Judging in the American Legal System Seminar: Final Paper

**How Do Judges “Create” Law?**
**Following the Development of California’s Provocative Act Murder Doctrine**

*(Name on last page)*

**Introduction**

Should armed robbery be a capital crime? If a robber points a gun and his victim, but never pulls the trigger, is he the type of person who should be punished with life imprisonment, or death? What if he is armed with a knife instead of a gun? What if he is not armed at all, but merely tells his victim that he is? Should it matter?

One obvious response to these questions would be to say “look at the statutes.” Generally, one expects that state legislatures have drafted penal codes containing answers to these questions. The penal codes state which actions constitute a criminal offense, which sentence may be imposed on those found guilty, and which factors mitigate or increase the punishment.

A problem arises when these statutes do not provide a clear answer. No legislature can possibly foresee the vast array of fact patterns which may come before a judge in any particular case. Statutes must be drafted broadly enough to encompass a wide range of facts, and the rest is left to judicial discretion to interpret each statute accordingly. In particularly unique cases, the judges may need to further develop the law with very little legislative guidance, resulting in judicially created doctrines applied, and further developed, in similar cases. This paper explores the creation of one of these judicially developed doctrines: California’s Provocative Act Murder Doctrine.

This doctrine developed when California judges faced the question of what to do when a defendant was accused of felony murder in a case where a police officer or victim
of the crime was the one who actually caused the death. For example, where a defendant attempted to rob a store, but the store clerk fired a gun and killed the defendant’s accomplice or another person, could that defendant be held responsible for the killing? In 1965, California’s answer to that question was “no.” However, through the judicial creation of the Provocative Act Murder Doctrine, the answer today is probably “yes.”

Part I begins with a brief overview of the relevant sections of California’s Penal Code. It lists the relevant sections judges must apply in a murder case, and summarizes the ways in which malice may be found.

Part II describes the case of People v. Washington, in which the California Supreme Court found that the state’s felony murder rule did not apply where the defendant or an accomplice did not commit the killing. Washington is essentially the starting point for the development of the provocative act murder doctrine. By restricting application of the felony murder rule in third-party killings, Washington forced subsequent courts to find malice and proximate causation by other means.

Part III explains the four principles articulated in People v. Gilbert, a case directly following Washington. Gilbert further expounded on the “exception” suggested in Washington that defendants in third-party killings may still be found guilty of murder where malice may be implied without the use of the felony murder rule. Gilbert was a fairly simple application of language in Washington suggesting implied malice in situations where felons initiate gun battles. Judges in subsequent provocative act murder cases primarily rely on the principles articulated in Gilbert when determining whether felons may be found guilty for murder when the killing was committed by a victim or police officer.
Part IV analyzes how courts developed the provocative act murder doctrine after *Gilbert*. It illustrates several problems in applying the *Gilbert* factors to different and often bizarre situations. First, this section explores how courts expanded the language from *Washington* referring to defendants who initiate gun battles, and how a wide range of actions other than simply firing the first shot may be deemed to initiate a gun battle by provoking lethal response from police or victims. Second, it describes the requirement that an accomplice cannot be held responsible for the actions of a principal if the principal cannot be held responsible (because the principal was the victim of the third-party killing). This requirement was unwisely diluted in *People v. Caldwell* in such a way that undermined the reasoning established in *Washington* and *Gilbert*. Third, this section explains the requirement that the provocative act be separate from those acts inherent in the underlying felony. It argues that it is necessary for courts to uphold this requirement in order to avoid falling back into a strict felony murder rule rejected in *Washington*. Finally, subsection D analyzes the most recent application of the provocative act murder doctrine in the case *People v. Diaz*. This case illustrates how far the doctrine has expanded in forty years, raising the question whether such a broad application is consistent with the original departure from the felony murder rule articulated in *Washington* and *Gilbert*.

Part V explores how judges draft jury instructions in complex cases. It compares the strategy of one Massachusetts judge to what appears to be a similar strategy applied in the California provocative act murder cases. It also analyzes how California courts have modified the standard provocative act murder jury instruction, and how one judge responded to a jury question regarding an application of the doctrine in a particular case.
The paper concludes by suggesting that by broadening the scope of the provocative act murder doctrine, California courts may have gradually come full circle back to a standard bordering on the original felony murder rule.

I. California’s Penal Code: Malice, Malice, Who’s got the Malice?

To understand how the California courts developed the Provocative Act Murder Doctrine, it is necessary to look at the penal code sections that the judges interpreted. Section 187 defines murder as “the unlawful killing of a human being . . . with malice aforethought.”¹ Section 188 goes on to define malice as either express malice “when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature” or implied malice “when the circumstances attending the killing show an abandoned and malignant heart.”² Under Section 189, malice may also be implied using the common law felony murder rule when the killings are committed by felons in the perpetration of a felony.³ On its face, Section 189 appears to only speak to degrees of murder, stating “All murder . . . which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking . . . is murder of the first degree. All other kinds of murders are of the second degree.”⁴ However, California courts have interpreted this section as a codification of the common law felony murder rule, which will imply malice in addition to making the killing murder in the first degree.⁵

² Cal. Penal Code § 188.
⁴ Cal. Penal Code § 189.
⁵ See People v. Washington, 402 P.2d 130, 133 (CA 1965).
First degree murder done in the course of enumerated felonies is punishable by life imprisonment or death.\(^6\)

**II. People v. Washington: The California Supreme Court Limits the Felony Murder Rule**

In 1962, James Washington and an accomplice, James Ball, attempted to rob a gas station. During the course of the robbery, one of the gas station attendants yelled “robbery,” at which point the owner of the gas station took a revolver out of his office desk. Ball then entered the office, pointed a gun at the owner, and the owner immediately fired at Ball, mortally wounding him. The station owner then hurried to the door of the gas station and fired at an unarmed man (later identified as Washington) running from the station with a bag of money in hand. Washington survived the gun shot, but was convicted of first degree murder under California’s felony murder law for the death of his accomplice, Ball.\(^7\)

On appeal, the California Supreme Court reversed Washington’s conviction, finding that the felony murder law “requires that the felon or his accomplice commit the killing, for if he does not, the killing is not committed to perpetrate the felony.”\(^8\) Because the killing is not in perpetration of the felony, malice aforethought cannot be ascribed to the robber under § 189 of the Penal Code.\(^9\)

Writing for the majority, Chief Justice Traynor argued that “To include such killings within § 189 would expand the meaning of the words 'murder . . . which is committed in the perpetration . . . (of) robbery . . . ’ beyond common understanding” and could lead to

