. Dean, 647 F.2d 779 (8th Cir. 1981), cert. denied, 456 U.S. 1006 (1982). See also 1 K. BRICKLEY, supra note 243, § 7.12.

313. As noted above, there is also an issue as to whether the doctrine could be used to hold O liable for the offenses that constitute the predicates for substantive RICO offenses. See supra note 311. If Pinkerton is utilized in a fashion comparable to the felony-murder doctrine, it would seem reasonable to hold O liable for substantive predicate offenses that were committed after he joined the RICO conspiracy.

314. One possibility would be to develop an intermediate form of Pinkerton liability that differentiates between those whose participation was limited to joining a conspiracy and those who took a more active role in a criminal enterprise. See supra note 190.
unless a defendant has committed or participated in the commission of a harm transcending mere association for criminal purposes. On the facts above, this argument would support limiting O's liability to RICO conspiracy absent an indication that he engaged in conduct which would itself support liability under one or more substantive RICO provisions.

Though reasonable, this argument ignores at least two factors. One is the general premise of conspiracy law—the "special dangers" of criminal associations. Here, the perpetrators have been able to inflict a far greater level of harm on society because of their association than any could have acting alone or in smaller groups. Because RICO was intended to provide heightened sanctions against this very evil, imposing Pinkerton liability in this context may not be as impermissible as some have suggested.

The second factor is the Pinkerton doctrine's rationale. Under that premise, O's act of affiliating with the perpetrators becomes a contributing cause of substantive offenses resulting from their association. Given that he can be deemed to have "caused" the commission of these offenses, it is no more unreasonable to use Pinkerton to hold O liable for them than it was to hold Daniel Pinkerton liable for offenses Walter perpetrated, or than it would be to hold O liable under an aiding and abetting rationale.

The "compound punishment" objection is, therefore, not a valid reason to except RICO from the compass of Pinkerton liability. The Pinkerton doctrine's rationale.

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315. See supra section II(B)(2) of this Article, pp. 962-978.

316. The discussion implicitly assumes that O's conduct would not sustain liability as an aider and abettor of the substantive RICO offenses although, as noted earlier, such liability is imposed under RICO. See supra note 263 and accompanying text.

CCE practice cannot be used as a guide on these facts. If the enterprise outlined above limited its activities to drug trafficking, Pinkerton liability could be used under CCE to hold O liable for substantive drug offenses committed by his colleagues. See United States v. Michel, 588 F.2d 986, 999 (5th Cir.), cert. denied, 444 U.S. 825 (1979) (all who agree to "violate the Drug Control Act" are "responsible for the substantive offenses committed by each member during the course of and in furtherance of the plan"). But he would not be subjected to "compound punishment" under CCE unless he had acted as a supervisor or manager of the operation. See supra notes 272-73 and accompanying text.

317. One can argue that it is the compound nature of substantive RICO offenses that makes the imposition of Pinkerton liability permissible in this context. This argument can be illustrated by using an example offered to show the problems involved in applying Pinkerton to organized crime "families." This example is taken from Coffey, supra note 209, at 1046 n.52.

"Families" are often divided into "crews," each of which has its own "turf," is at least generally aware of what other crews are doing and "presumably endorses" those activities as consistent with "the overall objectives" of the family. Id. This division
doctrine can be used as it is used in other contexts, to hold members of RICO conspiracies liable for substantive RICO offenses committed by their co-conspirators in furtherance of the goals of such a conspiracy. It does not

of labor can give rise to Pinkerton objections:

Is a member of Crew A, which specializes in narcotics, liable . . . for a hijacking committed by Crew D, a . . . crime of which Crew A members were completely unaware? Suppose the chief of Crew A, which is located in New York City, retires to Florida but . . . keeps in touch with his comrades. If Crew C kills a suspected informant . . . who could have testified . . . against the "family," is the relocated chief of Crew A . . . liable for homicide because the retaliation against witnesses is standard operating procedure in La Cosa Nostra?

