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People v. Dekens: The Expansion of the Felony-Murder Doctrine in Illinois

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I. INTRODUCTION

> The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence . . . . [W]hen [Judges] are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance . . . . 'Justice and general utility, such will be the two objectives that will direct our [Judges'] course.'[1]

One of the earliest judicially crafted rules designed to protect the welfare of society was the felony-murder rule.[2] This rule creates liability for murder when an unintended death occurs during the commission of a felony.[3] Judges originally developed the felony-murder rule to comport with the innate objectives of justice and general utility.[4] When this rule is altered in any way, judges must reassess the objectives of justice and general utility that would be served by the rule's restriction or expansion, letting the welfare of society dictate its final form.[5] Justice Cardozo's goals, unfortunately, are more easily articulated than applied.[6]

The felony-murder doctrine[7] historically applied to situations where

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1. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66-67, 75 (1921). Justice Cardozo explained how philosophy, custom, and social welfare helped develop the common law in general and his decisions. *See id. passim.* Justice Cardozo believed that social justice was one of the strongest forces that helped guide judicial decisions, especially when a criminal has taken an innocent life. *See id.* at 65-66. Social justice should "be given such weight as sound judgment dictates." *Id.* at 67.

2. *See* 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.5, at 206-07 & n.4 (1986) (establishing the purpose of the felony-murder rule at early common law).

3. *See id.* at 206; *see also infra* Part II.A.

4. *See* LAFAVE & SCOTT, *supra* note 2, § 7.5, at 206-07 (explaining how the felony-murder rule did not create an injustice at early common law).

5. *See* CARDOZO, *supra* note 1, at 74-75.

6. *See, e.g.*, People v. Dekens, 695 N.E.2d 474, 480 (Ill. 1998) (Bilandic, J., dissenting) (describing the majority opinion as lacking a just analysis); *see id.* at 481 (Heiple, J., dissenting) (implying that the majority decision did not justly interpret the law).

7. The word "doctrine" and "rule" are used interchangeably throughout this Note to acknowledge the different usage by the various judges and authors when referring to felony-murder.

a defendant committed a felony and, in the process, unintentionally killed an innocent victim.[8] Courts implemented the doctrine to help protect victims of felonies from further harm during the commission of those felonies.[9] More recently courts expanded the felony-murder rule to instances where someone other than the felon committed the homicide.[10] In *People v. Dekens*,[11] the Illinois Supreme Court decided the issue of a felon's liability under the rule where the intended victim kills a co-felon.[12] Although other courts have been reluctant to apply the felony-murder doctrine when a police officer kills a co-felon,[13] the Illinois Supreme Court held that a felon can be liable for

8. *See* 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 147, at 295 (15th ed. 1994); *infra* note 35 (discussing the theory of transferred intent); *see also* Commonwealth v. Balliro, 209 N.E.2d 308, 312 (Mass. 1965) (acknowledging that under the felony-murder rule, the felon did not need to intend to kill the victim); Commonwealth v. Redline, 137 A.2d 472, 475-76 (Pa. 1958) (recognizing that malice aforethought is not essential in felony-murder cases).

9. *See* TORCIA, *supra* note 8, § 147, at 300. The purpose of the law was to protect innocent lives. *See id.*; *see also* King v. Commonwealth, 368 S.E.2d 704, 705-06 (Va. Ct. App. 1988); LAFAVE & SCOTT, *supra* note 2, § 7.5, at 206-07.

10. *See* TORCIA, *supra* note 8, § 147, at 300-01 (discussing the possibility of liability when someone other than the felon kills the victim).

11. People v. Dekens, 695 N.E.2d 474 (Ill. 1998).

12. *See id.* at 475.

13. *See* LAFAVE & SCOTT, *supra* note 2, § 7.5, at 207-08 (recognizing that most jurisdictions do not attach liability under the felony-murder doctrine when a party other than the felon or co-felon committed the homicide). *See, e.g.*, People v. Washington, 402 P.2d 130, 134 (Cal. 1965) (establishing that the defendant could not be liable for first-degree murder while committing a first-degree robbery because the homicide must be committed by a felon or a co-felon); Weick v. State, 420 A.2d 159, 163-64 (Del. 1980) (concluding that the felons were not responsible for the death of a co-felon because the felons did not commit the homicide); State v. Crane, 279 S.E.2d 695 (Ga. 1981) (holding that the felon who committed a robbery was not guilty under the felony-murder statute for the murder committed by an intended victim of the crime); State v. Murrell, 585 P.2d 1017, 1019 (Kan. 1978) (noting that the jury acquitted a felon charged with felony-murder because the robbery victim killed the co-felon); Campbell v. State, 444 A.2d 1034, 1042 (Md. 1982) (reversing the surviving co-felon's conviction under the felony-murder rule because during the armed robbery either the police or the robbery victim killed the co-felon); Clark County Sheriff v. Hicks, 506 P.2d 766, 768 (Nev. 1973) (reasoning that the felony-murder rule was inapplicable when the intended victim of the burglary killed the co-felon); Jackson v. State, 589 P.2d 1052, 1053 (N.M. 1979) (concluding that the co-felon was not responsible for the death of his co-felon whom the intended victim killed during the commission of a robbery); State v. Jones, 859 P.2d 514, 515 (Okla. Crim. App. 1993) (holding that the felony-murder doctrine prohibited the prosecution of cases in which someone other than a felon killed the victims); Commonwealth v. Redline, 137 A.2d 472, 482-83 (Pa. 1958) (establishing that an armed robber was not guilty under the felony-murder rule because the police killed the co-felon); Wooden v. Commonwealth, 284 S.E.2d 811, 816 (Va. 1981) (acknowledging that an armed robber could not be responsible for the death of a co-felon when the robbery victim killed the co-felon).

the death of a co-felon under the rule.[14] In *Dekens*, the defendant asserted that attaching liability to a felon when a third party killed a guilty co-felon was beyond the scope of the felony-murder doctrine.[15] The Illinois Supreme Court disagreed in a four to three decision.[16] The majority held that any death that proximately results from the defendant's felony or attempted felony will be punished under the felony-murder doctrine.[17]

This Note first traces the felony-murder doctrine's historical development from a common law doctrine in England,[18] to its development and statutory codification in the United States,[19] and in Illinois.[20] This Note then compares the two theories that have developed to determine the degree of liability that should attach under the felony-murder rule: the agency theory of liability[21] and the proximate cause theory of liability.[22] This Note next discusses the facts of *Dekens*,[23] the lower courts' decisions,[24] the opinion of the *Dekens* majority,[25] and the separate dissenting opinions of Justice Bilandic[26] and Justice Heiple.[27] This Note then criticizes the *Dekens* majority for expanding the felony-murder rule beyond its intended purposes[28] without valid legal precedent.[29] This Note contends that Justice Heiple's opinion, espousing the agency theory of liability for the felony-murder doctrine, is the correct position and should be adopted in Illinois.[30] Finally, this Note predicts that the harsh result of

14. *See Dekens*, 695 N.E.2d at 477.

15. *See id.*

16. *See id.*

17. *See id.* The court only inquired as to "whether the decedent's death [was] the direct and proximate result of the defendant's felony." *Id.* In so holding, the court utilized the proximate cause theory of liability for felony-murder as opposed to the agency theory of liability. *See id.*; *infra* Part II.B.1 (explaining the agency theory of liability); *see also infra* Part II.B.2 (explaining the proximate cause theory of liability).

18. *See infra* Part II.A.

19. *See infra* Part II.B.

20. *See infra* Part II.C.

21. *See infra* Part II.B.1.

22. *See infra* Part II.B.2.

23. *See infra* Part III.A.

24. *See infra* Part III.B.

25. *See infra* Part III.C.

26. *See infra* Part III.D.

27. *See infra* Part III.E.

28. *See infra* Part IV.A.

29. *See infra* Part IV.A.1 (discussing the intended purpose of the felony-murder doctrine); *infra* Part IV.A.2 (discussing the use of the felony-murder rule as a deterrence factor).

30. *See infra* Part IV.B-C.

Dekens will not only fail to reduce the crime rate but will also derogate society's fundamental values of justice and fairness.[31]

II. BACKGROUND

A. The Origin of the Felony-Murder Doctrine in England

The felony-murder doctrine derived from early English common law.[32] Under the common law felony-murder rule, an act that resulted in the death of a person during the commission, or attempted commission, of any felony was a murder.[33] The English common law rule applied irrespective of the defendant's conduct while committing the felony or the potential danger of the specific felony the defendant committed.[34] Therefore, regardless of whether the felon specifically intended to kill or merely intended to commit a felony, the felon was a murderer if a person died.[35]

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31. *See infra* Part V.

32. *See* Norval Morris, *The Felon's Responsibility For the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 58 (1956). Scholars believe English courts first began applying the felony-murder rule in 1535. *See* John S. Anooshian, Note, *Should Courts Use Principles of Justification and Excuse to Impose Felony-Murder Liability?*, 19 RUTGERS L.J. 451, 454 (1988) (citing *Lord Dacres*, 72 Eng. Rep. 458 (K.B. 1535)). In *Lord Dacres*, Lord Dacres and his companions went hunting illegally in a park. *See id.* (citing 72 Eng. Rep. 458 (K.B. 1535)). The group made a prior agreement that any person who defied a member of the group would be killed. *See id.* (citing 72 Eng. Rep. 458 (K.B. 1535)). In accordance with the agreement, one of Lord Dacres' companions killed another person. *See id.* (citing 72 Eng. Rep. 458 (K.B. 1535)). At the time of the killing, Lord Dacres was removed from the group and was not cognizant of the killing; however, he and his companions were charged with murder. *See id.* (citing 72 Eng. Rep. 458 (K.B. 1535)).

33. *See* Jenkins v. State, 230 A.2d 262, 267 (Del. 1967), *aff'd sub nom* Jenkins v. Delaware, 395 U.S. 213 (1969). In 1644, Coke illustrated felony-murder as the following:

> If a man shoots at a wild fowl and accidentally kills a man, that is an excusable homicide because the act of shooting is not unlawful; but if a man shoots at a cock or hen belonging to another man and accidentally kills a man, that is murder because the act in unlawful.

TORCIA, *supra* note 8, § 147, at 295-96.

34. *See* LAFAVE & SCOTT, *supra* note 2, § 7.5, at 206-07 & n.3 (citing the MODEL PENAL CODE § 210.2 cmt. 6 (1980)). The doctrine applies without concern for whether the felon killed the decedent "intentionally, recklessly, negligently, or accidentally and unforeseeably." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 479 (2d ed. 1995).

35. *See* LAFAVE & SCOTT, *supra* note 2, § 7.5, at 206-07; *see also* Powers v. Commonwealth, 61 S.W. 735, 741 (Ky. 1901); Note, *Felony Murder: A Tort Law Reconceptualization*, 99 HARV. L. REV. 1918, 1919 (1986) [hereinafter Note, *Felony Murder*]. At early common law, it was generally accepted that the intent for felony-murder came from the intent to commit the felony. *See* TORCIA, *supra* note 8, § 147, at 295. When an unintended death accompanied an intended felony, the law transferred the intent to perpetrate the felony to the killing. *See id.* at 296-97.

Although few crimes constituted felonies during this period, all of the crimes categorized as felonies[36] carried a mandatory sentence of death.[37] Therefore, when the felony-murder doctrine originated, the felon could be executed for either the initial felony or the death resulting from the felony.[38] Regardless of whether the prosecution initially charged the defendant with a felony, felony-murder, or both, a felony conviction required a sentence of death.[39] Thus, a conviction for felony-murder did not alter the defendant's fate.[40]

Over time, the application of the felony-murder rule became more restrictive.[41] While the legislature classified more crimes as felonies, death was no longer a required punishment for all felonies.[42] Thus, the sentences for some felonies were not as serious as the sentence for murder.[43] The evolution of criminal law sentencing created a need for a reconsideration of the felony-murder doctrine.[44] Thus, the rule was eventually modified through judicial decisions.[45] Even with

36. *Compare* State v. Branson, 487 N.W.2d 880, 881 (Minn. 1992) (claiming "all felonies were punishable by death"), *and* LAFAVE & SCOTT, *supra* note 2, § 7.5, at 207 n.4 (declaring, "all felonies were punishable by death"), *and* TORCIA, *supra* note 8, § 147, at 305 (asserting, "all felonies were punishable by death "), *with Powers*, 61 S.W. at 741 (stating, "practically all felonies were punishable with death "), *and* Commonwealth v. Redline, 137 A.2d 472, 476 (Pa. 1958) (contending "practically all, if not all, felonies were punishable by death").

37. *See Powers*, 61 S.W. at 741 (representing how the impact of the felony-murder doctrine has changed since the early common law); *Branson*, 487 N.W.2d at 881-82 (discussing the development of the felony-murder rule); *Redline*, 137 A.2d at 476 (noting that the sentence for any convicted felon was death).

38. *See Powers*, 61 S.W. at 741-42 (tracing the history of the felony-murder doctrine); *Branson*, 487 N.W.2d at 881-82; *Redline*, 137 A.2d at 476.