\(^7\) People v. Washington, 402 P.2d 130, 132 (CA 1965).
\(^8\) Id. at 133.
\(^9\) Id.
absurd results.\textsuperscript{10} It would also not serve the purposes of the felony murder rule. Punishing felons for killings committed by their victims does not deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.\textsuperscript{11} It also does not deter the felon from committing the robbery in the first place:

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 by others that the robber’s conduct happened to induce. An additional penalty for a homicide committed by the victim would deter robbery haphazardly at best. To prevent stealing, (the law) would do better to hang one thief in every thousand by lot.\textsuperscript{12}

Chief Justice Traynor went on to attack the felony murder rule, generally, by recognizing criticisms that it is “unnecessary and that it erodes the relation between criminal liability and moral culpability” and concluding that “[a]lthough it is the law in this state, it should not be extended beyond any rational function that it is designed to serve.\textsuperscript{13}

Although Washington restricted the use of felony murder to imply malice where neither the defendant nor an accomplice caused the killing, it did not restrict murder liability altogether in such situations. Instead, the court left open the possibility that it would be unnecessary to resort to felony murder to imply malice if “the defendant for a base, anti-social motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death.”\textsuperscript{14} For example, where defendants

\textsuperscript{10} Id. at 133-34 (giving as a hypothetical example, “two men rob a grocery store and flee in opposite directions. The owner of the store follows one of the robbers and kills him. Neither robber may have fired a shot. Neither robber may have been armed with a deadly weapon. If the felony-murder doctrine applied, however, the surviving robber could be convicted of first degree murder, even though he was captured by a policeman and placed under arrest at the time his accomplice was killed.”).

\textsuperscript{11} Id. at 133.

\textsuperscript{12} Id. (quoting Oliver Wendell Holmes, Jr., \textsc{The Common Law}, 58, (1881)).

\textsuperscript{13} Id. at 134.

\textsuperscript{14} Id. (quoting People v. Thomas, 261 P.2d 1, 7 (Cal. 1953)).
“initiate gun battles” and their victims resist and kill, malice could be implied under § 188 without resorting to felony murder under § 189. Yet one recurring problem with this holding is that the majority in Washington never explained what it meant to “initiate” a gun battle. Thus, although Washington shut the door on felony murder, it left open a window for courts to develop what is now the provocative act murder doctrine.

III. People v. Gilbert: The Judges Apply the Washington Exception

Decided only six months after Washington, People v. Gilbert was a prime example of the “initiated gun battles” situation articulated in Washington, where liability for third-party killings could be found without resorting to the felony murder rule. In the course of a robbery, Gilbert initiated a gun battle by shooting at a police officer, at which point another officer fired back and wounded Gilbert’s accomplice, Weaver. The lower courts found the getaway driver, King, guilty on two counts of first degree murder for the deaths of the officer (shot by Gilbert) and for Weaver (shot by another officer). In reversing King’s conviction for Weaver’s murder, the California Supreme Court cited its holding in Washington as support for the argument that the felony murder rule could not apply because Weaver was not killed by the defendant or his accomplice. However, the Court noted that, had the jury been properly instructed below, “the evidence in the present case would support a conviction of first degree murder on the ground that Weaver was killed in response to a shooting initiated by Gilbert.”

15 Id.
17 Id. at 369.
18 Id.
19 Id. at 373.
20 Id. (“[E]ntirely apart from the felony-murder rule, malice may be established when a defendant initiates a gun battle, and that under such circumstances he may be convicted of murder for a killing committed by another. . . . [T]he court did not instruct the jury on that ground, but gave an erroneous
The most important portion of the *Gilbert* decision was an articulation of four principles which may be used “to convict a defendant of first degree murder for a killing committed by another”:

1. **Proof of malice aforethought** implied under § 188 as articulated in *Washington*.
2. “The killing must be attributable to the act of the defendant or his accomplice. When the defendant or his accomplice, with a conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response to such act, the defendant is guilty of murder”
3. **Vicarious criminal liability** where the defendant may be held responsible for an act of his accomplice in furtherance of the common design.
4. The application of Penal Code section 189 to determine the degree of a murder established under § 187 and §188.²¹

The most important of these principles is the fourth, applying § 189 to determine degree. This principle means that, although § 189 may not be used to imply malice, once a defendant is found to have done an act “with wanton disregard for human life . . . that involves a high degree of probability that it will result in death”, then § 189 may be invoked to raise the offense to first degree murder, if done in the perpetration of any of the enumerated felonies. Under § 190 and § 190.2(a)(17), first degree murder done in the

²¹ Id. at 373-74.
course of enumerated felonies is punishable by life imprisonment or death. Yet this principle is problematic to the degree that it applies the “in the perpetration of” language from § 189. The reasoning behind Washington’s rejection of the felony murder rule in these cases was that when the killing is not committed by the felon or his accomplice, “the killing is not committed to perpetrate the felony.” Although Washington dealt with this language in the context of the malice requirement, it would seem that the same reasoning should apply when using the same language to determine degree. In a later case before the Supreme Court of California, Chief Justice Bird argued that Gilbert erroneously applied § 189, and in doing so “carves out an impermissible exception which the Legislature never intended.” Chief Justice Bird argued that although the felon’s malicious act, which put the victim in danger, was an act in perpetration of the felony, the killing itself was not and therefore the plain language of § 189 required that it be murder of the second degree. To hold otherwise would require “writing into section 189 a third "kind" of first degree murder not provided for by the Legislature, i. e., a murder in which ‘the act which made the killing a murder attributable to the robber . . . was committed in the perpetration of the robbery.’ To do so, however, expressly contradicts the Legislature's provision that ‘all other (non-enumerated) kinds of murder are of the second degree.’” Although no subsequent decisions have rejected Gilbert’s application of § 189, Chief Justice Bird’s argument raises doubts as to whether the California courts have applied a consistent reading of § 189 when analyzing implied malice versus murder degrees.

