

ARTICLES

Reply to Block on Property Rights and Gun Control

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Block (2023) rejects the criticisms of Block and Block (2000) leveled by Fegley and Dominiak (2021) against their universal libertarian theory of gun control. The present article argues that Block fails to sufficiently address any of those criticisms, and thus they are here restated louder and harder. In his recent criticism, Block (2023) is mistaken, *inter alia*, about possession being an action, his density account of permissibility, and his deflationary theory of property rights.

In the present article, we address Block's (2023) recent criticism of our rejoinder (Fegley and Dominiak 2021) to Block and Block's (2000) theory of gun control. In this regard, we stick to our guns—no pun intended—and argue that in his latest criticism, Block shoots himself in the foot on many occasions—for example, when he reaffirms his problematic density criterion for permissibility of gun ownership or extends his notion of action beyond anything that can be accepted by a sensible Austro-libertarian. To facilitate the reader's navigation through the meanders of reasoning in the previous articles, we mark each argument with a proper name and date indicating its source as either Block and Block (2000), Fegley and Dominiak (2021), or Block (2023). To facilitate the reader's navigation even further, we hereby allow ourselves to suggest, somewhat brusquely, that our foregoing kerfuffle with Block (2023) and Block and Block (2000) over gun control ultimately boils down to our adversaries' contention that gun ownership under libertarianism is a matter of density (e.g., ownership of nuclear weapons would be permissible on, say, Jupiter but not on Earth, a much smaller planet), since it is density that determines whether a given weapon might be



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used discriminately or not, and our claim that whether a given weapon is a threat to innocents or not is a matter of its owner's acts and intents rather than geography. As usually happens with debates such as this one, sundry other issues are serendipitously discovered in its course and the discussion veers from the main track to such interesting asides as the relation between action and possession, the possibility of two legal whites making a legal black, or the idea that strict liability has no room for excuses. But to learn about these more specific issues, the reader, we are afraid, will have to consult our debates directly.

THE CRITICISMS

As our disagreement with Block on gun control encompasses multiple arguments and quite often veers into various tenets of a broader libertarian theory, it might serve us well to organize it into some of the more prominent thematic threads running through it. Accordingly, in what follows, we engage with Block's battery of arguments on such fronts as property rights, density, possession, imminent attack, self-defense justification versus strict liability, and Karen thought experiments.

Property Rights

Fegley and Dominiak (2021):

A central problem with Block and Block's universal libertarian theory of weapon control is that the discussion of the proportionality thesis is completely divorced from property rights. The only criteria that matter in their argument are population density and the destructive power of weapons. Property rights over land are not discussed at all. Despite beginning with a definition of libertarianism based in the proscription of the use or threat of force against a person or legitimately held property and describing how property can be legitimately attained, Block and Block do not reference the issue of property again.

Block (2023):

The way I see matters is that private property rights and the non-aggression principle are opposite sides of the same coin, or, perhaps, they are conjoined twins (Dyke and Block 2011). You can't have one without the other, they are so inseparable. . . . Thus, while FD are correct in maintaining that BB rarely explicitly mention private property rights, it is spread out all over the lot in their paper, implicitly. . . .

FD maintain that “Property rights over land are not discussed at all.” This is not true. Rather, this is a central part of the BB paper: the reason nuclear bombs are allowed in Jupiter, once we settle there, is that it is assumed that all people will have *gigantic* land holdings. If they keep this weapon in the center of their property, not on its periphery, they will be allowed to possess them.

We address the more substantive issues in the following subsection, which will further clarify our criticism that Block and Block’s (2000) theory is divorced from the libertarian theory of property rights. Block elsewhere contends that “libertarianism can support . . . ‘murder parks’ (where people may shoot one another, provided only that all of them had agreed to take part in this game, and there are thick walls so that no outsiders are shot)” (Block 2002, 170). Presumably, the proprietor of a murder park has legitimately acquired the land on which it sits. Clearly, then, the legitimacy of possessing and using guns in a murder park is a function of properly acquiring land and consent, and density need not be mentioned at all.

Additionally, Block and Block’s theory need not reference “libertarianism” at all, since the proposition that an individual’s body ought not be aggressed against is not uniquely libertarian; however, this seems to be the only “property right” that matters in their theory, while the rules that property owners establish over their homesteaded land holdings are neglected. While we stand corrected that property rights over land are mentioned once in the context of Jupiter, land ownership as such is not integral to their theory.

