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Reasonable Provocation

DISTINGUISHING THE VIGILANT FROM THE VIGILANTE IN SELF-DEFENSE LAW

INTRODUCTION

The right of self-defense is “intended to preserve the legal order by granting every person the right to fend off unlawful attacks.”¹ The state essentially grants an exception to its usual monopoly on the use of force and allows an individual to act as a “substitute policeman.”² That right, however, is subject to certain restrictions. Among those restrictions is the requirement in most jurisdictions that the individual claiming self-defense cannot have provoked the conflict.³ The precise contours of what constitutes provocation vary by jurisdiction.⁴

Each jurisdiction, to some extent, leaves unanswered the question of whether individuals can intentionally insert themselves into situations where violence is reasonably foreseeable and still maintain a claim of self-defense. The key problem in making these determinations is distinguishing between vigilant community members hoping to protect their communities and vigilantes seeking to mete out their own brand of extrajudicial law enforcement. While the former may be socially desirable, a society of laws can have little tolerance for the latter. Defining the boundary between these behaviors requires a carefully crafted rule that “implements [society’s] collective sense of justice.”⁵

Perhaps the highest profile case to implicate these issues in recent memory arose on February 26, 2012, when George Zimmerman shot Trayvon Martin.⁶ Zimmerman maintained that

¹ Mordechai Kremnitzer & Khalid Ghanayim, *Proportionality and the Aggressor’s Culpability in Self-Defense*, 39 TULSA L. REV. 875, 899 (2004).

² *Id.*

³ Margaret Raymond, *Looking for Trouble: Framing and the Dignitary Interest in the Law of Self-Defense*, 71 OHIO ST. L.J. 287, 294 (2010).

⁴ *Id.* at 294-95.

⁵ 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, 1 (1985).

⁶ Lizette Alvarez & Timothy Williams, *Documents Tell Zimmerman’s Side in Martin Case*, N.Y. TIMES (June 21, 2012), <http://www.nytimes.com/2012/06/22/us/documents-tell-zimmermans-side-in-martin-shooting.html>.

he acted in self-defense,⁷ while critics claimed that race motivated the shooting.⁸ The incident and the subsequent police response sparked a heated national dialogue on race,⁹ gun control,¹⁰ hoodies,¹¹ and Florida's "Stand Your Ground" law.¹² Largely lost in the debate, however, was the question of whether Zimmerman even had the right to assert self-defense in the first place. Zimmerman said he followed a suspicious character through a Florida neighborhood at night.¹³ In doing so, did he provoke the subsequent altercation, thus barring him from claiming self-defense?

Zimmerman's questionable case of self-defense is hardly unique. In Seattle, another individual is blurring the boundaries between vigilant and vigilante. Phoenix Jones is the "self-proclaimed Seattle superhero."¹⁴ For his nighttime crime-fighting patrols, Jones wears a "skintight black-and-gold, belted costume, a cape and a fedora."¹⁵ In one incident, Jones stepped between two

⁷ *Id.*

⁸ Bianca Prieto, *Trayvon Martin: "We Are Gathered Here Today to Demand Justice" in Teen's Fatal Shooting*, ORLANDO SENTINEL (Mar. 14, 2012), http://articles.orlandosentinel.com/2012-03-14/news/os-trayvon-martin-shooting-death-rally-20120314_1_shooting-death-bryant-chief-bill-lee.

⁹ Patrik Jonsson, *Trayvon Martin Shooting: A Turning Point in Gun Rights Debate?*, CHRISTIAN SCI. MONITOR (Apr. 19, 2012), <http://www.csmonitor.com/USA/Justice/2012/0419/Trayvon-Martin-shooting-a-turning-point-in-gun-rights-debate> ("The Feb. 26 shooting of the unarmed teenager in Sanford, Fla., by neighborhood watch captain George Zimmerman, and the initial police decision not to charge Mr. Zimmerman, sparked a national debate about race and violence in American society.")

¹⁰ *Id.*

¹¹ Gail Collins, *More Guns, Fewer Hoodies*, N.Y. TIMES (Mar. 28, 2012), <http://www.nytimes.com/2012/03/29/opinion/collins-more-guns-fewer-hoodies.html> ("The debate over the shooting death of Trayvon Martin seems to be devolving into an argument about the right to wear hoodies, but it really does not appear to be a promising development.")

¹² Toluse Olorunnipa, *Stand Your Ground Law's Impact Needs More Study, Task Force Told*, TAMPA BAY TIMES (Sept. 12, 2012), <http://www.tampabay.com/news/politics/stateroundup/stand-your-ground-laws-impact-needs-more-study-task-force-told/1251191> ("Gov. Rick Scott commissioned the task force [to examine Florida's 'Stand Your Ground' law] in the wake of the February shooting death of Miami Gardens teenager Trayvon Martin, which thrust the state's controversial gun laws into a national spotlight."). Among other things, the "Stand Your Ground" law eliminated the duty to retreat for any individual "who is attacked in any . . . place where he or she has a right to be . . ." FLA. STAT. § 776.013(3) (2011).

¹³ *New Video, Audio Released of Zimmerman's Account of Fatal Fight*, CBS MIAMI (June 21, 2012, 6:25 PM), <http://miami.cbslocal.com/2012/06/21/prosecutors-release-video-of-zimmermans-account-of-fatal-fight/>.

¹⁴ Casey McNerthey, *Seattle Police Arrest "Superhero" Phoenix Jones in Assault Investigation*, SEATTLEPI.COM (Oct. 10, 2011, 11:39 AM), <http://www.seattlepi.com/local/article/Seattle-police-arrest-superhero-Phoenix-Jones-2210657.php>.

¹⁵ Jessica Hopper & Neal Karlinsky, *Real-Life Superhero Gets Nose Broken*, ABC NEWS (Jan. 11, 2010), <http://abcnews.go.com/US/real-life-seattle-superhero-phoenix-jones-suffers-broken/story?id=12589895#.UFstJ0K0Lww>.

men who looked like they were about to fight.¹⁶ At that point, both men turned on Jones.¹⁷ According to Jones, one of the men had a gun and “start[ed] swinging on me and start[ed] an altercation with me.”¹⁸ Would the law of self-defense protect Jones if he fought back? Or had Jones provoked the incident by intentionally inserting himself into the middle of the altercation?

Controversial questions over the right to assert self-defense are pervasive in the criminal law. In Pennsylvania, Spencer Newcomer claimed self-defense after he stopped his car and shot a man who had been following him after an earlier argument.¹⁹ Newcomer claimed he thought the man was drawing a gun, but had he provoked the incident by stopping his car in the first place? In Massachusetts, Santano Dessin shot a man after an argument that prosecutors contended Dessin provoked so he could claim self-defense.²⁰ Does aggressively confronting another individual preclude a self-defense claim when the individual responds aggressively to that confrontation? In North Carolina, Roy Lowman’s wife shot a man who was beating her husband with a metal pipe.²¹ The police said it was a clear case of self-defense, but Lowman had initially confronted his attacker to stop him from hitting the Lowmans’ car with the pipe.²² Can Lowman claim self-defense after he inserted himself into a situation so obviously fraught with the possibility of violence?

This note will argue that courts should apply a reasonableness standard to questions of provocation in self-defense cases. By replacing the confusing and contradictory standards currently in place for determining provocation, a reasonableness standard will offer a more coherent analysis, which will enable jurors to reach just results that adequately and fairly distinguish between the vigilant and the vigilante.

Part I of this note will provide an overview of the various self-defense provocation exceptions in jurisdictions across the country, focusing on three broad frameworks: Any

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Rick Lee, *Judge: Spencer Newcomer Can Argue Self-Defense at Murder Trial*, YORK DAILY REC. (Nov. 23, 2012, 11:34 PM), http://www.ydr.com/crime/ci_22054704/judge-spencer-newcomer-can-argue-self-defense-at.

²⁰ Jarret Bencks, *Prosecutor: Somerville Shooting Set Up to Appear as Self-Defense*, BOSTON.COM (Nov. 16, 2012, 2:35 PM), http://www.boston.com/yourtown/news/somerville/2012/11/prosecutor_somerville_shooting.html.

²¹ Jessica Pickens, *Sheriff: Man Shot in Self Defense*, SHELBY STAR (Nov. 3, 2012), <http://www.shelbystar.com/news/sheriff-man-shot-in-self-defense-1.43252>.

²² *Id.*

Provocation, Straight Provocation, and Provocation with Intent. Part II will examine the particular circumstances surrounding the incidents involving George Zimmerman and Phoenix Jones and address how those circumstances and others would fare under the various frameworks discussed in Part I. Part III will propose a standard of reasonableness to apply in all cases where an actor claiming self-defense may have provoked the incident by intentionally inserting himself into a foreseeably dangerous situation. Part IV will apply the reasonableness standard to the cases of Zimmerman and Jones as a means of illustrating the benefits and clarity of such a standard.

I. THE PROVOCATION EXCEPTION TO SELF-DEFENSE CLAIMS

There is wide support in both statutory and common law for the proposition that individuals claiming self-defense cannot have brought the conflict on themselves.²³ In other words, the actor cannot have provoked the incident. What counts as provocation is significantly less clear. In common usage, provoke means to “incite to anger or resentment,” to “stir to action or feeling,” to “give rise; to bring about,” or to “bring about deliberately; induce.”²⁴ Black’s Law Dictionary defines provocation as follows: “1. The act of inciting another to do something, esp. to commit a crime. 2. Something (such as words or actions) that affects a person’s reason and self-control, esp. causing the person to commit a crime impulsively.”²⁵ Beyond the dictionary definitions, different jurisdictions frame the issue of provocation in different ways.

Provocation, as it is understood in the courts, exists on a spectrum ranging from “any causal contribution”²⁶ to provoking a fight with a person “with [the] intent to cause bodily injury to that person.”²⁷ Yet this variation seems to be largely unrecognized in the literature. Even general application treatises intended for multiple jurisdictions tend to offer only one definition of provocation, though that variation differs from

²³ MODEL PENAL CODE AND COMMENTARIES, § 3.04 cmt. 4(b) (Official Draft 1985).

²⁴ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1419 (5th ed. 2011). Interestingly, only the fourth definition requires any intentionality for provocation. This indicates that, at least in common usage, provocation does not have to be deliberate.

²⁵ BLACK’S LAW DICTIONARY 1346 (9th ed. 2009).

²⁶ Robinson, *supra* note 5, at 4.

²⁷ INDIANA PATTERN JURY INSTRUCTIONS, Criminal Instruction No. 10.03A (2013).

treatise to treatise and does not indicate that the standard may vary by jurisdiction.²⁸ While some sources recognize that provocation does not have a single definition across all jurisdictions,²⁹ they fail to lay out a comprehensive picture of the range of definitions available. This note rectifies that omission.

Generally, the ways that jurisdictions define provocation can be divided into three broad categories: Any Provocation, Straight Provocation, and Provocation with Intent. These different frames are not mutually exclusive, and behavior that falls within one frame may also fall within another. It might be helpful to think of these three frames as increasingly shrinking concentric circles within a Euler diagram. The Any Provocation frame, for instance, incorporates all of the behaviors addressed by subsequent frames. Each successive frame then addresses a correspondingly narrower spectrum of behavior. Each frame is discussed separately below.³⁰

A. *Any Provocation*

The first and most sweeping framing of the provocation question requires the actor to be essentially blameless in the instigation of a conflict before asserting a claim of self-defense. In perhaps the clearest statement of this definitional frame, the South Carolina pattern jury instructions call for a judge to charge a jury that “the defendant must be without fault in bringing on the difficulty” to claim self-defense.³¹ Washington, D.C. goes further. There, “One who deliberately puts himself/herself in a position where s/he has reason to believe that his/her presence will provoke trouble cannot claim self-defense.”³² In Washington, D.C., defendants claiming self-defense must show not only that they did not instigate the conflict, but also that they did not put themselves into a

²⁸ See, e.g., 2 SUBSTANTIVE CRIMINAL LAW § 10.4 (2d ed. 2012) (“One who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary . . .”); 22 C.J.S. CRIMINAL LAW § 60 (2013) (“A party invoking self-defense must be without fault with regard to causing the altercation.”). These two descriptions fit the Straight Provocation and Any Provocation frames, respectively. Each frame will be discussed in turn below.

