FIFTY YEARS OF THE *WASHINGTON–GILBERT* PROVOCATIVE ACT DOCTRINE:

Time for an Early Retirement?

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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

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[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

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[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 Sisyphean 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 became 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]

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[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

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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.

it was inflicted."[20] *Fowler* thus confirmed that murder liability depended on the offender's mental state, not the direct or indirect manner of killing. *Fowler* continues to provide the formula for assigning liability for indirectly caused homicides falling outside the "provocative act" framework.[21]

A. INTERMEDIARY HOMICIDES DURING FELONIES

Indirect proximate causation first supported murder in the felony-murder context in *People v. Harrison*.[22] In robbing a store, Harrison shot at employee Jones, who returned fire and inadvertently killed the store owner.[23] The court of appeal held that Harrison was the proximate cause of death, because it was a "normal human response" for individuals "shot at or threatened by robbers" to return fire, so the death was the "natural, foreseeable result" of the robbery.[24] *Harrison* followed *Fowler* by aligning the defendant's liability with his culpable mental state. Because the homicide occurred during a Penal Code section 189 felony, the offense was first degree murder.[25]

Washington involved similar facts. Attempting to rob a gas station, Ball pointed a gun at Carpenter, who fired his own gun and killed Ball.[26] A jury convicted Ball's accomplice Washington of first degree murder for the indirectly caused homicide.[27] *Washington* differed slightly from *Harrison*, as that case affirmed murder liability regarding "the death of an innocent bystander."[28] Because the *Washington* decedent was neither innocent nor a bystander, the Supreme Court could have preserved *Harrison*'s reasoning while reaching a different result. But the Court refused to consider "the fortuitous circumstance" of whether the decedent was a felon or innocent victim, as it "would make the defendant's criminal liability turn upon the marksmanship of victims and policemen."[29]

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20 *Id.*
21 Cervantes, 26 Cal.4th 860, 872 n.15.
22 176 Cal. App. 2d 330, 332–37 (1959).
23 Harrison, 176 Cal. App. 2d 330, 336.
24 *Id.* at 336, 345 (internal citation omitted).
25 *Id.* at 332.
26 Washington, 62 Cal.2d 777, 779.
27 *Id.*
28 Harrison, 176 Cal. App. 2d 330, 336.
29 Washington, 62 Cal.2d 777, 780.

Washington sought to limit not indirect causation liability but the reach of the felony-murder rule, finding it "should not be extended beyond any rational function that it is designed to serve."[30] The rule could operate to impute malice only where a felon directly inflicted death, as a homicide committed by a resisting victim or officer would not be committed to further the felony.[31] Nonetheless, murder liability was proper for intermediary homicides where (implied) malice could be shown without the felony-murder rule: "Defendants who initiate gun battles may also be found guilty of murder if their victims resist and kill."[32] This actual (rather than imputed) malice depended on the defendant's commission of what would become known as a "provocative act."

In theory, *Washington* rejected using the felony-murder rule to establish the malice element of homicide. But in practice, it also diminished the effect of the felony in proving the causation element. *Washington* endorsed the conclusion that *Harrison*, in assigning causation to the armed robber whose gunfire prompted a lethal response, had taken a "very relaxed view of the necessary causal connection between the defendant's act and the victim's death. . . ."[33] In other words, because the *Harrison* defendant initiated the gun battle, there was (barely) sufficient causation there. By contrast, the *Washington* defendant only "pointed a revolver directly at Carpenter" and did not shoot first, so there was insufficient causation.[34]

Gilbert more fully developed the provocative act doctrine.[35] Both Gilbert and accomplice Weaver entered a bank armed; the former shouted, "'Everybody freeze; this is a holdup.'"[36] After collecting money, Gilbert grabbed a hostage and fatally shot an officer while escaping, while another officer fatally shot Weaver.[37] Without the benefit of the not yet decided *Washington*, the trial court misinstructed the jury. *Gilbert* thus explained the principles of indirect causation liability for the benefit of the retrial. First, the Court emphasized that malice could appear, not through the

30 *Id.* at 783.
31 *Id.* at 781, 783.
32 *Id.* at 782.
33 62 Cal.2d 777, 782 n.2.
34 Washington, 62 Cal.2d 777, 779.
35 Cervantes, 26 Cal.4th 860, 868.
36 Gilbert, 63 Cal.2d 690, 696–97.
37 *Id.* at 697.

operation of the felony-murder rule, but through the commission of a provocative act "likely to cause death."[38] The homicide could thus be attributed to the dangerous act rather than the felony. Proximate causation would remain with the defendant because the responsive shooting was a "reasonable response" to the provocative act.[39]

Although *Washington* specifically limited the felony-murder rule, and expressly endorsed murder liability where the defendant exhibited implied malice, the opinion included dicta noting a deeper problem with intermediary homicide liability.

> In every robbery there is a possibility that the victim will resist and kill. The robber has little control over such a killing once the robbery is undertaken . . . .To impose an additional penalty for the killing would discriminate between robbers, not on the basis of any difference in their own conduct, but solely on the basis of the response by others that the robber's conduct happened to induce.[40]

This reasoning could apply outside the felony-murder context; for example, Fowler had little control over whether a driver would fatally injure Duree. Although the Supreme Court continued to limit its application of the provocative act doctrine to section 189 felonies, the court of appeal soon followed *Washington*'s dicta to its logical end.

B. INTERMEDIARY HOMICIDES OUTSIDE THE FELONY-MURDER CONTEXT

Washington created an exception to the felony-murder rule, as section 189 would not cover homicides directly caused by innocent intermediaries during felonies, and then an exception to that exception, as even those homicides could support murder liability if there was a "provocative act." But the court of appeal soon construed the provocative act doctrine as the default vehicle for indirect causation liability. In a case where the defendant and his brother were brutally beating a deputy sheriff when another deputy

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[38] *Id.* at 704–05.

[39] *Id.* Although commission of a section 189 felony could not establish the malice element of murder, it could be used to fix the degree as first degree murder in accordance with the statute. *Id.* at 705.

[40] Washington, 62 Cal.2d 777, 781.

fatally shot the brother, the court of appeal observed that the *Washington–Gilbert* "limitation upon the felony-murder doctrine" did not bar murder liability where the elements of the crime of proximate causation and malice "can be established without resort to that doctrine."[41] Citing *Gilbert*, the court affirmed murder liability based on the officer's "reasonable and foreseeable response."[42]

The court of appeal elaborated on this analysis in *In re Aurelio R.*[43] A gang member drove his cohorts into another gang's territory and they shot at rivals, who fired back and killed a passenger.[44] The court of appeal affirmed second degree murder liability, not through *Fowler*'s proximate causation-and-malice framework, but through the *Washington–Gilbert* provocative act framework, even though the felony in which the homicide occurred was not a section 189 felony like robbery but attempted murder.[45] That offense itself reflected express malice, so the court of appeal held there was no need for another provocative act to show malice.[46]

The *Aurelio R.* court apparently believed *Washington–Gilbert* was the only legal tool for holding the defendant liable for the homicide he proximately caused. But the decision disregarded *Fowler* and simply assumed *Washington* and *Gilbert* governed, even though their point was to limit the felony-murder rule.

Two Supreme Court decisions followed, which used the *Fowler* framework rather than *Washington–Gilbert* to affirm intermediary homicide liability in factually unusual cases. The defendant in *People v. Roberts* stabbed a victim (Gardner), who went into hypovolemic shock and in that irrational condition fatally stabbed a third party (Patch).[47] Rival gang-members in *People v. Sanchez* engaged in a shootout, and it was uncertain whose bullet killed a bystander.[48]

In determining "the evidence sufficed to permit the jury to conclude that Patch's death was the natural and probable consequence of defendant's

41 Velasquez, 53 Cal. App. 3d 547, 554, quoting People v. Antick, 15 Cal.3d 79, 87 (1975).
42 *Id.* at 554–55.
43 167 Cal. App. 3d 52 (1985).
44 *In re* Aurelio R., 167 Cal. App. 3d 52, 55–56.
45 *Id.* at 57–58.
46 *Id.* at 60–61.
47 2 Cal.4th 271, 294–95, 316 n.9 (1992).
48 26 Cal.4th 834, 838 (2001).

act,"[49] *Roberts* cited prior cases from both California and elsewhere where the defendant attacked the victim, whose instinctive response to evade the defendant's attack resulted in a fatality. In the "prototypical" case of *Letner v. State*,[50] the defendant shot someone on a boat who dove out to avoid the gunfire and drowned. Whereas *Letner* (like the *Lewis* suicide) involved the death of the targeted victim, other cases involved the targeted victim's directly killing a third party. In *Madison v. State*, the defendant threw a grenade near one person, who reflexively kicked it toward another, who died in the ensuing explosion.[51] And in *Wright v. State*, the defendant shot at a driver, who, while "ducking bullets," fatally drove into a pedestrian.[52] These cases supported *Roberts*' conclusion that a defendant would be the proximate cause of death so long as such harm was reasonably foreseeable, even if the precise manner of death was not the one contemplated.

