



Journal of Intercultural Management and Ethics

JIME

ISSN 2601 - 5749, ISSN-L 2601 - 5749

published by

Center for Socio-Economic Studies and Multiculturalism

Iasi, Romania

www.csesm.org

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REJOINDER TO FEGLEY AND DOMINIAK ON PROPERTY RIGHTS AND GUN CONTROL

Walter E. Block, Ph.D.

Harold E. Wirth Eminent Scholar Endowed Chair and Professor of Economics

Loyola University New Orleans, USA

E-mail: wblock@loyno.edu

Abstract

Fegley and Dominiak (2021) do not have a theory of gun rights, but they are adamant that the positions put forth by Block and Block (2000), and Rothbard (1998), are incorrect. The present paper is an attempt to defend the perspectives put forth on this important issue by the latter two publications, and to repudiate the criticisms of them articulated by the former. To wit, the view defended herein is that ownership and possession of nuclear weapons is a per se rights violation, and ought to be banned.

Key words: Gun control; property rights; geography; libertarianism;

I. Introduction

Rothbard (1998, pp. 190-191) is very clear in his condemnation of nuclear weapons. In his considered opinion:

“It has often been maintained, and especially by conservatives, that the development of the horrendous modern weapons of mass murder (nuclear weapons, rockets, germ warfare, etc.) is only a difference of degree rather than kind from the simpler weapons of an earlier era. Of course, one answer to this is that when the degree is the number of human lives, the difference is a very big one. But a particularly libertarian reply is that while the bow and arrow, and even the rifle, can be pinpointed, if the will be there, against actual criminals, modern nuclear weapons cannot. Here is a crucial difference in kind. Of course, the bow and arrow could be used for aggressive purposes, but it could also be pinpointed to use only against aggressors. Nuclear weapons, even ‘conventional’ aerial bombs, cannot be. These weapons are ipso facto engines of indiscriminate mass destruction. (The only exception would be the extremely rare case where a mass of people who were all criminals inhabited a vast geographical area.) We must, therefore, conclude that the use of nuclear or similar weapons, or the threat thereof, is a crime against humanity for which there can be no justification.

“This is why the old cliché no longer holds that it is not the arms but the will to use them that is significant in judging matters of war and peace. For it is precisely the characteristic of modern weapons that they cannot be used selectively, cannot be used in a libertarian manner. Therefore, their very existence must be condemned, and nuclear disarmament becomes a good to be pursued for its own sake. Indeed, of all the aspects of liberty, such disarmament becomes the highest political good that can be pursued in the modern world. For just as murder is a more heinous crime against another man than larceny, so mass murder—indeed murder so widespread as to threaten human civilization and human survival itself—is the worst crime that any man could possibly commit. And that crime is now all too possible. Or are libertarians going to wax properly indignant about price controls or the income tax, and yet shrug their shoulders at or even positively advocate the ultimate crime of mass murder?

“If nuclear warfare is totally illegitimate even for individuals defending themselves against criminal assault, how much more so is nuclear war...”

How does Block and Block (2000), the target of Fegley and Dominiak (2021) fit into this picture. The essay by the Blocks is an elaboration of Rothbard (1998). They, too, would ban nuclear weapons from the third rock from the sun. These two authors take this position because the explosive power of such weapons cannot be limited to guilty parties, and thus ought to be considered per se offensive, and thus illegal. Given that not only libertarianism but all civilized legal codes allow for defensive, but not offensive violence, such armaments are incompatible with all such political economic philosophies. Block and Block, in contrast, ask whether nukes ought to be banned everywhere. These authors allow for them on other planets, gigantic ones. They explain:

“Suppose that Jupiter were inhabited by only 1000 people, evenly spaced throughout the planet. Here, it would appear reasonable for each of them to own the proverbial atom bomb, and keep it in their basements if they wished. Given the low population density involved this device would no longer constitute a *reductio ad absurdum* of the libertarian position, for the explosive power, even including the fallout, could easily be confined to the enemy, or to the owner of the territory himself, thus not imposing any negative effects on innocent third parties. Since defensive use would thus be possible, there would be no necessary violation of the libertarian postulate.”