²⁹ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 226 (5th ed. 2009).

³⁰ The descriptions of these frames will necessarily be limited to a broad overview rather than an in-depth examination of any one frame.

³¹ South Carolina Jury Instructions Criminal § 6-6. Similarly, Virginia only allows a defendant to claim self-defense where he or she was “without fault in provoking or bringing on” the altercation. 2-52 Virginia Model Jury Instructions, Criminal Instruction No. 52.500.

³² 1-IX Criminal Jury Instructions for DC, Instruction § 9.504(a).

position where they has reason to believe that another individual would instigate a conflict. As the D.C. Circuit Court has ruled, “before a person can avail himself of the plea of self-defense against the charge of homicide, he must do everything in his power, consistent with his safety, to avoid the danger and avoid the necessity of taking life.”³³ Under this frame, simply having reason to believe that a conflict will result from an action, even absent culpable behavior, is provocation.

The Any Provocation frame places a heavy burden on individuals seeking to claim self-defense. Such individuals must not do *anything* they know might lead to trouble, let alone take affirmative steps to provoke the incident. Thus, provocation can mean little more than being somewhere an individual has reason to believe is the wrong place at the wrong time.³⁴ While the language courts have employed has been described as an “overstatement,”³⁵ various courts’ application of the language indicates that it is still a remarkably broad standard.

In South Carolina, the courts have interpreted the provocation limitation to mean that “[a]ny act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars [the] right to assert self-defense”³⁶ In *State v. Slater*, the defendant, carrying a gun illegally, approached an ongoing robbery in a parking lot.³⁷ Slater testified that he approached the commotion and surprised one of the robbers, who turned on him with a gun.³⁸ Slater said that he then ran away and fired his gun behind him when he heard shots being fired at him.³⁹ Slater left the scene and the victim died of the shots Slater fired.⁴⁰ The Supreme Court of South Carolina held that the trial court properly denied Slater’s request for a jury instruction on self-defense because he was not without fault in “bringing on

³³ *Laney v. United States*, 294 F. 412, 414 (D.C. Cir. 1923). Though ninety years old, this proposition still stands as good law. *See, e.g.*, *Young v. Scales*, 873 A.2d 337, 343 (D.C. 2005); *Sams v. United States*, 721 A.2d 945, 953 (D.C. 1998) (“On several occasions we have refused to depart from the principles set forth in *Laney*.”).

³⁴ *See, e.g.*, *Howard v. United States*, 656 A.2d 1106, 1111 (D.C. 1995) (“We have repeatedly reaffirmed the principle that self-defense may not be claimed by one who deliberately places himself [or herself] in a position where he [or she] has reason to believe his or her presence . . . would provoke trouble.” (brackets in original) (quotation marks omitted)).

³⁵ *DRESSLER, supra* note 29, at 226.

³⁶ *State v. Bryant*, 520 S.E.2d 319, 322 (S.C. 1999).

³⁷ 644 S.E.2d 50, 51 (S.C. 2007).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 51-52.

the difficulty.”⁴¹ As the court explained, “In the instant case, the record clearly reflects that Slater approached an altercation that was already underway with a loaded weapon by his side. Such activity could be reasonably calculated to bring the difficulty that arose in this case.”⁴² In other words, the defendant could not intentionally insert himself into a situation where violence was reasonably likely to result and then claim that he acted in self-defense when violence did result. Tellingly, nothing in the court’s opinion would suggest a different result if Slater had approached the robbery with the intent of aiding the individual being robbed.⁴³ In this case, the court found that Slater had provoked the incident in question, even though he joined an altercation that had already turned violent before his arrival.

In *Scott v. Commonwealth*, the Supreme Court of Virginia held that a defendant could not claim self-defense, even where the victim struck the first blow, if the defendant’s actions brought on that blow.⁴⁴ In *Scott*, the defendant, upset that his friends had been arrested, confronted the town policeman’s son.⁴⁵ The defendant said that the policeman was a “G d s o a b” as well as a “bootlegger and a gambler.”⁴⁶ In response, the policeman’s son “struck [the defendant] with steel [knuckles] on the nose and [beat] him with the [knuckles] while they were fighting upon the ground” until the defendant stabbed and killed him.⁴⁷ The court held that even though the victim had initiated the physical altercation, the defendant still could not claim self-defense under Virginia law because the necessity for such a defense arose from the defendant’s own actions.⁴⁸ A defendant who provokes an incident, even verbally, is precluded from asserting a valid claim of self-defense under the Any Provocation frame.⁴⁹

⁴¹ *Id.* at 52.

⁴² *Id.*

⁴³ *See generally Slater*, 644 S.E.2d 50.

⁴⁴ *Scott v. Commonwealth*, 129 S.E. 360, 362 (Va. 1925). Though dated, *Scott* is still frequently cited in treatises on Virginia’s self-defense laws. *See, e.g.*, 40 C.J.S. HOMICIDE § 189 (2012); Craig D. Johnston, VIRGINIA PRACTICE TRIAL HANDBOOK § 4:13 (2012 ed.).

⁴⁵ *Scott*, 129 S.E. at 361.

⁴⁶ *Id.* These insults are quoted from the court’s opinion. Presumably, *Scott* used actual profanity rather than mere initialism while addressing the policeman’s son.

⁴⁷ *Id.* at 361-62.

⁴⁸ *Id.* at 362.

⁴⁹ *Id.*

B. *Straight Provocation*

Establishing a less-exacting standard than the Any Provocation frame, jurisdictions applying the Straight Provocation frame preclude the claim of self-defense where the defendant acted as the aggressor in the conflict. For instance, in federal courts, “[t]he law recognizes the right of a person *who is not the aggressor* to stand his ground and use force to defend himself or another.”⁵⁰ Similarly, in Florida, the defendant cannot claim self-defense if the jury finds that the defendant “initially provoked the use of force against [himself].”⁵¹ Arizona, Kansas, Maryland, Tennessee, and Texas have likewise adopted the Straight Provocation frame.⁵²

Notably, Straight Provocation includes a degree of culpability that is not necessary under the Any Provocation frame.⁵³ As the Arizona Supreme Court held:

Before an act may cause forfeiture of the fundamental right of self-defense it must be willingly and knowingly calculated to lead to conflict. . . . [One] who merely does an act which affords an opportunity for conflict is not thereby precluded from claiming self-defense.⁵⁴

Thus, under the Straight Provocation frame, the mere knowledge that one’s presence may provoke a conflict is not enough to preclude a claim of self-defense.⁵⁵ Instead, an individual’s presence only counts as provocation if it is

⁵⁰ 1-8 MODERN FED. JURY INSTRUCTIONS—CRIMINAL § 8.08 (emphasis added).

⁵¹ FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.6(f), *available at* http://www.floridasupremecourt.org/jury_instructions/instructions.shtml.

⁵² *See* REVISED ARIZ. JURY INSTRUCTIONS (CRIMINAL) 3d § 4.04, *available at* http://www.azbar.org/media/292098/2011_cumulative_supplement.pdf (“The threat or use of physical force is not justified . . . [i]f the defendant provoked the other’s use of unlawful force”); PATTERN INSTRUCTIONS FOR KANSAS CIV. 4TH § 52.250 (“A person who initially provokes the use of force against [himself] is not permitted to use force to defend [himself]”); MD. PATTERN JURY INSTRUCTIONS—CRIMINAL § 5:07 (“You have heard evidence that the defendant acted in self-defense. Self-defense is a complete defense and you are required to find the defendant not guilty if . . . the defendant was not the aggressor”); TENN. PATTERN INSTRUCTIONS CRIMINAL § 40.06, *available at* http://www.tncrimlaw.com/TPI_Crim/40_06.htm (“The [threat] [use] of force against another is not justified if the defendant provoked the [deceased’s] [alleged victim’s] [use] [attempted use] of unlawful force” (brackets in original)); TEX. CRIMINAL PATTERN JURY CHARGES—DEFENSES § B15.3 (“Therefore, in deciding whether the state has proved that the defendant did not reasonably believe his use of deadly force was necessary, you must not consider any failure of the defendant to retreat that might be shown by the evidence if you find both—(1) the defendant did not provoke . . . the person against whom the defendant used deadly force; and (2) the defendant was not engaged in criminal activity at the time he used the deadly force.”).

⁵³ *See* Robinson, *supra* note 5, at 6.

⁵⁴ State v. Jackson, 382 P.2d 229, 232 (Ariz. 1963).

⁵⁵ *See id.*

“deliberately calculated to lead to further conflict.”⁵⁶ This is the difference between reasonable belief and intention. Under this frame, individuals must *intend* to provoke a conflict before they are precluded from claiming self-defense.⁵⁷ Merely having reason to believe that their actions will provoke conflict is not enough.

The Texas case, *La Farn v. State*,⁵⁸ provides a clear example of the application of the Straight Provocation frame. In *La Farn*, the defendant and the victim engaged in an altercation at a dance hall.⁵⁹ The defendant followed the victim outside and shot at him.⁶⁰ The court held that firing the first shot “forfeited [the] appellant’s right of self defense, and it [was] of no moment as to whether the deceased was armed or not at the time he was finally killed by the appellant’s third bullet.”⁶¹ Even when the victim fired back, the defendant could not claim self-defense because he had provoked the incident by firing the first shot.⁶² This case illustrates the Straight Provocation frame because the defendant here initially acted to instigate the conflict. Even if, by the end of the encounter, the defendant shot to save his own life, he started the gunfight. Given this, the court held that the defendant had provoked the incident and could not then claim to act in self-defense.

In *Marquardt v. State*, the Maryland Court of Special Appeals applied the Straight Provocation frame to a defendant’s attempt to claim self-defense for an assault charge. In that case, the defendant broke into the victim’s home searching for his wife, who was pregnant and who the defendant believed was smoking crack.⁶³ The defendant had armed himself with a baseball bat before entering the home because he believed “his wife may have been in the company of violent individuals.”⁶⁴ Upon the defendant breaking into the victim’s apartment, the victim started running toward the defendant with something in his hand.⁶⁵ The defendant, not

⁵⁶ *Id.*

⁵⁷ The intent element under this frame should not be confused with the Provocation with Intent frame, discussed below. Under Straight Provocation, the required intention is merely to create conflict. Provocation with Intent requires a greater showing. *See infra*, Part I.C.

⁵⁸ *La Farn v. State*, 265 S.W.2d 816 (Tex. Crim. App. 1954).

⁵⁹ *Id.* at 817.

⁶⁰ *Id.*

⁶¹ *Id.* at 819.

⁶² *Id.*

⁶³ *Marquardt v. State*, 882 A.2d 900, 909-10 (Md. Ct. Spec. App. 2005).

⁶⁴ *Id.* at 927.

