

University of Oregon

From the Selected Works of Caroline A Forell

Winter 2010

What's Reasonable?: Self-Defense and Mistake in Criminal and Tort Law

Caroline Forell, *University of Oregon*



Available at: https://works.bepress.com/caroline_forell/8/

WHAT'S REASONABLE?: SELF-DEFENSE AND MISTAKE IN
CRIMINAL AND TORT LAW

by
Caroline Forell*

In this Article, Professor Forell examines the criminal and tort mistake-as-to-self-defense doctrines. She uses the State v. Peairs criminal and Hattori v. Peairs tort mistaken self-defense cases to illustrate why application of the reasonable person standard to the same set of facts in two areas of law can lead to different outcomes. She also uses these cases to highlight how fundamentally different the perception of what is reasonable can be in different cultures. She then questions whether both criminal and tort law should continue to treat a reasonably mistaken belief that deadly force is necessary as justifiable self-defense. Based on the different purposes that tort and criminal law serve, Professor Forell explains why in self-defense cases criminal law should retain the reasonable mistake standard while tort law should move to a strict liability with comparative fault standard.

I.	INTRODUCTION	1402
II.	THE LAW OF SELF-DEFENSE.....	1403
III.	THE PEAIRS MISTAKE CASES	1406
	A. <i>The Peairs Facts</i>	1408
	B. <i>The Criminal Case</i>	1409
	1. <i>The Applicable Law</i>	1409
	2. <i>The Criminal Trial</i>	1410
	3. <i>The Aftermath</i>	1413
	C. <i>The Hattoris' Wrongful Death Trial and Appeal</i>	1415
	1. <i>The Civil Trial</i>	1415
	2. <i>The Civil Appeal: Hattori v. Peairs</i>	1415
	D. <i>Comparing the Outcomes in the Criminal and Civil Cases</i>	1417
	E. <i>The Influence of Different Purposes for Tort Law and Criminal Law</i>	1418

* Clayton R. Hess Professor of Law, University of Oregon School of Law. This Article is part of the *Lewis & Clark Law Review's* Spring 2010 Symposium, *Who Is The Reasonable Person?* I benefited from my colleagues' comments when I presented a version of this Article at a session of the University of Oregon School of Law's Academic Flash Mob, June 10, 2010. Thanks to Dorothy Kim and Jen Costa for their excellent research assistance.

IV.	REASONABLE MISTAKES IN CRIMINAL AND CIVIL SELF-DEFENSE CASES: THE DILEMMA OF TWO MORALLY INNOCENT ACTORS.....	1420
	A. <i>Justifications for the Current Tort Rule</i>	1420
	B. <i>Liability Rules for Reasonable Interferences with Property</i>	1421
	C. <i>British Case Law Support for My Proposal</i>	1424
	D. <i>Reasonable Mistakes Regarding Self-Defense as Partially Privileged</i>	1427
	E. <i>Application of My Proposal: The Louisiana “Castle” Cases</i>	1428
V.	CONCLUSION.....	1432

Trial Judge: “The defense of self-defense has been raised. A person is justified in using physical force upon another person to defend himself from what he reasonably believes to be the use or imminent use of unlawful physical force.”

Jury: “Who[se] def[inition] of reasonable are we supposed to use? Our definition (jury’s) or the defendant’s in his impaired state as was described to us through his testimony?”

Trial Judge: “[R]easonableness must be judged . . . from the standpoint of a *reasonable man* in the situation of the defendant at the time under all the circumstances surrounding him.”**

I. INTRODUCTION

What role should that “odious character,”¹ the reasonable person, play when a claim of self-defense based on mistake as to necessity of using deadly force is asserted in criminal and tort cases?² In this Article, I use the *Peairs* criminal³ and tort⁴ mistake-as-to-self-defense cases to examine why cases involving the same reasonableness standard and set of facts in two areas of law can lead to different outcomes. I also use this case to highlight how fundamentally different the perception of what is reasonable can be in different cultures. I then discuss whether the standard of care for such mistakes should continue to be treated the same under criminal and tort law. Based on the different purposes that tort and criminal law serve, I conclude that the tests should be different: criminal law should continue to require both a subjective and objective

** State v. Bassett, 228 P.3d 590, 591 (Or. Ct. App. 2010) (emphasis added).

¹ A.P. HERBERT, MISLEADING CASES IN THE COMMON LAW 12 (7th ed. 1932).

² While I focus on the use of deadly force, my basic analysis of the standard of care applies equally to the use of non-deadly force in both criminal and tort law.

³ State v. Peairs, (19th Jud. D. La. May 23, 1993) (unreported). See Cynthia Kwei Yung Lee, *Race and Self-Defense: Towards a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 432–38 (1996) [hereinafter Lee, *Race and Self-Defense*]; *Acquittal in Doorstep Killing of Japanese Student*, N.Y. TIMES, May 24, 1993, at A1.

⁴ Hattori v. Peairs, 662 So. 2d 509 (La. Ct. App. 1995).

standard; tort law should adopt a strict liability with comparative fault standard.

II. THE LAW OF SELF-DEFENSE

The essential requirements for when criminal law permits the use of deadly force in self-defense in most of the United States are well established. In a strong majority of American jurisdictions, a defendant who is not the aggressor in an encounter is justified in using deadly force against another person if he *honestly and reasonably* believes that: (1) he is in imminent or immediate danger of death, serious bodily injury, kidnapping or sexual intercourse compelled by force, and (2) the use of deadly force is necessary to avoid such danger.⁵ With little or no consideration of the different purposes for criminal and tort law, the requirements for self-defense in tort law follow those in criminal law.⁶ Thus, under both legal regimes, the majority rule is that a subjectively sincere mistake as to the necessity of using deadly force that is also objectively reasonable does not negate self-defense.⁷

Despite this seeming agreement on the standard,⁸ jurisdictions' views of what is legally sufficient courage and fortitude for self-defense to apply vary greatly.⁹ In the more developed criminal area, tests cover a broad

⁵ This definition is based on that provided in Cynthia Lee's *Murder and the Reasonable Man*, pages 127 to 134, and in § 3.04 of the Model Penal Code. In the majority of jurisdictions there is no duty to retreat when using deadly force in self-defense, and in all jurisdictions there is no duty to retreat in one's home. CYNTHIA LEE, *MURDER AND THE REASONABLE MAN* 128 (2003); MODEL PENAL CODE § 3.04 (1962).

⁶ Tort law uses different terminology, but this doesn't affect the substance. For example, the *Restatement (Second) of Torts* provides:

[A]n actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he reasonably believes that (a) the other is about to inflict upon him an intentional contact or other bodily harm, and that (b) he is thereby put in peril of death or serious bodily harm or ravishment, which can safely be prevented only by the immediate use of such force.

RESTATEMENT (SECOND) OF TORTS § 65(1) (1965). The *Restatement (Third) of Torts* does not address self-defense. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM (2010).

⁷ JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 216 (5th ed. 2009); DAN B. DOBBS, *THE LAW OF TORTS* 164–65 (2000).

⁸ There is agreement that certain personal aspects of the defendant cannot be factored into this reasonableness standard. For example, all jurisdictions agree that voluntary intoxication cannot be factored in and that therefore the standard is the "reasonable *sober* man." WAYNE R. LAFAVE, *CRIMINAL LAW* 478 (4th ed. 2003). See also *State v. Bassett*, 228 P.3d 590, 591 (Or. Ct. App. 2010).

⁹ Assessments of the reasonableness of conduct range from being purely objective to highly subjective in many areas of the law as is evidenced by its application in various areas of common law negligence. In some jurisdictions, an almost purely subjective "best judgment" is used to assess professional conduct. *Hodges v. Carter*, 80 S.E.2d 144, 146 (N.C. 1954) (attorney's conduct measured against the standard of "good faith and . . . honest belief"). When a doctor is sued for

spectrum that ranges from a purely subjective standard test¹⁰ used in Delaware, Ohio, North Dakota, and Kentucky¹¹ that makes a separate mistake assessment irrelevant, to applying a reasonableness test that factors in some of the actor's (and sometimes the victim's) physical and emotional attributes such as size, age, and a myriad of other background facts.¹² There is little agreement as to which attributes and background facts may be considered.¹³ Similarly, some commentators assert in the civil area that "[d]ifferences in age, size and relative strength are proper considerations."¹⁴ As is the case for other aspects of self-defense law, most likely a jurisdiction's tort law simply adopts the factors that the state's criminal law jurisprudence uses.

One aspect of the reasonableness standard has remained constant throughout most of history. Usually, the violence of the defendant's response has been assessed against the amount of fortitude that a *man* would have in deciding both the credibility and the reasonableness of the

malpractice, the reasonableness standard is the customary practice for doctors in the same or a similar locality. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. a (2010). When a minor is injured or harms another, the standard is the reasonable child of like age, intelligence, and experience. *Id.* § 10(a). But if a motorized vehicle is involved, the standard is the usual reasonable person standard. *Id.* § 10 cmt. f. Reasonableness standards are often contested. For example, I have argued that the usual reasonable person standard should also be used instead of the current reasonable child of like age and experience when assessing whether a minor was negligent in shooting another person. Caroline Forell, *Reassessing the Negligence Standard of Care for Minors*, 15 N.M. L. REV. 485, 485–86 (1985). The *Restatement (Third) of Torts* endorses my recommendation, but it is still not what most courts do. RESTATEMENT (THIRD) OF TORTS § 10 cmt. f.

¹⁰ Prior to the mid-nineteenth century, American criminal law allowed self-defense for any mistake as to the necessity of deadly force, whether reasonable or unreasonable. Richard Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 460, 480 & n.135 (1987) (citing *Shorter v. People*, 2 N.Y. 193 (1849)). Singer suggests that one reason for the movement requiring that a mistake be reasonable was that guns began to be available in the nineteenth century, making deadly mistakes more likely. *Id.* at 488.

¹¹ Delaware uses Model Penal Code language but without the Code's glosses that make it somewhat objective. See *Moor v. Licciardello*, 463 A.2d 268 (Del. 1983). See also *Steward v. Commonwealth*, No. 2008-SC-000617-MR, 2010 WL 1005912, at *5 (Ky. Mar. 18, 2010); *State v. Zajac*, 767 N.W.2d 825, 830 (N.D. 2009); *State v. Haines*, 860 N.E.2d 91, 97 (Ohio 2006) ("Ohio has a subjective test to determine whether a defendant properly acted in self-defense . . .").

¹² DRESSLER, *supra* note 7, at 241–42.

¹³ *Id.* See also Paul H. Robinson, *Criminal Law Scholarship: Three Illusions*, 2 THEORETICAL INQUIRIES IN L. 287, 320 (2001); Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137, 139 (2008) ("Courts and commentators despair of being able to determine which individual traits of an actor are taken into account in assessing his reasonableness.").

¹⁴ VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 106 (12th ed. 2010). For an example of a torts case that took the defendant's age into account in assessing whether his belief was reasonable, see *McKellar v. Mason*, 159 So. 2d 700, 702 (La. Ct. App. 1964), where the court applied the "reasonable man of 64 years" standard.

defendant's claims of fear and necessity.¹⁵ Until the latter part of the twentieth century, a major reason for this was that objective tests in all areas of law used the "reasonable man" standard as a matter of course because almost all the essential legal players (judges, juries, legislators, lawyers, law professors), as well as most defendants, were men.¹⁶

Even though the genderless reasonable person standard emerged in the 1970s and 1980s and is now widely deemed the appropriate standard to apply throughout law, the reasonable man continues to regularly crop up in instructions to the jury and in other judicial statements of law in the criminal and tort self-defense contexts.¹⁷ Most likely the reasonable man persists in this area both out of habit and because most people who claim self-defense continue to be men.¹⁸ More justifiably but less commonly, the reasonable man standard is used in some self-defense cases because the gender of the defendant may be viewed as relevant to his perception of the need for deadly force.¹⁹

¹⁵ See, e.g., *State v. Bassett*, 228 P.3d 590, 591 (Or. Ct. App. 2010). Recently, gender has become a factor in some cases when determining the reasonableness of a claim of self-defense. The reasonable *man* is no longer the standard applied to some claims of self-defense by women in the criminal arena. See, e.g., *State v. Warrow*, 559 P.2d 548, 559 (Wash. 1977) (use of the reasonable man standard for a woman claiming self-defense was reversible error). In addition to asserting that the gender of the woman claiming self-defense should be considered, many commentators, myself included, have examined the problems that battered women who kill present for the traditional self-defense tests of necessity, imminence, and proportionality that are measured against a reasonableness standard. CAROLINE A. FORELL & DONNA M. MATTHEWS, *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN* 216–18 (2000); LEE, *supra* note 5, at 128–30.

