

NOTE

DEADLY-FORCE SELF-DEFENSE AND THE PROBLEM OF THE SILENT, SUBTLE PROVOCATEUR

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Should the George Zimmermans of the world lose their right to claim justifiable self-defense at trial? If you look at cases like Zimmerman's in a vacuum, then your initial moral instinct might scream, "Yes!" Yet, how would you feel if an affirmative answer to this question carried with it the loss of innocent persons' rights to come and go as they please? These questions involve more than an instinctual sense of morality. They also involve the application and attendant consequences of the law. When a person purposefully provokes an attack against herself with the intent to kill the attacker under a guise of justifiable self-defense, the law limits the right of this person (the "provocateur") to claim self-defense at trial. Generally, the provocateur must verbally or physically act in some incendiary manner in order to invoke the "provocateur limitation." Some provocateurs, however, may be able to provoke an attack by their mere presence (e.g., a street-gang member present in a rival gang's neighborhood). Does and should the law impose the provocateur limitation in "provocative presence" situations? Combining a survey of the law with a philosophical and policy-oriented study, the author concludes that a proper provocateur limitation may, as applied, allow for the calculated killing of another human being by a "silent, subtle provocateur," yet courts must allow this immoral possibility in order to preserve the dignitary rights of innocent defenders.

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INTRODUCTION

This Note will analyze the scope of a type of limitation to the right of deadly-force self-defense across various jurisdictions within the United States. I will analyze what I refer to as the “provocateur limitation,” which is a restriction on the right of self-defense for those who use nonviolent, nonthreatening means to intentionally provoke violence against themselves in order to kill the person provoked under a guise of justifiable deadly-force self-defense. More specifically, I will analyze the problem of the “silent, subtle provocateur” within this limitation. A silent, subtle provocateur is one who intends to provoke violence against herself so that she may have a pretext for self-defense but engages in no outward act and speaks no words to further that intention. I will start with a survey of both the initial-aggressor limitation and the provocateur limitation in deadly-force self-defense law in jurisdictions across the United States. I will then differentiate the provocateur from the initial aggressor. Next, I will focus exclusively on the provocateur limitation and illustrate the legal and ethical problem of the “silent, subtle provocateur” by answering three questions: (1) Why have a provocateur limitation? (2) Does the law allow silent, subtle provocation for the purposes of the provocateur limitation? And (3) should the law allow silent, subtle provocation? Ultimately, I contend that a proper provocateur limitation may, as applied, allow for the calculated killing of another human being by a silent, subtle provocateur and that this immoral possibility must be allowed to exist as a legal necessity in order to preserve the dignitary rights of innocent defenders.

Example—George Zimmerman: The recent case and trial of George Zimmerman provides a good example of a silent, subtle provocateur. On February 26, 2012, in a Sanford, Florida housing complex, George Zim-

merman shot and killed Trayvon Martin.¹ Shortly after 7:00 P.M., Zimmerman called 911 to report a “suspicious guy” walking through Zimmerman’s housing complex who looked like he was “up to no good.”² Zimmerman told the 911 operator that there had been some recent break-ins in his neighborhood.³ At one point during the 911 call, Zimmerman said, “These a[—]holes, they always get away.”⁴ At another point, Zimmerman said, “S[—]. He’s running.”⁵ The 911 operator asked Zimmerman if he was following the person, to which Zimmerman responded in the affirmative.⁶ The 911 operator then said, “We don’t need you to do that.”⁷ Zimmerman replied, “Ok.”⁸ On the audio recording of the 911 call, Zimmerman says something unintelligible that sounds as though he may have used a derogatory racial slur.⁹ At Zimmerman’s trial, however, prosecutors filed an affidavit stating that Zimmerman actually said “these f—— punks.”¹⁰ At the close of the 911 call, Zimmerman and the 911 operator made arrangements for the responding police officers to meet Zimmerman.¹¹ At first, the 911 operator suggests that the police meet Zimmerman at the location of some mailboxes in the housing complex.¹² After initially agreeing, Zimmerman changes the plan and asks if the 911 operator can have the responding police officers call Zimmerman on his cell phone when they arrive at the housing complex so that Zimmerman can guide them to wherever he may be.¹³ The 911 call then ends.¹⁴

¹ E.g., Dan Barry et al., *In the Eye of a Firestorm: In Florida, an Intersection of Tragedy, Race and Outrage*, N.Y. TIMES, Apr. 2, 2012, at A1, available at <http://www.nytimes.com/2012/04/02/us/trayvon-martin-shooting-prompts-a-review-of-ideals.html?pagewanted=1>.

² *You Be the Judge: Zimmerman’s 911 Call - Does It Reflect Racial Bias?*, FOX NATION, <http://nation.foxnews.com/2013/07/18/you-be-judge-zimmermans-9-1-1-call-does-it-reflect-racial-bias> (last visited Feb. 23, 2015) [hereinafter *Zimmerman’s 911 Call*] (audio recording and transcript of Zimmerman’s call in its entirety). Note that Zimmerman actually called the Sanford Police Department nonemergency number and, therefore, technically did not call 911. See *id.* (discussing juror E54 and Zimmerman’s “non-emergency call”). Nonetheless, most sources label Zimmerman’s call to the Sanford Police Department on Feb. 26, 2012 a “911” call. For the sake of consistency with sources and simplicity, the author chose to maintain use of the term “911” call rather than introduce a new term.

³ *Id.* (time at 1:52 on the audio recording).

⁴ *Id.* (time at 3:25 on the audio recording).

⁵ *Id.* (time at 3:55 on the audio recording). Note that the quotation marks reference the actual audio, not the transcript contained on the Fox News webpage.

⁶ *Id.* (time at 4:13 on the audio recording).

⁷ *Id.*

⁸ *Id.*

⁹ See *id.* (time at 4:11 on the audio recording).

¹⁰ Mike Schneider, *Trayvon Martin Case: Zimmerman Did Not Use Racial Slur, Affidavit Says*, HUFFINGTON POST (Apr. 13, 2012, 11:53 AM), http://www.huffingtonpost.com/2012/04/13/trayvon-martin-case-zimmerman-did-not-use-slur_n_1423763.html.

¹¹ *Zimmerman’s 911 Call*, *supra* note 2 (time at 4:40–5:38 on the audio recording).

¹² *Id.* (time at 5:22 on the audio recording).

¹³ See *id.* (time at 5:32 on the audio recording).

¹⁴ See *id.*

Shortly after the 911 call ended, Zimmerman and Martin met and fought.¹⁵ Zimmerman shot and killed Martin in the course of the altercation.¹⁶ Zimmerman sustained some head injuries in the altercation.¹⁷ “Lawyers for Trayvon’s family [claimed] Zimmerman’s decision not to wait for police by the mailboxes and instead be reached by phone proves he planned to keep looking for the teen instead of simply waiting for a patrol car.”¹⁸ However, Zimmerman reported “that Trayvon approached him from behind as he was returning to his car.”¹⁹ Zimmerman admitted that he shot Trayvon Martin and claimed he did so in self-defense.²⁰ Ultimately, Zimmerman was charged with second-degree murder and acquitted by the jury at trial.²¹ At the trial, the prosecution and Zimmerman’s attorney disputed the events leading to Trayvon Martin’s death, witnesses testified without consensus, and little direct evidence existed.²² The question remains, despite Zimmerman’s acquittal, whether the law could and should have allowed a conviction if the prosecutor proved that Zimmerman internally hoped that Martin would attack him so that Zimmerman could then shoot Martin under a claim of deadly-force self-defense, even if Zimmerman did nothing to further that hope besides be present in the vicinity of Martin. Posed another way, could and should merely following someone be adequate provocation to cause a person to lose his or her right to self-defense under the provocateur limitation?

¹⁵ See Barry et al., *supra* note 1.

¹⁶ See *id.*

¹⁷ E.g., Matt Gutman et al., *George Zimmerman Tells Trayvon Martin’s Parents ‘I Am Sorry,’* ABCNEWS.COM (Apr. 20, 2012), <http://abcnews.go.com/US/george-zimmerman-case-exclusive-photo-shows-bloodied-back/story?id=16177849#.T5FqDGLLx5j>.

¹⁸ Frances Robles, *A Look at What Happened the Night Trayvon Martin Died*, TAMPA BAY TIMES, Apr. 2, 2012, 10:51 AM, <http://www.tampabay.com/news/publicsafety/crime/a-look-at-what-happened-the-night-trayvon-martin-died/1223083>.

¹⁹ *Id.*

²⁰ E.g., Barry et al., *supra* note 1.

²¹ See, e.g., Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 13, 2013, at A1, available at http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html?_r=0.

²² See, e.g., Erin Donaghue, *George Zimmerman Verdict: Prosecutors “Didn’t Have the Evidence” to Prove Their Case, Experts Say*, CBSNEWS.COM (July 15, 2013, 6:00 AM), http://www.cbsnews.com/8301-504083_162-57593686-504083/george-zimmerman-verdict-prosecutors-didnt-have-the-evidence-to-prove-their-case-experts-say/; Tamara Holder, *Has the Prosecution Made a Good Case Against George Zimmerman?*, FOXNEWS.COM (July 5, 2013), <http://www.foxnews.com/opinion/2013/07/05/has-prosecution-made-good-case-against-george-zimmerman/>; Jeffrey Toobin, *The Facts in the Zimmerman Trial*, NEW YORKER (July 16, 2013), <http://www.newyorker.com/online/blogs/comment/2013/07/the-facts-in-the-george-zimmerman-trial.html>.

I. THE PROVOCATEUR AND THE (INITIAL) AGGRESSOR

A. *Elements of the (Initial) Aggressor Limitation*

The “initial-aggressor” limitation is a restraint on a defendant’s right to claim self-defense after a deadly-force encounter.²³ Under the common law and statutory law of several jurisdictions, an “initial aggressor,” or simply an “aggressor,”²⁴ is “not justified in using force to protect himself from the counterattack that he provoked” by unlawful force.²⁵ Generally, one loses the right to defend herself from an attack and becomes an initial aggressor when she is the first to physically attack another or initiates the fray by threatening to physically attack another.²⁶ Some jurisdictions further qualify the initial-aggressor limitation by adding that the attack or threat of attack must be “calculated” to induce a deadly attack by another so that the aggressor may employ a seemingly—but not actually—justifiable use of deadly-force self-defense.²⁷ I will refer to this qualification as the “calculation rule.” In most jurisdictions, initial aggressors may regain the right to self-defense by clearly

²³ The “initial-aggressor” limitation is also a restraint on a defendant’s right to claim self-defense in nondeadly-force encounters, *see infra* notes 25–42 and accompanying text, but this Note is concerned only with deadly-force self-defense.

²⁴ Different jurisdictions vary between using the term “initial aggressor” or simply “aggressor.” Throughout this Note I will use “initial aggressor” and “aggressor” interchangeably since I will be employing quotes and citations that vary the term used. Wherever the reader sees the term “initial aggressor” the reader may assume “aggressor” and vice versa.

²⁵ *State v. Anthony*, 319 S.W.3d 524, 526 (Mo. Ct. App. 2010); *see, e.g., Conn. Gen. Stat. § 53a-19* (2010); 720 ILL. COMP. STAT. 5/7-4 (2012); LA. REV. STAT. ANN. § 14:21 (2013); MONT. CODE ANN. § 45-3-105 (2013); N.M. STAT. ANN. § 14-5191 (West 2014); *United States v. Peterson*, 483 F.2d 1222, 1231 (D.C. Cir. 1973); *Loesche v. State*, 620 P.2d 646, 651 (Alaska 1980); *People v. Griffin*, 224 P.3d 292, 300 (Colo. App. 2009); *State v. Beltran*, 717 A.2d 168, 173 (Conn. 1998); *People v. Brown*, 952 N.E.2d 32, 41–43 (Ill. App. Ct. 2011); *Bellcourt v. State*, 390 N.W.2d 269, 272 (Minn. 1986).

²⁶ *See Shlomit Wallerstein, Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 VA. L. REV. 999, 1001–02 (2005) (defining what generally qualifies one as an “intentional” aggressor). Note that Wallerstein differentiates between multiple types of aggressors (“intentional aggressors, non-culpable aggressors, and non-agent aggressors”). *Id.* at 999. In this Note, when I refer to “aggressors” or “initial aggressors” I am referring to those who start a fight irrespective of motive.

