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# Gun Violence and Fundamental Rights

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In this essay I develop themes that I have pursued in two previous papers—"Self-defense and Coerced Risk-Acceptance"<sup>1</sup> and "Arms as Insurance"<sup>2</sup>—and then respond to

some problems posed by Hugh LaFollette and Cynthia Stark.

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## I The Argument Thus Far

Arguably, the right not to be unjustly assaulted qualifies as a "human right." In two previous papers in which I have defended the right to bear arms, I focused on two categories of unjust assailants—private and public sector assailants.

### (a) *Private Sector Assailants: "Self-defense and Coerced Risk-Acceptance"*

The core "self-defense" argument for a right to bear arms derives it from a fundamental right to preserve oneself from harm, conjoined with empirical facts about technology, the reliability of police protection, and reasonably expected threats. I argue that, given a right to defend oneself against reasonably expected threats, and given that a firearm provides the only practicable means of self-defense, a right to bear arms can be inferred. Whether this right may be overridden by utilitarian considerations or by other rights will depend on a weighing of the risks that a person will be exposed to as a result of being disarmed against the risks that will be imposed by the person being armed. The risks to which a person will be exposed will depend on the person's situation and the attacks that can be reasonably expected. The risks that the person imposes will depend on the weapon and the person's dispositions. On balance, given the empirical results from jurisdictions in which licenses to carry concealed firearms are controlled in the way that licenses to drive automobiles are, the risks favor a right to prepare oneself for assaults by rogue individuals.

### (b) *Public Sector Assailants: "Arms as Insurance"*

Unjust assaults by governments against those they govern constitute a far more significant category. In the last century, between 100 and 170 million people were murdered by their own governments.<sup>3</sup> Comparatively, the private sector contribution to unjust death is small. A pervasive and recurrent phenomenon in the twentieth century was that of "governments going bad." A familiar sequence was an initially acceptable arrangement of institutions and practices (a "social contract") which then degenerated into various forms of oppression, including genocide or other forms of mass killing of targeted groups.

If a government is to be legitimated by consent, some effective constraint on its power is necessary. However, the right to resist government with force can hardly be institutionalized directly into the arrangements by which a sovereign nation exists. Governments, by their position as sovereign, are the ultimate arbiters of all conflict and have the "legitimate" power to enforce their arbitrations, and being the ultimate arbiters of disputes, they may in effect change the terms of the "contract" arbitrarily. An ultimate arbiter is also a meta-arbiter. Once power is effectively monopolized by a government, the power to unilaterally rewrite or reinterpret the contract is also in place. Thus, no effective contractual or institutional constraint on the power of government can be built into the contract in a way that protects citizens against their government acting unjustly.

Any real "contractual" constraint on the power of government must be indirect. An indirect contractual constraint is not an explicit constraint so much as a provision that has a constraining practical effect. The rights to bear arms and to assemble do not directly assert that citizens have an effective right to resist their governors

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when the government begins to go bad. However, the practical effect of such rights is to empower citizens to go some way toward nullifying the "social contract" should the government reinterpret it in an unreasonable manner. Consenting to be governed can be considered a reasonable act only if there is a right that makes it possible for citizens to resist their government if it behaves unreasonably toward them.

A right to bear arms makes it possible for citizens to resist their government should it become a rogue government. The further effect of an armed citizenry is to increase the costs and thus reduce the likelihood of rogue behavior by government. Governments that assault helpless citizens break "the social contract" with impunity. An armed and independently organized citizenry prevents such impunity. An armed citizenry does not guar-

antee less-than-totalitarian government, but by raising the expected costs of "social contract" violations by governments, it makes such violations less likely.

Having an armed citizenry has obvious costs. Law enforcement may be more expensive and dangerous. Citizens may feel incorrectly that the government has gone too far. Organizations outside of government control may work against the national interest. Citizens may themselves be subject to certain risks because of the increased costs of controlling insurrection and crime.

But all such costs are outweighed by the risk of a government seriously going bad. Such catastrophes are not reliably predictable far enough in advance to make it rational to consent to be governed without an implicit right to have some chance of forcible resistance.

## II Further Reflections

### (a) *Prolegomenon*

Why, among "developed" countries, does the United States lead in crimes of violence? When we look for explanatory differences, we find many candidates. One of the strongest explanatory possibilities is disparity of income and wealth. For example, among developed countries the United States displays by far the greatest disparity between incomes of the top and bottom ten percent of its population, with "traditional" violence occurring disproportionately among that bottom ten percent. In terms of wealth, the disparity is even stronger. Five percent of the population possesses over sixty percent of the wealth, whereas the bottom forty percent divide one half of one percent of the wealth.<sup>4</sup> Furthermore, the United States has severe but ineffective drug laws which create a violence-regulated industry that both recruits from and preys upon the powerless bottom ten percent. And, finally, it is also true that the United States has a greater than average rate of civilian gun ownership.

