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## People v. Hickman, 9 J. Marshall J. Prac. & Proc. 517 (1975)

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# PEOPLE v. HICKMAN

## JOURNEY TO THE LOGICAL LIMITS OF THE FELONY-MURDER DOCTRINE

The felony-murder doctrine defines a "homicide committed while perpetrating or attempting a felony"<sup>1</sup> as murder. The recent trend in felony-murder cases has been "to restrict very narrowly the application of the felony-murder doctrine."<sup>2</sup> An Illinois Supreme Court decision, *People v. Hickman*,<sup>3</sup> is not only a major impediment to the expansion of this trend, but an omen of its termination. Unlike *Commonwealth v. Redline*,<sup>4</sup> *Hickman* applies the proximate cause theory of the felony-murder doctrine. Nevertheless, the results are the same, i.e., a felon can be liable for the murder of an individual actually killed by a person resisting the felony only if the person killed is not a co-felon.

### HISTORICAL PERSPECTIVE

At common law, malice aforethought was the element distinguishing murder from other homicides.<sup>5</sup> Such malice may be express or implied.<sup>6</sup> It is implied where the homicide occurs during the commission of or during an attempt to commit a felony.<sup>7</sup>

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1. Perkins, *A Re-examination of Malice Aforethought*, 43 YALE L.J. 537, 558 (1934).

2. R. PERKINS, CRIMINAL LAW 722 (2d ed. 1969).

3. 59 Ill. 2d 89, 319 N.E.2d 511 (1974), cert. denied, *Hickman v. Illinois*, 95 S. Ct. 1571 (1975).

4. 391 Pa. 486, 137 A.2d 472 (1958).

5. Coke described murder as the crime that takes place "when a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the king's peace with malice aforethought, either express or implied." 3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 47 (1792). Malice aforethought is the criterion distinguishing murder from other homicides. It does not mean spite or ill-will, but "the dictate of a wicked, depraved and malignant heart." 4 W. BLACKSTONE, COMMENTARIES \*198 (1897) [hereinafter cited BL. COMM.]. A killing of another may be justifiable, excusable, or felonious. The killing is justifiable if it is performed by a peace officer to enforce justice or as an execution. It is excusable if done accidentally or in self-defense. A homicide, if felonious, can be murder or manslaughter. To be murder there must be malice aforethought. Perkins, *A Re-examination of Malice Aforethought*, 43 YALE L.J. 537 (1934).

6. Express malice is killing deliberately and with a formed design. 4 BL. COMM. \*199. Implied malice is not a different type of malice, but a different way to demonstrate its existence. Perkins, *A Re-examination of Malice Aforethought*, 43 YALE L.J. 537, 547 (1934). Malice is implied where the acts done are in wanton and wilful disregard of an unreasonable human risk. *Mayer v. People*, 106 Ill. 306, 46 Am. R. 698 (1883).

7. At common law, malice is also implied where the homicide resulted from resisting an officer of justice in the execution of his duty. 4 BL. COMM. \*200-01. The oft cited reason for the felony-murder rule is that at common law all felonies were capital offenses; it was of little

The application of the doctrine is generally based on two theories, the agency theory and the theory of proximate cause.<sup>8</sup> The agency theory requires the act of killing be actually or constructively that of the accused, *i.e.*, perpetrated by him or someone acting in concert with him and in furtherance of the felony.<sup>9</sup> This theory, if applied alone, renders the felony-murder doctrine inapplicable where the killing is actually performed by a person resisting the felony. In such a situation, the proximate cause theory is utilized to justify holding the felon guilty of murder.<sup>10</sup> The recent trend in case law is to criticize the use of the proximate cause theory.<sup>11</sup> Instead of rejecting or criticizing the proximate cause theory, however, *Hickman* utilizes it.

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consequence whether the felon was hanged for the felony or the murder. *Powers v. Commonwealth*, 110 Ky. 386, 413, 61 S.W. 735, 741 (1901). If the unlawful act committed or attempted is a misdemeanor, at common law the homicide is manslaughter.

And, in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter.

4 Bl. COMM. \*192-93.

The felony-murder rule was criticized and changed in England. *Regina v. Serne*, 16 Cox C.C. 311 (1877); *Regina v. Whitmarsh*, 62 Just. P. 711 (1898); *Rex v. Lumley*, 23 Cox C.C. 635 (1911). It was finally abolished by statute. HOMICIDE ACT, 5 & 6 ELIZABETH 2, ch. 11 (1957). The felony-murder doctrine in the United States is now commonly stated as "homicide committed while perpetrating or attempting a felony is murder." Perkins, *A Re-examination of Malice Aforethought*, 43 YALE L.J. 537, 558. The doctrine is applied regardless of whether the killing is unintentional or accidental. *Id.* at 557-58.

8. See Annot., 56 A.L.R.3d 239 (1974).

9. *Commonwealth v. Moore*, 121 Ky. 97, 88 S.W. 1085 (1905).

10. *People v. Payne*, 359 Ill. 246, 194 N.E. 539 (1935) (the perpetration of a felony sets in motion the chain of events causing death and therefore, the felon is criminally liable for murder).

11. The felony-murder doctrine has been severely criticized as being a relic. Mueller, *Criminal Law and Administration*, 34 N.Y.L. REV. 83, 98 (1959). The courts have taken particular aim at the proximate cause theory. The first cases in the United States criticizing the use of the proximate cause theory in homicide law were manslaughter cases. *People v. Garippo*, 292 Ill. 293, 127 N.E. 75 (1920); *Butler v. People*, 125 Ill. 641, 18 N.E. 338 (1888); *Commonwealth v. Campbell*, 7 Allen (89 Mass.) 541 (1863); *State v. Oxendine*, 187 N.C. 658, 122 S.E. 568 (1924). Relying on manslaughter cases, the Court of Appeals of Kentucky, in a felony-murder case, said that, if proximate cause was a sound principle on which to base felony-murder, even the dead robber would be guilty of murdering the victim. *Commonwealth v. Moore*, 121 Ky. 97, 88 S.W. 1085 (1905).