⁶⁵ *Id.* at 910.

wanting to “take a chance,” hit the victim in the head with the bat.⁶⁶ The court

acknowledge[d] that the privilege of self-defense is not necessarily forfeited by arming one’s self in anticipation of an attack, but that right is qualified by the proviso that the right only extends to one who was not in any sense seeking an encounter. Here, appellant provoked the encounter by breaking and entering into [the victim’s] apartment. The circuit court did not err in refusing to instruct the jury on self-defense.⁶⁷

Although the prospect of an armed, charging individual seems to present a classic case in which self-defense can be employed, the defendant forfeited any claim to self-defense by breaking into the victim’s apartment. At that point, the defendant had provoked the victim’s response and could not subsequently claim self-defense. It is significant, however, that the mere act of “arming one’s self in anticipation of an attack”⁶⁸ does not give rise to provocation under the Straight Provocation frame. Arguably, preparation for conflict could preclude a claim of self-defense under the Any Provocation frame because doing so would indicate that the person had “reason to believe that his/her presence will provoke trouble.”⁶⁹ Yet that belief is not enough under the Straight Provocation frame. Under Straight Provocation, the defendant must have exhibited actual misconduct by intending to provoke a conflict.⁷⁰

C. *Provocation with Intent*

The narrowest frame for precluding an individual from claiming self-defense on provocation grounds is Provocation with Intent. Unlike the Straight Provocation frame, where the intent to provoke any confrontation eliminates the right to claim self-defense,⁷¹ the defendant must intend to provoke the victim for the purpose of doing serious harm under the Provocation with Intent frame. The Delaware pattern jury instructions articulate this frame by charging that a defendant cannot assert self-defense where “the defendant, with the purpose of causing death or serious physical injury, provoked

⁶⁶ *Id.*

⁶⁷ *Id.* at 927 (internal citations and quotations omitted).

⁶⁸ *Id.*

⁶⁹ 1-IX CRIMINAL JURY INSTRUCTIONS FOR DC INSTRUCTION § 9.504(a).

⁷⁰ See *State v. Jackson*, 382 P.2d 229, 232 (Ariz. 1963).

⁷¹ *Id.*

the use of force in the same encounter.”⁷² In Pennsylvania, to preclude the right to self-defense because the defendant provoked the conflict, the prosecution must prove beyond a reasonable doubt that the defendant provoked the incident with the “conscious object to cause death or serious bodily injury.”⁷³ Pennsylvania juries are further charged that “[c]onduct that is not of such a nature does not constitute the kind of provocation upon which the Commonwealth may rely to prove its case.”⁷⁴ Thus, only defendants who act with the intent of provoking a conflict meant to cause serious harm to the victim are precluded from asserting self-defense in Pennsylvania. These instructions are typical of jurisdictions that apply the Provocation with Intent frame, including Alaska, Hawaii, Kansas, and Kentucky.⁷⁵

The Delaware case, *White v. State*,⁷⁶ illustrates the Provocation with Intent frame. In that case, the defendant fired his gun at the victim after the victim had robbed the defendant’s friend earlier in the day.⁷⁷ It did not matter for self-defense purposes if the victim later returned fire, because the defendant had acted “with the purpose of causing death or serious physical injury” in the same encounter.⁷⁸ Firing a gun at

⁷² DEL. PATTERN JURY INSTRUCTIONS CRIMINAL § 5.14, *available at* http://courts.delaware.gov/superior/pattern/pattern_criminal_jury_rev_2012.pdf.

⁷³ PA. SUGGESTED STANDARD JURY INSTRUCTIONS (CRIMINAL) § 9.501.

⁷⁴ *Id.*

⁷⁵ See ALASKA STAT. ANN. § 11.81.330 (2006) (“A person is justified in using nondeadly force upon another when and to the extent the person reasonably believes it is necessary for self-defense against what the person reasonably believes to be the use of unlawful force by the other person, unless . . . the person claiming self-defense provoked the other’s conduct with intent to cause physical injury to the other”); HAW. CRIMINAL JURY INSTRUCTION 7.01 (“The use of deadly force is not justifiable if the defendant, with the intent of causing death or serious bodily injury, provoked the use of force against himself/herself in the same encounter, or if the defendant knows that he/she can avoid the necessity of using such force with complete safety by retreating.”); PATTERN INSTRUCTIONS FOR KAN. CRIMINAL 4TH § 52.240 (“A person is not permitted to provoke an attack on [himself] with the specific intention to use such attack as a justification for inflicting bodily harm upon the person [he] provoked and then claim self-defense as a justification for inflicting bodily harm upon the person [he] provoked.”); 1-11 KY. JURY INSTRUCTIONS § 11.12 (“Provided, however, that if you believe from the evidence beyond a reasonable doubt that the Defendant provoked [the victim] to use or attempt to use physical force upon him, and that he did so with the intention of causing death or serious physical injury to [the victim], then the defense of self-protection is not available to him”).

⁷⁶ *White v. State*, 957 A.2d 2 (Del. 2008).

⁷⁷ *Id.*

⁷⁸ *Id.*

another person clearly falls within the range of behavior intended to cause death or serious injury.⁷⁹

The Pennsylvania Supreme Court in *Commonwealth v. Samuel*⁸⁰ offers another telling application of the Provocation with Intent frame. In this case, the limits of the frame are highlighted by the court's ruling on what falls outside those limits. In *Samuel*, the court held that even behavior that is provocative within the ordinary use of the word does not forfeit a defendant's right to claim self-defense so long as the defendant did not provoke the incident "with the intent to cause death or serious bodily injury."⁸¹ In *Samuel*, the defendant, in an effort to encourage the victim to leave an apartment, brought a gun into the room where they were sitting and placed it on the table.⁸² While acknowledging that the display of the gun "could be seen as provocative,"⁸³ the court held that it did not constitute provocation for self-defense purposes because there was "no suggestion that the [defendant] had pointed the gun at the victim, that he had physically assaulted the victim, that he had threatened the victim, or that he had any physical contact with the victim."⁸⁴ Put differently, the defendant had not manifested any "intent to cause death or serious bodily injury."⁸⁵ The defendant, therefore, could still claim self-defense when he shot the victim after the victim had left the room and returned with a sawed-off shotgun.⁸⁶ The *Samuel* case underscores a key feature of the Provocation with Intent frame—namely, that the court looks not only for provocation, but for a specific kind of provocation. This marks the crucial difference between the Straight Provocation and Provocation with Intent frames. Absent the particular intent to do serious harm to the victim, even behavior that would generally be considered provocative does not preclude a defendant from

⁷⁹ The similarities in the facts of this case and *La Farn v. State*, discussed above, illustrate the non-exclusivity of the different frames. Here, behavior that falls within the Provocation with Intent frame also falls within the Straight Provocation frame, though the inverse is not necessarily true.

⁸⁰ *Commonwealth v. Samuel*, 590 A.2d 1245 (Pa. 1991).

⁸¹ *Id.* at 1248.

⁸² *Id.*

⁸³ *Id.* at 1249.

⁸⁴ *Id.* at 1248.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1249. This holding was further bolstered by the victim's decision to leave the room and return with a gun, which the court wrote shifted the balance between the parties and placed the victim "in the position of being the aggressor." *Id.*

asserting a viable claim of self-defense under Provocation with Intent.

The narrowness of the Provocation with Intent frame is particularly clear when compared directly with the broader frames adopted in other jurisdictions. In an Any Provocation jurisdiction, merely being in a place where the individual has reason to think a punch will be thrown is enough to constitute provocation.⁸⁷ In a Straight Provocation jurisdiction, the thrower of the first punch cannot claim self-defense after the second person hits back.⁸⁸ In a Provocation with Intent jurisdiction, it is not even necessarily provocation within the meaning of the law to throw the first punch.⁸⁹ Rather, the individual who throws that punch must have had the “conscious object” of instigating an altercation intended to cause the victim’s death or serious bodily injury.⁹⁰ Only in that exceptionally limited circumstance has the defendant “provoked” the subsequent response and forfeited his right to claim self-defense.

II. FRAMES OF PROVOCATION IN PRACTICE

Having laid out a basic framework for how provocation is defined across different jurisdictions, it will be instructive to examine how those frames apply to fact patterns drawn from current events. This application will illuminate the relative strengths and weaknesses of each frame and highlight the need for a new approach to the question of provocation.

A. Case Studies—Underlying Facts

1. George Zimmerman

George Zimmerman’s shooting of Trayvon Martin “sparked a national debate about race and violence in American society.”⁹¹ Yet the facts remain clouded in controversy. Zimmerman said that he acted only to defend himself against an attack, while his critics claimed that he followed Martin and fired the fatal shots because of Martin’s race.⁹² These two

⁸⁷ See, e.g., *Howard v. United States*, 656 A.2d 1106, 1111 (D.C. 1995).

⁸⁸ See, e.g., FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.6(f).

⁸⁹ See, e.g., PA. SUGGESTED STANDARD JURY INSTRUCTIONS (CRIM.) § 9.501.

⁹⁰ *Id.*

⁹¹ Jonsson, *supra* note 9.

⁹² In reality, this dichotomy may be a false one. See generally L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293 (2012). Professors Richardson and Goff posit a “suspicion heuristic” to explain

interpretations of events can be designated the “Z narrative” (the account that Zimmerman gives) and the “M narrative” (the account of Zimmerman’s critics).⁹³ Ultimately, it is well beyond the scope of this note to determine which narrative most accurately describes that night’s events.⁹⁴ For illustrative purposes, however, this note will assume that the “Z narrative” is true and take the statements George Zimmerman made as an accurate account of that evening’s events. This assumption, which should not be read to imply that the author knows or believes this version of events to be true, is based on the fact that Zimmerman’s narrative most effectively highlights the central issue of this note: whether individuals can intentionally insert themselves into situations where violence is a reasonably foreseeable outcome and still maintain a claim of self-defense.

Zimmerman acted as a member of his community’s neighborhood watch group.⁹⁵ He lived in the Retreat at Twin Lakes, a gated community in Sanford, Florida.⁹⁶ According to Zimmerman’s conversation with a 911 operator on the night of the incident, there had been some break-ins in the

“how normal psychological processes that operate below the level of conscious awareness can lead to systematic errors in judgments of criminality.” *Id.* at 295. As they explain, “[w]hen the person being judged fits a criminal stereotype, the suspicion heuristic can cause the actor more easily to believe honestly—but mistakenly—that the person poses a threat and that deadly force is necessary and appropriate to repel it.” *Id.* at 314-15. Thus, stereotypes regarding Martin’s race, age, and attire “could have affected [Zimmerman’s] judgment that Martin posed a threat” even if Zimmerman did not harbor overtly racist beliefs. *Id.* at 317.

⁹³ David Kopel, *Florida’s Self Defense Laws, THE VOLOKH CONSPIRACY* (Mar. 27, 2012, 11:59 PM), <http://www.volokh.com/2012/03/27/floridas-self-defense-laws/>. Kopel notes in his post that the debate over Florida’s “Stand Your Ground” is ultimately misguided as it does not come into play in either narrative. In the “Z narrative” Zimmerman did not have the opportunity to retreat in complete safety, rendering whether he could stand his ground moot. Under the “M narrative” Zimmerman committed criminal homicide and wouldn’t be able to claim self-defense anyway. In neither narrative is the actual “Stand Your Ground” law implicated. *Id.*

⁹⁴ *Id.* Given that a jury ultimately acquitted Zimmerman of second-degree murder and manslaughter, there is some basis to conclude that his version of events is at least plausible, regardless of whether it is true in every respect. See Lizette Alvarez & Cara Buckley, *Zimmerman is Acquitted in Killing of Trayvon Martin*, N.Y. TIMES (July 14, 2013), <http://www.nytimes.com/2013/07/15/us/george-zimmerman-verdict-trayvon-martin.html> (“In finding him not guilty of murder or manslaughter, the jury agreed that Mr. Zimmerman could have been justified in shooting Mr. Martin because he feared great bodily harm or death.”).

⁹⁵ Campbell Robertson & John Schwartz, *Shooting Focuses Attention on a Program That Seeks to Avoid Guns*, N.Y. TIMES (Mar. 22, 2012), <http://www.nytimes.com/2012/03/23/us/trayvon-martin-death-spotlights-neighborhood-watch-groups.html>.

