

Who Killed Kayla Mueller?

The recent passing of al-Qaida hostages Warren Weinstein and Giovanni Lo Porto during a drone strike recalls the similar death of Kayla Mueller. Kept isolated in an abandoned building by the Islamic State group, she died when a Jordanian missile exploded. In each case, headlines reported the hostages were killed, not just *during* the strikes, but *by* them.

But did Jordan really *cause* Mueller's death? Did the U.S. cause the deaths of Weinstein and Lo Porto? Although there is room for re-evaluation of drone strike policy, true responsibility belongs with the terrorists who kidnaped and confined their victims.

The criminal law distinguishes between the "direct" and the "legal" cause of death. The former is the event that inflicted the fatal wound. But the latter concerns fault, and who thus deserves blame. This distinction should inform how journalists report events, and how policymakers respond.

A 1918 case clarified the causation rule for California. *People v. Fowler*, 178 Cal. 657. Just as the Islamic State left Mueller vulnerable, defendant Fowler beat his victim and left him lying alone on a dark road. An unsuspecting motorist then ran him over. The state Supreme Court held it did not matter whether Fowler or the driver was the direct cause of death. Either way, death was the "natural and probable result of the defendant's ... leaving [the victim] helpless and unconscious ... exposed to that danger."

Our state Supreme Court has since cited cases from around the country showing how legal causation derives not from the actual killing but from the creation of conditions that make death a natural and probable result. *People v. Roberts*, 2 Cal.4th 271 (1992). Where "A" threw a grenade at "B," who impulsively kicked it toward "C," who died as a result, Indiana's high court held the evidence supported A's conviction. *Madison v. State*, 130 N.E.2d 35 (Ind. 1955). A Florida court likewise held that where a defendant shot at a driver, who "ducking bullets," accidentally ran over a pedestrian, it was the shooter, not the driver, who committed the homicide. *Wright v. State*, 363 So.2d 617 (Fla. Dist. Ct. App. 1978). And these cases show that so long as such death is a foreseeable consequence of the defendant's conduct, it is no excuse that the grenade-kicker or driver acted unreasonably.

The concept applies with special force to hostage and "human shield" cases. When police inadvertently killed a human shield, the robbers were guilty of his death. The robber who "chose to put [the victim] in a dangerous place [... is] as culpable as if he had done the deed with his own hands." *Pizano v. Superior Court*, 21 Cal.3d 128 (1978).

Obviously, it is legal, not direct, causation that matters. If a hostage is killed during a rescue attempt of a Paris kosher market or Sydney chocolate shop, then regardless of who fired the fatal bullet, the terrorist who created the life-endangering condition should be said to have "killed" the victim.

But the failure to place blame with those who create such life-endangering

conditions makes shield-taking a profitable tactic. Last summer, for example, Hamas repeatedly fired rockets from Gaza hospitals and schools, and even forced children to remain in the line of fire. According to Amnesty International, Hamas “repeatedly launched unlawful attacks . . . and displayed a flagrant disregard for international humanitarian law and for the consequences of their violations on civilians in both Israel and the Gaza Strip.” Whereas the shield-using robbers moved the victim to a dangerous place, Hamas moved danger to the victims.

But instead of deterring life-threatening risks to children, reporters unwittingly rewarded them, and incentivized them for the future. With a statistical precision usually reserved for Olympic medal counts, journalists kept a running tally of civilians killed by responsive Israeli fire. (Amnesty and others have since concluded that some of these deaths were directly caused by Hamas’ own fire, not Israel’s.) But although Hamas is culpable for such deaths whether or not it “had done the deed with their own hands,” the exclusive focus on direct rather than legal causation exempts the terror organization from the blame it deserves.

Shieldtaking is an especially sinister tactic, because it works against only forces that respect innocent human life. It would be pointless to use children as human shields against ISIS or Hamas, because they would not hesitate to make them “martyrs.”

Ominously, pro-Russian separatists in Ukraine have adopted the tactic.

It is no surprise why ISIS told the world that Jordan had killed Kayla Mueller. The wonder is why Western media played along. More and more human shields will face that fate until the West stops rewarding terrorists’ efforts to escape blame for the deaths they cause.

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