

Is There a Right to Own a Gun?

1. Introduction

Gun control supporters often assume that the acceptability of gun control laws turns on whether they increase or decrease crime rates. The notion that such laws might violate rights, independently of whether they decrease crime rates, is rarely entertained. Nor are the interests of gun owners in keeping and using guns typically given great weight. Thus, a colleague who teaches about the issue once remarked to me that from the standpoint of rights, as opposed to utilitarian considerations, there wasn't much to say. The only right that might be at stake, he said, was "a trivial right—the right to own a gun".¹ Similarly, Nicholas Dixon has characterized his own proposed ban on all handguns as "a minor restriction," and the interests of gun owners in retaining their weapons as "trivial" compared to the dangers of guns.¹

I believe these attitudes are misguided. I contend that individuals have a *prima facie* right to own firearms, that this right is weighty and protects important interests, and that it is not overridden by utilitarian considerations. In support of the last point, I shall argue that the harms of private gun ownership are probably less than the benefits, and that in any case, these harms would have to be many times greater than the benefits in order for the right to own a gun to be overridden.

2. Preliminary Remarks about Rights

2.1. Assumptions about the Nature of Rights

I begin with some general remarks about the moral framework that I presuppose. I assume that individuals have at least some moral rights that are logically prior to the laws enacted by the state, and that these rights place restrictions on what sort of laws ought to be made. I assume that we may appeal to intuitions to identify some of these rights. An example

¹Nicholas Dixon, "Why We Should Ban Handguns in the United States," *St. Louis University Public Law Review* 12 (1993): 243-83, pp. 283, 244.

is the right to be free from physical violence: intuitively, it is, *ceteris paribus*, wrong for people to do violence to one another, and this limits what sort of laws may, morally, be made—it explains, for instance, why the state ought not to pass a law according to which a randomly chosen person in each district is flogged each week.

I further assume that we normally have a right to do as we wish unless there is a reason why we should not be allowed to do so—and hence that someone who denies our right to act in a particular way has the dialectical burden to provide reasons against the existence of the right in question. In contrast, one who asserts a right need only respond to these alleged reasons.²

What sort of reasons would show that we have no right to engage in a particular activity? Consider three relevant possibilities:

(i) Plausibly, we lack even a *prima facie* right to engage in activities that harm others, treat others as mere means, or use others without their consent. Thus, I have no claim at all (as opposed to having a claim that is outweighed by competing claims) to be allowed to beat up or rob other people.

(ii) Perhaps we lack a *prima facie* right to engage in activities that, even unintentionally, impose high *risks* on others, even if those risks do not eventuate. If my favorite form of recreation involves shooting my gun off in random directions in the neighborhood, even if I am not trying to hit anyone, my would-be right to entertain myself is at least overridden, but perhaps wholly erased, because of the danger to others.

(iii) Perhaps we lack a *prima facie* right to engage in activities that *reasonably appear* to evince an intention to harm or impose unacceptable risks on others. For example, I may not run towards you brandishing a sword, even if I do not in fact intend to hurt you. The principle also explains why we punish people for merely *attempting* or *conspiring* to commit crimes.

There may be other sorts of reasons for excepting an activity from the presumption in favor of liberty. The above list, however, seems to exhaust the reasons that might be relevant to the existence of a right to own a gun. I assume, in particular, that the following sort of consideration would *not* suffice to reject a *prima facie* right to do *A*: that a modest statistical correlation exists between doing *A* and engaging in other, wrongful activities.³ Thus, suppose that people who read the *Communist*

²See Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, 1984), p. 9, on the “presumption in favor of liberty.”

³It may, however, provide grounds for overriding the *prima facie* right to do *A*; see below, §2.2.

Manifesto are slightly more likely than the average person to attempt the violent overthrow of the government. (This might be because such people are more likely to *already* have designs for overthrowing the government, and/or because the reading of the book occasionally *causes* people to acquire such intentions.) I take it that this would not show that there is no *prima facie* right to read the *Communist Manifesto*—though *perhaps* the situation would be otherwise if the reading of the *Manifesto* had a very strong tendency to cause revolutionary efforts, or if the occurrence of this effect did not depend on further free choices on the part of the reader.

2.2. What Sort of Right Is the Right to Own a Gun?

First, I distinguish between *fundamental* and *derivative* rights. A right is derivative when it derives at least some of its weight from its relationship to another, independent right. A right is fundamental when it has some force that is independent of other rights. On these definitions, it is possible for a right to be both fundamental and derivative. Derivative rights are usually related to fundamental rights as means to the protection or enforcement of the latter, though this need not be the only way in which a right may be derivative. I claim that the right to own a gun is both fundamental and derivative; however, it is in its *derivative* aspect—as derived from the right of self-defense—that it is most important.

Second, I distinguish between *absolute* and *prima facie* rights. An absolute right is one with overriding importance, such that no considerations can justify violating it. A *prima facie* right is one that must be given some weight in moral deliberation but that can be overridden by sufficiently important countervailing considerations.⁴ Thus, if it would be permissible to steal for sufficiently important reasons—say, to save someone’s life—then property rights are not absolute but at most *prima facie*. It is doubtful whether any rights are absolute. At any rate, I do not propose any absolute rights; I argue only that there is a strong *prima facie* right to own a gun.

It is important to distinguish cases in which a *prima facie* right is *overridden* from cases in which we have *exceptions* to a generalization about what one has a right to. Speaking metaphorically, the difference is between removing something from the moral scale, and placing something heavier on the opposite side of the scale. To illustrate the distinction: assume that it is morally permissible to kill an aggressor in self-

⁴Compare W.D. Ross’s notion of “*prima facie* duties” in *The Right and the Good* (Indianapolis: Hackett, 1988), pp. 19-20, but note that, contrary to the impression created by the comparison with Ross, as I use the term, a *prima facie* right is a genuine right, albeit of limited weight, not merely something that is *usually* a right.

defense. This might be permissible in virtue of an *exception* to the right to life (the aggressor temporarily loses his right not to be killed by his intended victim), rather than because the aggressor's right to life is overridden. This is plausible since the permissibility of self-defense killing does not depend upon the defender's having either a stronger right to life or a more valuable life than the aggressor.⁵ In contrast, suppose it is permissible to kill an innocent person to save the lives of 1000 others. Plausibly, this is a case of the *overriding* of the first individual's right to life, rather than an exception to his right to life. In the second case but not the first, we would still say that the person killed had his rights violated.

Thus, the sort of reasons discussed in §2.1 for refusing to recognize a *prima facie* right to engage in an activity do not exhaust the possible reasons for not allowing a given activity. If none of the former sort of reasons applies to a given activity, then there is a *prima facie* right to engage in the activity, but that right could still be overridden by countervailing reasons.

2.3. Weighing Rights

The more *weight* a right has, the more serious its violation is and the more difficult it is to override the right. I assume three broad principles about the weighing of rights.

First: *Ceteris paribus*, the weight of a fundamental right increases with the importance of the right to an individual's plans for his own life or other purposes. This is not to say that every action that interferes with an individual's aims is a rights violation, but only that *if* an action violates rights, it does so more seriously as it interferes more with the victim's aims.

On some theories of self-interest, one's purposes may diverge from one's interests.⁶ In such a case, I maintain that the weight of a right should be at least partly determined by the rights-bearer's aims, and not

⁵Compare Judith Jarvis Thomson's objections to the overriding theory in "Self-Defense and Rights," in *Rights, Restitution, and Risk* (Cambridge, Mass.: Harvard University Press, 1986), pp. 42-44. Of the views of self-defense that Thomson discusses, the "factual specification" view is closest to mine; however, rather than saying that one doesn't have a right to life, I prefer to say one has a "ceteris paribus" right to life (other things being equal, it is wrong of others to kill one). The difficulty Thomson raises (pp. 38-39) with specifying all of the exceptions is inconclusive, since *ceteris paribus* clauses are common in philosophical and other principles, and we rarely expect to list all exceptions.