22 Cal. Penal Code § 190, § 190.2(a)(17).
25 Id. at 142.
26 Id. (quoting Cal. Penal Code § 189 “All murder which . . . is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking . . . is murder of the first degree. All other kinds of murders are of the second degree.”)
IV. Problems in Application After Gilbert: Defining (and Re-Defining) the Provocative Act Doctrine

Gilbert must have seemed like an easy case in which to apply the Washington analysis. No one could doubt that Gilbert had “initiated a gun battle” with the police. The Court applied Washington and articulated four principles which judges could rely on when deciding similar cases. But it did not take long for the first problems to arise. Perhaps the most difficult principles to apply after Washington and Gilbert were the requirements that an act be “highly likely to result in death” and “his victim or a police officer kills in reasonable response to such act.” These two principles are the basis for what is commonly referred to as the “provocative act” necessary to imply malice under § 188. The California courts have struggled to determine what such an act entails. Although Washington and Gilbert stated that the act of initiating a gun battle clearly fit this requirement, judges in subsequent cases have wrestled with what it means to “initiate a gun battle” or to be an act “highly likely to result in death.” Looking back at the plain language of § 188, such an act must either manifest “a deliberate intention unlawfully to take away the life of a fellow creature”, or the circumstances attending the killing must “show an abandoned and malignant heart” in order to find either express or implied malice. In Gilbert, the act of firing at police officers could reasonably fit either the express or implied malice requirements. Firing a gun at police officers to facilitate an escape is an action which reflects a deliberate intention to harm or kill the officers, and reflects “an abandoned and malignant heart.” Thus, while Gilbert may have been an easy case to find malice, later

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28 Cal. Penal Code § 188.
cases seem to stray from the plain language of the penal code in favor of the language used in the four *Gilbert* principles.

A. What does it mean to “initiate a gun battle”? Determining whether there was a “provocative act”

Four years after *Gilbert*, the California Court of Appeals dealt with the issue of what it meant to “initiate” a gun battle for purposes of implying malice in the case *People v. Reed*. In *Reed*, the defendant robbed a gas station and then proceeded to take the station attendant to the attendant’s car at gunpoint. Two officers cornered the defendant and ordered him to put up his hands. He refused, and pointed his gun in the officer’s direction and then at the attendant. The officers then fired shots at the defendant. Three of the shots hit the defendant and one shot mortally wounded the station attendant. The trial court found the defendant guilty of first-degree murder for the death of the attendant even though the defendant never fired a shot. The appellate court upheld the trial court’s reasoning that defendant’s actions of pointing the gun at the officers and victim were sufficient to find malice, “[s]uch aggressive actions required immediate reaction unless an officer is to be held to the unreasonable requirement that an armed robber be given the courtesy of the first shot.” Thus, under *Reed*, a defendant need not actually fire a shot in order to commit a provocative act.

The holding in *Reed* is problematic in that the opinion seems to be focusing more on the reasonableness of the officers’ response than on the culpability of the defendant. Few would argue that officers should give an armed robber the ‘courtesy of the first shot’ as a matter of police policy. However, it may be more reasonable for courts to extend such a

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30 *Id.* at 41.
31 *Id.* at 42.
32 *Id.* at 45.
courtesy when the matter relates to sentencing a defendant to life imprisonment or death. In holding that defendant’s actions in taking a hostage and his ‘menacing gestures’ with his gun\(^{33}\) are sufficient to “initiate a gun battle”, the court created a slippery slope that allowed the provocative act murder cases after Reed to dilute the felony murder limitation originally articulated in Washington by expanding the range of defendants’ actions which would satisfy the “provocative act” requirement. For example, in 1975, the Court of Appeals held that a defendant could commit a necessary provocative act without the use of a gun. In People v. Velasquez,\(^{34}\) police tried to arrest the defendant for intoxication and signs of narcotics use. The defendant resisted arrest, his brother joined the fray, and the two proceeded to take the officer’s batons and repeatedly strike the officers before one of the officers shot the defendant’s brother.\(^{35}\) In upholding the defendant’s murder conviction, the court stated that “[a]ny person who initiates a battle with deadly weapons in the course of committing another criminal offense intentionally and with conscious disregard for life commits an act that is likely to cause death. Fists can be lethal weapons as well as batons and guns.”\(^{36}\) Although the defendant’s actions were undoubtedly violent, the fact that an individual need not have a gun to “initiate a gun battle” raises questions as to the range of actions which could conceivably fall under the provocative act murder doctrine. The defendants in Reed and Velasquez may have acted with “an abandoned and malignant heart” to imply malice under § 188, but as the court strays from the language of § 188 to the “act likely to cause death” phrasing, the line between finding malice and finding proximate causation begins to blur.

\(^{33}\) See id. at 50.  
\(^{34}\) 53 Cal.App.3d 547 (1975).  
\(^{35}\) Id. at 550-52.  
\(^{36}\) Id. at 554-55.
Almost two years after Reed, the Supreme Court of California expanded the range of “provocative acts” even further in Taylor v. Superior Court. The facts in Taylor are similar to Washington in that the victim killed one of defendant’s accomplices in the course of a robbery. Two men attempted to rob a liquor store. One man, Smith, pointed a gun at the owner while the other, Daniels, verbally threatened the owner. The owner’s wife fired several shots at and killed Smith while Daniels fled the scene. The defendant was the getaway driver for the two men and was charged with the murder of his accomplice, Smith. Unlike Washington, the court in Taylor allowed the first degree murder charge to continue based primarily on the grounds that the threatening comments made by Daniels and the fact that Smith looked “intent” was conduct “sufficiently provocative of lethal resistance to lead a man of ordinary caution and prudence to conclude that Daniels and Smith ‘initiated’ the gun battle, or that such conduct was done with conscious disregard for human life and with natural consequences dangerous to life.” Thus, the primary distinction between the felons’ acts in Taylor and Washington came down to the fact that the robbers in Taylor articulated their threats, whereas the robber in Washington pointed the gun silently. Not surprisingly, this holding provoked two heated dissenting opinions.