39. *See Powers*, 61 S.W. at 741; *Branson*, 487 N.W.2d at 881-82; *Redline*, 137 A.2d at 476 (acknowledging the reasons for the lack of opposition to the felony-murder doctrine in the early common law).

40. *See Powers*, 61 S.W. at 741 (explaining why the extremely strict punishments for felony-murder were acceptable at early common law); *Branson*, 487 N.W.2d at 881-82; *Redline*, 137 A.2d at 476.

41. *See* LAFAVE & SCOTT, *supra* note 2, § 7.5, at 206-11 (hypothesizing that courts wanted to "alleviate the harshness of the rule" because the application of the felony-murder doctrine in modern criminal law differed from early common law).

42. *See* Jenkins v. State, 230 A.2d 262, 268 (Del. 1967), *aff'd sub nom* Jenkins v. Delaware, 395 U.S. 213 (1969) (acknowledging that restrictions to the felony-murder doctrine became necessary as felonies began to encompass lesser offenses).

43. *See Branson*, 487 N.W.2d at 882 (realizing that in modern criminal law there are many offense levels and corresponding punishments for felonies).

44. *See id.* at 881-82 (describing how the common law felony-murder development coincided with the development of modern criminal law).

45. *See* LAFAVE & SCOTT, *supra* note 2, § 7.5, at 207 & n.7. For example, the English Courts in *Regina v. Horsey*, held that liability only attached under the felony-murder doctrine if the homicide was a probable and natural consequence of the felon's action. *See* Regina v. Horsey, 176 Eng. Rep. 129, 131 (Assiz. 1862).

modifications, the rule proved unworkable, and the English courts eliminated the felony-murder rule by 1957.[46]

B. Development of the Felony-Murder Doctrine in the United States

In contrast to England, state legislatures firmly established the felony-murder doctrine in their jurisdictions by 1957.[47] Like its English counterpart,[48] America first adopted the felony-murder doctrine in an unqualified and unlimited form:[49] a death that occurred as a result of the perpetration or attempted perpetration of a felony was murder.[50] Despite the constant criticisms[51] of the felony-murder rule and its subsequent abolition in England, the rule has remained imbedded in the criminal law system of the United States.[52] The felony-murder rule has been sustained in almost[53] all American jurisdictions, even if not in its original form.[54] Through various

46. *See* Anooshian, *supra* note 31, at 455 (citing Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11, § 1 (Eng.)) (abolishing the felony-murder doctrine through a legislative statute). The English courts found the rule to be impracticable because the amount of crimes categorized as felonies broadened, and the corresponding sentence of death was too harsh to impose for all homicides that occurred during the commission of any of the numerous felonies. *See id.*

47. *See infra* note 63 (listing state felony-murder statutes); *see generally* TORCIA, *supra* note 8, § 147 (examining how the felony-murder doctrine was codified in jurisdictions in the United States).

48. *See supra* notes 32-40 and accompanying text for an explanation of the English felony-murder doctrine.

49. *See* Thomas R. Hoecker, Comment, *Felony Murder in Illinois*, 1974 U. ILL. L. F. 685, 685-86 (1974) (describing the transition of the felony-murder rule from England to the United States).

50. *See* Jenkins v. State, 230 A.2d 262, 267 (Del. 1967), *aff'd sub nom.* Jenkins v. Delaware, 395 U.S. 213 (1969) (describing the common law definition of the felony-murder rule).

51. *See* Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 446-53 (1985) (noting that those opposed to the rule characterize it as "an insupportable legal fiction" and an unjust "legal proposition"). The felony-murder doctrine often results in an unjust outcome. *See* DRESSLER, *supra* note 34, at 481. If two people commit the same felony, they should both be punished similarly. *See id.* Thus, if one of the felons unintentionally kills another while committing the felony, that person has no more culpability than the other felon and should not be subject to the stringent sentences designated for murderers. *See id.*

52. *See* Morris, *supra* note 32, at 58-59 (commenting on the establishment of the felony-murder doctrine in the United States).

53. Two jurisdictions have abolished the felony-murder rule by state statute. *See* HAW. REV. STAT. ANN. § 707.701 (Michie 1998) and KY. REV. STAT. ANN. § 507.020 (Michie 1997). Michigan has abolished the felony-murder rule by common law. *See* People v. Aaron, 299 N.W.2d 304, 328-29 (Mich. 1980).

54. *See* LAFAVE & SCOTT, *supra* note 2, § 7.5, at 206.

modifications of state criminal law,[55] the felony-murder doctrine has changed considerably.[56]

Jurisdictions have restricted the felony-murder doctrine in four distinct ways.[57] First, states have reduced the types of felonies applicable under the felony-murder doctrine.[58] Second, jurisdictions have given stricter interpretations to the proximate cause element.[59] Third, states have shortened the time period in which both the felony and the death must occur.[60] Finally, jurisdictions have directed that the death of the victim must be independent of the intended felony for felony-murder liability to attach.[61]

States have also modified the scope of the felony-murder rule through the codification of the common law rule.[62] Through statutes,

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55. *See id.* § 7.5 at 206-11. The restrictions limited the use and effect of the felony-murder rule. *See id.*

56. *See id.* § 7.5 at 206-07. The changes were necessary because absurd results were possible without the modifications:

> [S]uppose a statute makes it a felony to sell intoxicating liquor; yet if the purchaser should drink so much as to fall asleep in a blizzard on the way home and die of exposure, the seller ought not to be deemed a murderer, even through the felony actually caused the death in the sense that, but for the felony, the death would not have occurred. It is a felony to make a false tax return; but if the revenue agent investigating the taxpayer's return should slip on the taxpayer's front steps and break his neck, the taxpayer ought not to be guilty of murder, though his act in filing a false return may have been an actual cause of death.

Id. § 7.5 at 207 (footnote omitted).

57. *See id.* § 7.5 at 206.

58. *See id.* § 7.5 at 208-09. Felony-murder is often restricted to those felonies classified as inherently dangerous to life. *See id.* § 7.5 at 208. *See, e.g.*, Jenkins v. State, 230 A.2d 262, 269 (Del. 1967), *aff'd sub nom.* Jenkins v. Delaware, 395 U.S. 213 (1969) (establishing that the felony-murder rule is limited to felonies that are "foreseeably dangerous to human life").

59. *See* LAFAVE & SCOTT, *supra* note 2, § 7.5, at 206. *See, e.g.*, State v. Martin, 573 A.2d 1359, 1375 (N.J. 1990) (concluding that the homicide "must be the probable consequence of the defendant's conduct").

60. *See* LAFAVE & SCOTT, *supra* note 2, § 7.5, at 206. *See, e.g.*, State v. Leech, 790 P.2d 160, 163 (Wash. 1990) (deciding that the killing must have a causal relationship and occur in the same time and place as the actual felony).

61. *See* LAFAVE & SCOTT, *supra* note 2, § 7.5, at 206. *See, e.g.*, People v. Ireland, 450 P.2d 580, 590 (Cal. 1969) (holding that the felony-murder doctrine did not apply when the felony was an "integral part of the homicide"). In *Ireland*, the California Supreme Court reasoned that a defendant could not be charged with felony-murder if "it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged." 450 P.2d at 590 (footnote omitted) (emphasis in original). Thus, the defendant in *Ireland* could not be charged with felony-murder for stabbing his wife because the offense of murder included felonious assault. *See id.*

62. *See* Hoecker, *supra* note 49, at 685-86. Generally, state statutes did not establish new crimes. *See* 40 AM. JUR. 2D *Homicide* § 72, at 365 (1968). Most often the states

state legislatures have created various deviations and restrictions to the felony-murder doctrine.[63] Most states[64] have maintained that no specific mental element is necessary to convict the accused of felony-murder.[65] Furthermore, most state statutes are similar in that they

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merely modified the common law rule when the states codified it. *See id.*

63. *See* Note, *Felony Murder*, *supra* note 35, at 1919. An example of a statute reads as follows:

> All murder which shall be committed in the perpetration of, or attempt to perpetrate, any rape in any degree, sexual offense in the first or second degree, sodomy, mayhem, robbery, carjacking or armed carjacking, burglary in the first, second, or third degree, a violation . . . of this article concerning destructive devices, kidnapping as defined in . . . this article, or in the escape or attempt to escape from . . . any institution or facility under the jurisdiction of the Division of Correction of the Division of Pretrial Detention and Services, or from any jail or penal institution in any of the counties of this State, shall be murder in the first degree.

MD. ANN. CODE art. 27, § 410 (Supp. 1998). *See also* ALA. CODE § 13A-6-2(3) (Michie 1994); ALASKA STAT. § 11.41.110(3) (Michie 1998); ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (West Supp. 1998); ARK. CODE. ANN. § 5-10-104(a)(4) (Michie 1997); CAL. PENAL CODE § 189 (West Supp. 1998); COLO. REV. STAT. ANN. § 18-3-102(1)(b) (West 1990 & Supp. 1998); CONN. GEN. STAT. ANN. § 53a-54c (West 1994 & Supp. 1998); DEL. CODE ANN. tit. 11, § 636(a)(6) (Michie 1987 & Supp. 1994); D.C. CODE ANN. § 22-2401 (1981); FLA. STAT. ANN. § 782.04(1)(a)(2) (West 1992 & Supp. 1999); GA. CODE ANN. § 16-5-1(c) (1996); IDAHO CODE § 18-4003(d) (1997); 720 ILL. COMP. STAT. 5/9-1(a)(3) (West 1996); IND. CODE ANN. § 35-42-1-1(2)-(3) (West 1998); IOWA CODE ANN. § 707.2(2) (West 1993); KAN. STAT. ANN. § 21-3401(b) (1995); LA. REV. STAT. ANN. § 14:30.1(2)(a) (West 1997 & Supp. 1999); ME. REV. STAT. ANN. tit. 17-A, § 202(1) (West 1997 & Supp. 1998); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1998); MICH. COMP. LAWS ANN. §750.316(1)(b) (West Supp. 1998); MINN. STAT. ANN. § 609.19(2) (West 1987 & Supp. 1999); MISS. CODE ANN. § 97-3-19(1)(c) (1994 & Supp. 1998); MO. ANN. STAT. § 565.021(1)(2) (West Supp. 1998); MONT. CODE ANN. § 45-5-102(1)(b) (1997); NEB. REV. STAT. § 28-303(2) (1995); NEV. REV. STAT. § 200.030(1)(b) (1997); N.H. REV. STAT. ANN. § 630:1-b(1)(b) (1996); N.J. STAT. ANN. § 2C:11-3(a)(3) (West 1995 & Supp. 1998); N.M. STAT. ANN. § 30-2-1 (Michie 1978 & Supp. 1998); N.Y. PENAL LAW §125.25(3) (McKinney 1997); N.C. GEN. STAT. § 14-17 (1997); N.D. CENT. CODE § 12.1-16-01(1)(a) (1997); OHIO REV. CODE ANN. § 2903.1(B) (West 1994); OKLA. STAT. ANN. tit. 21, § 701.7B (West 1998); OR. REV. STAT. ANN. § 163.115(1)(b) (West 1990 & Supp. 1998); PA. STAT. ANN. tit. 18, § 2502(b) (West 1998); R.I. GEN. LAWS § 11-23-1 (1994); S.D. CODIFIED LAWS § 22-16-4 (Michie 1998); TENN. CODE ANN. § 39-13-202(a)(2) (1997 & Supp. 1998); TEX. PENAL CODE ANN. § 19.02(b)(3) (West 1994); UTAH CODE ANN. § 76-5-202(1)(d) (1995 & Supp. 1998); VT. STAT. ANN. tit. 13, § 2301 (1998); VA. CODE ANN. § 18.2-31 (1)(4)(5) (Michie 1996 & Supp. 1998); WASH. REV. CODE ANN. § 9A.32.030(1)(c) (West 1988 & Supp. 1999); W. VA. CODE § 61-2-1 (1997); WIS. STAT. ANN. § 940.03 (West 1996); WYO. STAT. ANN. § 6-2-101(a) (Michie 1997).

64. Several states have enacted statutes that compel a specific mental state. For example, in Arkansas the death must have occurred "under circumstances manifesting extreme indifference to the value of human life." ARK. CODE ANN. § 5-10-102(a)(1) (Michie 1997). In Delaware, liability attaches if "the person recklessly causes the death of another person." DEL. CODE ANN. tit. 11, § 636(a)(2) (1995).