⁶See Derek Parfit's discussion of the Desire-Fulfillment Theory, the Hedonistic Theory, and the Objective List Theory, in *Reasons and Persons* (Oxford: Clarendon Press, 1987), p. 4. The latter two allow for interests that diverge from an individual's purposes.

merely by the rights-bearer's actual interests.⁷ Consider an example to motivate this view: imagine a proposed law forbidding all homosexual relationships. Suppose its proponents argue that the law is at most a trivial rights violation, because homosexual relationships are morally bad, so homosexuals are mistaken in believing that they have a positive interest in such relationships.⁸ Without entering into a debate concerning the value of homosexuality, we can say that intuitively, the proponents' argument is *invalid*: the law would seem to be a *major* restriction of the civil liberties of homosexuals, regardless of whether homosexuality is healthy or virtuous.⁹ This is best explained by the hypothesis that rights function to guard individuals' *autonomy*, that is, their ability to pursue their plans for their own lives, rather than to protect their *interests* as assessed from a third-person point of view.

Second: In the case of a derivative right, the seriousness of its violation is proportional to the importance of the other right that it subserves. Thus, a derivative right that functions to protect the right to life is more important, other things being equal, than one that protects the right to property.

Third: The seriousness of a violation of a derivative right also depends upon how important the derivative right is to the other right that it subserves. For example, censorship of books criticizing the government would be a more serious violation of free speech than censorship of pornographic material, because the ability to publish political criticism is more important to protecting other rights than the ability to publish pornography.

A serious rights violation, then, is not the same thing as a violation of an important right. One might violate an important right but in a trivial way, creating an only moderately serious rights violation. The most serious rights violations will be those that are *major* violations of *important* rights.

⁷This contrasts with the view suggested by Todd Hughes and Lester Hunt, "The Liberal Basis of the Right to Bear Arms," *Public Affairs Quarterly* 14 (2000): 1-25, p. 7: "Suppose that the strength of the grounds for recognizing a right are proportionate to the importance of the human interests protected by it." But note that the argument they make in that passage succeeds equally well on my conception of rights.

⁸This inference is questionable: perhaps a person can have an interest in something that is morally bad. But suppose the proponents argue that this is not the case here, perhaps because one has an overriding interest in being virtuous.

⁹The point of the example may be obscured by one's disbelief in the anti-homosexuals' premise. But one can find examples of couples (whether homosexual or heterosexual) whose relationships are emotionally harmful to themselves, and I take it that even in such cases, forcible interference with such relationships would be a nontrivial rights violation.

3. Is There a Prima Facie Right to Own a Gun?

Given the presumption in favor of liberty, there is at least a prima facie right to own a gun, unless there are positive grounds of the sort discussed in §2.1 for denying such a right. Are there such grounds?

(i) Begin with the principle that one lacks a right to do things that harm others, treat others as mere means, or use others without their consent. It is difficult to see how owning a gun could itself be said to do any of those things, even though owning a gun makes it easier for one to do those things if one chooses to. But we do not normally prohibit activities that merely *make it easier* for one to perform a wrong but require a separate decision to perform the wrongful act.

(ii) Consider the principle that one lacks a right to do things that impose unacceptable, though unintended, risks on others. Since life is replete with risks, to be plausible, the principle must use some notion of *excessive* risks. But the risks associated with normal ownership and recreational use of firearms are minimal. While approximately 77 million Americans now own guns,¹⁰ the accidental death rate for firearms has fallen dramatically during the last century, and is now about .3 per 100,000 population. For comparison, the average citizen is nineteen times more likely to die as a result of an accidental fall, and fifty times more likely to die in an automobile accident, than to die as a result of a firearms accident.¹¹

(iii) Some may think that the firearms accident statistics miss the point: the real risk that gun ownership imposes on others is the risk that the gun owner or someone else will “lose control” during an argument and decide to shoot his opponent. Nicholas Dixon argues: “In 1990, 34.5% of all murders resulted from domestic or other kinds of argument. Since we are all capable of heated arguments, we are all, in the wrong circumstances, capable of losing control and killing our opponent.”¹² In

¹⁰Surveys indicate that about half of American men and a quarter of women own guns. See Harry Henderson, *Gun Control* (New York: Facts on File, 2000), p. 231; John Lott, *More Guns, Less Crime*, 2nd ed. (Chicago: University of Chicago Press, 2000), pp. 37, 41.

¹¹National Safety Council, *Injury Facts, 1999 Edition* (Itasca, Ill.: National Safety Council, 1999), pp. 8-9, 44-45; National Safety Council, “Odds of Death Due to Injury, United States, 1998” (URL: <http://www.nsc.org/lrs/statinfo/odds.htm>, accessed 22 May 2002). This is overlooking the fact that most of these accidental deaths would presumably happen to the gun owner himself; if we counted only accidental deaths of others, the rate would presumably be much lower.

¹²Dixon, “Why We Should Ban Handguns,” p. 266. Similarly, Jeff McMahan (unpublished comments on this paper, 7 January 2002) writes that “most [murders] occur when a perfectly ordinary person is pushed over a certain emotional threshold by an unusual concatenation of events.”

response, we should first note the invalidity of Dixon's argument. Suppose that 34.5% of people who run a 4-minute mile have black hair, and that I have black hair. It does not follow that I am capable of running a 4-minute mile. It seems likely that only very atypical individuals would respond to heated arguments by killing their opponents. Second, Dixon's and McMahan's claims are refuted by the empirical evidence. In the largest seventy-five counties in the United States in 1988, over 89% of adult murderers had prior criminal records as adults.¹³ This reinforces the common sense view that normal people are extremely unlikely to commit a murder, even if they have the means available. So gun ownership does not typically impose excessive risks on others.

(iv) Consider the idea that individuals lack a right to engage in activities that reasonably appear to evince an intention to harm or impose unacceptable risks on others. This principle does not apply here, as it is acknowledged on all sides that only a tiny fraction of America's 77 million gun owners plan to commit crimes with guns.

(v) It might be argued that the *total social cost* of private gun ownership is significant, that the state is unable to identify in advance those persons who are going to misuse their weapons, and that the state's only viable method of significantly reducing that social cost is therefore to prevent even noncriminal citizens from owning guns. But this is not an argument against the existence of a *prima facie* right to own a gun. It is just an argument for overriding any such right. In general, the fact that restricting an activity has beneficial consequences does not show that no weight at all should be assigned to the freedom to engage in it; it simply shows that there are competing reasons against allowing the activity. (Compare: suppose that taking my car from me and giving it to you increases total social welfare. It would not follow that I have no claim at all on my car.)

It is difficult to deny the existence of at least a *prima facie* right to own a gun. But this says nothing about the *strength* of this right, nor about the grounds there may be for overriding it. Most gun control advocates would claim, not that there is not even a *prima facie* right to own a gun, but that the right is a minor one, and that the harms of private gun ownership, in comparison, are very large.

¹³Lott, *More Guns*, p. 8; U.S. Department of Justice, "Bureau of Justice Statistics Special Reports: Murder in Large Urban Counties, 1988" (Washington, D.C.: U.S. Government Printing Office, 1993); U.S. Department of Justice, "Bureau of Justice Statistics Special Reports: Murder in Families" (Washington, D.C.: U.S. Government Printing Office, 1994).

4. Is the Right to Own a Gun Significant?

I shall confine my consideration of gun control to the proposal to ban all private firearms ownership.¹⁴ This would violate the prima facie right to own a gun. I contend that the rights violation would be very serious, owing both to the importance of gun ownership in the lives of firearms enthusiasts, and to the relationship between the right to own a gun and the right of self-defense.

4.1. *The Recreational Value of Guns*

The recreational uses of guns include target shooting, various sorts of shooting competitions, and hunting. In debates over gun control, participants almost never attach any weight to this recreational value¹⁵—perhaps because that value initially appears minor compared with the deaths caused or prevented by guns. The insistence that individuals have a right to engage in their chosen forms of recreation may seem frivolous in this context. But it is not. Consider two forms that the charge of frivolousness might take.