Roberts signified a return to prior case law. It cited many of the authorities upon which *Harrison* relied (including *Letner* and *Madison*). Although it did not cite *Fowler* directly, it applied its equation of "proximate causation–times–*mens rea* equals liability." It actually went beyond *Fowler* in holding the defendant's proximate causation could combine not only with malice to establish a murder but also with a premeditated and deliberate intent to kill to show murder in the first degree.[53]

The Supreme Court expressly revived the *Fowler* rule in *Sanchez*. As in *Aurelio R.*, the court of appeal had incorrectly deemed the provocative act theory indispensable for assigning liability. The jury had convicted both defendants of first degree murder for the bystander's death in the shootout, but the court of appeal held the law could not support first degree murder liability for both defendants.[54] If the actual shooter was guilty of murder, the other shooter would not be guilty under the provocative act theory, but if the provocateur was guilty of murder, it would relieve the actual shooter of liability.[55]

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49 Roberts, 2 Cal.4th 271, 321.

50 299 S.W. 1049 (Tenn. 1927).

51 130 N.E.2d 35, 38 (Ind. 1955)

52 363 So.2d 617, 618 (Fla. Dist. Ct. App. 1978).

53 Roberts, 2 Cal.4th 271, 320.

54 Sanchez, 26 Cal.4th 834, 839.

55 *Id.*

The Supreme Court rejected the court of appeal's reliance on the provocative act framework and instead used *Fowler*'s formula. Both shooters could be the concurrent, and thus proximate, cause of death, so both defendants could be guilty of murder — in the first degree.[56] Just as the *Fowler* Court did not know whether the defendant or the driver inflicted the fatal wound, so too did the *Sanchez* Court not know which shooter fired the fatal shot. As in *Fowler*, it did not matter. "[I]t is proximate causation, not direct or actual causation, which, together with the requisite mens rea (malice), determines defendant's liability for murder."[57]

Sanchez's companion case *People v. Cervantes* held likewise: "If a defendant proximately causes a homicide through the acts of an intermediary and does so with malice and premeditation, his crime will be murder in the first degree." *Fowler* and *Sanchez* differed in that the intermediary in the former case acted with an apparently innocent mental state, but neither *Sanchez* shooter did. But the proximate causation–times–*mens rea* formula could establish liability in either case.

Quoting the language from *Sanchez* and *Cervantes* in the two preceding paragraphs, the Supreme Court finally authorized provocative act murder liability where the underlying felony was attempted murder in *People v. Concha*.[58] Three assailants chased the intended victim who fought back and killed one of them.[59] The Supreme Court authorized first degree murder convictions for the two surviving assailants if they acted with premeditation and deliberation.[60] Although the Court's prior provocative act cases had involved implied malice rather than express malice, *Concha* recalled that once there was murder liability based on proximate causation and malice, section 189 could fix the degree.[61] If the commission of an enumerated felony could support first degree murder

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56 Section 189 supported first degree murder liability for murders committed with premeditation or by intentionally shooting from a vehicle with an intent to kill. Sanchez, 26 Cal.4th 834, 849.

57 Sanchez, 26 Cal.4th 845, 849.

58 47 Cal.4th 653, 662–63 (2009).

59 Concha, 47 Cal.4th 653, 658.

60 *Id.*

61 *Id.* at 663.

liability through section 189, so too could the element of premeditation and deliberation.[62]

Provocative act murder is not an independent crime, but merely a "shorthand," used for the "subset" of homicides that occur when an intermediary's response causes death.[63] Although the Supreme Court returns to the *Fowler* rule of proximate causation–times–*mens rea* when the provocative act doctrine does not properly describe the crime (as in *Roberts* and *Sanchez*), it has become the default means to determine liability. Yet the Court has already disavowed all the major premises that generated the *Washington–Gilbert* rule.

II. THE RISE AND FALL OF THE *WASHINGTON–GILBERT* FOUNDATION

Washington and *Gilbert* reflected the Court's reservations about finding both the malice and proximate causation elements of murder based on only the defendant's commission of a section 189 felony. The *Washington* majority and the dissent disagreed regarding four premises. The majority held (1) The purpose of the felony-murder rule is to deter negligent or accidental killings, not the commission of the felonies themselves; (2) The rule applies only where the homicide is committed in furtherance of the felony; (3) Pointing a gun at another person does not evince implied malice; and (4) A defendant cannot be held liable for the act of an intermediary over whose responsive conduct he has little control. Finally, *Gilbert* added that a victim who resists must act reasonably for proximate causation, and thus liability, to remain with the felon.[64]

None of these positions is good law today (nor was prior to *Washington* and *Gilbert*). The Court's subsequent case law has vindicated the dissent's points concerning (1) the purpose of the felony-murder rule; (2) the requisite relation between the felony and the homicide; (3) the construction of implied malice; and (4) a defendant's responsibility for harms purportedly beyond his control. Subsequent case law has also abandoned *Gilbert*'s "reasonable response" requirements.

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62 *Id.*

63 People v. Gonzalez, 54 Cal.4th 643, 649 n.2 (2012); Concha, 47 Cal.4th 653, 663.

64 Gilbert, 63 Cal.2d 690, 704–05.

A. THE DEMISE OF THE *WASHINGTON* PREMISES

1. The Additional Purpose of the Felony-Murder Rule

The Court has broadened the purpose of the felony-murder rule since *Washington*. The dissent there observed that felons' potential liability for indirect killings was "one of the most meaningful deterrents to the commission of armed felonies."[65] The majority rejected the argument as a matter of policy; the rule's only purpose was "to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit."[66] Deterring the felonies themselves was not a proper goal.[67]

The Court has since adopted the dissent's position. The rule now serves both to deter felons from killing negligently or accidentally and to deter commission of the underlying felonies.[68] The Court recently recalled its conclusion that "[t]he knowledge that a murder conviction may follow if an offense such as furnishing a controlled substance or tainted alcohol causes death 'should have some effect on the defendant's readiness to do the furnishing.' "[69]

The felony-murder rule's broader purpose supports a broader reach. And the deterrence imperative advocated by the *Washington* dissent also applies to provocative acts committed outside section 189 felonies: "[S]ociety has an interest in deterring people from initiating these deadly confrontations — gang warfare as well as shootouts with the police. More people will be deterred if they know when the smoke clears they will be held accountable for all the dead bodies . . . ."[70]

The law now accepts the imperative of deterring felonies and other provocative acts, as urged in Justice Burke's dissent.

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65 Washington, 62 Cal.2d 777, 785 (Burke, J., dissenting).

66 *Id*. at 781.

67 *Id*.

68 People v. Chun, 45 Cal.4th 1172, 1189 (2009); People v. Robertson, 34 Cal.4th 156, 171 (2004), disapproved on another ground in People v. Chun. Although *Chun* referenced the second degree felony-murder rule, it cited *Washington*, a first degree felony-murder case.

69 Chun, 45 Cal.4th 1172, 1193, citing People v. Mattson, 4 Cal.3d 177, 185 (1971) (internal quotations omitted).

70 *In re* Aurelio R., 167 Cal. App. 3d 52, 60.

2. The Loosening Relation between the Felony and the Homicide

Another change concerns the relation between the felony and the homicide. The *Washington* majority excluded killings by victims or officers from the reach of felony-murder liability. It reasoned that if the intermediary committed a homicide, it did not further the felony. "Indeed, in the present case the killing was committed to thwart the felony."[71] The *Washington* dissent disputed there was any requirement that the killing must take place to commit the felony. "[T]hen what becomes of the rule . . . that an accidental and unintended killing falls within the section? How can it be said that such a killing takes place *to* perpetrate a robbery?"[72]

The Supreme Court began to backtrack from the *Washington* majority's position in *Pizano v. Superior Court,* suggesting that a victim's defensive killing actually was part of the felonious design.[73] *Pizano* distinguished a hypothetical killing by an officer from the robber's malicious act in shooting that prompted it. Although the *killing* was committed to thwart the robbery, "*the act which made the killing a murder attributable to the robber — initiating the gun battle — was committed in the perpetration of the robbery.*"[74] The Supreme Court reiterated this distinction in *People v. Billa*, where one of three coconspirators committing arson of a truck (for insurance fraud purposes) accidentally burned to death.[75] The Court contrasted the *act* of setting the fire, which was committed in the perpetration of the felony, with the *result* of the conspirator's death, which was not.[76]

The Supreme Court expressly referenced *Washington* in describing how it no longer follows its rule. Although the meaning of "to perpetrate" (and its non-application to indirect killings) was central to *Washington*'s rationale, the Court has since broadened the reach of the rule.

> In [*Washington*], the defendant and a cofelon, James Ball, attempted to rob Carpenter, . . . [who killed Ball in self-defense]. . . . [T]his court reversed [defendant's felony-murder conviction] because "the killing [was] not committed . . . in the perpetration or

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71 Washington, 62 Cal.2d 777, 781.

72 *Id.* at 787 (Burke, J., dissenting).

73 21 Cal.3d 128 (1978).

