

# Self-Defense, Necessity, and the Duty to Compensate, in Law and Morality

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## I. INTRODUCTION

What is the proper scope of the right to self-defense in law and morality? How does this right compare to the privilege of necessity? Professor Uwe Steinhoff's manuscript offers a distinctive and wide-ranging perspective on the controversial questions these privileges raise.<sup>1</sup> This essay engages with a number of his arguments, particularly focusing on legal and moral duties of compensation.

First, this essay examines how Anglo-American tort law would likely address the defender's liability in a variety of scenarios, including

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1. *See generally* Uwe Steinhoff, Just War Theory: Self-Defense, Necessity, and the Ethics of Armed Conflicts (2016) (unpublished manuscript) (on file with author).

disproportionate, excessive, and unnecessary force; unreasonable and reasonable mistakes; and use of force against innocent aggressors. It next considers whether private necessity principles that apply to appropriations of private property also apply to actors who intentionally infringe or violate rights of bodily integrity. The essay then turns to the privilege of public necessity, which generally is not, but perhaps should be, accompanied by a duty to compensate, and its relationship to rights of self-defense. The following section explores mistake, justification, and excuse, and considers the question of whether an innocent victim should receive compensation from a reasonably mistaken defender. The final section explains that the notion of conditional fault helps make sense of a strict liability duty to compensate.

## II. TORT LAW AND SELF-DEFENSE GENERALLY

Let us take a closer look at how American tort law would address the scope of the right to self-defense and the circumstances in which the defender owes compensation. The following represents my understanding of American tort law, but the doctrine in most Anglo-American jurisdictions would probably be very similar. We will see that the state of tort doctrine supports some but not all of Professor Steinhoff's arguments and assertions.<sup>2</sup>

The tort defense of self-defense can be successfully invoked with respect to any intentional tort in which the tortfeasor uses or threatens to use force.<sup>3</sup> Thus, it can apply as a defense to battery, assault, or false imprisonment.<sup>4</sup> Tort law requires that defensive force be both proportional and necessary.<sup>5</sup> More force may be used to ward off a blow than may be used to prevent an offensive contact,<sup>6</sup> but deadly force may not be used to prevent nondeadly harm.<sup>7</sup> To a considerable extent, the reasonable person is the criterion for judging proportionality in nondeadly force situations, with the proviso that

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2. The main sources of my descriptions of American tort law are the RESTATEMENT (SECOND) OF TORTS (AM. LAW INST. 1965), which is widely followed by state courts in the United States; and a leading torts treatise, DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BULLICK, *THE LAW OF TORTS* (2d ed. 2011).

3. See RESTATEMENT (SECOND) OF TORTS ch. 4, topic 1, scope note (AM. LAW INST. 1965).

4. *Id.* at § 63. Some jurisdictions also recognize self-defense as a defense when the defendant uses force against an attacker, and the attacker—or another victim—sues the defendant for tortious negligence, rather than for the intentional tort of battery. See, e.g., *Brown v. Robishaw*, 922 A.2d 1086, 1092–94 (Conn. 2007).

5. RESTATEMENT (SECOND) OF TORTS § 63 cmt. j–k (AM. LAW INST. 1965).

6. *Id.* § 63 cmt. j (“A degree of force may be privileged to ward off a blow which threatens substantial harm, where the same degree of force would not be privileged merely to prevent touching in an insulting manner.”). For other provisions that discuss proportionality, see *id.* §§ 70–71, 73.

7. See *id.* §§ 63 cmt. j., 65.

“[t]he test is what a reasonable man in such an emergency would believe permissible and not that which, after the event and when the emergency is past, a reasonable man would so recognize as having been sufficient.”<sup>8</sup>

With respect to necessity, the Restatement (Second) of Torts restricts the use of nondeadly defensive force to situations in which the defender reasonably believes she can protect herself “only by the immediate infliction of [an] offensive contact or bodily harm upon the other.”<sup>9</sup> Defensive force can be used “only as a last resort,” and cannot be used “so long as there is a reasonable likelihood that the other will abandon his aggressive purpose or that the actor will have a later opportunity to protect himself.”<sup>10</sup> Indeed, the Restatement goes so far as to emphasize the defender’s “duty to avoid force,” by notifying the aggressor that the latter has mistaken the defender’s identity or has misinterpreted his conduct, or by warning the aggressor that he plans to defend himself.<sup>11</sup> Such a duty exists if the defender reasonably believes such measures will be effective and will not compromise his ability to defend himself.<sup>12</sup>

The defender may only use deadly force when he reasonably believes he is in peril of death, serious bodily harm, or rape, “which can safely be prevented only by the immediate use of [deadly] force.”<sup>13</sup> The Restatement recognizes a duty to retreat from any place other than the actor’s home if the actor correctly or reasonably believes he can retreat “with complete safety,”<sup>14</sup> grounding that duty in utilitarian considerations.<sup>15</sup> Even where the actor cannot successfully defend himself from the aggressor’s force

8. *Id.* § 63 cmt. j.

9. *Id.* § 63 cmt. k.

10. *Id.* One of the Restatement’s illustrations is based on a famous old English decision, *Tuberville v. Savage* (1669) 86 Eng. Rep. 684, 684; 1 Mod. Rep. 3, which precluded the use of non-deadly force even after the other had drawn a sword:

A draws his sword from his scabbard and says, “If it were not an assize time, I would run you through, but God help you when the court rises.” B immediately grapples with A and takes his sword from him, wounding him, but not severely. B is subject to liability to A.

RESTATEMENT (SECOND) OF TORTS § 63 cmt. k, illus. 10 (AM. LAW INST. 1965).

11. *Id.* § 63 cmt. l (AM. LAW INST. 1965) (emphasis omitted).

12. *Id.*

13. *Id.* § 65(1).

14. *Id.* § 65(3).

15. *See id.* § 65 cmt. g (“[T]he interest of society in the life and efficiency of its members and in the prevention of the serious breaches of the peace involved in bloody affrays requires one attacked with a deadly weapon, except within his own dwelling place, to retreat before using force intended or likely to inflict death or serious bodily harm upon his assailant, unless he reasonably believes that there is any chance that retreat cannot be safely made.”).

except by using disproportionate force, he is nonetheless not permitted to use a disproportionate level of force.<sup>16</sup> The force used must always be both proportional and necessary.<sup>17</sup>

However, tort law does provide a full defense if the defender makes a reasonable mistake about the legally relevant facts.<sup>18</sup> Thus, even if the proportionality and necessity requirements are not objectively satisfied—in the sense that it is known, *ex post*, that the use of force was not proportional or was not necessary—an actor is not liable for an intentional tort if the actor reasonably believed a set of facts existed that would satisfy those requirements.<sup>19</sup> Reasonable mistake about such facts precludes tort liability.<sup>20</sup>

The unwittingly justified actor who does not act for a defensive purpose is probably not entitled to invoke self-defense. According to the Restatement,

[t]he infliction of bodily harm is not privileged although in fact its infliction is necessary to prevent the other from inflicting bodily harm upon the actor, if he is ignorant of the other's intent to inflict bodily harm upon him and, therefore, does not act for the purpose of preventing its infliction.<sup>21</sup>

On the other hand, if the actor does act for a defensive purpose, he might retain the right of self-defense even if his beliefs that the facts support defensive force are unreasonable, so long as those beliefs turn out to be correct.<sup>22</sup> For example, § 70 of the Restatement provides that “[t]he actor is not privileged to use any means of self-defense which is intended or likely to cause a bodily harm or confinement in excess of that which the actor *correctly or reasonably* believes to be necessary for his protection.”<sup>23</sup>

As an example, consider the famous case of *People v. Goetz*.<sup>24</sup> New York law, unlike the law of most other states, permits the use of deadly

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16. See *id.* § 65 cmt. c, illus. 1 (“A attempts to slap B’s face. B is not privileged to shoot or stab A to prevent him from doing so, although, being much weaker than A, B cannot otherwise prevent A from slapping him.”).

