

THE RIGHT TO SELF-DEFENSE AGAINST THE STATE

by

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My dissertation develops a defense of a right to self-defense against the state. I set aside anarchist theories and grant for the sake of argument that the state has legitimate political authority. My goal is to convince non-anarchists that the right to self-defense extends to individuals against the state and the state's agents. I argue that the right to self-defense is a fundamental, negative, claim right. The right to self-defense has these characteristics: (1) it is fundamental, meaning that it is not derivative of any other right—it doesn't appeal to any other right for its justification (2) it is negative, meaning that it simply requires others to refrain from certain action, and (3) it is a claim right, rather than a permission right, which means that it logically entails correlative duties on others. I also challenge some basic tenets of the orthodox account of justified defensive force, including the imminence, necessity, and proportionality conditions. My argument is a controversial one; many will resist the idea that an individual could be justified in self-defense against the state for a variety of reasons, ranging from thinking the idea is absurd or dangerous, to thinking that even if it is morally permissible, it is impractical. I aim to rebut these objections and to provide strong moral reasons to show why individuals do in fact have this right.

This research explores the relationship between one of our most basic rights—the right to self-defense—with our most basic political relationship—the relationship between the individual and the state. Part of my aim is to convince non-anarchist readers of philosophical claims that are usually only supported by anarchists. The reason this is important, beyond

being academically interesting, is that if I am successful, it could allow a great majority of individuals to rethink their relationship with the state; not just at a basic level, but also in other applied areas such as gun rights, drug laws, and issues surrounding punishment and imprisonment.

This dissertation is dedicated to the loves of my life—my husband, Josh;  
my daughter, Dakota;  
my son, Isaiah;  
and our blessed #3 on the way.

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## Chapter 1: What kind of right is the right to self-defense?

Self-defense is the use of force, including deadly force, to prevent death or bodily harm to oneself from the attack of an aggressor. The idea that an individual is justified in taking defensive action to protect themselves from harm has a long history. In the 6<sup>th</sup> century, Roman law held that it was permissible to repel force with violence or force.<sup>1</sup> In the 17<sup>th</sup> century, Thomas Hobbes argues for an inalienable right to self-defense in *Leviathan*. Hobbes believes that, in the state of nature, man has a right to everything that would preserve his own life, including “one another’s body.”<sup>2</sup> But, if people were entitled to the use of another’s body, humanity would be in a perpetual state of war, so Hobbes states that men need to lay down certain rights in order to have a civil society.<sup>3</sup> Hobbes believes that it is in man’s own self-interest to lay down these rights for the security and peace civil society affords them. However, Hobbes thinks that the right to self-defense could never be a right that would be in man’s self-interest to lay down.<sup>4</sup> John Locke argues that a person has a right to defend themselves against anything which threatens to destroy their life.<sup>5</sup> Locke’s position implies that the right to self-defense is only about threats to one’s life, but I don’t intend that implication. I think the right to self-defense includes lesser threats. Locke states that when a person threatens another’s life they

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<sup>1</sup> Mommsen et al. 1985. See ‘Acts Done Under Duress’ in Book Four of Digest of Justinian. “Therefore, this clause comprises both force and duress and if anyone, compelled by force, does something, he may obtain *restitutio* through this edict” (Mommsen et al. 1985, p. 114).

<sup>2</sup> Hobbes 1651, p. 91. I have modernized the punctuation from the original.

<sup>3</sup> *Ibid.*, See pp. 91-100 for full discussion on the first two natural laws and contracts.

<sup>4</sup> Hobbes (1651) states, “Whensoever a man Transferreth his Right, or Renounceth it; it is either in consideration of some Right reciprocally transferred to himselfe; or for some other good he hopeth for thereby. For it is a voluntary act: and of the voluntary acts of every man, the object is some *Good to himselfe*. And therefore there be some Rights, which no man can be understood by any words, or other signes, to have abandoned, or transferred. As first a man cannot lay down the right of resisting them, that assault him by force, or take away his life; because he cannot be understood to ayme thereby, at any Good to himselfe” (p. 93). Claire Finkelstein (2001) provides a helpful recreation of Hobbes’ argument on pp. 334-35 in ‘A Puzzle About Hobbes on Self-Defense’.

<sup>5</sup> Locke 1690, p. 14.



have entered into a “State of War” and the person under threat has a reasonable and just right to defend their life against this threat. John Stuart Mill states that self-protection is the sole grounds for interference with people’s freedom.<sup>6</sup> In addition to historical precedent, there are very commonsensical reasons to believe that individuals have a right to self-defense. Those reasons are the prevalence of (1) violent crime, (2) domestic abuse, and (3) human trafficking. Without a right to self-defense, individuals would be left morally and legally defenseless in these situations.

The mere existence of a right to self-defense does not tell us anything about what *kind* of right it is. Rights can be fundamental or derivative, they can be positive or negative, and they can be claim rights or permission rights. Fundamental rights are rights that are not derivative from any other rights.<sup>7</sup> A derivative right protects or secures the fundamental right it is derived from, and the derivation is in light of the relationship between the two rights.<sup>8</sup> A negative right correlates with a negative duty, meaning that the holder of a negative right imposes a duty on other people to *refrain* from performing some action (or set of actions) that would interfere with the rights bearer. A positive right correlates with a positive duty, meaning that the holder of a positive right imposes a duty on other people to *perform* some specific action (or set of actions) that would promote the acquisition or preservation of some benefit. Finally, a claim right imposes duties on other people, whereas a permission right entails that the right-holder simply has the freedom to pursue some action, but it does not impose duties on other people.<sup>9</sup> So, what kind of right is the right to self-defense? In this chapter, I will provide an argument for a right to self-defense that is a fundamental, negative, claim right. Before providing this argument, I will

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<sup>6</sup> Mill 1859.

<sup>7</sup> A fundamental right is the same as a basic right.

<sup>8</sup> Huemer 2003. Huemer provides the understanding of derivative rights as “usually related to fundamental rights as means to the protection or enforcement of the latter” (p. 299).

<sup>9</sup> Permission rights are also referred to as liberties or privileges.

introduce a condition that I maintain is necessary for understanding all rights. I call this condition, the *defensibility condition*.

### **1.1. Understanding the motivation for the right to self-defense**

In 2018, 3.3 million U.S. residents were the victim of at least one violent crime.<sup>10</sup> This figure is significant, and it only captures victims who were over 12 years of age, who were residents of the U.S., and whose crimes were reported. That means that the number of *actual* victims of violent crime in the U.S. is even higher, as not every crime goes reported and this figure doesn't consider victims under 12 years of age. Violent crime in the U.S. has increased since 2015, after experiencing a long period of declining rates.<sup>11</sup> The National Crime Victimization Survey states that the total number of times a given individual experiences a violent crime has also experienced an increase from 2015 to 2018, with the rate of violent victimization in 2018 at 6.4 million. While a large number of people will never be the victim of a violent crime, a significant number of people will be, and there is no way to know who will become a victim and who won't be. People have a right to defend themselves against this kind of harm. Some individuals are dangerous, and some individuals will act wrongly; the right to self-defense acknowledges that individuals are justified in using defensive force to reduce or eliminate threats of physical harm.

In the United States, over 10 million adults experience domestic abuse annually.<sup>12</sup> The instances of abuse vary in frequency and severity, but roughly 1 in 5 women and 1 in 20 men

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<sup>10</sup> BJS 2019. Violent crime includes murder, rape and sexual assault, aggravated and simple assault, and robbery.

<sup>11</sup> NCVS states that violent crime decreased by 62% from 1994 – 2015.

<sup>12</sup> National Coalition Against Domestic Violence Fact Sheet 2020 (NCADV).

will require medical care as a result of the abuse.<sup>13</sup> The National Coalition Against Domestic Violence defines domestic abuse as follows:

Domestic violence is the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior as part of a systematic pattern of power and control perpetrated by one intimate partner against another. It includes physical violence, sexual violence, threats, economic, and emotional/psychological abuse.<sup>14</sup>

The harm that is perpetrated on victims of domestic abuse is wide-ranging and systemic and can lead to death. Approximately, 1500 people will die annually as a result of domestic violence.<sup>15</sup>

Some of the violence that occurs within a domestic abuse situation may be captured by the overall violent crime statistics, such that the level of overall violent instances is actually *lower* than I have stated. But even if this is the case, the figures presented are still very high.

Individuals have a right to defend themselves against domestic abuse.

Many people think of slavery as a problem of the past, but slavery is currently thriving globally in the form of human trafficking. According to the *Trafficking Victims Protection Act* (TVPA), human trafficking is defined as follows:

- sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or
- the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

A victim need not be physically transported from one location to another for the crime to fall within this definition.<sup>16</sup>

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.* While domestic violence is often thought of as occurring between intimate partners *only*, it can actually occur between any two (or more) people who are living in the same household, such as parents and children, siblings, or roommates. Systematic violence between intimate partners is better captured by the term, 'Intimate Partner Violence', where the partners do not need to be cohabiting for the abuse to be present.

<sup>15</sup> Huecker et al. This figure only accounts the deaths that can be attributed to domestic abuse *directly*, but many people die from the effects of domestic abuse without the cause of death being so obvious. For example, many women suffer increased rates of HIV and other STD's as a result of domestic abuse. HIV may be the cause of death, but the HIV was a result of the domestic abuse. A case such as this might not get calculated in the death statistics.

<sup>16</sup> U.S. Department of State 2020, p. 10

The International Labor Organization estimates that over 40 million people annually are victims of human trafficking.<sup>17</sup> A quarter of the victims are children. That is, over 10 million children are victims of trafficking in *one year*. It is important to note that this number just reflects the instances that have been reported. Given the nature of the crime, it is reasonable to assume that many more people are victims of human trafficking than is captured in this data. Individuals have a right to defend themselves against becoming enslaved.

The moral intuition that individuals have a right to self-defense is supported by legal codes such as the castle doctrine and “stand your ground” laws in U.S. states. Prior to the enactment of these legal principles, U.S. states legally required a ‘duty to retreat’ in self-defense situations. What a duty to retreat essentially equates to is, if it is determined that a person could have safely retreated from the threat, then that person is not justified using deadly defensive force against the threat. This duty can be applied to individuals experiencing a threat in public or private spaces.<sup>18</sup> Currently, 15 U.S. states require a duty to retreat in some capacity.<sup>19</sup> Typically, if the state requires a duty to retreat, then individuals are not legally allowed to use deadly force to defend themselves from death or serious bodily injury if they could have retreated with *complete safety*.<sup>20</sup> The “duty to retreat” principle has been challenged or overturned by the

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<sup>17</sup> International Labour Organization 2017. This is a report publishing data from 2016. Presumably, this figure has increased given the lucrative nature of trafficking markets. Unlike drugs, which once used, cannot be used again, a human being can undergo many “uses” before being discarded. While some people are released, or saved from their captivity, many will be killed or die during their enslavement.

<sup>18</sup> Public spaces include any space open to the public, including some workplaces. Private space has predominately meant the individual’s home, but it has also included an individual’s vehicle, or their workplace.

<sup>19</sup> AR, MA, MD, ME, MN, NJ, NY, and RI all require a duty to retreat, except in your home.

<sup>20</sup> See NJ Rev Stat § 2C:3-4 (2013):

(2) The use of deadly force is not justifiable under this section unless the actor reasonably believes that such force is necessary to protect himself against death or serious bodily harm; nor is it justifiable if:

(a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or

(b) The actor knows that he can avoid the necessity of using such force with *complete safety* by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take... (Emphasis added.)

enactment of the castle doctrine and “stand your ground” laws. Both of these legal principles hold that an individual does not have a duty to retreat prior to, or instead of, using deadly force to protect against the risk of death or serious bodily injury. However, they vary in the location of where an individual no longer has a duty to retreat. The castle doctrine applies to a person in their own home (or in some cases, their vehicle or workplace), and “stand your ground” laws applies to individuals in public spaces.

The castle doctrine has roots that go as far back as the Roman Republic<sup>21</sup>, but it is better known from English Common Law that influenced the U.S. Constitution. William Blackstone held that individuals have a right to defend themselves in their home, as a person’s home is a sacred place—his castle.<sup>22</sup> The castle doctrine is not a specific law, but rather a legal principle that individuals in their home do not have a duty to retreat prior to using deadly force in self-defense. In some cases, the castle doctrine has been applied to individuals in their vehicle or their workplace. “Stand your ground” laws remove the duty to retreat for individuals in public spaces. Florida implemented one of the earliest versions of stand your ground legal code, which has since been used as model legislation by the American Legislative Exchange Council.<sup>23</sup> Currently, at least 25 U.S. states require no duty to retreat by a person who is lawfully present in any

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<sup>21</sup> “To enter this house with any malevolent intention was a sacrilege” (Coulanges 1873, p. 10).

<sup>22</sup> “And the law of England has so particular and tender a regard to the immunity of a man’s house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of antient Rome, as expressed in the words of Tully; ‘*quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium?*’ [For what is more sacred, what more inviolable, than the house of every citizen?]” (Emphasis in original, Blackstone 2016, p. 148). Blackstone also states that a person’s defense of their home would have existed in the state of nature. “BURGLARY, or nocturnal housebreaking, *burgi latrocinium* [robbery of the castle], which by our antient law was called *hamesecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offence: not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation, which every individual might acquire even in a state of nature; an invasion, which in such a state, would be sure to be punished with death, unless the assailant were the stronger. But in civil society, the laws also come in to the assistance of the weaker party: and, besides that they leave him this natural right of killing the aggressor, if he can, (as was shewn in a former chapter)” (Emphasis in original, p. 148).

<sup>23</sup> See Florida statute Chapter 776 Justifiable Use of Force.

place.<sup>24</sup> Essentially, these laws permit individuals to “stand their ground” and use reasonable force, including deadly force, to prevent death or serious bodily harm from an attacker, without requiring that individuals retreat from the attack.

## 1.2. The defensibility condition

My argument for a fundamental right to self-defense is based on a definition of rights that includes a condition for *defensibility*. For a right to be defensible means that it is morally permissible to physically defend that which the right-holder has a right to. This means that individuals may use defensive force against all risks of rights-violations. I will refer to any risk of a rights-violation as a ‘threat’. So, if I have a right to bodily integrity and FEMA tries to show up at my door with a vaccine syringe, then it is appropriate to refer to the FEMA-syringe-wielding-rep as a threat to my right of bodily integrity. Or if I have a property right to my computer and I notice someone about to grab my computer while it is briefly unattended in a public space, then the probable-computer-thief is a threat to my property right. Because regardless of the content of the right, any potential rights-violation *is* a threat to the right-holder. The severity of the threat is directly related to the content of the right and what individuals may do to protect against these threats will be discussed in the following chapter.

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<sup>24</sup> Alabama, Alaska, Arizona, Florida, Georgia, Indiana, Iowa, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming. See Ala. Code § 13A-3-23(b); Alaska Stat. Ann. § 11.81.335; Ariz. Rev. Stat. Ann. § 13-411; Fla. Stat. Ann. § 776.013(3); Ga. Code Ann. § 16-3-23.1; Ind. Code Ann. § 35-41-3-2(c)(2); Ia. Code Ann. § 704.1; Ida. Code Ann. § 18-4009(1)(b); Kan. Stat. Ann. § 21-5222; Ky. Rev. Stat. Ann. §§ 503.050(4), 503.055(3); La. Stat. Ann. § 14:20(C); Mich. Comp. Laws § 780.972(2); Miss. Ann. Code § 97-3-15(4); Mo. Stat. Ann. § 563.031; Mont. Code Ann. § 45-3-110; Nev. Rev. Stat. Ann. § 200.120(2); N.H. Rev. Stat. Ann. § 627:4(III); N.C. Gen. Stat. Ann. § 14-51.3; Okla. Stat. Ann. Tit. 21 § 1289.25(D); 18 Pa. Cons. Stat. Ann. § 505(b)(2.3); S.C. Ann. Code § 16-11-440(C); S.D. Laws § 22-18-4; Tenn. Ann. Code § 39-11-611(b); Tex. Penal Code § 9.32(C); Utah Code Ann. § 76-2-402(3); W. Va. Code § 55-7-22; Wyo. Stat. § 6-2-602(e).

The defensibility condition also entails that right-holders do not have to wait until their right has been violated to take action. This means that right-holders are justified in using preemptive defensive force against the threat of a rights-violation. Consider the following case.

*Night Walker.* You are walking alone at night down a fairly quiet city street. A man is walking behind you and seems to be getting closer to you at a noticeable pace. You sense you are being followed, so you change your route by turning down a couple of different streets. The man is still following you. When you turn back to look at the man, his hands are in his pockets and it looks as though he could be holding a gun. You cannot tell if you are simply being paranoid.

Should you have to wait until you are being attacked to take defensive action? Absolutely not. You can be reasonably certain that if you take no action, you will be attacked. It is an open question of what kind of attack you may suffer, as there is no way to know if the man wants to rob you, rape you, abduct you, or murder you. But perhaps you are mistaken. Perhaps this man is just walking the same route as you at a brisk pace. Should this ambiguity require you to not take preemptive defensive action? I argue that it should not, as the consequences of not taking preemptive defensive action put you at an unacceptably high risk of either (1) suffering an irreparable harm, or (2) finding yourself in a situation where it would be impossible to take any defensive action. There are limits to what kind of defensive force can be justified and it is not my argument that *any* amount of defensive force is justifiable for rights-violations. The type and degree of defensive force that is justifiable is subject to conditions of proportionality and reasonableness to be detailed in the following chapter. But what I hoped to have made clear here, is that *it is* justifiable to use defensive force against threats of rights-violations. Individuals need to be able to enforce their rights even in situations where the force would have previously been deemed a rights-violation. As Michael Huemer states:

It is ethically permissible to use force against potential rights-violators to prevent their violation of rights, or against actual rights-violators to punish or remedy their violation of

rights, even when this use of force would otherwise have been a violation of the rights of the person against whom it is used.<sup>25</sup>

Without a defensibility condition, rights would be impotent, as there would be no justification to use force against others' attempts to violate your rights, which would essentially make the right a right in name only. This account of rights entails that individuals are able to use force against third parties who may try to intervene in the right-holder's initial defense efforts. For example, if while Tim is being attacked and is attempting to defend himself against the attacker, a third party comes along and, perhaps not knowing *who* the attacker is, uses force against Tim, then it is morally permissible for Tim to use force against this third party.

### **1.3. Fundamental vs. derivative rights**

A right is either fundamental or derivative, and it can be both fundamental and derivative if the right manages to fulfill the requirements of each. A right that is fundamental is a right that doesn't require appeal to other rights in order to be justified. As Huemer states, "A right is fundamental when it has some force that is independent of other rights."<sup>26</sup> Hugh LaFollette states that "A fundamental right is a non-derivative right protecting a *fundamental* interest."<sup>27</sup>

LaFollette acknowledges that rights can be overridden or restricted, but not without compelling reasons, nor can individuals forfeit their rights without some overwhelming considerations.<sup>28</sup>

LaFollette is not alone in this view, as it is commonly accepted that rights can be restricted and they can be overridden by countervailing considerations. Huemer states that whether rights can

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<sup>25</sup> Huemer *forthcoming*, pp. 15-6.

<sup>26</sup> Huemer 2003, p. 299.

<sup>27</sup> LaFollette 2000, p. 264.

<sup>28</sup> *Ibid.*



be overridden by these considerations is a matter of how weighty the respective rights are.<sup>29</sup> Samuel Wheeler holds that only a conflicting right can outweigh other rights and states, “Whether the right survives the countervailing right depends on the relative strength of the rights.”<sup>30</sup> A non-controversial example of a fundamental right is the right to life. The right to life doesn’t require any appeal to other rights in order to be justified and it clearly protects a fundamental interest. A fundamental interest is an interest that is “integrally related to a person’s chance of living a good life, *whatever her particular interests, desires, and beliefs happen to be.*”<sup>31</sup>

A derivative right is a right that assists in securing the fundamental right, and therefore the fundamental interest, that the fundamental right protects. Therefore, a derivative right is often, but not always, a right that is means-focused. By that I mean that the derivative right provides justification for certain types of action in order to help protect the fundamental right. The fundamental right itself may be too broad to provide guidance on what kinds of action or behavior are morally permissible in order to secure it. While the right to self-defense is often thought to be a fundamental right, and the justification for an individual to take defensive action to protect themselves from harm has a long history, there are some who would argue that the right to self-defense is a derivative right instead.<sup>32</sup> David DeGrazia makes a move like this by stating that the fundamental right is the right to physical security and the right to self-defense is

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<sup>29</sup> See Huemer’s (2003) three principles about the weighing of rights on pp. 300-01.

<sup>30</sup> Wheeler 1997, p. 433.

<sup>31</sup> LaFollette 2000, p. 264. Emphasis in original.

<sup>32</sup> DeGrazia and Hunt 2016 recognize the right to self-defense to be a fundamental right. The list of scholars who recognize defensive action as justified is extensive, so I have only included some here: Hobbes 1651, pp. 91-100; Locke 1690, p. 14; Mill 1859; Mommsen et al. 1985. See ‘Acts Done Under Duress’ in Book Four of Digest of Justinian. “Therefore, this clause comprises both force and duress and if anyone, compelled by force, does something, he may obtain *restitutio* through this edict” (Mommsen et al. 1985, p. 114). *Restitutio* is short for *restitutio in integrum*, which means “restoration to a whole or uninjured condition” (Merriam-Webster).

derivative of this more fundamental right.<sup>33</sup> While I don't think this view is completely implausible, I do think it lacks the justificatory force that the arguments for a fundamental right to self-defense offer. I argue that the right to self-defense is a fundamental right and that it is both a component of a right to life, yet distinct from it.<sup>34</sup> In order to evaluate my claim, it is necessary to understand what constitutes a right to life.