¹⁶ FORELL & MATTHEWS, *supra* note 15, at 6.

¹⁷ See, e.g., *Bassett*, 228 P.3d at 591.

¹⁸ DRESSLER, *supra* note 7, at 242–23. Furthermore, the victim in most cases where self-defense is asserted is most often also male except in the intimate homicide cases involving battered women who kill their batterers. Both criminal and tort law have described the qualities "primarily characteriz[ing]" reasonableness for self-defense in masculine terms as the man of "ordinary firmness and courage." RESTATEMENT (SECOND) OF TORTS § 63 cmt. i (1965). See also *State v. Rye*, 651 S.E.2d 321, 328 (S.C. 2007) (criminal law).

¹⁹ Arguably in *Peairs* and the other Louisiana cases I discuss in this Article, the fact that both the defendant and the victim were male instead of female can be deemed important because the defendants were not only acting as defenders of themselves, but also their wives and children, and their homes. See *infra* note 39 and accompanying text. The trial judge in the *Peairs* civil case used the reasonable man standard as follows:

The jurisprudence in Louisiana is well-settled that resort to the use of a dangerous weapon to repel an attack is not justified except in exceptional cases where the actor's fear of danger is not only genuine but is founded upon facts that would likely produce similar emotions in *men* of reasonable prudence. *Hattori v. Peairs*, 662 So. 2d 509, 514 (La. Ct. App. 1995) (emphasis added).

III. THE *PEAIRS* MISTAKE CASES

My current inquiry examines cases where the claims of self-defense and the mistake-of-fact converge.²⁰ All the cases I discuss involve male-on-male violence. The defendant's concern for the safety of women and children as well as himself appears in many of them.²¹ These are situations that raise multiple reasonableness issues. They allow for an analysis of the various perspectives that enter into the determination of what is reasonable in highly stressful contexts.

While claims of self-defense based on actual rather than mistaken necessity in criminal cases are common, there are far fewer torts cases where self-defense based on actual necessity is raised.²² However, there are a substantial number of reported torts cases applying the current reasonable-but-mistaken-belief rule.²³ Nevertheless, there are rarely both criminal and civil mistake-as-to-self-defense cases involving the same defendant. I have only discovered three such recent incidents where enough information was available because of newspaper coverage and an appellate decision. In 2008, the British House of Lords examined an important pair in their opinion in the torts case *Ashley v. Chief Constable of Sussex*.²⁴ The defendant in *Ashley* was a police officer who shot and killed

²⁰ DRESSLER, *supra* note 7, at 216.

²¹ *Peairs*, 662 So. 2d 509; *McKellar v. Mason*, 159 So. 2d 700 (La. Ct. App. 1964); *Smith v. Delery*, 114 So. 2d 857 (La. 1959); *Patterson v. Kuntz*, 28 So. 2d 278 (La. Ct. App. 1946).

²² Unlike criminal prosecutions for assaults and homicides (violent conduct where claims of self-defense might be raised) that are commonplace, lawsuits for the same kind of intentionally harmful conduct are exceptional. In theory, there is a viable tort claim against almost every defendant who is charged with criminal battery or homicide. Furthermore, because of tort law's less demanding standard of proof and different intent requirements, in situations where criminal battery or homicide cannot be proved, a tort claim may still be available. Thus, there are many more theoretically viable tort claims for intentionally violent conduct than are actually pursued.

The numbers differ drastically between the criminal and tort settings because, unlike criminal cases, the injured party or his estate brings a tort action for battery or wrongful death. Individuals who bring tort claims must pay their own lawyers (usually through a contingency fee arrangement). Generally, when a lawsuit is brought against an individual, the economic justification for the plaintiff choosing to bring the claim (and a lawyer being willing to pursue the claim) is that there is either liability insurance or a deep pocket such as an employer (via respondeat superior) that will pay any damages that are agreed upon in settlement or awarded at trial. However, most insurance policies exclude coverage for intentional torts of violence. Jennifer Wiggins, *Domestic Violence Torts*, 72 S. CAL. L. REV. 121, 135–36 (2001). Frequently the scope of employment requirement cannot be satisfied regarding vicarious employer liability. DOBBS, *supra* note 7, at 913–17 (2000). Thus, unless the defendant is wealthy, an award of damages will often be uncollectible. Factoring in an individual defendant's viable self-defense claim makes bringing a tort action even less likely.

²³ See, e.g., *supra* note 21.

²⁴ [2008] UKHL 25, [2008] 1 A.C. (H.L.) 962 (appeal taken from Eng.).

an unarmed naked man in his bedroom. The officer claimed self-defense based on mistake as to the necessity of using deadly force. Since English criminal law does not impose any reasonableness requirement when determining necessity of deadly force in criminal claims of self-defense,²⁵ no inquiry into whether differences exist when reasonableness is applied in criminal and tort contexts could be made.²⁶

The most notorious American pair is the *Goetz* cases where in 1984 Bernhard Goetz shot five bullets into a group of four black youths after two of them came up to him on a New York City subway and said “give me five dollars.”²⁷ One of the youths, Darryl Cabey, later sued for the severe injuries he suffered.²⁸ The other pair is the Louisiana cases, *State v. Peairs*²⁹ and *Hattori v. Peairs*,³⁰ where Rodney Peairs asserted self-defense in the shooting death of 16-year-old Japanese exchange student Yoshi Hattori in Baton Rouge in the fall of 1992. In both the *Goetz* and *Peairs* cases, young men of color were the victims of shootings by white men who claimed they felt physically threatened. Both involved contested social norms concerning the reasonableness of using deadly force and resulted in an acquittal in the criminal case and a finding of liability in the torts case.

I focus on the *Peairs* cases rather than those involving *Goetz* for several reasons. First, *Peairs* is more clearly a mistake case. While the issue in both *Goetz* and *Peairs* was whether the defendant’s use of deadly force was reasonable under the circumstances, the *Goetz* circumstances were such that the defendant could claim that his belief was not mistaken,³¹ that the young men in fact posed a serious threat to his person.³² No such

²⁵ *R. v. Williams (Gladstone)* (1984) 78 Cr. App. R. 276 (appeal taken from Eng.) (British criminal law uses a purely subjective test to determine the necessity of acting in self-defense).

²⁶ Nevertheless, as I will discuss later in this Article, the analyses of two British judges regarding what is and what should be the legal standard in tort law when a defendant, who is accused of intentionally harming another, claims self-defense based on mistake as to necessity, provides support for my claim that liability should exist even when the mistake was reasonable. See *infra* notes 170–84 and accompanying text.

²⁷ *People v. Goetz*, 497 N.E.2d 41, 43 (N.Y. 1986). See also GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE* 1 (1988).

²⁸ In the lawsuit, the jury in 1996 awarded Cabey \$43 million. Adam Nossiter, *Bronx Jury Orders Goetz to Pay Man He Paralyzed \$43 Million*, N.Y. TIMES, Apr. 24, 1996, at A1 [hereinafter Nossiter, *Bronx Jury*].

²⁹ (May 23, 1993). See generally Lee, *Race and Self-Defense*, *supra* note 3, at 432–38.

³⁰ 662 So. 2d 509 (La. Ct. App. 1995).

³¹ FLETCHER, *supra* note 27, at 26–27.

³² The youths were described as follows:

Uneducated, with criminal records, on the prowl for a few dollars, they exemplify the underclass of teenage criminals feared by both blacks and whites. In October of the same year, Darrell Cabey, age 19, had been arrested in the Bronx on charges of armed robbery. In 1983, James Ramseur, age 18, and Troy Canty, age 19, had both served short sentences for petty thievery. Barry Allen, age 18, had twice pled guilty to charges of disorderly conduct. James Ramseur and Darrell Cabey are found with a total of three screwdrivers in their pockets—

argument existed for the use of deadly force in *Peairs*. Furthermore, as in the *Goetz* cases, there was substantial news coverage of the *Peairs* criminal prosecution but, in addition, there was news coverage of the tort suit and an appellate opinion affirming the finding of tort liability. Finally, the outcome in the *Goetz* criminal case, discussed in numerous law review articles³³ and books,³⁴ and regularly featured in criminal law casebooks,³⁵ seems aberrational—a product of a particular time and place: New York City in the 1980s when crime was out of control.³⁶ In contrast, *Peairs*, a homeowner who shot someone he mistook for a dangerous intruder, is more typical even though the parties represented very different cultural understandings and values. In fact, Louisiana has at least three earlier torts appellate cases involving mistake as to the necessity of deadly force in self-defense cases that also involved male homeowners shooting teenage boys.³⁷ In none of these other cases does it appear that the tort defendant was criminally charged, and each seriously injured young victim lost his torts case. After examining the *Peairs* cases, I use *Peairs* and two other Louisiana cases to illustrate the appropriateness of my proposal to change how tort law deals with mistake as to necessity when self-defense is asserted.

A. *The Peairs Facts*

Husband, father, and homeowner Rodney Peairs fired his gun directly at Yoshi Hattori, killing him. Peairs shot Yoshi because he mistakenly believed that Yoshi threatened him and his family with serious harm. Peairs based this belief on the events described below which are,

the tools of their petty thievery. The few witnesses who come forward describe the behavior of the four youths before Goetz entered the car as “boisterous.”

Id. at 2–3.

³³ See, e.g., Stephen P. Garvey, *Self-Defense and the Mistaken Racist*, 11 NEW CRIM. L. REV. 119 (2008); Singer, *supra* note 10, at 493–97; Stephen L. Carter, Comment, *When Victims Happen to be Black*, 97 YALE L.J. 420 (1988); Aaron Goldstein, Note, *Race, Reasonableness, and the Rule of Law*, 76 S. CAL. L. REV. 1189, 1190–1205 (2003); Nadine Klansky, Comment, *Bernard [sic] Goetz, A “Reasonable Man”*: A Look at New York’s Justification Defense, 53 BROOK. L. REV. 1149 (1988).

³⁴ See, e.g., PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME 212 (1995); FLETCHER, *supra* note 27; LEE, *supra* note 5, at 148–54 (2003).

³⁵ See, e.g., JOSEPH G. COOK ET AL., CRIMINAL LAW, 733–38 (6th ed. 2008); PAUL H. ROBINSON, FUNDAMENTALS OF CRIMINAL LAW 502–10 (2d ed. 1995).

³⁶ Cynthia Lee describes this time in New York City as follows:

In the 1980s, when the Goetz shooting took place, New York subways were places where gang members terrorized riders by demanding money, covering cars with graffiti, and stealing tokens. These crimes often went unpunished. . . . [S]ix of [the members of the Goetz jury] had been victimized by crime; three by subway crime.

LEE, *supra* note 5, at 153.

³⁷ McKellar v. Mason, 159 So. 2d 700 (La. Ct. App. 1964); Smith v. Delery, 114 So. 2d 857 (La. 1959); Patterson v. Kuntz, 28 So. 2d 278 (La. Ct. App. 1946).

for the most part, taken from *Hattori v. Peairs*.³⁸ In both *Peairs* trials, Peairs was the defendant and the critical question was whether he was legally justified in killing Yoshi in an act of self-defense.³⁹

On Saturday evening, October 17, 1992, Yoshi and his host family's Caucasian 16-year-old son, Webb Haymaker, had become lost while looking for a Halloween party. Yoshi was wearing a white "John Travolta" disco costume while Webb was half-heartedly dressed as an accident victim; neither costume was intended to frighten, and neither boy was wearing a mask. Mistaking the Peairs's house, which had a large "Happy Halloween" banner in the front⁴⁰ and displayed a paper skeleton and plastic ghost,⁴¹ for the one where the party was (the right house was 10131, instead of Peairs's 10311, on the same street), they rang Peairs's front doorbell at around 8:15 p.m. When no one answered, they walked towards the carport door.

