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## PINKERTON SHORT-CIRCUITS THE MODEL PENAL CODE

ANDREW INGRAM\*

## I. INTRODUCTION

THIS is an article about unintended consequences. It is about what criminals do not foresee when they join a conspiracy, and it is about what legislators do not anticipate when they make piecemeal amendments to the text of the Model Penal Code.

Consider what Veronica failed to see coming. Her boyfriend Sam is visiting from out of town, and she helps him to arrange a meeting with an acquaintance of hers named Jake to buy some cocaine. At the meeting, Jake takes Sam's money but does not give him the drugs. Sam is angry at everyone, including Veronica. He and his friend Pierce want Veronica to drive them around town to find Jake and get his money and the cocaine. Veronica wants to propitiate Sam and make up for her role in the loss of his money. If the men find Jake, she expects a heated confrontation (she sees that Sam and Pierce have guns), but, perhaps due to her naive optimism, she believes the men will only threaten to use their pistols. She drives Sam and Pierce by several homes where Jake might be and sees them force their way through the front door of one residence and emerge without finding Jake.

Veronica thinks of one more place Jake might be. She leads Sam and Pierce to this last house. Sam and Pierce push their way inside when the door opens and shut it behind them. While waiting in the car, Veronica hears gunshots. Jake was not there, but the occupants (Lucky and Marshall) did not appreciate being forced against the wall and interrogated in their own house. There was a struggle and during the fight, Sam shot and killed Lucky.

Veronica is not innocent here. She knew that she was helping Sam and Pierce break down people's doors looking for Jake. That itself is blameworthy. She also should have been aware of the *risk* that someone could have been killed when Sam and Pierce brought along guns. It seems plausible too that she did in fact see the *risk* to life posed by her conduct but chose to drive the men around anyway. In either case, she would be blameworthy for her part in creating those risks. On the facts as

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I have described them, however, she did not plausibly intend to kill someone, nor did she know that someone would be killed.

In many jurisdictions, a prosecutor could nonetheless charge Veronica with much more than burglary (as an accomplice). She could charge Veronica with conspiracy to commit burglary (breaking into the houses) or aggravated robbery (conspiring to hold Jake at gunpoint to get the drugs or money from him). Seeing that the facts technically make out a conspiracy would earn a high grade, but an astute law student could get an A+ for noticing that the prosecutor could also charge Veronica with murder. On a *Pinkerton*<sup>1</sup> theory, Veronica is vicariously liable for the murder of Lucky because it was foreseeable that Sam or Pierce would kill someone in one of the houses they busted into.

Veronica did not believe that anyone would be killed—at most she was conscious of the risk that someone would be killed. A lay person or law student who missed the day on *Pinkerton* would be caught napping if he said that, surely, Veronica cannot be charged with the same crime as Sam. I think though that many legislators would also be surprised to know that Veronica can be charged, convicted, and punished the same as Sam.

If any of the above are not surprised at what can happen to Veronica in the criminal justice system, then I would venture that it is because they already expect too little justice from the system. In this article, I will align myself with the criminal law scholars who insist that culpability or moral blameworthiness is a *sine qua non* of criminal liability and that criminal punishment should not be disproportionate to a person's culpability.<sup>2</sup> Anyone who expects the criminal law to take serious account of culpability should be surprised that Veronica can be charged with murder.

The belief that criminal liability should not exceed culpability was a basic premise of the drafters of the Model Penal Code.<sup>3</sup> This commitment was baked into the text through the Code's provisions on mens rea: the section of the Code dealing with mens rea is titled "General Requirements of Culpability."<sup>4</sup> It makes committing a crime "purposely" the most culpable mens rea and committing a crime "negligently" the least.<sup>5</sup> Consistent with this view of culpability, the drafters of the Code rejected the *Pinkerton* theory of vicarious liability for all crimes committed in furtherance of the conspiracy that were reasonably foreseeable to the conspirator.<sup>6</sup>

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

2. *E.g.*, LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 6–7 (2009); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 415 (1978).

3. *See* MODEL PENAL CODE § 1.02(1)(c) (AM. LAW INST., Official Draft and Revised Comments 1985) (explaining that the Code seeks "to safeguard conduct that is without fault from condemnation as criminal").

4. *Id.* § 2.02.

5. *See* ALEXANDER & KESSLER FERZAN, *supra* note 2, at 24 ("This hierarchy presupposes that purpose is more culpable than knowledge, knowledge is more culpable than recklessness, and recklessness is more culpable than negligence.").

6. MODEL PENAL CODE § 2.06 cmt. 6(a).

Since its creation, the Code has proven influential, and many states adopted its text in whole or in part.<sup>7</sup> In some states, like Texas and New Jersey, *Pinkerton* was restored through amending their versions of the Code.<sup>8</sup> In other states, *Pinkerton* lives as a child of the judiciary.<sup>9</sup>

*Pinkerton* and the Model Penal Code, however, are poorly matched. The Code is built on certain guiding principles, among them the culpability principle, and its interlocking provisions are so drawn that the principles can be realized in a consistent fashion. For example, murder, which may be committed knowingly or intentionally, is a felony of the first degree.<sup>10</sup> Manslaughter applies to killings that are committed recklessly (when the killer was conscious of the risk of death she imposed on the victim) and is a felony of the second degree.<sup>11</sup> Lastly, “negligent homicide” is taking someone’s life negligently—when one should have been aware of the risk of death one’s conduct created but was not in fact aware.<sup>12</sup> It is a third-degree felony.<sup>13</sup>

*Pinkerton* short-circuits all this and gives the prosecution a path to a conviction for a first-degree felony with mens rea proof that could otherwise only produce a third-degree conviction. Not only is this facially inconsistent with and contrary to the logic of the Code, but it causes the Code’s culpability tracking function to go haywire. If we are convinced that punishments should not exceed culpability, then we should wish to see the state codes set right on this point.

The article is structured as follows. I first outline the arguments for why culpability should be a necessary condition of criminal liability and review how the Model Penal Code implements this condition. I also describe the origins of the *Pinkerton* doctrine, its rejection by the drafters of the Code, and the form it now takes in many states. In the next section, I explain in detail how tossing *Pinkerton* into the criminal law of a state with a penal code based on the MPC upsets the apple cart. I include an extreme example from Texas where *Pinkerton* has been used to convict a coconspirator of capital murder and sentence her to a term of life in prison without possibility of parole! Before concluding, I propose a reform that would retain liability of conspirators for the foreseeable crimes of their coconspirators but only permit them to be convicted of offenses

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7. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 *NEW CRIM. L. REV.* 319, 326 (2007).

8. *Compare id.* (listing New Jersey and Texas as states that undertook revisions of their criminal codes under the model code’s influence), *with* *State v. Bridges*, 628 A.2d 270, 275–76 (N.J. 1993) (citing N.J. STAT. ANN. § 2C:2-6 (West 2010)) *and* *TEX. PENAL CODE ANN.* § 7.02(b) (West 2003).

9. *See* Bruce A. Antkowiak, *The Pinkerton Problem*, 115 *PENN. ST. L. REV.* 607, 615 n.35 (2011) (collecting cases).

10. *MODEL PENAL CODE* § 210.2.

11. *Id.* §§ 2.02(2)(c), 210.3.

12. *Id.* §§ 2.02(2)(d), 210.4.

13. *Id.* § 210.4.

that can be committed with the type of mens rea they actually possessed toward those foreseeable crimes.

## II. BACKGROUND

### A. *Crime and Culpability*

The idea that criminal punishments must be related to the desert of the defendant is called “retributivism.” In its strongest form, retributivism proclaims that a criminal punishment must be imposed if and only if a defendant deserves that degree of punishment.<sup>14</sup> This strong form of retributivism, however, does not enjoy the support of all retributivists. Some deny that the state must undertake to punish every culpable person, but still insist that the defendant’s culpability is a necessary condition of punishment.<sup>15</sup> What all retributivists agree upon is that criminal liability is subject to a culpability “side-constraint” that limits who can be punished and sets the ceiling for the amount of punishment the state can inflict at the level of the defendant’s just deserts.<sup>16</sup> *Pinkerton* liability, we shall see, permits prosecutions that exceed this ceiling.

The Model Penal Code refers to its section on mens rea as a culpability provision with good reason. This is because retributivism reflects the belief that the criminal sanction is properly directed against people who make *choices* to break laws that prohibit harming or imperiling others.<sup>17</sup> Rather than trying to reduce antisocial behavior by treating people who engage in it as wild animals that need to be driven off or discouraged by fear and pain, the criminal law should appeal to people’s ability to regulate their own behavior and follow rules.<sup>18</sup> The theory thereby comforts the innocent person who can (hopefully) count on not being punished so long as she follows the criminal law’s rules.

Separating the innocent from the guilty is a matter of pinning down what choices each individual made. Even when we are sure that a person made *some* guilty choice, it does not follow that he is guilty of the particular charge laid against him. But deciding what choices an individual made is a function of figuring out what he thought he was doing, i.e., his mental state.

Between the person who causes harm in total innocence (a person who unwittingly returns home from abroad with a contagious disease) and the willful criminal, there are those who commit crimes with intermediate

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14. ALEXANDER & KESSLER FERZAN, *supra* note 2, at 7.

