

# Gun Rights as Deontic Constraints

## 1. Overview

In earlier work, I have argued that individuals have a significant right to own firearms for personal defense.<sup>1</sup> A prohibition on private gun ownership (or similar measures, such as a prohibition on private *handgun* ownership) would violate this right, resulting in some citizens suffering crimes from which they would otherwise have defended themselves using a gun. Because of the deontological nature of rights, I contend, such a prohibition could not be justified merely on the consequentialist ground that it produced greater overall benefits than harms. Rather, prohibition could only be justified if it at least prevented *many times* greater harm than the harm it caused to the individuals whose rights were violated.

Two critics, Nicholas Dixon and Jeff McMahan, have separately objected to this argument.<sup>2</sup> They maintain that, as long as gun prohibition renders people overall safer, and the state does not know in advance which individuals will suffer from crimes as a result of the prohibition, the prohibition policy will not count as violating anyone's rights, because there will be no particular individual who is overall at greater risk of suffering from a crime. Furthermore, Dixon argues that the failure of the state to protect people from gun violence constitutes a rights-violation sufficiently serious to counterbalance the alleged violation of people's self-defense rights. Thus, if these critics are right, the issue of gun control does after all come down to whether gun control laws prevent more crime than they cause.

In what follows, I rebut Dixon's and McMahan's objections. I argue that these critics misconstrue the nature of deontic constraints and treat rights in an overly consequentialist manner.

## 2. Empirical Background

Neither I nor my critics think that rights are *absolute*; all agree that it is possible for a rights-violation to be justified, if sufficiently great consequences are at stake. My critics set the bar for justifying gun control much lower than I do. But we all agree that empirical evidence concerning costs and benefits is relevant.

It is not possible here to produce a comprehensive and convincing assessment of the empirical evidence. The empirical case surrounding guns and gun control laws is complex and highly contentious. Nevertheless, it is valuable to understand at least the broad outlines of the empirical dispute.

Gun control proponents typically cite comparisons among nations with different gun laws and gun ownership rates, finding that among wealthy, liberal democratic nations, those with lower gun ownership and stricter laws also tend to have lower homicide rates. The United States is the outlier in such comparisons, with drastically higher gun ownership rates and homicide rates than other rich, liberal democracies.

Gun rights advocates often object to these international comparisons on grounds of small sample sizes, lack of controls, and possible confounding variables. It is sometimes suggested that America has a more generally violence-promoting culture than other nations, independent

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<sup>1</sup> Huemer 2003; 2016.

<sup>2</sup> Dixon 2011; McMahan 2012. Dixon advocates a ban on handguns, while McMahan advocates a ban on all guns. Hereafter, I shall lump these positions together, as the differences between them are not important for the arguments to follow.

of its gun laws. To account for this possible confound, one can consider different jurisdictions within the U.S. We then find that within the U.S., areas with stricter gun laws and lower gun ownership rates tend to have *higher* crime rates. Gun control advocates then object that *these* comparisons have other possible confounds.

Gun rights proponents go on to cite surveys finding that private citizens use guns for self-defense millions of times each year in the U.S.<sup>3</sup> Gun control proponents, however, hypothesize that these surveys contain drastic overestimates. They argue that even a small number of false positive responses can result in a large overestimate for a rare type of event, and that false reports in this case might be motivated by individuals who wish to portray themselves as heroic or who want to portray guns as beneficial for ideological reasons.<sup>4</sup>

Gun rights advocates also cite a famous study finding that in the U.S., laws allowing citizens to carry concealed weapons result in lower crime rates.<sup>5</sup> Critics say that this correlation could be accounted for by other factors, and that the results are very sensitive to changes in model specification and chosen time period.<sup>6</sup>

Finally, some argue that, whether or not guns themselves are bad, gun *prohibition* is bad since prohibition laws will tend to be disobeyed by criminals but obeyed by innocent citizens, thus producing the opposite of the desired result.<sup>7</sup>

That summary, again, is not enough to reveal where the truth lies on the empirical issues. But it may convey a sense of the complexity of the issues and of how it happens that different individuals reviewing the evidence tend to form strong, mutually opposed opinions about what the evidence shows. These opinions tend to be very strongly predicted by one's broader political orientation, as, e.g., either liberal or conservative.

