

Rob Chambers
Professor Wright
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Gun Control: Undervaluing a Strong Derivative Right

In 2001 the philosophy journal *Criminal Justice Ethics* printed a special issue focusing on gun control. Hugh LaFollette, who supports gun control, and Samuel Wheeler, who opposes strong gun control, both defended their previous writings on the subject. Several other writers contributed, including anti-gun-control philosophers Lance Stell and Lester Hunt who both sided with Wheeler. This paper will attempt to draw on the writings of Wheeler, Stell, and Hunt to argue against LaFollette. LaFollette attempts to show the weakness of the right to bear arms and to present enough evidence to justify significantly limiting that right. His argument is faulted because he does not give proper weight to the importance of firearms and does not acknowledge their legitimacy, leading to him to advocate gun control without sufficient evidence.

First, I will define what I mean by the “importance” and “legitimacy” of firearms. The importance of firearms is the value derived from the fact that firearms are often the best, and effectively the only, means to achieving certain important goals. This paper will show how the use of firearms in self-defense lends them great importance. Second, the legitimacy of firearms refers to their stature as tools with a legitimate purpose. Although firearms can be dangerous, they are no different in *kind* from other legitimate but potentially dangerous tools such as power saws or automobiles. LaFollette acknowledges neither the importance

nor the legitimacy of firearms.

LaFollette's argument begins with the assumption that gun control is not a yes-or-no question, but a question of what degree and manner of gun control. To determine the proper degree of gun control, LaFollette asks how much protection the right to bear arms has. He reasons that if the right to bear arms were a fundamental right like the right to freedom of speech, overwhelming evidence would be required to justify gun control. However, he views the right to bear arms as derivative from either the right to noninterference, or loosely from the right to self-defense.¹ He then reasons that since significantly less evidence is needed to limit a derivative right than a fundamental right, and since there is *some* evidence of overall harm due to the legal private ownership of firearms, gun control is justified.

However, more needs to be said regarding LaFollette's evidence of harm due to guns. First, the rate of homicides has historically increased with overall gun ownership. However, LaFollette admits that the causality is unclear. Gun ownership may have been spurred by increased crime, or vice versa, or some third factor may be to blame.² Stell throws the causality into further doubt, arguing that although both homicide rates and gun ownership rates have increased over the last century, changes in one did not result in a change in the other. In other words, homicide rates and total gun ownership levels show non-association.³ LaFollette, needing further justification, goes on to claim that guns are more often responsible for suicides, homicides, or accidental deaths than for self-defense killings.⁴ Stell points out,

¹Hugh LaFollette, "Gun Control," *Ethics* 110 (2000): 266.

²LaFollette, "Gun Control," 275.

³Lance K. Stell, "Gun Control and the Regulation of Fundamental Rights," *Criminal Justice Ethics* 20 (2001): 30.

⁴LaFollette, "Gun Control," 276.

though, that even though gun ownership rates have been increasing, fatal firearm accident rates have been decreasing. They decreased by 40 percent in the 1990s and have never been lower.⁵ Ultimately, LaFollette is forced to rely mostly on the correlation between homicide rates and gun ownership, even though he admits that the causation is unclear. For the remainder of this paper I will give LaFollette the benefit of the doubt and agree that, as he claims, “the overall statistical evidence tilts in favor of gun control advocates, although the evidence is disputable.”⁶

To determine the best manner of gun control to implement, LaFollette looks for the method that is most cost-effective and least intrusive. He proposes a method known as “strict liability,” which is essentially the notion that a gun owner is responsible for damage done by his firearm whether or not he caused the damage. For example, if someone intentionally breaks into a gun owner’s house, steals a gun, and kills someone, then the gun owner would be financially responsible.⁷ Currently, strict liability only applies to practices such as dynamiting, crop dusting, and impounding large reservoirs of water.⁸ Still, LaFollette claims that this is a justified proposal because guns are inherently dangerous, and gun owners should be responsible for knowingly owning an inherently dangerous tool. He suggests that insurance could be offered or even required to make the option more “palatable” to gun owners.⁹ Strict liability, according to LaFollette, would reduce the total ownership of guns while encouraging those who do own guns to store them more safely.

⁵Stell, 30.

⁶LaFollette, “Gun Control,” 279.

⁷LaFollette, “Gun Control,” 280.

⁸Lester H. Hunt, “Epilogue: Is There an Issue Here?,” *Criminal Justice Ethics* 20 (2001): 41.

