

April 1975

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Recommended Citation

Kathleen Harrington & Kathleen Harrington, *A Felon's Responsibility for the Fatal Acts of a Non-Felon*, 52 Chi.-Kent L. Rev. 184 (1975).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol52/iss1/12>

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A FELON'S RESPONSIBILITY FOR THE FATAL ACTS OF A NON-FELON

People v. Hickman,
59 Ill. 2d 89, 319 N.E.2d 511 (1974).

Throughout the Anglo-American system of criminal justice, those who engage in certain felonies and kill the subject of their felonious designs, or those who kill while forcibly resisting lawful arrest, may be convicted of murder. Where, however, death is caused by the retaliatory or defensive action of a victim of an intended felony, or by a police officer or other person assisting him, the criminal responsibility of the felon for that death is less clear.¹

The problem raised when a homicide is committed by a person resisting a felony is whether the felony murder doctrine can be utilized to charge the felon with murder. The applicability of the felony murder rule in this situation depends on whether the court adopts a proximate cause² or an agency³ theory of criminal liability. Adoption of the proximate cause basis for the imposition of liability under the felony murder rule holds a felon responsible for any death occurring during the course of the felony, which is a foreseeable consequence of the felon's initial criminal act. Under this distinct minority theory, which expands the common law scope of a felon's responsibility, the felony murder doctrine is applicable when the killing is done by one resisting the felony.

However, under the agency theory, which requires a more direct link of causation between the original felony and the subsequent homicide, criminal liability is imposed on the felon only when the conduct causing the death is an act done in *furtherance* of the initial felony. Thus this view limits the applicability of the felony murder rule to homicides committed by the defendant or a co-felon in furtherance of the felony.

1. Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956).

2. The proximate cause theory of criminal liability received wide recognition in early Pennsylvania decisions which have since been overruled. See note 34 *infra*.

3. The traditional application of the felony murder rule has been labelled the agency theory of liability. Under this theory, the felony murder doctrine is inapplicable where the fatal act is committed by one resisting the felony on the rationale that the purpose of the doctrine is to deter felons from killing negligently or accidentally by holding them strictly liable for the killings they commit, and that this purpose is not served by holding them responsible for the homicidal acts of others. See generally Annot., *Felony Murder—Killing By Another*, 56 A.L.R.3d 239 (1974).

4. The jurisdictions currently adopting the proximate cause view of criminal liability have uniformly applied it in situations where the felons either engaged in a gun battle or struggled with the victim for control of the gun. *People v. Podolski*, 332 Mich 508, 52 N.W.2d 201 (1952) (felons engaged in a gun battle); *Miers v. State*, 157 Tex. Crim. 572, 251 S.W.2d 404 (1952) (victim struggled with felon over control of the gun); *Hornbeck v. State*, 77 So. 2d 876 (Fla. 1955) (felons initiated a gun battle); *Johnson v. State*, 386 P.2d 336 (Okla. 1963) (felon seized control of a policeman's gun and another officer fired, mistakenly killing the policeman).

In the recent case of *People v. Hickman*,⁵ the Illinois Supreme Court extended the scope of the felony murder doctrine in Illinois to hold felons criminally responsible for the death of a police officer mistakenly shot by a fellow officer attempting to prevent the felony. This note will examine the facts upon which *Hickman* was based, assess the development and scope of the felony murder doctrine in Illinois prior to *Hickman*, and analyze the reasoning of the court in adopting the tort concept of proximate cause as a proper criterion of causation in a criminal homicide case.

People v. Hickman

On the evening of April 2, 1970, seventeen members of the Joliet police force were conducting a surveillance of a liquor warehouse. Defendants Hickman and Rock were observed breaking into the warehouse, while Papes, a third defendant, remained posted outside. Shortly after Papes entered the warehouse, the three men were seen leaving the building. As the police closed in, the defendants fled toward a parking lot at the rear of the warehouse. Papes was captured immediately and a search revealed a loaded pistol in his jacket pocket. Hickman and Rock continued their attempt to escape, disregarding a warning shot and police orders to halt. One of the police officers then observed a crouched figure running through the parking lot with a handgun who did not respond to his warning to drop the gun. Believing the crouched figure to be one of the burglars, the officer fired his shotgun. The crouched figure proved to be a fellow police officer who subsequently died as a result of the shotgun wound. Later that evening Hickman and Rock were arrested on a nearby street. Neither was armed and the trial record disclosed no evidence that either defendant was armed during the burglary. At the trial's conclusion, the jury found Hickman and Rock guilty of murder and burglary. Papes, who had been captured prior to the shooting, was found guilty of burglary. Following the jury verdict, the trial court entered an order arresting the judgment of murder against Hickman and Rock on the grounds that under Illinois law, the felony murder rule is inapplicable when the fatal act is committed by a non-felon acting in opposition to the felony.