²⁷ *See, e.g., Peterson*, 483 F.2d at 1233 (“While there appears to be no fixed rule on the subject, the cases hold, and we agree, that an [aggressor is one whose] affirmative unlawful act [is] reasonably calculated to produce an affray foreboding injurious or fatal consequences”); *State v. Potter*, 244 S.E.2d 397, 409 n.2 (N.C. 1978) (differentiating between physical aggression and verbal/conduct aggression by defining an aggressor as one who initiates a battery with or without calculated intent to bring about the fray or as one who brings about the fray by language or conduct—less than a physical attack—and said language or conduct must be “calculated and intended” to bring about the fray); *Wilkie v. State*, 242 P. 1057, 1059 (Okla. Crim. App 1926) (“[I]t is not particularly important whether [the aggressor] begins the trouble by [either] words or acts, if they are such as are ‘reasonably calculated’ to lead to an affray or deadly conflict.”).

communicating to their adversary their intent to withdraw and overtly withdrawing from the fray in good faith.²⁸

An initial aggressor may cause a confrontation by physical violence or by mere threatening words or conduct.²⁹ For a general example, subject to exceptions, imagine *Instigator (I)* pulls up his shirt to display a firearm tucked in his waistband with the intent to scare *Responder (R)*; *I* now loses the right to justifiable self-defense if *R* actually draws her firearm in response to *I*'s conduct and fires upon *I*.³⁰ If *I* prevails against *R* and *I* claims self-defense, arguing that *R* first fired upon *I* and therefore *I* was forced to defend himself by returning fire upon *R*, the trial judge will likely void *I*'s claim by a jury instruction.³¹ *I*'s threatening conduct foreseeably would and did generate *R*'s need to employ self-protective force. *R* is the victim who tried and failed to defend herself against *I*'s apparent aggression. Despite the fact that *R* fired first, *I* is likely guilty of murder due to the initial-aggressor limitation on his claim of self-defense.³² In the above example, *I*'s conduct may be replaced with an actual battery upon *R*; a verbal threat of immanent physical force upon *R*; or some other conduct, such as raising fists, that makes *R* believe that *I* is

²⁸ See, e.g., MO. REV. STAT. § 563.031 (2013) (stating an initial aggressor's self-defense right renews in the event that "[h]e or she has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened use of unlawful force"); *State v. Morrow*, 41 S.W.3d 56, 59 (Mo. Ct. App. 2001) ("Self-defense is not available to a defendant if he was the initial aggressor unless he withdrew from the conflict in such manner to have shown his intention to desist. . . . The withdrawal must be made in good faith and be more than mere retreat, which may be simply a continuance of hostilities. Additionally, the withdrawal or abandonment must be perceived by or made known to the adversary." (citations omitted)).

²⁹ See, e.g., *Parsley v. State*, 235 S.W. 797, 798 (Ark. 1921) ("[T]hreats, whether communicated, or uncommunicated, are admissible when there is doubt as to who was the aggressor . . ."); *State v. Jimenez*, 636 A.2d 782, 786 (Conn. 1994) ("[A] person may respond with physical force to a reasonably perceived threat of physical force . . ." (construing CONN. GEN. STAT. § 53a-19 (2010))); *People v. Dunlap*, 734 N.E.2d 973, 981 (Ill. App. Ct. 2000) ("Even the mere utterance of words may be enough to qualify one as an initial aggressor."); *State v. Pitts*, 562 A.2d 1320, 1333-34 (N.J. 1989) (citing *State v. Bowens*, 532 A.2d 215, 221 (N.J. 1987)) (holding that evidence of threatening conduct by the victim should be presented to the jury on the issue of the reasonableness of the defendants use of deadly force in an altercation).

³⁰ Joshua Dressler uses a similar example that inspired this example. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 224 (6th ed. 2012). In the hypotheticals throughout this Note, the author will use *I* to refer to the person who instigates the actual, immediate physical confrontation irrespective of whether that person acts innocently or culpably. The author will use *R* to refer to the person who responds or reacts to *I* in the actual, immediate physical confrontation irrespective of whether *R*'s conduct prior to the immediate confrontation created the circumstances ultimately leading to *I*'s provocation of *R*. For example, *R* tells *I* that if *I* walks down the only street leading to *I*'s house, then *R* will attack *I*. *I* then walks down that street, and *I*'s presence provokes *R* to attack *I*. *R* created the circumstances leading to *I*'s provocation of *R*. Nonetheless, in the actual physical confrontation, *R* is the responder, and *I* is the instigator.

³¹ See *infra* note 34 and accompanying text.

³² See, e.g., *Jimenez*, 636 A.2d at 785 ("It is not the law . . . that the person who first uses physical force is necessarily the initial aggressor . . .").

about to cause *R* serious bodily injury. In any of these alternative scenarios, *I* is still the initial aggressor of the confrontation (subject to a calculation rule in some jurisdictions) for the purposes of deadly-force self-defense.³³ *I* could have revived his right to claim self-defense only by communicating to *R* his intent to withdraw and overtly withdrawing from the fight in good faith. Note that because *R* was not the initial aggressor, *R* may justifiably claim self-defense in the event that *R* prevails over *I*.

The following summary by Joshua Dressler is a concise general description of an initial aggressor for our purposes:

Three features of the concept of “aggression” merit brief attention here. First, a person is an aggressor even if he merely starts a *nondeadly* conflict. Second, it is *incorrect* to state that the first person who *uses force* is *always* the aggressor. One who unlawfully brandishes a weapon in a threatening manner, but who does not use it, is an aggressor; the person threatened, although he is the first to use actual force, can still potentially claim self-defense. Third, the issue of whether a defendant is the aggressor ordinarily is a matter for the jury to decide, based on a proper instruction on the meaning of the term.³⁴

We should also add a fourth feature: that a good faith and well-communicated withdrawal from the fray by the initial aggressor revives the right to self-defense.³⁵ Although the above summary is suitable for the purposes of this Note, the reader should note that Dressler further distinguishes between an “aggressor” and a “deadly aggressor” by adding the calculation rule as a qualifier for a deadly aggressor. According to Dressler, “A ‘deadly’ (or ‘felonious’) aggressor is a person whose acts are reasonably calculated to produce fatal consequences.”³⁶ However, not all jurisdictions employ the calculation rule on the aggressor limitation.³⁷ The calculation rule requires, in general, that before a person’s act (i.e., use of force or threat of force) can cause forfeiture of the right to self-defense, the would-be aggressor must have reasonably calculated that the act would cause the victim to attack either the would-be aggres-

³³ See *supra* notes 23–29 and accompanying text.

³⁴ DRESSLER, *supra* note 30, at 224 (citing *State v. Jones*, 665 A.2d 910, 913–14 (Conn. App. Ct. 1995); *Swann v. United States*, 648 A.2d 928, 933 (D.C. 1994)).

³⁵ See sources cited *supra* note 28.

³⁶ DRESSLER, *supra* note 30, at 225.

³⁷ See, e.g., OR. REV. STAT. § 161.215 (2013) (mandating an aggressor limitation that has no requirement of a calculation rule and separately mandating a provocateur limitation that expressly has a calculation rule); see *infra* note 39 and accompanying text.

sor or a third party whom the would-be aggressor intends to defend.³⁸ Some jurisdictions do not apply the calculation rule at all to aggressors.³⁹ Others, like Dressler, distinguish between a general “aggressor” and a “deadly aggressor” by applying the calculation rule to the latter but not the former.⁴⁰ Some jurisdictions apply the calculation rule to both aggressors and deadly aggressors by replacing an intention to produce fatal consequences with an intention to incite a fray or cause bodily harm.⁴¹ This Note is concerned primarily with deadly-force self-defense, and because there is such variety amongst jurisdictions, Dressler’s summary of nondeadly aggressors will serve as a general summary of both “aggressors” and “deadly aggressors” alike, with the understanding that a calculation rule may or may not be utilized in a given jurisdiction. This Note will argue that the calculation rule for the initial-aggressor limitation is a mistaken result of jurisdictions confusing the provocateur limitation with the initial-aggressor limitation by combining both doctrines under the initial-aggressor umbrella. A proper initial-aggressor limitation should contain no calculation rule.⁴²

B. *Elements of the Provocateur Limitation*

What this Note refers to as the “provocateur limitation” is, like the aggressor limitation, a restraint on a defendant’s right to claim self-defense in a deadly-force encounter.⁴³ A provocateur, generally, is someone who provokes an attack against herself or another. For the purposes

³⁸ See, e.g., *United States v. Peterson*, 483 F.2d 1222, 1233 (D.C. Cir. 1973); *State v. Jackson*, 382 P.2d 229, 232 (1963); *Smith v. State*, 965 S.W.2d 509, 517 (Tex. Crim. App. 1998); 33 AM. JUR. 2D *Proof of Facts: Privileged Use of Force in Self-Defense* § 6 (1983).

³⁹ See, e.g., *State v. Riley*, 976 P.2d 624, 627–28 (Wash. 1999) (en banc) (defining an aggressor in detail without employing a calculation rule).

⁴⁰ See, e.g., MODEL PENAL CODE § 3.04(1)–(2)(b) (distinguishing between a use of force in nondeadly encounters and deadly-force encounters by applying a calculation in § 3.04(2)(b) deadly-force encounters, but not in § 3.04(1)–(2) nondeadly-force encounters).

⁴¹ See, e.g., GA. CODE ANN. § 16-3-21 (2006) (requiring intent to cause “great bodily harm”); *Banks v. Commonwealth*, 245 S.W. 296, 298 (Ky. 1922) (“It is well-established doctrine that, if one is an aggressor, or provokes a difficulty or affray, he cannot invoke the right of self-defense . . .”).

⁴² See *infra* Part II.B.

⁴³ No jurisdiction that I am aware of actually refers to this self-defense limitation as a “provocateur limitation” as I do; rather, most jurisdictions that employ a doctrine of provocation that is distinct from an aggressor limitation usually utilize terms such as “provoke,” “provoking the difficulty,” or “provocation” in naming the doctrine. See, e.g., ARIZ. REV. STAT. ANN. § 13-404(B)–(B)(3) (2010) (“[U]se of physical force against another [in self-defense] is not justified . . . [i]f the person provoked the other’s use or attempted use of unlawful physical force.”); LA. REV. STAT. ANN. § 14:21 (2007) (stating that neither an aggressor nor a person “who brings on a difficulty” can claim the right of self-defense); *State v. Sourivathong*, 636 P.2d 1243, 1244–45 (Ariz. Ct. App. 1981) (affirming the conviction of a defendant who claimed self-defense but was found to have “provok[ed] the difficulty” by his nonviolent but angry conduct in entering the home of his girlfriend who had asked him to move out the night before). Because of the variance amongst jurisdictions in terminology, I have chosen to con-

of deadly-force self-defense, the term “provocateur” is a term of art⁴⁴ that describes someone who uses language or conduct that is non-threatening and nonviolent (i.e., neither an attack nor threat of attack) to intentionally incite (or provoke) an attack so that the provocateur may then have a pretext for killing the other in ostensibly lawful self-defense.⁴⁵ Most jurisdictions hold that a provocateur may revive her right to self-defense by withdrawing in the same manner as an initial aggressor.⁴⁶ In the following pages, this Note argues that courts should not apply the withdrawal rule to the provocateur limitation.⁴⁷

There are two obvious differences between the provocateur limitation and the initial aggressor limitation. First, the initial aggressor limitation requires the use of force or threat of force to forfeit the right to self-defense. Under the provocateur limitation, however, one may lose his right to self-defense for mere insults or other nonthreatening, provocative language or gestures. So long as the provocateur engages in the non-threatening behavior with the intent to provoke an attack against himself in order to gain a pretext to kill the provoked attacker, the provocateur forfeits the right to claim self-defense at trial.⁴⁸ Most jurisdictions that

flute the various terms used for the doctrine of provocation, generally, to the single term “provocateur limitation.”

⁴⁴ See, e.g., Kimberly Kessler Ferzan, *Culpable Aggression: The Basis for Moral Liability to Defensive Killing*, 9 OHIO ST. J. CRIM. L. 669, 692–93 (2012) [hereinafter Ferzan, *Culpable Aggression*] (discussing why a provocateur loses the right to defend against an attack). “Provocateur” may also be used as a term of art in non-self-defense homicide studies. For example, *I* who hates *R* and wants to kill *R*, but is too scared to do so herself, may falsely or truthfully tell *I* that *R* intends to kill *I* in the hope that that *I* will kill *R* in a preemptive attack. *I* may also be called a provocateur. See Kimberly Kessler Ferzan, *Provocateurs*, 7 CRIM. L. & PHIL. 597, 598 (2013) [hereinafter Ferzan, *Provocateurs*]. However, for the purposes of this study on deadly-force self-defense, this Note will focus only on provocateurs who provoke attacks against themselves. This Note will focus on the type of provocateur that tells *R* falsely or truthfully, “I killed your dog,” in order to provoke an attack by *R*.