15. *See id.* at 7–8 (describing “weak” and “moderate” forms of retributivism).

16. *See* J.L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3, 4 (1982) (discussing the divisions and consensus within retributivism).

17. *See* ALEXANDER & KESSLER FERZAN, *supra* note 2, at 6 (“[I]t considers an actor *deserving* of punishment when he violates these norms that forbid the unjustified harming of, or risking harm to, others—that is, failing to give others’ interests their proper weight.”).

18. *See id.* at 4–6.

degrees of awareness and intent. Sometimes, a person makes choices knowing that her conduct will hurt someone but without that goal in mind. At other times, she may not be certain that what she does will hurt others, but she is aware that it will place them in great danger. In these intermediate cases, there is a difference in the choices being made, and these choices are not equally culpable. This is why murder is one crime and manslaughter is another. Fidelity to the culpability principle requires that one who made a less culpable choice (to get to work quick by speeding through his pedestrian neighborhood) is not convicted and punished for making a different, perhaps more culpable choice (to aim his car at his pedestrian neighbor and stomp the gas pedal).

Not all scholars accept retributivism,<sup>19</sup> but there is something very close to a consensus around the idea that culpability is a side-constraint on the criminal law.<sup>20</sup> In the next section, I will show how the Model Penal Code rationalized mens rea in order to make it an effective instrument for differentiating culpable choices. Even if one rejects a culpability condition on the criminal justice system, it remains true that the Model Penal Code is an attempt at a rational system for assessing culpability. The health of the law's internal logic—a necessity for the consistent treatment of offenders—is enough reason to watch how culpability is handled in states that adopted a version of the Model Code.

#### B. *Mens Rea in the Model Code*

In their own words, the drafters of the Model Penal Code sought “to safeguard conduct that is without fault from condemnation as criminal” and “to differentiate on reasonable grounds between serious and minor offenses.”<sup>21</sup> Accordingly, they insisted that mere behavior not be criminalized, but only voluntary acts undertaken with a culpable mental state. The Code declares, “A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.”<sup>22</sup> It adds that “a person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense.”<sup>23</sup> Thus the Code hews to a mens rea requirement, with the exception of a small number of strict liability offenses, which it attempts to limit to regulatory “violations” carrying fines only.<sup>24</sup>

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19. *E.g.*, Miko Bagaric & Kumar Amarasekara, *The Errors of Retributivism*, 24 MELB. U. L. REV. 124, 124 (2000).

20. *See* Richard S. Frase, *Limiting Retributivism*, in THE FUTURE OF IMPRISONMENT 83, 84 (Michael Tonry ed., 2004); Russell L. Christopher, *Time and Punishment*, 66 OHIO ST. L.J. 269, 305–06 (2005).

21. MODEL PENAL CODE § 1.02(1) (AM. LAW INST. 2017).

22. *Id.* § 2.01(1).

23. *Id.* § 2.02(1).

24. *See id.* § 2.05 & note.

The Code's mens rea provision has proved to be one of its most influential contributions to the law.<sup>25</sup> Praised for clarifying a recondite and misleading array of legal diction and doctrine,<sup>26</sup> the Code took the panoply of mens rea terms used in statutes and common law decisions—words like “specific intent,” “general intent,” “malice,” and “willful,”—and replaced them with just four expressly defined mental states.<sup>27</sup> Moreover, it graded them and put them in order of their seriousness: “each represents a different level of culpability.”<sup>28</sup>

Because they were working on a model code rather than a bunch of model statutes, the drafters wrote the hierarchal mens rea provisions to correspond to a hierarchy of criminal conduct and punishments. For example, a person is guilty of arson if he starts a fire with the purpose of destroying someone else's building; he is guilty of “reckless burning” if he purposely starts a fire and thereby recklessly puts someone else's building in danger of destruction.<sup>29</sup> Arson is a felony of the second degree, and reckless burning is a felony of the third degree.<sup>30</sup> A felony of the second degree is punishable by one year to ten years imprisonment, a felony of the third degree by one year to five years imprisonment.<sup>31</sup>

These provisions redefining the traditional fire crimes illustrate the Model Code's method of tuning punishment to culpability. The variance in the range of punishments is a function of mental state. Moreover, the definition of the crimes specifically states the elements to which the mental state is directed. That is to say, it is not intentional fire-starting generally that makes the difference between arson and reckless burning; it is the intention to do harm to someone else's property that makes the difference. This is in keeping with a criminal law that respects real distinctions in blameworthiness: starting fires per se is innocent—it is the decision to place another person's building at risk that is culpable. Intuitively, someone who starts a bonfire for a party but was not aware of the risk to other's property is not so blameworthy as the person who starts the same bonfire in conscious disregard of the danger that it will catch his neighbor's house on fire.

The Code's pattern of careful attention to the mental states of offenders and its modulation of punishment thereby is in keeping with the drafter's goal “to differentiate on reasonable grounds between serious and

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25. See Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 691 (1983) (calling it “the most significant and enduring achievement of the Code's authors”).

26. See Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 601 (1963) (“With analytic precision unrivaled by any other treatment of the subject of which I am aware, the Code sets forth four modes of culpability . . .”).

27. See MODEL PENAL CODE § 2.02 cmt. 1.

28. Ted Sampsel-Jones, *Mens Rea in Minnesota and the Model Penal Code*, 39 WM. MITCHELL L. REV. 1457, 1461 (2013).

29. MODEL PENAL CODE § 220.1.

30. *Id.*

31. *Id.* § 6.06.

minor offenses.”<sup>32</sup> The same spirit animates the rejection of the *Pinkerton* doctrine by the Code’s drafters, who feared that the “law would lose all sense of just proportion” if the rule in *Pinkerton* were embraced.<sup>33</sup> They were aware that conspiracy law had been applied to large conspiracies, formed of a leadership group and scattered lieutenants.<sup>34</sup> Courts call these hub-and-spoke conspiracies because the lieutenants, the spokes, may have no knowledge of the other spokes or their activities.<sup>35</sup> The Code’s drafters did not want each “spoke” subject to criminal liability for “thousands of additional offenses of which he was completely unaware and which he did not influence at all.”<sup>36</sup>

In lieu of establishing a rule of vicarious liability for coconspirators, the Code drafters suggested that the law of complicity was sufficient to catch those coconspirators who ought to be held responsible for the substantive crimes of their fellows.<sup>37</sup> A look at the Code’s complicity provisions will show how this is the case. They stamp as an accomplice to a crime anyone who “with the purpose of promoting or facilitating the commission of the offense . . . aids or agrees to aid such other person in planning or committing it.”<sup>38</sup> In a case brought against a defendant for substantive crimes committed by his coconspirators, the fact of the conspiracy would be evidence, often compelling evidence, that the defendant aided or agreed to aid his coconspirator in committing the substantive crimes.<sup>39</sup> A jury could rely on this evidence of complicity to find the defendant guilty, but importantly, the jury would not have been instructed that mere membership in a conspiracy is enough to establish vicarious liability for the foreseeable crimes of coconspirators.

Notice that by closing *Pinkerton* Street and forcing prosecutions of coconspirators for the substantive crimes of others down Complicity Lane, the drafters of the Code preserved a culpability requirement. To be an accomplice, one must act “with the purpose of promoting or facilitating the commission of the offense.”<sup>40</sup> As with reckless burning, the necessary mental state is welded to facts that make the conduct more or less culpable. Simply put, accomplice liability is limited to the crimes that the defendant chose to help others carry out. Again, this tracks an intuitive distinction in blameworthiness: a person who joins a drug conspiracy with-

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32. *Id.* § 1.02(1).

33. MODEL PENAL CODE AND COMMENTARIES: PART I § 2.06, at 298 (AM. LAW INST. 1985); *see also* MODEL PENAL CODE § 2.06 cmt. 6(a).

34. MODEL PENAL CODE AND COMMENTARIES: PART I, at 298; *see also* 2.06 cmt. 6(a).

35. *See, e.g.*, *United States v. Chandler*, 388 F.3d 796, 807 (11th Cir. 2004).

36. MODEL PENAL CODE AND COMMENTARIES: PART I at 298; *see also* MODEL PENAL CODE § 2.06 cmt. 6(a).

37. MODEL PENAL CODE § 2.06 cmt. 6(a).

38. *Id.* § 2.06(3)(a).

39. MODEL PENAL CODE AND COMMENTARIES: PART I at 298; *see also* MODEL PENAL CODE § 2.06 cmt. 6(a).

40. MODEL PENAL CODE § 2.06(3)(a).



out knowing that some members want to obtain its retail stock by robbing a medical marijuana shop is blameworthy, but she is not so blameworthy as the person who joins the same drug conspiracy and intends to play her part in the conspiracy by furnishing guns for the robbery.