So what hypothetical cause of violence in the United States do those with the power to set public agendas seize upon? Civilian gun ownership. And what is the proposed solution to violence in the United States? They propose to pass laws to reduce gun ownership and thus reduce violence: if the underclass is violently unhappy about its lack of economic power, what we should do is make its available weapons illegal.<sup>5</sup>

This strategy for reducing violence can be comfortably endorsed by those with income and power since disarmament leaves the power and wealth with those who

already have it. Another advantage of the disarmament strategy as a diversion of public attention is that any laws enacted will leave a residue of firearms violence to require yet further laws. The powerful can expect that the struggle to pass gun laws will be resisted with great fervor by law-abiding but pick-up-truck driving gun-owners, which means that serious discussion of other solutions to violence will be delayed. Proposals that would reduce the disparity of income and power, on the other hand, make those who have a lot of income and power uncomfortable, since they will have less income and power. (If your goal is to be able to drive your Mercedes SUV through "bad areas" safely, a solution that makes your Mercedes SUV unaffordable is no solution.) So, those in power support "too many guns" as the analysis of the violence problem and "more gun control" as its solution. In crude terms, "more gun control" is the device of choice for keeping attention away from measures that would actually change the power distribution—a smoke screen.

A solution can be accepted for questionable reasons and still be right. Gun control may be like that. So, part of seeing through the gun-control smoke screen is showing the defects in the disarmament strategy. The first defect is that there is little reason to think such laws would work. The empirical problems are well known: the relevant criminological correlations do not hold, and gun control has not reduced crime in any non-totalitarian country. The most stringent laws possible in a free society would make guns as difficult to obtain as heroin or cocaine is now. And that is not very difficult. The second defect is that

disarming any population is morally questionable. That has been the focus of my previous papers.

(b) *Further Thoughts on Personal Defense*

In his original paper, LaFollette argued that, because weapons-ownership is a derivative rather than fundamental right, it can be overridden by less weighty considerations than would have been the case were it fundamental.<sup>7</sup> LaFollette's contention is that interests are protected by rights. The more fundamental the interest, the more fundamental the right. The example he gives of a fundamental right is the right of free speech, which protects central human interests. The example he gives of a derivative right is the right to drink beer, which is grounded in our right to follow our interests but which, because it is so derived, can be restricted.

There are a number of problems with using the terms "fundamental" and "derivative" to discriminate rights. Here I will discuss only one.<sup>8</sup>

As used in discussions of rights, "derivation" refers to two different logical relations between rights and interests. In one case, a derived right is weaker; in the other case a derived right is just as strong, or almost as strong, as the interest from which it is derived. Here is a way of intuiting the two kinds of derivation: Consider a child in my wife's day-care center who has an allergy to peanuts such that the slightest contact with peanut material produces anaphylactic shock. Except in an emergency room, the child will probably die if touched with a peanut product. The child clearly has a right not to be touched with peanut butter. This right has a strength almost equal to that of her right not to be beheaded and an indefinitely large number of other rights not to have things done to her which would probably result in her death. All of these rights are almost equivalent in strength to her right not to be assaulted because, if any of these things is inflicted on her it will jeopardize or extinguish her life.

On the other hand, LaFollette's right to drink beer, derivative from the right to pursue happiness, is relatively easily overridden because LaFollette can pursue happiness by other means. The deprivation of beer-happiness can be compensated for by extra cigarettes or an ounce of grass. So his being denied beer does not entail his being denied the pursuit of happiness.

Here is an hypothesis about the logical relations between the different interests and the rights derived from those interests: when a derived right is weaker than the interest it protects, the derived right is a disjunct in a disjunction whose truth preserves the interest. My drinking beer is one of several ways in which I can pursue happiness. As a way of pursuing happiness, I have some

right to drink beer. Since, however, it is not the only way, my pursuit of happiness is not necessarily thwarted by keeping me from beer. Given a person's preferences, the interest entails a disjunction.<sup>9</sup> The interest is thwarted only when all the disjuncts are false. My pursuit of happiness is thwarted only if I cannot drink beer *and* I cannot play pool *and* I cannot converse with my friends, and so on, for a large number of my interests. Schematically, with "IPH" as "interest in the pursuit of happiness," the derivation would be, (A1) "IPH only if ( $A_1$  or  $A_2$  or ... or  $A_n$ )." Its logically equivalent form is (A2) "(not  $A_1$  & not  $A_2$  & ... & not  $A_n$ ) only if not IPH."