⁴⁵ See, e.g., Ferzan, *Provocateurs*, *supra* note 44, at 597, 598–600, 607–10 (explaining how provocateurs fit within the concept of *actio libera in causa*—“causing the conditions of one’s defense”—and distinguishing between aggressors and provocateurs); see also *Rowe v. United States*, 164 U.S. 546, 554 (1896) (implying that mere nonthreatening insult is enough to qualify one as “provoking a difficulty” so long as the requisite intent also exists); *Smith v. State*, 965 S.W.2d 509, 512–13 (Tex. Crim. App. 1998) (explaining the doctrine of “provoking the difficulty,” which is the provocateur limitation in the State of Texas); *McGowen v. Quarterman*, No. H-07-0655, 2008 WL 8053513, at *12 (S.D. Tex. Mar. 26, 2008) (affirming a jury instruction provided to explain the doctrine of “provoking the difficulty” as applies to a convicted provocateur defendant).

⁴⁶ See, e.g., *Brewer v. State*, 49 So. 336, 338 (Ala. 1909) (“A defendant in a homicide case cannot set up or plead self-defense if he was the aggressor and provoked or brought on the difficulty which resulted in the homicide, unless he thereafter withdrew . . . from the conflict, or in good faith attempted so to do . . . and announced, in good faith, by word or deed, his desire for peace, in which . . . contingency the defendant’s right of self-defense, though once lost, is revived.”).

⁴⁷ See *infra* Part II.A.

⁴⁸ See *supra* notes 42–46 and accompanying text. For the purposes of this Note, since my study is exclusively one of deadly-force self-defense, it is almost redundant to say that the

recognize a provocateur limitation as distinct from an initial-aggressor limitation require that the provocative behavior be employed with dual intent: (1) the intent to provoke an attack against oneself, and (2) the intent to physically harm the person provoked under a guise of self-defense (i.e., the calculation rule).⁴⁹ Generally, the calculation element of intent applies to the actual homicide and not necessarily to a scheme to circumvent the law.⁵⁰ The second obvious difference between the provocateur limitation and the initial-aggressor limitation is that one who re-

provocateur must intentionally incite an attack against herself *in order to* harm another under a pretext of self-defense. The term “provocateur,” used as a term of art, is defined by the intent to provoke an attack against oneself and the further intent to do physical harm to the one attacked. The only other reasons that a person may intentionally incite violence against herself are if she were suicidal, masochistic, subject to some psychosis, or hoping to get the other in trouble with the law (i.e., *I* provokes a fight with *R* not because *I* wants *R* to die but because *I* wants *R* to go to prison for beating *I*). But people with such reasons are not provocateurs (though they are provokers generally) because these reasons are outside the law of self-defense. Note that if there is no initial intention to do physical harm in the provoked fray—if the provoker is simply going to let the other attack, as would be the case with a suicidal person—then self-defense is a nonissue because no one is defending themselves; the provocateur limitation to self-defense becomes moot. In these cases, we are not dealing with self-defense at all. As to the person suffering from psychosis, here, too, the law of self-defense is a nonissue. There is no concern as to whether or not a mentally ill person will lose his or her self-defense right. The person suffering from psychosis escapes liability, if at all, from a lack of *mens rea* in the charged offense (i.e., a failure of proof defense rather than an affirmative defense of self-defense). One may also intentionally incite violence against herself simply because she likes or wants to fight. This person is a provocateur. This person may have no thought of self-defense law in her schemes. But her intent to fight is still consistent with wanting to do harm and defending one’s self in the process. That the provocateur did not think through the legal doctrinal issues makes the actor no less *intentional* as to the harm done. We punish the provocateur for intent to harm or intent to start a fight (fights necessarily involve physical harm), not for intent to circumvent the law. Some spew insults or say provocative things out of mere anger, reckless to the possibility that the other may respond with violence. These are not provocateurs. Recklessness should not be a suitable *mens rea* for the provocateur limitation, otherwise we subject the would-be provocateur to free speech limitations or to the whims of emotionally thin-skulled (to use a tort law phrase) others. Unless otherwise noted, whenever I use the term “provocateur” the reader may assume intent to provoke or incite an attack against oneself and the further intent to physically harm the other. However, I do take notice of other reasons a person, or general provoker (not a provocateur), may intentionally provoke an attack against oneself.

⁴⁹ See, e.g., *State v. Whitford*, 799 A.2d 1034, 1046 (Conn. 2002) (“Our case law interpreting that statute has established that, in order to prove provocation, the state must demonstrate that the defendant possessed a ‘dual intent: (1) the intent to cause physical injury or death, and (2) the intent to provoke’” (quoting *State v. Turner*, 637 A.2d 3, 4 (Conn. App. Ct. 1994))). But note that at least one jurisdiction’s common law, prior to being superseded by statute, recognized a provocateur limitation (though conflated with an aggressor limitation) that did not require a calculation element. See *Marlow v. State*, 38 So. 653, 655 (Fla. 1905) (“Where conduct is intended to provoke and does provoke a difficulty, the question whether or not the conduct was reasonably calculated to provoke the difficulty is not a practical one, in considering the matter of self-defense.”).

⁵⁰ See, e.g., *Turner*, 637 A.2d at 4 (stating the only intent that is required is the intent to provoke and the intent to physically harm and not listing an intent to circumvent the law of self-defense).

sponds in violence to an initial aggressor may likely be justified in her self-defense, but one who responds in violence to a provocateur cannot be justified under the law because she was not defending herself from attack or threat of attack.⁵¹ A third difference is that intent to provoke an attack against oneself is inherently indispensable within the provocateur limitation but not necessarily within the initial-aggressor limitation. An initial aggressor may simply want to attack another person irrespective of the likelihood of a counter attack, but a provocateur, by definition, cannot carry out his plan unless the other person attacks. An additional, though less obvious, difference is that the calculation rule is a natural, necessary restriction on the provocateur limitation but is an ill fit with the initial-aggressor limitation.⁵²

As an example of the provocateur limitation, imagine that *I* makes an especially offensive comment to *R* about *R*'s wife. Imagine further that *I* knows that *R* is especially sensitive about comments concerning *R*'s wife, and *I* hopes to provoke *R* to attack *I* so that *I* may gain a pretext to kill *R* in self-defense. In this scenario, *R*, provoked by *I*'s comment, hits *I* in the face, knocks *I* down, and begins to smash *I*'s head against the concrete floor. *I*, in apparent fear for his life, draws his licensed firearm and shoots *R*, killing him. Under a proper initial-aggressor limitation alone, as generally described in this Note, *I* may claim self-defense at trial. Under the provocateur limitation, however, *I* will lose his claim of self-defense by means of a jury instruction at trial.⁵³ *I* would lose his right to self-defense in a jurisdiction that has no calculation rule for the provocateur limitation so long as the state could prove that *I*'s intent in commenting on *R*'s wife was to provoke *R* to attack *I*.⁵⁴ *I* would lose his right to self-defense in jurisdictions that have a calculation rule, so long as the state could prove that *I* intended to provoke *R* to attack *I* and that *I*

⁵¹ See *infra* Part II.B.

⁵² The only reason the calculation rule would not be absolutely necessary to the provocateur limitation is if by "provocateur" one meant a colloquial usage rather than the term of art discussed in *supra* notes 44–48 and accompanying text. As to why the calculation rule is an ill fit to the initial-aggressor limitation, see *infra* Part II.B of this Note.

⁵³ An example of such a jury instruction: "You are further instructed as part of the law of this case, and as a qualification on the law of self-defense, that, if you find and believe from the evidence beyond a reasonable doubt, that [the defendant] . . . did some act, or used some language, or did both, if any, with the intent to produce the occasion to bring on the difficulty and kill [the victim] . . . [that] [the defendant] provoked the difficulty that resulted in the death of the deceased, and by his own wrongful act, if any, produced a necessity for taking the life of the deceased . . . you will find against [the defendant's] claim of self-defense." *McGowen v. Quatterman*, No. H-07-0655, 2008 WL 8053513, at *14 (S.D. Tex. Mar. 26, 2008). Typically, once the defendant has shown the elements of self-defense at trial, the burden is on the state to prove that the defendant was the provocateur in the altercation. See, e.g., *McGhee v. State*, 59 So. 573, 576 (1912) ("[T]he court [must] explicitly instruct [the jury] that the state must prove beyond a reasonable doubt that the defendant . . . provoked the difficulty . . .").

⁵⁴ See *supra* note 49 and accompanying text.

did so with the further intent to kill *R*.⁵⁵ *I* could have revived his right to self-defense if he communicated to *R* his intention to withdraw from the fight and then overtly and in good faith withdrew.⁵⁶ Note that *R* was the initial aggressor in the confrontation and physically attacked *I* in response to a mere insult. *R*, had he not been killed by *I*, would likely be liable for battery against *I*. Unlike in the initial-aggressor example above, here *R* is a culpable aggressor rather than an outright victim, but *I* nonetheless forfeits his right to self-defense.

In summary: (1) a provocateur employs nonthreatening words or nonthreatening conduct to provoke an attack; (2) a provocateur must have the intent to provoke an attack against herself or a third party whom the provocateur will defend; (3) many jurisdictions further require the intent to physically harm the person whom the provocateur provokes; (4) most provocateurs also intend to create a pretext for employing ostensibly—though not truly—lawful deadly-force self-defense; and (5) most jurisdictions allow, albeit mistakenly in the view of this Note, the provocateur to regain the right of self-defense by withdrawal.

II. PROVOCATEURS AND INITIAL AGGRESSORS SHOULD BE SEPARATE LEGAL CONCEPTS

A. *Provocateurs Cannot Withdraw*

Most jurisdictions confuse the provocateur and initial-aggressor concepts by combining them into a single doctrine.⁵⁷ Yet, the provocateur and the initial aggressor should be distinct from one another, because initial aggressors are liable to justifiable self-defense by their victims but provocateurs are not.⁵⁸ In the initial-aggressor example above, *R* was defending himself against *I* and had *R* prevailed, he would likely have had a successful claim for justifiable self-defense.⁵⁹ Under the provocateur example,⁶⁰ however, *R* was not defending himself against an attack by *I*; *R*, in fact, was the initial aggressor and had no right to self-defense

⁵⁵ See *id.*

⁵⁶ See *supra* note 46 and accompanying text.

⁵⁷ See, e.g., *United States v. Peterson*, 483 F.2d 1222, 1231 (D.C. Cir. 1973) (“The fact that the deceased struck the first blow . . . does not legalize the self-defense claim if in fact the claimant was the actual provoker. In sum, one who is the aggressor in a conflict culminating in death cannot invoke the necessities of self-preservation.”); *Hankerson v. North Carolina*, 432 U.S. 233, 237–38 n.4 (1977) (quoting an unpublished North Carolina jury instruction that describes an apparent doctrine of provocation in terms of an aggressor limitation).

⁵⁸ See Ferzan, *Provocateurs*, *supra* note 44, at 607 (“Namely, what aggressors do, but provocateurs do not, is engage in behavior that renders them liable to defensive force.”); but cf. Paul H. Robinson, *Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 56 (1985) (“[T]he causing-one’s-defense doctrine requires a single explanation.”).

⁵⁹ See *supra* text accompanying notes 28–34.

⁶⁰ See *supra* text accompanying notes 52–57.

unless *R* truly withdrew from the fight and clearly indicated to *I* his intention to withdraw.⁶¹ “Indeed, but-for the fact that initial aggressors can regain defensive rights (by withdrawing), there would be no need for an initial-aggressor instruction. The aggressor uses unjust force; the defender responds with just force; and therefore, the aggressor is not entitled to respond with force [in the first instance].”⁶² The provocateur limitation is much more complex when considering the requirement to withdraw. The provocateur does nothing to which the other person must defensively respond. In fact, the person who attacks the provocateur is the initial aggressor, and it is she who must withdraw to regain defensive rights. Accordingly, the question becomes whether the provocateur should have any recourse to regain defensive rights by withdrawing as does the initial aggressor.

Provocateurs “are less able to unring the provocative bell” than are initial aggressors.⁶³ Indeed, as Professor Ferzan observes, “‘I’ve stopped attacking you!’ is an easier claim to give normative force to th[a]n ‘Sorry I pissed you off on purpose! Takesy backsies.’”⁶⁴ The initial aggressor should have the benefit of the withdrawal rule because he can stop the fight.⁶⁵ Once the initial aggressor ceases to fight, the person whom the aggressor attacked now has no reason to advance.⁶⁶ Withdrawal under the initial-aggressor limitation has a reasonable possibility of stopping a fray, saving a life, and keeping a person from long-term incarceration.⁶⁷ The initial aggressor fights a presumably morally just party⁶⁸ and may reasonably assume that the morally just party will cease to attack when the threat is removed.⁶⁹ Unlike the initial aggressor, the provocateur will

⁶¹ See, e.g., 720 ILL. COMP. STAT. 5/7–4 (1994) (mandating that an initial aggressor must, “[i]n good faith,” withdraw from the encounter and effectively communicate her intention to withdraw to her adversary); *People v. Willner*, 879 P.2d 19, 22 (Colo. 1994) (“[The relevant Colorado statute] expressly requires that an initial aggressor retreat before physical force is justified.”).