On appeal, the appellate court for the third district reversed the lower court's order and reinstated the murder convictions.⁶ The case came to the Illinois Supreme Court on a certificate of importance.⁷ Faced with the most troublesome variation of the felony murder cases,⁸ where an innocent victim is killed by a non-felon, the *Hickman* court, adopting a proximate cause theory of liability, affirmed the murder convictions and held that a felon is criminally

5. 59 Ill. 2d 89, 319 N.E.2d 511 (1974).

6. 12 Ill. App. 3d 412, 297 N.E.2d 583 (1972).

7. ILL. REV. STAT. ch. 110A, § 316 (1973).

8. For an annotated survey of the varied factual situations in which the felony murder rule has been applied, see Hitchler, *The Killer and His Potential Victim in Felony Murder Cases*, 53 DICK. L. REV. 3 (1948).

responsible for the lethal acts of a non-felon intervening in opposition to the felony.

DEVELOPMENT OF THE FELONY MURDER RULE IN ILLINOIS

Under the common law, in order to convict a person of murder, the state had to prove malice aforethought.⁹ This element was difficult to establish when a felon accidentally or unintentionally killed someone during the commission of a felony. The felony murder doctrine which developed in response to this situation¹⁰ created a legal fiction of transferred intent whereby the malice which adhered to the initial felony was deemed transferred to the *felon's* homicidal act, thus supplying the element of malice necessary to prove murder. The felony murder rule operated to impute malice to a felon's homicidal act when malice did not expressly exist. Thus under the common law analysis, the felony murder doctrine did not extend to every homicide incidental to the commission of the felony; rather it included only those killings where the causation of the homicide was direct, *i.e.*, where the fatal act was committed by the defendant or a co-felon in furtherance of the unlawful purpose.¹¹ "[I]n order for a felon to be guilty of the homicide, the homicidal act (as in agency) must be either actually or constructively his."¹²

The present Illinois statutory scheme reflects the common law analysis. Section 9-1 (a) (3) of the Illinois Criminal Code codifies the felony murder rule and provides in part that a killing "without lawful justification" is murder if committed while "attempting or committing a forcible felony"¹³ other than

9. Professor Perkins observed that the phrase "man-endangering-state-of-mind" means "every attitude of mind which includes (1) an intent to kill, or (2) an intent to inflict great bodily injury, or (3) an intent to do an act in wanton and willful disregard of an unreasonable human risk. . ." Perkins, *The Law of Homicide*, 36 J. CRIM. L.C. & P.S. 391, 407 (1946).

10. A widely accepted explanation of the origin of the doctrine is that at early common law, most, if not all, felonies were punishable by death so that it was of little consequence whether the felon was hanged for the initial felony or the homicide committed in furtherance of that felony. A general discussion of the historical development of the felony murder rule is found in Crum, *Causal Relations and the Felony Murder Rule*, 1952 WASH. U.L.Q. 191; Moesel, *A Survey of Felony Murder*, 28 TEMP. L.Q. 453 (1955). The doctrine has been abandoned in England since 1957. The English Homicide Act of 1957, 5 & 6 Eliz. 2, c. 11, § 1 provides:

Where a person kills another in the course or furtherance of some other offense, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offense.

11. See *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958): "In adjudging a felony murder, it is to be remembered at all times that the thing which is imputed to a felon for a killing incidental to his felony is *malice* and *not the act of killing*. The mere coincidence of homicide and felony is not enough to satisfy the requirement of the felony murder doctrine." *Id.* at 490, 137 A.2d at 476.