First: One might think life is *lexically superior to* (roughly, of infinitely greater value than) recreation, such that no amount of recreational value could counterbalance even one premature death.¹⁶ This cannot be

¹⁴Feinberg (*Harm to Others*, pp. 193-98) discusses licensing schemes as an alternative to blanket prohibitions or blanket allowances of risky activities such as gun ownership. Space limitations prevent detailed discussion of this and other moderate gun control proposals. To allay concerns (see Andrew Herz, “Gun Crazy,” *Boston University Law Review* 75 [1995]: 57-153, p. 89 n. 126) that the position I attack may be a straw man, note that some gun control advocates have openly supported a general firearms ban or similar measures, such as a handgun ban (see Marvin Wolfgang, “A Tribute to a View I Have Opposed,” *Journal of Criminal Law and Criminology* 86 [1995]: 188-92, p. 188; Dixon, “Why We Should Ban Handguns”; Nicholas Dixon, “Perilous Protection: A Reply to Kopel,” *St. Louis University Public Law Review* 12 [1993]: 361-91; Deborah Prothrow-Stith and Michaele Weissman, *Deadly Consequences* [New York: Harper-Collins, 1991], p. 198), and polls have indicated about 20% popular support for a complete firearms ban (Henderson, *Gun Control*, p. 246). Moreover, examining this proposal will enable us to develop the theoretical framework needed for evaluating less extreme forms of gun control.

¹⁵See, for example, the Dixon-Kopel exchange (Dixon, “Why We Should Ban Handguns” and “Perilous Protection”; David Kopel, “Peril or Protection? The Risks and Benefits of Handgun Prohibition,” *St. Louis University Public Law Review* 12 [1993]: 285-359), in which Dixon early on dismisses this value as “trivial,” and neither party mentions it again, although Kopel’s reply is otherwise very thorough.

There are ethical issues concerning hunting, which we cannot address here. But it may be worth observing in passing that any ethical objections to hunting would be weaker than those that apply to the alternative means (factory farming) by which humans usually obtain meat.

¹⁶To be lexically superior to x is to rank above x in a lexical ordering of goods. Carl

taken to imply that risks to life should never be accepted, since it is impossible to eliminate all such risks. Instead, I will assume that those who affirm the infinite value of life would favor maximizing life expectancy.¹⁷

This position is implausible, since recreation is a major source of enjoyment, and enjoyment is (at least) a major part of what gives life value. Consider the range of activities whose primary value is recreational or, more broadly, pleasure-enhancing: nonreproductive sexual activity, reading fiction, watching television or movies, talking with friends, listening to music, eating dessert, going out to eat, playing games, and so on. Would it be rational to give up all those activities if by doing so one could increase one's life expectancy by, say, five minutes? Or suppose that a drive to the park slightly reduces one's life expectancy (due to the risks of traffic accidents, passing criminals, airborne germs, and so on). Would it be irrational to make the trip—no matter how much one enjoys the park?

Second, and more plausibly: one might claim that the value of the lives that could be saved by anti-gun laws is simply *much greater* than the recreational value of firearms. It is not obvious that this is correct, *even if* gun control would significantly reduce annual gun-related deaths. Many gun owners appear to derive enormous satisfaction from the recreational use of firearms, and it is no exaggeration to say that for many, recreational shooting is a way of life.¹⁸ Furthermore, there are a great many gun owners. At a rough estimate, the number of gun owners is two thousand times greater than the number of annual firearms-related deaths.¹⁹ Even if we assume optimistically that a substantial proportion

Bakal (*The Right to Bear Arms* [New York: McGraw-Hill, 1966], p. 340), discussing gun control, seems to endorse this view. The idea is more commonly associated with religious figures. For example, Rabbi Moshe Tendler (quoted in Edward Keyserlingk, *Sanctity of Life or Quality of Life* [Law Reform Commission of Canada, 1982], p. 21) explicitly posits the "infinite" value, in general, of any part of a life.

¹⁷I assume that those who argue that a life is superior to any amount of recreation would also say an *increment* in the length of a life is superior to any amount of recreation. Otherwise, the lexical superiority of life would be irrelevant to the gun debate—gun violence does not prevent any individual from having a life, but only *shortens* existing lives.

¹⁸It is difficult to find scientific information corroborating this, though anecdotal reports of the centrality of firearms in enthusiasts' lives are readily available (e.g., Abigail Kohn, "Their Aim Is True: Taking Stock of America's Gun Culture," *Reason* [May 2001]: 26-32). Even gun control advocates have remarked upon America's "gun culture" or "love of guns" (e.g., Michael Bellesiles, *Arming America: The Origins of a National Gun Culture* [New York: Alfred A. Knopf, 2000], pp. 3-9).

¹⁹Annual firearms deaths in America, including suicides, are close to 35,000 (Henderson, *Gun Control*, p. 225). Approximately 77 million Americans own guns (*ibid.*, p. 231; Lott, *More Guns*, pp. 37, 41), though most are probably not enthusiasts. This gives a 2200:1 ratio. 46% of gun-owners surveyed report hunting or recreation as their main reason for keeping a gun (Henderson, *Gun Control*, p. 234).

of recreational gun users could and would substitute other forms of recreation, we should conclude that the net utility of gun control legislation is greatly overestimated by those who discount the recreational value of guns. For obvious reasons, the utility resulting from recreational use of firearms is not easy to quantify, nor to compare with the value of the lives lost to firearms violence. Yet this is no reason for ignoring the former, as partisans in the gun control debate often do.

But our present concern is not chiefly utilitarian. The argument here is that gun enthusiasts' *prima facie* right to own guns is significant in virtue of the central place that such ownership plays in their chosen lifestyle. A prohibition on firearms ownership would constitute a major interference in their plans for their own lives. On the criteria given in §2.3, this suffices to show that such a prohibition would be a serious rights violation.

4.2. *The Right of Self-Defense*

The main argument on the gun rights side goes like this:

1. The right of self-defense is an important right.
2. A firearms prohibition would be a significant violation of the right of self-defense.
3. Therefore, a firearms prohibition would be a serious rights violation.

The strength of the conclusion depends upon the strength of the premises: the more important the right of self-defense is, and the more serious gun control is as a violation of that right, the more serious a rights violation gun control is.

I begin by arguing that the right of self-defense is extremely weighty. Consider this scenario:

Example 1: A killer breaks into a house, where two people—"the victim" and "the accomplice"—are staying. (The "accomplice" need have no prior interaction with the killer.) As the killer enters the bedroom where the victim is hiding, the accomplice enters through another door and proceeds, for some reason, to hold the victim down while the killer stabs him to death.

In this scenario, the killer commits what may be the most serious kind of rights violation possible. What about the accomplice who holds the victim down? Most would agree that his crime is, if not equivalent to murder, something close to murder in degree of wrongness, even though he neither kills nor injures the victim. Considered merely as the act of holding someone down for a few moments, the accomplice's action

seems a minor rights violation. What makes it so wrong is that it prevents the victim from either defending himself or fleeing from the killer—that is, it violates the right of self-defense. (To intentionally and forcibly prevent a person from exercising a right is to violate that right.) We may also say that the accomplice's crime was that of assisting in the commission of a murder—this is not, in my view, a competing explanation of the wrongness of his action, but rather an elaboration on the first explanation. Since the right of self-defense is a derivative right, serving to protect the right to life among other rights, violations of the right of self-defense will often cause or enable violations of the right to life.

It is common to distinguish *killing* from *letting die*. In this example, we see a third category of action: *preventing the prevention of a death*. This is distinct from killing, but it is not merely letting die, because it requires positive action. The example suggests that preventing the prevention of a death is about as serious a wrong as killing. In any case, the fact that serious violations of the right of self-defense are morally comparable to murder serves to show that the right of self-defense must be a very weighty right.