⁹LaFollette, “Gun Control,” 281.

Wheeler's argument is a variation of the standard self-defense argument. It begins with the obvious assertion that the importance of a type of self-defense is proportional to the likelihood of the event that one is trying to defend against. That is, defending against armed robbers is more important than defending against marauding Indians because it's a more likely event. Since the probability that a person was killed by his or her own government in the last century is far greater than the probability that a person was murdered by a common criminal, Wheeler makes the assertion, which I will return to later, that protection against government is more important than protection against criminals. Since firearms are the best and possibly the only way to defend against an unjust government, and since unjust governments so important to defend against, Wheeler concludes that firearms are necessary for self-defense.

The second part of Wheeler's argument connects the importance of firearms in self-defense with the right to bear arms. First, he asserts that the strength of a derivative right is proportional to how necessary the derivative right is to exercising a fundamental right or preserving a fundamental interest.¹⁰ He uses the example of a child who is fatally allergic to peanut butter; although most people do not have an especially strong right to not be touched with peanut butter, this child's right to not be touched with peanut butter would be equal to her right to not be murdered because the first is absolutely necessary to the second. By this same line of reasoning, Wheeler claims that since firearms are necessary for self-defense, and because self-defense is a fundamental interest, the right to bear arms is therefore very close in strength to the fundamental right of self-defense. Since overwhelming evidence is

¹⁰Samuel C. Wheeler, "Gun Violence and Fundamental Rights," *Criminal Justice Ethics* 20 (2001): 21.

required to limit a fundamental right, and since the evidence for significantly limiting the ownership of handguns and rifles is not overwhelming, Wheeler concludes that significant gun control is not justified.

While LaFollette concentrates on the short-term consequences of gun control, Wheeler concentrates on the long-term consequences. He sees the importance of the right to bear arms as deriving mostly from the right to resist one's own government should that government turn bad. Compared with the mass carnage that ensues when a government turns bad, the small increases in crime that LaFollette contributes to the widespread ownership of guns seem inconsequential. Essentially, LaFollette uses the premises that guns are "inherently dangerous"¹¹ and that guns can be risky to others as the overwhelming evidence necessary to justify gun control. Wheeler, who attaches greater importance to private gun ownership, does not see these factors as "overwhelming evidence."

Wheeler's argument, then, depends on the importance of guns, which in turn hinges on the idea that governments are dangerous entities worth protecting against. A simple probabilistic argument goes a long way toward showing the danger of governments. Wheeler claims that, according to the most authoritative estimates, 169 million people were mass murdered by their own governments in the last century.¹² This makes the chance that a given person in the last century was killed by his or her own government much higher than the chance that the person was killed by a common criminal. This in itself is sufficient evidence to conclude that governments are extremely dangerous. The remaining question is whether an individual government, namely the U.S. government, is dangerous. While Wheeler gives

¹¹LaFollette, "Gun Control," 281.

¹²Wheeler, "Gun Violence," 19.

this subject extensive treatment in “Arms as Insurance,”¹³ I can only summarize his main points. He argues that considering one’s own government to be incapable of going bad is “based on unjustified optimism, short-sightedness, and unwarranted smugness about one’s own race.”¹⁴ He points to the case of Germany, which transformed from one of the most cultured and stable countries in the world to one of the most horrible in only 30 years. Even in our own country, he points out that one can “speculate about the fate of the Japanese internees in World War Two if the Japanese had won at Midway and threatened the California coast.” Finally, Wheeler points out that while our government may be stable for the time being, it would be ridiculous to think that we can predict what it will be like for our great-grandchildren.¹⁵ All of these points, taken together, show that governments are extremely dangerous, and that no government is immune from going bad. Consequently, it is important to have a means of resisting one’s own government.

Of course, the crucial link between the importance of self defense against one’s own government and the importance of the right to bear arms is that firearms are the best, and possibly the only, way to resist one’s own government. Although the democratic process is certainly one safeguard against a government going bad, it is not truly reliable. After all, a government can change laws that it does not like. If it simply removes the right to vote, or makes that right ineffective by rigging the ballot, then there is no legal recourse for the population. One simply cannot control a bad government through the use of that same government. The only effective defense against government is the private ownership of guns.

¹³Samuel C. Wheeler, “Arms as Insurance,” *Public Affairs Quarterly* 13 (April 1999): 115-124.

