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COMMENTS

THE FELONY MURDER RULE IN ILLINOIS: THE INJUSTICE OF THE PROXIMATE CAUSE THEORY EXPLORED VIA RESEARCH IN COGNITIVE PSYCHOLOGY

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The felony murder rule has long been the subject of intense criticism by the legal scholar community. Illinois abides by the proximate cause theory of the felony murder rule. The proximate cause theory holds felons accountable for any foreseeable deaths that occur during the commission or attempted commission of a felony. This includes deaths of innocent bystanders caused by third parties, and even, as in two recently decided Illinois Supreme Court cases, the deaths of co-felons at the hands of police officers. Illinois courts have justified using proximate cause, a concept borrowed from tort law, on the grounds that the foreseeability requirement would temper the innate harshness of the felony murder rule. However, in practice, instead of placing a restriction on the felony murder rule, it has been applied expansively, extending liability even to those defendants whose actions appeared attenuated from their co-felon's death. This Comment explores why the proximate cause theory has failed in its purported purpose to limit the felony murder rule, and employs cognitive psychology as a means to explain the rule's expansive application.

* Juris Doctor 2008, Northwestern University School of Law. I am tremendously thankful to Professor Dorothy Roberts for her invaluable insight and guidance without which this Comment would be in shambles today. Similarly, I am grateful to Professor Janice Nadler for exposing me to the field of law and psychology which prompted my idea for this Comment in the first place. The editorial staff of the *Journal of Criminal Law and Criminology* also deserves a hefty thank you for their work and patience. Finally, and most importantly, I can never say enough thanks to my family: Hugo, Ruth, and Fabian.

I. INTRODUCTION

In the summer of 2006, the Illinois Supreme Court affirmed two first-degree murder convictions in *People v. Hudson*[1] and *People v. Klebanowski*.[2] Both cases involved eerily similar fact patterns where an off-duty police officer, unbeknownst to the perpetrators, happened to be a target of an armed robbery.[3] In both cases, the officer fatally shot one of the felons, and the defendant was convicted of first-degree murder for the death of his accomplice.[4] The Illinois Supreme Court upheld both convictions under the felony murder rule and reaffirmed its allegiance to the proximate cause theory of felony murder.[5]

The proximate cause theory holds felons accountable for any foreseeable deaths that occur during the commission or attempted commission of a felony.[6] This includes deaths of innocent bystanders caused by third parties, and even, as in *Hudson* and *Klebanowski*, deaths of co-felons at the hands of police officers.[7] Illinois courts have justified using proximate cause, a concept borrowed from tort law, on the grounds that the foreseeability requirement would temper the innate harshness of the felony murder rule.[8] However, in practice, instead of placing a restriction on the felony murder rule, it has been applied expansively, extending liability even to those defendants whose actions were attenuated from their co-felon's death. This Comment explores why the proximate cause theory has failed in its purported purpose to limit the felony murder rule and suggests that research in cognitive psychology can help us understand the rule's expansive application.

Psychologists have long been aware of universal biases, such as the hindsight bias, the phenomenon that people overestimate the predictability of past events,[9] and the outcome bias, the tendency to judge the quality of a decision based on its consequences.[10] Research suggests that these two biases, working in tandem, considerably undermine people's ability to

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[1] 856 N.E.2d 1078 (Ill. 2006).

[2] 852 N.E.2d 813 (Ill. 2006).

[3] *See id.*

[4] *Id.*

[5] *Id.*

[6] Kara M. Houck, *People v. Dekens: The Expansion of the Felony-Murder Doctrine in Illinois*, 30 LOY. U. CHI. L.J. 357, 367 (1999).

[7] *Id.* at 358-59.

[8] *See* People v. Hudson, 856 N.E.2d 1078, 1083 (Ill. 2006).

[9] Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 571 (1998).

[10] Philip G. Peters, Jr., *Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 ARIZ. ST. L.J. 1277, 1282 (1999).

judge the foreseeability of events in hindsight accurately[11]—a task required of juries and judges in determining the guilt of felony murder defendants via the proximate cause theory.[12] Furthermore, studies in causal attribution have shown that people conflate blameworthy behavior with causation.[13] For example, research shows that people assessing causation for a traffic accident placed more blame on a driver whose motive for speeding was to hide a vial of cocaine than on a driver rushing to hide an anniversary present.[14] Furthermore, another study suggests that blame is attributed in proportion to the severity of the result—thus the more severe the result, the more blame that will be attributed to the actor.[15]

The implications of this research for the proximate cause theory of the felony murder rule are twofold. First, by virtue of these psychological phenomena, both juries and judges tend to find that a resulting death was foreseeable in felony murder cases, even where there were superseding intervening causes breaking the causal connection between the defendant's conduct and the resulting death. Furthermore, due to the inherently blameworthy behavior entailed in committing a felony, causal attributions are exacerbated leading to unwarranted causal associations between the defendant's acts and the resulting death. As such, the research suggests that in individual cases, the playing field is heavily tilted against the felony murder defendant.

Second, and on a broader level, the expansion of proximate cause theory jurisprudence since its inception is a direct result of the outcomes of individual felony murder cases. Because juries are likely to find a resulting death foreseeable and appellate judges are generally deferential to jury determinations, courts have upheld felony murder convictions, gradually expanding the application of the proximate cause theory of the felony murder rule. In other words, the effects of the hindsight bias, outcome bias, and causal attribution on individual cases has translated into a general expansion of the Illinois Supreme Court's jurisprudence with respect to its felony murder rule.

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[11] *Id.*

[12] Rachlinski, *supra* note 9, at 579-80 ("The [hindsight] bias is not limited to specific populations of subjects.... Studies even have demonstrated that the bias influences the judgments of experts in several different fields. Two studies have shown that even state and federal judges are susceptible to the bias.").

[13] Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCHOL. 368, 368 (1992).

[14] *Id.* at 369.

[15] D. Chimaeze Ugwuegbu & Clyde Hendrick, *Personal Causality and Attribution of Responsibility*, 2 SOC. BEHAV. & PERSONALITY 76, 76 (1974).

This Comment is organized into three parts. Part II provides general background information on the felony murder rule and explains how the rule developed and is applied in Illinois. *Hudson* and *Klebanowski* are both discussed in detail as illustrations of the anomalous consequences resulting from the modern application of the proximate cause theory of the felony murder rule. After providing a synopsis of the relevant research on the hindsight bias, the outcome bias, and causal attribution literature, Part III analyzes and outlines the implications of these studies. First, I discuss the implications of the biases on individual cases and show how the research suggests that the felony murder defendant is placed at an unfair disadvantage at the hands of jurors and judges alike. Then, I explore the broader ramification of the research, specifically discussing how causal attribution research helps to explain why the Illinois legislature adopted such broad language in its felony murder statute, as well as why the Illinois Supreme Court's jurisprudence has been characterized by constant expansion of the rule. Finally, Part IV consists of general conclusions as well as a research proposal that would test my assertions regarding cognitive psychology's implications for the proximate cause theory of the felony murder rule.

II. THE FELONY MURDER RULE

The felony murder rule has long been the subject of intense criticism by the legal community.[16] In its traditional form, the felony murder rule provides that the killing of another human being during the course of a felony constitutes murder.[17] Whether the death was intentional or accidental is irrelevant—the mens rea required for murder is automatically supplied by the intent to commit the underlying felony.[18] At its broadest, "[t]he rule imposes strict homicidal liability on felons even for deaths

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[16] *See generally* Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763 (1999) (providing a history of the felony murder rule and its criticisms); Nelson E. Roth & Scott E. Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446 (1985); James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429 (1994).

[17] Tomkovicz, *supra* note 16, at 1433.

[18] Gerber, *supra* note 16, at 763; *see also* Norman J. Finkel, *Culpability and Commonsense Justice: Lessons Learned Betwixt Murder and Madness*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 19 (1996). Finkel notes that three reasons have been given justifying the felony murder rule. *Id.* The least satisfying is that felony murder is a strict liability offense requiring no mens rea. *Id.* The second is transferred intent where intent for the underlying felony substitutes for the mental state required for the homicide. *Id.* Finally, "constructive malice" presumes malice for the homicide from the mental state required for the commission of the underlying felony. *Id.* Finkel cleverly labels constructive malice "one size fits all" mens rea. *Id.*

caused by third parties such as victims, police, or bystanders."[19] As a result, the felony murder rule runs afoul of a fundamental principle of our criminal justice system—the requirement that a guilty mental state specific to the crime committed be established to attach criminal liability.[20] This dispensing with the mens rea requirement has led scholars and judges to call it "abhorrent,"[21] "anachronistic,"[22] "barbaric,"[23] "injudicious and unprincipled,"[24] "an unsightly wart on the skin of the criminal law,"[25] "parasitic,"[26] and a "modern monstrosity" that "erodes the relationship between criminal liability and moral culpability."[27]

Modern courts have justified the existence of the felony murder rule primarily based on principles of deterrence.[28] There are two different "strains" of the deterrence rationale.[29] The more commonly held of the two is that the threat of a murder conviction will induce felons to take greater care during the commission of a felony, thus minimizing the chance of negligent killings.[30] The second view posits that the risk of a murder conviction for any killing during the commission of a felony will dissuade potential felons from committing the felony in the first place.[31] However, both of these deterrence rationales have been challenged by scholars.[32]

With regard to accidental killings, scholars question how it is possible to deter an unintended act. Likewise, they pose the identical question where a third party, such as a police officer, commits the fatal act. Because the felon has no control over a third party's acts, scholars dispute how the felony murder rule can deter this kind of killing. Another problem with the

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[19] Gerber, *supra* note 16, at 766-67.