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When a derived right is just as strong as the interest being protected, the derived right is a (perhaps single) conjunct in a conjunction whose truth preserves the interest. If I have an interest in self-preservation (ISP), that interest is thwarted if any one of a number of catastrophes happen. If I am vaporized *or* if I am beheaded, *or* if I am frozen, *or* any of the other reliably causally death-efficacious things are done to me, my interest in self-preservation is thwarted. (B1) "ISP only if (not vaporized & not beheaded ... & not frozen)," so (B2) "(vaporized v beheaded ... or frozen) only if not ISP." For each disjunct in the antecedent of B2, having interest ISP preserved entails that the disjunct is false. Thus, whatever the strength of the interest, the strength of the right not to have someone make the disjunct true is just as strong.

By focusing on the "fundamental-derivative" distinction as a single distinction without noticing this difference, LaFollette has misunderstood the basic self-defense argument that motivates most advocates of an armed population. Another way to put this is that LaFollette has misrepresented the quantifier in my argument that, because for many people in many situations, a firearm is the only practical means of self-protection, they have a powerful right to own a firearm: "On [Wheeler's] view, guns are not inherently valuable, they are valuable only as a means of self-defense. I fail to see how this could make the right to bear arms fundamental. Not every means to a fundamental interest is a fundamental right."<sup>10</sup> My argu-



ment was not that guns are one among *several* means to protecting oneself in the situations envisaged in my paper, but that guns are *the only* currently practicable means. That a gun is the *only* practicable means in some situations generates a *prima facie* entitlement to have a gun. A means is a disjunct; *the* means is (the only) conjunct.

Analogously, were there a fundamental interest in health, then in current circumstances that fundamental interest would yield a derivative but still equally potent interest in having access to physicians' services and hospitals. In a world with adequate home medical robots, there would be practical alternatives, and hospital access could perhaps be limited to those able to afford personal care. In a world with different effective personal defenses, the interest in self-preservation would yield different derivative *prima facie* rights.

In neither the health-care nor the self-defense case does the presence of a fundamental *prima facie* right entail a derivative right that should be observed. In the case of a fundamental interest in health, the right to accessible health-care could be overridden by risks imposed by my having an extremely contagious and deadly ailment. Likewise, in looking after self-preservation, I argue that rights to bear arms must be determined by balancing risks a person suffers by being disarmed against risks to others from that person being armed.

The "risks" in question are, roughly, the probability that the would-be gun owner will be assaulted and the probability that she will unjustly assault someone herself. The first probability diminishes the strength of the right to bear arms "transmitted" by the status of a gun as the only practical means to preserve the interest in not being assaulted. Thus, except in very extreme situations, the right of a person to have a gun will be less strong than the right of that person not to be assaulted. On the risk-to-others side, the lower the probability that others will be unjustly assaulted, the lower the right of others to prohibit the person from having the weapon. Arguably, very endangered individuals have stronger rights to prepare for self-defense. A former felon living in a very bad neighborhood might have a right to a weapon whereas another former felon in a safe neighborhood might not.

That something is the only means to an important interest indeed transmits the strength of that interest to the strength of a right to its only means. Of course, given the sense of "fundamental" as "non-derivative," any derivative right will be non-fundamental. The analogy would be axioms and theorems in a formal system. That a theorem is derivative does not make it less necessary than the axioms. The child's right not to be touched with pea-

nut butter is derivative, but not thereby weaker than the child's "fundamental" right to self-preservation.

Cynthia Stark argues that the general principle of strength transmission leads to bizarre results. She cites two possible cases in which the transmission principle would lead to the assertion of a counter-intuitive right. Her counter-examples, however, are unpersuasive, at least in part because they lack sufficient detail to elicit clear intuitions. The first case, in which a person's self-respect required that the person mildly embarrass everyone he encountered, involves only a mild assault on others. Consider, however, the possibility that I have a facial disfigurement and speech defect that mildly discomfit everyone I meet. Nevertheless, my conception of myself as a human being requires that I engage people socially, even knowing of this effect. Do I not still have a right to continue to appear in public?<sup>11</sup> The second case, concerning the religious person whose right to practice his religion involves animal sacrifice, is puzzling, not least because

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such sacrifice is, according to Scripture, mandated by God, as long as there is a temple. Here the issue would seem to be about the rights of animals versus the truth of Torah. If animals have rights and are not just property allocated to mankind, then the second case becomes like the first case, a violation of rights. If animals have no rights or independent interests, then it is hard to see that the ascription of a right to sacrifice animals is any more problematic than the right (in that circumstance) to raise chickens. In both counter-examples, more stage setting would be needed to persuade me that there is a real counter-example in the offing. Compared to the obvious derivative right of the child not to have forced contact with peanut butter, and the plausible source of that right, the "bizarreness" of the examples would need to be strengthened.