The right to life has historically been understood to be a negative right in that a person simply had a right not to be deprived of life and others have a duty not to interfere with this right. This conception naturally led to the right being used to discuss and answer questions surrounding the termination of a life (euthanasia, suicide), or the prevention of a life (sterilization).<sup>35</sup> However, many now believe that the right to life is a positive right that requires that individuals be provided the basic necessities to sustain life, such as food, water, shelter, and so on. In more recent years, the right to life has expanded even further, to include such rights as the right to medical care and the right to work. When I refer to the 'right to life', I am referring to the right which is negative and simply means the right not to be deprived of life. While this understanding may be considered insufficient to those who would like the right to encompass the litany of other rights that have come to comprise a modern right to life, it is not controversial that it is a fundamental right. If fundamental rights protect fundamental interests, then the right not to be deprived of life certainly protects a fundamental interest, for an individual must be alive to have any interests at all (fundamental or otherwise).

If the right to life is the right not to be deprived of life, then it logically entails that an individual is permitted to take certain actions that serve that end. In fact, this seems to be entirely

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<sup>33</sup> DeGrazia and Hunt 2016. See pp. 149-50 for DeGrazia's full *Argument from Physical Security*.

<sup>34</sup> Another way of stating this is that the right to self-defense is a basic right.

<sup>35</sup> Bedau 1968, p.550.

acceptable when the action discussed is more innocuous, such as eating food. So, if Janine has a right to life, then Janine has a right not to be deprived of life. This entails that Janine can take certain actions to ensure Janine's survival, such as eating food, which other people cannot interfere with, or prevent, without it being considered a rights-violation. To be clear, I am not arguing that Janine has a positive right *to food*, such that there is an obligation for others to provide Janine food; but rather, Janine has a negative right to food, such that she is permitted to take certain action to ensure her survival, including working a job to buy the food, or growing the food oneself, and others may not interfere. It seems plausible that self-defense actions should be included in the types of actions that one can take to prevent being deprived of life. If this is true, then it appears that the right to life does include a component of the right to self-defense in its conception. The central claim of the right to self-defense is that an individual has a right to use to defensive force in order to protect their own life.<sup>36</sup> Another way of stating the central claim is to say that the right to self-defense is the right to use defensive force to prevent yourself being killed. I will refer to this claim as the *core component* of the right to self-defense. The argument I am making here is to say that this core component of the right to self-defense is an integral part of the right to life. The argument goes as follows:

1. The right to x entails a prima facie right to take actions that are necessary for x.
2. When an individual's life is under threat, it is (often) necessary to use defensive force to live.<sup>37</sup>
3. Therefore, the right to life entails the prima facie right (often), when an individual's life is under threat, to use defensive force.<sup>38</sup>

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<sup>36</sup> As discussed earlier in the chapter, *all* rights have the *defensibility condition* meaning that every right can be defended using defensive force. There are limits to what constitutes 'defensive force', but these limits will be discussed in another chapter.

<sup>37</sup> I have deliberately used the phrase, "life under threat" to encompass a broad set of life-threatening situations.

<sup>38</sup> This argument illustrates how the right to self-defense is a component of the right to life, but the basic argument can be applied to all rights-violations. Here is an example:

1. The right to x entails a prima facie right to take actions that are necessary for x.
2. When threatened with possible harm, it is (often) necessary to use defensive force to prevent or limit the harm.

I maintain that the right to life cannot properly be understood without this component of the right to self-defense. In this way, the right to self-defense is inextricably woven into the right to life. It is perhaps this connection that has led some scholars to believe that the right to self-defense is a “special case” of the right to life.<sup>39</sup> Surely, if individuals have a right to life, then they have the right to defend it, even if the defense of it has certain restrictions and qualifications. However, the special-case-view results in a right to self-defense that is far too narrow. The right to self-defense includes the right to defend yourself against other types of rights-violations, not just life-threatening harm. What makes the special-case view plausible, is that not all non-life-threatening harm is apparent from the outset. For example, if a woman has discovered an intruder in her home, she cannot be sure that the harm the intruder is intending to commit is non-life-threatening. It is entirely possible that all the intruder plans to do is to steal jewelry and money; there is no “real” threat to her life. However, the woman cannot be sure that the harm is non-life-threatening. Once one person (or more) has violated another individual’s personal space in a way that shows deep disregard for not only that individual’s rights, but for the law as well, then the individual whose personal space has been violated can rightfully be unsure as to the extent of that violation, up to and including whether this violation will extend to a risk to her life. If we understand that there are categories of harm that have been definitionally appointed as non-life-threatening, but in actuality, are *experienced* as life-threatening, then we can see why the right to self-defense could be thought of as a special case of the right to life. Furthermore, there are cases where there is clearly no threat to one’s life, but the individual still has a right to use defensive

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3. Therefore, the right not to be harmed entails the prima facie right (often), when threatened with possible harm, to use defensive force.

<sup>39</sup> Bedau (1968) states, “Thus, the right of self-defense, according to all Natural Rights theorists, including Blackstone, is simply a special case of the right to life” (p. 559).

force to protect themselves. If I am walking down the street and I notice that the man coming towards me is going to step on my foot, I have a right to use defensive force to prevent suffering this non-life-threatening harm. If this is true, then the right to self-defense cannot just be a special case of the right to life, as defensive force is justified in non-life-threatening situations. Ultimately, the special-case-view has certain merits, but it fails to capture important dimensions of the right to self-defense. Specifically, there are other critical components of a right to self-defense that cannot be explained or defended by their relationship to the right to life.

#### **1.4. The scope of the right to self-defense**

I have established that the core component of the right to self-defense is the right to prevent yourself from being killed. I argued that this component of the right is inextricably tied to the right to life and that it is fundamental. But the right to self-defense also includes components that are distinct from the right to life. The right to self-defense also includes: (1) the right to defend yourself against bodily harm or injury, where the harm/injury is either intentional or unintentional, and acute or sustained, and (2) the right to defend yourself against enslavement. I will show that while these components are distinct from the right to life, they are fundamental in nature because individuals have a fundamental interest in not being harmed even when the harm is non-life-threatening; given this, I maintain that the right to self-defense is a fundamental right.

##### *1.4.1. The right to defend yourself against bodily harm or injury*

A person's right to self-defense permits that person to defend against bodily harm or injury, where the bodily harm or injury does not have to be life-threatening for the self-defense to be

justified. For the purposes of brevity, I will consider bodily harm and injury to be synonymous throughout this dissertation and I will refer to them both as “bodily harm”.

There are three types of bodily harm that I will discuss: (1) intentional and acute bodily harm, (2) intentional and sustained bodily harm, and (3) unintentional bodily harm. I will argue that the right to self-defense includes justified defense against all three of these types of harm.<sup>40</sup>

### *Intentional and acute bodily harm*

An individual has a right to defend themselves against harm that is both *intentional* and *acute*, where the threat of harm could be either clearly non-life-threatening, or ambiguous. Imagine the following scenario.

*Frustrated Shopper.* Sally is at the grocery store. The lines at the checkouts are long due to the upcoming holiday. Sally is running late to pick her daughter up from ballet, so she races to the checkout line, inadvertently cutting off another shopper. The woman she has accidentally cut in front of is angry and makes aggressive comments to Sally. Sally apologizes to the woman and states that she did not see her. The woman becomes angrier and forcefully pushes her cart into Sally’s knee, causing Sally to fall to the ground.

The frustrated shopper has caused intentional and acute bodily harm to Sally. The threat is not life-threatening, but that does not mean Sally does not have a right to defend against it.<sup>41</sup> Should Sally have seen the frustrated shopper pushing her cart towards her, Sally would have been justified in trying to prevent it from hitting her. Or consider this scenario:

*Angry Football Father.* Nathan goes to his son’s football games every week. The crowd is full of enthusiastic parents and there is one dad, Shaun, who appears to be heavily invested in the game. During the course of the game, the referee makes a call that supports a play made by Nathan’s son. This decision infuriates Shaun and Shaun, seeing

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<sup>40</sup> There are many cases of self-injury (self-harm), but I will not be discussing these types of harms, as the ability to prevent a self-induced harm does not fall under the umbrella of a right to self-defense.

<sup>41</sup> I realize there could be a case where this kind of situation may escalate to being a life-threatening one, however, I would like to set aside this rare possibility and simply focus on the most likely scenario where Sally does not feel her life is at risk.

Nathan's happiness, decides to approach Nathan and confront him. Shaun is significantly bigger than Nathan. Nathan's attempts to defuse the situation by making light of it being "just a kids sport" incenses Shaun to the point that Shaun punches Nathan.

This kind of harm is intentional, acute, and it is ambiguous on whether it could be considered life-threatening. The chances are that *if* Shaun only punches Nathan once, the harm will not be life-threatening, although there are cases where one punch can kill.<sup>42</sup> But Nathan does not know if Shaun will punch him just once. From Nathan's point of view, it is ambiguous on whether the violence Shaun has inflicted on him, is life-threatening or not. Nathan has a right to defend himself against this type of harm. Nathan has a fundamental interest in not being harmed, whether or not the threat can be considered life-threatening. Nathan is justified in using defensive force to prevent being further harmed by Shaun.<sup>43</sup> Of course there are limits to what kind of defensive force is justified; Nathan cannot pull out a handgun and shoot Shaun, but these limits will be discussed in the next chapter, so I will not comment further on them here.

### *Intentional and sustained bodily harm*

An individual has a right to defend themselves against harm that is both *intentional* and *sustained*.<sup>44</sup> This type of harm is seen in cases of abuse or torture. Perhaps the best example that captures intentional and sustained harm is the case of domestic abuse. Domestic abuse is a systematic pattern of power and control of one individual over the other significant interpersonal

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<sup>42</sup> There are not official statistics on deaths that have occurred from one punch, however, it has occurred with some degree of regularity. See BBC news story for discussion of the surprising regularity with one-punch-deaths (Therrien 2017).

<sup>43</sup> I don't expect the justification of defensive force in this type of harm scenario to be considered controversial.

<sup>44</sup> This kind of harm could also be thought of as *chronic*. However, I think the term 'sustained' more accurately captures qualitative aspects of this kind of harm. Chronic is often associated with medical conditions where symptoms can be recurring. While the type of harm I am concerned with could certainly be described in this way, I think sustained captures the *lack of interruption* in the harm that people in these situations face.

relationships.<sup>45</sup> The type of abuse that a victim can undergo includes physical abuse, emotional/psychological abuse, sexual abuse, and economic abuse. In this section, I will focus my arguments on the harm that is a result of physical abuse, although I acknowledge that this type of abuse has emotional and psychological components. Victims of domestic abuse are involved in a pattern of physical harm where the type of harm they are subjected to varies in both degree and intensity, including pinching, punching, hitting, choking, pushing, kicking, biting, hair-pulling, and other types of physical coercion, including, but not limited to, being forced to take drugs or alcohol. The type of harm and the intensity of the violence may change from incident to incident.<sup>46</sup> While the incidents of physical abuse may occur in an acute setting, the harm that is generated from this pattern is sustained. In fact, in order for the abuse to be as effective as it is, it must be maintained at a certain level over time. The reason that this type of harm is relevantly different from the other categories of harm, is that the sustained nature of the harm permits individuals who are victims of it a wider latitude on what kind of defensive force is justified and *when* it can be used. These distinctions will be discussed in the following chapter. The point to be made here is that an individual has a right to defend themselves when the harm is intentional and sustained.

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<sup>45</sup> Zlatka Rakovec-Felser (2014) states, "Domestic violence could include violence between a husband and a wife, a girlfriend and boyfriend, or gay or lesbian partners. It could be violence between parents and children, adult children and elderly parents, or we could meet it between siblings."

<sup>46</sup> An example of how varied the violence can be in domestic abuse is seen in the case *State v. Norman*. Here is an excerpt from the opinion:

His physical abuse of her consisted of frequent assaults that included slapping, punching and kicking her, striking her with various objects, and throwing glasses, beer bottles and other objects at her. The defendant described other specific incidents of abuse, such as her husband putting her cigarettes out on her, throwing hot coffee on her, breaking glass against her face and crushing food on her face... Her evidence tended to show that her husband did not work and forced her to make money by prostitution, and that he made humor of that fact to family and friends. He would beat her if she resisted going out to prostitute herself or if he was unsatisfied with the amounts of money she made. He routinely called the defendant "dog," "bitch" and "whore," and on a few occasions made her eat pet food out of the pets' bowls and bark like a dog. He often made her sleep on the floor. At times, he deprived her of food and refused to let her get food for the family. During those years of abuse, the defendant's husband threatened numerous times to kill her and to maim her in various ways.



### *Unintentional bodily harm*

An individual is morally permitted to take certain actions to prevent suffering a harm, even when that harm is unintentional. Take the following case as an example.

*Bar Altercation.* Joe wants to hurt Mark by throwing a beer bottle at him, but Joe's throw misses Mark and hits Bob instead.

Bob has a right to defend himself against this threat, even though Joe does not intend to harm Bob. Another example can be seen in the following case.

*Reckless Cyclist.* Adam is walking along the street, and a cyclist is heading towards him. The cyclist is not intending to hit Adam, but nonetheless, Adam will be injured if he doesn't take action.<sup>47</sup>

I argue that Adam has a right to defend himself against this threat of unintentional bodily harm, because even though the cyclist does not *intend* to hit Adam, Adam will be harmed if he does nothing. The cyclist's absence of intention to harm does not negate Adam's right not to be harmed; however, the cyclist's absence of intention to harm *does* alter the kind of defensive force Adam is justified using. These limits will be discussed in the following chapter. The argument here is that Adam is justified in using defensive force against the cyclist to prevent suffering a harm, even though the cyclist is not intentionally trying to harm him. To reject the use of defensive force against unintentional harm would mean that individuals would have to allow themselves to be harmed, simply because the person committing the harm did not mean to do so. Most people who find themselves in a self-defense situation do not have access to the other person's mental state such that they can discern whether the harmful action is intentional. Individuals have to act with the limited information they have, in a brief period of time, while

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<sup>47</sup> To make the case clear, I will stipulate that it is evident from the way the cyclist is riding the bike, that the threat is non-life-threatening.

experiencing the stress that is generated from the threat of harm. But *even if* it were possible to know with absolute certainty that the person inflicting the harm was doing so unintentionally, it is still ethically permissible for you to defend against this kind of harm. It is not reasonable to ask people to willingly undergo harm just because the person inflicting the harm is doing so unintentionally.<sup>48</sup>

#### *1.4.2. The right to defend yourself against enslavement*

The right to defend yourself against enslavement includes three components: (1) the right to defend yourself from *becoming enslaved*, and (2) the right to defend yourself against *staying enslaved*, and (3) the right to defend yourself against any and all harm during your enslavement. The right to defend yourself against becoming enslaved and the right to defend yourself against staying enslaved means that a person may use the same defensive force that is morally permissible to prevent themselves from being killed. This is because the threat of enslavement is a sufficiently serious threat and because being enslaved is an extremely serious rights-violation.

As previously discussed, slavery not only still exists, but the market for human trafficking is robust.<sup>49</sup> Human trafficking is the crime of using coercion, compulsion, or force on individuals for the purpose of obtaining labor services or commercial sex acts.<sup>50</sup> Given the

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<sup>48</sup> On a practical level, I don't think people would be capable of allowing this to happen, even if we were to attempt to set a moral or legal precedent. If you have a cyclist coming towards you, you are not going to just "stand down" and allow yourself to be harmed.

<sup>49</sup> It is an interesting question of why human trafficking does not garner more global attention and outrage. At the time of writing this, tens of millions of humans *annually* are victims of trafficking.

<sup>50</sup> However, if the commercial sex involves a minor, no coercion, compulsion, or force needs to be present for it to be considered a human trafficking crime. As previously discussed, a person does not need to be moved between locations for the crime to be considered human trafficking. (This definition is taken from The United States Department of Justice's website on human trafficking.) A note about terminology. The United States Department of State's 20<sup>th</sup> Edition of the Trafficking In Persons Report (2020) states, "The United States considers 'trafficking in persons,' 'human trafficking,' and 'modern slavery' to be interchangeable umbrella terms that refer to both sex and labor trafficking. The TVPA and the Palermo Protocol describe this compelled service using a number of different terms, including involuntary servitude, slavery or practices similar to slavery, debt bondage, and forced labor" (p. 3). The United Nations Office on Drugs and Crime states in their Global Report on Trafficking in Persons that, "The

prevalence of modern-day slavery, it is important to understand how an individual's right to self-defense applies in these cases.

To be enslaved is to no longer be free. It is the subjugation of one person to another (or others) where the person enslaved is treated as the property of the enslaver (or enslavers) and is forced to obey them. Even though the person enslaved is alive, this person has been stripped of many (if not all) of the core values that make life meaningful.<sup>51</sup> Perhaps the best way to encapsulate the deprivation that slavery causes is to simply say that the person enslaved no longer has the freedom and ability to develop and live a life that is of their own making—it has been stolen from them.<sup>52</sup> In addition to this, is the critical fact that if you are enslaved, you are being forced to obey someone else's orders, which for many slaves involves brutal labor conditions, physical deprivations of basic necessities and living conditions, or being forced to perform sexual acts, including being raped.<sup>53</sup> Slavery conditions vary in type and degree. Not all types of enslavement are equally bad. In fact, there are some who argue that individuals willingly enter into slavery in order to improve their position in life.<sup>54</sup> Does this state of volunteer

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term *trafficking in persons* can be misleading: it places emphasis on the transaction aspects of a crime that is more accurately described as enslavement. Exploitation of people, day after day. For years on end.”

<sup>51</sup> I allow for the possibility that some of the core values of life may be able to be experienced while enslaved, although this is highly person- and circumstance-specific. For example, a person of faith may still be able to communicate with God while being enslaved.

<sup>52</sup> It is not the goal of this section to provide an exhaustive list of all of the deprivations that occur within slavery.

<sup>53</sup> These conditions often result in severe physical and mental trauma. This trauma can be so grievous that it is difficult to truly fathom the extent of the damage to those who have not experienced it. Watch Anneke Lucas discuss details of her experience (Spencer Lodge Podcast 2020). Unfortunately, victims of trafficking who speak out are often met with extreme skepticism. They are accused of lying about their experience, or that they are embellishing the details. While I think it is possible that this could occur in some cases, there are far too many cases for this to occur in every case. The more likely scenario is that human trafficking exists and some individuals who escape it, want to help save others by sharing their experience and drawing attention to the issue (considering the issue of human trafficking garners very little mainstream attention relative to its prevalence). Or perhaps they just find it psychologically liberating to have the truth of their experience spoken about such that this kind of liberation helps them heal.

<sup>54</sup> Stephen Kershner (2003) gives the following examples in his defense of slavery contracts:

there are cases in which the desperation of certain persons or their families leads them to enter into slavery contracts. One such type of case would involve persons in desperate situations in the third world who wish to trade their liberty, either temporarily or permanently, for benefits for themselves or those they love (e.g., family members). In the early years of the United States, some immigrants agreed to indentured servitude

enslavement reveal that enslavement isn't necessarily a serious rights-violation, so the use of lethal defensive force would not be justifiable in all cases of enslavement? It does seem to be the case that *if* a person can voluntarily enter themselves into enslavement, such that by doing so, they have some input as to the terms of their enslavement, then the use of lethal deadly force may be unjustified. However, this hinges on the controversial claim that a person can *voluntarily* enter into slavery. So, can a person voluntarily become enslaved?

The notion of *voluntary slavery* being permissible such that people could enter into a legally enforceable contract is largely rooted in claims about individual autonomy, concerns about freedom of contract, and respect of an individual's right to sell their property in alternative arrangements; individuals should be free to choose how to capitalize on their own labor and they should be free to direct their own lives, including the choice to endure servitude for whatever reason the individual deems worthy.<sup>55</sup> Most arguments for voluntary slavery are confined to the individual's right to sell their labor for a set period of time, including in some cases, a lifetime. These arguments are not suggesting a form of slavery where the master has *absolute authority* over the individual's life, such that the master could kill the slave, but rather a form of labor contract that extends beyond the norms of what a lot of people consider acceptable employment terms. I think referring to an unorthodox labor contract as 'voluntary slavery' is misleading. The very definition of slavery holds that the person is forced to lose their freedom of choice and action. Therefore, a person cannot *choose* to lose their freedom of choice and action, even for a temporary period of time, and be considered a slave in the relevant way. My argument is not

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in order to get to the United States. It is also similar to cases in which young women from third-world countries enter into the sex trade as a way to benefit their family (p. 510).

<sup>55</sup> *Ibid.* Danny Frederick (2014) believes that voluntary slavery is permissible, and that fixed-term slave contracts should be legally enforceable. Robert Nozick (2013) believed a free system would allow individuals to sell themselves into slavery. Nozick (2013) states, "The comparable question about an individual is whether a free system will allow him to sell himself into slavery. I believe that it would" (331).

concerned with individuals who choose to enter into an unorthodox labor contract that is referred to as ‘voluntary slavery’. My argument is concerned with the liberal view that slavery is inherently involuntarily.<sup>56</sup> I maintain that a proper conception of slavery, that is one where the enslaved person is not voluntarily agreeing to the terms of the enslavement, is of the kind that justifies use of lethal defensive force.<sup>57</sup>

### **1.5. Positive vs. negative rights**

Positive rights require duties by others to assist in the acquisition or preservation of some benefit (typically a good or service), whereas negative rights simply require that others refrain from interfering with individuals who are exercising their right. Positive rights therefore have a heavier burden to justify than negative rights. Greater justification is required for duties to assist rather than duties to refrain.