[20] *See* Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1386 (2003) (stating that "[t]here could be no crime, said Blackstone, without a 'vicious will'" and quoting *Morissette v. United States*, 342 U.S. 246 (1956), as saying that "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil").

[21] Isabel Grant & A. Wayne MacKay, *Constructive Murder and the Charter: In Search of Principle*, 25 ALBERTA L. REV. 129, 133, 156-57 (1987).

[22] People v. Aaron, 299 N.W.2d 304, 307 (Mich. 1980).

[23] David Lanham, *Felony Murder—Ancient and Modern*, 7 CRIM. L.J. 90, 101 (1983).

[24] *Aaron*, 299 N.W.2d at 334.

[25] H.L. Packer, *Criminal Code Revision,* 23 U. TORONTO L.J. 1, 4 (1973).

[26] *Aaron*, 299 N.W.2d at 333 n.16.

[27] Lanham, *supra* note 23, at 101.

[28] Tomkovicz, *supra* note 16, at 1448.

[29] Roth & Sundby, *supra* note 16, at 450.

[30] Tomkovicz, *supra* note 16, at 1449.

[31] *Id.*

[32] *See id.*; Gerber, *supra* note 16; Roth & Sundby, *supra* note 16.

deterrence rationales are that they require that those targeted by the rule know the law—laypeople are likely unaware of the felony murder rule rendering the deterrence justification moot. Finally, commentators note that there is no proof that the felony murder rule actually serves its deterrent purpose.[33] The lack of data supporting the deterrence justification has prompted one commentator to note:

> Assertions that the doctrine exists to prevent killings that occur in the course of felonies and that it actually achieves its goal are rooted in blind faith or self-delusion .... If the rule is to stand upon deterrent premises, it is incumbent upon supporters to do more than speculate. They should have to justify the suspension of our normal insistence upon proof of blameworthiness. Without a credible foundation in established facts, deterrence is not a real justification, but is instead a poor excuse for our infidelity.[34]

Some courts have also suggested a retributive basis for justifying the felony murder rule.[35] Under this rationale, proponents argue that "a crime which ends in death should be punished more severely than the same crime that does not end in death."[36] This justification for the felony murder rule has its roots in seventeenth- and eighteenth-century England where judges focused more heavily on the result of a crime rather than the intent of the perpetrator.[37] Consequently, "a convict ... bore responsibility for his felony and for any harmful result arising from the crime regardless of his specific intentions."[38] However, application of this theory in the modern American criminal justice system runs afoul of the established notion of "just desserts."[39] By considering felony murder a first-degree murder offense, punishment for an accidental or third-party killing is placed on the same level as premeditated murder, violating the principle of proportionality between crime and punishment.[40] A felony murder where the death resulted from negligence or recklessness, under the principle of proportionality, should not be punished as severely as a premeditated killing where the culprit had homicidal intent.

Despite such sustained criticism, the felony murder rule has persevered in almost all jurisdictions; only three states have completely abolished it.[41]

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[33] Tomkovicz, *supra* note 16, at 1456-57.

[34] *Id.* at 1457.

[35] Roth & Sundby, *supra* note 16, at 450.

[36] Donald Baier, *Arizona Felony Murder: Let the Punishment Fit the Crime*, 36 ARIZ. L. REV. 701, 710 (1994).

[37] Roth & Sundby, *supra* note 16, at 458.

[38] *Id.*

[39] Baier, *supra* note 36, at 710.

[40] *Id.* at 711.

[41] Roth & Sundby, *supra* note 16, at 446 n.6. Kentucky and Hawaii have abolished the rule by statute. HAW. REV. STAT. §§ 707-701 (1972); KY. REV. STAT. ANN. § 507.020

Professor James Tomkovicz convincingly analyzes the reasons why the felony murder rule has endured.[42] He suggests that one explanation for its endurance has been its limiting modifications in most jurisdictions.[43] Only a small minority of states still retain the broadest application of the rule while the rest have, in one way or another, curtailed the reach of the felony murder rule.[44] Most states have a restricted form of the felony murder rule that applies only to felons acting in furtherance of one of a certain, limited, group of felonies such as armed robbery, sexual assault, and assault with a deadly weapon.[45] Felonies outside of that list, such as selling liquor to a minor, do not lead to a felony murder conviction, even if multiple deaths resulted from a drunk-driving related accident. Others jurisdictions, instead of providing a specific list, generally limit the felony murder rule to felonies that are "inherently dangerous to human life."[46] Another limitation commonly subscribed to is the "agency theory,"[47] which limits the felony murder rule to killings caused by the felon or an accomplice, thereby excluding deaths caused by a third party's intervention.[48] An alternate approach, the proximate cause theory of felony murder, imposes liability on felons for killings committed by someone other than the felon or co-felon, but only if those deaths are proximately resulting from the defendant's unlawful actions.[49] While these "modern incarnations" of the felony murder rule have diminished the extent of the rule's injustice by eliminating numerous egregious felony murder cases, these limitations have also contributed to the felony murder rule's longevity: "By keeping it on a leash, legislatures and courts have prevented it from behaving in ways that could attract public attention and antipathy."[50]

(1975). Michigan has eliminated the rule by judicial decision. People v. Aaron, 299 N.W.2d 304 (Mich. 1980).

[42] *See generally* Tomkovicz, *supra* note 16.

[43] *Id.* at 1468; Baier, *supra* note 36, at 703 (noting that many scholars have called for the felony murder rule's total abolishment, yet its history in the United States has been one of limitation).

[44] Tomkovicz, *supra* note 16, at 1467.

[45] *Id.*

[46] *Id.*

[47] Houck, *supra* note 6, at 366.

[48] James W. Hilliard, *Felony Murder in Illinois—The "Agency Theory" vs. the "Proximate Cause Theory": The Debate Continues*, 25 S. ILL. U. L.J. 331, 344 (2001).

[49] People v. Lowery, 687 N.E.2d 973, 975-76 (Ill. 1997) (explaining that in Illinois, liability attaches under the felony murder rule for any death proximately resulting from the unlawful activity, notwithstanding the fact that the killing was by one resisting the crime); Hilliard, *supra* note 48, at 331-32.

[50] Tomkovicz, *supra* note 16, at 1468-69.

The Illinois legislature has adopted a combination of the above-mentioned limiting doctrines of felony murder. The statute restricts the rule's application to "forcible felonies." Under § 2-8 of the Illinois Code,

> "Forcible felony" means treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual.[51]

Therefore, Illinois includes a specific list of enumerated forcible felonies, but also provides for a broader, generalized definition of forcible felony. To determine whether a felony qualifies as "forcible" when applied to the felony murder rule, the Illinois Supreme court has stated that, "the test . . . is not whether the felony is normally classified as non-violent, but is whether, under the facts of a particular case, *it is contemplated that violence might be necessary* to enable the conspirators to carry out their common purpose."[52]

Beyond these general limitations, Illinois also subscribes to the proximate cause theory of the felony murder rule.[53] Although never actually codified by the Illinois Legislature, the Illinois Supreme Court explicitly accepted the proximate cause theory in 1997 by virtue of the legislature's broad definition of felony murder and based on the development of its case law.[54] Generally, felony murder has been recognized by the Illinois legislature since 1827, but in 1961, the legislature reconsidered whether the felony murder rule ought to exist.[55] Instead of curtailing the reach of the rule, the legislature adopted expansive language in its recodification, relying extensively on the 1934 Illinois Supreme Court case *People v. Payne*.[56] In *Payne*, the defendant informed his accomplices that there was a large sum of money at a particular house. Acting upon that information, two armed robbers broke into the home, eventually leading to a gun battle with two brothers who lived there.[57] One of the brothers was killed in the exchange but officials were unable to determine who fired the

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[51] 720 ILL. COMP. STAT. 5/2-8 (2006).