### C. Pinkerton

*Pinkerton* is a doctrine of vicarious liability that makes a defendant liable for substantive crimes committed by her coconspirators in furtherance of the conspiracy so long as those crimes were reasonably foreseeable to her.<sup>41</sup> *Pinkerton* was a federal case, but the doctrine named for it is good law in at least a dozen states.<sup>42</sup> In some places, the legislature has endorsed it. The Texas Penal Code, for example, reads:

If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.<sup>43</sup>

My concern in this article is with the way the doctrine makes vicarious liability a matter of what is reasonably foreseeable or what should have been anticipated. This is essentially to hold defendants liable for the crimes of their coconspirators on proof that they were negligent as regards the possibility that their partners would commit certain crimes as part of the conspiracy. Reasonable foreseeability, after all, is just how negligence is defined in the Model Penal Code:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.<sup>44</sup>

The idea of defining a culpable mental state by what the actor should have foreseen is not itself objectionable to my mind. Though some have

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41. *E.g.*, *United States v. Alvarez*, 755 F.2d 830, 847–48 (11th Cir. 1985).

42. Antkowiak, *supra* note 9, at 615 n.35 (listing Arkansas, Connecticut, Kansas, Florida, Georgia, Rhode Island, Texas, Nebraska, New Jersey, California, Colorado, Maryland, and Virginia). States that have rejected *Pinkerton* include Washington, Arizona, Nevada, and New York. *Id.* at 623.

43. TEX. PENAL CODE § 7.02(b) (West 1994).

44. MODEL PENAL CODE § 2.02(2)(d).

said liability for negligence has no place in a criminal code,<sup>45</sup> I have written elsewhere in defense of criminal negligence, arguing that it is compatible with a robust culpability side-constraint on criminalization.<sup>46</sup> What I find problematic is using a featherweight mens rea like negligence to establish vicarious liability for even the gravest substantive crimes.

There is reason to believe that the real scope of *Pinkerton* falls short of the outer boundaries of the doctrine once courts take the Constitution into account. The federal courts of appeals have occasionally indicated that there are due process limitations on the breadth of *Pinkerton* liability.<sup>47</sup> In *Alvarez v. United States*,<sup>48</sup> the Eleventh Circuit heard from three appellants who had been part of a drug conspiracy.<sup>49</sup> The men had acted as a lookout, go-between, and interpreter respectively during a drug sale with undercover DEA agents.<sup>50</sup> The motel room transaction unexpectedly turned into a gun battle, and some of the defendants' confederates shot and killed one of the disguised federal officers.<sup>51</sup>

Although it upheld the murder convictions of the coconspirators who had not participated in the shooting, the circuit court did so only after convincing itself that the defendants had not been "minor participants" in the drug transaction.<sup>52</sup> The court felt that the Due Process Clause would bar a *Pinkerton* conviction in cases involving "attenuated relationships" between the conspirator and the substantive crime.<sup>53</sup> If the conspirator were indeed only a minor participant or was otherwise ill informed of the circumstances that precipitated the crime committed by his coconspirators, due process would forbid holding him vicariously liable for the crime even if he could have reasonably foreseen its occurrence.<sup>54</sup>

Importantly however, none of the examples I give in this article of conspirators being punished more than they deserve for the acts of their fellows would count as unconstitutional under this embryonic rule.<sup>55</sup> As

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45. *E.g.*, ALEXANDER & KESSLER FERZAN, *supra* note 2, at 85.

46. Andrew Ingram, *The Good, the Bad, and the Klutzy: Moral Concern and Criminal Negligence*, 34 CRIM. JUST. ETHICS 87, 98 (2015).

47. Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton*, 57 AM. U. L. REV. 585, 603–04 (2008) ("By 1991, the Fourth, Sixth, and Ninth Circuits had all indicated their support for the proposition that due process required, at a minimum, the *Pinkerton* limits on vicarious liability.").

48. 755 F.2d 830 (11th Cir. 1985).

49. *Id.* at 850–51.

50. *Id.* at 851.

51. *Id.* at 838–39.

52. *Id.* at 850–51.

53. *Id.* at 850 & n.25.

54. *Id.* at 851 n.27.

55. *See* *United States v. Christian*, 942 F.2d 363, 367 (6th Cir. 1991) ("The foreseeability concept underlying *Pinkerton* is also the main concern underlying a possible due process violation."); *United States v. Chorman*, 910 F.2d 102, 112 (4th Cir. 1990) (finding that convictions were not "so attenuated as to run afoul of possible due process limitations on the *Pinkerton* doctrine"); *United States v. Johnson*, 886 F.2d 1120, 1123 (9th Cir. 1989) ("We recognize the potential due process

such, while it is important to see that the real reach of *Pinkerton*, at least in several of the federal circuits,<sup>56</sup> is less than the black letter law implies, it still reaches far enough to offend the culpability constraint and create the inconsistencies in state criminal codes that I identify in this piece.

#### D. *Pinkerton's Critics and Defenders*

The *Pinkerton* doctrine has never been the darling of criminal law scholars. As we have seen, the drafters of the Model Penal Code did not countenance it. And when Wayne LaFave asked, "Is one who is a member of a conspiracy of necessity a party to any crime committed in the course of the conspiracy?", he answered that "[u]nder the better view," the question had to be "answered in the negative."<sup>57</sup> LaFave's reasoning, like that of the Code's drafters, centered on the draconian potential for charging minor members of larger conspiracies with the foreseeable crimes of distant confederates.<sup>58</sup>

Further doctrinal objections to *Pinkerton* were well summarized in Justice Rutledge's dissent in that case. He charged the authors of the majority opinion with collapsing the distinction between three separate crimes defined by Congress: "(1) completed substantive offenses; (2) aiding, abetting or counseling another to commit them; and (3) conspiracy to commit them."<sup>59</sup> Conspiracy, he emphasized, is a crime in itself with the criminal act in conspiracy being the agreement itself.<sup>60</sup>

Rutledge also faulted the majority for mixing civil law principles with criminal ones.<sup>61</sup> For example, the majority opinion is fond of describing criminal conspirators as "partners," each of whose acts are considered the acts of others.<sup>62</sup> Rutledge rightly pointed out that what is unremarkable in civil trials is aberrant in the criminal law: "Guilt there with us remains personal, not vicarious, for the more serious offenses."<sup>63</sup>

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limitations on the *Pinkerton* doctrine in cases involving attenuated relationships between the conspirator and the substantive crime." I owe this string cite to Kreit's article. Kreit, *supra* note 47, at 604 n.106.

56. Some state high courts (Connecticut's for instance) have also stated that due process limits the application of *Pinkerton*. See Kreit, *supra* note 47, at 604 n.106 (citing Mark Noferi, *Towards Attenuation: A "New" Due Process Limit on Pinkerton Conspiracy Liability*, 33 AM. J. CRIM. L. 91, 134-37 (2006)).

57. WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 13.3(a) (3d ed. 2017).

58. See *id.*

59. *Pinkerton v. United States*, 328 U.S. 640, 649 (1946) (Rutledge, J., dissenting) (footnotes omitted).

60. See *id.*

61. *Id.* at 651.

62. *Id.* at 646-47; see also James M. Shellow, William Theis & Susan Brenner, *Pinkerton v. United States and Vicarious Criminal Liability*, 36 MERCER L. REV. 1079, 1080 (1985) (contending that "the Supreme Court imported the civil concept of vicarious liability into the American law of criminal conspiracy").

63. *Pinkerton*, 328 U.S. at 651 (Rutledge, J., dissenting).

In addition to the doctrinal critiques of *Pinkerton*, the case's rule has been attacked on constitutional grounds. Bruce Antkowiak asserted that the rule is unconstitutional wherever it is not legislatively created: he alleged that it amounts to the creation of a new substantive crime by the judiciary, thereby infringing due process and the jury right.<sup>64</sup> For his part, Justice Rutledge believed the doctrine permitted two prosecutions for the same criminal act of conspiring, thereby subjecting the defendant to double jeopardy.<sup>65</sup>

The criticism notwithstanding, *Pinkerton* does have a smaller number of scholarly defenders: Matthew Pauley, for example, has argued that the principle is doctrinally sound, as measured against common law tradition, because it is a "small expansion" of established law on complicity or aiding and abetting.<sup>66</sup> As LaFave notes, the rule can also be defended as a powerful tool in the prosecution of modern organized crime.<sup>67</sup>

Neil Katyal penned the most robust policy apology for *Pinkerton* and conspiracy generally in 2003.<sup>68</sup> He offers a "functional" defense and does not respond to retributivist arguments, which he declares are overemphasized in criminal law scholarship generally.<sup>69</sup> With the support of research in psychology, economics, and theory of organizations, Katyal shows that vicarious liability for coconspirators can be a big help to society in combating crime.

One way *Pinkerton* helps law enforcement is by increasing the incentives for conspirators to "flip" or turn state's evidence.<sup>70</sup> It is easier to induce less active or subordinate members of a conspiracy to flip if they can be threatened with prosecution for the crimes of their more powerful or active brethren.<sup>71</sup> Katyal also points out that vicarious liability increases the risk of joining a conspiracy and makes those risks more uncer-

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64. Antkowiak, *supra* note 9, at 639.

65. *Pinkerton*, 328 U.S. at 652–53 (Rutledge, J., dissenting).

66. Matthew Pauley, *The Pinkerton Doctrine and Murder*, 4 PIERCE L. REV. 1, 42 (2005).

67. LAFAVE, *supra* note 57, § 13.3(a) (citing *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 998–99 (1959)).

68. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L. J. 1307 (2003).

69. *Id.* at 1311.

70. *Id.* at 1372.