Judge Peters responded to the majority in Taylor, arguing that the majority’s holding effectively repudiated Washington and Gilbert, “To hold, as do the majority, that

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37 3 Cal.3d 578 (1970)
38 Taylor was in the Supreme Court of California on a writ granted at the preliminary hearing stage. Neither defendant had yet been convicted.
39 Taylor at 581 (Daniels "chattered insanely" during this time, telling Mr. West "Put the money in the bag. Put the money in the bag. Put the money in the bag. Don't move or I'll blow your head off. He's got a gun. He's got a gun. Don't move or we'll have an execution right here. Get down on the floor. I said on your stomach, on your stomach." Throughout this period, Smith's gun was pointed at Mr. West. Mrs. West testified that Smith looked "intent" and "apprehensive" as if "waiting for something big to happen." She indicated that Smith's apparent apprehension and nervousness was manifested by the way he was staring at Mr. West.)
40 Id. at 584.
41 Id. at 583.
petitioner can be convicted of murder for acts which constitute a first degree robbery solely because the victims killed one of the robbers is in effect to reinstate the felony-murder rule in cases where the victim resists and kills." 42 Judge Peters argues that the act of pointing a gun at another person carries with it an implicit threat of harm. This threat alone was rejected under Washington as insufficient to find malice. The idea that the mere additional act of verbalizing this implicit threat is sufficient to imply malice seems contrary to the reasoning articulated in Washington and Gilbert, "[i]t is unreasonable to assume that, just because the robber in Washington did not articulate his threat, the victim in that case had less reason to fear for his safety or, as the majority assert, less "provocation" for shooting the robber than did the victims in the instant case." 43 To make such a distinction not only ignores the facts in Washington and Gilbert, but ignores the “fundamental rationale of those cases-that the culpability of criminal defendants should be determined by their own acts, not by the fortuitous acts of their victims which are beyond the defendants' control and thus logically irrelevant to the defendants' culpability.” 44 In sum, the defendants here did not do any acts above and beyond the underlying felony of robbery. If their acts are sufficient to rise to the level of the “provocative act” exception to Washington, then the court in Taylor created an exception which swallows the rule.

42 Id. at 585. (“In holding that petitioner can be convicted of murder of John H. Smith, the majority repudiate this courts holdings in People v. Washington http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DocName=62CALIF2D777&FindType=Y&ReferencePositionType=S&ReferencePosition=779 and People v. Gilbert that robbers cannot be convicted of murder for a killing by a victim unless the robbers commit malicious acts, in addition to the acts constituting the underlying felony, which demonstrate culpability beyond that of other robbers. The majority conveniently ignore the facts of Gilbert and its entire discussion concerning implied malice.”)

43 Id. at 588 (“It is absurd to suggest that the robber's acts in Washington were, as a matter of law, not "sufficiently provocative of lethal resistance to support a finding of implied malice," whereas the robbers' acts in the instant case could be so considered.”).

44 Id at 589 (“In rejecting the contention that a purpose of the felony-murder rule is to prevent the commission of robberies, this court in Washington reasoned that whether robbers can be convicted of murder should not depend on the uncontrollable responses of their victims.”).
The second dissent by Judge Mosk further explained why the felons’ acts in *Taylor* are part of the underlying robbery felony as opposed to additional provocative acts:

> [E]very such conditional threat—whether express or implied—is inherent in the commission of the robbery itself. Indeed, the crime cannot be committed without making or carrying out a threat of violence: it is code law that ‘Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.’ (Italics added; Pen. Code, § 211.) Fear is generated by the menace of such force, e.g., by a threat to commit personal violence upon the victim unless he complies with the robber's demands. The threat thus has no independent significance, no purpose other than to facilitate the commission of the robbery. It is, in short, a necessary incident of the crime.\(^{45}\)

A defendant who only commits acts necessary to the robbery itself does not demonstrate any greater degree of culpability that justifies subjecting him to a greater penalty solely because his victim reacts in a particular way.\(^{46}\) “To ignore that rule is at best to frustrate the deterrent purpose of punishment, and at worst to risk constitutional invalidation on the ground of invidious discrimination. We cannot, of course, ascribe such an intent to the Legislature.”\(^{47}\)

As emphasized in the dissenting opinions, the central problem with the *Taylor* holding is the extremely low standard for what constitutes a “provocative act.” Going back to the first element articulated in *Gilbert*, that the act be one which is “highly likely to result in death,” it seems a far stretch indeed that the additional action of articulating an implied threat is enough to satisfy this standard. Looking to § 188 of the Penal Code, does threatening language raise the actions to a level showing an abandoned and malignant heart? With such a minor distinction between *Washington* and *Taylor*, it is questionable whether there is much difference between the provocative act doctrine and the strict felony

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\(^{45}\) Id. at 593.

\(^{46}\) Id. (“Fundamental principles of criminal responsibility dictate that the defendant be subject to a greater penalty only when he has demonstrated a greater degree of culpability.”).

\(^{47}\) Id.
murder rule. If simply pointing a gun at a robbery victim was an act “highly likely to result in death” then the prosecutor in Washington would not have needed to resort to the felony murder rule to imply malice. Is Washington so easily distinguished on the facts by the articulation of an implied threat? Relying on this distinction would seem to reinstate the felony murder rule applied to third party killings, with only a slight caveat that the defendant must speak his threat while armed. Is the Taylor court actually suggesting that a defendant who speaks bears greater moral culpability for a third-party killing than one who remains mute? The purpose of the felony murder rule, as stated in Washington, is “to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.” The ruling in Taylor serves only to deter a felon from speaking, and seems inconsistent with the holding in Washington. This marginal distinction creates problems for later courts applying the provocative act doctrine, because it dilutes the required severity of actions sufficient to imply malice.

B. Limit on the Provocative Act Doctrine: An accomplice cannot be held responsible where the principal cannot be held responsible.

The Supreme Court of California seemed to recognize that the holding in Taylor went too far in the direction of reinstating the felony murder rule, and in 1975 the Court limited the Taylor holding in the case People v. Atnick. Atnick expressly overruled any part of Taylor which considered the actions of Smith (the man who was killed) in determining the existence of a provocative act. The Court refused to extend the provocative act doctrine to find malice where the provocative act was done by the person killed, as opposed to one of his accomplices. The judges looked to the common law rules

48 15 Cal.3d 79 (1975).
49 Id. at 92 n.12.
of accomplice liability and reasoned that, because an individual could not be found guilty for causing his own death, the law of complicity prevented the deceased’s accomplices from being held responsible as well.\(^{50}\) Therefore, when applying the provocative act doctrine, a court may only look to the acts of the defendant and his \textit{surviving} accomplices. However, in some situations this is easier said than done.

For example, in \textit{People v. Caldwell}\(^{51}\) the central issue revolved around whether the defendant or his surviving accomplice had done an act which provoked police to shoot, or whether the police responded solely to the provocative act of the accomplice who died in the gunfire. The defendants were involved in a robbery followed by a high speed police chase which culminated in the death of their accomplice. However, the shooting took place after the car stopped and when police could not be sure that either defendant was still armed.\(^{52}\) The only \textit{malicious acts} the court could point to were the high-speed chase prior to the shooting, an earlier act where one defendant pointed a gun at the officers, and the acts of defendants in adopting an \textit{“aggressive stance”} as though preparing to shoot it out with the officers (although neither was actually pointing a gun).\(^{53}\) The other accomplice, who was killed in the shooting, was, in fact, still armed and pointing a gun at the officers, but his actions cannot be considered under the limitation set by \textit{Atnick}. The only shots fired during the ensuing gun battle came from the officers, and not the defendants.\(^{54}\)

\(^{50}\) \textit{Id.} at 89 (“neither the felony-murder doctrine nor the theory of vicarious liability may be used to hold a defendant guilty of murder solely because of the acts of an accomplice, if the accomplice himself could not have been found guilty of the same offense for such conduct”).