[52] People v. Belk, 784 N.E.2d 825, 828-29 (Ill. 2003); People v. Golson, 207 N.E.2d 68, 73 (Ill. 1965) (emphasis in original).

[53] Hilliard, *supra* note 48, at 331.

[54] Houck, *supra* note 6, at 370.

[55] *Id.* at 368-69.

[56] 194 N.E. 539 (Ill. 1935).

[57] *Id.* at 541.

fatal shot.[58] In upholding the defendant's conviction for felony murder, the Illinois Supreme Court stated:

> 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.... 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.[59]

The Committee specifically referenced *Payne* in drafting the felony murder statute, but it employed even broader language than the court in its commentary to the newly recodified felony murder rule: "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."[60] Once the legislature established this broad language for the felony murder rule, it was left up to courts for interpretation.

Since the 1961 revision of the Illinois Criminal Code, the Illinois Supreme Court's felony murder jurisprudence has been characterized by constant expansion. In 1974, the court decided two cases, *People v. Allen*[61] and *People v. Hickman*,[62] which both applied the felony murder rule to the situation where one police officer shot and killed another officer while in pursuit of the perpetrators.[63] In affirming the defendants' convictions, the court specifically cited the commentary to the 1961 revision of the felony murder rule.[64] Under this newly revised felony murder rule, a defendant may be held liable for the death of a police officer 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.[65] Thus, *Allen* and *Hickman* expanded the felony murder rule to include accidental killings of police officers responding to a felony, regardless of whether or not the felon actively participated in the officer's death, or was even armed at the time.

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[58] *Id.* at 543.

[59] *Id.*

[60] *See* People v. Hudson, 856 N.E.2d 1078, 1084-85 (Ill. 2006) (noting that the drafters of the 1961 criminal code incorporated *Payne*'s holding and included the quoted text in their commentary).

[61] 309 N.E.2d 544, 549 (Ill. 1974).

[62] 319 N.E.2d 511, 513-14. (Ill. 1974).

[63] *See id.*; *Allen*, 309 N.E.2d at 544.

[64] *Hickman*, 319 N.E.2d at 512-13; *Allen*, 309 N.E.2d at 545.

[65] *Hickman*, 319 N.E.2d at 513 (citing *Allen*, 309 N.E.2d at 549).

The next expansion of the felony murder rule came over twenty years later, in *People v. Lowery*, where the court overturned an intermediate appellate court decision that interpreted *Hickman* as expressly limiting third party liability to police conduct acting in the line of duty.[66] The court rejected the lower court's ruling, and expanded the felony murder rule to govern other types of third party killings.[67] In *Lowery*, the defendant attempted an armed robbery, but the victim wrestled the gun from the defendant's hands and fired at him as he fled.[68] The bullet, however, missed the defendant and fatally hit an innocent bystander.[69] In reinstating the murder charge, the Illinois Supreme Court stated:

> We reject the court's narrow interpretation of *Hickman*. *Hickman* clearly states that "those who commit forcible felonies know they may encounter resistance, both to their affirmative actions and to any subsequent escape." This court did not state expressly or impliedly that a robber's expectation of retaliation should be limited to police officers. *Hickman*'s reliance on *Payne*, which concerned the retaliation of an ordinary citizen, is evidence that this court did not intend to limit the use of retaliation to the conduct of an officer acting in the line of duty.[70]

Beyond expressing the broadest application of the felony murder rule in Illinois to date, *Lowery* is also significant as the first case where the court explicitly announced its adherence to the proximate cause theory of felony murder.[71] The *Lowery* court cited *Payne* as exemplary of Illinois's first application of the proximate cause theory and went on to explain why it adopted the proximate cause approach to felony murder.[72] The concept of proximate causation, explained the court, is derived from tort law and provided the initial impetus for Illinois courts to adopt the theory into criminal law.

> We believe that the analogies between civil and criminal cases in which individuals are injured or killed are so close that the principle of proximate cause applies to both classes of cases. Causal relation is the universal factor common to all legal liability. In the law of torts, the individual who unlawfully sets in motion a chain of events which in the natural order of things results in damages to another is held to be responsible for it.
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> It is equally consistent with reason and sound public policy to hold that when a felon's attempt to commit a forcible felony sets in motion a chain of events which

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[66] 687 N.E.2d 973, 978 (Ill. 1997).

[67] *Id.*

[68] *Id.* at 975.

[69] *Id.*

[70] *Id.* at 978.

[71] *Id.*

[72] While *Payne* has been repeatedly cited by the Illinois Supreme Court as the original proximate cause theory case, the *Payne* court used principles of accomplice liability to hold the defendant liable for murder. See *infra* note 207 for further discussion.

> 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.[73]

Lowery thus established that foreseeability is a central consideration when applying the proximate cause theory of felony murder.

In its next major felony murder case, *People v. Dekens*, the court went beyond its holding in *Lowery* and extended liability under the felony murder rule to co-felon deaths.[74] In *Dekens*, an undercover police officer arranged to buy drugs from the defendant, but prior to the meeting, the defendant and an accomplice, unaware of the true identity of their victim, concocted a plan to rob the undercover officer.[75] During the drug transaction, the defendant pointed a shotgun at the officer who retaliated by firing several shots.[76] As the officer made his escape, the co-felon grabbed him, leading the officer to fire at and fatally wound him.[77] The majority held the defendant liable for his co-felon's death, claiming that its previous holdings "compel application of the felony-murder doctrine to the circumstances of [the] case, and stating generally that 'liability should lie for any death proximately related to the defendant's criminal conduct.'"[78] The court's broad interpretation of proximate cause theory in *Dekens* set the stage for the court's most recent felony murder cases, *Klebanowski* and *Hudson*.

Klebanowski represents the first felony murder case where the defendant was held liable for the death of his accomplice even though he was removed from the scene of the crime. The defendant, Robert Klebanowski, agreed to drive Robert Winters downtown to commit a robbery.[79] Upon seeing a red car pulling out of a garage in an alley, Winters hopped out of the car armed with a BB gun he had stolen earlier that day and ran towards the vehicle.[80] The defendant remained in his car, away from the scene of the crime, and bolted as soon as he heard gun shots.[81] At trial, testimony revealed that Winters had unwittingly chosen to rob an off-duty lieutenant from the Chicago Police Department.[82] After yielding his wallet, the lieutenant chased after Winters and announced

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[73] *Lowery*, 687 N.E.2d at 978.
[74] 695 N.E.2d 474, 475 (Ill. 1998).
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.* at 477.
[79] People v. Klebanowski, 852 N.E.2d 813, 815 (Ill. 2006).
[80] *Id.*
[81] *Id.*
[82] *Id.* at 816.

himself as a police officer.[83] Winters turned and pointed his BB gun at the lieutenant prompting the lieutenant to fire multiple shots at Winters, ultimately killing him.[84] Because the defendant admitted in a videotaped statement that he expected to get some of the proceeds from the robbery for his role as a getaway driver, the trial court had no difficulty in finding that he aided and abetted Winters in the commission of the felony.[85] And because *Dekens* established that a felon can be held accountable for the death of his accomplice, the court affirmed Klebanowski's first-degree murder conviction and sentence to twenty years in prison.[86]

In his appeal, the defendant argued that there was no way for him to foresee the risk that Winters would be killed during the armed robbery.[87] The court quickly dispensed with the defendant's complaint, finding that Winters' death was "a direct and foreseeable consequence of the armed robbery."[88] In support of this contention, the court offered simply:

> Those who commit forcible felonies know they may encounter resistance, both to their affirmative actions and to any subsequent escape. It is unimportant that defendant did not anticipate the precise sequence of events that followed the armed robbery. We conclude that defendant's unlawful acts precipitated those events, and he is responsible for the consequences.[89]

Judge McMorrow, the same judge who would dissent two weeks later in *Hudson*, disagreed with the majority's analysis. Not only would she generally abandon the proximate cause theory in favor of the agency theory of felony murder, but she also found the proximate cause theory "particularly inapplicable under the facts of the [*Klebanowski*] . . . case."[90] She noted that Klebanowski's participation was limited to providing transportation to Winters, and this level of participation was too attenuated to support a finding that his conduct set in motion the chain of events that led to Winters's death.[91] In effect, McMorrow argued that Winters's own actions were a superseding intervening cause that rendered Winters's death unforeseeable and therefore freed Klebanowski from liability for his partner's death.[92]

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[83] *Id.*
[84] *Id.*
[85] *Id.* at 817.
[86] *Id.*
[87] *Id.* at 823.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 824.
[91] *Id.* at 825.
[92] *Id.*