⁹⁶ Prieto, *supra* note 8.

neighborhood recently.⁹⁷ Zimmerman called the police on the evening of February 26, 2012, because he said he saw a suspicious-looking teenager while driving to the grocery store.⁹⁸ He told the 911 operator that he saw a “guy [who] looks like he’s up to no good, or he’s on drugs or something. It’s raining and he’s just walking around, looking about.”⁹⁹ While giving the operator directions to his location, Zimmerman saw the “suspicious guy” start running.¹⁰⁰ Zimmerman exited his car and followed, until being told by the operator that “we don’t need you to do that.”¹⁰¹ Zimmerman said that as he returned to his car, Martin jumped out from the bushes and said, “[W]hat the f**k is your problem homie?”¹⁰² Zimmerman said that Martin then punched him in the face, causing him to fall to the ground.¹⁰³ Zimmerman described how the attack continued:

He was wailing on my head. When I started yelling for help, he grabbed my head and started hitting my head. I tried to sit up and yell for help and he grabbed my head and started hitting it into the sidewalk. When he started doing that I slid into the grass so he’d stop hitting my head and I was still yelling for help. And I could see people looking and some guy yells out “I’m calling 911” and I said “help me, help me, he’s killing me.”¹⁰⁴

Zimmerman said that Martin covered his nose and mouth and told him, “You’re going to die tonight.”¹⁰⁵ Zimmerman carried a gun that evening and said he thought Martin was reaching for it.¹⁰⁶ Before Martin could reach the gun, Zimmerman pulled it out and shot Martin.¹⁰⁷

Martin died from the wound.¹⁰⁸ Zimmerman later said of Martin, “I did not want to confront him.”¹⁰⁹ On July 13, 2013, a jury of six women acquitted Zimmerman of the second-degree murder and manslaughter charges that had been brought against him.¹¹⁰

⁹⁷ *Transcript of George Zimmerman’s Call to the Police*, MOTHER JONES, available at <http://www.motherjones.com/documents/326700-full-transcript-zimmerman> (last visited May 21, 2013) [hereinafter *Zimmerman Transcript*].

⁹⁸ *New Video*, *supra* note 13.

⁹⁹ *Zimmerman Transcript*, *supra* note 97.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *New Video*, *supra* note 13.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Alvarez & Williams, *supra* note 6.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See id.*

¹⁰⁹ *Id.*

¹¹⁰ Alvarez & Buckley, *supra* note 94.

2. Phoenix Jones

Phoenix Jones is the alter ego of Benjamin Fodor, a “self-style[d] superhero” in Seattle.¹¹¹ Jones wears a superhero costume and patrols the city streets seeking to stop crime.¹¹² As Jones describes himself, “I am just like everybody else. The only difference is that I try to stop crime in my neighborhood and everywhere else.”¹¹³

Jones does not stop crime by himself. He is a member of the “Rain City Superhero Movement.”¹¹⁴ At least eight other “superheroes” are also members of the group.¹¹⁵ Jones says that everyone on his team has either a military or mixed martial arts background.¹¹⁶ In addition, the Rain City Superheroes carry “[t]asers, nightsticks, [and] pepper spray, but no firearms.”¹¹⁷ Jones also carries a net gun and a grappling hook.¹¹⁸ Freelance filmmaker and photographer Ryan McNamee frequently patrols along with the group and records their actions.¹¹⁹

Numerous videos of Jones in action are available online.¹²⁰ In one video, Jones runs toward a group of people he believes to be fighting on a street.¹²¹ Jones scatters the group, yelling, “Break it up!”¹²² Shortly thereafter, some of the women in the group turn on Jones, and he has to avoid being hit by them.¹²³ In another video, Jones and other Rain City Superheroes are “on patrol” when they witness a fight outside a

¹¹¹ Jonathan Martin, *Phoenix Jones Appears in Court; Vows to Keep Fighting Crime*, SEATTLE TIMES (Oct. 13, 2011, 9:19 AM), http://seattletimes.com/html/theblotter/2016492053_phoenix_jones_appears_in_court.html.

¹¹² Hopper & Karlinsky, *supra* note 15.

¹¹³ Martin, *supra* note 111.

¹¹⁴ Casey McNerthney, *Police Alerted to “Superheroes” Patrolling Seattle*, SEATTLEPI.COM (Nov. 18, 2010, 10:00 PM), <http://www.seattlepi.com/local/article/Police-alerted-to-superheroes-patrolling-Seattle-821425.php>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Hopper & Karlinsky, *supra* note 15.

¹¹⁹ Ryan McNamee, *About Me*, RYAN MCNAMEE PRODUCTIONS, <http://mcnamee.weebly.com/about.html>. Jones’s self-promotion has sometimes led to conflict with other members of the Real Life Superhero community. *See, e.g., Phoenix Jones Sells Snake Oil, Calls It a Supersuit*, URBAN AVENGER (July 9, 2012, 1:13 AM), <http://urbanavenger.reallifesuperheroes.org/2012/07/09/phoenix-jones-sells-snake-oil-calls-it-a-supersuit/> (“The point is to make himself look good. [T]hat’s ALL that matters to him.”).

¹²⁰ *See, e.g., Phoenix Jones: First Fight of the New Year*, YOUTUBE (Mar. 24, 2012), <http://www.youtube.com/watch?v=QFmkyCmyMec>; *Phoenix Jones Stops Assault*, VIMEO, <http://vimeo.com/30307440>; *Phoenix Jones: Getting Punched in Belltown*, YOUTUBE (Mar. 24, 2012), <http://www.youtube.com/watch?v=TqFfHDSJ25s>.

¹²¹ *Phoenix Jones Stops Assault*, *supra* note 120.

¹²² *Id.*

¹²³ *Id.*

bar and pursue the various attackers to help identify them for the police.¹²⁴ In a third video, Jones and a sidekick insert themselves into the middle of an altercation in which one man is aggressively yelling at and striking another man outside a bar.¹²⁵ But then the aggressor changes his focus and begins punching and pushing Jones and his colleague.¹²⁶ In all three of these incidents, Jones or one of his cohorts calls 911 to request a police presence at the scene. Jones is not depicted in any of the videos initiating physical contact with the individuals.

Jones's troubles continued in another incident in which he claimed to be breaking up a fight. Despite his altruistic motive, police arrested him after members of the group claimed that a man in a "Spider-Man costume" attacked them with pepper spray.¹²⁷ Police said that the group was "dancing and having a good time" before Jones arrived, while Jones maintained that he broke up a violent encounter.¹²⁸

The arrest highlights the complicated relationship between Jones and the Seattle Police Department. On the one hand, several of the online videos show Jones cooperating with the police.¹²⁹ On the other hand, law enforcement officials profess skepticism toward Jones's involvement.¹³⁰ Seattle City Attorney Peter Holmes described Jones as "no hero, just a deeply misguided individual."¹³¹ Officers have noted several instances in which individuals have accused Jones of pepper spraying them during "some type of disturbance."¹³²

Prosecutors ultimately decided not to pursue charges against Jones after arresting him.¹³³ According to City Attorney Holmes, the city prosecutors did not think they could prove

¹²⁴ *Phoenix Jones: First Fight of the New Year*, *supra* note 120. This activity, with the notable difference that Jones and his colleague were wearing superhero outfits, is essentially the same activity that George Zimmerman claims he engaged in on the night he shot Trayvon Martin. *See Alvarez & Williams, supra* note 6. In both instances, the men claimed that they were helping follow individuals they believed were engaged in criminality to help the police locate and apprehend them. *See id.*

¹²⁵ *Phoenix Jones: Getting Punched in Belltown*, *supra* note 120.

¹²⁶ *Id.*

¹²⁷ McNerthney, *supra* note 14.

¹²⁸ *Id.*

¹²⁹ *See, e.g., Phoenix Jones: Getting Punched in Belltown, supra* note 120; *Phoenix Jones: First Fight of the New Year, supra* note 120.

¹³⁰ Jenny Kuglin, *Phoenix Jones: Real Life Superhero*, KOMO NEWS (Nov. 19, 2010), <http://capitolhill.komonews.com/content/phoenix-jones-real-life-superhero>.

¹³¹ Martha Kang, *No Charges Against Seattle's Self-Appointed Superhero*, KOMO NEWS (Nov. 24, 2011), <http://downtownseattle.komonews.com/news/people/693190-no-charges-against-seattles-self-appointed-superhero>.

¹³² McNerthney, *supra* note 14.

¹³³ Kang, *supra* note 131.

beyond a reasonable doubt that Jones intentionally pepper sprayed the entire group, particularly because in the State of Washington “a person is allowed to use force when he or she is coming to the aid of another person believed to be in danger.”¹³⁴ But Holmes drew a sharp distinction between the individuals the law is meant to protect and Jones. As he phrased it: “Our state’s good Samaritan statutes are designed to protect individuals who happen upon—rather than actively seek out—opportunities to render assistance to others, without expectation of compensation. These laws are not designed to protect a branded, costumed character, his roving video crew, or their copyrighted videos”¹³⁵

Seattle is not alone in its superhero presence. Real life “superheroes” have arisen in cities across the country, including Washington, D.C., Boston, San Francisco, Milwaukee, and Minneapolis.¹³⁶ As described in the *New York Times*:

In a niche of urban life that has evolved in recent years somewhere between comic-book fantasy and the Boy Scout oath, a cadre of self-cast crusaders—some with capes, some without, all with something to prove—are on the march.

. . . Whether they are making the world safer or just weirder remains an open question.¹³⁷

Whether these “superheroes”—and Jones in particular—have the right to claim self-defense is also an open question.

3. Additional Cases

Difficult questions regarding provocation are not limited to dramatic cases like Zimmerman and Jones. Thus, it is also worth considering how those questions are addressed in other, less high-profile circumstances.

In Pennsylvania, police charged Spencer Newcomer with murder for shooting and killing David Wintermyer after

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Mark Memmott, *DC’s Guardian and Phoenix Jones: Real Life Superheroes Open Up—A Bit*, NPR (Mar. 14, 2011, 3:30 PM), <http://www.npr.org/blogs/thetwo-way/2011/03/14/134539750/dcs-guardian-and-phoenix-jones-real-life-super-heroes-open-up-a-bit>; Kirk Johnson, *Crusaders Take Page, and Outfits, from Comics*, N.Y. TIMES, Dec. 26, 2011, at A1, available at <http://www.nytimes.com/2011/12/26/us/crusaders-take-page-and-outfits-from-comics.html>.

¹³⁷ Johnson, *supra* note 136.

the two men argued outside their neighboring homes.¹³⁸ Newcomer got in his car to drive away from the altercation, but he stopped and approached Wintermyer after he saw Wintermyer following him.¹³⁹ Newcomer claimed he acted in self-defense when he shot Wintermyer because he thought he saw Wintermyer pulling a weapon out of his pocket.¹⁴⁰ But the prosecution “contended Newcomer provoked the incident by stopping instead of driving away.”¹⁴¹ Further, the prosecution contended that Wintermyer never reached for his pocket at all and that Newcomer planned to confront Wintermyer that morning.¹⁴²

In Massachusetts, Santano Dessin shot a man after an argument that prosecutors contended Dessin provoked so that he could claim self-defense.¹⁴³ The prosecutor said that Dessin armed himself with a handgun, a knife, and pepper spray before aggressively confronting the other man.¹⁴⁴ When the victim apparently responded in kind, Dessin shot him.¹⁴⁵

In North Carolina, Roy Lowman left his home to confront a man who was smashing his car with a metal pipe.¹⁴⁶ The man knew Lowman and his wife and had been a guest in their home on the day of the incident, but after he left, he started hitting the Lowmans’ car.¹⁴⁷ When the man turned on Lowman, Lowman’s wife shot him three times.¹⁴⁸ The local sheriff said that the shots were fired in self-defense.¹⁴⁹

¹³⁸ Rick Lee, *Judge: Spencer Newcomer Can Argue Self-Defense at Murder Trial*, YORK DAILY REC. (Nov. 23, 2012), http://www.ydr.com/crime/ci_22054704/judge-spencer-newcomer-can-argue-self-defense-at.