The right to self-defense is not a good candidate for a positive right as it would require correlative duties for others to assist in ensuring individuals are protected from harm. What kind of duties would a positive right to self-defense entail? Perhaps it would entail that other people have to provide security systems for people’s homes or provide guns for their self-defense. Or perhaps it would entail that businesses offering self-defense classes are required to perform their services at a free or low-cost rate. These are only a few examples, but they help highlight how burdensome a positive right to self-defense would be. It also isn’t clear who would assume the

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<sup>56</sup> Some thinkers believe this liberal view to be a prejudice. J. Philmore (1982) states:

It seems to be a basic shared prejudice of liberalism that slavery is inherently involuntary, so the issue of genuinely voluntary slavery has received little scrutiny. The perfectly valid liberal argument that involuntary slavery is inherently unjust is thus taken to include voluntary slavery (in which case, the argument, by definition, does not apply). This has resulted in an abridgement of the freedom of contract in modern liberal society (p. 43).

<sup>57</sup> This is true even in cases of enslavement where the conditions are not the most brutal.

costs involved in any of these options if a positive right to self-defense were to be accepted, although it is plausible to think the state would be responsible as it is in the case with other alleged positive rights, such as the right to health care. A positive right to self-defense is neither morally appealing, nor practically feasible, but given that there aren't really any proponents of a positive right to self-defense, I won't discuss it further here.<sup>58</sup>

The right to self-defense is a negative right, as it simply obliges others not to interfere with an individual's defense of themselves.<sup>59</sup> A negative right of self-defense does not burden others to ensure an individual can defend themselves, but rather recognizes the individual's right to defend themselves and obligates them not to interfere. The negative duty imposed by a negative right to self-defense is not burdensome and coheres with our moral intuitions about individual liberty and responsibility. People don't typically think they are personally responsible for ensuring that other individuals are able to defend themselves in harmful situations, which is what a positive right to self-defense would imply. People also don't typically object to being required to not interfere in another individual's defense of her own self. This view doesn't preclude other people from helping individuals to defend themselves, or in certain situations, even obligating them to do so. A negative right to self-defense simply recognizes that individuals should be free from interference in defending themselves.

## **1.6. Claim vs. permission rights**

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<sup>58</sup> This isn't to say that a positive right to self-defense is worse than other positive rights. If there is a positive right to health care and the government can pay for your medical care, then they could also pay for your gun if you had a positive right to self-defense. I'm grateful to Michael Huemer for making this point.

<sup>59</sup> Narveson 2001, p. 58

I contend that the right to self-defense is a claim right, rather than a mere permission or liberty right, due to its focus on the right-holder's agency and her claim over other people. A claim right logically entails correlative duties on the part of others, whereas a permission right does not entail any correlative duties on others.<sup>60</sup> A permission right can be seen in the following example:

*Boxing Match.* Boxer A has a permission right to punch Boxer B. But Boxer B *may* forcibly interfere with Boxer A's attempt to do so.<sup>61</sup>

Boxer A's permission right to punch Boxer B does not entail any correlative duties on Boxer B, but more importantly, Boxer B is allowed to interfere with Boxer A's exercising of his right. This is because Boxer A's right is a *mere permission*—the right does not generate any obligation for Boxer B to not interfere. If the right to self-defense were a permission right, it would mean that individuals have the freedom to use defensive force, but it would not require that others not interfere with the right-holder's exercising of that right. Imagine the following scenario.

*Parking Garage Attack.* You are walking towards your car in an underground parking garage. Out of nowhere, a man grabs you and pulls you down to the ground. You are wrestling with the attacker to try and escape. You even manage to punch the attacker twice. Suddenly, a second man appears and tries to restrain you from defending yourself.

If the right to self-defense were a mere permission right, then the second man in the parking garage has no obligation *not* to interfere in your defense. In fact, if the right to self-defense were a permission right, then it is *morally permissible* for the second man to interfere with your use of defensive force against the attacker. Interference in a self-defense situation *amplifies* the need for self-defense by the person being harmed (or under threat of being harmed). The person who interferes is either deliberately or inadvertently becoming an accomplice in the attack, therefore

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<sup>60</sup> Feinberg 1966, p. 137. I agree with Joel Feinberg in that some idea or understanding of a 'claim' does appear to be essential to our conception of rights.

<sup>61</sup> I've borrowed this example from Michael Huemer.

increasing the number of people to defend against and increasing the force required to reduce or eliminate the threat. If there is no moral requirement to refrain from interfering with an individual's right to self-defense, it seems highly likely that this could lead to a breakdown of the legal recognition of a right to self-defense.

The right to self-defense requires the moral force that a claim right imposes. A claim right doesn't require others to assist in an individual's procurement of self-defense, as a positive right would suggest, but it does require that others do not interfere. A claim right also recognizes that the right-holder has no duty to refrain from exercising her right, nor any duty to relinquish her right.<sup>62</sup>

## 1.7. Conclusion

The right to self-defense that I have argued for is a fundamental, negative, claim right. I have shown that the right to self-defense is a component of the right to life yet distinct from it. The right to life is, at its root, the right not to be deprived of life, and all rights include certain morally permissible actions to protect the right. I have argued that defensive force must be considered one of these morally permissible actions for an individual to prevent themselves from being deprived of life. Therefore, the right to self-defense is *necessarily* a part of the right to life, and it is a fundamental right in this regard. The right to self-defense is also distinct from the right to life, as there are non-life-threatening harms that we have a right to defend against. Avoiding these harms is of fundamental interest to people, therefore, even in this capacity, the right to self-defense is a fundamental right.

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<sup>62</sup> Feinberg 1970, p. 249.



I have argued that the right to self-defense is a negative right, which simply recognizes that individuals should be free from interference when defending themselves. This is a commonsense understanding of the right to self-defense, as it coheres with our notions of individual liberty and personal responsibility, and it does not burden other individuals with unjustifiable moral obligations that would accompany a positive right to self-defense.

Finally, I have argued that the right to self-defense is a claim right, by which I mean that the right to self-defense logically entails correlative duties on other individuals. Without the justifiable claim of correlative duties, the right to self-defense would lack the requisite moral force that obligates other individuals not to interfere.

## Chapter 2: Revisiting the conditions for justified self-defense

In this chapter, I explore the question of *when* defensive force, including deadly force, is actually justified. Typically, there are four conditions that must be met for defensive force to be considered justified. The first condition is the *imminence requirement*. The use of defensive force is justified only if the threat is imminent; it cannot be in anticipation of a harm that is not impending, nor can it be executed after the threat has passed. The second condition is the *necessity condition*. Defensive force is considered necessary only if there is no way to retreat from the threat, and there are no other non-violent alternatives to use to avoid the threat. When using defensive force is the only option to defend against the threat, then it is commonly considered justified force. The third condition is the *proportionality requirement*. The use of defensive force must not cause vastly greater harm than the threat. I cannot stab someone for stepping on my toe. The fourth and final condition is that the aggressor is using *wrongful force*. For example, if a man breaks into my home, I can use self-defense against this wrongful force, but he would not be justified in using defensive force *against* my self-defense measures. While these four conditions are taken from legal doctrine on what constitutes justified self-defense, they are commonly thought to reflect people's moral intuitions on the matter. I suggest the following revisions to the conditions for justified defensive force: (1) the imminence requirement should be rejected and replaced with a condition I call the *reasonable certainty condition*, as the reasonable certainty condition does a superior job of explaining our intuitions on self-defense situations, particularly the sense that using preemptive defensive force is often justified, (2) the necessity condition should be revised so that there is less risk required of would-be victims, and (3) the proportionality requirement should include a condition for *irreversibility*, as this condition better captures the potential harm of rights-violations than the basic proportionality requirement does. I

accept the wrongful force condition as conventionally understood, so I will not be discussing it further.

## 2.1. The imminence requirement

The imminence requirement is often considered an uncontroversial condition for understanding justified self-defense. The imminence requirement holds that defensive force can only be justified against an attack if that attack is *just about to occur*. The concern is that if an imminence requirement isn't upheld, then it would result in defensive force being used *too soon*, and therefore resulting in unnecessary harm or death. Without the imminence requirement, the door to preemptive harm or killing seems dangerously wide open. Furthermore, if the threat isn't imminent, then there is usually an alternative solution that is preferable to using direct violence, such as calling the police. While the imminence requirement is widely accepted, there are criticisms of it, and it will be informative to review at least one of these.

Marcia Baron makes the argument that the imminence requirement is simply a proxy for necessity and therefore should no longer be its own distinct requirement. The crux of Baron's argument is that the imminence requirement is merely indicating the necessity of the defensive force. That is, if the threat is imminent, it often follows that the defensive force that was used was necessary to defend oneself from serious harm or death. But as Baron points out, there are instances where the use of defensive force against life-threatening, but not imminent harm, is justified.<sup>63</sup> And in those instances, what matters is that the defensive force was *necessary*, rather than that the threat was imminent. I believe the strength of Baron's argument is in her ability to

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<sup>63</sup> Baron 2011. Baron discusses examples of battered women who kill their abuser at times where they have the opportunity to end the life-threatening harm, although the harm is not imminent at the moment of self-defense.

highlight how life-threatening harm need not be imminent in order to justify defensive force to reduce the threat. Often people conceptualize life-threatening harm as a distinct and rare event in an individual's life, but this understanding fails to recognize the reality that many people suffer life-threatening harm as a *way of life*. *State v. Norman* is a well-known case of domestic abuse and the following synopsis by Baron demonstrates how a significant portion of some individuals' lives are filled with life-threatening, but not imminent harm:

Judy Norman had been abused for about twenty years by her husband, J.T.; the abuse included beating her with a baseball bat, putting out cigarettes on her, throwing hot coffee on her, throwing beer bottles and other objects at her, refusing to let her eat for days at a time, and breaking glass against her face. The abuse was attested to by numerous witnesses, and the evidence they (and Judy) presented was corroborated by police and hospital personnel. J.T. forced her to work as a truck stop prostitute and beat her if she resisted doing so or if he was dissatisfied with her earnings. The day before she killed him, he was angrier and more abusive than ever. The sheriff's deputies were called to the home, and Judy told them that J.T. had been beating her all day and she could not take it anymore. Telling her they needed a warrant before they could arrest him, they left the scene. They were called back later, after she had taken a bottle of pills. As she was attended by paramedics, J.T. cursed her and told the paramedics to let her die. During her brief hospital stay, Judy was visited by a social worker who persuaded her to go to the mental health center to discuss the possibility of having J.T. committed for treatment for alcoholism. When Judy disclosed her plan to J.T., he replied that "he would 'see them coming' and would cut her throat before they got to him." She also went to the social services office to seek welfare benefits, but he followed her there, interrupted her interview and insisted that she go home with him. At home he kicked her, threw objects at her, put a cigarette out on her neck, and refused to let her eat or bring food into the house for their children. (One of her daughters testified that it was the third consecutive day that he demanded that Judy not eat.). He also threatened to kill her, her mother, and her grandmother as a punishment to her for the drug overdose. Judy shot him in the head that night while he was asleep.<sup>64</sup>

People like Judy Norman experience a *persistent and sustained* threat to their life. This kind of threat to a person's life not only changes the nature of the threat, but it also alters the perceptual reality of the victim in a way that should restructure norms and expectations of their behavior,

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<sup>64</sup> Baron 2011, pp. 232-33

including what would justify defensive force.<sup>65</sup> A person undergoing sustained life-threatening harm no longer knows if the next instance of acute harm will be the one that ends her life. The period of time between incidents of life-threatening harm is not time “free from life-threatening harm”, but rather, a small reprieve from the acute, physical experience of life-threatening harm. Perhaps, at this point, all that can be said is that the imminence requirement shouldn’t hold for those individuals who are undergoing sustained life-threatening harm, such as women suffering from domestic abuse, but this does not entail that the imminence requirement should be removed from being a condition for justified self-defense in other situations. Maybe the best that we can say is that individuals undergoing a persistent or sustained life-threatening harm are the exception to the rule of imminence. In order to determine whether this should be the case, it is worth discussing a case of self-defense where the threat is *not* persistent and sustained. Imagine the following scenario:

*Mafia hit:* You learn that a mafia boss has ordered a hit on you. So, at some unknown point in the future, a hit man will likely show up and kill you. You could prevent this by killing the mafia boss.<sup>66</sup>

Is it morally justifiable for you to kill the mafia boss in self-defense? I think it is and the reason is due to the *reasonable degree of certainty* you have about the nature of the threat, despite the threat not being imminent. It is reasonable to think both that your life is objectively at risk, and

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<sup>65</sup> From the *State v. Norman* dissent, “[I]n his expert testimony a clinical psychologist concluded that defendant fit “and exceed [ed]” the profile of an abused or battered spouse, analogizing this treatment to the dehumanization process suffered by prisoners of war ... during the Second World War and the brainwashing techniques of the Korean War. The psychologist described the defendant as a woman incarcerated by abuse, by fear, and by her conviction that her husband was invincible and inescapable.” (*State v. Norman*, dissent, 268-9)

<sup>66</sup> An obvious objection to this could be to point out the alternative options such as moving out of a town or calling the police. But neither of these options truly eliminate the threat to your life, nor are they particularly feasible. For example, moving out of town comes at significant financial cost that may be practically impossible for some people and it also requires a complete uprooting of the individual’s life. And importantly, the mafia has far-reaching ties. The odds that you could successfully “vanish” such that you could live a life free from the threat are very low. Calling the police comes with the same risk that the mafia has ties in the police department and the mafia boss will now learn of your attempt to involve the police. This is not an insignificant risk as most organized crime has affiliates in the police department.

that you subjectively believe your life to be at risk despite the threat not being imminent. I argue that it is justifiable for you to use deadly defensive force to prevent being killed by the mafia boss. While there is no way to be certain that a hit man will actually come to kill you some time in the future, the mafia boss has already displayed his intent to kill you by ordering the hit. It is rational for you to assume that the hit will be carried out unless you take further action. It is your reasonable degree of certainty about the nature of the threat that permits you to use defensive force even though the threat is not imminent. I argue that we should replace the imminence requirement with a condition I call the *reasonable certainty condition*, as the reasonable certainty condition does a superior job of explaining our intuitions on self-defense situations, particularly the sense that acting preemptively is often justified. But what exactly do I mean by a ‘reasonable certainty condition’ for justified self-defense?

## **2.2. The reasonable certainty condition**

The reasonable certainty condition for justified self-defense holds that it is the reasonable degree of certainty about the likelihood of the threat being realized that determines whether the use of defensive force is justified. In order to motivate my claim, I will present a series of cases and show why the reasonable certainty condition should replace the imminence requirement for justified self-defense.

The reason the imminence requirement is so appealing is that you tend to have a higher degree of certainty that the threat will be realized than threats that are more distant in time.<sup>67</sup> If the threat is imminent, then you have a high degree of certainty that the threat is legitimate and

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<sup>67</sup> I think that *some* amount of uncertainty is probably present in most self-defense situations. Even in the situations that we might consider “full certainty”.

therefore, defensive force is justified. While not all imminent threats are certain, a threat becomes more certain as it becomes more imminent. And while this is unarguably true, it sets the bar for justified defensive force *too high*, and it is also sets the bar *too low* in cases of imminent, but uncertain threats. Having the bar set this high reduces the risk of would-be victims harming or killing people in error, but importantly, it also prevents many would-be victims from justifiably defending themselves in situations where the threat is less certain, or where the threat is more distant in time. For example, the imminence requirement rules out justified defensive action in cases such as in the *State v. Norman* case, or the mafia hit case. I argue that individuals are justified in defending themselves in these less certain cases, or in cases where the threat is in the future but is highly certain. Let's revisit a case I presented in chapter 1. I've revised the example to make it more ambiguous:

*Night Walker.* You are walking alone at night down a fairly quiet city street. A man is walking behind you and seems to be getting closer to you at a noticeable pace. You sense you are being followed. When you turn back to look at the man, his hands are in his pockets. You cannot tell if you are simply being paranoid.

I previously argued that individuals should not have to wait for a rights-violation to occur to use defensive action, as the consequences of not acting preemptively puts you at an unacceptably high risk of either (1) suffering an irreparable harm, or (2) finding yourself in a situation where it would be impossible to take any defensive action. What I am also stating here is that the justification for acting preemptively is an individual's *reasonable degree of certainty* about the likelihood that the threat is going to become realized. In the *Night Walker* scenario, you can be certain *enough* that you are at risk of being harmed, and that if you don't use defensive force preemptively, you will likely suffer this fate. Using defensive force preemptively gives would-be victims a physical advantage that they often need. Most individuals are not trained in combat or self-defense. Would-be victims who find themselves in a self-defense scenario are also at an

epistemic disadvantage relative to their aggressor. The aggressor knows that he is going to attack the would-be victim and knows what methods he will be using.<sup>68</sup> The would-be victim is often caught off-guard and has a limited time in which they can respond to the threat. If the would-be victim is able to assess the threat in enough time that they are able to use preemptive defensive force, then this affords them a slight advantage at successfully warding off the threat. This is a morally desirable outcome. It also seems like the intuitively correct outcome. Requiring that would-be victims wait until the threat is imminent to act defensively puts them at an unacceptably high degree of risk. I will refer to this as the *Unreasonable Risk Principle*. This principle is formulated as follows: it is unreasonable to require that would-be victims *increase* the risk to their own life in order to protect the life, or reduce the risk of serious bodily harm, of their possible assailants. This principle is based on the agent-relative consideration that individuals experiencing a threat to their life or a threat of serious bodily harm should be able to prioritize their safety above their aggressors. While it is important to permit individuals to not undergo any unreasonable risks to their own life, it is also important to ensure that individuals are not imposing harms on perfectly innocent people. I would like to introduce a distinction between two kinds of certainty that I think will be helpful. A person can be certain as to whether there is any threat at all, and they can be certain as to the characteristics of the threat, such as how dangerous the threat is, who is being targeted etc. If an individual is not certain that there is an actual threat, then they are very limited in what kinds of defensive action are morally permissible. For example, in the *Night Walker* scenario, it is ambiguous if there is an *actual* threat. But that ambiguity does not prohibit you from taking defensive action along the lines of

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<sup>68</sup> Obviously, this is a broad statement and there is a range of conscious knowledge that aggressors have on their method of attack. It is not my claim that every aggressor has specifically planned out their attack. What I am claiming here, is that aggressors have *more knowledge* on how the attack is going to happen than the would-be victim does.



shouting at the man.<sup>69</sup> However, in a scenario where the individual has already done or threatened some wrongful action, then I argue it is permissible to treat that threat as very serious, when in doubt. Here is an example that illustrates my point:

*Gas Station Robbery:* Andrea carries a handgun with her and has a concealed carry permit to do so legally. Andrea is grabbing some items from a gas station store when a man comes in with a handgun and holds the shopkeeper at gunpoint, demanding that the shopkeeper hand over all the money. While the shopkeeper is getting the money out of the till, the gunman decides to grab an item out of the fridge.<sup>70</sup> Andrea, who has previously remained hidden from the gunman, will soon be seen as the gunman moves towards the fridge. Andrea does not know what the gunman will do when he discovers that she has been hiding there.

There is no way for Andrea to be certain that the gunman's use of wrongful force is reserved solely for the shopkeeper. It is rational for Andrea to assume that the gunman will exercise that same amount of force once he discovers her. It is also reasonable for Andrea to believe that the gunman may even use greater force once he discovers her due to the fact that the gunman has not known that Andrea is there and may view her presence as an increased risk to his mission (or if he were to succeed in robbing the gas station store, an increased risk to being caught due to the increased risk of being identified). So, while Andrea cannot be certain what actions the gunman may take once he discovers her, she knows the gunman is already using wrongful force against the shopkeeper and she can be reasonably certain that her life will be at risk once he discovers her in the gas station. The idea that an individual in a potentially life-threatening situation should be required to perform some kind of mental calculus to save themselves *and* ensure that their

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<sup>69</sup> Shouting may not seem like a very strong defensive action but yelling at someone in a certain way can be considered verbal assault and, in some cases, can result in a criminal assault charge. If an individual yells at someone such that they cause the other person to reasonably fear the imminent possibility of bodily injury, then that individual may be charged with criminal assault. The point I am trying to make here is that if yelling at someone can be the cause of a justified criminal assault charge, then it is reasonable to also view it as a viable form of defensive action in the case that I have presented.