Judge McMorrow's doubts regarding the proper application of the proximate cause theory were once again at issue in the court's next case, *People v. Hudson*.[93] This time, the majority attempted to fully explain its adherence to the proximate cause theory of the felony murder rule.[94] Hudson, a fifteen-year-old boy, accompanied his friend Chrispin Thomas to rob a barbershop.[95] Although they were both armed with handguns, Hudson's weapon "was inoperable because the trigger had been removed."[96] Upon entering the barbershop, Thomas waved his gun and ordered the barbers and patrons to throw their money on the floor while Hudson stood guard at the entrance.[97] By chance, one of the patrons was an off-duty police officer receiving a haircut, who had his service gun with him under a barber's smock.[98] When Thomas had his back turned, the officer sprung into action, drew his weapon and announced himself as a police officer.[99] Thomas turned and pointed his gun at the officer who fired a shot and wounded the robber's upper arm.[100] Undeterred, Thomas transferred his gun to his other hand, and despite another warning by the officer, he again raised his gun.[101] The officer responded by firing two shots which fatally wounded Thomas.[102] Meanwhile, Hudson was still picking money up off the floor when the officer turned his attention to him and ordered him to drop his weapon.[103] Instead of complying, Hudson raised his gun.[104] The officer fired at Hudson and the bullet hit his leg.[105] Although wounded, Hudson managed to flee from the scene of the crime and was later apprehended at a nearby hospital.[106] At trial, Hudson was

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[93] 856 N.E.2d 1078, 1095. (2006).

[94] *Id.*

[95] *Id.* at 1080.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.* Although these were the facts as stated by the appellate court and the supreme court, the facts seem wholly incredible. It seems improbable that Hudson continued to pick up money off the floor after his friend had been shot three times. However, even if Hudson continued to collect the money, it makes no sense that he would raise his *triggerless* handgun in order to threaten the officer, and even more implausible that the officer would respond by shooting him in the leg (as opposed to the shoulder or the arm) in an attempt to disarm the defendant like he had Thomas.

[106] *Id.*

convicted of first-degree murder for the death of his accomplice under the felony murder rule and received twenty-two years in prison.[107]

In affirming the appellate court's ruling, the court outlined, for the first time in its felony murder jurisprudence, the elements of finding proximate causation: "The term 'proximate cause' describes two distinct requirements: cause-in-fact and legal cause."[108] Cause-in-fact, also commonly known as "but-for cause," simply establishes a general causal relationship between the initial act and the result.[109] For example, there is no doubt that the two teenagers' attempt to rob the barbershop was a but-for cause of Thomas's death.[110] Naturally, had they not gone to rob the barbershop, none of the tragic events of that day would have transpired. However, because but-for causation can encompass such a wide range of causal connections, the further restriction of "legal cause" is required in order to establish liability under the law.[111] The court explained:

> Legal cause is essentially a question of foreseeability; the relevant inquiry is whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct. Foreseeability is added to the cause-in-fact requirement because even when cause in fact is established, it must be determined that any variation between the result intended and the result actually achieved is not so extraordinary that it would be unfair to hold the defendant responsible for the actual result.[112]

Therefore, the foreseeability inquiry is necessary as a means of ensuring fairness by establishing the defendant's culpability for the resulting death. In effect, the "legal cause" requirement supplies the limiting component to Illinois's felony murder rule restricting its application to only those deaths that are foreseeable. However, even though the court described the two essential elements of proximate cause, it failed to address an essential issue in the proximate cause inquiry: specifically, how foreseeable must the

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[107] *Id.* at 1081.

[108] *Id.* at 1083.

[109] First Springfield Bank & Trust v. Galman, 720 N.E.2d 1068, 1072 (Ill. 1999).

[110] However, it is interesting to note that neither the majority nor the dissent considered the question of whether Hudson's presence was a but-for cause for Thomas's death. Had Thomas gone alone, assuming *arguendo* that he would have gone without an accomplice, it is quite plausible that the same result would have ensued rendering Hudson not a but-for cause of his friend's death and thus freeing him from liability.

[111] *See* W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921, 926 (2005) (quoting North v. Johnson, 59 N.W. 1012, 1012 (Minn. 1894) ("[C]ourts recognize that although consequences of an act go forward to eternity, . . . any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would set society on edge and fill courts with endless litigation.")).

[112] *Hudson*, 856 N.E.2d at 1083 (quoting *First Springfield Bank & Trust*, 720 N.E.2d at 1068).

manner of death be in order to trigger the felony murder rule?[113] Applied broadly, any resulting death could qualify as "foreseeable," regardless of how the death occurred, contravening the purpose of proximate cause theory as a limiting doctrine. In fact, if viewed at its broadest, the foreseeability requirement would actually be indistinguishable from a felony murder rule without a proximate cause theory of liability—if simply engaging in a criminal act is sufficient to establish that a death is foreseeable, then the entire proximate cause limitation would be rendered superfluous.[114]

The strongest argument for a narrow foreseeability inquiry in proximate cause felony murder cases is that in tort law, the proximate cause inquiry is specific.[115] In the context of tort law, it has been noted that,

> [E]ven where injury of some kind to some person was foreseeable, proximate cause may fail where the defendant's actions resulted in (1) an unforeseeable type of injury, (2) injury occurring in an unforeseeable manner, or (3) an injury to an unforeseeable plaintiff. Furthermore, foreseeability . . . aids in the decision of whether the actual consequences of the defendant's conduct were so bizarre or far-removed from the risks that made the conduct negligent that the defendant, though blameworthy, should not be liable for them.[116]

Because the court has justified its adoption of proximate cause theory based on its application in tort law, it would not make sense to apply this standard

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[113] Questions about the subjective nature of proximate cause inquiries and the reasonable person standard have long pervaded the legal field. Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CALIF. L. REV. 931, 952 (2000) notes that there is no way to construct the reasonable person nonarbitrarily:

> All of us are ignorant of many risks. When is that ignorance the kind that the reasonable person would possess, when is it not, and why? If negligence were culpable, then we could give an answer: The reasonable person would not be ignorant of those risks the ignorance of which would render him culpable. But if ignorance is never culpable because we lack direct control over it, then we have no materials from which to construct a nonarbitrary "reasonable person."

[114] There are many examples of the court applying foreseeability broadly in proximate cause cases. A good example is the early case *People v. Bongiorno*, 192 N.E. 856 (Ill. 1934). In *Bongiorno*, the court affirmed the defendant's first-degree murder conviction where he had already been arrested by a police officer and his co-conspirator, who had jumped out of a window to avoid arrest, came back around the building, up the stairs, and shot the police officer in the back. Even though the defendant was unarmed, the court inferred the intent to kill merely on the basis of the underlying armed robbery. The use of a deadly weapon, it reasoned, manifested the intent to kill in order to secure escape, and this was enough for the court to hold the defendant liable. The court premised liability solely on the underlying armed robbery felony. It should be noted that although the case was decided long before proximate cause theory jurisprudence, the court continues to cite *Bongiorno* as valid precedent in felony murder cases. *Id.* at 857.

[115] *See* Cardi, *supra* note 111, at 926-27.

[116] *Id.* at 926.

narrowly in civil litigation but broadly in criminal cases.[117] Judge McMorrow, in her dissent in *Klebanowski*, noted, "[W]e are not here considering an issue of tort liability, but an issue of imposing criminal liability for first-degree murder with the severe consequences that it entails."[118] Despite Judge McMorrow's concerns, the court has exhibited a more generalized approach to foreseeability—the *Klebanowski* majority held that "it is unimportant that defendant did not anticipate the precise sequence of events that followed the armed robbery."[119]

Further scrutinizing the facts of *Hudson* and *Klebanowski*, it appears that the court applied the foreseeability requirement so broadly as to eclipse the limiting objective of the proximate cause theory. The court determined that Hudson should have been able to foresee the death of his friend when he agreed to participate in the armed robbery of the barber shop.[120] However, the unique facts of the case seem to indicate that Hudson could not have possibly foreseen the unfolding of events that led to his friend's death. The fact that an armed, off-duty police officer happened to be receiving a haircut at the time of the robbery could not possibly have been considered by the felons. Furthermore, it is doubtful that Hudson could have anticipated that his friend would have pointed his weapon at a police officer, and even more unlikely that he could have foreseen his friend's persistent resistance when he transferred his weapon to his left hand to point at the officer after he had already been shot, virtually forcing the police officer to discharge his weapon again.[121] As Judge McMorrow emphatically points out in her dissent, "It is abundantly clear from the . . . facts that Thomas' conduct, *not defendant's*, 'set in motion' the chain of events which proximately caused Thomas' death at the hands of the officer."[122]

Even more than *Hudson*, *Klebanowski* represents an egregious example of how expansively courts have applied foreseeability

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[117] *See* Gerber, *supra* note 16, at 763-64. Gerber notes that the felony murder rule, in general, is inconsistent with other criminal and civil standards. He compares two cases, a wrongful death civil suit and a felony murder case, and concludes that "[o]ur law shows more care in assessing civil liability than in assessing felony murder despite the far more serious consequences of the latter." *See also* Note, *Felony Murder: A Tort Law Reconceptualization*, 99 HARV. L. REV. 1918, 1918 (1986) (asserting that "the felony murder rule is constructed out of tort principles and that, at a minimum, fairness considerations dictate that certain protections traditionally afforded tort defendants ought to be made equally available to felony murder defendants").

