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Who's Afraid of the Lucky MOOSE? Canada's Dangerous Self-Defence Innovation

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Résumé de l'article

Alors qu'il a peu été le sujet de débats publics, le droit canadien à l'autodéfense est devenu à bien des égards plus permissif que la loi de la Floride « Stand Your Ground » ou « Défendez votre territoire ». Cet article présente une recherche historique originale portant sur les origines de la loi canadienne sur l'auto-défense et qui révèle l'évolution de ses aspects conceptuels actuels. Il compare ces aspects avec ceux de la loi floridienne et nous met en garde contre les climats de peur qui, malgré les balises canadiennes, rendent les lois canadiennes vulnérables à des applications biaisées ou non raisonnées. Le cas de Gerald Stanley à Battleford en Saskatchewan sert à illustrer la mise en garde. L'auteur soumet que le succès de la défense d'accident de Stanley dans l'homicide de Colten Boushie reposait en fait sur les notions dangereuses de défense de propriété et de défense des personnes, faisant ainsi primer la protection de la propriété, de la liberté et de l'honneur sur celle de la vie humaine.

WHO'S AFRAID OF THE LUCKY MOOSE? CANADA'S DANGEROUS SELF-DEFENCE INNOVATION

*Noah Weisbord**

With little public discussion, the Canadian law of self-defence has become, in important respects, more permissive than Florida's Stand Your Ground law. This article provides original historical research into the origins of the Canadian law of self-defence that reveals the evolution of its current conceptual features. It compares these features with the features of the Florida law and warns that in climates of fear, despite Canadian safeguards, Canada's law is vulnerable to biased or unprincipled application. The Gerald Stanley case in Battleford Saskatchewan serves as a warning. The author argues that Stanley's successful accident defence in the homicide of Colten Boushie was, in fact, predicated on dangerous notions of defence of property and defence of person that prioritize the protection of property, liberty, and honour over human life.

Alors qu'il a peu été le sujet de débats publics, le droit canadien à l'autodéfense est devenu à bien des égards plus permissif que la loi de la Floride « Stand Your Ground » ou « Défendez votre territoire ». Cet article présente une recherche historique originale portant sur les origines de la loi canadienne sur l'auto-défense et qui révèle l'évolution de ses aspects conceptuels actuels. Il compare ces aspects avec ceux de la loi floridienne et nous met en garde contre les climats de peur qui, malgré les balises canadiennes, rendent les lois canadiennes vulnérables à des applications biaisées ou non raisonnées. Le cas de Gerald Stanley à Battleford en Saskatchewan sert à illustrer la mise en garde. L'auteur soumet que le succès de la défense d'accident de Stanley dans l'homicide de Colten Boushie reposait en fait sur les notions dangereuses de défense de propriété et de défense des personnes, faisant ainsi primer la protection de la propriété, de la liberté et de l'honneur sur celle de la vie humaine.

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Introduction

In 2012, Parliament overhauled Canada's self-defence and defence of property laws.[1] These reforms relaxed and eliminated the traditional constraints on defensive force—including necessity and proportionality—leaving police, prosecutors, judges, and juries unprecedented discretion to evaluate the reasonableness of an accused's actions "in the circumstances."[2] Canada's new law is arguably more permissive than Florida's notorious stand-your-ground law (Stand Your Ground), which largely dispenses with the traditional retreat requirement before deadly force is legally justifiable.[3] Canada's self-defence innovation is troubling in light of the Floridian experience, where an expanded self-defence law correlated with a surge in homicides,[4] capricious application, and inter-communal strife.[5]

Research into the evolution and impact of United States (US) self-defence laws provides a warning to Canadians about our 2012 innova-

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1 See *Citizen's Arrest and Self-defence Act*, SC 2012, c 9.

2 *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*] ("[a] person is not guilty of an offence if (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person; (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and (c) the act committed is reasonable in the circumstances", s 34(1)).

3 See Fla Stat tit 46 § 776.012–776.013, 776.031 (2005) [Fla Stat 2005].

4 See David K Humphreys, Antonio Gasparrini & Douglas J Wiebe, "Evaluating the Impact of Florida's 'Stand Your Ground' Self-defense Law on Homicide and Suicide by Firearm" (2017) 177:1 JAMA Internal Med 44 at 49.

5 See Nicole Ackermann et al, "Race, Law, and Health: Examination of 'Stand Your Ground' and Defendant Convictions in Florida" (2015) 142 Soc Sci & Med 194; Valerie Purdie-Vaughns & David R Williams, "Stand-Your-Ground is Losing Ground for Racial Minorities' Health" (2015) 147 Soc Sci & Med 341; American Bar Association, "National Task Force on Stand Your Ground Laws: Final Report and Recommendations" (September 2015) at 2, online (pdf): <www.issuelab.org/resources/22713/22713.pdf> [perma.cc/XA5L-5NZD]; John K Roman, "Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Report Data" (2013), online (pdf): *Urban Institute* <www.urban.org/UploadedPDF/412873-stand-your-ground.pdf> [perma.cc/C96G-NVQ6]; Chabeli Herrera, "Dream Defenders Stand Their Ground at United Nations" (23 September 2014), online: *Community Justice Project* <communityjusticeproject.com/media/2014/9/24/dream-defenders-stand-their-ground-at-united-nations> [perma.cc/6BJ2-3BQU] ("[t]he U.N. Human Rights Committee's placed 'stand your ground' on the list of issues it wishes the United States to respond to ... [T]he report highlights certain 'stand your ground' cases across Florida"); Susan Taylor Martin, "Florida 'Stand Your Ground' Law Yields Some Shocking Outcomes Depending on How Law Is Applied", *Tampa Bay Times* (1 June 2012), online: <www.tampabay.com> [perma.cc/MU2V-QLVQ].

tion.[6] This paper demonstrates that though the history of self-defence differs in the US and Canada—most significantly due to the absence of institutionalized slavery in Canada and the lesser importance of guns in Canadian politics—there are also important parallels to consider. Late nineteenth century westward expansion of governmental authority into Indigenous territories, the changing status of women in the twentieth century, and populist surges have contributed to the evolution of self-defence in both countries.[7] The conceptual architecture of Florida's Stand-Your-Ground legislation and Canada's 2012 innovation reveal an underlying struggle between the principles of preservation of life on the one hand and protection of property, liberty, and honour on the other. Examining Canada's 2012 law in a historical and theoretical context may help Canadians avoid some of the mistakes that have resulted in capricious outcomes and intercommunal strife in the US.

A key lesson of this research is that expanded self-defence and defence of property laws are of particular concern in climates of fear—places where communities are preoccupied with intergroup violence. In such environments—depleted US inner cities, segregated rural communities, contested international hotspots—anxious neighbours arm themselves in anticipation, increasing the risks of a fatal conflagration.[8] They are also more likely to perceive threats and to see the need to resort to violence to respond to those threats.[9] In *The Strategy of Conflict*, Thomas C. Schelling warned, "[f]ear that the other may be about to strike in the mistaken belief that we are about to strike gives us a motive for striking, and so justifies the other's motive."[10]

The law can encourage or deter forcible responses to perceived threats by, for example, emboldening individuals to stand their ground (an expanded self-defence law) or requiring claimants to retreat to the wall before killing their assailant (a narrower one). The law may also exacerbate intercommunal tensions in the ways it determines when violent self-help

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6 See generally Caroline E Light, *Stand Your Ground: A History of America's Love Affair with Lethal Self-Defense* (Boston: Beacon Press, 2017) [Light, *Stand Your Ground*].

7 See generally Ann E Tweedy, "Hostile Indian Tribes… Outlaws, Wolves, … Bears… Grizzlies and Things like That? How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense" (2011) 13:3 U Pa J Const L 687 at 703–09. See Light, *Stand Your Ground*, *supra* note 6 at 133–54; *R v Lavallee*, [1990] 1 SCR 852 at 872–73, 55 CCC (3d) 97 [*Lavallee*].

8 See generally Will Hauser & Gary Kleck, "Guns and Fear: A One-Way Street?" (2013) 59:2 Crime & Delinquency 271 at 287–88.

9 See generally *ibid*.

10 (Cambridge, Mass: Harvard University Press, 1960) at 207.

is permissible.[11] When self-defence is raised in court, the claim rests in various ways on decision-makers' perceptions of the reasonableness of the defendant's fear and of their actions in the circumstances. The reasonableness standard is informed by community preoccupations, whether subway violence, rural crime, domestic violence, or dangerous foreigners. Further, seemingly neutral drafting choices—for example, whether self-defence is a justification or an excuse, whether the law prioritizes objective or subjective elements, whether legislation is built around bright-line rules or flexible standards, whether the burden to prove self-defence falls on the prosecution or the accused—have distributional effects. The laws of self-defence have historically favoured White, property-owning men, while non-White, female, poor, sexual minority, and gender-nonconforming people are more likely to be punished for defending themselves and less likely to receive the support of the courts when they are the victims of violence.[12] Though some argue that a flexible self-defence law can be more inclusive,[13] there is accumulating evidence that expanded self-defence laws exacerbate the problem of uneven applications.[14]

Canadians confident that our legal culture inoculates us should think again: expanded self-defence laws have been linked with racial inequalities in Florida and thirty-two other US states,[15] and even before Parlia-

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11 See e.g. *State of Florida v George Zimmerman*, 592012CF001083A (Fla Cir Ct 2013). See Tom Foreman, "Analysis: The Race Factor in George Zimmerman's Trial", *CNN* (15 July 2013), online: <www.cnn.com> [perma.cc/K99A-ZXLC] ("[t]his verdict was prepared from day one," according to Drexel law professor George Ciccariello-Maher, who stated that "[f]rom the media campaign of demonizing Martin, to the selection of a nonblack jury, to the instruction not to refer to race ... his was the chronicle of an acquittal foretold"); Lizette Alvarez, "Zimmerman Case Has Race as a Backdrop, but You Won't Hear It in Court", *The New York Times* (7 July 2013), online: <www.nytimes.com> [perma.cc/XAC3-JAVK].

12 See Light, *Stand Your Ground*, *supra* note 6 at 10, 86, 92, 106–07. See also Barbara Hudson, "Beyond White Man's Justice: Race, Gender and Justice in Late Modernity" (2006) 10:1 Theor Crim 29 at 32.

13 See e.g. Vanessa A MacDonnell, "The New Self-Defence Law: Progressive Development or Status Quo?" (2014) 92:2 Can Bar Rev 301 at 302.

14 See ABA, *supra* note 5 at 2 (finding an increase in homicides in stand your ground states and uneven application of law leading to racial disparities); Martin, *supra* note 5 (finding that the defence succeeds more often when the deceased is black: seventy-three per cent for black deceased and fifty-nine per cent for white deceased); Mary Anne Franks, "Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege" (2014) 68:4 U Miami L Rev 1099.

15 See ABA, *supra* note 5 at 2, 12; Chandler B McClellan & Erdal Tekin, "Stand Your Ground Laws, Homicides, and Injuries" (2012) National Bureau of Economic Research Working Paper No 18187, online: <www.nber.org/papers/w18187.pdf> [perma.cc/F399-458N]; LaKerri R Mack & Kristie Roberts-Lewis, "The Dangerous Intersection between Race, Class and Stand Your Ground" (2016) 23:1 J Pub Mgmt & Soc Pol'y 47.

ment expanded Canada's self-defence laws, our criminal justice system was contending with biases of its own.[16] The dangers of capricious or racially motivated application were present in the February 2018 case against Gerald Stanley, a White Saskatchewan farmer who shot and killed twenty-two-year-old Red Pheasant Cree First Nation memberColten Boushie. This shooting happened in the course of an altercation after Boushie and four friends drove onto Stanley's farm with a flat tire in 2016.[17] The chief of the Federation of Sovereign Indigenous Nations warned that by linking Boushie's death with a surge in thefts in the area, the police provided "just enough prejudicial information for the average reader to draw their own conclusions that the shooting was somehow justified."[18] Seven months after Boushie's death, the Saskatchewan Association of Rural Municipalities passed a resolution with ninety-three per cent support to "lobby the Federal Government to expand the rights and justification" for self-defence in light of an alleged increase in rural crime.[19] A jury comprised entirely of ostensibly non-Indigenous members acquitted Stanley of second-degree murder and manslaughter pursuant to a hybrid defence melding defence of property, defence of person, and accident. Stanley's highly improbable "hang-fire" gun malfunction occurred after Boushie's vehicle was disabled and Stanley had fetched his handgun from the shed, fired two warning shots, approached the driver's side window,

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16 See Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada*, vol 5 (Montreal: McGill-Queen's University Press, 2015) ("[t]he failures of the justice system include the disproportionate imprisonment of Aboriginal people and the inadequate response to their criminal victimization" at 186). See generally David M Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006); David M Tanovich, "The Colourless World of *Mann*" 21 CR (6th) 47; Benjamin L Berger, "Race and Erasure in *R v Mann*" 21 CR (6th) 58; Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Halifax: Fernwood Publishing, 2017).

17 See Joe Friesen, "The Night Colten Boushie Died: What Family and Police Files Say About His Last Day, and What Came After", *The Globe and Mail* (20 October 2016), online: <www.theglobeandmail.com> [perma.cc/Q29U-VPXD] [Friesen, "The Night"].

18 *Ibid* (statement by Bobby Cameron, chief of the Federation of Sovereign Indigenous Nations).

19 Saskatchewan Association of Rural Municipalities (SARM), "Rural Crime: Resolution 34-17A" (2017), online: <sarm.ca> [perma.cc/M6L4-L96F]; "Sask. Residents Need More Rights to Protect Property, SARM Resolution Says" *CBC News* (14 March 2017), online: *CBC* <www.cbc.ca> [perma.cc/6E69-U7UR]. A storm of racist comments on social media, including comments from the "Saskatchewan Farmers Group" Facebook group, stoked intercommunal tension and prompted Premier Brad Wall to plead for an end to racist posts: see Kelvin Heppner, "Racist, Hateful Comments Can't Be Ignored", *RealAgriculture* (15 August 2016), online: <www.realagriculture.com/2016/08/racist-hateful-comments-cant-be-ignored/> [perma.cc/VG3A-LZA8]; Jason Warick, "Wall Calls For End to 'Racist and Hate-Filled' Online Comments", *Saskatoon StarPhoenix* (15 August 2016), online: <thestarphoenix.com> [perma.cc/W7LC-3TEB].

and reached in to shut the ignition off with his gun to Boushie's head.[20] It could only be deemed accidental if the court accepted that Stanley was lawfully defending property and person prior to the fatal shot. Indigenous scholars, activists, and community members denounced the verdict as a product of White supremacy, colonialism, and entrenched structural inequalities in the Canadian justice system.[21]

Canadians hope that safeguards in our criminal justice system and legal culture will prevent the kinds of abuses seen in Florida and other US jurisdictions with expansive self-defence laws.[22] Equality norms embodied in the *Canadian Charter of Rights and Freedoms* and in jurisprudence, for example, provide a potential bulwark against biased application of Canada's new self-defence law by inhibiting its overtly racist or sexist application.[23] The fact that Canadian judges are appointed rather than elected may insulate them from the pressures placed on Florida judges to be tough on crime so as to reassure fearful voters and win re-election. Perhaps our faith in the reasonableness of Canadian juries, compared to Floridian juries, will be vindicated. Restrictive Canadian gun laws could help offset the surge of homicides following the adoption of Florida's Stand-Your-Ground law.[24] These safeguards are important, but they may not be enough under the pressures of Canada's own existing or future climates of fear.

Parts I and II of this paper set forth an analysis of the genesis and politics of expanding self-defence laws in the US and Canada in key histori-

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20 See "Full Transcript of Judge's Instructions to Colten Boushie Jury: Put Yourself in a Juror's Shoes", *National Post* (14 February 2018), online: <nationalpost.com> [perma.cc/AN29-V3JP] [Full Transcript].