The most significant line of cases concerning the proximate cause theory comes out of the Supreme Court of Pennsylvania. See *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218, 261 A.2d 550 (1970); *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958); *Commonwealth v. Thomas*, 382 Pa. 639, 117 A.2d 204 (1955); *Commonwealth v. Almeida*, 362 Pa. 596, 68 A.2d 595 (1949); *Commonwealth v. Moyer*, 357 Pa. 181, 53 A.2d 736 (1947). See also Wingersky, *Death of Definition*, 7 DeP. L.R. 172 (1957-1958). *Redline*, in overruling the *Thomas* decision, holds that where a homicide is justifiable, *i.e.*, the killing of one of the felons by a person resisting the felony, a co-felon cannot be liable for felony-murder. *Redline* distinguishes *Almeida* where a police officer is

## THE HICKMAN DECISION

*Facts*

In *Hickman*, the defendants were caught in the midst of a burglary and attempted to flee to safety. One burglar was immediately apprehended and was discovered to be in possession of a handgun, while the other two suspects temporarily evaded the police. However, one police officer noticed a crouching figure with a handgun approach his position. The officer shouted an

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killed by other police officers. This being only excusable homicide (accidental), the felon is still accountable for murder. *Myers*, rejecting this factual distinction as being untenable, overrules *Almeida*. Both *Redline* and *Myers* reject the proximate cause theory. These courts adopt only the agency theory. Any killing by a person other than a felon, even though resulting from resistance to the felony, is not attributable to the felon as murder. In accord with the present Pennsylvania law are several jurisdictions: *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965); *Alvarez v. District Court In And For City And County of Denver*, 525 P.2d 1131 (Colo., 1974); *State v. Garner*, 238 La. 563, 115 So. 2d 855 (1959); *Commonwealth v. Balliro*, 349 Mass. 505, 209 N.E.2d 308 (1965); *Sheriff, Clark County v. Hicks*, 89 Nev. 78, 506 P.2d 766 (1973); *People v. Wood*, 8 N.Y.2d 48, 167 N.E.2d 736 (1960).

There are two recognized exceptions to the restrictions on the proximate cause theory. (1) Where the homicide victim is placed in a life-endangering position by the felon, such as being used as a shield for escape purposes or to facilitate the felony, the felon will be held accountable for the murder of the victim even if the actual killing is done by a person resisting the felony. *Wilson v. State*, 188 Ark. 846, 68 S.W.2d 100 (1934); *Miers v. State*, 157 Tex. Crim. 572, 251 S.W.2d 404 (1952); *Keaton v. State*, 41 Tex. Crim. 621, 57 S.W. 1125 (1900); *Taylor v. State*, 41 Tex. Crim. 564, 55 S.W. 961 (1900). (2) The Supreme Court of California rejects the proximate cause theory. *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965). However, where the felon does an act in conscious disregard of human life, e.g., starts a gun battle with police, he will be "vicariously liable" for the murder of anyone killed by the persons resisting his acts because the response is reasonable and not an independent intervening cause. *Taylor v. Superior Court of Alameda County*, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970); *People v. Gilbert*, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1968); *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965). A Nevada decision rejecting the proximate cause theory also rejects the California approach, concluding that the vicarious liability theory is merely another way of stating the felony-murder doctrine. *Sheriff, Clark County v. Hicks*, 89 Nev. 78, 506 P.2d 766, 768, n.7 (1973). A result of the vicarious liability exception is that, if a co-felon is killed in the melee, the surviving felon can be vicariously liable for murder. See *People v. Gilbert*, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1968).

The Michigan courts have a line of cases in accord with the *Redline* decision. In *People v. Austin*, 370 Mich. 12, 120 N.W.2d 766 (1963), the Michigan Supreme Court uses the reasoning of *Redline* to hold that a robber cannot be accountable under the felony-murder doctrine for the justifiable killing of a co-felon. The court distinguishes *People v. Podolski*, 332 Mich. 508, 52 N.W.2d 201 (1952), in which a police officer is killed in a gun battle with the felons. If the deceased is not a felon, but an innocent person, and even though the actual killing is by a person resisting the felony, the felon is liable for murder if the killing occurred during and arose out of the perpetration of the felony. *Hickman*, in distinguishing *People v. Morris*, 1 Ill. App. 3d 546, 274 N.E.2d 898 (1971), on the basis of the status of the deceased, is in accord with the results, although not the theory in *Redline* and *Austin*. *People v. Hickman*, 12 Ill. App. 3d 412, 417, 297 N.E.2d 582, 585-86 (1973).

order to "drop it." That person failed to respond whereupon the police officer fatally shot the individual, who was later discovered to be another police officer. No gunfire had been exchanged between any of the burglars and police and, when the felons were subsequently arrested, they were unarmed. Nevertheless, the jury found those defendants who fled guilty of murder.<sup>12</sup> The trial court entered an order arresting judgment of the murder convictions on the ground that in such circumstances the defendants could not be held liable under the felony-murder doctrine.<sup>13</sup> The State of Illinois appealed.