⁶² Ferzan, *Provocateurs*, *supra* note 44, at 608.

⁶³ *Id.* at 609.

⁶⁴ *Id.*

⁶⁵ See *id.*

⁶⁶ See *id.* (“When an aggressor stops an attack, there is no need to defend.”).

⁶⁷ See *id.*

⁶⁸ In this case, the language “presumed morally just” references the fact that the party did not start the fight, so the law should presume that the attacked person (the victim) fights back only out of a need to defend herself. See Ferzan, *Culpable Aggression*, *supra* note 44, at 691. Such a legal presumption is necessary to the right of self-defense as a justification, though perhaps not as an excuse.

⁶⁹ See Ferzan, *Provocateurs*, *supra* note 44, at 609 (explaining that the aggressor “cannot stand to complain that [the respondent] has acted on the very perception that he has created”). If the presumably morally just party does not cease to attack, then the morally just party loses his morally just classification and becomes an aggressor whom the withdrawing party may now defend against. See *supra* Part I.A (discussing the contours of the initial aggressor limitation).

likely be unable to stop the fight by withdrawing.⁷⁰ Indeed, the provocateur was in an equal state to “withdraw” when the fight started; the provocateur was not fighting and had announced no intention to fight.⁷¹ The provocateur fights a wrongdoer—an aggressor who, despite the provocateur’s scheming, should have resisted the impulse to attack and, under the law of most jurisdictions, had no right to attack.⁷² The provocateur has no basis to assume that he will be able to stop the fray because the person he provoked does not fight due to a threat; the other person fights because she hates the provocateur enough to engage in physical violence outside of a need for self-defense. The provocateur, therefore, has no reasonable possibility of being able to stop such rage by withdrawing.⁷³ Withdrawal under the provocateur limitation serves no purpose except to assist the provocateur in achieving his initial purpose—to kill the other person in ostensibly justifiable deadly-force self-defense—by cementing the provocateur’s superficial legal right to deadly-force self-defense.⁷⁴ Consider the following example.

I wants to kill *R*. *I* is aware that if he tells *R* that he slept with *R*’s wife, *R* will be so enraged that *R* will viciously attack *I*. *I* sees *R* at a large party. *I*, wanting to gain an opportunity to kill *R* in deadly-force self-defense, tells *R* that he slept with *R*’s wife. *R* attacks *I*. *I* tries to fend off *R* initially, but then, in order to boost his façade of innocence, *I* clearly tries to physically get away from *R* and yells, “I don’t want to fight! I never wanted to fight! I withdraw from the fight!” *R*, no less enraged that *I* slept with his wife,⁷⁵ continues to advance on *I*. *I* has nowhere to retreat. He started the fight in a corner of a house with no exits nearby. With no options left, *I*, in apparent fear for his life, lifts the cushion of a nearby chair to retrieve a firearm that he knows is always hidden there by the homeowner and shoots *R*. *R* dies from the gunshot. If no one heard *I* tell *R* that *I* slept with *R*’s wife, then *I* will likely get away with murder. If someone overheard the provocative words *I* said to *R* and tells a police detective, *I* may gain provocateur status. But then the detective will likely hear and report eyewitness accounts that *I* withdrew. The circumstances look and sound as though *I* really did want to with-

⁷⁰ See Ferzan, *Provocateurs*, *supra* note 44, at 609 (“When a provocateur incites anger and rage, there is no way to undo the damage.”).

⁷¹ See *id.* at 608–09.

⁷² See Ferzan, *Provocateurs*, *supra* note 44, at 617 (noting that the provocateur’s loss of her defensive rights does not justify the respondent’s response); *supra* Part I.A.

⁷³ See Ferzan, *Provocateurs*, *supra* note 44, at 609 (“Provocateurs, on the other hand, need more specific rules because their conduct does not ground the permissibility of the respondent to act (he still acts wrongly) and because they are less able to unring the provocative bell.”).

⁷⁴ See *id.* at 621.

⁷⁵ From *R*’s and the law’s perspective it is irrelevant whether *I* actually slept with *R*’s wife or *I* just lied to provoke *R*. The issue is provocation, not truth.

draw (i.e., the withdrawal, according to the witnesses, was overt, well communicated to *R*, and seemed to be in good faith). Later, should a prosecutor decide to take the case to trial, because the prosecutor is certain that *I* provoked the fight and has witnesses to that effect, the case against *I* will likely crumble when many other witnesses testify to *I*'s open and obvious withdraw.⁷⁶ If no one overheard *I*'s provocation, *I* kills *R* without punishment because the circumstances look to be a clear-cut case of self-defense. Even if someone overheard *I*'s provocation, *I* nonetheless is able to kill *R* without punishment because the withdrawal rule makes it likely that *I* will have regained his right to self-defense.⁷⁷

When the provocateur intentionally provokes an attack against himself the law should assume that he has signed up for the full fight until the other party prevails, loses, or withdraws. Yet, this is not so for the initial aggressor. When the initial aggressor withdraws, the law may allow for the reasonable possibility of a good-faith withdrawal effort and the reasonable possibility that the initial aggressor's withdrawal could stop the fray, since withdrawal removes the threat against the presumably morally just party.⁷⁸ When a provocateur withdraws, however, the law

⁷⁶ Granted, as with almost all hypotheticals, my hypothetical requires the assumption of a jury that listens and scrupulously adheres to jury instructions, assumes a good, clear jury instruction from the judge, assumes there is no strange circular common law interpretation of "good faith effort" to withdraw for provocateurs that presumes against a good faith effort for provocateurs, and generally assumes the law will work as it is written. Even viewing these assumptions skeptically, when the law works as lawmakers intend, this hypothetical should hold true.

⁷⁷ I understand that an initial aggressor whose purpose is to employ ostensibly lawful deadly force in apparent self-defense against his victim may also abuse the withdrawal rule in the same way that a provocateur may, i.e., to add force to his claim of self-defense. "Yes, I started the fight by throwing a punch, but I withdrew and the other party continued to advance," the initial aggressor may say. "Therefore, I had no choice but to defend myself and luckily I regained my self-defense right when I withdrew." The initial aggressor, like the provocateur, may calculate that his aggression will so enrage his victim that the victim will not be willing or able to cease attacking when the initial aggressor withdraws. This is all possible. However, unlike the provocateur, there is some reasonable possibility that the initial aggressor can stop the fight. The calculating initial aggressor fights a person that the law presumes to be just or at least innocent with respect to this altercation. It is reasonable for the law and the aggressor to assume that if the aggressor withdraws, the just or innocent party may cease to fight because the need to fight is removed. See Ferzan, *Provocateurs*, *supra* note 44, at 609. The provocateur, on the other hand, is somewhat sure that his victim is given to unstoppable rage because the victim attacks the provocateur in response to nothing more than nonthreatening words or gestures. See *id.* at 608. Here, it is unreasonable for the law or the provocateur to assume that the provocateur can unring that bell. See *id.* at 609. Even allowing that a calculating initial aggressor may abuse the withdrawal rule, there nonetheless exists a reasonable possibility that the withdrawal rule may serve some good in the initial-aggressor limitation, but that possibility does not exist under the provocateur limitation. See *id.* Thus, it is reasonable to allow for a withdrawal rule under the initial-aggressor limitation but not under the provocateur limitation.

⁷⁸ See, e.g., *People v. Willner*, 879 P.2d 19, 21–25 (Colo. 1994) (discussing a self-defense statute that explicitly provides for withdrawal in initial aggressor cases but not in provocateur cases).

should not allow for the unreasonable possibility that the provocateur's adversary will cease to advance because the provocateur's adversary is himself an aggressor. The provocateur's adversary advances out of rage and hate catalyzed by the provocateur's inflammatory, though non-threatening, conduct. Withdrawal, therefore, is not likely to dissuade the aggressor's advance.

The law also should not allow for the unreasonable possibility of a good-faith effort in a provocateur's withdrawal because the culpable provocateur in all likelihood hoped from the beginning, and indeed counted on the near certainty, that nothing would deter the other person from advancing once provoked.

Because the provocateur limitation should have no withdrawal rule and the initial-aggressor limitation requires a withdrawal rule, the law should treat initial aggressors and provocateurs as two separate concepts.⁷⁹

B. Actor Culpability and the Calculation Rule

The law is not concerned with whether the actor is culpable under the initial-aggressor limitation. However, under the provocateur limitation, the law removes the right of self-defense precisely because the actor is culpable. Initial aggressors lose the right to self-defense by the mere fact that they start the fight.⁸⁰ Non-culpable initial aggressors lose their

⁷⁹ See *supra* note 62 and accompanying text.

⁸⁰ See, e.g., *Willner*, 879 P.2d at 22 (discussing the initial-aggressor limitation). Note that Ferzan says it is “[p]rovocateurs [and not initial aggressors who] forfeit their defensive rights for the very simple reason that they start the fight.” See Ferzan, *Provocateurs*, *supra* note 44, at 597. But, she then goes on to say that “[t]his forfeiture occurs when [provocateurs] behave culpably.” *Id.* Ferzan defines “culpably” as “meaning that that they subjectively appreciate that they are running the risk of causing force to be used against them and they engage in the behavior without justification or excuse.” *Id.* While I agree that forfeiture occurs when the provocateur behaves culpably, I would limit my definition of what is culpable to intent, either to harm another or to start a fight. Otherwise the legal system runs the risk of subjecting unintentional would-be provocateurs to a chilling of free speech and free expression and subjecting them to the whims of emotionally thin-skulled others. One could make the argument that speech “creating [an] unjustifiable risk of causing the respondent to attack [the provocateur]” is not or should not be protected. See *id.* For example, one may resort to the fighting-words doctrine, see *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942), or the clear and present danger test, see *Terminello v. Chicago*, 337 U.S. 1, 4 (1949). While such formal arguments have force, out of concern for (and a high value for) personal rights (both speech and defensive rights), I would resort to substance over form. In the real world people often argue. Sometimes people start arguments to assert their rights against another in self-help. See e.g., *Terminello*, 337 U.S. at 4. And, when people argue, occasionally they say things that they know will incite the other to anger. See, e.g., *id.* That is to say that in day-to-day life people often “subjectively appreciate that they are running the risk of causing force to be used against them.” See Ferzan, *Provocateurs*, *supra* note 44, at 597. Anytime someone gets angry there is some risk of force. See, e.g., *Terminello*, 337 U.S. at 4. If culpability for provocateurs was reduced to a subjective risk of force, then I fear that relatively innocent people (i.e., those who had no intention of physical harm despite their offensive words) may be risking their right

self-defense right just as would a culpable initial aggressor.⁸¹ Those jurisdictions that employ a calculation rule in their initial-aggressor limitation are mistaken in doing so because a calculation rule implies that one must be culpable to be an initial aggressor. The application of the calculation rule to the initial-aggressor limitation is likely the result of a merger of the provocateur limitation and the initial-aggressor limitation—in a mistake of evolving jurisprudence—into a single doctrine. Despite the apparent imposition of the calculation rule into the initial-aggressor limitation, in almost any jurisdiction a non-culpable initial aggressor may still lose her right to self-defense, irrespective of the calculation rule. Consider the following example.

I and *R* are separately having dinner in the same restaurant. They do not know one another. Some third party unknown to both *I* and *R* has slipped a powerful hallucinogenic into *I*'s drink. *I*, acting under an overpowering, irresistible fury brought on by the hallucinogenic, pursues *R* with her steak knife. Having nowhere to run, *R* returns force by picking up his own steak knife and meeting *I* in combat, but he fails to prevail against *I* who ultimately kills *R*. *I* is not a culpable party because she was involuntarily drugged and therefore lacked mens rea, but *I* is nonetheless the initial aggressor.⁸² *I* may escape conviction for *R*'s murder, but not because *I* has a colorable self-defense claim.⁸³ Indeed, *I* may attempt to claim that she was acting in self-defense against *R*, who did not know *I*, had nowhere to run, and raised his knife only because *I* was attacking with her knife. But, it is highly unlikely that a judge or jury would believe her claim.⁸⁴ Rather, *I* may escape a guilty verdict because an element of mens rea for the murder charge is missing.⁸⁵ That is, *I* may escape guilt on a failure of proof defense but not on an affirmative

to self-defense in any number of common personal exchanges. One should note that Ferzan's study is primarily a study of "moral terrain," and she employs "existing legal standards" merely as evidence of "reflective judgments." See Ferzan, *Provocateurs*, *supra* note 44, at 599. My study, however, is primarily a legal study and only secondarily an ethical study. Perhaps our difference in focus is responsible for our differing explanations as to what constitutes culpability under the provocateur limitation and why the provocateur loses his right to self-defense.

