GROUP THINK: THE LAW OF CONSPIRACY AND COLLECTIVE REASON

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Although vicarious liability for the acts of co-conspirators is firmly entrenched in federal courts, no adequate theory explains how the act and intention of one conspirator can be attributed to another, simply by virtue of their criminal agreement. This Article argues that the most promising avenue for solving the Pinkerton paradox is an appeal to the collective intention of the conspiratorial group to commit the crime. Unfortunately, misplaced skepticism about the notion of a “group will” has prevented criminal scholars from embracing the notion of a conspiracy’s collective intention to commit a crime. However, positing group intentions requires only that the criminal law recognize the rational relationships between individuals who decide to collectivize reason to pursue a common criminal goal; no burdensome theory of corporate animals with unified minds is required. After exploring the different rational structures that a conspiracy can have, the Article outlines the circumstances when vicarious liability could be justified. Specifically, liability must be limited to participants in tightly knit conspiracies who engage in the kind of common deliberation that is capable of yielding collective intentions. A further consequence of this theory is that liability must be restricted to acts that fall within the scope of the criminal plan, not just acts that should have been reasonably foreseeable to members of the conspiracy.

I. INTRODUCTION

Pinkerton liability has long confounded criminal law scholars. Under this venerable doctrine, first announced by the Supreme Court in 1946, a conspirator’s actions may be attributed to all members of the conspiracy, subjecting them to criminal liability for the substantive crimes of their co-conspirators. The classic example is the bank robber who shoots (or

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1 See Pinkerton v. United States, 328 U.S. 640 (1946) (allowing liability for the reasonably foreseeable crimes committed by co-conspirators).
threatens to shoot) a security guard. The lookout who stays behind in the
car is just as guilty as the shooter, as long as it was reasonably foreseeable
that the plan might go awry and result in physical violence.\footnote{See, e.g., United States v. Rawlings, 341 F.3d 657, 659 (7th Cir. 2003) (discussing applicability of Pinkerton in bank robbery cases).} Federal courts
have continued to reaffirm and apply \textit{Pinkerton} at every turn in the
intervening decades. Earlier this year, for example, the Seventh Circuit
upheld a defendant’s conviction for using a firearm in a crime of violence
when it was unclear whether the defendant had a gun.\footnote{See, e.g., United States v. Roberson, 474 F.3d 432 (7th Cir. 2007) (holding that it was
irrelevant whether a defendant, convicted of using a firearm during a bank robbery, was
personally holding a gun, because Pinkerton liability justified the charge because his
accomplice had a gun).} Writing for a
unanimous panel that included Judges Easterbrook and Wood, Judge Posner
wrote that the factual issue of the defendant’s gun possession was
irrelevant.\footnote{Id. at 433 (permitting conviction for “brandishing” gun even though defendant may not
have been the one with the gun).} A co-conspirator in the bank robbery had branded a gun, so
\textit{Pinkerton} allowed the government to charge the defendant with using a
firearm in a crime of violence, despite the fact that he had done no such
thing.\footnote{See United States v. McLee, 436 F.3d 751, 758 (7th Cir. 2006) (referring to this
application of \textit{Pinkerton} as “constructive possession of the weapon”).} Such outcomes are commonplace in the federal courts, though both
the Model Penal Code and many state jurisdictions have either eliminated
or pulled back from \textit{Pinkerton}.

Indeed, the law of conspiracy in general is under pressure.\footnote{See Krulewitch v. United States, 336 U.S. 440, 445-46 (1949) (Jackson, J., concurring)
(“The unwavering protest of courts against the growing habit to indict for conspiracy in lieu
of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose
practice as to this offense constitutes a serious threat to fairness in our administration of
justice.”). Note that Learned Hand himself upheld the doctrine. See Harrison v. United
States, 7 F.2d 259 (2d Cir. 1925). In Harrison, Judge Hand made the comment about the
prosecutor’s nursery in holding that cumulative sentences were rarely appropriate “where the
counts are for merely alternative forms of the same offense, and where a conspiracy count is
added to a count for the substantive crime.” Id. at 263. Hand concluded:

\begin{quote}
It appears to us that the maximum sentence prescribed by Congress is intended to cover the
whole substantive offense in its extremest degree, no matter in how many different ways a
draughtsman may plead it, and even though he add a count for conspiracy, that darling of the
modern prosecutor’s nursery.
\end{quote}

\textit{Id}. It is striking, though, that despite the sarcasm of the quote, the conspiracy doctrine
remains unscathed by the court’s holding in the case.

skepticism about conspiracy as an inchoate substantive crime—\(^8\)—at least in the international context—and took judicial notice of the fact that many nations have no notion of it at all in their criminal law.\(^9\) The international version of *Pinkerton*—Joint Criminal Enterprise liability or JCE—is notoriously expansive in its reach,\(^10\) and the doctrine’s acronym is snidely

\(^8\) This element of the conspiracy doctrine, most closely associated with U.S. penal law (it remains unused in many European civil law jurisdictions), could be called conspiracy as a substantive offense. Here, the act of “agreeing” is itself the crime. Federal law provides criminal liability for a conspiratorial agreement, even before the plan comes to fruition. See 18 U.S.C.A. § 371 (West 2007) (providing five-year maximum for the stand-alone offense of conspiracy). At least one member of the conspiracy must make an overt act in furtherance of the conspiracy, although the defendant need not in order to be prosecuted. These prosecutions can be either ex post or ex ante. Conspiracy as a stand-alone offense is relatively unknown in civil law jurisdictions, where punishments are usually less severe than in the United States. These two factors are not unrelated. See James Q. Whitman, *The Comparative Study of Criminal Punishment*, 1 ANN. REV. L & SOC. SCI. 17, 32 (2005). U.S. jurisdictions are uniquely committed to intervening early in criminal endeavors with harsh punishments in order to deter future criminal conduct. When performed ex post, the benefit for prosecutors is that they need not offer any proof about the criminal act itself. They might simply offer evidence of the original conspiratorial agreement and leave it at that, even if they know that the plan did, indeed, come to fruition. When prosecuted ex ante, before the plan has a chance to come to fruition, conspiracy provides an institutional avenue by which the criminal justice system can intervene early in the development of a criminal endeavor and stop it before it actually happens. See, e.g., Iannelli v. United States, 420 U.S. 770, 778 (1975) (noting that “the agreement is the essential evil at which the crime of conspiracy is directed”); United States v. Feola, 420 U.S. 671, 694 (1975) (noting that “although the law generally makes criminal only antisocial conduct, at some point in the continuum between preparation and consummation, the likelihood of a commission of an act is sufficiently great and the criminal intent sufficiently well formed to justify the intervention of the criminal law”); United States v. Beil, 577 F.2d 1313, 1315 n.2 (5th Cir. 1978) (“The law of conspiracy identifies the agreement to engage in a criminal venture as an event of sufficient threat to social order to permit the imposition of criminal sanctions for the agreement alone, plus an overt act in pursuit of it, regardless of whether the crime agreed upon actually is committed.”).

\(^9\) When Congress passed the Military Commissions Act in response to the *Hamdan* ruling, it specifically authorized military commissions to try individuals charged with the inchoate crime of conspiracy. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006). Congress eliminated, however, all mention of conspiracy as a mode of vicarious liability for the substantive crimes of co-conspirators and replaced it with the more traditional notion of aiding and abetting. Id.

\(^10\) The doctrine was formulated in a crucial opinion by Judge Cassese in *Prosecutor v. Tadić*, Case No. IT-94-1-A, ICTY Appeals Judgment, paras. 226-29 (July 15, 1999), and allows defendants to be convicted for the criminal actions of their confederates in a joint criminal enterprise as long as the actions were reasonably foreseeable (thus mirroring *Pinkerton*). Despite constant criticism, the ICTY Appeals Chamber has reaffirmed the doctrine on numerous occasions, most notably in *Prosecutor v. Stakic*, Case No. IT-97-24-A, ICTY Appeals Judgment (Mar. 22, 2002). For a discussion of the theoretical implications of joint criminal enterprise liability, see Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT’L CRIM. JUST. 159 (2007); Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT’L CRIM. JUST. 69 (2007).
referred to at the tribunals as “Just Convict Everybody.” These developments suggest a renewed level of scrutiny for this still unsettled area of the criminal law.

In the past, the scholarly literature has either focused its attention on developing a theory to ground vicarious conspiratorial liability or has simply advocated for Pinkerton’s demise. Other scholars have made the more radical suggestion that the wider concept of conspiracy itself should be wiped from the landscape of criminal law. This Article will argue that each of these avenues is flawed. Conspiracy is indispensable as a general category to capture the essence of group criminality, but no scholar has successfully developed a theory consistent with the basic principles of criminal law sufficient to ground vicarious liability for co-conspirators. This Article aims to provide that doctrinal justification.

To that end, Part II will first examine the previous attempts at justifying vicarious liability. In order to bring the practice in compliance with basic notions of criminal law, these attempts have found ways to impute both an “act” and “intention” to the defendant sufficient to hold him liable for the substantive crimes of co-conspirators. Various moves are possible here, though the most promising one involved finding the relevant intention in the group’s intention to commit the crime. If the group truly “intended” the result, it was hardly a stretch to attribute this will to each member of the group. However, this view has long since been abandoned because it seemed to require positing a “group will” that implied the existence of a supra-human mind filled with the same kind of mental

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12 See Phillip Johnson, The Unnecessary Crime of Conspiracy, 61 CAL. L. REV. 1137 (1973). The criticisms have a long pedigree. See, e.g., Francis B. Sayre, Criminal Conspiracy, 35 HARV. L. REV. 393, 393 (1922) (concluding that “[a] doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought”).

13 The doctrine is of course under great debate in the scholarly literature. See, e.g., GEORGE P. FLETCHER, BASIC CONCEPTS IN CRIMINAL LAW 192 (1998) (noting that “it is impossible under American law to hold individuals liable simply for what they do, each according to his or her own degree of criminal participation”). Nonetheless, no case in the federal courts has substantially rolled back the Pinkerton doctrine since its creation—a resounding tribute to the power of stare decisis. United States v. Pinkerton, 328 U.S. 640 (1946); see also Mark Noferi, Towards Attenuation: A “New” Due Process Limit on Pinkerton Conspiracy Liability, 33 AM. J. CRIM. L. 91, 92 (2006) (referring to Pinkerton as “one of the most venerable, well-settled, and unexamined precedents in American criminal law” and discussing due process limitations on its application).
experiences that human beings have. This notion smacked of exaggeration at best, incoherence at worst. Scholars sought alternate routes to attribute the required actus reus and mens rea to the defendant.¹⁴

Indeed, Part III will consider how the “group will” view became untenable, in particular because legal realism discouraged analysis into the metaphysics of collective endeavors generally. Although this debate happened within the context of corporations, its effects were far-reaching, and the notion that conspiracies have a “group mind” was similarly discredited. Part IV will argue that this was especially unfortunate since groups truly matter to the law and cannot be reduced to their individual members. One consequence of this view is that the call to eliminate the law of conspiracy is an overreaction to the problem.

Part V will show that the discredited view of conspiracies with a “group will,” sufficient to meet the mental element required for vicarious liability, stemmed from an overemphasis on archaic psychological notions, and that the group mindedness of a conspiracy involves nothing more theoretically shocking than the rational relations between its members. The elements of this argument come from sober rational choice theory, not far-flung psychology. With this shift in orientation, it becomes quite possible to view the conspiracy as a series of “overlapping” agents, each of whom commits a portion of their lives to a collective endeavor and, for this limited purpose, agrees to submit to a common process of deliberation and execution. This model of the conspiracy as a series of overlapping agents provides the best ground for attributing the mental intention of the group to its individual members, as well as the acts of one conspirator to all others, and it does so without resort to the panicky psychology of a group will. This model recognizes the irreducibly collective aspect to some criminal behavior, yet also explains how these collective endeavors are built from the bricks and mortar of individual agents.

Part VI will employ this model to describe the different categories of conspiracies, each with a slightly different structure, while Part VII will trace the doctrinal implications. Specifically, attribution of the group’s intention to each individual provides the justification for vicarious conspiratorial liability, though only for acts within the scope of the criminal agreement and only for tightly knit conspiracies. As for Pinkerton liability, no basis exists for attribution of acts that fall outside the scope of the criminal agreement, for the simple reason that these acts play no part in group deliberations. Consequently, neither actus reus nor mens rea can be attributed to the other members of the conspiracy in these situations.

II. THE DOCTRINAL MYSTERIES OF PINKERTON

In a way, Pinkerton is really two rules rolled into one. The first element of the rule allows for vicarious liability for the crimes of co-conspirators that fall within the scope of the criminal plan. The second, more extensive application of the rule applies in cases where the actions of a co-conspirator fall outside the scope of the criminal agreement, but are nonetheless attributed to the defendant because they were “reasonably foreseeable.” Pinkerton’s name is usually affixed to the latter, more controversial application, in part because it was in Pinkerton that the Supreme Court announced the language of “reasonable foreseeability,” a language initially more familiar in tort than criminal law, but now firmly entrenched in the latter discipline as well. However, it is important to note that Pinkerton itself actually involved application of the more pedestrian vicarious liability. The case involved two brothers convicted of tax evasion, where one alone committed the criminal acts, though both were charged by virtue of an alleged criminal agreement between them to evade taxation. Application of the doctrine to actions outside the scope of the criminal agreement was developed in the subsequent case law.

A. THE ACT AND INTENTION REQUIREMENTS

The central dilemma is whether the defendant has committed an act, with the required intent, in order to be convicted of the substantive offense for which he is charged. So the question in Pinkerton was simply how Daniel Pinkerton could be convicted for Walter’s actions, especially since Daniel was in jail when Walter committed them. Somehow, by virtue of the criminal agreement, the act and intentions of one become the acts and intentions of the other, and liability can be attributed to all who join the

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17 Conspiracy is defined as an agreement between two or more individuals to pursue an unlawful goal. See 18 U.S.C.A. § 371 (West 2007). See generally George P. Fletcher, Rethinking Criminal Law 646 (Oxford reprint ed. 2000) (1978); Jens David Ohlin, Conspiracy, in Oxford Companion to International Criminal Justice (Antonio Cassese ed., forthcoming 2008). Our commonsense understanding of conspiracies is helpful here: they are secretive enterprises, pursued in proverbial backrooms, where the efficiencies of collective action and secrecy are harnessed to fulfill a criminal endeavor. See United States v. Rabinowich, 238 U.S. 78, 88 (1915) (“It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.”).
conspiracy. Furthermore, each individual bears equal responsibility for the actions of the conspiracy.\(^{18}\) Why does joining the conspiracy turn the acts of others into one’s own, as far as the law is concerned? This aspect of Pinkerton continues to elude coherent explanation.\(^{19}\) This basic question must be analyzed first before considering its more controversial applications.

Of course, the answer is that the Pinkerton brothers conspired together.\(^{20}\) But why should this matter? One possibility is that Daniel’s required mental state for tax evasion can be found in his intent that his brother Walter commit the crime, assuming of course that the act fell within the scope of the criminal plan and was explicitly discussed. While this view sounds plausible, it does not explain where we find the act requirement, since Daniel committed no act of tax evasion at all. In order to justify individual liability, consistent with the principle of culpability, Daniel must have committed a wrongful act.\(^{21}\) Culpability here means culpability for wrongdoing—and wrongdoing presupposes an act in violation of the law. Culpability cannot be separated from action because it stems from wrongful acts.\(^{22}\) In order to fulfill the culpability requirement for a Pinkerton prosecution, then, we must somehow show that the defendant committed a wrongful act, even though the act he is prosecuted for is the act of his co-conspirator.

One possibility is simply to attribute Walter’s act to Daniel, on the theory that Walter’s acts become Daniel’s merely because the two of them formed a criminal agreement. This explanation hardly makes sense, at least not without some larger account to explain how one person’s act can become another person’s act by some alchemic transformation. After all, it was Walter who performed the act, not Daniel.

The more likely avenue to provide the act requirement, then, is to argue that Daniel’s “act” was joining the conspiracy, or forming the

\(^{18}\) See 18 U.S.C.A. § 2(a) (West 2007) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”); see also United States v. Ambrose, 740 F.2d 505, 508 (7th Cir. 1985) (discussing historical evolution of 18 U.S.C.A. § 2(a)).

\(^{19}\) But see Fletcher, supra note 17, at 649-64; Claus Roxin, Täterschaft und Tatherrschaft (2006) (analyzing concepts of participation, perpetration, complicity, and conspiracy).

\(^{20}\) The criminal plans need not necessarily be grand, although they are almost always sufficiently complex that no one criminal could accomplish the task himself. Other modes of liability, such as co-perpetration, require cooperation in order to achieve criminal goals. See Fletcher, supra note 17, at 659.

\(^{21}\) For a discussion of culpability requirements, see infra notes 40-42 and accompanying text.

