RESPONSE TO WISNIEWSKI ON ABORTION, ROUND THREE

WALTER E. BLOCK*

1. Introduction

I have said this before (Block, 2011), but I will risk saying it once again: I am extremely grateful to Wisniewski[1] for engaging with me in this dialogue between us over the legitimacy of evictionism as a third alternative to the pro-choice and pro-life perspectives. And this for several reasons. First, this is a difficult philosophical problem. The more minds that focus on this issue the sooner we will solve this vexing challenge and the more deeply and thoroughly too. So far, although I have been writing about this issue since 1977, Wisniewski is the only scholar to have formally responded to my analysis. Second, this is an *important* issue, despite the fact that for all intents and purposes the pro-choice position has won the intellectual, moral and political battle, at least in the U.S. and Western Europe. Abortion is a leading cause of death of human beings[2] and yet, in the view of the leading lights of

*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. I wish to thank Aaron White for splendid research assistance on this article. He of course is not responsible for any errors herein.

CITE THIS ARTICLE AS: Walter E. Block, "Response to Wisniewski on Abortion, Round Three," *Libertarian Papers* 3, 37 (2011). ONLINE AT: libertarianpapers.org.

[1] I wish congratulate Jakub Wisniewski on winning first prize in the prestigious Mises University oral examination contest of 2011 (the Douglas E. French Prize), after coming in at second place in 2010 (**George and Joele Eddy Prize**). As it happens I was one of the officiating judges of his interview, and asked him several very probing questions, on Austrian economics, not abortion. I can attest that his award was very well deserved based on a *magnificent* performance. See on this: http://mises.org/about/3323

[2] So much off the radar is this particular cause of death, abortion, that it is not even listed here: www.cdc.gov/nchs/fastats/lcod.htm; www.the-eggman.com/writings/death_stats.html; www.worldlifeexpectancy.com/usa/top-15-causes-of-death; http://health.howstuffworks.com/diseases-conditions/death-dying/15-most-common-causes-of-death-in-the-united-states.htm. Indeed, it is difficult to find data on the number of infants killed, and murdered, due to abortion, whether on an absolute

our society, this is a settled issue.[3] Third, a personal appreciation to Wisniewski. I am not at all sure I have "nailed" this issue. I have claimed that evictionism is the only legitimate way to solve the abortion crisis; that both pro-life and pro-choice positions are erroneous; that evictionism should be the law of the land; that none of the objections leveled against it are in any way valid. If I had continued to write in a vacuum, with no published response whatever, I never could be at all sure that this viewpoint is the only correct one.[4] Thanks to Wisniewski, and only to him at least so far, I am becoming more and more confident that evictionism is the only stance fully compatible with libertarianism.

With the introduction, I now respond to Wisniewski (2011). In section II I address his views on the "mysterious force." Section III is given over his airplane ride. The burden of section IV is to discuss pushing the saved person into the lake. In section V we discuss morality, in VI implicit contracts in VII suttee and in VIII, existence and non existence. Section IX is the conclusion.

II. The mysterious force

Wisniewski (2011) begins his critique of Block (2010, 2011) with a brilliant and creative scenario:

> X, while fleeing a gang of thugs, inadvertently wanders onto Y's property. As it happens, a mysterious force petrifies him there and makes him absolutely immobile and immovable (unless killed) for the period of 9 months. As I read him, if Block were Y, he would find himself justified in saying "tough luck!" and plugging the wretch. I, on the other hand, believe that whilst X would certainly be liable for paying some form of compensation to Y for trespassing on the latter's property, Y could not possibly kill the unfortunate trespasser without grossly violating the element of proportionality built into the Non Aggression Principle (NAP). What he could do instead, if he were to find the 9 months presence of X on his premises absolutely insufferable, would be to collect a requisite amount of money from his insurance company and rent another property of comparable market value for that period.

basis, or relative to other causes. See on this: www.cdc.gov/mmwr/preview/mmwrhtml/ss5511a1.htm; www.who.int/features/qa/12/en/index.html; http://141.164.133.3/exchweb/bin/redir.asp?URL=www.cdc.gov/nchs/fastats/lcod.htm; www.who.int/mediacentre/factsheets/fs310/en/index.html

[3] Akin, presumably, to the fact that global warming, or cooling, or "change" is a settled issue amongst left wing environmentalists.

[4] Mill (1859) forcibly makes the point that criticism is vital for arriving at truth.

I regard this as an important challenge to the evictionist philosophy. However, I think it is one that this viewpoint can withstand.

