Criminal Law - *People v. Hickman* - Defining the Felon's Accountability Under the Felony Murder Rule

Mark M. Joy

Follow this and additional works at: http://lawecommons.luc.edu/luclj

Part of the Criminal Law Commons

Recommended Citation
Available at: http://lawecommons.luc.edu/luclj/vol7/iss2/12

This Comment is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.
CRIMINAL LAW—People v. Hickman—Defining the Felon’s Accountability Under the Felony Murder Rule

The felony murder rule states that a homicide “committed in the course . . . of a felony is murder on the theory that the element of malice may be implied from the fact of the commission of the felony, even though the killing is unintentional and accidental.” Its purpose is to deter dangerous unlawful acts and felonies, but it also simplifies the task of prosecution since proof of commission of a felony satisfies the need for proof of mental state.

Early English versions of the rule were broad in scope. Coke’s formulation encompassed all deaths resulting from illegal acts: “[i]f the act be unlawfull, it is murder.” Blackstone’s statement of the doctrine limited its use to felonious acts: “if one intends to do another felony, and undesignedly kills a man, this is murder.” These broad formulations were gradually narrowed in England, as well as in the United States. For example, in many states a felon is liable for accidental homicide only if it occurs during the commission of a felony which is dangerous to life. Although still prevalent in the United States, the felony murder rule was abolished in England in 1957.

FELONY MURDER IN ILLINOIS

The felony murder doctrine was codified in Illinois in 1827. It specified that a killing which occurred in the commission of an unlawful act was murder if its consequences naturally tended to destroy life or if it was done with felonious intent. The Criminal

1. R. ANDERSON, 1 WHARTON’S CRIMINAL LAW AND PROCEDURE 539 (1957).
4. 4 W. BLACKSTONE, COMMENTARIES *200-01.
5. For a discussion of the limitations placed on the felony murder rule, see W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 346 (1972) [hereinafter cited as LAFAVE & SCOTT]; R. PERKINS, CRIMINAL LAW 40-41, 44 (2d ed. 1969) [hereinafter cited as PERKINS]; MODEL PENAL CODE § 201.2, Comment 4 at 37 (Tent. Draft No. 9, 1959) [hereinafter cited as MODEL PENAL CODE].
7. Law of January 6, 1827, ILL. REV. LAWS § 28 (1827), which reads:
Involuntary manslaughter shall consist in the killing of a human being, without any intent so to do, in the commission of an unlawful act, or a lawful act, which probably [might] produce such a consequence, in an unlawful manner: Provided always, That 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
Code of 1961 modified the rule's formulation by limiting its application to forcible felonies:

A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.  

A forcible felony is defined as

treason, murder . . . rape, robbery, burglary, arson, kidnapping, aggravated battery and any other felony which involves the use or threat of physical force or violence.  

Liability for the acts of a felon who kills is imposed upon his confederates by a two-step process. The killer himself is guilty of murder under the provisions of the felony murder statute; his accomplices are held responsible under the accountability statute for the acts committed by the principal in furtherance of the common design of the felony.  

The most controversial application of the doctrine is to a felon charged with murder when the homicide is committed by a nonfelon acting in opposition to the felony. Proponents of a restrictive interpretation of the rule espouse the agency theory of homicide liability, which holds that the fatal act must be that of the defendant or his accomplice. Others advocate a proximate cause theory of liability, in which the felon is liable for the lethal acts of a resister to the felony, if the felon's conduct is the proximate cause of the retaliatory force. In the recent case of People v. Hickman, the Illinois Supreme Court applied the proximate cause theory and held partic-
Participants in a felony responsible for the death of a policeman shot accidentally by another police officer who was resisting the felony.

**People v. Hickman**

Seventeen Joliet policemen were engaged in a surveillance of a liquor warehouse on the night of April 2, 1970. Late that evening, the officers observed an automobile stopping at the side of the building. Several persons left the automobile, entered the warehouse, and exited from the building a few minutes later. Police then approached the men, Robert Papes, Glenn Hickman, and Anthony Rock. Papes, who was armed, fled in one direction and was soon apprehended by police. Hickman and Rock ran in another direction toward some bushes.