[118] People v. Klebanowski, 852 N.E.2d 813, 824 (Ill. 2006).

[119] *Id.* at 823 (quoting People v. Smith, 56 Ill. 2d 328, 333-34 (Ill. 1974)).

[120] People v. Hudson, 856 N.E.2d 1078, 1080 (Ill. 2006).

[121] *Id.*

[122] *Id.* at 1095.

determination under a proximate cause theory of felony murder. Not only was the defendant sitting in his car around the corner from the crime while the tragic situation unfolded, but his partner was armed with a BB gun, a weapon that most reasonable people would not consider lethal.[123] Furthermore, as in *Hudson*, the misfortune of choosing to rob a police officer could not possibly have been within Klebanowski's contemplation when he set out with Winters to find an appropriate victim. Also, like *Hudson*, the defendant had no control over his friend's decision to point his weapon at the officer which forced the officer, who legitimately believed that his assailant had a real weapon, to fire in self-defense. Despite these facts in both cases, the jury as well as the majority of the judges on the appellate and supreme courts concluded that both Hudson and Klebanowski should have been able to foresee the fatal consequences of their actions prior to attempting to commit their respective robberies.[124]

Research in cognitive psychology may help account for why the juries and judges convicted and upheld both defendants' felony murder convictions. Furthermore, the research can help explain why the court has grown to apply foreseeability so expansively. As I explain in the next section, foreseeability inquiries made in hindsight inevitably favor the prosecution, and blameworthy behavior invites inflated assessments of causation resulting in an extraordinarily high rate of felony murder convictions. As such, in establishing its proximate cause felony murder jurisprudence, the court, by affirming conviction after conviction, naturally expanded the scope of its proximate cause theory.

III. SURVEY OF PSYCHOLOGICAL RESEARCH FINDINGS AND IMPLICATIONS FOR THE PROXIMATE CAUSE THEORY OF THE FELONY MURDER RULE

Research in cognitive psychology provides a convincing explanation for why the proximate cause theory fails in its objective of limiting the felony murder rule. Psychological phenomena, like the hindsight bias and outcome bias, as well as theories of causal attribution, suggest that after-the-fact causal attributions are consistently overestimated, undermining the prophylactic effect of the proximate cause theory.[125] While legal scholars

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[123] *Klebanowski*, 852 N.E.2d at 815.

[124] *Id.*

[125] Dripps, *supra* note 20, at 1405. I am partially indebted to Professor Dripps for spawning the idea for this Comment. In his article, Dripps focuses on the fundamental attribution error ("FAE")—the tendency of people to attribute behavior and its consequences to an actor's personality rather than to the situation—and analyzes its implications for the theoretical justifications for punishment. He argues that the FAE may mean that retributive theory in practice will inflict punishment out of proportion to a rational measurement of "just

have analyzed the effect of these biases to proximate cause inquiries in tort litigation,[126] scholarly work examining the implications of these psychological phenomena to the felony murder rule is still in its infancy.[127]

A. THE HINDSIGHT BIAS

The hindsight bias refers to the phenomenon that people overestimate the predictability of past events.[128] Colloquially, the hindsight bias is familiarly referred to as "Monday morning quarterbacking," and is aptly captured in the popular expression that "hindsight is 20/20."[129] Virtually every study on the hindsight bias has confirmed its existence[130] and indicates that its effect is "remarkably robust."[131] Convincing demonstrations of hindsight bias are well established experimentally and the phenomenon has been the subject of extensive reviews.[132] It is also remarkably persistent—unlike many biases, it has been shown to be highly resistant to debiasing techniques, making it difficult to avoid.[133] Therefore,

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deserts." Legislators, judges, and juries following intuitive notions of blameworthiness will tend to overassess individual responsibility and underassess situational factors.

In reference to the proximate cause theory, Dripps notes:

> Absent such a limit, the lottery-like character of strict liability doctrines such as felony murder becomes more pronounced. FAE, together with the hindsight bias, however, suggests that proximate cause—notoriously difficult to define more precisely than as an appeal to intuition—will tend to be applied expansively rather than restrictively.

Id.

[126] *See, e.g.*, Justin D. Levinson & Kaiping Peng, *Different Torts for Different Cohorts: A Cultural Psychological Critique of Tort Law's Actual Cause and Foreseeability Inquiries*, 13 S. CAL INTERDIS. L.J. 195 (2004); John E. Montgomery, *Cognitive Biases and Heuristics in Tort Litigation: A Proposal to Limit Their Effects Without Changing the World*, 85 NEB. L. REV. 15 (2006); Peters, *supra* note 10.

[127] *See generally* Dripps, *supra* note 20. Although Professor Dripps deals primarily with broad theoretical questions, he briefly touches upon the felony murder rule and discusses the FAE and its role in proximate cause determinations. He suggests that the FAE compels people to blame the felony murder defendant because it causes people to attribute behavior to personality at the expense of considering situational factors. *Id.* at 1405.

[128] Rachlinski, *supra* note 9, at 571.

[129] *Id.* at 580.

[130] *Id.*

[131] Jeffrey J. Rachlinski, *Regulating in Foresight Versus Judging Liability in Hindsight: The Case of Tobacco*, 33 GA. L. REV. 813, 823 (1999).

[132] *See* K. Henriksen & H. Kaplan, *Hindsight Bias, Outcome Knowledge and Adaptive Learning*, 12 QUAL. SAFE HEALTH CARE 46, 46 (2006) (noting that "[r]obust reports of [hindsight bias] come from a variety of domains including medical diagnoses, legal rulings, financial forecasts, election returns, business outcomes, sporting events, and military campaigns").

[133] *See* Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 LAW & HUM. BEHAV. 89, 92 (1995) ("[T]he hindsight bias has proven resistant to most debiasing techniques. Attempts to undo the hindsight effect with strategies

even when people are warned of its existence and its effect, they are usually still susceptible to it.[134] Overall, studies in the hindsight bias have led one expert to conclude that "[t]he overwhelming verdict . . . is that the hindsight bias is a robust phenomenon that is not easily eliminated or even moderated. Across a wide variety of tasks and materials, a sizeable and consistent bias clouds judgments made in hindsight."[135]

The primary theoretical explanation of the hindsight bias is referred to as the cognitive theory.[136] The cognitive theory posits that when people know an outcome, they naturally integrate the events leading to that outcome into a coherent story.[137] In the process of constructing this narrative, people mentally emphasize certain circumstances that support the development of the known outcome while downplaying other circumstances that would have led to alternative plausible outcomes.[138] To better illustrate the unfolding of these mental processes, it is instructive to review one of the seminal studies in hindsight bias as an example—the Fischhoff experiment.[139]

In the Fischhoff experiment, researchers presented subjects with a short narrative describing the circumstances leading up to a war between the British and the Nepalese Gurkhas in the early nineteenth century.[140] After being presented with these facts, the subjects were given the choice between four possible outcomes: "British victory, Gurkha victory, stalemate with no peace settlement, or stalemate with a peace settlement."[141] The researchers divided the subjects into five different groups.[142] In each of the

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that rely on motivation, such as suggesting to people that they try harder, increasing personal relevance of the task, and rewarding people for unbiased responses, have proven ineffective. Furthermore, alerting people to the bias' influence does not mitigate the effect.") (internal citations omitted).

[134] While most researchers, like Rachlinski, maintain that the bias is extremely resilient, some scholars point out that there is research that shows that with comprehensive efforts in debiasing the effects of the hindsight bias can be reduced. *See* Peters, *supra* note 10, at 1289:

> [M]ost of the studies indicate that forcing subjects to think concretely about all possible outcomes reduces the hindsight bias markedly. . . . Although more research will be needed to ascertain precisely how actively the subject must participate in the debiasing exercise in order to reduce the bias, the current findings justify cautious optimism about the debiasing potential of strategies that actively engage the subject in a foresight exercise.

[135] Rachlinski, *supra* note 9, at 580-81.

[136] *Id.* at 582.

[137] *Id.* at 584.