First, I reiterate: there is certainly "proportionality built into" libertarian punishment theory, but it is not at all "built into" the NAP. That is, the punishment must be proportional to the crime, but there is no such requirement that rests on the victim for his self-defense *during* the commission of the crime. If there were, then there would be no possible justification, whatsoever, for killing X. However, suppose that X, unfortunately for him, blunders right into a "pure Austrian snow tree" (Demsetz, 1979). As a result, unless X is forcibly removed from these premises, 50 innocent people will die. These individuals depend upon the "pure Austrian snow tree" (PAST) for their very lives, and X is inadvertently bollixing up these works. Thus, in order to save this mass of people, X will perish, since he is "unmovable unless killed."[5] *Then* is it so clear that we must preserve the life of X, even at the cost of 50 other lives? No it is not, I contend. But if this is the case, then Wisniewski's argument for NAP proportionality goes by the boards. We have now provided at least one case where it would be justified to kill X, even though this would be wildly disproportionate to the "crime" (trespass) he is committing. To wit, X "only" trespassed on Y's land. Wisniewski's proportionality would limit Y's response to charging monetary rent to X. But, as this PAST example demonstrates, Y would clearly be justified in removing X from the premises, thus, necessarily but unfortunately, killing the latter. If this is not disproportionate, and I fully agree with Wisniewski that it is not, then nothing is.

In sharp contrast, let us consider not a NAP case, but rather one of ex ante punishment. Suppose that A steals a candy bar from B. Posit that the proper punishment for A is payment of $100 to B.[6] But, stipulate[7] that if this justified punishment of a $100 payment from A to B actually takes place, then our fifty proverbial people will again perish. Under these conditions, would libertarian law render this otherwise just punishment unjust? Of course not. Justice thought the heavens fall. Proportionality applies to ex post punishment, but not at all to ex ante violations of the NAP. QED.[8]

---

[5] If Wisniewski can concoct unlikely but pertinent scenarios, then so can I.

[6] Actually, according to libertarian law, it would be far more Draconian than that. See on this: Kinsella, 1996, 1997; Olson, 1979; Rothbard, 1977, 1988;Whitehead and Block, 2003

[7] Fair warning: another unlikely but relevant scenario is coming up

[8] Now, of course, under these conditions, B may well not wish to impose the punishment of A of the full $100 to which he is entitled. But he would still be *justified* in doing so, since deontological libertarianism is precluded from taking account of utilitarian considerations.

Assume, now, that I am wrong in all of this. Accept, arguendo, that Wisniewski is correct in maintaining that it would be impermissible under libertarian law for Y to evict X from his land. Does this even lay a glove on evictionist theory? It does not. Forget about my A and B example of 50 people dying when just punishment is carried out. Why does Wisniewski's riposte fail? It is because there is a disanalogy. The unwanted baby trespasses *within* the *body* of the trespassee. Wisniewski's X merely invades Y's *land*. Is there to be no difference between a person's body and his outside physical possessions? Surely, rape and murder and kidnapping, offenses against the *person* are more serious, much more serious, than those against mere property, such as car theft, fraud, pick pocketing.[9],[10]

Imagine the following:[11]

X, while fleeing a gang of thugs, inadvertently wanders onto Y's STOMACH ~~property~~. As it happens, a mysterious force petrifies him there and makes him absolutely immobile and immovable (unless killed) for the period of 9 months. As I read him, if Block were Y, he would find himself justified in saying "tough luck!" and EVICTING ~~plugging~~ the wretch. I, on the other hand, believe that whilst X would certainly be liable for paying some form of compensation to Y for trespassing on the latter's STOMACH ~~property~~, Y could not possibly kill the unfortunate trespasser without grossly violating the element of proportionality built into the NAP. What he could do instead, if he were to find the 9 months presence of X on his premises absolutely insufferable, would be to collect a requisite amount of money from his insurance company and rent another property of comparable market value for that period.

When put in these terms, Wisniewski's example loses virtually all of its emotional force. In this case, in contrast to Wisniewski's, X is perched not on Y's land, where the former does the latter little harm, but right inside his body, to the *great* detriment of Y's welfare. Or, to use Thompson's (1986, 1990, 1991) example, the needy, desperate X is now connected to Y's body through an umbilical chord, which alone can save X's life. Must Y remain attached to X for 9 months, whether through the umbilical chord or internal to his body? When the matter is put in these terms, this hardly follows, as

[9] We have to take this claim with a grain of salt, as it, strictly speaking, violates the marginal revolution in economics, which was used to solve the diamonds-water paradox.