Id. This example assumes Pinkerton is used to impose liability for non-RICO offenses, such as homicide. The attenuated nature of the association between Crew A, Crew C and the former chief of Crew A can give rise to reservations about using Pinkerton to attribute this type of liability on these facts because the "mediate causation" rationale becomes increasingly problematic as criminal affiliations are diluted. See supra section II(B)(2) of this Article, pp. 975-78. These reservations are far less compelling, however, if this scenario is analyzed as an enterprise under Turkette. Here, all the crew members belong to a RICO conspiracy, at least one purpose of which is to conduct the affairs of this enterprise through a pattern of racketeering activity consisting of the predicate offenses given above. This purpose is a violation of § 1962(c) and can be punished as such. Assume the former head of Crew A has done nothing to further this purpose except remain a member of the RICO conspiracy—is it unreasonable to hold him liable, under Pinkerton, for the substantive RICO offense perpetrated by his colleagues? Arguably, it is not, because the commission of this offense was obviously a foreseeable consequence of his association with the others. Holding him liable for the substantive RICO offense sanctions him for the "harm" mediatelly caused by his criminal association. Because the substantive RICO offense will be predicated on the discrete acts set forth above, it will inflict a "compound" sanction for their commission without subjecting the former crew chief to liability for every criminal act perpetrated by his associates.

Recently, in United States v. Edwards, No. 89-2880 (7th Cir., Oct. 15, 1991) (WESTLAW, Allfeds database), the Seventh Circuit addressed the extent to which the liability imposed under a Pinkerton theory can be applied to complex conspiracies: "We are faced in this case with the conundrum of applying the concept of reasonable foreseeability to a drug conspiracy that spanned approximately three years and that included numerous suppliers-wholesalers, middle-managers, and seller-retailers." Slip Op. at 6.

Although Edwards involved the attribution of responsibility among co-conspirators under the federal sentencing guidelines rather than for purposes of conviction, the court found that Pinkerton's principles of liability were applicable. Slip Op. at 5 (standards embodied in sentencing guidelines "roughly approximate" those of Pinkerton).
seem, however, that the "reverse Pinkerton" doctrine used under CCE can apply to RICO.

The reason lies in certain differences between CCE and RICO. CCE's "reverse Pinkerton" doctrine uses involvement in a predicate conspiracy offense to impute liability for substantive violations which, in turn, become the predicates of a CCE charge. While lesser conspiracy offenses are RICO predicates, it would not be possible to use such an offense in conjunction with Pinkerton liability to achieve a comparable result. Unlike CCE, RICO conspiracy requires an agreement to commit one or more substantive RICO violations in the context of an enterprise.\(^{318}\) Unless such an agreement can be shown to have existed, there is no basis for imputing liability for substantive RICO violations under Pinkerton; all that can be done with a lesser conspiracy charge is to use it to attribute liability for specific predicate offenses.

As an example, consider this variation on the K-Z hypothetical given above.\(^{319}\) The facts are the same except that J conspired with M, N, and O in the conduct of their illegal gambling operation. The prosecutor attempts to use the "reverse Pinkerton" doctrine to hold all four liable for RICO offenses. He charges M, N, and O with (a) conspiracy to conduct a gambling operation in violation of federal law; (b) ten substantive counts of conducting a gambling operation in violation of federal law; (c) RICO conspiracy; and (d) a section 1962(c) substantive offense. He charges that J conspired with M, N, and O to conduct a gambling operation in violation of federal law and uses this charge plus Pinkerton liability to hold J liable for the substantive gambling offenses. But he cannot use this liability to leverage a RICO conspiracy or substantive offense. Absent evidence that J's agreement met the requirements for RICO conspiracy or that his conduct independently satisfied the requirements for a section 1962(c) violation, his liability is limited to the predicate conspiracy and substantive offenses. As opposed to CCE, RICO conspiracy requires a specific agreement to violate RICO; absent such an agreement, an offender has not joined a RICO conspiracy and cannot, therefore, be found liable under any RICO provision, Pinkerton notwithstanding.

Pinkerton can, therefore, be used to impose substantive RICO liability in prosecutions under that statute if it can be shown that a defendant entered into the agreement necessary for a RICO conspiracy.\(^{320}\) It can be used under

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318. See supra note 302. CCE does not require a specific agreement to engage in concerted action. See supra notes 268-69 and accompanying text.