17. See *supra* note 5.

18. RESTATEMENT (SECOND) OF TORTS § 63 cmt. h–i (AM. LAW INST. 1965).

19. *Id.*

20. See *id.* §§ 63 cmt. h–i, 65 cmt. c.

21. *Id.* § 63 cmt. f. The Restatement offers the following illustration based on *Trogon v. State*, 32 N.E. 725, 727 (Ind. 1892):

A points what appears to be a cane at B and addresses a gross insult to him. B to avenge the insult knocks A down. B is not privileged to do so, although the supposed cane is a disguised shotgun and A was attempting to shoot B and would have done so, had B not knocked him down.

*Id.* § 63 cmt. f, illus. 2.

22. See *id.* § 70.

23. *Id.* (emphasis added). Similarly, the following provisions also treat correct beliefs in the same manner as reasonable beliefs for purposes of self-defense or defense of others. *Id.* §§ 63(1), 65(2), 65(3), 76.

24. See generally *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986).

force to prevent a robbery.<sup>25</sup> The evidence in the case might have supported the conclusion that defendant Goetz honestly, but unreasonably, believed the youths who approached him were planning to rob him.<sup>26</sup> His belief might have been unreasonable insofar as they did not display any weapons, did not make any explicit threat of force, and might have requested rather than demanded money.<sup>27</sup> However, other evidence not available to Goetz, including screwdrivers found inside the coats of two of the victims, and statements later made to a police officer and a reporter, might suggest that some of the victims were indeed planning to rob him.<sup>28</sup>

It is not clear, however, whether case law actually supports the Restatement's recognition of a full defense when the defendant is lucky in this way—in having no reasonable basis for beliefs that turn out to be correct and to support his self-defense claim. This position is in tension with the generally accepted view that an unwittingly justified actor is not entitled to the full defense of self-defense.<sup>29</sup>

Professor Steinhoff argues that self-defense should not be conceptualized as merely a right to prevent *harm* to the actor or to another person because it also embraces the right to prevent *nonharmful* rights violations.<sup>30</sup> Tort doctrine supports this argument, for it unquestionably permits defensive force merely to prevent an “offensive” battery or an “offensive” assault—categories of tortious conduct that need not cause or threaten physical harm.<sup>31</sup> One may use defensive force to prevent a pinch or sexual contact from a stranger, and of course one may use deadly force to prevent a rape,<sup>32</sup> even if one is confident the rape will not cause any physical harm.

With respect to the question whether a person may use defensive force she knows will be futile, I have found no relevant authority discussing situations comparable to the standard philosophical example of the rape

25. *Id.* at 47 (citing N.Y. PENAL LAW § 35.15(2) (McKinney 2004)).

26. *Id.* at 52–53.

27. *Id.* at 43–44.

28. *See id.* at 43–45.

29. Kenneth W. Simons, *Self-Defense: Reasonable Beliefs or Reasonable Self-Control?*, 11 NEW CRIM. L. REV. 51, 52–53 (2008).

30. *See* Steinhoff, *supra* note 1, at 7–20 (2016).

31. RESTATEMENT (SECOND) OF TORTS § 63(1) (AM. LAW INST. 1965) (recognizing privilege to use non-deadly force “against unprivileged harmful or offensive contact or other bodily harm”) (emphasis added); *see also* DOBBS, HAYDEN & BUBLICK, *supra* note 2, § 80.

32. *See* RESTATEMENT (SECOND) OF TORTS § 65(1) (AM. LAW INST. 1965) (referring to the right to use deadly force to prevent “ravishment,” defined in comment a to encompass not only rape but also “any form of carnal intercourse which is criminal in character as, for example, sodomy”).

victim who inflicts harm on an attacker when she knows her defensive force will be completely ineffective in preventing the rape or future harm.<sup>33</sup> Tort standards do not routinely include any specific requirement that the defender honestly or reasonably believe that his effort to defend himself has some chance of success; however, such a requirement is probably implicit in the usual requirements that the force must be used for the purpose of self-defense and that the defender must reasonably believe facts that would make the force proportionate and necessary.<sup>34</sup>

With respect to the use of excessive force in self-defense, American tort law holds the defender liable only for the portion of the victim's harm that can be attributed to the excessive force and not the portion attributable to the privileged force.<sup>35</sup> However, if the harm suffered by the victim is "indivisible" and cannot practically be apportioned, the defender "is liable for the entire harm."<sup>36</sup> By contrast, according to Steinhoff, German law does not require a defender to pay compensation for excessive use of force.<sup>37</sup>

With respect to the issue of innocent aggressors, Steinhoff asserts that those who kill innocent aggressors in proportionate and necessary self-defense owe no compensation in any Western jurisdiction, as far as he can see.<sup>38</sup> However, I have been unable to find case law either supporting or denying the position that an actor who defends against an innocent aggressor—such as a child or mentally incompetent person—has a legal duty to pay compensation to the aggressor or the aggressor's family. A

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33. A statement in the Restatement (Second) of Torts section on Self Defense and Defense of Third Persons might be read as precluding the use of futile force simply for the purpose of protecting the victim's honor, but that is probably an overly expansive reading:

There is no privilege to invade any of another's interests of personality solely for the purpose of vindicating the honor of the actor or of a third person, or to avenge an insult offered either by the other's words or conduct, where it does not amount to an offensive bodily contact or an apprehension of a harmful or offensive bodily contact.

*Id.* at ch. 4, topic 1, scope note.

34. The Restatement (Second) also supports Steinhoff's argument that acting from a punitive as well as preventive purpose does not disqualify the actor from asserting a valid self-defense claim. *See id.* § 63 cmt. e ("In order that this privilege may exist it is not necessary that the actor's sole motive be his desire to protect himself. If the actor's infliction of bodily harm upon the other is for the purpose of defending himself from bodily harm actually or apparently threatened by the other's conduct, it is privileged although the actor's decision to defend himself is influenced, no matter how greatly, by personal dislike or hostility to the other. Thus, the actor is privileged to use force to protect himself against an offensive contact threatened by a particular person whom he dislikes, although he would tolerate such a contact without resistance if threatened by a friend."); Steinhoff, *supra* note 1, at 11–14 (arguing that acts can be "both punitive and defensive").