Density

Fegley and Dominiak (2021, 276):

Block and Block discuss a hypothetical hypercrowded world in which the entire earth’s surface is as densely populated as a crowded phone booth. Is this meant to have implications for actual places in our world that have high population densities? Would a busy nightclub, with people packed together as in a crowded phone booth ban pistols or knives as a matter of libertarian principle? The answer, of course, is that the property owner would decide what kinds of weapons are allowed in the nightclub and potential patrons of the club would decide whether they are willing to accept those rules or spend their evening elsewhere. From a libertarian perspective, the relevant question is not the population density on a particular piece of land but what rules on weapons the legitimate property owner(s) sets over that land.

Block (2023, 74):

This metaphor was not at all ‘to have implications for actual places in our world that have high population densities.’ It was meant instead to demonstrate that under such assumptions not only would pistols be banned, but so would sharp fingernails, as they would necessarily violate the rights of people we were crunched up against.

We are happy that Block pushes his density argument so much both in his original (Block and Block 2000) article and in his rejoinder (Block 2023) to our criticism of his position (Fegley and Dominiak 2021), because we may use it as an opportunity to officially and publicly ask Block about what happened with his bedrock argument for blackmail legalization, according to which two legal whites can never make a legal black. Block (1986, 63) writes, “It is impossible for two separately legal acts to be rendered into an illegal one, and, therefore, blackmail should be legalized.” However, if that is indeed the case, then, as one of us pointed out in another place (Dominiak and Wysocki 2024), neither should two separately legal acts—for example, residing on Earth and owning a nuke (remember, owning a nuke is not per se illegal for Block, since one may own one on, say, Jupiter—for density is what ultimately matters)—be rendered into an illegal act—that is, owning a nuke while residing on Earth. If it is really “impossible for two separately legal acts to be rendered into an illegal one,” then owning a nuke while living on Earth “should be legalized,” or if it should not be legalized, then it is not after all “impossible for two separately legal acts to be rendered into an illegal one” and Block loses his bedrock argument for blackmail legalization. Although this is not the place for arguing about it in any detail (if for no other reason than because the argument is forthcoming in another place—that is, Dominiak and Wysocki (2024), we would like to point out that no general rule stating that “it is impossible for two separately legal acts to be rendered into an illegal one” can be rationally sustained, and so each case falling within its remit must be decided individually. However, this case-by-case approach is not available to Block, who explicitly invokes the said rule as an argument for his thesis about the legalization of blackmail. What is, then, additionally problematic for Block is that his solution to the nuke ownership question conflicts—via the said rule—with his solution to the blackmail question. Thus, at any rate, we hereby have at least a robust ad hominem argument against Block.

Block (2023, 74):

Of course the libertarian answer is the one offered by FD for *within* the nightclub. But here we are not at all interested in that. Rather, our concern is with the case where this nightclub is located cheek by jowl near the next nightclub, or property owned by other people. What then? Consider a realistic case: the nightclub patrons are making noise at 4am, not allowing

their neighbors to sleep. Then, it is not at all a matter of what policies this nightclub owner employs within his own property. He must not allow the excessive decibels to spill over onto his neighbors' property (Rothbard 1982).

Similar to how Block and Block's (2000) theory ignores the issue of what rules property owners establish regarding weapons and treats individuals as if they only exist in unowned space, Block here ignores the issue of how property rights are established. What does Rothbard say about decibels spilling over onto another's "property"?

Suppose, for example, that an airport is established with a great deal of empty land around it. The airport exudes a noise level of, say, X decibels, with the sound waves traveling over the empty land. A housing development then buys land near the airport. Some time later, the homeowners sue the airport for excessive noise interfering with the use and quiet enjoyment of the houses. Excessive noise can be considered a form of aggression but in this case the airport has already homesteaded X decibels worth of noise. By its prior claim, the airport now "owns the right" to emit X decibels of noise into the surrounding area. (Rothbard 1982, 77)

Suppose a nightclub is established with a great deal of empty land around it. It allows patrons to carry pistols. Would another property owner acquiring land near the nightclub have a right to have pistols in the nightclub banned? According to Block, the individual who wishes to display a nuclear bomb on his mantel must travel to a distant, sparsely populated planet to do so. Once he does so, does any fellow space homesteader who decides to locate near his home have any right to demand he disarm? Presumably, the bomb owner has acquired some kind of right to display his bomb in peace that is not extinguished by someone else who later chooses to locate himself within the blast radius of an atom bomb. Notice that what matters here is what property rights are acquired, not density per se.