While Hickman and Rock were fleeing, Sergeant James Cronk, one of the police officers participating in the surveillance, saw two people running in the same direction as the burglars. After his commands to halt were ignored, he briefly lost sight of them. Seconds later he saw a man carrying a handgun running in the same direction. Believing this man to be one of the burglars, he ordered him to drop his gun. When the man failed to comply, Cronk shot and killed him. The victim was Detective William Loscheider of the Joliet police force.

Hickman and Rock, who were arrested approximately one hour after the shooting, were found guilty of murder, burglary, and criminal damage to property in Will County Circuit Court. Papes was charged with and convicted of the latter two crimes only. The trial court entered an order arresting the judgment of murder against Hickman and Rock on the ground that the felony murder doctrine cannot support a conviction of murder when a police officer, in pursuit of a felon, kills a fellow police officer. The State appealed the arrest of judgment order and the appellate court reversed. On appeal to the supreme court, defendants argued that in order to sustain a felony murder conviction the killing must be done by one of the felons in furtherance of the forcible felony.

Chief Justice Underwood, writing for the court in *People v. Hickman*, affirmed the appellate court decision, holding that Hickman and Rock “... were directly responsible for the death of Detective Loscheider and guilty of his murder.” Ruling that a felon is responsible for lethal acts of a nonfelon done in opposition to the felony, the court noted:

---

17. 59 Ill. 2d at 95, 319 N.E.2d at 514.
The shot which killed Detective Loscheider was a shot fired in opposition to the escape of the fleeing burglars, and it was a direct and foreseeable consequence of defendants' actions. The escape . . . invited retaliation, opposition and pursuit. Those who commit forcible felonies know they may encounter resistance, both to their affirmative actions and to any subsequent escape. As we indicated in a recent felony-murder case, 'It is unimportant that the defendant did not anticipate the precise sequence of events . . . . His unlawful acts precipitated those events, and he is responsible for the consequences.'

Hickman therefore increases the liability of a felon for unintended homicides at a time when most states are restrictively construing the scope of the doctrine. However, the decision does not analyze the responsibility of a felon for the acts of an intervening agent when the homicide victim is a cofelon, rather than an innocent party as in Hickman. Additionally, Hickman tests the constitutional limits of a criminal's liability for acts committed by someone other than an accomplice.

THE PENNSYLVANIA DECISIONS

The Pennsylvania Supreme Court's treatment of the scope of the felony murder rule is enlightening because it has struggled with the full range of problems which have and will confront Illinois. Commonwealth v. Almeida involved a robbery in which a police officer was killed by a bullet which may have been fired by another policeman. Basing its decision on the proximate cause theory of

18. Id. at 94, 319 N.E.2d at 513 (citation omitted) (emphasis added).
19. The felony murder doctrine is currently held in disfavor in many jurisdictions, resulting in restrictive application. Perkins, supra note 5, at 44. For a summary of the most common limitations placed on the rule, see Model Penal Code, supra note 5, § 201.2 at 37.

In addition, the majority of jurisdictions whose highest courts have considered the issue do not hold a felon responsible for the lethal acts of resisters to the felony. Although it is difficult to state the rule definitively in all jurisdictions due to variations between the factual situations and judicial opinions from state to state, the following list clearly indicates the trend. Those states that apply the agency theory to the felony murder rule are: Kentucky, Commonwealth v. Moore, 121 Ky. 97, 88 S.W. 1085 (1905); Massachusetts, Commonwealth v. Balliro, 349 Mass. 209, 209 N.E.2d 308 (1965); Missouri, State v. Majors, 237 S.W. 486 (Mo. 1922); North Carolina, State v. Oxendine, 187 N.C. 658, 122 S.E. 568 (1924); New York, People v. Wood, 8 N.Y.2d 736, 167 N.E.2d 736, 201 N.Y.S.2d 328 (1960); Nevada, Sheriff v. Hicks, 506 P.2d 766 (Nev. 1973); Pennsylvania, Commonwealth ex rel. Smith v. Myers, 438 Pa. 218, 261 A.2d 550 (1970). California employs the agency theory, People v. Washington, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal.Rptr. 442 (1965), but it also utilizes a vicarious liability theory. For further discussion, see text accompanying notes 49 through 54 infra. Michigan holds the felon liable for the lethal acts of a resister when the victim is innocent, People v. Podolski, 332 Mich. 508, 52 N.W.2d 201 (1952), cert. denied, 344 U.S. 845 (1952), but not when the victim is a cofelon, People v. Austin, 370 Mich. 12, 120 N.W.2d 766 (1963). For a discussion of the shield exception, see text accompanying notes 55 through 58 infra.
Felony Murder