Peairs's wife, Bonnie, opened and then slammed the carport door and screamed to Peairs: "Get the gun!" Seeing how fearful she was, Peairs grabbed his .44 magnum Smith & Wesson revolver and headed for the carport door. By the time Peairs opened the door, Yoshi and Webb had walked down the driveway from the carport and were standing on the sidewalk about ten yards away. When Yoshi heard the door open, he began to walk back towards Peairs exclaiming, "We're here for the party!" Webb, who saw the gun, called for him to come back but Yoshi, who was smiling and walking quickly, continued into the carport. Peairs then yelled, "Freeze!" Several seconds later, when Yoshi didn't heed this command, Peairs shot him in the chest from a distance of about five feet.⁴² Peairs then closed and locked the door, and Bonnie called 911. Yoshi died while en route to the hospital.

B. *The Criminal Case*

1. *The Applicable Law*

The grand jury indicted Peairs for manslaughter instead of murder. Under Louisiana law, the prosecution therefore had to prove that Peairs committed criminal homicide, but without murderous intent. The charge of manslaughter was a concession that Peairs's conduct was partially excused because he was provoked and therefore killed "in sudden passion" that would have deprived "an average person of his self-control and cool reflection."⁴³

³⁸ 662 So. 2d 509, 511-13 (La. Ct. App. 1995).

³⁹ Arguably both defense of others and defense of one's home were also at issue in this case. Nevertheless, my focus is on self-defense with the caveat that the other two defenses make a claim of justification more compelling.

⁴⁰ *Parents of Slain Teen May Sue*, REG. GUARD, May 26, 1993, at 3A.

⁴¹ *Defense Depicts Japanese Boy as 'Scary'*, N.Y. TIMES, May 21, 1993, at A10.

⁴² *Acquittal in Doorstep Killing of Japanese Student*, *supra* note 3, at A11.

⁴³ LA. REV. STAT. ANN. § 14:31(1) (2007).

No one disputed that Peairs was sincerely frightened and believed that deadly force was necessary. The question for the jury was whether Peairs's mistake as to the necessity of using such force was reasonable. If his mistake were reasonable, then self-defense would negate the manslaughter charge, resulting in acquittal.⁴⁴ Basing manslaughter on provocation was not a perfect fit for the facts of this case. The emotion that Peairs said he experienced was not the jealousy, rage, or anger that are viewed as the typical bases of a partial defense of provocation.⁴⁵ While provocation is also available where the main emotion is fear, typically this basis for provocation appears in the much more highly charged on-going situations that result in a battered woman killing her batterer.⁴⁶

Here, Peairs experienced fear or even panic based on a tragic mistake as to the situation since in fact Hattori did not pose a threat of *any* kind to Peairs or his family. In a growing minority of jurisdictions that allow imperfect self-defense⁴⁷ or have adopted the Model Penal Code's section 3.09,⁴⁸ those partial excuses, which reduce murder to manslaughter where the killer honestly but unreasonably believes that deadly force was necessary to prevent death or serious bodily injury to himself or others, would have been more appropriate for the prosecution to pursue.

As is typical in a criminal case where self-defense is raised, the prosecution had the burden of proving beyond a reasonable doubt that Peairs did not act in self-defense. The statutory test for self-defense required the prosecution to show that Peairs did not "reasonably believe[] that he [was] in imminent danger of losing his life or receiving great bodily harm and that the killing [was not] necessary to save himself from that danger."⁴⁹

2. *The Criminal Trial*

What happened at the criminal trial is based on news reports. The trial attracted local interest as well as national and Japanese media coverage.⁵⁰ Each day the courtroom was packed with community

⁴⁴ DRESSLER, *supra* note 7, at 216. ("[A] defendant is justified . . . in using deadly force if, at the time of the homicide, she had reasonable grounds for believing, and did believe, that she was in imminent danger of death or grievous bodily injury, and that deadly force was necessary to repel the threat, although it turned out later that these appearances were false.")

⁴⁵ Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 972-73 (2002).

⁴⁶ *Id.* at 977-79 & n.79; Caroline Forell, *Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia*, 14 AM. U. J. GENDER SOC. POL'Y & L. 27, 34 (2006).

⁴⁷ DRESSLER, *supra* note 7, at 234-35.

⁴⁸ Lee, *Race and Self-Defense*, *supra* note 3, at 391-92.

⁴⁹ LA. REV. STAT. ANN. § 14:20 (2007).

⁵⁰ Adam Nossiter, *Judge Awards Damages in Japanese Youth's Death*, N.Y. TIMES, Sept. 16, 1994, at A12 [hereinafter Nossiter, *Judge Awards Damages*].

members⁵¹ and Japanese reporters.⁵² Yoshi's parents, Masaichi and Mieko Hattori, were in regular attendance,⁵³ as was a representative of the Japanese Consul General's Office.⁵⁴

From the start, the trial was about invasion by the "other," and "Peairs had sympathizers both inside and outside the courthouse."⁵⁵ As one potential juror who was struck from the jury pool said: "A man's home is his castle."⁵⁶ She wondered aloud why Peairs was even being prosecuted.⁵⁷

Peairs's attorney, Lewis Unglesby, played on these feelings to the 12-person jury that consisted of six men and six women, ten of whom were white and two of whom were black.⁵⁸ In his opening statement he portrayed Peairs to the jury as a "one of your neighbors,"⁵⁹ a man who liked sugar in his grits⁶⁰ who, along with his wife, Bonnie, was terrified by Yoshi's aggressive, kinetic, antsy, and scary approach.⁶¹ He told the jury that Yoshi was acting "like a stranger invading someone's home turf."⁶² Unglesby explained that "Yoshi had an extremely unusual way of moving."⁶³ He further asserted: "This is not an American or Oriental or any other known being casually walking up to the front door and saying, 'Hello, we're looking for the party,' That's not what happened."⁶⁴

During the trial it became clear that Bonnie's extreme reaction to Yoshi was key to the tragedy that unfolded. Both sides agreed that her "fear precipitated the shooting."⁶⁵ One news report noted that "[n]either her testimony nor her husband's fully explained her fear."⁶⁶ She testified: "There was no thinking involved. . . . I wish I could have thought. If I could have just thought."⁶⁷

When Bonnie opened the carport door, Webb Haymaker told her, "We're looking for the party."⁶⁸ At that moment, she spotted Yoshi. When

⁵¹ *Acquittal in Doorstep Killing of Japanese Student*, *supra* note 3, at A11.

⁵² *Defense Depicts Japanese Boy as 'Scary'*, *supra* note 41, at A10.

⁵³ *Acquittal in Doorstep Killing of Japanese Student*, *supra* note 3, at A11.

⁵⁴ Nossiter, *Judge Awards Damages*, *supra* note 50, at A12.

⁵⁵ *Acquittal in Doorstep Killing of Japanese Student*, *supra* note 3, at A11.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Lee, *Race and Self-Defense*, *supra* note 3, at 436 (citing Tim Talley, *Jury Selected; Opening Arguments Begin Today in Rodney Peairs Trial*, BATON ROUGE ADVOC., May 20, 1993, at 1A).

⁵⁹ *Defense Depicts Japanese Boy as 'Scary'*, *supra* note 41, at A10.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Acquittal in Doorstep Killing of Japanese Student*, *supra* note 3, at A11.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

asked to describe him, she responded, "I guess he appeared Oriental. He could have been Mexican or whatever."⁶⁹ She testified: "He was coming real fast towards me. . . . I had never had somebody come at me like that before. I was terrified."⁷⁰ Then, she slammed the door.⁷¹

Responding to Bonnie's terror and her demand that Peairs get his gun, he did so. Peairs testified that while "[r]unning to the carport door, he spotted someone coming from behind one of his parked cars 'real fast' [H]e pointed the gun and yelled 'freeze' to the two teen-agers, but [Yoshi] kept coming."⁷²

"I wanted him to stop,' [Peairs] testified. 'He didn't. He kept coming. The next thing I remember, I was scared to death. This person was not going to stop. This person was going to do harm to me.'"⁷³ Peairs fired one shot at Yoshi's chest. He said: "I felt I had no choice"⁷⁴ because he feared for his family.⁷⁵ "I couldn't understand why this person wouldn't stop."⁷⁶

In his closing statement, Peairs's attorney Unglesby described an internal conversation to the jury about how Peairs feared that something was terribly awry when Yoshi didn't respond to his command: "This person is not afraid of my gun. He's not respectful of my property. He has no fear whatever.' That's what Rodney Peairs knew."⁷⁷

Testimony indicated that Yoshi, who spoke little English, was known to rush up to people, waving his arms to get them to understand and behaved that way as he approached both Bonnie and Peairs.⁷⁸ Unglesby explained why Yoshi's language problem and strange behavior led to what he portrayed as Peairs's reasonable response: "We have two people colliding from completely different perspectives, . . . one who sees an intruder who is a danger to his family, who sees a person with a grin or smile on his face coming to his house with absolutely no respect for his home, his gun, or his warning."⁷⁹ He said that the way Yoshi was acting when he walked quickly toward Peairs made it reasonable for him "to think his life was in danger."⁸⁰

⁶⁹ Lee, *Race and Self-Defense*, *supra* note 3, at 437 (citing Testimony of Bonnie Peairs at 22, *State v. Peairs* (May 22, 1993) (on file with Professor Lee)).

⁷⁰ *Acquittal in Doorstep Killing of Japanese Student*, *supra* note 3, at A11.

⁷¹ *Defense Depicts Japanese Boy as 'Scary'*, *supra* note 41, at A10.

⁷² *Acquittal in Doorstep Killing of Japanese Student*, *supra* note 3, at A11. Peairs testified that he saw Yoshi holding something in one of his outstretched arms. It turned out to be a camera. *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Jury Acquits Man Who Shot Teen-Ager*, REG. GUARD, May 24, 1993, at 3A.

⁷⁶ *Acquittal in Doorstep Killing of Japanese Student*, *supra* note 3, at A11.

⁷⁷ *Defense Depicts Japanese Boy as 'Scary'*, *supra* note 41, at A10.

⁷⁸ *Acquittal in Doorstep Killing of Japanese Student*, *supra* note 3, at A11.

⁷⁹ *Id.*

⁸⁰ *Jury Acquits Man Who Shot Teen-Ager*, *supra* note 75, at 3A.

In his closing argument prosecuting attorney Doug Moreau highlighted the lack of proportion in Peairs's reaction to his wife's fear. "He goes back to the bedroom, gets the gun, never, ever, ever asking, 'Hey, what's up? What's out there? What would you like me to do?'" It's his conduct in going to the closet and getting the biggest handgun made by human beings and never ever asking what it's for."⁸¹ On the other hand Unglesby noted: "In your house, if you want to do it, you have the legal right to answer everybody that comes to your door with a gun."⁸²

Unglesby emphasized that Peairs was "no killer" and that he "cried and cried" when he discovered he had shot Yoshi.⁸³ At trial Peairs expressed remorse. When Unglesby asked whether "anything good" could come from all of this, Peairs responded, "That Mr. Hattori can understand how I feel."⁸⁴

The jury only deliberated three and a half hours before acquitting Peairs.

