

SELF-DEFENSE IN CLIMATES OF FEAR

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Climates of fear—depleted inner cities, segregated rural communities, contested international hotspots—strain the law of self-defense, affecting legislation, policing, prosecution, and adjudication. There are distributional implications to our legislative and judicial choices, justifying or excusing some uses of deadly force but not others, making some segments of the population safer and others less so. Florida’s “Stand Your Ground” law, Canada’s “Lucky Moose” law, and the international law of self-defence provide three revealing examples. Our doctrinal preferences correspond with the cases and incidents that have most left their mark on us. As such, the law of self-defense is haunted by projections, pre-conceived notions about the world related to our past experiences rather than the situation at hand. This article, based on the author’s keynote lecture at the 2017 McGill Law Graduate conference, considers the challenge that fear poses to the law of self-defence.

Les climats de peur – les centres-villes appauvris, les communautés rurales isolées, les points chauds internationaux contestés – mettent à mal le droit de la légitime défense, affectant la législation, les politiques publiques, les poursuites et les jugements. Nos choix législatifs et judiciaires ont des implications en termes de distribution, justifiant ou excusant certains emplois de la force létale, mais pas d’autres, rendant certaines couches de la population plus sûres et d’autres moins. La loi floridienne « Stand Your Ground », la loi canadienne « Lucky Moose » et le droit international de la légitime défense fournissent trois exemples révélateurs. Nos préférences doctrinales correspondent aux cas et incidents qui nous ont le plus marqués. En tant que telle, la loi sur la légitime défense est hantée par des projections, des notions préconçues sur le monde, liées à nos expériences passées plutôt qu’à la situation actuelle. Cet article, basé sur la conférence magistrale de l’auteur au colloque des cycles supérieurs en droit de McGill en 2017, examine le défi que la peur pose au droit de la légitime défense.

Ambientes de miedo – centros urbanos empobrecidos, comunidades rurales segregadas, brotes de contestación internacional – presionan el derecho a la defensa propia, afectando la legislación, la policía, el enjuiciamiento y las sentencias judiciales. Esto tiene implicaciones distributivas para nuestra organización legislativa y judicial, ya que justifica o excusa ciertos usos letales de la fuerza mientras que otros no, de tal forma que algunos segmentos de la población se sienten más seguros que otros. La ley “Stand Your Groud” en Florida, la ley “Lucky Moose” en Canadá y el derecho a la defensa propia en derecho público internacional son tres ejemplos reveladores. Al respecto, nuestras referencias doctrinales corresponden a los casos e incidentes que más nos han marcado. Por lo tanto, el derecho a la defensa propia se encuentra atormentado por proyecciones y nociones preconcebidas sobre experiencias pasadas, en vez de la situación actual. Este artículo, basado en una conferencia magistral pronunciada en 2017 por el autor en el coloquio del posgrado en derecho de McGill, explora el desafío que representa el miedo para el derecho a la defensa propia.

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Welcome, graduate students and faculty, scientists, and conspiracy theorists. Bienvenue à toutes et à tous. It's a great honor to be here, discussing the global commons at my alma mater. Thank you, Vincent, and the organizers of the conference for inviting me.

As you may be able to tell, I'm a little shell-shocked. I've just come from Florida, where the State Senate has been debating the "Guns on Campus" Bill,¹ which would allow students, faculty and staff to bring weapons to class. Can I have a show of hands, please: who in this room is carrying a concealed weapon? I like to know when beginning a lecture.

My talk today will be about the laws of self-defense, which are currently in flux. Dans la tradition de la Faculté de droit de McGill, je vais employer une approche transsystémique. Je m'intéresse à ce que les lois de légitime défense tentent d'atteindre. I call the talk "Self-Defense in Climates of Fear."

I've just moved back to Canada from Miami, where I've been teaching criminal law and international law for seven years. Much of my research has been on the crime of aggression in international law. But living in Florida, and given our global predicament, I've become increasingly interested in the broader question of how law contends with fear.