71. *See id.* at 1328. I wrote an article explaining that promising leniency to criminals in exchange for cooperation in convicting their partners runs the risk of imposing greater punishments on more honest criminals who refuse to betray their fellows when tempted to do so. Andrew Ingram, *A (Moral) Prisoner's Dilemma: Character Ethics and Plea Bargaining*, 11 OHIO ST. J. CRIM. LAW 161, 161–62 (2014). I said there that it encourages dishonesty and signals that the government does not care about the character of its citizens. *Id.* at 170–71. I further noted that it perversely creates a tortuous dilemma for more virtuous criminals who are loath to betray their friends or partners. *Id.* at 171. I did not call, however, for the abolition of accomplice plea bargaining but only wished to call attention to these costs of the practice. *Id.* at 177. In this article, I remain willing to grant that the information extraction advantages of *Pinkerton* are indeed net advantages.

tain.<sup>72</sup> “[P]eople are less likely to know the full extent of their liability under *Pinkerton*,”<sup>73</sup> Katyal writes, which makes sense given that it allows you to be held liable even for crimes that you did not imagine might be committed.

The increased uncertainty wrought by *Pinkerton* also breeds distrust, and distrust makes it harder for an organization, legitimate or otherwise, to function well.<sup>74</sup> Katyal points to studies in which uncertain dangers diminish people’s confidence in one another: “[I]n situations where a bad apple could poison a group, trust is weak.”<sup>75</sup> Lastly, Katyal correctly recognizes that insofar as criminals understand how *Pinkerton* works, they will be incentivized to monitor and temper the behavior of their partners.<sup>76</sup> For example, if a prudent conspirator is robbing a bank, she has reason to keep an eye on a coconspirator with a penchant for violence, or better yet, not cooperate with this person at all so that she will not be liable for the intemperate person’s crimes.

### III. THE PROBLEM

#### A. Analysis

If you believe that punishment should not exceed culpability, then you should be concerned that *Pinkerton* licenses a murder conviction on the mere proof that the victim’s death was foreseeable to the defendant. If you care about internal consistency in law, then you should be concerned about using *Pinkerton* in a Model Penal Code state, where the difference in mens rea is meant to make a difference in the seriousness of the crime.

Suppose that Jane, Kelly, Larry, and Mark, all of them brimming with school spirit, want to have a bonfire if their team wins on Saturday. Luckily for them, an installation piece by artist Patrick Dougherty has been standing on the green for eight months. Made from saplings woven together to form what look like little hobbit huts, Dougherty’s artwork has dried out and is now quite flammable. For that reason, it is due to be torn down at the end of the month.

After the team wins the big game, Jane, Kelly, Larry, and Mark start to rally a crowd to go to the green and set the sculpture on fire. “Huzzah, let’s do it!” the crowd cheers. “Hey, bring something to get the fire going,” the four reply. They have brought some newspaper and dryer lint to get the fire started. Unbeknownst to them, however, one of the students who has joined their conspiracy on the way to the green is a member of

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72. Katyal, *supra* note 68, at 1372–73.

73. *Id.* at 1373.

74. *Id.*

75. *Id.* (citing Sharon G. Goto, *To Trust or Not To Trust: Situational and Dispositional Elements*, 24 SOC. BEHAV. & PERSONALITY 119, 129 (1996)).

76. *Id.* at 1374.

the Student People's Front. This student, Nate, decides to fetch some gasoline.

The four original conspirators start the blaze, and the students are having a good time. Even the art lovers are having a good time: the piece was due to come down anyway, and the flaming sculpture is reminiscent of a work of art at Burning Man. Unfortunately, Nate, wishing to start a larger conflagration that will torch the neighboring economics department's Rand Hall, comes forward with his gasoline and pours it on. Sure enough, the fire quickly grows out of control. Although no one is injured, a statue of Alan Greenspan is charred.

Dean Wormer is furious about the damage to the Greenspan statute (a gift from the Heritage Center for Excellence in Freedom Studies) and relaxes Jane, Kelly, Larry, Mark, and Nate to the secular arm. The district attorney shares the dean's outrage and decides to throw the book at all of the students. Lucky for her, she has a video that someone in the crowd uploaded to Instagram showing Nate, gasoline in hand, shouting his intent to burn Rand Hall.

The New Jersey prosecutor charges Nate with aggravated arson: "A person is guilty of aggravated arson, a crime of the second degree, if he starts a fire or causes an explosion, whether on his own property or another's . . . With the purpose of destroying a building or structure of another."<sup>77</sup> Turning her attention to the four original conspirators, she decides to charge them with aggravated arson as well. Her theory is that they conspired with Nate and the other crowd members to commit criminal mischief by burning the stick-pile sculpture: "A person is guilty of criminal mischief if he . . . [p]urposely or knowingly damages tangible property of another."<sup>78</sup> It was foreseeable, she alleges, that in leading a crowd to start an illegal bonfire, another member of the raucous crowd, i.e., a coconspirator, would try to start a larger fire to burn one of the school buildings: "A person is legally accountable for the conduct of another person when . . . [h]e is engaged in a conspiracy with such other person."<sup>79</sup>

Each of the four wants to go to trial at first because each of them knows that they had no intent to burn down the economics department or start a larger fire and no knowledge that Nate was going to pour gasoline on the fire until he was doing it. Aggravated arson is a crime of the second degree in New Jersey,<sup>80</sup> which may be punished by between five and ten

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77. N.J. REV. STAT. § 2C:17-1(a) (2013).

78. *Id.* § 2C:17-3(a).

79. *Id.* § 2C:2-6(b). Although the statute does not mention foreseeability, the Supreme Court of New Jersey has interpreted it to bring it into line with *Pinkerton*: "Accordingly, we conclude, and now holding, that a co-conspirator may be liable for the commission of substantive criminal acts that are not within the scope of the conspiracy if they are reasonably foreseeable as the necessary or natural consequences of the conspiracy." *State v. Bridges*, 628 A.2d 270, 280 (N.J. 1993).

80. N.J. REV. STAT. § 2C:17-1(a).

years in prison.<sup>81</sup> Each of the four is remorseful, but they do not believe that they are arsonists or should be treated as such. Nonetheless, their attorneys explain to them the risks of going to trial to seek conviction on a lesser-included offense (like criminal mischief—destroying property worth less than \$2,000, which is a fourth-degree offense<sup>82</sup> with a maximum penalty of eighteen months imprisonment)<sup>83</sup> or leniency for their sophomore pyrotechnics from the judge at sentencing. Accordingly, they agree to make a plea bargain with the prosecution that will give them probation and an arson conviction but keep them out of prison.

Charging the four students with arson does not respect the culpability constraint on criminal law. What the students chose to do was to ignite a soon-to-be-demolished wooden sculpture, not torch a valuable building that could have had people inside of it. There is a great difference in blameworthiness between them and Nate. He poured gasoline on the fire intending to burn down the economics department, and his actions show far less concern for the rights and well-being of others than do those of the other four students. It is this lack of concern that makes him more culpable than them.<sup>84</sup>

The four students' actions were dangerous. One can understand the anger of the prosecutor, her sense that crowds starting fires pose a great threat to the community. This anger, however, is not a reliable guide to the culpability of the defendants because it is looking too much at the results of their actions and not the choices that they made. It is choice that "reveals when an actor does not have sufficient concern for others' interests."<sup>85</sup>

Even if you do not care whether criminals are punished more than they deserve, you ought to be bothered by the inconsistency in the penal code in this scenario. Suppose that Jane had acted alone to set fire to the Dougherty piece on the college green. After igniting the kindling, she walks away to avoid detection. At this point, Nate comes along and sees his chance to try to burn down the economics building. He tosses gasoline on the fire, which grows beyond Jane's expectations, and scorches Green-span's nose. In this scenario, if the district attorney wished to prosecute Jane for arson, she would have a much harder row to hoe. Because Jane and Nate never formed a conspiracy, she could not use *Pinkerton* to charge her. Rather, she would have to prove that Jane started the fire in the wooden sculpture with the purpose of burning down the economics building. I doubt that a jury would be convinced that was her intent without some additional evidence that she harbored the sort of hostility to Rand

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81. *Id.* § 2C:43-6(a)(2).

82. *Id.* § 2C:17-3(b)(2).

83. *Id.* § 2C:43-6(a)(4).

84. See ALEXANDER & KESSLER FERZAN, *supra* note 2, at 171 (explaining the view that culpability consists in knowingly risking harm to others, thereby manifesting lack of respect for them and their interests).

85. *Id.* at 174.

Hall that Nate did. The prosecutor would be much safer charging Jane with criminal mischief, the code provision that seems tailored by the legislature to fit her conduct.

If the prosecutor has to charge Jane with criminal mischief rather than arson, then the ladder of incendiary crimes specified by the legislature in their version of the Model Penal Code is working logically. Where Jane wants to destroy a decaying piece of art and not a building, she can only be charged with a lesser crime.