74 Pizano, 21 Cal.3d 128, 139 n.4 (italics in original).

75 31 Cal.4th 1064, 1067 (2003).

76 Billa, 31 Cal.4th 1064, 1071: see also *People v. Mejia*, 211 Cal. App. 4th 586, 614 (2012).

> attempt to perpetrate robbery . . .” This was so, we explained, because the killing was not in furtherance of the robbery. *The view of the felony-murder rule that the killing must somehow advance or facilitate the robbery has, however, been superseded by later cases.* [W]e [have] held there need be only a logical nexus between the felony and the killing.[77]

There is such a logical nexus between robberies and the lethal responses they often cause. Having abandoned the “committed in the perpetration of” requirement that justified requiring direct causation for felony-murder liability, the Court should abandon the direct causation rule itself.

3. The Expansion of Implied Malice

Post-*Washington* law has also undermined the case’s holding regarding implied malice. The Court has broadened its construction of the implied malice necessary to invoke the *Washington–Gilbert* doctrine regarding both facts and law.

First, the Court lowered the threshold needed to show implied malice to encompass the *Washington* facts. *Washington* acknowledged that felons who “initiate gun battles” evince such implied malice.[78] But the majority rejected the dissent’s broader conception of the verb “initiate”: “If a victim . . . seizes an opportunity to shoot first when confronted by robbers with a deadly weapon . . . any ‘gun battle’ *is* initiated by the armed robbers.[79] The majority instead concluded there was no malice because the robber merely “pointed a revolver directly” at the employee.[80]

Again, history has vindicated Justice Burke’s dissent. In a case where the defendant pulled from his waistband a gun, which “fired as it was drawn,”[81] the court of appeal “held that although the act of intentionally *firing* a handgun could support a finding of malice, the act of intentionally *brandishing* a handgun, as a matter of law, could not support such

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[77] People v. Dominguez, 39 Cal.4th 1141, 1162 (2006) (emphasis added), quoting Washington, 62 Cal.2d 777, 781.

[78] Washington, 62 Cal.2d 777, 782.

[79] *Id.* at 785 (Burke, J., dissenting).

[80] *Id.* at 779.

[81] 4 Cal.4th 91, 98–99 (1992).

a finding."[82] Arguably, *brandishing* is even less dangerous than *directly pointing* the weapon at the intended victim. But on review all seven Supreme Court justices held that, depending on the facts, brandishing could reflect implied malice. A fortiori, so may pointing a gun directly at an intended robbery victim. The *Washington* facts would produce a different result if the crime occurred today.

Even more significant legally was *People v. Medina*,[83] which clarified the meaning of "natural and probable consequence," the term that governs both implied malice and proximate causation. Street gang members verbally challenged a rival gang member by asking "Where are you from."[84] After a scuffle, the victim attempted to leave but one of the defendants fatally shot him as he drove away.[85] The Supreme Court affirmed the jury's conclusion that the homicide was a natural and probable consequence of the verbal challenge.[86]

Medina explained that the implied malice element of a "natural and probable consequence" was one that was "reasonably foreseeable,"[87] whereas *Washington* had construed the requisite risk needed to show implied malice as exceeding the "reasonably foreseeable" standard. In *Washington,* implied malice did not appear simply because death/serious injury "was a risk reasonably to be foreseen and that the robbery might therefore be regarded as a proximate cause of the killing;"[88] implied malice required that the act involve "a high degree of probability that it will result in death."[89] Under this former standard, "the defendant or his confederate must know [the provocative] act has a 'high probability' not merely a 'foreseeable possibility' of eliciting a life-threatening response from the third party.[90] The

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[82] Nieto Benitez, 4 Cal.4th 91, 96. *Washington* reversed the conviction rather than remand for a new trial that would apply the new rule.

[83] 46 Cal.4th 913 (2009).

[84] Medina, 46 Cal.4th 913, 916–17.

[85] *Id*.

[86] *Id*. at 920–22.

[87] *Id*. at 920.

[88] Washington, 62 Cal.2d 777, 781.

[89] *Id*. at 782, quoting People v. Thomas, 41 Cal.2d 470, 480 (Traynor, J., concurring) (1953).

[90] *In re* Aurelio R., 167 Cal. App. 3d 52, 57.

reasonable foreseeability needed to show proximate causation was not enough to show implied malice.

But *Medina* equated the likelihood of harm needed to show implied malice with the likelihood of harm needed to establish proximate causation. A conclusion that great bodily injury or death was reasonably foreseeable thereby establishes *both* proximate causation and the objective element of implied malice. A perpetrator who acts with knowledge of the danger and conscious disregard is guilty of second degree murder if he kills under these circumstances; if he is subjectively unaware of the danger, he is guilty of involuntary manslaughter.[91] It is now enough that the killing was a risk reasonably to be foreseen.

4. Defendants May Be Held Liable for Consequences Beyond Their Control

The most fundamental area of disagreement in *Washington* concerned indirect causation. As noted, the majority objected to imposing liability for victims' responses.

> In every robbery there is a possibility that the victim will resist and kill. The robber has *little control* over such a killing once the robbery is undertaken as this case demonstrates. To impose an additional penalty for the killing would discriminate between robbers, not on the basis of any difference in their own conduct, but solely on the basis of the response that the robber's conduct happened to induce.[92]

Justice Burke's dissent disagreed as a matter of fact and law. He observed numerous ways that a defendant could exercise control, such as dropping his weapon, not using it, or surrendering.[93] As a matter of law, he observed the law often imposes liability for consequences beyond the offender's control. "A robber has *no* control over a bullet sent on its way after he pulls the trigger." Some victims will jump out of the way; some will be hit. Some will be saved by paramedics and surgeons; some will not.

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91 People v. Butler, 187 Cal. App. 4th 998, 1008–09 (2010).

92 Washington, 62 Cal.2d 777, 781.

93 *Id.* at 790 (Burke, J., dissenting).

The debate resembles the one faced by the United States Supreme Court regarding victim impact statements in capital trials' penalty proceedings. Just as some but not all robbery victims will resist, and those who do will shoot with varying degrees of accuracy, so too will some but not all relatives testify, and those who do will speak with varying degrees of persuasiveness. In 1987, the high court followed a California decision and precluded the admission of such statements because their use for sentencing purposes discriminated among killers based on factors beyond their control.

> We think it obvious that *a defendant's level of culpability depends* not on fortuitous circumstances such as the composition of the defendant's family, but *on circumstances over which he has control*. . . . [T]he fact that a victim's family is irredeemably bereaved can be attributable to no act of will of the defendant other than his commission of the homicide in the first place.[94]

This decision analyzed sentencing as *Washington* had analyzed liability.

Four years later, the high court reversed course and authorized admission of victim impact statements.[95] The Court held juries could consider evidence concerning not only the offender's subjective blameworthiness but also the crime's objective harm, as the criminal law had long based liability on such harm, even when it was beyond the intent, control or even awareness of the offender.[96]

Post-*Washington* cases also imposed murder liability based on victims' reactions beyond the felon's control. The Supreme Court affirmed a felony-murder conviction where the defendant gave methyl alcohol to a victim who drank it and died.[97] The court of appeal likewise affirmed felony-murder convictions where a victim suffered a fatal heart attack during the

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94 Booth v. Maryland, 482 U.S. 496, 505, n.7 (1987), quoting People v. Levitt, 156 Cal. App. 3d 500, 516–17 (1984) (italics added).

95 Payne v. Tennessee, 501 U.S. 808, 819 (1991).

96 *Id.* at 819; see also at 835–36 (Souter, J., concurring) ("Criminal conduct has traditionally been categorized and penalized differently according to consequences not specifically intended, but determined in part by conditions unknown to a defendant when he acted.").

97 Mattison, 4 Cal.3d 177, 180–81.

robbery.[98] All these defendants were thus guilty of murder "solely on the basis of the response that the [felon]'s conduct happened to induce."[99] The cases thus confirmed the traditional rule that a defendant "takes his victim as he finds him."[100]

The California Supreme Court in *Roberts* extended this rationale beyond cases where the victim's medical reactions led to his own death. *Roberts* followed the logic of the *Washington* dissent rather than that of the *Washington* majority. That the *Roberts* defendant had no control over his victim's going into shock after being stabbed did not preclude liability for the ensuing stabbing.[101] *Roberts* approvingly cited *Wright*,[102] where the defendant was liable for the homicide that occurred when she shot at a driver who then lost control of his vehicle and killed a pedestrian. Some drivers might have been able to retain control of their automobile, whereas others would lack that ability. The shooter's non-control over the driver's subsequent conduct posed no barrier to liability. *Roberts* likewise cited *Fowler*, where the driver was also an innocent instrumentality of death, and proximate causation (and liability) lay with the defendant, who had no control over whether the driver would see the victim and rescue him, or not see him and inflict the fatal blow.