\(^{22}\) See Fletcher, supra note 17, at 459.
conspiratorial agreement, which ought to be sufficient to meet the act requirement in order to hold Daniel liable for Walter’s substantive offense. While it is undeniable that Daniel did commit this act, the act of joining the conspiracy is not the same act as the act of committing tax evasion. If anything, this act simply makes Daniel guilty of the inchoate offense of conspiracy to commit tax evasion, but not guilty of tax evasion proper. Surely the two are distinct.

Consider also the more problematic case where the act in question falls outside the scope of the original agreement. Assume that both brothers conspire to commit tax evasion, but Walter commits additional financial frauds that were neither discussed, nor agreed to, by Daniel. Under Pinkerton, liability might be assessed if the additional financial frauds are considered a reasonably foreseeable consequence of the tax evasion scheme. However, in such a case, Daniel never had any intention of committing the additional financial fraud, so the logical move is to find the required mental element in Daniel’s intent to join the criminal conspiracy in the first instance. The well-traveled problem is that this mental element suggests at most a crime of negligence, insofar as Daniel intended one result but, out of negligence, got another. It hardly supports imposition of full liability on Daniel for Walter’s substantive offense. The final option is simply to attribute Walter’s intention to Daniel. But what could justify such a transfer? As one judge put it:

    The major fallacy I see in the “foreseeable consequence” doctrine is not so much that it attributes an unintended act to the accomplice/co-conspirator but rather that it assesses the degree of his culpability for that act not by his own mental state but rather by the mental state of the perpetrator and/or the circumstances of the crime.23

The best explanation for how the perpetrator’s act and intention travel to the defendant is the path least traveled. For acts that fall within the scope of the criminal agreement, it is the group itself—the conspiracy—that carries the required mental element for the offense, and this fact alone justifies attribution of the required intention to the group’s individual members. If the group “intends” the result, all parts of the group can be legitimately said to “intend” the result as well. Furthermore, the same argument can be made for the act requirement as well. But how does one impute the act to the defendant in a Pinkerton case? What wrongful act did he commit? Somehow, the wrongful act of the perpetrator who commits the crime must be attributed to the defendant, and this Article will provide a

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rationale for this attribution\textsuperscript{24} by appealing to sober principles of rational choice theory that should suit all criminal law scholars. Simply put, if one member of the group commits an action that is caused by the group’s intention to commit the crime, it is plausible to attribute the act to the group itself, and by reverse extension, back down to each of its members.

B. FROM COLLECTIVE TO INDIVIDUAL CULPABILITY

Charting this reverse path is, however, very controversial. The inference from collective intentions to individual criminal liability is not necessarily self-evident. To skeptics of this inference, the group is one thing, its constituent members another. For example, if the nation is guilty, it does not necessarily follow that any individual member of the nation is guilty. The connection between collective and individual culpability was widely debated in the aftermath of World War II, as lawyers, philosophers, and politicians debated the appropriate culpability of regular Germans for the Holocaust.\textsuperscript{25} While some argued that the crimes of the German nation entailed individual culpability for regular Germans, others argued precisely the reverse: individual culpability could not be inferred from the simple fact of being a German. Indeed, many did nothing, or actively resisted, or were themselves victimized.\textsuperscript{26} How could they be culpable just by virtue of their membership in a nation—albeit one that acted like a criminal syndicate under Hitler?\textsuperscript{27}

The relevant difference between the case of German war guilt and the modern criminal conspiracy is that the latter functions with a tighter deliberative structure than the former. Decisions in a criminal conspiracy are made in the form of group deliberations that involve, as will be discussed in Part IV, a form of collective reason. This tightly knit form of reasoning is not present when the “collective” in question is a massive and loosely organized entity such as the German nation, composed of many

\textsuperscript{24} Doctrines of imputed liability are not entirely foreign to the criminal law, although the literature is short on theories to explain them. See Robinson, supra note 14, at 617.


\textsuperscript{26} On this specific point, see Herbert Morris, George Fletcher and Collective Guilt, 78 NOTRE DAME L. REV. 731, 737-38 (2003) (“There were Germans who were innocent infants at the time, Germans who risked their lives in opposing the wrongs and, to take an extreme case, there were Jews who were being persecuted, tortured, and killed who were also German nationals.”).

\textsuperscript{27} Id.
individuals who do not participate in the process of group deliberations.\textsuperscript{28} Some Germans were mere bystanders.\textsuperscript{29}

It is more fruitful to compare the criminal conspiracy with a more structured entity such as a legislature, which has a formal decision-making procedure that all members actively participate in. While conspiracies are not as structured as legislatures, with formalized rules or bylaws, they often have a decision-making structure that is generally followed by social convention, even if it is not codified in writing.\textsuperscript{30} It is quite common in the case of legislatures to speak of collective intentions, though critics of “legislative intent” often complain that legislatures cannot have intentions in the same sense that people do, so it is nonsensical to ask what Congress “intended” when it passed a particular law.\textsuperscript{31} Even if we can resolve this doubt, and attribute a collective intention to the legislature, it bears asking whether we can attribute that intention back down to the individual legislator.

This raises the special problem of dissenters. In Germany, many (or some) opposed Hitler, either by hiding Jews, speaking out against his policies (though this was rare and dangerous), or, in the most extreme case, plotting Hitler’s assassination.\textsuperscript{32} In the case of legislators, many vote against an initiative, and at first glance it would appear absurd to attribute a collective intention to them, since they did not even support the proposal. This point bears scrutiny. When a legislator returns home to his district, he can often escape criticism by noting that he voted against a particularly loathsome proposal. In this capacity he appears as an individual defending his voting practices. In other circumstances, though, the legislator may appear as a representative of the legislature—or even the whole nation if he is speaking with a foreign leader—at which point he may very well be called to account for the collective action, and a disavowal by appealing to his own dissenting position would appear inapposite. When is it

\textsuperscript{28} Of course, the Nazi government was not loosely organized but was, rather, devastating in its efficiency and cohesion. It is possible to distinguish here between the government and the German nation.

\textsuperscript{29} See Morris, \textit{supra} note 26, at 739.

\textsuperscript{30} See \textit{infra} Part VII for an extensive analysis of these structures.

\textsuperscript{31} For a discussion, see William N. Eskridge, Jr. & Philip P. Frickey, \textit{Statutory Interpretation as Practical Reasoning}, 42 STAN. L. REV. 321 (1990). See also Michael S. Moore, \textit{A Natural Law Theory of Interpretation}, 58 S. CAL. L. REV. 279, 350-51 (1985) (“Skepticism is warranted when we move from the further intentions of individuals to those of a group of such individuals. One cannot, as I argued, make out either of the realist conceptions of legislative intent. There just are not the group minds or shared intentions that could give these conceptions of legislative intention any application.”); Max Radin, \textit{Statutory Interpretation}, 43 HARV. L. REV. 863 (1930).

\textsuperscript{32} See Morris, \textit{supra} note 26, at 738.
appropriate to recognize that the individual has taken the collective decision and made it his own? The analogue in the conspiracy is the criminal who disagrees with a particular decision and is overruled, either by majority rule or a contrary decision by the conspiracy’s leader, but decides to remain in the conspiracy anyway. How can the group’s intention be imputed to an individual dissenter within the conspiracy, sufficient to ground Pinkerton liability?33

In order to determine whether collective intentions can be attributed to individuals, we must first analyze the structure of conspiracies. The thesis to be pursued here is that each individual who participates in a conspiracy bears a certain relationship to the individual’s thinking process, such that attribution of the collective intention to the individual may be warranted in certain limited circumstances. However, before doing so we must wait until we have explained the structure of collective decision-making. The answer will lie somewhere in the fact that once an individual injects himself in the process of collective decision-making, it is not so easy to disentangle from it. Final evaluation of this argument must be postponed until Part VII.

The contemporary literature has largely avoided such questions. While appeal to the group intention of the conspiracy offers, at first glance, the best solution to the Pinkerton paradox, the position is no longer seriously entertained in the scholarly literature. There are two likely reasons. The first and most pervasive is a distrust of the notion of a group will. If the group “intends” to commit the substantive crime, does this mean that the conspiracy has a mind of its own, like some kind of supra-human animal?34 Does each member of the conspiracy cease to exist, falling out of existence and replaced by the hive mind of the conspiracy? The notion seems to imply the existence of a unified group mind—an outlandish concept. As Part III will demonstrate, discussions of “group will” have long since been discredited in the law since the rise of legal realism and legal pragmatism. While this view provided the mental and objective elements for vicarious liability, the criticism was that it did so at too high a price.

The origin of this problem can be seen in our very basic understanding of what it means to conspire. We view the criminal conspiracy, rightly or wrongly, as tightly woven in deliberation and purpose, in much the same way that we regard corporations. Indeed, if one looks at the definition of a conspiracy in the Oxford English Dictionary, one finds that to “conspire” means, literally, to breathe together.35 The prefix con means “with,” of

33 For a detailed discussion of imputation, see Robinson, supra note 14, at 617.
34 See Moore, supra note 31, at 350.
course, and “spire” comes from the Latin *spiro*, *spirare*, meaning to blow, or more figuratively, to breathe.\(^\text{36}\) Hence, *conspirare* means literally to “breathe together,” and by extension, “to accord, harmonize, agree, combine or unite in a purpose, plot mischief together secretly.”\(^\text{37}\) The association then is not just some loose collective endeavor. The collective endeavor is a case of collective action so closely pursued that the conspirators *breathe together* as if they are, in a sense, one being—one animal. If this is what it means for a group to have a collective intention, it does indeed sound outlandish.

The second rationale for dismissing the notion of a group intention is that it might conflict with the basic individualistic precepts of the criminal law. Criminal lawyers are inclined to view everything through the lens of individual culpability, and rightly regard talk of group intentions as inherently suspect. Indeed, the entire conspiracy doctrine demonstrates a tension between collective action and individual liability. All conspiracies, by definition, are pursued collectively. However, conviction—and punishment especially—are targeted towards particular individuals, who must alone face the stigma and prison sentence associated with a criminal conviction.\(^\text{38}\) Why should the conspiracy be treated like an atomic unit, with each part bearing the same responsibility as the whole?\(^\text{39}\) For this reason, any talk of a “group will” is regarded as inconsistent with the Enlightenment principles of individual responsibility that the criminal law is founded upon. Talking about a group will sounds too much like guilt by association or blood guilt.

The goal of this Article is to revive the notion of a group intention, without bringing with it the baggage of a corporate animal with a psychological mind of its own. Ironically, developing this account of group intentions will offer doctrinal implications in Part VIII that do more to respect the individualistic precepts of criminal law and the principle of individual culpability than the current *Pinkerton* doctrine. Failure to consider the deliberative structure of conspiracies has allowed the criminal law to ignore the required mental and objective elements for vicarious liability, and has allowed expansive conspiracy doctrines like *Pinkerton* to

\(^{36}\) *Id.*  
\(^{37}\) *Id.*  
\(^{38}\) The conspiracy charge is one of the most frequently used tools by the modern prosecutor. See Raphael Prober & Jill Randall, *Federal Criminal Conspiracy*, 39 AM. CRIM. L. REV. 571, 572 n.9 (2002) (citing statistic that 4502 out of 70,114 federal criminal defendants in 1997 were charged under 18 U.S.C.A. § 371 and another 15,630 were charged under 21 U.S.C. § 846 or § 963). Statistics for *Pinkerton* liability are unavailable.  
\(^{39}\) For a discussion of culpability, see *infra* Part VII.B.
flourish. Charting the landscape of group intentions will offer a more coherent answer to the mental and objective elements of Pinkerton liability.

Before we start this analysis by turning to the history of the law’s treatment of collective endeavors, we must first address an alternate route to grounding Pinkerton liability. Theorists more comfortable with the tools of economics than criminal law theory may simply argue that Pinkerton liability is justified on efficiency grounds alone (because it deters crime), and that no other theoretical justification is required for the practice. The objection requires an explicit response.

C. THE EFFICIENCY OF PINKERTON LIABILITY

One way of expressing Pinkerton’s logic is to claim that it deters crime by increasing penalties for those who join conspiracies. Furthermore, one might say that a criminal assumes the risk of Pinkerton liability when he conspires with other criminals.40 If potential criminals have adequate advance knowledge of the penal law, they assume the risk that they will be held criminally liable for the actions of their co-conspirators, even when those actions fall outside the scope of the criminal agreement. The basis for this assumption of risk is largely utilitarian.41 There is adequate warning for this prosecutorial scheme and this extended liability serves a cautionary role meant to deter criminal behavior and provide increased incentives for potential criminals to inform on their co-conspirators.42 If one sees the law as a set of rules meant to incentivize repeat players to avoid criminal behavior or, at the least, to flip on their confederates if they do commit criminal behavior, then Pinkerton is just another rule along the golden path towards efficiency.43

40 Borrowing the term “assumption of risk” from tort law, this justification emphasizes that participants in a criminal conspiracy are aware—or should be aware—that federal and state conspiracy statutes allow punishment for the foreseeable crimes of their co-conspirators and that those who willingly participate in collective criminal endeavors take this risk upon themselves. Although this idea is almost never articulated as a distinct justification, it is nonetheless possible as an explanation for how vicarious liability might be consistent with the criminal law’s preference for criminal liability relative to an individual’s personal participation and culpability.

41 See, e.g., Robinson, supra note 14, at 668 (discussing deterrence).


43 See Richard A. Posner, An Economic Theory of the Criminal Law, 85 COLUM. L. REV. 1193 (1985) (deriving basic criminal prohibitions from the concept of efficiency). Indeed, Posner argues against the conventional wisdom that American criminal law notions such as conspiracy, as well as liability for mere “preparatory activity[ies],” are based on moral character and not on economic theory. Id. at 1194-95. Posner goes to great length to
Efficiency justifications are problematic when viewed against the background constraint embodied in the criminal law principle of *nulla poena sine culpa*, or no punishment without personal culpability.\(^\text{44}\) The principle codifies our natural intuition that no global utilitarian justification is sufficient to impose punishment on the innocent, regardless of the possible gains in efficiency or overall welfare.\(^\text{45}\) The culpability principle has a long history in the legal and philosophical literature, and extends back to the very origins of criminal justice.\(^\text{46}\) While new rules regarding criminal liability may be debated and imposed, they are constrained by the requirement that they match the individual culpability of the defendant in question.\(^\text{47}\)

establish the economic rationale (in terms of efficiency) for these doctrines, noting that the efficiency gains (from the criminal’s perspective) of pursuing criminal conduct in a conspiracy are offset by the increased liability risk. *Id.* at 1214-19.

\(^\text{44}\) See Kai Ambos, *Remarks on the General Part of International Criminal Law*, 4 J. INT’L CRIM. JUST. 660 (2006) (discussing centrality of culpability principle). In Germany, the principle is codified not only in national penal law, StGB § 46(1), but also its constitution. *GRUNDEGESETZ [GG] [Constitution]* art. 20(1) (F.R.G.). Although the principle of culpability is more often discussed in the European criminal law literature, it has nonetheless long been recognized as a basic principle of American criminal law. *See, e.g.*, FLETCHER, *supra* note 17, at 499-500 (discussing Model Penal Code’s treatment of culpability); JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 129 (1947) (noting that “punishment [should be] proportional to moral culpability”); Paul H. Robinson, *Four Predictions for the Criminal Law of 2043*, 19 RUTGERS L.J. 897, 903 (1988) (“I predict that the criminal law will move toward greater adherence to the principle of culpability.”). That the principle is not more often discussed in the U.S. literature is perhaps simply a reflection that European criminal law journals are more dominated by criminal law theory than their American counterparts.


\(^\text{46}\) See Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 464 (2001) (noting that all national legal systems subscribe to the principle that “people should be held accountable according to their own actions and their own mode of culpability”). However, Damaška concedes that the doctrinal consequences of the principle differ across national legal systems, and “requirements flowing from it are not equally demanding.” *Id.* Nevertheless, the culpability principle can only be displaced in cases of regulatory offenses and minor crimes where strict liability is appropriate. *Id.* Damaška calls these cases “morally neutral offences.” *Id.* For discussion of the principle’s significance, see FLETCHER, *supra* note 13, at 191-92 (describing culpability problems with the conspiracy doctrine); Douglas N. Husak & Craig A. Callender, *Willful Ignorance, Knowledge, and the “Equal Culpability” Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29 (1994).

\(^\text{47}\) Although U.S. constitutional arguments rarely appeal to the principle of culpability, it nonetheless lurks in the background without explicit mention. For example, the Supreme
A rich understanding of the culpability principle is required. It is not a mere threshold requirement. It is not sufficient to demand that punishment—regardless of its level or severity—be limited to individuals who display some degree of culpability. The principle does more than simply protect the absolutely innocent. Rather, the principle embodies elements of degree and proportionality. To punish an individual who bears only minor culpability (for, say, a minor crime) with a lengthy punishment (for, say, a much greater crime) is to engage in the most severe utilitarian balancing. The point of criminal justice is that such utilitarian considerations be tempered by at least some deontological constraints: punishment must be relative to a defendant's culpability and culpability cannot be generated by anything other than wrongful action.

