TWO CONCEPTS OF GUN LIBERTY

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Gun rights are celebrated by many as a form of liberty—"America's First Freedom," as the title of the NRA magazine puts it.[1] But what kind of liberty is at stake, and for whom? Ian Ayres and Fredrick Vars' *Weapon of Choice* provides a novel and important approach to those questions by proposing a system by which people can voluntarily restrict their own access to arms.[2] The lessons it suggests are relevant to discussions of gun rights and regulation more broadly; namely, that gun rights can be understood as both positive and negative liberties (to borrow Isaiah Berlin's famous frame from "Two Concepts of Liberty"[3]), and that efforts to regulate guns can *also* be understood in those terms.

Putting liberty on both sides of the scale is important. The gun debate in the United States is usually framed as if it is a matter of constitutional liberty on one side—that of gun owners—and "policy" interests on the other. As a matter of litigation, this is not necessarily a losing frame for would-be regulators, since constitutional rights can sometimes be restricted if the government can show that the regulation in question is adequately tailored to achieving a sufficiently weighty governmental purpose.[4] And, since no one doubts the importance of the governmental purpose in lessening the catastrophic number of fatal gun injuries (about

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1 *See generally*, *America's 1st Freedom*, NAT'L RIFLE ASSOC., available at http://www.nrapublications.org/digital/ (last visited Feb. 24, 2021) (a monthly publication by the NRA covering Second Amendment-related issues).

2 IAN AYRES & FREDRICK E. VARS, WEAPON OF CHOICE: FIGHTING GUN VIOLENCE WHILE RESPECTING GUN RIGHTS 2–3 (2020).

3 Isaiah Berlin, *Two Concepts of Liberty*, *in* LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY 166, 178 (Henry Hardy ed., 1995).

4 *See, e.g.*, Peruta v. Cty. of San Diego, 742 F.3d 1144, 1148–49 (9th Cir. 2014) ("California's 'important and substantial interest in public safety'—particularly in 'reduc[ing] the risks to other members of the public' posed by concealed handguns' 'disproportionate involvement in life-threatening crimes of violence'—trumped the applicants' allegedly burdened Second Amendment interest.") (alterations in original).

40,000 in 2018[5]), the question typically becomes whether any particular law does so effectively enough. In the vast majority of litigated Second Amendment cases, the answer has been "yes."[6]

But the "liberty versus policy" frame nonetheless distorts constitutional litigation and public discourse, effectively stacking the deck—legally and rhetorically—against efforts to reduce gun harms. After the 2014 Isla Vista massacre led to calls for gun regulation, commentator Joe "the Plumber" Wurzelbacher said to the parents of the gunshot victims: "your dead kids don't trump my constitutional rights."[7] A *Washington Post* op-ed, while not endorsing Wurzelbacher's tone, concluded that he "has a point."[8] The exchange illustrates the trap of the liberty-versus-policy frame: Solid evidence can and should be sufficient to sustain many gun laws, but if even "dead kids" don't count against the "trump" of the right to keep and bear arms, then would-be regulators are up against a wall.

It is notable, then, that litigators, scholars, and others have recently begun to emphasize the degree to which liberty interests are on *all* sides of the gun debate—including with regard to such foundational interests as personal safety.[9] As Justice Stevens pointed out in his dissent in *McDonald v. City of Chicago*, "[*y*]*our* interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe from

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[5] Data taken from Web-Based Injury Statistics Query and Reporting System (WISQARS), *Fatal Injury & Violance Data*, CTR. FOR DISEASE CONTROL & PREVENTION, https://webappa.cdc.gov/cgi-bin/broker.exe (last visited Feb. 24, 2021).

[6] Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1472 (2018) ("Consistent with the common wisdom, the vast majority of Second Amendment claims fail. Of the 1,153 Second Amendment challenges in the database, only 108 were not rejected, for an overall success rate of 9 percent.").

