EVICTIONISM IS LIBERTARIAN; DEPARTURISM IS NOT: CRITICAL COMMENT ON PARR

WALTER E. BLOCK*

1. Introduction

I have been attempting to promote the evictionist theory since 1977, as a libertarian response to the debate between the pro choice and the pro life viewpoints.[1] All told, so far, I have published ten separate articles on this vitally important issue (Block, 1977, 1978, 2001, 2004, 2008, 2010A, 2010B, 2010C, 2011; Block and Whitehead, 2005). For a long time I was a sole voice crying out in the wilderness on this issue; there were no responses forthcoming. Then, happily, Wisniewski (2010A, 2010B, 2011) did me the honor of publicly responding to my publications on this subject. I am now delighted to welcome Parr (2011) to this debating circle.[2]

*Walter E. Block (www.WalterBlock.com; wblock@loyno.edu) is Harold E. Wirth Eminent Scholar Endowed Chair and Prof. of Economics, College of Business, Loyola University New Orleans and a Senior Fellow of the Ludwig von Mises Institute.

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[1] My school newspaper, *The Maroon*, ran a column on this debate in their 11/18/11 issue (www.loyolamaroon.com/news/some-students-unhappy-with-one-voice-1.2673019). Needless to say, the author of this article offered two and only two choices: "I am: pro choice; pro life"; they of course missed both evictionism and departurism.

[2] I thank him for his very kind assessment of my contributions to libertarian theory in his acknowledgements section; and, also, for his support of my views vis a vis those of Wisniewski. I am grateful to Parr for reading me so carefully and accurately. All too often, critics put words in the mouths of their targets. Not so, not at all, in this case. Here, Parr and I have achieved real disagreement. We do not pass each other as ships in the might. At least, he does not misunderstand me. I hope to return his compliment. However, I cannot agree with Parr's claim that "the only matters of importance are whether or not the trespasser on topic willfully intended to trespass and whether or not he intends to put an end to it." Surely, comatose people, or fetuses for that matter, can be (non-criminal) trespassers, if they occupy other people's property without the permission of the latter. They would not be criminals, as they lack *mens rea* (unless they first trespassed, and then

Why is it so vitally important that evictionism be popularized, placed on the public menu, so to speak, in this dialogue? There are several reasons. One, there is a chance, albeit a small one, that libertarianism itself might break out into open discourse if this occurs. In evictionism, we libertarians have a possible opening to the discussion on this topic at large. This would be all to the good, since our philosophy of non aggression and private property rights is all but ignored amongst the general public.[3] Two, and here I reveal my pro life sentiments, evictionism is that last best chance to save millions of innocent babies from slaughter. As I write, the pro choice forces are in the ascendency, and nothing seems to be able to break their overwhelming power. Well, perhaps, evictionism can accomplish this crucial task. Why are libertarians greatly in debt to Wisniewski and Parr? Because if we cannot even agree as to the justice and righteousness of evictionism, there is little hope of it seeping out into general scrutiny, and even less of its acceptance there.

So, the present paper is devoted to pulverizing the departurist theory, a competitor with evictionism for the libertarian mantle. It is my fervent hope that if a brilliant, clever and creative libertarian such as Parr can be brought into conformity with evictionism, there is just that much more hope for its approval amongst the general public.

The purpose of section II of this paper is to explore departurism. Section III is devoted to an analysis of the objections to his perspective with which Parr counters evictionism. Section IV concludes.

II. Departurism

Departurism is the theory that since the fetus is an innocent party lacking mens rea, he cannot be a criminal. As such, treating him in the "gentlest manner possible," something I support,[4] precludes evicting him when to do so would involve his demise. Let Parr (2011) put this in his own words (footnote omitted):

> The departurist and evictionist views are in agreement that in the event of an unwanted pregnancy, a fetus becomes to its mother what a trespasser is to the owner of the property in question. However, where evictionism holds that it is justifiable for the

took a sleeping pill), but occupying someone else's territory without permission cannot be considered totally innocent nor rightful either.