I will briefly state – and I will have to simply leave it at that – what I make of this. I think the empirical issues are very complex and the evidence ambiguous, so that it is possible to reasonably draw opposite conclusions. The differing conclusions individuals draw are due mainly to very broad, background ideological differences that are nearly impossible to resolve, and not due, for example, to one side's being systematically smarter or more informed than the other. An unbiased review of the empirical evidence would find it inconclusive on most of the questions studied.<sup>8</sup>

Given that gun prohibition would violate rights, this situation leaves prohibition unjustified. Overcoming the moral constraint against rights-violations requires (expected) benefits at least many times greater than the (expected) costs. If the costs or the benefits of a policy are unknown, but plausibly of comparable magnitude, then the presumption against rights-violating interventions stands.

### 3. Deontological Motivations

Consequentialist moral theories hold that the right action is always the action with the best overall consequences; hence, consequentialists, for example, endorse sacrificing some innocent persons as long as doing so prevents a greater harm to others.

Deontological ethics is the denial of consequentialism. Deontologists hold that the right action, at least sometimes, is not the action with the best consequences. In particular, most

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<sup>3</sup> See especially Kleck 1997.

<sup>4</sup> Hemenway 1997; Dixon 2011, p. 157.

<sup>5</sup> Lott 2000.

<sup>6</sup> Dixon 2011, p. 158; National Research Council 2005, ch. 6.

<sup>7</sup> Huemer 2016.

<sup>8</sup> See, for example, the non-partisan National Research Council's (2005) review.

deontologists, myself included, hold that it is often wrong to sacrifice people to produce greater benefits for others, and that it is normally wrong to violate a person's rights, even if doing so prevents someone else from violating even more rights.

The motivation for my deontological stance is intuitive. There are particular situations in which almost everyone shares the sense that an action is wrong, even though the action would produce greater benefits than harms. Take one famous case from the ethics literature:

*Framing:* A crime has been committed that has caused great public outrage in a certain village. The sheriff believes (justifiedly and correctly) that unless someone is punished for the crime, there will be riots, during which multiple innocent people will be unjustly injured and possibly killed. The sheriff cannot find the actual perpetrator; he can, however, frame an innocent person, which will cause that person to be seriously and unjustly punished but will forestall the riots. Should the sheriff frame the innocent?<sup>9</sup>

Almost everyone's ethical intuition is that the sheriff should not frame the innocent person, despite that doing so would forestall a greater harm than the harm it caused. We might phrase this judgment in the language of rights – innocent individuals have a *right* not to be unjustly punished – or we might simply say that there is a deontological moral constraint against unjust harming. This constraint is not absolute – if framing the innocent would somehow prevent World War III, then, I believe (and most would agree), the sheriff *should* frame the innocent. But the unjust framing would have to at least produce many times greater benefits than harms in order to be justified.

Why think that gun prohibition would violate rights? This is motivated by hypothetical examples such as the following:

*Gun Grab:* There are three people in a certain house: Killer, Victim, and Accomplice. Killer has just broken into Victim's house, intending to kill Victim. Victim has a gun, which Victim would use to successfully defend herself from Killer. Before she can do that, however, Accomplice grabs the gun and runs away with it. As a result, Killer is able to kill Victim.

What is the correct moral assessment of Accomplice's behavior? It seems that Accomplice acted extremely wrongly. Though Accomplice did not himself kill Victim, Accomplice actively intervened in a way that prevented Victim from preventing the murder. This is morally on a par with – that is, not much less wrong than – actually killing Victim himself.

Similarly, restrictive gun laws that prevent some individuals from defending themselves from crimes who otherwise would have done so, are morally on a par with actually committing those crimes. Given a broadly deontological ethical stance, then, these laws could only be justified if they at least produced many times greater benefits than harms.