criminal liability, the court ruled that the defendant was guilty of felony murder, even if a nonfelon fired the fatal shot since the killing had its genesis in the robbery. The felon's liability was extended in Commonwealth v. Thomas to include the death of a cofelon shot by the intended victim of the robbery. The court reasoned that the death of the cofelon was as readily foreseeable as the death of an innocent third person.

The court overruled Thomas in Commonwealth v. Redline, holding that the Almeida rule does not apply when the homicide victim is one of the cofelons. The court said that since the policeman's killing of the cofelon in that case was justifiable, the murder charge was insupportable. "How can anyone," the court asked, "no matter how much of an outlaw he may be, have a criminal charge lodged against him for the consequences of the lawful conduct of another person?"

Finally, in Commonwealth ex rel. Smith v. Myers, the Pennsylvania court overruled Almeida, adopted the agency theory of criminal liability, and held that to sustain a felony murder charge the killing must be done by the defendant or an accomplice acting in furtherance of the felonious undertaking. The court rejected the Redline reasoning, holding that:

to make the result hinge on the character of the victim is, in many instances, to make it hinge on the marksmanship of resisters.


Early Illinois Law

The issue ultimately decided in Hickman was first considered in Illinois in 1888 in Butler v. People. Butler involved a fight between defendants and a village marshall who was attempting to arrest them for causing a minor disturbance. During the scuffle the marshall unintentionally shot and killed an innocent bystander. Citing the lack of concert of action or a common design, the court refused to find the defendants guilty of manslaughter.

It 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

---

23. Id. at 509, 137 A.2d at 483.
24. 438 Pa. 218, 261 A.2d 550 (1970). Smith, who was seeking a writ of habeus corpus, was an accomplice of the defendant in the Almeida case.
25. Id. at 234, 261 A.2d at 558.
26. 125 Ill. 641, 18 N.E. 338 (1888).
which was committed without his knowledge or assent, express or implied. 27

Although Butler did not involve a felony or an unlawful act likely to result in death, its significance lies in its statement of principles:

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

Erosion of the Butler doctrine originated in two cases arising from the same factual situation, People v. Grant 28 and People v. Krauser. 29 During an armed robbery attempt, defendants and a policeman engaged in a struggle that resulted in the officer's death. Grant and Krauser argued that the policeman had killed himself and, therefore, defendants could not be liable for murder. The court, in each case, held that the evidence demonstrated that the act of directing the gun, if not the actual pulling of the trigger, was committed by one of the defendants. The Krauser court distinguished the facts before it from those of Butler, noting that in Butler the death was not a natural consequence of defendant's actions.

Payne and Its Progeny

The agency theory of Butler was implicitly overruled in People v. Payne. 30 In Payne, conspirators attempted to rob the residence of two brothers. During the robbery, a gunfight erupted between the robbers and one of the brothers. The second brother was killed, but it was not known whether the fatal shot was fired by one of the robbers or by the victim's brother. In affirming the murder conviction of one of the conspirators who was not present at the robbery, the Illinois Supreme Court relied on language from Krauser:

It reasonably might be anticipated that an attempted robbery would meet with resistance, during which the victim might be shot either by himself or someone else in attempting to prevent the

27. Id. at 646, 18 N.E. at 340.
28. Id. at 645, 18 N.E. at 339.
29. 313 Ill. 69, 144 N.E. 813 (1924).
30. 315 Ill. 485, 146 N.E. 593 (1925). Krauser's conviction was reversed on evidentiary grounds.
31. 359 Ill. 246, 194 N.E. 539 (1935).
Felony Murder

robbery, and those attempting to perpetrate the robbery would be guilty of murder.  