319. See supra notes 309-10 and accompanying text.

320. An argument can be made for recognizing a form of Pinkerton liability predicated upon certain substantive RICO violations. An earlier section explained that Pinkerton and complicity liability attributes criminal liability based upon the act of
RICO precisely as it is used under other federal criminal statutes. It cannot, however, be used to attribute liability for RICO conspiracy in the absence of such an agreement.

B. Civil RICO

As the intricacies of civil RICO are beyond the scope of this Article, the present section is a very cursory treatment of the use of Pinkerton liability in this area. It is clearly a permissible use. The prior section demonstrated that there are no conceptual impediments to employing Pinkerton in criminal cases, and no other objections arise regarding its use in civil RICO cases. 321

Indeed, this is a hospitable milieu for the doctrine, as co-conspirator liability is well-established in civil law. 322

affiliating with others for criminal purposes. See supra section II(B)(2) of this Article, pp. 975-78. At least some of the conduct involved in substantive RICO violations can be characterized as an act of criminal affiliation; perhaps the best example is an "association in fact" enterprise that exists for purely illegal purposes. See supra notes 222-23 and accompanying text. Arguably, associating oneself with such an enterprise is an act akin to the acts that respectively support liability under Pinkerton (conspiracy) or complicity (aiding and abetting). Assuming that there are instances in which such an act could occur without the additional aspect of an agreement that would support Pinkerton liability, it can be argued that this act should support some form of affiliative liability. See supra section II(B)(2) of this Article, pp. 975-78. On the other hand, it can also be argued that the such liability is not necessary given the weapons that already exist for use in this context. And it can also be argued that such an extension of affiliative liability comes perilously close to instituting guilt by association. See id.

321. Because the criminal doctrine of complicity clearly applies to civil RICO cases, there is no reason why the kindred Pinkerton doctrine cannot also apply. For aiding and abetting liability, see, e.g., Banks v. Wolk, 918 F.2d 418, 421 (3d Cir. 1990) (aiding and abetting liability in civil RICO); Petro-Tech, Inc. v. Western Co., 824 F.2d 1349, 1356-58 (3d Cir. 1987) (same); Morrow v. Black, 742 F. Supp. 1199, 1203-04 (E.D.N.Y. 1990) (allegation of aiding and abetting RICO predicates stated claim for RICO conspiracy); Felman v. Prudential Bache Secs., 122 Bankr. 466, 469; (S.D. Fla. 1990) (claim for aiding and abetting § 1962(c) violation); see also Comment, Aiding and Abetting Liability for Civil Violations of RICO, 61 TEMPLE L. REV. 1481 (1988).

322. See generally supra section II(B)(2) of this Article, pp. 961-62 (vicarious liability in civil cases). Pinkerton is used under other federal statutes. As an example, Moses v. Illinois Dep't of Corrections, 908 F.2d 975 (7th Cir. 1990), was a civil rights case brought by a black correctional officer who believed he was the target of a whitesupremacist conspiracy. His action included a claim against a hospital that employed two nurses whom he accused of filing false reports of misconduct against him. Id. The hospital argued for dismissal of the claim, but the Seventh Circuit used Pinkerton
This discussion, therefore, assumes Pinkerton can be used in civil RICO litigation. It summarizes the few reported cases that address this issue and notes an advantage that can be realized from employing Pinkerton in civil RICO actions.

1. Cases

The reported cases include several attempts at using Pinkerton in civil RICO, though there are more failures than successes. In one of the failures, Feminist Women's Health Center v. Roberts, the plaintiffs sued anti-abortion protestors. They asserted RICO conspiracy and substantive claims against all defendants, and then tried to use their conspiracy allegations plus Pinkerton liability to withstand one defendant's motion for summary judgment of their section 1962(c) claim against her. The court held, however, that

to disagree:

Moses ... alleges that the hospital was part of a conspiracy to interfere with his civil rights. .. [E]very conspirator is responsible for every foreseeable act in furtherance of the conspiracy, Pinkerton v. United States, 328 U.S. 640 (1946), and if the hospital is part of the conspiracy it is vicariously responsible for the acts which did cause harm.