The intuition of the extreme wrongness of the accomplice's act is supported by the criteria for the seriousness of rights violations suggested in §2.3. First, the right to life is of foremost importance to individuals' ability to carry out their plans for their own lives. Second, the right of self-defense is very important to protecting individuals' right to life. Third, holding down a person who is being stabbed is extremely serious as a violation of the right of self-defense.

We turn to premise 2, that gun prohibition is serious as a violation of the right of self-defense. Consider:

Example 2: As in example 1, except that the victim has a gun by the bed, which he would, if able, use to defend himself from the killer. As the killer enters the bedroom, the victim reaches for the gun. The accomplice grabs the gun and runs away, with the result that the killer then stabs his victim to death.

The accomplice's action in this case seems morally comparable to his action in example 1. Again, he has intentionally prevented the victim from defending himself, thereby in effect assisting in the murder. The arguments from the criteria for the seriousness of rights violations are the same.

The analogy between the accomplice's action in this case and a general firearms prohibition should be clear. A firearms ban would require confiscating the weapons that many individuals keep for self-defense

purposes,²⁰ with the result that some of those individuals would be murdered, robbed, raped, or seriously injured. If the accomplice's action in example 2 is a major violation of the right of self-defense, then gun prohibition seems to be about equally serious as a violation of the right of self-defense.

Consider some objections to this analogy. First, it might be said that in the case of a gun ban, the government would have strong reasons for confiscating the guns, in order to save the lives of others, which (we presume) is not true of the accomplice in example 2. This, I think, would amount to arguing that the self-defense rights of noncriminal gun owners are overridden by the state's need to protect society from criminal gun owners. I deal with this suggestion in §5 below.

Second, it might be argued that example 2 differs from a gun ban in that the murder is *imminent* at the time the accomplice takes the gun away. But this seems to be morally irrelevant. For suppose that the accomplice, knowing that someone is coming to kill the victim tomorrow (while the victim does not know this), decides to take the victim's gun away from him today, again resulting in his death. This would not make the accomplice's action more morally defensible than it is in example 2.

A third difference might be that, whereas we assume that in example 2 the accomplice knows that the victim is going to be killed or seriously injured, the state does not know that its anti-gun policy will result in murders and injuries to former gun owners. This, however, is surely not true. Although the state may claim that the lives saved by a gun ban would *outnumber* the lives cost, one cannot argue that no lives will be cost at all, unless one claims implausibly that guns are never used in self-defense against life-threatening attacks. Some will think the former claim is all that is needed to justify a gun ban; this would return us to the first objection.

Fourth, it may be observed that in example 2, there is a specific, identifiable victim: the accomplice knows who is going to die as a result of his gun confiscation. In contrast, a gun-banning government cannot identify any specific individuals who are going to be killed as a result of its gun ban, even though it can predict that *some* people will be. But this seems morally irrelevant. Consider:

Example 3: An "accomplice" ties up a family of five somewhere in the wilderness where he knows that wolves roam. He has good reason to be-

²⁰An alternative proposal would ban only the sale of new firearms, hoping for the supply to dry out over a period of decades. This, in my view, would still violate the rights of the individuals who wished to acquire firearms and would also have a much lower expected impact on criminal gun use. In any case, for the sake of simplicity, I consider only the confiscatory proposal.

lieve that a pack of wolves will happen by and eat one or two of the family members (after which they will be satiated), but he doesn't know which ones will be eaten. He leaves them for an hour, during which time the mother of the family is eaten by the wolves.

In this case, the fact that the accomplice did not know who would die as a result of his action does not mitigate his guilt. Likewise, it is unclear how the state's inability to predict who will become the victims of its anti-gun policy would mitigate the state's responsibility for their deaths or injury.

Fifth, the victims of a gun ban would presumably have sufficient forewarning of the coming ban to take alternative measures to protect themselves, unlike the victim in example 2. Unfortunately, statistics from the National Crime Victimization Survey indicate that such alternative means of self-protection would be relatively ineffective—individuals who defend themselves with a gun are less likely to be injured and far less likely to have the crime completed against them than are persons who take any other measures.²¹ Consequently, though the present consideration seems to mitigate the state's culpability, it does not remove it. The situation is analogous to one in which the accomplice, rather than taking away the victim's only means of defending himself against the killer, merely takes away the victim's *most effective* means of self-defense, with the result that the victim is killed. Here, the accomplice's action is less wrong than in example 2, but it is still very wrong.

Since gun prohibition is a significant violation of an extremely weighty right, we must conclude that it is a very serious rights violation. The above examples initially suggest that it is on a par with the commission of (multiple) murders, robberies, rapes, and assaults—although the consideration of the preceding paragraph may show that it is somewhat less wrong than that. The point here is not that would-be gun banners are as blameworthy as murderers and other violent criminals (since the former do not *know* that their proposals are morally comparable to murder and have different motives from typical murderers). The point is just to assess the strength of the reasons against taking the course of action that they propose.

5. Are Gun Rights Overridden?

I have argued that there is a strong *prima facie* right to own a gun. Nev-

²¹Gary Kleck, *Targeting Guns: Firearms and Their Control* (New York: Aldine de Gruyter, 1997), pp. 170-74, 190; Lawrence Southwick, "Self-Defense with Guns: The Consequences," *Journal of Criminal Justice* 28 (2000): 351-70.

ertheless, firearms prohibition might be justified, if the reasons for prohibition were strong enough to override that right. To determine whether this is the case, we consider three questions: First, how great are the harms of private gun ownership? Second, how great are the benefits? Third, what must the cost/benefit ratio be like, for the right to own a gun to be overridden? I shall argue, first, that the harms of private gun ownership have been greatly exaggerated; second, that the benefits of private gun ownership are large and in fact greater than the harms; and third, that the harms would have to be many times greater than the benefits in order to override the right to own a gun.

There is a vast empirical literature concerning the effects of gun ownership and gun control. Here we can only overview a few of the most prominent arguments deriving from that literature.

5.1. *The Case against Guns*

5.1.1. *The 43-to-1 Statistic.* One prominent argument claims that a gun kept in the home is 43 times more likely to be used in a suicide, criminal homicide, or accidental death than it is to kill an intruder in self-defense.²² This statistic is commonly repeated with various modifications; for instance, LaFollette mischaracterizes the statistic as follows:

For every case where someone in a gun-owning household uses a gun to successfully stop a life-threatening attack, nearly forty-three people in similar households will die from a gunshot.²³

The problem with LaFollette's characterization, which evinces the statistic's tendency to mislead, is that Kellerman and Reay made no estimate of the frequency with which guns are used to stop attacks, life-threatening or otherwise; they only considered cases in which someone was killed.²⁴ Survey data indicate that only a tiny minority of defensive gun uses involve shooting, let alone killing, the criminal; normally, threatening a criminal with a gun is sufficient. To assess the benefits of guns, one would have to examine the frequency with which guns prevent crimes, rather than the frequency with which they kill criminals.²⁵

²²Arthur Kellerman and Donald Reay, "Protection or Peril? An Analysis of Firearm-Related Deaths in the Home," *New England Journal of Medicine* 314 (1986): 1557-60.

²³Hugh LaFollette, "Gun Control," *Ethics* 110 (2000): 263-81, p. 276 (emphasis added). Dixon ("Why We Should Ban Handguns," p. 276) misquotes the statistic as 53 rather than 43; however, to his credit, Dixon admits that the figure is inflated and says that a figure of 2.94 should be substituted.

²⁴Kellerman and Reay, "Protection or Peril?" p. 1559.

