

FIFTY YEARS OF THE WASHINGTON–GILBERT PROVOCATIVE ACT DOCTRINE:

Time for an Early Retirement?

MITCHELL KEITER*

The usual challenge in determining criminal liability is the age-old uncertainty: “Who done it?” But assigning blame may prove controversial even where the facts are undisputed. It may be clear that A directly inflicted the fatal wound, but in response to a wrongful action of B. For example, a bank robber’s waving a gun prompts a security guard to shoot — and inadvertently kill a customer. Should the robber or the guard be liable for the homicide? The use of civilian populations in urban warfare as human shields has highlighted the distinction between the direct or actual cause of death (the guard) and the proximate or legal cause (the robber).

Direct causation is neither necessary nor sufficient for homicide liability; proximate causation combines with a guilty mental state (*mens rea*) to produce homicide liability.¹ Whereas direct causation is a question of fact, proximate causation is a policy question, which seeks to assign liability

* Certified Appellate Law Specialist, Keiter Appellate Law, Beverly Hills, California. As a Chambers Attorney at the California Supreme Court, the author participated in the decisions of *People v. Sanchez*, 26 Cal.4th 834 (2001), and *People v. Cervantes*, 26 Cal.4th 860 (2001). The author would like to thank Sheila Tuller Keiter and Blair Hoffman.

¹ *People v. Sanchez*, 26 Cal.4th 834, 845 (2001). The more culpable the offender’s mental state, the higher the degree of homicide.

fairly and justly.² When a defendant is charged with homicide for a death directly inflicted by an intermediary, judges and juries must decide if the intermediary's response was a "dependent" or "independent" intervening variable. Intervening variables are independent if they are "unforeseeable," and "an extraordinary and abnormal occurrence."³ But the intervening variable is dependent if it is a "normal and reasonably foreseeable result of defendant's original act."⁴ Jurors may thus agree on what happened but disagree on whom to blame.

Fifty years ago, the California Supreme Court decided two cases that reshaped homicide liability. In *People v. Washington*⁵ and *People v. Gilbert*,⁶ the Court distinguished between direct proximate causation and indirect proximate causation, holding that only the former supported application of the felony-murder rule, which otherwise held felons strictly liable for all homicides committed during the felony.⁷ The decisions immunized defendants from felony-murder liability if a resisting victim or officer directly caused the death, even if the felon was the proximate cause.

In creating this exception to the felony-murder rule, the Supreme Court also created an exception to the exception: murder liability was proper even where an innocent party directly caused death so long as the defendant committed a highly dangerous act (like shooting) that proximately caused the fatal response. Such a "provocative" act would demonstrate implied malice, sufficient to support murder liability without resort to the felony-murder rule.⁸ Although *Washington* and *Gilbert* designed

² *People v. Cervantes*, 26 Cal.4th 860, 872 (2001).

³ *Id.* at 871.

⁴ *Id.*

⁵ 62 Cal.2d 777 (1965).

⁶ 63 Cal.2d 690 (1965).

⁷ Cal. Penal Code, §189; see Miguel Méndez, *The California Supreme Court and the Felony Murder Rule: A Sisyphian Challenge?*, 5 CAL. LEGAL HIST. 241 (2010) (Méndez); Mitchell Keiter, *Ireland at Forty: How to Rescue the Felony-murder Rule's Merger Limitation from Its Midlife Crisis*, 36 W. ST. L. REV. 1, 28 (2008) (Ireland at Forty).

⁸ See Part IA. In contrast to express malice, which involves a specific intent to kill, implied malice involves an intent to do an act, the natural and probable consequences of which are dangerous to life (the objective component), with conscious disregard of the danger to human life (the subjective component). *People v. Knoller*, 41 Cal.4th 139, 152–53, 156–57 (2007); see Méndez, *supra* note 7, at 244.

the provocative act doctrine as a substitute for the felony-murder rule to establish malice for homicides committed during section 189 felonies, the doctrine has become the default means for establishing murder liability for all homicides committed by an intermediary, even where there was no section 189 felony.⁹

Yet in the half-century since *Washington* and *Gilbert*, the Supreme Court has disavowed all the premises that produced those decisions, and restored the law to the status quo ante.¹⁰ The Court has recharacterized the purpose of the felony-murder rule, the requisite connection between the felony and the homicide, the definition of implied malice (and whether brandishing a weapon may reflect it), whether an unreasonable response breaks the chain of causation, and, most significantly, whether defendants may be held liable for factors beyond their control. Paradoxically, *Washington-Gilbert's* reach has expanded as its underpinnings collapsed.

This disavowal of *Washington-Gilbert's* foundation accorded with a judicial and legislative emphasis on public safety, prompted by an increase in crime in the late 1960s and 1970s. The law is now more inclined to authorize punishment for not only intended harms but also unintended ones, so long as they are reasonably foreseeable. Conduct less culpable than the *Washington* defendant's now supports murder liability in indirectly caused homicides.¹¹

But the provocative act doctrine remains, more entrenched than ever. Courts have addressed new factual circumstances by reconfiguring jury instructions (often incorrectly) — or bypassing the doctrine altogether. Although this patchwork development may achieve desired results in individual cases (or not), the law would enjoy greater consistency if courts followed the same formula for intermediary cases that applies in all others: A defendant who proximately causes death is liable for homicide in accordance with his mental state (*mens rea*).¹²

⁹ See Part I.B. The enumerated felonies of section 189 currently include arson, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, rape, and specified sex offenses.

¹⁰ See Part II.

¹¹ See Part III.

¹² See Part IV.

I. THE DEVELOPMENT OF THE PROVOCATIVE ACT DOCTRINE

For more than a century, homicide liability has required proximate, not direct, causation of death.¹³ In *People v. Lewis*,¹⁴ the defendant shot the victim in the intestines, “sending him toward a painful and inevitable death he apparently decided to hasten by slitting his own throat.”¹⁵ The victim may have been the direct cause of death, but blame, and thus proximate causation, lay with the defendant: “‘Even if the deceased did die from the effect of the knife wound alone, no doubt the defendant would be responsible . . . [if the fatal] wound was caused by the wound inflicted by the defendant in the natural course of events.’”¹⁶ Liability remained with the defendant even where the victim’s death was not inevitable, as in *Lewis*, so long as it was a natural and probable consequence of the defendant’s misconduct.¹⁷

The Supreme Court refined the intermediary causation rule in *People v. Fowler*, where Fowler struck Duree with a club, left him for dead on the roadway, and a motorist then inadvertently drove over the body.¹⁸ The Court reaffirmed the *Lewis*-derived rule that regardless of whether the club or the car inflicted the fatal wound, the defendant proximately caused Duree’s death, as it was “the natural and probable result of the defendant’s . . . leaving Duree lying helpless and unconscious in a public road, exposed to that danger.”¹⁹ Unless the driver intentionally ran over Duree, Fowler was the proximate cause.

Fowler further established that liability was the product of causation and *mens rea*. With proximate causation established, Fowler’s liability depended on the mental state with which he struck Duree: If in “self-defense, it would be justifiable. If it was felonious, it would be murder or manslaughter, according to the intent and the kind of malice with which

¹³ Cervantes, 26 Cal.4th 860, 869.

¹⁴ 124 Cal. 551 (1899).

¹⁵ Cervantes, 26 Cal.4th 860, 869.

¹⁶ *Id.*, quoting *Lewis*, 124 Cal. 551, 555.

¹⁷ *People v. Williams*, 27 Cal. App. 297, 299 (1915).

¹⁸ 178 Cal. 657, 667–69 (1918).

¹⁹ *Fowler*, 178 Cal. 657, 669.