[10] In the good old days of the early days of settlement in the U.S., stealing a man's horse was punished with the death penalty. But, this was because such a theft was really an attack on his person, not merely his property. For, without his horse, the man would die in this hostile territory.

[11] As is clear from the text, I have changed a few key words from Wisniewski's quote

Wisniewski would have it.[12] It is difficult to see how any such requirement can be reconciled with libertarian theory, which clearly eschews all such positive obligations.

Nor can Wisniewski counter by denying that Y's stomach constitutes a (sort of) property nor by claiming that Y does not have sole ownership over this body part. For this author, "Barring the scenarios in which carrying the fetus to term threatens the life of the mother…" But why, pray tell, should we favor the life of the mother over that of the fetus? Virtually every pro-life advocate, including Wisniewski, comes to this conclusion. But both are *equally* human.[13] Yes, of course, the latter is younger than the former. But, surely, it would be the rankest form of age discrimination to make a determination of who shall live and who shall die on any such basis. No, the only possible criterion on the basis of which anyone can prefer the life of the mother over that of the baby, when one *must* perish, is that the mother is the *owner* of the womb in question, and the infant human being is the *trespasser,* the private property rights violator. Wisniewski cannot have it both ways. He cannot in the mother versus the baby scenario favor the former on the basis of private property rights in the human person,[14] and then in his X versus Y controversy side with X not Y, thus casting aside the very private property rights that underlies, and justifies, his position on mom versus infant. My problem with Wisniewski in his X and Y scenario is that he sets aside the very property rights that he employs in the mother versus baby issue. Yes, property rights in the person are more important, far more important, than in land. But the latter, surely counts for *something.* If a starving J steals K's bread, K may still say him nay, in justice, and deny J his very life.

In Wisniewski's proportionality in the NAP view, all that X need do to make Y whole again is pay him a rental fee. Suppose that X is too poor to afford such a payment. Reading in between the lines, my debating partner might well allow him to get off scot free. But, I aver, trespass, violations of property rights, mean more than that, under libertarianism. The most benevolent thing Y could do is to allow him to reside on his land for 9 months, due to this "mysterious" force. The second best action he could take, from X's point of view, would be to charge him a rental fee.[15] But these options are not *required* of the property owner in question, Y. If Y wishes to take advantage of his property rights to the full extent afforded to him by libertarian law, he is entitled to evict X from his land, even if this results in

[12] To be sure, it would be *nice* if Y would save X's life in either of these ways, but that would be supererogatory.

[13] Pro-lifers such as Wisniewski, and pro-evictionists, such as me, agree to this.

[14] What other justification could a libertarian such as Wisniewski offer?

[15] Mother's should charge fetuses a rental fee?

the death of X. Any other conclusion makes a mockery of private property rights, the mainstay of libertarianism.

Another difficulty in this section of Wisniewski (2011) arises when he states:

> However, he also believes that if gentle steps turn out to be futile, the owner is justified in killing the trespasser. I fail to see why this should be the case. It is one thing to be decisive or even brutal in evicting a recalcitrant trespasser from one's premises, but it is quite a different thing to deprive him of life. Violating the property rights in one's life is always a greater contravention of the NAP than violating one's property rights in land.

I am not at all advocating that Y be allowed to "kill" X, the trespasser. Rather, I speak in terms of removing, or expelling, or, better yet, *evicting* him. Yes, at a given low level of technology, the one necessarily implies the other. The only way to banish X, and thus uphold private property rights, is, unfortunately, to kill X. But, with the evictionist philosophy, as technology improves, Wisniewski's Xs have a better and better chance of overcoming that "mysterious force (that) petrifies him there and makes him absolutely immobile and unmovable (unless killed) for the period of 9 months." Eventually, presumably, this "mysterious force" can be conquered, and *all* the Xs of the world saved. However, given Wisniewski's pro-life views, and the overwhelming political strength of the pro-choice forces at least in countries such as the U.S., even when medical technology finally allows us to quell this "mysterious force," the Xs will continue to be slaughtered at holocaust levels. Wisniewski should for this reason alone, apart, even, from the fact that it is the only view point fully compatible with libertarianism, leave off his pro-life perspective, and take up evictionism.

One last difficulty in this section of Wisniewski (2011):

> In sum, it is important to realize clearly that in any given "confrontation" between the owner and the trespasser, it is not just the former's property rights that are at stake, but the latter's as well, and even though in such cases the latter is obviously the original violator of the NAP, the former cannot retaliate with disproportionate severity.