²⁵Kleck, *Targeting Guns*, pp. 162-4, 178. Kleck estimates that about 1% of defensive gun uses involve shooting, and one in a thousand involve killing, the criminal, though these figures appear speculative. Kopel ("Peril or Protection?" p. 343) estimates that at

A second problem is that 37 of Kellerman and Reay's 43 deaths were suicides. Available evidence is unclear on whether reduced availability of guns would reduce the suicide rate or whether it would only result in substitution into different methods.²⁶ In addition, philosophically, it is doubtful that the restriction of gun ownership for the purpose of preventing suicides would fall within the prerogatives of a liberal state, even if such a policy would be effective. One cause for doubt is that such policies infringe upon the rights of gun owners (both the suicidal ones and the nonsuicidal majority) without protecting anyone else's rights.²⁷ Another cause for doubt, from a utilitarian perspective, is that one cannot assume that individuals who decide to kill themselves have overall happy or pleasant lives; therefore, one should not assume that the prevention of suicide, through means other than improving would-be victims' level of happiness, increases utility, rather than decreasing it. For these reasons, the suicides should be omitted from the figures.

A third problem is that Kellerman and Reay only counted as "self-defense" cases that were so labeled by the police and the local prosecutor's office; they ignored the possibility of cases that were later found in court to be self-defense. The latter kind of self-defense cases were probably more numerous.²⁸

5.1.2. International Comparisons. A second type of argument often used by gun-control proponents relies on comparisons of homicide rates between the United States and other industrialized democracies, such as Canada, Great Britain, Sweden, and Australia. The United States is found to have vastly higher homicide rates, and it is argued that this is due largely to the high gun-ownership rates in the U.S.²⁹

Skeptics suggest that the United States has a number of unique cultural factors that influence the murder rate and that invalidate such cross-country comparisons.³⁰ Some find this claim more plausible than do oth-

most 1% of defensive gun uses result in a fatality.

²⁶Kleck, *Targeting Guns*, pp. 269-92.

²⁷Hughes and Hunt ("Liberal Basis," pp. 13-14) make this argument.

²⁸Kopel ("Peril or Protection?" p. 342) cites cases discussed by *Time* magazine (17 July 1989; 14 May 1990) implying that perhaps three-quarters of self-defense cases are not initially labeled as such by the police and prosecutors.

²⁹Dixon, "Why We Should Ban Handguns," pp. 248-53; LaFollette, "Gun Control," p. 275; J.H. Sloan, A.L. Kellermann, D.T. Reay, J.A. Ferris, T. Koepsell, F.P. Rivara, C. Rice, L. Gray, and J. LoGerfo, "Handgun Regulations, Crime, Assaults, and Homicide: A Tale of Two Cities," *New England Journal of Medicine* 319 (1988): 1256-62 (though Sloan compares only two cities). But note that the correlation is sensitive to which countries one chooses for comparison (see Edgar Suter, "Guns in the Medical Literature—A Failure of Peer Review," *Journal of the Medical Association of Georgia* 83 [1994]: 133-48, p. 142).

³⁰David Kopel, *The Samurai, The Mountie, and the Cowboy: Should America Adopt*

ers. Fortunately, we need not rely on intuitions. Instead, we can test the claim empirically, by examining data within the United States, across jurisdictions with varying gun laws and gun ownership rates and over time periods with changing gun laws and gun ownership rates—this would effectively control for the cultural factors allegedly affecting the murder rate. When we do this, we find that (i) jurisdictions with stricter gun laws tend to have higher crime rates, (ii) shifts to more permissive gun laws tend to be followed by drops in crime rates, (iii) areas with higher gun ownership rates have lower crime rates, and (iv) historically, crime rates have fluctuated with no discernible pattern as the civilian gun stock has increased drastically.³¹

I do not claim to have *proved* that gun laws cause increased crime or that civilian gun ownership fails to do so. Nor do I deny that there is any evidence on the gun control advocates' side. What I am claiming at this point is that the evidence presented by gun control advocates fails to make a very convincing case for the net harmfulness of private gun ownership. The casual comparisons between countries discussed here typically use only a handful of data points, exclude many countries from consideration, and make no attempt to control statistically for any other factors that might affect crime rates. In contrast, far more rigorous studies are available to the other side, as we shall see presently. Thus, at a minimum, one cannot claim justified belief that gun prohibition would be beneficial overall.

5.2. *The Benefits of Guns*

5.2.1. *Frequency of Defensive Gun Uses.* Guns are used surprisingly often by private citizens in the United States for self-defense purposes. Fifteen surveys, excluding the one discussed in the following paragraph, have been conducted since 1976, yielding estimates of between 760,000 and 3.6 million defensive gun uses per year, the average estimate being 1.8 million.³² Probably among the more reliable is Kleck and Gertz's 1993 national survey, which obtained an estimate of 2.5 million annual defensive gun uses, excluding military and police uses and excluding uses against animals. Gun users in 400,000 of these cases believe that the

the Gun Controls of Other Democracies? (Buffalo, N.Y.: Prometheus, 1992); summarized in Kopel, "Peril or Protection?" pp. 304-7.

³¹On (i) and (ii), see §5.2.1 below and Kopel, "Peril or Protection?" p. 308. On (iii), see Lott, *More Guns*, p. 114. Lott's figures for the correlation between gun ownership and crime rates include controls for arrest rates, income, population density, and other variables. On (iv), see Don Kates, Henry Schaffer, John Lattimer, George Murray, and Edwin Cassem, "Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?" *Tennessee Law Review* 62 (1995): 513-96, pp. 571-74.

³²Kleck, *Targeting Guns*, pp. 149-52, 187-88.

gun certainly or almost certainly saved a life.³³ While survey respondents almost certainly overestimated their danger,³⁴ if even one tenth of them were correct, the number of lives saved by guns each year would exceed the number of gun homicides and suicides. For the purposes of Kleck and Gertz's study, a "defensive gun use" requires respondents to have actually seen a person (as opposed, for example, to merely hearing a suspicious noise in the yard) whom they believed was committing or attempting to commit a crime against them, and to have at a minimum threatened the person with a gun, but not necessarily to have fired the gun. Kleck's statistics imply that defensive gun uses outnumber crimes committed with guns by a ratio of about 3:1.³⁵ While Kleck's statistics could be an overestimate, one should bear three points in mind before relying on such a hypothesis to discount the defensive value of guns. First, Kleck's figures would have to be very large overestimates in order for the harms of guns to exceed their benefits. Second, one would have to suppose that all fifteen of the surveys alluded to have contained overestimates. Third, it is not clear *prima facie* that an overestimate is more likely than an underestimate; perhaps some respondents either invent or misdescribe incidents, but perhaps also some respondents either forget or prefer not to discuss their defensive gun uses with a stranger on the telephone.³⁶

³³Gary Kleck and Marc Gertz, "Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun," *Journal of Criminal Law and Criminology* 86 (1995): 150-87; discussed at greater length in Kleck, *Targeting Guns*. Some indication of the study's rigor is given by the reaction of Wolfgang, who describes himself as "as strong a gun-control advocate as can be found among the criminologists in this country" ("Tribute," p. 188) but goes on to admit, "Nonetheless, the methodological soundness of the current Kleck and Gertz study is clear. I cannot further debate it" (p. 191).

³⁴In 1993, the year of the Kleck-Gertz study, only about 25,000 murders occurred (U.S. Federal Bureau of Investigation, *Crime in the United States 1995: Uniform Crime Reports* [Washington, D.C.: U.S. Government Printing Office, 1996; URL: <http://www.fbi.gov/ucr/95cius.htm>], pp. 14-15). It is implausible that the number of murders averted by the presence of guns could so greatly exceed the number of murders actually committed, even if we grant that individuals who are at greater risk of murder attempts are disproportionately likely to own guns.

³⁵Kleck, *Targeting Guns*, pp. 159-60. But note that the figures assumed for the frequency of gun crimes rely on the National Crime Victimization Survey and the FBI's Uniform Crime Reports, which may greatly underestimate non-homicide crimes, due to under-reporting on the part of victims.

