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PERSPECTIVE

## Combat, casualties, and causation: Life-saving lessons of the California Supreme Court

By Mitchell Keiter

Many civilians face danger in the coming months, as Hamas' hostages, foreign nationals, and local residents remain trapped in Gaza. Who is to blame for the harms they suffer, and more importantly, what can we do to limit them? Several doctrines expounded by the California Supreme Court provide important lessons for the coming war and could help limit casualties.

### Proximate causation

The most important principle helped resolve a case this summer: *People v. Carney*, 14 Cal.5th 1130 (2023). Gang members Lonnie and Louis Mitchell displayed their firearms when they entered a Sacramento barber shop frequented by a rival gang, and expressed an intent to "shoot the place up." When members of the rival gang arrived, Lonnie Mitchell began firing his assault weapon indiscriminately. James Carney returned fire but his shot missed the Mitchells and killed a woman trying to shield her two-year-old daughter.

The Mitchells were convicted of premeditated murder. They appealed, contending they could not be guilty because the forensic evidence showed the fatal bullet came from Carney's gun. But the Supreme Court affirmed their convictions, citing its precedents that distinguish between the "direct" cause of death (i.e. the bullet) and the "proximate" cause, which assigns blame and punishment for the crime.



Palestinians inspecting damage to buildings and houses in Khan Younis following Israeli airstrikes, in the southern Gaza Strip on Oct. 10, 2023. | The New York Times

Direct causation does not always deserve blame. For example, when a defendant shot at a driver, who consequently lost control of his car and killed a pedestrian, it was the shooter, not the driver, who was guilty of homicide. *People v. Roberts*, 2 Cal.4th 271 (1992), citing *Wright v. State*, 363 So.2d 617 (Fla. Dist. Ct.App. 1978). Similarly, a defendant who beat a victim and left him lying in the road was responsible for his death when a car ran him over. *People v. Fowler*, 178 Cal. 657 (1918). Only if the driver did so purposely would the defendant cease to bear guilt, which would shift to the purposeful killer.

This principle applies especially to hostages and human shields. When a would-be rescuer unintentionally killed a human shield, the Supreme Court held the kidnappers were responsible. If death results because a kidnapper put the "deceased in a dangerous place," that kidnapper is as guilty "as if he had done the deed with his own hands." *Pizano v. Superior Court*, 21 Cal.3d 128, 141 (1978).

And the principle reaches not only hostages kidnapped by Hamas on Oct. 7, but also Palestinian Gazans, who wish to flee southward to avoid fighting. Hamas has prevented their flight by creating roadblocks and

confiscating car keys, so civilians are trapped against their will. Zimmerman, "Hamas Blocking Mass Evacuation in Gaza as IDF Urges Civilians to Move South," National Review, Oct. 15. Hamas has also prevented foreign visitors from leaving. Ebrahim, "The last remaining exit for Gazans is through Egypt. Here's why Cairo is reluctant to open it," CNN, Oct. 16; Wehner, "Blinken says Hamas to blame for foreign nationals not being able to leave Gaza; Egypt ready to help," Fox News, Oct. 15. If Hamas keeps noncombatants trapped in a "dangerous place" to use as human shields, it is as responsible if they

die as if it had shot them directly.

Civilian structures lose their protected status under international law when they are used for military functions. Secretary of State Anthony Blinken explained Hamas is doing just that, knowingly driving up the death count of its own civilian population, by keeping people in a dangerous place and by creating dangerous places next to people: “Hamas makes sure... that its command centers, that its weapons, its ammunitions are all located in residential buildings or buried underneath hospitals, schools, and supermarkets.” U.S. Brigadier General Pat Ryder noted Hamas’ “willful and deliberate integration” of armories and rockets “among the innocent Gazan population, thus ... employ[s] them as human shields.” Lieber, Stancati, Abdel-Baqui, “*Israel Airstrike Hits Crowded Refugee Camp in Northern Gaza*,” Wall St. J., Nov. 1.