I am not one to say that because Rothbard takes a position, it must be true; that it is necessarily not only compatible with libertarianism, but must touch it to its very core. Yes, he is widely and justly known as Mr. Libertarian, but only the pope speaks with infallibility;¹ and, then, he does so only on matters of faith. Rothbard is the founder and leader of the libertarian movement, but he is not its pope.

Thus, even though, and to the degree that, Block and Block (BB) perch on Rothbard’s shoulders in this matter, they cannot hide behind his “skirts.” They are obliged to stand on their own two feet, and withstand criticism launched at their publication.

It is to that task we now turn. But before we begin, let me toss one compliment in the direction of Fegley and Dominiak² (FD): they do a thorough job of articulating the viewpoints taken by BB. There will be no “passing of the ships at night” in this discussion; they aim their criticisms at what BB actually said, not at straw men of their own devising.³

II. The Fegley and Dominiak critique of Block and Block

After their summary of the BB thesis, the first criticism that FD launch against it is this:

“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

¹[https://www.google.com/search?q=the+pope+speaks+%2C+and+then%2C+only+on+matters+of+faith&source=hp&ei=wGQFYsawNbDJ0PEPof2-2AM&iflsig=AHkkrS4AAAAAYgVy0AljURk85tnjAPjEoELBa7N2VsBN&ved=0ahUKEwjGkIDI7PX1AhWwJDQIHgG-](https://www.google.com/search?q=the+pope+speaks+%2C+and+then%2C+only+on+matters+of+faith&source=hp&ei=wGQFYsawNbDJ0PEPof2-2AM&iflsig=AHkkrS4AAAAAYgVy0AljURk85tnjAPjEoELBa7N2VsBN&ved=0ahUKEwjGkIDI7PX1AhWwJDQIHgG-DzsQ4dUDCAk&uact=5&oq=the+pope+speaks+%2C+and+then%2C+only+on+matters+of+faith&gs_lcp=Cgdnd3Mtd2l6EAM6DggAEI8BEOoCEIwDEOUCULYFWKokYPM3aAFwAHgAgAHYAYgBlgKSAQUxLjAuMZgBAKABAqABAbABCg&sclient=gws-wiz)

[DzsQ4dUDCAk&uact=5&oq=the+pope+speaks+%2C+and+then%2C+only+on+matters+of+faith&gs_lcp=Cgdnd3Mtd2l6EAM6DggAEI8BEOoCEIwDEOUCULYFWKokYPM3aAFwAHgAgAHYAYgBlgKSAQUxLjAuMZgBAKABAqABAbABCg&sclient=gws-wiz](https://www.google.com/search?q=the+pope+speaks+%2C+and+then%2C+only+on+matters+of+faith&gs_lcp=Cgdnd3Mtd2l6EAM6DggAEI8BEOoCEIwDEOUCULYFWKokYPM3aAFwAHgAgAHYAYgBlgKSAQUxLjAuMZgBAKABAqABAbABCg&sclient=gws-wiz)

² All mention of these authors shall be to this one article of theirs, unless otherwise specified.

³ One would have thought FD deserve no special appreciation for the accuracy at which they set up their targets. And, in an ideal world, this would be true. But we do not live in that world. Thus, I do not at all consider this comment “condescending” as might be claimed; I consider this to be a strong compliment.

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.”

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. Wherever the one appears, the other is not sure to follow: it is already there! 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. Whenever concepts such as “threats,” or “rights violations” or “danger” are mentioned, and they appear practically in every paragraph, private property rights are at least implicitly involved. What kind of private property rights? Not so much physical property; rather human lives: our private property rights in our own selves, in our own persons. After all, what can it be thought other than the great impetus in opposing the possession of nuclear bombs in cities is that they will blow up and kill the entire citizenry, that is, destroy the private property rights of millions of people in their own bodies, in their own selves, in addition to physical property, a far lesser concern.

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. If they are placed in the middle of their holdings, and explode, other people will be so far removed from such a disaster as to suffer no *ex ante* threat, nor any *ex post* rights violations. This is but a logical implication of the Rothbard doctrine on the matter mentioned above. However, BB anticipate this FD objection as follows:

“Suppose that Jupiter were inhabited by only 1000 people, evenly spaced throughout the planet. Here, it would appear reasonable for each of them to own the proverbial atom bomb, and keep it in their basements if they wished. Given the low population density involved this device would no longer constitute a *reductio ad absurdum* of the libertarian position, for the explosive power, even including the fallout, could easily be confined to the enemy, or to the owner of the territory himself, thus not imposing any negative effects on innocent third parties.”