³⁶David Hemenway ("Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates," *Journal of Criminal Law and Criminology* 87 [1997]: 1430-45) and Philip J. Cook, Jens Ludwig, and David Hemenway ("The Gun Debate's New Mythical Number: How Many Defensive Uses Per Year?" *Journal of Policy Analysis and Management* 16 [1997]: 463-69) have argued that all the surveys contain extreme overestimates, perhaps as high as 30-to-1 overestimates. Cook and Ludwig's skepticism about the utility of surveys for estimating defensive gun use frequency arose after a survey they worked on returned results corroborating Kleck's (Cook et al., "Gun Debate," pp. 464-

One survey, the National Crime Victimization Survey, obtained an estimate an order of magnitude below the others. The NCVS statistics imply something in the neighborhood of 100,000 defensive gun uses per year.³⁷ Though even this number would establish a significant self-defense value of guns, the NCVS numbers are probably a radical underestimate, given their extreme divergence from all other estimates. Kleck describes the methodological flaws of the NCVS,³⁸ one of the more serious being that the NCVS is a nonanonymous survey (respondents provide their addresses and telephone numbers) that the respondents know to be sponsored by the U.S. Justice Department. Respondents may hesitate to nonanonymously report their defensive gun uses to employees of the law enforcement branch of the federal government, particularly if they believe there is any chance that they might be accused of doing anything illegal. In addition, respondents are not asked specifically about defensive gun uses, but are merely invited in a general way to describe anything they did for self-protection. And respondents are not asked about self-protective actions unless they have previously answered affirmatively to the crime victimization questions, and it is known that the NCVS drastically underestimates at least domestic violence incidents; only 22% of domestic assaults appearing in police records (which may themselves be incomplete) were mentioned by respondents to the survey.³⁹

5.2.2. *The Benefits of Concealed Weapons.* In the United States, some states prohibit the carrying of concealed weapons. Others have “discretionary” permit laws, meaning that local officials may, at their discretion, issue permits to carry concealed weapons to citizens who apply for such permits (in such states, officials commonly restrict permits to citizens with special circumstances, such as jobs that require them to carry large sums of money). Others have “nondiscretionary” or “shall-issue” laws, which require officials to issue permits to all applicants who meet speci-

65). See Gary Kleck, “Degrading Scientific Standards to Get the Defensive Gun Use Estimate Down,” *Journal on Firearms and Public Policy* 11 (1999): 77-137, for replies to their objections.

³⁷Cook et al., “Gun Debate,” p. 468. Analysis of data from earlier years appears in David McDowall and Brian Wiersema, “The Incidence of Defensive Firearm Use by U.S. Crime Victims, 1987 through 1990,” *American Journal of Public Health* 84 (1994): 1982-84; Gary Kleck, “Crime Control through Private Use of Armed Force,” *Social Problems* 35 (1988): 1-21, p. 9; and Philip J. Cook, “The Technology of Personal Violence,” in *Crime and Justice: A Review of Research*, vol. 14, ed. Michael Tonry (Chicago: University of Chicago Press, 1991), pp. 54-56.

³⁸Kleck, *Targeting Guns*, pp. 152-54.

³⁹See McDowall and Wiersema (“Incidence,” p. 1983), though they do not think this fact prevents us from relying on the NCVS.

fied, objective conditions (these conditions may include absence of a criminal record, payment of a fee, some minimum age, and/or completion of a firearms safety course). Shall-issue laws result in many more permits being issued. Finally, the state of Vermont allows the carrying of concealed weapons with no need for a permit. Several discretionary states converted to nondiscretionary laws during the 1980s and 1990s.

John Lott and David Mustard conducted a study, probably the most rigorous and comprehensive study in the gun control literature, on the effects of nondiscretionary laws on crime rates.⁴⁰ Lott's study uses time-series and cross-sectional data for all 3,054 counties in the United States from 1977 to 1992. Overall, states with shall-issue laws have a violent crime rate just over half (55%) of the rate in other states.⁴¹ This alone does not establish that the more restrictive gun laws are a *cause* of the dramatically higher violent crime rates in the states that have them, since the correlation could be explained by the hypothesis that states that already have higher crime rates are more likely to pass restrictive gun laws. The latter hypothesis, however, would not explain why violent crime rates fell after states adopted shall-issue concealed carry laws.⁴² After performing a multiple-regression analysis to control for numerous other variables—such as arrest and conviction rates, prison sentence lengths, population density, income levels, and racial and gender makeup of counties—Lott found that upon the adoption of shall-issue laws, murder rates declined immediately by about 8%, rapes by 5%, and aggravated assaults by 7%, with declines continuing in subsequent years (Lott explains the latter fact by the gradually increasing numbers of individuals obtaining permits).⁴³

Gun control proponents may find these statistics theoretically surprising: increasing the availability of one important means of committing violent crimes, they believe, should increase the violent crime rate.⁴⁴ But an alternative theory gives the opposite prediction: Increased availability of guns to citizens, including the ability to carry concealed weapons, increases the risks to would-be criminals of experiencing undesired consequences as a result of attempting a violent crime. These consequences include being shot, being detained by the would-be victim until the police arrive, and simply being unable to complete the crime. Thus, other

⁴⁰John Lott and David Mustard, "Crime, Deterrence, and Right-to-Carry Concealed Handguns," *Journal of Legal Studies* 26 (1997): 1-68; discussed at greater length in Lott, *More Guns*.

⁴¹Lott, *More Guns*, p. 46.

⁴²*Ibid.*, pp. 70-81.

⁴³*Ibid.*, pp. 51, 73; see pp. 122-58 for discussion of several objections raised by gun control proponents.

⁴⁴LaFollette, "Gun Control," pp. 273-74.

things being equal, increased availability of guns to the general public should result in decreased violent crime.

Lott's study strongly corroborates this theory. But even before considering statistical evidence, the theory is more plausible than that offered by gun control supporters. Gun control laws tend to influence the behavior of would-be crime victims much more than the behavior of criminals. Those who are willing to commit violent felonies are much more likely than the average citizen to be willing to commit misdemeanors such as carrying a concealed weapon without a permit. They are also more likely to have black market contacts capable of supplying them with illegal weapons.⁴⁵ Thus, laws that prohibit or place obstacles in the way of carrying concealed weapons, or owning weapons at all, are likely to cause a much greater reduction in the proportion of armed victims than in the proportion of armed criminals. Furthermore, one can guess that the possibility of encountering an armed victim probably has a greater effect on would-be criminals, with respect to deterring violent crimes, than would a moderate increase in the difficulty of obtaining a gun to assist in crimes, since the feared consequences of attacking an armed victim are extremely serious, whereas increased difficulty in obtaining a gun is a relatively small impediment to committing a violent crime, particularly if one can choose a victim who is physically weaker than oneself and unarmed, or if one has black market contacts. This argument is inconclusive, since it could be that very few noncriminals would carry guns for self-protection even if allowed to, in which case the risk to criminals of encountering armed victims would still be a minor factor. But in fact, a great many noncriminal Americans presently own guns, and approximately 9% of Americans surveyed admit to carrying a gun for self-protection outside the home.⁴⁶ Accordingly, criminals surveyed report being more afraid of encountering armed victims than they are of encountering the police.⁴⁷

For these reasons, one should not be surprised that the effect of stricter gun laws of reducing a deterrent to violent crime should pre-

⁴⁵Given the estimated 230 million privately owned guns the United States (Kleck, *Targeting Guns*, pp. 63-70, 96-97), a large black market can be anticipated in the event of a gun ban. Relatedly, Kopel ("Peril or Protection?" p. 319) observes that both alcohol and drug prohibition resulted in large black markets in these commodities and did not make it very difficult for citizens to obtain them.

⁴⁶Kleck, *Targeting Guns*, pp. 205-6, 213. The statistic includes all respondents who report carrying a gun at least once during the previous year, including "carrying" in a vehicle. On average, gun carriers reported having carried guns 140 days a year. Restrictive concealed-carry laws probably prevent many others from carrying their guns in public places.