35. RESTATEMENT (SECOND) OF TORTS § 71 (AM. LAW INST. 1965)

36. DOBBS, HAYDEN & BUBLICK, *supra* note 2, § 80.

37. Steinhoff, *supra* note 1, at 50.

38. *Id.* at 170.

caveat to § 64 of the Restatement (Second) declines to express an opinion about whether a privilege of self-defense exists “against conduct which the defender recognizes, or should recognize, to be entirely innocent.”<sup>39</sup> This caveat is explained by the lack of decisions bearing on the question.<sup>40</sup>

To be sure, criminal law provisions permitting defensive force against *unlawful* force are usually interpreted as permitting self-defense against innocent aggressors—whose attacks are excused but not justified and thus are considered to be unlawful.<sup>41</sup> And courts in tort self-defense cases very often follow the criminal law self-defense rules of that jurisdiction.<sup>42</sup> Nevertheless, direct authority for the proposition that defenders who harm innocent aggressors owe no compensation to the aggressor or the aggressor’s family seems to be lacking.<sup>43</sup>

### III. SELF-DEFENSE AND PRIVATE NECESSITY

The tort defense of private necessity is unusual insofar as it is an *incomplete* privilege: it privileges the actor to intrude upon another’s property, in the

39. RESTATEMENT (SECOND) OF TORTS § 64 caveat (AM. LAW INST. 1965).

40. The Reporter’s Note explains:

The question raised by the Caveat is whether the privilege of self-defense against innocent conduct is a complete privilege, similar to that of self-defense against intentional conduct . . . or whether it is an incomplete privilege, similar to that of defense against the act of a third person or a force of nature (stated in §§ 73 and 74). In the latter event the actor would be privileged if he did no harm but would be liable for any harm inflicted. The following will illustrate the point: A, a small child, is innocently playing with a stick of dynamite in a manner which threatens an explosion likely to injure B. Using force reasonable under the circumstances, B takes the dynamite away from A, and in doing so breaks A’s arm. Is B liable to A for the broken arm?

RESTATEMENT (SECOND) OF TORTS app. § 64 reporter’s note. The Reporter’s Note also quotes from the Commentaries of the Reporter for the Restatement (First) of Torts by Francis Bohlen, prepared in 1926, noting on the one hand, that in cases of reasonable mistake, a defender is not liable to an entirely innocent victim; and on the other hand, that in cases where the actor is imperiled by an animal or force of nature, the actor is not privileged to defend himself from such a peril by inflicting a substantial harm on another (citing *Regina v. Dudley*, 14 Q.B.D. 273 (1884); and then citing *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383), two criminal law lifeboat cases that reject a necessity defense). RESTATEMENT (SECOND) OF TORTS app. § 64 reporter’s note (AM. LAW INST. 1965).

41. See 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 36(a)(3) (2016 update).

42. Caroline Forell, *What’s Reasonable?: Self-Defense and Mistake in Criminal and Tort Law*, 14 LEWIS & CLARK L. REV. 1401, 1404 (2010).

43. In English law, too, treatise writers assume those who defend against innocent aggressors do not owe compensation, but no supporting case law seems to exist. See WINFIELD & JOLOWICZ ON TORT § 26-033 (Edwin Peel & James Goudkamp, 19th ed. 2014).

sense that the property owner has no right to interfere with that intrusion and cannot obtain a tort remedy for such an intrusion; but at the same time, the actor must pay compensation for the harm done to the property owner.<sup>44</sup> Does this principle suggest that, in some instances, a privilege to use defensive force should also be treated as incomplete, requiring the defender to pay compensation to the attacker?

Most torts treatises and scholars recognize an incomplete privilege of private necessity, whereby an actor is permitted to intentionally damage, destroy, use, or consume the property of another in order to avoid a greater evil—greater harm to his own property, or harm or risk of harm to his own person or to his family.<sup>45</sup> The classic case is *Vincent v. Lake Erie Transportation Co.*, in which the court found that a ship owner had a privilege to remain at plaintiff's dock during a storm in order to save his ship but was required to pay for the damage that he purposely or knowingly caused to plaintiff's dock by so remaining.<sup>46</sup> This is the classic case, but it is also fair to characterize it as virtually the *only* case that squarely holds that compensation is owed in such circumstances.<sup>47</sup> Nevertheless, the Restatement (First) of Torts and the Restatement (Second) of Torts both endorsed the position that an incomplete privilege exists in this situation.<sup>48</sup>

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44. See RESTATEMENT (SECOND) OF TORTS § 197 (AM. LAW INST. 1965).

45. See DOBBS, HAYDEN & BUBLICK, *supra* note 2, § 117; PROSSER AND KEETON ON TORTS 147–48 (W. Page Keeton et al. eds., 5th ed. 1984); KEITH N. HYLTON, TORT LAW: A MODERN PERSPECTIVE 81–82 (2016); Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307, 316–17 (1926); Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 416–17 (1959).

46. *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910).

47. See George C. Christie, *The Unwarranted Conclusions Drawn from Vincent v. Lake Erie Transportation Co. Concerning the Defense of Necessity*, ISSUES LEGAL SCHOLARSHIP, Oct. 2005 [hereinafter *Unwarranted Conclusions*], at 1, 2–3. See generally George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975, 1002 (1999) [hereinafter *Defense of Necessity*] (“[T]he Restatement (Second) relies on *Vincent* as support for its view of the privilege to destroy property.”); 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 LEGAL SCHOLARSHIP, Oct. 2005, 1, 1–2 (disagreeing with most scholars who “agree that there is a moral duty to pay for [property]”) (emphasis omitted).

48. RESTATEMENT (FIRST) OF TORTS § 197 (AM. LAW. INST. 1934); RESTATEMENT (SECOND) OF TORTS § 197 (AM. LAW. INST. 1965). Other provisions address the incomplete privilege issue in the context of trespass to chattels. See *Unwarranted Conclusions*, *supra* note 47, at 10 (“A similar provision, section 263, covers what amounts to trespass to chattels and the conversion of chattels. Section 263 of the *Restatement* limited the privilege to situations in which chattels were destroyed or used to save life or to avoid serious bodily harm and took no position as to whether one was authorized to take a chattel over the objection of its owner. Section 263 of the *Restatement (Second)* not only extends the privilege to cover the destruction or use of chattels to save property, but also permits the taking of property even if its possessor objects. The person destroying or using the property is,

Some American courts have reiterated the position in dictum, and I have found no cases expressly disputing that position. However, English law appears to be to the contrary: in a private necessity situation, the actor who is justified in invading another's property rights in order to avoid a greater evil has no duty to pay compensation.<sup>49</sup>

The incomplete privilege approach is often analogized to the government's power of eminent domain: the government has the power to force a property owner to sell his property when the property is needed for a public purpose, but the government must then pay the owner the fair market value of the property.<sup>50</sup> The incomplete privilege idea would also readily explain the result that most people intuitively support in Joel Feinberg's backpacker example: if he must break into a cabin to save himself from serious injury or death due to an unanticipated blizzard, he does not act wrongly in doing

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however, liable for any harm done.") (footnotes omitted); RESTATEMENT (SECOND) OF TORTS § 263 cmt. e, illus. 1 (AM. LAW. INST. 1965) (If an actor uses another's scarf as a tourniquet to stop his bleeding while awaiting an ambulance after an auto accident, he is liable for the harm to the scarf caused by the blood.).