\(^{51}\) 36 Cal.3d 210 (1984).

\(^{52}\) \textit{Id.} at 215. One of the defendants had pointed a gun at the officers but was disarmed when one of the police cars intentionally rammed the defendants’ car, dislodging the gun.

\(^{53}\) \textit{Id.}

\(^{54}\) \textit{Id.} at 216.
Applying the provocative act doctrine, the defendants could be found guilty of murder “only if one or both of them were shown to have intentionally committed acts which it was highly probable would result in death, manifesting a conscious disregard of human life, or malice.”55 At the time the first officer fired his gun, neither defendant was pointing a gun, and both were crouched behind objects as though taking cover in anticipation of gunfire.56 These acts alone do not seem highly probable to result in death. Yet, the court found substantial evidence to support the conviction by expanding the scope of the provocative act doctrine to include the defendants’ earlier actions during the high speed chase.57

Writing in dissent, Chief Justice Bird expressed concern that the majority’s holding undermined the rules already established in Washington, Gilbert, and Atnick.58 He found that the defendants’ actions in driving the getaway car, and previously pointing a gun, were not the proximate cause of the death because at the time the officers began firing, both the car and the gun had come to rest in a position of apparent safety.59 Instead of firing in response to the acts of the accused, the officers fired in response to the acts of their accomplice, but the majority found that the defendants’ earlier actions still influenced the officers. “According to the majority, an accused may face potential murder liability for his malicious act as long as the impact of that act lingers on in the fears of the third party.”60

55 Id.
56 Id.
57 Id. at 219-20 (“The jury . . . may have concluded that the co-felons' conduct reflected a common determination not to surrender, and the several acts of resistance were interdependent.”). See also id. at 222 (“The foregoing instructive decisions persuade us that defendants' malicious conduct of fleeing in a dangerous high-speed chase, confronting the officers with a dangerous weapon when the chase ended and further preparing to shoot it out with the deputies was a proximate cause of Belvin's death.”).
58 Id. at 226-27.
59 Id. at 228-29 (“At the time of the shooting, neither act posed the kind of 'dilemma' that could negate the conduct of the deputies as an independent intervening cause of Belvin's death.”).
60 Id. at 230-31.
Chief Justice Bird argues that this holding “introduces into the law a creative and dangerous expansion” of provocative act murder liability, which goes against the rule established in Washington and Gilbert.61 Secondly, he criticizes the majority for going against the holding in Atnick by relying on the acts of the defendants as supporting the continued resistance of their accomplice: “This exception swallows the Antick rule. It is difficult to imagine a situation in which the actions of co-felons are not sufficiently interconnected to support a jury finding that one might not have acted but for the continued resistance of others.”62 Thus, Chief Justice Bird’s dissent illustrates continuing problems with the development of the provocative act murder doctrine.63 Although the court in Washington based their decision on the language in California’s penal code, from that decision came the provocative act murder doctrine, not based on statute but on common law theories of causation, accomplice liability and case law. Subsequent courts have upheld Washington as the relevant law in third-party killings, but as the judicially-created provocative act doctrine evolves, it becomes questionable how much of Washington still survives.

C. Requirement that the “Provocative Act” be separate from those acts necessary to the underlying felony

One of the most important requirements of the provocative act murder doctrine is that the “provocative act” must be an act which is somehow over and above the acts required for the underlying felony. This requirement comes from the language in Gilbert stating, “the killing is attributable, not merely to the commission of a felony, but to the

61 Id. at 229 (in the opinion, provocative act murder is also referred to as “vicarious murder”).
62 Id. at 230-31 (“However, under today's majority opinion, an accused may be held responsible for the provocative acts of his deceased accomplice on the assumption that the deceased might have ceased his provocative conduct had the accused surrendered.”).
63 See infra Subsection D for an example of how the decision in Caldwell further expanded the scope of the provocative act murder doctrine.
intentional act of the defendant or his accomplice committed with conscious disregard for life.”64 For example, brandishing a gun is an act that is necessary to the felony of armed robbery, therefore that act alone is not enough to satisfy the provocative act requirement.65

The California Supreme Court clarified this requirement in In re Joe R.66 In that case, two juveniles (the defendant and his accomplice) attempted to rob Wayne Anderson, a man sitting at a bus stop. Anderson responded by grabbing for the accomplice’s gun. A struggle ensued in which the defendant hit Anderson in the head (though not hard enough to affect him). Anderson gained control of the gun and shot the accomplice as the defendant fled the scene.67 The Court found that defendant’s actions were merely those implicit in the underlying felony of armed robbery, and his act of hitting Anderson in the head did not provoke the lethal response.68 The Court looked to Gilbert and Washington and determined that “Gilbert clearly held that resistance provoked only by the robbery itself is no basis for a finding of implied malice necessary for murder liability. Implicit in Gilbert, as in Washington, was the assumption that the life-threatening act on which that liability is premised must be something beyond the underlying felony itself and must be a proximate cause of death.”69

64 People v. Gilbert, 63 Cal.2d 690, 704, 408 P.2d 365, 373 (1965).
65 This was essentially the situation in People v. Washington, 402 P.2d 130 (CA 1965).
66 27 Cal.3d 496 (1980).
67 Id. at 501-02.
68 Id. at 507 (“First, we reject, the minor’s blow to the back of Anderson’s head during the struggle as a basis of his responsibility for Ryles’ death. . . . That “rabbit punch” was certainly a malicious act taken in conscious disregard for life, since foreseeably it could have allowed Ryles to prevail and shoot Anderson, or at least caused the gun to discharge accidentally. However, it fails to meet the second requirement of Washington-Gilbert-Pizano murder liability since it did not provoke Anderson’s lethal resistance and was not the proximate cause of Ryles’ death.”).
69 Id. at 505.
However, the Court’s holding in \textit{In re Joe R} did not overrule \textit{Taylor}, but instead distinguished it on the grounds that the defendants’ actions in \textit{Taylor} went beyond the underlying felony because of “the robbers' threats of execution, their coercive approach to Mr. West (forcing him to lie on the floor), and their nervous and apprehensive manner that suggested the victims were in great danger.”\footnote{Id. at 506.} Thus, it does not take much for an act to go beyond that of the underlying felony.