#### 4. The Right to Be Protected from Guns

In reply to the above sort of argument, Nicholas Dixon points out that gun crimes are also rights violations, which are of comparable seriousness to the rights-violation of preventing someone from defending herself with a gun. If the government fails to restrict gun ownership, this will cause there to be more gun crimes. Thus, as far as rights are concerned, the need to

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<sup>9</sup> The example derives from McCloskey 1957, pp. 468-9.

prevent gun violence counterbalances the moral reasons to avoid interfering with self-defense, provided that restrictive gun laws prevent at least as many gun crimes as the number of crimes that they prevent people from defending themselves against.

This reasoning introduces a sort of consequentialism of rights: if an action violates rights but prevents a larger number of rights-violations, then, on Dixon's reasoning, the action is justified. This, however, is not how rights work on standard conceptions of rights. Recall the Framing case above, and simply note that being injured or killed by an angry mob is a rights violation; thus, if the sheriff refuses to frame the innocent person, there will be a larger number of rights-violations, and ones of comparable seriousness, than if he frames the innocent person. Still, framing the innocent is not permitted.

Dixon goes as far as to say that permissive gun laws (that is, presumably, the failure to adopt gun prohibitions) *cause* gun murders.<sup>10</sup> If so, it would seem that such permissive "laws" (that is, the absence of prohibitions) are seriously wrong. However, Dixon's causal claim is only true in the sense that whenever one fails to prevent some outcome that one could have prevented, one might be said to "cause" the outcome. Thus, in the Framing case, if the sheriff fails to frame the innocent person, one might say, in the same sense, that the sheriff will be causing the injuries and possibly deaths of multiple other people.

It does not matter whether we think this is a correct use of "cause" or not. That is a semantic question. What matters is that the situation of the sheriff in the Framing case and the situation of the state in the gun control case are analogous – at least, Dixon has identified no disanalogy. By declining to frame the innocent, the sheriff fails to prevent some rights-violations (by the angry mob) that he could have prevented. But this is the right choice, since the alternative would have been for the sheriff to violate the rights of the innocent defendant. Similarly, by failing to prohibit guns, the state fails to prevent some rights violations (by criminals) that it could have prevented. But this is the right choice, since the alternative would have been for the state to violate the rights of innocent gun owners.

This is the standard deontological conception of rights. On a deontological ethic, agents are morally responsible first for ensuring that their own actions do not violate rights. It is only *within that constraint* that agents may then have duties to prevent other agents from violating rights.

As Dixon rightly observes, the state, unlike private agents, has an affirmative obligation to protect citizens from crime.<sup>11</sup> This affirmative obligation, however, does not change the ethical logic. When one takes on special obligations to aid others, this does not weaken or circumvent one's standing negative obligations not to harm others; everyone else still has their original rights with undiminished force. Thus, in the Framing example, it makes no difference if we observe that the sheriff, in virtue of his position, has a positive duty to try to protect his town from riots. True though this observation may be, it goes no distance toward justifying the sheriff in framing the innocent – because, again, special obligations to protect others must be discharged within the constraints set by the general, standing rights to non-interference possessed by all persons.

For another example, consider the case of a lifeguard. In virtue of his position, a lifeguard may have obligations to assume *personal* risks of a sort that a non-lifeguard would not be obligated to assume. The lifeguard may thus be obliged to jump into dangerous waters in order to save a would-be drowning victim, where an ordinary bystander would have no such duty.

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<sup>10</sup> Dixon 2011, p. 162.

<sup>11</sup> Dixon 2011, p. 164. The state itself denies that it has any obligation to protect individuals (*Warren v. District of Columbia*, 444 A.2d 1, D.C. Ct. of Ap. [1981]), but this is simply a moral dereliction on the part of the state.

Nevertheless, the lifeguard is not permitted to impose *on others* risks that would not be permissible for a non-lifeguard to impose on others, even if doing so is instrumental in saving potential drowning victims. Thus, a lifeguard has no special entitlement to force bystanders to jump into dangerous waters in order to help save potential drowning victims.