¹³⁹ *Id.*

¹⁴⁰ *Id.* The object turned out to be a cell phone. *Id.*

¹⁴¹ *Id.*

¹⁴² Rick Lee, *Springettsbury Homicide: Witness Testifies about the Murder of David Wintermyer*, YORK DAILY REC. (Mar. 12, 2013), http://www.ydr.com/local/ci_22766465/eyewitness-springettsbury-township-murder-testifies-court.

¹⁴³ Jarret Bencks, *Prosecutor: Somerville Shooting Set Up to Appear as Self-Defense*, BOSTON.COM (Nov. 16, 2012), http://www.boston.com/yourtown/news/somerville/2012/11/prosecutor_somerville_shooting.html.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Jessica Pickens, *Sheriff: Man Shot in Self Defense*, SHELBY STAR (Nov. 3, 2012, 7:20 PM), <http://www.shelbystar.com/news/sheriff-man-shot-in-self-defense-1.43252>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* Technically, this case would fall into defense of another, rather than self-defense because Mrs. Lowman shot to defend her husband rather than herself. The distinction is relatively meaningless, however, given that the two doctrines are treated essentially identically. See, e.g., 22 C.J.S. CRIMINAL LAW § 60 (2013) (“A person is justified in the use of force against an aggressor to the extent it appears and one reasonably believes that this conduct is necessary to defend *oneself or another* against the aggressor’s imminent use of unlawful force.”) (emphasis added).

B. *Case Studies—Application of Frames*

1. Zimmerman and Jones

a. *Any Provocation Application*

Neither George Zimmerman nor Phoenix Jones would likely be able to assert self-defense in a jurisdiction applying the Any Provocation frame of provocation. The jury instruction in Washington, D.C., for example, that “[o]ne who deliberately puts himself/herself in a position where s/he has reason to believe that his/her presence will provoke trouble cannot claim self-defense”¹⁵⁰ is applicable to both individuals. They intentionally inserted themselves into situations where their presence could reasonably have provoked some sort of trouble, barring a claim to self-defense.

An altercation is a reasonably foreseeable result of following a suspicious individual around a neighborhood late at night. Certainly, Zimmerman did not do everything in his power “to avoid the danger,”¹⁵¹ even crediting his version of that night’s events. Avoiding the danger would have required him to avoid even the possibility of an encounter with Martin, assuming that Martin was, in fact, a suspicious individual. Zimmerman’s failure to take reasonable precautions is inconsistent with an individual who is not “even slightly at fault in creating the difficulty.”¹⁵² Zimmerman’s behavior falls short of the requirements for claiming self-defense under the Any Provocation frame.

In Jones’s case, his disregard of the potential for conflict is particularly stark. The reasonable possibility of violence inherent in Jones’s encounters has been repeatedly demonstrated.¹⁵³ Yet, rather than do “everything in his power . . . to avoid the danger,”¹⁵⁴ Jones continues to thrust himself directly into dangerous situations. In doing so, Jones forfeits his right to claim he acted in self-defense under the Any Provocation frame.

¹⁵⁰ 1-IX CRIMINAL JURY INSTRUCTIONS FOR DC INSTRUCTION § 9.504(a).

¹⁵¹ *Laney v. United States*, 294 F. 412, 414 (D.C. Cir. 1923).

¹⁵² *Smith v. Commonwealth*, 435 S.E.2d 414, 416 (Va. Ct. App. 1993) (citations and internal quotation marks omitted).

¹⁵³ See, e.g., Hopper & Karlinsky, *supra* note 15; *Phoenix Jones: Getting Punched in Belltown*, *supra* note 120.

¹⁵⁴ *Laney*, 294 F. at 414.

A comparison to *State v. Slater*¹⁵⁵ is particularly instructive for both individuals. Similar to the defendant in *Slater*, both Zimmerman and Jones approached individuals they believed to be engaged in illegality.¹⁵⁶ Indeed, Jones seeks such encounters.¹⁵⁷ Just as the court in *Slater* found that the defendant's behavior in approaching a criminal activity was "reasonably calculated to produce the occasion"¹⁵⁸ in which violence occurred, so too would a court likely find in the cases of Zimmerman and Jones. As such, both would be barred from asserting self-defense under the Any Provocation frame.

b. Straight Provocation Application

Zimmerman and Jones would likely find more favor in a jurisdiction applying Straight Provocation. Under this frame, an act "must be willingly and knowingly calculated to lead to conflict" before the actor forfeits the right to claim self-defense.¹⁵⁹ Mere lack of judgment, absent actual misconduct, is not enough.¹⁶⁰ If a jury believed Zimmerman's account of the events of that night, he would almost certainly be able to claim self-defense. Jones, on the other hand, would require a case-by-case inquiry, though he would not be categorically barred from asserting self-defense.

Assuming his version of events to be true, Zimmerman would likely succeed in being able to assert a self-defense claim under the Straight Provocation frame. It does not matter how apparent it may seem in retrospect that following an allegedly suspicious character through a neighborhood late at night may lead to a violent confrontation. So long as Zimmerman did not act with the purpose of bringing about the conflict, he would not lose his right to claim self-defense. In fact, in Zimmerman's recounting of the events that night, Martin is the one who threw the first punch and initiated the verbal and physical altercation.¹⁶¹ Because Zimmerman did not intentionally bring on this confrontation, nor initiate the violence in the encounter, he did not forfeit his right to assert a self-defense claim in a jurisdiction applying the Straight Provocation frame.

¹⁵⁵ *State v. Slater*, 644 S.E.2d 50 (S.C. 2007). *See supra* note 37-43 and accompanying text.

¹⁵⁶ *See Robertson & Schwartz, supra* note 95; *supra* note 120.

¹⁵⁷ *See supra* note 114.

¹⁵⁸ *Slater*, 644 S.E.2d at 52 (quoting *State v. Bryant*, 520 S.E.2d 319, 322 (S.C. 1999)).

¹⁵⁹ *State v. Jackson*, 382 P.2d 229, 232 (Ariz. 1963).

¹⁶⁰ *Id.*

¹⁶¹ *New Video, supra* note 13.

Jones is not categorically precluded from claiming self-defense under the Straight Provocation frame. Jones certainly runs afoul of the admonition from the Maryland Court of Special Appeals that the right to claim self-defense “only extends to one who was not in any sense seeking an encounter.”¹⁶² Yet, while Jones does appear to seek out encounters, that does not necessarily mean that he engaged in misconduct, as required under this frame.¹⁶³ The key inquiry for a court is whether Jones acted as the aggressor in a given encounter.¹⁶⁴ A jury would have to make these factual determinations on a case-by-case basis. Thus, Jones would have the right to claim self-defense where he interposes himself between individuals who were already fighting when one or both of those individuals turn their aggression on him.¹⁶⁵ He would not, however, have the right to claim self-defense where he is the aggressor.¹⁶⁶

c. Provocation with Intent

In jurisdictions applying the Provocation with Intent frame, it is almost certain that courts would allow both Zimmerman and Jones to assert self-defense. There is simply nothing that could be gleaned from either of their actions to indicate that they acted “with the purpose of causing death or serious physical injury”¹⁶⁷ by engaging in provocative behavior.

A telling comparison is reached by looking at the Pennsylvania case *Commonwealth v. Samuel*.¹⁶⁸ There, the defendant engaged in provocative activity by placing a loaded weapon on the table as a strong inducement for the victim to leave the apartment.¹⁶⁹ Despite being provocative, the defendant did not lose his right to claim he acted in self-defense because the action did not manifest the intent to cause

¹⁶² *Marquardt v. State*, 882 A.2d 900, 927 (Md. Ct. Spec. App. 2005).

¹⁶³ *Jackson*, 382 P.2d at 232. The misconduct in *Marquardt* arose from the defendant illegally breaking into the victim's home. *Marquardt*, 882 A.2d at 909-10.

¹⁶⁴ See 1-8 MODERN FED. JURY INSTRUCTIONS – CRIMINAL § 8.08.

¹⁶⁵ See, e.g., Hopper & Karlinsky, *supra* note 15; *Phoenix Jones: Getting Punched in Belltown*, *supra* note 120.

¹⁶⁶ See McNerthney, *supra* note 14; see also *supra* note 164. The Jones case highlights the difficulties of determining the aggressor in a given incident. Jones claimed that he broke up an already-violent encounter. *Id.* Members of the group on the street, however, claimed that they were merely “dancing and having a good time.” *Id.* That the state ultimately decided not to press charges indicates the complexity of making factual determinations in these types of situations.

¹⁶⁷ DEL. PATTERN JURY INSTRUCTIONS CRIMINAL § 5.14.

¹⁶⁸ 590 A.2d 1245 (Pa. 1991). See *supra* notes 80-86 and accompanying text.

¹⁶⁹ *Id.* at 1248.

death or serious bodily injury.¹⁷⁰ For Zimmerman, even if a court were to find that he acted provocatively by following Martin while carrying a gun, there is no indication, at least in Zimmerman's version of events, that he acted with the intent to harm Martin before the altercation began.¹⁷¹ Absent the element of intent, it does not matter how provocative Zimmerman's behavior was or how reasonably likely it was to lead to a violent confrontation. He could still assert a self-defense claim, which a jury could decide to credit or not.

Jones's appearance in the midst of a fraught encounter in full superhero regalia, while likely to be provocative as the word is commonly understood, is not provocation according to the courts applying this frame.¹⁷² If such inherently threatening behavior as displaying a firearm does not count as provocation,¹⁷³ then wearing a superhero mask surely would not qualify. Given the breadth of provocative behavior that is allowed without constituting provocation for the purposes of asserting a self-defense claim under Provocation with Intent, it seems likely that Zimmerman and Jones would be permitted to assert a claim of self-defense in a jurisdiction applying that frame.

2. Additional Cases

a. Any Provocation Application

The Any Provocation frame is so narrow that it will preclude a defendant from claiming self-defense in most questionable cases. For instance, Spencer Newcomer—who got out of his car and shot a man who had been following him after their earlier argument¹⁷⁴—would not be found “without fault in provoking or bringing on” the altercation.¹⁷⁵ Regardless of whether the victim was actually pulling out a weapon when Newcomer shot him, Newcomer could not assert self-defense after putting himself “in a position where [he had] reason to believe that [his] presence will provoke trouble.”¹⁷⁶ Newcomer stopped the car and went to confront the victim with whom he

¹⁷⁰ *Id.*

¹⁷¹ See *supra* notes 91-109 and accompanying text.

¹⁷² See *supra* notes 71-90 and accompanying text.

¹⁷³ See *Commonwealth v. Samuel*, 590 A.2d 1245 (Pa. 1991).

¹⁷⁴ Lee, *supra* note 138.

¹⁷⁵ 2-52 VA. MODEL JURY INSTRUCTIONS—CRIMINAL INSTRUCTION 52.500.

¹⁷⁶ 1-IX CRIMINAL JURY INSTRUCTIONS FOR DC INSTRUCTION § 9.504(a).

quarreled earlier.¹⁷⁷ Clearly, this is a position that would give a person reason to believe that trouble would ensue. Further, Newcomer did not do “everything in his power, consistent with his safety, to avoid the danger”¹⁷⁸ given that he could have simply continued driving rather than stopping his car and confronting Wintermyer.

A nearly identical analysis applies to Roy Lowman, who left his home to confront a man smashing his car with a metal pipe.¹⁷⁹ This was a circumstance where trouble was reasonably foreseeable. Lowman, therefore, would likely be precluded from claiming self-defense in a jurisdiction applying the Any Provocation frame when trouble did result.