Why does Hamas do this, when it produces death for its own people? Because it receives a reward for every civilian death it proximately causes: more international pressure against Israel. As Hamas official Ali Baraka explained, “The Israelis are known to love life. ... We... sacrifice ourselves. We consider our dead to be martyrs.” Feith, “*Hamas’ Strategy of Human Sacrifice*,” The Free Press, Oct. 17. Hamas does not build shelters for vulnerable Gazans because dead children are not a bug of its tactics, but a feature.

### Self-defense

Self-defense principles are also instructive. What if a soldier receives gunfire from a shooter hiding inside a building? Must he hold his fire (and remain a vulnerable sitting duck) just because there might be a civilian somewhere?

The justification of self-defense follows the broader principle of transferred intent, which dates back to the 1576 case of *Queen v. Saunders & Archer*, 75 Eng.Rep. 706, cited in *People v. Scott*, 14 Cal.4th 544 (1996). A defendant who poisoned an apple intended for his wife was no less guilty because his daughter unexpectedly ate it instead. What mattered was the *killer’s mental state*, not the *victim’s identity*. So shooters who intend to kill but have bad aim are no less guilty if they kill an unintended victim.

The reverse concept of *transferred justification* also applies. In *People v. Mathews*, 91 Cal.App.3d 1018 (1979), a woman asserted that a passenger in an adjacent car had pointed a gun at her, so she fired in self-defense, but hit the other car’s driver instead. If she could have lawfully defended herself against the passenger, she was not guilty even though she hit the driver: “The inquiry must be whether the killing would have been justifiable if the accused had killed the person whom he intended to kill.” Accordingly, militaries need not pursue zero tolerance of civilian harm at the cost of their own safety. See *People v. Gilbert*, 63 Cal.2d 690, 704 (1965): A “victim’s self-defensive killing ... is a reasonable response to the dilemma thrust upon [him],” even if it harms unintended bystanders.

Contrary to overheated rhetoric, not every civilian casualty is a war crime. Soldiers may not deliberately *target* civilians, so they may not shoot-or-behead-a-baby. But soldiers need not expose themselves, or their mission, to excessive risk. As President Roosevelt declared before D-Day, “I am not prepared to impose any restriction on military action... that... might militate against the success [of Operation Overlord]

or cause additional loss of life to our Allied Forces of invasion.”

### The orderly ascertainment of truth

Supreme Court principles also inform how evidence should be gathered and presented, as “the orderly ascertainment of truth... should not be a one-way street.” *Jones v. Superior Court*, 58 Cal.2d 56, 60 (1962). The Supreme Court there held that a rape defendant who wished to rely on a defense of impotence had to disclose the witnesses and medical evidence he planned to present at trial, because “the defendant... has no valid interest in denying the prosecution access to evidence that can throw light on issues in the case.” An even more important “two-way street” rule compels witnesses to undergo cross-examination, and permits courts to strike their direct testimony if they refuse even if that refusal is based on fear of retaliation. *People v. Brooks*, 3 Cal.5th 1, 31 (2017). It can be better to have no evidence at all than a distorted account.

But news from Gaza does not follow this model. As former Reuters bureau chief Luke Baker explained last week, “Any health official stepping out of line and not giving the death tolls that Hamas wants reported to journalists risks serious consequences.” Barnes, “*Death tolls from Hamas-run health ministry are not trustworthy, former Reuters chief warns*,” The Telegraph, Oct. 24, 2023. (For obvious reasons, he waited until he was the *former* chief to say so.) Humanitarian workers face the same pressure; a week earlier, UNRWA posted that Hamas had taken fuel supplies earmarked for humanitarian purposes and then deleted the post. Hulkower,

“*Hamas Steals Fuel And Medical Equipment From UN Humanitarian Compound: REPORT*,” The Daily Caller, Oct. 16, 2023. But if journalists cannot print the whole truth due to intimidation, they should not substitute half-truths in its place.

### Removing incentives

There is no perfect strategy for confronting a terrorist organization that wilfully invites the demise of its own children. But at a minimum, journalists ought not reflexively echo the casualty attributions made by Hamas, as this rewards it both for intimidating journalists and for endangering civilians. A more careful determination of causation and responsibility would conform to established principles of justice. More importantly, it would remove Hamas’ incentive for generating civilian casualties, and thereby save lives.

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