21 See Kristy Woudstra, "Every Canadian Needs to Read Senator Murray Sinclair's Response to Stanley Verdict", *The United Church Observer* (February 2018), online: <www.ucobserver.org/> [perma.cc/N8MK-PGTM]; Steve Bonspiel, "Canadian Justice System Needs Overhaul in Light of Gerald Stanley Verdict", *CBC News* (17 February 2018), online: <www.cbc.ca> [perma.cc/XMQ9-7WEK]; Jorge Barrera, "Gerald Stanley Acquittal Outrage Result of 'Centuries of Oppression,' says Prominent Civil Rights Lawyer", *CBC News* (14 February 2018), online: <www.cbc.ca> [perma.cc/J8MQ-E4R4]; Azeezah Kanji, "Gerald Stanley Acquittal Yet Another Guilty Verdict For Canada", *Toronto Star* (22 February 2018), online: <www.thestar.com> [perma.cc/3NCH-2RQZ].

22 See Kent Roach, "A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions" (2012) 16:3 Can Crim L Rev 275 at 278 [Roach, "Preliminary"].

23 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

24 See Lisa Rapaport, "Murders Surge in Florida in Decade After 'Stand Your Ground' Law", *Reuters* (14 August 2017), online: <www.reuters.com> [perma.cc/RSC7-Q8BC]. See also David Bercuson, "In Rural Canada, Harper's Gun Ownership Comments Ring True", *The Globe and Mail* (20 March 2015), online: <www.theglobeandmail.com> [perma.cc/RK92-8XKF].

cal moments from the nineteenth century to today. This analysis reveals how competing theoretical justifications for self-defence based on the preservation of life, on the one hand, and the protection of property, liberty, and honour on the other emerge or recede in shifting historical and political contexts in both countries. Next, Part III unpacks key conceptual features of the new self-defence law—for example, classification as a justification or excuse, distribution of objective and subjective elements, placement of fixed preconditions and flexible standards, and distribution of burdens and decision-making authority—that render Canada's self-defence law arguably more vulnerable to bias or unprincipled application than Florida's self-defence law. Part IV examines recent jurisprudence, including *R. v. Cormier*, *R. v. Stanley*, and *R. v. Khill*,[25] revealing that Canadian self-defence arguments are already expanding in unforeseen ways. Finally, Part V considers potential safeguards within Canada's legal and political culture that may temper the risk but warns that they may not be sufficient.

I. The Genesis of Expanded Self-Defence in the US and Florida

A. The American True Man from the Nineteenth Century to the 1960s

Canadian and US laws of self-defence are based on the English common law, which granted the Crown primary responsibility for defending subjects from criminal threats.[26] Under this system, subjects were legally required to resolve their disputes peacefully. Nonetheless, a subject in a public place had a narrow right to defend himself when he was faced with a threat of death or great bodily harm, the threat was imminent, and his response was both necessary and proportionate.[27] The subject was required to "retreat, to the wall behind their back" before meeting force with force, unless retreating posed a lethal risk.[28] According to Blackstone:

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25 *R v Cormier*, 2017 NBCA 10 [*Cormier*]; *R v Stanley*, (2018) Battleford Crim 40/17 at 22 (SKQB) [*Stanley*]; *R v Khill*, (28 June 2018) Hamilton J17-69 (Ont Sup Ct (Crim & Pen Div)) [*Khill*].

26 See Caroline Light, "From a Duty to Retreat to Stand Your Ground: The Race and Gender Politics of Do-It-Yourself-Defense" (2015) 15:4 Cult Stud Crit Methodologies 292 at 293 [Light, "Duty to Retreat"].

27 See ABA, *supra* note 5 at 1; VF Nourse, "Self-Defense and Subjectivity" (2001) 68:4 U Chicago L Rev 1235 at 1239. See generally *R v Bull* (1839), 173 ER 723, 9 Car & P 22.

28 Lily Rothman, "The Surprising History Behind America's Stand Your Ground Laws" *Time* (15 February 2017) [perma.cc/AQ96-LHRS]. See *R v Smith* (1837), 173 ER 441, 8 Car & P 160 (KB); Richard Maxwell Brown, *No Duty to Retreat: Violence and Values in American History and Society* (Oxford: Oxford University Press, 1991) at 12–42.

> And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow subjects the law countenances no such point of honour ... The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him.[29]

The so-called "castle doctrine" emerged in 1604. It permitted a man to use lethal force if attacked in his home on the logic that "the house of every one is his castle."[30] According to Edward Coke, the homeowner could assemble his friends and neighbours to defend his house, but was prohibited from leaving the house to defend himself against violence with force.[31] Whereas the common law doctrine of self-defence was grounded in the sanctity of human life, the castle doctrine provided a narrow, parallel doctrine grounded in property rights (including a man's woman and children), liberty (freedom from unlawful interference in the home), and honour (a man's home is his castle).[32] Because white men were the primary holders of real property at the time, the castle doctrine effectively provided them with special privileges to use defensive force not available to most women and non-white individuals.[33]

Scholars in the US have linked the erosion of the duty to retreat inherited from English common law to resistance to new citizenship rights and economic opportunities for African-American men in the wake of the Civil War and "anxieties around white masculine vulnerability."[34] Anti-federalist suspicion and "threatening" Indigenous people at the frontier provided additional impetus for a white male ethos of "do-it-yourself"

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29 William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1769), vol 4 at 185.

30 *Semayne's Case* (1604), 77 ER 194 at 194, 5 Co Rep 91 ("although the life of man is a thing precious and favored in law … if thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not felony" at 195) [*Semayne's case*]. See also William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1768), vol 3 ("every man's house is looked upon by the law to be his castle" at 288).

31 See *Semayne's case*, *supra* note 30 at 195. Contrast this position with the decision in *Cormier*, *supra* note 25 (the accused successfully relied on the defence of property in leaving his apartment; defence of property morphs into defence of person), under Canada's new law, discussed *below* at notes 196–203 and accompanying text.

32 See Jeannie Suk, *At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy* (New Haven: Yale University Press, 2009) at 56, 58–59.

33 See *ibid* at 60; Light, "Duty to Retreat", *supra* note 26 at 292–93; Franks, *supra* note 14 at 1111–12, 1116, 1126–27.

34 Light, "Duty to Retreat", *supra* note 26 at 293. See Light, *Stand Your Ground*, *supra* note 6 at 39–40; Suk, *supra* note 32 at 60.

(DIY) security and the right to bear arms.[35] Resurrecting strands of eighteenth century jurisprudence within English common law that had softened the innocent victim's duty to retreat,[36] a series of US post-bellum cases in the late nineteenth century expanded the right of self-defence outside the home.[37] These cases muddied the underlying purpose of self-defence so that it was no longer clear whether self-defence was primarily about protection of human life or protection of property, liberty, and honour. *Erwin v. State* was a key precedent, with the court holding that "a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm."[38] The "true man" in this legal and historical context was invariably white.[39] According to historian Caroline E. Light, "the elasticized boundaries of home" today mean that "the white castle might potentially be anywhere, including a public street."[40] Homicide rates in the US, especially against African Americans, increased dramatically.[41]

Self-defence and defence of others, particularly white women in the southern US, became the justification for a wave of black lynchings in the late nineteenth and early twentieth centuries.[42] The expansion of civil and political rights to African Americans triggered a populist backlash[43] that

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35 See Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Cambridge, Mass: Harvard University Press, 1994) at 138–141. For an overview of the White male ethos of DIY security, see generally Susan Faludi, *The Terror Dream: Fear and Fantasy in Post-9/11 America* (New York: Metropolitan Books, 2007) at 1–15, 241–42.

36 See Fiona Leverick, *Killing in Self-Defence* (Oxford: Oxford University Press, 2006) at 69–76 for a description of vacillations between absolute, strong, weak, and no-retreat rules across legal systems. See *ibid* at 74–75 for a description of the brief period in which England had a no-retreat rule.

37 See *Miller v State*, 116 NW 850 at 857–58 (Wis Sup Ct 1909); *Beard v United States*, 158 US 550 at 559–60 (1895) [*Beard*]; *Erwin v State*, 29 Ohio St 186 at 199–200 (Sup Ct 1876) [*Erwin*]; *Runyan v State*, 57 Ind 80 at 84 (Sup Ct 1877) [*Runyan*].

38 *Supra* note 37 at 199–200.

39 See *Beard*, *supra* note 37 at 560–61 (citing *Erwin* and *Runyan* and describing the plaintiff as "a white man and not an Indian" who had killed another white man in Arkansas "Indian country" at 550–51). For a more complete description of the "true man," see Light, *Stand Your Ground*, *supra* note 6 at 58–61; Suk, *supra* note 32 at 60–61; Katelyn E Keegan, "The True Man & the Battered Woman: Prospects for Gender-Neutral Narratives in Self-Defense Doctrines" (2013) 65:1 Hastings LJ 259 at 263–64.

40 Light, "Duty to Retreat", *supra* note 26 at 296.

41 See Steven F Messner, Robert D Baller & Matthew P Zevenbergen, "The Legacy of Lynching and Southern Homicide" (2005) 70:4 Am Sociological Rev 633.

42 See Crystal N Feimster, *Southern Horrors: Women and the Politics of Rape and Lynching* (Cambridge, Mass: Harvard University Press, 2009) at 4–5.

43 See Light, *Stand Your Ground*, *supra* note 6 at 43.

was reflected in the jurisprudence of the day. While white men who raped black women could be expected to be acquitted in southern courts, black men accused of raping white women were almost always found guilty.[44] Blacks arrested after killing rapists and lynchers were denied the defence (and more often any legal process), while white killings of black individuals were deemed justified.[45] When black civil rights activists who had been refused police protection began to carry weapons for self-defence in the 1960s, conservative leaders, including California Governor Ronald Reagan, pushed for and won gun control legislation.[46] Even though progressives in the women's rights movement and civil rights movement made strides in attaining equal protection under the law in the decades that followed, those strides were hampered by the narrative of the propertied white man defending his castle, a narrative that came to a head in Florida in 2005.

B. The Modern Stand-Your-Ground Innovation

In 2005, Florida expanded the bounds of self-defence by enacting its stand-your-ground legislation.[47] Florida's reform was the first step in a broader expansion of self-defence across the US, spearheaded by the National Rifle Association (NRA), the conservative American Legislative Exchange Council (ALEC), and pro-gun conservative politicians in the wake of the 9/11 attacks, when anxiety about government's ability to provide Americans with protection from dangerous strangers (foreign and domestic) ran high.[48] The precipitating event for legislative change in Florida occurred in 2004, where four hurricanes intensified (ultimately false) fears of widespread looting.[49] When a stranger attempted to force his way into the mobile home where James Workman had moved his family after Hurricane Ivan destroyed his house, Workman shot and killed him. It took three months to clear Workman of wrongdoing.[50] Even though the de-

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44 See Jennifer Wriggins, "Rape, Racism, and the Law" (1983) 6 Harv Women's LJ 103 at 106–07, 109–13.

45 See Light, *Stand Your Ground*, *supra* note 6 at 97–103.

46 See Edward Wyckoff Williams, "Fear of a Black Gun Owner", *The Root* (23 January 2013), online: <www.theroot.com> [perma.cc/V4SA-SV8R].

47 See Fla Stat 2005, *supra* note 3 § 776.012.

48 See Faludi, *supra* note 35 at 12; Adam Weinstein, "How the NRA and Its Allies Helped Spread a Radical Gun Law Nationwide", *Mother Jones* (7 June 2012), online: <www.motherjones.com> [perma.cc/5EKS-WE7V].

49 See Ben Montgomery, "Florida's 'Stand Your Ground' Law Was Born of 2004 Case, but Story Has Been Distorted", *Tampa Bay Times* (15 April 2012), online: <www.tampabay.com> [perma.cc/396H-GXEJ]; Weinstein, *supra* note 48.

50 See Weinstein, *supra* note 48.

ceased intruder turned out to be an emergency worker, the incident galvanized Florida State Representative Marco Rubio and Governor Jeb Bush to pass legislation expanding self-defence[51] and prioritizing protection of property, liberty, and honour.

Prior to 2005, unless a Floridian was "attacked in his home by a person not having an equal right to be there," he had a duty to "retreat to the wall" if he could do so in absolute safety; this duty was consistent with the duty to retreat, typical of self-defence laws in common law jurisdictions.[52] Stand Your Ground circumscribed Florida's common law[53] "retreat to the wall" requirement, thereby expanding the right to use deadly force if certain bright-line conditions were met: a person is not the initial aggressor, not engaged in an unlawful activity, and is in a place where they have the right to be.[54] When these conditions are met, a person is allowed to:

> stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.[55]

The law also includes new presumptions in favour of the accused concerning "reasonable fear" when the accused claims defensive force within a dwelling.[56] "Dwelling" is expansively defined and includes occupied motor vehicles.[57] For police to arrest a person for using or threatening to use force, there must be probable cause that the force used or threatened was unlawful—that is, the person was not lawfully standing their ground.[58] Under Stand Your Ground, the accused is entitled to a pre-trial evidentiary hearing where they will be deemed immune from criminal prosecution and civil liability if they convince a judge by a "preponderance of the

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51 See *ibid*.

52 *Baker v State*, 506 So (2d) 1056 at 1058–59 (Fla Dist Ct App 1987).

53 Florida had a common law duty to retreat until the 2005 legislative changes: see *Weiand v State*, 732 So (2d) 1044 (Fla Sup Ct 1999), citing *Hedges v State*, 172 So (2d) 824 at 827 (Fla Sup Ct 1965) for the proposition that "[t]he duty to retreat emanates from common law, rather than from [Florida] statutes" at 1049.

54 Fla Stat 2005, *supra* note 3 §§ 776.032, 776.041.

55 *Ibid* § 776.013(3).

56 Fla Stat tit 46 § 776.013(2)(a) (2017) [Fla Stat 2017].

57 See *ibid* §§ 776.013(2)(a), 776.013(5)(a).

58 See *ibid* § 776.032.

evidence" that they acted in self-defence or to prevent the commission of a forcible felony.[59]

Florida's law became the national model.[60] Through legislation or jurisprudence, at least thirty-three states have now eliminated the duty to retreat and expanded the ambit of permissible DIY security.[61]

II. The Genesis of Expanded Self-Defence in Canada

Like Florida, Canada inherited Britain's self-defence common law rules, including necessity, proportionality, the duty to "retreat to the wall", and the castle doctrine. Yet, until Canada's 2012 innovation, broader, more flexible self-defence in Canada remained more or less rooted in the preservation of human life. Between 1892 and 2012, incremental expansions occurred when Parliament attempted to simplify the law and when the judiciary attempted to tweak it to account for the range of reasonable human responses to force and the threat of force. Before 2012, deadly force was never permitted to defend mere property.[62]

A. Codification

Discussions about codifying Canadian criminal law took place in the late nineteenth century as the dominion was extending legal authority north and west into Indigenous territory,[63] settlers were contending with

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59 Fla Stat tit 46 § 776.085 (2012); *Peterson v State*, 983 So (2d) 27 at 29 (Fla Dist Ct App 2008) [*Peterson*]. See *Dennis v State*, 51 So (3d) 456 at 458, 62 (Fla Sup Ct 2010) [*Dennis*], wherein the Florida Supreme Court adopted *Peterson* as binding in Florida.

60 See Weinstein, *supra* note 48.

61 See Cynthia V Ward, "'Stand Your Ground' and Self-Defense" (2015) 42:2 Am J Crim L 89 at 90 n 1; ABA, *supra* note 5 at 2.

62 See *R v Gee*, [1982] 2 SCR 286 at 302, 139 DLR (3d) 587 [*Gee*]; *R v Clark*, [1983] 5 CCC (3d) 264 at 271, 4 WWR 313 [*Clark*]; *R v Gunning*, 2005 SCC 27 at para 26 [*Gunning*].