Medina expressly considered the victim's potential response in evaluating the natural and probable consequences of the defendant's conduct. Whether death was a natural and probable consequence (as required to show implied malice) depended on not only the direct risk posed by the defendant's conduct but also the indirect risk inherent in the victim's response. The *Washington* majority had held that malice appeared where defendants "initiate gun battles," as that posed a direct danger to life. But the majority refused to find malice when the robber did not initiate, attributing the gunfire to the victim who fired first. Notwithstanding the foreseeability of death, the Court rejected murder liability for a felon's conduct that *would not have led to death but for the victim's reaction*.

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98 People v. Hernandez,169 Cal. App. 3d 282 (1985); People v. Stamp, 2 Cal. App. 3d 203 (1969).

99 Washington, 62 Cal.2d 777, 781.

100 Stamp, 2 Cal. App. 3d 201, 211.

101 Roberts, 2 Cal.4th 271, 321.

102 363 So.2d 617 (Fla. Dist. Ct. App. 1978).

But *Medina* broadened the requisite natural and probable consequence to encompass not only the offender's act but also the victim's response. "[I]t was or should have been reasonably foreseeable to these gang members that the violence would escalate even further *depending on Barba's response to their challenge*."[103] This followed from *Sanchez*'s holding that proximate cause could lie with the defendant, even though his actions would not have caused death but for his antagonist's response.[104] The Supreme Court expressly connected this logic to the provocative act doctrine: "The danger addressed by the provocative act doctrine is not measured by the violence of the defendant's conduct alone, but also by the likelihood of a violent response."[105]

The evaluation of natural and probable consequences must encompass direct and indirect consequences. A defendant who falsely shouts "Fire!" in a crowded theater endangers life, not directly, through the emission of breath, but indirectly, by creating the probability that a second person will react by fatally trampling a third. So long as the shouter perceives the danger, he acts with malice. The same result must obtain when someone shouts "Robbery!" or "This is a holdup!" The indirect danger to victims is at least as great.

Roberts rejected *Washington*'s claim that it is unfair to impose murder liability based on a response beyond the defendant's control. Because victim resistance is a predictable response to violent conduct,[106] the defendant properly bears responsibility for all its natural and probable consequences.

B. THE DEMISE OF *GILBERT*'S REASONABLE RESPONSE REQUIREMENT

Gilbert further reduced the likelihood of felons' murder liability for intermediary homicides, as the case appeared to reject liability unless the victim's response was reasonable. "[T]the victim's self-defensive killing or the police officer's killing in the performance of his duty cannot be considered an independent intervening cause for which the defendant is not liable, for

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103 Medina, 46 Cal.4th 913, 927 (italics added).

104 Sanchez, 26 Cal.4th 834, 846–48, citing People v. Kemp, 150 Cal. App. 2d 654, 659 (1957).

105 Gonzalez, 54 Cal.4th 643, 657.

106 People v. Thomas, 53 Cal.4th 771, 813 (2012).

it is a reasonable response to the dilemma . . . ."[107] The decision hinted that an unreasonable response would be an independent variable.

Not only did *Gilbert* appear to hold the response must be reasonable for the felon to be liable, it also appeared to describe which responses are — and are not — reasonable. Because the *Gilbert* trial preceded *Washington's* rule requiring a provocative act as a basis for malice, the jury was not instructed that it needed to base malice on the shooting rather than just impute it from the robbery. The missing instruction "withdrew from the jury the crucial issue of whether the shooting of Weaver was in response to the shooting of Davis or solely to prevent the robbery." Retrial was thus needed for the jury to find a malicious act, but the quoted sentence appeared to hold that unlike a homicide committed by an officer in response to a felon's shooting, which could support the felon's murder liability, a homicide committed "solely to prevent a robbery" could not.

More than a decade later, the Court minimized the significance of the responder's reasonableness in *Pizano v. Superior Court*.[108] Two men robbed a home and took a resident hostage, and the neighbor, not seeing the hostage, fatally shot him in an attempt to foil the robbery.[109] The defense claimed that the neighbor's motivations in shooting "solely to prevent the robbery" precluded murder liability under *Gilbert*.[110] But the Court accepted the people's argument that "whether a killing was 'in reasonable response' to the malicious conduct should be treated as 'an objective proximate cause determination, and not a subjective response determination.' "[111] *Pizano* thus denied that the response needed to be reasonable for the felon to be liable.[112]

But if *Pizano* retreated from *Gilbert*'s apparent insistence on reasonableness, it confirmed that liability would ordinarily depend on the intermediary's subjective motivation: whether he killed in response to "the felon's additional malicious conduct" or just "the felony itself."[113] Murder

107 Gilbert, 63 Cal.2d 690, 705.
108 21 Cal.3d 128 (1978).
109 *Id.* at 132.
110 *Id.* at 137.
111 *Id.*
112 *Id.* at 138.
113 *Id.*

liability required not just that the defendant commit a malicious act (and proximately cause death), it required that the act — rather than the felony — be the precise proximate cause of death.[114] *Pizano* concluded that the defendant's taking a hostage was the proximate cause of the victim's death even if the intermediary's motive was to prevent a robbery, because the defendant placed that victim in harm's way.[115]

Roberts further undercut any possible "reasonableness" requirement, as the intermediary could not reason at all.[116] What mattered simply was whether the defendant proximately caused the victim's death, i.e. whether death was a natural and probable consequence.

The court of appeal expressly rejected a reasonable response requirement in *People v. Gardner,*[117] where one drug dealer shot a second, which prompted a third to shoot in response.[118] *Gardner* recalled *Lewis*[119] and *Fowler*,[120] and then *Pizano* and *Roberts*, in holding the "reasonable response" requirement was a "shorthand phrase" for the element of proximate causation.[121] *Gardner* did not distinguish between killing to prevent a homicide or to prevent a robbery; the defendant could be liable whenever death was a natural and probable consequence of his act.[122]

The decision in *People v. Schmies*[123] further linked defendant's initial misconduct with the lethal outcome, and reduced the likelihood that an intervening variable would be "independent" and break the causal chain. The defendant fled from a traffic stop, generating a pursuit that ended with a fatal collision between an officer's car and a bystander's.[124] The defendant wished to introduce the Highway Patrol's pursuit policies to show the officer acted unreasonably, but the court found that the officer's

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114 *Id*. at 139.

115 *Id*.

116 Roberts, 2 Cal.4th 271, 321.

117 37 Cal. App. 4th 473 (1996).

118 As in *Sanchez*, 26 Cal.4th 834, it was uncertain who fired the fatal shot. Gardner, 37 Cal. App.4th 473, 475.

119 124 Cal. 551 (1899).

120 178 Cal. 657 (1918). It was the first time in the three decades since *Gilbert* that a published decision analyzed *Fowler* with regard to this issue.

121 Gardner, 37 Cal. App. 4th 473, 476–81.

122 *Id*. at 480–81.

123 44 Cal. App. 4th 38 (1996).

124 *Id*. at 43.

noncompliance would not preclude liability: "[T]o exonerate defendant it is not enough that the officer's conduct must be *unreasonable*; rather it must be sufficiently extraordinary as to be *unforeseeable*."[125]

Schmies thus offered a *Gilbert*-like bank robbery hypothetical that imposed murder liability on the defendant even if the guard's response was unreasonable. Like an officer's overly aggressive chase, a victim's shooting at an armed robber is not "so extraordinary that it was unforeseeable, unpredictable and statistically extremely improbable."[126]

The Supreme Court expressly endorsed the view that breaking the causal chain required not just unreasonableness, but unforeseeability;[127] *Gilbert*'s "reasonable response" was indeed a "shorthand phrase" for "objective proximate cause" or "natural and probable consequence."[128] To break the causal chain and absolve the defendant of liability, the intermediary's response had to be an "extraordinary and abnormal occurrence."[129] Foreseeability was enough to support homicide liability: "If proximate causation is established, the defendant's level of culpability for the homicide in turn will vary in accordance with his criminal intent."[130]

Defendants can no longer evade liability for their conduct's natural and probable consequences by citing intermediaries' unreasonableness. A defendant whose methamphetamine production started a fire proximately caused the deaths of two firefighting pilots who crashed trying to extinguish the fire, even though (1) one pilot's blood-alcohol count exceeded FAA standards; (2) the pilot failed to make required radio contact; (3) the plane was negligently maintained.[131] "The relevant question is whether, when recklessly starting the forest fire, [defendant] Brady could reasonably anticipate that aircraft would be summoned to extinguish the fire and that a fatal collision might result."[132] By contrast, if the pilot intentionally caused the crash (as if Fowler intentionally ran over his victim), that would

125 *Id.* at 52 (italics added).

126 *Id.* at 56.

127 People v. Crew, 31 Cal.4th 822, 847 (2003).

128 Gardner, 37 Cal. App. 4th 473, 479.

129 Cervantes, 26 Cal.4th 860, 871, quoting People v. Armitage, 194 Cal. App. 3d 405, 420 (1987).

130 *Id.* at 872 n.15.