¹⁴Wheeler, “Arms,” 122.

¹⁵Wheeler, “Arms,” 123.

One huge fact supporting this is that every major genocidal government has disarmed the target population before attempting genocide.¹⁶ If firearms did not significantly raise the cost of government-sponsored murder, it would seem strange that every single one of these governments went to the trouble of disarming the population. This results from certain practical characteristics of firearms: they are easy to use, require little training, and can be effective against even professional soldiers.¹⁷ Wheeler admits that a technology that prevents government coercion without the drawbacks of firearms would be preferable. However, since no such technology exists, firearms remain the only effective means of resisting government.

Since defense against government is crucial to the fundamental right to self-defense, and since the drawbacks of firearms are not overwhelming, the right to bear arms therefore gains importance comparable to the right to self-defense. It would also be justified to say that, since firearms are necessary to the right to bear arms, firearms themselves are important.

Simply from the fact that firearms are important, one would expect that they are legitimate. Yet, LaFollette's argument involves showing that guns deserve to be controlled in part because they are less legitimate than normal objects. His argument¹⁸ begins with the assertion that some objects such as nuclear weapons are obviously dangerous, while others such as feathers are obviously benign. He claims that we can determine whether guns are dangerous by answering two questions: "(1) Are guns inherently dangerous and (2) What is the empirical probability that guns cause serious harm?"¹⁹ I will argue that the first question is irrelevant and is used to wrongfully cast doubt on the legitimacy of guns, and that only

¹⁶Wheeler, "Arms," 117.

¹⁷Wheeler, "Arms," 118.

¹⁸LaFollette, "Gun Control," 268.

¹⁹LaFollette, "Gun Control," 268.

the second question carries real weight.

LaFollette defines inherently dangerous objects as those “whose nature or design is sufficient to justify our prediction that they will cause harm independent of any empirical evidence.”²⁰ Nuclear weapons are designed to cause harm, and are inherently dangerous. Alcohol, automobiles and cigarettes were not *meant* to cause harm, so they are not inherently dangerous. Guns, like nuclear weapons, were invented and designed to cause harm; they are used accordingly, and are inherently dangerous. Since we are more likely to control inherently dangerous objects than objects which simply have harm as an unwanted side effect, LaFollette concludes that gun control is more natural and justified than if guns were not inherently dangerous.

However, I think that we make privately owned nuclear weapons illegal not because they’re *inherently* dangerous, but because they’re *actually* dangerous. A cost-benefit analysis, done in the same manner as with any other tool, reveals that the probability of a citizen doing massive damage with them outweighs any possibility of good. To isolate the real issue, imagine that an incompetent scientist made a chemical weapon that, while intended to be dangerous, ended up being totally, irreversibly benign. It couldn’t be easily turned into a real chemical weapon, and none of the chemicals in it were actually at all dangerous. If we had a perfectly responsive legal system, then that inert weapon would not be illegal. Yet, the weapon is obviously meant to be dangerous; its “nature” and “design” are meant to be that of a chemical weapon, so by LaFollette’s definition it would seem to be “inherently dangerous.” The only thing that actually changed when the bomb was found to be benign is

²⁰LaFollette, “Gun Control,” 258.

the actual probability that it would cause harm. It is this probability that actually matters, not the fact that it was meant to be dangerous. If this example seems somewhat bizarre, it's probably because "inherently dangerous" is such a vague concept, and that separating inherent from actual danger is nearly impossible.

Perhaps a better formulation of LaFollette's argument would be to define *intentionally* dangerous objects as those that are designed to cause harm. At first glance, these objects are more likely to be misused to cause unjust harm than normal objects. Equivalently, the average probability that intentionally dangerous objects will cause serious harm is greater than that of normal objects. Therefore, in the interest of efficiency, a pragmatic system of law should regard intentionally dangerous objects with more suspicion than other objects.

Still, the real issue is the probability that a privately owned gun will cause harm. The only link between "intentionally dangerous" and "actually dangerous" is an assumption made in the interest of efficiency. However, assumptions such as this have no place in matters as large and important as gun control. Therefore, a fair evaluation of whether gun control is justified should look only at the costs and benefits of gun ownership and of gun control, and not at the fact that guns are designed to cause violent harm. LaFollette is using the idea that guns are "inherently dangerous" to make them seem illegitimate and prone to regulation, just as he uses the idea that the right to bear arms is a derivative right to infer that the right is weak. Neither of these conclusions follow from the premise, and both need more complete support than LaFollette provides.