Efficiency justifications for Pinkerton risk violating this broad conception of the culpability principle. Whether the conspirator “assumes the risk” that his co-conspirators might stray from the criminal plan, or simply embodies our utilitarian desire to provide disincentives for criminal conduct, he cannot suffer punishment that exceeds his culpability. Some story must be told that connects his criminal liability and punishment with his degree of culpability in the overall criminal endeavor. Otherwise, the defendant is being used as a contingent means to achieve greater social

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49 A few philosophers have argued that utilitarian considerations need not be tempered by a philosophical notion of desert. See, e.g., GALEN STRAWSON, FREEDOM AND BELIEF (1986) (questioning the very principle of moral desert); Derek Parfit, Comments, 96 ETHICS 832, 839 (1985-1986) [hereinafter Parfit, Comments] (arguing that desert and responsibility are irrelevant). Cf. DEREK PARFIT, REASONS AND PERSONS 323-26 (1984) (earlier position that desert is not absolute but can vary by degree). However, Parfit’s later view is extreme; he argues that no one ever deserves to be punished for their conduct and that the entire institution of punishment can be justified on utilitarian grounds alone. See Parfit, Comments, supra, at 839. Not only does this yield intolerable consequences—innocent defendants could be punished purely for social utility—but it would also require fundamentally altering our philosophical attitudes about criminal justice as well as the institution of punishment itself. Almost every other philosopher operating within criminal law theory accepts some account of moral desert as a necessary constraint on punishment. See Lloyd L. Weinreb, Desert, Punishment, and Criminal Responsibility, 49 LAW & CONTEMP. PROBS. 47, 47-49 (1986).
goals; this flies in the face of the criminal justice’s longstanding goal to adjudicate individual culpability.\textsuperscript{50} This is the business of the criminal law.

Efficiency justifications for \textit{Pinkerton} do more than simply violate the culpability constraint. These justifications ignore the decision-making structure of the conspiracy: the fact that some members orchestrate and direct, while others execute and support.\textsuperscript{51} There are many different ways that a conspiracy can be structured,\textsuperscript{52} and in each case, the collection of information and the making of decisions (including the formation of criminal goals and strategies for achieving them) are pursued in very particular ways. The conspiracy is not some abstract, atomic unit. It is a collective endeavor with an internal deliberative structure that carries both rational and legal relevance.

Ignoring this internal structure carries more than just moral implications—there are legal and pragmatic considerations as well. The internal deliberative structure of the conspiracy charts the reasons that a group of individuals engage in criminal conduct, and it is precisely these reasons in which the penal law seeks to intervene. Consequently, an agent’s reasons for acting are always relevant, regardless of whether one focuses on culpability or efficiency. For the criminal law scholar, the reasons provide a roadmap to moral desert; the rational deliberative structure explains the culpability of the defendant. For the efficiency theorist, reasons provide the backdrop against which incentives will either succeed or fail.\textsuperscript{53} It does not matter that the former is generally backward-looking and the latter is generally forward-looking; both theorists need to understand the rational deliberative structure of the conspiracy. Another way of putting the general point is that reasons provide a causal explanation

\textsuperscript{50} Although it is possible to ground criminal justice in utilitarian norms, one cannot totally give up deontological constraints on punishment. At least some non-consequentialist account must partially undergird the institution of punishment. Although my argument does not depend on acceptance of these deontological constraints, it is important to recognize that however one expresses the non-consequentialist restraints on punishment, they will necessarily come back, at some level, to a concept of individual culpability. This is inescapable. For a discussion, see Weinreb, \textit{supra} note 49, at 47-49 (arguing that utilitarian justifications for punishment covertly fall back on the concept of desert). The alternative—punishing non-culpable defendants purely for the sake of deterrence—is unjust.

\textsuperscript{51} See, e.g., Posner, \textit{supra} note 43, at 1218-19 (making no distinction between different kinds of conspiracies).

\textsuperscript{52} See \textit{infra} Part V.

\textsuperscript{53} This point is often overlooked. It is fallacious to think that consequences can be charted independently of an agent’s reasons. In order to affect outcomes, consequentialists must carefully chart an agent’s reasons for acting and then carefully craft incentives to alter them.
for actions.\textsuperscript{54} If one wants to change an agent’s actions, one had better intervene with incentives by changing an agent’s reasons for acting.\textsuperscript{55} In order to accomplish this, the efficiency-seeker must carefully evaluate the decision-making structure of the agent.

III. THE ORIGINS OF GROUP AGENCY

Since the notion of a “group will” is so promising for solving the Pinkerton riddle, it would stand to reason that the internal structure of a criminal conspiracy would be well worked out in the literature. In fact, the question has been largely ignored in the criminal law literature on conspiracy. Why has the literature failed to see that the conspiracy’s collective intention provides the mens rea for a co-conspirator’s substantive offense? This Part offers that explanation by examining the law’s historical treatment of collective endeavors and, in particular, the status of corporations—the group endeavor of greatest concern to the law. It will become clear through this analysis that legal scholarship long ago rejected the notion of a “group will” as psychologically implausible and, in any event, inconsistent with the tenets of legal realism.

In the first decades of the twentieth century, legal scholars were particularly concerned with the increasing legal status of corporations.\textsuperscript{56} Indeed, the debate was a holdover from the nineteenth century that was never resolved. In particular, the scholarly literature, heavily influenced by French, German, and Italian treatise-writers, became particularly concerned with justifying this treatment by virtue of some foundational story about the “nature” of corporations.\textsuperscript{57} These debates centered on the classic distinction between “natural” and “artificial” persons—a distinction that shows up in

\textsuperscript{54} See Donald Davidson, Actions, Reasons, and Causes, in \textit{Essays on Actions and Events} 3, 4 (2d ed. 2001) (arguing that “the primary reason for an action is its cause”); see also Simon Evnine, Donald Davidson 41 (1991) (“What is special about actions is that they are events performed by people for reasons. They are done intentionally. What is important about descriptions if they are to reveal an event as an action is that they related the event to the agent’s reason for performing the event.”).

\textsuperscript{55} See Davidson, supra note 54, at 8. Davidson concludes that when we look at the primary reason for which an action was accomplished, the “action is revealed as coherent with certain traits, long- or short-termed, characteristic or not, of the agent, and the agent is shown in his role of Rational Animal.” \textit{Id.} This analysis makes it possible to reconstruct a “syllogism” that explains why the agent performed the action, i.e., “from the agent’s point of view there was, when he acted, something to be said for the action.” \textit{Id.} at 9.

\textsuperscript{56} See infra notes 61-71 and accompanying text.

\textsuperscript{57} See infra notes 64-66 and accompanying text.
as diverse places as the political theory of Hobbes\(^{58}\) and the international relations of Vattel.\(^{59}\)

Quite quickly, three schools of thought emerged.\(^{60}\) The first school contained several theories united by the proposition that the corporation was a “real” person by virtue of its organization.\(^{61}\) Many of these arguments appealed to various foundational elements that explained the “real” nature of the corporation. For example, the corporation had a will or “directedness,” if not a soul in religious terms.\(^{62}\) Some of these theorists were quick to point out that the fact that the corporation was, in some sense, artificial (i.e., created), did not entail the view that the corporate person was not real.\(^{63}\) Of course corporations were constructed out of “natural” persons, the argument went, but the corporation’s status as a person was nonetheless required by virtue of the facts on the ground.\(^{64}\) The corporation was a real person.\(^{65}\)


\(^{60}\) The literature contains variations on each theory, though for simplicity it is possible to group related theories into three basic categories.

\(^{61}\) See, e.g., W.M. Geldart, Legal Personality 7 (Clarendon Press 1924) (1910) (distinction between natural and juridical persons); Otto Gierke, Political Theories of the Middle Age (Frederic William Maitland trans., 1900); A.V. Dicey, The Combination Laws as Illustrating the Relation Between Law and Opinion in England During the Nineteenth Century, 17 Harv. L. Rev. 511, 513 (1904) (“When a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which by no fiction of law but by the very nature of things, differs from the individuals of whom it is composed.”); Arthur W. Machen, Corporate Personality, 24 Harv. L. Rev. 253 (1911).

\(^{62}\) This view was most associated with Ernst Zitelmann, who argued that corporate persons were real precisely because they were directed by a “will.” See Machen, supra note 61, at 256-57.

\(^{63}\) See, e.g., Geldart, supra note 61, at 94.

\(^{64}\) See Machen, supra note 61, at 257 (noting that “an artificial lake is not an imaginary lake”).

\(^{65}\) Id.
A second school of thought, often identified with Savigny and Brinz, rejected the supposed “reality” of the corporate person and suggested that the corporation was a fictional entity. This was not to suggest that corporate activities were illusory. Rather, it was simply to suggest that the corporation itself, as an entity, could be reduced to its component parts (its individual members), and that any attempt to think of the corporation as a real person was to mistake a fictional entity for a real being. Talk of corporate persons was just that—a façon de parler. This linguistic shortcut facilitates our discussions about corporations and their legal relations in particular.

A third school of thought, somewhat less known than the first two, suggested that the legal power of the corporation flows from some positive grant of power, either from the legal system or a governmental authority,
which allows the corporate endeavor to proceed.\textsuperscript{71} This theory, sometimes referred to as the “concession” theory, emerged from a general distrust of group action as threatening the liberty of the individual, and as possibly threatening to either the sovereign or ecclesiastical powers.\textsuperscript{72} As such, only one of these authorities could authorize group agency, and without this “positive sanction,” the corporation, or any other similar collective endeavor, was a nullity.\textsuperscript{73}

The debate between these three approaches raged on for many years, until a variety of intellectual developments in the American academic scene converged to displace them. Philosopher John Dewey wrote an article in the \textit{Yale Law Journal} that pointed to the essential “emptiness” of the debate.\textsuperscript{74} Specifically, Dewey concluded, “In saying that ‘person’ might legally mean whatever the law makes it mean, I am trying to say that ‘person’ might be used simply as a synonym for a right-and-duty-bearing unit. Any such unit would be a person; such a statement would be truistic, tautological.”\textsuperscript{75} Essentially, under Dewey’s view, the only thing at issue is which rights and which duties ought to be assigned to the modern corporation. This was a real issue for legal scholars and practitioners to debate.\textsuperscript{76} However, any further debate about the supposed “reality” of the corporate person was overly metaphysical and lacking in philosophical significance. The critique was entirely in line with Dewey’s pragmatism.\textsuperscript{77} We were wrong to think that if legal philosophers figured out if corporations were “real” persons, this conclusion would have any implications for how corporations should be treated. Rather, the label

\textsuperscript{71} See Ernst Freund, The Legal Nature of Corporations (1897).

\textsuperscript{72} See Dewey, supra note 70, at 666-67.

\textsuperscript{73} See, e.g., Ernst Freund, Standards of American Legislation 39 (1917) (identifying as a Middle Ages theory that “communal organization not sanctioned by prescription or royal license” was illegal). This concept became religious doctrine, so that communal organization without church authority was prohibited. \textit{Id}. Freund concludes that corporate existence itself is a function of public policy made explicit by legislative enactment which provides for the legality of corporate structures, a limitation and requirement not imposed on natural persons and their actions. \textit{Id}. For a discussion of Freund’s theory, see Dewey, supra note 70, at 667.

\textsuperscript{74} See Dewey, supra note 70, at 655-56.

\textsuperscript{75} \textit{Id}. at 656.


\textsuperscript{77} John Dewey, Reconstruction in Philosophy, in 12 The Middle Works (1982). For other formulations of philosophical pragmatism, see William James, Pragmatism (1975) (discussing appropriate goals for intellectual inquiry). In Rorty’s famous (and more contemporary) formulation, if it makes no difference to inquiry, it should make no difference to philosophy. See Richard Rorty, Truth and Progress 19 (1998).
“person” simply represented the fact that our legal system had decided, for other reasons, to confer rights and duties on the corporation. The language of personhood signaled nothing more.

Dewey’s pragmatism won the day, and debates about the legal personality of corporations evaporated, or at the very least changed in a significant way. No longer were the philosophical questions debated; they were dismissed as being overly metaphysical. Although corporate law flourished in the coming decades, with increasingly complex doctrines, the metaphysical status of the corporate persons was not on the research agenda.

The corporate person debate was further sidetracked, or rendered irrelevant, by the subsequent rise of the legal realists. During the twenties, thirties, and forties, the legal realists came to prominence by claiming that legal decisions were made by recourse to many extraneous factors implicit in the contingent nature of human reasoning, and that the course of legal scholarship was to understand these processes. Under this view, the prospect of figuring out the metaphysical status of corporate persons was scholarly bankrupt. Indeed, the realists believed that understanding the metaphysical nature of corporate persons would have no discernible impact on the study of corporate law, which was better studied with an eye towards the particular ways that legal disputes were decided. Indeed, Felix Cohen’s famous realist manifesto, *Transcendental Nonsense and the Functionalist Approach*, made particular reference to the corporate

79 See David Luban, *What’s Pragmatic About Legal Pragmatism?*, 18 CARDOZO L. REV. 43, 65-66 (1996) (arguing that coherent legal arguments presuppose philosophical positions). Luban goes on to note the number of legal absurdities, particularly in the area of corporate conspiracies, caused by the under-theorized nature of corporations after Dewey made his argument. *Id.* at 70-72.
80 The rise of legal realism was not solely responsible for the change. There were already currents of anti-metaphysical attitudes in American legal scholarship from which the fountain of legal realism sprung. Indeed, Machen cites a long list of European treatises on the subject of corporate personhood published in France, Germany, and Italy at the turn of the century, and then bemoans that “[o]ur complete oblivion to all this wealth of controversial learning strikingly exhibits the insularity of our English law.” See Machen, *supra* note 61, at 254; see also JULIUS BINDER, *DAS PROBLEM DER JURISTISCHEN PERSÖNLICHKEIT* (1907); LÉON MICHOUX, *LA THÉORIE DE LA PERSOINALITÉ MORALE* (1906 & 1909).
82 See Dewey, *supra* note 70, at 673 (noting that “the entire discussion of personality, whether of single or corporate personality, is needlessly encumbered with a mass of traditional doctrines and remnants of old issues”).
personhood debate, signaling it as a prime example of overly metaphysical reasoning, the kind he derided as being part of the “special branch of the science of transcendental nonsense.”84 After Cohen and the rise of the other legal realists, no major scholar of corporate law has seriously entertained the metaphysical status of corporate persons. It has, perhaps rightly, been dismissed as unnecessarily foundational—i.e., seeking metaphysical justifications for our contemporary legal practices—a long-since-discredited goal of legal scholarship.85

The important thing to understand about the pragmatic and legal realist rejection of the corporate personhood debate is that its implications spread far beyond the domain of corporations. Just as the metaphysical status of corporations was not considered a legitimate discussion for legal scholarship, so too the discussion of any other group entity—trade unions, associations, nations—was considered illegitimate.86 This certainly accords with how Geldart et al. viewed their enterprise.87 They believed they were fighting about more than just corporations; their debate encompassed trade unions,88 associations, and the state, as well as more nebulous associations such as conspiracies.89 Indeed, the whole debate was about collective endeavors and their structure;90 corporate personality was just the most obvious example of what was, in fact, a much broader problem. It is therefore not difficult to see how the rise of legal realism dampened not only discussions of corporate personhood, but also of other collective endeavors such as conspiracies.

With this historical background, it is clear why the current scholarship has largely ignored the abstract question of the internal structure of conspiracies. The question smacks of the very kind of overly philosophical question that legal scholars have been trained to ignore since the rise of

86 See Cohen, supra note 84, at 820 (discussing broader problem of metaphysical concepts in legal reasoning).
87 See supra notes 61-64 and accompanying text.
88 See Dewey, supra note 70, at 669.
89 Cf. id. at 666 (describing minor organizations like conspiracies).
90 See Frederick Hallis, Corporate Personality xvii (1930) (offering broad conception of legal personhood extending beyond business corporations); Frederic Maitland, Collected Papers Vol. 3 307 (1911); Dewey, supra note 70, at 656 n.23 (defining “corporate” in its broadest sense as including all collective bodies, whether technically incorporated or not); id. at 662 n.8 (English statutory definition of “person” included all persons, incorporated or unincorporated, unless otherwise stated); Bryant Smith, Legal Personality, 3 YALE L.J. 283, 289 (1928).
legal realism. 91 Worse still, attributing a “group will” to a conspiracy in order to resolve the mens rea problem in Pinkerton would appear to return to the worst excesses of the corporate personality debate: continental, theory-laden doctrine that anthropomorphizes the conspiracy into a superrhuman animal with a magical group mind. As such, discussions of Pinkerton either focus on aligning liability incentives with desired outcomes or analyzing the actus reus and mens rea without any reference to the group’s intentions. 92 The result is that Pinkerton suffers from an unresolved tension.