[138] *Id.*

[139] *Id.* at 576.

[140] *Id.*

[141] *Id.*

[142] *Id.*

first four groups, one of the outcomes was communicated to the subjects, after which they were asked to assign a probability of that outcome in retrospect.[143] In the final group, no outcome was disclosed and the subjects were simply asked to rate the probability of each possible outcome.[144] The study showed that those who were asked to determine the probability in hindsight exaggerated the foreseeability of the result.[145] Judging in hindsight was found to increase people's estimates of the actual outcome by between 6 and 44%.[146] The study also provided support for the cognitive theory explanation for the hindsight bias:

> [S]ubjects told that the British had won rated the British advantages (better weapons and training) as more relevant to the outcome than the Nepalese advantages (better motivation and familiarity with the terrain). These subjects probably also concluded that training and weapons are more important to a military victory under these circumstances than motivation and familiarity with the terrain, and perhaps are more significant in warfare generally.[147]

Thus, by emphasizing the circumstances that would clearly lead to the given outcome, people may view the outcome as inevitable.[148]

Hindsight bias studies have also been conducted with regards to tort law specifically addressing the question of foreseeability. Inspired by the well known case *Tarasoff v. Regents of University of California*,[149] cognitive psychologists Susan and Larry LaBine set out to study the effects of the hindsight in determining liability for psychiatrists for violence committed by their patients.[150] The experiment was modeled after the Fischhoff experiment described above, except this time the scenario

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[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* at 585.

[148] Fischhoff, the author of this pioneering study, concluded:

> In hindsight, people consistently exaggerate what could have been anticipated in foresight. They not only tend to view what has happened as having been inevitable but also to view it as having appeared "relatively inevitable" before it happened. People believe that others should have been able to anticipate events much better than was actually the case.

Id. at 572.

[149] 551 P.2d 334 (Cal. 1976). In *Tarasoff*, the plaintiff sued therapists and police for failure to warn the victim where the patient had expressed the intention to kill her. Although the lower courts granted a motion to dismiss, the court reversed the decision against the therapists. The court held that the therapists' special relationship to the patient was extended to the victim, and they had a duty to use reasonable care in warning the victim of the possible danger. *Id.* at 343.

[150] Susan J. LaBine & Gary LaBine, *Determinations of Negligence and the Hindsight Bias*, 20 LAW & HUM. BEHAV. 501 (1996).

involved psychiatrists' treatment of potentially violent patients.[151] Those who were told that a patient became violent judged the patient's violence as significantly more foreseeable than those that were not provided with an outcome.[152] Furthermore, subjects aware of the violent outcome judged the therapist negligent 24% of the time, while those that were told that no violence resulted, or were given no outcome, judged the therapist negligent 6% and 9% negligent, respectively.[153] The researchers thus reaffirmed the power of the hindsight bias in assessing foreseeability.[154]

B. THE OUTCOME BIAS

The outcome bias refers to the tendency to judge the quality of a decision, good or bad, based on its consequences.[155] Although such determinations are a natural process of how we learn from past mistakes, a good decision does not necessarily guarantee a good outcome. It has been noted by a prominent social psychologist that "all real decisions are made under uncertainty. A decision is therefore a bet, and evaluating it as good or not must depend on the stakes and the odds, not on the outcome."[156] Psychologists emphasize that the outcome bias is distinct and independent from the hindsight bias, even though, as will be discussed *infra*, the two work in tandem, seriously complicating the task of making after-the-fact foreseeability judgments.[157] To be clear, whereas the hindsight bias makes people over-predict the foreseeability of past events, the outcome bias leads people to judge the quality of past decisions based on the results of those decisions.

In one of the major studies on the outcome bias, cognitive psychologists Jonathon Baron and John Hershey found the existence of the bias consistently across five experiments.[158] In their first experiment, for

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[151] *Id.*

[152] *Id.* at 502.

[153] *Id.* at 510.

[154] *Id.* The researchers, quoting C.W. Williams, P.R. Less-Haley & R.S. Brown, *Human Response to Traumatic Events: An Integration of Counterfactual Thinking, Hindsight Bias, and Attribution Theory*, 72 PSYCHOL. REP. 483, 488 (1993), noted:

> [I]t is natural for people to ponder questions such as "what might have been . . ." and "if only . . ." following a traumatic event. . . . [T]he easier it is for observers to imagine alternative outcomes to a tragic event, the easier it is to construe that the target could have and should have done more about preventing the tragedy, and the more the target will be blamed for the outcome.

[155] Peters, *supra* note 10, at 1282.

[156] Ward Edwards, *How to Make Good Decisions*, in *"What Constitutes a Good Decision?"*, 56 ACTA PSYCHOLOGICA 5, 7 (1984).

[157] Peters, *supra* note 10, at 1282.

[158] Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. PERSONALITY & SOC. PSYCHOL. 569, 570 (1988).

example, they provided subjects with a scenario of a fifty-five-year-old man suffering from a heart condition.[159] Even though he could live with the condition, a bypass procedure was available which would both relieve his pain as well as increase his life expectancy.[160] The operation, however, presented a risk; there was an 8% chance that the operation would fail resulting in death.[161] Equipped with this knowledge, subjects were asked to evaluate a surgeon's decision to go ahead with the operation.[162] When told that the surgery was a success, subjects rated the decision significantly more favorably than those who were told that it failed.[163] Baron and Hershey found similar support for the presence of the outcome bias in the subsequent four experiments.[164]

Not only does the outcome bias cause people to judge decisions negatively based on adverse outcomes, but further research suggests that it is amplified as the severity of the injury increases.[165] In another study, anesthesiologists were asked to judge the quality of care received in twenty-one cases where a patient suffered negative consequences due to the improper administration of anesthesia.[166] The researchers varied the injury so that in some cases the damage was permanent, while in others it was only temporary.[167] The researchers found that the ratings for appropriate care decreased by thirty-one percentage points when the outcome was changed from temporary to permanent and increased by twenty-eight percentage points when the outcome was changed from permanent to temporary, indicating that the severity of harm had a magnifying effect on the outcome bias.[168]

C. RESEARCH IN CAUSAL ATTRIBUTION

Particularly significant for this examination of proximate cause and the felony murder rule is Mark Alicke's study on "Culpable Causation," which he defines as "the influence of the perceived blameworthiness of an action

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[159] *Id.* at 571.

[160] *Id.*

[161] *Id.*

[162] *Id.* at 572.

[163] *Id.*

[164] *Id.*

[165] Robert A. Caplan et al., *Effect of Outcome on Physician Judgments of Appropriateness of Care*, 265 J. AM. MED. ASS'N 1957, 1960 (1991); *see also* Peters, *supra* note 10, at 1283 ("Outcome bias appears to be most serious when the victim's injuries are severe. Although the research findings have been inconsistent, most conclude that severity is associated with a greater assessment of fault.").

[166] *See* Caplan et al., *supra* note 165, at 1960.

[167] *Id.*

[168] *Id.*

on judgments of its causal impact on a harmful outcome."[169] Alicke recognizes the complexity of causal determinations, especially in cases where multiple causal factors force the observer to portion out such factors among possible candidates, and assess the relative influence of each.[170] In making causal determinations where a negative result ensues, Alicke ascribes to the "stain criterion."[171] This theory posits that people will over-attribute blame to a culpable party to emphasize her wrongdoing.[172] He hypothesizes, "[W]hen asked to identify which of a number of competing causal factors is the primary cause of a harmful event, people will cite the cause for which an actor is most blameworthy."[173] In a series of four studies, Alicke confirmed his prediction. The first of these studies is illustrative.

Subjects were presented with a scenario where a man, John, was speeding in a rush to get home and got into an accident with another automobile as he crossed an intersection.[174] As a result, the other driver sustained multiple lacerations, a broken collar bone, and a fractured arm.[175] John, however, walked away from the accident unscathed.[176] Within this scenario, Alicke manipulated several variables in order to study how subjects attributed blame when confronted with multiple necessary and sufficient causes.[177] There were three variations that each included an additional factor: (1) an oil spill that hindered John's ability to stop when he applied the brakes, (2) a tree branch which hindered John's ability to see a stop sign at the intersection, and (3) the running of the stop sign by the other driver and John's inability to slow down in time to avoid the other car.[178] Also, in order to introduce the blameworthy element to his test, Alicke manipulated the reasons why John was rushing home.[179] In the "socially desirable motive" version, he was rushing home to hide an anniversary present from his parents that he had left out in the open.[180] In the "socially undesirable motive" version, John was racing home to hide a

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[169] Alicke, *supra* note 13, at 368.

[170] *Id.*

[171] *Id.* (citing JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY (1970)).

[172] *Id.*

[173] *Id.* at 369.