Just so, the state's duties to protect citizens from crime do not enable the state to permissibly violate any rights that private individuals would not be entitled to violate, even if the state does so in pursuit of crime-prevention.

## 5. The Risk-Reduction Argument

We turn to Dixon's other major objection to my argument, an objection in which Dixon is joined by Jeff McMahan. Dixon and McMahan each contend that the right of self-defense is entirely subservient to a broader goal (perhaps a broader *right*) of physical security. For this reason, the right of self-defense cannot serve as an obstacle to policies that render everyone physically safer. An action that interferes with some people's self-defense efforts while simultaneously making those very people overall safer is either no violation of self-defense rights at all, or a violation that does not matter morally. Since, Dixon and McMahan believe, gun prohibition would lower each citizen's overall risk of suffering violence, prohibition would not violate anyone's right of self-defense in any way that matters.<sup>12</sup>

To succeed, this argument must not merely claim that some citizens are rendered safer by gun prohibition while a smaller number are rendered less safe. To argue that prohibition does not violate anyone's rights, Dixon and McMahan must hold that *every individual* is rendered safer by gun prohibition; no individual's risk of suffering violent crime goes up.

But that is certainly false. Consider the case of the woman who wants to buy a gun to protect herself from her mentally unstable, estranged ex-husband. The ex-husband outweighs her by 70 pounds. He has abused her before. The police cannot or will not protect her; they will not station a car outside her house all night, nor send an officer to follow her all day. She has no hope of defending herself without a weapon. She is not safer if both she and the ex-husband are legally prohibited from buying guns; she will, rather, be at his mercy.

Or take the case of the man who must walk home through gang territory at night and wants to buy a gun to protect himself. He is not safer if both he and the gangs are legally prohibited from buying guns. He has no hope of defending himself with a knife, or a can of pepper spray, or a phone. He needs a gun.

These are not unusual or insignificant scenarios; these are precisely the sorts of circumstances that make people want to buy guns for self-protection. And studies consistently show that guns are in fact effective means of self-defense.<sup>13</sup>

Perhaps McMahan or Dixon would argue that, although some individuals may know themselves to be at greater risk of harm due to a gun ban, *the state* does not know which individuals will be at greater risk, since the state does not know the details of each person's situation. Therefore, *from the state's point of view*, for any given individual, the probability of that individual being victimized will go down as a result of gun prohibition. And thus, from the state's point of view, it looks as though each individual's right to security is being protected. Let us call this the Ignorance Defense, since it enables the state to defend its behavior by appealing to ignorance about whom its actions will harm.

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<sup>12</sup> McMahan 2012; Dixon 2011, pp. 161-2.

<sup>13</sup> National Research Council 2013, pp. 15-16.

The Ignorance Defense implies that whether it is permissible to knowingly cause harm to someone can depend upon whether one knows the identity of one's victim, and in particular, that harming individuals of unknown (to the agent) identity is easier to justify than harming individuals of known identity. Return to the Framing case, in which we initially agreed that it would be wrong for the sheriff to frame a particular (known) individual. Let us modify the case as follows:

*Opaque Framing:* As in Framing, except that the sheriff has devised a way to frame someone without his knowing in advance whom he is framing: he can fabricate evidence seemingly proving that the perpetrator of the crime owns a car with license plate number E71 41A. The sheriff knows that this license plate number is in use in the village, but he does not know by whom. Once he publishes his fabricated evidence, whoever turns out to own the car with that license plate number will inevitably be arrested by other police officers, convicted, and punished for the crime. This will forestall the riots. Of course, this person will almost certainly be innocent.

Since the sheriff does not know who owns the license plate in question, he reasons that, for any given resident of the town, that individual is more likely (from the sheriff's point of view) to be among those who would be harmed by the riots than to be the one person who will be unjustly imprisoned. Therefore, each individual's probability of being unjustly harmed is reduced by the act of framing the unknown motorist; therefore, framing the innocent is justified and *not a violation of anyone's rights*. This parallels the reasoning by which gun prohibition allegedly avoids violating anyone's rights.