This logic collapses, however, once Jane is acting in concert with others. All of a sudden, it becomes much easier to convict Jane of arson. The prosecutor need not show that she intended to burn down a building; all that is necessary is that the destruction of the building have been foreseeable. The district attorney need not carefully take stock of her evidence and decide just how far up the fire-crimes ladder her proof can take her. Indeed, she can jump immediately to an arson charge on evidence that it was foreseeable that someone Jane acted with would try to spread the fire to a building. Looking at the code as a whole, this is an arbitrary shortcut with no rhyme or reason: why should the presence or absence of a conspiracy affect the proof necessary to obtain a conviction for the same crime? Why would a rational drafter establish graded offense with more or different elements and then place a conspiracy shortcut into the code? The special dangers that go along with group criminality cannot be cited as a reason for this shortcut. The wrong of visiting these dangers on society is presumably already accounted for by the crime of conspiracy itself.<sup>86</sup>

Inconsistent results can flow from inconsistent doctrine. In the examples I have given, the prosecutor's choice to charge a lesser crime directly or a more serious crime under a *Pinkerton* theory can make a large differ-

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86. The special danger of group criminality is a well-worn justification for criminalizing conspiracy. See, e.g., Kathleen F. Brickey, *Conspiracy, Group Danger and the Corporate Defendant*, 52 U. CIN. L. REV. 431, 443 (1983). Apart from the problem of relying on it twice-over to defend *Pinkerton* liability, this reason to retain conspiracy as a crime is dubious when it comes to many of the actual conspiracy indictments that are handed down today. As Justice Jackson noted in his concurring opinion in *Kruehwith v. United States*, 336 U.S. 440 (1949), the term "conspiracy" smacks of subterranean, arachnid schemes: "It sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself." 336 U.S. at 448 (Jackson, J. concurring). The reality of many indicted conspiracies today is far more petty and mundane. See *id.* at 449 ("It also may be trivialized, as here, where the conspiracy consists of the concert of a loathsome panderer and a prostitute to go from New York to Florida to ply their trade . . ."). The hasty decision of Veronica, Sam, and Pierce to hunt down Jake over a bad drug deal is a far cry from a Guy Fawkes plot. In these cases, there is little planning and no enduring criminal organization to menace society at large or challenge the power of the state. This argument supports a conclusion outside the scope of this article—namely that conspiracy law itself ought to be reined in and restricted to cases in which there is substantial planning or the formation of a permanent criminal organization. Any occasion when two or more people explicitly or implicitly decide together to go commit a crime and perform an overt act would not then be a "conspiracy."



ence in sentencing. These discrepancies may be aggravated by prosecutors' abilities to use their charging discretion as leverage in plea bargaining.<sup>87</sup> As in the case of the campus bonfire, a district attorney need not be able to convince a jury to convict under an attenuated conspiracy theory for her to bring a legally sufficient indictment.<sup>88</sup> Thus, sloppy doctrine can be abused by prosecutors before other actors in the criminal justice system, like judges and juries, are given a chance to reject the overstretching of a pliant legal theory.<sup>89</sup>

These faults do not extend to the other criminal law doctrines that compose the law of parties. At least as solicitation and complicity are defined in the Model Penal Code, they respect the culpability constraint and avoid creating a shortcut around the Code's mens rea requirements. The Code states, "A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime . . . ."<sup>90</sup> Solicitation is a crime of the "same grade and degree as the most serious offense that is . . . solicited."<sup>91</sup> This is fine: a person who tells someone else to commit a crime is no less culpable for using another as his instrument. His culpability is further ensured by the requirement that he give his directions with the purpose of promoting or facilitating the crime's commission.<sup>92</sup>

Complicity, or accomplice liability, is also wrapped in an intent requirement in the Code.<sup>93</sup> A person who acts "with the purpose of promoting or facilitating the commission of the offense" is complicit in the crime of another if he "aids or agrees or attempts to aid such other person in

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87. See Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 703–04 (2014) (explaining the phenomenon of "vertical overcharging" by prosecutors).

88. See *id.*

89. Cf. Paul H. Robinson, Michael T. Cahill & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 16 (2000) ("Some people might cite prosecutorial discretion as a panacea for any legislative overreaching. However, such discretion is as likely to exacerbate as to counteract the dangers of over-criminalization, and, in any event, blind reliance on discretion at any level only opens the door to the type of selective, disparate treatment that adjudication rules should combat." (footnote omitted)).

90. MODEL PENAL CODE § 5.02(1) (AM. LAW INST., Official Draft and Revised Comments 1985).

91. *Id.* § 5.05(1).

92. *Id.* § 5.02(1).

93. As Matthew Pauley notes in his defense of the *Pinkerton* rule, the common law version of the complicity doctrine was latitudinarian and held someone who intentionally or knowingly aided or abetted a crime liable for its natural and probable consequence, whether or not he intended or foresaw those additional crimes. Pauley, *supra* note 66, at 31. The natural and probable consequences approach to complicity liability violates the culpability constraint for the same reasons that *Pinkerton* does. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.05[B][5] (2d ed. 1995) ("[T]he effect of the rule is to permit conviction and punishment of an accomplice whose culpability is less than is required to prove the guilt of the primary party."). However, this is not the topic of this article.

planning or committing it.”<sup>94</sup> This is fine for the same reasons that the Code’s version of solicitation is sound. Furthermore, in states like New Jersey<sup>95</sup> and Texas<sup>96</sup> that adopted the MPC, these provisions were not tampered with and their mens rea safeguards were left intact.

B. *An Extreme Case, Texas Capital Murder*

The Texas Penal Code allows indictments that transmute *Pinkerton* with the offense of capital murder. This technique can blaze a shortcut, not just from negligent homicide to murder, but to a conviction that guarantees a life-without-parole sentence, maugre what punishment the judge or jury might have thought justified for a coconspirator who was not a killer. This is an extreme example of (1) the way *Pinkerton* offends the culpability constraint and (2) the messy consequences of later legislators tinkering with the text of a model code years after its enactment by their predecessors.

A person is guilty of capital murder if he intentionally or knowingly causes the death of an individual and does so in certain enumerated circumstances.<sup>97</sup> These include taking the life of a police officer or a child, and killing in the course of committing another crime such as kidnapping, burglary, or robbery.<sup>98</sup> In sum, capital murder is differentiated from murder both by the special circumstances element and by the strict mens rea element. Whereas capital murder requires intentionally or knowingly causing the death of another person, a person can be guilty of murder if he “intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual.”<sup>99</sup> Likewise, satisfying the elements of felony murder only permits a conviction for murder and not capital murder.<sup>100</sup>

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94. MODEL PENAL CODE § 2.06(3).

95. N.J. REV. STAT. § 2C:2-6(c) (2013).

96. TEX. PENAL CODE ANN. § 7.02(a)(2) (West 2017).

97. *Id.* §§ 19.02–.03.

98. *Id.* § 19.03.

99. *Id.* § 19.02(b)(2).

100. *Id.* §§ 19.02(b)(3), 19.03(a). The felony murder rule also offends the culpability constraint and has come under attack from commentators for that reason. *E.g.*, Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 452 (1985). Notably, the drafters of the Model Penal Code only adopted a modified version of the felony murder rule. *See* MODEL PENAL CODE § 210.02(1)(b) (AM. LAW INST., Official Draft and Revised Comments 1985). A person is guilty of murder if he causes the death of another “recklessly under circumstances manifesting extreme indifference to the value of human life.” *Id.* The Code establishes a rebuttable presumption that this was the case if he caused the death while committing one of a number of enumerated violent felonies. *Id.* By contrast, the prevailing felony murder rule in the states today contains no mens rea requirement beyond that integral to the predicate felony. *See* Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 419 (2011) (“[T]hey defined felony murder as causing death in committing or attempting particular felonies, rather than requiring a particular culpable mental state with respect to death.”).

Capital murder was included in the Texas Penal Code as a strategic move in the constitutional struggle over the death penalty in the 1970s.<sup>101</sup> When the Supreme Court decided *Furman v. Georgia*,<sup>102</sup> the justices objected to the unpredictable and arbitrary application of the death penalty by the states.<sup>103</sup> At that time, “death st[ood] condemned as fatally offensive to human dignity.”<sup>104</sup> When death later got clemency from the Court, every state that wanted to invite it back had to outline specific circumstances that differentiated murders that were death eligible.<sup>105</sup> The capital murder statute was the vehicle for this in the Lone Star State.<sup>106</sup>

The public struggle over the morality and prudence of the death penalty continued after the Court’s reversal of course in the 1970s. In time, those who wished to see fewer people condemned to die began to advocate for a new punishment option for juries: life without parole. Prior to 2005, a person convicted of capital murder could either be sentenced to death or life imprisonment.<sup>107</sup> The latter, however, was not a guarantee of imprisonment unto death. A prisoner sentenced to life was still eligible for parole.<sup>108</sup> If the law instead promised juries that a capital defendant sentenced to life in prison would stay there permanently, many opponents of sanguinary punishment thought that they would be more likely to choose confinement over death. As one scholar wrote at the time, “Juries are likely to consider parole eligibility when making the decision between life and death and where life without parole is not an option, may feel compelled to impose the death penalty simply to ensure that an offender is permanently incapacitated.”<sup>109</sup>

When the prosecution indicts a defendant for capital murder, it chooses whether to pursue the death penalty.<sup>110</sup> If it obtains a conviction and is arguing that the defendant should die, then the jury is asked to answer a series of special questions that determine whether the defendant

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101. See *Jurek v. Texas*, 428 U.S. 262, 268 (1976) (“After this Court held Texas’ system for imposing capital punishment unconstitutional in *Branch v. Texas*, decided with *Furman v. Georgia*, the Texas Legislature narrowed the scope of its laws relating to capital punishment. The new Texas Penal Code limits capital homicides to intentional and knowing murders committed in five situations . . . .” (citation omitted)).