As a final consideration—to show the misleading nature of Block and Block's (2000, 293) asserted "relation between geographical size and type of legal weaponry"—that same nuclear bomb owner would be fully within his rights to ban knives on his property and require that visitors bring a bazooka. If he established a planned city within the potential blast radius of his bomb and which other space pioneers found attractive enough to settle in with full knowledge of his bomb-displaying habits, then ownership of his bomb would be legal, even with a high population density. This stands regardless of whether Block is correct that mere possession of a nuclear weapon is an imminent threat.

Possession

Fegley and Dominiak (2021, 276):

Another way in which Block and Block's account is divorced from the libertarian theory of private property rights is in their idea that possession of an item, in this case a nuclear weapon, can in itself constitute a violation of libertarian rights. This contention is plainly false. According to libertarianism, all natural rights are negative rights, that is, rights that can be violated only by acts and never by omissions, let alone the status or characteristics of persons. Yet possession is not an act. It is a status or, in other words, a relation between a person, a thing, and all other persons.

Block (2023, 74):

How about possession of stolen property? That is an "act" for which the thief can be justly punished. Or consider kidnapping. The kidnapper first acted when he captured his prisoner. No dispute there. He kidnapped someone. But now that act is over. He is at present merely possessing the previously kidnapped victim in his basement. The implication of FD's grievance is that this should not be considered a crime since it is not an act. But obviously it is. Nor can this point be sustained on the ground of Austrian economics. I now possess an apple. If I sell it, that is certainly an economic act. But suppose instead I just keep it. That, too, is an economic act, given that I had an alternative, that I rejected in favor of maintaining possession.

It is indeed a "statist legal fiction" to arrest people for victimless crimes, such as possession of pornography or prohibited drugs. But this certainly does not apply to merely "possessing" stolen goods or kidnapped people.

Nor is there any "omission" involved here. Rather, there is a blatant commission: the possession of a nuclear weapon, cheek by jowl to other people and their possessions, in a geographical position such that if it explodes, it will end the lives of millions of innocents. I have a right to swing my arms around all I want, except when it will impact your nose. But not only that. I have no right to do so if there is even a danger of such impact. I need not punch you in the nose to be considered a criminal. The threat to do so is fully sufficient.

For one thing, it is beside the point in a legal discussion to refer to the Austrian economics or praxeological notion of action which treats omissions as actions (Mises 1998, 13). Block himself many times argues that for legal

purposes, omissions are not actions. After all, if law adopted the praxeological notion of action, omissions would be actions and therefore the nonaggression principle could be violated by omissions. This in turn would effectively amount to smuggling positive obligations into libertarianism through the back door. As a rough example, since under libertarianism people are held liable for their actions and “action is not only doing but no less omitting to do what possibly could be done” (Mises 1998, 13), then an omission to rescue which results in the death of a drowning person would render the would-be rescuer liable. This, of course, would not do under libertarianism. Accordingly, a sharp distinction between actions and omissions must be drawn and obeyed by libertarians for legal purposes (even if it is irrelevant for Austrian economics). It is therefore a surprising move on Block’s part to refer to the praxeological notion of action. But since juxtaposing Austrian and libertarian notions of action is an interesting and important business in its own right, we again would like to use this opportunity to openly ask Block about his current view on the matter: Does the distinction between omissions and actions matter for libertarianism, or is omitting just as much of an action as doing (as it is for Austrian economics)?

Second, to see the predicament in which Block’s idea of action is caught, consider how his otherwise correct diagnosis that kidnapping is an action degenerates into a muddy idea that possessing the victim is an action as well. It is true that kidnapping as normally performed—locking someone in the basement or snatching him from the street—is an action. It is a bodily movement, caused by the actor’s volition or the actor’s purposeful bodily movement, if you will, which causes another’s deprivation of freedom—again, in contradistinction to omission, which is, roughly speaking, also purposeful but lacks the bodily movement element under its proper description (cf. Moore 1993). But once someone has been kidnapped—locked in the basement or what have you—there is no more kidnapping going on (although, of course, the effects of the kidnapping do go on). There are no further purposeful bodily movements that would cause another’s deprivation of freedom over and over again. No. There is just one action of kidnapping, the effects of which extend in time. Thus, it is highly problematic to say that “the implication of FD’s grievance is that this should not be considered a crime since it is not an act.” Rather, it is the implication of Block’s grievance that—between the time when the victim is locked in the basement (that is, the time of the actual kidnapping) and the time, say, two years later, when he is freed—either countless kidnappings take place at each moment of time when the victim is kept in the basement or a single act of kidnapping, which begins at the time of locking the victim up, continues for two years, although the purposeful bodily movement which caused the deprivation of freedom is long extinguished (note that the latter interpretation would straightaway commit Block to a position which divorces actions from purposeful bodily movements because it implies that the action in question is taking place when the purposeful bodily