### *Decision*

The Illinois Appellate Court unanimously reversed the arrest of judgment order of the trial court, and the Illinois Supreme Court thereafter unanimously affirmed the judgment of the Illinois Appellate Court. *Hickman*<sup>14</sup> is controlled by ILLINOIS REVISED STATUTES ch. 38, § 9-1(a) (3), which states:

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

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.<sup>15</sup>

ILLINOIS REVISED STATUTES ch. 38, § 2-8 provides that burglary is a forcible felony.<sup>16</sup> The defendants contended that the death was a result of a justifiable and lawful act by a police officer and that, for the felony-murder doctrine to be applied under this statute, the defendants or someone acting in concert with them must have actually performed the fatal act.<sup>17</sup>

The court's rejection of this contention is based on statutory construction. The opinion of the Illinois Supreme Court adopts the statutory construction of *People v. Allen*<sup>18</sup> and commends the reasoning of the Illinois Appellate Court which did not rely

12. The jury found Papes, the defendant who was in custody at the time of the killing, guilty of burglary, but not guilty of murder. His liability is not in issue in either of the reviewing court decisions.

13. *People v. Hickman*, 59 Ill. 2d 89, 90, 319 N.E.2d 511, 512 (1974).

14. The use of "*Hickman*" or "*Hickman* decision" in the text refers only to the Illinois Supreme Court decision. The Illinois Appellate Court decision will be designated as such.

15. ILL. REV. STAT. ch. 38, § 9-1(a) (3) (1971).

16. 'Forcible felony' means treason, murder, voluntary manslaughter, rape, robbery, burglary, arson, kidnapping, aggravated battery and any other felony which involves the use or threat of physical force or violence against any individual.

ILL. REV. STAT. ch. 38, § 2-8 (1971).

17. *People v. Hickman*, 59 Ill. 2d 89, 92, 319 N.E.2d 511, 512 (1974).

18. 56 Ill. 2d 536, 309 N.E.2d 544 (1974).

on *Allen*.<sup>19</sup> In the Illinois Appellate Court decision of the *Hickman* case, Justice Scott states:

While the syntax of the words involved in our felony-murder statute could be interpreted on the restrictive and narrow lines urged by the defendants, we do not believe that in statutory construction we are bound to consider only the wording used in the statute. The court in construing a statute may consider the notes and reports of the commission pursuant to which the statutory provision was adopted. (I.L.P. *Statutes* ch. 6, sec. 126, p. 115, see 1952 Op. Atty. Gen. 159.) Turning our attention to the committee comments in regard to the statute in question we find on page 9 of SMITH HURD ILL. ANN. STAT., ch. 38, the following comments in regard to the application of sec. 9-1(a)(3), the felony-murder provision:

'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. [sic] \* \* \* or even by a third person trying to prevent the commission of the felony.'<sup>20</sup>

The committee comments which annotate the felony-murder statute cite *People v. Payne*<sup>21</sup> as authority for this proposition of law. Referring to *Allen*, the Illinois Supreme Court in *Hickman* declares:

This court has recently re-examined the holding of *Payne* and considered its import in relation to section 9-1 of the CRIMINAL CODE OF 1961, concluding that it was the intent of those who drafted the felony-murder statute to incorporate therein the holding in *Payne*.<sup>22</sup>

*Payne* indicates that it is a natural and probable consequence of an attempted robbery that a victim might be shot by a felon or by someone resisting the robbery. Chief Justice Underwood, writing for the Supreme Court in the *Hickman* decision, quotes *Payne*:

'It might reasonably be anticipated that an attempted robbery would meet with resistance, during which the victim might be shot either by himself or someone else in attempting to prevent the robbery, and those attempting to perpetrate the robbery would be guilty of murder.'<sup>23</sup>

The Illinois Appellate Court opinion of *Hickman* adds that "a defendant may be criminally responsible for the killing of

19. *People v. Hickman*, 59 Ill. 2d 89, 95, 319 N.E.2d 511, 514 (1974).

20. 12 Ill. App. 3d 412, 415, 297 N.E.2d 582, 584 (1973).

21. 359 Ill. 246, 194 N.E. 539 (1935).

22. *People v. Hickman*, 59 Ill. 2d 89, 93, 319 N.E.2d 511, 513 (1974).

23. *Id.*; *People v. Payne*, 359 Ill. 246, 255, 194 N.E. 539, 543 (1935).

See also *People v. Krauser*, 315 Ill. 485, 146 N.E. 593 (1925).

another during the commission of a forcible felony even though no certainty exists that the defendant or his cohorts performed the fatal act."<sup>24</sup>

In addition to *Payne*, the *Hickman* decision relies on two very recent Illinois Supreme Court decisions, *People v. Allen*<sup>25</sup> and *People v. Smith*.<sup>26</sup> In *Allen* a police officer was shot and killed during an attempted armored truck robbery, the court holding therein that a defendant could be convicted of felony-murder whether the fatal shot is fired by a co-felon in furtherance of the attempt or by a police officer in resistance thereto. According to the rationale of *Smith*, the felon need not foresee the precise sequence of events leading to the death. In *Smith*, the Illinois Supreme Court stated:

It is unimportant that the defendant did not anticipate the precise sequence of events that followed upon his entry into the apartment . . . . His unlawful acts precipitated those events, and he is responsible for the consequences.<sup>27</sup>

The felons are not cleansed of criminal liability merely because they were fleeing at the time of the fatal shooting. It has "previously [been] held that the period of time and activities involved in escaping to a place of safety are part of the crime itself."<sup>28</sup> The Illinois Appellate Court in *Hickman* quotes *People v. Golson*<sup>29</sup> to explain that:

\* \* \* [W]here two or more persons engage in conspiracy to commit robbery and an officer is murdered while in immediate pursuit of either or both of the offenders who are attempting to escape from the scene of the crime with the fruits of the robbery, each of the conspirators is guilty of murder, for the crime had not been completed at the time inasmuch as the conspirators had not won their way to a place of safety. We pointed out that a plan to commit a robbery would be futile if it did not comprehend an escape with the proceeds of the crime, and that unless the plan was to kill any person attempting to apprehend the conspirators at the time of or immediately upon gaining possession of the property, the plan would be inane.<sup>30</sup>

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24. *People v. Hickman*, 12 Ill. App. 3d 412, 416, 297 N.E.2d 582, 585 (1973). See also *People v. Krauser*, 315 Ill. 485, 146 N.E. 593 (1925) (reversed on other grounds); *People v. Danner*, 105 Ill. App. 2d 126, 245 N.E.2d 106 (1969).