65. *See* Note, *Felony Murder*, *supra* note 35, at 1919. The statute requires a mental state for a conviction under other forms of murder. *See id.* Courts have characterized the

establish that a person who commits a felony and kills another person during the felony can be convicted of murder under the felony-murder rule.[66]

Nonetheless, the states differ when the fact situation strays from the common scenario where the felon unintentionally kills the victim.[67] Controversy arises when courts must decide the felon's criminal liability for homicides committed by a party who is not the felon.[68] Courts have used varying theories of liability to guide their determination.[69] Primarily, courts have utilized the following two theories of liability in applying the felony-murder doctrine: the agency theory[70] of liability and the proximate cause theory[71] of liability.[72]

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felony-murder rule as either a theory of strict liability or transferred intent. *See* Roth & Sundby, *supra* note 51, at 453-60. Under transferred intent, culpability for the homicide is established by transferring the intent to commit the felony to the intent to commit murder. *See id.* at 453-54. Conversely, strict liability justifies culpability through establishing that someone committed a felony and a homicide occurred; no separate mental state is necessary. *See id.* at 457. If a defendant committed a felony and a death occurred, the defendant is strictly liable for the death because the defendant also committed the felony. *See, e.g.*, People v. Hall, 683 N.E.2d 1274, 1280 (Ill. App. Ct. 1997) (holding the felon liable for a homicide regardless of whether the killing was reckless or accidental).

66. *See* Morris, *supra* note 32, at 59.

67. See Case Note, *Criminal Law—Application of Felony Murder Rule Sustained Where Robbery Victim Killed Defendant's Accomplice*, 5 DEPAUL L. REV. 298, 302 (1956) [hereinafter, *Application of Felony Murder Rule*] (noting that jurisdictions deviate when the situation is more complex than what is generally provided for in the felony-murder statutes).

68. *See* Morris, *supra* note 32, at 59-61 (establishing that courts must address whether felons are murderers due to their felonies irrespective of who killed the victim).

69. *Compare* Campbell v. State, 444 A.2d 1034, 1042 (Md. 1982) (holding the defendant not guilty under the felony-murder rule because the court applied the agency theory of liability), *with* People v. Hernandez, 624 N.E.2d 661, 665-66 (N.Y. 1993) (utilizing the proximate cause theory of liability to hold the defendant guilty under the felony-murder doctrine).

70. Agency is "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." RESTATEMENT (SECOND) OF AGENCY § 1, at 7 (1957). Courts define the agency theory of liability as, "not extend[ing] to a killing, although growing out of the commission of the felony, if directly attributable to the act of one other than the defendant or those associated with him in the unlawful enterprise." State v. Canola, 374 A.2d 20, 23 (N.J. 1977); *see also infra* Part II.B.1.

71. The test for proximate cause is "that which determines an injury to be the proximate result of negligence only where the injury is the natural or reasonable and probable consequence of the wrongful act." 57A AM. JUR. 2D *Negligence* § 509, at 495 (1989). The courts describe the proximate cause theory of liability for the felony-murder rules as, "any death proximately resulting from the unlawful activity–notwithstanding the fact that the killing was by one resisting the crime." People v. Lowery, 687 N.E.2d 973, 975-76 (Ill. 1997); *see also infra* Part II.B.2.

72. *See* State v. Branson, 487 N.W.2d 880, 882-83 (Minn. 1992) (distinguishing the two different theories of liability that can be applied in a felony-murder case).

1. Agency Theory of Liability

A majority of the jurisdictions in the United States have endorsed the agency theory of liability for felony-murder.[73] Under the agency theory, "the doctrine of felony-murder does not extend to a killing, although growing out of the commission of the felony, if directly attributable to the act of one other than the defendant or those associated with him in the unlawful enterprise."[74] For a person to be responsible for the killing of another under the felony-murder doctrine, the action must be actively or constructively his own.[75] Therefore, the defendant or a person acting in concert or advancing a common purpose with the defendant must commit the act.[76] Under the agency theory, a felon is not liable when the felon's victim or a bystander commits a homicide.[77]

States adopted the agency theory of liability to comport with the basic rules of criminal responsibility.[78] These rules generally limit a person's responsibility to his own actions and the actions committed by his agents in furtherance of a mutual criminal purpose.[79]

2. Proximate Cause Theory of Liability

Of the states that have adopted a specific felony-murder theory of

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73. *See, e.g.*, Weick v. State, 420 A.2d 159, 161-62 (Del. 1980); State v. Garner, 115 So. 2d 855, 861-64 (La. 1959); Campbell v. State, 444 A.2d 1034, 1037 (Md. 1982); Commonwealth v. Balliro, 209 N.E.2d 308, 313 (Mass. 1965); State v. Rust, 250 N.W.2d 867, 875 (Neb. 1977); Clark County Sheriff v. Hicks, 506 P.2d 766, 768 (Nev. 1973); Jackson v. State, 589 P.2d 1052 (N.M. 1979); State v. Oxendine, 122 S.E. 568, 570 (N.C. 1924); State v. Jones, 859 P.2d 514, 515 (Okla. 1993); Commonwealth v. Redline, 137 A.2d 472, 482-83 (Pa. 1958); State v. Severs, 759 S.W.2d 935, 938 (Tenn. Crim. App. 1988); Wooden v. Commonwealth, 284 S.E.2d 811, 816 (Va. 1981). Georgia and Minnesota have both applied an agency approach without formally adopting the agency theory of liability. *See* State v. Crane, 279 S.E.2d 695, 696 (Ga. 1981); *Branson*, 487 N.W.2d at 885.

74. *Canola*, 374 A.2d at 23 (examining the agency theory of liability for the felony-murder doctrine).

75. *See Garner*, 115 So. 2d at 861.

76. *See id.* (establishing that a defendant cannot be responsible for a third party's actions during the commission of a felony).

77. *See, e.g.*, People v. Washington, 402 P.2d 130, 133 (Cal. 1965); *Crane*, 279 S.E.2d at 696; Commonwealth v. Moore, 88 S.W. 1085, 1087 (Ky. 1905); *Campbell*, 444 A.2d at 1042; *Branson*, 487 N.W.2d at 885; *Hicks*, 506 P.2d at 768; *Jackson*, 589 P.2d at 1053; *Jones*, 859 P.2d at 515; *Redline*, 137 A.2d at 482-83; *Wooden*, 284 S.E.2d at 816.

78. *See Campbell*, 444 A.2d at 1038 (examining why states adopt the agency theory of liability for the felony-murder rule).

79. *See id.* The criminal justice system does not commonly extend liability for criminal acts as far as tort liability extends. *See id.*

liability,[80] only a minority has applied the proximate cause theory of liability.[81] Under the proximate cause theory, liability attaches "for *any* death proximately resulting from the unlawful activity—even the death of a co-felon—notwithstanding the killing was by one resisting the crime."[82] For liability to attach in proximate cause jurisdictions, the homicide must be the proximate result of the felon's actions.[83]

States embrace the proximate cause theory of liability to ensure that those who commit felonies that endanger human lives are held responsible for any resulting deaths.[84] To achieve this purpose, the proximate cause theory for felony-murder attempts to function as a reasonable extension of criminal liability.[85] The courts that utilize the proximate cause theory assert that a reasonable application of the theory ensures that a felon is not liable for the superseding acts of a third party.[86] Thus, the courts conclude that the adoption of the proximate cause theory does not create unlimited criminal liability when applied to the felony-murder rule.[87]

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80. Georgia and Minnesota have not explicitly adopted a theory of liability because their felony-murder statutes clearly indicate how to apply the rule. *See supra* note 73.

81. *See, e.g.*, Johnson v. State, 482 S.W.2d 600, 604-05 (Ark. 1972) (holding that a defendant or co-felon who used a victim as a shield to escape from a burglary can be guilty of felony-murder even though the defendant or co-felon did not fire the fatal shot); Mikenas v. State, 367 So. 2d 606, 608-09 (Fla. 1978) (defining felony-murder to include the killing of a co-felon by a police officer); People v. Dekens, 695 N.E.2d 474, 475 (Ill. 1998) (applying the proximate cause theory of liability to determine that a defendant can be guilty of murder when his co-felon is killed by the intended victim of the crime); State v. Martin, 573 A.2d 1359, 1375 (N.J. 1980) (convicting the defendant of felony-murder because the death was causally connected to the felony); People v. Hernandez, 624 N.E.2d 661, 662 (N.Y. 1993) (affirming the conviction of the defendants for the murder of a police officer who a fellow officer killed following the defendant's attempted robbery); Miers v. State, 251 S.W.2d 404, 408 (Tex. Crim. App. 1952) (concluding that the defendant was responsible for the death of the victim who accidentally shot himself during a brawl with the defendant); State v. Oimen, 516 N.W.2d 399, 401 (Wis. 1994) (holding the defendant guilty of felony-murder because he proximately caused his co-felon's death).

82. State v. Canola, 374 A.2d 20, 23 (N.J. 1977) (explaining the history and breadth of the proximate cause theory of liability).

83. *See Hernandez*, 624 N.E.2d at 662. "[C]riminal liability will adhere only when the felons' acts are a sufficiently direct cause of the death. When the intervening acts of another party are supervening or unforeseeable, the necessary causal chain is broken, and there is no liability for the felons." *Id.* at 665-66 (citations omitted); *see also* DRESSLER, *supra* note 34, at 488.

84. *See Hernandez*, 624 N.E.2d at 666 (stating that it is of no consequence "[t]hat other States choose more narrow approaches" when applying the felony-murder rule).

85. *See id.* at 665.

86. *See id.* at 665-66 (discussing that it is a question for the jury to determine if a police officer that kills a person while attempting to stop a felony is a superseding cause).

87. *See id.* at 665-66. Although the court does not seek to create unlimited liability,

C. *Felony-Murder Doctrine in Illinois*

Illinois, along with a minority of other states,[88] espouses the proximate cause theory of liability for felony-murder.[89] In Illinois, if a death is proximately caused by the felonious[90] actions of the defendant, then murder liability[91] attaches.[92] Most importantly, the facts surrounding each felony must be considered closely, on a case-by-case basis, to determine if the murder was a result of the commission of the felony.[93]

1. Statutory Authority

The Illinois legislature first recognized the felony-murder rule in 1827.[94] In 1961, during the recodification of the Illinois Criminal Code, the legislature discussed the elimination of the felony-murder rule.[95] The doctrine's firm establishment within the fabric of Illinois criminal law, however, proved to be more powerful than any criticism

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it concluded that "[m]ore than civil tort liability must be established[.]" *Id.* at 665.

88. *See supra* note 81 (listing decisions in which the courts adopted the proximate cause theory of liability for the felony-murder doctrine).

89. *See* People v. Lowery, 687 N.E.2d 975, 975-76 (Ill. 1997); *see also infra* Part II.C.2 (discussing how the Illinois Supreme Court established the proximate cause theory of liability for the felony-murder rule).

90. Felonious is "[a] technical word of law which means done with intent to commit crime, *i.e.*, criminal intent." BLACK'S LAW DICTIONARY 617 (6th ed. 1990).

91. *See supra* Part II.B.2 (defining the proximate cause theory of liability for the felony-murder rule).

92. *See Lowery*, 687 N.E.2d at 975-76. In *Lowery*, the defendant was in the course of committing an armed robbery when a struggle ensued and the victim obtained the gun. *See id.* at 975. The defendant ran from the scene of the crime. *See id.* When the victim of the robbery attempted to shoot the fleeing defendant, the victim instead killed an innocent bystander. *See id.* The court, applying the proximate cause theory of liability, held the felon liable for the death of the bystander under the felony-murder doctrine. *See id.* at 979.

93. *See id.* at 977-78. The time and place of the murder are not as relevant as whether the commission of the actual felony caused the death. *See id.* at 978-79.

94. *See* Roger Joslin, Comment, *Felony Murder in Illinois: Extension Beyond Justification*, 1960 U. ILL. L. F. 158, 158 (1960). The law in 1827 provided, "where such involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder." STATUTES OF ILLINOIS, Criminal Jurisprudence: Crimes and Penalties § 145, at 138 (Gross 1874).

95. *See* 720 ILL. COMP. STAT. ANN. 5/9-1 Committee Comments of 1961, at 15 (West 1993). The Committee Comments to the first-degree murder statute acknowledged the existing debate over abandoning the felony-murder doctrine. *See id.* at Committee Comments of 1961, at 15.

of the felony-murder rule.[96] The Committee Comments[97] concluded that due to the dangerous nature of forcible felonies, deaths resulting from such actions should be categorized as murder without the necessity of additional proof.[98]

The recodified Illinois Criminal Code of 1961[99] divided the offense of first degree murder into the following three general classes: (1) actual intent to kill; (2) acting with knowledge that the acts will or probably will result in death or great bodily harm; and (3) felony-murder.[100] The statute limited liability under the felony-murder doctrine to deaths occurring during the commission of forcible felonies.[101] As in most jurisdictions, the Illinois statute led to

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96. *See id.* at Committee Comments of 1961, at 15.

97. In 1972, Charles H. Bowman revised the Committee Comments. *See id.* at Committee Comments of 1961, at 8.

98. *See id.* at Committee Comments of 1961, at 15.

99. *See* Hoecker, *supra* note 49, at 687. In recodifying the felony-murder rule the substance of the rule remained the same, only the form was altered. *See id.* The chief draftsman of the 1961 recodification commented that the most sizeable change was the "unified arrangement by article and section, and the direct, concise use of modern language." Charles H. Bowman, *The Illinois Criminal Code of 1961*, 50 ILL. B.J. 34, 36 (1961).