Santano Dessin, likewise, could not assert self-defense in a jurisdiction applying the Any Provocation frame after he allegedly armed himself and sought to confront his victim with the intention of being able to shoot him.¹⁸⁰ Even if Dessin was not the first to turn the incident violent, his initiation of a verbal confrontation can be enough to preclude a self-defense claim under this frame.¹⁸¹

None of the individuals here would likely succeed in being able to assert self-defense in an Any Provocation jurisdiction. This highlights the wide breadth of provocation in jurisdictions applying this frame.

b. Straight Provocation

A determination of whether an individual can assert self-defense under the Straight Provocation frame turns on finer-grained facts than a determination under the Any Provocation frame. In the case of Newcomer, the determination would hinge on how he behaved after getting out of his car. If he acted as the aggressor in confronting Wintermyer, he would not be able to claim self-defense. But if Wintermyer acted as the aggressor, Newcomer’s right to assert self-defense would remain intact.¹⁸²

¹⁷⁷ Lee, *supra* note 138.

¹⁷⁸ Laney v. United States, 294 F. 412, 414 (D.C. Cir. 1923).

¹⁷⁹ Pickens, *supra* note 21.

¹⁸⁰ Bencks, *supra* note 143.

¹⁸¹ See Scott v. Commonwealth, 129 S.E. 360, 361-62 (Va. 1925).

¹⁸² Of course, “aggressor” and “aggressive” are malleable words that fail to provide clear guidance. The inherent problem of applying this standard to facts such as this is discussed more fully *infra* in Part III.A.2.

Based on the reported facts in Lowman's case, Mrs. Lowman likely would be able to assert a valid defense of others claim in a Straight Provocation jurisdiction. While her husband went out to confront the victim, it does not appear that Mr. Lowman started the actual altercation. Rather, the victim attacked Mr. Lowman with the pipe. While Lowman may have put himself in harm's way by leaving his home, he did not become the aggressor by doing so. Thus, a court would not deny Lowman's right to claim self-defense.

On the other hand, Dessin would likely be precluded from asserting self-defense in a Straight Provocation jurisdiction. The events reported by the prosecutor indicate that Dessin was the instigator and aggressor of the altercation. Thus, he would be squarely prohibited from asserting self-defense under the Straight Provocation frame.

c. Provocation with Intent

Newcomer may or may not fall into this frame depending on whether the jury believed his account or the picture painted by prosecutors that he had planned the confrontation.¹⁸³ Like Dessin, if Newcomer set out that day with the purpose of starting a confrontation meant to harm his victim, he would be precluded from claiming self-defense under the Provocation with Intent frame.

Lowman would likely not be precluded from asserting self-defense under the Provocation with Intent frame, at least as the facts in the case are known. There is no indication that he acted with the purpose of provoking a conflict so that he and his wife could inflict "death or serious physical injury" on the victim.¹⁸⁴ Additional facts could lead to a reassessment of that conclusion, but absent such facts, Lowman would not be barred from claiming self-defense under this frame.

Dessin, meanwhile, would provide a textbook case of an individual precluded from asserting self-defense in a Provocation with Intent jurisdiction.¹⁸⁵ According to the prosecutor, Dessin provoked the altercation with the victim with the intent to "give him an opportunity to shoot [the

¹⁸³ See Lee, *supra* note 142.

¹⁸⁴ DEL. PATTERN JURY INSTRUCTIONS CRIMINAL § 5.14.

¹⁸⁵ That Dessin also could not claim self-defense in a Straight Provocation jurisdiction once again illustrates the non-exclusivity of the different frames. See *supra* note 79.

victim].”¹⁸⁶ This would present a clear case of Provocation with Intent, and Dessin would consequently be unable to assert a claim of self-defense.

III. A NEW STANDARD: REASONABLE PROVOCATION

Having examined the major frames of provocation in self-defense cases and their application to particular facts, this note now proposes a new standard for determining whether an individual may claim to have acted in self-defense without having provoked the incident: reasonableness. This new standard will address the shortcomings of the other approaches and provide a workable, consistent frame for determining provocation in self-defense cases.

As discussed below, each of the existing frames for analyzing provocation holds some flaw in its application. Thus, a new rule is needed to best articulate and promote society’s “collective sense of justice.”¹⁸⁷ The challenge in crafting such a rule is to find the appropriate balance between the vigilant and the vigilante. The answer lies in reasonableness. By focusing the relevant inquiry less on who contributed to the altercation, the meaning of provocation, or the intent of various actors, the courts will be able to better achieve results consistent with society’s notions of justice.

A. *Weaknesses in the Frameworks*

In addition to the problematic inconsistencies between the frames discussed above, each frame falls short of providing an optimal rule for determining questions of provocation in self-defense cases. As such, they fail to achieve the goals of the criminal law in general: “to create the set of rules that best implements our collective sense of justice.”¹⁸⁸ Thus, in crafting a rule to govern claims of self-defense, the focus should be both on achieving justice in the actual case as well as incentivizing behavior that society wishes to promote. In delineating the boundaries of self-defense, this means crafting a rule to encourage intervention in the killing of Kitty Genovese,¹⁸⁹ while

¹⁸⁶ Bencks, *supra* note 143.

¹⁸⁷ Robinson, *supra* note 5, at 1.

¹⁸⁸ *Id.*

¹⁸⁹ “In 1964, a young woman named Kitty Genovese was murdered in Queens, NY by repeated stabbings over a period of 30 minutes while 38 witnesses watched from their buildings—none of whom called the police.” Carolyn D. Amadon, *Thoughts from*

also discouraging someone from enacting a *Death Wish* scenario.¹⁹⁰ For the reasons discussed below, each of the current frames falls short of meeting this ideal.

1. Any Provocation

The primary flaw with the Any Provocation frame is that it shifts too much of the burden of good behavior onto the actor claiming to have acted in self-defense. Not only must actors show that they did not provoke the incident within the plain meaning of the word, they must also show that they are “without fault in bringing on the difficulty.”¹⁹¹ Looking solely at that language, and absent any limiting instructions on what it means to be without fault, that frame could encompass behavior as innocent as painting one’s house a color that one has reason to know will upset his neighbor.¹⁹² While there do not seem to be any cases of such innocent behavior precluding the right to claim self-defense, the jury instructions in Washington, D.C. would preclude a self-defense claim even where one does nothing more than enter into a situation wherein he has reason to believe that trouble will result.¹⁹³ This essentially would allow the most aggressive members of society to prevent others from engaging in what would otherwise be lawful and protected conduct.¹⁹⁴ Certainly, it is not within our “collective sense of justice”¹⁹⁵ to allow the aggressive and violent to determine the conduct of everyone else. To do so would be to undermine the very principles underlying our system of laws. Because the Any Provocation frame comes too close to the line of allowing the most irrational or threatening individuals to

the Chair: No Excuses, CBA REC., Oct. 2005, at 52. “The witnesses, who watched a man attack and kill Kitty Genovese from their windows, stated they feared potential criminal liability if a court later determined that they wrongfully interfered by coming to her aid.” Alicia M. Duff, *Rhode Island Adopts Model Penal Code Standard for the Use of Force for the Protection of Others—State v. Beeley*, 653 A.2d 722 (R.I. 1995), 30 SUFFOLK U. L. REV. 551, 553 n.16 (1997).

¹⁹⁰ “Five [*Death Wish*] films were produced between 1974 and 1994. All of them starred Charles Bronson as Paul Kersey, a previously pacifistic architect-turned-vigilante due to the death of his wife at the hands of criminals.” Robert J. Cottrol, *Submission Is Not the Answer: Lethal Violence, Microcultures of Criminal Violence and the Right to Self-Defense*, 69 U. COLO. L. REV. 1029, 1030 n.3 (1998).

¹⁹¹ S.C. REQUESTS TO CHARGE – CRIMINAL § 6-6.

¹⁹² Robinson, *supra* note 5, at 5-6.

¹⁹³ 1-IX CRIMINAL JURY INSTRUCTIONS FOR DC INSTRUCTION § 9.504(a).

¹⁹⁴ See Raymond, *supra* note 3, at 338.

¹⁹⁵ Robinson, *supra* note 5, at 1.

determine the behavior of all others, it cannot be accepted as a workable principle as it is currently formulated.

2. Straight Provocation

The Straight Provocation frame exists as a kind of middle ground between the extremes of the Any Provocation and Provocation with Intent frames. It comes the closest to exemplifying the plain meaning of provocation because that meaning is exactly the standard that the frame uses. One who provokes an incident cannot claim self-defense.¹⁹⁶ While the frame is admirably straightforward, its application lacks clarity absent some explanatory gloss. Certainly there are obvious cases where the defendant would not have the right to assert self-defense—for example, where the defendant fires the first shot¹⁹⁷ or breaks into the victim's home.¹⁹⁸ But there is a vast middle ground of behavior that is not so clearly delineated. What about the use of insulting language?¹⁹⁹ What about brandishing a firearm without making an overt threat?²⁰⁰ This is to say nothing of the potentially provocative behavior of George Zimmerman or Phoenix Jones. In these gray areas, the mere word “provocation” offers little guidance. While the Straight Provocation frame comes closest to offering a Goldilocks “just right” solution to the self-defense framing question, it can only be useful and beneficial in application when it is paired with some explanation to further elaborate what is meant. Absent that explanation, the frame is too vague to serve as an appropriate analytic tool.

3. Provocation with Intent

Where the Any Provocation frame overly restricts the behavior of an individual seeking to claim self-defense, the Provocation with Intent frame allows too much latitude. Under this frame, an individual can engage in foreseeably and

¹⁹⁶ See FLA. STANDARD JURY INSTRUCTION (CRIMINAL) § 3.6(f) (2012), available at http://www.floridasupremecourt.org/jury_instructions/chapters/chapter3/p1c3s3.6.f.rtf.

¹⁹⁷ See *La Farn v. State*, 265 S.W.2d 816, 816-17 (Tex. Crim. App. 1954).

¹⁹⁸ See *Marquardt v. State*, 882 A.2d 900, 908-10 (Md. Ct. Spec. App. 2005).

¹⁹⁹ See *Scott v. Commonwealth*, 129 S.E. 360, 361-62 (Va. 1925) (applying the Any Provocation frame to hold that defendant's insulting language qualified as provocation).

²⁰⁰ See *Commonwealth v. Samuel*, 590 A.2d 1245, 1246-47 (Pa. 1991) (applying the Provocation with Intent frame to hold that displaying weapon did not qualify as provocation).

deliberately provocative behavior so long as it is not with the “conscious object to cause death or serious bodily injury to the alleged victim.”²⁰¹ As discussed above, under this frame, it is possible for an individual to throw the first punch in a fight and then still claim self-defense when the victim responds violently. This frame defies the plain meaning of the word “provocation” and allows behavior fundamentally at odds with society’s notions of justice: namely, that a person can start a fight and then claim legal protection when the other party fights back.²⁰² This sort of behavior is exactly the conduct that the provocation doctrine is designed to prevent. This frame’s failure to prevent that conduct places its flaws in sharp relief.

B. *Reasonable Provocation*

To correct for the problems inherent in the existing frames of provocation, this note contends that states should adopt a rule whereby courts consider a two-part inquiry when weighing whether a defendant is precluded from claiming self-defense:

- (1) Were the defendant’s allegedly provocative actions objectively reasonable?
- (2) Was the risk of violence that the defendant incurred reasonable in light of the totality of circumstances?

Focusing on the reasonableness of the defendant’s actions and asking whether the defendant has engaged in unjustifiably risky behavior ensures that determinations regarding self-defense and provocation closely conform to society’s sense of justice. That sense would become the determinative inquiry. This ensures that legal judgments surrounding provocation in self-defense cases abide by societal norms for context-specific situations rather than the variable judicially-imposed frames discussed above. Indeed, reasonableness is a “device for delivering to the jury, in its role as conscience of the

²⁰¹ PA. SUGGESTED STANDARD JURY INSTRUCTIONS (CRIM.) § 9.501 (2012).