[7] Robert A. Levy, *Joe the Plumber Said 'Your Dead Kids Don't Trump My Constitutional Rights.' Could He Be Right?*, WASH. POST (June 13, 2014), https://www.washingtonpost.com/posteverything/wp/2014/06/13/joe-the-plumber-said-your-dead-kids-dont-trump-my-constitutional-rights-could-he-be-right/.

[8] *Id.*

[9] *See, e.g.*, Jonathan Lowy & Kelly Sampson, *The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 GEO. J.L. & PUB. POL'Y 187, 198 (2016) (arguing that there is a constitutional liberty interest to be free from gun violence in ordinary life); Darrell A. H. Miller, *Constitutional Conflict and Sensitive Places*, 28 WM. & MARY BILL RTS. J. 459, 479–80 (2019). Reva Siegel and I have recently argued that the interest in regulation goes beyond physical safety, and includes—as the common law has long recognized—a broader interest in public safety, including the equal liberties of other citizens to pursue their constitutional interests without terror or intimidation. *See* Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: Recovering the Common Law Approach to Public Safety*, 115 NW. L. REV. (forthcoming 2021).

armed violence."[10] In this frame, it is impossible to play "liberty" as a trump card. What is at stake are two competing visions of liberty.[11]

Weapon of Choice both builds on and complicates this story about liberty and guns. Others at this symposium were better equipped to address the proposal's likely effectiveness as a matter of policy. I have written elsewhere about some of the constitutional questions involved, including the right not to keep or bear arms.[12] Here, I try to unpack some of its implications for liberty and choice—an issue that, no less than the policy or constitutional implications, is at the heart of the proposal.

In "Two Concepts of Liberty," Berlin (drawing on deeper currents in debates about liberalism) laid out two different ways of thinking about liberty, which he called negative and positive.[13] Roughly, negative liberty is "freedom from"—an absence of interference from others, including, most crucially, the state.[14] Positive liberty, by contrast, is a "freedom to"—to realize one's goals and purposes.[15] As Frank Michelman summarizes: "Negative liberty refers to absence of restraint against doing as one wants, while positive liberty implies action governed by reasons or laws that one gives to oneself."[16]

American rights talk tends to be associated with the former frame, since our constitution (the federal one, anyway[17]) is typically understood to limit governmental interference with individual choice, rather than to guarantee meaningful choices. From Berlin's perspective, this is all for the best, since a system of positive liberties can enable and even encourage governmental overreach by legitimizing imposition of values and choices

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[10] McDonald v. City of Chicago, 561 U.S. 742, 891 (2010) (Stevens, J., dissenting).

[11] *See* Jamal Greene, *Foreword: Rights As Trumps?*, 132 HARV. L. REV. 28, 30, 34 (2018) (noting that the rights-as-trumps frame is particularly ill-suited to address the "paradigmatic conflicts of a modern, pluralistic political order" in part because it "cannot accommodate conflicts of rights"); *see also* Joseph Blocher, *Rights as Trumps of What?*, 132 HARV. L. REV. F. 120, 120–22 (2019).

[12] *See* Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 4 (2012).

[13] Berlin, *supra* note 3, at 178.

[14] *Id.*

[15] *Id.*; *see also* Ian Carter, *Positive and Negative Liberty*, STAN. ENCYCLOPEDIA PHIL., (Feb. 27, 2003, rev. Oct. 15, 2019), http://plato.stanford.edu/archives/spr2003/entries/liberty-positive-negative/.

[16] Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503 (1988).

[17] State constitutions, by contrast, often contain many affirmative guarantees. *See e.g.*, EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013). For a recent effort to elevate the prominence of state constitutional law, see JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

thought to be in people's "true" interests. Berlin's views in this regard were shaped by the historical tendency of oppressive governments to justify their actions in those terms, not that this is always or necessarily so.[18] Others have responded that the negative liberty Berlin celebrates is hardly valuable if it does not include a liberty to exercise meaningful choices.[19]

How does Berlin's frame map onto the debate about gun rights and regulation, and the liberty frames discussed above? What kind of liberty—positive or negative—do gun rights advocates seek? What about gun regulators? And where does *Weapon of Choice* fit in?