100. *See* 720 ILL. COMP. STAT. ANN. 5/9-1 Committee Comments of 1961, at 15 (West 1993). The Illinois First Degree Murder Statute states:

> (a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:
>
> (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
>
> (3) he is attempting or committing a forcible felony other than second degree murder.

720 ILL. COMP. STAT. 5/9-1 (West 1996).

101. *See* 720 ILL. COMP. STAT. 5/9-1(a)(3) (West 1996). Forcible felonies are codified in Illinois as the following:

> treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnapping, kidnapping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual.

720 ILL. COMP. STAT. ANN. 5/2-8 (West 1996). The Committee Comments to the statute stated that the felony-murder doctrine should be restricted to forcible felonies because the previous felony-murder statute attached liability too broadly. *See* 720 ILL. COMP. STAT. ANN. 5/9-1 Committee Comments of 1961, at 15 (West 1993). The committee limited the felonies applicable to the felony-murder doctrine by acknowledging the trend in case law. *See* ILL. COMP. STAT. ANN. 5/9-1 Committee Comments of 1961, at 12. Most of the previous cases in which the felony-murder rule had been applied involved a homicide that occurred during a forcible felony. *See* ILL. COMP. STAT. ANN. 5/9-1

predictable and satisfactory results where the defendant or one of his co-felons perpetrated a felony and committed a homicide.[102] The application of the felony-murder statute was more controversial, however, in situations not explicitly covered by the statute,[103] such as when a non-participant of the felony commits the homicide.[104] Such instances forced the Illinois courts to reinterpret the statute to fit these unique situations.[105]

2. Common Law Development

While the statute codified the presence of the felony-murder rule, it did not clearly guide the courts in its application.[106] Because the statute is silent regarding situations where a person other than the felon commits the homicide, the courts had to determine whether to apply the felony-murder doctrine and which theory of liability should be used to justify its application.[107] Prior to *Dekens*, the Illinois Supreme Court has decided whether the felony-murder statute applied in the following situations: when an intended victim killed an innocent bystander;[108] when either a co-felon or an intended victim killed another intended victim;[109] and when a police officer or a co-felon killed another police officer.[110] In each case, the defendant's liability was dependent on whether the court adopted the proximate cause or agency theory of liability.[111]

Committee Comments of 1961, at 12. *See, e.g.*, People v. Weber, 83 N.E.2d 297 (Ill. 1938) (robbery); People v. Nixon, 20 N.E.2d 789 (Ill. 1939) (burglary); People v. Goldvarg, 178 N.E. 892 (Ill. 1931) (arson).

102. *See* Joslin, *supra* note 94, at 158-59. *See, e.g.*, People v. Nowak, 258 N.E.2d 313, 319 (Ill. 1970) (deciding that an action by a defendant in furtherance of the felony was imputed to all of the defendants that had the intent to commit the felony); People v. Weber, 83 N.E.2d 297, 307-08 (Ill. 1948) (holding that the defendant was guilty of felony-murder when he shot and killed the victim of the felony during an armed robbery).

103. *See* Joslin, *supra* note 94, at 158-59.

104. *See id.* at 160.

105. *See* Case Note, *Application of Felony Murder Rule*, *supra* note 67, at 300-02.

106. *See id.* (recognizing the controversy surrounding the felony-murder doctrine in Illinois). *See generally* 720 ILL. COMP. STAT. 5/9-1(a)(3) (West 1996).

107. *See* Case Note, *Application of Felony Murder Rule*, *supra* note 67, at 298-99. Applying the felony-murder rule is most difficult when a person not involved in committing the crime killed the deceased. *See* Hoecker, *supra* note 49, at 691.

108. *See* People v. Lowery, 687 N.E.2d 973, 975 (Ill. 1997) (holding the felony-murder doctrine did apply); *but see* Butler v. People, 18 N.E. 338 (Ill. 1888) (holding the felony-murder doctrine did not apply).

109. *See* People v. Payne, 194 N.E. 539, 542-43 (Ill. 1935) (holding the felony-murder doctrine did apply).

110. *See* People v. Allen, 309 N.E.2d 544, 549 (Ill. 1974) (holding the felony-murder doctrine did apply).

111. *See* Case Note, *Application of Felony Murder Rule*, *supra* note 67, at 299

Initially, the Illinois Supreme Court implicitly adopted the agency theory of liability.[112] The court held that if a person, not a party to the criminal conspiracy, committed the homicide the felon could not be held responsible under the felony-murder rule.[113] For criminal liability to attach, the act must have been performed by the actor's own "hand" or by another person acting in support of a common intent to commit the felony.[114]

Subsequently, the Illinois Supreme Court constructively overruled the agency theory of liability through the adoption of the proximate cause theory of liability.[115] The court applied the proximate cause theory to a situation in which either an intended victim or co-felon killed the victim.[116] As long as the death was a reasonable and natural

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(establishing that the courts' options were based either on the agency theory of liability or on the proximate cause theory of liability).

112. *See Butler*, 18 N.E. at 339-340. The Illinois Supreme Court stated that "[i]t would be a strange rule of law, indeed, to hold a man liable for a crime which he did not commit, which he did not advise, and which was committed without his knowledge or assent, express or implied[.]" *Id.* at 340; *see also supra* note 70 (defining agency and the agency theory of liability).

113. *See Butler*, 18 N.E. at 339-40. In *Butler*, a marshal was attempting to arrest a member of a group that was disturbing the peace in a crowd. *See id.* at 338. While attempting to make the arrest, another member of the group attacked the marshal. *See id.* The marshal was knocked to the ground and was suppressed. *See id.* While bystanders stopped the fight, the marshal's gun discharged and killed an innocent person in the crowd. *See id.* Subsequently, the man who attacked the marshal was charged with felony-murder because a death occurred while the defendant was committing a felony (unlawful battery). *See id.* at 338-39. The Illinois Supreme Court, however, reversed the defendant's conviction. *See id.* at 340.

114. *See id.* at 339. The defendant could not be held liable under the felony-murder doctrine because there was no existing relationship between the marshal and the defendant to act in concert to commit a felony. *See id.* The defendant and the marshal were enemies not accomplices. *See id.* The defendant did not consent to the marshal killing the victim nor did they conspire to act together. *See id.* at 339-40.

115. *See* Joslin, *supra* note 94, at 159-60. The Illinois Supreme Court decided *People v. Payne* thirty-seven years after deciding *Butler*; however, the *Payne* decision did not mention the precedent that the Illinois Supreme Court established in *Butler*. *See id.* at 160; *see also* People v. Payne, 194 N.E. 539, 543 (Ill. 1935) (ignoring the prior adoption of the agency theory of liability by the Illinois Supreme Court).

116. *See Payne*, 194 N.E. at 543. In *Payne*, the defendant and a group of friends conspired to rob the victim and his brother. *See id.* at 540-41. The defendant did not physically participate in the actual robbery; however, during the robbery, the accomplices became involved in a firearms altercation with the victims. *See id.* at 541. One of the victims was killed, although it could not be determined if he was killed by a felon, the other victim, or himself. *See id.* at 543. Despite not being present at the robbery, the defendant was guilty of murder because he conspired to commit the felony, and the actions of the co-felons were imputed to him. *See id.* at 540-43. Prior to the Illinois Supreme Court decision, the circuit court in a jury trial also applied the proximate cause theory of liability and found the defendant guilty of felony-murder. *See id.* at 540.

consequence of the felony, a court could hold a felon liable for the death of an intended victim regardless of how the victim was killed.[117] Because the felons could have reasonably anticipated that their felonious actions might be met with resistance by the intended victims,[118] the death that ensued from the victim's intervention was a probable result of the felons' actions.[119]

Under the proximate cause theory of liability, the Illinois Supreme Court later extended the application of the felony-murder rule, holding a felon liable for the death of a police officer who was killed by either a fellow officer or a co-felon.[120] The expansion of the felony-murder rule to a scenario in which possibly neither the victim nor co-felon committed the murder required reliance on the proximate cause theory of liability.[121] To justify the use of the theory, the Illinois Supreme Court cited legislative intent,[122] referring specifically to the Committee Comments that accompanied the recodification of the felony-murder statute as advocating the proximate cause theory.[123] In doing so, the court implicitly continued to hold that any death that is a direct and

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117. *See id.* at 543. Irrespective of whether a co-felon or an intended victim of the felony caused the death, the felon was held liable under the felony-murder rule. *See id.*

118. *See id.*

119. *See id.* at 543. The court held that the felons could have reasonably foreseen the death of the intended victim because it was within the scope of the natural and probable consequences of the felony. *See id.*

120. *See* People v. Allen, 309 N.E.2d 544, 549 (Ill. 1974). In *Allen*, the felons attempted to commit a robbery and entered into a gun battle with police officers. *See id.* at 545. One of the police officers was shot and later died from the wounds he sustained. *See id.* It could not be fully determined if one of the other police officers or a felon shot the bullet that killed the victim. *See id.* at 546. Nonetheless, the Illinois Supreme Court determined that liability attached under the felony-murder doctrine, regardless of who fired the fatal shot. *See id.*

121. *See id.* at 545.

122. *See id.* at 548-49. The *Allen* court referred to the following Committee Comments that accompanied the Illinois murder statute:

> The felony-murder class is represented by a number of cases, but none has been found in which the offense which was being perpetrated was other than a *forcible* felony. (*E.g.* robbery; burglary; arson). It is immaterial whether the killing in such a case is intentional or accidental, or is committed by a confederate without the connivance of the defendant . . . or even by a third person trying to prevent the commission of the felony.

720 ILL. COMP. STAT. ANN. 5/9-1 Committee Comments of 1961, at 12-13 (West 1993) (citing *People v. Payne*, 194 N.E. 359 (1935)). Thus, the court reasoned that the citation to *Payne* in the Committee Comments indicated that the legislature intended the felony-murder statute to incorporate *Payne*. *See Allen*, 309 N.E.2d at 548.

123. *See Allen*, 309 N.E.2d at 548-49. *Allen* reached its conclusion on the basis of the holding in *Payne*. *See* Paul M. Van Arsdell, Jr., *Illinois Supreme Court Review 1974-75: Felony Murder Statute Construed*, 1976 U. ILL. L. F. 204, 207. As in *Payne*, the defendant was liable for the death of the police officer regardless of whether a co-felon or a police officer fired the shot. *See Allen*, 309 N.E.2d at 548-49.

reasonable consequence of the felon's actions is within the scope of the felony-murder rule.[124]

In a subsequent case, the Illinois Supreme Court appeared to limit the application of the felony-murder rule by interpreting the felony-murder statute as only extending liability to instances where the decedent is an innocent person.[125] In *People v. Hickman*, the appellate court found the felon responsible under the felony-murder rule when a police officer mistakenly killed another police officer in pursuit of a felon.[126] The appellate court appeared to limit the scope of the felony-murder rule by interpreting the proximate cause theory of liability[127] to mean that "he whose act causes in any way, directly or indirectly, the death of an innocent victim is guilty of murder by virtue of the felony-murder doctrine."[128] The Illinois Supreme Court upheld the appellate court's finding and declared that the description of the felony-murder rule by the appellate court was correct.[129] The court was unclear, however, as to whether this declaration was a rule of general application in felony-murder cases or simply a holding limited to the facts of the case.[130]

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124. *See Allen*, 309 N.E.2d at 548-49 (expanding the holding of *Payne* by applying the felony-murder rule to cases in which either a felon or a police officer kills the victim).

125. *See* People v. Hickman, 319 N.E.2d 511, 514 (Ill. 1974) (holding that the appellate court in *Hickman* correctly interpreted the felony-murder rule). The Illinois Supreme Court decided *Hickman* eight months after deciding *Allen*.

126. *See* People v. Hickman, 297 N.E.2d 582, 586 (Ill. App. Ct. 1993). In *Hickman*, as opposed to *Allen*, it was undisputed that the police officer was shot and killed by a fellow police officer. *See id.* at 583.

127. The Illinois Supreme Court implicitly adopted the proximate cause theory of liability. *See* People v. Payne, 194 N.E. 539, 543 (Ill. 1935); *see also supra* notes 115-19 and accompanying text (discussing *Payne*).

128. *Hickman*, 297 N.E.2d at 586 (interpreting *Payne*). In establishing the applicable definition of the proximate cause theory of liability, the appellate court specifically considered and distinguished the appellate court decision in *People v. Morris*, 274 N.E.2d 898 (Ill. App. Ct. 1971). *See id.* at 585-86. In *Morris*, a third party committed the homicide, but the defendant was not guilty of felony-murder because the third party's acts were not done in furtherance of the plan to commit the felony. *See Morris*, 274 N.E.2d at 901. Therefore, the *Hickman* court concluded that the guilt or innocence of the party that was killed during the commission of a felony was integral to the liability that would be attached under the proximate cause theory of liability. *See Hickman*, 297 N.E.2d at 585-86.

129. *See Hickman*, 319 N.E.2d at 514 (holding that the "appellate court correctly interpreted the felony-murder statute"). The Illinois Supreme Court also explained the appellate court's application of direct and foreseeable consequences as the following: "It is unimportant that the defendant did not anticipate the precise sequence of events that followed. His unlawful acts precipitated those events, and he is responsible for the consequences." *Id.* at 513 (quoting People v. Smith, 307 N.E.2d 353, 355 (Ill. 1974)).