323. Not discussed below is American Trade Partners, L.P. v. A-1 Int'l Importing Enter., 755 F. Supp. 1292 (E.D. Pa. 1990), which used co-conspirator liability as a basis for finding venue in civil RICO actions. See id. at 1304 n.19 ("any co-conspirator's act in a district is attributable to the other co-conspirators").


325. Id. Bonnie Undseth argued that there was no evidence she had committed two predicate offenses, the minimum needed to show the pattern of racketeering activity required for a section 1962(c) violation. Id. at 2. Plaintiffs argued that as a member of a RICO conspiracy, she was liable under Pinkerton for predicate acts committed by other members of the conspiracy. Id. at 3. This was an attempt to establish the predicate acts needed for a § 1962(c) claim by using Pinkerton to
they had not alleged her involvement in the conspiracy with the specificity required in federal civil pleading, so their conspiracy claim failed. This meant that the attempt to use Pinkerton to sustain their section 1962(c) claim failed, also. The most interesting aspect of this decision is dicta in which the court apparently rejects use of the "reverse Pinkerton" doctrine in civil RICO cases.

A more conventional attempt to use Pinkerton failed in Laterza v. American Broadcasting Co. Plaintiffs' RICO claims arose from an alleged pattern of racketeering involving door-to-door magazine subscription sales. The magazine publishers named as defendants moved to dismiss, arguing that plaintiffs had not accused them of participating in "any specific criminal act." Plaintiffs argued that the publishers were liable because they contracted with the salesmen who were alleged to have committed RICO predicate acts. The plaintiffs were apparently attempting to use these contracts as the premise for imposing Pinkerton liability on the publishers. The district court held that the attempt failed because there was no evidence that the publishers and salesmen were joined in a RICO conspiracy; it held

attribute liability for predicate acts to a defendant who had neither personally committed them nor personally participated in their commission. See id. at 3-4. This is analogous to the use of the "reverse Pinkerton" doctrine discussed in the previous section. See supra note 301 and accompanying text.

326. Federal Rule of Civil Procedure 9(b), which applies to civil RICO claims, requires that "circumstances constituting fraud" be "stated with particularity." FED. R. CIV. P. 9(b). This is a common problem in civil RICO pleading. See, e.g., J. RAKOFF & H. GOLDSTEIN, supra note 221, § 7.06[1].

327. See J. RAKOFF & H. GOLDSTEIN, supra note 221, § 7.06[1] (no cases used Pinkerton under § 1962(c) to hold defendant liable for predicate acts of a co-conspirator, "even if he did not specifically enter into a conspiracy to commit that particular act").

328. This portion of the opinion indicates that section 1962(c) claims must be based upon acts personally committed by a defendant, rather than those attributed to a defendant via the Pinkerton doctrine. See id. (quoting United States v. Persico, 832 F.2d 705, 714 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988)) (§ 1962(c) targets "individual patterns of racketeering engaged in by a defendant, rather than the collective activities . . . which are proscribed by section 1962(d).").


330. Id. at 411-12.

331. Id. at 412.

332. Id.

333. Id. ("attempt to impose liability on the Publisher Defendants as principals by way of a conspiracy").
that the existence of contractual relationship was not sufficient to support the imposition of such liability. 334

Another unsuccessful attempt came in Frymire v. Peat, Marwick, Mitchell & Co.,335 a stockholder suit against an accounting firm for improperly auditing corporate financial statements. Plaintiffs asserted a claim for RICO conspiracy, apparently intending to use it to hold the defendant liable for substantive RICO violations committed by an alleged co-conspirator.336 Like the two attempts described above, this effort failed because the court held that the plaintiffs had not adequately alleged the defendant's involvement in the RICO conspiracy.337

The government successfully used Pinkerton in a civil RICO suit against a union local.338 The complaint alleged that several individuals "conspired, in violation of 18 U.S.C. § 1962(d), to violate, and actually did violate, 18 U.S.C. § 1962(b) and (c)." The action sought injunctive relief barring these individuals from continuing their involvement with the local.339 The district court awarded judgment for the government on all RICO counts.340 It held that because the defendants were members of a RICO conspiracy, each was liable for substantive RICO violations committed in furtherance of that conspiracy, even though the violations were perpetrated by other members of the conspiracy.341

334. Id. at 413 ("mere fact that defendants contracted together" insufficient). Pinkerton is never cited in the opinion, but is clearly the basis for the plaintiff's argument in this regard.