In the traditional liberty-versus-policy frame, opponents of gun regulation are cast as asserting a negative liberty to be free from government restrictions on their use of firearms. This is the classic formulation of an American constitutional rights claim and is easily framed as a basic libertarian argument about choice. The complicating factor, of course, is that many believe that the choice is not self-regarding—hence Justice Stevens' argument above[20]—so it does not lend itself to such a claim. Some less prominent gun rights claims involve a positive liberty argument and enlist state intervention to override the choices of other private actors who wish to limit exposure to guns. Such interventions are evident, for example, in what are sometimes called "take your gun to work" laws, which limit the ability of private businesses to exclude guns from their premises.[21]

Would-be regulators, by contrast, typically assert something like a positive liberty—a claim for state intervention, including the imposition of external obstacles (i.e., regulation) on others' conduct.[22] But here again, the distinction is not quite so clear once one considers the kinds of constitutional interests and liberties described above. Advocates of gun regulation are also asserting a freedom *from* the "external constraint" of a bullet (or, for that matter, coercion or intimidation), a standard negative liberty claim. In the words of a grieving parent who lost a child in the 2014 Santa Barbara shooting: "They talk about gun rights. What about Chris's

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[18] Daniel M. Weinstock, *Berlin's Methodological Parsimony*, 46 SAN DIEGO L. REV. 839, 843 (2009).

[19] Charles Taylor, *What's Wrong with Negative Liberty*, *in* 2 PHILOSOPHICAL PAPERS: PHILOSOPHY AND THE HUMAN SCIENCES 211, 217–19 (1985); *see also* AMARTYA SEN, DEVELOPMENT AS FREEDOM 18 (1999) (describing a "capabilities" approach to defining freedom).

[20] *See* McDonald v. City of Chicago, 561 U.S. 742, 891 (2010) (Stevens, J., dissenting).

[21] Blocher, *supra* note 12, at 41–42.

[22] *See* Carter, *supra* note 15.

right to live?"[23] Notably, it was this comment that inspired Joe the Plumber's retort;[24] a perfect encapsulation of the competing/co-existing rights claims.

As a matter of constitutional doctrine, one might suggest that the state action requirement draws a clear line—gun owners are asserting a right to be free from governmental interference, while would-be regulators are making claims against other private citizens who generally are *not* obligated to respect anyone else's constitutional rights. Though true, even as a matter of straightforward doctrine, it is clear that constitutional rights can be regulated in the name of protecting other constitutional interests.[25] So the question is not necessarily whether freedom from gun violence is an enforceable constitutional right; rather, the question is whether freedom from gun violence is a legitimate basis for legislation. The answer is plainly yes.

More fundamentally, threats to negative liberty can and often do come from private sources. A woman who is terrorized by an armed domestic abuser is decidedly unfree; she is constrained in her choices (a violation of negative liberty), notwithstanding the lack of direct government involvement.[26] Indeed, the very logic of the right to keep and bear arms is, most commonly, a right to arm oneself against such threats. Whereas regulators seek safety from private threats through law, most gun owners seek to do so by arming themselves.[27] Although the means are different, the liberty they are defending is the same.

In short, the gun debate does not, as it might first appear, map neatly onto Berlin's frames of negative and positive liberty. And, understanding

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23 *See* Lowy & Sampson, *supra* note 9, at 188.

24 *See* Levy, *supra* note 7.