130. *See id.* at 514.

In 1997, the Illinois Supreme Court faced the same fact scenario in which it originally adopted the agency theory of liability over 100 years earlier.[131] This time, however, the court affirmed the application of the proximate cause theory of liability under the felony-murder doctrine.[132] As in the earlier case, the intended victim killed an innocent party during the commission of a felony.[133] The defendant requested that the court reassess the theory of liability previously applied in the cases involving the felony-murder doctrine.[134] Citing public policy,[135] the language of the Illinois felony-murder statute,[136] and legislative intent,[137] the court reaffirmed the proximate cause theory of liability.[138] The court concluded that the killing of an innocent person by an intended victim of the felony could not be masked as an intervening cause or coincidence, and thus the felony-murder doctrine still applied.[139]

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131. *Compare* People v. Lowery, 687 N.E.2d 973 (Ill. 1997) *with* Butler v. People, 18 N.E. 338, 339-340 (Ill. 1888) (holding that a defendant could not be held liable under the felony-murder doctrine when there was no relationship between the person responsible for the homicide and the defendant).

132. *See Lowery*, 687 N.E.2d at 976.

133. *See id.* at 975. After struggling with the intended victim of the armed robbery, the defendant in *Lowery* fled from the scene of the crime. *See id.* The intended victim of the robbery obtained the defendant's gun and proceeded to shoot at the fleeing defendant. *See id.* The intended victim, however, shot and killed a passing woman instead of the defendant. *See id.*

134. *See id.* at 975-77. The court analyzed both theories of liability and assessed the previous Illinois Supreme Court decisions in which it had applied the proximate cause theory of liability. *See id.* (citing People v. Payne, 194 N.E. 539,543; People v. Allen, 309 N.E.2d 544, 548-49 (Ill. 1974); *Hickman*, 319 N.E.2d at 514).

135. *See Lowery*, 687 N.E.2d at 976. The court reasoned that it was consistent with public policy to apply the doctrine of proximate cause to civil and criminal cases. *See id.* In upholding the doctrine, the court reasoned that the "[c]ausal relation is the universal factor common to all legal liability . . . . [T]he individual who unlawfully sets in motion a chain of events which in the natural order of things results in damages to another is held to be responsible for it." *Id.*

136. *See* 720 ILL. COMP. STAT. 5/9-1 (West 1996); *see also Lowery*, 687 N.E.2d at 976 (construing the language of the Illinois felony-murder statute). The *Lowery* court did not justify how the language of the Illinois felony-murder statute explicitly demonstrated a proximate cause theory of liability. *See Lowery*, 687 N.E.2d at 977. Rather, the court arrived at the proximate theory by noting that of the two possible theories, "[w]e fail to see how the plain language of the statute demonstrates legislative intent to follow the agency theory." *See id.*; *see supra* note 100 (quoting the language of the statute).

137. *See Lowery* , 687 N.E.2d at 977; *see also supra* note 122 (citing the Committee Comments utilized by the *Lowery* court to justify the proximate cause theory of liability for the felony-murder rule).

138. *See Lowery*, 687 N.E.2d at 976-77 (affirming that Illinois should not adopt the agency theory of liability for felony-murder).

139. *See id.* at 978. Notably, the court did not recognize what it would consider to be an intervening cause in a felony-murder situation. *See id.* The court merely stated that

III. DISCUSSION

On April 16, 1998, the Illinois Supreme Court decided *People v. Dekens*.[140] In a four to three decision,[141] the court held that the felony-murder rule applied without regard to who killed the victim or the culpability of the deceased.[142] Presented with a case of first impression, the court decided that the felony-murder rule attached liability to the defendant when the intended victim killed the co-felon.[143]

A. *Background of People v. Dekens*

On January 5, 1996, the defendant arranged to sell drugs to an undercover policeman.[144] The defendant and the decedent, Peter Pecchenino, planned to rob the police officer.[145] At the exchange, the defendant approached the police officer with a gun.[146] In response, the police officer discharged several shots from his own gun.[147] Pecchenino was struck by the police officer's shots and died.[148] Subsequently, the defendant was charged with Pecchenino's murder, criminal drug conspiracy, and attempted armed robbery.[149]

B. *Lower Court Decisions*

Relying on an earlier appellate court decision,[150] the trial court judge

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the intended victim's "resistance was in direct response to defendant's criminal acts and did not break the causal chain between defendant's acts and decedent's death." *Id.*

140. People v. Dekens, 695 N.E.2d 474 (Ill. 1998).

141. Justice Miller wrote the opinion joined by Chief Justice Freeman, and Justices Harrison and Nickels. *See id.* at 474-78. Justices Bilandic, McMorrow, and Heiple dissented. *See id.* at 478-81 (Bilandic, J., dissenting) and (Heiple, J., dissenting).

142. *See id.* at 477.

143. *See id.*

144. *See id.* at 475. The defendant's name was Cody Dekens, and the sale was arranged to take place at a residence in Kankakee County. *See id.*

145. *See id.* (stating that the defendant and decedent arranged to commit the robbery at the narcotics sale).

146. *See id.* The defendant threatened the undercover police officer with his gun. *See id.*

147. *See id.* The police officer drew his gun as a result of the defendant's threats. *See id.* The police officer attempted to leave the house but was unable to retreat because Pecchenino grabbed him. *See id.*

148. *See id.* (establishing that the decedent died from wounds sustained by the police officer's shots).

149. *See id.* (charging the defendant under the felony-murder statute for Pecchenino's death).

150. *See* People v. Morris, 274 N.E.2d 898, 901 (Ill. App. Ct. 1971) (*overruled by* People v. Dekens, 695 N.E.2d 474 (Ill. 1998)). In *Morris*, the defendant and two co-felons went into a restaurant to rob the customers. *See id.* at 900. During the robbery, a

dismissed the defendant's felony-murder charge.[151] The trial court determined that felony-murder was only applicable when the death occurred as a result of an action that furthered the felony.[152] The trial court found that the police officer's action of shooting the co-felon did not further the defendant's goal of committing an armed robbery.[153]

The appellate court upheld the trial court's dismissal of the felony-murder charge.[154] The appellate court's decision, however, centered on a different analysis than that of the trial court.[155] The appellate court held that the felony-murder rule was only applicable when the person murdered was an innocent victim.[156] Therefore, the defendant was not liable under the felony-murder rule because a co-felon was killed as opposed to an innocent victim.[157]

C. The Majority's Application of the Proximate Cause Theory

The Illinois Supreme Court overturned[158] the lower courts' decisions by a one Justice majority.[159] In reviewing the felony-murder rule, the Illinois Supreme Court recognized that none of the previous Illinois Supreme Court felony-murder cases specifically addressed the situation where the deceased individual was a party to the crime.[160]

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customer entered the restaurant. *See id.* One of the co-felons struggled with the customer because he would not hand over his wrist watch to the felons. *See id.* While the struggle ensued, three shots were fired from the co-felons gun. *See id.* The co-felon was shot and killed. *See id.* The defendant was tried and convicted in the Circuit Court of Cook County for the murder of his co-felon under the felony-murder statute. *See id.* at 899. On appeal, the Appellate Court in the First District of Illinois overturned the ruling of the circuit court. *See id.* at 901.

151. *See Dekens*, 695 N.E.2d at 475.

152. *See id.* In *Morris*, the court held that when the co-felon struggled with an innocent customer, the act was not done in furtherance of the commission of the felony. *See Morris*, 274 N.E.2d at 901. Therefore, the requirements of the felony-murder doctrine were not satisfied and the surviving felon was not guilty of murder. *See id.*

153. *See Dekens*, 695 N.E.2d at 475. The State appealed the trial court's decision. *See id.*

154. *See id.* The appellate court decision was unpublished. *See id.*

155. *See id.* (concluding that the appellate court reached the same conclusion as the trial court but for different reasons).

156. *See id.* (acknowledging the appellate court's position that the decedent's involvement in the crime was pertinent when determining if liability extended to the defendant under the felony-murder doctrine).

157. *See id.* (pointing to the appellate court's rationale that the felony-murder doctrine was intended to protect innocent victims and was not intended to protect decedents that were accessories to the felony).

158. *See id.* (granting the State's petition for appeal).

159. *See id.*

160. *See Dekens*, 695 N.E.2d at 475-77 (establishing *Dekens* as a case of first impression). The court summarized and assessed the applicability of prior Illinois Supreme Court decisions regarding the felony-murder rule and compared the cases to the

The court concluded, however, that the outcome of the previous cases prompted the application of the felony-murder rule in *Dekens*.[161]

As a threshold matter, the court determined that the proximate cause theory of liability should apply in Illinois.[162] In doing so, the court let the principles of public policy, articulated in a prior Illinois Supreme Court decision,[163] determine whether the defendant should be responsible for any death that was a proximate result of the defendant's felonious actions.[164] Having established the use of the proximate cause theory, the court framed the issue as whether the defendant's felony was the direct and proximate cause of the co-felon's death.[165]

Noting that the felony-murder doctrine is applicable when an intended victim of the felony kills an innocent third party,[166] the court found that the logical progression of the felony-murder doctrine would include an intended victim killing a guilty party that participated in the felony.[167] The court stated that the decedent's actions and involvement in the felony should not displace the defendant's responsibility for the homicide.[168] According to the court's reasoning, the focus of the

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facts in *Dekens*. *See id.* The cases the court surveyed were the following: *People v. Payne*, 194 N.E.2d 539 (Ill. 1935), *People v. Allen*, 309 N.E.2d 544 (Ill. 1974), *People v. Hickman*, 319 N.E.2d 511 (Ill. 1974) and *People v. Lowery*, 687 N.E.2d 973 (Ill. 1997). *See id.*; *see also supra* Part II.C (discussing evolution of the felony-murder rule in Illinois).

161. *See Dekens*, 695 N.E.2d at 477 (stating that the court had previously considered adopting the agency theory, instead of the proximate cause theory, but did not do so).

162. *See id.* at 476-77. The court began its determination with an examination of the progression of the felony-murder rule from the *Payne* decision in 1935 to the *Lowery* decision in 1997. *See id.*; *see also supra* Part II.C (tracing the development of proximate cause liability for felony-murder in Illinois).

163. *See id.* at 476-77 (citing *Lowery*, 687 N.E.2d at 977). Quoting *Lowery*, the court highlighted the following passage:

> It is equally consistent with reason and sound public policy to hold that when a felon's attempt to commit a forcible felony sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act.

Id. at 476 (citing *Lowery*, 687 N.E.2d at 976).

164. *See id.* at 477 (holding that "death proximately related to the defendant's criminal conduct" was actionable under the felony-murder doctrine in Illinois).

165. *See id.* at 695 N.E.2d at 477 (holding that the guilt or innocence of the deceased person was irrelevant in determining liability under the proximate cause theory of liability for felony-murder).

166. *See id.* (citing *Lowery*, 687 N.E.2d at 977-78).

167. *See id.*

168. *See id.* The court stated, "[w]e do not believe that the defendant should be relieved from liability for the homicide simply because of the decedent's role in the offense." *Id.*

felony-murder doctrine was to assess the defendant's actions—not the guilt or innocence of the deceased.[169] The Illinois Supreme Court concluded that the defendant could be charged under the proximate cause theory of felony-murder for the killing of a co-felon by an intended victim of the felony.[170]

Relying on the Illinois Supreme Court's earlier, apparent acceptance of the proposition that the rule could only apply if the decedent were innocent,[171] the defendant argued that the felony-murder rule could not apply if the decedent were a co-felon.[172] Although the Illinois Supreme Court consented to the *Hickman* court's approach, the Court only found it to be applicable to the specific holding of that case.[173] The *Hickman* court's discussion of the limitations regarding the guilt or innocence of the deceased when applying the felony-murder rule was dicta and not the holding endorsed by the Illinois Supreme Court.[174]

The defendant further argued that the Illinois Supreme Court's application of the felony-murder doctrine was incompatible with the true purpose of the felony-murder doctrine.[175] After examining the

169. *See id.* at 477-78 (stating that if the court considered the guilt or innocence of the deceased, the analysis would diverge from the proximate cause theory of liability). The court remarked, "[n]or do we believe that application of the [felony-murder] doctrine depends on whether or not the decedent was an innocent party. To hold otherwise would import the agency theory of felony-murder into our law." *Id.* at 477.

170. *See id.* at 477 (concluding that a felon is criminally liable for the death of a co-felon during the perpetration or attempted perpetration of a felony).