The problems here are two. First, this comes perilously close to adopting the view that rights can clash. Yet, it is a basic premise of libertarianism that rights can *never* be compatible with one another.[16] If they appear to do so, it is inevitably because the rights of either one or the other party, or both, have been misspecified. In this case, Y has legitimate land title,

[16] Machan, 2010; Rand, 1963; Rothbard, 2005; Steiner, 1994; Touchstone, 2010

and yet X, pretty much with impunity, if one overlooks the rental payment that Wisniewski would charge to X in Y's behalf, *also* has a right to this self-same land. But two different people *cannot* own100% of any one thing.[17]

Second, Wisniewski's rendition sounds perilously close to the Coasean analysis of property rights. Here, when there is a seeming conflict in rights between two parties, the judge rules not on the basis of deontology, that is, asks who has the valid right, but in conformity to utilitarianism, or wealth maximization.[18] Consider again the PAST case. Previously, I opposed the right to life of the beleaguered X vis a vis that of 50 other people. But I could easily invert this; there could be 50 of Wisniewski's Xs ranged against only one innocent person. How can our author address this challenge? My claim is that in eschewing strict support for property rights, my libertarian colleague is at sea without a rudder. He has no *principles* on the basis of which he can make any determination. Would it be Coase-like, on the basis of mere nose counting, or so called wealth maximization?

III. The airplane ride

In this section, Wisniewski correctly states that this dispute between the two of us concerns the status of this statement:

> X gets Y drunk to the point of the latter's passing out and drags him onboard the plane, and then, as soon as Y regains consciousness, asks him to jump out." This author also accurately avers[19] that "this still sounds to him, in my own words, 'like a (coercive) kidnapping, not at all analogous to a voluntary pregnancy.'"

Then, Wisniewski continues:

> I fail to see which part of the abovementioned sentence is suggestive of coercion. X getting Y drunk certainly does not mean X forcibly pouring alcohol into Y's mouth, and I do not think that any elaborate explanations or qualifications are needed here. Likewise, "dragging" an unconscious person somewhere by definition precludes being interpreted as a coercive activity, since speaking of

[17] This is the essence of the libertarian critique of fractional reserve banking. See, also, on this, the movie, "The Producers."

[18] For a critique of Coase, see Block 1996; Cordato, 2000; Fox, 2007; Hoppe, 2004; Krause, 1999; Krecke, 1996; Lewin, 1982; North, 1992; Rothbard, 1982; Stringham and White, 2004; Terrell, 1999.

[19] One of the pleasures of my debate with Wisniewski is that we do not talk past each other. Certainly, he does not, and I hope and trust that I match him in this. Neither of us, then, misinterprets the other's position. We have, in other words, achieved real disagreement, as opposed to passing each other as ships in the night. This, alone, is no mean achievement.

> an unconscious person as being forced to do anything is a category mistake.
>
> Think about a scenario in which X escorts a benumbed Y out of a party, "drags" him into his car and takes him to his (X's) home. Could such a series of events possibly be interpreted as a coercive kidnapping? And if a deadly storm started to rage outside at the moment of Y's awakening, would X be justified in ordering him to move out? I maintain that he would not, since he is the ultimate and necessary cause of Y ending up on his property—consequently, Y cannot be considered a trespasser, and X can be considered responsible for whatever happens to Y as a direct and immediate result of forcing him out of X' premises. This sort of causal analysis is the crux of practically all of my anti-evictionist arguments, and yet I fail to see Block addressing it at any point in his responses.

As he says, I did indeed previously address this point. However, as Wisniewski regards this attempt of mine "a failure," let me try again.

At first blush, the issue would appear to rest upon whether X is improving Y's position or worsening it. If X "drags" an unconscious Y *out* of the path on an oncoming truck he would not be coerce him. If X "drags" Y *into* the path of that onrushing vehicle, he is clearly violating the NAP with regard to him. But even this is only a first approximation. For any "dragging" of an unconscious person anywhere, for any reason, constitutes at least presumptively an assault and battery. It is a placing of hands upon an individual without his consent. Now, of course a (private enterprise)[20] court would properly be lenient, extremely lenient, to an X who drags a comatose Y into safety, even if the latter later complains.[21] But, if our X drags an unconscious Y into *danger*, then it should be clear, a forteriori, that he has engaged in a coercive activity. Wisniewski says it is a "category mistake" to think of this act as a coercive one, since one cannot "speak… of an unconscious person as being forced to do anything." Yes, one may not so speak. But I am *not* interpreting this "dragging" of the unconscious Y as a forcing of him to *do* something. No, Y cannot engage in any human action (Mises, 1998) while unconscious. Rather, the *doer* is X. X is doing something