3. *The Aftermath*

"Spectators applauded when the forewoman announced the unanimous verdict."⁸⁵ Peairs's lawyer, Unglesby, echoed the local community's view when after the acquittal he concluded: "This was not a criminal event or a criminal act or a criminal person."⁸⁶

Supporting this view, Charles Sutton, a parking lot owner, said as he stood near the courthouse: "We're just prisoners in our neighborhoods It would be to me what a normal person would do under those circumstances."⁸⁷

The people of Japan reacted very differently from the Baton Rouge public.⁸⁸ Like the Hattoris, many Japanese were shocked, appalled and bewildered by Peairs's acquittal.⁸⁹ Yoshi's father, Masaichi Hattori, said the verdict was "unbelievable."⁹⁰ The Japanese press echoed this sentiment: "Unbelievable!" screamed a giant headline on one of the daily Japanese newspapers.⁹¹ Representing public sentiment, Japanese TV

⁸¹ *Acquittal in Doorstep Killing of Japanese Student*, *supra* note 3, at A11.

⁸² *Id.*

⁸³ *Defense Depicts Japanese Boy as 'Scary'*, *supra* note 41, at A10.

⁸⁴ *Acquittal in Doorstep Killing of Japanese Student*, *supra* note 3, at A11.

⁸⁵ *Jury Acquits Man Who Shot Teen-Ager*, *supra* note 75, at 3A.

⁸⁶ *Id.*

⁸⁷ *Acquittal in Doorstep Killing of Japanese Student*, *supra* note 3, at A11.

⁸⁸ George Yoshinaga, *Applauding a Killer? It Defies Decency*, L.A. TIMES, June 14, 1993, at B4.

⁸⁹ *Parents of Slain Teen May Sue*, *supra* note 40, at 3A.

⁹⁰ *Jury Acquits Man Who Shot Teen-Ager*, *supra* note 75, at A3A.

⁹¹ *Parents of Slain Teen May Sue*, *supra* note 40, at 3A. *See also* Teresa Watanabe, *Japanese Angered by U.S. Acquittal of Student's Killer*, L.A. TIMES, May 25, 1993, at A4. In 1997, Christine Choy opened an Asian Film Festival in San Francisco with her documentary about the killing of Yoshi titled "The Shot Heard 'Round the World." It included images of Yoshi in life and death and examined the cultural differences that

commentator asked: “[W]hich society is more mature? The idea that you protect people by shooting guns is barbaric.”⁹²

As the strong reactions on both sides demonstrate, what is reasonable depends on who is being asked. Another example of the cultural divide concerning what is reasonable was Unglesby’s failure to encourage his client to apologize—behavior that is viewed as an expected and effective form of compensation in Japan,⁹³ but which, until recently,⁹⁴ was widely viewed by American defense lawyers as risky and ineffective.⁹⁵ Peairs voiced his regret at the trial; however, “he never expressed any regret or apology to the Hattoris”⁹⁶ Peairs met in private with Mr. Hattori soon after the trial ended. Peairs’s attorney attended the meeting as well, and Mr. Hattori said it turned out to be “no meeting at all.”⁹⁷ The day after the “frustrating meeting” Mr. Hattori said he felt more inclined to bring a wrongful death lawsuit against Peairs.⁹⁸

led to such different reactions to the tragedy in the United States and Japan. Annie Nakao, *Asian Film Fest Opens with a Bang*, S.F. EXAMINER, May 21, 1997, at B1.

⁹² Yoshihiro Hattori: *Afterwards*, SPIRITUS-TEMPORIS.COM, <http://www.spiritus-temporis.com/yoshihiro-hattori/afterwards.html> (“1.65 million Japanese and one million Americans signed a petition urging stronger gun controls in the US; the petition was presented to Ambassador Walter Mondale on November 22, 1993, who delivered it to President Bill Clinton. Shortly thereafter, the Brady Bill was passed, and on December 3, 1993, Mondale presented Hattori’s parents with a copy.”).

⁹³ See generally Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC’Y REV. 461 (1986); Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement (with Japan and the United States in Mind)*, 27 MICH. J. INT’L L. 1 (2005). Lee describes the different cultural and legal views of apology as follows:

Generally, when one causes significant injury or harm to another, the Japanese practice is to apologize and the American inclination is to refuse an apology. The legal system in each country is consistent with its societal inclination or disinclination to apologize. That is, the Japanese bench and bar expect a party causing injury to apologize, and the apology becomes part of the settlement process. In contrast, American legal institutions undervalue the apology and have yet to develop a facilitating use for it.

Id. at 52.

⁹⁴ In the past fifteen years many tort lawyers, especially in the area of medical malpractice, have reconsidered their negative views on the effectiveness of apology as a form of compensation. See Andis Robeznieks, *The Power of an Apology: Patients Appreciate Open Communication*, AM. MED. NEWS, July 28, 2003, available at <http://www.ama-assn.org/amednews/2003/07/28/prsa0728.htm>. See generally Jonathan Todres, *Toward Healing and Restoration for All: Reframing Medical Malpractice Reform*, 39 CONN. L. REV. 667 (2006).

⁹⁵ See Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1042–45 (1999).

⁹⁶ *Parents of Slain Teen May Sue*, *supra* note 40.

⁹⁷ *Id.*

⁹⁸ *Id.*

C. *The Hattoris' Wrongful Death Trial and Appeal*

1. *The Civil Trial*

When Yoshi's parents did not receive an apology, they opted for the remedy that is viewed as the typical means of receiving reasonable compensation in the United States: a lawsuit.⁹⁹ In 1994, the wrongful death suit was tried to Judge William Brown, sitting without a jury.¹⁰⁰ The issue was the same as in the criminal trial: Was it reasonable under the circumstances for Peairs to shoot and kill Yoshi in a mistaken belief that deadly force was necessary? The lawyer for Peairs's insurance company stated the case from the defense point of view as follows: "It's not irrational for a woman in her bed clothes with three small children in the house to be fearful. . . . That's rational these days. It's irrational for a man in costume to run toward another man who is in his house with a gun."¹⁰¹ However, this view was not persuasive to Judge Brown even though Peairs testified: "I was scared to death."¹⁰² Unlike the criminal trial, the crowd was silent when the verdict was announced.¹⁰³ Judge Brown awarded the Hattoris more than \$650,000 in damages and costs, stating: "There was absolutely no need to the resort of a dangerous weapon."¹⁰⁴

Only Peairs appealed; after trial his insurance company paid its policy limit of \$100,000 to the Hattoris.¹⁰⁵

2. *The Civil Appeal: Hattori v. Peairs*

In the appeal to a three-judge panel, the standard of review was whether the trial judge's rulings were "manifestly erroneous."¹⁰⁶ The court noted that the same statutory criminal self-defense standard and mistake of fact standard were applied in the torts suit as in the criminal trial, stating: "This is a criminal statute, but it is applicable to civil cases."¹⁰⁷ While this is typical of how courts treat criminal self-defense statutes in battery and intentional wrongful death cases,¹⁰⁸ courts do not

⁹⁹ The Hattoris had at least three reasons for filing their lawsuit against Peairs and his homeowner's insurance company. First, they wanted to provide support for gun control. Joan Treadway, *Parents Turn Grief into Anti-Gun Effort*, TIMES-PICAYUNE, Oct. 6, 1996, at B1. They also wanted to do something that would preserve the memory of Yoshi. Nossiter, *Judge Awards Damages*, *supra* note 50, at A12. Finally, they wanted there to be some form of public accountability for Yoshi's death. *Id.*

¹⁰⁰ *Hattori v. Peairs*, 662 So. 2d 509, 509 (La. Ct. App. 1995).

¹⁰¹ Leslie Zganjar, *Civil Trial Begins in Case of Slain Japanese Exchange Student*, ASSOCIATED PRESS, Sept. 12, 1994, ¶ 5.

¹⁰² *Peairs*, 662 So. 2d at 514.

¹⁰³ Nossiter, *Judge Awards Damages*, *supra* note 50, at A12.

¹⁰⁴ *Id.*

¹⁰⁵ According to one news report, the Hattoris "earmarked for anti-gun groups \$40,000 of the \$100,000 they got from the homeowner's insurance company." Treadway, *supra* note 99.

¹⁰⁶ *Peairs*, 662 So. 2d at 514.

¹⁰⁷ *Id.*

¹⁰⁸ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 127 (W. Page Keeton ed., 5th ed. 1984).

have to apply the criminal statutes in tort cases unless, as rarely happens, the legislature clearly intends the rules to apply to both crimes and torts. Applying criminal self-defense statutes to civil claims is comparable to negligence per se where it is within a court's discretion whether to borrow the criminal statute's standard of conduct.¹⁰⁹ That courts have this discretion is essential for my proposal that there should be tort liability for a reasonable mistake.

On appeal, Peairs alleged two errors concerning the applicable tort rule when a defendant alleges self-defense based on a mistaken belief that deadly force was necessary. First, he argued that the trial judge erred in "its determination that Rodney Peairs was not justified in his actions."¹¹⁰ The appellate court responded: "[W]e . . . find nothing within the record to support his assertion that such fear was reasonable."¹¹¹ The court concluded: "Under the circumstances of this case, we cannot say that it was either reasonable or necessary for Rodney Peairs to resort to the use of deadly force in order to protect himself and his family."¹¹² Thus, unlike the jury in the criminal trial, the appellate judges agreed with the trial court¹¹³ that Peairs's mistake as to necessity was unreasonable and therefore subject to liability.

Peairs also argued that the trial judge erred in "failing to apportion fault" between himself and Yoshi Hattori.¹¹⁴ Peairs claimed that the trial court should have found Yoshi acted unreasonably and that his unreasonable conduct should have been factored in as comparative fault.¹¹⁵ At the time of the *Peairs* case it was an open question in Louisiana whether victim's negligence could be compared to the defendant's intentional conduct. While there might have been sufficient evidence to allow the fact finder to assess the reasonableness of Yoshi's conduct that contributed to his death, the appellate court held that "[b]ecause [Peairs's] actions were so extreme, we believe it would be poor public policy to compare fault in this situation."¹¹⁶ More recently the Louisiana

¹⁰⁹ Caroline Forell, *Statutory Torts, Statutory Duty Actions, and Negligence Per Se: What's the Difference?*, 77 OR. L. REV. 497, 504-06 (1998).

¹¹⁰ *Peairs*, 662 So. 2d at 513.

¹¹¹ *Id.* at 515.

¹¹² *Id.*

¹¹³ The trial court stated: "Self defense, is not acceptable. There was no justification whatsoever that a killing was necessary for Rodney Peairs to save himself and/or to protect his family." *Id.*

¹¹⁴ *Id.* at 513, 516.

¹¹⁵ *Id.* at 516. Louisiana is unusual in allowing comparative fault in battery and intentional wrongful death cases where the defendant provides evidence of intentional wrongful conduct by the plaintiff. The appellate court rejected this comparative fault claim because Yoshi's conduct was clearly not intentional. *Id.* at 516.

¹¹⁶ *Id.* at 517.

Supreme Court made it clear that it follows the majority rule¹¹⁷ that comparative fault is not permitted when the defendant's conduct was intentional and the plaintiff's conduct was merely negligent.¹¹⁸

D. Comparing the Outcomes in the Criminal and Civil Cases

There are important distinctions between how criminal and civil cases are tried.¹¹⁹ Differences in both the standards of proof and who has the burden of proof may sometimes provide the best explanation for why a criminal case results in acquittal while the tort case for the same incident results in liability.¹²⁰ As is typical, in the criminal case against Peairs, the burden was on the prosecution to prove beyond a reasonable doubt that his belief that he needed to use deadly force in self-defense was reasonable.¹²¹ On the other hand, as is typical, in the civil case the burden was on Peairs to prove by a preponderance of evidence that his belief was reasonable.¹²² This distinction may have mattered; however, the

¹¹⁷ Gail D. Hollister, *Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault*, 46 VAND. L. REV. 121, 160 & n.138 (1993).

¹¹⁸ *Landry v. Bellanger*, 851 So. 2d 943, 954 (La. 2003). The rejection of comparative fault, sometimes described in criminal terms as provocation, is typical when seeking compensatory damages in an intentional tort case. RESTATEMENT (THIRD) TORTS: APPORTIONMENT OF LIAB. § 1 cmt. c (2000). See generally Hollister, *supra* note 117. In contrast, when tort law takes on a criminal aspect through the assessment of punitive damages, factoring in the conduct of the victim is often deemed permissible. See Andrea G. Nadel, Annotation, *Provocation as Basis for Mitigation of Compensatory Damages in Action for Assault and Battery*, 35 A.L.R. 4th 947 (1985).