336. Id. at 894-95. "Plaintiffs allege . . . that [Peat, Marwick] was . . . vicariously liable as a co-conspirator with Powers." Id. at 895. See also id. ("plaintiffs have asserted only vicarious liability . . . on a theory of violation of 18 U.S.C. § 1962(d), a conspiracy to violate RICO").

337. Plaintiffs maintained that the co-conspirator had violated § 1962(a)-(c), but the court held that the complaint did not indicate "which of those sections [Peat, Marwick] supposedly agreed to violate, let alone find facts which would support such an agreement." Id. at 896. The court dismissed the RICO count, but gave leave to amend. Id.


339. Id. at 283.

340. Id. The suit sought appointment of a receiver and injunctive relief barring the defendants from "any further contacts with Local 560." Id. For the government's ability to bring civil RICO actions, see supra section II(C) of this Article, p. 981.


342. Id. at 335 ("culpability under § 1962(c) established by their own acts . . . and, under Pinkerton, by the conduct of their co-conspirators"). See also id. ("culpability . . . under § 1962(b) . . . established by their own conduct . . . and, under
This exhausts the reported civil RICO jurisprudence on the *Pinkerton* doctrine, but cases that consider use of the doctrine under comparable federal statutes are collected in the margin.343

2. Advantages

Vicarious liability is a matter of great dispute in civil RICO litigation.344 The controversy is too complex to address here, but centers around the extent to which employers can be held liable for RICO violations

*Pinkerton*, by the racketeering acts of their coconspirators*).

343. In *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981), *aff'd in part & rev'd in part sub nom. In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), plaintiff tried to use *Pinkerton* to hold the members of an alleged conspiracy liable "for Robinson-Patman Act and Clayton Act § 7 violations committed by one or more of the members of the conspiracy." *Id.* at 1176-77. The defendants argued that *Pinkerton* does not apply to civil cases in general "and to civil antitrust cases . . . in particular." *Id.* at 1177. Unfortunately, the trial court refused to reach this issue:

[H]owever it may have been ignored in recent years, and despite its never having been applied in a civil context, *Pinkerton* is a Supreme Court decision which has not been overruled. . . . [I]t is best that the question of the applicability of the *Pinkerton* doctrine in a civil antitrust context await another case and another day.

*Id.* at 1178. *Cf.* Sidney Morris & Co. v. National Ass'n of Stationers, 40 F.2d 620, 624 (7th Cir. 1930) (co-conspirator liability under the Clayton Act). *Pinkerton*’s status under anti-trust laws may not be relevant in determining its role under RICO, as RICO’s drafters made a conscious effort to differentiate it from the anti-trust laws. *See* O’Neill, "Mother of Mercy, Is This the Beginning of RICO?: The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U.L. REV. 172, 186 (1990) (Though they modelled RICO on the antitrust laws, the drafters of the Act were careful to distinguish the two.).


committed by their employees.\textsuperscript{345} Neither the courts nor the commentators have yet resolved this issue.\textsuperscript{346}

The \textit{Pinkerton} doctrine is not a rule of vicarious liability so it cannot resolve the issue.\textsuperscript{347} It is, however, an alternate means of holding employers liable for substantive RICO violations carried out by their employees; it can also be used to expand the reach of RICO substantive liability beyond those who personally commit the requisite racketeering acts. Curiously, it does not seem to have been used in either fashion, perhaps because of uncertainty as to whether it can be used in civil litigation.\textsuperscript{348}