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *See id.*

[180] *Id.*

vial of cocaine from his parents.[181] As predicted, John's motive for speeding played a pivotal role in subjects' determination of causal attribution.[182] John was cited more frequently as a cause of the accident when he was rushing to hide the vial of cocaine than when he was speeding home to hide the anniversary present.[183] Furthermore, when rated on a scale from one to ten, John was considered more responsible for the accident and his actions more causally related to the accident in the "socially undesirable" version, regardless of which scenario the subjects were exposed to.[184] The results of this experiment, along with the other three experiments conducted in the study, led Alicke to conclude that the degree of culpability in an act influences perceptions of causation.[185]

Much like the outcome bias, causal attributions are subject to magnification when the severity of harm increases. In a pioneering study on causation and the attribution of responsibility, researchers studied the relationship between the severity of negative consequences of blameworthy behavior and attribution of responsibility for that behavior.[186] Subjects were given a condensed description of a jury trial regarding a bank robbery.[187] In the course of the robbery, a bank teller, in trying to trigger an alarm, disobeyed the robber's order not to move, prompting the robber to fire at him or her.[188] The bullet, however, missed the teller and ricocheted off the wall, hitting another customer.[189] The primary variable manipulated in the study was the extent of the resulting harm to the victim.[190] In the mild scenario, the customer merely suffered a superficial flesh wound, whereas in the severe scenario, the bullet severed the customer's spine causing permanent paralysis from the neck down.[191] The researchers then surveyed the subjects' attributions of responsibility for the robber who fired the bullet, as well as for the teller, who moved against the robber's orders.[192] The results indicated a greater degree of responsibility attribution as the severity of harm to the victim increased for *both* the robber and the

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[181] *Id.*

[182] *Id.* at 370.

[183] *Id.*

[184] *Id.*

[185] *See id.*

[186] Ugwuegbu & Hendrick, *supra* note 15.

[187] *Id.* at 77.

[188] *Id.*

[189] *Id.* at 79.

[190] *Id.* The researchers also manipulated the gender of the perpetrator and the victim, and although they found interesting results, these are outside the scope of this Comment.

[191] *Id.*

[192] *Id.*

teller.[193] While, as common sense would dictate, the robber was assigned a significantly higher degree of responsibility in both scenarios, it is revealing that the teller's responsibility was also amplified when paralysis resulted.[194] Furthermore, when asked to evaluate a level of punishment for the robber and teller, subjects recommended more punishment as the severity of the resulting harm increased.[195] Thus, the subjects recommended, on average, prison time of one to five years for the robber in the mild scenario, whereas they recommended five to ten years' prison time when paralysis resulted.[196] Furthermore, while subjects generally proposed no punishment for the teller in the mild scenario, most recommended a loss of raise as punishment in the severe scenario.[197]

Research in causal attribution, therefore, provides two conclusions relevant to this paper's inquiry. First, blameworthy behavior causes observing third parties to make unwarranted causal connections when evaluating responsibility. And second, these unwarranted connections are magnified when the resulting harm is greater.

D. CASE-SPECIFIC IMPLICATIONS OF RESEARCH IN COGNITIVE PSYCHOLOGY ON THE PROXIMATE CAUSE THEORY OF THE FELONY MURDER RULE

The implications of hindsight bias research to the foreseeability requirement of proximate cause theory, as applied to specific cases, are straightforward. Juries are asked to determine whether the defendant should have foreseen the consequences of his conduct, but the research on hindsight bias suggests that these after-the-fact determinations are inherently skewed. Because the hindsight bias makes outcomes seem more predictable in hindsight than they were in foresight, juries are more likely to conclude that a death occurring during the course of a felony was foreseeable. While in some cases such a result might be warranted, in others, such as *Hudson* and *Klebanowski*, such assessments might be over-exaggerated.

As discussed, the cognitive theory underlying hindsight bias suggests that people, when given information about bad outcomes, likely "rewrite the story" so that the beginning and middle provide a causal explanation for what they know to be the end result.[198] Thus, juries attempting to make

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[193] *Id.* at 81.
[194] *Id.* at 84.
[195] *Id.* at 83.
[196] *Id.*
[197] *Id.*
[198] *See* Peters, *supra* note 10, at 1286.

foreseeability determinations in felony murder cases will tend to highlight particular facts that would seem to make the resulting death inevitable while downplaying those that would result in an alternative outcome. The jurors in *Hudson*, for example, may have mentally highlighted the fact that Hudson was clearly aware that his friend was armed with a lethal weapon, but they may have downplayed the significance of the coincidence that an off-duty police officer happened to be getting a haircut when the two boys went to rob the store, and that he had his service revolver with him while he was getting his hair cut. Similarly, in *Klebanowski*, juries may have mentally emphasized Klebanowski's role in the crime as the getaway driver, yet diminished the role the police officer played in Winters' death and minimized the significance of the fact that Winters was armed with a non-lethal BB gun as opposed to a firearm. In this way, the jury may have assessed the foreseeability of Winters' death as more plausible.

It is also important to stress that trial judges and appellate court judges are equally affected by the bias,[199] suggesting that they too will overestimate the foreseeability of the resulting deaths in felony murder cases. Furthermore, because judges are required to defer to jury determinations, they are unlikely to disturb an initial decision against a defendant.

When combining hindsight bias effects with the outcome bias, foreseeability determinations in felony murder cases are further prejudiced.[200] Because the outcome bias distorts past judgments by associating bad outcomes with bad decisions, juries are likely to judge the defendant harshly for participating in the felonious enterprise.[201] In addition, because the outcome bias is amplified in cases where the resulting harm is severe, juries considering felony murder cases will likely be susceptible to an extreme manifestation of the bias.[202] As such, outcome bias research suggests that the felony murder defendant will be considered more blameworthy than he would have been had no death resulted, even in

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[199] Rachlinski, *supra* note 9, at 579-80 (explaining that "[t]he [hindsight] bias is not limited to specific populations of subjects. . . . Studies even have demonstrated that the bias influences the judgments of experts in several different fields. Two studies have shown that even state and federal judges are susceptible to the bias").

[200] *See* Peters, *supra* note 10, at 1283 (noting that "[i]n real life, the two biases can work together").

[201] *Id.*

[202] Because the research strongly suggests a correlation between severity of harm and intensity of the outcome bias, one would assume that death, being the most severe of harms, would yield the greatest outcome bias effect. This assertion, however, to my knowledge, has yet to be tested, which is why I propose further study of this phenomenon in my conclusion.

cases such as *Hudson* and *Klebanowski*, where the deaths appeared to be completely disconnected from the defendants' acts.[203]

The research specifically addressing causation, much like the hindsight and outcome biases, also has significant ramifications for jury determinations assessing the proximate cause theory of felony murder. The Alicke study demonstrates that people will include the blameworthiness of a person's actions in their calculus in making causal attributions.[204] Therefore, the mere fact that the felony murder defendant was engaged in felonious conduct will tend to lead juries to connect a defendant's actions to the resulting death. Ugwuegbu and Hendrick's study further adds that when blameworthy behavior results in severe injury, even greater responsibility tends to be attributed to the actor.[205] Working in tandem, these two studies in causal attribution suggest that the playing field is heavily tilted against the felony murder defendant. Much like John speeding home to hide his vial of cocaine, the felony murder defendant will generally be causally connected to the resulting death, and, because of the severity of the result, this causal connection will be amplified, further skewing proximate cause determinations against the defendant.

E. BROAD IMPLICATIONS OF RESEARCH IN COGNITIVE PSYCHOLOGY ON THE PROXIMATE CAUSE THEORY OF THE FELONY MURDER RULE

On a broad level, research in cognitive psychology can help explain why the proximate cause theory was instituted in the first place and why it is has grown to be applied so expansively. The Illinois Legislature employed unconstrained language when drafting its felony murder rule in 1961 by considering the felony murder rule in the abstract and by premising its decision on the facts of *People v. Payne*,[206] a case that has been labeled the original proximate cause-felony murder case in Illinois. After this recodification, the court gradually expanded the scope of the felony murder

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[203] It is important to note that at least one scholar has cautioned against reform that would offset the effects of hindsight and outcome biases in tort litigation. *See* Peters, *supra* note 10, at 1278. However, his concerns, though legitimate with respect to civil suits, are mostly inapplicable in criminal cases. For example, he suggests that pro-defendant sympathies generated by doubting the motives of the plaintiff in tort suits, especially malpractice suits, help to offset the advantages conferred to the plaintiff by the presence of the biases. *Id.* at 1296. Clearly, such sympathies would not be present in a felony murder case where the opposing party is the state. Peters also points out that there are cognitive biases favoring defendants and that "underclaiming" is prevalent in tort law—both facts which do not translate into the criminal law field and felony murder cases. *Id.* at 1297.