The drafters of the Criminal Code of 1961 specifically approved the Payne rule by incorporating it in the committee comments:

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.  

This principle was applied by the appellate court in People v. Danner, where a struggle between the defendant and the robbery victim resulted in the victim's death from what may have been a self-inflicted wound. In upholding the conviction, the court stated:

If the evidence establishes that defendant was attempting to commit a forcible felony and the victim's death was a result of that attempt, it is immaterial who fired the particular shot which killed the victim or whether the killing was intentional or accidental.  

In another recent case, People v. Smith, the victim awoke to find a strange man standing in her apartment door. When he threatened to kill her, she jumped out of a third floor window in an attempt to save herself, and subsequently died from the fall. In affirming the intruder's felony murder conviction, the court relied on Payne, holding that defendant could have anticipated the fatal result of his conduct.

In People v. Allen, decided only a few months before Hickman, three men were thwarted in an attempt to rob an armored truck by police who were surveilling the area of the planned crime. A gunfight initiated by the felons resulted in the death of a policeman, but it was not clear who fired the fatal shot. Citing the foreseeability language of Krauser and Payne and the committee comments to the Criminal Code, the court stated:

We therefore hold that the defendant in this case may be held liable for the death of Officer Singleton whether the fatal shot was fired by a co-felon in the furtherance of the attempted robbery or by another police officer in opposition to the attempted robbery.  

32. Id. at 255, 194 N.E. at 543.
33. ILL. ANN. STAT. ch. 38, § 9-1, Committee Comments at 9 (Smith Hurd 1972) (citations omitted) (emphasis added) [hereinafter cited as § 9-1, Committee Comments].
35. Id. at 130, 245 N.E.2d at 108.
38. Id. at 545, 309 N.E.2d at 549.
The Significance of Hickman

The court in *People v. Hickman* relied on the *Payne* decision and the committee comments to the Criminal Code in determining that defendants Hickman and Rock were responsible for the policeman's death. At first glance, *Hickman*'s effect on the scope of the felony murder rule may seem a less dramatic departure from established law due to its dependence on *Payne*, a case decided in 1935. Yet it is significant for several reasons.

The *Hickman* court is the first Illinois court to confront the undisputed factual situation of an innocent person killing another innocent person in opposition to a felony. In *Krauser, Payne*, and *Allen*, the court could not determine whether the felon or the innocent party had fired the fatal shot; in *Hickman* it was certain that a policeman killed a fellow officer. Critical examination of the felony murder doctrine was required since the identity of the person firing the fatal shot was undisputed. The court's reconsideration of the proper scope of the rule resulted in a holding which firmly commits Illinois to its expansion.

Furthermore, although the trend toward extension of the felony murder doctrine has been evident since *Payne*, the court could have readily distinguished all prior cases on other grounds and reversed the defendants' convictions in *Hickman*. For example, in *Krauser, Payne*, and *Allen* the felon either used or threatened to use his gun first. Even in the *Almeida* and *Thomas* cases, which marked the furthest limits of the rule's extension in Pennsylvania, the defendants exchanged gunfire with their resisters. In *Hickman*, on the other hand, the felons neither initiated nor engaged in a gunfight. In addition, *Danner* and *Krauser* involved struggles between the felon and the nonfelon which resulted in the death of the latter. Since it mattered little who pulled the trigger if the felon caused the gun to be pointed at the innocent party, the fatal acts that the nonfelons may have committed could be freely imputed to the felon. In *Hickman*, however, no struggle was involved. Finally, in *Smith* the lethal act was entirely that of the victim, rather than that of the resister, as in *Hickman*. Confronted with several alternatives to the harsh reasoning of *Payne*, the *Hickman* court chose to broadly construe the scope of the felony murder rule in Illinois.

