

[Originally published in *The Critique*, <http://www.thecritique.com/articles/gun-rights-noncompliance/>, 7/14/2016.]

## Gun Rights and Noncompliance: Two Problems of Prohibition

by Michael Huemer

Most of my fellow academics seem to harbor a visceral antipathy toward guns. Many, perhaps most, would like to see all private gun ownership outlawed. I think this position is not well grounded, either in empirical evidence or in moral principle. If we followed the lessons that we – or at least, the social scientists among us – try to teach our students, we would not be so confident of the benefits of gun restrictions. If we traced the implications of the moral principles we accept in other contexts, we would not be so quick to dismiss the rights of gun owners.

Like most controversial issues, the issue of gun control is highly complex, and it is commonly treated in a sadly oversimplified manner. I can't fix that problem here (though I have discussed the issue at greater length elsewhere<sup>1</sup>). Here, I will address only what seem to me the two most important arguments concerning the simplest and most extreme form of gun control, which would be a complete ban on private gun ownership. The first argument is that gun prohibition would violate the right of individuals to protect themselves. The second argument is that gun prohibition will fail because criminals will disregard the law.

### The Right to Self-Defense

The rights of the individual often seem lost in gun policy debate, as in most policy debates – we ask “what is good for society?”, but we rarely ask “what does the individual have a right to?” At the same time, we tend to ignore the factual situation of people different from ourselves, so that when asked what is best for society, we answer based on our personal circumstances, or even on the imagined circumstances of an ideal society.

I, for example, live in an incredibly safe place; I hardly need a gun. Perhaps you, reader, are in a similar situation. If so, you might be inclined to think, “No one needs a gun.”

But it isn't true. *I* need never walk home on streets where I fear for my life. But *many* Americans live in places where they fear for their own safety, and are completely justified in that fear. Many more have abusive lovers, ex-husbands, or other people in their lives who have beaten them or threatened them with violence. And many believe – again, with complete justification – that the government cannot or will not protect them.

Consider the case of Ruth Bunnell, who in 1972 called the San Jose Police

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<sup>1</sup> “Is There a Right to Own a Gun?”, *Social Theory and Practice* 29 (2003): 297-324, <<http://www.owl232.net/guncontrol.htm>>.

Department to report that her estranged husband had just told her that he was coming over to her house to murder her. She requested immediate police aid, but the police refused to help, instructing her instead to call back when her husband arrived. When he arrived forty-five minutes later, she was unable to call back because the husband immediately stabbed her to death.

My point in relating this case is not the usual one; my point is not simply that Bunnell could have defended herself with a gun. My point concerns what happened after the murder. John Hartzler, the administrator of Ruth Bunnell's estate, brought a lawsuit against the city for failing to protect her.<sup>2</sup> In tort law, there are four conditions for a valid civil claim: (i) the defendant must have had some duty to the plaintiff; (ii) the defendant must have breached that duty; (iii) the plaintiff must have suffered a harm; (iv) the breach of duty must have caused the harm. On this basis, you might assume that Hartzler had an open-and-shut case: surely the police were duty bound to respond to Bunnell's plea for protection; surely their failure to do so caused her death.

You would be mistaken. The court dismissed the suit without a trial. Hartzler appealed, but the appellate court affirmed the dismissal. No one disputed that Bunnell had suffered a tragic harm caused by the police's refusal to protect her. The city simply claimed that they *never had any duty to protect* Ruth Bunnell in the first place – and the court agreed. Nor was this an idiosyncratic decision; U.S. courts have consistently held to the theory that the government only has an obligation to “society” in general, to provide a general deterrent to crime – not an obligation to any individual.<sup>3</sup>

My point: individuals have a right to protect themselves. I would say this even if the government had promised to protect all of us, but I think the point especially clear given that they have not. Having refused to accept any obligation to protect you, the government cannot justly turn around and prohibit you from taking reasonable and effective measures for your own defense. For many Americans, that means a gun. Studies of defensive gun uses consistently find that gun use decreases one's chance of being injured by a criminal, compared with other methods of self-protection.<sup>4</sup>