131 People v. Brady, 129 Cal. App. 4th 1314, 1331–32 (2005).

132 *Id.* at 1334.

be so unforeseeable as to relieve the defendant of liability — and impose it on the "intermediary" who directly caused death.[133]

Just as the law no longer holds that unreasonable responses are independent intervening variables, it also no longer deems unreasonable a victim's resistance to a robbery. The law at the time of *Washington* and *Gilbert* held, "Any civilized system of law recognizes the supreme value of human life, and excuses or justifies its taking only in cases of apparent absolute necessity."[134] It was permissible to kill to prevent only felonies that presented a danger of great bodily harm.[135] *Gilbert* could therefore distinguish killings to prevent death from killings to prevent a robbery.

But the Supreme Court soon clarified that although the law forbade killing *to prevent the loss of property*, it permitted killing *to prevent a robbery*. A homeowner could not set up a spring gun to prevent a burglary when the resident was away because there was no risk of physical harm to the absent burglary victim.[136] But forcible and violent crimes like robbery or rape created a presumption that the victims were at risk for death or great harm.[137] If a gun-waving robber demanded money, the clerk could legitimately choose to kill the robber and eliminate the risk to himself rather than desist and possibly increase it. Victims could doubt a robber's promise that they could avoid harm by complying with the robber's demands, and did not need to expose themselves to added danger by giving the robber "the courtesy of the first shot."[138] As the Supreme Court later quoted from a Florida case, "When an opportunity arose to get the 'drop' on the robbers, the proprietor was entitled to act upon it in resistance of the robbery."[139]

Legislation reified this shift. A 1984 law created a presumption that a resident who used force against an unlawful and forcible intruder acted

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133 Cervantes, 26 Cal.4th 860, 874; Sanchez, 26 Cal.4th 834, 869; Brady, 129 Cal. App. 4th 1314, 1334 n.11.

134 People v. Jones, 191 Cal. App. 2d 478, 482 (1961).

135 *Id*. at 481.

136 People v. Ceballos, 12 Cal.3d 470, 478–79 (1974).

137 *Id*. at 475.

138 People v. Reed, 270 Cal. App. 2d 37, 45.

139 Kentucky Fried Chicken v. Superior Court, 14 Cal.4th 814, 825 (1997), quoting Schubowsky v. Hearn Food Store, Inc., 247 So.2d 484 (Fla. Dist. Ct. App. 1971).

under a reasonable fear of imminent peril.[140] As a burglary victim is presumed to have a need for self-defense, a fortiori, so does a robbery victim. The Supreme Court thus relied on post-*Washington* authorities to conclude that robbery victims' "resistance was in the public interest even where it resulted in harm to third parties."[141] Resistance to a violent felony now is not only reasonably foreseeable, it is reasonable.

C. THE REJECTION OF *WASHINGTON–GILBERT*'S PREMISES RESTORED THE STATUS QUO ANTE

Washington and *Gilbert* were historical aberrations. In rejecting murder liability for an armed robber who pointed a gun at his victim and proximately caused death, the Court did more than disapprove *Harrison*; it rejected the prior law on the five major questions described above. The following decades thus merely restored the status quo ante.

Washington held a defendant acts with malice when he "initiates" a gunfight, but pointing a gun at the victim was not enough.[142] In holding otherwise, the Supreme Court did not invent a new position but relied on a 1923 precedent.[143] In each case the defendant brandished a firearm in apparent violation of Penal Code section 417.[144] Even though the defendant did not point the gun at the victim, there was nonetheless evidence from which the jury could have found implied malice.[145] *Washington*'s holding that even pointing a gun at the victim could not establish implied malice was a temporary aberration.

Similarly aberrational was *Washington*'s conclusion that the felony-murder rule applied only if the killing occurred to further the felony.[146] The Supreme Court had earlier rejected a defendant's contention that felony-murder liability attached only when the killing occurred "in pursuance of," "while committing," or "while engaged in" the felony.[147] To the

140 People v. Hardin, 85 Cal. App. 4th 625, 633 (2000).

141 Kentucky Fried Chicken, 14 Cal.4th 824, citing Yingst v. Pratt, 220 N.E.2d 276 (Ind. 1996).

142 Washington, 62 Cal.2d 777, 782.

143 *People v. Hubbard*, 64 Cal. App. 2d 27 (1923).

144 Nieto Benitez, 4 Cal.4th 91, 105; Hubbard, 64 Cal. App. 2d 27, 37.

145 Hubbard, 64 Cal. App. 27, 33, 37.

146 Washington, 62 Cal.2d 777, 781.

147 People v. Chavez, 37 Cal.2d 656, 669 (1951).

contrary, felony-murder liability attached so long as the felony and the homicide were part of a "continuous transaction."[148] The Court's recent "logical nexus" requirement merely restored the prior law.[149]

The *Chavez* decision also indirectly supports the conclusion that the pre-*Washington* felony-murder rule encompassed both contemporary purposes: the deterrence of inadvertent killings during felonies and deterrence of the felonies themselves. The people's evidence showed Chavez killed after committing a burglary and/or rape, whereas Chavez contended he killed intentionally but in a heat of passion.[150] Therefore, when the Court justified a broad application by asserting that the felony-murder rule "was adopted for the protection of the community and its residents,"[151] it was referring to the protection provided, not by deterring inadvertent killings, but by the deterrence of dangerous felonies.

Especially aberrational was *Washington*'s objection to imposing liability on defendants for the conduct of third parties over whom they had little control.[152] Obviously, the *Fowler* defendant had no control over whether the driver ran over Duree's body or avoided it. Accordingly, *Roberts* reflected the prior rule that homicide liability required only proximate causation, not control over the direct cause.[153]

Finally, prior to *Gilbert*, the Supreme Court had required only foreseeability, not reasonableness, in determining whether responsive conduct was a dependent or independent intervening cause. Just one year earlier, the Court observed, "Even assuming that the officers as reasonable and prudent persons should have been aware of the alleged surrender, it was reasonably foreseeable that during the sudden terror created by the defendant's behavior the officers might act imprudently."[154] A responding party's "mere negligence . . . is no defense even though it is the sole cause of death because it is a foreseeable intervening cause."[155]

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148 *Id.* at 670.

149 Dominguez, 39 Cal.4th 1141, 1162.

150 Chavez, 37 Cal.2d 656, 665, 667.

151 *Id.* at 669.

152 Washington, 62 Cal.2d 777, 781.

153 Roberts, 2 Cal.4th 271, 321.

154 People v. Mitchell, 61 Cal.2d 353, 362 (1964).

155 People v. McGee, 31 Cal.2d 229, 240 (1947).

The Supreme Court once again recognizes that (1) the felony-murder rule is designed to deter the commission of felonies; (2) pointing (or even brandishing) a gun may show implied malice; (3) the felony-murder rule covers all homicides where there is a logical nexus between the felony and the homicide; (4) offenders may be liable for harms beyond their control; and (5) unreasonable but foreseeable responses do not break the chain of causation. Ironically, reliance on the provocative act doctrine has expanded as its logical foundations have collapsed.

III. THE SHIFT IN PENAL PRIORITIES

A. THE TENSION BETWEEN SUBJECTIVE CULPABILITY AND OBJECTIVE DANGER IN DETERMINING LIABILITY

The past half-century has seen the erosion of not just the specific premises underpinning *Washington* and *Gilbert* but the philosophical zeitgeist that generated it. The criminal law has long tried to balance two competing priorities. As the Court explained in 1884, criminal punishment could seek to protect "personal security and social order" or to make "an accurate discrimination as to the moral qualities of individual [defendant's] conduct."[156] These aims may conflict regarding punishment for intentional conduct that produces unintended but foreseeable harms. Should the law punish defendants only for their subjectively intended consequences, or also for objectively foreseeable ones?

Each position enjoys support,[157] and the Supreme Court has oscillated between them.[158] Receiving support from the recently published Model Penal Code, the subjectivist model neared its apex in the 1960s. The Court modified doctrines that had enhanced public safety by deterring dangerous behavior, and instead determined liability with an almost exclusive focus on the offender's mental state.[159]

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156 People v. Blake, 65 Cal.275, 277 (1884).

157 Compare Méndez, *supra* note 7, at 245–50 (2010) with Mitchell Keiter, *With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law*, 38 U.S.F. L. Rev. 261, 263–68 (2004).

158 *See* Mitchell Keiter, *How Evolving Social Values Have Shaped (And Reshaped) California Criminal Law*, 4 Cal. Legal Hist. 393 (2009) *(Evolving Values)*.

159 *Id.* at 404–20.

The felony-murder rule was one such doctrine. In the 1950s, the Court endorsed a broad construction, observing, "The statute was adopted for the protection of the community and its residents, not for the benefit of the lawbreaker."[160] But the Court constricted the doctrine in *Washington* by requiring a felon's direct causation.

The Court further limited the doctrine four years later in *People v. Ireland*.[161] Before *Ireland*, a defendant who assaulted the victim with a dangerous weapon in a manner endangering life, and did so without justification or mitigation (e.g. heat of passion), would be guilty of murder if the victim died; the law imposed liability for the foreseeable if unintended consequence of death.[162] The rule deterred the dangerous condition that naturally and probably led to death. But citing *Washington*'s dictum about constraining felony-murder liability, *Ireland* barred reliance on the doctrine to impose murder liability for a fatal assault, as the rule would prevent the jury from considering the defendant's (subjective) diminished capacity defense.[163] The Court further limited the felony-murder rule in *People v. Wilson*,[164] where it barred application of the (first degree) felony-murder rule for the section 189 felony of burglary where it was committed for purpose of assault.