¹¹⁹ Another arguable difference is that tort law typically focuses on reasonable conduct, while criminal law's central focus is on reasonable belief. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 cmt. a (2010) ("reasonably careful person"); see generally Cynthia K.Y. Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification*, 2 BUFF. CRIM. L. REV. 191 (1998). However, the torts cases where conduct is the sole focus typically involve negligence. At common law, the focus in tort when the intentional defense of self-defense is alleged is on reasonable belief rather than conduct. RESTATEMENT (SECOND) OF TORTS § 70(1) (1965) ("which the actor correctly or reasonably believes to be necessary for his protection"). Furthermore, since civil courts typically borrow the criminal statutory standards that focus on belief, it is likely that the focus for both criminal and tort law is on belief. In fact both reasonable belief and reasonable conduct may be considered in mistake as to the necessity of deadly force in self-defense, whether the case be criminal or civil. Thus, when one assesses reasonableness in the case of Peairs shooting Yoshi, one can ask whether his belief that deadly force was necessary to protect him and his family from bodily harm and whether his conduct in shooting Yoshi point blank was reasonable or proportionate. See generally LEE, *supra* note 5, at 260–75.

¹²⁰ This was one of the reasons given for the different outcomes in the two trials of O.J. Simpson for the murders of his ex-wife and Mr. Goldman. *Civil, Criminal Trials as Different as Guilt, Liability*, STATE (Columbia, S.C.), Feb. 9, 1997, at A12.

¹²¹ See *supra* note 49 and accompanying text.

¹²² DOBBS, *supra* note 7, at 159.

decisiveness with which the decision-makers reached the opposite results in the two cases¹²³ suggests that these evidentiary rules were not the reason for the different reasonableness determinations.

Another difference between the two *Peairs* cases that arguably affected the outcomes was that the criminal trial was tried to a jury and the civil trial was tried to a judge. Perhaps the jury was more easily swayed by Peairs's subjective fear for himself, his family, and his home than the judges were in the tort case. However, in the case involving Bernhard Goetz, he fared very differently in his two jury trials. In the tort case, the jury awarded a whopping \$43 million¹²⁴ to one of the young men he shot even though the jury in the criminal case acquitted him of attempted murder. These starkly different jury verdicts suggest that outcomes in criminal and civil cases are often not dependent on whether the civil case is tried to a judge or a jury.¹²⁵

Other factors such as different testimony, other evidence, and different people acting as decision-makers, lawyers, and trial judges can affect outcomes in cases. Such differences are inevitable when there are two trials about the same incident, regardless of whether the trials are both criminal,¹²⁶ both civil,¹²⁷ or one is criminal and the other is civil.¹²⁸ However, an important distinction that always exists when there is both a criminal and a civil trial concerning the same incident is that the purpose for the prosecution is very different from the purpose for the lawsuit.

E. The Influence of Different Purposes for Tort Law and Criminal Law

A compelling reason for the different assessments of the reasonableness of Peairs's belief is that, because criminal law and tort law

¹²³ The jury in the criminal case took only three hours to acquit. *Acquittal in Doorstep Killing of Japanese Student*, *supra* note 3. The trial judge in the torts case strongly condemned Peairs's conduct as clearly unreasonable. *See supra* note 112–13 and accompanying text.

¹²⁴ Nossiter, *Bronx Jury*, *supra* note 28.

¹²⁵ As noted earlier, the *Goetz* outcomes may have been influenced by changes in New Yorkers' perceptions of their need to defend themselves against criminals. The crime rates in New York City plummeted between the time of the criminal case and the civil case; thus, the circumstances in New York City surrounding what the jury, as determiners of social norms, viewed as reasonable fear may have been different enough to affect their assessment of Goetz's conduct in the two cases.

¹²⁶ *E.g.*, compare Seth Mydans, *Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES, Apr. 30, 1992, at A1, with Seth Mydans, *2 of 4 Officers Found Guilty in Los Angeles Beating*, N.Y. TIMES, Apr. 18, 1993, at A1 (the Rodney King trials).

¹²⁷ *E.g.*, compare *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905) (jury awarded \$14,322.50 to the plaintiff because the defendant doctor competently operated on her ear without her consent), with SCHWARTZ, KELLY & PARTLETT, *supra* note 14, at 98 (a second trial in the same case where the jury awarded \$39 for the same injury instead).

¹²⁸ *E.g.*, compare Jim Newton, *Simpson Not Guilty: Drama Ends 474 Days After Arrest*, L.A. TIMES, Oct. 4, 1995, at A1, with B. Drummond Ayres, Jr., *Jury Decides Simpson Must Pay \$25 Million in Punitive Award*, N.Y. TIMES, Feb. 11, 1997, at A1.

serve different purposes and provide different remedies, what a decision-maker deems to be reasonable for criminal law may not be the same as what is deemed reasonable for tort law. Criminal law protects the public and punishes on behalf of the community through imprisonment or death.¹²⁹ Tort law provides compensatory damages designed to make the injured party “whole,” to serve as vindication of the injured party, and to deter the defendant and others.¹³⁰ Deterrence is likely irrelevant when a reasonable or even an unreasonable mistake is made regarding self-defense. When a person believes that his life or the life of another is imminently threatened, neither the possibility of criminal punishment nor of civil liability will likely deter him from using deadly force.¹³¹ In such a situation sincere fear for one’s life also makes the use of deadly force a morally innocent act. However, as between two morally innocent parties, compensation and vindication provide compelling reasons for finding liability in tort while acquitting the same actor of a crime. The fact that civil cases are brought by the injured parties instead of by the state make the compensatory and vindicatory purposes especially clear to the decision-maker.

I believe that the most likely explanation for the jury in the *Peairs* criminal case concluding that the defendant’s mistake was reasonable, while the judges in the *Peairs* civil case found his mistake to be unreasonable, is the decision-makers’ awareness of the consequences of finding Peairs’s belief to be unreasonable: imprisonment in the criminal trial, money damages in the civil trial. The sense that both parties were morally innocent makes reaching these different outcomes attractive: providing compensation seemed appropriate, but imposing punishment did not.

The jury’s conclusion in the criminal trial that Peairs’s mistake as to necessity was reasonable is defensible. As Professor Cynthia Lee notes: “When Hattori failed to stop after Peairs yelled ‘Freeze!’ it might have been reasonable for Peairs to have believed Hattori was about to attack him”¹³² However, she also comments that “a guilty verdict would have been legally defensible as well.”¹³³

In this particular scenario it is understandable that the jury in the criminal case sympathized with Peairs. No one disputes that he and his wife were extremely frightened by Yoshi and that Peairs sincerely believed that deadly force was necessary in defense of himself, his family, and his home. In addition, he was acting out of the socially acceptable emotion of fear in contrast to the anti-social emotions of anger, rage, jealousy, and possessiveness that typify “heat of passion” manslaughter. Most likely punishing him as a criminal did not comport with the jury’s sense of

¹²⁹ LAFAVE, *supra* note 8, at 13.

¹³⁰ DOBBS, *supra* note 7, at 4.

¹³¹ Singer, *supra* note 10, at 500–01.

¹³² Lee, *Race and Self-Defense*, *supra* note 3, at 434.

¹³³ *Id.* at 435.

justice, and therefore they found his mistake did not merit conviction for manslaughter.

When it came to the tort suit, however, the combined goals of vindicating Yoshi and compensating the Hattoris for the painful loss of their child, as well as the lack of any possible penal consequence for Peairs, made it more appropriate and just to allow recovery in this situation involving two morally innocent actors.

IV. REASONABLE MISTAKES IN CRIMINAL AND CIVIL SELF-DEFENSE CASES: THE DILEMMA OF TWO MORALLY INNOCENT ACTORS

The difference in the purposes served by criminal law compared to tort law makes it appropriate and just to change the current default rule in tort law from “no liability” to “liability” in all cases where the defendant injured or killed another based on a mistake as to the necessity of using deadly force in self-defense, defense of others,¹³⁴ and/or defense of home.

A. *Justifications for the Current Tort Rule*

The barriers to my proposed change in the tort rule are low. Rarely have courts or commentators provided any justification for the no-liability-if-the-mistake-was-reasonable rule. When they do provide an explanation, they typically say it is because tort law does or should follow the criminal law rule.¹³⁵ But why? As noted earlier, applying the criminal liability rule for mistake-as-to-necessity to tort law is not mandated even when, as is typical, there is legislation because the statutes only set out the criminal standards. Courts are therefore free to impose liability for reasonable mistakes regarding the necessity for using force or deadly force in self-defense if this better serves the purposes of tort law.

One justification for a finding of no liability is that “self-preservation [is] the first law of nature.”¹³⁶ While resort to available deadly force (typically a firearm) may often be inevitable when one perceives, albeit mistakenly, that death or serious injury to oneself or others will otherwise result, denying compensation does not necessarily follow. If a reasonable person would also have used deadly force, one can be privileged to act but required to pay for the harm caused and still satisfy this justification. This would be more in line with what tort law does in the areas of

¹³⁴ In a minority of jurisdictions, this is already the rule for mistaken defense of others. DOBBS, *supra* note 7, at 168–69.

¹³⁵ Hattori v. Peairs, 662 So. 2d 509, 514 (La. Ct. App. 1996) (“This is a criminal statute, but it is applicable to civil cases.”).

¹³⁶ SCHWARTZ, KELLY & PARTLETT, *supra* note 14, at 105. Ironically, the basis given for this justification is the Louisiana case *Smith v. Delery*, 114 So. 2d 857 (La. 1959), discussed *infra*, even though that case does not set out this justification.

reasonable mistake as to property and the partial privilege of private necessity discussed in the next Section.

A related justification given is that “[t]he burden of the mistake is placed upon the innocent plaintiff because it is socially necessary that men be free to defend themselves against apparent attack”¹³⁷ This assertion is dubious. It is unlikely that a person would be deterred from using deadly force in self-defense because of a concern that he might be liable if it turns out that he is mistaken about what he sincerely perceives as a deadly threat. On the flip side, it is equally unlikely that a person will be more inclined to use deadly force because, if they are mistaken about the necessity, they will not be liable if that mistake was reasonable. These mistakes are made under extreme duress, and the balancing of costs and benefits simply does not occur.¹³⁸

B. *Liability Rules for Reasonable Interferences with Property*

In tort law, all reasonable mistakes are not treated the same. They are treated differently depending on whether the mistake involves intentional harm to or interference with another’s property (strict liability) or person (no liability). In *Ranson v. Kitner*, the defendant was out hunting wolves.¹³⁹ He shot and killed the plaintiff’s dog which he sincerely and reasonably mistook for a wolf.¹⁴⁰ At the time of this case, killing a wolf was deemed a laudable act.¹⁴¹ Nevertheless, even though he reasonably mistook the dog for a wolf, the defendant was held liable for conversion. This case is often taught in law school¹⁴² to illustrate the usual rule that one is strictly liable for a reasonable mistake when harm to another’s personal property results.¹⁴³ Similarly, reasonable mistakes as to ownership of real property result in strict liability for trespass to land.¹⁴⁴

¹³⁷ KEETON ET AL., *supra* note 108, at 111.

¹³⁸ As Kenneth Simons observes: based on scientific evidence “[i]n the fast-moving context of a violent attack, it is often unrealistic to expect the person attacked to consciously and carefully evaluate the precise extent of a threat, the likely effect of his response on the aggressor, and the availability of alternatives.” Kenneth W. Simons, *Self-Defense: Reasonable Beliefs or Reasonable Self-Control?*, 11 NEW CRIM. L. REV. 51, 78 (2008).

¹³⁹ 31 Ill. App. 241 (1888).