In many ways, Florida is a climate of fear. People are afraid of many things, though not always the same things. Some Floridians are afraid of "radical Islamic terror," "bad hombres," and "American carnage" spreading from the inner cities. Others are afraid of Immigration and Customs Enforcement and trigger-happy police officers. Floridians are armed to the teeth. My university administration is afraid of school shooters and have equipped the campus police with machine guns, body armor and an armored personnel carrier from Operation Iraqi Freedom.

Climates of fear differ from the normal fears we imagine in the typical self-defense case. We are all fearful when confronted by a bear in the woods or a masked stranger in a dark alley. These are random acute incidents, bad luck, micro-climates of fear. In this talk, I'm concerned with entire weather systems. Climates of fear afflict segments of the population, and there is often an intergroup dimension. Because different fears pre-occupy different groups, climates of fear strain the law of self-defense, affecting legislation, policing, prosecution, and adjudication. There are distributional implications to our legislative and judicial choices, justifying or excusing some uses of deadly force but not others, making some segments of the population safer and others less so.

Our doctrinal preferences correspond with the cases and incidents that have most left their mark on us. As such, the law of self-defense is haunted by projections, pre-conceived notions about the world related to our past experiences rather than the situation at hand. Projections about reasonableness: is it more reasonable to flee a violently abusive spouse, or to kill them when they are asleep? Projections about the

¹ US, SB 622, *An act relating to concealed weapons or firearms*, 23-00711-17, Fla, 2017.

kind of world we live in: an international community or an anarchic state of nature? Projection about the most dangerous threat: Big Brother (the State) or Little Brother (the criminals)?

Florida's climate of fear makes Floridians especially trigger-happy, and Florida's Stand-Your-Ground law takes this into account. Canadian lawmakers drafting the new 2012 self-defense law were influenced by the case of Lyn Lavallee, who shot and killed her abusive spouse as he left the room after threatening her life. But for the most part and for the time being, Canadians do not live in a climate of fear comparable to Florida's.

I. Conceptual characteristics of self-defense

In order to understand the work these "Climates of Fear" are doing, it can be revealing to play a kind of imagination game. We can apply the new Canadian self-defense law to the Trayvon Martin/George Zimmerman encounter. We can also test the UN Charter rule on self-defense between nations²—the most bright-line self-defense rule I know—on the Gerald Stanley case in Saskatchewan.³ Gerald Stanley was a 54 year old Saskatchewan farmer who killed Colten Boushie, a young man from the Red Pheasant First Nation reserve, when Boushie pulled onto Stanley's farm with a flat tire in 2016. This method can help us to foreground common features in the law of self-defense and better understand the conceptual and distributional implications of our choices. At stake is our feeling of security.

I will start with Florida's Stand Your Ground law.⁴ Before Florida's Stand Your Ground law was passed in 2005, a defendant who claimed self-defense in Florida after killing another person had to convince the jury that he or she had no possible escape and was honestly and reasonably afraid he or she would be grievously harmed or killed. The Castle Doctrine carved out a narrow exception for people who were in danger in their home. In this situation, there was no duty to retreat—for where would someone retreat if not their home? Florida's Stand Your Ground law modified the self-defense rule by removing the requirement to retreat. It effectively expanded the Castle Doctrine to include any place a person is legally allowed to be. Today, a Floridian who feels intimidated by another on a sidewalk or in a park can draw a line in the sand and kill the person who crosses it. If the killer can convince a jury that he or she was sincerely afraid for their life, and if the jury considers that fear to be reasonable, this self-defense argument will succeed.

Since the law came into force in 2005, there have been a number of shocking applications. Most of you are familiar with the fatal confrontation between George Zimmerman and Trayvon Martin on a rainy night in Sanford, Florida, in 2012. But you

² *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 51.