[20] Benson, 1990, 2002; Friedman, 1979, 1989; Hoppe, 2001; Osterfeld, 1989; Peden, 1977; Rothbard, 1973, 1982, 1991; Stringham, 1998-1999; Tannehill and Tannehill, 1984; Wooridge, 1970

[21] Let us suppose that Y wanted to commit suicide as a traffic fatality, and thus resents X's intrusion. X could reasonably argue that Y, in this case, should have placed a "Do not disturb" or "Do not resuscitate" sign on his person. In the absence of such notification, X could reasonably be excused for his "dragging" of Y. We here abstract from the danger Y would be imposing upon motorists with his inconsiderate suicide attempt.

in violation of the NAP, by the laying of his hands on the body of Y without the latter's permission, and then, worse, by placing Y in a position of mortal danger. Yes, this would indeed be a "category mistake" were I to attribute human action to a comatose person, but I am not. Rather, I am claiming purposive action to X and he is very conscious of his behavior. Of course X would not be justified in ordering a suddenly awakened Y out of his house and into a deadly storm, but the analogy to evicting a fetus into an environment that will kill it (outside of the womb before it is viable there), breaks down. No one *forced* a fetus into the womb.[22] Rather, the infant was *created* there.

IV. Pushing the saved person into the lake

There is a railroad track located next to a lake. B is lying on the track, about to be run over by the train. A pushes B off the track and into the lake, saving him from a certain death by being crushed by the oncoming train. However, neither A nor B can swim, and it is a deep lake. Wisniewski claims that A is guilty of murder; I demur.[23] Why is A a murderer, according to this author? Because:

> … if A voluntarily decides to involve himself in the causal chain comprising himself, A, and B and any potential threats to which A's actions can immediately and directly expose the latter, B, then if A's actions do, in fact, immediately and directly expose B to a lethal hazard, then A is as responsible for the resultant harm B sustains as A would be if A himself were the said hazard.[24]

Wisniewski denies that this analysis implies positive obligations, anathema amongst all libertarians deserving of the name.[25] But I cannot see my way clear to agreeing with my debating partner on this. Why is it incumbent on A to jump into the lake to save B? Just because A has already, once, rescued B from the train? Why does this impose *any* obligation on A? A performed a mitzvah! For this he is to be condemned as a murderer?

One possible explanation for this is that Wisniewski relies on positive obligations. K is starving on day 1. J gives K enough food to survive on day

[22] apart from rape.

[23] I also ignore the possibility that there is a C around there, who can either save B from the train without pushing B into the lake, or, if C does push B into the lake, that C can then jump in, and save B from drowning. In the present scenario discussed in the text, there are only A and B, no C.

[24] Wisniewski speaks in terms of he himself, Wisniewski, saving B from the train. I have changed this quote so as to reflect A saving B, not Wisniewski, for ease of exposition

[25] Wisniewski is quite correct in saying that "this is uncontroversial among us."

1. But K will die on day 2 unless J again grub-stakes him. There is no third party, L, who can help K. J, again, complies on day 2. On day 3, K again asks J for sustenance. This time, however, J refuses. On Wisniewski's account, J is now a murderer. Why? Because J has exposed K to a "lethal hazard," namely, starvation on day 3. In contrast, I do not at all regard J as a murder. Rather, I view him as a savior of K, for two days. Wisniewski seems to be arguing that if you save someone's life from a train, or from starving for two days, but do not continue to do so by jumping into the lake as a lifeguard, or again giving him food on the third day, you have violated your positive obligation to keep him alive.

Of course, my critic is not without a possible response to my charge that he herein employs positive obligations. He can reply that A is a murderer because *he pushed B into the lake, where B drowned*. Well, yes, of course, A did indeed do that. But, he did so as *part* of his action to save B from the train. I fully agree with Wisniewski that under the following situation, A is indeed a murderer: 1. A pushes B out of the path of the train; then, 2. A decides he does not much like B who is now safely lying there just off the train tracks at the edge of the lake, and pushes B in to the water, to his death. But in the situation we are discussing, there was only one act, not two: A pushes B so strongly to save him from the train that B falls into the lake. In my view, A is a hero, not a murderer, even though B dies. Why? When there is life, there is hope. In saving B from the train, A gives B a few more precious seconds of life. A is thus B's *benefactor*. Who knows, perhaps a C will pop up at that time, jump in the lake and save B.[26] Even if not, A has still conferred a boon on B: those few more seconds of living.