movement no longer exists). Moreover, Block's grievance also implies that the perpetrator acts—that is, does the kidnapping—when he is asleep, as he must be many times during the two years when the victim is kept in the basement. But then the implication of Block's grievance is a very distorted idea of action indeed (neither libertarian nor Austrian), according to which one can act while asleep. Furthermore, one can act even while dead: Imagine that a moment after locking the victim in the basement, the perpetrator dies. Since, according to Block's suggestion, the kidnapping is going on as long as the victim is kept in the basement (or there are innumerable kidnappings going on in this time), then the dead perpetrator must have been doing the kidnapping after his own death. Not only that, he must have been doing the kidnapping as late as two years after his own death—that is, at a stage at which he was already well decomposed. So, no. Block's ideas should be vehemently opposed and rejected. Possession is not an action. And just as possessing the kidnapped victim is not an action, so too possessing stolen property, a gun, or a nuclear weapon is not an action. Taking possession of these items is an action, but that is a totally different matter.

Imminent Attack

Fegley and Dominiak (2021, 277):

The act of acquiring possession of a nuclear weapon cannot be a threat against another for one more reason: to wit, it is not in itself an imminent attack on another's person or property, so no self-defense justification is available for a counterattack against such an acquirer. Compare the issue of battered women (one of the most relevant issues as far as the contours of self-defense, especially its imminence condition, are concerned; see Kadish, Schulhofer, and Steiker 2007, 750–74). . . . The fact that a man beat his wife in the past and that he will very likely do it again does not render her killing her sleeping husband a self-defense. There was no imminent or ongoing attack against her person while he was asleep, so no self-defense or counterattack (against a nonexistent attack) is possible.

Block (2023, 75):

First of all, FD fail to mention “property rights” in this context. Second, one can readily question whether or not it is ever justified for a beaten wife to kill her sleeping husband. Suppose that is her only option to keeping from being beaten in the future. It seems eminently reasonable, at least to the libertarian now writing, that this would be eminently justified. Are FD pacifists? It would appear that they are. Pacifism is compatible with libertarianism, but it is by no means required of this philosophy, as FD appear to be suggesting. Third, there is that

small matter of “imminence.” It seems to me, and would seem so to any reasonable man, that there is a clear and present danger of an atom bomb going off while placed in someone’s basement in the middle of a large city. If that is not imminent, I don’t know what is.

We find it unsatisfactory that Block constructs a thought experiment, speculates about our conclusions about this thought experiment, and, based on this speculation, attributes views to us that we do not hold and have not expressed. The only relevant portion of Block’s response is the third part having to do with “imminence,” but here he is merely begging the question by assuming that the possession of a nuclear weapon is a threat rather than proving it.

Self-Defense Justification versus Strict Liability

Fegley and Dominiak (2021, 277):

Even more problematic and divorced from libertarian rights theory is Block and Block’s claim that mistakenly shooting an actor brandishing a rubber knife would be an act of self-defense. For a self-defense justification to be present, the attacker has to forfeit his rights by committing a forbidden act. Unless he forfeits his rights, killing him infringes upon these rights. But for a man to forfeit his rights, he must first commit a forbidden act. Brandishing a rubber knife *in a play* is not an act forbidden by libertarian law (or any law, for that matter). Hence, killing such a man by mistake is univocally an infringement upon his unforfeited rights. Normally, we would, of course, say that if this mistake was reasonable (it was not negligent), killing the actor could be excused from criminal punishment (but is still unjustified). The problem with this response for Block and Block is that they subscribe to the strict liability standard, so for them there are no excuses. Thus, tough luck, the guy who shoots the actor by mistake should be hanged (or whatever punishment Block’s [2004, 129] standard of two eyes for an eye predicts for homicide). By the same token, the mistaken views of the A bomb owner’s neighbors are irrelevant. If they attacked the A bomb owner, they would violate his rights and should be punished accordingly.