⁸¹ See, e.g., 720 ILL. COMP. STAT. 5/7-4 (1994) (stating that a claim of self-defense is unavailable to an aggressor who "[i]nitially provokes the use of force against [herself], with the intent to use such force as an excuse to inflict bodily harm upon the assailant; or [o]therwise initially provokes the use of force").

⁸² See, e.g., *id.* (stating that intent is not a required element of the initial-aggressor rule).

⁸³ See *id.*

⁸⁴ See, e.g., Jeanne E. Neese, *Criminal Procedure—Provocation Not a Bar to Self-Defense in Absence of Intent to Cause Death or Serious Bodily Injury*—Commonwealth v. Samuel, 590 A.2d 1245 (Pa. 1991), 65 TEMP. L. REV. 751, 760 (1992) ("[T]he defendant's burden [is] to produce evidence of the following factors: reasonable belief in imminent danger, freedom from fault in provoking the incident, and conformance with any duty to retreat.").

⁸⁵ See DRESSLER, *supra* note 30, at 204 ("A failure-of-proof defense is one in which the defendant introduces evidence at his trial that demonstrates that the prosecution has failed to

defense of self-defense.⁸⁶ Thus, even though *I* is not culpable, she still has no colorable claim of self-defense, irrespective of the calculation rule. Initial aggressors effectively, if not doctrinally, lose their right to self-defense simply because they start the fight, even in jurisdictions where the law attempts to employ some culpability requirement (e.g., the calculation rule) on the initial-aggressor limitation.⁸⁷

Even where *I* accidentally clashes with *R*, the law is not concerned with *I*'s culpability or a calculation rule; by merely being the cause of the fray, the law imposes a duty to withdraw upon *I*.⁸⁸ Whether *I* caused the clash accidentally or not, *I* must first withdraw from the encounter before she may justifiably defend herself (e.g., say, "I'm sorry. I didn't mean to run into you. I don't want to fight. I'm leaving.").⁸⁹ The only sure way for the law or *R* to know that *I* was not initiating an attack is for *I* to speak and act in a manner consistent with withdrawal. *I* may choose not to announce her desire to stop fighting and simply defend herself against *R* in the event that *R* attacks *I* under the mistaken belief that *I* is attacking *R*. But if *I* ultimately kills *R* in a deadly-force encounter, a jury will likely find *I* guilty because she had no need to defend herself where she could have stopped the encounter by withdrawal. There is no need for deadly force when all one needs to do to avoid deadly force is say, "I'm sorry. I didn't mean to run into you." The law does and should presume that withdrawal is possible under the initial-aggressor limitation.⁹⁰ The whole purpose for the initial-aggressor limitation is for implementation of the withdrawal rule.⁹¹ Once the duty to withdraw is imposed upon a

prove an essential element of the offense charged. . . . The prosecution must shoulder the burden of disproving beyond a reasonable doubt a defendant's failure-of-proof claim.").

⁸⁶ See *id.*

⁸⁷ Others have a more complex explanation for why initial aggressors lose the right to self-defense. Jeff McMahan says, "To attack someone who is liable to be attacked is neither to violate nor to infringe that person's right, for the person's being liable to attack *just is* his having *forfeited* his right to not be attacked." JEFF McMAHAN, *KILLING IN WAR* 10 (2009). McMahan appears to bundle a forfeited right to self-defense along with a forfeited right *not* to be attacked. See *id.* at 8 ("[A] person [who] is *liable* to attack . . . would have no justified complaint about being attacked."). Professor Robinson says that an aggressor should not lose his right to self-defense at all. See Robinson, *supra* note 58, at 27–29. Rather, the law should allow the aggressor his affirmative defense "but . . . separately impose liability on the basis of the actor's earlier conduct in culpably causing the conditions of his defense." *Id.* at 27. Professor Ferzan, in discussing culpable initial aggressors, states that because the aggressor's use of force is unjust and the other's is just, "the aggressor is not entitled to respond with force." Ferzan, *Provocateurs*, *supra* note 44, at 608. I am inclined to agree with Ferzan on purely philosophical grounds so long as we are limiting the application to culpable initial aggressors. But in adding to the consideration the law's actual treatment of initial aggressors in real world outcomes, I would prefer to say that initial aggressors lose the right to self-defense simply because they start the fight.

⁸⁸ See sources cited *supra* note 28.

⁸⁹ See sources cited *supra* note 28.

⁹⁰ See *supra* Part II.A.

⁹¹ See *supra* note 62 and accompanying text.

person, that person is the initial aggressor in deadly-force self-defense law.⁹²

Provocateurs, in contrast to initial aggressors, lose the right to self-defense because they are culpable.⁹³ Here, “culpable” means that the provocateur intends to physically harm another.⁹⁴ The only way that a provocateur, by definition, can harm the other is through scheming (i.e., calculation).⁹⁵ So, here, the calculation rule is a necessary element of the limitation.

A non-culpable provocateur cannot (or, at least, should not) lose her right to self-defense where she is merely exercising her right to free speech or free expression; or, if not exercising such a right, she has no intent to bring about physical harm and poses no threat.⁹⁶ Consider the following example.

I yells at *R*, *I*'s good friend and stockbroker, because *R* has poorly invested *I*'s money. *I* is so angry at *R* that *I* yells an insult at *R* that *R* is especially sensitive to. *I* is aware of *R*'s special sensitivity to this particular insult because *I* had previously witnessed *R* attack *Friend* (*F*) when *F* yelled this same insult at *R*. *F* was able to flee from *R* and never reported the incident to police. This particular insult is not one that would cause most people to react violently; in fact, most people would find the insult innocuous. *R* is emotionally hypersensitive when it comes to this particular insult. In response to the insult, *R* viciously attacks *I*. *I* has nowhere to run and in his effort to defend against *R* pushes *R* against a wall, impaling him on a set of low hanging decorative elk antlers. *I* later claims that he did not yell the insult with the intent to start a fight or with any intent to physically harm *R*, much less to gain a pretext for self-defense. *I* claims that he yelled the insult simply because *I* was so angry at *R* for losing *I*'s money that *I*, on an impulse, yelled the most hurtful thing he could think of (for *R* specifically). At trial, *I* claims justifiable self-defense. On these facts, whether or not the judge allows a provocateur instruction to go to the jury and whether or not the jury will convict under a provocateur instruction depends on whether the judge⁹⁷

⁹² See *supra* note 62 and accompanying text.

⁹³ See *infra* Part III.

⁹⁴ Intent to start a fight also makes a provocateur culpable, but the underlying concern with fighting is physical harm. See discussion *supra* note 48. If fights caused no physical harm (to combatants, bystanders, or property), then they likely would not be unlawful. See discussion *supra* note 48. For all future references, when I speak of culpability as intent to harm, the reader may assume intent to fight as well.

⁹⁵ See *supra* note 27 and accompanying text.

⁹⁶ See, e.g., *State v. Jackson*, 382 P.2d 229, 232 (Ariz. 1963) (“Before an act may cause forfeiture of the fundamental right of self-defense it must be willingly and knowingly calculated to lead to conflict.”).

⁹⁷ Usually under a preponderance of the evidence standard, it is within the judge’s discretion to decide whether or not to submit a provocateur instruction to the jury. See, e.g.,

and jury⁹⁸ determine that *T*'s intent was to physically harm or whether *T*'s intent was to emotionally vent.⁹⁹ A provocateur is only a provocateur if she intends to harm the one provoked by calculating that she will be able to defend against the one provoked with deadly force once she provokes the attack.¹⁰⁰ The only reason to have a provocateur limitation is to punish the provocateur for inflicted or attempted harm. If the provoking party does not intend to harm the other, or is merely suicidal or a masochist, then the issue of self-defense does not come into play because nobody is defending herself. If the provoking party is mentally ill, her case will turn on a failure of proof defense negating mens rea, not on the affirmative defense of self-defense.¹⁰¹ If provoking an attack against oneself could not cause harm, the provocateur limitation would not exist. The adjudicator finds against the provocateur on the elements of self-defense not simply because the provocateur started the fight, as with initial aggressors, but because the provocateur intended to cause physical harm, i.e., because she is culpable.¹⁰²

Under the initial-aggressor limitation, the actor loses the right of self-defense irrespective of the actor's culpability and the calculation rule. Under the provocateur limitation, the actor loses the right to self-defense precisely because of the actor's culpability and the calculation rule. Because the provocateur and initial-aggressor limitations differ as to the reason one may lose one's right to self-defense, the courts should treat them as two separate doctrines.¹⁰³

Campbell v. State, 812 So. 2d 540, 543 (Fla. Dist. Ct. App. 2002) (holding that a jury instruction may only be reviewed under an abuse of discretion standard); Caldwell v. State, 54 S.W.2d 521, 523 (Tex. Crim. App. 1932) (holding that a prosecutor's requested provocateur instruction was properly submitted to the jury because a "preponderance of the testimony" supported the instruction).

⁹⁸ The jury decides under a beyond reasonable doubt standard. See, e.g., Juarez v. State, 961 S.W.2d 378, 385 (Tex. Crim. App. 1997) ("The State has the burden of persuasion in disproving evidence of self-defense. . . . [I]t is a burden requiring the State to prove its case beyond a reasonable doubt." (citations omitted)).

⁹⁹ See, e.g., State v. Doris, 94 P. 44, 53 (Or. 1908) ("A man does not lose his right of self-defense unless he has done some wrongful act. Mere innocent or accidental cause of difficulty or combat permitted by this instruction is not enough." (quoting State v. Taylor, 50 S.E. 247, 251 (W. Va. 1905) (internal quotation marks omitted))).

¹⁰⁰ See *supra* Part I.

¹⁰¹ See discussion *supra* note 48.

¹⁰² See *supra* note 94 and accompanying text.

¹⁰³ Professor Robinson would rather not treat provocateurs any differently from initial aggressors under the law. He would eliminate the forfeiture of self-defense doctrines for both provocateurs and initial aggressors. See Robinson, *supra* note 58, at 27, 56 (arguing that all "causing-one's-defense doctrine[s]" should be treated by a "single explanation" and that loss of self-defense doctrines should be replaced with a separate imposition of "liability on the basis of the actor's earlier conduct in culpably causing the conditions of his defense"). Robinson provides this example as an explanation of how his system would work for provocateurs:

[C]onsider . . . *D*, who sends *T* a false letter claiming that he, *D*, is in possession of a watch that *T* treasures. *D* knows that the watch was recently stolen and that *T*, a

C. *Victim Culpability*

The provocateur and initial-aggressor limitations also differ with respect to the victim's culpability. Consider *R*, who played our victim above in the first in-text provocateur example and the first in-text initial-aggressor example. *R* is a culpable party in the provocateur example, but *R* is not a culpable party in the initial-aggressor example. The victim is culpable under the provocateur limitation because he has no right to harm any person in response to mere nonthreatening words or gestures. The victim is not culpable under the initial-aggressor limitation because he was responding to an actual attack (or immediate threat of attack) upon himself thus giving him the right to defend himself. The law should treat the initial-aggressor limitation as separate from the provocateur limitation because victims are culpable under the latter doctrine, but not the former.

III. THE PROVOCATEUR LIMITATION IS JUST

The initial-aggressor limitation causes the person who starts the fight to lose an affirmative defense at trial.¹⁰⁴ American law, generally, has, in effect, decided that the initial aggressor, regardless of culpability, does not get to claim self-defense.¹⁰⁵ Why we have an initial-aggressor limitation with such an outcome and whether this outcome is moral are questions beyond the scope of this Note. The focus of this Note is the provocateur limitation. The provocateur limitation and the initial-aggressor limitation are so distinct that the ethics of each limitation are

person of violent temper, will on receipt of the letter unjustifiably attack him in an attempt to recover the watch. *D* knows nothing of the whereabouts of the watch, but has devised this grand scheme to permit him to kill *T* in self-defense. *D*'s conduct in sending the letter is not itself unlawful. Because he did it with the intent to kill *T*, however, one may be inclined to hold him liable for murder, or at least attempted murder. His liability would be based on his conduct [prior to the encounter] in causing the attack, not on his justified defensive force [during the attack].

Id. at 41 (citations omitted). Robinson's system may be an excellent idea. However, one cannot know without actual imposition and actual consequences. The common law and statutory law are not likely to change, so I maintain that provocateurs should be a distinct class from initial aggressors because under the current law both lose their right to self-defense for differing reasons. Robinson's focus is a critique of, and solution for, the criminal law, *see id.* at 1–2, while my focus is not so much a critique as it is a study of the scope of the criminal law as applied to deadly-force self-defense. Because our respective emphases differ, our conclusions are also likely to differ. However, Dean Margaret Raymond poses a similar inquiry to Robinson's and her's is also a critique of the law; yet, Raymond concludes the opposite of Robinson. *See* Margaret Raymond, *Looking for Trouble: Framing and the Dignitary Interest in the Law of Self-Defense*, 71 OHIO ST. L.J. 287, 288–89 (2010) (posing a similar hypothetical to Robinson's, but concluding against the idea of opening the time frame on liability due to concerns of interference with "dignitary interests").