IV. THE IMPORTANCE OF GROUPS

A. ELIMINATING CONSPIRACY

The broadest possible solution to the Pinkerton riddle is to eliminate not just Pinkerton but the entire law of conspiracy (including the inchoate offense) and return the criminal law to its traditional focus on individuals. Previous criticisms of the conspiracy doctrine have called it an unnecessary doctrine, an overambitious prosecutorial tool that ought to be eliminated. 93 The law of conspiracy could, of course, be replaced by classic categories of perpetration, including principal and accessory liability. 94 A more individualistic account would, no doubt, be capable of adequately charting the individual culpability of each defendant according to his criminal conduct. If this were the appropriate avenue, then the Pinkerton riddle would disappear.

However, I argue in this section that such an individualistic account is unwarranted. The language of conspiracy, though currently flawed, captures the often collective aspect of modern criminal behavior. 95 Once we start looking around, group action is more strongly represented than we

91 Compare Luban, supra note 79, at 68-70 (rejecting Dewey’s argument about persons), with Grey, supra note 78, at 28-29 (defending legal pragmatism against Luban’s attack).
93 See Johnson, supra note 12, at 1137 (1973); see also Note, Developments in the Law, Criminal Conspiracy, 72 Harv. L. Rev. 920, 922 (1959); cf. Sanford Kadish, Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine, 73 Cal. L. Rev. 323, 362-63 (1985) (noting that “[e]ven those who defend the doctrine concede that it is an extension”); Noferi, supra note 13, at 95-104 ( canvassing theoretical justifications for vicarious conspiracy liability); Robinson, supra note 14, at 666-67.
94 For a discussion, see Jens David Ohlin, Commentary on Stakic, in ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL LAW (forthcoming 2008) (analyzing principles of perpetration in the conspiracy doctrine). See also Roxin, supra note 19 (discussing hegemony-over-the-act theory of perpetration).
95 See Katyal, supra note 42, at 1309-10 (discussing pervasive nature of criminal conspiracies).
might have realized—individuals often coordinate their actions to produce increasingly complex criminal operations that were once unthinkable. Gone is the image of the lone gunman on horseback robbing banks or resorting to highway robbery; the arch criminal of the future will be the leader of syndicates, directing subordinates to engage in isolated acts of criminal behavior that, when coordinated together, produce immense criminal gains.96

Nowhere is this more painfully obvious than in international criminal law. There, the central crimes of concern to the international community are genocide and crimes against humanity.97 Genocide is the historical clash between peoples locked in existential battle—one group seeks the destruction of the other and implements a policy or plan designed to bring about that group destruction.98 These crimes are necessarily pursued at the collective level, for without a coordinating policy or plan, there is no genocide.99 Genocide is therefore the attempt by one ethnic group to eliminate another. Crimes against humanity are pursued, at the very least,

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96 See id. at 1319.
97 The other major crime of concern to the international community is aggression, though it has not been prosecuted since Nuremberg. See Jens David Ohlin, Aggression, in OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, supra note 17. Aggression is a collective crime because it occurs at the intersection of individual and state responsibility for aggressive war, and as such at the intersection of international and criminal law. At Nuremberg, the International Military Tribunal (“IMT”) refused to convict Nazi leaders for conspiracy to commit war crimes or crimes against humanity, mostly because continental judges believed that the American conspiracy doctrine was an unwarranted imposition of collective liability. However, the IMT did convict for conspiracy to wage aggressive war on the theory that aggression was necessarily collective in nature anyway. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 111-14 (2003); Jonathan A. Bush, “The Supreme . . . Crime” and Its Origins: The Lost Legislative History of the Crime of Aggressive War, 102 COLUM. L. REV. 2324 (2002).
98 For a defense of this view of genocide, see generally GEORGE P. FLETCHER & JENS DAVID OHLIN, DEFENDING HUMANITY (2008) (discussing irreducibly collective nature of genocidal crimes, informed by historical paradigm of the phenomenon). This view admittedly differs from the Rome Statute, which at least in theory recognizes the possibility that one person might commit a genocidal act without participating in a larger genocidal endeavor by a group. See Rome Statute of the International Criminal Court, art. 6, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute]. However, this hypothetical case is best categorized as a hate crime, not genocide. The historical paradigm of genocide is the clash of ethnic groups, one of which seeks the destruction of the other, and pursues collective conduct to achieve that destruction.
99 Cassese argues that the widespread or systematic nature of genocide is not part of its legal definition. See CASSESE, supra note 97, at 100. Nonetheless, Cassese does argue that the widespread nature of the attacks is an essential objective element of the legal definition of crimes against humanity. Id. at 64-66. This requirement is codified in article 7 of the Rome Statute.
at the platoon level, if not higher in the chain of command by civilian and military authorities who authorize rape, forcible transfers and deportations of civilian populations (more commonly known as ethnic cleansing), and murder.\textsuperscript{100} Large-scale planning is required by those involved in these cases in order to implement the widespread destruction that makes these cases “of interest to the international community as a whole.”\textsuperscript{101} War crimes are often, though not always, collective in nature. For example, when a platoon engages in war crimes by causing disproportionate harm to innocent civilian populations, these actions usually result from the platoon activities that implicate a collective.\textsuperscript{102} It is rare to have target selection handled exclusively by an individual soldier. These decisions come down from the chain of command.

Collective crimes are not limited to the international context and domestic prosecutors now use the conspiracy charge in a large percentage of their cases.\textsuperscript{103} Organized crime, drug dealing, and financial crimes are just three examples where group criminality is the norm. In these contexts, individual criminal conduct, unsupported by a network of fellow criminals, would be an exception requiring explanation.\textsuperscript{104} It is important that criminal law doctrine remain faithful to the increasingly collectivized elements in criminal behavior. Eliminating conspiracy as a mode of liability in favor of an individualistic account of perpetration would fail to capture these essential characteristics.

Moreover, it is important that one’s criminal law doctrine remain sensitive to these exterior facts. This goal is not necessarily self-evident. Some might ignore criminal law doctrine, not caring whether it matches the facts on the ground. Better to be concerned, they might say, with promoting the right outcomes, regardless of whether the doctrine conforms to the general structure of criminal behavior. There are two obvious answers to this anti-theoretical objection. First, producing a clear doctrine to model contemporary criminal behavior is an a priori good. It is just better for the law to be theoretically sound, to work around a set of doctrinal distinctions that are coherent. More importantly, though, a good doctrinal

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Prosecutor v. Krstic, Case No. IT-98-33-T, ICTY Trial Judgment (Aug. 2, 2001) (describing the coordinated plan to commit ethnic cleansing and genocide of Bosnian Muslims in Srebrenica that resulted in 7000 to 8000 deaths).
\item See Rome Statute, supra note 98, at pmbl. (“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”).
\item See CASSESE, supra note 97, at 100.
\item See Prober & Randall, supra note 38, at 572 n.9.
\item Id.
\end{enumerate}
\end{footnotesize}
account of group behavior might be required for instrumental reasons. It is foolish to believe that one could find a doctrine that does not correctly model group criminality and still end up with the “right” outcomes, either in terms of morality or efficiency. This would be shocking if it could be accomplished. The right doctrine is not just a matter of dreaming up a theory that is un-tethered from the facts on the ground. Rather, the doctrine is used to explain correctly the behavior of the agents in question, which, as it turns out, is precisely the world in which we are seeking to produce the “right” outcomes. It is impossible to produce the “right” outcomes unless one is working with a rich theoretical model that correctly shows how group criminal behavior is produced. Otherwise, one cannot properly structure incentives that will change these behaviors.

The proper response is therefore not to eliminate the law of conspiracy, as some have hastily suggested, but to reform it. One ought to develop a rich doctrine of group criminality that recognizes certain basic facts: the increasingly collective nature of criminal behavior; the diverse structure that these conspiracies can take, both in decision-making and execution; and the distinct roles that individuals can play in these conspiracies. Each of these three elements is relevant for a defendant’s culpability, and the Pinkerton doctrine should remain faithful to them. Specifically, a new model promises to explain how it is possible for a conspiracy to have a group intention sufficient to provide the mens rea and actus reus for vicarious liability.

B. THE PROBLEM OF REDUCTION

Those who argue that the law of conspiracy should be eliminated seek to analyze group criminality at the level of individuals. This strategy accords with the increasingly individualized tendencies of Enlightenment thought and the history of liberalism, which views the sanctity of the individual as of paramount importance. Groups are seen as ephemeral, derivative, or a mere façon de parler; it is individuals who matter. Therefore, it would make sense for the criminal law to reduce conspiracies to the actions of individuals. This conclusion would suggest that the proper avenue for reforming the law of conspiracy, including Pinkerton, is to eliminate it entirely.

105 See Katyal, supra note 42, at 1307; Posner, supra note 43, at 1195.
106 See, e.g., Fletcher, supra note 13, at 192 (questioning whether conspiracy should be replaced with notions of perpetration and complicity); Johnson, supra note 12, at 1137 (arguing for elimination of the doctrine).
107 This view is consistent with the position taken by Fletcher, supra note 13, at 192, and Johnson, supra note 12, at 1137.
Such elimination would be unwarranted. Although this point is often not recognized in the current literature on conspiracy, we must treat the group aspect of collective endeavors seriously, because this is the only way to understand group behavior. By invoking recent developments in the literature on rational choice theory, it is clear that the rational choices of groups can only be considered by analyzing them as groups, and that any attempt to reduce group level decision-making to individual decision-making will fail to capture the rational choices made by group deliberations. Recent work in this area has demonstrated this conclusion, although it appears to have gained little traction in criminal law theory.

The philosopher Philip Pettit, for example, has argued that group rationality cannot be reduced to individual rationality. To understand Pettit’s argument, it is important to reconstruct each stage carefully. First consider the so-called “doctrinal paradox”—the subject of much discussion in the legal literature since the 1990s. Consider a three-judge court deliberating on a tort matter. The decision rests on two predicate questions: did the defendant owe a duty of care, and did the defendant’s negligence cause the injury in question? Only if both of these factors are true should the defendant be liable. Now, assume that the first judge finds a duty of care but rejects the causation prong. He therefore votes “no” on the question of liability. The second judge finds no duty of care, though he does believe that the defendant’s actions were the cause of the injury. He, too, votes “no” on the question of liability. The third judge finds both a duty of care and causation, and so he votes in favor of liability. The general jurisprudential question to be decided is how the court should conduct the voting. If they take votes just on the question of liability, two judges (a majority) will vote against it. If, however, they vote for each component issue separately, the result will be the exact opposite. Two of the judges (the majority of the court) have concluded that the defendant owes a duty of care. Furthermore, two judges (also a majority) have concluded that the defendant’s actions caused the injury in question. When taken together,
these two results generate liability. Pettit calls one the conclusion-centered procedure and the other a premise-centered procedure. Obviously, one can find any number of examples in legal reasoning that generate the same paradox. Some legal bodies, such as at the Supreme Court, use the conclusion-centered procedure, but other legal arenas, such as jury decisions that require official factual determinations of a long list of predicate factual questions (e.g., special interrogatories), use the premise-centered procedure. The problem shows up whenever there is an *overlapping* majority for the premises in question. There are two votes for each premise, but only one individual who actually votes for both premises.

The important point about the doctrinal paradox is that it results from any group deliberations that involve multiple premises that are logically related to each other. Pettit refers to this generalized phenomenon as the “discursive dilemma,” although the name is not terribly important. The important thing to recognize is that it is a generalized phenomenon of group deliberations. It shows up in legal reasoning, it shows up in political voting, and it shows up in collective deliberations. It will show up in large groups—say for example, national elections—and it shows up in small groups (say, for example, three people in a kitchen deciding how to plan their day at the beach). It also does not matter how many premises are involved. Although the calculations will get more complicated to diagram, a complicated decision procedure with *n*-premises will suffer the same fate.

Where I disagree with Pettit is when he concedes that “the paradox may still seem unlikely to figure much in ordinary social life,” citing Sunstein for the proposition that people in social groups “will often reach collective decisions on an incompletely theorized basis.” Pace Sunstein, any social group engaged in collective deliberations will suffer the same fate, even though the participants may not be aware of it or capable of

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111 Id. at 452.
112 Supreme Court Justices vote based on final outcomes, often to the point of incoherence. The issue is discussed in Kornhauser & Sager, supra note 109, at 14 (discussing aberrant votes by Justice White in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), and Justice Kennedy in *Arizona v. Fulminante*, 499 U.S. 279 (1991)).
114 Pettit demonstrates that the problem appears whenever “[a]ny collective of individuals . . . coordinate their actions around the pursuit of a common purpose . . . .” Pettit, *Collective Persons*, supra note 108, at 452.
115 See id. at 446.
116 Id. at 449 (citing CASS SUNSTEIN, *ONE CASE AT A TIME* (1999)).
articulating, with theoretical sophistication, the dilemma they face. But the fact that they cannot fully explain the dilemma does not mean that the issue does not arise.

The basic prongs of the dilemma—and here we continue to evoke Pettit’s argument—are that the group can either maximize rationality at the collective level or the individual level. If they wish to treat themselves as individuals, they will tally up the votes on the conclusions and be done with it. If, on the other hand, they reason as a group, they will resolve contradictions at the group level, and insist that the relation of the premises to the conclusion be logically consistent across the group. If the group believes that Premise One holds and the group also believes that Premise Two holds, then the group must also believe in liability as a conclusion, on pain of contradiction. This is the hallmark of group rationality.

Now here is the rub. In cases where the group is acting in this kind of integrated way, one must analyze its actions at the level of the group in order to understand its behavior. To reduce the group to a set of atomic individuals will fail to capture the reasons behind the group’s final determination. It is precisely because the group seeks to maximize reason at the global level that its actions can be properly interpreted. In such cases, failure to consider the group dynamics blocks our ability to interpret the group’s actions and make sense of their behavior. Otherwise, one must assume a level of irrationality, which is clearly unwarranted when it is evident that the group is engaged in purposive activity. This is the essence of the Charity Principle—we ought to assume that when interpreting

117 Indeed, Pettit at other points seems to recognize this fact, as when he states that “purposive groups will almost inevitably confront examples of the discursive dilemma and that, short of resorting to deception, they will be under enormous pressure to collective reason by practicing *modus ponens*—as in the premise-centered procedure—rather than *modus tollens*.” *Id.* at 452.

118 This method is usually used by the Supreme Court in its voting practices. *See* Michael I. Meyerson, *The Irrational Supreme Court*, 84 NEB. L. REV. 895, 899-900 (2006).

119 If the group uses the premise-centered procedure, they are practicing *modus ponens*; if the group uses a conclusion-centered procedure, they are practicing *modus tollens*. *See* Pettit, *Collective Persons*, supra note 108, at 450.

120 Nothing in this account suggests that criminals are perfectly rational, nor even that they are just as rational as non-criminals. Rather, criminals remain committed to the process of rationality in the sense that rationality is the structure of thought and deliberation. One cannot reason over time unless one is committed to the norm of rationality.

121 Understanding an agent’s reasons for acting is paramount to understanding their behavior, including their linguistic behavior. In doing so, one assumes that an agent is acting more—rather than less—rationally. This is the essence of the Charity Principle. *See* Donald Davidson, *Radical Interpretation*, *in* INQUIRIES INTO TRUTH AND INTERPRETATION 125, 134-35 (2001).
behavior we are presented with more, not less, rationality. Recognizing the group-level rationality here is simply the natural outgrowth of this commitment of behavior interpretation.

C. CONSPIRACY AS A COLLECTIVE ENDEAVOR

We must obviously connect this work on group agency with our particular account of conspiracies. Do conspiracies usually follow this pattern? It would be wrong simply to assume that the modern-day criminal conspiracy fits this description of the rational group agent. In fact, the analysis here will suggest that in many cases the modern conspiracy does not. However, there is something about this notion of collective reason that is nonetheless entirely applicable to collective criminal endeavors.

Why do many groups necessarily collectivize reason? Groups with a common purpose will be required to pursue their actions over time. Common purposes are to be distinguished from simple, atomic actions that can be completed in a single moment. A common purpose requires a plan for implementation and requires that simple steps be aggregated together to complete a collective endeavor. This is the essence of a criminal conspiracy: a plan.

Plans require, necessarily, deliberation and action over time. Judgments at one point in time must be related to judgments at subsequent points in time. Moreover, the group, insofar as it is committed to a common purpose, will feel constrained by its previous deliberations and judgments. There will be, in other words, an attempt to achieve some kind of overall rational unity over time.

Of course, one might add, the group is not constrained by previous judgments in some hard and fast way. The group may very well change its mind—but this is precisely the point. The group does not ignore previous judgments on matters that are essential to the plan’s success. Rather, the group takes ownership of these judgments during the course of their

122 Id.

123 On the connection between group agency and the principle of charity, see Carol Rovane, Charity and Identity, in Donald Davidson’s Philosophie des Mentalen (W. Kohler ed., 1998) (arguing that charity demands that we posit group agency before we posit irrationality).