I conclude this section with a note on practicality: what is practical is primarily concerned with the costs imposed by alternatives.<sup>12</sup> Some of the alternatives may be unaffordable; other alternatives may be excessively

costly in other ways. The woman who must work evenings could quit her job as a way of reducing her danger of assaults. Many of the elderly who live in dangerous neighborhoods and are especially vulnerable to victimization, stay home after dark because they are denied effective self-defense. These, in my opinion, are excessively costly solutions imposed on them. I very much doubt that there is an algorithm for determining when the alternatives are sufficiently onerous to make a firearm or any other device "the only practical means." But in central cases the idea seems to me clear enough.

(c) *Further Thoughts About Resisting Government*

The point of view taken in "Arms as Insurance" could be characterized as "suspicion of governments as such." There are several observations to make here.

First, being suspicious of government does not mean thinking that having no government is better than having some government. I am suspicious of used car dealers, but if I need the services of a used car dealer, I deal with one and take precautions. I think a rational agent should have the same attitude toward government in general and her own government in particular.

Secondly, the empirical evidence suggests very strongly that, collectively, governments are more violent and dangerous than citizens. If we think of governments as quasi-individuals, the past several millennia present us with a population that has been more violent and dangerous, statistically, than almost any population of humans. If a society's crime rate were close to that of the "society of nations" over the past millennia, it would be a very bad population indeed. This suggests that, if suspicion of used car dealers has some justification, suspicion of government is thoroughly justified.

Thirdly, the position taken in "Arms as Insurance" is that governments have a tendency to go bad. This drift should not be a surprise. Certain natural features of governments facilitate the degeneration. At least some of the time governors choose the governing line of work because they value power over other people.<sup>13</sup> If a governor values power, and a natural application of power is to increase power, then there is a reason to acquire as much power as possible. Furthermore, the natural "efficiency" interests of government encourage governments to reduce the resistance potential of citizens. Citizens with some power to resist government make government inefficient. Policies may have to be implemented with more force than would be the case were power more centralized. Since increasing government power can end only when citizens are helpless, it should not be surprising that governments are dangerous to those they govern.

Even given such rational or structural tendencies, One might wonder how governors could kill their own citizens, or direct others to do so. Part of the process is defining the troublesome group as "other," as not "us." The "other-us" distinction is already in place for foreigners. It is a small step from the necessity of killing foreigners to the necessity of killing those nominally citizens of a country but not really citizens, for instance Jews, blacks, cult members, or terrorists. Statesmanship, after all, has always included the willingness to have people killed for higher ends.

Various institutions, such as strong traditional prerogatives, ethnic and family ties, and local controls can work to limit central governors. Such constraints, though, since they are limitations on government power, are naturally opposed by governors. In the end, such institutions can only be defended by the possibility of meaningful resistance, that is, by force.

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A surprising phenomenon, at least for me, is that suspicion of government, to the extent that it considers reasonable that there be an option of resistance to government, is viewed as a strange and radical idea by my contemporaries. The view expressed in "Arms as Insurance" was a liberal platitude not very long ago. Hubert Humphrey, a mainstream liberal politician of some prominence in the 1950s and 1960s could say without awkwardness:

Certainly, one of the chief guarantees of freedom under any government, no matter how popular and respected, is the right of citizens to keep and bear arms. This is not to say that firearms should not be very carefully used and that definite safety rules of precaution should not be taught and enforced. But the right of citizens to bear arms is just one more guarantee against arbitrary government, and one more safeguard against a tyranny which now appears remote in America, but which historically has proved to be always possible.<sup>14</sup>

"Arms as Insurance" merely expands and defends Humphrey's point, which had been made by Americans through the previous two centuries.

## NOTES

1 Wheeler, *Self-Defense and Coerced Risk-Acceptance*, 11 PUB. AFF. Q. 431 (1997).

2 Wheeler, *Arms as Insurance*, 13 PUB. AFF. Q. 111 (1999).

3 The data on genocides are largely derived from J. SIMKIN, A. ZELMAN, & A.M. RICE, *LETHAL LAWS*, Jews for the Preservation of Firearms Ownership, Inc., 2874 South Wentworth Avenue, Milwaukee, WI 53207, 414 769 0760. See also Harff & Gurr, *Victims of the State*, 7 (1) PLOOM NEWSLETTER 24 (1995); and Harff, *Rescuing Endangered People: Missed Opportunities*, Social Research, Volume 62, No. 1, Spring 1995, pp. 23-39.