¹⁰⁴ *See supra* Part II.B (discussing two hypotheticals in the context of affirmative and failure of proof defenses).

¹⁰⁵ *See supra* Part II.B.

grounded in differing moral logic. This Note discusses the initial-aggressor limitation only to better explain the parameters of the provocateur limitation by contrast. From here forward, this Note will focus exclusively on the provocateur limitation's place in deadly-force self-defense law. As to why we should have a provocateur limitation and whether its jurisprudential outcome is moral is a subject we turn to now.

The provocateur limitation is just because it punishes all wrongdoers and no innocents. Remember that provocateurs are punished because they are culpable.¹⁰⁶ If the provocateur is not culpable, she should not be punished because she poses no physical threat, intends no physical harm, and is likely exercising her free speech rights.¹⁰⁷ But, even if the provocateur is culpable, and thus deserving of punishment, so is the provocateur's "victim."¹⁰⁸ Nonthreatening words or gestures never qualify as a justifiable reason to employ force, especially deadly force, against another person.¹⁰⁹ A provocateur, by definition, employs only nonthreatening, nonviolent words or gestures in his schemes.¹¹⁰ Therefore, the person who responds to the provocateur's taunts is also culpable; like the provocateur, she is a wrongdoer.¹¹¹ The person who responds is, in fact, the initial aggressor. The result of the provocateur limitation is that if the wrongdoing provocateur prevails, he is punished by the law. If the wrongdoer who responds to the provocateur prevails, she would likewise be punished. Should both actors survive the fray, both are punished. The worst-case scenario is that one wrongdoer dies in the fray, and the other is punished.¹¹² The provocateur limitation provides the most just outcome possible under our current law with one exception: the provocateur limitation, if rightly applied, allows the *silent, subtle provocateur* to go free.¹¹³

¹⁰⁶ See *supra* Part II.B.

¹⁰⁷ See *supra* Part II.B. This is true unless the words are in clear and obvious violation of the fighting words doctrine and the clear and present danger test, otherwise the would-be provocateur is within her constitutional rights to argue with another. See discussion *supra* note 80.

¹⁰⁸ See, e.g., TEX. PENAL CODE ANN. § 9.31(b)-(b)(1) (West 2011) (“(b) The use of force against another is not justified: (1) in response to verbal provocation alone.”).

¹⁰⁹ See *id.*

¹¹⁰ See *supra* note 45 and accompanying text. If the antagonist's words or gestures are threatening, then he is an initial aggressor and not a provocateur. See *supra* note 26 and accompanying text.

¹¹¹ See Ferzan, *Provocateurs*, *supra* note 44, at 614–15.

¹¹² This worst-case scenario does not take into account the effectiveness of investigations, etc. It considers only what happens once a case reaches the court.

¹¹³ Whether a wholly different system of self-defense law should be in place is an open question. Again, however, this Note's focus is on the scope of present law throughout the various jurisdictions of the United States.

IV. DOES THE LAW ALLOW SILENT, SUBTLE PROVOCATION?

A. *The Law Turns on What Constitutes an “Act”*

A silent, subtle provocateur is one who without using any words or gestures provokes an attack against herself so that she may kill the person she provoked under the guise of justifiable self-defense. Does the law allow silent, subtle provocation under the provocateur limitation? The answer depends on what we mean by “allow.” If by “allow” we mean that silent, subtle provocation is a lawful act, then the answer is generally no, but with exceptions. Presumably, in most jurisdictions, if a provocateur confesses to murder and explains his intentional or knowing actions and schemes, he will likely be punished irrespective of his lack of words and gestures. Even if the provocateur rescinds his confession and ultimately goes to trial, his rightly obtained confession would likely be sufficient evidence to provide a provocateur jury instruction, and if the jury convicts (which is likely, considering the confession), the verdict will likely remain undisturbed on appellate review. Texas, however, may be an exception. In Texas, even if one confesses to purposefully “provoking the difficulty,” as a matter of law, the would-be provocateur must use words or gestures that “actually provoke[d] the attack.”¹¹⁴ Idaho and Oklahoma may also be exceptions.¹¹⁵

On the other hand, if we define “allow” to mean an inability to police and enforce short of a full confession, then the answer is maybe. The rule of the provocateur limitation works by means of a jury instruction. Obviously, the jury instruction must be prompted by evidence of provocation. So, whether the provocateur limitation applies depends on what a given jurisdiction allows as sufficient evidence of provocation. The evidence would need to demonstrate intent (sometimes knowledge) and an act of provocation. Intent may be implied by circumstances, but, without an act, intent never comes to fruition and no crime has been committed. As a result, for a silent, subtle provocateur, mere presence would have to be sufficient evidence of the act because, by definition, the silent, subtle provocateur does not use words or gestures.¹¹⁶ Therefore,

¹¹⁴ *Smith v. State*, 965 S.W.2d 509, 513–14 (Tex. Crim. App. 1998). Indeed, the law of Texas implies that even if a defendant admits to intentionally provoking an attack that, short of an overt act to pair with the defendant’s intent and confession, the law cannot find guilt. *See id.* at 514.

¹¹⁵ *See State v. Livesay*, 233 P.2d 432, 435 (Idaho 1951) (“Bare intent and purpose to provoke a difficulty does not deprive one of the right of self-defense.”); *Turnbull v. State*, 128 P. 743, 745 (Okla. Crim. App. 1912) (“[T]hough he intended to provoke a difficulty with intent to kill; the mere purpose or intent unaccompanied by any overt act is not enough.”).

¹¹⁶ The line between mere presence and gestures or actions can be blurry. If a person merely walks through a neighborhood outside of a bully’s house, is then attacked by that bully, and knew that the bully was likely to attack on sight, does that person’s act of walking constitute an act under the provocateur limitation? Or, does the fact that the person is walking where

whether a silent, subtle provocateur loses the right to self-defense turns on what qualifies as an *act* under the provocateur limitation in a given jurisdiction. Most jurisdictions in the United States require some affirmative act—words or gestures beyond mere presence—for a defendant to fall within the provocateur limitation.¹¹⁷ The issue with the silent, subtle provocateur, however, is that she does not use words or gestures. The question then becomes: Does the law ever recognize an act without words or gestures under the provocateur limitation?

Some jurisdictions have a *wrongful* or *unlawful* act requirement. Generally, these terms are used interchangeably.¹¹⁸ In Oregon, “[a] man does not lose his right of self-defense unless he has done some wrongful act. Mere innocent or accidental cause of difficulty or combat . . . is not enough.”¹¹⁹ Also in Oregon, merely offensive words are insufficient to constitute provocation under the provocateur limitation unless “accompanied by circumstances *clearly* showing an intent on his part to provoke some kind of an affray.”¹²⁰ The Oregon rule could be understood to mean that a showing of intent to harm may make the act or words wrongful, which seems to suggest that wrongful intent accompanied by any act is the actual requirement. However, given that Oregon Supreme Court cases iterate the need for a wrongful act, the better reading is that the act or words must both be wrongful and accompanied by an intent to bring on a fray.¹²¹

he has every legal and constitutional right to do so make walking in any neighborhood no more than mere presence? Some jurisdictions answer this concern by requiring an *unlawful* act before the provocateur limitation comes into play. It seems to follow that lawful or innocuous acts like walking should not constitute an “act” under the provocateur limitation. Imagine *I*, a newspaper reporter, follows *R*, a newsworthy individual, whenever *R* is in a public place, and that *R* threatens *I* with great bodily harm should *R* see *I* following him around again. Should *I* lose his right to self-defense if he, in accordance with his job description and the practices of his industry, continues to follow *R* in public places? Because *I* has a dignitary right to walk where he pleases in public places, I doubt that *I*’s act of walking or following should constitute an act or gesture under the provocateur limitation. One could argue that the law should allow for a case-by-case determination of whether lawful or innocuous activities should qualify as an act, but such ad hoc determinations have an inherent tendency to become tantamount to a rule of law in application due to adherence to judicial dicta. In any event, an express rule is preferable, if not necessary.

¹¹⁷ See *infra* text accompanying notes 128–49.

¹¹⁸ See, e.g., *Patrick v. State*, 285 So. 2d 165, 169 (Miss. 1973) (using “unlawful” and “wrongful” interchangeably).

¹¹⁹ *State v. Doris*, 94 P. 44, 53 (Or. 1908) (quoting *State v. Taylor*, 50 S.E. 247, 251 (W. Va. 1905)) (internal quotation marks omitted).

¹²⁰ *Id.* (emphasis added).

¹²¹ See, e.g., *State v. Gray*, 79 P. 53, 55 (Or. 1905) (“[The defendant] is precluded by his conduct to avail himself of a necessity arising from a present impending peril of great bodily harm brought on himself by his own wrongful act.”); *State v. Doherty*, 98 P. 152, 153 (Or. 1908) (affirming jury instructions that state that a defendant may lose his right to self-defense if the defendant engaged in the wrongful act of using “abusive and offensive language to decedent and decedent expressed his intention to strike him if he repeated such language, and

Some jurisdictions have a simple-act requirement for the provocateur limitation. A simple act is an act for which the law has no express requirement that it be wrongful or unlawful. Texas, for example, has a qualified simple-act requirement. In Texas, there must be some affirmative act of provocation, and the act must be reasonably capable of causing the attack.¹²² Texas further qualifies its simple-act requirement by expressly disallowing mere presence as adequate provocation.¹²³ Texas goes so far as to say that a defendant “may seek the victim with the intent to provoke a difficulty, but the defendant must go further and do or say something which actually provokes the attack before he will lose his right to self-defense.”¹²⁴ If Texas had no qualification on its simple-act requirement, as some jurisdictions do not, it is possible that, under the right circumstances, a savvy prosecutor could successfully argue that merely walking in a neighborhood where violence is likely to happen is a sufficient act of provocation.¹²⁵

he did repeat it”). In *Doherty*, clear evidence of intent was also relevant in the affirmed instructions but only insofar as the evidence showed the “defendant had no reasonable apprehension of impending injury to himself,” and thus acted without necessity where “[t]he right to take the life of another in self-defense is founded on necessity.” *Id.* at 153–54.

¹²² See, e.g., *Smith v. State*, 965 S.W.2d 509, 514 (Tex. Crim. App. 1998) (“The first element, that the defendant did some act or used some words which provoked the attack on him, triggers the inquiry into whether the issue of provocation may be present in the case.”); *Reeves v. State*, No. 01-10-00395-CR, 2012 WL 5544770, at *4 (Tex. App. Nov. 15, 2012) (“[T]he test [is] met if a rational jury could have found beyond a reasonable doubt that some act or words of [the defendant] actually caused [the victim] to attack him and that those words or acts were ‘reasonably capable of causing an attack, or . . . ha[d] a reasonable tendency to cause an attack.’” (quoting *Smith*, 965 S.W.2d at 517)), *aff’d*, 420 S.W.3d 812 (Tex. Crim. App. 2013).

¹²³ Other jurisdictions, like Texas, have rules holding that mere presence is never enough to constitute provocation under the provocateur limitation. See, e.g., *State v. Livesay*, 233 P.2d 432, 435 (Idaho 1951) (“Bare intent and purpose to provoke a difficulty does not deprive one of the right of self-defense.”); *People v. Bailey*, 777 N.W.2d 424, 425–26 (Mich. 2010) (“No legal authority in Michigan supports that one becomes an aggressor merely by presenting oneself to the victim on a public street, even if armed.”); *State v. Edwards*, 717 N.W.2d 405, 416 (Minn. 2006) (conflating the provocateur and initial-aggressor limitations: “[A] defendant is generally not regarded as an initial aggressor merely because he armed himself or went to a place where an assault was likely”).

¹²⁴ *Smith*, 965 S.W.2d at 514.

¹²⁵ Idaho, for example, requires only “some act.” *Livesay*, 233 P.2d at 435. Oklahoma requires that the *purpose* (not the act) be unlawful, but the act may be any “overt act.” *Brandle v. State*, 173 P. 661, 662 (Okla. Crim. App. 1918) (“[S]o long as [the defendant’s] purpose was lawful and no overt act was committed by him . . . he was within his legal rights.”). Oklahoma’s simple-act requirement was almost, but not quite, qualified by *Fanning v. State*: “[T]he lawful provoking of another *might* not operate to deprive the aggressor of his right to self-defense,” 224 P. 359, 362 (Okla. Crim. App. 1923) (emphasis added). Note that Oklahoma once had a rule that mere presence was never enough to constitute provocation, but though the rule was never expressly overruled, it was effectively superseded by later conflicting appellate case law. *Compare* *Turnbull v. State*, 128 P. 743, 745 (Okla. Crim. App. 1912) (“[T]hough he intended to provoke a difficulty with intent to kill; the mere purpose or intent unaccompanied by any overt act is not enough.”) *with* *Fanning*, 224 P. at 363 (“[T]he case of *Turnbull v. State* was one in which the assault grew out of a lawful act of the accused”).