Next in the batting order is this FD criticism:

“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.”

No. I have already answered the density issue with the Jupiter example. Density is very important. The closer are people located to one another, the more threats, danger, they impose upon each other. The libertarian NAP principle does not only incorporate actual violence. Threats, too, are proscribed.

Perhaps FD are too young to appreciate what the “phone booth” example is all about.⁴ This amenity measures about 3 feet by 3 feet by 7 feet. The “game” in my generation was to see how many people could be stuffed into it at one time. Bodies would be packed in as sardines in cans. 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 scrunched up against.

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).

In third place in the batting order is this FD complaint against BB:

“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.”

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.⁵ 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.

In the cleanup batters’ box of criticisms offered by FD at BB is this:

“... 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.... The fact that a man beat his wife in the past and that he will very likely do it again does not render her

⁴ Their generation might have been involved in body surfing instead. See how “with it” I am?

⁵ A human action in the sense of Mises (1949).

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.”

First of all, FD fail to mention “property rights” in this context.⁶ 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.⁷ 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. When it goes off, there would not even be time for anyone to yell “thar she blows.”⁸

FD are not finished yet, not by a long shot. Their next foray is this (emphasis added):

“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, p.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.”

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.⁹ 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

⁶ Hey, if FD could criticize BB for not mentioning this term where it is not needed, where it is clearly implicitly, I can return the favor vis a vis them.

⁷ Suppose that this wife beater regularly molests her young children. Then would it be acceptable to put paid to him while he is asleep. I cannot think of a single solitary reason why this would be unjustified.

⁸ The question is, would a competent court issue an injunction against the possessor of the atom bomb in the big city. It is difficult to see how it would not.

⁹ I shall have to somewhat modify my previous compliment to them for accuracy in presenting the view of BB.

a nuclear bomb in his city residence, the outraged neighbors would be more than entitled to treat him very harshly.¹⁰

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,¹¹ it is difficult to see how you can make a positive contribution to political economy, at least not to this aspect of it.

But FD are not without a riposte to this, and a powerful one. They rely upon the fact that it is the subjective feelings of the atom bomb owners' neighbors, not him, and those of the recipient of the knife attack, that count, not the feelings of the attacker, that count for BB. And thus they write:

"Karen believes that 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."

All I can say in reply is that Karen ought to get a life. She cannot discern the wide philosophical gap between a rifle and an atom bomb. This woman would not be welcome in my house.

III. Conclusion

In this section of their paper, FD assert that: "The real issue, then, is not population density per se but whether the rights of neighboring property owners are violated." Yes, yes, of course, this is correct; rights, not density per se. However, population density is not entirely irrelevant. The lower it is, the further away are neighbors, the higher it is, the closer they are located. In the telephone booth, we are all perched in our neighbors' armpits; on Jupiter, the exact opposite prevails. Rights violations, then, are affected by density even though they are of course not synonyms of each other.

FD extol the virtues of "proprietary communities." That is fine, as it is within a given nightclub, mentioned above. 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.

FD make an interesting and important contribution to libertarian theory, but it cannot be truly said that they lay a glove on the thesis of BB, nor of Rothbard.

¹⁰ There is a real world occurrence loosely related to the textual discussion at this point. The movie actor Alec Baldwin shot a member of the crew (New York Times, 2023). Let us stipulate that this was done accidentally, and that he, not the armorer in charge of the props, was solely responsible for this act. Let us also posit a Nozickian (1974) type of magic machine that could transfer the life out of Baldwin and into the body of life of Baldwin's victim, Halyna Hutchins, cinematographer for this movie. Would it be justified to compel the former to give up his life so the that latter could continue to live? It seems difficult to reject this conclusion. There are now two people, both innocent of any mens rea. Yet, accident or no accident on Baldwin's part, justice would imply that she have the one life force available to the two of them, not he.

¹¹ Joke: do you know the difference between a bathroom and a living room? No? Well, then, don't come to my house.

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