49. See Sugarman, *supra* note 47, at 44–48. A more recent article by a British scholar agrees that English law appears to reject the incomplete privilege analysis in *Vincent* and instead treats the privilege as complete, that is, as not requiring the payment of compensation. Graham Virgo, *Justifying Necessity as a Defence in Tort Law*, in DEFENCES IN TORT 152–53 (Andrew Dyson, James Goudkamp & Frederick Wilmot-Smith eds., 2015). Canadian case law on the point is unclear. ALLEN M. LINDEN & BRUCE FELDTHUSEN, CANADIAN TORT LAW §§ 3.73–3.74 (10th ed. 2015); Sugarman, *supra* note 47, at 51–52. In *Munn & Co. v. Motor Vessel Sir John Crosbie*, the Exchequer Court held that *Vincent* did not support liability when the owner of the ship, which was moored to the wharf with the wharf owner's permission, merely declined to untie the ship, but took no affirmative steps to keep the ship attached to the wharf, and when it was not certain that in riding out the storm, the ship would cause damage to the wharf. [1967] 1 Ex. C.R. 94 (Can.). In my view, *Munn* is indeed distinguishable from *Vincent* insofar as the ship owner committed no trespass in the first instance in remaining tied to the wharf. However, I find less persuasive the court's distinction that *Vincent* involved the affirmative retying of ropes to keep the ship attached to the dock. In my view, even if none of the ropes had been retied in *Vincent*, liability would properly have been imposed under the court's rationale, simply because the ship owner decided, for his own benefit, not to untie the boat from the dock and thus decided to trespass. See Sugarman, *supra* note 47, at 51. The court in *Munn* also stated that, even on the facts of *Vincent*, it would be inclined to take the view of the dissent in that case and not impose liability. *Munn & Co. v. Motor Vessel Sir John Crosbie*, [1967] 1 Ex. C.R. 94 (Can.).

50. This approach is an instance of a "liability rule" within the Calabresi & Melamed framework. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–09 (1972).

so, but he must pay for the harm to the cabin, the food he consumes, and the furniture he burns to stay warm.<sup>51</sup>

What is the scope of the *incomplete privilege* doctrine? Does an actor have a similar incomplete privilege to inflict harm or to violate another's rights in order to avoid a greater evil if the harm or rights violation takes the form of a personal injury or a dignitary wrong to another? Suppose a wrongful assailant is running after me with a knife. My only escape option is to run through a crowd of people. I know that I am very likely to knock one of them over, possibly causing minor injury, and this indeed occurs. The assailant disappears, and the victim sues me. Do I have a privilege to run over the victim, so that the victim is not permitted to interfere with my knocking him down? Even if I do, must I compensate for the harm that I have caused? Alternatively, suppose I knock down the victim but cause no physical harm. Nevertheless, knocking a person down, absent his consent, would ordinarily be characterized as an offensive battery, requiring compensation for the dignitary wrong. In this case, must I compensate for that dignitary injury?

Notice that the question whether I have a privilege, in either the sense that the law does not forbid my conduct, or that the victim has no right to resist, is much more difficult to resolve in this scenario than in a scenario in which, to save my life, I interfere with another's *property* rights. If I run and hide in your enormous yard to avoid the assailant, private necessity may well justify my interference with your property rights. Thus, if you emerge from your home and try to exercise your normal right to use minor force to exclude me from trespassing in defense of property, knowing that this will permit the assailant to find me, you are most likely liable—at least under the assumption that the assailant was not a threat to you until you pushed me off your property. But in the original assailant example, the victim arguably has a right to resist the actor running him over, even if the cost is the person's losing the ability to escape the assailant. The right to self-defense is a much more potent right than the right to protect one's property.

There is no clear case authority supporting (a) a tort privilege to choose the lesser evil for the benefit of the actor when that requires the actor to purposely or knowingly harm a person without that person's consent, or, even if privilege (a) exists, supporting (b) an accompanying duty to compensate the person for that harm.<sup>52</sup> To be sure, the Model Penal Code

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51. See *Unwarranted Conclusions*, *supra* note 47, at 1–2.

52. See Bohlen, *supra* note 45, at 319. One English treatise states: “What little authority there is seems to deny such a privilege [justifying personal injury on the ground of necessity], at any rate if it would involve serious bodily harm or death.” JOHN G. FLEMING, *FLEMING'S THE LAW OF TORTS* §5.170 (Carolyn Sappideen & Prue Vines eds., 10th ed.

endorses a utilitarian choice of lesser evils defense, and its Commentaries specifically authorize a defendant to knowingly kill another if necessary to avoid a larger number of deaths.<sup>53</sup> Moreover, *United States v. Holmes* recognized in dictum in a criminal necessity case that an intentional killing is justifiable in a situation where all occupants of a lifeboat are likely to die if no one is thrown overboard, so long as the victim is chosen by lot.<sup>54</sup> So it would not be surprising if a court in a tort case were to support (a), at least in some circumstances. But it is much less clear that a court would support (b).

The Restatement (Second) of Torts § 73 supports liability when the conditions of (a) are *not* satisfied, that is, when the actor chooses an equal or greater evil.<sup>55</sup> It also seems to support liability when (a) is satisfied but the actor causes “any substantial bodily harm to an innocent person.”<sup>56</sup> In

2011). However, the only citations are to two inconclusive American cases. *Id.* at 110 n.209. The treatise continues: “It could be, however, that one who is threatened with very serious injury may subject an innocent stranger to slight harm, disproportionately smaller than any from which the person is trying to escape.” *Id.* §5.170; *see also* PROSSER & KEETON ON TORTS, *supra* note 45, at 148 (stating, without any direct authority, that if a driver in an emergency “is put into a dilemma of injuring the plaintiff or someone else . . . [and if] the driver chooses reasonably . . . to injure plaintiff, the indications are there would be no liability”).

53. *See* MODEL PENAL CODE AND COMMENTARIES § 3.02 (AM. LAW INST. 1985) (offering an example of breaching a dike and thus flooding a farm and killing its inhabitants instead of the inhabitants of an entire town, an example that is structurally similar to the Trolley problem). For background on the Trolley problem, *see infra* note 83. The MPC Commentaries provide another knowing killing example, a roped mountaineer who cuts the rope connected to another mountaineer to prevent both individuals from falling to their death, but arguably this is properly analyzed as a case of self-defense. MODEL PENAL CODE AND COMMENTARIES § 3.02 cmt. 3. (AM. LAW INST. 1985).

54. The trial court reasoned that, absent a special relationship such as that of sailor to passenger, the choice of who should be sacrificed should be made by lot, because “[i]n no other than this or some like way are those having equal rights put on an equal footing, and in no other way is it possible to guard against partiality and oppression, violence and conflict.” *United States v. Holmes*, 26 F. Cas. 360, 366–67 (C.C.E.D. Pa. 1842); *accord*, MODEL PENAL CODE AND COMMENTARIES § 3.02 (AM. LAW INST. 1985) (supporting the intentional killing of an innocent if that will bring about a net saving of lives so long as “the choice among lives to be saved is not unfair”).

55. RESTATEMENT (SECOND) OF TORTS § 73 (AM. LAW INST. 1965) (“The intentional infliction upon another of substantial bodily harm, or of a confinement involving substantial pecuniary loss, for the purpose of protecting the actor from a threat of harm or confinement not caused by the conduct of the other, is not privileged when the harm threatened to the actor is not disproportionately greater than the harm to the other.”).