The Court revised other doctrines to limit liability for unintended fatal consequences. Perhaps the best example was the very issue that presented the tension between promoting "personal security" and ensuring "an accurate discrimination" of the offender's moral qualities: voluntary intoxication.[165] The law initially had imposed full accountability on the offender for the consequences of his conduct, notwithstanding his absent rational faculties, which he himself had chosen to abandon.[166] But critics argued the fault lay

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160 Chavez, 37 Cal.2d 656, 669.

161 70 Cal.2d 522 (1969).

162 Jackson v. Superior Court, 62 Cal.2d 521, 526 (1965) cited in Ireland *at Forty, supra* note 7, at 28 (2008).

163 Ireland, 70 Cal.2d 522, 539. Actually, the quoted *Jackson* language appeared to permit the defendant to introduce evidence (like diminished capacity) that would mitigate the homicide to manslaughter.

164 1 Cal.3d 431 (1969).

165 Blake, 65 Cal. 275, 277.

166 "He must be held to have purposely blinded his moral perceptions, and set his will free from the control of reason — to have suppressed the guards and invited the mu-

not with the drinker but the drink, which "robbed you of your mind, your freedom, your very self,"[167] and the Supreme Court expanded the exculpatory effect of extreme intoxication.[168] The debate mirrored the felony-murder debate: did the inebriate (like the felon) deserve murder liability because he intentionally "set in motion a chain of events [where the homicide] was the natural result,"[169] or should he avoid murder liability because, having commenced the crime, he "has little control over" its fatal conclusion?[170]

After crime rose substantially in the decade after *Washington,* the pendulum swung back to a more public safety–oriented philosophy.[171] The public (and the Legislature) abolished the diminished capacity defense.[172] The Court tempered its efforts to rein in the felony-murder rule; in addition to the changes described in Part II, the Court expressly overruled *Wilson* in part on public safety grounds.[173] And the Legislature abolished voluntary intoxication as a defense to implied malice murder.[174] In sum, there was more inclination to punish offenders for the unintended but foreseeable consequences of their intended acts.

B. (MISTER) *WASHINGTON* GOES TO *SMITH:* HOW THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE SUPERSEDED *WASHINGTON*

Furthering this trend was the natural and probable consequences doctrine (NPC), which holds an aider and abettor (or coconspirator) liable for not

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tiny; and should therefore be held responsible as well for the vicious excesses of the will, thus set free, as for the acts done by its prompting." Roberts v. People, 19 Mich. 401 (1870).

167 Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of The Intoxication Defense*, 87 J. Crim. Law & Criminology 482, 490 (1997), quoting Lawrence M. Friedman, Crime and Punishment in American History 148 (1993).

168 A defendant could introduce evidence showing that his intoxication precluded his forming a specific intent to kill, and thereby mitigate his homicide to involuntary manslaughter. People v. Mosher, 1 Cal.3d 379, 391 (1969); People v. Gorshen, 51 Cal.2d 716, 733 (1959).

169 Harrison, 176 Cal. App. 2d 330, 345.

170 Washington, 62 Cal.2d 777, 781.

171 *Evolving Values, supra* note 158, at 420–21.

172 *Id.* at 428.

173 People v. Farley, 46 Cal.4th 1053, 1120 (2009): "Individuals within any type of structure are in greater peril from those entering the structure with the intent to commit an assault, than are individuals in a public location who are the target of an assault."

174 *Evolving Values, supra* note 158, at 425–27.

only the planned crime but also any other committed by the perpetrator that is its natural and probable consequence.[175] The doctrine recognizes the special dangers posed when multiple offenders combine to commit a crime, and thus it developed in conspiracy law as "a protection to society, for a group of evil minds planning and giving support to the commission of a crime is more likely to be a menace to society than where one individual alone sets out to violate the law."[176] Like extreme intoxication, the use of a partner can override an individual's capacity to maintain control over the course of events.[177]

The case that most extensively reviewed the doctrine involved a defendant who sent several armed agents to obtain information from the victim "at any cost."[178] But instead of obtaining information, the agents killed him.[179] Although the homicide frustrated rather than furthered the object of the conspiracy by eliminating the source of information, the defendant was convicted of not only conspiracy to commit an aggravated assault but also first degree murder.[180] Following the policy that "conspirators and aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion," the court of appeal affirmed, because "a homicide result[ing] from a planned interrogation undertaken 'at any cost' by armed men confronting an unwilling source is unquestionably the natural and probable consequence of that plan."[181] In other words, if the defendant had wanted to be judged on his own conduct, he should have interrogated the victim himself. By enlisting others, he ran the risk that they would extend the assault beyond his limited design.

The case cited *Washington*, and both appeared to distinguish the propriety of holding a defendant liable for homicides committed by an

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175 See Kimberly R. Bird, *The Natural and Probable Consequences Doctrine: "Your Acts Are My Acts!,"* 34 W. St. U. L. Rev. 43 (2006).

176 People v. Welch, 89 Cal. App. 18, 22 (1928).

177 "[W]hen an accomplice chooses to become a part of the criminal activity of another, she says in essence, 'your acts are my acts,' and forfeits her personal identity." Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 Hastings L.J. 91, 111 (1985).

178 *People v. Luparello*, 187 Cal. App. 3d 410, 443 (1986).

179 *Id*. at 419.

180 *Id*. at 419–20.

181 *Id*. at 438, 443.

accomplice with the impropriety of such liability for homicides committed by a (resisting) *victim*. But the distinction is not above question. In both cases, the homicidal conduct may be undesired, unplanned, and contrary to the defendant's purpose (i.e. killing the victim prevented the discovery of information, just as the *Washington* victim's killing a robber impeded the crime). But it is also reasonably foreseeable. If the goal of deterring foreseeable harms supports liability for a defendant when his cofelon departs from the plan and shoots the clerk, why should the defendant not be just as liable when the clerk shoots the cofelon? One answer is that the NPC rule serves to deter criminal combinations, so criminals bear special risks for using partners, and receive tacit "rewards" for acting alone. By contrast, one would think, section 189 felonies cannot be committed without a victim. But the same logic could apply for felons who commit crimes like burglary, arson or train-wrecking when no one is present to reduce the risk of a resistance that endangers bystanders. And the law could similarly reward robbers who commit their crimes under conditions minimizing risks to bystanders. If there is less risk that a victim's resistance will endanger bystanders during times when there are few if any customers than one committed during a bank's peak hours, why should the law shield the robber from liability for the foreseeable consequences of the latter danger?

Medina showed how an accomplice and victim could combine to escalate a dangerous conflict.[182] The defendant challenged the victim about his gang affiliation; when the victim responded, a fight ensued that ended in fatal gunshots.[183] The Supreme Court observed that the natural and probable consequence derived from the *combination* of the initial challenge and the victim's answer:

> Even if the three aggressors did not intend to shoot [the victim] when they verbally challenged him . . . it was . . . reasonably foreseeable . . . that the violence would escalate further depending on [the victim's] response to their challenge. . . . [R]etaliation was likely to occur and . . . escalation of the confrontation to a deadly level was reasonably foreseeable. . . .

182 46 Cal.4th 913.

183 *Id*. at 917.

The *Washington* distinction between liability for homicides directly committed by an accomplice and non-liability for homicides directly committed by the victim is not so stark, especially in cases where it is unclear who fired the fatal shot.[184]

The Court's decision in *People v. Smith* further blurred the distinction between cases supporting liability based on an accomplice's escalating the violence and cases opposing liability based on the victim's escalation. The defendant's brother had joined a competing gang, and to leave the gang he needed to be "jumped out" (beaten).[185] Defendant decided to attend (with armed colleagues) to ensure his brother was not hurt too much, but they agreed they would not shoot unless shot at first.[186] The beating escalated to an exchange of gunfire, which killed the defendant's cousin and friend.[187]

The Court held that substantial evidence supported the conclusion that the defendant aided and abetted the crimes of disturbing the peace and assault or battery, of which the fatal shooting was a natural and probable consequence.[188] Although the rival gangs were normally enemies, they combined to stage the jump-out, and the deaths were a natural and probable consequence. This supported the defendant's liability for murder, even if the jury could not identify the actual killer, so long as it concluded that whoever it was acted with malice.[189]

Smith demonstrates how much the law has changed since *Washington*. Both cases involved a defendant who participated in a crime where an antagonist's fire killed the defendant's colleague. Washington's cofelon committed an armed robbery by directly pointing a gun at the victim, but the Court rejected liability because he had "little control" over the victim's response.[190] Smith committed lesser crimes (disturbing the peace and assault or battery) and the evidence did not establish whether he brandished his gun before the rival gang began shooting, after it did, or not at all.[191] And whereas the *Washington* victim's fire was in response to the robber's

184 *See, e.g.,* Sanchez, 26 Cal.4th 834.