12. *People v. Wood*, 8 N.Y.2d 48, 52, 167 N.E.2d 736, 739 (1960), citing the early American cases which adhered to the agency theory of liability and refused to impute to a felon the lethal act of a non-felon; *Commonwealth v. Campbell*, 89 Mass. (7 Allen) 541 (1863), (rioters protesting the Civil War draft not guilty of murder for the accidental shooting of a bystander by a soldier attempting to suppress the riot). *Butler v. People*, 125 Ill. 641, 18 N.E. 338 (1888); see text accompanying note 20 *infra*.

13. ILL. REV. STAT. ch. 38, § 2-8 (1973) defines a forcible felony as "treason, murder, voluntary manslaughter, rape, robbery, burglary, arson, kidnapping, aggravated battery and any other felony which involves the use or threat of physical force or violence against any individual."

voluntary manslaughter."¹⁴ Thus under the Illinois codification, the felony murder rule imputes intent to the homicidal act but does not impute the homicidal act from one person to another. Section 9-1 of the felony murder statute refers to a person "who kills", but does not expressly make his co-felons criminally liable. The responsibility of one person for the actions of another evolved with the development of the doctrine of accountability. Under this principle a defendant is held accountable for the acts of a co-felon committed in furtherance of the felony. The accountability principle was recognized early in Illinois in *Brennan v. People*,¹⁵ and is codified in section 5-2(c) which provides that:

A person is legally accountable for the conduct of another when: (c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission he solicits, aids, abets, agrees, or attempts to aid such other person in the planning or commission of the offense.

Thus through the juxtaposition of the felony murder rule and the separate principle of accountability, a felon can be held liable for murder when a *co-felon* kills someone in furtherance of the felony. The imposition of liability under the common law application of the felony murder doctrine required the presence of two factors: 1) the fatal act must have been done by the defendant or a co-felon and 2) it must have been committed in furtherance of the felony.

Language reflecting an adoption of the agency theory of liability underlying the traditional application of the felony murder doctrine was articulated in early decisions rendered by the Illinois Supreme Court. Although the fatal acts in these cases were committed by the defendant or a co-felon, the cases gave the court the opportunity to set forth the underlying principles which would be used in later cases to decide the extent of criminal liability for the homicidal acts of non-felons.

In *Brennan v. People*,¹⁶ a defendant appealed his murder conviction based on the homicidal act of one of his co-felons. Using an agency rationale consistent with the traditional application of the felony murder doctrine, the *Brennan* court held that the defendant could be found guilty of murder provided the victim was "killed in the attempt to execute the common purpose. If several persons conspire to do an unlawful act, and death happens in the prosecution of the common object, all are alike guilty of the homicide. The act of one of them done in furtherance of the original design, is, in the

14. ILL. REV. STAT. ch. 38, § 9-1(a)(3) (1973) provides:

(a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death (3) He is attempting or committing a forcible felony other than voluntary manslaughter.

15. 15 Ill. 511 (1854). In finding defendants responsible for the homicidal act of a co-felon the court observed: "It is sufficient that they combined with those committing the deed to do an unlawful act, such as to beat or rob (the deceased) and that he was killed in the attempt to execute the common purpose." *Id.* at 516.

16. *Id.*

consideration of the law, the act of all."¹⁷ Similar language, holding that in order to impose liability under the felony murder rule, the fatal act must be committed by one of the felons and in furtherance of the felony, was expressed by the court in *Hanna v. People*¹⁸ and *Spies v. People*.¹⁹

*Butler v. People*²⁰ appears to be the first case arising in Illinois where the court had the opportunity to articulate its view concerning the applicability of the felony murder rule when a non-felon kills an innocent victim. In *Butler*, when a town marshall attempted to suppress the rowdy conduct of the Butlers and their companions, they responded by physically attacking him. During the fight the marshall fired his gun and accidentally killed one of the bystanders. Although the court ultimately found the defendants' action was not a felony, thus precluding the operation of the felony murder rule, the *Butler* court set forth a broad rule applicable to all homicides with reasoning clearly applying to situations in which a felony is involved:²¹

No person can be held responsible for a homicide unless the act was either actually or constructively committed by him; and in order to be his act, it must be committed by his hand, or by someone acting in concert with him, or in furtherance of a common design or purpose. Where the criminal liability *arises from the act of another*, it must appear that the act was done in furtherance of the common design, or in prosecution of the common purpose for which the parties were assembled or combined together.²²

Citing *Commonwealth v. Campbell*,²³ an early Massachusetts case which held that a felon could not be held responsible for the fatal act of one resisting

17. *Id.* at 516.