In earlier work, I have drawn the following analogy.<sup>5</sup> Imagine that a killer has broken into a house where his intended victim lies in bed. The victim has a gun, which he would use to defend himself against the killer. Unfortunately, however, the killer has an accomplice in the house. As the victim reaches for his gun, the accomplice grabs it first and runs away with it. As a result, the killer is then able to

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<sup>2</sup> *Hartzler v. City of San Jose*, 46 Cal.App.3d 6 (1975), <<http://www.lawlink.com/research/CaseLevel3/51629>>.

<sup>3</sup> See also *Warren v. District of Columbia* (444 A.2d 1, D.C. Ct. of Ap. [1981]); *Riss v. New York* (22 N.Y. 2d 579 [1968]); *DeShaney v. Winnebago County* (489 U.S. 189 [1989]).

<sup>4</sup> Committee on Priorities for a Public Health Research Agenda to Reduce the Threat of Firearm-Related Violence, *Priorities for Research to Reduce the Threat of Firearm-Related Violence* (Washington, D.C.: National Academies Press, 2013), pp. 15-16, <[http://www.nap.edu/download.php?record\\_id=18319](http://www.nap.edu/download.php?record_id=18319)>.

<sup>5</sup> “Is There a Right to Own a Gun?”, *op. cit.*, p. 306.

stab the victim to death. In this scenario, the killer is guilty of murder. What about the accomplice?

The accomplice's action was less bad than that of the killer; nevertheless, it was extremely wrong. By taking away the victim's means of self-defense, he violated the victim's rights in an extremely serious way and became responsible (in addition to the killer) for the victim's death. Just so, when the state deprives individuals of weapons, it can predict that some individuals will suffer murder, rape, or other serious crimes that would have been prevented if the victims had the means to defend themselves. By coercively interfering in individuals' self-defense efforts, the state becomes partly responsible (in addition to the criminals themselves) for their victimization – the state in effect becomes an accomplice to those crimes. Failing to protect people is one thing; actively intervening to stop them from protecting themselves is much worse.

Just as it would be wrong for the state to murder a certain number of innocent individuals, it is also wrong for the state to be an accomplice in their murders. This is true even if the state has reason to believe that a greater overall benefit to society would be attained. One may not, for example, murder an innocent person, even if your doing so somehow stops someone else from murdering two other innocent people. (May you murder an innocent person to prevent a *thousand* other murders? Perhaps – but that is not what is at issue here. By most accounts, the number of crimes prevented by guns is comparable to the number caused by guns.<sup>6</sup>)

Thus, consider a famous hypothetical from the ethics literature: suppose a defendant is on trial for a crime that has caused great public outrage.<sup>7</sup> If no one is punished, there will be riots, during which several innocent people will most likely be unjustly injured or killed. The jury, however, realizes that the defendant is factually innocent. Should they convict anyway – thus sacrificing the one innocent defendant to save several other innocent people from being harmed by the riots? Almost everyone answers “no” to this question. The reason seems to be that to do so would violate the rights of the one individual, and one may not do this, even to prevent other people from committing several other rights-violations.

I gave this argument in 2003. Since then, I have seen one printed response to it. It was from (anti-gun) philosopher Jeff McMahan in a 2012 editorial:

Imposing a ban on guns, [gun rights advocates] argue, would be tantamount to taking a person's gun from her just as someone is about to kill her. But this is a defective analogy. [. . .] Guns are only one means of self-defense and self-defense is only one means of achieving security against attack. It is the right to security against attack that is fundamental. A policy that unavoidably deprives a 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>8</sup>

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<sup>6</sup> Committee on Priorities, *op. cit.*, p. 15.

<sup>7</sup> H. J. McCloskey, “An Examination of Restricted Utilitarianism,” *Philosophical Review* 66 (1957): 466-85, at pp. 468-9.