125 This kind of self-constraint would appear to be implicit in the notion of deliberation. For a discussion, see Philip Pettit & Michael Smith, Freedom in Belief and Desire, in Free Will 388, 389 (Gary Watson ed., 2003) (referring to the conversational stance that agents take toward one another).

deliberations, and if the judgments are to be disavowed as wrong or no longer applicable, the group will likely have reasons for doing so—for changing its mind, as it were. If the previous judgments were simply irrelevant, the group need not have any reasons at all for the new beliefs.

It is in this sense that conspiracies, as collective criminal endeavors, will demonstrate some kind of rational deliberative structure over time. The conspiracy will be organized around a common purpose—say a theft or a murder—and will engage in collective decision-making that necessarily takes place over time. There will be an attempt to relate the various judgments that take place over time rationally in order to maintain a sensible strategy. If, for example, the group decides that poison is the best strategy, the group at a later point will start selecting poisons. For the group to start selecting guns would simply make no sense unless the group first went back and revised its original judgment. The point here is that without such a revision, the second judgment would be irrational. It would not make sense.

Group conspiracies will actually go so far as to enforce this collective rationality on its members. If, after the decision to use poison is taken, one member of the conspiracy started shopping for guns on behalf of the group, this type of behavior would be discouraged. The important point is that this standard of group-level rationality would be imposed even if the individual in question had dissented from the poison vote and had voted in favor of the shooting strategy. It would not matter. The group would insist on overall rational unity at the collective level and would insist that the dissenter, and other outlying members of the conspiracy, get with the program.127

Consider another example. A group of thieves decides to start stealing credit card numbers. They have two general options for getting the numbers. As the first option, they can use computer equipment to breach the mainframe of a large retailer and electronically download an entire database of credit card numbers. The downside of this process is that it is difficult and the numbers will probably be encrypted, and the group is unsure of its ability to crack the encryption code. The second option is to pay—i.e., bribe—individuals who work for the retailer on the inside to turn over the credit card numbers before they are encrypted. Based on a general sense of the perceived chances of success, the group pursues the second avenue of bribery. After the bribery plan is initiated, one member of the conspiracy, who didn’t like the plan anyway, uses common money to purchase the kind of large computer system required for the hacking. This type of behavior would not be supported and the group would require that the collective plan be followed.

127 For a discussion of overall rational unity at the group level, see id. at 146.
There is something about collective endeavors that requires that reason be collectivized.\footnote{This point is implicit in Pettit’s argument and the discussion of the doctrinal paradox. All collective decision-making structures will face pressures to collectivize reason. \textit{See Lewis A. Kornhauser & Lawrence G. Sager, The One and The Many: Integrity and Group Choice in Paradoxical Cases}, 32 PHIL. \\& PUB. AFF. 249, 251 (2004) (“The possibility of a paradoxical distribution of preferences or judgments of this sort is not unique to courts; in principle, a paradoxical distribution of views can arise in any group of three or more persons faced with a decision that can be broken down into at least two constituent subdecisions.”).} Although legal decisions by a tribunal can be made with either the premise- or conclusion-centered approaches, collective endeavors, whether criminal or not, require premise-centered approaches or else the cohesion of the group plan falls apart. Actions can only be coordinated together if the group operates with a minimal level of collective rationality. If individuals pursue the whole plan independently of each other, the result is hardly a conspiracy. It would be nothing more than multiple individuals who happen to be working toward a similar goal, but without any effective coordination of their activities.\footnote{\textit{See Peter A. French, Collective and Corporate Responsibility} 68 (1984) (distinguishing between crowds and corporations).} This is the opposite of a conspiracy. This is more like crowd behavior: independent actions that happen to lead to an aggregate result.\footnote{\textit{Id.}}

It should be noted that nothing in this account presupposes that the decision-making process of the conspiracy is democratic. It would be absurd to think that all criminal conspiracies vote on all strategic questions as if they were a body politic running a plebiscite on every issue. Indeed, conspiracies are often hierarchically organized, with the authority to make final decisions delegated to a smaller group within the overall conspiracy. Some members of the conspiracy may have a greater say than others (they may get “more votes” by virtue of their perceived authority within the criminal organization). Some might get more influence because they have pledged key assets (say, capital) without which the conspiracy cannot proceed. Regardless, the conspiracy will have some definite decision-making structure, whether democratic, oligarchic, or plutocratic, and once the decisions are made, they will become the group’s decisions, in a fundamental sense, as opposed to merely the decisions of those in the group who supported them. The result is a true group agent dedicated to a common criminal endeavor through collectivized rationality.

V. THE SOLUTION OF OVERLAPPING AGENTS

We have so far considered the degree to which collective endeavors may qualify as a form of group agency, and that group agency, properly
understood, cannot be reduced to individual action. When individuals work together toward a common purpose, they often engage in collective reasoning that can only be understood as rational by looking at it from the perspective of the group agent. It is for this reason that, at first glance, it makes sense that the criminal law should look to the conspiracy itself for the requisite mens rea for *Pinkerton* liability.

Nonetheless, we must return to our original anxiety, expressed at the beginning of this Article, that an account of group intentions sufficiently robust to provide the mens rea necessary for *Pinkerton* liability will inevitably require us to adopt an unwieldy theory of the conspiracy as a corporate animal that breathes together with a group will and a supra-human mind. However, if we properly chart the deliberative structure of a common criminal endeavor, it will become clear that no such theory is required. Rather than thinking of the conspiracy as a group animal, all we have to do is recognize that such groups are composed of individual agents who decide to collectivize reason, i.e., to reason collectively. The salient characteristics of the criminal conspiracy are its capacity to engage in reason-giving and reason-demanding behavior, the normative stance that the outside world may take with regard to the conspiracy, and the

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131 For another example of an argument for the irreducibly collective aspect of group behavior, see John R. Searle, *Collective Intentions and Actions*, in *INTENTIONS IN COMMUNICATIONS* 401-15 (Philip R. Cohen et al. eds., 1990). Searle argues that individuals who engage in joint behavior can only be understood as having a “we-intention,” i.e., an intention to engage in joint behavior. A we-intention cannot be reduced to an “I-intention,” Searle argues, otherwise we lose the distinction between individuals who engage in joint projects for the sake of achieving joint goals and individuals who engage in individual actions that they believe will contribute to large consequences. *Cf.* RAIMO TUOMELA, *A THEORY OF SOCIAL ACTION* (1984) (arguing that group intentional behavior can be reduced to individual actions). For further discussion of the issue, see MICHAEL E. BRATMAN, *FACES OF INTENTION* 114 (1999) (arguing that shared intentions consist of multiple attitudes and their interrelations); CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 88-89 (2000) (discussing agents who have overlapping intentions). *See also* George P. Fletcher, *Law in Searle*, in JOHN SEARLE 85 (Barry Smith ed., 2003).

132 See supra notes 34-37 and accompanying text.

133 By normative stance, I mean simply the posture that one agent will take toward another agent. Agents treat one another differently than they treat the natural world, which can only be described in scientific terms or with other causal properties. Other agents, however, can be held to account to certain prescriptive or normative standards. It is possible, in other words, to demand a certain kind of behavior from another agent, and then call that agent to account when they fail to live up to that norm. It would be senseless to treat the external environment in this manner. The normative stance is therefore one of the hallmarks of human agents and their relationships with each other. *See, e.g.*, ROVANE, supra note 126 (describing ethical-regarding relations); Pettit & Smith, supra note 125, at 389 (describing the conversational stance). Pettit and Smith argue that holding an interlocutor to certain normative standards of rationality is implicit in conversation itself, otherwise one would have no reason to treat an interlocutor seriously.
normative stance that the conspiracy takes with regard to its own members. 134 Nothing more is required. 

The first important point to make is that rational agents can cut across biological lines. 135 This general point can be inferred from what we said in the previous section on group agency, 136 but it bears repeating in a more general way. What matters for rationality is a certain deliberative process and a commitment to hold beliefs together in a rational way, i.e., choose between conflicting goals and then pursue those goals by formulating the necessary plans to achieve them. 137 All of this is done with the usual machinery of rational thought: transitive ordering of preferences and the many other elements that we take to be constitutive of basic rational thought. 138 The important thing to remember is that this rational unity often exists in individual human beings, but this is not the only case of rational unity. As described in the above section, rational unity can be achieved in a group of human beings committed to collective deliberation and collective action. 139 It is clear that the relationship between rational unity and a single biological human being is contingent—not necessary. It is possible for rational unity to cut across the dividing lines that biology provides for us. 140 This should not be surprising. The freedom of the human mind, coupled with the human capacity for communication, allows us to transcend (to some degree) our biological singularity. Although our thoughts are

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134 Individual members of a group conspiracy are sometimes held to certain standards by the group as a whole. When individual members violate these standards, they are subject to sanction by the group. For example, a collective criminal group may have certain expectations about privacy and secrecy regarding their operations—a norm which the group will be strongly motivated to enforce against any member who violates it.

135 For a discussion of individual agents who overlap to form a group agent, see Carol Rovane, *What Is an Agent?*, 140 SYNTHESIS 181 (2004). Rovane develops the central idea of collective agents whose boundaries cut across the bodies of individual human agents, although she does not refer to them explicitly as “overlapping agents.”

136 See supra Part IV.B-C.

137 This notion is implicit in Rovane, *supra* note 135, at 189, as well as in ISAAC LEVI, *HARD CHOICES: DECISION MAKING UNDER UNRESOLVED CONFLICT* 151-52 (1986) (“[E]ven students of market economies attribute beliefs, desires, goals, values and choices to families, firms and, of course, government agencies.”).

138 See Rovane, *supra* note 135, at 183 (outlining normative requirements of agency).

139 See supra Part IV.B-C.

140 The idea that rational agency is not confined by human biology has long since been recognized. While it is true that human beings almost always demonstrate unity of consciousness within a single biological brain, there is nothing that requires that rational unity be confined to a single human brain. On the distinction between rational unity and unity of consciousness, see Korsgaard, *supra* note 124, at 109-15; Marya Schechtman, *Experience, Agency, and Personal Identity*, 22 SOC. PHIL. & POL’Y 1 (2005). The issue is also discussed in Jens David Ohlin, *Is the Concept of the Person Necessary for Human Rights?*, 105 COLUM. L. REV. 209, 235 n.118 (2005).
necessarily psychologically unified in one mind, we are free to forge rational relations across multiple minds.

This key point about rational unity encourages us to think more critically about how it comes to pass that an individual human being joins a collective endeavor, and what this says about an individual human being’s deliberative capacity and their relationship to a larger deliberative group. When an individual joins a group deliberation, she makes a commitment to submit her reasons to collective rationality in order to achieve rational unity at the group level. This commitment, as it were, is constitutive of the notion of collective deliberation, as we showed in the previous section.141

What is crucial, however, is that the individual does not submit her entire psychology to the group mind. Her thoughts, in a sense, remain her own. What she does submit to the group endeavor, however, is her *reasons*, transmitted through the regular channels of interpersonal communication. There is no hive mind here, no group mind with unified thoughts in the same way that human beings have direct access to their thoughts.142

Indeed, individuals who participate in such endeavors rarely submit all of their reasons to the group agent. If, for example, an individual joins a criminal conspiracy dedicated to money-laundering, he makes a commitment to pursue rational unity at the group level pertaining to issues relevant to money-laundering. Note carefully that rational unity is different from psychological or phenomenological unity. While the former means that reasons are related together in a common deliberative scheme, the latter implies a unified center of consciousness and the direct sharing of thoughts.143 A conspiracy demonstrates unity in the former sense, not the latter. Therefore, a conspirator helps the group make decisions about money-laundering and possibly other criminal activities that are subsidiary to the money-laundering. In some criminal organizations like the mob, joining the collective endeavor means collectivizing reason for all of the individual’s criminal activities—no additional freelancing outside of the criminal organization is allowed. This rule depends on the criminal organization and the background rules for membership, but regardless, the

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141 See supra Part III.B-C.

142 The point here is that rational unity in a group does not require that all members have direct access to the group’s reasons. The traditional skepticism about group minds and group wills was that a group such as a corporation or legislature only has indirect access to its reasons because each part of the group has to talk to each other to communicate these thoughts. See, e.g., Moore, supra note 31, at 350. In a human being, by contrast, mental states are unified because one individual has direct mental access to all of his mental states. However, the idea of rational unity in a group does not require this kind of mental or psychological unity—it requires only the unification of reasons, a relation that does not presuppose mental unity.

143 See Korsgaard, supra note 124, at 109-15.
criminal does not submit reasons regarding his personal life to the decision-making process of the group agency. Some elements of his life, and the rational deliberations related to it, remain segregated from the collective endeavor. The individual therefore only joins the criminal organization with regard to one particular facet of his existence. Other elements of his existence—say his love life, his parenting, or his religious beliefs—are not submitted to the group agent.

This demonstrates that the individual who joins a collective endeavor maintains two centers of rational unity. There is one center of rational unity that deals with the criminal’s personal life as well as elements of his professional life that are irrelevant to the criminal endeavor. There is a second center of rational unity that combines with other agents to form the kind of joint deliberation that we have described. There is therefore a commitment to overall rational unity across several human beings with regard to this one limited endeavor. One might describe this phenomenon as one of overlapping agents. The conspiracy is formed by individual human beings, each of whom retains individual autonomy, but each of whom willingly agrees to turn over a segment of their reasons to the collective endeavor. The conspiracy is formed as the overlap of these individual agents. This model explains how individual agents join a group endeavor yet remain autonomous from it at the same time. They participate in the collective endeavor but are not subsumed by it. Individuals belong to, and stand apart from, the group agent at the same time. They donate a portion of their lives to the group agent but not the entirety of their existence. The result is a series of overlapping agents, each of whom retains individual autonomy but gives up that autonomy in one area of their life in furtherance of a joint criminal goal. This is hardly a difficult phenomenon to visualize; every soldier who joins a military unit understands that they give up their autonomy (in some matters) in pursuit of

144 This point is emphasized by Rovane, supra note 135, at 193-95 (discussing examples of undercover FBI Agent Donnie Brasco, as well as the participants of the Manhattan Project).

145 See generally Rovane, supra note 135 (using a term other than “overlapping agents”).

146 Kutz also analyzes collective action in terms of an overlap, although he is concerned solely with an overlap of intentions. See Kutz, supra note 131, at 94-95. Under this account, collective actions are formed when two or more individuals have individual intentions to participate in a common endeavor. However, these overlapping intentions should not be confused with the view expressed here, which depends more explicitly on joint participation in a common rational point of view that is formed from the overlap of multiple agents.
collective goals. Perhaps this is why the law of war was so quick to recognize the collective aspect of war crimes.147

A. THE DELIBERATIVE STRUCTURE OF CONSPIRACIES

With this model, we can now begin to explain the deliberative structure of a conspiracy. This explanation is essential if we are to maintain that group deliberations are sufficiently integrated to yield collective intentions of the sort that might ground the mens rea for Pinkerton. First, the conspiracy wants to achieve its criminal goal and will resolve problems that threaten to frustrate it. Reasons are ranked against each other and contradictions are resolved. Of course, this does not mean that the conspiracy achieves anything close to complete rational unity.148 This is far from the truth. Rather, it simply means that there is a joint commitment to purposive action.149 Second, we should make the distinction between sharing information and sharing decision-making authority. In some cases, members of a conspiracy will share decision-making authority—either by democratic means or something well short of it—with each other. In other cases, members of a conspiracy will simply share information, while one member of the conspiracy engages in decision-making. These variations will present subtle questions to be examined in the next section. However, it is sufficient for the moment to simply note that information sharing and deliberation, even if it falls short of final decision-making, can implicate shared deliberation. But the nature of this deliberation must be postponed until the next section.150

Finally, we should point out another hallmark of conspiracy which makes clear its status as an overlapping agent: the conspiracy is capable of adopting a normative stance in that it can engage in reason-giving and reason-demanding behaviors.151 By reason-giving, I simply mean that the conspiracy can give reasons for its actions and articulate how the decision-

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147 Individuals cannot commit crimes against humanity by themselves. Article 7(2)(a) of the Rome Statute, supra note 98, requires a “widespread or systematic attack” that must be “pursuant to or in furtherance of a State or organizational policy to commit such attack.”
148 See Rovane, supra note 135, at 186.
149 Id.
150 See infra Part VI.D.
making process leads to its completed actions. To the extent that the conspiracy’s reasons are insufficient to justify a stated course of action—i.e., they are irrational—the conspiracy will be forced to admit that it should revise its decisions to conform to the demands of rationality. By reason-demanding, I simply mean that the conspiracy can demand that others give reasons for their actions and that the conspiracy can call others to account for their rational failures. Think, for example, of the pressure that the conspiracy might bring to bear against any of its members who act in ways that contradict the considered judgment of the group. In such cases, the group can demand reasons from the individual member and bring various normative pressures to bear on him, depending on the values of the agents involved. This process of demanding and giving reasons is a classic example of the ways that rational agents interact with each other, and this is precisely what is going on when a conspiracy holds one of its members to account for his actions.