⁴⁷James Wright and Peter Rossi, *Armed and Considered Dangerous: A Survey of Felons and Their Firearms* (Hawthorne, N.Y.: Aldine de Gruyter, 1986), pp. 144-46.

dominate over their effect of making it harder to obtain tools for assisting in such crimes.

5.3. Why a Gun Ban Must Have Much Greater Benefits than Harms to Be Justified

In order to be justified as a case of the overriding of prima facie rights, gun prohibition would have to save many times as many lives as it cost, for:

1. It is wrong to murder a person, even to prevent several other killings. (premise)
2. A violation of a person or group's right of self-defense, predictably resulting in the death of one of the victims, is morally comparable to murder. (premise)
3. If it is wrong to commit a murder to prevent several killings, then it is wrong to commit a rights violation comparable to murder to prevent several killings. (premise)
4. Therefore, it is wrong to violate a person or group's right of self-defense, predictably resulting in the death of one of the victims, even to prevent several killings. (from 1, 2, 3)
5. Therefore, it is wrong to violate a group of people's right of self-defense, predictably resulting in the deaths of many of the victims, even to prevent several times as many killings. (from 4)
6. Gun prohibition would violate a group of people's right of self-defense, predictably resulting in the deaths of many of the victims. (premise)
7. Therefore, gun prohibition is wrong, even if it would prevent several times as many killings as it contributed to. (from 5, 6)

Similar arguments can be made concerning other rights—including, for example, the right to engage in one's chosen form of recreation—the general point of which would be that the overriding of a right for consequentialist reasons requires a benefit not merely greater, but *very much* greater than the harm to the rights-bearer. For simplicity, however, I focus only on how the argument works with the right of self-defense.

Consequentialists reject premise (1). But virtually all who accept the notion of rights would accept (1). Consider this well-worn example:⁴⁸

Example 4: You are a judge in a legal system in which judges render verdicts of guilt or innocence. You have a defendant on trial for a crime

⁴⁸H.J. McCloskey, "An Examination of Restricted Utilitarianism," *Philosophical Review* 66 (1957): 466-85, pp. 468-69. I have slightly modified the example.

that has caused considerable public outrage. During the course of the trial, it becomes clear to you that the defendant is innocent. However, the public overwhelmingly believes him guilty. As a result, you believe that if the defendant is acquitted, there will be riots, during which several people will be (unjustly) killed and many others injured. Assume that the crime in question carries a mandatory death sentence. Should you convict the defendant?

Most people, including virtually all who believe in rights, say the answer is no. If this is the correct answer, then we must conclude that it is wrong to violate one person's rights (in particular, his right to life) even if doing so would prevent several rights violations of comparable seriousness. This is because rights function as *agent-centered constraints*: each individual is enjoined from violating rights, himself, rather than being enjoined to cause a reduction in the total number of rights violations in the world.⁴⁹ Something like premise (1) is essential for distinguishing a rights-based moral theory from a consequentialist theory.

Premise (2) was supported by the argument of §4.2.

Premise (3) is supported by the idea that the requirements for overriding a *prima facie* right are proportional to the seriousness of the rights violation that would be involved. Even if this assumption does not hold in general, it is plausible that it applies to this case, that is, that *if* it is unjustified to kill a person in order to save several lives, and *if* a particular violation of the right of self-defense is morally on a par with killing a person, then it is also wrong to commit that violation of the right of self-defense in order to save several lives. It is difficult to see why the right of self-defense should work differently, by way of being much easier to override, from the right to life.

Step (5) is a reasonable inference from (4). Suppose that the judge in example 4 opts for conviction, acting wrongly. Suppose he is faced with similar situations four more times throughout his career, each time acting in the same wrongful manner. Presumably, the whole *series* of actions, consisting in sum of his killing *five* people unjustly in order to save several times that many people, is also wrong. Now consider one more modification: suppose that instead of coming at different times throughout his career, the same five innocent defendants had all come to him in a single, collective trial, that he gave a collective verdict convicting all of them, and that this action saved the same number of other people. Pre-

⁴⁹This notion is widely accepted: see Samuel Scheffler, *The Rejection of Consequentialism*, 2nd ed. (Oxford: Clarendon Press, 1994), p. 80; Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 28-31; Thomas Nagel, "Nozick: Libertarianism without Foundations," in *Other Minds: Critical Essays 1969-1994* (New York: Oxford University Press, 1995), p. 145.

sumably the judge's action is still wrong. It is for this sort of reason that we should accept the inference from (4) to (5).

Premise (6) is supported by the arguments of §5.2.

Finally, (7) follows from (5) and (6). Given the extremely serious nature of gun prohibition as a rights violation, very severe strictures apply to any attempt to justify it morally—strictures similar to those that would apply to justifying a policy that killed many innocent people to achieve some social goal.

6. Replies to Objections

Objection #1

Premise (1) seems oversimplified; in some cases, it is permissible to violate one person's rights to prevent a comparable harm to a few other people, as in the infamous "trolley car problem"⁵⁰:

Example 5: A runaway trolley car is approaching a fork in the track. If it goes down the left fork, it will collide with and kill one person. If it takes the right hand fork, it will collide with and kill five people. None of these people can be moved out of the way in time, nor can the trolley be stopped. However, you can flip a switch at the fork which determines whether the car goes to the left or the right. The switch is presently set to send the car to the right. Should you flip the switch?

Most people say yes.⁵¹ So we should ask: Is gun prohibition more analogous to flipping the switch in example 5, or to convicting the defendant in example 4?

Initially, gun prohibition seems more similar to the action of example 4, where we have a proposed official action by the state that would violate an important right of an individual who is innocent of any wrongdoing, for the purpose of helping to keep the peace and prevent *other* individuals from committing crimes. This is not true of the action discussed in example 5, but it is true of the proposed gun ban. The analogy is perhaps strengthened when we consider the plight of an individual who violates the gun prohibition in order to protect himself from criminals in his neighborhood: if caught, this person would be sent to prison, even in

⁵⁰See Philippa Foot, "The Problem of Abortion and the Doctrine of the Double Effect," *Oxford Review* 5 (1967): 5-15; Judith Jarvis Thomson, "Killing, Letting Die, and the Trolley Problem," *The Monist* 59 (1976): 204-17.

⁵¹Based on author's informal survey of undergraduates. The majority is large, even when students have been primed with the example of the doctor who kills a patient to distribute his organs to five other patients.

the absence of any evidence of his intent to harm others, because this is part of a policy aimed at stopping those who *do* wish to harm others from owning guns. Those who believe that it is generally worse to punish an innocent person than to let several guilty people go free should consider that principle in the light of this example.

But to determine whether gun prohibition is best seen in the light of example 4 or example 5, we should like to know what the morally relevant difference between these two examples is. Consider several accounts of the moral distinction between the cases:

(i) The law-of-double-effect account: In example 4, a person's rights are violated *as a means* to benefitting others, whereas in example 5 a person's rights are violated as a mere *side effect* of another action that benefits others.⁵²

One could argue that the rights violation involved in gun prohibition—namely, confiscating guns from noncriminal gun owners—is not a means the state employs to achieve its end, for this rights violation does not causally contribute to protecting others from crime. Rather, it is only the confiscation of guns from the *criminals* that so contributes. It happens that there is a third thing—confiscating as many guns from the whole population as possible—that includes both actions, but the one is not a means to the other.

However, if this latter argument is correct, then (i) cannot be the correct account of the difference between examples 4 and 5. For if it were, there would be no rights-based objection to a policy according to which criminal defendants are convicted whenever the probability of their guilt exceeds, say, 10%. The consequent imprisonment of the innocent convicts would not be a means employed by the state to achieve its end, for *their* imprisonment does not causally contribute to the desired end of protecting others from crime; it would only be the imprisonment of the actual criminals that would so contribute.