25. 56 Ill. 2d 536, 309 N.E.2d 544 (1974).

26. 56 Ill. 2d 328, 307 N.E.2d 353 (1974). (The accused entered the deceased's apartment and threatened to kill her. Frightened, the victim jumped to her death from a third story window.)

27. *People v. Smith*, 56 Ill. 2d 328, 333-34, 307 N.E.2d 353, 355-56 (1974).

28. *People v. Hickman*, 59 Ill. 2d 89, 94, 319 N.E.2d 511, 513 (1974) (citing *People v. Golson*, 32 Ill. 2d 398, 207 N.E.2d 68 (1965)).

29. 35 Ill. 2d 398, 207 N.E.2d 68 (1965).

30. *People v. Hickman*, 12 Ill. App. 3d 412, 416, 297 N.E.2d 582, 585

In addition, the Illinois Appellate Court distinguished *People v. Morris*<sup>31</sup> from *Hickman*. *Morris* holds that a felon cannot be convicted of felony-murder when a person resisting the felony kills the felon's accomplice. In *Hickman*, the deceased is an innocent person, not the felon's accomplice. The basis of the distinction is the status of the deceased. The deceased in *Morris* is a co-felon who assisted in setting the causal chain in motion. In *Hickman*, the Illinois Supreme Court makes no mention of *Morris*.<sup>32</sup> Chief Justice Underwood, stating the court's awareness of the felony-murder doctrine's restrictions in other jurisdictions, concludes, "[o]ur statutory and case law . . . dictate a different, and we believe preferable, result."<sup>33</sup>

#### ANALYSIS

In analyzing *Hickman*, three conclusions are evident. (1) The Illinois courts could have arrived at a contrary decision only by reason of a strained application of the rules of statutory construction, for the legislative intent is clearly supportive of the *Hickman* decision. (2) *Hickman* is consistent with Illinois case law. (3) The same criticisms will be made against the *Hickman* decision as have generally been made against the proximate cause theory.

#### *Statutory Construction*<sup>34</sup>

A statute affords the best means of its exposition and if the intent of the General Assembly can be ascertained from its

(1973); accord, *People v. Bongiorno*, 358 Ill. 171, 173, 192 N.E.2d 856, 857 (1934).

31. 1 Ill. App. 3d 566, 274 N.E.2d 898 (1971).

32. This is capable of two interpretations. (1) The Illinois Supreme Court acquiesces in the view of the Illinois Appellate Court, or (2) the Illinois Supreme Court does not like the distinction and chooses to ignore it. The first seems the preferable interpretation since, had the Illinois Supreme Court not agreed with the distinction, the opinion probably would have included dictum to that effect.

33. *People v. Hickman*, 59 Ill. 2d 89, 95, 319 N.E.2d 511, 514 (1974).

34. Interpretation is generally spoken of as if its chief function was to discover what the meaning of the Legislature really was. But when a Legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all that a judge had to do with a statute, interpretation of statutes, instead of being one of the most difficult of a judge's duties, would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present. . . . [W]hen the judges are professing to declare what the Legislature meant, they are in truth, themselves legislating to fill up *casus omissi*.

J.C. GRAY, *THE NATURE AND SOURCES OF THE LAW* 172-73 (1909).



provisions that intent will prevail without resorting to other or extrinsic aids for construction.<sup>35</sup>

Extrinsic matters are referred to only where there is doubt as to the statute's meaning.<sup>36</sup> At first glance, the felony-murder statute appears to be unambiguous. The person actually killing the other must be one committing or attempting a felony. However, the statute provides that the one who "causes" the death by perpetrating a forcible felony is guilty of murder.<sup>37</sup> Under the proximate cause theory, merely setting the causal chain in motion is sufficient "cause." Therefore, the person perpetrating the felony may be liable for murder even though he did not actually kill anyone. To determine whether this interpretation was the result intended by the legislature, the courts must resort to rules of statutory construction.

Rules of construction are not rules of law<sup>38</sup> and are used only to ascertain legislative intent.<sup>39</sup> Not only should the statute be construed in harmony with the existing law as "part of a general and uniform system of jurisprudence,"<sup>40</sup> but in case of ambiguity, the statute should be construed by referring to the common law in existence at the time of its passage.<sup>41</sup> The present statute is merely a codification of the common law, with the exception that specific felonies are designated as forcible felonies.<sup>42</sup> *Hickman* emphasizes that this conclusion is evi-

35. 34 I.L.P. *Statutes* § 125 (1958). See also *Moran v. Katsinas*, 16 Ill. 2d 169, 157 N.E.2d 38 (1959).

36. *Burgeson v. Mullinix*, 399 Ill. 470, 479, 78 N.E.2d 297, 302 (1948); 34 I.L.P. *Statutes* § 101 (1958).

37. The Court of Appeals of New York, in *People v. Wood*, 8 N.Y.2d 48, 50, 167 N.E.2d 736, 737 (1960), interprets the New York felony-murder statute as requiring that the felon perform the actual killing:

Section 1044 of the Penal Law, Consol. Laws, c. 40, defines murder in the first degree as follows:

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

"2. \* \* \* without a design to effect death, by a person engaged in the commission of, or in an attempt to commit, a felony either upon or affecting the person killed or otherwise." (emphasis added).