B. WHY WE SHOULD ACCEPT THIS ACCOUNT

There are at least five distinct reasons why we should view a conspiracy as an overlapping agent.

1. The Mens Rea for Vicarious Liability

With the overlapping agents view, there is no need to posit the existence of a supra-human group will with a hive mind and a unified psychology. There is no mystery to how agents can collectivize reason in such a way that they have the requisite mens rea that allows for, say, Daniel Pinkerton to be convicted for the crimes of Walter Pinkerton, even if Daniel was in jail at the time. In that case, the two individuals formed a collective endeavor dedicated to tax evasion and the group itself intended the crime. This explains why the mens rea can be attributed to Daniel; he participated in the deliberative process that produced the collective intention. However, the collective intention was created from simple rational connections between the individuals, not a corporate animal that “breathes” together. Furthermore, the account also explains how Walter’s acts can be attributed to Daniel, because the act in question was causally produced from the same collective intention and, again, Daniel participated in producing that collective intention.

152 Pettit’s view is that the “capacity to think is superveniently dependent, at least in part, on the relations involved in intrapersonal or interpersonal interaction.” P ETTIT, supra note 151, at 178.

153 See P ARFIT, supra note 49, at 118-19 (discussing reasons and deliberation).
Some might balk at the suggestion, so a couple of analogies would be helpful. Orchestras produce collective music, and the symphony itself can be attributed to the orchestra because each instrument plays individual notes that combine together to form the symphony. However, would it be correct to then attribute the symphony to the first violins? In a sense not, since they only play the violin part, but in another sense, yes, in that once the music is aggregated in the form of a symphony, each instrument’s individuality fades into the background and is overshadowed by the collective sound. An army is a similar group. The army is made up of soldiers, but if you train your gaze on the battlefield at large, you see the movements of armies, not individual soldiers. Patton’s Third Army charged across Europe. This is more than just a shorthand description for naming the thousands of soldiers who drove tanks or engaged in any of the various component actions that made up the march. There is something called the Third Army that makes this description true.

In the case of conspiracies, individuals who collectivize reason have submitted themselves to a collective deliberation for one reason: their desire to pursue a criminal goal by acting with a unified purpose. Of course, not all conspiracies are unified to this degree, a point that bears careful scrutiny in Part VI. Nonetheless, as we have shown in Part IV, the reasons of the group cannot be reduced to the reasons of individuals. Once individuals join a group that requires collective reason, their individuality fades to the background, overshadowed by the collective action in which they participated. In a sense, the conspirator is like the violin player: one can see him in two lights, either as an individual or as a group. But this paradox is more than just a gestalt image—it is a function of the overlapping nature of these agents. The conspirator can be treated as both individual and group because, in a sense, he is both, engaging in collective reason towards a dedicated criminal pursuit but also maintaining his own autonomy in his personal life. Pinkerton straddles this distinction, in that it imputes the collective intention of the overlapping agent to the individual criminals. Once an individual becomes entangled in the collective reason of a conspiracy, he cannot disentangle himself from its collective intentions unless he withdraws. He also cannot disentangle himself from its actions, thus solving the objective element of the Pinkerton riddle as well. One can attribute the wrongful act of a perpetrator to his fellow conspirators because the act was causally produced by the collective intention of the group.

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154 See infra Part VI.A-C.
155 See supra notes 107-23 and accompanying text.
2. Withdrawal

This view also explains how agents join and withdraw from a conspiracy. One of the mysteries of a conspiracy is how a free and autonomous agent can rationally decide to join the conspiracy, be subsumed by it, but still maintain sufficient autonomy to withdraw from the conspiracy at a later date. The model of overlapping agents explains how this phenomenon is possible. Individual agents simultaneously stand inside and outside the conspiracy, keeping one foot committed to the collective endeavor and the collectivized reason it demands, yet also maintaining a portion of their private lives separate and not rationally unified with the group agent. It is from the standpoint of his continuing and persisting individual center of agency that the conspirator can decide whether it is rational, based on an all-things-considered judgment from his individual point of view, to join or withdraw from the conspiracy.

3. Flipping

The overlapping model also shows how an agent can rationally pursue group goals and individual goals (say by flipping or implicating other members) at the same time. Consider the example of a street-level enforcer in an organized criminal mob. The enforcer is approached by the FBI, which tells him that the agency is close to bringing down the organization with indictments. They tell him that the result is inevitable and just a question of timing—the writing is on the wall. They offer him a deal, including witness protection and relocation, in exchange for his testimony and cooperation. Now, it is clear that it would be within the enforcer’s self-interest to consider the deal, i.e., it is rational, all things considered. It is equally true that, from the perspective of the conspiracy, cooperation is not in its best interests. Indeed, its very survival depends on the refusal of its members to cooperate with the authorities. We are therefore left with a slight conundrum. The decision to withdraw and turn state’s evidence is both rational and irrational, depending on the point of view taken. From the enforcer’s point of view as an individual, withdrawal is clearly rational; from the enforcer’s point of view as a member of the group, withdrawal is clearly irrational because it harms the collective interest. How can both be true? They are indeed both true, because the

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156 Flipping is a crucial concern for Katyal, supra note 42, at 1328. Katyal’s theory does not provide an account for this, but flipping could be both rational and irrational depending on one’s point of view. The view presented here explains this fact.

157 This example could be expressed as a version of the Prisoner’s Dilemma, where cooperation is rational from the group perspective, but from the individual perspective defection is most preferable because the individual has no assurance that cooperation can be
enforcer is wearing two hats. In his private life he acts as an autonomous agent, capable of making an all-things-considered judgment about the best course of action. In his professional life, though, he acts as part of a group agent composed of overlapping individual agents, each of whom is committed to deliberating a course of action in common. Furthermore, it is from the perspective of his private life that the enforcer judges the rationality of joining the conspiracy. It is also from this private perspective that the enforcer judges the rationality of leaving the conspiracy. Even though he joins the conspiracy, he never fully gives up his private life and his ability to conduct private deliberations about the suitability of his participation in the collective agent.

4. Culpability

As a fourth point, the overlapping agent model of conspiracies promises, at least at first glance, the possibility of solving the problem of culpability. Earlier we suggested that blanket Pinkerton liability was problematic because it imposes total liability for all members of the conspiracy, regardless of their level of culpability. The charge was that Pinkerton liability ignored the internal structure of the conspiracy and treated it as a single agent without internal differentiation. It should now be clear that thinking of the conspiracy as a set of overlapping agents with intertwined but often distinct deliberations opens up space to explain how the different parts of a conspiracy function. The conspiracy is composed of many different agents, each of whom may play a slightly different role in the deliberative structure of the conspiracy—roles which may be legally significant.

5. Incentives

A fifth and final advantage of the model of overlapping agents for conspiracy is that it aids intervention in criminal behavior through the construction of incentives to deter behavior. The overlapping agents model helps explain the complicated psychology that participants may exhibit. They feel in one sense committed to the collective endeavor, yet in another capable of independently evaluating, from a distinct perspective, their

guaranteed. On the collective and individual aspects of the Prisoner’s Dilemma, see DAVID GAUTHIER, MORALS BY AGREEMENT (1986).

158 See infra Part VII.B for a detailed analysis.

159 This is only a preliminary answer. A more fully formed discussion of the internal structure of conspiracies must wait until infra Part VI.

160 Katyal’s article is dedicated to discussing the empirical studies of this complicated psychology, though there is no background theory to explain how conspiracies could yield such complicated psychological patterns. See Katyal, supra note 42 passim.
commitment to this group project. The criminal law, by seeking to deter behavior, takes advantage of this cleavage, and at times attempts to open it further by giving the criminal additional reasons to withdraw from the conspiracy and turn on his confederates. Therefore the criminal law, insofar as it seeks cooperation, takes advantage of the dual role of the conspirer. If the conspiracy was not formed from the parts of overlapping agents, this would not be possible. As a final point, if the criminal law is to make use of these incentives effectively, it must first understand the deliberative structure of these overlapping agents. Only then can the incentives be constructed in such a way that they become reasons for the individual agent to withdraw and betray.

C. CONFERRING PERSONHOOD ON THE CONSPIRACY

One final point remains. If this model is correct and conspiracies really are overlapping agents, why not go the full route and confer legal personality on the conspiracy? We have stopped at calling it a group agent or a collective endeavor. The law already treats other group agents as legal persons, including corporations, labor unions, political parties, and even nation-states within international law.161 Some might believe that the arguments presented above warrant conferral of personhood on criminal conspiracies, which could then be hauled into court and prosecuted as a group entity in much the same way that a corporation (not just its directors) can be the subject of a criminal prosecution.162

Many factors counsel against this strategy.163 There were special factors requiring the conferral of legal personhood in the case of corporations, none of which are present in the case of conspiracies.

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161 See supra notes 88-90 and accompanying text.
163 Some might object from the opposite direction and argue that the overlapping agent’s similarity to a group person is a reductio ad absurdum, which shows that we have gone too far in anthropomorphizing the criminal conspiracy. This objection would be motivated by the same distaste for metaphysics that leads advocates of the fictional entity theory to oppose the real entity theory. See supra notes 66-70 and accompanying text. Have we gone too far in positing a human will to the criminal conspiracy, in much the same way that nineteenth century continental theories went too far in attributing a will and soul to the modern corporation? This objection ought to be dismissed, for our account of overlapping agents relies on nothing more than the commitment of multiple individuals to pool information and deliberate in common. No greater psychological connections are either required or suggested, nor have we posited the existence of some group “will” or abstract soul. We have simply noted the degree to which these groups collectivize reason for the purpose of criminal action.
Corporations engage in economic ventures that the law seeks to facilitate.164 Conferring full personhood on corporations allows them to enter into contracts, sue breaching parties for damages, and generally protect fiduciary interests in a court of law. Furthermore, corporations can own property and are even covered by constitutional protections such as the right to be free from unreasonable search and seizures and other due process protections.165 Although some of these legal rights also implicate corresponding legal duties,166 in general they are beneficial to the economic interests of the corporation and promote collective economic endeavors. Economic efficiency is increased, arguably, if the corporation is allowed to appear and directly press its own interests from within the legal system. This economic incentive does not apply to the case of conspiracies. Indeed, the criminal law wants to dissuade, not encourage, collective criminal behavior, and conferring legal personhood on conspiracies (or criminal organizations) would do nothing to help that process of dissuasion. In fact, it might even harm it.167

Furthermore, the special demands of criminal justice—especially individualized punishment—make conferral of legal personality particularly problematic for group criminal endeavors. This Article began by noting that the criminal justice system is necessarily individualistic. Only individuals can serve prison sentences.168 And while it is technically possible for a group agent with collective assets to pay a fine, it is impossible to throw a group agent into prison without also imprisoning the individual agents from which it is composed.169 Conferring legal personhood on the conspiracy itself would not only fail to advance the interests of the criminal law, but would actively harm them.

164 C.f. Machen, supra note 61, at 263 (discussing both legal rights and legal responsibilities of corporate persons).
165 See supra note 76 and accompanying text.
166 Corporations are not only subject to criminal and civil liability, but are also increasingly subject to evolving international standards of human rights. See generally Eric Engle, Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?, 20 ST. JOHN’S J. LEGAL COMMENT 287 (2005-2006).
167 See Katyal, supra note 42 passim.
168 For a discussion of this paradox, see Coffee, supra note 162, at 386. However, some judges have tried to work around the difficulty. See, e.g., United States v. Allegheny Bottling Co., 695 F. Supp. 856 (E.D. Va. 1988) (sentencing a corporation to three years’ imprisonment). The court attempted to seize the assets of the corporation under the theory that “imprisonment” implied only some kind of physical restraint, though the stone walls and iron bars of the typical prison were not the only way to achieve physical restraint. Id. at 860-61.
169 See Allegheny Bottling Co., 695 F. Supp. at 861 (“Cases in the past have assumed that corporations cannot be imprisoned, without any cited authority for that proposition.”) (emphasis omitted).
What is needed is a *Pinkerton* doctrine that recognizes that the conspiracy is the intersection of both individual *and* collective action: individuals who maintain their autonomy yet collaborate in limited ways for the advancement of a common criminal goal. The overlapping agents model does exactly that. It provides a model that can make subtle distinctions in the internal deliberative structure of a conspiracy, i.e., show that it has movable parts whose distinctions are morally and legally significant. That being said, we have not yet made any of those distinctions. The task of the next section will be to offer them and to show, in a preliminary way, the different internal deliberative structures that a conspiracy might have.

VI. THREE KINDS OF CONSPIRACIES

In this section we will chart the different internal deliberative structures that a conspiracy might have and give examples of each. Three distinct kinds of conspiracies will be presented and then evaluated to determine whether their deliberative structure is sufficiently cohesive to yield vicarious *Pinkerton* liability, consistent with our understanding of the relevant mens rea and actus reus requirements. The three kinds of conspiracies do not represent an empirical or sociological account of how conspiracies actually operate but rather a conceptual analysis of the different ways a conspiratorial group could conceivably be organized. The final section of this Article will then explore how the *Pinkerton* doctrine should be reformed.

A. TIGHTLY KNIT VERTICAL CONSPIRACIES

We will call the first type of conspiracy the *tightly knit vertical conspiracy*.\(^\text{170}\) This conspiracy is vertical because the decision-making is hierarchical and members at the top make the final decisions, which are then executed by those lower in the conspiratorial hierarchy. Nonetheless, although lower members do not contribute to actual decision-making, they do participate in the deliberative process by pooling information and pushing it up the hierarchy. This makes the conspiracy tightly knit and distinguishes it from a looser organization that pursues a common collective

\(^{170}\) The terms “vertical conspiracy” and “horizontal conspiracy” are well known in antitrust law, although they are used for different effect. In that context, a vertical agreement to commit antitrust violations such as price-fixing links, say, a manufacturer with distributors and retailers. A horizontal conspiracy, by contrast, connects horizontal competitors to restrict competition. *See generally* Thomas A. Piraino, Jr., *Sharp Dealing: The Horizontal/Vertical Dichotomy in Distributor Termination Cases*, 38 EMORY L.J. 311 (1989). These definitions differ from the ones used in this Article, which emphasize instead the connections between architects of the conspiracy and their enforcers.
endeavor, but with little or no coordination. By contrast, the tightly knit conspiracy pursues deliberation with a procedure that demands that information be pooled. There is an expectation among members that relevant information will be relayed back to some command individual at the end of the day or some other predetermined time period.

A good example of a conspiracy with top-down decision-making and pooled information is a mafia family.\footnote{See, e.g., United States v. Tocco, 200 F.3d 401, 425 (6th Cir. 2000) (discussing “general structure of La Cosa Nostra”); United States v. Flynn, 852 F.2d 1045, 1052 (8th Cir. 1988) (discussing “command system of a Mafia family”); United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982) (discussing “organizational pattern or system of authority” and command structure of Mafia).} The head of the family makes all decisions about common criminal endeavors.\footnote{See, e.g., Tocco, 200 F.3d at 425 (discussing family structure and Tocco as boss over “ten to twelve partners, all associated by blood or by marriage”).} Although he may delegate some decision-making authority to the captains below him, these delegated decisions are always subject to review and reversal by the head of the family.\footnote{Id. at 432 (describing permission that was required from mob boss who held supervisory role).} Furthermore, the criminal endeavor is tightly knit in the sense that the family expects that information on criminal activities will be shared and pooled together so that the best decisions can be made. Individual foot soldiers do not roam the streets without direction, generally pursuing mayhem.\footnote{Id.} They engage in discrete actions, under orders from above, and then report back all relevant information to their superiors, who then pass along the information to the rest of the group. Some members of the mob family may, for reasons of individual interests, withhold information from the rest of the group, thereby preventing the group from achieving total information-pooling. It is important to distinguish the interests of the individual \textit{qua} individual from the interests of the group as an overlapping agent. The individual member may face some tension as he decides whether to pool a particular piece of information. Say the foot soldier receives a visit from an FBI agent seeking cooperation.\footnote{See Rovane, supra note 135, at 193 (providing Donnie Brasco as an example).} The foot soldier may realize that it is in the group’s interest to hear about this friendly visit, but doing so puts him and his family at great risk. This kind of dilemma is to be expected, and it is important to distinguish the group’s \textit{commitment} to information-pooling from its \textit{achievement} of that goal. While they may fall short of the goal, they remain committed to it at the group level. Indeed, the mob family that finds out that an individual family member has hidden
relevant information may enforce the information-pooling requirement in a decidedly draconian manner.  