There is another problem with (i). Suppose that in example 4, the mob is appeased as soon as the conviction is announced, although the execution does not occur for several weeks (but you cannot stop the punishment once you have given the verdict). In this case, (i) implies that you may convict the defendant. His execution would not be aimed at as a means, since the desired end is attained before the execution occurs. The execution would merely be an additional effect of the act whereby you averted the riots.

(ii) In example 4, the harm to be avoided would stem from the inten-

⁵²Foot (“Problem of Abortion”) defends this account.

tional, wrongful actions of other persons, whereas this is not the case in example 5.

This account is incorrect, since one can imagine a case like example 4 except that executing the innocent defendant will prevent the deaths by natural causes of several innocents. Our intuitions will still disapprove the proposed action.

(iii) In example 4, the act itself (or: “the relevant action-type,” that of convicting the defendant) is intrinsically harmful or restrictive to another person, whereas in example 5 the relevant action-type (diverting the train from the right to the left track) is intrinsically neutral.

On this account, gun prohibition, being a rights-violating and intrinsically restrictive act, would be more analogous to example 4 than to example 5. However, (iii) is quite problematic in any case, since, in example 4, one could argue that the judge’s act of uttering certain words is not intrinsically harmful or restrictive to the defendant—it is only the subsequent actions of the police officers that result from the judge’s words that are harmful or restrictive.⁵³

(iv) In example 5, one *diverts* an existing threat to another person or persons, whereas in example 4 one *creates* a new threat/harm.⁵⁴ In my view, this is the most plausible account.

On this theory, gun prohibition is more similar to example 4. It does not divert a threat—it does not divert existing criminals from some victims to another class of victims. But nor does it create a new threat (unless the law causes new people to become criminals). Instead, it creates a new *impediment to the forestallment* of a threat. Thus, it would be more like the following case than like either example 4 or example 5:

Example 6: A mob is outraged by a crime, which they believe to have been committed by V, although you know that V is innocent. Unless the mob is appeased, they will go on a rampage, killing and injuring more people. Seeing the angry mob approaching his home, V prepares to flee. You grab and restrain him until the mob arrives to lynch him.

The act described in example 6 seems wrong in much the same way as the judge’s act in example 4. This suggests that the creation of a new impediment to the forestallment of a threat is morally on a par with the creation of a new threat, rather than being comparable to the diversion of

⁵³See Jonathan Bennett, *The Act Itself* (Oxford: Clarendon Press, 1995), for further problems.

⁵⁴See Thomson, “Killing”; however, Thomson gives a different (in my opinion, less satisfactory) theory about these cases in *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990), pp. 180-200.

a threat. This conclusion is in line with the conclusion of §4.2 that preventing the prevention of a death is morally comparable to killing.

Objection #2

Perhaps an argument can be made, based on principles similar to those I have used, that the sale of guns is morally wrong. A company that sells many guns can be more or less certain that some of the guns it sells will be used to commit crimes. The company would be partly responsible for these crimes, having provided criminals with the means of committing them. Given premise (1) in §5.3, the company could not defend itself merely by saying that its gun sales, on net, prevented more crimes than they contributed to.

This argument employs at least two distinct moral principles. It employs my premise (1), and it employs the premise (call it “Seller Responsibility”) that a seller of a product is (partly) morally responsible for the use to which customers put the product.

Seller Responsibility applies in some cases. If I sell a gun to a customer who I know plans to use it to commit a murder, then I am partly responsible for the subsequent murder. If there is merely a high probability that the buyer plans to commit a murder, then I have still acted wrongly, though not as wrongly as in the first case. Likewise, if I run a gun store and I market my guns specifically to criminals, then I am partly responsible for any resulting crimes.⁵⁵

But we cannot accept Seller Responsibility without qualification. If we did, we would have to apply it to sellers of automobiles, knives, ropes, and all other products that are sometimes used wrongly. Since a large automobile manufacturer knows that at least some of its cars are used in crimes (hit-and-runs, drunk driving, even murders), it would be wrong for them to continue selling cars.

I propose, therefore, a restricted Seller Responsibility principle which holds that a seller is responsible for the criminal use of his product *only if* (i) the product has no morally legitimate uses, (ii) on the information available to the seller, there is a substantial probability, in an individual sale, that the buyer intends to use the product in a morally objectionable manner, or (iii) the seller willfully or negligently fails to take reasonable steps to reduce the chances of selling to criminal users. Condition (i)

⁵⁵These sorts of accusations seem to be the basis for charges of immorality leveled at the gun industry (e.g., Ronald Green, “Legally Targeting Gun Makers: Lessons for Business Ethics,” *Business Ethics Quarterly* 10 [2000]: 203-10; George Brenkert, “Social Products Liability: The Case of the Firearms Manufacturers,” *Business Ethics Quarterly* 10 [2000]: 21-32). It is worth noting that even these critics seem to accept restrictions on Seller Responsibility of the sort that I suggest.

does not apply to firearms. While (ii) and (iii) *can* apply to gun sales, they need not. Hence, although some wrongful gun sales undoubtedly occur, there is no reason to believe all gun sales to be wrong.

Objection #3

Some object that strong gun rights positions imply the existence of a right to own all sorts of weapons. Briefly, if there is a right to own a gun, then there is also a right to own a nuclear missile, which is absurd.⁵⁶

While my premises may support some *prima facie* right to own all manner of weapons, from machine guns to nuclear missiles, the arguments of §4 do not imply that all such *prima facie* rights are equally weighty, nor do those of §5 imply that the reasons for overriding all such *prima facie* rights are of equal strength. Based on empirical evidence discussed above, firearms, particularly handguns, are the most effective means of self-defense against violent criminals, while both handguns and rifles are commonly used for recreational purposes. It would be, to say the least, difficult to make a case for the importance of nuclear missiles for either recreational or self-defense purposes, while it would be easy to make a case for the overriding of any *prima facie* right to own a nuclear missile. The reader may make his own assessment of the case for various other weapons.

7. Extensions of the Argument

Thus far, we have considered gun control only in the extreme form of a ban on all guns. What of more limited measures? Here I mention just two of the more common measures proposed or enacted. First, many support a ban on all *handguns*. Second, many states either prohibit or place severe restrictions on the carrying of concealed weapons in public places. What do our arguments based on the right to own a gun imply about these measures?

I think that these measures are also serious rights violations, though not as serious as a complete gun ban. The reason is that they (would) create severe impediments to individuals defending themselves. The features of handguns that make them useful to criminals are also the features that make them the most suitable weapons for self-defense purposes—the fact that they are small and light, require little strength or skill to wield effectively, and are widely feared. Furthermore, for various

⁵⁶The “nuclear missile” case (occasionally encountered in informal discussion) is merely the extreme form of the objection. Relatedly, Hugh LaFollette (in unpublished comments on this paper) has objected that my position implies the existence of a right to own machine guns, grenades, and bazookas.

reasons, almost no one in our society would carry a gun for self-protection unless she was able to carry it concealed. Almost no one would carry any kind of gun other than a handgun for self-protection. So laws that prevent law-abiding citizens from carrying concealed weapons, or from owning handguns at all, effectively eliminate self-defense uses of guns outside the home,⁵⁷ to the extent that the laws are obeyed. We have seen that the best available evidence indicates that such laws increase rather than decrease crime; thus, there is no case for overriding victims' self-defense rights. All mentally competent, noncriminal adults should therefore be allowed to own and carry concealed handguns. The fewer impediments or costs that are placed in the way of their doing so, the better, since any such impediments can be expected to decrease the rate at which victims defend themselves much more than they can be expected to decrease the rate at which criminals carry guns.⁵⁸

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⁵⁷About 670,000 of Kleck's estimated 2.5 million annual defensive gun uses occur away from the user's home (Kleck, *Targeting Guns*, p. 192).

⁵⁸I would like to thank Charles Barton, Ari Armstrong, Valeria Damaio, Bruce Tiemann, Ananda Gupta, the anonymous referees at *Social Theory and Practice*, and most of all Stuart Rachels, for their comments on earlier versions of this paper.