56. *Id.* § 73 cmt. b. (“The fact that the actor cannot otherwise protect himself against bodily harm so threatened gives him no privilege to cause any substantial bodily harm to

such a case, the Restatement concludes that the actor is not privileged at all; thus, the actor owes compensation without regard to whether the privilege would have been incomplete, or whether the victim has a privilege to resist the actor.<sup>57</sup> But most of the examples the Restatement offers that illustrate causing substantial harm to an innocent aggressor involve an actor causing a harm to a victim *equal* to the harm the actor expected to suffer himself. Thus, in one example, an actor under duress kills an innocent to avoid his own death.<sup>58</sup> In a second, the actor uses a bystander as a shield against a deadly attack, resulting in the bystander suffering a wound that apparently could have been deadly.<sup>59</sup> In a third, the stronger of two boat occupants pushes the other overboard because the boat cannot carry both.<sup>60</sup> And, in a fourth, an adult driving a sleigh throws a three-year old *child* (!) to the wolves to save himself.<sup>61</sup> Moreover, all of the cases involve a purposeful rather than knowing interference with the innocent person's rights. Finally, because of the lack of any relevant case law, the Restatement declines to take a position on either (a) or (b) when the question is whether the actor has a privilege to cause only *slight* bodily harm.<sup>62</sup>

However, in § 74, the Restatement (Second) does apply the incomplete privilege idea to a narrow category of cases in which the actor knowingly or purposely commits a battery upon an innocent person, intends only an offensive bodily contact or similarly minor invasion of the person's rights, and thereby causes bodily harm.<sup>63</sup> One illustration under this section is quite similar to my escape-from-an-assailant example,<sup>64</sup> suggesting that

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an innocent person.”). Thus, Illustration 2 provides that if B, to avoid a deadly attack by A, uses C as a human shield, and as a result C is wounded, B is subject to liability to C. *Id.* § 73 cmt. b, illus. 2.

57. *Id.* § 73 cmt. c.

58. *Id.* § 73 cmt. b, illus. 1.

59. *Id.* § 73 cmt. b, illus. 2. However, in this example, unlike the others, it is possible that the expected as well as actual harm to the plaintiff is less than the expected harm to the defendant who is invoking necessity.

60. *Id.* § 73 cmt. b, illus. 3.

61. *Id.* § 73 cmt. b, illus. 4.

62. *Id.* § 73 caveat (“The Institute expresses no opinion that there may not be a privilege to inflict a comparatively slight bodily harm upon another for the purpose of protecting the actor or a third person from a disproportionately greater bodily harm, as for instance, death, threatened otherwise than by the conduct of the other.”).

63. *Id.* § 74 (“(1) The intentional infliction upon another of an offensive bodily contact or a substantially harmless invasion of any other interest of personality is privileged for the purpose of protecting the actor from a [threat of] substantial bodily harm . . . (2) The actor is subject to liability for any bodily harm or pecuniary loss caused by the exercise of the privilege stated in Subsection (1) . . .”).

64. *Id.* § 74 cmt. a, illus. 1 (“A is pursuing B through a crowded street, brandishing a razor and threatening to cut B’s throat. B, in order to escape from A, intentionally knocks down C, and subjects D and E, who are walking on the sidewalk, to jostlings which are normally

the Restatement would impose a duty to compensate in that example if the actor causes bodily harm. But no cases are cited in support of this provision.

As a whole, the Restatement private necessity provisions employ a largely utilitarian balance when the choice is between the actor's and the victim's property interests,<sup>65</sup> but they add a significant thumb on the scale favoring the victim's interests when those interests are of *personality*, that is, the interests in avoiding harm or dignitary violations from nonconsensual physical touchings or confinements.

The Restatement private necessity provisions do not carefully distinguish the different senses in which an actor might be *privileged* to infringe the property or personal rights of another. To be sure, those provisions do clarify that when the actor merely interferes with the other's *property* rights, the other loses her right to use force to prevent that interference.<sup>66</sup> But there is very little discussion of whether a *privileged* interference with another's right of bodily integrity would preclude the other's right to use force in self-defense.<sup>67</sup> In this respect, I quite agree with Steinhoff's argument that even if necessity justifies a duty to compensate, the question remains whether necessity renders the actor invoking the necessity liable to defensive force.<sup>68</sup> A duty to compensate is entirely consistent both with such liability to defensive force and with the absence of such liability. And I find persuasive Steinhoff's argument that the potential collateral victims of the

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highly offensive. B is not liable to D and E, nor is he liable to C, unless C sustains substantial bodily harm.").

65. See *id.* § 197(1) cmt. c ("In determining the question of reasonableness, the probable advantage to the actor to be expected from the entry must be weighed against the probable detriment to the possessor of the land or other persons properly upon it. Thus the actor's entry to avoid death or serious bodily harm would be unreasonable if it would involve a more serious or even an equal risk of harm to the possessor of the land or other lawful occupants. Likewise, where the entry is for the purpose of protecting the actor's land or chattels, not only would any serious risk of harm to the person of the possessor or other lawful occupants make the entry unreasonable, but so would a disproportionate, or even an equal, risk of harm to the land or chattels of the possessor or chattel of third persons lawfully on the land.").

66. See *id.* § 77.

67. One exception is § 73, comment c, which explicitly states that if an actor intentionally causes substantial bodily harm to another and if the harm threatened to the actor is not disproportionately greater than the harm to the other, the actor is not privileged to inflict such a harm or physical contact; accordingly, "the other has his normal privilege of resisting any attempt made by the actor to inflict such contact." *Id.* § 73 cmt. c.

68. Steinhoff, *supra* note 1, at 200.

tactical bomber are owed compensation but at the same time are entitled to use defensive force to protect themselves from harm.<sup>69</sup>

#### IV. SELF-DEFENSE AND PUBLIC NECESSITY

When a private actor or public official invokes necessity, not to protect his own interests or the interests of a third party, but to protect the public as a whole from serious harm, tort law characterizes the privilege as one of public necessity and applies a different set of rules than for private necessity.<sup>70</sup> A private actor who invokes public necessity has a complete privilege, with which others may not interfere and which does not require compensation—at least if the actor invokes necessity only to interfere with others' property interests.<sup>71</sup> Thus, a private actor may, in a dire lifeboat scenario, throw overboard the luggage of another passenger to save the lives and property of all the passengers.<sup>72</sup> Or he may destroy a house to prevent a fire from spreading to the rest of a city. Two rationales can be offered for not requiring compensation in such cases. First, the standard fairness or corrective justice rationale for a private necessity duty to compensate, that one who chooses to infringe another's property right to benefit himself must pay for the harm thereby done, does not apply when the actor is choosing to benefit the public. Second, a practice of imposing liability on such beneficent actors might have the effect of discouraging their beneficence.

The Restatement (Second) of Torts recognizes a complete privilege of public necessity to avoid “an imminent public disaster.”<sup>73</sup> Moreover, the Restatement permits the actor invoking the public necessity privilege not only to enter the land of another but also to “use reasonable force against the person, if it reasonably appears to the actor to be necessary to do so in

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69. *Id.* at 165.