LETHAL LAWS estimates that the deaths from ten famous genocides in this century total 55.9 million people. The supplement on Rwanda, published after LETHAL LAWS, raises that figure.

The most authoritative and comprehensive estimate of the number of deaths unjustly inflicted by governments on their own citizens in the past hundred years is 169 million human beings, by R.J. RUMMEL, *DEATH BY GOVERNMENT* (1994). Rummel includes mass murders by colonial powers and other slaughters that might not technically be termed "genocides," since completeness may not have been the aim.

4 The figures are from the 1997 Federal Reserve Survey of Consumer Finances.

5 It is no longer fashionable to target the poor or minorities explicitly. As many authors have noted, the earliest American gun-control laws were explicitly or implicitly directed at slaves, freedmen, and native Americans. See Cottrell & Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEORGETOWN L.J. 309 (1990) and Tahmassebi, *Gun Control and Racism*, 2 GEORGE MASON CIV. RTS J. 67 (1991). More recently, the Gun Control Act of 1968 was, as some will remember, a response to the riots of 1968. Inexpensive guns ("Saturday night specials") that the poor could afford were among the targets.

6 I will not be specific about exactly what I am against in being against "more gun control." I am more interested in the presumptions behind discussions of regulations on firearms than in the details. Discussions of detail about which weapons and laws are appropriate and which are inappropriate are analogous to discussions of the kinds of free speech that are allowable, and to whom. With free speech, issues about decibel levels of loud-speakers in sound trucks, whether sky-writing can be allowed to obscure sunsets, what age groups should have access to pornography, and so forth, are details. The key idea in the right of free speech is that important values are protected by freedom of speech, so that any restrictions require substantial reasons. So also in discussions about firearms restrictions the presumption should be that any restrictions must take very seriously the values of self-defense and insurance against tyranny.

Reasonable gun laws would include reasonable restrictions on competent owners and somewhat stronger restrictions on the public carrying of firearms. Reasonable gun control must allow people to protect themselves and meaningfully resist

their government if need be. Thus gun registration is an unreasonable restriction, since it helps to defeat the ability of people to resist their government. Laws whose primary effect is to make guns inaccessible to the poor are also unreasonable. Certainly laws such as those in effect in Great Britain, Massachusetts, and New York City are unreasonable.

7 LaFollette, *Gun Control* 110 ETHICS 269 (2000).

8 Other important but less directly relevant features of "fundamental" include the following:

(a) "Fundamental" has a comparative, and so is an attributive. That is, generally speaking, rights and interests are fundamental relative to kinds, rather than being fundamental or not: fundamental stockholder rights might differ from fundamental human rights.

(b) "Fundamental" can mean "underived" or "axiomatic." But it can also mean "practically prerequisite." A lift could be said to be the fundamental piece of garage equipment because only if one has a lift are the other tools usable. The "enabling" sense of fundamental rights, that some rights are required in order that other rights be preserved, seems to be this sense. Charlton Heston's claim that the Second Amendment is the most fundamental right should be understood in this sense. Without the right to bear arms, other rights are practically undefended and thus endangered.

9 How many disjuncts must be true for a general interest like "being satisfied enough by my lights" to be true is pretty vague. Perhaps many of those elements in the disjunction of what I would like must be true.

10 LaFollette, *Gun Control*, at 266 (my italics).

11 Even if we suppose that the person's lack of self-respect would be total, and so catastrophic, and could (somehow) be avoided only by needlessly embarrassing others, the issue would remain whether this is perverse, that is, whether there is something immoral about that need. Maybe we should tolerate that weirdness and not confine the person to his home, if the embarrassment is mild enough. Sadists do not have a right to inflict pain, no matter how important it is to their pleasures. If "human interests" are essentially normative, so that anyone's fundamental interests in the morally relevant sense are interests it is permissible to have, then there cannot be a morally relevant interest in violating the rights of others.

12 Other devices for self-defense, such as magic spells and phasers, we can leave aside as "impractical" even though not logically impossible.

13 The same observation would apply to police. Although the majority of police are decent people, my experience with police officers has been that a higher proportion of police enjoy the kinds of domination that being a police officer entails than is found in the general population.

14 Humphrey, quoted in *Know Your Lawmakers*, GUNS, February 1960. I owe this quotation to Robert Cottrell, Professor of Law at Georgetown University.