<sup>8</sup> “Why Gun ‘Control’ Is Not Enough,” *New York Times* (Dec. 19, 2012), <<http://opinionator.blogs.nytimes.com/2012/12/19/why-gun-control-is-not->

I see two ways of understanding McMahan's argument: (1) Perhaps McMahan is arguing that, even if gun prohibition causes some people to be victimized who otherwise would have defended themselves, it still decreases the total number of victimizations that occur, and therefore it is not a violation of anyone's right to security. But of course, this would just miss the central point. This would be analogous to claiming, in the example above, that punishing the innocent defendant is permissible because it will decrease the total number of rights-violations.

(2) More likely, what McMahan means is this: a ban on guns will not just increase the overall level of security for society, but will actually increase security for *every individual*. And since the right to security is the only relevant right at stake here, the gun ban will not violate anyone's rights. If that is the argument, it is factually false. McMahan may believe that individuals only need guns because others have guns – but that just isn't the case. Take the case of the woman whose estranged husband has threatened to kill her. He has beaten her in the past – not with a gun, with his fists. If he attempts to kill her, and neither of them has a gun, he will most likely kill her. She needs a gun to defend herself. She doesn't need it because he has a gun; she needs it because he outweighs her by fifty pounds, because he might have a knife, because she doesn't know how to fight.

Or take the case of the man who has to walk home through gang territory at night. If he is accosted by a gang, he will not successfully defend himself with a knife, or a can of mace, or a phone. He needs a gun. Again, he doesn't need it because the gang has guns; if no one has a gun, the gang is going to be able to do whatever they want.

The reader will appreciate that these are hardly outlandish scenarios. These are precisely the sort of situations that make people want a gun for self-defense. Now, suppose the woman with the violent husband turns up at a gun store. And suppose they send her away, because a new law has just been passed that says only government agents are allowed to buy guns. How is she made safer by this? I am not asking how society might be made safer. I am asking about *that individual*, who went to buy a gun to protect herself – she was not worried about gun violence in society, she was worried about her abusive husband. So how is *she* more secure?

Now suppose she decides to buy a gun anyway. She gets it on the black market, as it would be in a gun prohibition regime. But the police catch her, and she is prosecuted for an illegal gun purchase. In court, she tries to explain her reasons for the purchase – she had no desire to hurt anyone, but she had to protect herself. The police could not protect her and didn't even claim that they could. These explanations are rejected in court (as they surely would be), because “the desire to protect oneself” is not accepted under the anti-gun law as a valid excuse for buying a gun, and thus the woman is sent to jail. Is this a just outcome? Could we in good conscience claim that at no point in this story were anyone's rights violated; at no point was an innocent person sacrificed for the sake of others?

If you say frankly that we *should* sacrifice innocent individuals whenever doing so is better for society, that is a position I can at least understand. And if you are also willing to say that the jury in the earlier example in fact *should* convict the innocent

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enough/>.

defendant to prevent the riots, then you have a consistent position. But even then, it is far from clear that gun prohibition will achieve its stated aim – which brings us to the other major problem with prohibition.

### **The Compliance Problem**

Many confuse the question, “Would it be good for everyone to give up their guns?” with the question, “Would it be good to have *a law that says* everyone has to give up their guns?” These are two very different questions – for what the law prescribes is not the same as what actually happens.

Most people can appreciate this point for at least some issues. For example, the drug war. It is illegal to buy or sell marijuana, cocaine, heroin, or any of a variety of other recreational drugs. That does not mean that people do not buy and sell drugs. What it means is that they are bought and sold on the black market. It does not mean that you cannot get hold of cocaine if you want it; it means that you must buy it from criminals at high prices. It also means that the state will not enforce agreements between drug sellers and buyers, so if you feel cheated, you must enforce your rights yourself. This is why the drug trade is so prone to violence. Granted, society would be better if everyone gave up using drugs. That does not mean that society is better for having laws against using drugs.