Wisniewski will attempt to characterize what I have just said as a concession to his perspective. He will agree, presumably, with my assessment of A vis a vis B, but respond that this train-lake example is only an analogy to our real point of disagreement, evictionism. And, here, clearly, there is not one act, the mother becomes pregnant and in one fell swoop evicts the fetus; rather, there are two separate acts: first, the mother becomes pregnant, and then, separately, secondly, she evicts the fetus. I have "conceded" that if A engaged in two separate acts, not one, then A is a murderer. Why does this not apply, Wisniewski will plaintively object, to the evictionist mother? The reason is, of course, I do not regard eviction as akin to pushing a non swimmer into a lake where he drowns. Rather, in my view, I see the unwanted fetus as an interloper, as a trespasser. When the mom banishes the baby from her domain, she is not a murderer, but rather basing her actions

[26] Remember, neither A nor B can swim.

on her private property rights in her womb. But, now, we are getting off the subject of the train and lake, so I move to the next topic.

V. Morality

Perhaps there is a way of reconciling our two views. According to Wisniewski (2011):

> … since … there is no relevant moral difference between being an ultimate cause of one's harm and being a proximate cause of one's harm as long as one is a *necessary* cause of one's harm, it has to be concluded that evicting an invitee to his death is just as much a contravention of the NAP and the principle of gentleness as killing him on the spot is.

I am not inclined to dispute with Wisniewski on the *morality* of these issues. He may well be correct on that matter. In contrast, my concern, my *only* interest here, is not with the *morality* of evictionism, but rather with its *legality*. That is, with what the law would be in the just or libertarian society. To wit, my focus on abortion, eviction, etc., is only on how proper *law* would treat these acts. If Wisniewski's concern instead is only with *morality*, then there may well be little or no difference between our two views. However, I am inclined to believe that this is not at all the case; that his use of the word "morality" in this context is merely a typographical error on his part.

VI. Implicit contracts

Wisniewski (2011) is quite correct in attributing to me support for implicit contracts. But, this does not at all imply acquiescence in the notion that when a woman engages in sexual intercourse, she makes a(n implicit) contract with the fetus to carry it to term. The paradigm case of (violation of) an implicit contract is when a man in a restaurant orders and drinks a cup of coffee, whereupon he is presented with a bill for it of $1 billion. He never would have agreed to any such deal. There was no meeting of the minds between customer and supplier at such a price. In contrast, if the bill was for $5, this could easily be covered by an implicit contract, even if the diner expected to pay only $1.

Why does this not cover the case of pregnancy? First, there is the case of pregnancy due to rape. Here, we have the very opposed of a "contract." Second, for many years, numerous people, and even some nowadays, simply did not know that sexual intercourse led to pregnancy. How could there be a *contract* of any type or variety, if individuals did not even realize this fact of life? Third, there are not two contracting parties. An implicit contract is still a contract, and a contract necessarily requires two (or more) contracting

parties. At the time of intercourse, abstracting from the father and surrogate mother agreements, there was only *one* party.

Wisniewski's response to this third point of mine is (footnote omitted):

> …but why should we treat intercourse rather than conception as the moment at which the relevant, binding decisions take place? Since, obviously enough, no contract (even an implicit one) can be made with the fetus before it comes into existence, it seems only natural to think of the moment at which it comes into existence—i.e., conception—as the moment at which the mother, who voluntarily invites a new potential human being into her womb (i.e., voluntarily allows it to appear there), makes an implicit contract with it. Block's attempt to portray intercourse as the relevant point of focus appears to involve a significant mischaracterization of the situation.

However, there is good and sufficient reason to focus on intercourse rather than conception. Intercourse (apart from rape) is a voluntary human *action*. A woman can agree to partake in it, or not. In contrast, the female has no conscious control over conception. Once the sperm has entered her body, it is not at all up to her conscious volition whether she conceives or not.[27] If it were just a matter of willing it, there would be no otherwise healthy but infertile couples. Voluntary sexual intercourse is a human action; conception is not under the actor's control. Rather, it is like a sneeze or a reflex.

But suppose, arguendo, that we accept Wisniewski's notion that the relevant stage of development is conception, not intercourse. And further, that we adopt his view that this can be interpreted as the mother "inviting" the fetus to house inside her body. It still seems like a gigantic and unwarranted stretch to say that this "invitation" is for nine months.[28] Moreover, this author sees this as part of an implicit contract, not a more promise, and this author fails to explain *why* he rejects Rothbard's (1998) distinction between the two. He contents himself with calling it a "cop-out" but this really will not do.