18. 86 Ill. 243, 245 (1877). "If the defendant and those indicted with him had a common design to do an unlawful act then in contemplation of the law whatever act any one of them did in furtherance of the original design is the act of all."

19. 122 Ill. 1, 177, 12 N.E. 865, 951 (1887). "Where persons combine to stand by one another in a breach of the peace with a general resolution to resist all opposers, and, in the execution of their design a murder is committed all of the company are equally principals in the murder . . . if the murder be in furtherance of the common design."

20. 125 Ill. 641, 18 N.E. 338 (1888).

21. In *Commonwealth v. Redline*, 391 Pa. 486, 500, 137 A.2d 472, 478 (1958), the court commented: "The rowdysm of the Butlers and their companions was a misdemeanor and not a felony. But the principle involved is the same so far as defendants' criminal responsibility for the marshall's unintentional killing of an innocent third party was concerned. At common law, a homicide committed by one acting in furtherance of a misdemeanor (at least one *malum in se*) is by like token, voluntary manslaughter . . . malice not being imputed since the initial offense was not a felony. And so the jury convicted the Butlers of voluntary manslaughter. But the Supreme Court of Illinois reversed the judgments for the reason . . . that criminal responsibility is not imputable to a wrongdoer for the homicidal effect of a resisting officer's accidental or unintentional killing of an innocent bystander."

22. 125 Ill. at 645, 18 N.E. at 339.

23. 89 Mass. (7 Allen) 541 (1863). *Campbell* appears to be the earliest American case which raised the question of whether a felon is criminally responsible for the fatal acts of a non-felon. See note 12 *supra*.

the felony, the *Butler* court added that it knew of no legal principle which would hold the defendants liable for the acts of the marshall.²⁴

Similar reasoning, reflecting continued adherence to the agency theory of the felony murder rule, was expressed by the court in *People v. Garippo*.²⁵ In *Garippo*, surviving robbers were charged with the murder of an accomplice shot during the course of a robbery by an unknown person. The case was submitted to the jury with instructions which would have allowed conviction even if there were no proof that the fatal act was committed by one of the felons in furtherance of the felony. Citing *Campbell* and *Butler* with approval, the court reversed the convictions noting that, "Under those instructions plaintiffs in error might be held responsible for shooting done by *another person* when there was no concert of action between him and them."²⁶

In the companion cases of *People v. Grant*²⁷ and *People v. Krauser*,²⁸ the defendants participated in an armed robbery of a grocery store. A policeman was killed while attempting to disarm Krauser. The store owner did not see who fired the fatal shot, and Krauser testified that the policeman had control of the gun when it went off. Grant appealed his murder conviction relying on the agency theory that there could be no felony murder unless his co-felon did the fatal shooting. In affirming the murder conviction, the *Grant* court found that the evidence showed beyond a reasonable doubt that during the struggle one of the felons pointed the gun at the policeman even if he did not actually pull the trigger. Adhering to the agency requirement, the court concluded that the fatal act was done by one of the felons.²⁹ "Where two men are engaged in a robbery and *one kills a third party* in pursuance of the robbery both are equally guilty."³⁰

When Krauser appealed his murder conviction, the court reversed for failure to give proper instructions on the defense of insanity. In a lengthy opinion devoted largely to the insanity issue, the court dealt only incidentally with the felony murder issue. In what could be viewed as a shift from the traditional agency theory of liability, however the court said that it was immaterial whose hand held the gun when it was fired. But since the court

24. 125 Ill. at 646, 18 N.E. at 339. "They would be responsible for what they did themselves, and for such consequences as might naturally flow from their acts and conduct, but they never advised, encouraged, or assented to the acts of (the town marshall), nor did they in any manner assent to anything he did and hence they could not be responsible for his conduct toward the deceased."

25. 292 Ill. 293, 127 N.E. 75 (1920).

26. *Id.* at 300, 127 N.E. at 78.

27. 313 Ill. 69, 144 N.E. 813 (1924).

28. 31T Ill. 485, 146 N.E. 593 (1925).

29. The state contended that the trigger was pulled by Grant or Krauser. Grant objected to a jury instruction based on the state's contention because the only testimony presented was that of Krauser who claimed that the policeman had killed himself. The court ruled that the state was entitled to instructions presenting its theory of the case, implying that the question of who committed the fatal act during the struggle for the gun was a question of fact for the jury to decide.