The same was true of alcohol during the Prohibition era: massive noncompliance, expansion of organized crime, a violence-prone black market. Much the same has been true of prostitution for as long as it has been proscribed. The same will be true of guns during America’s gun prohibition era, if that era ever arrives. Some Americans will give up their weapons – but many will not. America is not England; guns play practically no role in British culture, but America, for better or worse, is another matter entirely. Many Americans love guns, which is why the country now has about 270 million guns, with an adult population of only 247 million.<sup>9</sup> About a third of households contain at least one gun.<sup>10</sup> And guns are durable; a hundred-year-old gun may still be perfectly functional. So even if we completely stop producing them right now, America’s gun stock is not going to run dry during this century. However you feel about America’s gun culture, it is a fact that has to be contended with. Pretending that people do whatever the law says has not given us a successful drug policy; it won’t give us a successful gun policy either.

The question to ask about a proposed law is never, “Would it be good if everyone followed this law?” The question is always, “Will things be better when those who are most likely to follow this law follow it, and those who can be expected to break it break it?”

There are two kinds of gun owners: criminal gun owners and noncriminal

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<sup>9</sup> Madeleine Morgenstern, “How Many People Own Guns in America? And Is Gun Ownership Actually Declining?”, *The Blaze* (Mar. 19, 2013), <<http://www.theblaze.com/stories/2013/03/19/how-many-people-own-guns-in-america-and-is-gun-ownership-actually-declining/>>; U.S. Census Bureau, “Quick Facts: United States”, <<https://www.census.gov/quickfacts/table/PST045215/00>>.

<sup>10</sup> CBS News, “Number of households with guns on the decline, study shows,” Mar. 10, 2015, <<http://www.cbsnews.com/news/number-of-households-with-guns-on-the-decline-study-shows/>>.

owners. Criminals (and prospective criminals) own a gun for purposes of robbing, threatening, or killing others (perhaps in addition to noncriminal purposes); noncriminal owners own a gun for purposes of self-protection, hunting, or other recreation. The ideal situation would be to disarm all the criminals, while leaving the noncriminal citizens armed. But that option is not available. In the event that private gun ownership were outlawed, who would actually be most likely to follow the law, and who would be most likely to break it?

The group most likely to follow the law would be those who own a gun for self-defense or recreation. The group most likely to break the law would be those who own a gun for criminal purposes. Why? Criminals, to put it lightly, have a lesser average level of respect for law than the rest of us. A man who is prepared to commit armed robbery or murder is unlikely to pause at the thought of committing a misdemeanor gun law violation. Therefore, restrictive gun laws affect innocent citizens much more than they affect criminals. Criminals may even welcome more restrictive gun laws: surveys show that criminals in America are more afraid of encountering armed victims than they are of encountering the police (and wisely so).<sup>11</sup> Restrictive gun laws help criminals by reducing their chances of encountering armed victims. In other words, they tend to have approximately the opposite of their intended effect.

The popular version of this argument: “If guns are outlawed, only outlaws will have guns.” This is an old argument, and gun control advocates are ready for it. Their response: it isn’t only the criminals we have to worry about. It is *ordinary citizens* we should worry about. Gun control proponents fear that a perfectly normal, noncriminal person with access to a gun may one day, in the heat of argument with a neighbor or family member, suddenly “snap” and shoot the other party. To support this fear, they cite statistics about the number of murder victims who were killed by someone they knew, or the number of murders that occur after a heated argument.

This argument is a logical and empirical error. When we hear that most murder victims were killed by a family member *or someone they knew*,<sup>12</sup> this does not imply that they were killed by a normal person as a result of a simple disagreement of the sort that anyone could find themselves in. Remember that the category “someone known to the victim” includes such people as the victim’s drug dealer, the victim’s pimp, one of the victim’s fellow gang members, the victim’s partner in crime. Most homicides are committed by people with prior criminal records, and they are overwhelmingly committed *against other criminals*.<sup>13</sup> Many are gang-related or drug-related.<sup>14</sup> It isn’t Aunt Sally shooting Uncle Ted in an argument over the phone bill.