63 See Desmond H Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: University of Toronto Press, 1989) at 3–4; Richard Gwyn, *Nation Maker: Sir John A. MacDonald: His Life, Our Times*, vol 2 (Toronto: Random House Canada, 2011) at 86–98, 141–55. See also Gina Starblanket & Dallas Hunt, "How the Death of Colten Boushie Became Recast as the Story of a Knight Protecting His Castle", *The Globe and Mail* (13 February 2018), online: <www.theglobeandmail.com> [perma.cc/539A-FAX5] (recounting how the Dominion's westward expansion was premised on an appeal to "the institution of masculinity: the ability to build a home, provide for and protect one's family, and—most importantly—to exercise control over one's private domain" at the same time that "Canada sought to ... [present] Indigenous lands as lawless spaces absent legal order and continually crafting and revising the judicial narratives that gave settler legality to these spaces" at *ibid*).

local resistance, and armed US outlaws were infiltrating from the south.[64] Though Prime Minister John A. Macdonald supported a more permissive Canadian gun culture,[65] Canadian commenters cautioned against the post-bellum US self-defence expansion and the "true man" rationale never really took hold in the Canadian dominion.[66]

Canada's 1892 self-defence codification, like the 2012 innovation, was meant to simplify and clarify the law. Prime Minister Macdonald did not push for a unified *Criminal Code of Canada* to entrench a Canadian "true man" ethos. Rather, his actions were primarily in accordance with the nineteenth century English drive toward codification and to remedy the uneven reception of English law across the young country.[67] Canada's first *Criminal Code* did reflect honour-based conceptions in parts, but this aspect was more an incident of drafting history rather than a reflection of a distinctive Canadian "true man" ethos.[68]

English codification enthusiast Sir James Fitzjames Stephen drafted the precursor to Canada's first *Criminal Code* in 1878 with the goal of eliminating excessive technicality.[69] Stephen's 1878 draft contained simple, straightforward self-defence provisions that embodied Blackstone's conception of necessity, proportionality, duty to retreat, and the castle

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64 See Gwyn, *supra* note 63 at 239–40; SW Horrall, "Sir John A. MacDonald and the Mounted Police Force for the Northwest Territories" (1972) 53:2 Can Historical Rev 179.

65 He had acknowledged in 1869: "there were reasons, in this country only, that the restrictions imposed on carrying weapons should not be so general as those which prevailed in England. We were exposed to irruptions from the neighbouring States of lawless characters in the habit of carrying weapons, and where it known that our people were prohibited from defending themselves, these parties might be encouraged to greater depredations. It was, therefore, not intended to adopt the restriction which had been made to prevent the carrying of pistols, or similar weapons of defence": *House of Commons Debates*, 1-2, vol 2 (4 May 1869) at 171–72 (Rt Hon Sir John A MacDonald).

66 See e.g. "Self-defence" (1886) 22:2 Can LJ 206 at 206–07 (agreeing with the 1886 Iowa Supreme Court's decision in *State v Donnelly*, 11 Iowa 705 at 706–07 (Sup Ct 1886), which rejected the accused's argument that in an age of firearms, he could kill an assailant committing a felony rather than retreat to the wall).

67 See Gwyn, *supra* note 63 at 365–67. For a history of codification, see generally DH Brown, *supra* note 63. See also Jula Hughes, "Codification – Recodification: The Stephen Code and the Fate of Criminal Law Reform in Canada" (19 April 2013), online (pdf): *Social Science Research Network (SSRN)* <papers.ssrn.com/sol3/papers.cfm?abstract_id=2253561> at 5–6.

68 See generally DH Brown, *supra* note 63; *The Criminal Code, 1892*, SC 1892, c 29 [*Criminal Code, 1892*].

69 See Hughes, *supra* note 67 at 5–6.

doctrine.[70] In 1879, however, a Royal Commission was tasked with a redraft. The Royal Commission reconceived the project, seeking to create a more comprehensive code that would render the law knowable to the general public in conformity with the principle of legality.[71] While the commission's 1879 provisions on self-defence purported to be grounded in the same principles as the prior version,[72] they were more elaborate,[73] containing a host of technical exceptions and specifications of how the principles of necessity, proportionality, and retreat might apply differently depending on what was being defended, who was the initial aggressor, whether the accused intended to cause death or grievous bodily harm, and like considerations. The British Parliament rejected both the 1878 and 1879 draft criminal codes, but Canada's Parliament adopted the 1879 Royal Commission draft, including its elaborate self-defence provisions.[74]

The 1892 *Criminal Code* explicitly required retreat only if the accused was the initial aggressor, resurrecting a common law distinction from the

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70 See *ibid* at 21; *Criminal Code (Indictable Offences) Bill* (UK), 41 Vict sess (1878), Bill 178 ss 119–20 [Bill 178].

71 See Allen M Linden, "Recodifying Criminal Law" (1989) 14:1 Queen's LJ 3 at 5 (noting the "elasticity" of Stephen's first draft code, and tracing it to the fact that the first Stephen code sought to leave open the possibility of creating new common law crimes); Hughes, *supra* note 67 at 6, 21. See also UK, Criminal Code Bill Commission, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences: With an Appendix Containing a Draft Code Embodying the Suggestions of the Commissioners* (London: George Edward Eyre & William Spotiswoode, 1879) [Royal Commission Report] at 8 (largely rejecting the "elasticity" of the first Code in favour of "particularity" and knowability at *ibid*).

72 See Royal Commission Report, *supra* note 71 ("[w]e take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty, and property against illegal violence … all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent. This last principle will explain and justify many of our suggestions. It does not seem to have been universally admitted; and we have therefore thought it advisable to give our reasons for thinking that it not only ought to be recognised as the law in future, but that it is the law at present" at 11).

73 See *ibid* ("[i]nstead of endeavouring to enunciate [the relevant] principles in abstract and general terms" in the code itself, the commissioners "judged it better to declare expressly what the law is in cases of such frequent or probable occurrence, that the law in respect of them has been settled ... and leaving the general principles to be applied in cases so extraordinary that the law as applicable to them has never yet been decided, when if ever they arise" at 11).

74 See Bill 178, *supra* note 70; *Criminal Code (Indictable Offences) Bill* (UK), 2 Vict sess (1879), Bill 117.

Middle Ages that had not been part of Stephen's 1878 draft.[75] This distinction reflected the principle that an active provocateur bears some responsibility for the violence that ensues. Furthermore, it was considered to legitimize cowardice and be an insult to a man's honour for the law to demand retreat from a violent encounter that was not of his own making.[76]

This formulation survived a 1955 revision, which compounded the complexity of the 1892 *Criminal Code*. The 1955 revision broke down existing self-defence and defence of property provisions into paragraphs and subparagraphs in line with modern drafting techniques, but without careful regard for the integrity of the underlying scheme.[77] Lawyers, judges, academics, and even the Law Commission of Canada excoriated these provisions for being overly complicated and incoherent,[78] with one prominent scholar going so far as to call them "the most confusing tangle of sections known to law."[79] Different provisions applied depending on whether the accused was the initial aggressor or provoked the assault,[80] whether death or grievous bodily harm was intended by the accused,[81] and wheth-

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75 Killing was "justifiable" in self-defence only where the accused was the subject of sudden and unexpected attack. Self-defence by initial aggressors, who were considered to be at least partly at fault was merely "excusable," so long as the accused first attempted. Justifiable homicides let to acquittal, where "excused" defendant required a pardon to be released, as well as forfeiture of the defendant's movable property to the Crown. See Leverick, *supra* note 36 at 74–75. See also *R v McIntosh*, [1995] 1 SCR 686 at paras 62–72, 95 CCC (3d) 481, McLachlin J [*McIntosh*].

76 See Leverick, *supra* note 36 at 77–78; David M Paciocco, "Applying the Law of Self-Defence" (2007) 12:1 Can Crim L Rev 25 at 56 [Paciocco, "Law of Self-Defence"].

77 See *Criminal Code*, SC 1953–54, c 51, ss 34–35 [*Criminal Code* 1954]. See also Hughes, *supra* note 67 at 21–23; *McIntosh*, *supra* note 75 at paras 67–75, McLachlin J.

78 See *R v Pandurevic*, 2013 ONSC 2978 at paras 10–16 [*Pandurevic*].

79 David M Paciocco, *Getting Away with Murder: The Canadian Criminal Justice System* (Toronto: Irwin Law, 1999) at 274.

80 See *Criminal Code* 1954, *supra* note 77, s 34. Section 34(1)–(2) applied only to those who did not provoke the assault; section 35 offered a more restrictive defence offered only to an initial aggressor or someone who provoked the assault; section 34(2) was determined in *McIntosh*, *supra* note 75, to be available to both accused who provoked assaults and those who did not, a decision that has surprised some. See Paciocco, "Law of Self-Defence", *supra* note 76 at 67–68.

81 See *Criminal Code* 1954, *supra* note 77, s 34(1)–(2). Section 34(1) was available only to an accused who does not intend to cause death or grievous bodily harm; section 34(2) was initially thought to be available only to an accused who intended to cause death or grievous bodily harm but was eventually extended to include both those who do and don't intend to cause death or grievous bodily harm. See *R v Pintar*, (1996) 30 OR (3d) 483, 110 CCC (3d) 402 [*Pintar*] ("as a matter of policy, I am unable to fathom why accused persons charged with murder, who otherwise meet the criteria of s. 34(2), should be precluded from relying upon the provision simply because they did not intend to kill or cause grievous bodily harm. If anything, these accused are potentially less

er death or grievous bodily harm in fact resulted from the claimed act of self-defence.[82]

B. Judicial Convergence Around a Soft Retreat Requirement

The Supreme Court of Canada eventually came to acknowledge the futility of imputing a clear legislative intent to the scheme as a whole given the "confused nature" of the provisions.[83] A jurisprudence beset with technicalities, acknowledged absurdities, and non-literal interpretations emerged as judges did their best to reconcile text with purpose and principle.[84] Contrary to the text of the legislation, the judiciary read in a qualified retreat requirement and Canadian self-defence remained rooted in the preservation of human life.[85]

Although the language of section 35 of the *Criminal Code* seemed to suggest that passive victims could stand their ground, Canadian courts interpreted the law to include a "soft" retreat requirement in *all* self-defence claims.[86] Retreat became a factor—sometimes a decisive one[87]—in determining whether an accused reasonably apprehended an assault or whether resort to force was necessary or proportionate.[88] In accordance with received common law principles, retreat could only be considered where it was a realistic option and, under the castle doctrine, no one was expected to retreat from their home.[89] In time, the statutory retreat requirement for initial aggressors was softened.[90] This Canadian, judge-made "soft retreat" requirement was animated less by the true man ethos

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morally blameworthy than those who intentionally kill or cause grievous bodily harm" at 514).

82 See *Criminal Code* 1954, *supra* note 77, s 34(2). Section 34(2) was available only to those who cause death or grievous bodily harm.

83 *McIntosh*, *supra* note 75 at paras 22, 40.

84 See generally Paciocco's practical effort to explain the doctrinal interpretation of the four key self-defence provisions in Paciocco, "Law of Self-Defence", *supra* note 76 at 26–29.

85 See AJ Ashworth, "Self-Defence and the Right to Life" (1975) 34:2 Cambridge LJ 282 at 288–89, 293; Leverick, *supra* note 36 at 74; Fiona Leverick, "Defending Self-Defence" (2007) 27:3 Oxford J Leg Stud 563 at 577.

86 See *Pintar*, *supra* note 81 at 503, *Criminal Code* 1954, *supra* note 77, s 35.

87 See e.g. *R v Eyapaise*, [1993] 20 CR (4th) 246, 1993 CanLII 7265.

88 See *R v Abdalla*, 2006 BCCA 210 at paras 22–24 [*Abdalla*]; *R v Proulx*, (1998) 127 CCC (3d) 511 at 524–27, 39 WCB (2d) 166. See also *R v Northwest*, 1980 ABCA 132 at para 16; *R v Cain*, 2011 ONCA 298 at paras 6–9.

89 See *Abdalla*, *supra* note 88 at para 24. See also *R v Boyd*, 1999 118 OAC 85 at 88, 41 WCB (2d) 92.

90 See *McIntosh*, *supra* note 75 at paras 62–72.

and more by the preservation of human life, with due regard for the limited capacity of a victim of attack to live up to idealistic conceptions of the reasonable person.[91]

C. Softening of the Imminence Standard and Contextualization of the Reasonable Person

Beginning in the 1980s, a new climate of fear emerged as the primary impetus for law reform: the home. Feminists argued that it was dangerous for battered women to behave like reasonable men when threatened with a lethal attack by an intimate partner and that self-defence should be reformed to account for the accused's circumstances.[92]

A seminal expansion of Canada's self-defence law occurred in 1990, driven by the judiciary, not Parliament. In *R. v. Lavallee* the Supreme Court of Canada expanded opportunities for justifiable homicide and DIY security in the home.[93] In that case, the defendant Lyn Lavallee shot her abusive spouse Kevin Rust in the back of the head as he left her bedroom. Rust had just beaten Lavallee and threatened to come back and kill her later if she did not kill him first. But, here, rather than designating a woman's home as her castle, the justices expanded Canadian self-defence law by interpreting the "reasonableness" of deadly force in light of the defendant's subjective experiences.[94] Justice Bertha Wilson, relying on expert testimony to dispel a number of pervasive myths[95] about battered women, wrote:

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91 See *ibid*. See e.g. *R v Baxter* (1975), 27 CCC (2d) 96 at 111–12, 1975 CanLII 1510 [*Baxter*]. See also *Brisson v The Queen*, [1982] 2 SCR 227 at 239–40, 139 DLR (3d) 685 [*Brisson*]. An accused need not "weigh to a nicety" precisely how much force is necessary (*ibid* at 255, citing *Palmer v The Queen*, [1971] AC 814 at 832, [1971] 1 All ER 1077).

92 See MacDonnell, *supra* note 13 at 305–11 for an account of 1980s and 1990s-era feminist law reform initiatives in Canada.

93 *Supra* note 7.

94 See *ibid* at 873–83; Canada, Department of Justice Canada, *Bill C-26 (S.C. 2012 c. 9) Reforms to Self-Defence and Defence of Property: Technical Guide for Practitioners* (2013), online (pdf): <www.justice.gc.ca> [perma.cc/ZS49-NZ98] ("[o]ne motivation for the list of factors is that it presents a means of codifying certain relevant considerations that derive from jurisprudence. In particular, two aspects of the landmark SCC decision in *Lavallee* are now codified: imminence of the attack is not a rigid requirement that must be present for the defence to succeed, but rather is a factor to consider in assessing the reasonableness of the accused's actions; and an abusive history between the accused and the victim is a relevant factor in assessing the reasonableness of the accused's actions" at 11) [DOJ, *Technical Guide*].

95 See *Lavallee*, *supra* note 7 at 889 (among others, that battered women are not beaten as badly as they claim or they would have left and that some women enjoy being beaten).

> If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to a world inhabited by the hypothetical "reasonable man."[96]

Lavallee overruled jurisprudence which had held that the imminence requirement that had been judicially read into the statutory element of "reasonable apprehension of death or grievous bodily harm" should be interpreted strictly, such that the assault must be underway at the time of the alleged act of self-defence—even when the accused had been abused by her spouse over a long period of time and he had threatened to kill her family members if she tried to leave him.[97] Expert testimony concerning the ability of an accused to perceive danger from her mate was admissible in relation to the issue of whether she reasonably apprehended death or bodily harm.[98] Expert testimony shedding light on why an accused failed to exercise what the trier of fact might view as possible avenues of escape was also admissible.[99] Relaxing the imminence standard acknowledged the impossible position of women judged by a male-oriented test who are more likely to be harmed by waiting until an attack is underway.[100]

The Supreme Court of Canada prioritized the right to life of women and their spouses over property rights; however, this prioritization did not serve as the rationale for Lavallee's acquittal. The justices acknowledged that for many women, the home is a climate of fear that the state is not fully capable of securing. At the same time, legal scholars criticized the Supreme Court for encouraging women who kill to depict themselves as pathological, subordinated victims[101] while men would be acquitted for defending their castle.

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96 *Ibid* at 874.

97 *Ibid* at 883. See *R v Whynot (Stafford)*, [1983] 61 NSR (2d) 33, 9 CCC (3d) 449 [*Whynot*] ("no person has the right in anticipation of an assault that may or may not happen, to apply force to prevent the imaginary assault" at 47).