¹⁴⁰ “The . . . dog had a striking resemblance to a wolf.” *Id.*

¹⁴¹ BARRY HOLSTUN LOPEZ, *OF WOLVES AND MEN* 160 (1978); Rick Bass, *The Way Wolves Are*, in *OUT AMONG THE WOLVES: CONTEMPORARY WRITING ON THE WOLF* 177–78 (John A. Murray ed. 1993).

¹⁴² *See, e.g.*, JOSEPH W. GLANNON, *THE LAW OF TORTS* 34 (4th ed. 2010); MEREDITH J. DUNCAN & RONALD TURNER, *TORTS* 33 (2010); SCHWARTZ, KELLY & PARTLETT, *supra* note 14, at 24, 105.

¹⁴³ *See, e.g.*, *Teledyne Indus., Inc. v. Eon Corp.*, 401 F. Supp. 729, 741 (S.D.N.Y. 1975); *Douglas v. Wones*, 458 N.E.2d 514, 519 (Ill. App. Ct. 1983). *See generally* KEETON ET AL., *supra* note 108, at 86–87.

¹⁴⁴ *See, e.g.*, *Union Pac. R.R. Co. v. Vale, Or. Irrigation Dist.*, 253 F. Supp. 251, 258 (D. Or. 1966); *Cooper v. Horn*, 448 S.E.2d 403, 423 (Va. 1994). *See generally* KEETON ET AL., *supra* note 108, at 74–75.

Another property doctrine that conflicts with the current mistake-as-to-self-defense rule is private necessity. The partial privilege rule regarding private necessity is set out in the much-analyzed case of *Vincent v. Lake Erie*.¹⁴⁵ In *Vincent*, the defendant damaged the plaintiff's dock by tying his ship to it during a sudden violent storm.¹⁴⁶ The court in *Vincent* held that the defendant was privileged to protect his more valuable property but had to pay for the damage he caused to the plaintiff's property.¹⁴⁷ Even where private necessity involves a threat of death or serious physical harm to human life, unless another person's property is used or damaged, authority suggests that while privileged to use the property, compensation must be provided for any property damage.¹⁴⁸

The comparison of private necessity to mistaken self-defense in the tort setting was discussed in a recent debate between Professors Corrado and Fontaine, in the *American Criminal Law Review*, about whether a reasonable mistake as to necessity of self-defense in the criminal law context is justified or merely excused.¹⁴⁹ They agreed that even though a reasonable mistake as to necessity should result in an acquittal in criminal law, in the tort context, it should result in strict liability instead.¹⁵⁰ Their basis for this was by analogizing to private necessity and the partial privilege set out in *Vincent*.¹⁵¹ As Professor Corrado explains: "The analogy here is to the justification of necessity. You are entitled to use the resources of another to save yourself; but once the emergency is past you must make compensation [through] tort liability."¹⁵² Professor Fontaine agreed: Victims of mistaken self-defense "deserve to be compensated by their inflictors. They are, in fact, *victims*."¹⁵³

Two distinguished torts commentators, Richard Epstein and Stephen Sugarman, have also noted the disparity between the rule for private necessity and mistaken self-defense. In his classic article, *A Theory of Strict*

¹⁴⁵ *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910). For a summary of the multiple rationales for a partial privilege in *Vincent* by the leading torts commentators, see Stephen D. Sugarman, *The "Necessity" Defense and the Failure of Tort Theory: The Case Against Strict Liability for Damages Caused While Exercising Self-Help in an Emergency*, ISSUES IN LEGAL SCHOLARSHIP (2005), http://works.bepress.com/stephen_sugarman/7.

¹⁴⁶ *Vincent*, 124 N.W. at 221.

¹⁴⁷ *Id.* at 222. Economic analysis provides some justification for this rule since knowledge that compensation will be paid for harm to his property may encourage the person whose property is being used by the other to allow him to do so. Of course, it is unlikely that most property owners will know that this is the liability rule.

¹⁴⁸ *Ploof v. Putnam*, 71 A. 188 (Vt. 1908). See also DOBBS, *supra* note 7, at 248.

¹⁴⁹ Reid Griffith Fontaine, *In Self-Defense Regarding Self-Defense: A Rejoinder to Professor Corrado*, 47 AM. CRIM. L. REV. 97, 103 (2010); Michael Louis Corrado, *Self-Defense, Moral Acceptability, and Compensation: A Response to Professor Fontaine*, 47 AM. CRIM. L. REV. 91, 94 (2010).

¹⁵⁰ Fontaine, *supra* note 149.

¹⁵¹ Corrado, *supra* note 149, at 94 & 95 n.11.

¹⁵² *Id.* at 95.

¹⁵³ Fontaine, *supra* note 149, at 103.

Liability,¹⁵⁴ Professor Epstein argues that *Vincent* was correctly decided noting that “[t]he necessity may justify the decision to cause the damage, but it cannot justify a refusal to make compensation for the damage so caused.”¹⁵⁵ Epstein then makes clear that cases of mistaken self-defense should also result in strict liability.¹⁵⁶ In both the private necessity and reasonable mistake in exercising self-defense cases, “defendant must bear the costs of those injuries that he inflicts upon others as though they were injuries that he suffered himself.”¹⁵⁷ He therefore concludes that “[i]f the defendant harms the plaintiff, then he should pay even if the risk he took was reasonable”¹⁵⁸

Professor Sugarman also focuses on private necessity; however, he argues that *Vincent* is wrongly decided, that the rule in such cases should be no liability because there is no “special justification for imposing strict liability.”¹⁵⁹ In contrast, Sugarman notes that while mistaken self-defense is analogous to private necessity in that both involve innocent victims, strict liability may be appropriate in the mistaken self-defense cases, mentioning loss-spreading as one possible justification.¹⁶⁰ These commentators are right in suggesting that the tort rule should be that a reasonable mistake as to self-defense is only partially privileged. A person who fears for his life is entitled to use deadly force, but if mistaken he should pay for the harm to another that he causes.

In sum, when sudden duress from an independent outside source causes a person to reasonably choose to interfere with another person’s property interests, tort law deems such choice as lawful but requires that the user should pay if damage results. It is hard to justify both this rule and the no-liability rule for a reasonable mistake in using deadly force in self-defense. I therefore propose that like reasonable mistakes that damage or interfere with another’s real or personal property and the partial privilege in cases of private necessity, a reasonable mistake regarding the necessity of using deadly force should result in strict liability. The British description of intentional harm to a person as a trespass on the person highlights the similarity.¹⁶¹ Loss of or damage to human life should be treated as at least as deserving of compensation as damage to property when the injured party did not actually pose a threat

¹⁵⁴ Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

¹⁵⁵ *Id.* at 158.

¹⁵⁶ Professor Epstein’s sample case, *Morris v. Platt*, 32 Conn. 75 (1864), is not one where the defendant was mistaken as to the necessity of self-defense. Instead, the defendant mistakenly but “prudently” shot the wrong person when acting in self-defense, and the act was in fact necessary. Epstein, *supra* note 154, at 159.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 160. See also Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUDIES 391, 416 (1975).

¹⁵⁹ Sugarman, *supra* note 145, at 57.

¹⁶⁰ *Id.*

¹⁶¹ *Ashley v. Chief Constable of Sussex*, [2008] UKHL 25, [2008] 1 A.C. [962], [980] (appeal taken from Eng.) (Lord Rodger of Earlsferry).

of bodily harm to the defendant. Thus, the fairness justification, that as between the innocent actor and the innocent injured party, the actor should bear the loss, should apply equally to both situations.¹⁶²

C. *British Case Law Support for My Proposal*

While there is ancient legal support for my proposal,¹⁶³ I could find only one reported American case holding that a defendant who mistakenly used deadly force out of a fear of death or serious bodily harm is liable even if his belief was reasonable.¹⁶⁴ However, the recent British decision, *Ashley v. Chief Constable of Sussex*, approves of different rules for mistaken self-defense in criminal and torts cases because of the different purposes they serve. It also provides support for imposing strict liability when a defendant mistakenly but reasonably uses deadly force in self-defense.

In 1998, a British police officer, mistakenly believing that deadly force was necessary,¹⁶⁵ shot and killed James Ashley in Ashley's home.¹⁶⁶ Police Constable Sherwood and other officers forcibly entered Ashley's flat at around 4:30 a.m., pursuant to a warrant, in search of illegal drugs.¹⁶⁷ Asleep in the bedroom at the time, Ashley and his girlfriend were awakened by the noise of the officers' entry. As Sherwood went into the unlighted bedroom, Ashley, who was unarmed and naked, approached him. Out of fear for his life, Sherwood shot and killed him.¹⁶⁸ In 2001, Sherwood was acquitted of murder and manslaughter based on his claim of self-defense under a purely subjective standard.¹⁶⁹ Ashley's father and son then sued the County of Sussex, which employed

¹⁶² For example, insane persons, though morally innocent, are held liable for battery when they intentionally injure or kill another even though they are found "not guilty" of a crime due to insanity. *See, e.g., Polmatier v. Russ*, 537 A.2d 468 (Conn. 1988) (insane defendant found liable for wrongful death but not guilty of murder).

¹⁶³ Under Roman law:

Persons who do damage because they cannot otherwise defend themselves are innocent; for all statutes and legal systems allow one to repel force by force. But if in order to defend myself I throw a stone at my adversary, but hit, not him but a passerby, I shall be liable under the Lex Aquilia [the general tort statute for wrongful damage]; for one is allowed to strike only the person who uses force

RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 56 (9th ed. 2008) (quoting THE DIGEST OF JUSTINIAN, 9.2.45.4)

¹⁶⁴ *Chapman v. Hargrove*, 204 S.W. 379, 380 (Tex. Civ. App. 1918).

¹⁶⁵ The defendant admitted that the shooting was a mistake. *Ashley v. Chief Constable of Sussex*, [2006] EWCA (Civ) 1085, [2007] 1 W.L.R. 398, [411] (appeal taken from Eng.).

¹⁶⁶ Nick Davies, *Armed and Dangerous: The Police with Their Fingers on the Trigger*, *GUARDIAN*, May 23, 2001; Matt Adams, *Naked Shooting Victim's Family Vow to Sue Police*, *BIRMINGHAM POST*, May 23, 2001.

¹⁶⁷ Davies, *supra* note 166.

¹⁶⁸ *Id.*

¹⁶⁹ *Ashley*, 1 W.L.R. at [414].

Sherwood, under Britain's wrongful death statute for a variety of tort claims including battery.¹⁷⁰ One of the issues at trial and on appeal was the civil standard for a mistake as to the necessity of using deadly force in self-defense.¹⁷¹ The trial court dismissed the battery claim because it found that the purely subjective standard used in criminal law also applied in the torts context.¹⁷² Thus, "given the lack of evidence at the criminal trial to disprove the officer's belief that he had been in imminent danger of attack, the [battery] claim had no real prospect of success and was to be struck out."¹⁷³ The plaintiffs appealed this ruling.

The appeal was considered by the Court of Appeal¹⁷⁴ and House of Lords.¹⁷⁵ Sir Anthony Clarke wrote the opinion in the Court of Appeal case while five judges wrote opinions in the House of Lords decision.¹⁷⁶ Clarke described three options where self-defense was alleged in a tort suit:

- (i) the necessity to take action in response to an attack or imminent attack must be judged on the assumption that the facts were as the defendant believed them to be, whether or not he was mistaken and, if he made a mistake of fact, whether or not it was a reasonable mistake to make;
- (ii) the necessity to take action in response to an attack or imminent attack must be judged on the facts as the defendant believed them to be, whether or not he was mistaken but, if he made a mistake of fact, he will only establish the relevant necessity if the mistake was a reasonable mistake to make;
- (iii) in order to establish the relevant necessity the defendant must establish that there was in fact an imminent and real risk of attack.¹⁷⁷

All the appellate judges rejected the trial judge's adoption of the first option that a subjective belief was all that was required. They did so because the purposes served by tort law justified a different rule.¹⁷⁸ Thus, the judges concluded that the choice was between requiring that the mistake be reasonable in order for self-defense to apply (the American rule), or finding liability if the harm resulted from a mistaken belief, regardless of whether the mistake was reasonable or not (my strict liability proposal).