102. 408 U.S. 238 (1972).

103. See, e.g., *id.* at 295 (Brennan, J., concurring).

104. *Id.* at 305.

105. See Patrick S. Metzger, *Death and Texas: The Unevolved Model of Decency*, 90 NEB. L. REV. 240, 244 (2011).

106. See *Jurek*, 428 U.S. at 276 (sustaining the new Texas death penalty regime against constitutional challenge).

107. See Act of June 17, 2005, 79th Leg., R.S., ch. 787, 2005 Tex. Gen. Laws 2705, 2705 (2005) (amending the text to instead provide for life without parole).

108. *Ellason v. Owens*, 526 F. App’x 342, 345 (5th Cir. 2013).

109. Danya W. Blair, *A Matter of Life and Death: Why Life Without Parole Should Be A Sentencing Option in Texas*, 22 AM. J. CRIM. L. 191, 204 (1994) (footnote omitted).

110. See TEX. CODE CRIM. PROC. art. 37.071 §§ 1, 2(a)(1) (West 2017).

will receive a fatal sentence or life without parole.<sup>111</sup> If it obtains a conviction without pursuing the death penalty, there is no sentencing phase and the defendant is automatically sentenced to life without parole.<sup>112</sup>

Despite its origin as an accommodation to the Supreme Court's restrictions on the use of the death penalty, the capital murder statute is now mostly used to obtain life without parole sentences. In 2017, prosecutors filed 446 capital murder cases and only sought the death penalty in three instances.<sup>113</sup> In that same year, there were 249 capital murder convictions.<sup>114</sup> By way of comparison, there were 854 murder indictments filed and 536 murder convictions obtained in 2017.<sup>115</sup> Observers of the Texas criminal justice system have begun to notice that capital murder charges are no longer "being reserved for the 'worst of the worst.'"<sup>116</sup>

"It is well-settled in Texas that a person can be found guilty of capital murder as a conspiring party . . . ."<sup>117</sup> Although no data is available on exactly how many people are charged with or convicted of capital murder on a *Pinkerton* theory of vicarious liability,<sup>118</sup> opinions in appellate cases

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111. *Id.* art. 37.071 § 2.

112. *Id.* art. 37.071 § 1. If the defendant is a juvenile, then he or she will receive a regular life sentence. TEX. PENAL CODE ANN. § 12.31(a)(1) (West 2017).

113. Office of Court Administration, *Annual Statistical Report for the Texas Judiciary: Fiscal Year 2017*, D-8 (2018), <http://www.txcourts.gov/media/1441398/ar-fy-17-final.pdf> [<https://perma.cc/TZ5L-C238>].

114. *Id.*

115. *Id.*

116. Scott Henson, *One in Three Murder Charges in TX a Capital Case*, GRITS FOR BREAKFAST (May 2, 2018, 8:44 AM), <http://gritsforbreakfast.blogspot.com/2018/05/one-in-three-murder-charges-in-tx.html> [<https://perma.cc/MB4K-KJWW>].

117. Longoria v. State, 154 S.W.3d 747, 754 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). This statement holds true for both cases in which the prosecution pursues the death penalty and those it does not. During the sentencing phase, a death qualified jury is given an antiparties instruction: it must answer "whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken." TEX. CODE CRIM. PROC. art. 37.071 § 2(b)(2) (West 2017). "Awareness" is close to how the Penal Code defines recklessness: "A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." TEX. PENAL CODE ANN. § 6.03(c). This elevates the mens rea required beyond the mere negligence standard of *Pinkerton*. Nonetheless, awareness is still something less than the knowledge or intent ordinarily required for capital murder. See TEX. PENAL CODE ANN. §§ 19.02–.03. Although the death penalty is not a focus of this section, I agree with prior scholarship that the use of *Pinkerton* in Texas death cases still can offend the culpability constraint despite the antiparties instruction. See Omar Randi Ebeid, *Death By Association: Conspiracy Liability and Capital Punishment in Texas*, 45 HOUS. L. REV. 1831, 1852 (2009).

118. See Scott Henson, *Unanswered Questions About Law-of-Parties Beyond Death Penalty*, GRITS FOR BREAKFAST (June 10, 2017, 5:52 PM), <http://gritsforbreakfast.blogspot.com/2017/06/unanswered-questions-about-law-of.html> [<https://perma.cc/JQC7-3BFF>].

reveal numerous instances in which this has occurred.<sup>119</sup> For instance, the court described the facts in *Ervin v. State* as follows:

Appellant's guilt is established by her own words documented in her second and third statements. No evidence contrary to her statements was admitted at the trial. In her statements, appellant admits that she drove Dexter and Keithron to the carwash where a man was washing a barbeque pit in a large truck, and she dropped them off there. She admits she knew Dexter and Keithron both had guns. She saw them put on their bandana masks and hoodies as they got out of her car. She states that she "knew they were going to rob someone in the carwash." While the two men were robbing the man at the carwash with a firearm, appellant acknowledges that she stayed nearby. After she heard a loud gunshot coming from the direction of the carwash, she returned to the location to pick up Dexter and Keithron, who were standing on the street wearing black hoodies and holding their black bandana masks. Appellant stopped her car, they got in the car, and she drove them from the carwash to Keithron's house.

From this evidence, the jury could have reasonably determined that appellant entered into an agreement with Dexter and Keithron to commit the aggravated robbery of the man at the carwash, Davis, because she drove them to the location, left them there with their guns and wearing bandana masks and hoodies, knowing they were going to rob the man. The jury could also have reasonably determined that Dexter murdered Davis in furtherance of the conspiracy to rob him because he shot him during the course of taking Davis's cell phone that Davis's wife said was missing from Davis. Furthermore, from appellant's statements, the jury could have reasonably determined that she should have reasonably anticipated the murder of Davis by Dexter as a result of the carrying out of the conspiracy because she knew he had a loaded firearm when he went wearing a mask and hoodie to rob Davis. She also knew that immediately before Davis was killed, Dexter had driven Keithron to an area nearby where Keithron had robbed a lady at a bus stop with a firearm.<sup>120</sup>

"The jury found her guilty, and, because the State did not seek the death penalty, punishment was automatically assessed at life imprisonment

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119. *E.g.*, *Quigley v. State*, No. 02-15-00441-CR, 2017 WL 930066, at \*7 (Tex. App.—Fort Worth Mar. 9, 2017, no pet.); *Demus v. State*, 05-09-00175-CR, 2010 WL 277092, at \*3 (Tex. App.—Dallas Jan. 26, 2010, pet. ref'd); *Bell v. State*, 2-07-166-CR, 2008 WL 4053005, at \*4 (Tex. App.—Fort Worth Aug. 29, 2008, pet. ref'd).

120. *Ervin v. State*, 333 S.W.3d 187, 201–02 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd) (citations omitted).

without parole.”<sup>121</sup> There is nothing to complain of in the court’s analysis of the sufficiency of the evidence. What is noteworthy about this case is that it illustrates that successful prosecutions of defendants like Veronica (the driver who I imagined at the beginning of this article) for capital murder are a reality.

The disparity between culpability and prison term when defendants are convicted in these cases is aggravated by the inability of judge or jury to modulate the punishment meted out at sentencing. In ordinary Texas felony cases, the defendant can elect before trial to be sentenced by either the judge or the jury.<sup>122</sup> Regardless of which path the defendant has chosen, the rules of evidence are greatly relaxed at sentencing, and the defendant and prosecution can offer any relevant evidence, including evidence bearing on character and the circumstances of the crime.<sup>123</sup> Given this opportunity in a case like Veronica’s, the defense attorney would certainly remind the jury as often as she could that her client was only the driver and not the killer. Furthermore, Veronica herself could take the stand and testify that she did not want or expect anyone to be killed. Were a defendant like Veronica convicted of murder rather than capital murder, she and her counsel could avail themselves of these opportunities to argue for a prison term between five years and life.<sup>124</sup> It is quite plausible that judge or jury would see a person who was not carrying a gun or directing someone else to kill as less culpable than her coconspirators.

The loss of a chance at parole in these cases obviously cuts off another opportunity for a person with power in the criminal justice system to recognize that a *Pinkerton* defendant is not so culpable and not so deserving of an extreme prison sentence. Normally, a Texas “inmate is eligible for release on parole when the inmate’s actual calendar time served plus good conduct time equals one-fourth of the sentence imposed or 15 years, whichever is less.”<sup>125</sup>

From a doctrinal standpoint, the combination of *Pinkerton* and capital murder exhibits the dangers that come from legislative tampering with a model code, both at the time of adoption, and in the decades that follow. The Model Penal Code provides neither for *Pinkerton* liability nor a separate offense of capital murder distinct from murder.<sup>126</sup> In enacting the capital murder provision, the legislature sought to limit its application to intentional or knowing homicides, but because they also adopted *Pinkerton*, this limitation is easily circumvented in homicide prosecutions of coconspirators. Managing the complicated interplay of different statutes is

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121. *Id.* at 195.