98 See *Lavallee*, *supra* note 7 at 870–91.

99 See *ibid*.

100 See *ibid* ("I do not think it is an unwarranted generalization to say that due to their size, strength, socialization and lack of training, women are typically no match for men in hand-to-hand combat. The requirement imposed in *Whynot* that a battered woman wait until the physical assault is 'underway' before her apprehensions can be validated in law would, in the words of an American court, be tantamount to sentencing her to 'murder by installment'" at 883).

101 See generally Martha Shaffer, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years after *R v Lavallee*" (1997) 47:1 UTLJ 1 at 1–2, 8–9; Martha Shaffer, "*R v Lavallee*: A Review Essay" (1990) 22:3 Ottawa L Rev 607 at 610–11.

Lavallee galvanized a broader trend in Canadian criminal law to contextualize the objective reasonableness standard in light of the accused's characteristics and history—the "contextual objective" or "individualized objective" approach.[102] Acknowledgement of new climates of "reasonable" fear served as impetus to incrementally expand the law of self-defence in the 1990s and 2000s. In *R. v. McConnell*, for example, the court factored in expert evidence about prison environment in determining whether an accused reasonably feared a threat from other inmates.[103]

Lavallee did not delineate to what extent judges and juries should incorporate the accused's characteristics, situations, or life experiences into the reasonable person standard. Inviting expert evidence to contextualize the reasonable person was not intended to extend the defence to the benefit of those who harbour racist, sexist, or homophobic views, but the innovation nevertheless created new opportunities for biased contextualization. Had *Lavallee*'s contextual objective approach been available to George Zimmerman after he killed Treyvon Martin in Sanford, Florida in 2012, for instance, Zimmerman, like Bernie Goetz—New York's notorious subway shooter—might have made use of evidence about his own experiences of "white victimization", possibly even calling on experts to testify on his behalf.[104] Such experiences could likewise undergird a claim for a relaxed imminence standard on the part of firearm-carrying "true men" in climates of fear who kill black or Indigenous youth rather than retreat, then claim that their fear was reasonable in the circumstances. *Lavallee* improved Canadian law by providing an important acknowledgement of the varied experiences of people who kill in self-defence,[105] but it also expanded the availability of self-defence to accused individuals and made the law more vulnerable to abuse.

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[102] See Roach, "Preliminary", *supra* note 22 at 278.

[103] 1995 ABCA 291 at 39–42, Conrad JA in dissent aff'd by *R v McConnell*, [1996] 1 SCR 1075, 196 NR 307, rev'g 1995 ABCA 91 majority. See also *R v Nelson* (1992), 8 OR (3d) 364 at 381, 71 CCC (3d) 449 [*Nelson*] (an accused with an intellectual impairment affecting their ability to perceive or respond to an assault may be analogous to the position of the so-called battered woman and therefore should not be judged in reference to the perceptions of the ordinary or reasonable person at 381).

[104] See generally George P Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (New York: Free Press, 1988) at 1–5 [Fletcher, *A Crime of Self-Defense*]; Mark Lesly & Charles Shuttleworth, *Subway Gunman: A Juror's Account of the Bernhard Goetz Trial* (Latham: British American Publishing, 1988); Lillian B Rubin, *Quiet Rage: Bernie Goetz in a Time of Madness* (Berkeley: University of California Press, 1986).

[105] See Department of Justice Canada, *Self Defence Review: Final Report*, by Judge Lynn Ratushny (1997) at 134–50.

D. Canada's Lucky Moose Law (2012)

A 2009 shoplifting incident at the Lucky Moose Food Mart in Toronto's Chinatown provided the next major impetus for legal change—this time driven by Parliament.[106] Store owner David Chen's security cameras recorded serial shoplifter Anthony Bennett stealing a tray of flowers and fleeing on his bicycle.[107] When Bennett returned to the Lucky Moose an hour later, Chen and two employees apprehended him and locked him in a delivery van until the police arrived.[108] Bennett pleaded guilty to shoplifting, but pressed charges against Chen for assault, forcible confinement, kidnapping, and possession of a concealed weapon (a boxcutter).[109] Chen argued his actions had been a lawful citizen's arrest but faced a legal hurdle. Under existing law, citizens could only arrest a suspect if they discovered the suspect committing a crime or immediately afterward.[110] Bennett's crime had occurred an hour before Chen captured and confined him.[111] At trial, Judge Ramez Khawly found that Bennett's crime was ongoing because he returned to the store to steal again, and acquitted Chen.[112] Chen was depicted in the national press as a law-abiding Chinese grocer defending his store against a serial offender, not a George Zimmerman or Bernie Goetz, despite the fact that Bennett was African-Canadian.[113]

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106 See "'Lucky Moose Law' Extending Powers of Citizen's Arrest Takes Effect", *CTV News* (11 March 2013), online: <www.ctvnews.ca> [perma.cc/AB4L-7D4V] ["Lucky Moose Law Powers"].

107 See CBC Short Docs, "Lucky Moose" (2017) at 01m18s–01m20s, online (video): *CBC* <www.cbc.ca/shortdocs/shorts/lucky-moose> [perma.cc/FX7C-N2GT] [CBC Short Docs, "Lucky Moose"].

108 See Lucky Moose Law Powers, *supra* note 106 at 1m55s–2m45s; Amara McLaughlin, "Lucky Moose's 'Wall of Shame' Ignites Debate Among Chinatown Customers", *CBC News* (11 August 2017), online: <www.cbc.ca> [perma.cc/A2HN-RHGP].

109 See Lucky Moose Law Powers, *supra* note 106 at 3m00s–3m40s; McLaughlin, *supra* note 108.

110 See *Criminal Code*, *supra* note 2, s 494 as it appeared from 1 January 2003 to 10 March 2013; Anita Lam & Lily Cho, "Under the Lucky Moose: Belatedness and Citizen's Arrest in Canada" (2015) 30:1 CJLS 147 at 155–56.

111 See Lucky Moose Law Powers, *supra* note 106; McLaughlin, *supra* note 108.

112 See Lucky Moose Law Powers, *supra* note 106 at 8m00s–8m10s.

113 See e.g. Christie Blatchford, "Ontario's 'Justice on Target' Horribly off the Mark", *The Globe and Mail* (24 October 2009), online: <www.theglobandmail.com> [perma.cc/HS67-YPLK]; Peter Kuitenbrouwer, "David Chen Trial: Anthony Bennett Admits He is a Thief", *National Post* (6 October 2010), online: <www.nationalpost.com> [perma.cc/JQ6C-UUAH] (calling Bennett "perhaps the least sympathetic victim the courts at Old City Hall have seen in a long time"); CBC Short Docs, "Lucky Moose", *supra* note 110; Christie Blatchford, "The Thief Plays the Victim in Trial of Toronto Grocer",

Chen's case generated an outpouring of public support for citizens' rights to protect their property with political repercussions. With a federal election looming, Liberal MP Joseph Volpe, NDP MP Olivia Chow and Conservative MP Rob Nicholson—the Minister of Justice—each introduced bills intended to expand citizen's arrest rights.[114] The Lucky Moose incident coincided with a Conservative push, revealed in a leaked internal document that identified "very ethnic" swing ridings (including Chinese ridings in the Greater Toronto area) which, if won, could give the Conservatives a majority government.[115] The leaked "very ethnic" strategy—which ultimately resulted in the resignation of the staffer who named it—proposed soliciting donations from Alberta's stable, conservative riding associations to fund sophisticated polling and micro-messaging in key swing communities in the Greater Toronto Area.[116] David Chen, a folk hero in key swing communities, was a valuable political asset.

DIY defence of property was an issue with broad appeal to Chinese and South Asian shopkeepers in the Greater Toronto Area and also to rural farmers in Western Canada.[117] Conservative pollsters, between 2006–2011, discovered that "very ethnic" shopkeepers and rural farmers shared a number of preferences: they were socially conservative, tradi-

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The Globe and Mail (6 October 2010), online: <www.theglobeandmail.com> [perma.cc/CNN4-EJ6V].

114 See Bill C-547, *An Act to amend the Criminal Code (arrest by owner)*, 3rd Sess, 40th Parl, 2010 (Hon Joseph Volpe); Bill C-565, *An Act to amend the Criminal Code (arrest without warrant by owner)*, 3rd Sess, 40th Parl, 2010 (Hon Olivia Chow); Bill C-60, *An Act to amend the Criminal Code (citizen's arrest and the defences of property and persons)*, 3rd Sess, 40th Parl, 2010–2011 (Minister of Justice, Hon Rob Nicholson).

115 Letter from Kasra Nejatian to Linda Duncan (3 March 2011), in Paul Wells, "Jason Kenney's Plan for Breaking Through in Ethnic Communities" *Maclean's* (3 March 2011), online (pdf): <www2.macleans.ca/wp-content/uploads/2011/03/2011-03-03-breaking-through-building-the-conservative-brand-in-cultural-communities11.pdf> [perma.cc/6MU6-D8DJ]. See Laura Payton, "Ethnic Riding Targeting Key to Conservatives' 2011 Victory" *CBC News* (23 October 2012) online: <www.cbc.ca> [perma.cc/Q5SP-MP8C] [Payton, "Conservatives' 2011 Victory"].

116 See Laura Payton, "Kenney Staffer Apologizes for Fundraising Letter", *CBC News* (21 March 2011), online: <www.cbc.ca> [perma.cc/TWT5-4P3J]; Wells, *supra* note 115.

117 See April Lindgren, "Toronto-area Ethnic Newspapers and Canada's 2011 Federal Election: An Investigation of Content, Focus and Partisanship" (2014) 47:4 Can J Pol Sci 667 ("[d]emographic reality in 2011 meshed nicely with the CPC's growing conviction that a platform of fiscal conservatism and tough-on-crime rhetoric would attract ethnic and immigrant voters" at 669); Bercuson, *supra* note 24; Curtis Rush & Jennifer Yang, "Grocer Not Guilty in Citizen's Arrest Case" *The Star* (29 October 2010), online: <www.thestar.com> [perma.cc/P74D-V2RQ]. See e.g. Steve Mertl, "Prairie Justice: Rifle-Toting Homeowner Puts New Self-Defence Laws to the Test", *Yahoo! News* (6 December 2013), online: <ca.news.yahoo.com> [perma.cc/VP5G-7GU3].

tional when it came to family, religious (often Christian), and entrepreneurial.[118] Yet, Western Canadian rural support for DIY security was fueled by additional factors, most significantly a Canadian variation of the grassroots populism[119] surging in the US and propelling the adoption of stand-your-ground laws across the nation.[120] Like populism in the US, Canadian populism was most often attributable to a white ethnic majority losing its demographic dominance, a sharp rise in immigration changing cultural communities, increasing publicity of European injustices against Indigenous communities, and "[n]ews media and political personalities who bet big on white backlash."[121] The Conservative government's parallel initiative to abolish the long-gun registry as it pushed to expand the availability of DIY security was a direct appeal to its rural, "old stock", populist base.[122]

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118 See Tom Flanagan, "The Emerging Conservative Coalition", *Policy Options* (1 June 2011), online (pdf): <policyoptions.irpp.org> [perma.cc/4QNZ-2TW4].

119 See Sean Speer & Jamil Jivani, "Pondering Populism in Canada", *Policy Options* (10 July 2017), online: <policyoptions.irpp.org> [perma.cc/5G3X-JS78]; Shachi Kurl, "Kurl: Yes, Trump-Style Populism Could Happen in Canada. Here's Why", *Ottawa Citizen* (3 November 2017), online: <ottawacitizen.com> [perma.cc/UM2J-CE5N]. But see Stephen Maher, "Maher: No, Canadians Need Not Fear Trump-Style Populism Here", *Ottawa Citizen* (3 November 2017), online: <ottawacitizen.com> [perma.cc/5HXC-LHV9].

120 See Nelson Wiseman, "The American Imprint on Alberta Politics" (2011) 31:1 Great Plains Quarterly 39 at 41.

121 Amanda Taub, "Canada's Secret to Resisting the West's Populist Wave", *New York Times* (27 June 2017), online: <www.nytimes.com> [perma.cc/7P2H-DVRE]. See Todd Donovan & David Redlawsk, "Donald Trump and Right-Wing Populists in Comparative Perspective" (2018) 28:2 J Elections, Public Opinion & Parties 190 at 191–92; Honor Brabazon & Kirsten Kozolanka, "Neoliberalism, Authoritarian-Populism, and the 'Photo-Op Democracy' of the Publicity State: Changes to Legislative and Parliamentary Norms by the Harper Government" (2018) 51:2 Can J Pol Sci 253 ("[the Harper government] combined restrictions to democratic participation with partisan communication to an unprecedented degree and in unprecedented arenas" at 257); Martin Lukacs, "Afraid of the Rise of a Canadian Trump? Progressive Populism is the Answer", *The Guardian* (16 February 2017), online: <www.theguardian.com> [perma.cc/5LWW-3LV7]. On white victimhood, see e.g. Paul Bradley, "Victimhood 101: The Multicultural Hijacking of Canadian Education" (11 November 2015), online (blog): *Council of European Canadians* <www.eurocanadian.ca> [perma.cc/M3V3-XSX4]; Joseph Brean, "Separate and Equal Nations: The Academic Theory Behind Idle No More", *National Post* (12 January 2013), online: <nationalpost.com> [perma.cc/Z7W3-EL6G].

122 Tristin Hopper, "Taking Stock of 'Old Stock Canadians': Stephen Harper Called a 'Racist' After Remark During Debate", *National Post* (19 September 2015), online: <www.nationalpost.com> [perma.cc/Q7W9-8SG3]. See generally Mark Kennedy, "Harper Sparks Controversy by Linking Guns and Personal Security", *Ottawa Citizen* (16 March 2015), online: <ottawacitizen.com> [perma.cc/GY8M-3YU4]; Colby Cosh, "The Gun Lobby Reloads", *Maclean's* (27 February 2012), online: <www.macleans.

The Lucky Moose incident provided an opportunity for the Conservative government to navigate urban/rural and visible minority/white preferences, attract the support of key constituencies, and potentially win a majority government. The strategy was successful, and the Conservatives won a majority government in the 2011 election.[123]

1. Beyond Citizen's Arrest

Prime Minister Stephen Harper instructed the Department of Justice to consider expanding the *Criminal Code* provisions on citizen's arrest, but also on self-defence and defence of property. Draft Bill C-26 incrementally modified the citizen's right to arrest by replacing the old "immediate response" requirement with a new "reasonable time after the offence is committed" requirement.[124] When the draft bill was debated in Parliament, MPs from all parties expressed support. Concerns about emboldening vigilantes,[125] providing non-professional private security personnel new powers,[126] "reliv[ing] the wild west,"[127] and teens beaten with baseball bats for snatching soda from convenience stores were left unaddressed in the final draft.[128] Liberal MP Judy Sgro made a comparison to Stand Your Ground when she told Parliament, "[w]e do not want to have happen what has happened in Florida, where people become emboldened, whether they have a gun or not, to think they can take the law into their own hands."[129] Joseph Volpe was troubled by the ambit of the proposed legislation and reminded his colleagues, "[w]e were essentially trying to address the issue of a citizen's right to arrest, period, pure and simple."[130] Conservative,

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ca> [perma.cc/F69J-83LV]; Claudia Chwalisz, "The Prairie Populist: How Stephen Harper transformed Canada" (2015) 22:3 Juncture 225.

123 See Payton, "Conservatives' 2011 Victory", *supra* note 115.

124 See Canada, Library of Parliament, *Bill C-26: The Citizen's Arrest and Self-defence Act*, by Robin MacKay, Publication No 41-1-C26-E (Ottawa: Library of Parliament, 1 December 2011, revised 8 May 2012) at 12–13; Bill C-26, *An Act to amend the Criminal Code (citizen's arrest and the defences of property and persons)*, 1st Sess, 41st Parl, 2012 (assented to 28 June 2012), SC 2012, c 9.

125 See *House of Commons Debates*, 41-1, vol 146 No 114 (1 May 2012) at 7377 (Wayne Marston).

126 See *ibid* at 7386 (Hon Judy Sgro).

127 *Ibid* at 7382 (François Lapointe).