185 People v. Smith, 180 Cal. Rptr. 3d 100, 103-05 (2014).

186 *Id.* at 5.

187 *Id.* at 6.

188 *Id.* at 8–9, 17, 19.

189 *Id.* at 19.

190 Washington, 62 Cal.2d 777, 781.

191 Smith, 180 Cal. Rptr. 3d at 105.

pointing the gun at him, the *Smith* evidence did not indicate the rival gang shot in self-defense or with justification. But it was evident that Smith had no more control over his antagonists' shooting than Washington had over the robbery victim's. Nearly a half-century after *Washington*, the California Supreme Court endorsed murder liability "solely on the basis of the response by others that the [criminal]'s conduct happened to induce."[192]

IV. HOW THE PROVOCATIVE ACT DOCTRINE UNDULY RESTRICTS LIABILITY

The Supreme Court has tried to minimize the significance of the provocative act doctrine, explaining that it is not a special form of murder, just a shorthand description for homicides committed through an intermediary. The Court has insisted that categorizing some intermediary killings as "provocative act" homicides does not matter, because all homicides ultimately depend on the proximate causation–times–*mens rea* formula. "[W]hether or not a defendant's unlawful conduct is 'provocative' in the literal sense when it proximately causes an intermediary to kill through a dependent intervening act, a defendant's liability for the homicide will be fixed in accordance with his mens rea."[193] Yet the doctrine's results often diverge from those produced by the *Fowler* formula.

Sometimes this occurs just due to the complicated nature of the doctrine. Trial judges must adjust the instruction(s) to accommodate the specific facts of the case, and with dozens of possible adjustments to make, there will be occasional errors. On other occasions, the instruction does not accommodate an unusual fact pattern, so a defendant may evade liability. The doctrine does not appear to support murder liability for two defendants for the same homicide unless they are accomplices — which is why *Sanchez* could produce two first degree murder convictions only through bypassing the doctrine.[194] Similarly, the prescribed instruction does not currently accommodate the event (as in *Sanchez*) that the direct cause is indeterminate. No instruction addresses the event that an intermediary

192 Washington, 62 Cal.2d 777, 781.

193 Cervantes, 26 Cal.4th 860, 872 n.15.

194 Sanchez, 26 Cal.4th 834, 858 (Werdegar, J., concurring).

directly inflicts a serious injury short of death.[195] Most problematically, although the Court has emphasized that the crime is manslaughter where a defendant causes death through an intermediary without malice,[196] no current instruction offers juries that option, thereby creating an undesirable all-or-nothing choice.[197]

Problems may thus arise where the instructions do not appear to address the specific factual circumstances of a case, and even more problems arise when they do — with instructions that mis-describe the law. Current instructions describe the law based on older holdings and ignore more recent developments.

A. THE ELEMENTS OF A PROVOCATIVE ACT

This reliance on outdated law affects the very definition of a provocative act; current instructions demand a "high probability that the act will provoke a deadly response."[198] The "high probability" language derives from a 1953 concurring opinion defining implied malice, cited in *Washington*.[199] The Supreme Court has since made clear that the implied malice instruction should instead provide the "natural and probable consequence" phrase.[200] Although the court of appeal distinguished the two standards in holding there must be "a high probability — not merely a foreseeable possibility — of eliciting a life-threatening response,"[201] the Supreme Court later explained that the "natural and probable consequence" element of implied malice is satisfied upon a showing of a "reasonable foreseeability": "The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough."[202] But the instruction preserves more the restrictive "high probability" standard rejected by the Supreme Court.

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195 *See* People v. Monk, 56 Cal.2d 280, 296 (1961).

196 Cervantes, 26 Cal.4th 860, 872 n. 15; Fowler, 178 Cal. 657, 669.

197 *See* People v. Barton, 12 Cal.4th 186, 196 (1995).

198 CALCRIM 560, 561.

199 Washington, 62 Cal.2d 777, 782, quoting People v. Thomas, 41 Cal.2d 470, 480 (Traynor, J., concurring) (1953).

200 People v. Knoller, 41 Cal.4th 139, 152 (2007).

201 People v. Briscoe, 92 Cal. App. 4th 568, 582 (2001).

202 Medina, 46 Cal.4th 913, 920.

The instruction offers further potential for confusion as the requirement of a "deadly response" also demands that the high probability of fatality derives from the *response*, even though the risk has often (usually) appeared from the provocateur's direct action. In other words, firing a gun during a robbery is dangerous to human life mostly because it could directly kill, and only secondarily because it might prompt responsive fire.[203] The doctrine thus has been turned upside down; as explained by *Washington* and *Gilbert*, the Court originally measured danger with regard only to its direct consequences, ignoring the risk of a response. Now the instruction does the opposite, excluding any consideration of the act's direct risk. But the danger presented by both the act and the response must be measured to judge whether death was a natural and probable consequence.[204]

B. THE "MERE" COMMISSION OF A FELONY

Another major problem is the requirement that the requisite provocative act "must be an act beyond that necessary simply to commit the crime."[205] Nothing supports this artificial prerequisite. Murder liability requires proximate causation and malice.[206] *Washington* simply barred reliance on the felony-murder rule as automatic proof of malice. In other words, the jury needed to determine whether the natural and probable consequences involved death or great bodily harm because the "mere" commission of a felony was *not automatically malicious*.

But the doctrine now holds that mere commission of a felony is *automatically not malicious*. Rather than invite jury consideration of the facts, the rule may foreclose it. Nothing in law or logic supports the idea that death can never be a natural and probable consequence of the "mere" commission of a crime committed through force or threat of force like robbery, rape or kidnapping.[207]

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[203] Nor is it evident from the instruction that if the response prompts return fire from the provocateur that this "third round" will qualify as the requisite "response" to the provocative act, as it will be responding to the victim's legitimate self-defense.

[204] Medina, 46 Cal.4th 913, 927.

[205] CALCRIM 560. This requirement is absent where the crime itself requires express malice (e.g. attempted murder).

[206] Sanchez, 26 Cal.4th 834, 845.

[207] The requirement is especially problematic because it is unclear what is "necessary" to commit a crime.

The requirement is anachronistic in light of the Supreme Court's concluding that the "reasonable foreseeability" element of proximate causation is coextensive with the "natural and probable consequences" element of implied malice.[208] Therefore, the "life-threatening act" required to show malice "is essentially a shorthand definition that *restates* the proximate cause requirement of provocative act murder."[209] If the harm is reasonably foreseeable, the act is by definition sufficiently "life-threatening" to satisfy the objective element of implied malice. Because an act may be "provocative" due to not only its own level of violence but also the likelihood of a violent response, the "mere" commission of a forcible felony presents a sufficient risk from which a jury may find malice. As current law holds that the victim's violent resistance need not have been a "strong probability" but only a "possible consequence,"[210] *Washington*'s observation that "[i]n every robbery there is a possibility that the victim will resist and kill" is no longer an argument against murder liability for intermediary homicides but one that compels its imposition.

C. THE *ANTICK* EXCEPTION

The third problem flows from the Court's decision in *People v. Antick*.[211] When officers confronted Antick and accomplice Bose after an apparent burglary, Bose committed the provocative act of shooting at an officer, who returned fire and killed Bose.[212] Notwithstanding the general rule that felons are vicariously liable for their accomplices' acts, *Antick* precluded vicarious liability for Antick based on Bose's act.[213] This restriction followed the rule that an accomplice's liability derived from that of the direct perpetrator. Antick's liability would thus derive from Bose's, but Bose could not be liable for his own death. This exception to the provocative act liability (an exception to an exception to an exception) is deficient on several levels.

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208 Medina, 46 Cal.4th 913, 920.

209 Gonzalez, 54 Cal.4th 643, 657 (italics added).

210 Cervantes, 26 Cal.4th 860, 871.

211 15 Cal.3d 79 (1975).

212 Antick, 15 Cal.3d 79, 83.

213 *Id.* at 91.

First, it conflicts with *Washington*'s declaration that it does not matter which person is killed.[214] Had Antick and Bose been joined by another accomplice (conveniently alphabetized as "Caldwell"),[215] but only Bose committed a provocative act, Antick would not be liable for Bose's death as it occurred. But if the officer had killed Caldwell instead of Bose, Antick would be liable for Caldwell's death. In other words (as noted in Part I), Antick's liability would "turn upon the marksmanship of victims and policemen."