30. 313 Ill. at 71, 144 N.E. at 816 (emphasis added).

attributed the fatal act to Krauser,³¹ even if the gun was in the policeman's hand when fired, the *Krauser* court did no more than apply the agency requirement to a factual determination that the fatal act was committed by a felon in furtherance of the felony.

Surprisingly, *Krauser* was cited as authority for the court's holding in *People v. Payne*,³² which seems to eliminate the agency requirement that the homicidal act be committed by defendant or a co-felon in furtherance of the felony. In *Payne*, the defendant agreed to direct his confederates to a home they could rob. When the armed confederates reached the designated house, one of the occupants fired his gun in an attempt to prevent the robbery. One of the robbers returned the fire and during the exchange of shots the occupant's brother was killed. Although there was no evidentiary finding on who fired the fatal shot, the court affirmed *Payne*'s murder conviction, citing with approval the following passage from the *Krauser* opinion:

It might reasonably be anticipated that an attempted robbery would meet with resistance, during which the victim might be shot either by himself or *someone else in attempting to prevent the robbery*, and those attempting to perpetrate the robbery would be guilty of murder.³³

Thus in *Payne*, the court appears to have shifted from an agency basis for the imposition of criminal liability to a tort concept of proximate cause³⁴ which allows the imposition of liability when a killing is committed by a non-felon resisting the felony, on the rationale that resistance with possible deadly results is a foreseeable consequence of a felon's initial criminal act. Under the proximate cause theory of criminal liability, the felony murder rule not only transfers the *mens rea* underlying the initial felony to the subsequent homicidal act, but by way of extension, also imputes to the felon the lethal act of someone other than himself or a co-felon. Thus under this view, a felon is guilty of murder if he is the initiating cause of a chain of events which results in the death of a human being.³⁵

31. The court did not hold that *Krauser* was responsible for the lethal act of a non-felon. Rather the court found that the act was *Krauser*'s regardless of whose hand actually held the gun when it was fired. "It was the act of (*Krauser*) whether his hand or (the policeman's) held the revolver . . ." 315 Ill. at 506, 146 N.E. 601 (1925).

32. 359 Ill. 246, 194 N.E. 537 (1935).

33. *Id.* at 254, 194 N.E. at 543 (emphasis added).

34. The proximate cause theory of criminal liability adopted by the Pennsylvania Supreme Court in the well known case of *Commonwealth v. Almeida*, 362 Pa. 596, 68 A.2d 595 (1949) (defendant convicted of felony murder when a policeman, responding to felon initiated gunfire killed an innocent bystander), was overruled in *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218, 261 A.2d 550 (1970), which reversed the murder conviction of one of the companions of defendant in the *Almeida* case. In *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958), the court reversed a murder conviction based upon the death of defendant's co-felon shot by a policeman resisting the felony. *Redline* overruled *Commonwealth v. Thomas*, 382 Pa. 639, 117 A.2d 204 (1955) (defendant convicted of murder when his co-felon killed by a robbery victim).

35. In his dissenting opinion in *Redline*, Justice Bell expressed the view that a strong public policy, aimed at discouraging crime, dictated the extension of the felony murder rule: "The brutal

Although *Payne* appears to articulate that the proximate cause theory is a proper basis for the imposition of criminal liability under the felony murder rule, the court fused both agency and proximate cause language when it expressed its holding: "Where several persons conspire to do an unlawful act and another crime is committed *in the pursuit of the common object* all are alike guilty of the crime committed if it is a *natural and probable consequence* of the execution of the conspiracy".³⁶

As authority for its holding, *Payne* relied on the *Krauser* case which made a specific finding that the fatal act in struggling for control of the gun was committed by one of the felons, thus meeting the agency requirement consistent with the traditional application of the felony murder rule recognized by prior Illinois decisions. Additionally, a limitation of the *Payne* holding to its facts would place the decision in accord with two narrow exceptions to the felony murder rule which do permit the imposition of liability for the fatal acts of non-felons. In *Payne*, the felons engaged in a gun battle during which an innocent victim was killed. The "gun battle" cases,³⁷ as well as those cases where a felon uses an innocent victim as a shield for purposes of escape,³⁸ represent well recognized exceptions to the traditional felony murder doctrine. The rationale underlying the imposition of liability in "gun battle" and "shield" situations is that the felon's action in engaging in a gun battle or erecting a shield are sufficiently provocative to be legally equated with the actual fatal act committed by the resisting non-felon.³⁹ An alternate rationale

crime wave which is sweeping and appalling our country can be halted only if the courts stop coddling, and stop freeing murderers, communists, and criminals on technicalities made of straw. The courts seem to have forgotten that justice is not a one-way street—law-abiding communities are entitled, at least equally with criminals, to the protection of the law." 391 Pa. at 514, 137 A.2d at 483.

