

Provocateurs

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Abstract When a provocateur intentionally provokes a deadly affray, the law of self-defense holds that the provocateur may not use deadly force to defend himself. Why is this so? Provocateurs are often seen as just one example of the problem of *actio libera in causa*, the causing of the conditions of one's defense. This article rejects theories that maintain a one-size-fits-all approach to *actio libera in causa*, and argues that provocateurs need specific rules about why they forfeit their defensive rights. This article further claims that provocateurs need to be distinguished from their cousins, initial aggressors, as initial aggressors engage in conduct that grounds the permissibility of the defender's behavior whereas the provocateur's behavior does not justify the respondent's use of force against him. In addition, this article rejects that the basis of this forfeiture can be found in the doctrines surrounding when and why mitigation for provocation is appropriate for the respondent. Provocateurs forfeit their defensive rights for the very simple reason that they start the fight. This forfeiture occurs when they behave culpably, meaning that they subjectively appreciate that they are running the risk of causing force to be used against them and they engage in this behavior without justification or excuse. The question of when the provocateur's behavior is justified is incredibly complex. It requires analysis of when it is that one is justified in increasing the risk of another's wrongdoing. Any analysis of this justification must take seriously the liberty rights of the potential provocateur to engage in otherwise permissible behavior. Moreover, the determination of whether the provocateur is justified will turn on whether the later acts that he puts into motion are themselves justified. Thus, when Charles Bronson in the movie *Death Wish* presents himself as a victim so that muggers will attack him, the justifiability of his conduct in appearing as a vulnerable victim will turn on whether he is entitled to engage in this conduct, intending to later defend himself. This article argues that in *Death Wish*-type cases, the reason that the

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