Second, current instruction mis-describes the *Antick* exception. It informs juries that an element of the crime is that the provocative act must have been committed by the defendant or a surviving perpetrator, presumably to follow *Antick*.[216] But although *Antick* held that a deceased accomplice may not be liable for his own death, he may be liable for the death of a police officer or other innocent victim. So the defendant may be guilty if the decedent's provocative act proximately caused both his own death and that of a non-accomplice.[217]

More importantly, two cases have cast doubt upon *Antick*'s continuing validity. *Antick* relied on a case where the defendant Ferlin hired an arsonist who accidentally died while setting the fire.[218] That decision rejected felony-murder liability, as the Court denied "that defendant and deceased had a common design that deceased should accidentally kill himself."[219] But as noted above, *Billa* addressed the staged traffic accident by distinguishing the fatal *outcome*, which was not part of the felonious design, from the *acts* leading to death, which were. *Billa* limited *Ferlin* and endorsed liability "where one or more surviving accomplices were present at the scene and active participants in the crime."[220] These conditions appeared to describe the *Antick* facts, so the premises underlying its

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214 *See* Washington, 62 Cal.2d 777, 781; the complete text of the citation in note 29 *supra* reads: "A distinction based on the person killed, however, would make the defendant's criminal liability turn upon the marksmanship of victims and policemen. A rule of law cannot reasonably be based on such a fortuitous circumstance."

215 *See* People v. Caldwell, 36 Cal.3d 210 (1984).

216 CALJIC 8.12.

217 People v. Garcia, 69 Cal. App. 4th 1324, 1331 (1999).

218 People v. Ferlin, 203 Cal. 587 (1928).

219 *Id*. at 597.

220 Billa, 31 Cal.4th 1064, 1072.

exception, like the *Washington–Gilbert* foundations described in Part II, might be obsolete.

But the most profound problem with the "*Antick* exception" is that the Supreme Court has rejected the very concept that an accomplice's liability derives from the direct perpetrator's.[221] The Court used the facts of Shakespeare's *Othello* to show how an accomplice may be liable for an offense for which the direct perpetrator is not.[222] Under the facts of the play, accomplice Iago might be liable for murder even though perpetrator Othello might be guilty of only manslaughter (because he acted in a heat of passion). The analysis concerned examples where the perpetrator was not liable for the full crime committed by the aider and abettor due to a personal defense that applied only to the perpetrator, e.g. insanity, heat of passion, duress, imperfect self-defense.[223] But as the Court disapproved "any interpretation of *People v. Antick* . . . that is inconsistent with this opinion," the death and consequent unprosecutability of a deceased provocateur could be another such personal immunity from liability.

D. A COMMON STANDARD FOR ALL INDIRECT CAUSATION HOMICIDES

The Supreme Court has embraced the proximate causation–times–*mens rea* formula of determining liability in homicide cases — including those committed by intermediaries who are not literally provoked.[224] But it continues to authorize a different, and in practice more stringent, test for liability where the intermediary is "literally provoked." Why should there be a different test for "literal" provocation?

It is possible that *Washington*'s real objection to murder liability was not that the consequences were *beyond the robber's control* but that they were *within the victim's control*. Unlike some of the preceding intermediary homicide cases, *Washington* involved what was arguably discretionary resistance. Of courses, the *Fowler* driver (like the *Roberts* defendant) did not exercise any choice at all. And other cases did not involve any real

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221 People v. McCoy, 25 Cal.4th 1111 (2001).

222 *Id.*

223 *Id.* at 1121, citing People v. Taylor, 12 Cal.3d 686, 692 n.6, 697 n.13, disapproved on other grounds in People v. Superior Court (Sparks), 48 Cal.4th 1 (2010).

224 *See* Sanchez, 26 Cal.4th 834; Roberts, 2 Cal.4th 271.

choice. Whereas nearly everyone dying a slow and painful death like the *Lewis* victim could be expected to accelerate the process, nearly everyone being shot at would try to avoid the bullets as in *Letner* (and *Wright*), and nearly everyone near a live grenade could be expected to kick it away as in *Madison*, many if not most robbery victims would *not* pull a gun and begin firing.[225] *Washington*'s recognition that "[i]n every robbery there is a *possibility* that the victim will resist and kill"[226] implicitly found such aggressive resistance by a victim was a minority consequence, and thus outside the "normal" course of events. Unlike the other victims, it could be argued that the robbery would not have inevitably caused death in *Washington*, but for the victim's escalating the conflict by firing the first shot.[227]

But post-*Washington* cases have recognized that it is not unreasonable for a robbery victim to use force when most effective rather than place trust in a felon's peaceful intentions. And even if it were, such unreasonableness is reasonably foreseeable, and therefore does not break the chain of causation. If a felon is liable when his robbery causes the victim to suffer a heart attack, a fortiori, the felon may be liable when the robbery causes the victim to resist.

Proximate causation is proximate causation, whether the case involves "literal provocation" or not. The law should provide uniform instruction for all indirect causation homicides.

IV. CONCLUSION: MEND IT OR END IT?

The paradox of the provocative act doctrine is that its reach has expanded as its rationales have collapsed. Assailants are indeed liable for consequences over which they have no control. They are likewise liable when their victims act unreasonably. And if the natural and probable consequences of an

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225 Unlike the *Madison* intermediary, who kicked the grenade toward another innocent bystander, the robbery victims in *Harrison* and *Washington* aimed at their assailants.

226 Washington, 62 Cal.2d 777, 781.

227 *Washington* was less inclined than *Harrison* to find the victim's response "an impulsive act of avoidance" based on "the sudden terror of the moment," as in *Harrison*. The robbery victim in *Washington* was already on alert for the possibility of a robbery when the robber appeared, and the victim thus had already prepared his weapon. *Id.* at 779.

act are lethal (i.e. death is reasonably foreseeable), it establishes both proximate causation and the objective element of malice. Resistance to violent felonies is reasonably foreseeable, so proximate causation — and liability — rest with the felon.

How should these changes affect the application of the doctrine? As the doctrine was specifically conceived to limit the felony-murder rule,[228] one option would return its restrictive effect to that context exclusively; the Supreme Court did not affirm a provocative act murder outside the felony-murder context until 2009.[229] This could prevent undue reliance on a disfavored doctrine, but not otherwise impede the ordinary application of the proximate causation–times–*mens rea* formula.[230]

Another possible reform could limit the doctrine to those cases where a cofelon (rather than an innocent party) dies. The Court has formally denied a meaningful distinction between cofelons and innocent victims. "One may have less sympathy for an arsonist who dies in the fire he is helping to set than for innocents who die in the same fire, but an accomplice's participation in a felony does not make his life forfeit or compel society to give up all interest in his survival."[231] But this argument does not extend to crimes that provoke a self-defensive response like robbery, rape or kidnapping. These felonies are punishable by substantial prison terms, yet killing to prevent their commission is justifiable homicide, for which no sentence is imposed. In other words, a violent felon does forfeit the protection of the law because he may be killed without penalty. If an officer kills to prevent a violent felony, there is no need for a criminal prosecution. But if he misses and kills an innocent person, there is an unjustifiable homicide demanding prosecution. It matters who dies.

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228 Cervantes, 26 Cal.4th 871, 872 n.15.

229 Concha, 47 Cal.4th 653.

230 On the other hand, the Supreme Court has since moved away from its aggressive efforts to limit the reach of section 189's felony-murder rule. In *People v. Wilson*, 1 Cal.3d 431, 440 (1969), the Supreme Court rejected felony-murder liability for a burglary where the intended felony was an assault (which could not by itself support felony-murder liability). Forty years later, the Court concluded it could not narrow the statutorily prescribed reach of section 189, and disapproved *Wilson* for doing so. People v. Farley, 46 Cal.4th 1053, 1117–20 (2009).

231 Billa, 31 Cal.4th 1071.

But abolition may be preferable to piecemeal tinkering. The doctrine has taken half a century to reach its current state through natural evolution, as it expanded to react to new factual circumstances like *Pizano*'s human shield, *Aurelio R.*'s express malice, and *Concha*'s premeditation. A doctrine established as an exception to an exception, designed to confine the reach of the felony-murder rule, has become the default vehicle for imposing liability for intermediary homicides. And due to its imperfect design and instructional lacunae, the doctrine cannot cover every factual predicate to ensure that the desired formula of proximate causation–times–*mens rea* always obtains. The law prescribes the provocative act doctrine to decide liability, except in those cases like *Roberts* and *Sanchez* where it doesn't fit, and trial courts must then haphazardly return to the proximate causation–times–*mens rea* formula, without any guidance from the Supreme Court. Using that formula in every case — as a first resort — will ensure greater consistency and justice in homicide prosecutions.

Washington described a doctrine that is "unnecessary," "erodes the relation between criminal liability and moral culpability," and "should not be extended beyond any rational function that it is designed to serve."[232] Because the proximate causation–times–*mens rea* formula of *Roberts* and *Sanchez* suffices to impose liability for intermediary homicides commensurate with the offender's *mens rea*, the *Washington–Gilbert* provocative act doctrine is unnecessary. Due to loopholes through which some offenders might escape liability, and the lack of a manslaughter option for cases where either the offender kills indirectly while in a heat of passion (voluntary manslaughter), or where the natural and probable consequences of the provocateur's act are lethal but the defendant does not subjectively realize it (involuntary manslaughter), the doctrine erodes the link between liability and culpability. And because the *Washington–Gilbert* doctrine was conceived to limit the reach of the felony-murder rule, it has been extended beyond any rational function it was designed to serve. Although the quotation from *Washington* referred to the felony-murder rule, the quote now describes that case's own creation.

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232 Washington, 62 Cal.2d 777, 783.