³ *R v Stanley*, 2018 SKQB 27, [2018] SJ No 95 (WL).

⁴ See Fla Stat §§ 776.012, 776.013, 776.031 & 776.032 (2018).

may not have heard about the case of Oscar Delbono.⁵ Oscar Delbono shot Shane Huse in the neck in front of his children after an argument, the culmination of a long-running dispute over Huse's two pitbull terriers. Huse had turned to walk away when Delbono fired his gun and killed him. Because the police considered Delbono's fears reasonable, no charges were filed.

Consider the case of Ernesto Che Vino.⁶ Ernesto Che Vino threatened two Florida Power and Light workers with a rifle as they approached his mobile home to shut the power. Vino slapped the helmet off one of them and fired a warning shot into the air. The Circuit Judge ruled that Vino's actions were justified because he was in "reasonable" fear for his life.

Meanwhile, Marissa Alexander fired a single warning shot after her abusive husband threatened to kill her. Alexander, who had no previous criminal record, sought immunity under Florida's Stand Your Ground law but was unsuccessful. She was found guilty of aggravated assault,⁷ which carries a mandatory minimum sentence of 20 years.⁸ According to the State Attorney, Ms. Alexander "was not in fear"⁹ when she fired her weapon; she was "angry."¹⁰ Critics of the case said the Stand Your Ground law was unevenly applied because Alexander was portrayed as an angry black woman.¹¹

Shocking, right? What most people don't know is that Canada's new self-defense law¹² is potentially even more expansive and vulnerable to abuse than Florida's. In 2012, after a century, Parliament simplified Canada's self-defense law. "Required elements" under the old law—rigid conditions that had to be satisfied for the defense to succeed—were made into a non-exhaustive list of "factors" or "considerations" that the Court weighs.¹³ The non-exhaustive list of factors includes: the nature of the force or threat; the imminence of the attack; the defendant's role in the incident; the size, age, and gender of the parties.¹⁴ But with no retreat requirement, no bar on the initial aggressor claiming self-defense, and no proportionality requirement, a Florida Court applying the new Canadian law would likely arrive at the same result as it did in 2012, that George Zimmerman was not guilty of killing Trayvon Martin.

⁵ Michael LaForgia, "Some Law-abiding Citizens Claiming Self-defense Go to Prison Without Invoking 'Stand Your Ground'", 6 October 2012, online: Tampa Bay Times <<https://www.tampabay.com/news/courts/criminal/some-law-abiding-citizens-claiming-self-defense-go-to-prison-without/1254961>>.

⁶ David Ovalle, "Florida Law Protects Miami-Dade Man Who Pointed Gun at FPL Workers, Judge Rules", 17 November 2010, online: *Sun Sentinel* <<https://www.sun-sentinel.com/news/fl-xpm-2010-11-17-fl-stand-ground-ruling-20101117-story.html>>.

⁷ See *Alexander v State*, 121 So (3d) 1185 (Fla Ct App 2013) (WL).

⁸ Fla Stat § 775.087 (2) (a) (2) & (3) (a) (2) (2018).

⁹ Trymaine Lee, "Marissa Alexander, Mom Facing 20 Years, Shot at Abusive Husband in Anger, Prosecutor Says", 10 May 2012, online: HuffPost <https://www.huffingtonpost.ca/entry/marissa-alexander-prosecutor_n_1504428?ec_carp=3820690374057666454>.

¹⁰ *Ibid.*

¹¹ See e.g. Kelly Brown Douglas, "Sandra Bland and Other 'Angry Black Women'", 20 July 2016, online: HuffPost <https://www.huffingtonpost.com/kelly-brown-douglas/sandra-bland-and-other-angry-black-women_b_7821876.html>.

¹² *Citizen's Arrest and Self-defence Act*, SC 2012, c 9.

¹³ See *Criminal Code*, RSC 1985, c C-46, s 34(2).