The Felon's Responsibility for the Acts of Others: When the Victim Is a Cofelon

The supreme court in *Hickman* held a felon responsible for the
Felony Murder

killing of an innocent party committed by a person acting in resis-
tance to the felony. The court did not consider the question of a
felon's liability for an accomplice's death caused by a retaliatory
force, even though the appellate court in People v. Hickman had
raised that very issue in dictum.\

The only early Illinois case dealing with this issue is People v.
Garippo.\(^{42}\) Garippo involved a manslaughter prosecution of a felon
for the death of a cofelon who was killed during a robbery, possibly
by the victim or by another nonfelon. In reversing the conviction,
the court held that the homicide was independent of the common
design of the robbery and not attributable to the defendants. The
court relied on the agency theory espoused in Butler, which holds
that the defendant is responsible only for the acts of himself and his
accomplices. However, Garippo's viability is uncertain since the
Hickman court adopted the proximate cause theory of criminal lia-

Shortly before Hickman was decided, the appellate court had
considered a felon's responsibility for his cofelon's death in People
v. Morris\(^{43}\) and People v. Hudson,\(^{44}\) cases arising from the same
factual situation. During an armed robbery, one of the victims res-
sisted and killed one of the felons. The court refused to affirm the
murder convictions of cofelons Morris and Hudson, basing its re-

The problem of the felon being charged with the murder of a cofelon who accidently
kills himself during the perpetration of the felony has never arisen in Illinois. People v. Ferlin,
203 Cal. 587, 265 P. 230 (1928), and Commonwealth v. Bolish, 381 Pa. 500, 113 A.2d 464
(1955), both involved a defendant who was charged with the murder of a hired arsonist who
accidently killed himself when he was carrying out the plan. The issue in such a case is
somewhat different than that in Hickman, since there is no retaliatory lethal force involved.
The failure of a court to convict in such a situation may be attributable to the court's
reluctance to afford the cofelon the protection of the criminal law.

42. 292 Ill. 293, 127 N.E. 75 (1920).
44. 6 Ill. App. 3d 1062, 287 N.E.2d 41 (1972).
46. 12 Ill. App. 3d at 417, 297 N.E.2d at 586.
death of an innocent victim from that of a felon, the court has indicated that it will adopt the Redline limitation when confronted with this problem.

**The Felon's Responsibility for the Acts of Others: When the Prosecution Is Not Based on the Felony Murder Rule**

**The California Approach**

A finding by a court that the felony murder rule does not apply to acts performed by a nonfelon does not necessarily preclude a defendant's conviction of murder for such acts. In a series of decisions the California Supreme Court has ruled that a defendant may be vicariously liable for the lethal acts of a resister to the felony if the defendant, in engaging in conduct that is likely to kill, acts with a conscious disregard for human life.

The leading California case, *People v. Washington*, involved an attempted robbery in which the robbery victim killed one of the felons. The court refused to apply the felony murder statute to convict defendant of his cofelon's murder, holding that the purpose of the rule, to deter the felon from killing negligently, was not served by punishing him for a killing committed by another person. However, without using the felony murder rule to imply malice, the court set forth a ground upon which a defendant could be held responsible for the acts of a nonfelon:

> Defendants who initiate gun battles may also be found guilty of murder if their victims resist and kill. Under such circumstances, "the defendant for a base, anti-social motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death."  

In *Taylor v. Superior Court*, the court expanded the scope of its vicarious liability theory by holding that acts less serious than initiating gunfire are sometimes sufficiently provocative of lethal resistance to hold a defendant liable for a murder committed by a nonfelon. During a robbery attempt, one of the felons repeatedly issued death threats to the victims and the other felon exhibited an apprehensive and nervous composure. One of the robbery victims responded by shooting and killing one of the felons, which resulted in

---

48. 12 Ill. App. 3d at 417, 297 N.E.2d at 585-86.
50. 62 Cal. 2d at 782, 402 P.2d at 134, 44 Cal. Rptr. at 446.
51. 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970).
Felony Murder

the cofelon's conviction for murder. The court held that the felons, in effect, had initiated the gunfire by their threatening conduct, rendering the defendant vicariously responsible for the resister's act.