Some jurisdictions have a rather vague at-fault act requirement. Jurisdictions with an at-fault act requirement fall somewhere between wrongful-act and simple-act jurisdictions. “At fault” tends to mean that the defendant was a but-for and proximate cause of the altercation and usually applies where the defendant did some wrongful act, but the act need not necessarily be wrongful to make the defendant at fault.¹²⁶ At-fault jurisdictions with vague rules that fail to clearly distinguish between evidence of intent and evidence of an act may leave the door open to finding a defendant at fault even if she did not act. In these jurisdictions, one may be at fault, in the sense of being a mere cause, by simply being in the wrong place at the wrong time (or the right place at the right time in the case of a true provocateur).¹²⁷

Fanning, in distinguishing *Turnbull*, went so far as to say of the jury instruction affirmed in that case: “Under the circumstances there the phrase should have read ‘by any unlawful act of his own’ because the provoking of a difficulty by a lawful act would not deprive one of the right to invoke the plea of self-defense.” *Id.* at 363. Note that *Fanning* stopped just short of imposing an unlawful-act requirement when limiting its statement to the circumstances of *Turnbull* and choosing to distinguish rather than overrule *Turnbull*. This is an odd choice since fully or partially overruling *Turnbull* would have yielded a more predictable provocateur rule. Had *Turnbull* been partially overruled only on a misstatement as to intent (that one may intend to kill and retain the right of self-defense) and been approved on its statement as to the act (mere purpose unattended by an overt act is never enough), then Oklahoma would have a rule that mere presence never amounts to provocation. Had *Turnbull* been expressly overruled in its entirety, then Oklahoma would have a solid unlawful-act requirement. As it stands, Oklahoma, is left with a case-by-case ad hoc determination of when an “overt act” may qualify as provocation.

¹²⁶ See, e.g., *State v. Moore*, 540 P.2d 1252, 1257 (Ariz. 1975) (disposing of a defendant’s claim that a jury charge stating that an at-fault defendant has no right to self-defense is vague, but without elaborating on why the charge is not vague or what it means to be “at fault”); *State v. Slater*, 644 S.E.2d 50, 52–53 (S.C. 2007) (holding that the defendant “was not without fault in bringing on the difficulty” because the defendant “carried the cocked weapon, in open view, into an already violent attack in which he had no prior involvement. [His] actions, including the unlawful possession of the weapon, proximately caused the exchange of gunfire, and ultimately the death of the victim.”); *State v. Frazier*, 736 S.E.2d 301, 307 (S.C. Ct. App. 2013) (citing *Slater*, 644 S.E.2d at 53); *State v. Foutch*, 34 S.W. 423, 424 (Tenn. 1896) (equating being “in fault” to using opprobrious words to another); *Smith v. Commonwealth*, 435 S.E.2d 414, 416 (Va. Ct. App. 1993) (“If an accused ‘is even slightly at fault’ in creating the difficulty leading to the necessity to kill, ‘the killing is not justifiable homicide.’ Any form of conduct by the accused from which the fact finder may reasonably infer that the accused contributed to the affray constitutes ‘fault.’” (citations omitted)).

¹²⁷ See *State v. Jones*, 101 S.E. 647, 647 (S.C. 1919), which affirms the following jury instruction in an at-fault jurisdiction:

If the lives of two men had been threatened, each by the other, and one man went where he knew another was going to be, and he went there with the intent and purpose in his heart to do harm or injury to the other, then there would be express malice in his very act of going there; . . . if a man goes where he knows another is going to be, and he goes there for the purpose of meeting the other and to do him harm or injury, and if he knows that his going there is liable to bring on a difficulty, and he goes there and brings about the difficulty in that way, he cannot set up self-defense; . . . Mr. Foreman and gentlemen, he cannot set up self-defense. In a case of

At least two jurisdictions have recognized provocation by mere presence on appellate review. In South Carolina, which has an at-fault act requirement, an appellate court upheld jury instructions that stated that the act of going to a place (i.e., making oneself present at a place) where the defendant knows an antagonist is present is a sufficient act to make a defendant at fault when paired with the requisite intent for the provocation limitation.¹²⁸ In the District of Columbia, the Court of Appeals affirmed defendant William Laney's manslaughter conviction by holding that Laney had no right to a self-defense instruction to the jury.¹²⁹ The Court held so because Laney's presence provoked a mob that had been chasing him down a street.¹³⁰ The Court reasoned that once Laney reached a place of safety (a backyard he had run to) his reappearance on the street constituted provocation, which eliminated his right to a self-defense instruction.¹³¹ The Court said, "[W]hen [Laney] adjusted his gun and stepped out into the areaway, he had every reason to believe that his presence there would provoke trouble. . . . [H]is conduct in adjusting his revolver and going into the areaway was such as to deprive him of any right to . . . self-defense."¹³² The Court attempted to maintain an act requirement by citing the defendant's "conduct" with his revolver and his movement into street as the means by which he deprived himself of a right to self-defense. Ultimately, however, the *Laney* Court did not succeed, if it was trying to, in maintaining an act requirement. Fifty years later another D.C. Court of Appeals case would fashion this rule using *Laney* as its sole support: "Self-defense may not be claimed by one who deliberately places himself in a position where he has reason to believe 'his presence . . . would provoke trouble.'"¹³³

In jurisdictions that have an unlawful or wrongful-act requirement, silent, subtle provocation is likely allowed because mere presence is neither active enough nor wrongful enough to constitute a wrongful act. In jurisdictions that have an unqualified simple-act requirement, silent, subtle provocation may or may not be allowed depending on the circumstances of the case, the disposition of the judge, and the composition of the jury because without any qualifications on what constitutes an act, a prosecutor may successfully argue that merely going to a public place where the actor believes she could be attacked is an act sufficient to

that kind, he brought on the difficulty, and cannot be said to be without fault in bringing on the difficulty.

Id.

¹²⁸ *See id.*

¹²⁹ *Laney v. United States*, 294 F. 412 (D.C. Cir. 1923).

¹³⁰ *See id.* at 414.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *United States v. Peterson*, 483 F.2d 1222, 1234 (D.C. Cir. 1973) (citing *Laney*, 294 F. at 414).

provoke. Jurisdictions that have a simple-act requirement qualified by a reasonableness standard are more likely to allow silent, subtle provocation than unqualified simple-act requirement jurisdictions, but less likely than unlawful-act jurisdictions. Jurisdictions that have an at-fault act requirement may allow or disallow silent, subtle provocation; it is dependent on whether intent and act are effectively fused into a single cause requirement (would not allow) or whether an act requirement and a separate intent requirement are maintained apart from causation (may allow). Jurisdictions that have a rule holding that mere presence may never be an act constituting provocation likely allow silent, subtle provocation and, in so doing, also ensure innocent provokers the right to claim self-defense. Jurisdictions that have already recognized that mere presence may constitute provocation may disallow both silent, subtle provocation and innocent provocation. In Part V, I will reach the question of whether jurisdictions should allow silent, subtle provocation.

B. Zimmerman Revisited

In the introduction to this Note, I used the Zimmerman case as an example of a fact pattern involving a seemingly culpable defendant that *could* be interpreted to meet the requirements of the provocateur limitation. We cannot know to a certainty what occurred between Trayvon Martin and George Zimmerman on the night of the shooting. Assuming, strictly for the sake of hypothetical argument, that Zimmerman made no verbal or physical threats or any provocative statements or gestures to Martin, the question then becomes could Zimmerman's mere presence have been evidence enough of an act of provocation to trigger a provocateur limitation if Florida had one?

Florida once had a common law aggressor limitation that included within its definition a provocateur limitation, but it is no longer employed.¹³⁴ Prior to the codification of Florida's aggressor limitation, at least one Florida Supreme Court decision recognized the possibility of

¹³⁴ See, for example, *Marlow v. State*, 38 So. 653, 655 (Fla. 1905), which affirms this jury instruction:

An aggressor is not necessarily a person who may strike the first blow in a personal encounter, or make the first demonstration indicating an intent to strike; but if a person, with malice and hatred in his heart towards another, purposely acts towards such other person as to provoke a difficulty, either by acts or words, with the intent to induce such other person to strike the first blow or make the first demonstration, in order to form a pretext to take his life, then the defendant could not avail himself of the right to self-defense.

Id. (internal quotation marks omitted). Note that the limitation described in the jury instruction is one that confuses the provocateur limitation with the aggressor limitation by combining both doctrines into one. Florida now resorts to statute for its aggressor limitation, which courts interpret as not including a provocateur element. See *infra* notes 136–37 and accompanying text.

provocation by nonthreatening words or gestures that would lead to the loss of the right of self-defense.¹³⁵ When Florida's legislature codified its aggressor limitation, it used the term "provokes" to describe the act of the aggressor that leads to the defendant's loss of the self-defense right.¹³⁶ But, the Florida legislature left the term "provokes" undefined, leaving the term vague and open to broad interpretation. If the Florida legislature intended to import every element of Florida's common law understanding of provocation into the statute, including a provocateur element, then the legislature should have been clearer. Florida's courts now understand the term "provoke" to mean that the defendant must have used force or the threat of force, making the limitation purely an initial-aggressor limitation with no provocateur element.¹³⁷

¹³⁵ "If you find from the evidence in this case . . . that the defendant, A. D. Marlow, . . . used offensive and opprobrious language towards Brand, or did *any* act or thing for the purpose and with intent of provoking a difficulty with Brand, so as to induce Brand to assault him, with the premeditated design that, if the said Brand did assault him, to shoot and kill the said Brand, then Marlow cannot avail himself of the plea of self-defense, and you will find him guilty as charged." *Marlow*, 38 So. at 655 (emphasis added) (internal quotation marks omitted) (affirming a jury instruction).

¹³⁶ FLA. STAT. ANN. § 776.041 (West 2014):

776.041. Use or threatened use of force by aggressor

The [self-defense] justification described in the preceding sections of this chapter is not available to a person who:

. . .

(2) Initially provokes the use or threatened use of force against himself or herself, unless:

(a) Such force or threat of force is so great that the person reasonably believes that he or she is in imminent danger of death or great bodily harm and that he or she has exhausted every reasonable means to escape such danger other than the use or threatened use of force which is likely to cause death or great bodily harm to the assailant; or

(b) In good faith, the person withdraws from physical contact with the assailant and indicates clearly to the assailant that he or she desires to withdraw and terminate the use or threatened use of force, but the assailant continues or resumes the use or threatened use of force.

¹³⁷ See *Gibbs v. State*, 789 So.2d 443, 445 (Fla. Dist. Ct. App. 2001) ("Because the instruction did not limit provocation to some force or threat of force, the instruction could have misled the jury to believe that appellant's pointedly asking the victim why she failed to acknowledge her greeting and/or appellant's racial retorts and obscene gestures were sufficient provocation to preclude appellant from defending herself from an attack by the victim."). The Florida Supreme Court Committee on Standard Jury Instructions, prior to a 2014 statutory revision and citing *Gibbs v. State*, proposed an official change to its jury instructions: "The use of deadly force is not justifiable if you find that [the defendant] used force or the threat of force to initially [provoke] the use of force against [him or herself]." *Amendments to the Use of Force Jury Instructions*, FLA. BAR NEWS (Feb. 15, 2014), <http://www.floridabar.org/DIVCOM/JN/JNNNews01.nsf/RSSFeed/F15700F87E56AD3385257C71006B6F46>. In 2014, Florida enacted a revision to § 776.041 expressly including threats of force in addition to "use of force" within the text of the statute. This revision merely reflects the practice of Florida courts in recognizing threats of force as equivalent to uses of force. See *Gibbs*, 789 So.2d at 445. Since the enacting of the 2014 statutory revision, the Florida Supreme Court Committee on Standard Jury Instructions continues to consider alterations to its initial-aggressor jury instruc-

The parties did in fact contest Florida's initial-aggressor limitation during the Zimmerman trial, and the jury rejected the finding that Zimmerman was the initial aggressor by means of its not-guilty verdict.¹³⁸ The jury did so, however, without an initial-aggressor jury instruction from the presiding judge, Judge Nelson. The prosecution attempted to persuade the judge to include an initial-aggressor instruction in the jury charge but failed under an objection from the defense.¹³⁹ The prosecution argued that "Zimmerman provoked the event by following Martin."¹⁴⁰ The defense objected and cited *Gibbs v. State*, which interprets provocation under Florida's initial-aggressor limitation to require "some force or threat of force" by the defendant.¹⁴¹ The judge agreed with the defense that following Martin did not constitute force or a threat of force and did not include an initial-aggressor instruction to the jury.¹⁴² Professor Fagan argues that whether or not following Martin constitutes a threat of force is a fact-matter for the jury, and the jury could have and should have had an initial-aggressor instruction for guidance on how rightly to determine the issue.¹⁴³ After all, in front of the jury during the trial, the parties argued the issue of whether Zimmerman's following of Martin indicated murderous intent, so why not then include an instruction?¹⁴⁴ Seemingly, Judge Nelson could have given the *Gibbs* appellant's alternative initial-aggressor instruction that the *Gibbs* court approved in that case: "The use of force . . . is not justified if you find [the defendant] initially provoked the use of force against herself, *by force or the threat of force*."¹⁴⁵ The jury could then decide for themselves whether Zimmerman's following of Martin constituted a threat of force. In any event, Judge Nelson was under no legal requirement to agree with the prosecution because *Campbell v. State* maintains that the choice to provide or withhold a jury instruction is within the trial judge's discretion.¹⁴⁶

tion. See *ALERTS - Criminal Jury Instructions*, FLORIDASUPREMECOURT.ORG, http://www.floridasupremecourt.org/jury_instructions/alerts.shtml (last updated Feb. 25, 2015).