¹⁴ *Ibid.*

This may be upsetting considering the racial dimensions of the Zimmerman trial. But imagine the new Canadian law as applied to the Lyn Lavallee case, and it seems more sensible. Recall, Lyn Lavallee shot her husband, Kevin Rust, in the back of the head as he was leaving her bedroom on his way to a party going on elsewhere in the house. Rust had just assaulted Lavallee and threatened to kill her when the party ended. Under the traditional law of self-defense in the USA and Canada, Lavallee's self-defense claim would fail because she was not in imminent danger, and there were "more reasonable" ways to protect herself. The threat to her life was not imminent, because Rust was walking away. She could have fled, gone to the police, or taken other steps to protect herself. The Supreme Court's big innovation in the Lavallee case was to interpret the "objective" elements of self-defense in a "contextualized" way. The Supreme Court concluded that a reasonable "battered woman" would have also perceived an imminent threat and responded similarly to Lavallee.¹⁵ In situations of sadistic domestic violence, the new Canadian law and Stand Your Ground law make sense.

Often our doctrinal preferences correspond with the cases and incidents that have most left their mark on us rather than the conceptual underpinnings of the law. Applying these laws in completely different contexts can reveal important facets we might have overlooked. Before we embark on a few more comparisons, it may be helpful for me to introduce some conceptual underpinnings that span self-defense laws.

II. Is self-defense a justification or an excuse?

A justification speaks to the rightness of the act. An excuse is the law's concession to human frailty. Self-defense is traditionally considered the "quintessential justification"¹⁶—an instance where the accused is thought to have acted rightly, rather than simply being excused as a so-called "concession to human frailty."¹⁷ The distinction has concrete repercussions. In *R v Ryan*,¹⁸ a 2013 Canadian case, the Court refused to allow self-defense to go to a jury because a battered woman could not be justified in hiring a hit man to kill her abuser. The Court nevertheless allowed the excuse of duress to go to the jury. In Florida law, the old Canadian law, and international law, you are patted on the back for using deadly force in self-defense. In the new Canadian law, it's not clear whether you're congratulated or forgiven for human frailty. Lyn Lavallee was acquitted because of her diagnosis of "battered women's syndrome". This seems more like a concession to human frailty than a pat on the back. Canadian feminist legal scholars have pointed out that even though the Supreme Court was right to allow Lavallee's appeal and set her free, the Court's

¹⁵ *R v Lavallee*, [1990] 1 SCR 852.

¹⁶ See e.g. G R Sullivan, "Professing Criminal Law", Book Review of *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams* by Dennis J Baker & Jeremy Horder, eds, (2014) 12 Ohio St J Crim L 267 at 277.

¹⁷ See e.g. *R v Tran*, 2010 SCC 58, [2010] 3 SCR 350 para 14.

¹⁸ *R v Ryan*, 2013 SCC 3, [2013] 1 SCR 14.

depiction of her propagates a problematic view of battered women.¹⁹

III. Objective standard, subjective standard, or mixed?

Traditional laws of self-defense also employ a more robust “objective” component to the test. This means that the defendant’s perception of the threat must be “objectively reasonable” and the defendant’s response “necessary and proportionate” according to the judge or jury. The most objective law of them all is the UN Charter, which requires an armed attack to trigger the right of self-defense.²⁰ The subjective fears of the leaders who launched the attack are irrelevant. Such an objective test may seem overly rigid if you are imagining Lyn Lavalée being terrorized by Kevin Rust. But a strict objective test becomes far more sensible in the nuclear standoff between the US and North Korea, where unverifiable, subjective fears of an attack may tempt Kim Jong Un or Donald Trump to start World War III.