The details of \textit{Pinkerton}’s role in civil RICO litigation are beyond the scope of this Article,\textsuperscript{349} but the uses noted above can be illustrated by two examples. In the employer-employee scenario, assume one entity—GATO, Inc.—wants to take over another—SUNDO, Inc. GATO officers AA, AB, AC, AD, and AE employ a pattern of racketeering activity to weaken SUNDO’s financial position so that it cannot resist GATO’s take-over efforts. The GATO officers are clearly chargeable under 18 U.S.C. section 1962(b),

\begin{quote}
345. RICO plaintiffs often attempt to impose liability "on the employer of the individual(s) alleged to have violated the statute under . . . theories of vicarious liability, in an effort to reach a corporate, usually deep, pocket." J. RAKOFF & H. GOLDSTEIN, supra note 221, at 3. See, e.g., D & S Auto Parts v. Schwartz, 838 F.2d 964, 966 (7th Cir.), cert. denied, 486 U.S. 1061 (1988) ("[V]icarious liability is inconsistent with this court’s approach to direct RICO liability. . . . The statute, as interpreted by this court, imposes liability only upon a corporation that is a perpetrator of a criminal scheme.") (citing United States v. DiCaro, 772 F.2d 1314 (7th Cir. 1985); Haroco Inc. v. American Nat’l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), aff’d, 473 U.S. 606 (1985)).

346. See J. RAKOFF & H. GOLDSTEIN, supra note 221, at 3-6.


Liability for conspirators, although premised on one’s relationship with other members of the conspiracy, is based on one’s own participation in the conspiracy and a principle of law that a conspirator should be liable for the acts of her or his confederates who are furthering a common plan. Liability for the acts of coconspirators is joint and several. . . . Vicarious liability . . . involves shifting of full responsibility to a blameless party, based on the party’s relationship or policy considerations.

\textit{Id.}


349. For a more extensive discussion of \textit{Pinkerton}’s use in this context, see Seeberger, \textit{Partners in Crime: RICO Associations in Fact and Pinkerton Liability—A Conspiracy by any Other Name or a Conspiracy is a Conspiracy is a Conspiracy}, \textit{forthcoming}.\end{quote}
(c) and/or (d). The more attractive target for litigants seeking to redress damage inflicted by the officers' activities is, of course, GATO itself. If these litigants can show that GATO conspired with its officers regarding the activity in question, GATO can be held liable for RICO conspiracy. Current RICO law does not permit it to be held liable for substantive violations absent evidence that it actively engaged in substantive RICO violations. The advantage Pinkerton liability offers plaintiffs in this situation is that the officers' conduct can be imputed to their corporate employer if it is shown that they all joined a RICO conspiracy that produced the substantive violations. This provides an alternative means for imposing substantive liability on the employer, one that avoids the need for relying on the uncertainty of respondeat superior.

350. See supra section II(C) of this Article, pp. 980-85. That is, they (i) conspired to violate one of RICO's substantive provisions, and (ii) have committed such a violation by using their pattern of racketeering activity (a) to acquire an interest in and/or control of SUNDO, a RICO enterprise; (b) to conduct or participate in the conduct of its affairs. See id.


352. See, e.g., Schofield v. First Commodity Corp., 793 F.2d 28, 32-33 (1st Cir. 1986) (rejecting vicarious liability under RICO substantive provision); Haroco v. American Nat'l Bank & Trust Co., 747 F.2d 384, 401 (7th Cir. 1984), aff'd, 474 U.S. 606 (1985) (rejecting respondeat superior and holding that a "corporate enterprise should be liable where it is the perpetrator, or the central figure in the criminal scheme"); Philan Ins. Ltd. v. Frank B. Hall & Co., 748 F. Supp. 190 (S.D.N.Y. 1990) (corporate defendants could not be held liable under RICO for wrongdoings of employees on respondeat superior if no facts showed company as active perpetrator of fraud); United States v. United Skates of America, Inc., 727 F. Supp. 430, 431 n.4 (N.D. Ill. 1989) ("something more than respondeat superior is required before a corporation will be held liable for the acts of its employees"). Even courts that reject application of respondeat superior hold that corporate enterprises can be held liable if they were a "perpetrator" of a RICO offense. See D & S Auto Parts, Inc. v. Schwartz, 838 F.2d 964, 966 (7th Cir.), cert. denied, 486 U.S. 1061 (1988); Haroco, 747 F.2d at 401. Pinkerton offers a means of establishing that a corporate or other employer was a "perpetrator" of RICO substantive violations even when it took no affirmative action toward that end. As such, it is a useful supplement to aiding and abetting liability, which can be used to impose substantive liability when its requirements are met. See supra section II(A), II(B)(2) of this Article, pp. 932-35, 944-78. Since such liability requires a more active level of participation than Pinkerton liability, the two are not co-extensive and Pinkerton offers advantages that do not exist under aiding and abetting.
To illustrate the operation of the second device noted above, assume GATO desires to take over SUNDO and conspires with certain SUNDO officers to that end. The SUNDO officers—BA, BB, BC, BD, and BE—use a pattern of racketeering activity to weaken SUNDO's financial position so it cannot resist GATO's advances. Once again, the individuals are liable for RICO conspiracy and substantive offenses, but GATO is only liable for RICO conspiracy, as it did not participate in the racketeering activity. If, however, one applies Pinkerton to this scenario, GATO can be held liable for substantive offenses that proximately resulted from its conspiracy with BA, BB, BC, BD, and BE. Even if respondeat superior applied to RICO, it would not permit imputation of such liability to GATO because BA, BB, BC, BD, and BE were not employed by GATO.353