In *Hornbeck v. State*, 77 So. 2d 876, 878 (Fla. 1955), the Florida statute is interpreted to mean that the killing need not be done by the felon. The court quotes F.S.A. § 782.04: "The unlawful killing of a human being \* \* \* when committed in perpetration of or in the attempt to perpetrate any \* \* \* robbery \* \* \* shall be murder in the first degree."

38. 34 I.L.P. *Statutes* § 111 (1958).

39. *People v. Hudson*, 46 Ill. 2d 177, 181, 263 N.E.2d 473, 476 (1970); 34 I.L.P. *Statutes* § 111 (1958).

40. 34 I.L.P. *Statutes* § 130 (1958). See also *Arnolt v. City of Highland Park*, 52 Ill. 2d 27, 282 N.E.2d 144 (1972).

41. *In re Estate of Frick*, 26 Ill. App. 2d 56, 167 N.E.2d 266 (1960); 34 I.L.P. *Statutes* § 130 (1958).

42. Letter from Charles H. Bowman to the members of the Joint Committee of the Illinois State and Chicago Bar Associations to Revise the Illinois Criminal Code, March 13, 1961. (Professor Bowman was the chief architect of the ILLINOIS CRIMINAL CODE OF 1961.)

Section 9-1(a)(1) and (2) are a restatement of what is probably

denced by the use of the common law, especially *Payne*, to support the explanation of the statutory law in the committee comments.<sup>43</sup> *Payne* is based on the felony-murder statute which was repealed when the ILLINOIS CRIMINAL CODE OF 1961 was enacted.<sup>44</sup> The old statute is also considered merely "declaratory of the common law."<sup>45</sup>

#### Illinois Case Law

*People v. Allen*<sup>46</sup> is the first Illinois Supreme Court case to construe the Illinois felony-murder statute to include the *Payne* holding. *Payne* concludes:

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 robbery, and those attempting to perpetrate the robbery would be guilty of murder.<sup>47</sup>

*Payne* continues, "[a] killing which happens in the prosecution of an unlawful act which in its consequences naturally tends to destroy the life of a human being is murder."<sup>48</sup> It is immaterial whether the killing is unintentional or accidental.<sup>49</sup> *People v. Smith*<sup>50</sup> adds that the felon need not foresee the precise manner in which death occurred. *Payne* and *Allen* can be factually distinguished from *Hickman*. In both, the death resulted from a gun battle between felons and persons resisting the felony.<sup>51</sup>

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the current law, but (3) is a change since it restricts felony-murder only. (This probably does not involve a change since no case of felony-murder has been found in Illinois where the felony was not within the code classification of 'forcible felony.' Indeed one Illinois case suggests, despite the present statutory language, the felony must be forcible.)

The purpose of this letter was to apprise committee members of significant changes in the law which would result if the Code were adopted. The above quotation was the only statement concerning section 9-1.

43. 59 Ill. 2d 89, 92-93, 319 N.E.2d 511, 512-13 (1974).

44. Involuntary manslaughter shall consist in the killing of a human being without any intent to do so, 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 human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged murder.

Act of January 6, 1827, ch. 38, sec. 28 [1826-27] Ill. Laws 128 (repealed 1961).

45. *People v. Goldvarg*, 346 Ill. 398, 401, 178 N.E. 892, 893 (1931).

46. 56 Ill. 2d 536, 309 N.E.2d 544 (1974).

47. *People v. Payne*, 359 Ill. 246, 255, 194 N.E. 539, 543 (1935) (citations omitted).

48. *Id.*

49. *People v. Goldvarg*, 346 Ill. 398, 402, 178 N.E. 892, 894 (1931); *People v. Danner*, 105 Ill. App. 2d 126, 130, 245 N.E.2d 106, 108 (1969).

50. 56 Ill. 2d 328, 307 N.E.2d 353 (1974). See note 26 *supra*.

51. *People v. Allen*, 56 Ill. 2d 536, 309 N.E.2d 544 (1974) (gun battle with police); *People v. Payne*, 359 Ill. 246, 194 N.E. 539 (1935) (gun battle with the robbery victims).

In *Hickman* however, there was no gun battle, and the felons were not proven to be armed. The felons may not even have been in the immediate vicinity when the killing occurred.<sup>52</sup> The *Hickman* decision points out that “[t]hose who commit forcible felonies know they may encounter resistance, both to their affirmative actions and to any subsequent escape.”<sup>53</sup> The Illinois Supreme Court prefers liability in such circumstances rather than the California requirement that a gun battle be initiated by the felons before they can be held accountable for the murder of an innocent person who is killed by one resisting the felony.<sup>54</sup>

There are Illinois cases holding that the proximate cause theory should not be applied as part of the law of homicide. *Butler v. People*<sup>55</sup> and *People v. Garippo*<sup>56</sup> are both manslaughter cases. Both can be distinguished from *Hickman*. In *Butler* the shooting of a third person by the sheriff was not naturally to be expected to follow from the acts of the accused.<sup>57</sup> The distinction is in the nature of the accused’s act. In *Butler* the act is assault, whereas in *Hickman* the act is burglary. People do not expect to be fired at with a weapon to prevent an assault. In *Garippo*, the causal connection between robbery and the death is not established because there is no direct evidence with reference to the shooting.<sup>58</sup> Further, the deceased is one of the robbers. Since *Morris*, a felon cannot be held liable for murder for the death of a co-felon who is actually killed by a person resisting the felony,<sup>59</sup> and therefore, *Garippo* would have the same result today without criticizing the proximate cause theory. *Morris* defines the outer limit of the proximate cause theory. The Illinois Appellate Court decision in *Hickman* distinguished *Morris*, but the Illinois Supreme Court failed to mention the case. Thus the Illinois Supreme Court

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52. Whether the felon’s flight is within the *res gestae* of the burglary is not a contested issue in *Hickman*. Nevertheless, *Hickman* is consistent on this point with prior Illinois cases and the majority of American case law. *People v. Golson*, 32 Ill. 2d 398, 207 N.E.2d 68 (1965); *People v. Bongiorno*, 358 Ill. 171, 192 N.E. 856 (1934); *Conrad v. State*, 75 Ohio St. 52, 78 N.E. 957 (1906).