[3] One need only witness the attempts of the mainstream media to do just that with regard to the Ron Paul campaign for presidency of the U.S. *circa* 2011 to see the overwhelming truth of this statement.

[4] Provided, only, that the rights of the property owner to evict trespassers is upheld.

> mother to evict this fetus from her property (that is, to abort it), departurism—on the grounds of the axiom of gentleness—holds that it is not. The departurist position affirms that all unwanted fetuses are morally innocent of their gestation-entailed trespass and that, as such, these fetuses, in their removal from the premises of the property owner, are to be treated in 'the least harmful manner possible' (Block, 2011, p. 3). Departurism further affirms that such a manner is applicable to any unwanted fetus because the innately certain and temporary duration of its trespass is an attestation that private property rights are being respected (that is, it is an indication that, in the unwanted fetus' departure from the property owner's premises [the process of gestation], the act of trespass is in the act of being stopped). There exists every reason, then, for departurism to affirm that the fetus' continued and completed departure is the gentlest manner possible to affect its removal from the property owner's premises or, at least, that such a manner is more gentle than the property owner's lethal eviction of him."

Further, Parr (2011, footnote omitted) explains:

> When there exists, like there does in an unwanted pregnancy, a situation in which a non-criminal trespasser is ceasing his property-directed aggression (that is, when he is in the actof stopping his trespass), departurism contends that libertarian law ought to require that the owner of the property in question allow for this trespasser to complete the process of his departure from the premises just in case death is the necessary result of his eviction. Because such a case is relevantly similar to the case of a trespass within the womb (and because allowing for such a trespasser to depart in this situation is the gentlest manner possible consistent with stopping the crime) the same course of action ought to be endorsed by libertarian legal theory in either case."

Here, we run into trouble. For in his own footnote 2, Parr (2011) blatantly contradicts the foregoing. He states there: "The point is, the fetus is not purposefully committing a trespass. It is unable to engage in any sort of human action at this stage of its development." Of course, the fetus is not *purposefully* trespassing. The human being, at this stage of development, cannot *purposefully* act at all. But if this infant person cannot *commit* a trespass, he cannot *act* so as to *stop* his trespass either. He cannot engage in human action (Mises, 1998) at all. So Parr's statement, immediately above, "that is, when he is in the *act*[5] of stopping his trespass" *cannot* be true, and, by that author's own admission. But this is a *crucial* element of departurism. His

[5] I have added emphasis to this word.

entire thesis stands or falls on this claim.[6] Parr's defense of the fetus is that it is continually *acting* so as to depart. But it is doing no such thing and my debating partner even concedes this. Yet, it is on the basis of this supposed *act*, that the mother is supposedly precluded from evicting him.

Nor can I accept Parr's claim that "allowing for such a trespasser to depart in this situation is the gentlest manner possible consistent with stopping the crime (sic)."[7] Allowing the fetus nine months of trespass is hardly upholding the private property rights of the mother; it is not all *stopping* the tort.

A man is raping a woman. The police come upon this horrid scene and order the rapist to cease and desist, *immediately,* of course. But the rapist is a departurist. He tells the cop, "Hey, I'm in the *process* of stopping my act of coercive intercourse. Just give me a little time to finish up. How about 9 months? Too long? Ok, 9 weeks? No? 9 hours? Still too long? Tell you what," says the rapist: "I'll make you a deal: 9 more minutes? Can't be more reasonable than that, can I?" The man in blue replies: "Not even 9 seconds. Now!"

III. Objections[8]

1. Gentleness

There is nothing "gentle" about libertarianism. Indeed, in its punishment theory, it is very, very Draconian.[9] Nor does Rothbard (1973,

[6] Well, falls. There are other necessary elements of it that are fallacious too, see below.

[7] I think Parr misspeaks when he characterizes this unwanted occupancy of the fetus in the womb as a "crime."