California courts have repeatedly held that defendants who take hostages have committed an act beyond the underlying felony. For example, in \textit{Pizano v. Superior Court},\footnote{21 Cal.3d 128 (1978).} the Supreme Court of California found that the provocative act murder doctrine, as articulated in \textit{Gilbert}, applied where the defendants used the victim as a shield. “Indeed, it has been argued that malice is express in such cases on the ground that using the victim as a shield is a direct and deliberate creation of immediate lethal danger to the deceased and to him alone.”\footnote{Id. at 136 (internal quotes omitted).} Aside from its applicability to shield cases, \textit{Pizano} was a somewhat unusual application of the provocative act doctrine for two reasons. First, the individual firing at the robbers was neither a police officer nor a victim. It was a neighbor of the victim’s, shooting to prevent the robbers from escaping. Furthermore, the neighbor was not actually aware that the robbers had taken the victim hostage; he started shooting believing only the robbers were exiting the victim’s home.\footnote{Id. at 132.} Under these facts, it initially seems contrary to \textit{Gilbert} to hold the defendants responsible, because the defendant’s actions in taking the hostage are not what provoked the lethal response. Rather, the

\footnote{\textit{See} text \textit{supra} Part IV B.}
response was directed at preventing the successful completion of the felony.\textsuperscript{75} The Court rejected this reading of \textit{Gilbert}, finding that \textit{Gilbert}'s reference to killings in "reasonable response" was an objective inquiry as to proximate cause, rather than a subjective question as to the third party's reason for shooting.\textsuperscript{76} The defendant's actions in placing the victim in the line of fire were both malicious and a proximate cause of the victim's death. Therefore the defendant could be found guilty by applying the \textit{Gilbert} factors.\textsuperscript{77} Courts continue to apply this rationale in hostage and victim shield cases.\textsuperscript{78}

The requirement that the provocative act go beyond that which is necessary to the underlying felony has been satisfied by fairly minimal additional actions. However, it is still an important requirement if the provocative act doctrine is to remain distinct from strict felony murder liability: "Without that additional intentional and provocative act, the defendants lack the necessary state of mind – an intent to kill or at least an intent to commit life-threatening acts. Moreover, by holding them responsible for murder only if they do something beyond the underlying felony we encourage felons to halt the cycle of violence before someone is killed."\textsuperscript{79} Therefore, the requirement that a felon commit an additional

\textsuperscript{75} \textit{Id.} at 137 ("However, as petitioner points out, Cuna did not fire in response, whether reasonable or unreasonable, to Vaca's being used as a shield; he was not even aware of Vaca's presence. Instead, Cuna fired because the police had not arrived and the robbers were about to escape. In short, petitioner concludes, Cuna fired 'solely to prevent the robbery' which \textit{Gilbert} states to be insufficient to create liability for murder on the part of either Esquivel or petitioner.").

\textsuperscript{76} \textit{Id.} at 137-39 ("the function of the reasonable response test in a Gilbert situation is to provide the trier of fact with a guideline for determining whether the malicious conduct rather than the underlying felony proximately caused the victim's death").

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} \textit{See e.g. People v. Briscoe}, 92 Cal. App. 4th 568, 588 (2001) ("Briscoe used Rozadilla--then Parovel's girlfriend--as an implied hostage. A jury could properly find that he committed a provocative act when Briscoe pointed a weapon to Rozadilla's head and demanded that Parovel acquiesce to his demands. In so doing, he dramatically increased the risk to Rozadilla of injury or death by the manner in which he held her in a headlock and by the proximity of the weapon to her head."); \textit{People v. Kainzrants}, 45 Cal. App. 4th 1068 (1996).

\textsuperscript{79} \textit{People v. Aurelio R.}, 167 Cal. App. 3d 52, 59-60 (1985) (Explaining that, in robbery cases, "Good reasons exist to require these robbers to do something further before they can be held accountable for a death resulting from a third person's bullet.").
act serves as a basis for finding the necessary implied malice. It also facilitates a more rational deterrence purpose than the ‘haphazard’ deterrence of a strict felony murder rule.

D. Recent Applications: People v. Diaz

The individual cases discussed thus far illustrate the basic parameters of the provocative act murder doctrine. Specifically, that (1) the defendant commit an act highly probable to result in death, manifesting a conscious disregard of human life, or malice, (2) that the defendant cannot be held responsible for the provocative acts of his accomplice if that accomplice died as a result of those acts, and (3) that the acts be beyond those necessary to the commission of the underlying felony. In theory, these parameters are consistent with the decision in Washington that the felony murder rule does not apply where neither the defendant nor his accomplice directly caused the killing. In reality, the judicially-created provocative act murder doctrine is not so clear cut in its application. As each subsequent case has developed the doctrine, it has also broadened its application. The result is that the provocative act murder doctrine may have expanded to the point where it is nearly indistinguishable from the felony murder rule in its application.

An example of an overly-broad application of the provocative act murder doctrine can be found in a recent case, People v. Diaz.\textsuperscript{80} The defendant in Diaz attempted to rob a house with his brother, Sonny, and another accomplice, Mendez. During the course of the robbery, an occupant of the house called 911 and told them that there were men in her house with guns.\textsuperscript{81} When police arrived at the scene, Mendez immediately surrendered.\textsuperscript{82} The defendant then came outside the house, looked at the deputies, did not show his hands

\textsuperscript{81}Id. at *3.
\textsuperscript{82}Id.
upon orders from the deputies to do so, and reentered the house. The deputies testified that
the defendant appeared to be holding a shotgun at the time, but did not point it at anyone. 83
Instead, he “stood about two feet inside the doorway of the house, holding the shotgun at
‘port arms,’ that is, on his right side, with the barrel pointed off to his right.” 84