70. RESTATEMENT (SECOND) OF TORTS § 196 cmt. a (AM. LAW. INST. 1965).

71. This statement is subject to a qualification: in admiralty law, if a private actor destroys another's property to save the lives or property of others on board a vessel, all individuals whose property has been thereby saved must contribute pro rata to compensate the person whose property was destroyed for their benefit. This rule is called “general average contribution.” RICHARD A. EPSTEIN, TORTS § 2.17 (1999); *Unwarranted Conclusions*, *supra* note 47, at 8; *see also* Virgo, *supra* note 49, at 145. According to Christie, this rule only applies to those whose property was saved, not to those whose lives were saved. *Unwarranted Conclusions*, *supra* note 47, at 8.

72. *Mouse's Case* (1608) 77 Eng. Rep. 1341, 1341; 12 Co. Rep. 63, 63.

73. RESTATEMENT (SECOND) OF TORTS § 196 (AM. LAW. INST. 1965). This formulation seems to recognize a much narrower privilege than the formulation employed by many courts, which extend the privilege in cases short of a *public disaster*. For example, many courts would permit an actor to destroy a diseased animal pursuant to public necessity. *See* DOBBS, HAYDEN & BUBLICK, *supra* note 2, § 118.

order to accomplish the purpose for which the privilege exists.”<sup>74</sup> However, no case law authority is cited for the latter proposition.

When a *public* official invokes the defense of public necessity, courts are divided about whether compensation must be paid, as an instance of, or an analogy to, the government’s duty to pay compensation when taking private property for a public use under the power of eminent domain.<sup>75</sup>

The distinction between private and public necessity is not entirely clear from case law.<sup>76</sup> Private necessity is sometimes described as conduct by which the actor seeks to benefit either himself or any “third person or the property of [such person].”<sup>77</sup> How this distinction is formulated is important in resolving how tort law would treat Jeff McMahan’s insulin example.<sup>78</sup> McMahan supposes that a passerby steals insulin to save the life of a person he finds in a diabetic coma.<sup>79</sup> Does he owe compensation to the owner of the insulin? Under the Restatement (Second) of Torts, he probably does.<sup>80</sup> The Restatement includes an example of a doctor who takes medicine from a pharmacist for the benefit of his patient, and it characterizes the example as a private necessity case.<sup>81</sup> On this view, the passerby who steals insulin

74. RESTATEMENT (SECOND) OF TORTS § 196 cmt. b (AM. LAW. INST. 1965).

75. *Compare* *Customer Co. v. City of Sacramento*, 895 P.2d 900, 923 (Cal. 1995) (no duty to compensate when police officers damaged building while flushing out suspect with tear gas), *with* *Wegner v. Milwaukee Mut. Ins. Co.*, 479 N.W.2d 38, 42 (Minn. 1992) (recognizing duty to compensate under similar circumstances).

76. *See* DOBBS, HAYDEN & BUBLICK, *supra* note 2, § 118 n.7 (“[T]he private necessity cases as traditionally understood might include those in which the defendant acts altruistically for the benefit of another person and in which he himself has no interest. If that matters, then perhaps it suggests that we have miscast the categories; instead of public necessity vs. private necessity, we should think of defendants acting for others and those acting at least in substantial part for their own interests.”); Virgo, *supra* note 49, at 144–45.

77. RESTATEMENT (SECOND) OF TORTS § 197(1)(b), cmt. e (AM. LAW. INST. 1965).

78. Jeff McMahan, *Self Defense Against Justified Threateners*, in *HOW WE FIGHT: ETHICS IN WAR* 104, 105 (Helen Frowe & Gerald Lang eds., 2014); Steinhoff, *supra* note 1, at 174, 196.

79. McMahan, *supra* note 78.

80. *See* RESTATEMENT (SECOND) OF TORTS § 263(2) (AM. LAW INST. 1965).

81. The Restatement offers these illustrations:

*Example 2*: “A, a pharmacist, refuses to sell B a bottle of medicine available only from A and necessary to save the life of B. B takes the medicine and uses it. B is privileged to do so, but is subject to liability to A for the value of the medicine.” *Id.* § 263(2) cmt. e, illus. 2.

*Example 3*: “The same facts as in Illustration 2, except that B is a physician who takes the medicine to save the life of his patient. B is privileged to do so, but is liable to A for the value of the medicine.” *Id.* § 263(2) cmt. e, illus. 3.

should be characterized as falling within the private rather than public necessity doctrine, and thus would have a duty to compensate.

However, I believe the characterization question is more complex. If the third party on whose behalf the actor steals is a member of the actor's family, the actor personally benefits in a significant way, and the standard rationale for private necessity indeed applies.<sup>82</sup> But if the third party is simply a member of the public whom the actor is generous enough to benefit, it is difficult to distinguish this from paradigm public benefit cases—such as saving other passengers on a boat or saving residents of your city from a fire—in which the fairness and incentive arguments favor the public necessity rule of no liability. Why should it matter whether the actor's generosity extends to one stranger or to many?

Some of the most philosophically interesting instances of necessity are, for tort law purposes, instances of public necessity. Most Trolley problem<sup>83</sup> variations so qualify.<sup>84</sup> However, tort law's public necessity doctrine, as currently conceived, justifies interference only with property rights.<sup>85</sup> I have found no cases permitting private individuals to override others' rights of bodily integrity for the sake of avoiding a greater evil, or even for the sake of avoiding an "imminent public disaster."<sup>86</sup>

Thus, although Steinhoff asserts that tort law requires a person who harms innocents in the exercise of a necessity privilege to compensate for that harm,<sup>87</sup> this is not true of American tort law. Those invoking private necessity to justify interference with property rights most likely do owe compensation, though even here, the incomplete privilege approach of *Vincent* is controversial.<sup>88</sup> However, those invoking private necessity to justify interference with *personal* rights might or might not owe compensation, public officials invoking public necessity might or might not, and private individuals invoking public necessity do not.

But how *should* a court resolve the conflict when confronted with an exercise of the privilege of private necessity that would intrude upon personal rights? On first impression, it seems indefensible that a person's interest in obtaining compensation for a potentially serious personal injury

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82. *See id.* § 263(1).

83. Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCYCLOPEDIA PHIL. (Winter 2016), <https://plato.stanford.edu/entries/ethics-deontological/> [<https://perma.cc/XP7A-F8Y4>].

84. This is so unless the person on the spur is a relative or friend of the actor, a fact that would, on my view, convert the case to one of private necessity. *See, e.g.*, MODEL PENAL CODE § 3.02 cmt. 3 (AM. LAW INST. 1985).

85. RESTATEMENT (SECOND) OF TORTS § 196 (AM. LAW INST. 1965).

86. *Id.*

87. Steinhoff, *supra* note 1, at 200.

88. *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910).

would receive less legal protection than a person's interest in compensation for infringement of a mere property interest. However, I believe an American court faced with such a case would be justifiably cautious before awarding full compensatory damages, in light of the potential magnitude of such an award, and the risk that the prospect of having to pay such an award would deter private actors from doing what they otherwise reasonably believed necessary to save themselves from harm—as in the escape-from-an-assailant case.<sup>89</sup> By contrast, in those private necessity cases in which the actor infringes only a property right, the burden of paying compensation is often less, and is often more predictable and easier to insure against. But imagine a future world in which providing full compensation for a serious personal injury were much less burdensome. Imagine that the restorative power of medicine improved to such a degree that no one ever died from traumatic injuries, and all such injuries could be promptly cured at modest cost. In such a world, I believe it would be incumbent on justified injurers to ensure that their victims obtained such a cure, and I believe courts would so insist.