128 See *ibid* ("[n]o one here would want a teenager who stole two cans of Pepsi to be beaten with a baseball bat" at 7382).

129 *Ibid* at 7387 (Hon Judy Sgro).

130 *House of Commons Debates*, 40-3, vol 145 No 145 (21 March 2011) at 8999 (Hon Joseph Volpe).

Liberal, and NDP MPs nevertheless supported the final bill, which passed with overwhelming support.

Minister of Justice Rob Nicholson introduced the newly adopted bill in front of the Lucky Moose, with Chen standing beside him.[131] Nicholson said, "[v]ictims of crime should not be revictimized by the criminal justice system when they attempt to protect their property."[132] For professors Anita Lam and Lily Cho, the Chen case "reveals the ways in which contemporary citizenship depends on continuing racial exclusion despite being imbued with ideas of progressiveness and modernity."[133] Through their critical postcolonial lens, the Lucky Moose saga reads less as a tale about Canada's multi-ethnic identity rather than as the white majority welcoming a "model minority" into the fold.[134]

Volpe was right that Lucky Moose did more than incrementally expand citizen's arrest. While Canadians were focused on Toronto Chinatown's "vigilante grocer," Bill C-26 subtly expanded Canada's concept of self-defence and defence of property. The same year Lucky Moose was adopted, the Conservative government used their majority in Parliament to abolish the long-gun registry, thereby expanding the right of self-defence while deregulating gun ownership.[135]

2. Self-Defence Under Lucky Moose

The Department of Justice describes the new self-defence provisions as essentially a simplification and clarification of existing law.[136] Indeed, the law is simpler and certain features of the old law did survive more or less unchanged. These include the first two requirements that the accused reasonably perceived the relevant use of force, and subjectively acted with a defensive purpose and not, for example, to vindicate some pre-existing grudge.[137] A major innovation, however, comes in the third required element: that the accused's acts were reasonable in the circumstances. This

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131 See "New Citizen's Arrest Rules to Come into Effect", *CBC News* (27 June 2017), online: <www.cbc.ca> [perma.cc/HGZ8-TXT6].

132 Colin Perkel, "David Chen Inspired Citizen's Arrest Powers Set to Take Effect", *National Post* (28 June 2012), online: <www.nationalpost.com> [perma.cc/SCP5-W7NY].

133 Lam & Cho, *supra* note 110 at 152.

134 See *ibid* at 152, 157–58.

135 See Cosh, *supra* note 122; "Vote #128 on February 15th, 2012", online: *OpenParliament* <openparliament.ca> [perma.cc/3SJW-6KRL].

136 See DOJ, *Technical Guide*, *supra* note 94 ("[t]he intent of the new law is to simplify the legislative text itself, in order to facilitate the application of the fundamental principles of self-defence without substantively altering those principles" at 8).

137 See *Criminal Code*, *supra* note 2, s 34(1)).

element has been described as the heart of Canada's new law of self-defence.[138] Mandatory criteria that had to be satisfied under the old law for self-defence to succeed, notably necessity and proportionality, were shifted to a non-exhaustive list of factors for judges and juries to weigh when applying the overall reasonableness-of-the-act standard.[139] The vestigial retreat requirement contained in section 35 of the pre-2012 *Criminal Code* was completely eliminated.[140] As discussed, case law developed under the previous legislation had eased these mandatory requirements with exceptions and qualifications, so the change was not as abrupt as it appears when comparing old and new legislation on their face. Yet, according to Professor Alan Brudner, Parliament replaced "a subtly nuanced law whose detailed provisions satisfy constitutional requirements with a blunt and non-committal law whose very vacuity was probably unconstitutional."[141] Certainly, by making the unstructured "reasonableness in the circumstances" standard the core of self-defence, Canada's Parliament expanded the availability of the defence[142] and increased the discretion of police, prosecutors, judges, and juries applying the law. In addition, as will be discussed further below, this change arguably moved proportionality and necessity from questions of law, interpreted according to text and legal principle, to factual determinations.

Other changes in the new law are perhaps less controversial, but bear mention because they expand the availability of the defence. Self-defence can now be invoked in response to any threat of force used against an accused, not just an assault.[143] It may now be used to exculpate in relation

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138 See Roach, "Preliminary", *supra* note 22 at 278.

139 See *Criminal Code*, *supra* note 2, s 34(2).

140 See *ibid*, s 34.

141 Alan Brudner, "Constitutionalizing Self-Defence" (2011) 61:4 UTLJ 867 at 897.

142 Most authors and judges agree that the new section 34 is more expansive. See David M Paciocco, "The New Defense against Force" (2014) 18:3 Can Crim L Rev 269 at 270; Roach, "Preliminary", *supra* note 22 at 279–84, 293; *Pandurevic*, *supra* note 78 at para 37; *R v Evans*, 2015 BCCA 46 at para 19; *Cormier*, *supra* note 25 at para 46. But see *R v Bengy*, 2015 ONCA 397 at para 48, claiming that by requiring the trier of fact to consider some "pro-conviction" factors that were not relevant under each and every former provision, the new self-defence law may sometimes result in convictions where the previous legislation would have resulted in acquittal: "[f]or instance, the former s. 34(2) had no proportionality requirement and arguably justified excessive force if the accused was under a reasonable apprehension of death. The former provisions also did not require consideration of alternative means of response" (*ibid* at para 48). The court took the view that "[i]n some cases, the new self-defence provisions are more generous and in other cases they are more restrictive" (*ibid* at para 47).

143 See Roach, "Preliminary", *supra* note 22 at 279; *cf R v Carr* (1976), 16 NBR (2d) 386, 38 CRNS 230. The text of previous legislation applied only to an accused faced with an "assault", but courts, stretching the language of the legislation, had accepted that self-

to a greater variety of offences, for example, if an accused stole a vehicle to avoid force.[144] The new section 34(1)(a) extends to defence of others, where the previous legislation only permitted defence of self or of a limited class of others under the accused's protection.[145] Finally, as discussed further below, new legislation dropped the language of justification which is typical of common law and statutory definitions of self-defence, arguably expanding self-defence to include conduct that is not justifiable but merely excusable.[146]

3. Defence of Property Under Lucky Moose

The new defence of property provision departs further still from previous and prevailing models. Section 35 essentially provides a defence for someone who reasonably believes property in which they are in peaceable possession of is being threatened, so long as the act they commit is reasonable in the circumstances.[147] There are no enumerated factors to guide the reasonableness evaluation. Unlike the legislation it replaces, section 35 makes no distinction between the kinds of force that can be used to protect various forms of property and homes. Once again, the language of necessity and justification present in the pre-2012 legislation is omitted. Canada's new defence of property provision has been criticized for raising the unsettling possibility that Lucky Moose, like Florida's Stand Your Ground, might sanction the intentional use of deadly force merely to protect property.[148] Courts interpreting the pre-2012 legislation had held that it "cannot be reasonable to kill another merely to prevent a crime which is directed only against property."[149] Yet, by deleting the necessity requirement altogether, and without clarifying the role of prior jurisprudence, Parliament created unprecedented space for an individual who intentionally kills someone he thought was stealing his car stereo or who drove on-

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defence could be used in response to non-intentional acts like criminal negligence as well.

144 See Roach, "Preliminary", *supra* note 22 at 279.

145 See *Criminal Code*, *supra* note 2, s 34(1)(a) *cf Criminal Code*, *supra* note 2, ss 34(1), 37(1) as they appeared on 10 March 2013.

146 See Roach, "Preliminary", *supra* note 22 at 280–81 and Part III-A, *below*, for more on this topic.

147 See *Criminal Code*, *supra* note 2, s 35.

148 See Roach, "Preliminary", *supra* note 22 at 275–76, 293, 299.

149 *Gee*, *supra* note 62 at 302, citing Halsbury's Laws of England, vol 11(1), 4th ed, *Criminal Law, Evidence and Procedure* at HBE-455. See also *Gunning*, *supra* note 62 ("the intentional killing of a trespasser [can] only be justified where the person in possession of the property is able to make out a case of self-defence" at para 26, suggesting that it can never be reasonable to intentionally kill in order to eject a trespasser); *R v Szczerbaniwicz*, 2010 SCC 15 at para 23.

to his farm uninvited to win an acquittal if police, prosecutor, judge, or jury considers the homicide "reasonable in the circumstances."[150]

III. Stand Your Ground and Lucky Moose: a Conceptual Comparison

Florida's Stand Your Ground and Canada's Lucky Moose are groundbreaking expansions of received common law, but their conceptual features are quite different. Comparing the conceptual underpinnings of Stand Your Ground and Lucky Moose in relation to: 1) justification and excuse; 2) objective and subjective elements; 3) fixed preconditions and flexible standards; 4) whether the burden of proof is on the prosecutor or the accused; and 5) the locus of decision making, illuminates the potential expansiveness of Lucky Moose, as well as its capacity to erode the normative grounding of self-defence. In basic ways, Lucky Moose is potentially more permissive of DIY security than Stand Your Ground, while at the same time creating unprecedented space for police, prosecutors, judges, and juries to infuse the defence with their own preconceived notions of "reasonableness."

A. Justification and Excuse

Self-defence is classified as a justification defence in most jurisdictions, not an excuse.[151] Justifications generally point to some moral or public interest that supersedes the reasons for criminalizing the offence.[152] The accused is deemed to have acted rightly in defending themselves rather than being excused as a "concession to human frailty."[153] Criminal

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150 *Criminal Code*, *supra* note 2, s 35(1)(d).

151 See generally Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed (Toronto: Carswell, 2014) ("[t]he different terminology relates to an ancient era preceding the middle ages when justifications absolved, while excuses were merely a matter for mitigation of punishment" at 499) [Stuart, *Canadian Criminal Law*]. See Brudner, *supra* note 141 ("[b]y general agreement, self-defence belongs within the category of defences called justifications rather than within the category called excuses" at 869). Kent Roach et al, *Criminal Law and Procedure: Cases and Materials*, 11th ed (Toronto: Emond, 2015) (noting that self-defence has "traditionally been considered a quintessential justification—an instance in which the accused is thought to have acted *rightly*, rather than simply being excused as a so-called concession to human frailty" at 888) [Roach et al, *Criminal law and Procedure*]; The American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes: Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962* (Philadelphia, PA: The American Law Institute, 1985), s 3.04.

152 See Guyora Binder, *Criminal Law* (New York: Oxford University Press, 2016) at 333.

153 Roach et al, *Criminal law and Procedure*, *supra* note 151 at 888. See e.g. Hamish Stewart, "The Role of Reasonableness in Self-Defence" (2003) 16:2 Can JL & Jur 317 at 336 (considering whether putative self-defence should function as an excuse or as a justifi-

law scholars debate whether a deed is justified because it prevents more harm than it causes or because the reasons for acting were right.[154] Whether a legal scholar focuses primarily on the deed itself or the reasons for that deed, the prevalent view is that the common law defence of justification, which includes self-defence, contains built-in necessity and proportionality requirements.[155] According to Paul Robinson, "[a]ll justification defenses have the same internal structure: triggering conditions permit a necessary and proportional response."[156]

Florida's Stand Your Ground and the pre-2012 Canadian law are explicitly labelled justifications in the text of the legislation,[157] thereby requiring necessity and proportionality as elements. Lucky Moose, in contrast, removes the language of justification from the legislation and replaces it with the uninformative phrase "not guilty of an offence," which makes no distinction between justification, excuse, or any other ground for excluding liability.[158] When it comes to defence of person, necessity, and proportionality are demoted from common law requirements (however flexibly and contextually interpreted) to factors to be weighed alongside

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cation, and settling on justification) [Stewart, "Reasonableness"]; George P Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown & Co, 1978) [Fletcher, *Rethinking Criminal Law*] ("[c]laims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor" at 759). The Supreme Court says that excuses rest "on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience … Praise is indeed not bestowed, but pardon is" (*Perka v The Queen*, [1984] 2 SCR 232 at 248, 14 CCC (3d) 385). In a justification defence, the accused is not punished because, in the circumstances, "the values of society, indeed the criminal law itself, are better promoted by disobeying a given statute than by observing it" (*ibid* at 247–48).

154 See Malcolm Thorburn, "Justifications, Powers, and Authority" (2008) 117:6 Yale LJ 1070 at 1093–94. See also Paul H Robinson, "In Defense of the Model Penal Code: A Reply to Professor Fletcher" (1998) 2:1 Buff Crim L Rev 25 at 39–40; Paul H Robinson & John M Darley, "Objectivist Versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory" (1998) 18:3 Oxford J Leg Stud 409 at 411–14. See also George P Fletcher, "The Right Deed for the Wrong Reason: A Reply to Mr. Robinson" (1975) 23:2 UCLA L Rev 293 at 293–95.

155 See Roach, "Preliminary", *supra* note 22 at 277–78, 299.

156 Paul H Robinson, "Criminal Law Defenses: A Systematic Analysis" (1982) 82:2 Colum L Rev 199 at 216 ("[a] mistake as to a justification is by its nature necessarily an excuse, not a justification" at 239–40).

157 Under the old Canadian law, an accused "is justified" if they acted in self-defence (*Criminal Code*, *supra* note 2, s 34(2) as it appeared from 1 January 2003 to 10 March 2003), while the current s 34(1) states that an accused is "not guilty of an offence" (*Criminal Code*, *supra* note 2).

158 *Ibid*, ss 34(1), 35(1).

others in a non-exhaustive list.[159] Lucky Moose's defence of property provision does not mention necessity or proportionality at all.

According to Kent Roach, Lucky Moose's bleeding of justification into excuse "is consistent with recent developments in self-defence especially in the context of battered women."[160] Some authors contend that since the 1990s the judiciary's sympathetic response to battered women who kill their spouses has transformed self-defence into an excuse on the basis that battered defendants were acting in a *subjectively* reasonable (but objectively unreasonable) way when they killed their partners.[161] Another way of understanding *Lavallee* and the line of "battered woman" cases that followed that is more consistent with the language of justification in the old law is that self-defence was no concession to human frailty. Rather, these decisions acknowledged that the requirements of necessity and proportionality should be interpreted and applied in light of the accused's circumstances.[162]

Though the justification/excuse distinction is currently out of favour among an increasing number of Canadian criminal law scholars who argue that it produces more smoke than light,[163] the excision of the principle of justification from Lucky Moose risks rendering the new law more expansive than Stand Your Ground, a classic justification defence with necessity and proportionality limitations.

If Lucky Moose instigates a paradigm shift from justification to excuse, it could expand self-defence unpredictably as courts broaden its availability from those who act rightly, to those who act wrongly but forgivably.[164] Treating self-defence as a concession to human frailty rather

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159 See *ibid*, ss 34(2)(b), 34(2)(g).

160 Roach, "Preliminary", *supra* note 22 at 281.

161 See e.g. Cathryn Jo Rosen, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill" (1986) 36:1 Am U L Rev 11 at 36 (supporting such a development). But see Kevin Jon Heller, "Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases" (1998) 26:1 Am J Crim L 1 at 87–93 (arguing against such a move).

162 See Elizabeth M Schneider, "Resistance to Equality" (1996) 57:3 U Pitt L Rev 477 at 511. See also Jody Armour, "Just Deserts: Narrative, Perspective, Choice, and Blame" (1996) 57:3 U Pitt L Rev 525 at 526–28; Susan Dimock, "Reasonable Women in the Law" (2008) 11:2 Crit Rev Intl Soc & Pol Phil 153 at 164.