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<sup>11</sup> James D. Wright and Peter H. Rossi, *Armed and Considered Dangerous: A Survey of Felons and Their Firearms* (Hawthorne, N.Y.: Aldine de Gruyter, 1986), pp. 144-6.

<sup>12</sup> Noel J. Riggs and Steve B. Scott, “The Top 5 Murders by Relationship to the Victim in the United States,” *Top 5 of Anything* (2016), <<https://top5ofanything.com/list/8a1bf3d1/Murders-by-Relationship-to-the-Victim-in-the-United-States>>.

<sup>13</sup> Michael Thompson, “Most Murder Victims in Big Cities Have Criminal Record,” *WorldNetDaily* (Mar. 4, 2013), <<http://www.wnd.com/2013/03/most-murder-victims-in-big-cities-have-criminal-record/>>.

<sup>14</sup> Marcus Hawkins, “Putting Gun Death Statistics in Perspective,” *About.com* (Aug. 1,

Even the minority of cases that involve a spouse or family member of the killer do little to support the contention that it is ordinary citizens we need to worry about, rather than criminals. Criminals have acquaintances and family members too. Not surprisingly, people who have a criminal way of life – drug dealers, gang leaders, and so on – are also prone to commit crimes against their own family members, spouses, and so on. This does not show that *ordinary* people are in danger of shooting their family if they have access to a gun.

For a reality check, ask yourself how often you have seen a normal adult (say, one with no criminal record) punch a friend, acquaintance, or family member in the face as a result of a disagreement. Now consider how much stronger the inhibitions must be against *murder* than against simple punching, in the mind of a normal adult in our society. Normal people do not kill others because of a family squabble. Criminals with antisocial personality traits and poor impulse control may do so – but they are also the people least likely to actually obey restrictive gun laws.

Gun control advocates believe our society would be safer if no one had guns. Perhaps so – but that is not the relevant question. The question is whether our society would be safer if the people with the greatest disposition to follow the law gave up their weapons, and the people with the least inclination to obey the law kept theirs.

## Conclusion

To summarize the main line of reasoning:

*Premise 1:* It is permissible to violate an individual's rights only if, at minimum, doing so prevents harms many times greater than the harm it causes to that individual.

*Comment:* This is supported by the example of the jury convicting the innocent man to prevent riots. There are many similar examples. Some believe, in fact, that it is *never* permissible to violate certain rights; that view is compatible with (but stronger than) premise 1. Premise 1 only rules out that a rights violation could be justified by its preventing harms only modestly greater than the harms it causes – and this is something that any believer in rights accepts.

*Premise 2:* Gun prohibition violates the self-defense rights of individuals, causing some of them to be seriously harmed or killed.

*Comment:* The claim that gun prohibition will result in some citizens being harmed or killed is an uncontroversial empirical claim; many surveys show that self-defense uses of firearms are very common in the U.S. The claim that gun prohibition would be a *rights violation* is supported by the example of the accomplice who seizes a victim's gun right before a murderer kills the victim.

*Intermediate conclusion:* Gun prohibition is permissible only if, at minimum, it prevents harms many times greater than the harms it causes.

*Premise 3:* Gun prohibition will not prevent much greater harm than it causes.

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2015), <<http://usconservatives.about.com/od/capitalpunishment/a/Putting-Gun-Death-Statistics-In-Perspective.htm>>.

*Comment:* There is a great deal of complex and mixed data on this that cannot be reviewed here. Here, I have focused on one main point: that in America, gun prohibition is not likely to succeed in keeping guns out of the hands of criminals; its largest effect will be on the behavior of innocent citizens. Thus, whether gun prohibition would even prevent more harm than it caused is at best unknown; it cannot reasonably be claimed that it would prevent many times more harm than it caused.

*Conclusion:* Gun prohibition is impermissible.