The California approach appears to be more a change in terminology than a significant departure from the broad construction of the felony murder statute enunciated by the Illinois Supreme Court in Hickman. That both the California and Illinois courts will imply malice from a defendant's conduct and hold him liable for the acts of another in certain instances suggests that results might not differ significantly under the two systems. In People v. Allen, for example, the felon's initiation of gunfire could subject the defendants to liability for murder under the California approach. In Hickman, defendants' flight from police could be interpreted as conduct sufficiently provocative of lethal resistance to support a murder conviction under the less exacting standards of Taylor. In discussing California's "rather new and unique theory of vicarious liability," the Nevada Supreme Court noted a trial judge's observation that a "rose, the felony murder rule, is still a rose by any other name, vicarious liability." The Shield Exception

At least three jurisdictions impose liability on the felon for the death of a victim when he is used as a shield or forced to occupy a place of danger in order to aid in the felon's escape. The courts reason that the defendant exhibits express malice by placing the victim in danger. For example, in Wilson v. State, a person was killed when he was forced to shield robbers during their escape. The court ruled that the defendant's action in forcing the victim into a perilous position was as much a cause of the victim's death as if defendant himself had fired the fatal shot.

A "shield" case arising in Illinois would be governed by the felony murder rule as interpreted in Hickman. However, there is no reason to believe that prosecution could not be brought independently of

54. Id. at 768 n.7.
57. 188 Ark. 846, 68 S.W.2d 100 (1934).
the rule under section 9-1(a)(2) of the Criminal Code:

A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(2) He knows that such acts create a strong possibility of death or great bodily harm to that individual or another.58

Therefore, the shield cases pose no problem in Illinois even if the Hickman rule is rejected.

THE CONSTITUTIONALITY OF HICKMAN

A defendant convicted of felony murder under circumstances in which neither he nor a confederate actually performed the killing may challenge the Hickman interpretation of the felony murder statute on constitutional grounds. The application of the United States Constitution to this area of law is still unclear, but case law indicates that the Hickman decision may violate defendants' rights to due process of law as guaranteed by the fourteenth amendment.59

An analysis of this constitutional argument must focus first on the court's interpretation of the felony murder statute, and then on the question of whether that interpretation denies defendants due process of law by failing to give adequate notice of prohibited conduct.

The felony murder statute reads:

A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.60

A reading of the statutory language leads one to the conclusion that the "person who kills" or the person "performing the acts which cause death" must be the same person who is "attempting or committing a forcible felony."

Since neither defendant in Hickman is the "person who kills" and the defendants are held responsible for the policeman's conduct, liability must be imposed by principles of criminal accountability. But responsibility for the acts of another person arises only when the conduct falls within the scope of the accountability statutes. Section 5-1 of the Criminal Code sets forth a broad rule of accountability:

59. [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . . U.S. CONST. amend. XIV, § 1.
A person is responsible for conduct which is an element of an offense if the conduct is either that of the person himself, or that of another and he is legally accountable for such conduct as provided in Section 5-2, or both.\textsuperscript{61}

Section 5-2 provides:

A person is legally accountable for the conduct of another when:

(a) Having a mental state described by the statute defining the offense, he causes another to perform the conduct, and the other person in fact or by reason of legal incapacity lacks such a mental state; or

(b) The statute defining the offense makes him so accountable; or

(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.\textsuperscript{62}

The defendants in \textit{Hickman} may be held responsible for the acts of the resister to the felony only if their conduct fits within section 5-2. Subsection (a) fails to define their conduct since it refers to the "innocent agent" concept, where the defendant has induced a person lacking mental capacity to commit the act.\textsuperscript{63} Nor are the requirements of subsection (b) satisfied, since by the language of the felony murder statute the "person who kills" must be the same person who is "attempting or committing a forcible felony." Finally, accountability is not established by subsection (c), since the defendants did not solicit, aid, or abet the resister to the felony.