²⁰² Much of the criticism of the verdict in the Zimmerman case seems to stem from the belief that Zimmerman initiated the confrontation with Martin but did not suffer any legal consequence as a result. *See e.g.*, Amy Dardashtian, *Zimmerman Verdict Exposes Deficiencies in U.S. Self-Defense Law*, HUFFINGTON POST (July 14, 2013, 2:52 PM), http://www.huffingtonpost.com/amy-dardashtian/zimmerman-trial-self-defense-law_b_3594741.html (“Those who believe Zimmerman should have been found guilty, overwhelmingly point to the fact that he was the aggressor.”). Dardashtian argues that the law in this area of self-defense is improperly divorced from morality because it allows the instigator in certain altercations to avoid punishment. *Id.*

community, the normative or value judgment as to the degree of moral culpability to be assigned to the particular offender.”²⁰³

The first prong of the test focuses on the specific actions of the defendant to determine whether the individual acted in an objectively reasonable manner. In other words, did the individual act as “a reasonable person of ordinary prudence would have done in the same or similar circumstances”?²⁰⁴ It does not make sense, nor does it comport with conceptions of justice, to entitle an individual acting unreasonably in provoking an encounter to then claim immunity from prosecution. Likewise, it does not follow that someone who does act reasonably should be precluded from claiming self-defense because of the unreasonable actions of others.

Framing the issue as one of reasonableness inherently strikes a balance between these two poles and ensures that only those individuals conforming to baseline societal norms can claim legal justification when they commit what would otherwise be a crime. Thus, because he was not acting reasonably, the vigilante killer of *Death Wish*²⁰⁵ who actively pursues criminals to seek revenge would be precluded, as a threshold matter, from claiming self-defense in any situation where those criminals turned on him. Society has no interest in protecting the vigilante. The initial shooters in *La Farn*²⁰⁶ and *White*²⁰⁷ would be similarly barred. In contrast, the provocative house painter of Professor Robinson’s hypothetical²⁰⁸ would not be precluded from claiming self-defense absent some extraordinary set of circumstances.

The first prong of the test looks entirely at the facial reasonableness of the allegedly provocative actions. It calls for a very tight focus on whether the “provocative” action itself—be it following a suspicious character at night or jumping between two men about to fight—is, on its face, reasonable. This prong

²⁰³ Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 16 (1998) (quoting Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete: A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 444-46 (1981)).

²⁰⁴ 57A AM. JUR. 2d NEGLIGENCE § 133 (discussing the reasonable person standard in the context of negligence).

²⁰⁵ See *supra* note 190.

²⁰⁶ *La Farn v. State*, 265 S.W.2d 816, 817 (Tex. Crim. App. 1954); see discussion *supra* notes 58-62 and accompanying text.

²⁰⁷ *White v. State*, No. 329, 2008 WL 4107980, at *1 (Del. Sept. 5, 2008); see discussion *supra* notes 76-78 and accompanying text.

²⁰⁸ See Robinson, *supra* note 5, at 5-6.

calls for looking at the act itself, devoid of context. Actions that are objectively reasonable on their face are presumed not to be provocation under this frame. Those actions that are not reasonable are presumed to be provocation.

The first prong, however, is not necessarily dispositive. Rather, it creates a rebuttable presumption that is then analyzed under the second prong. This two-step process is necessary because in some instances it may be desirable to endorse and encourage behavior that is facially unreasonable. Likewise, actions that seem reasonable out of context may be unreasonable when considering them in their full context. Thus, under the second prong of the test, a jury would consider the totality of circumstances in which the defendant acted. This triggers a balancing test. If the jury finds that a facially unreasonable action was the preferred course of conduct in light of the totality of circumstances, the action would not be considered provocation. Similarly, a facially reasonable action can be deemed provocation if the broader context suggests unreasonableness, though this may be a more difficult threshold to overcome. In either instance, the facial reasonableness of the actions creates a presumption that can be confirmed or rebutted in light of the totality of circumstances. A defendant able to comply with these two prongs would be entitled to claim self-defense.

The Kitty Genovese case²⁰⁹ provides a clear example of the role the second prong plays in the proposed test. While it may generally appear unreasonable to insert oneself into a situation where a deranged man is repeatedly stabbing a woman on the street, it would be even worse to consciously ignore the murder. In that circumstance, a facially unreasonable action—confronting a disturbed man wielding a knife—is the proper and socially desirable course of conduct, and the would-be Samaritan runs a risk of violence that is more than justified by the apparent harm that will result from a lack of intervention.²¹⁰ Any legal rule that did not account for

²⁰⁹ See Amadon, *supra* note 189.

²¹⁰ The Kitty Genovese example may be slightly misleading here because many jurisdictions recognize defense of others alongside self-defense as a justification for otherwise criminal behavior. See, e.g., 22 C.J.S. CRIMINAL LAW § 60 (2012) (“A person is justified in the use of force against an aggressor to the extent it appears and one reasonably believes that this conduct is necessary to defend oneself or another against the aggressor’s imminent use of unlawful force.” (emphasis added)). Thus, a case like Kitty Genovese is already covered by existing law. What is not addressed is a situation where an individual intervenes for the good of the general community but cannot point to a specific individual in need of the intervention. The actions of

such behavior would not be in accord with the conceptions of justice that the criminal law is designed to preserve. The criminal law ought to protect the vigilant community member who aids his community and fellow community members.

While it does not appear that any jurisdiction has yet introduced reasonableness as the central inquiry for determining a question of provocation, reasonableness is deeply intertwined with many other aspects of a self-defense claim. For instance, in New York, where a defendant claims to have acted in self-defense, the jury must determine whether “he believed deadly force was necessary to avert the imminent use of deadly force” and also “whether these beliefs were reasonable.”²¹¹ Similarly, in the Sixth Circuit, a defendant acting in self-defense may use “only as much force as reasonably appears to be necessary under the circumstances.”²¹² In some states, a defendant who acted “reasonably in self-defense is generally insulated from criminal liability even if the person injured is an innocent bystander.”²¹³ In short, determining questions of reasonableness with regard to provocation would be consistent with the decisions juries already make when deciding other matters of self-defense. Indeed, the general principles of self-defense in the common law are tightly bound to questions of reasonableness.²¹⁴ The introduction of another reasonableness inquiry would not overly complicate the analysis that juries already undertake whenever they are confronted with a case of self-defense.

While reasonableness inquiries are prevalent in self-defense cases, such inquiries are not universally acclaimed, particularly as they relate to race and the law. As Cynthia Lee writes, “racial stereotypes[] may influence our assessment of whether the defendant’s use of force against the victim was reasonable.”²¹⁵ Professor Lee and others point to the Bernhard

neighborhood watch members and other similarly situated individuals would fall into this latter category of those who deserve protection but are not squarely covered by existing law.

²¹¹ *People v. Goetz*, 497 N.E.2d 41, 52 (N.Y. 1986).

²¹² DIST. JUDGES ASS’N 6TH CIR., PATTERN CRIMINAL JURY INSTRUCTIONS § 6.06 (June 10, 2011), available at http://www.ca6.uscourts.gov/internet/crim_jury_insts/pdf/12_Chapter_6.pdf.

²¹³ See 2 CRIMINAL PRACTICE MANUAL § 38:7 (2012).

²¹⁴ See, e.g., *Benjamin v. Bailey*, 662 A.2d 1226, 1232 (Conn. 1995) (“The common law principle permitting one to use deadly force in self-defense has long been restricted by the general rule of reason.”).

²¹⁵ Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 401 (1996).

Goetz case, where the jury acquitted Goetz, who is white, for shooting four black teens on a New York subway where Goetz claimed he acted in self-defense.²¹⁶ To combat this implicit racial bias, “Lee has suggested that jurors determining reasonableness claims in self-defense and provocation cases should be instructed to conduct switching exercises,” in which they see whether they would reach the same result if the races of the different parties involved were switched.²¹⁷ Yet, although juries’ determinations of reasonableness are often criticized, even critics contend that a reasonableness inquiry is better than most of the alternatives.²¹⁸ In other words, while the application of a reasonableness standard is subject to question, the standard itself remains sound.

Fundamentally, when properly applied, reasonableness as the baseline inquiry on provocation dovetails closely with the goal that a jury’s determinations should implement society’s “collective sense of justice.”²¹⁹ The very nature of the reasonableness inquiry is that it seeks to determine whether an individual’s conduct falls within the realm of socially acceptable and societally expected behavior. Behavior that falls outside of the sphere of reasonableness exposes the actor to criminal or civil liability, or both.²²⁰ It is entirely appropriate that a jury seeking to determine whether to extend the protection of the criminal law to a defendant should make the same determination in self-defense cases where there is an issue of provocation.

IV. APPLICATION OF REASONABLE PROVOCATION

To more fully develop and explain the use of a reasonableness standard for determining questions of provocation in self-defense cases, it will be helpful to examine how the proposed rule will apply in real-world situations and how it will interact with the existing frames of provocation. Such determinations necessarily require highly fact-specific inquiries that are best undertaken through the judicial process. This note does not seek to answer the question of whether a jury would find

²¹⁶ *Id.* at 420-21 (“Yet, whether the jurors were conscious of it or not, race probably influenced the jury’s perception of whether Goetz acted reasonably.”).

²¹⁷ Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1484 (2012).

²¹⁸ See Lee, *supra* note 215, at 374.

²¹⁹ Robinson, *supra* note 5, at 1.

²²⁰ See, e.g., *People v. Goetz*, 497 N.E.2d 41, 52 (N.Y. 1986).

the specific actions discussed below reasonable. Rather, it seeks to highlight some of the key factors that a jury should take into account when making a reasonableness determination.

A. *George Zimmerman*

George Zimmerman's behavior on the night he shot Trayvon Martin provides an initial test case for the standard of reasonableness in self-defense provocation questions. Was Zimmerman a vigilante or merely being vigilant? As discussed above, Zimmerman, according to his own account of the events, would likely not be able to claim self-defense under the Any Provocation frame, but likely could claim self-defense under the Straight Provocation or Provocation with Intent frames.²²¹ This divergence can be reconciled with a focus on reasonableness.

Under the Reasonable Provocation frame, the initial inquiry in Zimmerman's case under the proposed standard is whether he behaved reasonably in following a suspicious individual through his neighborhood because he thought the individual might be preparing to commit a crime.²²² While this is perhaps not behavior in which the average person would engage, a jury would not necessarily find that the behavior rose to the level of unreasonableness. Indeed, Zimmerman would argue that he fulfilled the role of a neighborhood watch member. That he was more aggressive in that role than others may not automatically elevate his conduct to the level of unreasonableness. When weighing the reasonableness of Zimmerman's actions, a jury would likely take note that, according to Zimmerman, when the 911 operator told him that he did not have to follow Martin, he ceased to do so and began walking back to his car.²²³ Following the instructions of the 911 operator would likely be seen as increasing the reasonableness of Zimmerman's actions. Zimmerman broke no laws, however, and a jury could find that he intended to perform a useful task for law enforcement officers.

Conversely, that Zimmerman carried a gun would likely undermine the overall reasonableness of his actions in the eyes

²²¹ See *supra* Part II.B.1.

²²² Although the initial inquiry would have to be into the facts of the events that night, this note assumes that Zimmerman's account of events is true. Therefore the inquiry for our purposes begins with a determination of facial reasonableness.