The only way that LaFollette's "inherently dangerous" argument could be valid is if there were something inherently wrong with the function of guns. That is, if it were wrong

to shoot a criminal in self-defense, then LaFollette could argue that there's something inherently wrong with guns. This view, though, would stand in sharp contrast to the opinions of most Americans and to existing law. Likewise, LaFollette could conceivably say that there's something inherently wrong with violently resisting one's government. But, unless he would claim that Jewish resisters in the Warsaw Ghetto were wrong to violently resist their government, or that early American patriots were wrong to fight back against the abuses of the English monarchy, he would have no case. Guns do have legitimate uses, and there is nothing inherently wrong with using violence to achieve just ends.

Of course, just like automobiles, guns have unwanted and harmful side effects. LaFollette claims that we know automobiles are not inherently dangerous because we "have enhanced the auto's original aim of efficient transportation while lessening harmful side effects."²¹ However, we have also enhanced the gun's original aim of precisely harming certain individuals by lessening harmful side effects like accidental firing, injury to the gun operator and inaccurate shooting. Certainly, we must consider empirical evidence concerning the risks posed by firearms in the same way that we examine the risks posed by automobiles. But, so long as one accepts that there is nothing wrong with the legitimate use of guns, the idea that guns are inherently or intentionally dangerous has no bearing.

In light of the argument that guns are both important, and considering that guns are legitimate and that LaFollette's accusation of inherent danger is therefore inconsequential, there seems to be insufficient evidence to support LaFollette's conclusions. First, his claim that extensively controlling or even abolishing handguns is justified seems rather extreme.

²¹LaFollette, "Gun Control," 269.

²² Second, even his program of strict liability becomes indefensible. As Hunt points out, strict liability is currently only applied to acts like dynamiting that are “(1) not commonly done, (2) necessarily involve a substantial risk of serious harm to other, and (3) cannot be made safe even with exercise of the utmost care.”²³ And, as Hunt argues, both (1) and (3) are clearly untrue of guns. Furthermore, (2) is untrue if even a few basic safety rules are observed.

Even more important than how deeply the program would break with legal tradition, though, is the degree and manner in which it would limit gun ownership. While it may intuitively seem that the program would improve gun safety without limiting the freedom to bear arms, it would actually have more complicated effects. Either through the probability of extreme financial losses, or through the voluntary or government-enforced insurance premiums that LaFollette espouses,²⁴ the program would undoubtedly impose financial costs on gun owners. If mandatory insurance were imposed, the program would have much the same effect as imposing fines on gun ownership. This, in fact, is just a difference in degree from banning guns; as Hunt notes, Thomson machine guns virtually disappeared when the US government imposed a \$200-per-gun tax in the thirties.²⁵ Furthermore, Hunt describes how the costs would disproportionately discourage law-abiding but poor citizens from owning firearms since the marginal value of money for them is greater than for the rich. This factor makes the strict liability program, in some ways, even less appealing than programs that impose punishments like jail time. In light of the financial burden that strict liability would

²²LaFollette, “Gun Control,” 280.

²³Hunt, 41.

²⁴LaFollette, “Gun Control,” 280.

²⁵Hunt, 40.

impose on all gun owners, saying that strict liability wouldn't limit the freedom to bear arms could be compared to saying that fining people for speaking doesn't limit freedom of speech. Whether the limits are justified is one matter; that they *are* limits is hard to contest.

LaFollette admits that his evidence is weak, but that gun control is still justified because the right to bear arms is a derivative right. However, Wheeler has shown that the fact that it's a derivative right does not necessarily mean that the right is weak. In fact, he's shown that the right to bear arms is rather strong. LaFollette's other reason for promoting gun control is because guns are inherently dangerous, giving us special reasons to control them.²⁶ However, I have argued that the concept of "inherently dangerous" has no meaning in issues as large and weighty as the right to bear arms. Thus, his use of what even he considers disputable evidence²⁷ is insufficient to justify significant gun control such as his strict liability program, which puts gun ownership in the same category as crop dusting with unpredictable poisonous clouds of pesticides. Although gun control is necessary since certain weapons are definitely not appropriate for private ownership, LaFollette's program is motivated by insufficient evidence and would impose unjustified laws.

²⁶LaFollette, "Gun Control," 269.

²⁷LaFollette, "Gun Control," 279.