171. *See id.* (citing People v. Hickman, 297 N.E.2d 582, 585-86 (Ill. App. Ct. 1973)). The appellate court in *Hickman*, held that the defendant could be liable for the death of a police officer killed by a fellow police officer under the felony-murder rule. *See Hickman*, 297 N.E.2d at 585-86. In its holding, the *Hickman* court distinguished *People v. Morris*, 274 N.E.2d 898 (Ill. App. Ct. 1971) because *Hickman* dealt with an innocent victim whereas the deceased in *Morris* was a felon. *See Hickman*, 297 N.E.2d at 585. The defendant in *Morris* could not be liable for felony-murder because the deceased contributed to the actions that were the proximate cause of his own death. *See id.* at 586. In *Hickman* , however, an innocent party was killed during the commission of a felony; thus, the felony-murder doctrine was applicable. *See id.*; *see also supra* notes 125-30 and accompanying text (discussing *Hickman).*

172. *See Dekens*, 695 N.E.2d at 477-78.

173. *See id.* at 477. The court explained that the holding in *Hickman* "should be understood as *extending only to the issue actually decided*—whether the defendant *in that case* was liable for murder when the decedent was a police officer who had been shot and killed by another officer." *Id.* (emphasis added).

174. *See id.* (stating that the defendant's argument to solely limit the felony-murder rule to innocent victims was "unpersuasive"); *see also supra* note 130 and accompanying text (discussing the lack of clarity in *Hickman*).

175. *See id.* at 478 (pointing to defendant's claim that the purpose of the felony-murder doctrine was to protect innocent people from becoming the victims of unintended deaths during felonies).

Committee Comments,[176] the Illinois Supreme Court rejected the defendant's argument.[177] The court held that the legislative intent espousing the proximate cause theory would be frustrated if the defendant was not responsible for the death of a co-felon.[178] The proximate cause theory imposes liability on a defendant for any deaths that were a proximate result of the defendant's felonious actions.[179] Thus, the court found that allowing a defendant to escape responsibility when the decedent is a co-felon conflicts with this theory and the legislature's intent.[180]

D. Dissenting Opinion Advocating a Limited Proximate Cause Theory

Justice Bilandic, in his dissent, asserted that the proximate cause theory did not compel the majority's result.[181] He criticized the majority for not explaining how its holding furthered the intent of the felony-murder doctrine.[182] Instead of asking whether the result comported with the purpose of the felony-murder doctrine, the majority only inquired as to whether the defendant's actions in committing a felony proximately caused the death of the co-felon.[183]

The dissent also found fault with the majority's determination of proximate cause.[184] Justice Bilandic asserted that the proximate cause of the co-felon's death was the involvement of the co-felon himself in the felony.[185] The co-felon's actions resulted more directly in his own

176. *See supra* note 95-99, 101, 122 and accompanying text (discussing 720 ILL. COMP. STAT. ANN. 5/9-1 and the corresponding Committee Comments of 1961).

177. *See Dekens*, 695 N.E.2d at 478 (examining the Committee Comments to the section in the Illinois Criminal Code that codified the felony-murder rule).

178. *See id.* (holding that "denying liability when the decedent is a co-felon would conflict with the legislature's adoption of the proximate cause theory"). The Illinois Supreme Court then remanded the case to the circuit court of Kankakee County for further proceedings. *See id.*

179. *See id.* at 477.

180. *See id.* at 478 (establishing that felons should be held responsible for all actions that are a proximate result of the felony).

181. *See id.* at 478-79 (Bilandic, J., dissenting) (criticizing the majority for treating *Dekens* like a tort liability case as opposed to a criminal case); *supra* note 135 (examining how the court in *Lowery* applied the proximate cause theory of liability to both criminal and civil cases).

182. *See Dekens*, 695 N.E.2d at 479 (Bilandic, J., dissenting).

183. *See id.* (Bilandic, J., dissenting) (asserting that the majority did not ask the correct question and thereby did not reach the true issue of the case).

184. *See id.* (Bilandic, J., dissenting).

185. *See id.* (Bilandic, J., dissenting) (stating that, as such, the defendant was not the proximate cause of the co-felon's death).

death than did the defendant's actions.[186] The dissent reasoned that the degree of guilt attached to a defendant when an innocent party is killed during a felony is not the same as when a person actively participating in the felony is killed.[187] Justice Bilandic clearly disapproved of the majority's holding because it did not comport with his notions of justice inherent in the adoption of the felony-murder doctrine.[188]

Furthermore, Justice Bilandic found the majority opinion to have an unsubstantiated foundation in Illinois legislative and judicial law.[189] First, Justice Bilandic maintained that previous Illinois Supreme Court decisions did not dictate the outcome the majority asserted.[190] The majority conceded that none of the prior cases addressed the exact issue presented in *Dekens*.[191] Therefore, the dissent argued that the prior cases did not logically lead to the majority's conclusion that the felony-murder doctrine was applicable in a situation where a co-felon was killed.[192] Second, the dissent claimed that the majority unfairly relied on the Committee Comments.[193] The dissent contended that the Committee Comments did not address the issue that was before the court in *Dekens* and therefore could not adequately support the majority's conclusion.[194]

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186. *See id.* (Bilandic, J., dissenting) (explaining that the decedent assisted in planning the crime during which he was eventually killed).

187. *See id.* (Bilandic, J., dissenting) (criticizing the majority's logic in holding the defendant liable for the death of a person that actively and willingly participated in the crime).

188. *See id.* (Bilandic, J., dissenting). Justice Bilandic contended that the majority frustrated the purpose of the felony-murder doctrine because "the ramifications of the felony-murder doctrine are harsh; a defendant who, it is conceded, intended only to commit a far less serious offense than murder is nonetheless made guilty of first degree murder." *Id.* at 478 (Bilandic, J., dissenting).

189. *See id.* at 479-80 (Bilandic, J., dissenting).

190. *See id.* at 479 (Bilandic, J., dissenting). Justice Bilandic stated that these cases, cited by the majority as clearly supporting its holding, in fact "say nothing of the sort." *Id.* None of these cases, according to Justice Bilandic, considered the issue of whether the application of the felony-murder rule applied to the death of a co-felon. *See id.* Distinguishing the *Lowery* decision, Justice Bilandic noted that the issue there was instead over the killing of an innocent bystander, not a co-felon. *See id.*

191. *See id.* at 476. The majority stated the Illinois Supreme Court had "never addressed the precise question raised" in the *Dekens* case. *See id.*; *see also supra* note 160 (listing the felony-murder rule cases that the majority discussed).

192. *See id.* at 479 (Bilandic, J., dissenting) (finding no prior precedent for the majority's decision).

193. *See id.* at 480 (Bilandic, J., dissenting).

194. *See id.* (Bilandic, J., dissenting). Justice Bilandic stated that the Committee Comments only concluded that it was irrelevant whether a felon or a third person attempting to stop the felony killed the decedent. *See id.*; *see also supra* note 122 (quoting the Committee Comments).

The dissent proposed following the original purpose of the felony-murder doctrine.[195] They concluded that the felony-murder doctrine created liability for murder during a felony even when there was no intent to kill.[196] Intent is not necessary because when a person commits a forcible felony, the probability that death will occur is an "inherent danger."[197] The dissent argued that the felony-murder rule protects innocent people from the inherent danger of a felony.[198] Thus, Justice Bilandic emphasized that the felony-murder rule did not purport to protect felons that were involved in the commission of a crime.[199]

In conclusion, the dissent stated that the majority would have reached a different holding if it followed traditional notions of fairness and justice.[200] The dissent criticized the majority for achieving a result wholly opposed to the intent of the doctrine.[201]

E. Dissenting Opinion Advocating an Agency Theory of Liability

Justice Heiple authored a separate dissenting opinion even more critical of the majority than Justice Bilandic's opinion.[202] Justice Heiple's dissent advocated that a just interpretation of the felony-murder rule mandates the adoption of an agency theory of liability.[203]

Justice Heiple asserted that the majority's application of the felony-murder doctrine wrongly displaces the intent requirement that is necessary for convictions under other types of first-degree murder.[204]

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195. *See id.* at 478 (Bilandic, J., dissenting) (asserting that "[g]iven the harsh consequences of the felony-murder doctrine, I [Justice Bilandic] believe that it should be limited to those situations in which its application achieves the purpose underlying the rule").

196. *See id.* at 478 (Bilandic, J., dissenting) (exemplifying the harsh results of the felony-murder doctrine).

197. *See id.* (Bilandic, J., dissenting) (citing People v. Lowery, 687 N.E.2d 973, 977 (Ill. 1997)).

198. *See id.* (Bilandic, J., dissenting) (citing *Lowery*, 687 N.E.2d at 977) (stating that the legislature was concerned with "protecting the general populace").

199. *See id.* (Bilandic, J., dissenting) (emphasizing that majority's extension of the felony-murder doctrine "dilute[d] the justification for the felony-murder doctrine").

200. *See id.* at 480 (Bilandic, J., dissenting).

201. *See id.* at 478-80 (Bilandic, J., dissenting) (asserting that the majority did not achieve justice because it misapplied the felony-murder doctrine).

202. *See id.* at 480-81 (Heiple, J., dissenting).

203. *See id.* (Heiple, J., dissenting). Interestingly, Justice Heiple joined in a previous Illinois Supreme Court opinion that upheld the use of the proximate cause theory for felony-murder. *See* State v. Lowery, 687 N.E.2d 973, 977 (Ill. 1997). Justice Heiple stated in *Dekens*, however, "I have changed my view of the matter." *Dekens*, 695 N.E.2d at 480 (Heiple, J. dissenting).

204. *See Dekens*, 695 N.E.2d at 480 (Heiple, J., dissenting); *see supra* note 100

Thus, Justice Heiple maintained that a court applies the doctrine correctly only when a defendant is held responsible for a death that resulted from the defendant's actions during the felony.[205] Accordingly, Justice Heiple rejected the application of the felony-murder doctrine when the defendant, or someone acting in concert with the defendant, does not directly perform the actions that result in the victim's death.[206]

In supporting the adoption of the agency theory, Justice Heiple relied on the language of the Illinois felony-murder statute.[207] The language in the statute does not state that a felon is liable for the acts of a third party during the commission of the felony.[208] Justice Heiple asserted that the felon must personally cause the death by "performing the acts which cause[d] the death."[209]

Finally, Justice Heiple dismissed the majority's use of the Committee Comments.[210] Although the Committee Comments directly supported the application of the proximate cause theory of liability,[211] Justice Heiple did not find the Committee Comments to be controlling because the committee only supported its findings with one Illinois Supreme Court case.[212] Justice Heiple asserted that the Committee Comments were nonlegislative and no evidence existed to show how the legislature intended to apply the felony-murder doctrine in Illinois.[213] In conclusion, Justice Heiple maintained that justice

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(quoting Illinois' first degree murder statute); *see supra* note 35 and accompanying text (explaining why there is not a required mental state for felony-murder). Justice Heiple began his dissent with a brief overview of the development of the felony-murder doctrine. *See Dekens*, 695 N.E.2d at 480 (Heiple, J., dissenting); *supra* Part II.A (discussing the origins of felony-murder and how it developed).

205. *See Dekens*, 695 N.E.2d at 480 (Heiple, J., dissenting).

206. *See id.* (Heiple, J., dissenting) (finding that if a third party committed the homicide the felon should not be held responsible under the felony-murder rule).

207. *See id.* at 480-81 (Heiple, J., dissenting); *see also* 720 ILL. COMP. STAT. 5/9-1 (West 1993 & Supp. 1998) (requiring a person to "perform the acts which cause death").

208. *See Dekens*, 695 N.E.2d at 480-81 (Heiple, J., dissenting); *see also* 720 ILL. COMP. STAT. 5/9-1.

209. *Dekens*, 695 N.E.2d at 480-81 (Heiple, J., dissenting) (quoting 720 ILL. COMP. STAT. 5/9-1).

210. *See id.* (Heiple, J., dissenting). The majority discussed how the Committee Comments supported their holding. *See id.* at 478; *supra* notes 95-99, 101, 122 and accompanying text (discussing the Committee Comments in relation to the development of the felony-murder doctrine in Illinois).

211. *See id.* (Heiple, J., dissenting) (citing 720 ILL. COMP. STAT. ANN. 5/9-1 Committee Comments of 1961, at 12-13 (West 1993)).

212. *See Dekens*, 695 N.E.2d at 480-81 (Heiple, J., dissenting). Justice Heiple noted that the committee only cited to the holding in People v. Payne, 194 N.E. 539 (1935). *See id.* (citing 720 ILL. COMP. STAT. 5/9-1 Committee Comments of 1961 at 16).

213. *See id.* (Heiple, J., dissenting).

required Illinois to adopt the agency theory of liability in felony-murder cases.[214]

IV. ANALYSIS

The majority in *Dekens* asserted that the purpose of the felony-murder doctrine is to hold the defendant liable for any deaths that proximately result from the commission of a felony.[215] In interpreting felony-murder so broadly, the Illinois Supreme Court's holding in *Dekens* directly conflicts with the original intent of the doctrine.[216] The court expanded the applicability of the felony-murder rule so that intent can be transferred not only from a different felony,[217] but also from a different person.[218] Furthermore, the court failed to explain how the expansion of the felony-murder doctrine would provide an additional deterrent to crime.[219] In adopting an expanded felony-murder rule, the court improperly relied upon legislative comments rather than the plain meaning of the statute, which suggests an agency theory of liability—a theory that is a "reasonable and just interpretation of the law."[220]

A. *Purpose of the Felony-Murder Doctrine*

The majority incorrectly asserted that the purpose of the felony-murder doctrine is to impose liability on a defendant for all deaths that proximately result from the defendant's felony.[221] The court determined that felons must be liable for all of the foreseeable consequences of their crimes.[222] According to the majority, if felons are not held responsible for the proximate results of their actions, then

214. *See id.* (Heiple, J., dissenting).