<sup>70</sup> For purposes of this example, I will just stipulate that the shopkeeper does not have his own weapon and that the gunman knows this.

assailant isn't seriously injured or killed, is not only making moral demands that are beyond practicality for most people, but the notion also rests on a problematic understanding of risk perception. Humans are not able to perceive and calculate risk as rationally as we might like to think; the experience of risk is heavily subjective.<sup>71</sup> Neuroscience has shown us that the human brain responds to stimuli using the part of the brain responsible for instinct and emotion first and cognitive reasoning does not factor in until later.<sup>72</sup>

In order to motivate my claim that individuals are justified in using preemptive force in less-certain threat situations, I would like to present a scenario in which it seems intuitively correct that the would-be victim needn't wait until the threat is imminent to act:

*Car Creeper.* You are returning to your car alone after having dinner with a friend. Your car is parked on a side street. There are scattered streetlights, and you can hear people walking across on the other side of the road. As you get closer to your car, you sense someone behind you. You turn around and observe two men walking together that appear to be friends. You continue to walk to your car, but you start to feel as though the two men are closer to you than they were before. You glance behind you and notice that they are indeed closer, and they have started walking faster. They are not talking to each other anymore and, as best you can tell, they appear to be trying to avoid eye contact with you. You are nearly at your car.

The *Car Creeper* scenario is intentionally ambiguous. The important and interesting question is what are you justified in doing in such a scenario? If you are to adhere to the imminence requirement, you would not be justified in acting upon the perceived threat in the above scenario. Your options would be to either continue walking to your car or keep walking (perhaps in the

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<sup>71</sup> Ropeik 2012, p. 1222.

<sup>72</sup> Ropeik (2012) states, "We know from neuroscience that the brain is hard-wired to respond subconsciously to any stimulus with instinct and emotion first (this response starts in an area of specialized cells in the limbic system near the brain stem called the amygdala), and employ cognitive reason second. Neuroscience has also firmly established that after the first few milliseconds of the initial stimulus/response, the brain's architecture and chemistry insures that the ongoing response continues to give more weight to the emotional feel of the situation than to the facts" (p. 1223).

direction of other people).<sup>73</sup> This seems unsatisfactory though. If you wait until the perceived threat becomes an imminent threat, thereby removing (almost) all uncertainty about the question of whether it is indeed a threat, you lose almost all defensive advantage. Despite the uncertainty, you should be justified in taking *some* defensive action. Obviously, there are limits to what kind of defensive action would be permissible in situations of increased uncertainty, but the presence of a greater uncertainty should not render you unjustified in taking *any* defensive action. But this just raises the question – how certain do you need to be for defensive force to be justified?

Unfortunately, I will not be able to offer a precise answer here, as degrees of certainty in self-defense situations are not easily quantifiable, and even if they could be quantified, they would be quantified after the fact (which is a problem in itself). But the claim I making here is that if a person is reasonably certain that the threat they are perceiving is real, then they are justified in taking some amount of defensive action to reduce their risk of being harmed. Given that the defensive action would be occurring against a less certain perceived threat, the would-be victim is not morally permitted to use the same degree of defensive force that would be permissible in an imminent-threat situation. In order to mitigate the risk of unnecessary harm, the would-be victim must use *less* defensive force. The details of what this defensive force would be, are, as in all self-defense situations, highly relative to the actual situation. In the *Car Creeper* scenario, this might look like the would-be victim displaying a gun, or a can of mace, perhaps with a verbal warning. The general principle I am advocating is that in cases of uncertainty, it is morally justifiable to threaten the potential assailant, including displaying a gun or other weapon. I call this the *Defensive Threat Principle*. The defensive threat principle makes a threat, which is an act of coercion, morally justifiable in order to (1) reduce the risk to the would-be victim of actually

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<sup>73</sup> Perhaps you could also try getting your phone out and making a call. However, if you are indeed under threat, it may not be wise to appear distracted as this kind of behavior often signals to aggressors that you are an easy target.

being attacked, but importantly, (2) doesn't inflict physical harm on the potential assailant thereby reducing the chances of harming an innocent person.

I will discuss further specifics on what kind of defensive action is permissible in the proportionality section of this chapter; however, what I hope to have sufficiently shown here, is why individuals should be permitted to use defensive force in situations of reduced certainty. I have argued that you can be certain (enough) about a threat without the threat being imminent, and that the reasonable certainty condition better explains our intuitions about self-defense cases. If we have to wait until the threat is imminent to act, we may well be dead, or seriously harmed. Indeed, Baron has already demonstrated this in domestic abuse cases. Using the reasonable certainty condition to justify defensive force better aligns with our moral intuitions about cases and ultimately provides stronger justification for would-be victims who are under threat.

### **2.3. The necessity condition**

The necessity condition holds that defensive force is only justified if the force needed to reduce or eliminate the threat is *necessary*. That is, if an individual can reduce or eliminate the threat by retreating from the threat, that person should do so. This kind of philosophy is demonstrated in the duty to retreat laws previously discussed. If retreat is not possible, and defensive force is used, the force may only be the minimum amount required to reduce or eliminate the threat. But assessment about whether the force was necessary is always evaluated after the fact by a third person in what is referred to as the *reasonable-person standard*. So essentially, it is helpful to think of the necessity condition as having two components. Defensive force is only justified if:

1. The defensive force was actually necessary, and
2. The defender reasonably believed that it was necessary.

Prima facie, the necessity condition seems right, as it constrains individuals from using unnecessary violence. This is certainly a desirable state of affairs. However, an individual who is at risk of serious or deadly harm will likely be unprepared or underskilled in executing her own defense. Most would-be victims have a limited self-defense skillset, will be unprepared for the attack, and will be operating in a limited window of time. The odds that they will successfully ward off the aggressor are already slim. To task them with finding a way to save themselves while minimizing the risk to the attacker is unreasonable, as I have already argued, and it also undervalues the victim's position. Ultimately, the necessity condition, as it is currently understood, epistemically burdens individuals and demands unnecessary risks, which infringe on the individual's ability to defend themselves. A revision of the necessity condition is necessary to avoid these pitfalls. In the following section, I develop a revision of the necessity condition that requires individuals only to use force if the force used significantly reduces the probability of harm to you, compared to the best nonviolent alternative. This revised account captures the spirit of the condition, without epistemically burdening individuals and placing them at undue risk.

### *2.3.1. When is defensive force really "necessary"?*

In order to better understand the role that necessity is playing in self-defense, I will modify the previous gas station example. Imagine the following scenario:

*Gas Station Robbery with Exit:* Andrea carries a handgun with her and has a concealed carry permit to do so legally. Andrea is grabbing some items from a gas station store when a man comes in with a handgun and holds the shopkeeper at gunpoint, demanding that the shopkeeper hand over all the money. While the shopkeeper is getting the money out of the till, the gunman decides to grab an item out of the fridge.<sup>74</sup> Andrea, who has

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<sup>74</sup> For purposes of this example, I will just stipulate that the shopkeeper does not have his own weapon and that the gunman knows this.

previously remained hidden from the gunman, will soon be seen as the gunman moves towards the fridge. However, Andrea notices that directly behind her, and out of the gunman's current view, is an exit door that is currently wedged open with a piece of lumber. Andrea moves quickly towards the door and exits the gas station.

This example appears to be straightforward. Andrea discovered a way to avoid the threat by removing herself from the threat. The question is though, would it be morally permissible for Andrea to use defensive force against the gunman rather than retreating through the exit door? I argue that it would be. The reason Andrea is morally permitted to use defensive force to dispel the threat, rather than retreating, even when the defensive force would be considered 'unnecessary', is due to the interplay of the following two key considerations.<sup>75</sup> The first consideration is the *Unreasonable Risk Principle* that I have previously discussed. That principle holds that it is unreasonable to require would-be victims to increase the risk to their own life in order to protect the life of, or reduce the risk of serious harm to, their possible assailants. This principle takes into account that humans process risk highly subjectively.

The second consideration is what I will refer to as the *Permissible Presumption Shift* (PPS) and it is defined as follows: if an individual has already acted wrongly, or unlawfully, then you are justified in presuming that this individual is a threat and that their well-being may be severely discounted in your calculation of whether to use force. You are justified in presuming this for two main reasons: (1) It is rational to assume that this individual poses a threat of other wrongful actions, and (2) the *level of certainty* required for defensive force against that individual is reduced. For example, if a man breaks into your home, then you are justified in presuming that this man is a threat to you. You could be wrong about the degree to which this

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<sup>75</sup> An additional reason that Andrea should be morally permitted to use defensive force against the gun man is his continued threat to the shopkeeper. Even if Andrea successfully evades the gunman and escapes, the shopkeeper is still at risk of being seriously harmed or killed.

man is a threat to you—perhaps the man is a drug addict, and he is not fully cognizant of his actions. But this fact (should this be the case) is not information you have available to you at the time of determining whether to use defensive force. The information you *do have* tells you that this man has violated your personal space, your personal property, and the law, therefore you are able to presume that he will continue to be a threat to you if you don't act. Let's see how these two considerations apply to the revised gas station example.

Knowing that we make highly subjective decisions when assessing risk, we can say that Andrea will calculate how to act based on her assessment of the facts. For example, the fact that the exit door is wedged open does not mean that Andrea will view the option to exit through it as the safest option. It is possible that Andrea will observe that the exit door is open but view the option to run to it and exit the gas station as *too risky*.<sup>76</sup> What if the gunman spots her running and shoots her in the back? What if the gunman has an accomplice waiting for him in a car outside and the accomplice decides to attack her? For Andrea, both of these are open possibilities, and these possibilities put her at an increased level of risk *in her mind*. This perceived increased risk level is also related to the degree of control Andrea has over the situation. For Andrea, retreating through the exit door puts her in a situation where she is now out of control. The sense of being in control plays a powerful role in humans' ability to perceive risk.<sup>77</sup> Our fear is greater when we think we have less control, and we feel safer the more control we think we have. This is important in the evaluation of whether the individual could have reasonably believed to have viewed the defensive force as "necessary". To require that Andrea retreat through the exit door, rather than use defensive force, is to ask Andrea to undergo an

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<sup>76</sup> In Samuel Wheeler's (1997) discussion of risk perception and self-defense, he states, "The fact that there is a better action available and within her power does not make that action either reasonable or obligatory" (p. 434).

<sup>77</sup> See Chapter 3 in Ropeik's *How Risky Is It, Really?: Why Our Fears Don't Always Match the Facts*.

unacceptably high degree of risk. Not only is the risk level unacceptably high, but it seems to be prioritizing the gunman's well-being over Andrea's. The gunman has already acted wrongly and unlawfully—he has committed a crime and he has threatened the life of the shopkeeper. Andrea is justified in presuming that the gunman is a threat to her, and she can, therefore, severely discount the gunman's well-being in her determination of whether to use force. She need not retreat if she believes it to be too risky, just to ensure the gunman is not subject to any “unnecessary” force. None of this precludes Andrea from retreating should she wish to do so. Retreat is always an open option, and, in some cases, it may be viewed as the best option. What I am attempting to establish here is that individuals are not required to retreat, rather than use defensive force. I think it would be helpful to examine another example. Imagine the following scenario:

*Crazed Runner.* You are walking down a dark street and you see a man running at you from down the street. He doesn't appear to have any weapons. He is yelling, “I'm going to kill you!” There is no one else on the street.

You consider running in the opposite direction, but what if you trip while you are running away, and this trip causes him to catch up to you? What if you are wrong about the man not having any weapons, and when you turn your back to him to run, he pulls out a gun and shoots you, or throws a knife at you? It seems like retreating might not be your best bet. You do have your handgun with you. The crazed runner is far enough away that, theoretically, you could shoot him anywhere. But you are not the best marksman and you only have a limited time to shoot (if you shoot at all). You want to give yourself the best chance to end the threat, so you shoot at the biggest surface area—the man's chest. By doing this, you have the best chance of immobilizing him. But is this defensive force *necessary*? As the necessity condition is currently conceptualized, the defensive force I described above would be deemed unnecessary. In the



*Crazed Runner* scenario, you should have either run from the crazed runner (retreat), or you should have attempted to shoot him somewhere with less potential for a catastrophic outcome, such as his knee (minimal force). But it is burdensome to require individuals to only use the minimal force necessary as it expects individuals to make a determination that may not be possible to make at the time due to limited time, knowledge, and skill. What is the minimally necessary force to end a threat in any given situation? From the philosopher's armchair, it might seem that the minimally necessary force is to shoot the crazed runner in the knee, not the chest, but the would-be victim might not have access to this knowledge in a life-threatening situation. And even if the would-be victim does know that, on balance, shooting an aggressor in the knee, not the chest, typically is enough force to end the threat, how does she know that *in this instance, with her life on the line*, it will be enough? There is no way to be sure from the would-be victim's point of view. Ultimately, the current formulation of the necessity condition places would-be victims at an unreasonable level of risk, based on a flawed understanding of human risk perception, as well as unrealistic epistemic expectations. I suggest we revise the necessity condition to be as follows:

Defensive force is justified only if the force used significantly reduces the probability of harm to you, compared to the best nonviolent alternative.

This revised account still recognizes the value of not harming individuals unjustly through unnecessary defensive force, without requiring individuals to undergo significant risk to their own life. My revised account of the necessity condition would justify defensive force being used in both the revised gas station and crazed runner cases, where defensive force would have previously been unjustified. An account of the necessity condition that better aligns with our intuitions about self-defense cases is not only a more practically desirable outcome, but it is the morally just outcome too.

### 2.3.2. Review of the 'reasonable-person standard'

The second component of the necessity condition is whether the victim *reasonably believed* that the use of defensive force was necessary. This is called the *reasonable-person standard* and it is a determination that is applied after the fact, by a third-party, usually in court. The standard is used to determine what kind of defensive force is excusable, not justified. Therefore, by this standard, there are defensive actions that when held to other standards of self-defense seem unjustifiable, but by this standard, would be considered excusable. What a “reasonable person” *is*, is not well-defined.<sup>78</sup> No agreement has been made on its definition. The ‘reasonable person’ has been described as being the average man, the community ideal, and the embodiment of ethical behavior.<sup>79</sup> In addition to the term’s ambiguity, the reasonable-person standard doesn’t appear to take into account the reality of how humans perceive risk. This is not surprising given how poorly defined the term is, but it is my suggestion that the cognitive limitations in human risk assessment should be incorporated into our understanding of the reasonable-person standard. The consequences of having a reasonable-person standard without these considerations means that we risk denying defenders justified claims of self-defense.

Self-defense situations are high stress situations, so the standard for what constitutes a reasonable person when assessing these situations needs to be broader than what a reasonable person would be when assessing less stressful situations. The assessment of what is reasonable in self-defense scenarios needs to take into account that the defender is usually making a critical

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<sup>78</sup> This element is sometimes the sole issue in a trial, but courts’ explications of ‘reasonableness,’ ‘ordinary care,’ or the ‘reasonable person’ are typically vague or quasi-circular. In the absence of a clear definition, the question of what the reasonable person would or would not have done threatens to collapse into a question of what the judge or jury will say the reasonable person would have done” (Ingram 2014, pp. 427-28).

<sup>79</sup> See Ingram’s (2014) analysis of these definitions in his paper.

decision in less than two seconds and without much of the information that the assessor has after the fact in making such a determination. Consider the following case:

*Car Park Vagrant.* You are walking to your car in a poorly lit parking garage at night. Your car is the only car in the garage. You hear footsteps behind you, so you turn to look at who it could be. There is a disheveled looking man walking towards you. He lunges towards you and goes to say something. Before you can hear what the man was going to say, you have drawn your pistol and shot at him, striking him in the calf.

Is this kind of defensive action excusable? *Should* it be excusable? Say we learn that the disheveled looking man in the scenario was actually a vagrant who had no weapons on him. The chances are, he was just looking to ask you for help of some sort. Suppose we learn that this man, prior to being a vagrant, had been a very kind man who had simply fallen on hard times. In the calm light of day, with all of this additional information and plenty of time to reflect, it is quite possible that a third-party will *not* believe that it was reasonable for you to believe that the force was necessary to protect yourself.<sup>80</sup> It is entirely likely that a narrow reasonable-person standard will be applied and that your actions will be deemed *inexcusable*. This could be for a number of reasons ranging from viewing your behavior as too hasty or too paranoid, to being concerned that by excusing your actions the precedent is being set for unjustifiable, but excusable harm, or because the third-party views you as heartless and simply cannot imagine how you could have thought it reasonable to shoot an unarmed man without any physical contact. To prevent defenders being punished for defensive action that should be excusable, there needs to be an understanding of the reasonable-person standard that does a better job at taking into account the *specific limitations* present in self-defense situations. Namely, the epistemic

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<sup>80</sup> I challenge the reader to imagine that if they find themselves sympathetic to the third-party who would not believe it was reasonable that the person believed it was reasonable to use that kind of defensive force, to ask themselves if their intuition changes if features of the person change? For example, would it change anything if the would-be victim was a female?

constraints and the limited window of time in which a defender can act within these constraints. The reasonable-person standard should be defined and understood in a way that the defender's actions in the *Car Park Vagrant* case are excusable. I suggest that the reasonable-person standard should be what a normal person in the stress-of-the-situation-the-defender-was-in, would think, as opposed to what a normal person examining the facts afterwards would think. And I think it is important that the evaluation takes into account that *even though* the situation may not have appeared life-threatening after-the-fact, it is very likely that the defender believed that their life was in danger given the stress and shock of the situation and the limited time in which they have to act (often under a few seconds). It is difficult to extract the defender's experience from the pile of evidence that is presented after the fact, but greater attention must be paid to it if we want to be able to apply a fair and just reasonable-person standard in self-defense situations.

#### **2.4. The proportionality requirement**

The proportionality requirement holds that defensive force is only justified if the defensive force does not cause vastly greater harm than the threat. Proportionality is relational and normative, and it only sets the upper limit to the defensive force that may be used.<sup>81</sup> That is, if a defender can successfully fend off a threat of a serious harm by using minimal defensive force, it isn't considered *disproportionate* in any meaningful way. A test of *comparable seriousness* is often used to determine if the defensive force is proportional to the threat.<sup>82</sup> However, there is disagreement on when the threshold for comparable seriousness has been met. Some scholars argue that proportional defensive force is only justified if the harm that the defender is defending

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<sup>81</sup> Uniacke 2011, p. 255.

<sup>82</sup> *Ibid.* Uniacke (2011) states, "Proportionate self-defense requires that the threat fended off/interest protected pass a threshold of comparable seriousness in relation to the harm inflicted on the attacker" (p. 256).

against is at least equivalent to the harm that the defender is inflicting on the aggressor. Suzanne Uniacke calls this the *equivalent harm view*, which is essentially the view that maintains it is the computation of weighing competing harms that is morally relevant for determining proportionality. Uniacke wants to undermine the equivalent harm view by showing that a specific type of moral asymmetry is morally permissible, and that it is *this* moral asymmetry that is critical to justification of self-defense. The moral asymmetry that Uniacke believes is critical to determining proportionality is the seriousness of the unjust threat. Uniacke states:

There is a corresponding moral asymmetry between the unjust harm the victim fends off, as opposed to the (defensive) harm inflicted on the attacker. The latter moral asymmetry is relevant to proportionate self-defense: the degree of defensive harm it is proportionate to inflict on the attacker depends upon the seriousness of the unjust threat the victim is fending off.<sup>83</sup>

I agree with Uniacke that the equivalent harm view cannot succeed because there is justified moral asymmetry in proportional self-defense. I also agree that the seriousness of the unjust threat is the relevant feature. However, Uniacke goes on to state that her view is agent-neutral and that no special considerations should be given to the defender. Uniacke states:

It is important to clarify that the moral asymmetry that I claim is relevant to judging proportionate self-defense is an impartial consideration that gives no special, agent-relative weight to the particular interests of the defender. Some writers urge agent-relative considerations in relation to permissible self-defense, the idea being that in fending off a threat it can (sometimes) be legitimate to prioritize one's own interests more than would be justified from a purely impartial perspective.<sup>84</sup>

As I have already argued, would-be victims *should* be able to prioritize their own interests above the interests of their assailants. I think to argue for impartiality is to miss a critical moral dimension of self-defense—an individual's life matters more to *herself* than to anyone else.<sup>85</sup>

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<sup>83</sup> *Ibid.*, p. 261.

<sup>84</sup> *Ibid.*, p. 263.

<sup>85</sup> I agree with Jonathan Quong (2009) that agent-relative value is critical in understanding the permission and justification to use to defensive force. Quong states:

Additionally, the threatening action that the assailant has taken has caused a morally significant shift in the way they are to be viewed and treated by other individuals (particularly the person they are threatening). Ultimately, while Uniacke's view has certain merits, its failure to acknowledge the interests of the would-be victim as interests that *should be* considered above those of the assailant, makes it a morally unsuccessful (and unappealing) view.

David Rodin also does not seem to think it is the equivalence between the harm avoided and the harm inflicted that is the relevant feature of proportionality either, however, his view focuses on whether the harms are different in magnitude and kind. Rodin argues that there are some kinds of harms that are permanent such that "reconstruction" is not a possibility. Rodin states:

But it is not simply the possibility of redress that differentiates attacks against property from attacks against persons, it is also the possibility of reconstruction. A house destroyed by marauders may be rebuilt better than it was before, and a lost fortune can be reconstructed. However, after an attack which kills, mutilates, or disfigures, the original state of health or wholeness can never be reconstructed (the reconstruction of an artificial limb is not the same thing at all). What this suggests is that the harms inflicted by attacks against persons and attacks against property are not just different in magnitude; they are different in kind. It is not simply that being killed is a worse injury than being robbed of everything that one owns; it is a different kind of injury, for one inflicts damage that may be reconstructed in full, whereas for the other, this possibility does not meaningfully exist.<sup>86</sup>

I think Rodin's focus on the lack of reconstruction is on the right track. There is something morally significant about a harm so severe that one can never be made whole again that is not present in cases where the harm (or damage) perpetrated can be remedied.<sup>87</sup> I agree with Rodin

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By that I simply mean that *your* life is of particular importance to *you*. One implication of this fact is that most deontological theories do not require people to make great sacrifices on behalf of others unless they have voluntarily incurred an obligation to do so. You would be a hero if you risked your life by rushing out into choppy and dangerous waters to rescue someone who was drowning, but morality does not demand that you risk your life in this way. Your life is your own, and so morality does not require that you give it up or put it at significant risk for another person or even several other people (p. 516).