IV. Clear rule or flexible standard?

Following the 9/11 attacks, President Bush sought to supplant the UN Charter’s clear “armed attack” rule with a more flexible imminence standard that weighs the severity of the threat and its timing. Condoleeza Rice, Bush’s National Security Advisor, famously said that she didn’t want the smoking gun to be a mushroom cloud. The new Canadian law modifies the old law in analogous ways, turning bright-line rules into a non-exhaustive list of factors. Likewise, the Florida Stand Your Ground law replaces a clear rule with a flexible standard by doing away with the “retreat to the wall” requirement. Interestingly, Florida retains a bright line rule if the defendant is the initial aggressor. He or she must attempt to retreat and signal his intention for the defense to be available. Not so in Canada.

A flexible standard makes sense if your trauma is violent criminals in the streets, rogue nations providing terrorists with weapons of mass destruction or homicidal domestic abuse. Clear rules are more appealing if you are especially concerned about overzealous National Rifle Association (NRA) members with open carry permits, great power invasions of non-compliant resource-rich nations and bogus claims of self-defense by estranged spouses.

These doctrines attract strange bedfellows. They also have distributional effects. That’s why both the NRA and some feminist groups supported the Stand Your Ground legislation in Florida.

Climates of fear influence the design and enforcement of self-defense laws at critical points. Climates of fear make it more likely that individuals will react to the

¹⁹ See especially Jason MacLean, Nadia Verrelli & Lori Chambers, “Battered Women Under Duress: The Supreme Court of Canada’s Abandonment of Context and Purpose in *R. v. Ryan*”, (2017) 29 CJWL 60 at 82.

²⁰ *Supra* note 2.

world with defensive force: George Zimmerman killing Trayvon Martin; George Bush invading Iraq; Gerald Stanley shooting Colten Boushie. Climates of fear encourage legislators to implement laws that allow individuals to resort to violent self-help. Climates of fear make it more likely that courts will find that deadly force was “reasonable in the circumstances.” They create a greater risk of bogus claims of self-defense and make it harder to sort them out.

It is not a solution to implement self-defense laws that provide a justification defense with robust objective elements and bright line rules. This type of redesign would create unrealistic and unjust standards for people like Lyn Lavallee, who are fearful for special reasons or don’t respond how the “reasonable man” might.

The laws will not save us from ourselves. Perhaps the best we can do is to take an honest look at our traumas and think through how they are shaping the design and interpretation of our laws. What becomes increasingly clear is that when we discuss the design and interpretation of laws of self-defense, we are weighing and balancing how we will evaluate each other’s traumas. In modern interdependent societies, these traumas implicate us all. Weighing and balancing traumas is a delicate exercise and should be approached with sensitivity. On top of it all, there’s a kind of commons here — the legislative choices we make have distributional implications.

Critical scholars have demonstrated that the American legal system’s handling of violent self-defense has long favored white, property-owning men. Non-white, female, poor or gender-nonconforming people have always been more likely to be punished for defending themselves and less likely to see the courts come to their aid when they’re harmed.

Fear does work in the criminal law. It is vulnerable to capture by authoritarian leaders and terrorists alike. In climates of fear especially, we must ensure that the laws of self-defense justify conduct that advances common interests, not special ones, and excuse individuals that deserve compassion, not those most likely to threaten others.

We have entered trying times, and it is natural to be afraid. Fear prepares us to survive dangerous situations. It increases our heart rate, increases blood flow to our muscles, and sends hormones shooting to our amygdala to focus us on danger and store it in our memory. Fear can also impair our ability to regulate emotions, read non-verbal cues, reflect before acting, and act ethically. Climates of fear pose a clear and present danger to the global commons. The state of emergency they create puts groups with countervailing fears on a war footing where the fallacy is that “we” can only guarantee our security by attacking “them”.

This is why this is an especially important gathering. You have deliberately carved out a moment to meet and reflect on our common legal heritage, and how to

safeguard it. It is meetings like these, in climates like these, that provide an opportunity to breath in, breath out, and face our fears with reason, compassion, and integrity. Good luck this weekend.