122. TEX. CODE CRIM PROC. art. 37.07 § 2(b).

123. *Id.* art. 37.07 § 3(a)(1).

124. TEX. PENAL CODE ANN. § 12.32(a) (West 2017).

125. TEX. GOV’T CODE ANN. § 508.145(f) (West 2017).

126. See MODEL PENAL CODE § 210.1 (AM. LAW INST., Official Draft and Revised Comments 1985) (“Criminal homicide is murder, manslaughter or negligent homicide.”).

one of the virtues of adopting an architectonic code, but these advantages are lost or diluted when changes are made for political or policy reasons divorced from considerations of harmonious drafting. For example, capital murder was invented in response to the Court's decision in *Furman*. It is also probable that concerns about effective law enforcement raised by prosecutors motivated the legislature's adoption of *Pinkerton*. As evidence, consider that in New Jersey, the legislature adopted a similar amendment to the MPC on the recommendation of the attorney general's office, after that body asserted the rule's importance to organized crime prosecutions.<sup>127</sup>

Continuing this theme, there is a sad irony in the fact that the humane amendment that made life without parole a choice for death qualified juries also mandates that coconspirators like the driver in *Erwin* are permanently locked up upon conviction. Here again, piecemeal tinkering with the crimes code exhumes irrationality that systematic codification is meant to bury.

#### IV. A SOLUTION

##### A. *Evaluating Culpability*

Nothing in the foregoing should be taken for a categorical denial that people who could have foreseen the crimes that would be committed by their coconspirators are blameworthy for those crimes. Beyond the culpability they may bear for conspiring or committing the crime that is the object of the conspiracy, they may be truly blameworthy for negligently contributing to the foreseeable crimes *Pinkerton* counts against them. This does not mean, however, that they are as blameworthy as one who recklessly, knowingly, or intentionally commits those crimes.

*Pinkerton* amounts to a negligence standard for coconspirators,<sup>128</sup> and I argued in a past article that a conviction based on criminal negligence can satisfy the culpability constraint.<sup>129</sup> My position, built off of the philosophical work of ethicist Nomy Arpaly on the subject of praiseworthiness and blameworthiness, is that failure to avert to foreseeable risks is blameworthy when that neglect reflects a failure of moral concern. Moral concern is a matter of responsiveness to moral reasons.<sup>130</sup>

Moral reasons are just the facts that make an action right or wrong.<sup>131</sup> For example, the fact that you promised to help your friend move over the weekend is the reason that you ought to take your truck to his apartment. By the same token, that someone could be hurt is a moral reason not to burn down a building. When an arsonist strikes in order to obtain insur-

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127. *State v. Bridges*, 628 A.2d 270, 276 (N.J. 1993).

128. See *supra* note 43 and accompanying text.

129. Ingram, *supra* note 46, at 98.

130. NOMY ARPALY, UNPRINCIPLED VIRTUE: AN INQUIRY INTO MORAL AGENCY 79 (2003).

131. NOMY ARPALY, MERIT, MEANING, AND HUMAN BONDAGE 14 (2006).

ance money, he shows a blameworthy lack of responsiveness to that moral reason.

It is also possible to act for antimoral reasons, such as when an abuser hits his girlfriend because it will hurt her or because it will cow her. As Arpaly writes, “[I]f what makes it wrong to strike someone is the fact that doing so would cause suffering to a fellow human being and Iago strikes someone in order to make a human being suffer, then he does not simply fail to respond to moral reasons but ‘antiresponds’ to them.”<sup>132</sup>

The negligent person differs from the reckless person in that the latter is aware that his conduct creates an unjustified and substantial risk to others, whereas the former is not aware but should have been.<sup>133</sup> Negligence can nonetheless be blameworthy when the failure to avert to the risks of one’s conduct is due to lack of concern for the well-being of others rather than a morally neutral disability like fatigue or senility. Philosopher of law Anthony Duff offers the example of a man accused of rape who claims that he thought his victim was consenting.<sup>134</sup> Even if we credit the defendant’s story, Duff says that we may still think him blameworthy if his attitude towards his victim did not manifest “a proper respect for the woman’s rights.”<sup>135</sup> We can imagine a misogynist who “never considered whether his victim might not be consenting, because his disdain for women blinded him to her humanity, rights, and agency.”<sup>136</sup> Arpaly makes the point well:

If one cares about morality, moral facts matter to one emotionally, and they are salient to one. As a result, other things being equal, a person of more moral concern will be more sensitive to moral features of situations—more apt to notice, for example, that a fellow human being is showing signs of distress.<sup>137</sup>

The negligent person is less culpable than the person who performs the same acts conscious of the harms she is risking and much less culpable than the person who performs the same acts intending to cause those harms. Consider Veronica who drove her boyfriend Sam around town when he was looking for Jake, the man who had ripped him off. Suppose that Veronica had seen Sam with his gun and heard him say that he is going to find Jake to “get what’s mine.” Veronica may not be aware of the “substantial and unjustified risk” that Sam will kill Jake or kill someone else. Though she is angry at Jake and wants Sam to get his money back, she may be telling herself that Sam is carrying a gun “just in case” and probably will not use it. Veronica here is failing to see the risk posed to

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132. *Id.*

133. See MODEL PENAL CODE § 2.02(2)(c)-(d) (AM. LAW INST., Official Draft and Revised Comments 1985) (defining recklessness and negligence).

134. R.A. DUFF, INTENTION, AGENCY, AND CRIMINAL LIABILITY 171 (1990).

135. *Id.*

136. Ingram, *supra* note 46, at 117.

137. ARPALY, *supra* note 130, at 87.



life by what she and Sam are doing. Even so, if her oversight stems from a deficit of concern for the lives of Jake and her neighbors, then she is blameworthy.

Veronica, a negligent coconspirator, is blameworthy but not so blameworthy as an intentional killer. In an extreme case, someone who intentionally takes someone's life out of hatred or spite is not just failing to respond to moral reasons, she is antiresponding to them. This person is plainly more blameworthy than the negligent actor, who by definition cannot commit a crime for the reasons that make it wrong because she is not averting to the facts that constitute those reasons.

In other instances of intentional killing, the criminal is not antiresponding to moral reasons but simply not responding to them. His motive, for instance, is to escape the store with the money from the cashier's drawer without being caught. If he shoots to kill the clerk to keep from being identified later, he ignores a host of moral reasons against what he is doing. True, he is not spiteful or sadistic—he is not killing the clerk for the reasons that make it wrong—and yet, because he knows what he is doing and is doing it on purpose, he still seems much more blameworthy than negligent Veronica. Failing to respond to moral reasons when they are staring you in the face shows a much graver deficit of moral concern than does failing to see them through a fog of contingencies. Stripped of philosophical jargon, it is plain that someone who can look at an innocent clerk and pull the trigger has made a far more wicked choice than has someone who chauffeurs an armed and angry man who is looking for a confrontation.

#### B. *Legislative Reform*

In order to make *Pinkerton* compatible with the culpability constraint on the criminal law and eliminate it as a shortcut sliced through the penal code, I propose modifying it to allow liability only for those offenses for which the actor held the kind of culpable mens rea sufficient to commit the substantive offense. For example, I would modify the Texas statute to read as follows:

If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators in furtherance of the unlawful purpose, each of the other conspirators is guilty of the felony actually committed or a lesser included offense thereof, provided that the other conspirator acted with the kind of culpability that suffices to commit the felony or lesser included offense with which he or she is charged and the offense was a result of the carrying out of the conspiracy.

When acting intentionally suffices to commit the felony or lesser included offense, a conspirator acts intentionally if it is the conspirator's conscious objective or desire that a coconspirator

will engage in conduct that constitutes the felony or lesser included offense or when he or she is reasonably certain that a coconspirator will engage in conduct that constitutes the felony or lesser included offense.<sup>138</sup>

When acting knowingly suffices to commit the felony or lesser included offense, a conspirator acts knowingly when he or she is reasonably certain that a coconspirator will engage in conduct that constitutes the felony or lesser included offense.

When acting recklessly suffices to commit the felony or lesser included offense, a conspirator acts recklessly if the conspirator consciously disregards a substantial and unjustifiable<sup>139</sup> risk that a coconspirator will engage in conduct that constitutes the felony or lesser included offense.

When acting with criminal negligence suffices to commit the felony or lesser included offense, a conspirator acts with criminal negligence if the conspirator ought to be aware of a substantial and unjustifiable risk that a coconspirator will engage in conduct that constitutes the felony or lesser included offense.<sup>140</sup>

This reform has the advantage of enabling convictions of negligent or reckless conspirators while ensuring that they are no easier to convict and that they receive no more punishment than negligent or reckless defendants who are not part of a conspiracy. It does so by taking advantage of the familiar concept of a lesser included offense. This prevents culpable conspirators from slipping through the cracks where there is a mens rea mismatch. For example, one conspirator commits a crime in furtherance of

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138. The disjunctive definition is necessary because some crimes, notably theft, require intentional rather than simply knowing action. *See, e.g.*, TEX. PENAL CODE ANN. § 31.03(a) (West 2017) (“A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.”). The culpability difference between someone who knows that his coconspirator will commit a crime in furtherance of the conspiracy and one who intends that his coconspirator will commit that crime is vanishing, however. This is reflected by the fact that the code typically allows the same offense to be committed intentionally or knowingly and for equivalent punishments in either case. *See, e.g., id.* § 22.01(a)(2) (defining assault as “intentionally or knowingly threaten[ing] another with imminent bodily injury”).