[8] This section of Parr's paper is perhaps the most interesting and important. It is here that the rubber meets the road. However, I do wish this author were a bit less apologetic about criticizing me: "it may seem, at times, as though this paper is engaging evictionism in a manner decidedly adversarial." That is entirely appropriate! If evictionism is to emerge unscathed from the narrow libertarian scholarly community and move into the world at large, it is important that it be subjected to the most scathing criticisms possible. Mill (1859) would have had it no other way. In the event, however, Parr does not at all pull his "punches," for which I am very grateful. If I can counter the clever and creative roadblocks he places in front of evictionism, that view will be even the more strengthened.

[9] Kinsella, 1996, 1997; Olson, 1979; Rothbard, 1977, 1998; Whitehead and Block, 2003; In the view of Rothbard (1998, p. 88, ft. 6): "It should be evident that our theory of proportional punishment—that people may be punished by losing their rights to the extent that they have invaded the rights of others—is frankly a *retributive*

1998) in his foundational documents about this theory, wax eloquent about "gentleness." From whence, then, does it spring? I contend that it stems from the non aggression principle (NAP): in countering a rights violation, we want to ensure that we stop just on this side of violating the rights of the rights violator. So, if A sees B stepping on his lawn, as a first step A may not blow B away with a bazooka. Rather, A must notify B of his trespass, and if B immediately ceases and desists, perhaps even with an apology thrown in, that is the end of the matter. It is only if B turns surly, hostile and aggressive, and refuses to budge, that A may properly escalate. Not, immediately, to the bazooka stage, but a threat to call the police would not be considered at all inappropriate; even a physical push would not be untoward. If B at this point initiates physical aggression against A, say by pushing him back, throwing a punch at him, or pulling a gun or knife on him, then all bets are off, and A may appropriately escalate the violence sufficiently to protect himself and his property from invasion. That is the sum and sole element of "gentleness" in libertarianism. Perhaps in my previous writings on this matter I should have been more careful to delineate the limitations of this concept, for Parr picks up this particular football and runs all over the place with it. He carries it to such an extreme,[10] that he concludes that "…the gentlest manner possible for the property owner to affect his removal is not to lethally evict him, but to allow for him to remove himself from the premises." By this Parr means that the mother must be forced to tolerate the existence of the fetus on her property, the womb, *for the entire nine months*. Thus, while departurism might differ from the extreme pro life position in its theory, in the law it espouses there is no difference between the two of them whatsoever.

Where will more babies be saved, under departurism or evictionism? Clearly the latter, because the former is, in effect, the system we have right now. And, there are precious few infants who survive under present institutional arrangements. So, if Parr is serious about departurism with its fully justified emphasis on "gentleness," he should, if only as a practical matter, give up his own thesis and embrace evictionism. In that way, at least *some* babies would be saved right now (those near the end of the gestation period), and more in future, as medical technology improves, and the viability

theory of punishment, a 'tooth (or two teeth) for a tooth' theory. Retribution is in bad repute among philosophers, who generally dismiss the concept quickly as 'primitive' or 'barbaric' and then race on to a discussion of the two other major theories of punishment: deterrence and rehabilitation. But simply to dismiss a concept as 'barbaric' can hardly suffice; after all, it is possible that in this case, the 'barbarians' hit on a concept that was superior to the more modern creeds."

[10] They don't call me Walter (Moderate) Block for nothing.

of the infant outside of the womb comes at an earlier and earlier stage of development.

How does departurism theory handle the cases of rape? There would be no exceptions, since the gentlest manner possible, according to departurism, would be to compel the rape victim to house the trespasser for the full nine months. Where is the gentleness for the rape victim?

How does departurism address the issue of an eviction when the mother's life is at stake? Again, Parr's theory if I understand it correctly would mandate that the mother die (or be kept alive brain dead on a life support system) so that the baby may live, and then the mother, who could otherwise have survived unhurt, would be allowed to pass away. This is gentleness to a fault for the fetus, but none at all for the mother. Why? Is it not the mother's property we are discussing? Does not libertarianism place great weight on private property rights? Evictionism is thus compatible with the freedom philosophy in a way that departurism is not, in terms of adherence to the doctrine of private property rights. Evictionism, not departurism, is compatible with saving the life of the mother under these circumstances.