215. *See id.* at 476-77 (adopting the proximate cause theory of liability).

216. *See id.* at 478, 480 (Bilandic, J., dissenting); *see also infra* Part IV.A.1 (noting that the majority's decision extends the felony-murder doctrine beyond its original purpose).

217. *See supra* note 35 (explaining how the law transfers the intent to commit a felony to the intent to commit a murder).

218. *See Dekens*, 695 N.E.2d at 478. The effect of the expansion of the felony-murder rule is to enable intent to be transferred from a different person without the proof of that intent. The court did not explain why the expansion was necessary. *See id.*

219. *See id.* at 474-79 (failing to establish how the holding of the *Dekens* case would deter future felonious conduct).

220. *Id.* at 481.

221. *See id.* at 476-77. The majority stated that "the intent [of the felony-murder rule] would be thwarted if we [Justices] did not hold felons responsible for the foreseeable consequences of their actions." *Id.* at 477.

222. *See id.* (establishing that the defendant's liability should not be discharged due to the guilt of the decedent).

the intent of the felony-murder rule is frustrated.[223] The felony-murder rule, however, has two major purposes: (1) to impose liability on a felon for an unintended homicide committed by the felon or someone working in concert with the felon during a felony[224] and (2) to deter a person from committing a felony because of the liability that is attaches if a homicide occurs during the felony.[225]

1. Purpose of the Felony-Murder Doctrine at Inception

Contrary to the reasoning of the majority, the purpose of the doctrine is not furthered if a defendant is punished for a homicide that a victim of the felony committed.[226] The felony-murder doctrine was implemented to hold felons responsible for an unintended death of their victims.[227] Therefore, the felony-murder rule should be confined to the traditional common law boundaries it has always maintained.[228]

The felony-murder doctrine, established in England, created liability for any unintended homicides that occurred in conjunction with a defendant's felony.[229] Later development of the felony-murder doctrine in England[230] established that the doctrine was not intended to hold the defendant responsible for acts that were attributable to others.[231] The scholars who discussed the felony-murder rule focused their attention on instances where either the felon or co-felon actually committed the homicide.[232] In addition, the English court system

223. *See id.* (citing State v. Lowery, 687 N.E.2d 973, 976 (Ill. 1997)).

224. *See infra* Part IV.A.1 (discussing the origins of the felony-murder doctrine as a means to hold felons accountable for accidental deaths which occur during the commission of the felony).

225. *See infra* Part IV.A.2 (discussing the deterrent functions of the felony-murder doctrine).

226. *See* People v. Washington, 402 P.2d 130, 134 (Cal. 1965) (holding that for a felon to be guilty of murder under the felony-murder rule, the act of killing must be committed by the defendant or by his accomplice).

227. *See* Comment, *Felons Can Be Held Responsible under the New Jersey Murder Statute for the Death of an Innocent Party Killed by Police Attempting to Apprehend the Felons*, 24 RUTGERS L. REV. 591, 600-01 (1970) [*hereinafter* Comment, *New Jersey Murder Statute*].

228. *See* Commonwealth *ex rel.* Smith v. D.N. Myers, 261 A.2d 550, 555 (Pa. 1970) (finding that the defendant was not guilty under the felony-murder rule when a police officer killed an off-duty police officer in the pursuit of the felon).

229. *See* LAFAVE & SCOTT, *supra* note 2, § 7.5, at 206-08; *see also supra* Part II. (discussing the background of the felony-murder rule).

230. *See supra* Part II.A.2 (tracing the history of the felony-murder doctrine in England).

231. *See* Comment, *New Jersey Murder Statute*, *supra* note 227, at 600 (acknowledging that the felony-murder rule had a limited application in England).

232. *See id.* (mentioning Lord Coke, Blackstone, Judge Stephen, and Justice Holmes). Lord Coke's formulation of felony-murder was the following:

narrowly applied the felony-murder rule.[233] The traditional common law only extended liability under the felony-murder rule when the defendant or a person acting in concert committed the homicide.[234] Therefore, convicting a felon for the actions of a third party extends liability further than was originally contemplated by early scholars of the felony-murder rule.[235] Thus, holding the defendant in *Dekens* responsible for the death of a person killed by a third party, clearly departs from the original intent of the felony-murder doctrine and is unjust.[236]

The felony-murder rule originated as a type of murder without any required mental state.[237] Instead of a required mental state, the felon's intent to commit the specific felony satisfies the intent necessary to commit the actual homicide.[238] The doctrine of transferred intent

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> If the act be unlawful it is murder. As if *A* meaning to steal a Deer in the Park of *B*. Shooteth at the Deer, and by the glance of the arrow killeth a boy, that is hidden in a bush: this is murder, for that the act was unlawful, although *A* had no intent to hurt the boy, nor knew not of him. But if *B* the owner of the Park had shot at his own Deer, and without any ill intent had killed the Boy by the glance of his arrow, this had been Homicide by misadventure, and no felony.

E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 56 (1648). Blackstone's definition of felony-murder was, "if one intends to do another felony, and undesignedly kills a man, this is also murder." 4 W. BLACKSTONE, COMMENTARIES *200-01. Holmes determined liability under felony-murder when "a man does an act with intent to commit a felony, and thereby accidentally kills another; for instance, if he fires at chickens, intending to steal them, and accidentally kills the owner, whom he does not see." OLIVER W. HOLMES, THE COMMON LAW 48 (Mark DeWolfe Howe ed., 1963).

233. *See* Sidney Prevezer, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 COLUM. L. REV. 624, 634 (1957) (noting that the English court system developed the felony-murder doctrine).

234. *See id.* English common law only extended liability when an accomplice committed the homicide during the commission of a felony. *See id.* (citing Rex v. Betts, 22 Crim. App. R. 148 (1930) and Regina v. Grant, 38 Crim. App. F. 107 (1954)).

235. *See* Campbell v. State, 444 A.2d 1034, 1042 (Md. 1982) (holding that the proximate cause theory of liability extended beyond the traditional common law application of the felony-murder rule).

236. *See* LAFAVE & SCOTT, *supra* note 2, § 7.5, at 218 (reasoning that "it is not justice (though it may be poetic justice) to hold the felon liable for murder on account of the death, which the felon did not intend, of a co-felon willingly participating in the risky venture").

237. *See* People v. Dekens, 695 N.E.2d 474, 480 (Heiple, J., dissenting) (acknowledging that felony-murder is the only type of first degree murder in Illinois that does not mandate a mental state to obtain a conviction); *supra* notes 204-06 and accompanying text (explaining Justice Heiple's reasoning regarding the intent requirement); *see also* 720 ILL. COMP. STAT. 5/9-1(a)(3) (West 1996).

238. *See* TORCIA, *supra* note 8, § 147, at 296-97 (explaining that the mental state for the homicide is supplied by the mental state for the felony); *see also Dekens*, 695 N.E.2d at 480 (Heiple, J., dissenting).

transfers the felon's mental state during the felony to the felon during the commission of the homicide.[239] If a felon commits a murder during the commission of a felony, the law views the felon's intent to commit the felony as the same intent necessary to commit the murder.[240] Thus, the purpose of the felony-murder doctrine is satisfied because the felon is held responsible for the death of the victim.[241]

The purpose of the felony-murder doctrine is not satisfied, however, when a third party, who is not the felon, commits the homicide.[242] Punishing a felon for the acts of a disinterested third party does not comport with the societal goals of justice and general utility.[243] The felon's intent to commit a felony does not satisfy the intent requirement for murder when someone other than the felon commits the actual homicide.[244] When applying the felony-murder rule, the intent requirement cannot transfer from one person to another.[245] When courts, like the *Dekens* majority, transfer the intent from the felon to a third party, the courts misuse the doctrine.[246] One of the major purposes of the felony-murder doctrine is to create

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239. *See* TORCIA, *supra* note 8, § 147, at 296-97. *See, e.g.*, State v. Bradley, 317 N.W.2d 99, 101 (Neb. 1982) (establishing that the defendant's intent to commit a robbery replaced the intent to commit the homicide under the felony-murder rule).

240. *See* TORCIA, *supra* note 8, § 147, at 296-97 (discussing how the law transfers the intent from the felony to the homicide).

241. *See Dekens*, 695 N.E.2d at 480 (Heiple, J., dissenting).

242. *See id.* (Heiple, J., dissenting). Under the felony-murder doctrine, the prosecution is not required to prove that the defendant had the intent to commit the homicide, but the prosecution must prove that the defendant caused the death. *See id.* (Heiple, J., dissenting) (quoting Commonwealth v. Redline, 137 A.2d 472, 476 (Pa. 1958)). "[T]he thing which is imputed to a felon for a killing incidental to his felony is *malice* and *not the act of killing*." *Redline*, 137 A.2d at 476.

243. *See* People v. Washington, 402 P.2d 130, 133-34 (Cal. 1965) (explaining that the felony-murder doctrine cannot be justified if a proximate cause theory of liability is applied).

244. *See Dekens* 695 N.E.2d at 480 (Heiple, J., dissenting) (noting that the felony-murder doctrine did not function as a rule of causation but as a rule of intent); *see also Washington*, 402 P.2d at 133:

> When a killing is not committed by a robber or by his accomplice but by his victim, malice aforethought is not attributable to the robber, for the killing is not committed by him in the perpetration or attempt to perpetrate robbery. It is not enough that the killing was a risk reasonably to be foreseen and that the robbery might therefore be regarded as a proximate cause of the killing.

Id.

245. *See Washington*, 402 P.2d at 133-34 (discussing the misapplication of the felony-murder doctrine under the proximate cause theory of liability).

246. *See* Joslin, *supra* note 94, at 160-61 (explaining how the Illinois courts have deviated from the original intent of the felony-murder doctrine when applying the proximate cause theory of liability).

liability solely for a felon or accessory who commits a homicide during the commission of a felony.[247] The felony-murder doctrine does not advocate the transfer of the felon's intent to any other person who commits a homicide during the commission of a felony, whether that killing is justified or unjustified.[248] Thus, the proximate cause theory espoused by the *Dekens* majority extends beyond the original intent of the felony-murder doctrine.[249]

2. Deterrence

Another "purpose of the felony-murder rule is to *deter* felons from killing negligently or accidentally by holding them strictly responsible for killings they commit."[250] The *Dekens* majority mistakenly believed that finding the defendant guilty of murder would further the deterrence purpose of the felony-murder rule.[251] In fact, the proximate cause theory of liability does not serve as a deterrent.[252] For deterrence to be effective, the person contemplating committing a

247. *See Washington*, 402 P.2d at 133.

248. *See* Commonwealth v. Redline, 137 A.2d 472, 482-83 (Pa. 1958) (criticizing the application of the proximate cause theory of liability on the basis that the homicide was justifiable).

249. *See* Joslin, *supra* note 94, at 161 (discussing the misuse of the felony-murder doctrine under the proximate cause theory of liability). "[T]he 'proximate cause' theory, which imputes to the felon the acts of unrelated persons, is an unjustified extension because it is nothing more than a mechanism of revenge." *Id.*

250. *Washington*, 402 P.2d at 133 (emphasis added); *see also* Jackson v. State, 589 P.2d 1052, 1053 (N.M. 1979) (holding that the application of the felony-murder rule is limited and the "responsibility under this doctrine [should be kept] in line with the evolving concepts of criminal law"); *Redline*, 137 A.2d at 483 (Bell, J., dissenting) (imploring that "[t]he brutal 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").

251. *See* People v. Dekens, 695 N.E.2d 474, 476-77 (Ill. 1997) (holding that the proximate cause theory of liability fulfilled the deterrence purpose of the felony-murder rule).

252. *See* Commonwealth *ex rel.* Smith v. D.N. Myers, 261 A.2d 550, 554 (Pa. 1970) (noting that the deterrent effect of the felony-murder rule is very doubtful); Morris, *supra* note 32, at 67 (attaching responsibility for the unexpected result of a criminal action is not as productive as attaching a greater amount of liability for the intended felony); *see also* HOLMES, *supra* note 232, at 48.

> The only blameworthy act is firing at the chickens, knowing them to belong to another. It is neither more nor less so because an accident happens afterwards; and hitting a man, whose presence could not have been suspected, is an accident. The fact that the shooting is felonious does not make it any more likely to kill people. If the object of the rule is to prevent such accidents, it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while, if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot.