¹³⁸ Jeffrey A. Fagan, *The Zimmerman Verdict and the Initial Aggressor Exception*, COLUM. L. SCH. MAG., available at <http://www.law.columbia.edu/magazine/611849> (last visited Feb. 25, 2015).

¹³⁹ See *id.*

¹⁴⁰ *Id.*

¹⁴¹ *Gibbs*, 789 So.2d at 445; see Fagan, *supra* note 138.

¹⁴² See Fagan, *supra* note 138.

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁵ *Gibbs*, 789 So.2d at 444. *Gibbs* had to do with nondeadly force that resulted in the death of the victim by heart attack, but the application of *Gibbs* generalizes to deadly-force encounters as well, since the issue was determining what constitutes provocation under Florida's initial-aggressor limitation. See *id.* at 444-45.

¹⁴⁶ See *Campbell v. State*, 812 So. 2d 540, 543 (Fla. Dist. Ct. App. 2002) (holding that "[t]he decision of the trial court to give or withhold a proposed jury instruction is reviewed

While no one knows the exact thoughts of Judge Nelson during the Zimmerman trial, perhaps she felt the instruction “did not comport with the evidence presented by the state.”¹⁴⁷ The evidence certainly supported the idea that Zimmerman followed Martin. Nonetheless, despite reasonable suspicions of Zimmerman’s motive, Zimmerman’s mere presence near or behind Martin was the only evidence of a threatening act presented at trial. The jury was likely already considering the possibility that Zimmerman’s following of Martin constituted a threat since the defense and the prosecution argued the issue at trial. Perhaps Judge Nelson felt that an aggressor instruction would add prejudicial weight to the prosecution’s claim that following a person, with no other evidence of a threat, can cause a citizen to lose his right to self-defense. Zimmerman embodied just the type of undesirable defendant to promote such a finding without resort to a jury instruction. This may be just the type of case that Judge Smith of Florida’s Fourth District Court of Appeals had in mind when he said,

[W]e might doubt that sensible jurors need telling of an inference that is said to arise unaided from their own reason, experience and common understanding. And if the evidence is such that the inference has not occurred to the jury after argument of counsel, we might doubt that it is the trial judge’s business to summon up the inference either by a wink and nod or by an overt instruction.¹⁴⁸

Had the jury found that Zimmerman’s mere presence constituted a threat of force, and had the case survived appellate review, Florida could effectively have been back in the provocateur-limitation business by, again, conflating provocateurs and initial aggressors into a single doctrine.¹⁴⁹ The new provocateur element would have been much broader, however. Mere presence would be enough to find provocation and cause one to lose his right to self-defense. This would be a “provocative presence” rule, if you will. While such a rule may properly remove the right of self-defense for silent, subtle provocateurs, it would also unjustly burden

under an abuse of discretion standard.” (citing *Langston v. State*, 789 So.2d 1024, 1026 (Fla. Dist. Ct. App. 2001)).

¹⁴⁷ As did the court in *Kingery v. State*, 523 So.2d 1199, 1207 (Fla. Dist. Ct. App. 1988).

¹⁴⁸ *Palmer v. State*, 323 So.2d 612, 615 (Fla. Dist. Ct. App. 1975). Note that *Palmer* was disapproved of by *Smith v. State*, 394 So.2d 407, 407 (Fla. 1980), but the disapproval was limited to a holding in *Palmer* that the trial court, as a matter of law, cannot charge a jury on the inference of guilt rising from a defendant’s failure to explain his possession of stolen property.

¹⁴⁹ Florida’s old common law provocateur limitation was contained within its initial-aggressor limitation. See *supra* note 134 and accompanying text.

the rights of future defenders who may not share Zimmerman's culpability as perceived by the public.

V. SHOULD THE LAW ALLOW SILENT, SUBTLE PROVOCATION?

Can the law recognize provocation without words and gestures, provocation by mere presence? Yes. But should the law recognize provocation by mere presence? Ultimately, though it is possible to envision scenarios in which one's mere presence seemingly should be adequate provocation as recognized by the courts,¹⁵⁰ having a "provocative presence rule" would impermissibly burden the dignitary rights of innocent defenders.

Dean Margaret Raymond argues in an article critiquing "time-framing"¹⁵¹ that an "expan[sion] [on] the [time] frame to deprive an actor of a claim of self-defense . . . permits interference with the actor's dignitary interest—her freedom to move about freely and to choose where to go and what to do."¹⁵² Such dignitary interests are also at the core of an argument against allowing recognition of provocation by mere presence (or otherwise without an act)¹⁵³ for purposes of the provocateur limitation. The following pages explain that to deny a person her claim of self-defense by imposing a provocateur limitation based on provoca-

¹⁵⁰ For example, a scenario where an armed gang member goes into the neighborhood of a rival gang and stands in the middle of the street waiting for one of the rival gang members to attack so that he can then respond with ostensibly justifiable deadly force.

¹⁵¹ Raymond, *supra* note 103, at 288 (quoting Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 593 (1981)). Time-framing is an approach to criminal liability developed by Professor Kelman and, as applied to deadly-force self-defense, is similar to Professor Robinson's approach. Compare Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, in CRIMINAL LAW CONVERSATIONS 207 (Paul H. Robinson et al. eds., 2009) (arguing that opening up time frames on criminal liability is a more honest, objective approach to criminal liability and less subject to policy or political motivation than is the current criminal law system of rules and limitations), with Robinson, *supra* note 58, at 27 (arguing that law should not utilize a provocateur limitation but should "separately impose liability on the basis of the actor's earlier conduct in culpably causing the conditions of his defense").

¹⁵² Raymond, *supra* note 103, at 289.

¹⁵³ In Kelman's time-framing argument or in Robinson's causing-one's-defense doctrinal argument, the problem of an "act" would not be an issue because an *actus reus* element of the actual charged offense of murder would be the early "act," prior to the deadly-force encounter, of going (walking, driving, etc.) to the place where mere presence is meant to provoke. But in a study of the provocateur limitation that deals exclusively with the actual encounter, we do need a provocative act, and the act must be done within the sight or hearing of the person provoked. See, e.g., *State v. Edwards*, 717 N.W.2d 405, 419 (Minn. 2006) ("Forfeiture is triggered only on a finding that the defendant, acting 'with the purpose of causing [the victim's] death or serious bodily injury, provoked the use of force against himself in the same encounter.'" (quoting MODEL PENAL CODE § 3.04(2)(b)(i))). Self-defense is not necessary as an affirmative defense in Kelman's or Robinson's proposed systems. See discussion *supra* note 151. For an excellent rebuttal to time-framing as applied to deadly-force self-defense see Raymond, *supra* note 58, at 27, 56. See also discussion *supra* note 103.

tive presence would cause the law to support bullies' efforts to control victims' freedom by supporting bullies' long-term threats of future physical violence, promoting the loss of victims' personal rights to come and go as they please, and threatening victims with state-imposed punishment.

The law impermissibly supports a bully's long-term threat of future physical violence when it removes the threatened person's (i.e., the victim's) right of self-defense. Consider this example:¹⁵⁴ *I* and *R* live in a jurisdiction that subscribes to a provocative-presence rule. *I* knows *R* to be a person who excels at violence, has no fear of the criminal justice system, and always follows through on a threat. *R* tells *I* that if *I* goes to the grocery store (the only grocery store in town) that *R* will kill *I*. *I* calls the police to tell them that *R* has made this threat. The police are not likely to arrest *R* for the threat nor are they going to run *R* off from the grocery store. Even in the unlikely event that the police did arrest *R* and *R* was convicted of criminal threatening, he likely will not go to prison for any significant length of time if at all. *I* may get a restraining order against *R*, but restraining orders are only temporary. The police *may*, as a courtesy, accompany *I* to the grocery store, but they will not continue to do so permanently. Eventually *I* runs out of food and goes to the grocery store alone. *R* sees *I* at the grocery store and attacks *I*. In a jurisdiction that has a provocative-presence rule *I* has this choice: allow *R* to kill *I* by not fighting back, or fight back and kill *R* and endure state punishment for murder. The law supports *R*'s threat of violence by ensuring that if *I* defends against *R*'s attack, *I* will be punished. One might argue that *I* had a third option: not to go to the grocery store at all, which brings us to our next point.

The law impermissibly supports a bully's control over another person's freedom when the law removes the right of the victim to be in a public place chosen by the bully. In the example above, *R* in effect tells *I* that *I* cannot go to the grocery store, and, once *R* makes his threat, the law also tells *I* that *I* cannot go to the grocery store. Remember that *R* always follows through on his threat, and *I* knows this to be true. *I* is certain that if she goes to the grocery store she will have to violate the

¹⁵⁴ Note that the symbol *I* refers to the instigator in the immediate encounter, not to the person that causes the conditions of his own defense by a previous long-term threat of future violence. Therefore, the victim in this hypothetical must be *I* because the victim's presence at the place that the bully, *R*, forbade her to be (here, the grocery store) provokes *R*. *R*, the bully, then responds to *I*'s innocent provocation (i.e., *I*'s mere presence). Note also that one party can be an initial aggressor (e.g., *R*) while the other party may at the same time be a provocateur (e.g., *I*). See text corresponding to *supra* notes 110–12; see also *supra* Part II. In any event, the argument, here, is that while *I* technically *could* be a provocateur (i.e., subject to the provocateur limitation), the law should not view her as one because to do so would wrongfully restrict her dignitary rights.

provocative-presence rule to defend against *R*. Thus, *I*'s third option of not going to the grocery is not really an "option" at all, but is in fact *I*'s only reasonable choice because *I* actually cannot go to the grocery store and avoid death or state-imposed punishment. The law supports *R*'s (the bully's) control over *I* because the law effectively removes *I*'s (the victim's) right to be at the grocery store by adding its own deterrence to that of *R*.

The law impermissibly supports a bully's control over another person's freedom when the law ensures the punishment of the person intimidated—the victim. In the example above, if *I* ignores *R*'s effort to keep her from the grocery store, then *I* will suffer either death at the hands of *R* or prison at the hands of the state. *I* must acquiesce to *R*'s restricting her freedom or face a terrible price. However, even if *I* does acquiesce to *R*'s restricting her freedom, *I* is still punished by the loss of a right to be in a public place. Once *R* threatens *I*, the provocative-presence rule comes into play to ensure punishment of *I* regardless of how the circumstances play out.

CONCLUSION

At the beginning of this Note, I posed these questions: (1) *could* and (2) *should* merely following someone be adequate provocation to cause a person to lose her right to self-defense under the provocateur limitation? As to *could*: the answer, predictably, is dependent on jurisdiction. In some jurisdictions, yes; in other jurisdictions, no; still in others, maybe. As to *should*: because the law should not support the efforts of bullies to control free persons' dignitary rights in their freedom of movement, the law should not allow a provocative-presence rule. The higher value of the law should be the personal freedom of innocents, not the incarceration of the guilty. Therefore, if the law must err, then the law should err on the side of letting the guilty go free rather than on the side of punishing the innocent. For the problem of the silent, subtle provocateur, the issue is not whether one *should* be allowed to vengefully retaliate against a bully or provoke a target into a trap. In a perfect world one should not. Rather, the issue is *can* the law punish a silent, subtle provocateur without burdening the dignitary rights of innocents. It cannot.