Block (2023, 75–76):

Notice, I italicized the words “in a play.” Who is talking about a play? Not BB. These were their actual words:

“Suppose A comes rushing at B carrying a knife in the up-thrust position, while yelling ‘Kill!’ in a blood-curdling manner, whereupon B draws his pistol and shoots A dead. Later, it turns out that A was merely an actor, practicing for a part, and that the knife was made of rubber, as are most stage props of that sort. Is B guilty of murder? Not a bit of it. Rather, B would properly to judged to have done no more the exercise his right of self defense. Even the reasonable man would have so concluded.”

There was no *play* mentioned here. Far from it. Rather, B faced what he reasonably judged to be a homicidal maniac. Of course, if a member of the audience shoots an actor on stage for acting in the same manner, he is at fault, but this is not at all what BB wrote about. In like manner, if there were someone with sufficient lack of consideration to others to harbor a nuclear bomb in his city residence, the outraged neighbors would be more than entitled to treat him very harshly.

The question of whether A is practicing for a play, a movie, or some other production is entirely irrelevant. We specifically allow for the possibility of considering B’s homicidal action reasonable and therefore—according to a legal standard different from Block’s—excusable. Our point is not, as Block appears to think, that B’s actions are unreasonable. Rather, the point is that Block’s holding to a strict liability standard does not allow for excuses based on mistakes, even if they are reasonable.

Karen

Block (2023, 76):

We are next introduced to FD’s fictional character Karen. They argue that if the atom bomb owner’s neighbors have a right to stop him for possessing that weapon, then Karen, too, has a right to stop anyone from being armed in pretty much any other way, for example with a pistol or a rifle.

But there is a gigantic gargantuan, humongous disanalogy between a nuclear weapon and a revolver. Yes, both can kill. But the former necessarily involves all people in the neighborhood of at least several dozens of square miles, the innocent along with the guilty. The latter can be pinpointed, and target only criminals against whom it would be justified to use defensive violence. Karen, if you can’t see the difference between these two very different scenarios, it is difficult to see how you can make a positive contribution to political economy, at least not to this aspect of it.

The burden for Block is to show why his subjective feelings about his neighbor's ownership of an atomic bomb matter while Karen's subjective feelings about her neighbor's rifle do not. Based on Block and Block's (2000, 293) proposed relationship between geographical size and legal weaponry, the suburban Karen occupies an area with a population density in which rifles (and possibly pistols) would rightfully be banned. In this instance, Block and Block's argument and Karen's preferences are in agreement.

To reiterate our point regarding the unjustifiable asymmetric treatment of nuclear weapons and small arms, "Karen believes that the owner of an AR-15 is just as much a potential mass murderer as the owner of a bomb. If she must trust the AR-15 owner to be competent to shoot the rifle only at aggressors without hitting innocent bystanders, why not also the owner of the nuclear bomb, which, after all, requires much less skill to not detonate?" (Fegley and Dominiak 2021, 278). Block and Block consider the mere possession of a nuclear bomb to be a threat; many people consider the mere possession of a firearm likewise to be a threat. Block's response to the latter group is that a firearm can be aimed to avoid harming innocent third parties and that the user of a firearm who did injure third parties would be legally responsible for doing so. Surely, the owner of a firearm who merely possesses it but never uses it cannot be said to harm third parties, unless there is some prior legal agreement to not possess firearms. Why can't mere possession of nuclear weapons be treated in the same way?

CONCLUSION

We appreciate that Block made the effort to respond to our criticisms. While he believes he is in agreement with us that "the real issue . . . is not population density per se but whether the rights of neighboring property owners are violated" (Block 2023, 76), he seems to not appreciate the full implications of certain property rights being acquired by the original homesteader. He writes, "FD extol the virtues of 'proprietary communities.' . . . But suppose one proprietary community wishes to place its atom bomb in its own territory, one foot away from the domain of the other. Then, all of a sudden, this solution is proven nugatory" (Block 2023, 76).¹ Even if we assume Block is correct that the mere possession of a nuclear weapon under conditions of sufficient population density is aggression, what matters is what rules were established by the homesteader.

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¹ Our comment about proprietary communities was made in the following context: "Unless there is some agreement between property owners saying otherwise, the mere possession of a weapon is not a violation of property rights. But there is little reason to treat the absence of mutual understanding or formal agreements on proper conduct with and ownership of weapons as the default setting in a free society. There is ample scope in proprietary communities . . . to reach agreements on the ownership and use of weapons based on the preferences of members. Those with opposing preferences can sort themselves, allowing both gun enthusiasts and Karen to be happy (at least on this margin). As such, a universal theory of gun control need not imply specific universal rules on the ownership and use of weapons, but is just a particular application of libertarian property rights theory" (Fegley and Dominiak 2021, 279).

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