¹⁷⁰ They also sued for assault, false imprisonment and negligence. *Ashley*, 1 A.C. at [962].

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* In October 2009 the law lords of the House of Lords became the Justices of the Supreme Court, created under the Constitutional Reform Act of 2005. Constitutional Reform Act, 2005, c. 4, § 3 (Eng.).

¹⁷⁴ *Ashley*, 1 W.L.R. at [398].

¹⁷⁵ *Ashley*, 1 A.C. at [962].

¹⁷⁶ Lord Bingham of Cornwall, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Carswell, and Lord Neuberger of Abbotsbury. *Id.*

¹⁷⁷ *Ashley*, 1 W.L.R. at [411].

¹⁷⁸ *Ashley*, 1 A.C. at [973], [984].

In his Court of Appeal opinion, Clarke said that the English strict liability rule for mistakes concerning defense of property provided “undoubted force” for applying the same rule to mistakes regarding the necessity of deadly force in self-defense.¹⁷⁹ He stated further that “if the principles of trespass to property and trespass to the person are the same, the principles set out [in the property cases] support [Ashley’s] case.”¹⁸⁰ Nevertheless, relying on an 1891 United States Supreme Court decision,¹⁸¹ and implications he drew from a 1980 criminal law revision report that changed the criminal law rule from both subjective and objective to purely subjective,¹⁸² Clarke held that the second option of allowing self-defense to bar recovery if the defendant’s mistake was reasonable was more appropriate.¹⁸³

On appeal to the House of Lords the five law lords each wrote an opinion that addressed whether the tort rule should be to allow self-defense if the mistake was reasonable or to apply strict liability. They concluded that, because the strict liability rule was not presented on appeal, they could not adopt it in this case but that the question of which of the two rules was correct remained open.¹⁸⁴

Lord Scott strongly favored strict liability, stating: “I am not persuaded that a mistaken belief in the existence of non-existent facts that if true might have justified the assault complained of should be capable, even if reasonably held, of constituting a complete defence to the tort of assault.”¹⁸⁵ He noted that mistaken self-defense cases were situations where the rights to self-preservation of the two parties conflict and “the law of tort, must then strike a balance.”¹⁸⁶ Scott then explained why he preferred strict liability, stating that “every person is prima facie entitled not to be the object of physical harm intentionally inflicted by another.”¹⁸⁷ He justified allowing recovery even where a mistake was reasonable based on the compensatory and vindicatory purposes of tort law.¹⁸⁸ He noted, however, that in some situations the conduct of the plaintiff could be considered as comparative fault.¹⁸⁹

¹⁷⁹ *Ashley*, 1 W.L.R. at [411].

¹⁸⁰ *Id.* at [412].

¹⁸¹ *Id.* at [420]–[21] (citing *New Orleans & Ne. R.R. Co. v. Jopes*, 142 U.S. 18, 23–24 (1891) (stating that tort law follows the criminal law rule)).

¹⁸² *Id.* at [414]–[15].

¹⁸³ *Id.* at [421].

¹⁸⁴ *Ashley*, 1 A.C. at [975].

¹⁸⁵ *Id.* at [975] (Lord Scott of Foscote).

¹⁸⁶ *Id.* at [973].

¹⁸⁷ *Id.* at [974].

¹⁸⁸ *Id.* at [974]–[76].

¹⁸⁹ *Id.* at [975]. England enacted pure comparative fault in the Law Reform Act of 1945. Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28, sched. 1 (Eng.).

D. Reasonable Mistakes Regarding Self-Defense as Partially Privileged

Lord Scott's view is similar to mine. However, I propose that the law treat reasonably mistaken self-defense like private necessity. Both should be partially privileged, meaning that the defendant had a right to act but must pay for the harm he caused by invading another's rights.¹⁹⁰ This comports with the common law maxim that "where there's a right, there's a remedy."¹⁹¹

In balancing the rights of the parties, a reasonable mistake would justify allowing the decision-maker to consider any unreasonable conduct by the plaintiff that contributed to the defendant's mistake and apportion damages between the parties based on that assessment. Consistent with apportioning damages between the plaintiff and the defendant in other strict liability situations,¹⁹² the decision-maker should follow the state's comparative fault rule.¹⁹³

In contrast, an unreasonable mistake should not be partially privileged because there is no right to unreasonably use deadly force. Furthermore, no apportionment of damages should be permitted. This is the appropriate approach even when the plaintiff's unreasonable conduct contributed to the defendant's use of deadly force. Because the defendant intentionally caused physical harm to another based on an unreasonable belief, tort law's compensatory purpose justifies paying full damages to the injured the plaintiff, thereby making him "whole."¹⁹⁴

As the next Section illustrates, application of my proposal would result in fairer outcomes than the present rule.

¹⁹⁰ This fits Jules Coleman's second basis for compensation under a theory of corrective justice: "an individual can suffer loss owing to the justifiable conduct of another, but the justifiability of the conduct precludes neither liability nor recovery." Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 355 (1992).

¹⁹¹ In Latin: *ubi jus ibi remedium*. See, e.g., Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 168 (2008).

¹⁹² RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 17 (1998); DOBBS, *supra* note 7, at 1021.

¹⁹³ Most states follow one of three comparative fault rules. Some use the "pure" rule that allows apportionment no matter how much of the fault is attributable to the plaintiff. The majority allows apportionment either so long as the plaintiff's fault is less than that of the defendant (the 49% rule) or is no greater than that of the defendant (the 50% rule). DOBBS, *supra* note 7, at 505. The 50% rule is the most widely followed of the three. *Id.*

¹⁹⁴ *Hattori v. Peairs* might be such a case. If allowed to apportion damages, a decision-maker could have found Yoshi's failure to stop after Peairs aimed his gun at him and yelled "freeze" to be unreasonable. Factoring in Yoshi's conduct in allocating damages when Peairs's belief was found to be unreasonable would be inappropriate. Another example of such a case is *Bethley v. Cochran*, 77 So. 2d 228, 230-31 (La. Ct. App. 1955), in which a white property owner's fear was unreasonable, and therefore he was liable for shooting an unarmed black man who was stealing pecans.

E. Application of My Proposal: The Louisiana "Castle" Cases

Lawsuits for shootings where the defendant claims defense of his home, self and others are not as uncommon as one might expect. For example, the Louisiana appellate courts applied the use of deadly force in mistaken self-defense rule a number of times prior to the *Hattori v. Peairs* decision.¹⁹⁵ These cases do not mention previous criminal prosecutions and, most likely, none were brought because in all but one of the torts cases the defendant's belief in the necessity of using deadly force was found to be reasonable.¹⁹⁶ Two cases, *Patterson v. Kuntz*¹⁹⁷ and *Smith v. Delery*,¹⁹⁸ each resulted in the denial of tort damages for a teenage boy who was severely injured when he was shot by a man who mistakenly but reasonably believed he was defending his home, self and family, including his terrified wife, from a dangerous intruder. The courts in these cases described the shootings as "an unfortunate tragedy,"¹⁹⁹ a "tragic incident,"²⁰⁰ and "regrettable."²⁰¹ I apply my proposed rule to the facts of these cases to demonstrate the resulting fairer outcomes that better comport with the purposes of tort law.

Unlike Peairs's situation where there were no previous incidents that would have made his or his wife's alarm more understandable, in both *Patterson* and *Smith* there were background circumstances that included numerous incidents involving a "peeping Tom" and prowler. Both men acted out of panic, fear, and protectiveness. In neither case was deadly force in fact necessary.

Patterson is the leading Louisiana case on reasonable but mistaken use of deadly force in self-defense.²⁰² On October 24, 1943, defendant Warren Kuntz shot and severely injured a 15-year-old trespasser.²⁰³

¹⁹⁵ In addition to the cases discussed in the text, Louisiana appellate courts decided the following: *McKellar v. Mason*, 159 So. 2d 700, 701-02 (La. Ct. App. 1964) ("the reasonable man of 64 years" standard applied to find the defendant's use of deadly force was reasonable in shooting a 14-year-old pigeon thief in the back as he attempted to escape over the backyard fence); *Bethley*, 77 So. 2d at 230-32 (white property owner's fear was unreasonable and therefore he was liable for shooting an unarmed black man who was stealing pecans); *Edwards v. Great Am. Ins. Co.*, 146 So. 2d 260, 261-62 (La. Ct. App. 1962) (motel owner's belief that deadly force was necessary was reasonable when he shot a 15-year-old boy attempting to break into an occupied motel room).

¹⁹⁶ *Bethley*, 77 So. 2d at 231. *Bethley v. Cochrane* is the only one of the cases where the defendant's fear was held to be unreasonable. The white property owner was therefore liable for shooting an unarmed black trespasser who was stealing his pecans.

¹⁹⁷ 28 So. 2d 278 (La. Ct. App. 1946).

¹⁹⁸ 98 So. 2d 899 (La. Ct. App. 1957), *aff'd*, 114 So. 2d 857 (La. 1959).

¹⁹⁹ *Patterson*, 28 So. 2d at 284.

²⁰⁰ *Smith v. Delery*, 114 So. 2d 857, 860 (La. 1959).

²⁰¹ *Delery*, 98 So. 2d at 903.

²⁰² *McKellar v. Mason*, 159 So. 2d 700, 704 (La. Ct. App. 1964); *Patterson*, 28 So. 2d at 283-84.

²⁰³ *Patterson*, 28 So. 2d at 278.

According to evidence presented at trial, for more than a year before the shooting Kuntz and his family were “repeatedly annoyed, harassed and threatened by a prowler” whose invasion of their privacy was “apparently directed against his wife and [19-year-old] daughter.”²⁰⁴ Although this person never broke into the defendant’s home, the Kuntz family feared that he would. In response to Kuntz’s requests, police officers stationed themselves outside the defendant’s home on multiple occasions, but to no avail. When the police presence failed to deter the prowler, whom they described as a “sex pervert,” the police suggested that Kuntz get a gun.²⁰⁵ Acting upon their advice, in early October 1943 he borrowed a revolver.²⁰⁶

According to Kuntz, on October 20th, “a tall young person, who disappeared before he could be apprehended, was discovered in the driveway.”²⁰⁷ Kuntz further testified that on the evening of October 23rd, his wife was in her bedroom when “she saw the eyes of a man peering in at her; that she screamed in fear and became hysterical and that [he] grabbed the borrowed pistol and fired out of the window.”²⁰⁸ The next night Kuntz armed himself with the pistol and waited with the lights out for the person to return.²⁰⁹ At around 8:00 p.m. Kuntz spotted a man in his driveway walking towards the bedroom window.²¹⁰ Kuntz shouted for him to stop; when he didn’t comply, Kuntz “fired three shots one of which struck the intruder in the back.”²¹¹ The injured party was 15-year-old Robert Patterson.

Robert’s father sued on behalf of his seriously injured son, and Kuntz responded that he acted in self-defense. The trial court found in favor of Kuntz.²¹² On appeal, the court declined to even consider why Robert had trespassed onto Kuntz’s property because, under the reasonable mistake rule, Robert’s reason for being there was irrelevant.²¹³ The court affirmed the trial court, holding that there was sufficient evidence to support the trial court’s finding that under the circumstances Kuntz’s mistake was reasonable,²¹⁴ and therefore he was not liable.

How would this case come out today under my proposed rule? The circumstances leading up to the shooting provide support for the trial and appellate court’s conclusion that Kuntz’s belief that he needed to

²⁰⁴ *Id.* at 279.

²⁰⁵ *Id.* at 281.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 279.

²⁰⁸ *Id.* at 281.

²⁰⁹ *Id.* at 282.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 279.

²¹³ *Id.* at 282.

²¹⁴ The court’s rule concerning mistake was that a person who uses force “under a reasonable apprehension of danger is not civilly liable to one whom he has cause to believe is his assailant even though it subsequently appears that he is mistaken.” *Id.*

use deadly force was reasonable. Kuntz testified that on the evening of the shooting, “he was in mortal fear that the intruder would at some time do bodily harm to his wife or daughter.”²¹⁵ His fear was that of a reasonable man anticipating “an attack on his womenfolk.”²¹⁶ For the person who peered into his wife’s window to return after being shot at the previous night, which is who Kuntz believed Robert to be, would make that person seem fearless, crazy, and dangerous.