[204] *See generally* Alicke, *supra* note 13.

[205] *See generally* Ugwuegbu & Hendrick, *supra* note 15.

[206] 194 N.E. 539 (Ill. 1935).

rule and the proximate cause theory by affirming convictions case by case across a wide range of scenarios. This expansion eventually culminated in the two recent cases, *Hudson* and *Klebanowski.*

Critical to understanding why the legislature chose such broad language in its recodification of the rule in 1961 is the fact that *Payne*, more so than some of the modern cases, may actually lend itself to a foreseeability analysis in which the defendant could be held accountable for the resulting death.[207] In *Payne*, armed robbers engaged in a shootout with two brothers that resulted in one of their deaths.[208] Three men, all armed, approached the brothers' home in the early evening, two from the front and one from the rear.[209] One of the brothers went out to the porch where he was confronted by one of the men who pointed a revolver at him, which prompted him to scream.[210] According to the surviving brother's testimony, upon hearing the scream, he went towards the door armed with a revolver but heard gun shots before he could intervene.[211] These initial gunshots started the gunfight that resulted in the fatality.[212] Because it could not be determined who fired the fatal shots, one of the primary questions confronting the court was whether it mattered that the actual perpetrator was unknown for the purposes of the felony murder rule.[213] The court affirmed the defendant's conviction for murder, finding that "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."[214] This holding, the first

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[207] It is important to note that *Payne*, despite its being dubbed as the first proximate cause theory case in Illinois, never discusses "proximate cause" in its analysis and was in fact partially premised on complicity theory. The defendant conspired with the armed robbers but was actually not present at the scene of the crime. Accomplice liability, also known as the law of complicity, imputes a co-felon with the criminal acts of the principal actor. Thus once it was established that the defendant aided and abetted the armed robbers, he was held responsible for the consequences of their actions. However, the proximate cause element of the case, as discussed above, is whether it mattered who fired the fatal shot in determining whether the felony murder rule ought to apply. In fact, in *Lowery*, where the court explicitly adopted the proximate cause theory, the court did not mention that the defendant was not present at the time of the killing when labeling *Payne* as "exemplary of Illinois' first application of the proximate cause theory." People v. Lowery, 687 N.E.2d 973, 976 (Ill. 1997).

[208] *Payne*, 194 N.E. at 541.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.* at 543.

[214] *Id.*

announcement of the proximate cause theory of felony murder, stemmed directly from the particular facts of the case. Thus, while psychological phenomena probably also contributed to Payne's conviction, it is significant that Payne was the one who hatched the plan to rob the brothers, and that it was the assailants who fired the initial shots that led to the gun battle resulting in the homicide. Therefore, when the legislature reconsidered the felony murder rule in drafting the 1961 criminal code and used *Payne* as the basis for its recodification, it is understandable that the legislature would opt for expansive language. Causal attribution research suggests that in thinking about felony murder cases in the abstract, especially with *Payne* as a backdrop, the committee justified its broad language because it was led to believe that, generally speaking, felons are naturally culpable and causally connected to any resulting deaths.

"Giving effect" to the legislature's intent as evinced in the statute's broad language, the court continued to broaden the application of the proximate cause theory on a case-by-case basis. Recapping the major felony murder cases since the 1961 recodification starting with *Allen* and *Hickman*, the court extended liability to felons for the death of police officers acting in the line of duty, even if shot by a fellow officer.[215] In *People v. Lowery*, the case in which the court explicitly announced its adherence to the proximate cause theory, liability was extended to felons for all third-party deaths.[216] Finally, *Dekens* established that felons could even be held responsible for the deaths of co-felons at the hands of a victim.[217] The two most recent cases, *Hudson* and *Klebanowski*, affirmed the ruling in *Dekens* that felons could be held liable for the deaths of their accomplices, but on fact patterns that seem to undermine the purported limiting purpose of the proximate cause requirement completely. To reiterate the majority in *Hudson*,

> Foreseeability is added to the cause-in-fact requirement because even when cause in fact is established, it must be determined that any variation between the result intended and the result actually achieved is not so extraordinary that it would be unfair to hold the defendant responsible for the actual result.[218]

However, as discussed above, the court applies proximate cause more generally in *Hudson* and *Klebanowski* than it does in tort suits. Thus, by so broadening the scope of the proximate cause inquiry, the court undermines the very limitation that it claims to endorse.

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[215] People v. Hickman, 319 N.E.2d 511, 513 (Ill. 1974); People v. Allen, 309 N.E.2d 544, 549 (Ill. 1974).

[216] People v. Lowery, 687 N.E.2d 973, 975-76 (Ill. 1997).

[217] People v. Dekens, 695 N.E.2d 474, 475 (Ill. 1998).

[218] People v. Hudson, 856 N.E.2d 1078, 1083 (Ill. 2006) (quoting First Springfield Bank & Trust v. Galman, 720 N.E.2d 1068, 1083 (Ill. 1999)).

In conclusion, research in cognitive psychology suggests proximate cause determinations are bound to be skewed against defendants in individual cases, leading to a high degree of probability that felony murder defendants will be convicted of murder. These convictions are almost always affirmed because appellate judges are equally susceptible to the various biases and are they are required to be deferential to jury determinations. The combined effect of these affirmations has led to an ever-expanding felony murder rule jurisprudence culminating in cases like *Hudson* and *Klebanowski*, where the foreseeability inquiry seems to have been subsumed by the defendants' mere participation in the underlying felony.

IV. PROPOSED FUTURE STUDY AND CONCLUSION

More research may be required to give full effect to each of the claims laid out in this Comment. However, arranging a study that would test these assertions would not be difficult. In fact, the two cases which inspired this comment, *Hudson* and *Klebanowski*, would provide the ideal starting point for a study. Using the facts of each case, one can easily emulate the Fischhoff Experiment to test whether the hindsight bias's effect extends to juries and felony murder cases. Furthermore, one could directly test people's causal attributions by relying on the same fact patterns and manipulating variables that might make the defendant more and less blameworthy to test whether, in fact, people do use blameworthiness as a gauge for causation in felony murder scenarios. It may be more difficult to test the broader implications of cognitive psychology, but it might be revealing to present subjects with a handful of fact patterns from Illinois felony murder cases such as *Payne*, *Lowery*, *Hickman*, *Dekens*, *Klebanowski*, and *Hudson*, then have them rate the culpability of the defendant in each. The resulting ratings may reveal how laypeople would judge whether or not the felony murder rule is expanding. Thus, if the defendants in *Klebanowski* and *Hudson* are judged the least culpable while the defendants in *Payne* and *Hickman* are judged the most culpable, it would lend credence to the assertion that the felony murder rule has expanded since the proximate cause theory's inception. Furthermore, subjects could indicate whether they believed the death was foreseeable as well as the kind of punishment they believed would be warranted in each situation to help judge how community sentiment stacks against the legislature's mandate that felony murder is first-degree murder.

Illinois's adherence to the proximate cause theory of the felony murder rule has recently led to some anomalous results holding defendants liable for first-degree murder for deaths that they neither intended, nor could have foreseen happening. This Comment contributes to the long scholarly

tradition of critiquing the felony murder rule by focusing on the proximate cause theory and looking at the theory through the lens of cognitive psychology. The hindsight and outcome biases both reveal an inherent infirmity in foreseeability inquiries—people are bound to believe that a result was inevitable and thus conclude that a specific outcome was more foreseeable in hindsight than it actually was in foresight. Furthermore, research in causal attribution shows that people are likely to consider the morality of a person's actions when determining causality, even though the two are completely independent factors. Thus, the felony murder defendant, who was inevitably engaged in morally blameworthy behavior in participating in a felony, will be causally linked to a resulting death even if his participation in the felony did not directly lead to that death.

On a broader level, these psychological phenomena may have induced the Illinois legislature to adopt a broad felony murder statute in its 1961 revision of the criminal code which, in turn, has given tremendous leeway in interpreting the statute. Due to the influence of cognitive psychology on each individual case, felony murder defendants inevitably lose, and the court keeps announcing broader and broader standards for the interpretation of the 1961 felony murder statute. It has been precisely this expansion that led the court to decide *Hudson* and *Klebanowski* the way it did. Both cases represent the failure of the proximate cause theory as a limiting doctrine on the felony murder rule. Instead, the foreseeability requirement seems to have grown to be applied disingenuously, rendering any participation in a felony sufficient basis for justifying holding a defendant accountable for a death. As a result, whereas the proximate cause theory is supposed to temper the innate harshness of the felony murder rule, in practice it is applied so expansively as to eliminate its limiting purpose.