36. 359 Ill. at 93, 194 N.E. at 543.

37. The California Supreme Court articulated the "gun battle" exception to the traditional application of the felony murder rule in *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965). During an attempted robbery, defendant's accomplice entered a service station with his gun drawn, and was promptly shot and killed by the proprietor. Adhering to the traditional application of the felony murder rule, the court reversed defendant's murder conviction because the fatal act was committed by a non-felon resisting the felony. However the court noted that felons who initiate gun battles could be found guilty of murder if their victims resist and kill "and it is unnecessary to imply malice by invoking the felony murder doctrine." *Id.* at 781. In *People v. Gilbert*, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965) defendants initiated a gun battle during an attempted robbery and one of the felons was killed by a policeman. The court held the surviving felons guilty of murder since they initiated the gun battle. In *Taylor v. Superior Court of Alameda County*, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970) the court broadened its "gun battle" exception to include conduct by felons who engage in gun battles initiated by a robbery victim.

38. Several states have imposed criminal liability for the fatal acts of non-felons where defendants use innocent persons as shields to aid in the felony or escape. *Keaton v. State*, 41 Tex. Crim. 621, 57 S.W. 1125 (1900); *Taylor v. State*, 41 Tex. Crim. 564, 55 S.W. 961 (1900); *Wilson v. State*, 188 Ark. 846, 68 S.W.2d 100 (1934); *State v. Kress*, 105 N.J. Super. Ct. 514, 253 A.2d 481 (1969). These cases present a limited exception to the traditional rule that there is no liability for the fatal acts of non-felons, relying on the rationale that the fatal act is placing the human shield in the path of opposition gunfire.

39. In *Wilson v. State*, 188 Ark. 846, 68 S.W.2d 100 (1934) the court found that the

suggested by some courts is that when a felon engages in acts that are likely to kill, with a conscious disregard for human life, the killing by the non-felon is attributable to the intentional death-inducing act of the felon. Thus since malice can be shown by the facts, it is unnecessary to transfer malice by involving the felony murder doctrine.⁴⁰

Limiting the *Payne* holding to the factual situation which supports it, it is arguable that *Payne* merely stands for the proposition that when a felon engages in a gunfight during the commission of a forcible felony, and an innocent party is killed by one resisting the felony, the homicide is attributable to the felon under a limited exception to the felony murder rule. *Payne* left uncertain whether the court retained the traditional agency view of the felony murder rule, and merely imposed liability because the felons engaged in a gun battle; or whether the decision represents a complete abandonment of the agency requirement in favor of a proximate cause theory of liability.

*People v. Morris*⁴¹ resolved one aspect of this uncertainty. In *Morris*, the defendant and two companions engaged in an armed robbery. When one of the robbery victims resisted, a gunfight erupted and one of the felons was killed by a bullet from his own gun. The Appellate Court for the First District held that a surviving robber could not be held liable for the murder of his accomplice by a non-felon. Adopting the rationale of *Commonwealth v. Redline*⁴² the *Morris* court said that since the victim was a felon, the homicide was justifiable and therefore would not support a murder charge. Expressing its holding in familiar agency language, the court indicated that the felony murder rule would not extend liability for the homicidal acts of non-felons regardless of the status of the victim:⁴³ "In order to meet the requirements of the felony murder doctrine, it is necessary that the conduct causing death was an act done in *furtherance* of the common design to commit a forcible felony."⁴⁴ Thus, if *Payne* represented a departure from the agency requirement of the felony murder rule, *Morris* appears to reflect its reaffirmation.

felon's action in erecting a human shield was as much the cause of the victim's death as if the felon had fired the fatal bullet himself.