<sup>86</sup> Rodin 2003, p. 45.

<sup>87</sup> Hugo Grotius (2005) thinks that the threat of loss or limb is so significant, that we can even use lethal force against such threats. "But what shall we then say of the Danger of I losing a Limb, or a Member? When a Member,

that differentiating between attacks against persons and attacks against property is important in understanding proportionality in self-defense situations. However, it is important to distinguish between harms to property vs. persons and compensable vs. non-compensable harms.<sup>88</sup> For example, I can be harmed and have that harm compensated (e.g., you pay me \$500 for punching me). And there can be harm to property that is *not* compensable (e.g., my home is burnt down by a homeless man who will not compensate me for my loss). So, damage to property can be non-compensable in a way that harm to a person can be. But although important, this distinction misses a core element of what we are really concerned about when an individual's rights are violated—the degree of irreversibility of the rights-violation.

I suggest that we should define proportionality in terms of the seriousness of the rights-violation *qua* rights-violation, not the seriousness of the harm. Part of my reasoning is grounded in the significance of irreversibility of the rights-violation as previously mentioned. I call this the *irreversibility condition*. The irreversibility condition considers the degree to which the rights-violation is *reversible* in order to determine the proportionate justified defensive force. Take the following case:

*Hat Thief.* You are sitting at a café and you leave your belongings to go and buy a coffee. As you turn around to head back to your table, you notice a person boldly grabbing your hat and running out of the café.

The rights-violation in the *Hat Thief* case is a property rights-violation. The thief has stolen your hat, but this rights-violation is a *reversible rights-violation*. That is, it is conceivable that the police could locate your hat, therefore making you “whole” again through the return of your

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especially if one of the principal, is of the highest Consequence, and almost equal to Life itself; and 'tis besides doubtful whether we can survive the Loss; I am of Opinion, if there be no Possibility of avoiding the Misfortune, the Aggressor may be lawfully killed” (p. 401).

<sup>88</sup> I take at least part of Rodin's concern with lack of reconstruction to be to do with the element of *compensability* of the harm (to a person) or damage (to property).

property. Now I realize the possibility of the police finding your hat is rare, but even if they are not able to locate your hat, you are able to purchase another hat and have a comparable product. It would not be reasonable to think of this rights-violation as irreversible in a meaningful way. The amount of defensive force that would be justified in a reversible rights-violation of this kind would be low. Some degree of physical contact would be warranted, such as tackling the thief to the ground and grabbing the hat, but it wouldn't be justified to use a weapon on the thief just to get your hat back. But what about the following property-rights violation?:

*\$1 Million Robbery.* A thief breaks into a rich person's home and steals \$1 million from their personal safe. The rich person had failed to realize their homeowner's insurance had lapsed, so the stolen money is not insured, and therefore, not compensable.

Would the rich man be justified in using serious violence to stop the thief, given that the property rights-violation is not reversible? I argue that he would be. The degree of defensive force that would be justified would not include lethal force, but the rich man would be justified in using serious violence (e.g., brandishing a weapon, wrestling the thief, handcuffing him until the police arrived etc) to prevent the rights-violation from occurring.<sup>89</sup> This example helps to illustrate that it is not just the question of whether the rights violation is occurring against a person or property that is relevant, but rather, how *reversible* the violation is, in determining the proportionate defensive response.

Consider the following case:

*Forced Benign Vaccination.* There is a vaccine that is considered beneficial to receive, but you do not wish to receive the vaccine. Someone shows up at your door and forcibly inoculates you with the vaccine against your will.

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<sup>89</sup> The justification is not just in light of the fact that the thief is trespassing in the rich man's home, but rather, is based in the *irreversibility of the rights-violation*.



The rights-violation in this situation is serious due to its *irreversibility*. You can no longer return to your pre-inoculated state and you have had your right to bodily integrity violated. Even if the police were to come and arrest the person who forcibly inoculated you, the seriousness of the rights-violation would remain—it is irreversible. Given the irreversibility of this rights-violation, you would be justified using far greater defensive force measures to reduce the chances that the rights-violation would occur. For example, it would be justifiable in a case such as this to use a weapon to prevent being force-inoculated. The reason that using the irreversibility condition is superior to simply using proportionate levels of harm or violence is due to the fact that it can better explain our intuition in cases such as the *Forced Benign Vaccination* case and the *\$1 Million Robbery case*.<sup>90</sup> If we were to use the standard proportionality model, the fact that the vaccine doesn't cause any actual harm to you would make use of defensive force unjustified. Perhaps the standard proportionality model would still permit some minimal defensive action but given the threat against you (forced vaccination) isn't viewed as a harm (given the vaccine has been designated as benign), you would be very limited in what defensive action would be justified. Let's examine another case:

*Drugged Rape.* Betty was drugged and raped. Upon waking she has no recollection of the rape. Betty experiences no physical pain as a result of the rape, and in fact, does not even know it has occurred until a week later when her friend informs her. There are no other significant physical repercussions from the rape (or being drugged), such as pregnancy or the development of STD's or STI's.

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<sup>90</sup> But what about those that don't share this intuition? The intuition that I should be justified in using defensive force, including deadly force to prevent being vaccinated with a harmless and beneficial vaccine. It may just be that we cannot persuade those who think force-inoculation even if "harmless and beneficial" is a serious rights-violation. But for those who are not persuaded that this is a serious rights-violation, I challenge them to consider if we were to change the vaccine to medication. Could the victim then use defensive force, including deadly force, to prevent being medicated with medicine that is harmless and beneficial? What about if instead of a vaccine, it was forced surgery? The surgery had no short or long-term ill effects, and it was beneficial for you—would you still not be justified using defensive force to prevent having the surgery? I think some of this debate is captured in the cases of Jehovah's Witnesses denying blood transfusions even though they are considered (by most) to be harmless and beneficial. A final thought is perhaps the issue lies in the problem of calling any vaccine, medicine, or surgery, "harmless and beneficial"?

In the *Drugged Rape* case, it should not matter that Betty does not recall the rape or have any physical injuries or repercussions. The salient feature is that Betty has suffered severe rights-violations, primarily the right to bodily integrity and the right to bodily autonomy. These rights-violations are irreversible. Betty can no longer return to her life as a non-rape-victim. Betty would be justified using serious defensive force to prevent being drugged given this.

Furthermore, Betty would be justified despite the threat of rape not being certain. As I have already argued, individuals are justified in using defensive force even in less-certain threat cases. While Betty would not have been able to know that being drugged would have led to rape, if she had been able to use defensive force to prevent being drugged, she would have been justified in doing so given the irreversibility of the rights-violation.<sup>91</sup> Betty is justified *even if* she would experience no harm from the rape. Using the irreversibility condition is what allows Betty this justification. If the focus of proportionality is on the weighing of harms, Betty would be left vulnerable to the claim that because she suffered no harm, she is not justified in using defensive force. And even if we grant that the harm view of proportionality would permit *some* defensive action, it would undoubtedly be at a level below that which the irreversibility condition would allow. Using the irreversibility condition to determine justified proportional defensive action allows a wider latitude of defensive actions, which coheres with our commonsense intuition that an individual should be justified in defending themselves in cases such as these.

## 2.5. Conclusion

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<sup>91</sup> This is true even if the drugging didn't lead to rape. Being drugged is an irreversible rights-violation as it deprives the individual of the use of their own mind and puts the individual's body in a vulnerable state which carries with it the significant risk of other types of harm (such as rape, mutilation, dismemberment, or death).

In this chapter I have argued for three substantive revisions to the standard requirements of justified defensive force. I have argued that the imminence requirement be replaced with the reasonable certainty condition, therefore enabling individuals to use justified defensive force in less-certain threat cases, or cases where the threat is life-threatening but further away in time. The second revision I have argued for is that the necessity condition be revised to allow defensive force to be justified in cases where the agent could have retreated, and in cases where the individual has used greater-than-minimal-force. Lastly, I have argued that the proportionality requirement should include a condition for irreversibility, as it is the irreversibility of the rights-violation that is the salient feature against which individuals are justified in defending themselves. Ultimately, my model of the standards of justified defensive force is more supportive of the victim's position and argues for a more permissive view of justified defensive action.

## Chapter 3: The Right to Self-Defense Against the State

The right to self-defense against the state is the right to use defensive force against individual government employees as well as the right to use defensive force against the state itself. If the state, or its institutions implement tyrannical measures against its citizens, then individuals are justified in using defensive force against them. As mentioned previously, this may include preemptive defensive force. The right to self-defense is a right that will be easier for anarchists to accept than individuals who believe the state has legitimate political authority. So what would individuals who believe the state has legitimate political authority think? For those individuals, the right to self-defense against the state might seem unnecessary, extreme, dangerous, or even downright preposterous. For the sake of argument, I will assume that some states have legitimate political authority. My defense of the right to self-defense against the state will therefore be the right for an individual to defend herself against a *legitimate state*.

A person has the right to self-defense against all other individuals. Individuals in the government are not special; they are susceptible to the same human errors, biases, and moral failings that ordinary citizens are. Perhaps they are even more likely to perform corrupt or immoral actions. Individuals who work for the government are afforded certain powers and privileges that may allow them to take advantage of state resources in a way that is not open to regular citizens. Therefore, the right to self-defense should include the right to self-defense against the government. My basic argument is as follows:

1. Individuals have the right to self-defense against other private individuals.
2. Individuals in government are not relevantly different from private individuals.
3. Therefore, individuals have a right to self-defense against the government. (From 1 & 2)

My defense of premise 1 has already been provided in chapter 1 outlining the reasons why we should accept a general right to self-defense, so I won't say much more here. However, some may object that while the right to self-defense exists, we have largely delegated that right to the state. The objection isn't that individuals no longer have *any* right of self-defense, but that individuals should defer to the state's assistance where possible in order to reduce or prevent untrained individuals from harming or killing others. There are three main problems with this kind of thinking. The first problem is that police are not capable of protecting everyone from crime. This is an obvious point, but it is worth highlighting that *because they cannot assist in all cases*, it is not fair or reasonable to expect individuals to rely solely on the police as their means of protection. There is no way to know for certain who the police will be able to protect or not.

The second problem is that in the U.S., the police have no legal obligation to protect any individual from harm. This was established in the case of *Warren v. District of Columbia* in 1981. Three women living in the District of Columbia were raped, beaten, and forced to perform sexual acts for their attackers after police failed to respond adequately to their call for assistance.<sup>92</sup> The women sued the District of Columbia and individual officers of the police department for their negligence. Their suit was dismissed and their subsequent appeal was denied by the District of Columbia Court of Appeals.<sup>93</sup> The court stated that its decision was based on "the fundamental principle that a government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen."<sup>94</sup> The government has officially denied its obligation to protect any individual citizen. Given this, it is hard to

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<sup>92</sup> See *Warren v. District of Columbia* 1981.

<sup>93</sup> *Ibid.*

<sup>94</sup> Stated in the Memorandum Opinion by Judge Joseph M. Hannon to appeal No. 79-6 in *Warren v. District of Columbia* 1981.

imagine what kind of justification could be used to deprive citizens of a right to self-defense, or request that they defer to the state's assistance.

The third problem is that *because* the state and its agents are potential threats against individuals, they cannot be relied upon to provide protection to these individuals. You cannot be asked to rely on A for protection against A. In this chapter I will offer strong evidence showing why the state is a serious threat to individuals.

In premise 2, I have stated that government officials are not relevantly different from private individuals. In order to motivate this claim, I will offer real world cases of government officials who have committed human errors, who have been subject to biases, and who have morally failed. I will also offer evidence of the state harming its own citizens to help illustrate that not only are government workers susceptible to the same kinds of biases, errors, and moral failings as private individuals, but that by working for the state, these individuals have not only more power and authority to wield against other individuals, but often, less accountability for the harms they have committed.

### **3.1. The biases, moral failings, and human error of government officials**

There is no shortage of moral failings by government officials. News of these moral failings often makes its way to the media, with some of the most common moral failures being infidelity, bribery or misuse of the person's governmental position, and problems with alcohol or drugs. While not all of these failings impact the citizenry at large in a tangible way, it is important to note their prevalence as it supports my claim that government officials are not relevantly different from private individuals and that these failings are not a rare occurrence.

In 2018, the West Virginia House Judiciary Committee voted to impeach all four remaining members of the state Supreme Court due to each member's involvement in overspending and misuse of taxpayer money, corruption, and lack of oversight.<sup>95</sup> The judges were found to have spent hundreds of thousands of dollars remodeling their own offices, using state vehicles for private use without paying the appropriate tax, and taking home office furnishings and equipment that they were not legally allowed to take.<sup>96</sup> In 2020, former Child Protective Services worker Candace Talley was managing a foster care case and coerced the mother into prostitution in exchange for money and for "assisting" the mom to better her case through falsifying her drug test results.<sup>97</sup> In 2010, a former Chicago police department detective and area commander Jon Burge, was found guilty of perjury after submitting a sworn statement in 2003 that denied he had participated in torture.<sup>98</sup> Between 1972 and 1991 Burge either "directly participated in or implicitly approved the torture" of at least 118 individuals.<sup>99</sup> Burge had subordinates who worked for him and they were known as the Midnight Crew, Burge's Ass Kickers, and the A-Team.<sup>100</sup> Burge's goal was to have the individual confess to whatever crime they wanted the individual to confess to and the methods of torture used to extract the false confessions are extensive, including but not limited to: mock executions at gunpoint, electroshock machines used on their genitals, and raping the individuals with sex toys.

There are a seemingly infinite number of examples of government officials and their moral failures. What makes these moral failures so horrendous isn't just the fact that a particular individual has failed to be a moral human, but rather, how these government officials actually

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<sup>95</sup> McElhinny, "Delegates vote." The fifth member, Justice Menis Ketchum, escaped impeachment due to a timely retirement announced the day before the impeachment proceedings.

<sup>96</sup> *Ibid.*

<sup>97</sup> Brown, "Pennsylvania: Former CPS."

<sup>98</sup> Baker, "In Chicago."

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

use their position of authority as a worker of the government to commit immoral acts that would not be possible if the individuals weren't able to wield the authority of the state.

Individuals who work for the government are not immune to making human errors simply by virtue of working for the government. For this reason, individuals should be able to defend themselves in these situations. Often times, human error by government agencies or officials doesn't result in an immediate self-defense situation, such as when the Defense Travel System of the United States Department of Defense sent out an attachment in an unencrypted email containing the bank account numbers, social security numbers, and emergency contact information of roughly 21,500 marines, sailors, and civilians to the wrong email list.<sup>101</sup> But this kind of privacy breach can generate vulnerable situations for individuals where self-defense does become necessary. However, many times the errors that are committed by individuals in the government *do* result in self-defense situations, as in the cases of police mistakenly raiding the wrong house. In 2013, 61-year old John Adams was shot to death in his own home, while his wife was handcuffed, due to a mistake that was made by the Tennessee police.<sup>102</sup> While the Adams case is a particularly tragic case resulting in death, mistaken raids by police are not as uncommon as one might hope.<sup>103</sup> In Chicago, there have been at least 10 lawsuits in the few years preceding 2020 over mistaken raids.<sup>104</sup> In many of these mistaken raids, individuals are subject to violence, trauma, and damage to their belongings or home, and these harms are very hard to receive compensation for *even when* the police admit to a mistake.<sup>105</sup>

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<sup>101</sup> Bisson, "7 Data Breaches."

<sup>102</sup> Reason, "Cops Raid."

<sup>103</sup> For a more in-depth analysis of paramilitary police raids, including mistaken raids, I encourage the reader to view Balko, "Overkill." Balko actually designed a map, *Raidmap*, to highlight the epidemic and allow people to view botched raids by type, but it is no longer accessible.

<sup>104</sup> Ciarmarella, "Chicago Police Sued."

<sup>105</sup> Obviously, there are some types of harms which are not compensable. But the basic point is that *if* it is the case where the harm could be compensated, and even if the police have admitted to the wrongdoing, compensation is still hard to receive, thus exacerbating the initial harm.



In 2008, Daniel M. Butler and David E. Broockman of Yale University conducted field research to see how responsive state legislators were to their constituents.<sup>106</sup> They emailed just under 5000 state legislators asking for assistance registering to vote. They signed one lot of letters using a white alias and another lot of the letters using a black alias. Their study demonstrated that the black alias received fewer responses than the white alias when no indication of partisanship was given.<sup>107</sup> The study also concluded that it wasn't the racial composition of both the Republican and Democratic parties that could explain the discrimination, as whites from both parties discriminated against blacks at nearly equal levels.<sup>108</sup>

In the late 1990's, an event that became known as the "Rampart scandal" took place involving 70 police officers assigned to or associated with the Community Resources Against Street Hoodlums (CRASH) anti-gang unit of the Los Angeles Police Department's Rampart Division. The police officers were implicated in unprovoked shootings and beatings, planting of false evidence, stealing and dealing narcotics, and various forms of misconduct.<sup>109</sup> Of the 70 police officers originally implicated, 58 were brought before an internal administrative board, 12 were suspended, 7 resigned, and 5 were terminated. The scandal resulted in 106 prior criminal convictions being overturned, 104 civil lawsuits filed, which cost the City of Los Angeles approximately \$125 million in settlements.<sup>110</sup> The Rampart Division used "gang-profiling" in order to arrest individuals who looked like gang members due to a 1988 California anti-terrorism law which made gang profiling legal.<sup>111</sup>

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<sup>106</sup> The study is limited to the constituent request simply being a request to have assistance registering to vote.

<sup>107</sup> Butler and Broockman 2011.

<sup>108</sup> *Ibid.*

<sup>109</sup> PBS. "Rampart Scandal."

<sup>110</sup> PBS. "Rampart Scandal Timeline."

<sup>111</sup> Hayden, "LAPD."

I have provided argumentation to show that individuals who work for the government are not relevantly different from private individuals, but what is also important to understand is that individuals who work for the government hold more power over other individuals and therefore can abuse this power and harm citizens as I have demonstrated. I will now outline three examples of the state harming its citizens on a much larger scale than the previous examples. These examples show that the state is able and often willing to inflict horrendous harm on civilians, and that they also have the means to do so more effectively, on a larger scale than the average citizen, and often without any legal recourse available to the victim.

### **3.2. Democide, no-knock raids, and drones**

Governments have killed and harmed more people than any other institution in history. When one reviews the violent history of various governments, it seems shocking that anyone would *not* view the state as a threat to individual citizens. I will begin by demonstrating the magnitude of the death toll attributed to governments by discussing a phenomenon called ‘democide’. I will then discuss the tragedy of no-knock raids committed by U.S. police, as well as discuss the drone program that was extended under the Obama Administration and was responsible for the killing of an estimated 3,797 people, including 324 civilians.<sup>112</sup> These examples will serve to show that it is both the state and the individual employees of the state that are a threat to individuals and why it is imperative that the right to self-defense applies against both.

#### *3.2.1. Democide*

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<sup>112</sup> Zenko, “Obama’s Final.” Apparently, Obama told senior aides in 2011, “Turns out I’m really good at killing people. Didn’t know that was gonna be a strong suit of mine” (see Halperin and Heilemann 2013, p. 55).

Rummel defines democide as “the murder of any person or people by a government, including genocide, politicide, and mass murder.”<sup>113</sup> While Rummel’s definition of democide includes people being killed by *any* government, a majority of the worst cases are those where people have been killed by *their own* government. Rummel documents that 169 million people lost their lives between 1900 and 1987 from democide.<sup>114</sup> 128 million of these people were from the following regimes: communist USSR; communist China, including pre-Mao guerrillas; Khmer Rouge Cambodia; Vietnam; Yugoslavia; and Nazi Germany.<sup>115</sup> The staggering prevalence of democide throughout the last century shows why our right to self-defense includes the right to self-defense against the government. Rummel states that “the less freedom people have, the greater the violence; the more freedom, the less violence.”<sup>116</sup> His suggestion to reduce the threat of democide is to have the government’s power constrained through different checks and balances.

Rummel noted that the prevalence of democide increases dramatically once the regime type shifts from democratic to authoritarian and from authoritarian to totalitarian, stating, “Power kills, and absolute Power kills absolutely.”<sup>117</sup> Democratic governments have the least democide, and most of it appears to be democide of *foreigners* during war.<sup>118</sup> Perhaps, one might think, we do not need to be concerned about the U.S., then, given the democratic features of our government.

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<sup>113</sup> Rummel 1994, p. 31. Rummel also provides definitions for genocide, politicide, and mass murder. These definitions and a fuller definition of democide are provided on pp. 36-8. Some of the material included here has appeared in Straight, Jasmine. 2020. “The Right to Self-Defense Against the State.” *Philosophia*:1-22.

<sup>114</sup> *Ibid.* See Rummel pp. 1–27 for additional data and figures that support this number. The *Black Book of Communism* (Courteois et. al. 1999) estimates that nearly 100 million people were killed by communist regimes during the 20th century (see p. 4 for a breakdown of the estimates by regime).

<sup>115</sup> Rummel 1994., p. 3.

<sup>116</sup> *Ibid.*, p. xvi.