2. Positive obligations

Positive obligations are anathema to libertarianism. As supporters of laissez faire capitalism, we support only the doctrine of negative obligations: people are obligated, *only*, to refrain from initiating, or threatening, physical violence against innocent people or their property. They are not at all legally obliged to help others, to be a Good Samarian. Once we open up the floodgates of positive obligations, there is no logical stopping place. We will be logically obligated to accept a right to food, clothing, shelter, medical care, etc. Welfare "rights" cannot be far behind.

Parr is a compromiser on this matter. He asks for an "exemption" from the rejection of positive obligations in behalf of his departurist theory. He thus removes himself from libertarian theory on this issue. He pleads that evictionism, too, is subject to this difficulty, so that on the basis of that one criterion, there is nothing to choose between the two positions, but he is in error here.

In my view of evictionism, there are no positive obligations, none whatever. But wait; part and parcel of this theory is that the mother who wants to evict a fetus[11] must *notify* an appropriate agency, such as new adoptive parents, a church, a monastery, an orphanage, Craig's List, etc. On

[11] Or the parent who no longer wants to care for and feed his child.

the basis of this, Parr asserts: "The evictionist obligation, however narrow and limited, *is* a positive one."

Not so, not so, not so a thousand times. As I have taken great pains to demonstrate, this obligation to notify is *not* a positive obligation. Rather, it is part and parcel of the homesteading requirement that one not be a forestaller. Let me briefly explain.[12] One of the key elements of libertarian homesteading theory[13] is that no square inch of terrain remain unowned, as long as people wish to claim it. To wit, the pattern of settlement *must* be such that no one is allowed to lay claim to land in a bagel or donut format, for to do so would leave the inner bit of land (the hole in the bagel) unowned, but under the control of the forestalling homesteader. Would-be settlers on this land would be precluded from entering, since the forestaller owns all the surrounding land.[14] This is not cricket. This pattern of land ownership is illicit, according to libertarian theory.[15] It would not be a *positive obligation* on the part of the forestaller to allow others access to, and egress from, this inner lying land, so that they could homestead it. Rather, this is part and parcel of what proper homesteading *means,* at least in the libertarian version thereof.

It is the same with children, babies and fetuses. The exact same analysis holds. Of course, one may not own fetuses, infants, children. But, it is permissible to own the rights to be their guardian. How is this attained? By giving birth to them, or adopting them, and then caring for them. But, suppose a person comes to own these guardianship rights, legitimately, but then no longer wants to continue to feed and clothe her baby. May she hide this child from others, who would be glad to be its guardian? No more than may anyone homestead land in the bagel format. For, to do so would be to forestall others from adopting that child. Just as nature abhors a vacuum, and land homesteading disallows the donut format, so, to, does libertarian theory reject the person who kills a fetus, when there are others who would gladly have adopted it. It is no more a positive obligation to allow others into the

[12] For more on this, see: Block, 2001, 2003, 2004, 2008, 2010A, 2010B, forthcoming; Block and Whitehead, 2005; Epstein vs Block, 2005

[13] Block, 1990, 2002A, 2002B; Block and Yeatts, 1999-2000; Block vs Epstein, 2005; Bylund, 2005; Hoppe, 1993, 2011; Kinsella, 2003, 2006; Locke, 1948; Paul, 1987; Rothbard, 1973, 32; Rozeff, 2005

[14] We assume it is impossible to bridge over, or tunnel under (Block and Block, 1996) the forestallers donut land holdings.