B. LOOSELY KNIT VERTICAL CONSPIRACIES  

The second category is the loosely knit vertical conspiracy. This conspiracy retains the top-down decision-making structure of the previous conspiracy, but does so without a significant degree of pooled information. Coordination is therefore minimal. Individual members of the conspiracy each pursue activity that furthers the criminal purposes of the group, but they do so independently and with little coordination. They do not report back every hour or every day with information that is then assimilated into the decision-making process of the conspiracy. Rather, they simply go out and perform whatever criminal activity the organization was constituted for.  

The best example of a loosely knit vertical conspiracy is a case of crimes against humanity that are committed by individual soldiers with limited contact with the architects and organizers of the plan. Imagine an army or militia that conducts mass atrocities against a civilian population that it hopes to terrorize. The army leadership decides that it is going to forego the usual laws of war and will resort to intentional civilian killings, as well as looting, rape, and murder. The Army makes this decision at the highest echelons, because it believes that foregoing the usual constraints on lawful warfare will help it achieve military victory by instilling fear in

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177 Such cases are prosecuted under the joint criminal enterprise doctrine. See Rome Statute, supra note 98, at art. 25(3)(d) (identifying the “aim of furthering the criminal activity or criminal purpose of the group”); Prosecutor v. Tadić, Case No. IT-94-1, ICTY Appeals Chamber Judgment, ¶ 203 (July 15, 1999); Cassese, supra note 97, at 186-76 (analyzing concentration camp cases).  

178 Id.  

179 See, e.g., Prosecutor v. Krajišnik, Case No. IT-00-39-T, ICTY Trial Chamber Judgment, ¶ 308 (Sept. 27, 2006) (describing plan by Serb forces to kill one Muslim family on each side of town to instill fear in the local population); Prosecutor v. Krstic, Case No. IT-98-33-T, ICTY Trial Chamber Judgment, ¶¶ 41-43 (Aug. 2, 2001) (describing acts designed to instill fear among Muslim refugees).  

180 See Krajišnik, ¶ 309 (describing killings, looting, and rapes conducted by Arkan’s paramilitary forces); Krstic, ¶ 44 (reporting a mother whose children were taken away in the night and killed during campaign of fear).
the local population, or will advance genocidal goals. However, individual soldiers may commit these atrocities in faraway villages and will not necessarily report their activities to the commanders who are making these decisions. In fact, the soldiers may belong to militias that stand outside of the chain of command. Yet, in some sense, it would be inaccurate to refer to these soldiers as simple individuals committing isolated acts of criminal behavior. They clearly know that their actions fit in with a larger criminal endeavor. But they are not a part of a tightly knit conspiracy to commit war crimes and crimes against humanity. Rather, they are one part of a loosely knit vertical conspiracy to commit those crimes. The decisions are made by the military authorities, but the crimes are often executed by individual members of the conspiracy who

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181 See Krajinišnik, ¶¶ 305-09 (describing campaign to rid municipality of Muslims); Krstic, ¶ 85 (describing plan to execute all Muslim civilian males of military age). However, in many cases campaigns of extermination were broader than their original intent and included young teenage boys and elderly men. See Krstic, ¶ 85.

182 For example, militias in Darfur were found to be operating with support and financing from state officials, though in some cases without direct oversight of their daily activities. Int'l Comm'n of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, at 33-34 (Jan. 25, 2005), available at http://www.ohchr.org/english/docs/darfurreport.doc.

183 Much of the military atrocities in Serbia, Rwanda, and Darfur were committed by militias that stood outside of the “regular” military chain of command, though their activities were frequently directed or coordinated by superiors through other channels, either directly or indirectly. See, e.g., Krajinišnik, ¶ 309 (describing Arkan’s forces in Serbia); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 12A (Sept. 2, 1998) (describing rapes, beatings, and killings by local militias); Int’l Comm’n of Inquiry on Darfur, supra note 182, at 31-32 (Jan. 25, 2005) (noting that Janjaweed militias in Darfur were acting with the “support, complicity or tolerance of the Sudanese State authorities”). Militia forces were also used during Indonesia’s campaign of violence in East Timor. See Carsten Stahn, Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor, 95 AM. J. INT’L L. 952, 952-53 (2001) (reporting the pro-Indonesian militias prior to 1999 referendum on independence).

184 The ICTY has steadfastly insisted on viewing these activities within their collective context by analyzing them under the doctrine of joint criminal enterprises. See, e.g., Prosecutor v. Stakic, Case No. IT-97-24-A, Appeals Judgment, ¶ 59 (Mar. 22, 2002) (reaffirming joint criminal enterpise doctrine and rejecting Trial Chamber’s application of co-perpetrator model). For a discussion, see Ohlin, supra note 94. The doctrine was first enunciated in Prosecutor v. Tadić, Case No. IT-94-1, Appeals Judgment, ¶ 186 (July 15, 1999).

185 See, e.g., Tadić, ¶ 232 (noting that “[a]ppellant was aware that the actions of the group of which he was a member were likely to lead to such killings”).

186 For criticism of applications of the conspiracy doctrine in these cases, see Jens David Ohlin, Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise, 5 J. INT’L CRIM. JUST. 69, 85-88 (2007).
sometimes have little to no coordination of their actions. Although the individual soldiers are aware of the commandments from above, they do not pool information with their superiors in such a way that the conspiracy is intimately involved in their actions. They simply receive orders and then follow them.

C. TIGHTLY KNIT HORIZONTAL CONSPIRACIES

The third kind of conspiracy is the tightly knit horizontal conspiracy. These conspiracies are identifiable by shared decision-making and pooled information. Therefore, in addition to the fact that decisions are made across a horizontal group of conspirators, information is also pooled among all members of the conspiracy. The classic example of such a conspiracy would be a bank robbery. These crimes are frequently collective because it is much easier to rob a bank in a group rather than go it alone. Bank robberies are complex criminal escapades that require multiple participants, including a lookout, getaway driver, and stick-up man. However, bank robberies are always committed by small, integrated groups, not the kind of large groups that dominate the mafia or, say, an army committing war crimes.

The element of the tightly knit horizontal conspiracy that ought to be emphasized is the degree to which such criminal groups—figuratively—breathe together. When the conspiracy only includes, say, three or four members, there is a greater likelihood that decisions are made collectively at the horizontal level. Larger organizations necessarily require some kind

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187 There are vast differences in the level of coordination depending on the atrocity in question. In the case of Nazi Germany, it was clear that the genocide was not only planned and directed by the highest echelons of Hitler’s government, but the execution of the plan was also carried out by regular German forces whose actions were coordinated by the military chain of command. See generally Telford Taylor, The Anatomy of the Nuremberg Trials (1992) (detailing role of German military organizations in Nazi atrocities). In contrast, the Darfur genocide appears to be conducted by militias that receive state support for their activities, although their daily conduct is not always directed by state officials. See Int’l Comm’n of Inquiry on Darfur, supra note 182, at 34-35 (Jan. 25, 2005) (describing gifts and cash payments from Sudanese government officials to militias).

188 None of this is meant to suggest that all conspiracies to commit war crimes and genocide follow this pattern. Indeed, many do not. It is quite possible to have a vertical conspiracy that is so closely knit, with extensive coordination, that it resembles a mafia family. The Nazi system of genocide may be one example, where all information relevant to the “Final Solution” was expected to be pushed up the chain of command. In some cases in the former Yugoslavia the conspiracies functioned in this way, especially when the atrocities were committed by regular forces as opposed to paramilitary forces.

189 See, e.g., United States v. Zackery, 494 F.3d 644, 649 (8th Cir. 2007) (Pinkerton liability in bank robbery case).

190 Id. (describing complex plans required for bank robbery).
of vertical top-down decision-making in order to stave off chaos and disorder; smaller criminal endeavors have the luxury of debating a course of action amongst all conspirators and then deciding collectively to pursue that course of action. All members of this kind of conspiracy have equal access to all sources of information and reason is collectivized at the group level.

This dissection of the various kinds of conspiracies leaves out a fourth possibility that is unlikely to occur: the loosely knit horizontal conspiracy, evidenced by shared decision-making without pooled information. Such a conspiracy is highly unlikely, since shared decision-making implies at least a minimal amount of pooled information. How can decisions be made together if information is not also shared? Of course, one might imagine a scenario where the conspiracy adopts a shared decision-making structure, but some member of the conspiracy is a holdout and keeps some information to himself. However, so long as the conspiracy is ostensibly committed to the principle of information sharing, deviation from this norm should be considered as a simple failure to live up to the demands of the group’s decision-making procedure. If the individual is found out, the group may demand the information or seek a reprisal against any member who refuses to comply with the agreed-upon decision procedure. These cases are better analyzed as tightly knit horizontal conspiracies, albeit with defecting members.

D. APPLICATION

The three central categories of conspiracy are not mutually exclusive. Some criminal groups may have combinations of each woven together in complex patterns. A criminal endeavor may include, for example, a tightly knit horizontal conspiracy among decision-makers, who are then somehow related to a vertical conspiracy that extends down to the level of street thugs. Although these two conspiracies are related—i.e., pursuing the same criminal goals—it is nonetheless important to keep them separate. In such cases, there are two conspiracies that intersect; the vertical conspiracy

191 See supra note 127 and accompanying text.

192 This is frequently the case in international criminal law. See Kai Ambos, Joint Criminal Enterprise and Command Responsibility, 5 J. Int’l Crim. Just. 159, 180 (2007) (discussing coordination along horizontal level); see also Prosecutor v. Stakic, Case No. IT-97-24-A, Trial Judgment, ¶ 376 (July 31, 2003) (discussing vertical cooperation in joint criminal enterprise case). Also, a horizontal conspiracy among military planners to commit crimes against humanity and genocide may be connected to a vertical conspiracy that extends down to the platoon level. This issue is discussed in Mark Osiel, The Banality of Good: Aligning Incentives Against Mass Atrocity, 105 Colum. L. Rev. 1751, 1769 (2005) (discussing “vertical and lateral dimension to the social dynamics between those involved in state-sponsored mass atrocity”). Indeed, Osiel correctly notes that instructions are usually given from the top down and “information conveyed from bottom to top.” Id. at 1769.
maintains a distinct deliberative structure that is entirely different from the horizontal conspiracy.

As a final point, the categories allow for differences in degree. At what point will a closely knit conspiracy become loosely knit? These are complex questions of fact. However, it would be hasty to conclude that this difficult exercise in line-drawing makes these categories suspect. There will always be difficult fact patterns that might be hard to classify as either tightly knit or loosely knit. But these difficult questions of application do not undermine the essential usefulness of the categories in the vast majority of cases where it is easy to determine if a conspiracy uses shared decision-making and pools information.

The task is now to evaluate the three kinds of conspiracy against the overlapping agents model in order to determine which—if any—demonstrate the kind of rational deliberative structure of an overlapping agent sufficient to generate the kind of group intentions necessary to ground Pinkerton liability. The reader will recall that our model described collective endeavors as composed of overlapping agents who agree to collectivize reason at the global level and employ premise-centered reasoning. The collectivized reason of an overlapping agent allows the group to stand in a certain rational posture with other agents, i.e., to engage in reason-giving and reason-demanding behavior. In other words, the overlapping agent is capable of having its own reasons, articulating them, holding others responsible for their reasons, and in turn capable of being held responsible for its own reasons. This allows it to have a collective intention in the relevant sense for Pinkerton.

Against this standard, the three kinds of conspiracies stand in marked contrast. The loosely knit vertical conspiracy hardly demonstrates any of the qualities of collectivized reason, because the far-flung participants may not even be aware of the premises of the conspiracy, nor do they engage in any kind of collective deliberation. The tightly knit vertical conspiracy demonstrates some of the qualities of collectivized reason, insofar as all members of the conspiracy have access to the same information, but the degree of collective deliberation is minor or non-existent. If the decisions are all being made at the top, there is no need to engage in collective deliberation with those at the bottom. Contradictions will not be resolved, nor will they even be discussed. Only the tightly knit horizontal conspiracy demonstrates the kind of integration necessary for

\[193 See \textit{supra} \textit{Part IV}. \]
\[194 See \textit{supra} \textit{notes 151-53 and accompanying text (discussing Bennett, Pettit, and Parfit on rationality)}. \]
\[195 See \textit{Osiel, supra note 192, at 1769}. \]
\[196 Id. \]
collective reasoning and, as such, demonstrates the kind of overlapping agent that is capable of forming a collective intention. This is the best way to explain how Daniel Pinkerton could be liable for Walter’s actions, even though he was in jail at the time. Daniel’s culpability stems from the wrongful acts of a group conspiracy composed from the overlap of Daniel and Walter, both of whom can now be viewed in their capacity as group members, not individuals. Having stood together in pursuit of criminal objectives, they must now stand together to face criminal justice.

Of course, there may be a middle ground between tightly knit vertical and horizontal conspiracies, depending on the degree to which decision-making is shared; the difference is a continuum, not absolute. But this does not weaken the conclusion. Rather, it reinforces our previous statement that some criminal groups may demonstrate a hodge-podge of different flavors. However, it is certain that a conspiracy without any substantial degree of rational integration or shared decision-making is incapable of producing a collective intention sufficient for *Pinkerton* liability.

**VII. REFORMING *PINKERTON* LIABILITY**

Having identified the different kinds of conspiracies and measured them against our model for understanding collective action, we can now better explicate how the *Pinkerton* doctrine must be reformed to take into account the internal deliberative structure of conspiracies. In essence, the reforms are required by our overlapping agents model, which demonstrates that conspiracies are neither atomic nor inscrutable, nor are they cut from the same cloth. It matters how the individual agents within a conspiracy go about reaching a collective decision, because this determines whether a collective intention can be attributed to an individual or not.

**A. RETHINKING *PINKERTON* LIABILITY**

1. **Limiting Vicarious Liability to Tightly Knit Conspiracies**

It should be clear now that vicarious liability, even for acts that fall within the scope of the criminal agreement, should be reserved for tightly knit conspiracies with shared decision-making. These overlapping agents are sufficiently cohesive to produce collective intentions, but conspirators in a loosely knit conspiracy, with far-flung participants, should not be vicariously liable for the actions of co-conspirators. These conspiracies are so loosely organized that each member’s role in the deliberative

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197 See *supra* notes 171-74 and accompanying text.
198 This is precisely the kind of liability generated by the *Pinkerton* doctrine.
structure is not sufficiently fixed to produce a collective intention. The overlap is not sufficiently significant to ground an attribution of liability consistent with the culpability principle.199

Vicarious liability makes sense in the case of a tightly knit horizontal conspiracy because the agent in question closely participates in the deliberative structure of the agent and helps form the collective intention. It is this fact that generates culpability, for the simple reason that he participated closely in the decision-making process and, in a sense, made it his own. However, agents in a loosely knit conspiracy have no such role in the deliberative structure of the overlapping agent; such loosely organized endeavors arguably have no collective intentions at all because reason is not collectivized.

2. Eliminating the Foreseeable Consequences Doctrine

Recall our previous statement that Pinkerton involves two applications: (1) vicarious liability for actions within the scope of the criminal agreement, and (2) vicarious liability for actions that extend beyond the criminal agreement and are a reasonably foreseeable consequence of the conspiracy. Based on the previous analysis, it is now abundantly clear why vicarious liability in the first version is defensible. Individuals who join conspiracies engage in collective decision-making that results in a collective intention. This intention, and the wrongful act it produces, can then be attributed to all members participating in the decision-making process.

However, the second, more extensive application of Pinkerton cannot be justified, given that the mental intention of the group must be attributed to the defendant in order to ground the vicarious liability.200 But where the action extends beyond the criminal agreement, how can it be said that the group has a collective intention to commit the crime? The group clearly does not, for the very reason that the group did not agree to the act in question, but rather formed an agreement for a narrower initiative that one individual decided to breach. Furthermore, it is unclear how limiting

199 See supra note 47 and accompanying text.

200 Federal courts have been so willing to apply the foreseeable consequences doctrine that some consequences are almost per se foreseeable, given the frequency with which prosecutors have successfully resorted to this theory of liability. The classic example is that it is foreseeable that a co-conspirator who owns a weapon might use it to commit a violent felony. See, e.g., United States v. McLee, 436 F.3d 751, 758 (7th Cir. 2006). This reasoning even applies when the defendant is unaware that his co-conspirator brought the weapon to the locus of the criminal act. See United States v. Chairez, 33 F.3d 823, 826 (7th Cir. 1994) (“A co-conspirator can be held vicariously liable under Pinkerton despite his claims that he did not know or suspect the gun’s presence in the car.”).
Pinkerton liability to acts that are reasonably foreseeable provides any answer to the problem.\footnote{The impact of the foreseeability requirement is supposedly reduced by restricting its application to conduct that is “reasonably” foreseeable, though prosecutors and judges have responded by finding increasingly creative arguments to demonstrate that a particular outcome was reasonably foreseeable. For a discussion of this problem, see Jens David Ohlin & George P. Fletcher, Reclaiming Fundamental Principles of Law in the Darfur Case, 3 J. INT’L CRIM. JUST. 539, 549 (2005).} One still has to find the mens rea somewhere, and limiting application to foreseeable cases does not help in attributing the required mental element to a conspirator.