25 The Supreme Court specifically emphasized as much about the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) ("Of course the right was not unlimited, just as the First Amendment's right of free speech was not . . . .") (internal citation omitted); *id.* at 626–27 (enumerating permissible restrictions); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 U.C.L.A. L. REV. 1267, 1321–25 (2007) (noting that, even in the context of strict scrutiny, constitutional rights can be regulated in the name of compelling government interests which may themselves be derived from other constitutional values).

26 *See* EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 5 (2007) (arguing that "the primary harm abusive men inflict is political, not physical" and developing a conception of "coercive control," "an objective state of subordination"); Susan B. Sorenson, *Guns in Intimate Partner Violence: Comparing Incidents by Type of Weapon*, 26 J. WOMEN'S HEALTH 249, 251 (2017) (noting that armed abusive partners tend to use guns as a means of threat and intimidation, rather than physical harm).

27 *See* Kate Masters, *Fear of Other People Is Now The Primary Motivation For American Gun Ownership, a Landmark Survey Finds*, TRACE, (Sep. 19, 2016), https://www.thetrace.org/2016/09/harvard-gun-ownership-study-self-defense/.

those frames and how they are deployed is crucial to understand the broader debate about gun rights and regulation. The question must be how to accommodate a multiplicity of constitutional interests, not whether to limit one right—the Second Amendment—in the name of policy considerations.

Weapon of Choice—particularly, the first third of the book, which is dedicated to the issue of self-restriction—both illustrates and complicates this story of liberty and gun violence. As the title suggests, *choice* is the essential and distinguishing feature of Donna's Law, the proposal at the center of the book.[28] It is therefore especially important to unpack the nature of the liberty that Ayres and Vars have in mind. Partly, as the book explains persuasively, and in some detail, this means understanding self-restriction *as* choice—Ulysses tying himself to the mast, to borrow a metaphor.[29]

What does Donna's Law look like through the lens of Berlin's two frames? Is it an instance of positive or of negative liberty? And, conversely, what does self-restriction have to show about Berlin's seminal distinction? Can the broad and longstanding debate about positive and negative liberties benefit from closer consideration of self-restrictions like Donna's Law?

Interestingly, both Berlin and Ayres/Vars effectively build their ideas around the notion of a "divided self."[30] Consider, for example, a person who is in the grips of mental illness, and whose freedom from restraint (i.e., negative liberty) could lead not only to self-harm but to destruction of his own freedom to define himself over time. Is it liberty-enhancing to reject or remove restraints—even those that are self-selected—in such a situation? For Ayres and Vars, this is of course the heart of their proposal: To permit those who fear such a moment to guard themselves against it by restricting their own access to arms.[31] If one conceptualizes mental illness as an "external" constraint, then self-restriction in response is essentially self-defense: a classic claim of negative liberty.[32]

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[28] AYRES & VARS, *supra* note 2, at 3.

[29] Angela Scivaggio & Fredrick E. Vars, *"Bind Me More Tightly Still": Voluntary Restraint Against Gun Suicide*, 53 HARV. J. ON LEGIS. 671, 672 (2016) (employing the metaphor).

[30] Berlin, *supra* note 3, at 181.

[31] *See* AYRES & VARS, *supra*, note 2, at 3.

[32] *See* Carter, *supra* note 15 ("[N]egative theorists tend to count only external obstacles as constraints on freedom, whereas positive theorists also allow that one may be constrained by internal factors, such as irrational desires, fears or ignorance.").

Conversely, self-restriction is a quintessential act of positive liberty: "the possibility of acting - or the fact of acting - in such a way as to take control of one's life and realize one's fundamental purposes,"[33] even if that means accepting or seeking temporary restraints. This is liberty, but of a different kind. As Berlin noted,

> The desire to be governed by myself, or at any rate to participate in the process by which my life is to be controlled, may be as deep a wish as that for a free area for action, and perhaps historically older. But it is not a desire for the same thing.[34]