139. I think it is hard to imagine that the risk will ever be justifiable given the criminal ends the conspirators are pursuing.

140. The latter paragraphs specify how to treat collateral crimes, making them a “result” or part of the “circumstances surrounding” the vicariously liable conspirators’ conduct. *Cf. id.* § 6.03. Further guidance as to the meaning of mens rea terms should of course come from their primary definitions in the code. *Id.* For example, “substantial and unjustifiable risk” should have the same meaning here that it does generally: “The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.” *Id.*

the conspiracy knowingly or intentionally; his culpable coconspirator was conscious of or should have been conscious of the risk this would happen. Given the proposed rule, the culpable coconspirator cannot escape vicarious liability simply because she acted recklessly or negligently while her partner in crime acted intentionally or knowingly. On the contrary, she can still be held vicariously liable for a lesser included offense of the crime committed by her partner.<sup>141</sup>

Invoking lesser included offenses also accounts for other mismatches, such as when a conspirator believed that his fellow was going to steal property of a certain value in furtherance of the conspiracy but the value of the property he stole was ultimately higher. In Texas, an offense “is a lesser included offense if . . . it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission.”<sup>142</sup> A bank robber who believed his coconspirator was going to steal a cheap, late model car to be the getaway vehicle is vicariously liable for theft of property with that value; he neither escapes all liability when the coconspirator steals a new Cadillac, nor is he punished for the more serious offense of stealing the expensive car (that he did not know his partner would take).

The proposed amendment would enable the prosecution of Veronica for negligent homicide.<sup>143</sup> This is a lesser included offense of murder,<sup>144</sup> the crime committed by Sam. If the prosecution could show that Veronica was not just negligent but reckless about the possibility that Sam would kill someone (suppose Sam told her that he would “shoot anyone who got in his way”), they could charge her with manslaughter. This is also a lesser included offense of murder<sup>145</sup> because like negligent homicide, it differs from murder “only in the respect that a less culpable mental state suffices to establish its commission.”<sup>146</sup>

If adopted in Texas, my proposal would prevent the capital murder convictions of conspirators I describe in this article. This is because none of these conspirators plausibly knew about or intended the homicides in question, and capital murder can only be committed intentionally or knowingly.<sup>147</sup> These cases represent extreme violations of the culpability constraint and are instances in which a conviction for manslaughter or negligent homicide intuitively fits the crime much better.

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141. TEX. CODE CRIM. PROC. art. 37.09 (West 2017) (“An offense is a lesser included offense if . . . it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission . . .”).

142. *Id.* art. 37.09.

143. *See* TEX. PENAL CODE ANN. § 19.05 (“A person commits an offense if he causes the death of an individual by criminal negligence.”).

144. *Saunders v. State*, 913 S.W.2d 564, 572 (Tex. Crim. App. 1995).

145. *Cavazos v. State*, 382 S.W.3d 377, 384 (Tex. Crim. App. 2012).

146. TEX. CODE CRIM. PROC. art. 37.09 (3).

147. TEX. PENAL CODE §§ 19.02(b)(1), 19.03(a).

My proposal contrasts with that of other *Pinkerton* critics in that it leaves the doctrine as a tool, albeit a less handy one, for prosecutors. Whether you think this is better than abolition may depend upon what you think of holding people criminally liable for harms that were foreseeable but which they did not foresee. Opponents of criminal negligence like Larry Alexander and Kimberly Kessler Ferzan<sup>148</sup> would probably still be unhappy with *Pinkerton* unless it were further restricted to require that the defendant acted recklessly—that he or she consciously anticipated that his or her coconspirator would commit the collateral crime in furtherance of the conspiracy.

People like Neil Katyal who back *Pinkerton* on functional, policy grounds ought to be able to accept the doctrine in this modified form. While adding the mens rea element may make it harder for prosecutors to convict or credibly charge defendants with the most serious crimes, the ability to charge conspirators with lesser included offenses preserves much of *Pinkerton*'s power as the plea-extorting, information-extracting crowbar that Katyal commends. For one thing, prosecutors could rise to the occasion and confront defendants in some cases with evidence that they knew certain crimes in service of the conspiracy would be committed. But even when they could only prove negligence or recklessness, the threat of vicarious liability would remain.<sup>149</sup>

Katyal also praises *Pinkerton* for increasing the uncertainty and risk involved in joining a conspiracy. By the same token, he lauds it for encouraging coconspirators to keep tabs on one another. The uncertainty that comes with joining a conspiracy remains even if *Pinkerton* has a new culpability requirement. The person contemplating joining a conspiracy still faces known unknowns—confederates' crimes he has not foreseen but should have anticipated. The magnitude of the risk is diminished certainly—he can only be vicariously liable for a negligence crime in this scenario—but the indefinite scope of his liability still remains. Katyal sees doubt about the hazards in play as itself dissuasive and an obstacle to crim-

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148. ALEXANDER & KESSLER FERZAN, *supra* note 2, at 85.

149. This depends upon the presence of a lesser included offense with a negligence or recklessness mens rea. In Texas, for example, assault can be committed recklessly, TEX. PENAL CODE § 22.01(a)(1), but theft can only be committed intentionally or knowingly, *see id.* § 31.03. Thus, given my proposed reforms, some conspirators could escape vicarious liability even if they were reckless or negligent about the offenses their coconspirators would go on to commit. From a retributivist perspective, this is what consistency requires: if society does not want to criminalize negligently depriving someone of property then someone who joins a conspiracy negligent as to the possibility that a partner in crime would commit a theft in its service should not be subject to additional criminal liability. Of course, a retributivist might also hold that legislatures should criminalize more kinds of negligent or reckless acts. Regardless, I think that this leaves plenty for prosecutors to work with since the unplanned but foreseeable crimes committed in furtherance of a conspiracy that surpass the severity of the object crime itself are typically homicides or assaults.

inal cooperation,<sup>150</sup> and this doubt would remain even if prosecutors were forced to charge negligent homicide rather than murder under a version of *Pinkerton* that respected retributivism. The same can be said of encouraging conspirators to look over each other's shoulders. What you do not know about what your confederates are doing can still hurt you on sentencing day (albeit not as much), and so the incentive to monitor other members of the conspiracy remains.

One advantage identified by Katyal is almost untouched by the proposed reform: the incentive to moderate the behavior of your companion conspirators. Criminals who know that their partners are going to commit collateral crimes in support of the conspiracy are still incentivized to prevent those crimes from occurring. In the case of a homicide, a robbery conspirator who knows that his partner is going to deviate from their plan and shoot the security guard will be guilty of murder—not manslaughter or negligent homicide—regardless of what version of *Pinkerton* governs.<sup>151</sup> The only difference would be in the potential issues that the defendant could raise at trial, i.e., denying that he knew what his partner would do during the robbery.

Finally, as I noted above, judges and commentators have raised constitutional objections to *Pinkerton*. Bruce Antkowiak, for instance, has argued that in “every place where *Pinkerton* lives by the will of the courts alone, the doctrine should be retired given its impact on the jury right and the grave due process problems it creates.”<sup>152</sup> My proposal, of course, is a modification to the statutory text that implements *Pinkerton* in some states. In jurisdictions that have adopted *Pinkerton* by judicial decision, altering the doctrine in the way I suggest would not cure Antkowiak's concerns about its constitutionality. In that case, one who took those concerns to heart might still prefer excising the doctrine from the law. On the other hand, both Antkowiak's concerns and my own could be satisfied if the legislatures in those jurisdictions with common law *Pinkerton* enacted a statute with the mens rea bumpers I propose.

## V. CONCLUSION

Criminal law doctrine ought to be taken seriously. Even though it is statute based and frequently jostled by legislatures, it still deserves the thoughtful attention of lawyers. This is true whether or not one believes that the criminal law should be subject to the culpability constraint. As in other subjects like contracts, there is room to identify good and bad law—

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150. See Katyal, *supra* note 68, at 1342–43 (“Legal risks cannot be contracted away because the parties cannot know the risk with precision; therefore, an agreement may be more difficult to strike.”).

151. See, e.g., TEX. PENAL CODE § 19.02(b)(1) (explaining that murder can be committed intentionally or knowingly).

152. Antkowiak, *supra* note 9, at 639.

law that is inconsistent, illogical, or poorly drafted—regardless of differing views on policy or philosophy.

My proposal aims to normalize outcomes across cases of individual and group action. It is a suggestion to treat individuals alike—those who commit their crimes in groups and those who commit them alone. If we think conspiring itself should be a crime, that is fine and a sound basis to differentiate between solo criminals and social ones, but whatever fault we judge there to be in the act of conspiring itself, it shouldn't change the fact that a reckless homicide is manslaughter and a knowing or intentional one is murder. Someone who recklessly causes the death of another by driving for her angry boyfriend should not be convicted of capital murder and sentenced to life without parole while her counterpart who recklessly causes the death of another by driving drunk is convicted of manslaughter and sentenced to fifteen years.