163 See e.g. Stuart, *Canadian Criminal Law*, *supra* note 151 at 499–502.

164 See Roach, "Preliminary", *supra* note 22 at 280–81. But see *R v Ryan*, 2013 SCC 3, in which the Supreme Court of Canada suggests that justification defences may be broader than excuses ("[g]iven the different moral qualities of the acts involved, it is generally true that the justification of self-defence ought to be more readily available than the excuse of duress" at para 26).

than precluding wrongfulness altogether creates space to forgive the battered woman who acts unreasonably because of trauma, but it also risks putting racist, sexist, and homophobic triggering conditions back into play in Canadian law. It is, after all, a basic principle of criminal law—and a principle of fundamental justice under section 7 of the *Charter*—that people not be punished for morally involuntary conduct.[165] Whether this principle includes conduct based on unreasonable or mistaken beliefs is a matter of controversy among criminal law theorists.[166] If an individual genuinely feared for their life and genuinely lost control when encountering black or Indigenous youth, the new law could arguably provide an excuse for their actions. Yet, racist (unreasonable and/or mistaken) beliefs would certainly preclude a justification defence. This potential outcome is especially so when the reasonable person is contextualized to incorporate key aspects of the accused's circumstances (for example, past history of victimization) into the evaluative benchmark.[167]

B. Objective and Subjective Elements

Stand Your Ground and Lucky Moose both retain the basic common law distribution of objective and subjective elements: a reasonable perception of force or threat of force (subjective perception of the accused, objectively verified), a defensive purpose (accused's subjective state of mind), and the accused's actions must be reasonable (objective standard).[168] Yet key differences between the two laws render Lucky Moose more tolerant of the idiosyncrasies of the accused, thereby bringing its objective standard closer in line with the subjective experiences of the accused. Where

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165 *Supra* note 23, s 7. See *R v Ruzic*, 2001 SCC 24 at paras 42–47.

166 The weight of scholarly opinion holds that justified self-defence cannot be based on an unreasonable or mistaken belief, but some scholars disagree. For the majority view, see e.g. Fletcher, *Rethinking Criminal Law*, *supra* note 153 at 762–69; John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (New York: Oxford University Press, 2007) at 91–139; Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge: Cambridge University Press, 1994) at 39–47. For the minority view, see e.g. Stewart, "Reasonableness", *supra* note 153 at 336; Hamish Stewart, "The Constitution and the Right of Self-Defence" (2011) 61:4 UTLJ 899 at 889–900; Joshua Dressler, "New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking" (1984) 32:1 UCLA L Rev 61 at 64; Stephen P Garvey, "Self-Defense and the Mistaken Racist" (2008) 11:1 New Crim L Rev 119 at 126–27.

167 *Charter* values, however, discussed at 50–52, 54 of this paper, provide a bulwark.

168 See DOJ, *Technical Guide*, *supra* note 94 at 2; US, Florida Supreme Court Committee on Standard Jury Instructions in Criminal Cases, *Florida Standard Jury Instructions in Criminal Cases* at 3.6(f), online (pdf): *Supreme Court of Florida* <jury.flcourts.org/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-3> [perma.cc/H8X9-Z5T2] [SCF Instruction].

Stand Your Ground provides that "a person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary,"[169] Canada's law provides that "a person is not guilty of an offence if ... the act committed is reasonable in the circumstances."[170]

Stand Your Ground's reasonableness standard mentions no circumstances that judges or juries must factor in when evaluating whether the accused's defensive response was justified.[171] Stand Your Ground's objective standard has, however, been made somewhat more accommodating of lived experiences through judicial interpretation. This accommodation is captured in the Supreme Court of Florida's model jury instructions.[172] When it comes to the reasonableness of the accused's perception of the threat, Florida judges can instruct juries that they may take into account "threats or prior difficulties" with the victim and the "violent and dangerous" reputation of the victim, if it is known by the accused.[173] When it comes to the reasonableness of the defensive response, judges can instruct juries that they may take into account "the relative physical abilities and capacities of the defendant and (victim)."[174] This contextualization is not nearly as expansive as Lucky Moose's non-exhaustive list of circumstances for juries to consider in assessing the reasonableness of the accused's defensive response, which includes, among other factors,

> [T]he size, age, gender and physical capabilities of the parties to the incident ... the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat ... any history of interaction or communication between the parties to the incident.[175]

Through section 31(1)(c), Lucky Moose provides far more leeway than Stand Your Ground for juries to factor in the lived experience of the accused when assessing the reasonableness of their actions. It leaves juries to determine whether to factor in characteristics of the accused such as

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169 Fla Stat 2017, *supra* note 56 § 776.012(2).

170 *Criminal Code*, *supra* note 2, s 34(1)(c).

171 See SCF Instruction, *supra* note 168 ("[t]he danger need not have been actual; however, to justify the [use] [or] [threatened use] of deadly force, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that [force] [or] [threat of force]" at 3.6(f)).

172 See *ibid*.

173 *Ibid*.

174 *Ibid*.

175 *Criminal Code*, *supra* note 2, s 34(2)(e)–(f.1).

diminished intelligence,[176] an anxious, paranoid and distrustful personality caused by a medical syndrome,[177] and potentially—and dangerously—a heightened sense of fear of dangerous strangers resulting from prior victimizations, real or imagined.[178]

C. Fixed Preconditions and Flexible Standards

Stand Your Ground is renowned for dispensing with the common law's predefined retreat requirement. What is less known is that under Stand Your Ground, retreat is still a requirement in specified circumstances. Other bright-line, predefined threshold requirements that no longer exist in Canada under Lucky Moose are also retained in the Florida law. The elimination of so many fixed preconditions for self-defence is novel in the common law world and renders Lucky Moose more expansive than Stand Your Ground in a number of respects. However imperfect Florida's formalistic threshold requirements are, they provide a bulwark against capricious application—no longer the case in Canada. This divergence is demonstrated by the laws' differing approaches to aggressors, imminence, and defence of property.

Stand Your Ground, like Canada's pre-2012 law,[179] retains separate regimes depending on the initial aggressor in a confrontation. An initial aggressor cannot rely on Stand Your Ground—they must have "exhausted every reasonable means of escape," or retreated in good faith, indicating clearly to the assailant that they wish to withdraw.[180] In contrast, the new Canadian law contains no fixed retreat requirement whatsoever, not even for the initial aggressor in a confrontation. Instead, "the person's role in the incident" is another fluid factor to be considered.[181] Similarly, self-defence is not available to a Floridian "attempting to commit, committing,

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[176] See *Nelson*, *supra* note 103 at 381–83 (an intellectual impairment affecting Nelson's ability to perceive and respond to an assault "may be in a position similar to that of the accused in *Lavallee* in that their apprehension and belief could not be fairly measured against the perceptions of an 'ordinary man'" at 381).

[177] See *R v Kagan*, 2004 NSCA 77 at paras 10–11 (in which an expert testified that the accused showed some features of Asperger's Syndrome).

[178] This heightened sense of fear is arguably what happened in *People v Goetz*, 497 NE (2d) 41 at 50 (NY Ct App 1986) [*Goetz*] (the accused carried an unlicensed firearm, which he purchased after a mugging in 1981). See Fletcher, *A Crime of Self-Defense*, *supra* note 104 at 41–42.

[179] See *Criminal Code*, *supra* note 2, s 34 as it appeared from 1 January 2003 to 10 March 2013.

[180] Fla Stat 2017, *supra* note 56 § 776.041(2).

[181] *Criminal Code*, *supra* note 2, s 34(2)(c).

or escaping after the commission of, a forcible felony."[182] Lucky Moose contains no comparable predefined threshold rules. Rather, sections 34 and 35 rest entirely on an *ex post facto* "reasonableness in the circumstances" standard.

Though not as stark a prerequisite as retreat, imminence is another traditional self-defence threshold requirement retained in Stand Your Ground but demoted in Lucky Moose. The imminence requirement was not explicit under Canada's pre-2012 self-defence law, but imminence had been read in as a fixed requirement by courts,[183] and remained a requirement after *Lavallee*, though it was relaxed. Under Stand Your Ground, deadly force is only justified if the defender reasonably believes that death or great bodily harm is "imminent."[184] The Department of Justice maintains that section 34 essentially codifies *Lavallee*,[185] for example, by ensuring that any evaluation of the reasonableness of an accused's response to a threat accounts for the size, age, gender, and physical capabilities of the parties, as well as any history of abuse.[186] But where *Lavallee* called for a contextualized understanding of criteria such as the impossibility of retreat or of the proportionality of the response,[187] section 34 eliminates these as requirements and turns them into "considerations" to be weighed against one another in an overall reasonableness analysis. Scholarly critiques of the imminence requirement in self-defence maintain that imminence "carries undeclared meanings," operating "as a proxy for any number of other factors—for example, strength of threat, retreat, proportionality, and aggression"—thereby rendering the law more contingent than previously assumed.[188] By explicitly making "imminence" optional rather than clarifying its elements, Lucky Moose risks destabilizing Canadian self-defence law even further, exacerbating the contingency that scholars criticized under the traditional formulation.

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182 Fla Stat 2017, *supra* note 56 § 776.041(1).

183 See *Whynot*, *supra* note 97 at 47.

184 Fla Stat 2017, *supra* note 56 § 776.012(2).

185 See DOJ, *Technical Guide*, *supra* note 94 ("[t]he intent of the new law is to simplify the legislative text itself, in order to facilitate the application of the fundamental principles of self-defence without substantively altering those principles" at 8), ("[o]ne motivation for the list of factors is that it presents a means of codifying certain relevant considerations that derive from jurisprudence. In particular, two aspects of the landmark SCC decision in *Lavallee* are now codified" at 11).

186 See *Criminal Code*, *supra* note 2, s 34(2)(e)–(f).

187 See generally *Lavallee*, *supra* note 7. See *Baxter*, *supra* note 91 at 108–09; *Brisson*, *supra* note 9 at 255.

188 See Nourse, *supra* note 27 at 1236–37.

Stand Your Ground has been criticized for departing from the bright-line common law rule that deadly force should not be used to protect mere property.[189] There are numerous reports of outrageous cases where Floridians are set free after chasing down and killing people they suspect are stealing property (for example, a car stereo, a wave runner) or robbing nearby homes.[190] Stand Your Ground makes it easier to justify the use of deadly force in the home and also to prevent the commission of a forcible felony, which, under Florida law, includes robbery and burglary.[191]

By removing explicit reference to proportionality and removing the distinctions between the kinds of force that can be used to protect various forms of property—which had been present in the 1892 and 1955 *Criminal Codes*—[192]Lucky Moose risks departing further still from the goal of preserving human life. While it is arguable that disproportionate force is never reasonable, or that lethal force is never reasonable to protect mere property, it is unclear whether juries will reach such a conclusion. As such, Roach's paper warns that Lucky Moose opens the unsettling possibility "that seriously injuring or even killing a person solely to defend property could be considered to be a valid defence of property under section 35."[193] The conspicuous absence of proportionality language in section 35—versus section 34 where proportionality is listed as a factor for juries to consider—provides defendants a persuasive argument that when it comes to defence of property, Parliament deliberately left proportionality out.

D. Burden of Proof

Lucky Moose has come into force in a criminal justice framework that is already more favourable to defendants than Florida's in relation to the burden of proof. Critics of Stand Your Ground condemn a proposed Re-

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189 See Franks, *supra* note 14 at 1106. The Canadian rule was stated by Dickson J in *Gee*, *supra* note 62 at 302 (citing Halsbury's Laws of England, *supra* note 152: "it cannot be reasonable to kill another merely to prevent a crime which is directed only against property" at HBE-455). See also *Clark*, *supra* note 62 at 271.

190 See e.g. Chris Bury & Howard L Rosenberg, "Man Cleared for Killing Neighbor's Burglars", *ABC News* (30 June 2008), online: <www.abcnews.com> [perma.cc/E4ZJ-CN2H]; Eyder Peralta, "'Stand Your Ground': Miami Judge Decides Fatal Stabbing Was Self-Defense", *NPR* (22 March 2012), online: <www.npr.org> [perma.cc/4JJ7-8WNW]. See also David Ovalle, "Miami Shores Teen Who Killed WaveRunner Thief Won't Face Criminal Charges", *Miami Herald* (18 June 2013), online: <www.miamiherald.com> [perma.cc/M2Z3-QFNN].

191 See Fla Stat 2005, *supra* note 3 § 776.08.

192 See *McIntosh*, *supra* note 75 at 716–19; *Criminal Code, 1892, supra* note 68 ss 45–46, 48–53; *Criminal Code* 1954, *supra* note 77 ss 34–42.

193 Roach, "Preliminary", *supra* note 22 at 293.

publican-sponsored modification that would flip the burden of proof in self-defence cases by requiring the prosecution to prove that a defendant who used deadly force instead of retreating from an attack was not behaving reasonably.[194] Critics say that this extra procedural hurdle for the prosecution will make it easier for firearm-carrying "true men" who kill and get off scot-free.[195] While Canadian law requires defendants to demonstrate an "air of reality" before a defence can be considered by the jury, it does put the ultimate burden on the Crown to disprove self-defence "beyond a reasonable doubt."[196] This practice, while firmly rooted in the constitutional protection of the presumption of innocence,[197] does have the effect of making it more difficult in this respect for Canadian prosecutors over Floridian ones to secure convictions against defendants who claim self-defence.

E. Locus of Decision Making

Stand Your Ground and Lucky Moose subtly shape and redistribute decision-making authority in ways that break from common law tradition. A crucial element of self-defence, and criminal law defences more generally, is "their deep connection to the power of certain individuals to make authoritative decisions about when they are justified to do what the criminal law generally prohibits."[198] Conduct is legally justified only if the appropriate person or people—the legislature, judge, jury, prosecutor, or the accused themselves—validly *decide* that it's justified.[199]

Procedural provisions in Florida's law shift decision-making authority downward from trial courts to police and judges in pre-trial immunity hearings. A person who uses or threatens force and claims self-defence under Stand Your Ground "is justified in such conduct and is immune

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194 See e.g. Caroline Light, "A 'Stand Your Ground' Expansion That Expands Inequality", *The New York Times* (23 March 2017), online: <www.nytimes.com> [perma.cc/Z5GT-8MM6]; Martin, *supra* note 5: "[p]eople often go free under 'stand your ground' in cases that seem to make a mockery of what lawmakers intended".

195 See e.g. Light, *supra* note 194.

196 See *R v Cinous*, 2002 SCC 29 at paras 144–45 [*Cinous*]. See also *R v Saunders*, 2018 NLPC 1317A00740 at para 15; *R v Johnson*, 2016 ABQB 633 at para 16; *R v Rocchetta*, 2014 ONSC 3058 at para 28.

197 See *Charter*, *supra* note 23, s 11(d); *Cinous*, *supra* note 196 at paras 144–45.

198 Thorburn, *supra* note 154 at 1093.

199 See *ibid* at 1093–94. See also Meir Dan-Cohen, "Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law" (1984) 97:3 Harv L Rev 625 at 667–73 (distinguishing between two sorts of legal rules: conduct rules, which are addressed to the general public and are designed to guide its behaviour, and decision rules, which are directed to the officials who apply conduct rules).

from criminal prosecution and civil action."[200] The repercussion is that the police may not arrest a person invoking Stand Your Ground without "probable cause" that the force that was used or threatened was unlawful (not defensive).[201] Thus, Florida law grants the police special authority to dispose of the case at the scene of the crime. If the police nevertheless press charges, rather than raise self-defence as an affirmative defence to be decided by the jury at the end of the trial, an accused can claim immunity at any stage of the process and must be granted a special pre-trial immunity hearing.[202] If, at this hearing, the accused proves by "a preponderance of the evidence" that force or threat of force was defensive, their immunity is established and there is no trial.[203]

Where Canadian judges used to control the application of necessity and proportionality requirements in concrete cases, Lucky Moose puts the locus of decision making squarely in the hands of juries. As discussed, the heart of Lucky Moose is the requirement in sections 34(1)(c) and 35(1)(d) that the act committed must be "reasonable in the circumstances." Roach points out that "the reasonableness of any particular act will be seen as a prototypical question of judgment that is associated with jury determinations."[204] Professor Boaz Sangero, discussing jurisdictions that have similarly collapsed necessity and proportionality requirements into a global reasonableness assessment, cautioned that such a move "in effect implies the relinquishment of any sort of significant guidance by the legislator," and is liable to mistakenly suggest that the reasonableness of defensive force is a factual question rather than a legal one.[205]

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200 Fla Stat 2017, *supra* note 56 § 776.032(1).

201 *Ibid* § 776.032(2).