The appellate court accurately noted that the classic “home is one’s castle” rule²¹⁷ provides “the right of a man to maintain his home free from outside interference and intrusion and to repel invasion therein by the use of force.”²¹⁸ However, on the night of the shooting, Robert didn’t attempt to enter Kuntz’s “castle.” It is also dubious that shooting Robert in the back, even if it was based on a reasonable belief that deadly force was needed, was in fact necessary to prevent an attack on Kuntz’s “womenfolk.” Under my proposed rule the decision-maker would need to find actual necessity, not merely that the defendant’s belief was reasonable. If Robert did not in fact pose an imminent threat to Kuntz or his family, then Kuntz’s belief was mistaken and Kuntz would be liable. However, because the mistake was reasonable and Louisiana, like the vast majority of states, has rejected contributory negligence and adopted comparative fault,²¹⁹ apportionment would be available and Robert’s reason for trespassing would become very relevant.

Robert testified that the reason he was in Kuntz’s driveway was that he had gone there to urinate while on his way to the movies.²²⁰ If the trial court had believed Robert’s explanation, then under my apportionment rule some (but probably not much) fault might be allocated to Robert. However, if the trial court did not believe Robert’s story, then most likely Robert was the “peeping Tom.” His intrusive and unlawful conduct that evening and over the previous year would likely result in him being found more than fifty percent at fault and therefore, under the majority comparative fault rule,²²¹ Robert would recover nothing, while under the minority and Louisiana “pure” rule,²²² Robert would likely recover a little but not much because the decision-maker would apportion most of the fault to him. Thus, Robert’s credibility would be critical to the outcome in this case. This is appropriate because if Robert was not the “peeping Tom,” both he and Kuntz were morally innocent. Peeing in another’s yard does not justify any level of violence.

²¹⁵ *Id.*

²¹⁶ *Id.* at 284.

²¹⁷ Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 241–42 (2008).

²¹⁸ *Patterson*, 28 So. 2d at 283.

²¹⁹ DOBBS, *supra* note 7, at 504.

²²⁰ *Patterson*, 28 So. 2d at 282.

²²¹ *See* DOBBS, *supra* note 7, at 505.

²²² LA. REV. STAT. ANN. § 9:2800.68(A) (2009).

As the appellate court noted: “This is an unfortunate tragedy and we sympathize with the young man who unquestionably suffered a severe injury and endured much pain and mental anguish.”²²³ Who should bear the cost of this “tragedy”? Tort law’s purpose of compensating injured parties whose rights to bodily integrity have been intentionally interfered with makes liability the appropriate default rule.

Almost exactly ten years after Warren Kuntz shot and seriously wounded 15-year-old Robert Patterson, Edward Delery shot and seriously wounded 14-year-old news carrier Wayne Smith while Wayne was attempting to retrieve his dog from Delery’s yard. On October 12, 1953, Wayne was delivering papers on his bike accompanied by his dog, Taffy, at around 4:15 a.m.²²⁴ He’d already delivered Delery’s paper and was on the other side of the street when Taffy, reacting to the barking of other dogs, ran off in the direction of Delery’s yard.²²⁵ In an effort to prevent Taffy from waking the neighborhood, Wayne pursued him.²²⁶ He caught Taffy in Delery’s bushes and was taking him back to the street when Delery yelled for him to “Halt!” and immediately thereafter shot him in the back.²²⁷ Wayne’s father, William Smith, sued on behalf of his seriously injured son, and Delery responded that he acted in self-defense.²²⁸ The trial court dismissed the suit and William Smith appealed. Both the court of appeals and supreme court granted review and, relying on *Patterson*, held that Wayne was not entitled to recover because Delery’s mistake in using deadly force was reasonable.²²⁹

The basis for finding Delery’s mistake to be reasonable was very similar to that in *Patterson*.

[T]he actual appearance of prowlers, peeping toms and intruders and repeated rumors of such appearances, extending over a period of more than one year, had created a general fear and apprehension among defendant and his neighbors, which was probably heightened by the fact that most of the men (except the defendant) held travelling jobs, and during their frequent absences their young wives and minor children looked mainly to the defendant for protection²³⁰

On the morning of the tragic shooting, Delery’s wife was awakened at about 4:13 a.m. by her infant child’s crying and got up and gave her a

²²³ *Patterson*, 28 So. 2d at 284.

²²⁴ *Smith v. Delery*, 98 So. 2d 899, 900 (La. Ct. App. 1957).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Because he was employed by the local newspaper, Wayne received a small amount of money through workers’ compensation. The compensation insurance carrier intervened, seeking reimbursement for its payments. *Id.* at 899.

²²⁹ *Id.* at 901; *Smith v. Delery*, 114 So. 2d 857, 858–60 (La. 1959).

²³⁰ *Delery*, 114 So. 2d at 859.

bottle.²³¹ When her neighbor's dog began howling she looked out the window but saw nothing.²³² She returned to the bedroom.²³³ At this point she testified that she "heard this terrific rustling at the children's window" and looked out to see a figure coming from the backyard down the neighbor's driveway toward the street.²³⁴ She wakened Delery out of heavy sleep but was so terrified that she was unable to speak.²³⁵ She silently pointed toward the window and, seeing how frightened she was, Delery, who also heard the rustling near the children's bedroom window, grabbed his gun, looked out the window, and spotted a figure near his window.²³⁶ He shouted and then shot in the direction of the figure, and his bullet struck Wayne in the back.²³⁷

This case starkly presents the dilemma of two morally innocent parties. Like Peairs and unlike Kuntz, Delery clearly was mistaken as to the need for deadly force since the boy undeniably posed no threat of any kind. However, unlike Peairs and like Kuntz, Delery's mistake was likely reasonable. As the Supreme Court concluded, "he acted as a reasonable and prudent man in light of the surrounding circumstances."²³⁸

Even though the boy was not at fault in any way, the current rule, which the court applied, led to no recovery. My proposed rule, instead, would lead to full recovery. For "this tragic incident, which left the plaintiff's son with a serious and permanent disability"²³⁹ which rule better serves the purposes of tort law? Obviously, I intend this as a rhetorical question. Wayne suffered a devastating injury at the hands of Delery even though the boy did "nothing more than attempt to prevent his dog from joining in the barking and that, in perfect good faith, [did] all that he could to retrieve it from somewhere near the rear of [Delery's] residence."²⁴⁰ Justice cried out for him to be compensated.

V. CONCLUSION

As the Louisiana cases illustrate, many factors can affect whether a legal decision-maker will find a belief or conduct to be reasonable. Time and place,²⁴¹ race²⁴² and gender²⁴³ will sometimes influence the

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 860.

²³⁷ *Id.*

²³⁸ *Id.* at 858.

²³⁹ *Id.* at 860.

²⁴⁰ *Smith v. Delery*, 98 So. 2d 899, 903 (La. Ct. App. 1957).

²⁴¹ For example, the reasonableness determinations in *Peairs*, *Delery*, and *Patterson* may have been different if these incidents had happened in Hawaii, which has the lowest number of guns in the home and the lowest number of deaths from guns in

determination of reasonableness in any trial. When the same defendant is both criminally prosecuted and civilly sued, differences including the legal players,²⁴⁴ the evidence admitted,²⁴⁵ and the burdens of proof²⁴⁶ may also affect the reasonableness determination. Regardless of these many factors, justice demands different reasonableness rules in mistake cases based on the purposes of the legal regime involved.

For criminal law, the current rule that self-defense is a complete defense if the defendant's fear was both real and reasonable is appropriate. An actor's conduct based on a reasonable fear of death or serious injury does not merit punishment and, when life is at stake, criminal sanctions will not deter deadly force. It is also unlikely that such an actor represents a future danger to the public.²⁴⁷ Most important, a violent response towards another is not wrongful when it is based on a reasonable fear that the other is perpetrating a deadly attack on the actor or a third party.

In contrast, the compensatory and vindictory purposes of tort law make it appropriate to flip the criminal law rule so that strict liability is the default outcome when reasonable fear results in the mistaken use of deadly force. Thus, if the defendant injures another based on a mistake as to necessity, whether the mistake is reasonable or unreasonable, liability should result. However, so long as the defendant can convince jury that he subjectively believed deadly force was necessary (credibility)

the home, instead of Louisiana, which has the one of the highest number of guns in the home and has the highest number of deaths from guns in the home. Press Release, Violence Policy Center, States with Higher Gun Ownership and Weak Gun Laws Lead Nation in Gun Death (May 6, 2009), <http://www.vpc.org/press/1006gundeath.htm>

²⁴² In *Peairs*, Bonnie Peairs described Yoshi as being either "Oriental" or "Mexican or whatever." Lee, *Race and Self-Defense*, *supra* note 3, at 437–38. Rodney Peairs described him as "Oriental." *Hattori v. Peairs*, 662 So. 2d 509, 515 (La. Ct. App. 1995). Did Hattori's race affect the jury's assessment of the reasonableness of the Peairs's fear? What if Hattori had been White? Black? What if Peairs had been Black and Hattori had been White? See generally Lee, *Race and Self-Defense*, *supra* note 3, at 437–38.

²⁴³ The men in *Peairs*, *Delery*, and *Patterson* all viewed themselves as the defenders of their wives, children, and homes. See generally FORELL & MATTHEWS, *supra* note 15.

²⁴⁴ For example, the economic resources of the parties may make a difference. See generally Albert Yoon, *The Importance of Litigant Wealth*, 59 DEPAUL L. REV. 649, 650 (2010).

²⁴⁵ One explanation given for the different assessment of reasonableness in the two *Peairs* trials was that there was "new evidence introduced in the civil trial, including that Mr. Peairs once shot a dog and had been heard to utter a death threat against his wife's former husband." Nossiter, *Judge Awards Damages*, *supra* note 50.

²⁴⁶ *Id.* See *supra* notes 122–23 and accompanying text.

²⁴⁷ On the other hand, someone who mistakenly injures or kills another because he sincerely but unreasonably believes that deadly force is necessary may represent a future danger to the public; the ubiquity of guns increases the risk of future deadly mistakes by such a person and therefore voluntary manslaughter may be the appropriate criminal law response.

and his belief and conduct were reasonable under the circumstances, he should have a legal right to act and therefore a partial privilege. Because of this partial privilege, damages should be apportioned between the parties if the jury finds the injured party engaged in unreasonable conduct.

My proposal does not eliminate the need to determine reasonableness in the civil setting. Instead it makes the reasonableness determinations more congruent with the purposes of tort law. An unreasonable mistake results in liability; a reasonable mistake results in apportionment of the damages unless the plaintiff was either faultless (defendant would be fully liable) or was so much at fault that under the state's comparative fault rule recovery is barred. Which of these outcomes will result, again, depends on a reasonableness assessment.

In a case like *Peairs*, where the actor's belief was unreasonable, liability would result. In a case like *Delery*, where the actor's belief was reasonable and therefore he was partially privileged, the decision-maker would most likely find no fault on the part of the victim, meaning that the defendant would still be liable for the entire amount of damages. However, in other situations such as that in *Patterson*, the decision-maker would likely find that the plaintiff bore some responsibility. How much would depend on the plaintiff's reason for trespassing.

For more than a century, the American tort and criminal rules concerning reasonable mistakes as to the necessity of using deadly force in self-defense have been identical.²⁴⁸ This should not continue. As the British courts recently concluded in *Ashley*, consistency between criminal and tort law is not appropriate when it conflicts with the purposes of tort law.²⁴⁹ Innocent victims of intentional but mistaken maiming or killing deserve a legal right to compensation.

²⁴⁸ *New Orleans & Ne. R.R. Co. v. Jopes*, 142 U.S. 18, 24 (1891).

²⁴⁹ *See Ashley*, 1 A.C. at [973]. *See supra* notes 165–89 and accompanying text.