In order to understand the rationale of these two reforms, we return to the culpability principle and apply it to the decision-making structure of conspiracies discussed in Parts V and VI. A reformed Pinkerton doctrine, limited to tightly knit horizontal conspiracies and to acts that fall within the scope of the criminal plan, would remain more faithful to the culpability principle and the underlying rationales of criminal justice.\footnote{It should be emphasized that the doctrinal amendment proposed here is limited to Pinkerton liability and does not implicate conspiracy as a stand-alone offense, prosecuted before a criminal plan comes to fruition. I am not questioning the idea that conspiracy per se should be criminal (as a stand-alone offense). The stand-alone offense provides an incentive for individuals to refrain from collective criminal endeavors, and if they join one, they remain liable for the substantive crime of conspiracy. In fact, this may very well give them an incentive to cooperate. Also, such prosecutions may be consistent with the culpability principle, provided that conspiracy to commit a particular crime is considered as a lesser offense than the particular crime itself.} These factual determinations could be made at trial, and established criteria could be applied using the overlapping agents model.\footnote{Of course, it is difficult to predict the practical effect of eliminating the foreseeable consequences doctrine. Instead of relying on the foreseeable consequences doctrine, prosecutors might simply prosecute the same conduct by arguing instead that the actions formed part of the group’s criminal agreement, as evidenced by either an implicit arrangement or explicit discussion. This fact highlights the degree to which the foreseeable consequences doctrine, in reality, represented a burden-lifting provision for prosecutors. Instead of requiring the prosecution to prove beyond a reasonable doubt that the scope of the conspiracy included the criminal conduct at issue, prosecutors could simply avoid that question as moot under the foreseeable consequences doctrine, and instead approach the matter as an issue of law. Therefore, eliminating the foreseeable consequences doctrine would certainly have the following practical effect: it would remove the doctrine as a crutch for prosecutors and force them to deal more directly with the factual issue of the conspiracy’s true scope. This is the correct result, for the true scope of the criminal conspiracy ought to be the sine qua non of any Pinkerton prosecution.} An agent from a loosely knit conspiracy is far removed from the rational process of reason-asking
and reason-giving behaviors and these offenders should be prosecuted under the standard rules for accomplice liability.

Why should this be morally or legally relevant? Simply put, unless one advances a purely consequentialist justification for Pinkerton’s broad attribution of vicarious liability, one has to tell some story that purports to connect the actions of a defendant with the actions of his co-conspirators, consistent with a general theory of responsibility. The source of this demand is the culpability principle, which limits punishment to each individual’s degree of culpability. In the absence of straight utilitarian calculations, a desert-based argument must refer, in some way, to the conspiratorial agreement that both individuals share. I have argued above that the only viable solution is an appeal to a collective intention, so that the intention of the group becomes, for purposes of criminal justice, the intention of the defendant. In previous sections, I defended the claim that the hallmark of true collective agency, sufficient for the creation of a collective intention, is collectivized reason and premise-centered reasoning. No other non-consequentialist account could provide the necessary foundation for such a broad attribution of vicarious liability. By this standard, then, a collective intention cannot be attributed to lower-rung members of a loosely knit vertical conspiracy because they do not participate in the collective reasoning.

In making these distinctions, we need to understand the difference between collecting and disseminating information, and deliberating towards a desired outcome while selecting a course of action to achieve it. The latter may produce a collective intention because it suggests a closer association with the deliberative process of the common criminal endeavor, sufficient to generate responsibility through the existence of a collective intention. For the more loosely organized conspiracies, vicarious liability

204 See supra note 133 and accompanying text.
205 See, e.g., MODEL PENAL CODE § 2.06 (2001) (accomplice liability for aiding and abetting). But see FLETCHER, supra note 17, at 650-51 (noting that under Anglo-American and French law, accessories and perpetrators are treated the same).
206 On the difficulties on giving up desert within the confines of criminal law theory, see supra note 49-50 and accompanying text. Compare JOEL FEINBERG, Justice and Personal Desert, in DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 55-60 (1970) (defining desert as moral notion upon which responsive attitudes and institutions of punishment are founded), with Paul H. Robinson & John Darley, The Utility of Desert, 91 NW. U. L. REV. 453, 456 (1997) (arguing for a “just desert allocation of liability . . . based upon the community’s shared principles of justice rather than on those developed by moral philosophers”).
207 See supra Part III.
must be rejected in favor of the traditional principles of accomplice liability preferred by the Model Penal Code.208

B. RETHINKING EQUAL CULPABILITY

These observations suggest a second category of doctrinal amendments. Traditional Pinkerton rules entail that all members of the conspiracy are equally liable, regardless of their level of participation (provided that they meet the threshold requirement of a substantial contribution).209 This result is entailed by the underlying principles of Pinkerton liability. If each conspirator is liable for the substantive crimes of its members, it would stand to reason that each is equally culpable, for in the eyes of the law each member has—by definition—committed the same crimes. It is worth dwelling on this unique consequence of Pinkerton and whether our previous categorizations suggest a change of course.210

Our analysis in the previous section suggested that shared decision-making should be treated differently from mere participation in the form of pooled information. If the doctrine of equal culpability makes sense at all, it makes sense when there is shared decision-making. In this case, the collective intention of the group justifies the attribution of vicarious liability. One can therefore make a plausible argument that the common deliberations allow us to attribute the collective decisions to all members equally, since all members participated in the decision-making process. However, if there is no shared decision-making, equal culpability must be generated (and justified) by some other mysterious factor. Indeed, it seems intuitively correct that decision-makers are more culpable than mere contributors, and that equal culpability for all conspirators should be limited to conspiracy cases where all participants are involved in the rational decision-making process, i.e., the tightly knit horizontal conspiracy.211 In such cases, the fact that multiple agents use collective reasoning means that each, in a way, shares the criminal reasons that generate not just criminal liability, but equal criminal liability.

208 See Model Penal Code § 2.06.
209 See United States v. Falcone, 311 U.S. 205 (1940) (finding the mere selling of sugar to distillers insufficient for conspiracy liability).
210 See, e.g., Enmund v. Florida, 458 U.S. 782, 798 (1982) (“Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.”).
211 Each member of such a conspiracy makes a significant contribution that would qualify under complicity standards—each engages in an overt act in support of the criminal objective.
But what if we justify the doctrine of equal culpability on efficiency grounds? Arguably, the imposition of equal culpability provides an incentive against collective criminal behavior, since participants will be unlikely to join a conspiracy if they automatically “inherit” full culpability of their co-conspirators in more advanced positions in the hierarchy.\footnote{\textit{See, e.g.}, United States v. Blackmon, 839 F.2d 900, 908-09 (2d Cir. 1988) (explaining that members of a conspiracy may be charged with conspiracy for actions committed by co-conspirators prior to their date of joining, although they do not inherit retroactive liability for substantive offenses).} On this theory, then, equal culpability is justified not only in cases of tightly knit horizontal conspiracies (as I have suggested), but all flavors of conspiracy. However, the consequentialist argument cuts both ways. The equal culpability scheme provides a perverse incentive for minor participants to engage in greater degrees of criminality because they already share culpability with their criminal compatriots who exercise greater control. Once part of a conspiracy, the law apparently makes no distinction between participants—a disavowal harmful even by consequentialist lights. The law ought to give incentives for minor participants to remain that way, such that those who take on the greatest responsibilities also take on the greatest risks of liability. Such centrifugal forces would pull conspiracies apart rather than provide an incentive to pull them closer together. In the end, it would help prevent collective criminal endeavors from achieving the very kind of close cooperation at issue in this Article (in a closely knit conspiracy) that generates the most destructive criminal behavior.

C. OTHER REQUIREMENTS FOR VICARIOUS LIABILITY

\paragraph{1. The Common Action Requirement}

Some courts have found that a conspiracy can be created even in the absence of an agreement to commit simultaneous actions. \textit{Interstate Circuit v. United States}\footnote{306 U.S. 208 (1939).} is one famous example. In \textit{Interstate}, movie theaters were charged with conspiracy under the Sherman Anti-Trust Act, and the Court held that “[i]t is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators.”\footnote{\textit{Id.}} The Court’s argument suggests that parallel actions, even in the absence of an explicit agreement, might be considered a conspiracy since each member knew that “success” was only possible if each participated in the activity. Although there was no explicit coordination,
the parallel actions functioned like a conspiracy because each “conspirator” knew what the outcome would be if each acted in a certain way.

It should be clear from our analysis that such a loose definition of conspiracy would be insufficient to ground vicarious liability. The required mental element can only be found in group intentions, and in a conspiracy like *Interstate* there is no group intention at all. What would it mean to say that the movie theater chains in *Interstate intended* to restrict competition and fix prices? Group intentions arise during common deliberation and common action, but mere parallel actions do not implicate shared decision-making or collective reason. In such cases, individuals do not submit their reasons to the group, but rather keep their reasons to themselves and make similar calculations that result in parallel actions. Consequently, vicariously liability must be limited to conspiracies with common actions that rise beyond parallel actions.

2. Liability for Prior Acts of the Conspiracy

Another doctrinal puzzle involves imposition of vicarious liability for the acts of the conspiracy prior to the defendant joining the conspiracy. Does the defendant “inherit” the crimes of the group through the mere act of joining the conspiracy? This issue can be divided into two situations. First, does the defendant inherit liability for the prior acts of the conspiracy that fall within the scope of the criminal agreement that he has now formed? Second, does the defendant inherit liability for the prior acts of members that may fall outside the scope of the criminal agreement, though they might be reasonably foreseeable if, of course, they were to happen in the future? An interesting argument might be marshaled in favor of the latter position by noting that it should not matter whether the reasonably foreseeable actions actually happen in the past or the future; what matters is whether they would be reasonable foreseeable if they were to happen in the future.

Of course, *Pinkerton* liability was never meant to be applied in this manner, and even federal courts have generally refused to apply it retroactively, though it is unclear if courts refuse to apply it retroactively for the right reasons. First, it is clear that individuals who join a conspiracy should not be vicariously liable for the prior actions of wayward conspirators, since we have already argued that such liability is never justified. However, they also should not be held liable for the prior acts of fellow conspirators that are within the scope of the conspiratorial plan. The relevant question is whether the group intention to commit the crime can be attributed to the defendant who joins the conspiracy. At the time that the

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215 See, e.g., Blackmon, 839 F.2d at 900, 909.
group intention was formed, however, the individual was not part of the conspiracy. Therefore, the imposition of liability would require us to attribute to the defendant a collective intention that he played no part in formulating, since it arose before he joined the conspiracy. And this would be no more justifiable than attributing to him someone else’s intention.

3. Multiple Objectives

Another doctrinal puzzle involves drawing the boundary lines around a conspiracy. Criminal plans rarely involve a single criminal act; they are composed of multiple subparts, each of which may be prosecuted as another criminal offense. This raises the question of how to define the contours of the conspiracy. For example, a mafia family may pursue multiple criminal objectives at the same time. Is this a single conspiracy or a group of distinct but related conspiracies? Answering this question has profound implications for vicarious liability, since defendants face vicarious liability for the actions of co-conspirators, but obviously not for the actions of criminals belonging to a different conspiracy. Failure to have a coherent theory for defining the outer contours of a conspiracy might make an individual liable for the actions of dozens of criminals to whom they have little relationship. For example, in Kotteakos v. United States, the Supreme Court noted that “separate adventures of like character” could not be melded together into the common purpose of a single enterprise.216 In that case, there were eight separate conspiracies, though each had a common member and each violated the National Housing Act. But these facts alone were insufficient to prove a single global conspiracy.

It is now clear why melding together “separate adventures of like character” is impermissible, at least for purposes of vicarious liability. The relevant question is finding the individuals with whom the defendant collectivized reason by forming a horizontal conspiracy committed to some criminal goal. It is this group that has the collective criminal intention necessary for grounding vicarious liability. A far-flung collection of multiple conspiracies has no collective intention; at least, not if there is no collective deliberation among the groups.

4. Abandonment

Classic conspiracy doctrine places severe restrictions on the circumstances under which a defendant can withdraw from a conspiracy.217 Such a withdrawal does not vitiate liability for the actions of the conspiracy

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216 328 U.S. 750, 769 (1946).
prior to withdrawal, but does, if successful, stop liability for any future acts committed by the conspiracy after the departure of the defendant. Jurisdictions are generally split on this issue, with some (including the federal courts) requiring a simple announcement of abandonment to one’s fellow conspirators, while others demand that the withdrawing member actually “thwart” the criminal plan if he hopes to end his vicarious liability for the conspiracy’s future actions.218

The harsh thwarting requirement does not appear to be justified. In a sense, the thwarting requirement is akin to disallowing withdrawal. Individuals retain vicarious liability unless they thwart the conspiracy. But if they successfully thwart the conspiracy, then they would not be subject to vicarious liability anyway, since there would be no completed criminal offense to be liable for. This doctrinal scheme is inconsistent with our understanding of how collective intentions are attributed to a conspirator. Once a conspirator departs from the conspiracy, he stops engaging in the process of collectivized reason—the very factor that we have identified as most significant for the formation of collective intentions. If this is true, their departure from the collective reasoning process removes the very factor that justified their vicarious liability in the first place, i.e., their participation in the formation of the collective intention. With the withdrawal in place, liability should end, as well, simply by virtue of their departure in the reasoning process.219

218 Most often, thwarting will take the form of informing the police of the criminal endeavor. For a discussion of this issue, see United States v. U.S. Gypsum Co., 438 U.S. 422, 464-65 (1978) (affirmative act sufficient for withdrawal); Eldredge v. United States, 62 F.2d 449, 451 (10th Cir. 1932). Many jurisdictions also take a harsh view of renunciation as a defense to conspiracy as a standalone offense. This traditional common-law view is supported by the argument that conspiracy as an offense is the formation of a criminal agreement, and that once the agreement is made, no amount of renunciation changes the fact that the original agreement was made. But see Model Penal Code § 5.03 (2001) (allowing renunciation as a defense if the defendant both renounces the criminal purpose of the conspiracy and prevents its commission). The Model Penal Code approach has been adopted in several states, while others have taken an even more lenient approach and require only a substantial effort to prevent the crime. See Sanford H. Kadish & Stephen J. Schulhofer, Criminal Law and Its Processes: Cases and Materials § 680 (7th ed. 2001); Note, Conspiracy: Statutory Reform Since the Model Penal Code, 75 Colum. L. Rev. 1122 (1975).

219 Could the strict thwarting requirement be justified on consequentialist grounds? Obviously it would provide incentives against joining criminal conspiracies in the first place, given that the standards for withdrawal are so high. Criminals considering joining a conspiracy would think twice about it, as long as they have the foresight to realize that they might, in the future, disagree with the criminal aims of the conspiracy and desire a withdrawal that may be more difficult to achieve than they first thought. However, this incentive structure proves problematic, even on consequentialist grounds, because it provides a perverse incentive for conspirators to stick with the criminal objective. Given the fact that thwarting a criminal endeavor is so difficult (and potentially dangerous, depending on the
VIII. CONCLUSION

Although collective criminal behavior is no doubt destructive for society, this alone cannot serve as an adequate justification for *Pinkerton*. The demands of criminal law theory cannot be brushed aside. Only the collective reason exhibited by a truly integrated and tightly knit conspiracy can serve as an appropriate route for meeting the act and intention requirements for vicarious criminal liability. Nonetheless, by appealing to the collective reason exhibited by the tightly knit conspiracy and, in so doing, unlocking the theoretical foundation for *Pinkerton*, we have also pulled back the worst excesses of *Pinkerton* to remain consistent with basic principles of criminal law. The criminal justice system can no longer tolerate vicarious liability for the foreseeable consequences of co-conspirators—a frequent refrain but one that previously could not be explained. The collective intention of the group to commit the crime provides the necessary mental element to sustain vicarious liability, but when participants engage in actions that fall outside the scope of the criminal plan, by definition no such collective intention exists. The elements of this theory—overlapping agents and collective intentions—are new to criminal law theory, but they emerge from basic notions that are not at all foreign to the criminal law literature. Indeed, they are the product of a sober analysis of the deliberative structure of conspiracies, appealing to decision theory, and they avoid all vestiges of overbearing nineteenth century doctrines of corporate wills. The doctrinal amendments proposed in this Article—limiting *Pinkerton* to tightly knit conspiracies, eliminating the foreseeable consequences doctrine, etc.—are mandated by nothing more extravagant than the manner and mode of decision-making in conspiracies, which is precisely the appropriate subject for the criminal law.

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criminal gang), conspirators may choose to stay in the conspiracy, rather than leave and remain saddled with vicarious liability for a co-conspirator’s actions. Better to stay and gain the benefits of the conspiracy, rather than leave and keep only the legal burdens.