

PROPERTY RIGHTS AND GUN CONTROL: A REPLY TO BLOCK AND BLOCK

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ABSTRACT: Block and Block (2000) argue that according to libertarian law the mere possession of a nuclear weapon on planet Earth is an act of aggression and therefore would rightfully be prohibited. In this reply, it is argued that their geospatial framework for analyzing which weapons may be prohibited is divorced from the standard libertarian view, which emphasizes property rights over scarce goods, including land. Additionally, their argument that third parties' subjective claims of being threatened by the mere possession of weapons determine whether an aggression occurred is untenable.

Block and Block (2000) attempt to provide a universal libertarian theory of weapon control, emphasizing spatial and geographical considerations. They argue that the legality of a particular type of weapon should depend on whether the weapon can be used in self-defense against aggressors without violating the rights of third parties. An implication of their argument is that nuclear weapons cannot be deployed on Earth without violating the rights of innocent third parties and that therefore the mere possession of them is banned under libertarian law.

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In the following sections, Block and Block's (2000) theory of gun control and the potential objections to it that they address are summarized. It is then argued that there are two major problems with their argument. First, despite their claims that it is a libertarian theory, it is completely divorced from property rights. Additionally, their argument that the subjective feelings of third parties determine the extent of aggression implies that the possession of not only nuclear weapons but also a number of conventional weapons would be banned.

BLOCK AND BLOCK'S THEORY OF GUN CONTROL

Block and Block (2000) characterize their contribution to the gun control debate as incorporating geographic considerations that had previously been ignored. "[G]iven the political economic premises of libertarianism, on the basis of which we shall argue, there are virtually no other considerations involved *than* the geographical" (290). They start with the libertarian position that

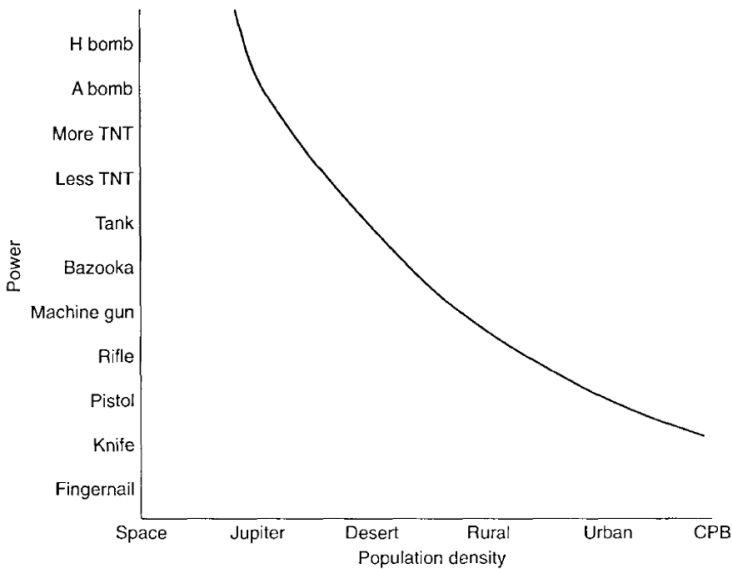
[t]he one proscribed act is the use or threat of force against a person or his legitimately held property. Property can justly be attained, first, through homesteading hitherto unowned property, and, second, through any non-invasive act such as trade or a gift. (290)

They then distinguish between the aggressive act of brandishing a weapon and the peaceful act of carrying one safely holstered. But does that mean that any weapon can be lawfully possessed, as long as one is doing so in a non-threatening manner? At first glance, if the mere possession of a pistol is not a rights violation per se, then neither is a that of variety of weapons, from a rifle to a tank to a nuclear bomb. Block and Block respond to this by saying that the issue hinges on whether it is possible to use the weapon in a purely defensive way, confining the damage to those at whom it is aimed. They conclude that this cannot be the case for a nuclear weapon on Earth.

However, such a conclusion does not apply in any imaginable universe, but is based on what Block and Block (2000) call the "proportionality thesis," which holds that there is an inverse relationship between population density and the power of a weapon that can be considered legitimate. In outer space, ownership of nuclear weapons would be legitimate since their use could be confined to aggressors without harming innocent third parties.

But if the world were so crowded that it resembled a “crowded phone booth” (CPB), they state that “not even a pistol, perhaps not even a knife, can possibly be used without impacting innocent people. If so, then it may be banned just as today we properly prohibit ownership of nukes in cities” (293). They illustrate this relationship in figure 1, reproduced below.

FIGURE 1: THE RELATION BETWEEN GEOGRAPHICAL SIZE AND TYPE OF LEGAL WEAPONRY.



Block and Block (2000, 293) then address the objection, What if a person wishes to possess a hydrogen bomb for its own sake, “for contemplation, or for aesthetic or scientific reasons, or as a museum piece, etc.”? This would not be allowed under libertarian law due to the fact it would be impossible to limit the damage done such that innocent third parties would not be harmed.