However, even if defendants could be held accountable by section 5-2, the requirement in the felony murder statute that the killing must be done "without lawful justification" is not met. Since the police officer who fired the fatal shot in \textit{Hickman} apparently intended to prevent a person who committed a forcible felony from defeating his arrest by escaping, the homicide was probably committed with lawful justification.\textsuperscript{64}

\textsuperscript{61} ILL. REV. STAT. ch. 38, § 5-1 (1973).

\textsuperscript{62} ILL. REV. STAT. ch. 38, § 5-2 (1973).

\textsuperscript{63} ILL. ANN. STAT. ch. 38, § 5-1, Committee Comments at 286 (Smith Hurd 1972).

\textsuperscript{64} ILL. REV. STAT. ch. 38, § 7-5(a) defines when a policeman's use of force is justifiable:

A peace officer . . . is justified in the use of any force which he reasonably believes to be necessary to effect the arrest . . . However, he is justified in using force likely to cause death or great bodily harm only when he . . . reasonably believes both that:

(1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and

(2) The person to be arrested has committed or attempted a forcible felony or is attempting to escape by use of a deadly weapon.
Only by resort to the committee comments, which lack the force of law, may one conclude that the legislative intent is that the felony murder statute applies even if the killing is committed by a "third person trying to prevent the commission of the felony." And while a court may look to the comments to determine legislative intent, rules of statutory construction in Illinois require that statutes imposing severe punishment be construed restrictively. However, the legislative intent evidenced in the comments is controverted by section 1-3 of the Criminal Code which states: "[n]o conduct constitutes an offense unless it is described as an offense in this Code or in another statute of this State." In the great majority of states whose highest courts have considered this issue, the felony murder statute has been interpreted not to extend to the lethal acts of resisters to the felony. This, along with the language of the felony murder and accountability statutes, creates serious doubts as to the correctness of the Hickman court's broad construction of the felony murder statute.

The Illinois Supreme Court's interpretation of this contradictory statutory scheme raises an issue of whether a person who plans a forcible felony is adequately forewarned that his conduct may subject him to liability for a homicide committed by a resister to a felony. In United States v. Harriss, the United States Supreme Court held that lack of definiteness in a criminal statute deprived a person convicted under it of due process of law as guaranteed by the fourteenth amendment:

The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

The requirement of definiteness was again considered in Bouie v. City of Columbia. While noting that the principle is usually applied to uncertainty resulting from vague or overbroad language in a statute, the Court held that the potential deprivation of the right

65. § 9-1, Committee Comments, supra note 33, at 9.
68. ILL. REV. STAT. ch. 38, § 1-3 (1973).
69. See note 19 supra.
71. Id. at 617 (emphasis added).
to fair notice is even more critical when the statute is precise on its face. A statute that is void for vagueness at least gives a potential defendant some notice that there may be a question as to the statute’s coverage; precise statutory language, on the other hand,

lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction.73

Such a judicial enlargement of a statute, according to Bouie, operates in the same manner as an ex post facto law, thereby denying a defendant due process of law.

The application of the Harriss test suggests that the defendants in Hickman were not adequately forewarned of the proscribed conduct. In fact, since the felony murder and accountability statutes appear clear on their face that a felon or his accomplice are not responsible for the lethal acts of nonfelons, the Hickman interpretation may have violated the special prohibition set forth in Bouie against judicial enlargement of precise statutory language. The Hickman decision may adequately inform those committing forcible felonies in the future of the possible penalty if a resister kills a nonfelon. However, the same due process consideration of lack of fair notice will again arise if a felon’s resister kills one of his cofelons, since neither the Hickman court nor the felony murder statute address that issue.74

73. Id. at 352.
74. The argument may also be made that the defendants in Hickman were denied equal protection of the laws. U.S. Const. amend. XIV, § 1. In a petition for writ of certiorari to the United States Supreme Court, the defendants urged that the Illinois Supreme Court’s opinion . . . discriminates against these petitioners in that they are convicted by reason of acts of persons not in any way connected with or confederating with them, while all other defendants have their own actions as the basis for criminal responsibility. Petitioners’ Brief for Certiorari at 6, Hickman v. Illinois, 421 U.S. 913 (1975).