Based on the cases previously discussed, it seems unlikely that the defendant had
committed a provocative act highly probable to result in death, manifesting a conscious
disregard of human life, or malice which was beyond that inherent in the underlying felony.
He was standing in a doorway, holding, but not pointing a gun. He had no hostage. He had
not fired a shot. At most, he had refused the deputies’ initial requests to show his hands
and put the shotgun down. One must ask, at this point, had the defendant committed an act
so highly probable to result in death that a court following Washington and Gilbert would
imply malice necessary for murder? Did his actions manifest “a deliberate intention
unlawfully to take away the life of a fellow creature” or “show an abandoned and
malignant heart” as required under § 188? It is necessary to ask these questions, because
just after the defendant reentered the house, his brother Sonny came running from the
house pointing a handgun at the deputies. The deputies immediately fired and killed
Sonny. “A few seconds later, defendant ran out of the house and down the sidewalk with
his hands in the air.” 85 Although the court in Diaz recognized that Sonny’s actions could
not be considered when applying the provocative act murder doctrine, it nonetheless found
sufficient evidence to sustain the defendant’s conviction. 86 The Court of Appeals relied
substantially on *People v. Caldwell* to support its decision,"manifesting Chief Justice Bird’s dissent fears. The application of provocative act murder to imply malice is exceptionally questionable in *Diaz* because the defendant was found to be mildly mentally retarded, though not so disabled as to excuse him from culpability. It is possible that defendant’s allegedly “provocative acts” arose more from an inability to act in a rational manner when in a crisis situation than from any actual malice.

The decision in *Diaz* compels the question whether the provocative act doctrine is consistent with the original departure from the felony murder rule articulated in *Washington* and *Gilbert*. Have the California courts developed the doctrine from “defendants who initiate gun battles” to simply “defendants who are armed” or “defendants who do not immediately surrender”? Is the current application of the provocative act doctrine consistent with the legislative requirements expressed in California’s Penal Code sections §§ 187, 188, and 189? Was it ever? By straying from the plain language in the penal code, and developing through case-law a judicially-created murder doctrine, have the California courts come full circle and arrived back at the felony murder rule? It seems as though the provocative act murder doctrine may be manipulated to such a degree that the only line separating it from a strict felony murder rule may be the line of judicial creativity and discretion.

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87 Id. (“*Caldwell* illustrates how the acts of several accomplices may constitute substantial factors in an accomplice’s death, even though the accomplice’s conduct is the immediate cause of his own death. . . . Here, as in *Caldwell* . . . defendant’s actions created a dangerous situation. Defendant’s actions prompted [the deputy] to say ”shotgun” and further prompted the deputies to draw their weapons and prepare themselves to shoot anyone who came outside the house and threatened them with a gun. . . . Here, as in *Caldwell*, the jury could have reasonably inferred that defendant and Sonny ‘manifested a concerted determination not to surrender and a readiness instead to shoot it out’ with the deputies.”).

88 See supra text accompanying notes 58-63.

89 *Diaz* at *5.

90 See id. (describing a psychologist’s opinion that the defendant "can verbalize in a cognitive manner what the consequences of his actions under certain conditions are. Whether or not he acts in a rational manner when he's under stress and pressure in a crisis situation is another issue."
V. Instructing the Jury: How do judges draft jury instructions in complex cases?

Inherent in any doctrine with as many caveats and complexities as the provocative
act murder ruled are the inescapable difficulties in formulating understandable jury
instructions which will enable the jurors to accurately apply the relevant law to the facts of
an individual case. Not surprisingly, many cases which apply the provocative act murder
doctrine are appealed on the basis of inadequate jury instructions.  

In an effort to understand how judges write jury instructions in difficult cases, I met
with Judge David Lowy of the Massachusetts Superior Court. During our interview, Judge
Lowy explained that he considers crafting jury instructions to be “one of the most
enjoyable parts of the job. . . . You have to understand the law as it relates to this case . . .
and the real fun is to figure out how to communicate that to twelve people who haven’t
spent their lives in the law. . . . You take all of these really interesting legal issues and try to
communicate it in a way that makes sense. . . . That’s a really fun challenge.”

Judge Lowy explained his usual practice in writing jury instructions begins with a
model instruction, if there is one, as a starting point. He then looks to all recent appellate
cases involving jury instructions or cases requiring a finding of not guilty for insufficiency
of the evidence where the court addressed the elements of the crime. Using those cases and
the model instruction as a basis, Judge Lowy explained that “I try to take that language and
I try to put it into . . . plain English for the jury. On the one hand, you want to try and
make it as understandable as you can. On the other hand, you want to make sure to have

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91 See e.g. People v. Gilbert, 408 P.2d 365 (Cal. 1965); People v. Briscoe, 92 Cal. App. 4th 568 (2001);
2005).
92 Interview with Judge David Lowy, Massachusetts Superior Court, in Salem, Mass. (Jan. 2, 2007).
the core of what the SJC or the Appeals Court has said, with the elements in particular.”

When asked what he thought appellate courts could do to make a trial judge’s job easier in difficult cases, Judge Lowy responded that the appellate courts could draft instructions “with the jury in mind,” by using less technical legal language and more plain-English that a jury would comprehend.

After speaking with Judge Lowy, I looked to the provocative act murder cases to see if California judges used a similar strategy when writing jury instructions. It appears from the opinions that many judges also begin with the model jury instruction, and then incorporate appellate opinions.

California provides judges with a model jury instruction, CALJIC 8.12 specifically written for cases where the killer is not the defendant or his accomplice. The text of this instruction reads:

A homicide committed during the commission of a crime by a person who is not a perpetrator of that crime, in response to an intentional provocative act by a perpetrator of the crime other than the deceased [perpetrator], is considered in law to be an unlawful killing by the surviving perpetrator[s] of the crime.

An "intentional provocative act" is defined as follows:
1. The act was intentionally committed;
2. The natural consequences of the act were dangerous to human life; and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for human life.

In order to prove this crime, each of the following elements must be proved:
1. The crime of _______ [or] [attempted _______] was committed;
2. [During the commission of the crime, a [surviving perpetrator] [the defendant] also committed an intentional provocative act;] [or] [The crime committed included conduct comprising an intentional provocative act;]
3. [The victim of the _______] [A peace officer] [Another person not a perpetrator of the crime of _______] in response to the provocative act,

93 Id.
killed [a perpetrator of the crime] [another person] [a fetus];

4. The [defendant's] [surviving perpetrator's] commission of the intentional provocative act was a cause of the death of (name of the deceased).

In People v. Kainzrants, the judge added to this model instruction, inserting a special instruction defining “provocative act,” and clarifying the requirement that the act go beyond the commission of the underlying felony:

The commission of a dangerous felony, such as attempted armed robbery, is not necessarily an intentional provocative act. Some additional intentional act or conduct on the part of the perpetrator of the felony is required. A provocative act is defined as the intentionally placing of another in imminent peril. The imminent peril must have existed or objectively appeared to have existed at or near the time the fatal shot is fired.