But would that not also prohibit nuclear power stations, the damage of which can also not be so limited when they blow up? No, they are legitimate under libertarian law because they are not a weapon, while a hydrogen bomb is. “Were we to ban all appliances whose power, under the worst possible scenario, could not be confined to the appropriate people and their holdings, we would

have to prohibit all aircraft, and laboratories experimenting with deadly viruses, etc.” (Block and Block 2000, 294). The difference resides in the fact that these things are not weapons.

But does this not contradict the social scientific notion of subjectivism, where a physical object that some may consider a weapon can also be considered an art piece, depending on the ends of the actor? “Not at all, for under the libertarian code, to the extent that we accept the subjective evaluations of people regarding reality (as opposed to the ‘reasonable man’ standard), it is the subjective evaluation of the threatened *victim*, not the perpetrator, which is determinative” (Block and Block 2000, 294). Block and Block offer the analogy of someone shooting a knife-wielding attacker in self-defense, only to find out that the attacker was an actor practicing for a part and that the knife was made of rubber. In such a case, the shooter would have exercised his right of self-defense, having subjectively perceived that he was facing mortal danger. Similarly, “were we to take any subjective considerations into account as a matter of libertarian law, it would *not* be those of the contemplator of the A bomb; rather, it would be those of his neighbors, who, presumably, take a very different view of the device” (295).

Block and Block realize that this argument opens up a possible *reductio* regarding airplanes, which sometimes crash and kill innocent third parties. If the victim of a knife attack is allowed to determine the reality of the situation, why do we not allow the potential victims of plane crashes to determine if airplanes are invasive weapons? The answer is that no reasonable person would ever come to any such conclusion.

OBJECTIONS

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 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.

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. This was already clear in Roman times and then was encapsulated in the nineteenth century by Friedrich Karl von Savigny ([1848] 1979, 2) in his classical definition: "[B]y the possession of a thing, we always conceive the condition, in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded." Now, the so-called possession crimes or violations that exist under the American legal system are only convenient legal fictions by which the state prosecution can make its job easier by circumventing difficulties with proving the elements of actual crimes. As pointed out by Michael S. Moore (1993, 20),

[P]ossession crimes are generally defined so that either an act (of acquiring possession) or an omission (to rid oneself of possession) are prerequisites to liability. Thus, it is not the *state* of possessing that is being punished, but either the act of taking possession, or (in the cases where the defendant comes into possession without doing anything) the omission to rid oneself of possession.

Therefore, there is no way in which one can violate a negative right by way of possession or some other status. Moreover, it is

ironic that libertarian authors reach for a statist legal fiction to buttress their position.

Of course, Block and Block could respond that what they really meant was not that the status of possession can constitute a violation of a negative right (since it clearly cannot) but that the act of acquiring possession can. However, although the act of acquiring possession would indeed qualify as a kind of event that can violate negative rights, this fact would not prove that it can violate such rights by constituting a threat (as Block and Block argue). The act of acquiring possession can easily be conducted in a clandestine way (as the state of possessing can hardly be), and then by no means could it constitute a threat (if, for example, I say in the seclusion of my house that I am going to beat Block and Block and no one hears it, then it is not an act of making a threat). Besides, 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.

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.

There is a second problem with Block and Block's (2000, 294) contention that it is the subjective belief of the "threatened *victim*, not the perpetrator, which is determinative." They argue that regardless of any protestations by the owner of a nuclear bomb that it will not be used as a weapon, it *is* a weapon and that it is those who believe they are threatened by it who get to determine whether it is threat. But this argument certainly proves too much, for it would apply to any neighbor, to whom we'll refer as Karen, who considers individual ownership of a semiautomatic rifle, such as an AR-15, a threat. Some people argue that there is no legitimate reason for a civilian neighbor to own certain "threatening" weapons, and therefore an implication of Block and Block's argument is that the people feeling threatened should decide which, if any, weapons can be owned.

Block and Block (2000, 295) contend that the difference between a nuclear power plant meltdown (or a plane crash) and a nuclear bomb is that the latter is a weapon, and this is why the latter and not the former can be banned. But based on their criteria, an AR-15 is clearly a weapon and would not have the same protections that airplanes, which "cannot by any stretch of the imagination be considered as weapons," enjoy. And it will not do to argue that unlike with a nuclear bomb, the use of an AR-15 can be pinpointed to avoid harming innocent third parties (given a certain population density) such that Karen's subjective feelings about the bomb matter but not her feelings about the rifle. 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? Based on the argument presented by Block and Block, this asymmetric treatment cannot be justified.

CONCLUSION

A libertarian theory of gun control must be derived from property rights. If murder park (Block 2002) can be justified based on individuals' free choice to enter a property where intentional homicide is allowed, then so can the ownership of firearms on a freely entered property, even if the number of entering people results in a high density. The real issue, then, is not population density per se but whether the rights of neighboring property owners are violated. 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 in the tradition of MacCallum (1970) and Foldvary (1994), covenant communities à la Hoppe (2001), or individuals living under a system governed by tort liability insurance (Murphy [2002] 2010, 35–37; 2017) 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.

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