How should we resolve the question of compensation in *public* necessity cases? There are good reasons not to impose a duty of compensation on a private actor who acts for the public benefit, as explained above, but at the same time, the community ought to take steps to provide some form of compensation to the innocent victim. For example, compensation could be funded out of general taxes. When a person is deliberately harmed for the public good or to avoid a greater evil, she has an especially powerful claim to be made whole or at least to have her burden alleviated. Similarly, when government officials deliberately infringe the property and personal rights of citizens in order to avoid a greater evil, the government should pay compensation. Some might object that a duty to compensate will deter government actors from making difficult but necessary tradeoffs in emergencies that would greatly benefit the general public.<sup>90</sup> The objection can be answered. If there is evidence of such an effect, the amount of

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89. See *supra* p. 366.

90. See *e.g.*, *Respublica v. Sparhawk*, 1 Dall. 357, 363 (Pa. 1788) (“We find, indeed, a memorable instance of folly recorded in the 3 Vol. of Clarendon's History [of England], where it is mentioned, that the *Lord Mayor of London*, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to removing the furniture . . . belonging to the Lawyers of the Temple, then on the Circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt.”).

compensation might be reduced, or the incentive structure for government action in an emergency might be improved in other ways.

## V. MISTAKE, JUSTIFICATION, AND EXCUSE

The discussion of private necessity raises a serious question about tort law's treatment of reasonable mistake. Suppose I defend myself from an attack with force that, on the facts as I reasonably believe them to be, is both legally proportionate and legally necessary, but suppose I am reasonably mistaken—the attacker was entirely innocent. Suppose, for example, that I am the Mistaken Resident who reasonably kills the identical twin of a serial killer on the loose. I am not at fault, but neither, we can suppose, is the identical twin. Should I not compensate the innocent victim?<sup>91</sup>

The answer is two-fold. First, I agree with Steinhoff that the reasonableness requirement for mistakes about the facts that underlie the privilege of self-defense is action-guiding, and in that respect is more akin to a justification than an excuse.<sup>92</sup> Indeed, it is *strongly* action-guiding in some contexts. For some actors, it is not only morally permissible, it is morally desirable, that the actor act upon reasonable beliefs, even though the actor knows that it is possible the beliefs are mistaken. This is true of police officers and of others with an affirmative responsibility to prevent harm. Perhaps for other actors, acting upon reasonable beliefs is merely morally permissible, for it is up to them—and not a matter of moral criticism—whether they take action to defend themselves, to defend others, or to prevent crime. But even such actors, when they act based on reasonable appearances, truly are acting justifiably from the ex ante perspective of the options open to the actor at the time. Conduct that is merely permissible is one species of justifiable conduct.

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91. The Reporter's Note to the Restatement (Second) of Torts provision on self-defense briefly addresses the argument:

It might be argued that since the purpose of a tort action is not to punish a guilty defendant, but merely to adjust a loss which his conduct has caused to another, the actor should bear the burden of his mistake, no matter how reasonable. Under the influence of the criminal law, however, the interest in self-preservation, "the first law of nature," has been given an importance which justifies the privilege to act under a mistake.

RESTATEMENT (SECOND) OF TORTS § 63 reporter's notes (AM. LAW INST. 1966).

92. In prior work, I have suggested that a reasonableness requirement for beliefs with respect to criminal law and tort defenses is one kind of justification, while the requirement that the conduct in question be ex post permissible or obligatory in the ways specified by the defense is another kind. Simons, *supra* note 29, at 64–66. For a similar position, see R. A. Duff, *Rethinking Justifications*, 39 TULSA L. REV. 829, 841–42 (2004) (distinguishing acts that are "justified" ex post from those that are "warranted" based on the evidence).

Second, there is, once again, good reason not to encumber a defendant with a weighty financial obligation to compensate the victim when the defendant has made a reasonable mistake in the use of self-defense, even when the victim is entirely innocent and in no way responsible for the mistake. But, if it were feasible to provide full compensation in such a case by imposing only a modest burden on the mistaken actor, that would be the more just resolution.

It is instructive here to note that reasonable mistake is *not* a defense to the tort of trespass to land, when the mistake concerns the question whether the property that the actor is occupying is his own or belongs to another.<sup>93</sup> Perhaps a partial explanation for this strict liability rule is that liability in such cases often takes the form of declaratory relief, which only modestly burdens the mistaken tortfeasor.<sup>94</sup> One further important feature of a *reasonableness* requirement for beliefs about the factual preconditions of self-defense is that such a requirement, as applied by courts, typically embraces elements of both justification and excuse.<sup>95</sup> Although, in general, tort law is much less willing than criminal law to preclude liability on the basis of excuse, excuse is implicitly recognized as an aspect of the reasonable person test.<sup>96</sup> When the actor is confronted by an emergency, tort law gives strong deference to the actor's *ex ante* judgment, recognizing the difficulty of making the proper decision when faced with two unpalatable alternatives with very little time to decide.<sup>97</sup>

This deferential attitude helps explain the otherwise puzzling absence of case law raising the issue of private or public necessity. Consider, for example, the famous case of *Cordas v. Peerless Transportation Co.*<sup>98</sup> A taxi driver and his employer were found not liable when an armed bandit jumped into the taxicab, after which the driver accelerated rapidly, slammed

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93. RESTATEMENT (SECOND) OF TORTS § 329 cmt. c (AM. LAW INST. 1965).

94. *Id.* § 907 cmt. b (AM. LAW INST. 1979).

95. Duff, *supra* note 92, at 833.

96. See Andrew Dyson, James Goudkamp & Frederick Wilmot-Smith, *Central Issues in the Law of Tort Defences*, in DEFENCES IN TORT, *supra* note 49, at 3, 22–24; John C.P. Goldberg, *Tort Law's Missing Excuses*, in DEFENCES IN TORT, *supra* note 49, at 53, 55; John C.P. Goldberg, *Inexcusable Wrongs*, 103 CAL. L. REV. 467, 487 (2015) [hereinafter *Inexcusable Wrongs*].

97. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 9 (AM. LAW INST. 2010) (“If an actor is confronted with an unexpected emergency requiring rapid response, this is a circumstance to be taken into account in determining whether the actor's resulting conduct is that of the reasonably careful person.”).