The trial judge in that case also preinstructed the jury at the beginning of the jury selection process, during voir dire, to explain the elements of the provocative act doctrine in a very plain-English and understandable fashion:

Now, the People in this case are proceeding on a legal theory. And the legal theory is called the provocative act theory. And in essence what this legal theory says is that--or their theory is that the defendant committed an act which provoked a lethal response, somebody else to do a shooting that led to the death of the victim. That's what the People's theory is. And to give you an example--and this is not based on the facts of this case. This is just what we call a hypothetical example. Let's assume Mr. A and Mr. B decide to rob a store. And they go into the store and Mr. A pulls out a gun and he gets in an [sic] shoot-out with the store owner. And the store owner shoots Mr. B. Everybody got it so far? Okay. Now, the law says under those circumstances that Mr. A is liable for the killing of Mr. B., his partner in crime, even though he didn't shoot him. That's an illustration of the provocative act theory that the People are proceeding on in this case.

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95 This line of the instruction was modified after People v. Gardner, 37 Cal.App.4th 473 (1995) where the court urged that the language be modified to eliminate the word “reasonable” before response to reflect an objective rather than subjective standard.
96 CALJIC 8.12
98 Id. at 1075 n.2.
99 Id. at 1073-74.
On appeal, the defendant in *Kainzrants* objected to this preinstruction, arguing that the trial judge failed to explain other required elements of the offense. The appellate court dismissed the defendant’s objection on the grounds that the jury instructions, *as a whole*, during the entire course of the trial were sufficient.\(^{100}\)

The appellate court in *People v. Gardner* found that it was appropriate for the trial judge to modify the standard jury instruction by eliminating the word “reasonable” before the word “response.”\(^ {101}\) This modification reflected the reasoning articulated in *Pizano v. Superior Court*\(^{102}\) that the “reasonable response” language from *Gilbert* concerned an objective proximate cause requirement, rather than a subjective question as to the reasonableness of the individual responding to the provocative act.\(^ {103}\) As noted above, the model instructions were changed after *Gardner* to make this modification permanent.

*People v. Briscoe* illustrates how a trial judge responded to a question from the jury, asking “whether robbery at gunpoint is--in and of itself--a provocative act.”\(^ {104}\) Based on the requirement discussed above that the provocative act be separate from, or beyond the acts inherent in the underlying felony, one might expect the trial judge to answer this question in the negative.\(^ {105}\) Yet the trial judge did not view this question as one to be answered as a matter of law, but instead viewed it as “a factual question turning on the circumstances of each case. The court noted that the underlying offense was robbery, not robbery at gunpoint.”\(^ {106}\) The court reasoned that “if robbery could be committed without a gun, then the use of a gun might constitute the provocative act beyond that required to

\(^{100}\) *Id.* ("Whether a jury has been correctly instructed is not to be determined from a consideration of parts of an instruction or from particular instructions, but from the entire charge of the court.").


\(^{102}\) 21 Cal.3d 128 (1978).

\(^{103}\) *See supra* text accompanying notes 76-78.


\(^{105}\) *See supra* Part IV C.

\(^{106}\) *Id.*
commit the underlying robbery in an appropriate case.”107 The judge then instructed the jury that this was a factual determination, and directed the jury to review the jury instruction (the same model instruction provided above) defining a provocative act.108 This answer (or lack thereof), seems problematic in that it did not clarify the necessary requirement of the provocative act doctrine that the “provocative act” not be one inherent in the underlying felony. Instead, the trial judge should have looked to the special instruction provided in Kainzrants, and possibly answered the jury’s inquiry using the language from that case.109 Given the facts of Briscoe, the jury would likely have found multiple actions beyond those required for the underlying felony.110 However, the appellate court did not find error in the trial judge’s failure to clarify this element of the offense. Instead, the Court of Appeals supported the trial court’s determination that the question was one of fact, reasoning that “robbery at gunpoint may or may not be a provocative act, depending on the degree to which the perpetrator uses the gun. One who robs another while doing no more than holding a weapon may not have committed a provocative act, while a perpetrator who brandishes a deadly weapon, puts it to the head of a robbery victim, cocks the gun or pistol-whips the victim with it may have.”111 Yet these actions described in the appellate court opinion are clearly actions which go beyond the underlying felony. The act of possessing a gun during the felony, by itself, cannot be a provocative act. To permit otherwise would eliminate the distinction between provocative act murder and felony murder in all armed robberies. It would also seem to go against the

107 Id.
108 Id.
109 See supra text accompanying note 98.
110 See Briscoe, 92 Cal. App. 4th 568, 586 (describing defendant’s actions pistol-whipping the robbery victim).
111 Id. at 589-90.
intent of the California Legislature, in the sense that there are already sections of the Penal Code which enhance the criminal sentence if a firearm is used during a felony. It seems unlikely that the Legislature would intend that the act of possessing a firearm, punishable by only one additional year imprisonment, would also be sufficient to imply malice for murder culpability. For an act to satisfy the provocative act requirements, it is necessary that it is an act which goes beyond the underlying felony. Although the trial court’s failure to make this clarification in the Briscoe case may have been harmless, given the facts, trial judges in future cases should be cautious when instructing the jury on this point. Otherwise the key distinction between provocative act murder and felony murder may become illusory.

VI. Conclusion: What’s Left? Have California Courts Developed the Provocative Act Murder Doctrine in a Retreat Back to Felony Murder?

What is left of the holding in People v. Washington? Subsequent decisions still cite to Washington for the proposition that the felony murder rule does not apply where the defendant or his accomplice did not commit the killing. Yet in the forty years since Washington and Gilbert, the California courts have developed and expanded the provocative act murder doctrine into a unique, if not somewhat difficult to define and apply, rule of law. They have done so by relying primarily on case law, rather than on the plain language of the California Penal Code. The language in Washington discussing defendants who “initiate gun battles” has been expanded to include defendants who point guns and articulate threats during a robbery, and defendants who stand in a doorway holding, but not pointing, guns. Are these actions really enough to imply malice under §

112 See Cal. Penal Code § 12022 (“any person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless the arming is an element of that offense”).
188. Does possessing a gun during a robbery “show an abandoned and malignant heart” sufficient to find a defendant guilty for murder? Can the actions of an accomplice killed during the felony be considered based on the theory that a defendant’s actions encouraged his accomplice? If so, these actions are perilously close to those originally rejected in Washington, and indicate that California courts may have come full circle back to a standard bordering on the original felony murder rule.

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