40. *Taylor v. Superior Court of Alameda County*, 3 Cal. 3d 578, 91 Cal. Rptr. 275, 477 P.2d 131 (1970). See also *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958), where the court suggested that in the Texas and Arkansas "shield" cases malice was not imputed by defendants' participation in the initial felony, but rather express malice was found in the act of placing an innocent person in the path of hostile gunfire.

41. 1 Ill. App. 3d 566, 274 N.E.2d 898 (1st Dist. 1971).

42. 391 Pa. 486, 137 A.2d 472 (1958). The court reversed a murder conviction based on the killing of the defendant's co-felon by a policeman. The court reasoned that since the killing of the co-felon was justifiable, the defendant could not be convicted for the consequences of the policeman's lawful conduct.

43. The *Redline* distinction, based on the character of the victim, was found without merit in *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218, 261 A.2d 550 (1970). In holding that the felony murder doctrine is not applicable when the killing is done by one resisting the felony, and the victim is an innocent third party, *Myers* represents a complete abandonment of the proximate cause theory of liability by the Pennsylvania Supreme Court. The court commented that it was giving *Almeida* its proper burial, "taking it out of its limbo and plunging it downward into the bowels of the earth." *Id.* at 237, 261 A.2d at 559-60.

44. 1 Ill. App. 3d at 570, 274 N.E.2d at 901.

THE *Hickman* OPINION

It was against this background that the supreme court agreed to hear the *Hickman* appeal. Considering first the wording of the felony murder statute,⁴⁵ the court candidly acknowledged that a literal interpretation could support the defendants' contention that in order for the felony murder rule to apply, the fatal act must be committed by a felon or co-felon in furtherance of the felony.⁴⁶ Conceding its arguability, the court rejected defendants' statutory analysis as being too narrow. In its construction of section 9-1 (a) (3), the court held that a felon can be held accountable for the homicidal act of a non-felon intervening in opposition to the felony on the basis of its prior holding in *People v. Payne*.⁴⁷ The court referred to the *Krauser* passage⁴⁸ cited in *Payne*, and noted further that in the committee comments to section 9-1 (a) (3), the drafters, relying on *Payne*, said that when a killing occurs during the course of a felony it is immaterial whether the killing was committed by the defendant, a co-felon, "or even by a third person trying to prevent the commission of the felony."⁴⁹

Treating *Payne* as standing for the proposition that proximate cause is a proper basis for extending liability for the fatal acts of non-felons under the felony murder rule, the court found that it was the intention of the drafters of the felony murder statute to incorporate therein the *Payne* holding, thus making section 9-1 (a) (3) dispositive of the issue raised in *Hickman*. *Morris* was not cited or distinguished.⁵⁰ In further support of its holding, the court relied on its recent decision in *People v. Allen*,⁵¹ where a policeman was killed when robbers initiated a gun battle in their attempt to escape. Although an investigation was unable to determine whether the fatal shot was fired by a felon or a police officer, the *Allen* court affirmed the defendant's murder conviction, holding that "under the facts of this case the defendant was accountable regardless of who fired the fatal shot."⁵²

Again, as in *Payne*, the *Allen* facts establish the presence of the "gun battle" exception to the traditional application of the felony murder rule.

45. ILL. REV. STAT. ch. 38, § 9-1 (a) (3) (1973). See note 14 *supra*.

46. By the statute's own language, the "person who kills" or performs "the acts which cause the death" must be the same person who is "attempting or committing a forcible felony." The statute makes no provision for a murder charge where the person who kills is acting in opposition to the felony.

47. 359 Ill. 246, 194 N.E. 537 (1935).

48. See text accompanying note 33 *supra*.

49. ILL. ANN. STAT. ch. 38, § 9-1, Committee Comments 9 (Smith Hurd 1972).

50. Presently in Illinois under the *Morris* and *Hickman* decisions, if a policeman shoots and kills a felon, a surviving accomplice would not be charged with murder; but if the bullet missed the felon and hit a bystander, the accomplice would be guilty of murder. Criminal liability based on such a fortuitous event has led one court to comment: "A distinction based on the person killed, however, would make the defendant's criminal liability turn upon the marksmanship of victims and policemen. A rule of law cannot reasonably be based on such a fortuitous circumstance." *People v. Washington*, 62 Cal. 2d 777, 780, 402 P.2d 130, 132, 44 Cal. Rptr. 442, 444 (1965).