53. 59 Ill. 2d 89, 94, 319 N.E.2d 511, 513 (1974).

54. *Id.* at 95, 319 N.E.2d at 514.

55. 125 Ill. 641, 18 N.E. 338 (1888).

56. 292 Ill. 293, 127 N.E. 75 (1920).

57. See also *Butler v. People*, 125 Ill. 641, 646, 18 N.E. 338, 342 (1888). (“There was, therefore, nothing in the character of the assault which could justify a prudent man resorting to a revolver.”); *People v. Krauser*, 315 Ill. 485, 505-06, 146 N.E. 593, 601 (1925).

58. See *Commonwealth v. Almeida*, 362 Pa. 596, 619-20, 68 A.2d 595, 607 (1949).

59. *People v. Morris*, 1 Ill. App. 3d 566, 274 N.E.2d 898 (1971). (The deceased co-felon was killed when he and one of the robbery victims struggled for the co-felon’s firearm.)

appears to acquiesce in the Illinois Appellate Court distinction based on the status of the deceased.<sup>60</sup>

*General Criticisms of the Proximate Cause Theory*

In *Commonwealth v. Redline*,<sup>61</sup> the Supreme Court of Pennsylvania made a similar distinction based on the status of the deceased. Although overruling the proposition that the felony-murder doctrine can be utilized to convict a felon for the murder of a co-felon actually killed by a person resisting the felony,<sup>62</sup> the *Redline* court refused to overrule the use of the felony-murder doctrine in the situation where a police officer is killed, even though inferences were raised by the defense that the deceased was mistakenly shot by another policeman.<sup>63</sup> Despite this distinction, *Redline* rejects the proximate cause theory, reasoning that the felony imputes malice, rather than the act of killing.<sup>64</sup> "[T]he killing must have been done by the defendant or by an accomplice or confederate or by one acting in furtherance of the felonious undertaking."<sup>65</sup> A more direct causal chain is required between the death and the felony than a mere coincidence.<sup>66</sup>

In a subsequent case, *Commonwealth ex rel. Smith v. Myers*,<sup>67</sup> the Supreme Court of Pennsylvania extends the *Redline* reasoning to reject the use of the felony-murder doctrine where any person, innocent or co-felon, is killed by someone resisting the felony. "Indeed, to make the result hinge on the character of the victim is, in many instances, to make it hinge on the marksmanship of resisters."<sup>68</sup> *Myers*, criticizing the felony-murder doctrine adds, "it has been said to be 'highly punitive and objectionable as imposing the consequences of murder upon a death wholly unintended'."<sup>69</sup> *Myers* also utilizes the

60. See note 52 *supra*.

61. 391 Pa. 486, 137 A.2d 472 (1958). ("The defendant was convicted of murder in the first degree . . . for the death of his co-felon from a gunshot wound inflicted by a police officer endeavoring to apprehend the two." *Id.* at 486, 137 A.2d at 473.)

62. *Commonwealth v. Thomas*, 382 Pa. 639, 117 A.2d 204 (1955).

63. *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958), (upholding *Commonwealth v. Almeida*, 362 Pa. 596, 68 A.2d 595 (1949)).

64. See *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958). See also Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 59 (1956); Note, *Commonwealth v. Redline*, 71 HARV. L. REV. 1565 (1958).

65. *Commonwealth v. Redline*, 391 Pa. 486, 496, 137 A.2d 472, 476 (1958).

66. *Id.*

67. 438 Pa. 218, 261 A.2d 550 (1970). (A police officer was killed in a gun battle with the felons. The defense raised inferences that the deceased was killed by another police officer.)

68. *Id.* at 234, 261 A.2d at 558.

69. *Id.* at 225, 261 A.2d at 553 (citing Pirsig, *Proposed Revision of the Minnesota Criminal Code*, 47 MINN. L. REV. 417, 427-28 (1963), in which the major objection is the imposition of capital punishment).

argument that the felony-murder rule is ineffective in preventing the commission of felonies.<sup>70</sup>

*Redline* and *Myers* indicate that the basic objection to the felony-murder doctrine's proximate cause theory is that a killing in opposition to a felony is not in perpetration of it. The killing must be actually or constructively the act of the felon, i.e., performed by the felon or one acting in furtherance of the felonious intent. When the actual killing is performed by one resisting the felony, there is a superseding cause<sup>71</sup> which is not foreseeable to the felon, and this foreseeability should be required for criminal liability.<sup>72</sup>

These criticisms can be rebutted, and support can be found for the proximate cause theory. On the basis of common experience, several felonies have been designated as being inherently dangerous.<sup>73</sup> The purpose of the felony-murder statute is "to prevent the death of innocent persons likely to occur during the commission of certain inherently dangerous and particularly grievous felonies."<sup>74</sup> ILLINOIS REVISED STATUTES ch. 38, § 2-8 lists these inherently dangerous felonies.<sup>75</sup> It is not necessary that the felon foresee the precise manner in which the death occurs. It is only necessary that he foresee that human life is endangered and that death may ensue in some way.<sup>76</sup> A

70. Commonwealth *ex rel. Smith v. Myers*, 438 Pa. 218, 226, 261 A.2d 550, 554 (1970); O.W. HOLMES, THE COMMON LAW 58 (1949); accord, *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

71. *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965). Superseding or intervening causation is described as follows:

If the act of the accused was in fact a cause of a socially-harmful occurrence, and was a substantial factor thereof, it will be recognized as the proximate cause 'unless another, not incident to it, but independent of it, is shown to have intervened between it and the result.' R. PERKINS, CRIMINAL LAW 708 (2d ed. 1969). Chief Justice Traynor in *Washington, supra*, points out that "[i]n every robbery there is a possibility that the victim will resist and kill. The robber has little control over such a killing once the robbery is undertaken . . ." 62 Cal. 2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965). (Justice Traynor also comments that the felony-murder doctrine could lead to absurd results such as holding one felon for the death of a co-felon actually killed by a victim even though the felons were not armed. Generally, however, one felon cannot be held liable under the felony-murder doctrine for the death of a co-felon who was actually killed by a person resisting the felony. If the crux of the argument is that the felons were not armed, Justice Traynor does not appear to disapprove of the holding of an unarmed felon guilty of felony-murder where an innocent person is killed by a co-felon, even if the accused was not aware that the co-felon was in possession of a deadly weapon. The felon's weapon may be concealed. It is not incumbent upon the victim or another resisting the felony to politely inquire as to the felon's arsenal.)

72. *Regina v. Serne*, 16 Cox C.C. 311 (1877); O.W. HOLMES, THE COMMON LAW 59 (1949).

73. R. PERKINS, CRIMINAL LAW 40 (2d ed. 1969); Perkins, *A Re-examination of Malice Aforethought*, 43 YALE L.J. 537, 560 (1934).

74. *State v. Williams*, 254 So. 2d 548, 550 (Fla. App. 1971).

75. See note 16 *supra*.

76. See *People v. Smith*, 56 Ill. 2d 328, 307 N.E.2d 353 (1974).

person should reasonably foresee that when one of these inherently dangerous felonies is perpetrated or attempted human life is endangered. *Hickman* observes: "Those who commit forcible felonies know they may encounter resistance, both to their affirmative actions and to any subsequent escape."<sup>77</sup> It is not a superseding cause for a person attacked to defend himself or his property.<sup>78</sup> Further, only the *mens rea* of the murder is imputed to the felon. The *actus reus* is the setting in motion of the causal chain by perpetrating the felony.<sup>79</sup> The Illinois Appellate Court's *Hickman* decision distinguishes *Morris* not on the theory that the deceased is merely a felon, nor that he assumes the risk, but because he assists in setting in motion the chain of events which causes his own death.<sup>80</sup>

Justice Burke of the Supreme Court of California, discussing the deterrent effect of the felony-murder doctrine on the perpetration of felonies, points out:

[T]o say that the knowledge that this awesome, sobering, terrifying responsibility of one contemplating the use of a deadly weapon in the perpetration of one of the listed offenses is not the strongest deterrent to the commission of such offenses belies what is being demonstrated day after day in the criminal departments of our trial courts.<sup>81</sup>

In addition, the article which *Myers* cites to support the view that the felony-murder doctrine is excessively punitive commends the Wisconsin statute which, instead of presenting the felon-murderer with a death penalty, merely tacks an additional

77. 59 Ill. 2d 89, 94, 319 N.E.2d 511, 513 (1974).

78. "For any individual forcibly to defend himself or his family or his property from criminal aggression is a primal human instinct." Commonwealth *ex rel. Smith v. Myers*, 438 Pa. 218, 241, 261 A.2d 550, 561 (1970) (dissenting opinion); See also R. PERKINS, CRIMINAL LAW 719-22 (2d ed. 1969); Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 649 (1920).

79. It is equally consistent with reason and sound public policy to hold that when a felon's attempt to commit robbery or burglary 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.

Commonwealth v. Moyer, 357 Pa. 181, 191, 53 A.2d 736, 741 (1947).

If a person with legal malice commits an act or sets off a chain of events from which, in the common experience of mankind, the death of another is a natural or reasonably foreseeable result, that person is guilty of murder, if death results from that act or from the events which it naturally produced.

Commonwealth v. Bolish, 381 Pa. 500, 520, 113 A.2d 464, 474-75 (1955) (reversed on other grounds).

80. *People v. Hickman*, 12 Ill. App. 3d 412, 417, 297 N.E.2d 582, 585-86 (1973).

81. *People v. Washington*, 62 Cal. 2d 777, 791, 402 P.2d 130, 139, 44 Cal. Rptr. 442, 451 (1965) (dissenting opinion).

fifteen years to the sentence for the felony.<sup>82</sup> Since *Furman v. Georgia*,<sup>83</sup> the use of the death penalty is severely restricted.<sup>84</sup> The practical effect may well be that the felon-murderer only gets a longer sentence of imprisonment. If so, the felony-murder rule might not be considered excessively punitive.

#### THE STATE OF THE LAW: HICKMAN'S IMPACT

A felon is criminally liable for murder if he or his co-felon kills another while perpetrating or attempting a felony.<sup>85</sup> It is immaterial whether the killing is unintentional or accidental.<sup>86</sup> The felony must be either (1) dangerous to human life<sup>87</sup> or (2) a non-violent felony which, under the circumstances, must be carried out violently.<sup>88</sup> Where the killing is actually performed by a felon or his co-felon, the felon can be held for the murder of another co-felon.<sup>89</sup> If the killing is done by one resisting the felony, the felon cannot be liable for the death of a co-felon.<sup>90</sup> Those jurisdictions rejecting the proximate cause theory of the felony-murder doctrine hold that even if the deceased is an innocent person killed by one resisting the felony, the felon cannot be held liable for murder.<sup>91</sup> Had such a theory been used in *Hickman*, the defendants could not have been found guilty of felony-murder. These courts recognize exceptions where the felons start a gun battle with the police<sup>92</sup> or use the deceased as a shield in an escape attempt.<sup>93</sup> No such incidents occur in *Hickman*. Jurisdictions which retain the traditional proximate cause theory continue to hold the felon liable for the death of innocent persons accidentally killed by forces resisting

82. Pirsig, *Proposed Revision of the Minnesota Criminal Code*, 47 MINN. L. REV. 417, 427-28 (1963).

83. 408 U.S. 238, *reh. denied*, 409 U.S. 902 (1972).