202 See *Peterson*, *supra* note 59 (interpreting "criminal prosecution" to include "arresting, detaining in custody, and charging or prosecuting the defendant" at 29 as indicated in Fla Stat 2017, *supra* note 56 § 776.032). In *Dennis* (*supra* note 59 at 458, 462) the Florida Supreme Court adopted *Peterson* (*supra* note 59) as binding in Florida.

203 See Benjamin M Boylston, "Immune Disorder: Uncertainty Regarding the Application of 'Stand Your Ground' Laws" (2014) 20:1 Barry L Rev 25 at 28 (arguing "the statute's vagueness on the topic of immunity has put courts in a difficult position" at 26); Fla Stat 2017, *supra* note 56 § 776.032(4).

204 Roach, "Preliminary", *supra* note 22 at 278.

205 Boaz Sangero, *Self-Defence in Criminal Law* (Oxford: Hart, 2006) (Sangero's view is that proportionality—even when obscured and collapsed within an amorphous reasonableness standard—"by its very nature, has the character of law"; it does not concern the determination of a fact's existence, but rather concerns the development of normative requirements for the facts of a given case at 176).

F. An Unprincipled Revolution?

There is a rich literature on the distinction between rules, standards, and principles.[206] All three are intended to influence the behaviour of private citizens, but they also distribute decisional authority in different ways. The distinction between rules and standards hinges on the extent to which "efforts to give content to the law are undertaken before or after individuals act," with rules specifying in advance whether certain actions will be penalized, and standards delegating to courts the authority to make the determination afterwards.[207] Principles, like standards, are applied to evaluate actions after the fact, but unlike rules and standards, principles allow the "policies, values, and rationales animating the law ... to shine through" and shape outcomes.[208]

The move away from rigid rules and toward more contextually-sensitive tests is a trend in Canadian criminal law,[209] as it has been in other areas of Canadian law.[210] Professor Lisa Dufraimont tracks a move from rules to principles in the Canadian law of evidence that is in some ways analogous to the move from rules to standards in the law of self-defence. She maintains that adopting a principled (versus a rule-based) approach in the law of evidence has the potential to bring evidence law closer to "its underlying policies."[211] According to Dufraimont, evidentiary

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[206] See e.g. Ronald M Dworkin, "The Model of Rules" (1967) 35:1 U Chicago L Rev 14; Frederick Schauer, "Prescriptions in Three Dimensions" (1997) 82:3 Iowa L Rev 911; Douglas G Baird & Robert Weisberg, "Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207" (1982) 68:6 Va L Rev 1217; Henry M Hart, Jr & Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed by William N Eskridge, Jr & Phillip P Frickey (Westbury, NY: Foundation Press, 1994) at 102–43; Louis Kaplow, "Rules Versus Standards: An Economic Analysis" (1992) 42:3 Duke LJ 557; Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89:8 Harv L Rev 1685; Gideon Parchomovsky & Alex Stein, "Catalogs" (2015) 115:1 Colum L Rev 165.

[207] Kaplow, *supra* note 206 at 560. See also Eric A Posner, "Standards, Rules, and Social Norms" (1997) 21:1 Harv JL & Pub Pol'y 101 at 101–03. But see Thorburn, *supra* note 154 ("[c]ontrary to what is generally believed, it is not up to trial courts to decide ex post facto what conduct is justified and what is not. This determination is made ex ante by other institutional actors such as private fiduciaries, public officials, and sometimes, ordinary citizens caught in extraordinary circumstances. The court's role is simply to review the validity of that prior exercise of decision-making discretion" at 1129).

[208] Lisa Dufraimont, "Realizing the Potential of the Principled Approach to Evidence" (2013) 39:1 Queen's LJ 11 at 21.

[209] See e.g. *ibid* at 13.

[210] See e.g. B Baines, "Comparing Women in Canada" (2012) 20:2 Fem Leg Stud 89; Lorne Sossin & Colleen M Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007) 57:2 UTLJ 581.

[211] Dufraimont, *supra* note 208 at 13.

rules are "prone to being applied mechanically and acontextually," while evidentiary principles are "more capable of flexible and contextual application."[212] She argues that wholeheartedly adopting a principled approach, rather than applying principles to pre-existing evidentiary rules, will also reduce unhelpful complexity.[213]

In replacing the old rule-based law of self-defence and defence of property with sections 34 and 35, Parliament was responding to a similar problem in a similar way. The old Canadian law of self-defence, like the old law of evidence, was excessively complex and rigid rules were often applied in ways that clashed with their underlying rationales.[214] According to the Department of Justice, "[t]he intent of the new law is to simplify the legislative text itself, in order to facilitate the application of the fundamental principles of self-defence without substantively altering those principles."[215] Instead of undergoing a "principled revolution" however, the law of self-defence became "standardized"—bright-line rules were replaced by flexible standards.

Unfortunately, the non-exhaustive list of factors in section 34(2) for judges and juries to consider when determining whether a defensive act met the "reasonable in the circumstances" standard replaced one type of complexity with another. Where judges and juries had previously struggled to understand the "overlapping and inconsistent" regime of rules and standards that constituted the old law, they now have a non-exhaustive list of incommensurable factors to weigh and balance.[216] These changes to the law come at a time when legal scholars are increasingly warning, in other areas, that "the language of balance begs more questions than it solves"; it "camouflages much of the scholar's and the court's thinking," and "it does not lend itself to a rational reconstruction of the argumentative path."[217] Furthermore, where principles allow the "policies, values and rationales animating the law… to shine through," standards such as

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[212] *Ibid* at 11, 13.

[213] See *ibid* at 20.

[214] See *ibid* at 13; DOJ, *Technical Guide*, *supra* note 94 at 1.

[215] DOJ, *Technical Guide*, *supra* note 94 at 8.

[216] Stuart, *Canadian Criminal Law*, *supra* note 151 at 510–11.

[217] Martin Luterán, "The Lost Meaning of Proportionality" in Grant Huscroft, Bradley W Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York: Cambridge University Press, 2014) 21 at 36 citing Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford: Oxford University Press, 2007) at 86; Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009) at 88–89; Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?" (2009) 7:3 NYU Intl J Cont L 468 at 482.

"reasonableness in the circumstances" suffer from some of the same opacity and attenuated relationship with the justifications behind the law as rules while providing fewer predefined limits.[218] The risk is that the "standardization" of Canadian self-defence law will leave judges and juries to base their reasonableness decisions on private beliefs about the purpose of the law and prejudices about the victim and defendant.

IV. Lucky Moose Jurisprudence: Omens of Doctrinal Expansion

Individuals charged under Lucky Moose are beginning to make their way before trial courts across the country. There are still not enough cases to draw reliable conclusions about the application of the law, as researchers have done in the US. Three Canadian cases, however, hint at the potential expansiveness of Lucky Moose and its vulnerability to capricious and biased application in climates of fear.

A. Defence of Property Morphs into Defence of Person: Cormier

The vast availability of legitimate DIY security through the combination of sections 34 and 35 of Lucky Moose was revealed in *Cormier* at the Court of Appeal of New Brunswick.[219] Frederick Cormier was convicted of second-degree murder for stabbing and killing Spencer Eldridge, who had repeatedly threatened Cormier and challenged him to a fight.[220] When Eldridge and a companion appeared at Cormier's father's apartment, Cormier locked himself inside.[221] Eldridge left, but returned a few hours later, beating on the windows, having threatened by text message to smash every window in the apartment unless Cormier paid an alleged debt.[222] Cormier, his father, and a friend picked up knives and pipes and went outside.[223] The evidence here was contested, but showed that Eldridge swung a metal pipe at Cormier, whereupon Cormier stabbed Eldridge to death.[224]

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[218] Rules are generally thought to serve as a more effective guide to behaviour than standards at the expense of flexibility, but critics such as Kennedy and Schlag challenge this depiction as an inaccurate oversimplification. See Pierre Schlag, "Rules and Standards" (1985) 33:2 UCLA L Rev 379; D Kennedy, *supra* note 206.

[219] *Supra* note 25.

[220] See *ibid* at paras 1, 9.

[221] See *ibid* at para 10.

[222] See *ibid* at paras 10–11.

[223] See *ibid* at para 15.

[224] See *ibid* at paras 13–20.

Cormier appealed his conviction, contending that the judge misled the jury by leaving the jurors with the impression that he forfeited his self-defence claim by leaving the apartment. This provided the Court of Appeal of New Brunswick with an opportunity to interpret the scope of Lucky Moose. The Court of Appeal rejected the Department of Justice's contention that Lucky Moose was only meant to simplify existing law and concluded that "in truth ... the new provisions have substantially altered the principles of self-defence ... resulting in a more generous application which could lead to more acquittals."[225] Even if under the old law Cormier didn't have a strict duty to retreat, the new law went further. Lucky Moose extended Cormier's father the right to defend his peaceable possession of his property to the accused, his son, who now had a right to lawfully assist in defending the property of others. In doing so, the court reasoned, Lucky Moose also extended the castle doctrine to one assisting another to defend their property.[226] Further, by omitting proportionality as an element of defence of property (section 35) or even a factor to be considered in the reasonableness calculus in the manner of defence of person (section 34), any soft duty to avoid a confrontation by staying inside if reasonably possible appeared to be eliminated.[227] The Court of Appeal found that under the new law, it was open for the jury to conclude that "Mr. Cormier did exactly what the law allows him to do under s. 35: use reasonable force to prevent Messrs. Eldridge and Beckingham from entering or damaging the property under the peaceful possession of Mr. Cormier Sr."[228] The jury was entitled to find that Cormier was acting reasonably in defence of property when he armed himself, opened the door, and con-

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[225] *Ibid* at para 46.

[226] See *ibid* ("[t]he case law generally speaks of one not having to retreat from one's own home. The rationale behind the principle that one does not have to retreat from one's own home is that one is legally entitled to use force to remove an intruder. The *Citizen's Arrest and Self-Defence Act* preserves this right for those in peaceable possession of property. Not only that, it extends the same right to one who is lawfully assisting a person whom they believe on reasonable grounds is in peaceable possession of property. Thus, under s. 35, not only could Mr. Cormier Sr. act to prevent Messrs. Eldridge and Beckingham from entering his property, but Mr. Cormier was legally entitled to assist him in doing so. As was stated in *Antley* and repeated in *Forde*, rather than requiring retreat in those circumstances, the law allows a person to use such force as necessary to remove the intruder" at para 57).

[227] See *ibid* ("[w]hat counsel argued was that Mr. Cormier should have stayed inside the apartment and kept the door closed between himself and Mr. Eldridge. In some circumstances, that argument, if limited to addressing the factor to be considered under s. 34(2)(b), might be justified. However, the present circumstances do not justify that argument when one considers s. 35 of the *Criminal Code*" at para 59).

[228] *Ibid* at para 62.

fronted Eldridge outside.[229] Under section 35(c) of the pre-2012 law, if Cormier was found to have provoked the assault by confronting Eldridge, he would have been required to retreat. The Court concluded, "[t]his is quite possibly a case in which what began as the defence of property quickly morphed into the defence of one's person."[230] In this way, the interplay of sections 34 and 35 of Lucky Moose extended the castle—and not even Cormier's own castle—into the street.

B. Proliferating Hybrid Defences: Stanley

The Court of Appeal's "morphing" of Lucky Moose's defence of property and defence of person provisions provided Gerald Stanley a powerful argument, which Stanley's defence counsel, Scott Spencer, extended even further. In his opening statement, Spencer explained Stanley's theory of the case and the place of self-defence: "[i]t's not a self defence ... but there is a self defence factor."[231] Stanley's acquittal would ultimately hinge on a hybrid defence melding defence of property, defence of person, and accident.

According to Spencer, Gerald Stanley and his son Sheldon had attacked Boushie's disabled SUV when they became suspicious that two of the occupants were attempting to steal an ATV.[232] Gerald fetched his handgun from the shed and Sheldon entered the house to get keys or a rifle.[233] Gerald fired two shots into the air or above the heads of Boushie's fleeing friends.[234] The Crown, defence, and judge agreed that these actions qualified as defense of property and Chief Justice Popescul instructed the jury, "it is not disputed that Mr. Stanley was legally justified in defence of his property to retrieve his handgun and fire it into the air."[235] Thus, the reasonableness of Stanley's defence of property was never put to the jury.

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229 See *ibid* ("[t]he need for self-defence arguably only arose when Mr. Cormier reasonably apprehended the threat of imminent bodily harm when he saw Mr. Eldridge, armed with a pipe, coming at him. It is only at that point that Mr. Cormier used his knife to stab Mr. Eldridge" at para 62).

230 *Ibid* at para 63.

231 Charles Hamilton, "Now that we are on a short break. Here's some more of what Spencer had to say in his opening: 'It's not a self defence… but there is a self defence factor'" (5 February 2018 at 11:40), online: *Twitter* <twitter.com> [perma.cc/89BK-R45K].

232 See Full Transcript, *supra* note 20.

233 See *ibid*.

234 See *ibid*.

235 *Stanley*, *supra* note 25. See also *ibid*: "it is not disputed that Mr. Stanley was legally justified in defence of his property to retrieve his handgun and fire it into the air". For the *Stanley* trial transcript, see Full Transcript, *supra* note 20.

Without this finding, Stanley's actions would constitute an intentional or negligent homicide amounting to murder or manslaughter.

As discussed, Canadian jurisprudence has historically rejected lethal force to defend "mere property."[236] Stanley testified that as he approached the driver's side window, he became frightened that his wife was under the wheels of the SUV.[237] Here, he was providing evidence that the first two elements of defence of person—reasonable belief that force is being used against them or another person (section 34.1.a) and defensive purpose (section 34.1.b)—had been met. Stanley testified that he sought to prevent further harm when he reached into the open window of the SUV Boushie was driving with his left hand to shut off the ignition.[238] He recounted that he gripped a handgun in his right hand and "[b]oom, the thing just went off."[239] Instead of attempting to argue the third element of self-defence, that Stanley's actions were reasonable in the circumstances (section 34.1.c), Spencer argued that Stanley's gun or bullets were defective and that the shooting was a "freak accident" caused by a rare malfunction—a "hang-fire."[240] Self-defence, necessary to render Stanley's acts lawful until the fatal shot, was never put to the jury. Defence of property (explicit) morphed into defence of person (implicit) and then accident, freeing Stanley from arguing that his actions were reasonable. His acquittal hinted at new combinations and permutations under Lucky Moose.

Critics of the *Stanley* verdict wonder how Boushie's death can plausibly be deemed an accident.[241] From the outset of the investigation, they had warned of hidden bias, expressing concern about an RCMP news release in the wake of Boushie's death that mentioned thefts in the area, chain of custody irregularities around the vehicle involved, Judge Bruce Bauer's granting of bail for such a serious offence, the RCMP's decision not to charge individuals who posted racist comments online in the wake of the killing with hate speech, and peremptory challenges in the course of

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236 See *Gee*, *supra* note 62; *Clark*, *supra* note 62; *Gunning*, *supra* note 62 and accompanying text.

237 See Full Transcript, *supra* note 20.

238 See Andrea Hill, "Gerald Stanley Trial: 'Boom, the Thing Just Went Off,' Says Sask. Farmer Testifying in Own Defence", *Saskatoon StarPhoenix* (6 February 2018), online: <thestarphoenix.com> [perma.cc/XS5F-AL3X].

239 *Ibid*. See Full Transcript, *supra* note 20.