51. 56 Ill. 2d 536, 309 N.E.2d 544 (1974).

52. *Id.* at 540, 309 N.E.2d at 546 (emphasis added).

However, the *Hickman* court elected to disregard the distinction between the felon-initiated gunfire present in *Allen* and the unarmed escape attempt in *Hickman*. Rather than comparing the provocative nature of the defendants' conduct in both cases, the court looked only at the similar result stemming from each course of conduct. Accordingly, both the initiation of a gun battle and an unarmed escape attempt were unlawful precipitating factors which effected identical results: "The escape here had the same effect as did the gunfire in *Allen* in that it invited retaliation, opposition and pursuit. Those who commit forcible felonies know they may encounter resistance, both to their affirmative actions and to any subsequent escape."⁵³ Applying clear proximate cause language, the *Hickman* court stated that the fatal shot fired in opposition to the felons' escape was a direct and foreseeable consequence of the defendants' felonious conduct. Since their unlawful acts precipitated the foreseeable act of resistance, the defendants were criminally responsible for the consequences of that resistance.

In concluding, the *Hickman* court acknowledged that a contrary result would obtain in those jurisdictions, which, adhering to the traditional application of the felony murder rule, refuse to extend liability for the fatal acts of non-felons except in "gun battle" or "shield" situations. However, the court stated that Illinois statutory and case law dictated the "preferable" *Hickman* result.

CONCLUSION

That the *Hickman* result was dictated by the statutory language of the felony murder rule or prior case law is questionable. The Illinois felony murder statute makes no provision for the imposition of liability where the fatal act is committed in opposition to a felony; and *Payne*, which the court found to be controlling, articulated a hybrid rationale which fused both agency and proximate cause language in its application of the felony murder rule.

Clearly, the *Hickman* decision established a significant expansion of the felony murder rule in Illinois. In effect, the court has unequivocally adopted a broad tort concept of proximate cause as the basis for imposing criminal liability under the felony murder rule; and more importantly, has elected to use this theory of liability on facts clearly distinguishable from a "gun battle" or "shield" situation. Thus the court has resolved any doubt that the cautious proximate cause language used in prior cases would be limited to the facts there presented. With the *Hickman* decision, liability for the lethal acts of non-felons extends beyond the "gun battle" scenario. Presently in Illinois, absent a *Morris* situation where the victim is a co-felon, the felony murder rule will apply no matter whose act accomplishes the killing, so long as that act is a foreseeable consequence of defendant's felonious conduct.

53. 59 Ill. 2d at 94, 319 N.E.2d at 516.

No other jurisdiction presently extends the felony murder doctrine to impose liability in a *Hickman* situation.⁵⁴ The consistent trend in other jurisdictions has been to restrict the use of the felony murder rule to its common law application, and impose liability only when the homicidal act is committed by a felon or co-felon in furtherance of the felony.⁵⁵ This trend reflects the premise that there must be a more direct causal connection between the criminal conduct of the defendant and the homicide committed than is required by the tort liability concept of proximate cause.

One solution proposed by the American Law Institute in its Model Penal Code, would avoid the harsh effect of the felony murder doctrine in a *Hickman* situation without abolishing the doctrine itself. The Code suggests that the felony murder rule be modified to raise only a *rebuttable* presumption of the *mens rea* required for murder rather than the conclusive presumption that is now operative.⁵⁶ Such a presumption could have been successfully rebutted by the defendants in *Hickman*. Legislative enactment of this type would more properly balance the relationship between criminal liability and moral culpability.

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54. Those jurisdictions which have adopted the proximate cause theory of liability in felony murder cases have limited its application to "gun battle" or "struggle" situations *See* note 4 *supra*.

55. *Commonwealth v. Moore*, 121 Ky. 97, 88 S.W. 1085 (1905); *State v. Majors*, 237 S.W. 486, (1922); *People v. Wood*, 8 N.Y.2d 48, 201 N.Y.S.2d 328, 167 N.E.2d 736 (1960); *Commonwealth v. Balliro*, 349 Mass. 505, 209 N.E.2d 308 (1965); *People v. Washington*, 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130 (1965); *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218, 261 A.2d 550 (1970); *Sheriff, Clark County v. Hicks*, 89 Nev. 78, 506 P.2d 766 (1973).

56. MODEL PENAL CODE § 210.2 (Proposed Official Draft 1962).