²²³ *New Video*, *supra* note 13.

of a jury.²²⁴ But that alone does not require that Zimmerman's actions, given the totality of circumstances, be deemed unreasonable. This is particularly true given that the question here focuses on whether the behavior leading to and possibly provoking the encounter was reasonable. Zimmerman's decision to carry a firearm did not directly lead to the altercation, because there is no indication in Zimmerman's recounting of events that Martin even knew Zimmerman was carrying a gun before the fight started.²²⁵ The discovery of the gun after the altercation began cannot be thought to have provoked that very altercation. A jury would have to decide whether the act of carrying a loaded gun that night meant that Zimmerman acted in a facially unreasonable manner.

Even if Zimmerman's actions were facially unreasonable that night, the fact finder's inquiry is not at an end. Instead, the jury would have to determine whether the risk of violence that the defendant ran was reasonable in light of the totality of circumstances. The issue then becomes a balancing test. On the one hand is the foreseeable possibility of a violent confrontation. On the other hand is the possible benefit of locating and identifying a suspected burglar for the police. In addition, there is the general deterrent effect of an engaged and vigilant community.²²⁶ In light of these options, a jury would need to determine whether the possible benefit of Zimmerman's actions outweighed the possible harms. Only if the jury found Zimmerman's actions reasonable in light of the totality of circumstances would his self-defense claim succeed.

B. *Phoenix Jones*

A more difficult analysis is required in the case of Phoenix Jones—the Seattle “superhero.” On their face, Jones's actions in wearing a mask while actively seeking out crime to fight seem likely to be found unreasonable under the proposed

²²⁴ Robertson & Schwartz, *supra* note 95 (“Using a gun in the neighborhood watch role would be out of the question, [Sanford Police Department Volunteer Coordinator Wendy Dorival] said in an interview.”).

²²⁵ Alvarez & Williams, *supra* note 6 (“Mr. Zimmerman was firm in his central self-defense claim: He did not show his gun before the fight and he did not provoke Mr. Martin.”).

²²⁶ This is the general motivation behind such policing philosophies as the “Broken Windows” theory. Maria Cruz Melendez, *Moving to Opportunity & Mending Broken Windows*, 32 J. LEGIS. 238, 239 (2006) (“The Broken Windows theory suggests that unchecked physical and social disorder within neighborhoods may lead to serious crime within the neighborhood. Conversely, decreasing disorder within a neighborhood may lead to a decrease in serious crimes.”).

Reasonable Provocation frame. His actions smack of the vigilantism that society refuses to protect as legitimate behavior.²²⁷ While he may not fit the traditional vigilante mold of one seeking to avenge crimes where traditional law enforcement has failed, Jones walks perilously close to that line. The line becomes even fuzzier when considering that Jones carries weapons with him—though not firearms—while intentionally seeking out situations replete with the possibility of violence. That he wears a mask and styles himself a superhero is not dispositive, but it certainly offers strong support for the conclusion that Jones does not engage in objectively facially reasonable behavior on his nighttime patrols of dangerous neighborhoods. For Jones to succeed on the first prong of the Reasonable Provocation test, a jury would have to find that his superhero persona and behavior were reasonable.

Despite the unlikelihood of this finding, the inquiry would not end there. Even if a jury found that Jones's superhero affectations were unreasonable, he may still fall within the realm of self-defense protections. Jones could still claim self-defense if the risk of violence in a given situation was reasonable in light of the totality of circumstances. This analysis boils down to a case-by-case balancing test of the interests involved. In each instance, a jury must weigh whether the harm that Jones aimed to prevent outweighed any unreasonableness of his actions in working to prevent that harm. In other words, even if he acted unreasonably, did society benefit from Jones's willingness to do so? This analysis may mirror the approach that juries unofficially already take when faced with cases of vigilantism. As Professor Hine writes, "[T]he law of extra-judicial self-help is effectively split between the 'no justified vigilantism' stance of the courts and the 'justified if reasonable' stance of the community."²²⁸ This should not be read to indicate that the rule proposed in this note is a justification for vigilantism. Indeed, the author presumes that a jury would find vigilantism in its more virulent forms unreasonable. Rather, it indicates that a jury may find a place for the sort of soft vigilantism of Phoenix Jones and other "real-life superheroes" as they patrol and seek to preempt violent

²²⁷ Kelly D. Hine, *Vigilantism Revisited: An Economic Analysis of the Law of Extra-Judicial Self-Help or Why Can't Dick Shoot Henry for Stealing Jane's Truck?*, 47 AM. U. L. REV. 1221, 1227 (1998) ("No state currently recognizes a 'Justified Vigilantism' or 'Community Protection' defense to criminal prosecution.").

²²⁸ *Id.* at 1228.

confrontations. The evaluation of costs and benefits in any given case would hinge on how unreasonable a jury found a particular act balanced against the societal benefits it produced.

C. *Other Cases*

While the determination of reasonableness must ultimately be made by a court in full command of the facts, under the prosecution's version of events in the Dessin case,²²⁹ it is hard to imagine a jury finding Dessin's actions reasonable. According to the prosecutor, Dessin sought out his victim for the purpose of provoking a fight that would enable him to shoot the victim and claim self-defense.²³⁰ It was essentially a premeditated attack that—barring exceptional circumstances not yet presented—a jury would almost certainly deem unreasonable under either prong of the test. The determinations in the Newcomer and Lowman cases, however, present more complexity.

In the case of Newcomer,²³¹ the reasonableness determination would depend on the facts that were known or believed at the time Newcomer stopped his car to confront Wintermyer. How violent was their earlier argument? Is there any history of violence between the two? Did Newcomer reasonably believe that violence would result if Wintermyer continued to follow him? What did Newcomer intend to do when he got out of his car? The answer to each of these questions would inform a jury on the ultimate reasonableness of Newcomer's actions. It is clear that Newcomer apparently believed that Wintermyer carried a weapon with him.²³² The fact that Newcomer shot him indicates that he perceived Wintermyer to be a threat. These facts would cut against the reasonableness of confronting Wintermyer. Certainly, confronting an armed and threatening individual seems like an unreasonable course of action to follow—more so when retreat seemed to be a perfectly viable option in the form of simply continuing to drive. Yet answering some of the questions above could also inform the totality of circumstances prong and indicate that Newcomer's actions were reasonable when considering the full picture. Focusing on the reasonableness of Newcomer's acts would provide

²²⁹ See *supra* notes 143-45 and accompanying text.

²³⁰ Bencks, *supra* note 143.

²³¹ See *supra* notes 138-42 and accompanying text.

²³² Lee, *supra* note 138 (“Newcomer contended Wintermyer was pulling a weapon, later determined to be a cell phone, from his pocket, according to defense documents.”).

a focal point for the jury's inquiry into whether Newcomer acted in self-defense or whether he had removed himself from the law's protection by provoking the incident.

As in the case of Newcomer, the Lowman case²³³ would also turn on the specific facts of the encounter. It appears that the Lowmans knew the victim and had invited him into their home before the incident. What they understood of the man's personality and mental state, plus their relation to him, would inform the reasonableness of trying to confront him when he began hitting the car with a metal pipe. As with Newcomer, the action does not appear to be particularly reasonable on its face. The attacker was in the process of smashing the Lowmans' car with a metal pipe when Roy Lowman approached him.²³⁴ This apparently followed an argument between the Lowmans and the man.²³⁵ Lowman could have remained in his home and simply called the police. But instead, he left his home to confront the victim. Inserting himself into that situation to protect property seems unreasonable, though a jury could potentially find differently on that point alone. Further, additional facts about the Lowmans' relationship with the man, their knowledge of his mental state, the manner in which Lowman approached, and what Lowman said would all inform the jury's determination in such a case. When viewed in the totality of circumstances, even an apparently reckless act could be reasonable. It is through such a reasonableness inquiry that a jury would be able to best determine the extent to which Mr. Lowman's actions ought to be protected by the law of self-defense. Regardless of the actual outcome in any given case, focusing the jury's inquiry on the reasonableness of the defendant's allegedly provocative actions given the totality of circumstances provides the best course for implementing society's "collective sense of justice."²³⁶

D. Reasonableness as a Gloss on the Existing Frames

This note proposes that jurisdictions ought to adopt the Reasonable Provocation frame for determining matters of provocation. But even if not adopted as a stand-alone rule, the reasonableness standard can serve as a helpful gloss on the existing frames for determining provocation. Doing so would

²³³ See *supra* notes 146-49 and accompanying text.

²³⁴ Pickens, *supra* note 146.

²³⁵ *Id.*

²³⁶ Robinson, *supra* note 5, at 1.

help to minimize the weaknesses intrinsic in each approach and create a stronger, more just application of each frame.

Focusing on reasonableness under the Any Provocation frame would soften an otherwise strict rule regarding the defendant's actions. Under the existing formulation, "[a]ny form of conduct by the accused from which the fact finder may reasonably infer that the accused contributed to the affray constitutes 'fault.'"²³⁷ The revised frame would require proof of unreasonable conduct before a jury could find provocation. This presents an inherently fairer framing of the issue. It does not go so far as to require culpability—as might be required under other frames—and offers some measure of protection for nonculpable actors behaving within society's norms and expectations. An actor need no longer be completely blameless, just reasonably blameless. This offers the jury a degree of latitude in determining when to withdraw the legal protections of a self-defense claim and allows the jury to reach the most just result.

Under the Straight Provocation frame, the reasonableness inquiry will aid juries in determining what exactly it means to be the aggressor within the meaning of the law. That is to say, behavior that could be described as provocative—which could include anything from firing a gun²³⁸ to using profanity²³⁹—does not necessarily count as provocation unless it is also unreasonable given the totality of circumstances. Only then does the actor's behavior constitute provocation within the meaning of the law. In some sense, this could be seen as merely substituting one ambiguous word ("reasonable") for another ("provocative"). But jurors in self-defense cases are already steeped in determining issues of reasonableness.²⁴⁰ The addition of another reasonableness inquiry will introduce less confusion into the jury's deliberations than the need to make determinations under an entirely different standard.

The interaction between the reasonableness standard and the Provocation with Intent frame is the inverse of the reasonableness standard's interaction with the Straight Provocation frame. With Straight Provocation, reasonableness informs the determination of provocation. Under Provocation with

²³⁷ *Smith v. Commonwealth*, 435 S.E.2d 414, 416 (Va. Ct. App. 1993) (internal citations omitted).

²³⁸ *La Farn v. State*, 265 S.W.2d 816 (Tex. Crim. App. 1954).

²³⁹ *Scott v. Commonwealth*, 129 S.E. 360 (Va. 1925).

²⁴⁰ See *supra* notes 211-14 and accompanying text.

Intent, the frame informs reasonableness. An individual acting with the intent of provoking an incident to cause death or serious bodily injury is not acting reasonably. Thus, his behavior would not fall under the protection of the law. This is an instance in which the frame would help to define reasonableness instead of reasonableness helping to define the frame. The two standards are not necessarily incompatible, though determinations of unreasonableness may be broader than the extremely narrow focus of the Provocation with Intent frame. Put differently, conduct that constitutes Provocation with Intent will always be presumed unreasonable, but unreasonable behavior may not fall within the Provocation with Intent frame.

CONCLUSION

The law of self-defense is far from clear in situations where an individual may have provoked an altercation by deliberately inserting himself into a situation where violence is likely. Different jurisdictions frame the issue of provocation differently, so that conduct clearly deemed provocation in one jurisdiction would just as clearly be protected as self-defense in another. Yet all of the frames suffer from serious weaknesses. To create a clear and fair rule of provocation, jurisdictions should adopt a standard of reasonableness when weighing questions of provocation. Under that standard, a defendant's self-defense claim would first be analyzed for facial reasonableness. This analysis would create a presumption that could be rebutted or affirmed by considering the totality of circumstances. A defendant would be precluded from claiming self-defense where his actions were found unreasonable under this two-pronged inquiry. Either as a stand-alone rule or as a gloss on the currently existing frames, this standard would preserve societal notions of justice while providing a measure of clarity to jurors and members of society at large.

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