240 See Full Transcript, *supra* note 20.

241 See e.g. Tristin Hopper, "Gerald Stanley's 'Magical Gun': The Extremely Unlikely Defence that Secured His Acquittal", *National Post* (14 February 2018), online: <nationalpost.com> [perma.cc/DH7P-CMKG]; Michael Plaxton, "The Stanley Verdict: Manslaughter and 'Hang Fire'", *The Globe and Mail* (11 February 2018), online: <www.theglobeandmail.com> [perma.cc/XG2E-WFXF].

jury selection that removed all ostensibly Indigenous people from the jury.[242] Boushie's family launched a petition for an out-of-province lead investigator and a new Crown prosecutor.[243] Their request was denied, the case proceeded as anticipated, and the verdict reinforced their belief that Canada's justice system is systemically biased against them.[244]

C. The Highly Modified Objective Approach: Khill

Army reservist Peter Khill made effective use of Canada's Lucky Moose expansion to win a complete acquittal after he shot and killed Jon Styres, an unarmed Indigenous man who Khill suspected was stealing his truck from his driveway.[245] Khill testified that as a trained reservist, he reacted instinctively to "neutralize a threat", rather than calling the police from inside his Hamilton-area home.[246] Khill's attorney, Jeff Manishen, called experts to support his contention that the jury should consider Khill's military training when evaluating the reasonableness of his perception of the threat and his reaction to it (*Criminal Code*, sections 34(1)(a) and (c)).[247] Khill's acquittal confirmed that Lucky Moose's "contextual objective approach," originally intended to provide battered women and other vulnerable groups with realistic options to defend themselves, had grown to encompass armed soldiers confronting threats to their property.

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242 See e.g. David M Tanovich, "How Racial Bias Likely Impacted the Stanley Verdict", *The Conversation* (5 April 2018), online: <theconversation.com> [perma.cc/ZK9X-RRBX]; Jason Warick, "No Hate Speech Charges Laid in Colten Boushie Case", *CBC News* (18 February 2017), online: <www.cbc.ca> [perma.cc/K23A-QZHG]; Andrea Hill, "Gerald Stanley Trial – 'It's Something That We Feared:' Boushie Family Frustrated by Visibly All-White Jury", *Saskatoon StarPhoenix* (30 January 2018), online: <thestarphoenix.com> [perma.cc/BH5U-FH94]; Kent Roach, "Colten Boushie's Family Should Be Upset: Our Jury Selection Procedure is Not Fair", *The Globe and Mail* (30 January 2018), online: <www.theglobeandmail.com> [perma.cc/HC36-AWWV]; Friesen, "The Night", *supra* note 17.

243 See The Canadian Press, "Trial Dates Set for Gerald Stanley, Man Charged in Death of Colten Boushie", *CBC News* (2 August 2017), online: <www.cbc.ca> [perma.cc/PA9X-TEEU].

244 See Joe Friesen, "Gerald Stanley Acquitted in the Shooting Death of Coulten Boushie", *The Globe and Mail* (9 February 2018), online: <www.theglobeandmail.com> [perma.cc/LU6U-EPV6].

245 See *Khill*, *supra* note 25; *R v Khill*, 2018 ONSC 4149 at paras 4–10.

246 Dan Taekema, "'Why Not Call 911?' Crown Grills Peter Khill About the Night He Killed Jon Styres", *CBC News* (19 June 2018), online: <www.cbc.ca> [perma.cc/X47P-3XSM].

247 See Samantha Craggs, "Military Training like Peter Khill's Lasts Decades, Psychologist Says During Murder Trial", *CBC News* (22 June 2018), online: <www.cbc.ca> [perma.cc/TD3D-VDZS].

Manishen cautioned against comparisons with the Stanley case.[248] He pointed out that unlike the Stanley case, potential jurors in the Khill case were asked upfront about possible racial bias; three candidates were screened out.[249] Potential jurors were asked a single question, created by the judge and approved by both the prosecution and the defence: "[w]ould your ability to judge the evidence in this case without bias, prejudice or partiality, be affected by the fact that the deceased victim is an Indigenous person and the person charged with this crime is a white person?"[250] Chief Ava Hill, elected leader of the Six Nations of the Grand River, queried the effectiveness of the screening, asking, "[h]ow do you prove that? I can ask you if you're racist and you can say no."[251] Where Manishen argued that race played no part in Khill's acquittal, Hill maintained that the *Khill* verdict was the product of "racism rearing its ugly head."[252] Canada's strict jury secrecy rules prevent any inquiry into the reasons for the *Khill* verdict,[253] so it will require a study of numerous Canadian cases akin to the Florida study by the *Tampa Bay Times* (including the identities of victims and perpetrators) to establish whether racial bias is systemically affecting outcomes in self-defence scenarios.[254]

The Crown has appealed the *Khill* verdict, arguing that, among other errors of law, Judge Glithero erred in directing the jury to consider Khill's military training as a factor in their assessment of the reasonableness of his actions.[255] It remains to be seen whether the Court of Appeal for Ontario will recognize the historical patterns at play and circumscribe Canada's contextual objective approach.[256]

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[248] See Dan Taekema, "Not Guilty Verdict for Peter Khill Shows Canada's Justice System Still Broken After Boushie, Says Chief", *CBC News* (28 June 2018), online: <www.cbc.ca> [perma.cc/3PN9-ACUW] [Taekema, "Not Guilty Verdict"].

[249] See *ibid*.

[250] Ameil Joseph, "Erasing Race But Not Racism in the Peter Khill Trial", *CBC News* (6 July 2018), online: <www.cbc.ca> [perma.cc/8UBJ-GNBC].

[251] Taekema, "Not Guilty Verdict", *supra* note 246.

[252] *Ibid*.

[253] See generally *R v Pan; R v Sawyer*, 2001 SCC 42.

[254] See Martin, *supra* note 5.

[255] See *Khill*, *supra* note 25, Notice of appeal to ONCA; see Dan Taekema, "'It Feels Like a Little Bit of Hope': Crown Appeals Peter Khill Not Guilty Verdict", *CBC News* (20 July 2018), online: <www.cbc.ca> [perma.cc/VVM7-3X6Y].

[256] See generally Kameel Stanley & Connie Humburg, "Many Killers Who Go Free with Florida 'Stand Your Ground' Law Have History of Violence", *Tampa Bay Times* (21 July 2012), online: <www.tampabay.com> [perma.cc/E7CL-8GWM]; Amnesty International, "New Statistics On Violence Against Aboriginal People Released" (25 November 2015), online (blog): *Human Rights Now* <www.amnesty.ca> [perma.cc/64-AJ-PEXR].

V. Are Canadian Safeguards Sufficient?

Hopefully Canada's national and legal culture[257] will inoculate it against the systematic bias and arbitrary outcomes experienced in Florida and other US jurisdictions with expansive self-defence laws. There are several possible bulwarks. Canada's comparatively restrictive gun laws may protect against the abrupt and sustained increase in homicides that followed Florida's stand-your-ground innovation.[258] It is comforting that strong majorities of Canadians continue to feel safe in their own neighborhoods since climates of fear increase the potential for fatal confrontations.[259] Though the adoption of Lucky Moose was driven in part by populist skepticism about government's capacity to guarantee the security of law-abiding, property-owning Canadians, to date, populist leaders in Canada have been less successful than their US, European, and Australian counterparts at turning "true Canadians" against "dangerous strangers."[260]

The foremost Canadian bulwark against capricious application of the self-defence provision is existing jurisprudence. The Department of Justice insists that "the new law is not intended to displace old jurisprudence ... previously recognized self-defence considerations continue to apply wherever relevant."[261] Judges and juries who harbour gender or racial biases that might colour their appreciation of the reasonableness of a perception of threat, or of a claimed act of self-defence, would be instructed in relation to these biases to the extent that jurisprudence addresses these sources of bias. This requirement to instruct continues under section 34 and has the potential to mitigate the effects of hidden bias that has led to

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257 See generally Nanos Research, "Exploring Canadian Values" (October 2016), online (pdf): *Nanos Research* <www.nanos.co/wp-content/uploads/2017/07/2016-918-values-populated-report-w-tabs-r.pdf> [perma.cc/2PH4-2ZST] ("Canadians are most proud of Canada's equality, equity and social justice … [t]op Canadian values are right[s] and freedoms, respect for others and kindness and compassion" at 2).

258 See Humphreys, Gasparrini & Wiebe, *supra* note 4.

259 See also "Focus Canada 2010: Public Opinion Research on the Record Serving the Public Interest" (28 February 2011) at 37, online (pdf): *The Environics Institute for Survey Research* <www.environicsinstitute.org/docs/default-source/project-documents/focus-canada-2010/final-report.pdf> [perma.cc/9YS7-N489].

260 See e.g. Michael Adams, *Could it Happen Here? Canada in the Age of Trump and Brexit* (Toronto: Simon & Schuster Canada, 2017) at 55–73; Taub, *supra* note 121; Maher, *supra* note 119 (all three arguing against the likelihood of a Trump-like movement in Canada). But see Speer & Jivani, *supra* note 119 (arguing that it is "presumptuous to assume on this basis that Canada is somehow immune to the populist trends seen elsewhere" at *ibid*); Kurl, *supra* note 119; "Canada 150: The National Mood and the New Populism" (24 June 2017), online: *Ekos Politics* <www.ekospolitics.com> [perma.cc/Y2DF-JPMC] (indicating that northern populism is on the rise).

261 DOJ, *Technical Guide*, *supra* note 94 at 11.

convictions where triers of fact wrongly perceived an ability to retreat or that there was no imminent threat.[262] However, it is not clear how consistently juries are in fact instructed about bias with reference to jurisprudence; not all sources of bias have been appropriately recognized.

So-called *Charter* values provide another potential bulwark against bias.[263] Tacit norms of the constitutional order including equality and autonomy are increasingly used to guide the development of the substantive criminal law and its defences.[264] In *R. v. Tran*, for example, the Supreme Court held that the "ordinary person" who forms the standard in the defence of provocation "must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the *Canadian Charter*."[265] As a result, the Court held, an accused would not be able to rely on the fact that they were homophobic to ground a defence of provocation were the accused the recipient of a homosexual advance. Whether an act taken in self-defence was reasonable must be evaluated from a perspective that is neither racist, sexist, or homophobic.[266] Though *Charter* values may help inoculate section 34 against bias, their suppleness and discretionary application makes it risky to rely on them. The US experience is not encouraging. The Fourteenth Amendment guarantees equal protection in US law, serving an analogous function to the *Charter's* equality protections.[267] Thus far they have failed to

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262 See *R v Malott*, [1998] 1 SCR 123 at 133–34, 155 DLR (4th) 513.

263 See generally Don Stuart, "Criminal Justice is Better Balanced Under the Charter", *Law Times* (2 April 2007), online: <www.lawtimesnews.com> [perma.cc/L3VV-TZ5C] (arguing that "[t]he Charter of Rights and Freedoms has helped ensure that we have a balanced criminal justice system of which Canadians can be proud. The Charter protects minority rights against the tyranny of the majority"); *R v Mabior*, 2012 SCC 47 ("[c]ourts must interpret legislation harmoniously with the constitutional norms enshrined in the *Charter* ... *Charter* values are always relevant to the interpretation of a disputed provision of the *Criminal Code*" at para 44); *R v Sharpe*, 2001 SCC 2 at para 33; *Application under s 83.28 of the Criminal Code (Re)*, 2004 SCC 42 at para 35.

264 See Benjamin L Berger, "Constitutional Principles" in Markus D Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) 422.

265 2010 SCC 58 at para 34.

266 There is an argument, however, inspired by *Goetz*, *supra* note 178, that notwithstanding norms of equal treatment and anti-discrimination, "…an actor should be punished, not for possessing or choosing to possess racist or otherwise illiberal beliefs or desires, but only for choosing to cause (or risk causing) harm when the law does not permit him to make such a choice" (Garvey, *supra* note 166 at 129).

267 See US Const amend XIV, § 1; *Charter*, *supra* note 23, s 15.

inoculate Stand Your Ground from biased application in Florida and other states.[268]

Guarantees of judicial independence may also play a role. Judges facing re-election in Florida and other states routinely pander to voter fear by becoming tougher on criminal defendants[269] and occasionally resorting to fearmongering and racial prejudice.[270] The Canadian system of judicial appointment by federal and provincial governments, which relies on arm's-length judicial advisory committees to draft a shortlist of qualified candidates, has the potential to insulate judges from the popular will and encourage independent and impartial decisions in self-defence cases. Yet, judicial appointments in Canada are no guarantee that judges will apply Lucky Moose's malleable provision in an unbiased manner.

Canadian criminal justice provides safeguards not present in the US, but in climates of fear, where hidden bias exerts its greatest influence on the application of reasonableness standards, jurisprudence, *Charter* values, and judicial appointments based on merit may not be enough. There are empirical reasons to question the notion that when it comes to applying Lucky Moose, Canadian judges and juries will necessarily be fair-minded, tolerant, and resistant to populist fears. Recent research by the Angus Reid Institute and the CBC found that sixty-eight per cent of Canadians say visible minorities should do more to "fit in" to mainstream Canadian society,[271] fifty-eight per cent believe Canada's policies toward people who cross the border at an unofficial point of entry and attempt to claim asylum are "too generous,"[272] and one-in-four Canadians would like to see Canada institute a Trump-style travel ban on Syrian refugees.[273]

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268 See Robin West, "Toward an Abolitionist Interpretation of the Fourteenth Amendment" (1991) 94:1 W Va L Rev 111 ("[n]o citizen shall be subject to uncheckable violence by anyone other than the state" at 129); Robin West, "A Tale of Two Rights" (2014) 94:3 BUL Rev 893 at 898–900; ABA, *supra* note 5 at 2.

269 See Gregory A Huber & Sanford C Gordon, "Accountability and Coercion: Is Justice Blind when It Runs for Office?" (2004) 48:2 Am J Pol Sci 247 ("all judges, even the most punitive, increase their sentences as reelection nears" at 258).

270 See e.g. Adam Liptak, "Rendering Justice, With One Eye on Re-election", *The New York Times* (25 May 2008), online: <www.nytimes.com> [perma.cc/9VHU-FG94].

271 "What Makes Us Canadian? A Study of Values, Beliefs, Priorities and Identity" (3 October 2016), online: *Angus Reid Institute* <angusreid.org> [perma.cc/CHF9-NF55].

272 "Two-thirds Call Irregular Border Crossings a 'Crisis,' More Trust Scheer to Handle Issue Than Trudeau" (3 August 2018), online: *Angus Reid Institute* <angusreid.org> [perma.cc/T3WA-VXLQ] [Angus Reid Institute, "Irregular Border Crossings"].

273 See "Open Door Policy? Majority Support Government Decision Not to Increase 2017 Refugee Targets" (20 February 2017) at 1, online (pdf): *Angus Reid Institute* <an-

Whether growing anti-immigrant attitudes will bias the application of Lucky Moose, or whether Canada's civic culture and legal safeguards will prevent the kinds of abuses seen in Florida is a looming question.[274]

Conclusion

Lucky Moose has been depicted by its sponsors as a celebration of Canadian multiculturalism and diversity, with the law expanding to accommodate the needs of women and Canada's ethnic communities.[275] Yet, when read in light of the US experience, the history of Canada's self-defence innovation and the potential inadequacies of bulwarks against capricious application of the law should serve as a warning that Lucky Moose, when applied in climates of fear, may not achieve the equalizing outcomes Parliament expects. If the US experience teaches anything, it is that the benefits of expanded self-defence have primarily helped property-owning "true men."

A comparison of the conceptual architecture of Stand Your Ground and Lucky Moose, and the application of Lucky Moose in *Cormier*, *Stanley*, and *Khill* demonstrate the expansiveness of Canada's self-defence innovation and its vulnerability to abuse. Under Lucky Moose, the essential question is whether the accused's actions in defending person or property were "reasonable in the circumstances." Yet, in climates of fear such as Battleford, Saskatchewan, near where Colten Boushie was killed, concepts of reasonableness are deeply contested. In the hands of a conscientious judge and jury guided by jurisprudence and *Charter* values, Lucky Moose leaves space for a contextualized conception of reasonableness, one that may identify and eliminate hidden bias. Injected into a system that denies bias, invoked in climates of fear, Lucky Moose is a danger to Canada's most vulnerable communities, to the legitimacy of our justice system, and to our efforts to build a more just society.

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gusreid.org/wp-content/uploads/2017/02/2017.02.17-Refugees2017.pdf> [perma.cc/94L7-HL9G].

274 See Angus Reid Institute, "Irregular Border Crossings", *supra* note 271 ("Canadians are less inclined to encourage minorities to retain their culture, customs and language … than they were a generation ago").

275 See Part D, "Canada's Lucky Moose Law" at 22–23, *above*.