A contract with a fetus is problematic, moreover. We commonly, and correctly, do not allow even children to sign contracts without parental or guardian approval, on the ground that these youngsters are too immature to do any such thing. But, surely, a fetus is even less able to understand and agree to a contract than is a child. Therefore, a forteriori, if it is impermissible for children to be contractual signatories, this applies with even great force to

[27] I ignore the possibility of using chemical means to retard, or increase the chances of this occurring.

[28] I had better not invite Wisniewski to my home for dinner; who knows how long he will assume my invitation is for. Perhaps even for nine months? Maybe more?

fertilized eggs. So, Wisniewski's emphasis on conception, rather than intercourse, will not do the philosophical work he asks of it.

VII. Suttee

Wisniewski and I are in full agreement with his claim that institutions such as suttee and voluntary slavery are justified in libertarian law if and only if *all* contracting parties agree to be bound by them. However, I fear, my critic places far too much reliance on custom in this regard and thus opens himself up to my attempt at a reductio ad absurdum. That is to say, since suttee is customary, and Wisniewski too easily supports custom, he must also favor suttee. But this is surely a stance incompatible with the NAP of libertarianism, as he wisely admits. Wisniewski in response attempts to escape from this challenge with the following:

> Hence, the logical implication of my remarks about the role of custom in a libertarian society is that one could be obliged to observe the practice of suttee only if, having been confronted with the choice of either joining or refusing to join a private community which requires its members to observe the practice of suttee, one decided to opt for the former.

But, what does it *mean* to have agreed, or disagreed for that matter, to be bound by the law or practice or custom of suttee? Consider a twelve year old female living somewhere in the middle of India in the middle of the 19th century who is forced to marry a fifty year old cousin or some other such person of the father's choosing.[29] Whereupon this man then ups and dies, leaving the young girl subject to a death sentence. I fear that Wisniewski is mistaken if he thinks it is a historical fact of India that it was then, or even now, a "private community" that young girls were or are free to accept or reject.

And the same goes for the custom or practice or law of clitorectomy for all young girls in Africa, or "honor" killings of young females who disobey their parent's choice of husbands or lifestyle, in communities all around the world. It must be a strange form of libertarianism indeed that accepts these practices as legitimate, just because they are widespread customary practices. As I say, this scholar places far too great weight on custom. As libertarians, we must view all customs through the prism of the NAP, and suttee, clitorectomy and "honor" killings are far from passing muster.

[29] If she refuses, she will be subject to being murdered in an "honor" killing.

But Wisniewski is not without yet another response. He says: "Block is known to defend voluntary slave contracts. Why should voluntary suttee contracts be treated any different? After all, they are equally based on the foundation of respect for the NAP."

This rejoinder will not suffice. First, voluntary slave contracts are not at all "customary." Indeed, I know of no real example of them.[30] These are contrary to fact conditionals, an entirely imaginary construct, created only to illustrate the extreme implications of libertarianism. Further, in a voluntary slave contract, there is mutual benefit, at least in the ex ante sense. Not so, with these other arrangements. The former is consistent with the NAP, not the latter. Thus, there is simply no valid analogy between voluntary slavery, on the one hand, and suttee, clitorectomy or honor killings on the other.

VIII. Existence and non existence

Wisniewski makes two further statements that cannot be allowed to go without critical comment. First, he says: "… the fetus can be regarded as kidnapped only if Y from my drinking scenario, whom X forcibly (though not involuntarily) escorts to his home, can also be thought of as a victim of kidnapping, which I already disputed earlier." I cannot comprehend how, when X plies Y with liquor until the latter is drunk and then "forcibly (though not involuntarily)"[31] escorts Y to X's home, that this does not count as the very paradigm case of kidnapping. Perhaps my debating partner would also maintain that when a man slips the date rape drug rohypnol into a woman's drink, then "escorts" her to his home, whereupon he engages in "voluntary" sex with her, that this is not rape. To the contrary, this is again the very paradigm case of rape, along with, of course, overpowering a female and then through pure brute strength forcing her to have sexual intercourse. *Of course* Wisniewski's drinking scenario depicts kidnapping, his assertions to the contrary notwithstanding.