The advantage that the Pinkerton doctrine offers in both situations is that it provides an alternative device for imposing substantive liability upon a party who did nothing more than agree to the commission of racketeering acts that were intended to have a defined impact upon an enterprise. It is clear that this type of liability exists under RICO's criminal provisions, as RICO was clearly designed to target "bosses" who set racketeering activity in motion but do not personally engage in predicate acts. Using Pinkerton allows liability for this scenario to be transposed to the civil context, where the impetus for racketeering activity may come from artificial entities that bear little or no resemblance to the "Godfathers" that prompted RICO's enactment.

One might ask why, if such parties can be held liable for RICO conspiracy, there is any reason to resort to Pinkerton to impose substantive liability, as well. There are at least two reasons to do so. One is that Pinkerton gives civil litigants an opportunity to hold these parties liable for the harms actually caused by their actions. The other is that it is a means of reaching "deep pockets" that may not otherwise be available, because several cases hold that neither indemnification or contribution exist under RICO.354

As several of the cases described above illustrate, the most difficult part of employing the Pinkerton doctrine in civil RICO litigation is pleading conspiracy with the specificity required by the Federal Rules of Civil

353. See, e.g., 1 K. Brickey, supra note 243, at 739-78.

Procedure.\textsuperscript{355} For civil litigants who can meet this burden, the \textit{Pinkerton} doctrine is a useful device for imposing substantive RICO liability on parties who might otherwise avoid it.

IV. CONCLUSION

The \textit{Pinkerton} doctrine emerged as this country was about to discover "organized crime." Serendipitously, it complements many of the measures subsequently enacted to strike at that phenomenon. Like those measures, it deals with a criminal act that has assumed increasing significance in the last few decades as federal law has shifted to a new paradigm of criminal behavior. In this paradigm, the focus shifts from individually-perpetrated offenses to offenses that are perpetrated by or in the context of organized activity.

This paradigm results from the concern with "organized crime." It is still evolving, but clearly differs from the common law model of criminal behavior in targeting a distinct act—allying with others to conduct unlawful activities. The common law recognized the significance of this act in rules of complicity, but complicity targets a relatively limited range of affiliative behavior. It focuses on single instances of criminal behavior or, at most, a sporadic repetition of such behavior. It does not address organized criminal activity.

Conspiracy evolved independently to address another type of criminal alliance—an explicit agreement encompassing commission of certain, otherwise-defined offenses. It, however, only sanctions the conduct entailed in that agreement. The \textit{Pinkerton} doctrine was crafted to remedy this deficiency by allowing conspirators to be held liable for specific harms resulting from their alliance.

RICO was intended to implement the new paradigm by making it a separate offense to engage in, or to agree to engage in, criminal activity in the context of an organization. It was designed to discourage such conduct by imposing new and stringent penalties that can be cumulated to reflect the seriousness of particular constituent acts. Incorporating \textit{Pinkerton} liability into RICO is consistent with the underlying purpose of the statute and with the new paradigm of criminal behavior it embodies.

\textsuperscript{355} \textit{See supra} notes 313-20.