<sup>117</sup> *Ibid.*, p. 19.

<sup>118</sup> *Ibid.*, p. 14.

While the U.S. would undoubtedly be at a lower risk than most other governments, Rummel discovered that most of the democide executed in democracies was achieved in an undemocratic manner, so we still have reasons to worry that democracies can carry out democide. Rummel states that significant democide can be avoided if a society has cross pressures with an associated political culture.<sup>119</sup> Cross pressures are present when interests compete and are diversified. No unified goal or interest is in place and the power is therefore dispersed. These cross pressures help develop a political culture that maintains checks and balances on power through debate, protest, and voting. This political culture helps democracy to maintain its checks and balances on the state's power, which in turn helps to ensure that the democracy does not devolve into a regime that is rife with the threat of democide. The threat posed by the state is amplified by the resources it has access to, such as military grade weaponry and surveillance technology, and the power it has over citizens in the form of being able to enact laws and execute punishment. For these reasons, it should be clear why our right to self-defense includes the right to self-defense against the state.

### *3.2.2. No-knock raids*

Military-style police raids have harmed many innocent Americans.<sup>120</sup> As previously mentioned, many of these raids are mistaken raids and cause significant harm to the victims. But there is a specific type of police raid that is worth discussing in more detail, as the justification and methodology of the raid shows (1) the danger that the state poses to its citizens, and (2) the growth in the militarization of the domestic U.S. police. These types of raids are called *no-knock raids*. In a no-knock raid, the police do not announce their intention to enter the residence, which

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<sup>119</sup> *Ibid.*, pp. 22-3.

<sup>120</sup> Coyne and Hall 2018, p. 96.

often results in catastrophic injuries or even death.<sup>121</sup> No-knock raids are only able to be performed when a no-knock warrant is issued, and the warrant is granted when it is thought that evidence will be destroyed if police were to announce their presence. A *New York Times* investigation found that 81 civilians and 13 police officers had been killed as a result of no-knock police raids between 2010 and 2016.<sup>122</sup> Some U.S. police departments are reviewing their no-knock raids policy due to the resultant violence, although the motivation behind these policy changes is suspiciously focused on reducing police officer injuries, rather than any clear concern or responsibility for the policy's harmful effects on civilians.<sup>123</sup> This suggest that if citizens were *not* armed, then the police departments would not be motivated to make any changes (and would just keep killing civilians). Therefore, demonstrating the value of an armed citizenry. These raids are typically performed by highly militarized police units such as Special Weapons and Tactics teams (SWAT) or a Police Paramilitary Unit (PPU).<sup>124</sup> The presence of militarized domestic police in the U.S. has increased significantly since the 1980s. As of 2000, almost 90% of U.S. police departments that exist, in a community with a population greater than 50,000, use some kind of PPU.<sup>125</sup> No-knock raids differ from mistaken raids in that they are intentionally trying to catch the citizens off guard and they strategically use intimidation and forceful tactics to reach their end.

### 3.2.3. *Drone killing*

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<sup>121</sup> See Cornell Law School, "No-Knock", and Coyne and Hall 2018, pp. 96-7.

<sup>122</sup> Sack 2017.

<sup>123</sup> In Houston, a police officer created a fictional confidential informant in order to obtain a no-knock warrant to raid a house. The result is that four police officers were shot and two civilians were killed. The Houston Police Department is now considering ending their no-knock raid policy (Zaveri, "Houston Police.").

<sup>124</sup> Coyne and Hall 2018, p. 97.

<sup>125</sup> *Ibid.*, p. 97

America's 'War on Terror' gave rise to a new form of warfare by way of using drones, otherwise referred to as *unmanned aerial vehicles* (UAV).<sup>126</sup> Drones are guided autonomously, or by remote control (or both), and contain sensors, electronic transmitters, target designators, and offensive ordnance, designed to aid in the interference with or destruction of enemy targets.<sup>127</sup> After 9/11, President George W. Bush instituted a drone program to be able to kill leaders of al Qaeda. From June 2004 to January 2009, Bush ordered 44 strikes in Pakistan, an average of one drone strike per forty days.<sup>128</sup> President Barack Obama greatly accelerated the program, authorizing nearly four times the amount of drone attacks as the Bush administration. According to estimates provided by three non-governmental organizations, Obama authorized 506 strikes that killed 3040 terrorists and 391 civilians.<sup>129</sup> On his third day in office, Obama ordered two drone strikes by the CIA and killed an estimated one militant and ten civilians (including at least four children).<sup>130</sup> *The Intercept* published an expose on Obama's drone use titled, "The Drone Papers", and it includes leaked military documents demonstrating the inner workings of the military operation.<sup>131</sup> Jeremy Scahill writes:

Drones are a tool, not a policy. The policy is assassination. While every president since Gerald Ford has upheld an executive order banning assassinations by U.S. personnel, Congress has avoided legislating the issue or even defining the word "assassination." This has allowed proponents of the drone wars to rebrand assassinations with more palatable characterizations, such as the term du jour, "targeted killings."<sup>132</sup>

It is important to note that the executions that are ordered through drones via the executive order that made such killing possible, do not undergo any judicial process. Typically, when an

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<sup>126</sup> I will be using the term "drones" to refer to all UAV's for the remainder of the chapter.

<sup>127</sup> Guilmartin, "unmanned aerial."

<sup>128</sup> Bergen and Tiedemann 2011.

<sup>129</sup> Zenko, "Obama's Embrace."

<sup>130</sup> *Ibid.*

<sup>131</sup> Access to these documents is available at: <https://theintercept.com/drone-papers/>.

<sup>132</sup> Scahill, "Assassination Complex." For information on the history of assassination bans see Bazan, "Assassination Ban."

individual is suspected and convicted of a crime, they are viewed as innocent until proven guilty and they are afforded a legal trial in which they can defend their innocence. Victims of the presidential drone policy have their Fifth Amendment right violated, as the Fifth Amendment states that no person shall be “deprived of life, liberty, or property, without due process of law”; however, these individuals are killed without due process of law.

Perhaps one might make the argument that these individuals lack Constitutional rights as most of the casualties of drone warfare are not U.S. citizens. And furthermore, that these casualties have been proven to be terrorist threats and their deaths are a mere consequence of war. While it is true that many of the victims of drone warfare are *not* U.S. citizens, some of them are. Anwar al-Awlaki was the first U.S. citizen to be killed by a drone strike ordered by President Barack Obama. In 2014, a classified memorandum was released by the U.S. Court of Appeals for the Second Circuit demonstrating the Obama administration’s legal justification for the assassination of U.S. citizen Anwar al-Awlaki. The memorandum stated there was no legal precedent for the assassination, nor was there any explicit authorization in any federal statutes. In fact, as previously stated, historically there has been a *ban* on assassinations by the federal government. Obama’s use of drones to carry out assassinations serves as an excellent example as to why an individual is justified in using their right to self-defense against the state.

It is often considered paranoid to view the state as a threat to individuals. It is not a socially acceptable view and individuals who profess to be concerned about the state’s ability to inflict harm on individuals can often be socially isolated due to these views. But even these three examples serve to show why we should consider the state a serious threat to individuals.

There are two obvious objections to my argument that an individual’s right to self-defense applies against the state. The first objection is centered around the concern that the state

*should* have a monopoly on force and permitting individuals to have a right to self-defense against the state is an unacceptable equalization of force. The second objection is dismissive of the threat of tyranny due to the improbability of it eventuating, especially in legitimate states such as the U.S. I will now discuss these objections and show why neither of them is strong enough to resist the claim that individuals have a right to self-defense against the state.

### **3.3. The ‘equalization of force’ objection**

One might state that my argument for a right to self-defense against the government could not apply, because the government is a special type of entity that requires maintaining a monopoly on force. If the right to self-defense includes the right to self-defense against the government, then we would have an equalization of force that is problematic for a state to effectively maintain its power. I call this the *equalization of force objection*. The objection looks like this:

1. The state’s ability to effectively maintain law and order would be threatened if there were an equalization of force between the state and its citizens.
2. We should not threaten the state’s ability to effectively maintain law and order.
3. There is an equalization of force if the right to self-defense is taken to include a right to self-defense against the government.
4. Therefore, we should not include a right to self-defense against the government under the right to self-defense. (From 1, 2, & 3)

Premise 1 holds that an equalization of force between citizens and the state would destabilize the state’s ability to maintain law and order effectively. But why think this is so? If the state was not abusing its power, then most (normal) citizens would not simply initiate force against it. Premise 1 implies that providing citizens with a check on the state via an equalization of force is problematic. But it is only problematic if the state has reasons to be afraid that a check would result in initiation of force by its citizens. Most normal citizens have a strong interest in staying alive along with not being injured; therefore, most people would not attack the state without



good reason. Most people just want to live their lives free from violence and would not put themselves in harm's way without good cause. It might be worth questioning *why* the state would fear an equalization of force. Perhaps the state does not want the level of accountability that an equalization of force would impose. Presumably, an equalization of force would lift some burden off the police, but some people find this an unappealing outcome. McMahan is concerned about an equalization of force between citizens and the state, as he thinks it would result in a less effective police force, with personal defense becoming an issue of "self-help."<sup>133</sup> The worry is that if more citizens are armed, then the police force would need to increase in size, become better armed, and also be more willing to fire. This would increase the power of the government and result in increased costs in the public and private sphere. His argument seems to rely on the premise that it is objectionable to allow citizens to use private means of security, rather than relying on the police force. This premise assumes that private means of security are a *worse option* for individuals than the police force. I understand McMahan to be mostly concerned with personal self-defense when he speaks of the "privatization" of personal security, as he is concerned about "self-help" and "vigilantism." We know that police are trained to be able to handle life-threatening situations, but we cannot say the same for all individuals who own a gun. Perhaps, then, individuals are unequipped to provide themselves with adequate protection, which increases their chance of death or harm.

While it is certainly true that a majority of individuals who own a gun would not be as well-trained as police in dealing with life-threatening situations, the police have no legal obligation to protect any individual from harm.<sup>134</sup> The government has officially denied its

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<sup>133</sup> McMahan 2012.

<sup>134</sup> See earlier discussion of *Warren v. District of Columbia* 1981. Additionally, most gun owners do not need to be as well-trained as the police to effectively ward off an attacker. Sometimes simply revealing the gun or stating that you have one deters attackers. This is significant part of the appeal of defensive gun use.

obligation to protect any individual citizen. Given the reality that individuals cannot rely on the police as a means of protection, it is hard to see the police as the preferred option over private protection. As Huemer points out, the right to protect yourself exists whether or not the government recognizes an obligation to protect you, but given that the government has explicitly stated it does not recognize any such obligation, the right to be able to protect yourself becomes even more important.<sup>135</sup>

### **3.4. Improbability of tyrannical government**

I understand a *tyrannical government* to be a *cruel and oppressive* government that has arbitrary or unrestrained power. There are obvious forms of tyrannical governments, such as the governments that resulted under Hitler's and Stalin's rule, but it is important to note that tyranny does not follow the same set of steps to reach its end goal in every case. But to get to that end state often requires an incremental strategy implemented over time, where individuals lose increasing freedom and control over their own lives. In one sense, my claim that the threat of a tyrannical government is a serious threat is obvious. No one would want to claim that a tyrannical government would not pose a serious threat. But many would question the likelihood of developing a tyrannical government. The objection would hold that the probability of a tyrannical government being realized is not significant, so considering it a "serious threat" is exaggerated. Being concerned about the threat of tyranny seems almost irrational in some way. I will call this the *improbability objection*.

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<sup>135</sup> Huemer 2016. Huemer uses this point to defend an individual's right to bear arms.

In response, I would argue that those who consider the realization of a tyrannical government highly improbable are likely mistaken about the mechanisms that allow for democratic governments to become tyrannical. The person who thinks that tyranny is so unlikely that we need not weigh it along with *true* serious threats (such as private gun crime, war, disease) probably believes that the checks and balances provided in the U.S. Constitution do not permit the kind of centralization of power required for a tyrannical government to grow. This is simply false. It is true that the U.S. Constitution was initially designed to prohibit expansive government and centralization of power, but the U.S. government has not adhered to these restrictions. The Tenth Amendment states explicitly that the power of the federal government is limited to what the Constitution delegates to it<sup>136</sup> and Article I, Section 8 of the Constitution lists the powers of the legislature. If we are to take the Constitution seriously, then almost every federal program or federal law in the U.S. today is unconstitutional.<sup>137</sup>

The justification for this breach of constitutionality (if given) is usually an appeal that is grounded in the belief that the Framers of the U.S. Constitution were living in a very different time, with very different needs, so they could not have contemplated the complexity of today's world. It is likely that a good majority of citizens find certain breaches of constitutionality permissible due to the personal benefits they receive. It is also quite likely that many people have not even contemplated the issue of whether federal programs are unconstitutional. But this lack of constitutional constraint should not be taken lightly, however well-intentioned any individual breach may be. The U.S. Constitution was intended to establish a federal government and delegate limited powers to it, as well as enumerating specific rights and protecting them through

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<sup>136</sup> Tenth Amendment: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

<sup>137</sup> Huemer 2013, pp. 221-26. See Huemer for a more detailed discussion of what programs, laws, and federal agencies would be unconstitutional.

limited government power. Government power was to be limited by a system of checks and balances and division of powers among the three branches of government. Constitutional violations demonstrate that the Constitution has been ineffective in protecting against government expansion of power, and that the system of checks and balances has not been effective at limiting the power of government. The limited powers of the government were integral to ensuring that individual rights were protected. This is because the expansion of government power often leads to a deprivation of individual rights. While there are obvious reasons to be concerned about the ineffectiveness of the Constitution to constrain government power, the key reason to be concerned is the potential for tyranny.

Recall that Rummel's research shows that the best way to protect against democide is to prevent democracies from evolving into either authoritarian or totalitarian states by maintaining cross-pressures that keep power dispersed. Expansion of government power is often made possible through a unified goal, rather than many diverse interests. Dispersal of power helps to prevent the growth of government power. So, while democracies are less likely to become tyrannical, there are mechanisms that allow for it to happen.

A cautionary tale of democracy's ability to become tyrannical is seen in the Weimar Republic's transformation into Nazi Germany. The Weimar Republic had a representative democracy from 1919-1933. They instituted the Weimar Constitution, and while it is certainly much more extensive than the U.S. Constitution in that the stated domain of the Reich include control over many more sectors of society, such as establishing fundamental principles for the rights and duties of religious associations and educational matters including high schools and scientific libraries<sup>138</sup>, it does share some fundamental goals, such as freedom of speech, freedom

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<sup>138</sup> See Article 10 of the Weimar Constitution.

of association, and equality among persons under the law. Article 48 of the Weimar Constitution allows for the Reich President to bypass or override the Reichstag in emergencies.<sup>139</sup> Hitler became Chancellor in 1933 and very shortly afterwards there was a fire in the Reichstag building. Hitler was able to use Article 48 to implement the Reichstag Fire Decree, which not only nullified most civil protections afforded by the Weimar Constitution, but also allowed Hitler to imprison his political enemies.<sup>140</sup> Having his political enemies detained allowed Hitler to pass the Enabling Act through parliament with little resistance.<sup>141</sup> The Enabling Act gave Hitler the power to pass laws without consent of the parliament. Hitler was able to achieve this level of power through legal action afforded initially by the Weimar Constitution. This is relevant for two reasons: (1) it provides an example of how a democratic government can become a tyrannical government, and (2) the power of executive order afforded to the U.S. President is relevantly similar to Article 48 of the Weimar Constitution.

Executive orders in the U.S. are legally binding Presidential orders that commonly direct and manage operations of the federal government. They carry the same legal force as laws passed by Congress, but they do not need the approval of Congress.<sup>142</sup> The basis of executive order power is in the executive power granted to the President in Article II, section 1 of the U.S. Constitution. Every U.S. president has used executive orders, although they were used less frequently early on. Executive orders have included major controversial policy changes and have

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<sup>139</sup> Snyder 1958, pp. 385-92. *Reichstag* is the German word for parliament.

<sup>140</sup> "Decree of the Reich 1946".

<sup>141</sup> "Law to Remove the Distress 1943".

<sup>142</sup> The American Bar Association ("Executive Orders") states:

Congress also has the power to overturn an Executive Order by passing legislation that invalidates it. (The President, of course, may veto such legislation, in which case Congress may override the veto by a two-thirds majority). Congress could also effectively thwart an Executive Order calling for an action that requires funding by using its power of the purse to deny the necessary funding. Finally, the courts have the power to stay enforcement or ultimately overturn an Executive Order that is found to be beyond the President's constitutional authority.

resulted in individual rights violations. Perhaps the best-known case of executive order abuse is President Roosevelt’s Executive Order 9066 during World War II.<sup>143</sup> Executive Order 9066 authorized the United States Secretary of War to prescribe military areas,<sup>144</sup> which resulted in tens of thousands of innocent Japanese-American citizens being sent to internment camps exclusively due to their race or national origin, where they were imprisoned without trial.

I argue that Article 48 of the Weimar Constitution and executive orders in the U.S. share a dangerously similar legal feature—the ability for a leader to make unilateral decisions about the country. Now, the response to this claim may be that there are enough other meaningful differences between the two constitutions that this similarity is not troubling. After all, the U.S. government has checks and balances—executive orders can be challenged by Congress, and the Supreme Court can strike down the executive order on the grounds that it is unconstitutional. These checks and balances help constrain the growth of government power via executive order, so the U.S. is not as at risk for tyranny as Weimar Republic was.

I have already argued that the checks and balances have not been effective at limiting government power, but a relevant example here will prove useful. The Supreme Court heard two cases challenging the constitutionality of Roosevelt’s Executive Order 9066, but the Court upheld Roosevelt’s executive order *both times*.<sup>145</sup> A possible explanation for this could be that Supreme Court judges are appointed by the President and approved by the Senate, so it stands to reason that the President is not going to appoint anyone who they think would restrain them from doing what they want to do. During his twelve years in office, Roosevelt appointed eight

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<sup>143</sup> National Archives, “Executive Orders” (see executive order #9066).

<sup>144</sup> *Ibid.*

<sup>145</sup> See *Kiyoshi Hirabayashi v. United States* 1943; *Korematsu v. United States* 1944.

Supreme Court justices.<sup>146</sup> The failure of the Supreme Court to check the executive branch (twice) allowed for severe individual rights violations and serious harm to tens of thousands of citizens. Additionally, the Supreme Court similarly has allowed Obama’s drone execution program to continue and has refused to hear a lawsuit concerning a drone strike in Yemen that killed five people in 2012.<sup>147</sup> The stated reason for dismissal of the lawsuit is that opening the case would amount to doubting the actions of the military and it was not the place of the courts to review such action.<sup>148</sup> If this truly is the reason, then what governmental check does the U.S. have against its military? It seems that the checks and balances that were supposed to ensure our government can’t grow tyrannical were either never there or have become so ineffective that the U.S. is now in a place where the Supreme Court won’t even hear a case that would result in questioning military action—military action that resulted in a loss of life from the controversial and veiled use of drones. Perhaps another reason the Supreme Court is not willing to hear these kinds of cases, and the reason it has allowed Obama’s drone program to continue is because it is the Executive who appoints the judges.

The key to ensuring that government does not expand, consolidate, and grow into a tyrannical government is to allow the people to have a capacity to exercise force equal to that of the government. There is no external mechanism to ensure that the government stays in check, and even an apparently strong system of checks and balances can fail to prevent expansive government power. I have provided an example of a democracy becoming tyrannical through

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<sup>146</sup> Sparrow, “FDR and the Supreme Court.” The only President who appointed more Supreme Court judges than Roosevelt was George Washington, and this is because he was the first President and the Supreme Court had just been formed.

<sup>147</sup> Lardieri, “Supreme Court.”

<sup>148</sup> Andrew Chung reporting for Reuters on the decision writes:

The unanimous ruling by a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit in Washington upheld a lower court’s finding that it lacked the authority to question decision-making by the government over the missile strike.

their own constitution and legal channels. I then showed that we have good reason to be concerned about executive orders, as they allow for unilateral decisions by the President and we cannot always rely on the Constitution's system of checks and balances to protect individuals from the government's power. This argument demonstrates that the risk of tyranny is significant and that the possibility of a tyrannical government being realized is certainly not *highly improbable*.

### **3.5. Conclusion**

In this chapter I have argued that the right to self-defense that I have already established applies against both the state and the state's agents. I have supported my position by showing that individuals cannot be expected to rely on the state for protection given that (1) the state is not capable of providing protection to each individual, (2) the state has no legal obligation to protect any specific individual, and (3) we cannot expect to be provided protection by the entity or persons we may need protection from. I have provided evidence that government officials are subject to the same biases, moral failings, and human errors that private citizens are, and furthermore, that *because* of their governmental authority, these individuals have an even greater ability to perpetuate harm on citizens. I demonstrated that the state is a serious threat to private citizens by discussing the prevalence of democide, no-knock raids, and drones. I then dealt with two strong objections to my argument—the first being the objection to the equalization of force between the state and its citizens, and the second being the improbability of a tyrannical government being realized. Neither of which hold up upon further analysis. The person who still wishes to deny that individuals have a right to self-defense against the state has the burden of proof to show why the state is not the serious threat I have shown it to be.