While the equal protection clause does not prohibit reasonable classifications, Puget Sound Power & Light Co. v. Seattle, 291 U.S. 619 (1934), it does require that all within a class be treated equally. Yet the defendants in Hickman are the only group of criminals in Illinois who are held accountable for the acts of other persons even when their conduct is not described in section 5-2 of the Criminal Code. See notes 60-64 supra and accompanying text. Some support can be drawn for this argument from Skinner v. Oklahoma, 316 U.S. 535 (1942), which held that a law requiring sterilization of habitual criminals violated the equal protection clause because it applied to those convicted of larceny, but not of embezzlement, even though both crimes were similar in nature and punishable in the same manner. Similarly, the defendants in Hickman are treated differently than all other criminal defendants in Illinois, even those charged with crimes similar in nature and punishable in the same manner.
HICKMAN: A POLICY ANALYSIS

The extension of the felony murder rule to lethal acts of nonfelons is appealing on emotional grounds. It is difficult to sympathize with a person who arms himself and commits a felony which results in the death of an innocent person. Yet a law that attaches a criminal sanction to an act, particularly when that sanction involves the most severe penalty which the state can impose, must be legally as well as emotionally supportable.

The Hickman court conditions liability upon foreseeability; the victim’s death in that case is a “direct and foreseeable consequence of defendants’ actions.” This may represent an even broader causal connection than the proximate cause test of tort law. If tort principles were applied to the facts of Hickman, the policeman firing the fatal shot could be deemed an intervening agent, relieving the felon of liability. By not considering the intervening cause theory, the court has actually adopted a “but-for” test: but for the action of the felon, the victim would not have been killed. Instead of applying tort rules to criminal law, liability should be limited to those acts of the felon performed in furtherance of the felony, confining the scope of the felony murder rule to the lethal acts of the felon or cofelon.

If the object of the criminal law is retribution, the Hickman decision will meet with approval, since any harsh result will satisfy the desire for vengeance. Yet the criminal acts in Hickman—burglary and criminal damage to property, which resulted in an unintended homicide—are not as heinous as premeditated murder, a crime which carries the same penalty. Therefore, if the penalty is to be justified, it should serve the primary purpose of the felony murder rule—deterrence of dangerous felonies. But Hickman does not strike at the harm intended by the criminal. Instead, it punishes a greater wrong which infrequently results from his acts, even though the felon neither anticipated nor intended that the homicide would

---

75. 59 Ill. 2d at 94, 319 N.E.2d at 513.
77. Prosser’s statement of the “but-for” rule is: “The defendant’s conduct is not a cause of the event, if the event would have occurred without it.” Id. at 239. Thus, the “but-for” rule is a restrictive rule, limiting the defendant’s liability when the test is not met. It is not meant to be a rule of causation in tort law, let alone in criminal law.
78. LaFave and Scott argue that tort principles should not be applied in criminal law. A person’s liability for his negligent acts is undergoing an expansion in tort law, but this trend should not be carried into the realm of criminal law, where the consequences of guilt are more drastic than a payment of money. LaFave & Scott, supra note 5, at 251-52.
occur. Even if one accepts the theory that more severe penalties serve as a deterrent, the punishment should at least bear some relationship to the moral culpability of the criminal. This relationship is absent when the felon is held responsible for unintended and undesired acts committed by a third person. The criminal conduct is more accurately described by the involuntary manslaughter statute, which prohibits reckless acts that are likely to result in death or great bodily injury. The purposes of justice would be better served by the imposition of a punishment befitting the crime. Illinois should discard the proximate cause theory as it applies to criminal law and hold that a felony murder conviction will be sustained only when the person who kills is the felon himself or his confederate.

Mark M. Joy


81. Ill. Rev. Stat. ch. 38, § 9-3(a) (1973). The involuntary manslaughter statute reads: A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly. Id. (emphasis added).

Thus, it appears that only the acts of the defendant and his cofelons, for whose actions he is accountable, may result in conviction unless the proximate cause theory of criminal liability is used. Still, the involuntary manslaughter conviction is preferable to a murder conviction if the punishment better matches the moral culpability of the defendant.