[15] Suppose someone homesteaded the land on the periphery of the United States, one mile deep, and wouldn't allow anyone else access to the interior ("fly over country"). Would this be a legitimate pattern of land settlement? No. Because the owner of the mile "bagel" all around our country would actually control access to the interior, without having so much as set a foot in this area, let alone homesteaded it. He would be guilty of forestalling.

hole in the bagel than it is to notify the orphanage, church, monastery, etc., of an no longer-wanted infant, whether pre or post birth. Parr concedes that departurism requires an exemption from the positive obligation prohibition of libertarianism; yes. But evictionism needs no such thing. In that authors view, "The evictionist obligation, however narrow and limited, *is* a positive one." 'Tisn't.

But Parr is not without a fall-back position: "Where departurism affirms that the gentlest manner possible requires that the property owner withhold eviction for the duration of departure, evictionism affirms that it requires him to do likewise for the duration of notification."

However, there really is no such thing as a "duration of notification." Notification, in the modern era, takes as long as you can warm up your computer, and type in a few words. In the old days, and nowadays too, the "duration" was as long as it took you to go to the local orphanage, or church, or to type up something for Craig's List. There is in law such a thing as de minimus: the law does not take into account trifles. The argument for departurism, here, but not that for evictionism, is impinging on this doctrine of de minimus. That is to say, the "duration of notification" is so trifling that the law need take no note of it. And, since libertarianism is but a theory of just law, it, too, can ignore this objection of Parr's.

My critic tries again: "The only difference between the departurist and evictionist requirements is a theoretical one: the amount of time entailed in the fulfillment of each one."

No, the amount of time is crucial. Nine months is *very* different that nine minutes, or nine seconds. Yes, of course, there is a continuum (Block and Barnett, 2008) between these short and long time periods. But that does not mean we cannot distinguish between them. When a landlord wants to evict a tenant for non-payment of rent, the just court will not compel the person in arrears to vacate the premises *instantaneously*; that would be impossible to comply with, in any case. On the other hand, the reasonable judge will not allow non payers to occupy the premises for anything like nine months. This is not merely a "theoretical" distinction. "Justice postponed is justice denied," is an insight deadly to the departurist thesis.

Claims Parr: "The evictionist, here, is in a conundrum. He cannot claim that the duration of notification is any less onerous a violation of the property owner's eviction rights than is the duration of departure because he is committed to holding duration as something of an irrelevancy." Here is a joke that is apropos to this division between the two of us. "Do you know the difference between a living room and a bathroom?" "No?" "Well, then, don't come to my house." Extrapolating, I would say that if you can't tell the

difference between nine months on the one hand, and nine seconds or minutes on the other, then don't get into political economics. The "duration" relied upon by Parr is the full nine months of gestation. The "duration" required for notification is somewhere between nine seconds and nine minutes. To put these two words in the same sentence is to do violence to the truth.[16]

In the view of Parr: "Extrapolating from his views on duration, if the evictionist is to be logically consistent, he must say that this imposition of positive rights would still apply if the mother was forced to house this trespasser against her will not for nine months, but for *any duration*, including whatever amount of time it takes to fulfill the evictionist obligation to notify."

There are really two separate issues under discussion here, and we do well to distinguish between them. On the one hand, there is duration. And, it is my contention that the difference between nine months and a few minutes is so great as to consist of a difference in kind, not merely degree. On the other hand, there is the question of positive rights. My claim here is that while departurism violates the libertarian prohibition of positive rights, as does any "exemption" from this law, evictionism is not vulnerable to this charge, based on the fact that the parent who wishes to give up responsibility without notification is guilty of forestalling, an egregious violation of the libertarian doctrine of homesteading, and thus a crime.

3. Duration

In this section of his paper, Parr launches a very clever *reductio* at the evictionist theory (footnotes deleted):

> X and Y are discussing the topic of abortion in the penthouse of X's nine-story manse. The conversation turns ugly. It is at this point that X declares Y unwanted; Y, in this declaration, becomes a trespasser and so resigns to comply with X's request to vacate the premises. To square himself with the evictionist obligation to notify, X contacts another to inform him of his intention to evict Y. Y is in the act of leaving the manse and it will take him nine minutes to do so.