## Chapter 4: The Right to Bear Arms

The right to bear arms is commonly accepted as a derivative right. As stated previously, a derivative right helps to ensure the protection of the fundamental right that it is derived from. The right to bear arms is usually said to be derived from a fundamental *right to self-defense*, although some gun control proponents believe that it is derived instead from a *right to physical security* and use this basic right to justify gun restrictions. There are certainly those who hold that there are no gun rights and propose an absolute ban on private gun ownership. Nicholas Dixon makes a utilitarian argument for an outright handgun ban<sup>149</sup> and Jeff McMahan proposes an (almost) complete private gun ban based on his argument that the right to bear arms is derived from the *right to physical security* and that the right to bear arms actually *threatens* people's right to physical security.<sup>150</sup>

The right to bear arms, then, protects an individual's right to self-defense against the government. It protects the right to self-defense against the government as a *central function*. The 'central function' of a derivative right is to secure and protect the fundamental interests of the fundamental right, which means the central function of the right to bear arms is to secure and protect the individual's life, including against threats posed by the government.

My position that individuals have a right to self-defense against the state means that there are certain gun restrictions that cannot be justified. The gun restrictions I will discuss are: (1) licensing requirements for gun ownership, (2), concealed carry restrictions, and (3) outright gun bans. My argument for gun rights is distinct from other arguments that defend gun rights, as my emphasis is not just on defense against ordinary criminals. My defense of gun rights is grounded

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<sup>149</sup> Dixon 1993, pp. 243-83.

<sup>150</sup> McMahan 2012.

in the notion that individuals face serious threats from other sources, specifically governments and the military, and that these threats are often overlooked or undervalued. Viewing the state or the military as a serious threat is often dismissed as paranoid or unreasonable. But I think this is a severe mistake. Indeed, it is a mistake that has cost millions of individuals their lives. I will therefore also address the issue of military grade small arms. The permissibility of tank and other large military operational weaponry is an important discussion to have, but I will not be addressing it in this chapter.

#### **4.1. Licensing requirements**

Gun control advocates often cite the “private sale loophole” as dangerous, as it allows private sales of guns without the oversight provided in the Gun Control Act of 1968 (GCA).<sup>151</sup> The GCA requires that a firearms dealer be licensed and that the dealer perform a background check for the sale or transfer of any firearm (this includes cases where the dealer sells firearms at a gun show), that the gun sale record be maintained, that gun sales records be available to law enforcement, that multiple purchases be reported, and that the firearms dealer report any theft or loss.<sup>152</sup>

Licensing requirements are often suggested as a way to “close the loophole.”<sup>153</sup> A variety of different qualifications have been suggested by gun control proponents to obtain a license to own a gun, including a background check for private sales, mandatory safety training, written and performance-based testing for gun competency, as well as knowledge of the relevant firearm

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<sup>151</sup> Law Center to Prevent Gun Violence 2016b.

<sup>152</sup> GCA 1968.

<sup>153</sup> Law Center to Prevent Gun Violence 2016b.

laws.<sup>154</sup> Licensing requirements are not common, although some states use some of these<sup>155</sup> and there appears to be a correlation between an increase in licensing requirements and greater restrictions in state concealed carry laws.

Historically, licensing requirements have been used as a way to eradicate civilian gun ownership. There is a strong pattern of disarmament following gun control measures that are similar to what are referred to today as “licensing requirements”. These gun control measures were put into place prior to some of the worst democides in history.

In 1918, Vladimir Lenin introduced firearm registration that required every gun owner to provide the type of weapon, its serial number, and their residential address to the government. Later that year, he enacted stronger gun control laws and required all citizens except those in the Red Army to surrender all firearms and ammunition (which would then be used by the Red Army).<sup>156</sup> Those who failed to comply were sentenced to one to ten years in prison.<sup>157</sup> Lenin also added a rewards system for people to report on each other if they knew someone had a weapon.<sup>158</sup>

In 1920, Lenin decreed that those who were found in possession of an unregistered weapon (regardless of criminal intent) were to be punished with a minimum sentence of six months.<sup>159</sup> Lenin died in 1924, but his gun control efforts helped pave the way for Joseph Stalin. Stalin implemented a new criminal code in 1925 in which Article 128 punished the unauthorized

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<sup>154</sup> *Ibid.*

<sup>155</sup> Cal. Pen. Code, § 26850 and §§ 31610-31670. California requires that you have a valid Firearm Safety Certificate to purchase or acquire firearm (this requires a 75% or higher score on an objective written test administered by Department of Justice [DOJ] certified instructors). You must also perform competency of “safe handling” of the firearm in front of DOJ certified instructor in order to take possession of the firearm.

<sup>156</sup> Simkin et al. 1994, p. 119.

<sup>157</sup> See Decree of the Council of People’s Commissars in Simkin et al. 1994, pp. 121-23.

<sup>158</sup> *Ibid.*

<sup>159</sup> See Decree of the Council of People’s Commissars on the issuing, keeping, and handling of firearms in Simkin et al. 1994, pp. 129-31.

possession of a firearm with either three months of forced labor or a fine of 300 rubles (this was a significant fine—equivalent to four months’ pay for the most highly skilled workers).<sup>160</sup> In 1926, Stalin revised the criminal code, including Article 128, in which he doubled the punishment for unauthorized possession of a firearm (six months hard labor or a fine of 1000 rubles).<sup>161</sup> Rummel estimates that 4,017,000 people were victims of democide under Lenin’s rule from 1917-1924 and 42,672,000 were victims under Stalin’s rule from 1929-1953.<sup>162</sup> While there were clearly more factors at play than the disarmament of the citizens, it should be obvious that citizens’ being deprived of the ability to defend themselves against the government played a key role in Lenin’s and Stalin’s successes.

In 1928, the Weimar Republic enacted the Law on Firearms and Ammunition, which introduced regulations that required a permit if someone wished to shoot at a shooting range and for all firearm purchases (even those purchased prior to 1928), or ammunition purchases.<sup>163</sup> Section 16 of the 1928 law specified that only those who were of “undoubted reliability” and those who could *demonstrate need* would be able to obtain a permit for firearms or ammunition.<sup>164</sup> This law was kept in place during Hitler’s early days and enabled him and the Nazi Party to perform an effective civil disarmament in 1933, which largely targeted his political opposition—Socialists and Communists.<sup>165</sup> In 1938, Hitler replaced the 1928 Law on Firearms and Ammunitions with the Weapons Law, which explicitly forbade Jews from owning firearms or ammunition, as well as requiring those in possession of them to turn them in.<sup>166</sup> Those who

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<sup>160</sup> Simkin et al. 1994, p. 101.

<sup>161</sup> *Ibid.*, pp. 101, 145.

<sup>162</sup> Rummel 1994, p. 8.

<sup>163</sup> Simkin et al. 1994, p. 151.

<sup>164</sup> *Ibid.*, p. 151.

<sup>165</sup> *Ibid.*, p. 154.

<sup>166</sup> *Ibid.*, p. 183.

failed to comply were subject to up to five years imprisonment in a penitentiary.<sup>167</sup> The 1938 Weapons Law retained the requirement that a person be able to “demonstrate need” and be of undoubted reliability in order to be granted a firearms acquisition permit or a firearms carry permit.<sup>168</sup> Notably, members of the Nazi Party and other government employees were not subject to these permit requirements.<sup>169</sup> In 1942, Hitler acknowledged the threat that having an armed populace would pose when he stated,

The most foolish mistake we could possibly make would be to allow the subject races to possess arms. History shows that all conquerors who have allowed their subject races to carry arms have prepared their own downfall by so doing. Indeed, I would go so far as to say that the underdog is a *sine qua non* for the overthrow of any sovereignty.<sup>170</sup>

Rummel estimates that 20,946,000 were victims of democide under Hitler’s rule from 1933-1945.<sup>171</sup> Again, undoubtedly many factors contributed to the significant death toll under Hitler, but it is clear that disarming his opposition was integral to his strategy, and it was effective in achieving his desired outcome.

Adding safety training requirements, or gun use competency tests, to licensing requirements will increase costs to law-abiding gun owners, and have virtually no impact on criminal gun owners. The increased costs to obtain a gun license could deter law-abiding individuals from getting a license at all. These increased costs would be a particularly significant burden to those of lower socio-economic status, individuals who might have the greatest need to

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<sup>167</sup> *Ibid.*, p. 183.

<sup>168</sup> *Ibid.*, p. 167.

<sup>169</sup> *Ibid.*, p. 167.

<sup>170</sup> Hitler 1953, p. 345

<sup>171</sup> Rummel 1994, p. 8.

own a gun in the first place.<sup>172</sup> Overall, the most common qualifications suggested for a license to own a gun have little impact on criminals, because criminals are less disposed to obey the law.<sup>173</sup> This is the issue of *criminal noncompliance* and it is frequently overlooked by gun control proponents, but it is important that it be considered. If gun restrictions only impact law-abiding gun owners and not criminal gun owners, and gun restrictions make it difficult for a law-abiding gun owner to obtain a gun, then we risk a situation where criminals are still obtaining guns and law-abiding individuals have been deterred (or otherwise prevented). Making it difficult for law-abiding individuals to obtain a gun is not only an infringement on their right to bear arms but is actually harmful. It is harmful because individuals are deprived of the major benefit to owning a gun—the ability to use a gun defensively. Furthermore, licensing requirements violate an individual’s right to self-defense against the state. They do so by making it very difficult for law-abiding citizens to obtain a gun, thereby preventing the equalization of force that would keep the government in check. As history has shown us, disarmament is a critical step of a tyrannical takeover of a government, and the precursor to disarmament is licensing requirements. Therefore, licensing requirements violate an individual’s right to self-defense against the state.

#### **4.2. Concealed carry restrictions**

In most U.S. states, if there is a not law permitting a gun owner to carry their gun concealed (usually with a concealed carry permit), then it is considered illegal to carry a concealed weapon.

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<sup>172</sup> This is simply to say that those who have less money are more likely to live in a less safe neighborhood. Generally, wealthier people live in safer neighborhoods. Living in a less safe neighborhood means you are more likely to find yourself in a self-defense situation where being armed could save your life.

<sup>173</sup> Huemer 2016; Lott 2010, p. 318. Huemer (2016) states that people frequently confuse the results *if* the law were effective with the actual likely results of the law. He discusses compliance in terms of a gun prohibition, but the same reasoning can be applied to other gun laws and restrictions. See Huemer 2016 for a full discussion on the noncompliance problem as it relates to criminal gun owners.

The exception to this is states who have a “permitless carry” law, which allows individuals to carry a concealed weapon without a permit. Concealed carry laws generally fall into two categories: (1) “shall issue” laws and (2) “may issue” laws. “Shall issue” laws hold that if an applicant does not have any disqualifying criteria (such as being a convicted felon), then they are to be granted a concealed weapon permit.<sup>174</sup> The issuing authority does not have any discretionary power to reject the applicant. There are some limited exceptions to this rule as some “shall issue” states allow limited discretion on issuing concealed carry permits, such as denying a permit to an applicant where there is reasonable suspicion that the individual is a danger to self or others.<sup>175</sup> On the other hand, “may issue” laws allow for the issuing authority to exercise their discretion.<sup>176</sup> The “may issue” states typically require the applicant to identify some kind of special need or “good cause” for wanting to acquire a concealed weapon permit. What constitutes a “good cause” varies between states, but a common requirement is that the individual provide evidence of an immediate threat to their life.<sup>177</sup> I am only concerned here with the restrictions that “may issue” laws place on individuals, as these laws make it more difficult for individuals to exercise their right to self-defense against the state.

Someone could object that concealed carry restrictions are not relevant to my claim of self-defense against the state, because an individual having a right to concealed carry would be irrelevant if tyranny were to arise; the relevant issue would be whether or not the individual had a gun at their disposal. But this objection fails to realize two key points: (1) the ability to defend yourself against the government is not restricted to only being able to exercise that right *in the*

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<sup>174</sup> Grossman and Lee 2008, pp. 198-206.

<sup>175</sup> Giffords Law Center, “Concealed Carry.”

<sup>176</sup> Grossman and Lee 2008, pp. 198-206.

<sup>177</sup> It is also common for the “good cause” requirement to stipulate that, in addition to the immediate threat, it must be the case that law enforcement resources are inadequate to assist.

home and relatedly, (2) a person's right to self-defense against the state is not *only applicable* in cases of tyranny but is also present in cases that are smaller in magnitude, such as the mistaken raid cases discussed in chapter 3. The right to concealed carry helps secure the right to defend yourself in these smaller-magnitude cases that can occur outside of the home. It is also worth noting that tyranny is not like a switch—one day we are free and the next day it is full-blown tyranny—tyranny often builds through many smaller-magnitude cases, so the ability for a person to carry concealed in order to defend themselves in these cases is critical, not only in individual cases, but in the overall fight against tyranny.<sup>178</sup>

Currently, almost all U.S. states have *some* concealed carry law, but provisions vary greatly. Thirty-one states have “shall issue” laws, nine states have “may issue” laws, and nine states do not require any permit to carry concealed weapons.<sup>179</sup> No state that has enacted a “shall issue” law for concealed carry has reverted to a “may issue” law.<sup>180</sup> The change from “may issue” laws to “shall issue” laws appears to be in response to increases in crime.<sup>181</sup> This finding is consistent with evidence that shows having “shall issue” concealed carry laws *reduces* violent gun crime compared to “may issue” laws—they effectively act as a violent crime deterrent.<sup>182</sup>

This result has been challenged, but even a non-partisan review of the gun crime literature cannot

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<sup>178</sup> 7 of the 9 “may issue” states also require a permit to purchase a handgun, whereas only 4 out of the 31 “shall issue” states require a permit to purchase a handgun. This means that approximately 78% of the “may issue” states require a permit to purchase a handgun and only 13% of the “shall issue” states (NRA-ILA n.d.). New Jersey is an example of a “may issue” state that requires a permit to purchase. First, an individual is required to purchase a Firearms Purchaser Identification Card from their local police department (that can take anywhere from 1-6 months to be approved). Then second, if the individual wishes to purchase a handgun, they are required to apply for a Permit to Purchase a Handgun, which requires submitting three character references (NJSP, 2017).

<sup>179</sup> NRA-ILA n.d.; Law Center to Prevent Gun Violence 2016a.

<sup>180</sup> Lott 2010, p. 240; Grossman and Lee 2008, p. 203.

<sup>181</sup> Grossman and Lee 2008, p. 206

<sup>182</sup> Lott 2010, pp. 97-9 & pp. 259-74. Lott's original research covered the years 1977-1992 when only eighteen states had concealed carry laws. He has updated his research twice since then and his most recent research spans from 1977 through 2005 and factors in the concealed carry laws in thirty-nine states. His findings are consistent across all three sets of research and show that states that have concealed carry laws see a reduction in murder and violent crime.



definitively state that concealed carry laws do not reduce at least some types of violent crime.<sup>183</sup> In 2004, the National Research Council reviewed the firearms literature and while the chapter on concealed carry laws concludes that “it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates,”<sup>184</sup> the dissenting opinion by James Q. Wilson in Appendix A states that Lott’s results on right to carry laws and crime rates “survive virtually every reanalysis done by the committee.”<sup>185</sup> Wilson concludes his dissent by stating, “I find that the evidence presented by Lott and his supporters suggests that RTC laws do in fact help drive down the murder rate, though their effect on other crimes is ambiguous.”<sup>186</sup>

The benefit of allowing more people to carry concealed weapons is not just in the individuals’ ability to defend themselves, but also in the very fact that the gun is *concealed*, making it near-impossible for any criminal to know which persons may have guns. This extends the benefits of concealed carry beyond just the individual carrying the gun, to individuals who do not carry at all.

### 4.3. Outright gun bans

Arguments for gun bans are based on the notion that allowing individuals access to guns increases the risk to everyone’s safety and results in a greater number of gun-related deaths. The arguments are generally utilitarian in nature, but not always. McMahan recognizes a right to physical security, but he believes that private gun ownership violates this right. In favor of a policy banning private gun ownership, McMahan states, “A policy that unavoidably deprives a

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<sup>183</sup>Wellford et al. 2004.

<sup>184</sup> *Ibid.*, p. 150.

<sup>185</sup> *Ibid.*, p. 269.

<sup>186</sup> *Ibid.*, p. 271.

person of one means of self-defense but on balance substantially reduces her vulnerability to attack is therefore respectful of the more fundamental right from which the right of self-defense is derived.”<sup>187</sup> I will argue that gun ban arguments fail for two main reasons. The first reason is that a gun ban violates an individual’s right to bear arms and therefore, the individual’s right to self-defense against the state. Secondly, when one considers all of the relevant statistics and data related to private gun ownership, gun crime, and gun deaths, the conclusion that should be drawn is that gun ownership does not make people more unsafe.

Individuals who propose banning guns often fail to understand the value of defensive gun use, as well as the deterrent value of gun ownership. The main premise of the gun ban argument is that if guns were no longer available, then gun crime could not occur, and therefore, there would be a decrease in gun-related fatalities and injuries. There are two major flaws in this kind of thinking. The first flaw is the failure to understand *criminal noncompliance*. Criminals often do not obey the law, and gun restrictions are particularly vulnerable to noncompliance given that the criminals who use guns in their criminal activities will not be deterred by the law. For example, a gang member involved in drug trafficking is not going to *not* purchase or obtain a gun because the government tells him that it is illegal to own a gun. The gang member is already performing many illegal activities, most of which require a gun, and he is not going to suddenly start obeying the law in the case of a gun ban (or any other gun restriction). The second flaw is not recognizing that there are many types of violent crime outside of crimes perpetrated with the use of a gun, so by depriving individuals of their ability to defend themselves effectively in these situations, the government is tantamount to an accomplice in the crime.<sup>188</sup> In order to motivate

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<sup>187</sup> McMahan 2012, n.p.

<sup>188</sup> Huemer (2003) provides an excellent argument for this position in, “Is There A Right to Own A Gun?” See the examples on pages 306-8.

my argument that gun bans violate both an individual's right to bear arms and an individual's right to self-defense against the state, I will discuss the gun ban that was enacted in Australia in 1996.

#### *4.3.1. Australia's gun ban: a useful case study*

Australia provides an interesting case study on gun bans. Australia enacted a mandatory gun buyback program during October 1996 through September 1997.<sup>189</sup> In May 1996 Australia instituted the National Firearms Agreement which banned all automatic and semi-automatic firearms from civilians except occupational shooters such as exterminators; created a nationwide registration requirement for all firearms; and instituted a "genuine reason" requirement for owning, possessing, or using a firearm, in which they state, "that personal protection not be regarded as a genuine reason for owning, possessing, or using a firearm."<sup>190</sup> Many statistical studies have been performed on the data of firearm deaths and suicides since Australia's gun ban, but no consensus has been reached on whether the gun ban had any significant effect on reducing gun deaths despite using the same data for analysis.<sup>191</sup> Interestingly, guns are not the only weapon banned in Australia. The list of prohibited items is *extensive* and includes knives, pepper spray, and tasers<sup>192</sup>. Furthermore, *any* item which an individual carries for self-protection can be considered a "dangerous article" according to the Control of Weapons Act 1990 (CWA) and you can be arrested and imprisoned for carrying such an article.<sup>193</sup> A 'dangerous article' has been defined as:

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<sup>189</sup> Ramchand and Saunders, "The Effects of the 1996 National."

<sup>190</sup> Australasian Police, "Special Firearms Meeting," p. 3.

<sup>191</sup> See section 2 of Lee and Suardi 2008.

<sup>192</sup> For full list, see Australian Police, "Prohibited Weapons."

<sup>193</sup> See Victorian Government, Control of Weapons Act 1990. This law is enacted in the state of Victoria, rather than the whole country, however, there appear to be other such similar laws in other states prohibiting an individual from carrying defensive weapons.

- (b) an article which has been adapted or modified so as to be capable of being used as a weapon; or
- (c) any other article which is carried with the intention of being used as a weapon;<sup>194</sup>

This means that if, in the light of not being able to legally carry a firearm, you wish to carry a knife or pepper spray to defend yourself, you could be charged with a criminal offence. In fact, in 1993, a man in Victoria was charged with possession of a weapon for wearing a leather belt that was studded.<sup>195</sup> The Magistrates Court charged him with the crime of possessing a weapon based on the CWA. Australia's pattern of gun registration, its requirement that an individual provide a "genuine reason", where this reason cannot be self-defense, along with its gun ban, has followed an eerily similar pattern to the one seen under Hitler, Lenin, and Stalin. This is not to say that Australia is destined for tyranny, however, it is worth noting the authoritarian measures Australia implemented during the COVID-19 pandemic as evidence that they may be vulnerable to tyrannical takeover. These measures ranged from helicopters policing the skies to ensure lockdowns, preventing citizens from departing the country unless they applied for an exemption, closing interstate borders so that individuals were no longer free to travel within the country, and creating segregated parts of society where only the "fully vaccinated" would be permitted to be. It is reasonable to think that one of the main reasons that authoritarian measures such as these were able to be instituted is that Australians do not have the right to bear arms for self-defense, therefore preventing an equalization of force between citizens and the Australian government. The gun ban that prevented civilian gun ownership has violated every individual's right to self-defense against the state, and this became even more pronounced during the pandemic when Australians were left defenseless against the state's authoritarian measures.

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<sup>194</sup> See section 3 of Control of Weapons Act 1990.

<sup>195</sup> See *Deing v. Tarola* (1993) 2 VR 163.