Id.

felony must know the result of the felony and the consequences attached to that result.[253] The felon must have this knowledge in order to make a decision whether or not to commit the felony.[254] The proximate cause theory of liability for felony-murder does not serve the deterrence purpose of the rule because an unintended act by a third party cannot be deterred.[255] Thus, the majority in *Dekens* failed to fulfill the deterrence purpose of the felony-murder doctrine.[256] In *Dekens*, the defendant could not have known that the victim would kill the co-felon.[257] Without that knowledge or without any intent to commit a homicide, a felon should not be convicted of first degree murder, even under the felony-murder doctrine.[258]

B. Prior Illinois Law

The majority claimed that the legal precedent in Illinois mandated the holding in *Dekens*.[259] Contrary to the majority opinion, no such mandate exists to hold the defendant liable for the justified killing by the intended victim.[260] The Illinois felony-murder statute does not attach liability to the defendant when a third party commits a homicide during a felony.[261] In addition, the majority's support is founded upon flawed legal precedent established in prior felony-murder cases.[262]

Specifically, the literal terms of the felony-murder statute prohibit

253. *See* Van Arsdell, *supra* note 123, at 214 (delineating the elements of deterrence); 1 LAFAVE & SCOTT, *supra* note 2, §1.5, at 33-4 & n.26 (examining the requirements that must be met for deterrence to be effective).

254. *See* Van Arsdell, *supra* note 123, at 214 (concluding that knowledge of the consequences of the crime can produce a change of desire to commit the crime).

255. *See* Philip D. Zelikow, Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 HOUS. L. REV. 356, 376 (1978) (acknowledging that the defendant has no control over the acts of the third party).

256. *See Dekens*, 695 N.E.2d at 481 (Heiple, J., dissenting) (advocating that the adoption of the agency theory would fulfill the intent of the felony-murder doctrine).

257. *See generally* Van Arsdell, *supra* note 123, at 214 (noting that for deterrence to work a defendant would have had to expect a police officer, or in the instant case a co-felon, to be killed during the commission of the felony).

258. *See Dekens*, 695 N.E.2d at 480 (Heiple, J., dissenting) (concluding that the proximate cause theory of liability does not support the justifications for the felony-murder doctrine).

259. *See id.* at 476-78 (citing previous Illinois cases that adopted the proximate cause theory of liability and the felony-murder statute); *see also supra* note 160 (listing the Illinois Supreme Court cases that the majority discussed).

260. *See id.* at 478-80 (Bilandic, J., dissenting); *id.* at 480-81 (Heiple, J., dissenting).

261. *See id.* at 480-81 (Heiple, J., dissenting).

262. *See id.* at 481 (Heiple, J., dissenting).

the holding reached by the *Dekens* majority.[263] The statute explicitly states that the prosecution must prove that the felon personally killed the decedent by "performing the acts which cause[d] the death."[264] The majority in *Dekens* did not explore nor explain the derivation of the proximate cause theory from the Illinois felony-murder statute.[265] Instead, the majority embraced the Committee Comments that referred to the felony-murder statute.[266] The Committee Comments, however, are nonbinding.[267] The plain meaning of the felony-murder statute is dispositive in determining that if a person not involved in perpetrating the felony commits a homicide, the felon cannot be held responsible.[268] Therefore, the prior court decisions that the majority used as support consisted of flawed and erroneous reasoning.[269] Thus, the proximate cause theory does not find support in Illinois law and cannot achieve just results.[270]

C. Agency Principles

Instead of expanding the felony-murder doctrine beyond the legislature's intended scope, the Illinois Supreme Court should have adopted the agency theory of liability.[271] A defendant should not be held responsible for any killing not attributable to himself or his

263. *See id.* (Heiple, J., dissenting). The statute plainly states, "[a] person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death . . . he is attempting or committing a forcible felony other than second degree murder." 720 ILL. COMP. STAT. 5/9-1(a)(3) (West 1996).

264. *Dekens*, 695 N.E.2d at 480 (Heiple, J., dissenting) (quoting 720 ILL. COMP. STAT. 5/9-1(a)(3) (West 1996)). Causation is not explained or illustrated by the statutory language. *See* Van Arsdell, *supra* note 123, at 213. Therefore, the legislature did not dictate the proximate cause definition the Illinois Supreme Court used. *See id.*

265. *See Dekens*, 695 N.E.2d at 478 (overlooking the actual language of the statute and, instead assessing the Committee Comments).

266. *See supra* note 122 (providing the relevant text of the Committee Comments). The Committee Comments cited to cases where the felony-murder doctrine had been applied in Illinois. *See* 720 ILL. COMP. STAT. ANN. 5/9-1 Committee Comments of 1961 at 19 (West 1993). One of the listed cases was *People v. Payne*, 194 N.E. 539 (Ill. 1935), which adopted the proximate cause theory of liability. *See id.*

267. *See Dekens*, 695 N.E.2d at 481 (Heiple, J., dissenting) (referring to the Committee Comments as brief and nonlegislative).

268. *See id.* (Heiple, J., dissenting). The majority offered the Committee Comments as the only statutory support for its holding, but the Committee Comments cannot alter the plain meaning of the felony-murder statute. *See id.* (Heiple, J., dissenting).

269. *See id.* (Heiple, J., dissenting) (asserting that the prosecution in the previous cases did not prove that the felon performed the acts that resulted in the homicide).

270. *See id.* (Heiple, J., dissenting) (concluding that the majority had no basis for finding the defendant guilty under the felony-murder statute).

271. *See id.* (Heiple, J., dissenting) (criticizing the majority for continuing to use the proximate cause theory of liability).

accomplices acting in furtherance of the common felony.[272] The agency theory of liability should be utilized in Illinois, as it is in the majority of other states,[273] to promote the just and reasonable application of the felony-murder doctrine.[274] Thus, a defendant should not be held liable for actions that he did not intend to bring about, assent to, assist with, or contemplate.[275] In the future, the Illinois Supreme Court should return to the agency theory that it first embraced in 1888 when applying the felony-murder doctrine.[276]

V. IMPACT

The *Dekens* decision has created an extensive basis of liability under the felony-murder doctrine.[277] Felons are now liable for acts they could not have contemplated before committing the felony.[278] In doing so, a defendant can be held liable for a crime committed without his knowledge or assent and committed by a party other than the felon or accessory.[279] Thus, a defendant will be held responsible for the

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272. *See* People v. Washington, 402 P.2d 130, 134 (Cal. 1965) (adopting the agency theory and finding the defendant not liable because the homicide was committed by the intended victim, not the felon); Commonwealth v. Redline, 137 A.2d 472, 478-79 (Pa. 1958) (finding the defendant not guilty under the agency theory of liability for first degree murder when a police officer killed a co-felon during commission of a felony).

273. *See supra* note 73 (listing the cases from the majority of jurisdictions that have adopted the agency theory of liability).

274. *See Dekens*, 695 N.E.2d at 481 (Heiple, J., dissenting).

275. *See* Campbell v. State, 444 A.2d 1034, 1038 (Md. 1982) (holding that the agency theory precluded the surviving felon from being charged under the felony-murder statute when a police officer or intended victim shot and killed the co-felon).

276. *See* Butler v. People, 18 N.E. 338, 340 (Ill. 1888); *see also* notes 113-15 and accompanying text (explaining the facts and holding of the *Butler* court). In general, the *Butler* court applied the agency theory and reasoned that:

> They [defendants] would be responsible for what they did themselves, and such consequences as might naturally flow from their acts and conduct; but they never advised, encouraged, or assented to the acts of Conrey [intended victim that committed the homicide], nor did they [defendants] combine with him to do any unlawful act, nor did they [defendants] in any manner assent to anything he [intended victim] did, and hence they could not be responsible for his conduct towards the deceased.

Id. at 339-40.

277. *See Dekens*, 695 N.E.2d at 481 (Bilandic, J., dissenting); *id.* at 480-81 (Heiple, J., dissenting); *see also* Joslin, *supra* note 94, at 161 (maintaining that the proximate cause theory of liability exceeded the legitimate purpose of the felony-murder doctrine).

278. *See Campbell*, 444 A.2d at 1038 (citing Commonwealth v. Campbell, 89 Mass. 541, 544-45 (1 Allen 1863)) (deducing that the application of the proximate cause theory of liability creates an unreasonable amount of liability).

279. *See Butler*, 18 N.E. at 340 (stating that it would be "a strange rule of law" if the proximate cause theory of liability was applied to the felony-murder rule).

actions of those assisting and those opposing the felonious actions.[280] A defendant who commits a felony may also be liable for homicide if he himself, his accessory, the law enforcement officer, or the intended victim committed the homicide during the commission of the felony.[281]

The Illinois Supreme Court's holding in *Dekens* creates a great injustice.[282] The felony-murder rule has been criticized in the past for creating unjust results.[283] Instead of paying heed to the criticisms, the court expanded the reach of the doctrine.[284] Under the Illinois statute, a person can be found guilty under the felony-murder rule for committing a homicide during a forcible felony.[285] A forcible felony encompasses "any . . . felony which involves the use or threat of physical force or violence against any individual."[286] The extensive liability already provided for by the breadth of the statute is compounded by the holding in *Dekens*.[287] There are very few limits on what can be classified as a forcible felony,[288] and now there appear to be no limits as to who can commit the homicide.[289] This is a serious result when death is a possible punishment.[290]

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280. *See Campbell*, 444 A.2d at 1038 (concluding that, in a proximate cause theory of liability, the felon is responsible for the actions of the person that is attempting to thwart the felon's criminal activity).

281. *See Dekens*, 695 N.E.2d at 475-78 (citing cases in which a defendant was found liable under the proximate cause theory); *see also supra* note 81 (listing jurisdictions that have adopted the proximate cause theory of liability in felony-murder cases).

282. *See* Morris, *supra* note 32, at 50 (describing the results of cases that adopted the proximate cause theory of liability for felony-murder). "Though their purpose of deterring the commission of certain felonies is commendable, the means selected appears to be socially unwise and is based on reasoning not free from substantial analytic and historical errors." *Id.*

283. *See* Note, *Felony Murder*, *supra* note 35, at 1918 (stating that the felony-murder doctrine is widely criticized).

284. *See Dekens*, 695 N.E.2d at 480 (Heiple, J., dissenting). The felony-murder doctrine had been questioned as being unjust; however, the majority court did not follow public policy. *See id.*

285. *See supra* note 102 (interpreting the language of the Illinois felony-murder statute).

286. 720 ILL. COMP. STAT. 5/2-8 (West 1996).

287. *See supra* note 101 and accompanying text (listing the forcible felonies); *see also supra* Part III.C (explaining the majority opinion in *Dekens*).

288. *See* 720 ILL. COMP. STAT. 5/2-8. Examples of forcible felonies include the following: first degree murder, second degree murder, criminal sexual assault, robbery, burglary, aggravated arson, arson, and kidnapping. *See id.*

289. *See Dekens*, 695 N.E.2d at 477-78 (establishing that the proximate cause theory of liability could create liability for a felon when an uninvolved third party kills a co-felon).

290. *See* 720 ILL. COMP. STAT. 5/9-1 (West 1996); *supra* note 100 and accompanying text (quoting the first degree murder statute).

The court created the precedent for a felon to be held liable when anyone commits a homicide during the commission of the defendant's felony.[291] The liability created by this decision is unfounded and does not serve public policy.[292] The holding in *Dekens* will erode the basis of justice and fairness in the Illinois criminal justice system.[293] The broad based holding will not protect people from accidental killings; it only serves to create a larger gap between "moral culpability" and "criminal liability" in the felony-murder doctrine.[294] Therefore, the court missed the opportunity to halt the expansion of unjust liability and adopt a just theory of liability.[295]

VI. CONCLUSION

The majority in *Dekens* has extended the felony-murder doctrine beyond any previous Illinois court decision. The proximate cause theory of liability that the majority adopted is inconsistent with the intent and legitimate purposes of the felony-murder doctrine. By extending the felony-murder doctrine, the court unjustly held the defendant liable for a death that the felony-murder doctrine does not acknowledge. *Dekens* proves that the application of the proximate cause theory of liability brings about unjust results. Therefore, Illinois should reassess its use of the proximate cause theory of liability and adopt the agency theory when applying the felony-murder doctrine. Only then will Illinois achieve a just result.

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291. *See generally Dekens*, 695 N.E.2d at 474-78 (creating the possibility for extensive liability through the majority holding).

292. *See Dekens*, 695 N.E.2d at 480 (Heiple, J., dissenting). *See generally* Van Arsdell, *supra* note 123, at 216. A commentary on the extension of the felony-murder doctrine after the *Hickman* decision:

> It does not serve the policy of rehabilitating offenders or protect society from accidental killings. The extension fails to advance the policy of deterrence in any direct and effective sense, and, to the extent that the policy of retribution is served by *Hickman*, the policy entails random and arbitrary punishment.

Id.; *see also supra* note 171 (explaining the facts and holding of *Hickman*).

293. *See Dekens*, 695 N.E.2d 480-81 (Heiple, J., dissenting). Justice Frankfurter stated, "not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community." Irvin v. Dowd, 366 U.S. 717, 729 (1961) (Frankfurter, J., concurring).

294. *See* People v. Washington, 402 P.2d 130, 134 (Cal. 1965).

295. *See Dekens*, 695 N.E.2d at 480-81 (Heiple, J., dissenting) (advocating the adoption of the agency theory of liability for the felony-murder doctrine).