[16] It may take a *de minimus* amount of time to notify the world that there is an unwanted fetus or infant, but how long would the donor have to wait before getting rid of the unwanted child. Not too long. In the libertarian society, surely, the pro life forces would set up an institution that would come pick up unwanted post birth children within the hour (in cities; helicopter trips to the boonies might take a bit more time). As for pre birth infants, this organization, I'd bet my bottom dollar, would have a doctor to the scene of the potential crime long before an abortionist doctor could get there. That means that the mother who wants to evict a fetus would not have to wait *at all*.

> Because Y's nine minute departure could be turned to ninety or even nine *seconds*, without any change in principle whatsoever, X decides that he is justified in not bearing the burden of Y's aggression against his property for one instant longer. X wants Y gone now, and so he resolves to toss him out of the ninth-story window.

On the basis of this example, Parr concludes that evictionism is open to the following charge:

> Such a libertarianism, if it did not altogether destroy the civil society, would most certainly destroy the host-guest relationship. Guests everywhere, ever suspicious of the motivations of their hosts, would be declining invitations to all events in which their host-requested removal from the premises might entail their deaths.

But this criticism misses its mark. There is, after all, such a thing as implicit contracts. When A orders a cup of coffee at a restaurant B and drinks it down without looking at the menu, he would be properly aggrieved if he were presented with a bill for one million dollars. There is an implicit contract between A and B such that if there is anything unusual about the commercial interaction (price, there is arsenic in the coffee, etc.) the buyer must be *notified* of this. Otherwise, there is no meeting of the minds, an important consideration for legitimate contracts. Similarly, there are implicit contracts between hosts and guest, whether the premises are a ninth floor penthouse, or, to use the more usual examples that have been employed against evictionism, an air plane at 30,000 feet, or a boat miles from shore. It is thus a bit of hyperbole to assert that under evictionism: "libertarianism is transformed into an ideology of corpses."

Why cannot the implicit contract phenomenon be used *against* evictionism? Why can it not be argued that there is an implicit contract between mother and baby that she carry it, fully, to term? This is because a necessary condition for a contract, implicit or explicit, is that there be *two* contracting parties. But, in the case of sexual intercourse, if we ignore the father,[17] there are *not two* different parties, the mother and the fetus. Rather, at

[17] Suppose there is a "host-mother" contract with the father of the baby and the pregnant woman. The former pays the latter to "host" the fetus for the full nine months, plus, refrain from smoking, etc. Then and only then would the pro life or departurist policy prescription be compatible with libertarianism: the mother would indeed be precluded from evicting or worse, aborting, the fetus due to this freely taken on contractual obligation.

the time of ejaculation, there is only *one* person alive, the mother. The infant[18] does not come into being[19] until later.[20]

IV. Conclusion

Parr concludes: "departurism should find its way into libertarian canon." I think not. I am grateful to Parr for responding to my own views on this issue; for going a long way in the direction of evictionism, with his departurism. For clarifying, in my own mind, just what evictionism is, and what it implies. But I cannot bring myself to believe that he has succeeded in overturning evictionism as *the* libertarian view of the pro life, pro choice controversy, and substituting departurism in its place.

If we libertarians cannot agree on evictionism, how can we convince the general public? Departurism is a recipe for support of the status quo. If not in theory, then at least in practice, there is not a dime's worth of difference between the public policy implications of pro life and departurism. From a pragmatic point of view, the pro life forces have lost. Given this, departurism has *already* been rejected by the powers that be. But evictionism not only has never been *tried,* it has never been so much as *heard* of by the population. If we want to save the next generation of very young (pre birth) human beings, we must embrace and promote evictionism, not departurism. And the same holds for the criterion of consistency with libertarianism; evictionism passes muster on this basis, departurism does not.

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[18] Both Parr and I agree that the human being is created at the time the sperm inserts itself into the egg.

[19] We abstract here from the fact that at inception, the fetus is too young to be a partner in a contract in any case.

[20] How much later? It matters not. The point is, that at the moment of completion of sexual intercourse, there is only *one* contractual "partner" to the commercial interaction who is in existence.

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