84. In Illinois a majority of a three judge court is required to impose the death penalty. ILL. REV. STAT. ch. 38, § 1005-8-1A (1973).

85. *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965); *Commonwealth v. Moore*, 121 Ky. 97, 88 S.W. 1085 (1905); *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218, 261 A.2d 550 (1970).

86. *People v. Smith*, 56 Ill. 2d 328, 307 N.E.2d 353 (1974); *People v. Goldvarg*, 346 Ill. 398, 178 N.E. 892 (1931); *People v. Danner*, 105 Ill. App. 2d 126, 245 N.E.2d 106 (1969).

87. ILL. REV. STAT. ch. 38, §§ 9-1(a) (3), 2-8 (1973); *People v. Pavlic*, 227 Mich. 562, 199 N.W. 373 (1924).

88. *People v. Auilar*, 59 Ill. 2d 95, 319 N.E.2d 514 (1974).

89. *People v. Warren*, 44 Mich. App. 567, 205 N.W.2d 599 (1973) (liability is not based on felony-murder).

90. *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965); *People v. Morris*, 1 Ill. App. 3d 566, 274 N.E.2d 898 (1971); *People v. Austin*, 370 Mich. 12, 120 N.W.2d 766 (1963); *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958).

91. *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965); *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218, 261 A.2d 550 (1970).

92. *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

93. *Miers v. State*, 157 Tex. Crim. 572, 251 S.W.2d 404 (1952).

the felony.<sup>94</sup> The felon is liable for homicides resulting from any resistance which is natural, probable, and foreseeable, except the death of a co-felon.<sup>95</sup> Resistance is foreseeable,<sup>96</sup> although it is not necessary that the felon foresee the actual manner in which the death occurred, only that death may occur.<sup>97</sup> The felon is liable even though the killing occurs while he is attempting to escape to a place of safety.<sup>98</sup> It is only because the proximate cause theory is utilized that the defendants in *Hickman* are held criminally liable for felony-murder.

*Hickman* provides continuity between the common law and modern law. The *Hickman* decision will probably result in the gradual withdrawal by the American courts from the extreme positions of *Myers* and *People v. Washington*,<sup>99</sup> and thereby bring certainty to the law. The felon in Illinois will be responsible for the death of any person, except a co-felon, killed by another resisting the felony. Judges and lawyers will find the law more certain in application than it has been in the years since *Redline*, and perhaps equally important, the *Hickman* decision evidences the response of the legal system to society's demand that the rights of the victim be considered along with the rights of the accused.<sup>100</sup> The victim, *i.e.*, the community,

94. See *People v. Hickman*, 59 Ill. 2d 89, 319 N.E.2d 511 (1974); *Hornbeck v. State*, 77 So. 2d 876 (Fla. 1955); *People v. Podolski*, 332 Mich. 508, 52 N.W.2d 201 (1952).

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

96. *Id.* at 94, 319 N.E.2d at 513.

97. *People v. Smith*, 56 Ill. 2d 328, 307 N.E.2d 353 (1974).

98. *People v. Hickman*, 59 Ill. 2d 89, 94, 319 N.E.2d 511, 513 (1974).

99. *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965) (holding that, for a felon to be liable under the felony-murder doctrine, the killing of an innocent person must be done by the felon or a co-felon).

100. The Illinois Appellate Court's *Hickman* opinion quotes Justice Cardozo:

'When they [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, \* \* \* The final cause of law is the welfare of society.'

12 Ill. App. 3d 412, 417, 297 N.E.2d 582, 586 (1973); B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66-67 (1932).

Courts have a duty, especially in these days when crime has become so prevalent, to see that the lives, the property and the rights of law-abiding people are protected and consequently must delicately balance the scales of justice so that the rights of the public are protected equally with those of the persons accused of crime.

*Commonwealth v. Bolish*, 381 Pa. 500, 519, 113 A.2d 464, 474 (1955) (reversed on other grounds). The rise in crime has been attributed to the recent "pro-criminal decisions."

This is the age of Crime and Criminals, and the peace-loving citizen is the forgotten man. Murder, robbery and rape are rampant, and this tidal wave of ruthless crime, violence and widespread lawlessness which too often goes unpunished is due in considerable part to recent pro-criminal decisions of the highest courts in our State and Country.

*Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218, 238, 261 A.2d 550, 560 (1970) (dissenting opinion). This rise in crime has been docu-



must have redress for the fatal results of the felon's gross indifference to the inalienable right to life of all persons in the community. The future of the felony-murder doctrine includes the utilization of the proximate cause theory; consequently, the *Hickman* decision will lead to an increase in felony-murder convictions. The protection of society requires it.

*Hickman* signals the revitalization of the proximate cause theory of the felony-murder doctrine. It indicates that the result in *Redline* could have been attained without rejecting the proximate cause theory. The extension of *Redline* has defeated much of the purpose behind the felony-murder doctrine, even though its rationale remains logically sound. The Illinois Supreme Court refuses to reject this traditional reasoning. As a result, a consistent, and uniform system of jurisprudence is presented, and an example is set for other jurisdictions which also consider it preferable to maintain, rather than ignore, the centuries of reasoning behind the felony-murder doctrine.

*Gale Murrin*

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mented. From 1960 to 1973 violent crimes, i.e., murder, forcible rape, robbery and aggravated assault increased 159.6 percent per 100,000 inhabitants. Total crime increased 120.2 percent. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 59 (1973).