When civilians are denied legal access to guns and deprived of their right to bear arms, a cultural and psychological shift occurs surrounding the value of self-defense and the individual's relationship to the state. The government is no longer viewed as subservient to the individuals who comprise the country, but rather the individuals are subservient to the state's commands *and* individuals are dependent on the state for its protection. The individual is no longer a realistic check on the state's power. And over time, the population at large becomes much more malleable and compliant to the state. I believe this psychological and cultural shift is often deliberately orchestrated to allow for a tyrannical regime to take over. Historically, evidence of strategy to create psychological shifts in people's views about guns can be seen in such policies as the policy under Lenin where citizens were offered rewards for reporting on each other if they had a weapon.

Even if I am right that gun bans violate an individual's right to self-defense against the state, perhaps the reason that this violation could be deemed permissible, or the reason that one might question the very existence of a right to self-defense against the state, is the problem of private gun crime. Gun ban advocates frequently cite the problem of private gun crime as a compelling reason to enact a ban. So how prevalent is private gun crime and is it severe enough to justify a gun ban?

#### *4.3.2. The problem of private gun crime*

There were approximately 318 million people living in the U.S. in 2014, and 33,599 of them died as a result of a gun.<sup>196</sup> Nearly two-thirds of the gun deaths—21,334—were from suicide and only 10,945 of them were from murder.<sup>197</sup> This means that .003% of the 2014 U.S. population were

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<sup>196</sup> Kochanek et al., pp. 12, 87. I am using statistics from 2014 as final data is not available for 2015 (or 2016).

<sup>197</sup> *Ibid.* The breakdown for all 33,599 firearm related death is as follows: 21,334 suicide, 10,945 homicides, 586

murdered through the use of guns and .007% committed suicide using a gun. 2,626,418 people died in 2014, which means that 1.27% of these deaths were the result of a gun.<sup>198</sup> While no loss of life should be dismissed, this number of gun deaths is extremely low relative to other causes of death, or to the potential harm of having a tyrannical government.<sup>199</sup> It isn't clear that gun restrictions don't actually increase gun crime, rather than reduce it. Before this claim can be assessed, it is necessary to know the amount of gun crime. I have already provided the statistics from gun crimes that result in fatalities, but this does not fully capture gun crime, as there are non-fatal gun crimes that need to be accounted for. There were 466,110 victims of non-fatal gun crimes from 414,700 incidents in 2014.<sup>200</sup> Combining both the 2014 gun-related fatalities and the non-fatal gun crimes yields a result of 499,709 victims, or .0157% of the entire population. While this figure is again low, that does not mean it isn't worth trying to eliminate gun-related crimes or death. Often gun control advocates state that even one life lost from a gun is one too many.<sup>201</sup> The question is whether or not a gun ban or gun restrictions actually reduce this rate, and it is not at all clear that they do. In order to understand the broader picture of gun crime it is necessary to understand an often-under-discussed element of gun crime, and that is the defensive use of a gun.

#### 4.3.3. *Defensive gun use*

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accidental discharge, 464 legal interventions/war, and 270 homicides where there was undetermined intent.

<sup>198</sup> *Ibid.*, pp. 5, 87. 614,348 deaths were from heart disease and 591,699 were from cancer.

<sup>199</sup> *Ibid.*, p. 12. In 2014, poisoning caused 51,966 deaths, which is 18,372 *more* deaths than all firearm deaths for the same year (note that the firearm deaths include suicide). Motor-vehicle traffic-related injuries resulted in 33,736 deaths, which is just slightly higher than firearm deaths. And 33,018 persons died as the result of a fall in the same year, which is just under the figure for firearm related deaths.

<sup>200</sup> Truman and Langton 2015, p. 3. The number of incidents does not accurately reflect the level of victimization, which is why I will use the figure for the number of victims when analyzing the effects of gun crimes. These crimes include any crime in which the offender had, used, or showed a gun.

<sup>201</sup> While this sentiment is understandable, it is not sufficient to justify gun restrictions that prohibit individuals from exercising their right to bear arms.

A summary of nineteen professional surveys indicates that defensive gun use (DGU) is high, with estimates ranging from 700,000 to 3.6 million uses per year in the United States.<sup>202</sup> There is an outlier study conducted by the Census Bureau for the Bureau of Justice Statistics called the National Crime Victimization Survey (NCVS), which estimates DGU at roughly 65,000 to 116,000 cases per year. The DGU figure varies in the NCVS from year to year, but the significance of their figures, no matter what the year, is that they are radically under all other DGU survey estimates. Criminologist Gary Kleck has emphasized that the likely reason the DGU estimates in the NCVS survey are drastically lower than all other DGU surveys is due to the fact that the NCVS survey is not anonymous and it is conducted by the Justice Department.<sup>203</sup> It is reasonable to think that respondents would not be forthcoming about divulging their defensive gun use non-anonymously to a government official. Additionally, in the NCVS survey, respondents are not asked directly about DGU, but rather, they merely have the opportunity to mention it *only after* identifying themselves as a crime victim.

Something is generally not considered a DGU unless it concerns the threat of another person (not including police officers, military, or security officers), involves contact with an actual person (i.e., not investigating a strange noise or animal), the gun was used in some way (even if just a verbal threat), and the person could state some intended crime they thought might occur.<sup>204</sup> Even the lowest estimate of DGU shows a significant benefit compared to the cost of gun-related crime. Let's imagine that the lowest probable DGU statistic is applied to the gun crime figures for 2014, which would likely be underrepresenting defensive gun use given that

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<sup>202</sup> Kleck 1999, p. 77.

<sup>203</sup> Kleck and Gertz 1995, pp. 153-57.

<sup>204</sup> Kleck and Kates 2001, pp. 213-28.

gun manufacturing has nearly doubled since 1993.<sup>205</sup> This application would show that more crimes were prevented by DGU than there were victims of gun crimes, by a ratio of roughly 7 to 5. This ratio increases to 36 to 5 if we consider the highest estimate for DGU (3.6 million). I acknowledge that not every DGU is equivalent to the prevention of a crime, but I think it is reasonable to think of DGU this way generally, as we often have no way of knowing the outcome of the counterfactual. If gun crime is outweighed by DGU by even the lowest DGU estimate, then the prevalence of private gun crime cannot be used as a reason to ban guns. Because to ban guns would be to deprive individuals of the defensive use of their gun and therefore, increase the chances that they would be a victim of crime. At this stage, the gun ban proponent would argue that there is a flaw in my argument, because if guns were banned, then the would-be victim wouldn't be a victim anymore because the gun ban would have removed the access to guns, and therefore, gun crime would decrease.<sup>206</sup> However, as previously mentioned, this view fails to understand the importance and relevance of criminal noncompliance. Criminals will not comply with a gun ban. In fact, it is reasonable to think that criminals may even become emboldened to commit *more* crime knowing that the broader population is largely disarmed. Evidence of this phenomenon can be seen in U.S. cities and states that have stricter concealed

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<sup>205</sup> I am comparing the lowest DGU statistic, which is from the 1990's with crime in 2014, as most of the DGU surveys were analysis is misleading. There is no way to be certain that the DGU survey figures would hold in 2014, which is why I am using the lowest probable DGU estimate (700,000) to reduce the chances that this brief analysis misleading. Additionally, the ATF reports total firearms manufactured in 1993 was 5,055,637 and 9,050,626 in 2014 (BATF 2016, p. 1). See Exhibit 1 for firearms manufactured from 1986-2014. While gun manufacturing does not necessarily mean increased defensive gun use, it is reasonable to think that this substantial increase in manufacturing indicates a demand in the market for guns.

<sup>206</sup> Leisha Garg (2022) of the Institute for Youth in Policy states, "A ban on semi-automatic weapons would lead to a lower circulation of guns as most criminals obtain their guns illegally. That lower circulation of guns would mean that less violent crime would occur." This is just one of numerous dialogues that gun-control proponents try and argue when supporting a gun ban.



carry laws. The gun crime is greater in places where it is more difficult for a citizen to easily own and carry a gun.<sup>207</sup>

#### 4.4. The ineffectiveness objection

Some hold that private guns wouldn't be an effective defense against a tyrannical government, so why allow an (admittedly) smaller threat for the sake of an ineffective defense against a larger threat? I call this the *ineffectiveness objection*. The objection could grant that the threat of tyranny is problematic, but still hold that given how ineffective individuals would be at defending against a tyrannical government, we should not accept the risk of private gun crime for the sake of a supposed right to defend oneself against the government.

In reply, a person's right to defend their own life is not granted *only* if they can effectively defend against a threat. The right to defend your life exists whether or not you are successful. Your right does not change because the threat becomes bigger. We would not accept this kind of reasoning against other types of asymmetrical threats.<sup>208</sup> Individuals have the right to take self-defensive measures that are unlikely to be effective. If I am being attacked by a large, strong criminal with a weapon, I am justified in punching him even though this most certainly won't forestall the attack. However, I acknowledge this response is insufficient to deal with the objection, as it fails to adequately justify why the right to self-defense against the government is more important than other people's desire not to be harmed by private gun crimes.

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<sup>207</sup> Economist John Lott (2010) concludes in his chapter on concealed-handgun laws and crime rates, "The empirical work provides strong evidence that concealed-handgun laws reduce violent crime and that higher arrest rates deter all types of crime... This provides additional support for the claim that the greatest declines in crime rates are related to the greatest increases in concealed-handgun permits" (pp. 97-8).

<sup>208</sup> It is arguably the case that most self-defense situations involve some kind of asymmetry.

We have good reasons to think that individuals would be more effective at dealing with tyrannical threats than the objection suggests. There are well-known cases of smaller, non-governmental forces defeating large, well-equipped government militaries. The Americans defeated the British in the American Revolution against all odds. In addition to their unparalleled navy, Britain had a large, powerful land army where many of their soldiers were veterans of previous wars. At the time of the American Revolution, the British military was the most powerful in the world. In contrast, the Americans had very little experience fighting in wars, there was no regular army, nor was there much cohesion amongst the colonists. A second example can be found in the Vietnam War. The Vietnamese used guerilla warfare and unorthodox attacks on the U.S. troops to evade being captured, despite the U.S. having considerably more robust military resources.<sup>209</sup> A third example is the establishment of Algeria as a sovereign state. The National Liberation front used guerilla warfare against the French from 1954 until 1962 when Algeria was finally declared independent from France.<sup>210</sup> A fourth and final example is the defeat of the Soviet Union in the Soviet-Afghanistan War in 1989. The Soviets invaded Afghanistan in 1979 but the mujahidin (resistance fighters) employed guerrilla tactics which impeded the Soviet Union's ability to gain ground. These guerrilla tactics by a much less organized and powerful group is a large reason that the Soviet Union was ultimately defeated. While there are many important differences between the American Revolution, the Vietnam War, Algeria's establishment as a sovereign nation, and the Soviets defeat in Afghanistan, all four examples illustrate that smaller, non-government forces can triumph over larger, better-equipped government forces. It is not the goal of this chapter to detail every

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<sup>209</sup> Direct military involvement ceased in 1973. At this time, the U.S. and the Soviet Union had the most powerful military in the world.

<sup>210</sup> At the time of the Algerian War, the French military was the fourth most powerful military in the world.

account of small non-governmental forces effectively winning out over powerful governments, but what I hope to have shown is it that it is not at all clear that individuals would be ineffective at fighting against tyranny, especially when considering that all four of the four most powerful government militaries (those of the U.S., the Soviet Union, Britain, and France) have at some point been defeated by smaller non-governmental forces. Another point to consider is that the threat of a tyrannical government being implemented is greater when the populace is disarmed, as disarmament is part of the strategy (see section 4.1). So, by restricting people's right to bear arms, we increase the chances of tyrannical government being made a reality.

#### **4.5. The moral permissibility of military grade small arms**

Perhaps one of the biggest objections to an individual's right to self-defense against the state is the notion that *if* this right were to exist, then it seems to lend itself to the unpalatable conclusion that civilians would be allowed to own military grade weaponry, including fully automatic guns. Even in the pro-gun-rights philosophical literature, it is difficult to find a proponent of this kind of view. However, I will argue that military grade small arms are not only morally acceptable for civilians to own, but there is compelling historical evidence that the Framers who drafted the Second Amendment accepted this premise too. It is important to consider the Framers' position, as gun control proponents often argue that gun control is not a violation of the Second Amendment as the Framers could not envision a world in which semi-automatic or automatic guns existed.

Military grade small arms can fall into two broad categories. The first category includes weapons that were designed for military use and the second category includes weapons that are modified versions of their military counterparts. The first category includes weapons such as

M16's which have features such as the capacity for fully automatic and burst firing. These specific features are currently illegal on any civilian-owned firearm in the U.S. The second category includes weapons such as AR-15's, which are currently legal for U.S. civilians to own. While the second category of weapons contains guns that are currently legal, it is worth including them in the discussion given that there are strong efforts to have them banned. My argument will focus primarily on the first category of weapons, as I have already provided argumentation concerning why gun bans and certain other gun restrictions are not justified for the kind of weapons that are included in the second category.

In the case of guns, the key difference between military rifles and civilian rifles is the firing rate. The civilian AR-15 has an effective firing rate of 45 rounds per minute. However, it is important to note that there is a manual transfer between magazine reloads where the magazine holds a maximum of 30 rounds (and many states have tried to ban 30-round magazines and/or limit the legally owned magazine capacity to one holding 15 rounds or less). By comparison, the M4 carbine—a military rifle which the AR-15 is modelled after—is able to shoot 90 rounds per minute in 3-round burst mode. The M4 carbine has *twice* the firing rate of its civilian counterpart. The objection to owning the M4 carbine (and other military guns like it) is often framed in the question, “who needs access to these kinds of weapons?” Who needs access to a gun that fires at *double* the rate of a civilian rifle? The answer is individuals who need to defend themselves against the state, as the state has access to these weapons.

The Framers of the U.S. Constitution intended the Second Amendment to protect individuals against a tyrannical government. While the early days of the republic had partisan disputes about many issues, the right to keep and bear arms was not one of them.<sup>211</sup> It was

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<sup>211</sup> Halbrook and Kopel 1999, p. 398.

commonly accepted that the right to bear arms was meant to protect against tyranny and oppression. The author of the Second Amendment, James Madison, endorsed widely published commentary by Tench Coxe that supported the right to bear arms and its value in protecting against tyranny.<sup>212</sup> Coxe stated,

As civil rulers, not having their duty to the people before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, the people are confirmed by the article in their right to keep and bear their private arms.<sup>213</sup>

It is no accident that the first two Constitutional amendments pertain to an individual's ability to speak or act against their government. The Framers had good moral reasons at the time to include this protection. The Framers consistently spoke of the Second Amendment as having the same kind of broad range that the First Amendment had and spoke of these amendments as protecting and securing essential human rights.<sup>214</sup> The Bill of Rights was implemented when the Founders were designing a government, essentially from scratch. They were concerned with protecting individuals against government force, particularly against the possibility of tyranny.

The Framers included the Second Amendment to provide individuals with a *legal right* to protect themselves against force, and the force they were concerned with was not just force deployed by other civilians, but also force deployed by the government. Discussions during the formulation of the Second Amendment made this explicit. An early draft of the Second Amendment, which stated that “religiously scrupulous” persons will not be compelled to bear

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<sup>212</sup> Kates 1994, p. 361.

<sup>213</sup> Coxe 1789. Coxe wrote under the pseudonym “A Pennsylvanian,” and this statement appeared in the Federal Gazette and Philadelphia Evening Post in a section titled, “Remarks on the first part of the Amendments to the Federal Constitution.”

<sup>214</sup> Kates 1994, p. 361.

arms was revised, as it was thought to conflict with the aim of the Second Amendment—to protect citizens from an oppressive government.<sup>215</sup> Representative Elbridge Gerry stated,

This declaration of rights, I take it, is intended to secure the people against the maladministration of the Government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed.<sup>216</sup>

The Framers intended the right to bear arms to serve as protection for an individual’s right to self-defense and self-preservation against oppression.<sup>217</sup> There does not appear to have been any controversy about why the Second Amendment was so important. These findings are also supported by contemporary Constitutional scholarship. Criminologist and lawyer Don B. Kates states that “the idea of the Second Amendment as something other (or less) than a guarantee of an individual right to arms is a purely twentieth century invention that prior generations, especially the Constitution’s authors, did not contemplate.”<sup>218</sup>

In 1939, the Supreme Court held in *United States v. Miller* that, “Only weapons that have a reasonable relationship to the effectiveness of a well-regulated militia under the Second Amendment are free from government regulation.”<sup>219</sup> If the Second Amendment, including the militia cause, is properly understood, then it is clear that this finding supports the notion that weapons which would be effective in the use of a militia should be free from government regulation. And the logical conclusion one must draw on what weapons would be effective in the use of a militia, are ones that would be capable of mounting a serious defense (or offense)

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<sup>215</sup> Halbrook 1984, pp. 77-8.

<sup>216</sup> *Ibid.*, pp. 77-8. Elbridge Gerry was Massachusetts’ Representative in the Continental Congress, attended the Constitutional Convention, was a signer of the Declaration of Independence, and was Vice President of the United States under James Madison during 1813.

<sup>217</sup> Malcolm 1994. The Framers agreed with English judge Sir William Blackstone’s philosophy surrounding the right to bear arms when he stated, “the sanctions of society and laws are found insufficient to restrain the violence of oppression” (as quoted in Malcolm, p. 162).

<sup>218</sup> Kates 1994, p. 362.

<sup>219</sup> *United States v. Miller*.

against the state. It stands to reason that these weapons would be equivalent to the ones that the state had access to. In fact, when the Second Amendment was being drafted, civilians had access to the same guns that the government did—primarily muskets, although other weapons and guns that were popular during this time period were the Blunderbuss, the Puckle Gun, and Hand Mortars.<sup>220</sup> When gun control proponents suggest that the Second Amendment could not apply to the guns of today due to their superior technological advancement, they often argue that there is no way that the Framers could have imagined the kinds of guns used today (such as the AR-15). Not only is this misleading given that the Framers had correspondence about technology that would improve the firing rate of the rifle to 16 rounds per 20 seconds,<sup>221</sup> but it also overlooks a key point. That is, that civilians owned weaponry equivalent to that of the government during this time period. It seems highly implausible to imagine that the *if* the Framers were concerned about this equivalency, they would have drafted the Second Amendment the way that they did—completely absent the concern of civilians being armed with weaponry that the state had access to. I realize this opens up the question of the permissibility of tank and other large military operational weaponry, which I won't be able to fully discuss in this chapter. What I will say is that I do believe there are justifiable philosophical grounds for civilians to own tanks and other large military operational weaponry and I acknowledge that this is a controversial position to hold, but I also maintain that there may be utilitarian considerations to take into account which limit or outweigh civilians having the right to own them the way they have a right to bear arms.

But perhaps, even if the Framers had knowledge of more rapidly firing guns than gun control proponents would like to acknowledge, and civilians owned guns equivalent to that of the

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<sup>220</sup> Day, “The Firearms.”

<sup>221</sup> See Joseph Belton’s correspondence to the Continental Congress on April 11, 1777 (1907).

state, these historical revelations are still not compelling enough to justify military grade small arms to be owned today. After all, couldn't one just argue that the Framers were wrong about this equivalency given the devastation that could be wrought if civilians were to own military grade small arms now? For example, if a civilian were able to be legally armed with a fully automatic gun such as an M4 carbine, then the harm and death that could be caused by their use of it in a public shooting would be far greater than if they had only had access to a semi-automatic gun. Surely this is more important than any historical narrative.

In response, I think this is a mistaken line of argument. An individual's rights are not outweighed by general welfare considerations, at least not unless the utilitarian reasons are extremely compelling. Given that military grade small arms are not legally allowed to be owned, there are no statistics to draw on in order to show that military grade small arms gun crime is so overwhelmingly bad as to override an individual's right to self-defense against the state. What we can do is recall the statistics of DGU versus private gun crime and see that private gun crime is certainly not worse. In fact, it is worth restating that DGU outweighed the problem of private gun crime by a ratio of 7 to 5 (on the low end). Furthermore, we can note that almost all private gun crime is committed with handguns, not rifles. For example, in 2014, of the 8,124 murders committed with a firearm, 5,562 of these were committed using a handgun. Only 248 were committed using a rifle and 262 using a shotgun.<sup>222</sup> It is worth noting that murder committed by a rifle or a shotgun were both lower than knives or cutting instruments (1,567 murders), blunt objects such as clubs or hammers (435 murders), and personal weapons such as hands, fist, feet (660 murders). So the likelihood that military grade small arm gun crime would be significantly

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<sup>222</sup> 93 were classed as "other guns" and 1,959 were classed as "Firearms, type not stated".



worse than gun crime committed by rifles, and to the degree that it would make private gun crime a more serious problem than the problem of a tyrannical government, is very low.

#### **4.6. Concluding remarks**

I have argued that certain gun restrictions cannot be justified, because they interfere with a central function of the right to bear arms—they interfere with an individual's right to self-defense against the government. Restrictions on a Constitutional right should not defeat a central function of the right. The gun restrictions considered in this paper are similar to measures that have been enacted prior to horrific cases of democide, demonstrating how they infringe on the right to self-defense against the government. The burden is on the advocate of gun restrictions to prove that something many times worse would happen without the restriction. I have shown that the prevalence of gun crime is quite low and is a significantly smaller problem than a tyrannical government. I have also provided reasons to think that gun restrictions might actually increase gun crime, rather than reduce it. Ultimately, gun restrictions do not have much greater benefit than costs. Gun control proponents have failed to meet the burden of proof to justify gun restrictions.

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