For Berlin, by way of partial contrast, the notion of the divided self provides not only the basis of a conception of positive liberty, but also a cautionary note about how such liberty can be invoked to justify the imposition of freedom-sapping restraints.[35] Recognizing a divided self—a higher, rational self, and a lower, unreflective and sometimes self-destructive self—sets up the notion that a person is "free" when the former is in control. Perhaps that is easy to accept in the case of severe mental illness. But what about a person who is impulsive or sad? For Berlin, the main concern was that if one scales up to the collective or social level, then it becomes easier to justify oppression in the name of freedom: repression will be imposed "in the name, and on behalf, of their 'real' selves, in the secure knowledge that whatever is the true goal of man . . . must be identical with his freedom."[36] Ayres and Vars seem sensitive to this kind of slippery slope, which might explain why their proposal places limits on the ways in which the registry can be used—forbidding, for example, certain parties from requesting or requiring information about registration.

Framing a gun policy in this way—as *enhancing* liberty (whether understood in negative or positive terms)—is itself an important contribution that has implications beyond the specifics of Donna's Law. To make the discussion concrete, consider a legal hypothetical: Could an individual who has been battling depression or some other mental health challenge seek an extreme risk protection order (i.e., an ERPO or red flag) "against" themselves? Doing so would mean convincing a court to issue

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33 *Id.* (describing positive liberty).

34 Berlin, *supra* note 3, at 178.

35 *See id.*

36 *Id.* at 180; *see also id.* at 181 ("[T]he 'positive' conception of freedom as self-mastery. . . has in fact, and as a matter of history, of doctrine and of practice, lent itself more easily to this splitting of personality into two[] . . . .").

an order on the basis that—in the words of Connecticut's pathbreaking 1999 risk warrant statute[37]— the person presented "probable cause to believe . . . [the] person poses a risk of imminent personal injury to himself or herself or to other individuals."[38] ERPO laws typically say that petitions can be filed by law enforcement officers or family members, so it is not totally clear whether a person *could* legally seek one on their own. That person, however, could simply ask a family member or law enforcement officer to file the petition; many ERPOs are uncontested anyway, and those predicated on risks of self-harm probably involve, in some instances, the equivalent of a cry for help.

It is unclear whether such self-referred ERPOs are prevalent, but they would emphatically not be a substitute. Donna's Law is designed for people to opt-out of gun purchases or possession when they are *not* in the midst of a crisis, and that class of persons would not necessarily satisfy the "imminence" requirement for an ERPO. And those who *do* pose an imminent risk to themselves or others are likely not in a position to go through the registration process that Donna's Law sets up. The point is simply that the law may already provide a way for people to choose.

What changes if the Donna's Law/ERPO scenario is "scaled up" to include more than one person? A household? A homeowner's association, by way of a covenant? A neighborhood, city, or state? Ayres and Vars address some of these associational settings in later parts of the book, and in other work.[39] The larger the group, the harder the questions—a polity will inevitably be even more divided than a single "divided" self. But the lesson of *Weapon of Choice* is that liberty is on all sides of those questions.

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[37] For a recent and perceptive account of Connecticut's law, *see* David Nielsen, *Disarming Dangerous Persons: How Connecticut's Red Flag Law Saves Lives Without Jeopardizing Constitutional Protections*, 23 QUINNIPIAC HEALTH L.J. 253 (2020). Nielson's Article makes an excellent case in favor of Connecticut's law, but in my view goes too far in suggesting that other state's laws—none of which have been struck down on Second Amendment grounds—violate the Second Amendment. *See also* Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: "Red Flag" Laws and Due Process*, 106 VA. L. REV. 1285 (2020).

[38] CONN. GEN. STAT. § 29-38c (1999).

[39] Ian Ayres & Fredrick Vars, *Peaceful Assembly Can't Happen Without the Option of Gun-Free Events*, WASH. POST (Oct. 28, 2020, 8:46 PM), https://www.washingtonpost.com/opinions/2020/10/28/peaceful-assembly-cant-happen-without-option-gun-free-events/.