98. *Cordas v. Peerless Transp. Co.*, 27 N.Y.S.2d 198 (N.Y. City Ct. 1941).

on his brakes and leaped from the cab, which then veered onto the sidewalk and struck three pedestrians—a mother and her two infant children.<sup>99</sup> Although pleaded as a negligence case, the case might also have been analyzed as an intentional tort of battery because a jury might have found the cab driver knew to a substantial certainty that abandoning his cab while it was heading for a crowded sidewalk in Manhattan would result in the cab colliding with a pedestrian.<sup>100</sup> If the driver's conduct were treated as a prima facie battery, he would have to assert necessity as a defense.<sup>101</sup> In ruling for the defendant, the court placed heavy emphasis on the difficulty of making a wise judgment under the emergency circumstances requiring a split-second decision.<sup>102</sup> I am sure the court would have reached the same decision if it had framed the question as whether the driver had a necessity defense to battery because the court would have found sufficient evidence that the driver *reasonably believed* it was necessary for him to leap out of the cab, despite knowing that his action would very likely cause injury to innocent pedestrians.<sup>103</sup>

I strongly suspect that many other private necessity cases exist in which a driver confronts a sudden emergency and chooses unwisely yet is excused because he had too little time to think and because his instinct for self-preservation should not be condemned.<sup>104</sup> The reluctance to impose liability in such cases is understandable, though regrettable. In tort law, as opposed to criminal law, personal excuses are only rarely recognized, and for good reason.<sup>105</sup> But I also believe that, in the not too distant future, technological change in the form of autonomous vehicles will greatly

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99. *Id.* at 199–200.

100. *Id.*

101. RESTATEMENT (SECOND) OF TORTS § 65(1) (AM. LAW INST. 1965).

102. *Cordas*, 27 N.Y.S.2d at 202. After sharing numerous quotations from Shakespeare, the court concludes,

If under normal circumstances an act is done which might be considered negligent it does not follow as a corollary that a similar act is negligent if performed by a person acting under an emergency, not of his own making, in which he suddenly is faced with a patent danger with a moment left to adopt a means of extrication. The chauffeur—the ordinary man in this case—acted in a split second in a most harrowing experience. To call him negligent would be to brand him coward; the court does not do so . . . .

*Id.*

103. An even more extreme case is *Laidlaw v. Sage*, 52 N.E. 679, 681 (N.Y. 1899), in which defendant deliberately used plaintiff, an employee, as a human shield to protect himself from a bomb. The court reached the dubious conclusion that defendant's conduct was not tortious and rested this conclusion on an indefensible rationale: his decision to jeopardize his employee's welfare to save his own skin was not a voluntary act. *Id.*

104. See Kenneth W. Simons, *Dimensions of Negligence in Criminal and Tort Law*, 3 THEORETICAL INQUIRIES L. 283, 314 nn.83–85 (2002).

105. See *Inexcusable Wrongs*, *supra* note 96, at 485.

diminish the occasions for invoking the emergency doctrine in automobile accident cases. We will then have to squarely face the question: what tradeoffs of life and limb does the justification, and not the excuse, of necessity permit when two automobiles, or an automobile and a pedestrian, are predicted to collide? And we will then have to face the incomplete privilege question: if the automobile driver programmed his car to favor his welfare over the welfare of a pedestrian or of the occupant of another car, and even if the programmed decision is one that we as a society commend as satisfying the criteria of the necessity defense, should he not compensate for the harm that he coolly programmed his car's computer to bring about? After all, he made that decision at a time when he was not in the grip of fear, panic, and self-serving instinct.

## VI. CONDITIONAL FAULT AND STRICT LIABILITY

An actor's privilege to act from necessity should sometimes be understood as conditional, and not merely incomplete in the sense that *Vincent* espoused, that is, in the sense of requiring ex post compensation if the actor is able to pay. If it is predictable that sudden storms will arise and cause ships to collide with docks, we might require one or the other party to take out insurance to ensure that payment for a potential loss can be assured. Many commercial activities, and even noncommercial activities such as driving an automobile, carry with them obligations to make arrangements in advance to assure the ability to pay for specified types of harm.

On the other hand, suppose the actor cannot afford to pay, and has no prospects of ever being able to afford to pay, yet she is faced with an emergency threatening her life, and can save her life only by breaking into another's cabin, causing modest property damage? It might not be realistic to expect tort law to refine its rules sufficiently to permit a complete privilege in this type of case. However, as a moral matter it seems clear that such an actor should be permitted to trespass without paying compensation. At the same time, arguably the most just solution is for the community as a whole to compensate the property owner for the harm. By contrast, if another actor, confronted with the same emergency, can readily compensate the cabin owner, it is only just that she be required to do so.<sup>106</sup>

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106. See *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910) ("Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such a person to pay the value of the property so taken *when he became able to do so.*") (emphasis added).

The point is an instance of a more general principle. Tort law characterizes some activities as requiring compensation no matter how carefully they are conducted—engaging in abnormally dangerous activities such as blasting,<sup>107</sup> owning wild animals,<sup>108</sup> or distributing products that may contain manufacturing flaws that reasonable care cannot prevent.<sup>109</sup> In these situations, it is sensible for the community to require advance assurance from those conducting the activity that they will be able to pay the costs of that activity. We might say that for such activities, the “fault” consists in engaging in the activity but not adequately preparing to accept the financial responsibility to compensate for the harms that the activity will inevitably cause.<sup>110</sup>

Consider how this principle applies in a very different context, the standard tactical bomber example from the literature on the doctrine of double effect, in which military necessity justifies bombing an important military target even though the decision-maker predicts the collateral deaths of some civilians as a side effect.<sup>111</sup> Tort law principles are not and should not be the governing legal principles for military actions; nevertheless, as a moral matter—and perhaps as a matter of international law—compensation ought to be paid to those civilians’ families. And as a moral matter, I believe a nation should not undertake a war unless it can guarantee in advance its ability to pay adequate compensation to collateral victims.

But in many life-threatening emergency situations that individuals face when acting on their own, it would be unrealistic and unduly onerous to require the individual to provide advance assurance—through insurance or other means—that he or she can pay for any harm caused. Someone who is too poor to provide such assurance *ex ante*, and too poor to provide compensation *ex post*, is still entitled to infringe another’s property rights in an emergency if that is the only way to preserve her life.

## VII. CONCLUSION

Professor Steinhoff’s illuminating arguments about the scope of self-defense and necessity focus on an actor’s privilege to use force against another actor rather than on the actor’s duty to compensate for harm caused

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107. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 20 cmt. e (AM. LAW INST. 2005).

108. *Id.* § 22.

109. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. a (AM. LAW INST. 1998).

110. Kenneth W. Simons, *Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformulation*, 15 HARV. J.L. & PUB. POL’Y 849, 868–69 (1992); *see also* Gregory C. Keating, *Nuisance as a Strict Liability Wrong*, J. TORT L., Mar. 2012, at 1, 1 (arguing that strict liability in tort is characteristically “a conditional wrong whose essence lies in failing to volunteer reparation for harm justifiably done”); Keeton, *supra* note 45, at 417.

111. McMahan, *supra* note 78, at 104–05.

in the improper or proper exercise of that privilege. Nevertheless, those arguments also have some important implications for the grounds and scope of that duty, as this essay explains.

My exploration of the duty to compensate in law and morality reveals that applicable legal standards offer some guidance, but the guidance is frequently spotty and the relevant case law is remarkably scarce. With respect to the separate question whether and when a *moral* duty to compensate exists, the answer depends on a range of factors, including whether the conduct in question is justified or excused, whether it serves the interests of the public or only of the actor, the nature of the right that the conduct infringes, whether the actor is reasonably mistaken, and whether the actor's privilege should be understood as conditional on the actor's providing advance assurance that compensation will be paid.