But this is a very odd view. It would be very unusual to hold that the original framing is wrong, but that the opaque framing is just.

Suppose we claim that the sheriff actually *does* know the identity of his victim in Opaque Framing, since he knows that the victim is *the owner of the car with license plate E71 41A*. This would be correct if "knowing who will be harmed" only requires knowing some description that uniquely applies to the person who will be harmed. But in that case, the state also knows the identity of the people who would be harmed by gun prohibition, since it knows that they would be *the people who would have used a gun to defend themselves from crime*. Thus, the Ignorance Defense would fail.

Suppose we embrace the unusual view that the framing is permissible in Opaque Framing, due to the sheriff's ignorance of whom his act will harm. But if the sheriff acquires certain information – namely, the information of "whom he is framing" – then, no matter whom it turns out to be, the action will be wrong. This raises awkward questions about what exactly it means to "know whom one is framing." Is it just to know the person's *name*? (Would their first name be enough? What if one has the spelling wrong?) Must one know some details about the person's life? Must one know what they look like? What if the sheriff has seen a blurry photograph of the owner of the E71 41A license plate?

The problem is not simply that it is hard to draw a clear distinction between epistemic states that count and ones that do not count as "knowing who" the victim of a harmful action is. The problem is that the factors that might plausibly determine this *are morally irrelevant*. It is thoroughly implausible that framing the innocent first becomes a rights-violation when the sheriff learns the *name* of the person who will go to jail. Or when he sees a picture of that person. Or when he learns that person's favorite food. In standard thought experiments used to motivate deontological ethics, it is intuitively wrong to sacrifice one to benefit others, and this does not depend on one's knowing the name, or the facial appearance, or any other

distinctive information about the victim of the sort that might add up, in ordinary parlance, to “knowing who they are.”

## 6. Conclusion

The essential claim of the gun rights argument is that coercively interfering with individuals, in a way that prevents them from defending themselves from crimes, is morally on a par with committing those same crimes. On standard deontological ethical views, it would be wrong for the state to commit a number of murders, rapes, armed robberies, and assaults against innocent citizens, even if in doing so the state could prevent a slightly larger number of such crimes from being committed by private criminals. Therefore, it is also wrong for the state to coercively interfere with individuals’ self-defense efforts, even if that interference were to prevent slightly more crimes than the number of crimes the state thereby contributed to.

Dixon disputes this reasoning, citing the state’s positive duty to protect its citizens from criminals, and asking why the rights of citizens to be free from gun violence do not counterbalance gun owners’ rights to self-defense. The answer is that agents, including governments, possess a primary obligation to ensure that they themselves do not violate rights, which takes precedence over the agent’s desire to prevent *other* agents from violating rights. One may act to prevent other agents from violating rights only within the constraint that one does not violate rights oneself.

Both Dixon and McMahan also argue that self-defense rights have moral weight only insofar as they render individuals safer, and that gun prohibition, despite interfering with one means of self-defense, will render everyone overall safer. The latter claim overlooks cases in which some individuals are made safer by the general availability of firearms, especially those in which individuals face threats from physically stronger, more numerous, or otherwise intrinsically more formidable opponents.

Dixon appeals to the state’s lack of knowledge of which citizens would be harmed by gun prohibitions, to argue that each citizen’s *probability* of being victimized would be reduced by a gun ban. But, given the knowledge that an action will harm someone, it is not plausible that ignorance of which people will be harmed and which will be benefitted can insulate one from the charge of violating the rights of those who are harmed.

It would be wrong for a sheriff to frame an innocent person for a crime, even if doing so would forestall riots that would cause greater harm. This is true even if the sheriff somehow does not know whom he is framing. Similarly, it would be wrong for the government to violate the rights of innocent gun owners, even if doing so would prevent someone else from committing a larger number of rights violations, and even if the state does not know whom it is harming.

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