Second, Wisniewski avers that "… it is not the case that existence is necessarily better than nonexistence, since deciding to abort the fetus often indicates nonchalance and disregard for human life on the part of the mother, and, arguably, having an unconscious existence that is treated in so contemptuous a manner is worse than having no existence at all."

[30] Indentured servant contracts are the closest real world example to voluntary slave contracts, but they last for only seven years, and are much more like long term labor contracts than voluntary slavery.

[31] I fail to understand the meaning of this phrase

Here, Wisniewski commits a performative contradiction (Hoppe, 2006). Wisniewski exists. He could scarcely engage with me in this dialogue did he not.[32] If he attempts to dispute this particular claim of mine, that will only further cement my claim as to his existence. So, based on his actions, he prefers existence to non existence. Were this not the case, he would have committed suicide, God forbid. But he did not such thing. He is still alive. Therefore, his protestations to the effect that "it is not the case that existence is necessarily better than non existence," are proven false. He himself does not really believe it, based on his actions, which speak louder than words.[33]

IX. Conclusion

Wisniewski has stretched "implicit contracts" out of all reasonable interpretation. He uses it as a tool where it is totally inappropriate. It binds the rape victim, who by no stretch of the imagination can be interpreted as having engaged in voluntary sex, whether implicitly or explicitly. It binds the mother too, who does not know that pregnancy is caused by intercourse. Even the exception to Wisniewski's pro-life position, in cases of serious risk to the mother's health, is problematic for this author. Why? This is because it relies, completely, on the mother having property rights in her womb. But if so, only evictionism, not pro life, incorporates this fact. If it were not the case that the fetus is a trespasser because it has invaded the mother's body, and is thus a parasite, why favor the mother over the baby? The former has already lived, let us say, for 30 years. The child in her body has been conceived, possibly, only 30 days ago. The infant thus has its entire life in front of it, while the mother's life is already roughly one third over. So, if have to make a choice between them, and there is no issue of property rights or trespass involved, why not pick the former over the latter? It is only because the mother, not the baby, owns the property rights in question that we support her vis a vis her baby. Implicit contracts are meant to support every-day occurring events. Thanks to them, no one can be forced to pay $1 billion for an already consumed cup of coffee. Everyone agrees to this. In sharp contrast, abortion rights are *very* contentious. Wisniewski cannot be allowed to insert the round peg of abortion into the square hole of implicit contracts. The laws of logic do not allow him to succeed in his otherwise very

[32] Plus I recently saw him, conversed with him at two separate Mises Institute conferences in Auburn Alabama during the summer of 2011, and had dinner with him at one of them. Take it from me, Wisniewski exists.

[33] I do not take the position that existence is *necessarily* better than non existence. For example, if a person was suffering from continual excruciating pain, form an incurable disease, he may very well prefer to commit suicide.

brilliant and creative attempts to undermine the only position compatible with libertarianism, evictionism.

Let us end by once again considering Wisniewski's "mysterious force." Suppose that there are lots of X's all over the place. Posit that the law now allows all X's to be not only evicted, but actually murdered.[34] Presume that medical technology can at present save only the X's who have been trespassing on Y territory for 6 months, but that medical technology will gradually improve to the extent that it will eventually be able to totally counteract this "mysterious force" earlier and earlier. If we can establish that the Ys can only evict, but not murder the Xs, right now, then, at the outset, we save fully one third of the Xs, albeit it not all of them. Eventually, thanks to improving medical techniques, we will be able to overcome this "mysterious force" at *any* stage of the X who is trespassing. On the other hand, if we reject evictionism, then, even when we are technologically able to save all of the Xs, the law will still allow their murder. Would Wisniewski embrace evictionism for that reason? If so, he is already part way toward taking my side of this debate. If not, his support of the Xs must come into question.

References

Benson, Bruce L. 1990. *The Enterprise of Law: Justice Without the State.* San Francisco: Pacific Research Institute for Public Policy.

———. 2002. "Justice without Government: The Merchant Courts of Medieval Europe and Their Modern Counterparts," printed in Beito, Gordon and Tabarrok (editors) /The Voluntary City: Choice, Community and Civil Society. / Oakland, CA: The Independent Institute pp. 127 - 150.

Block, Walter. 1977. "Toward a Libertarian Theory of Abortion." *The Libertarian Forum.* Vol. 10, No. 9, September, pp. 6-8; www.mises.org/journals/lf/1977/1977_09.pdf; Block, Walter. Undated (1997?). "L'Aborto: Una Legittima Difesa," *Claustrofobia*, anno 1, n. 3, pp. 16-22.

———. 1978. "Abortion, Woman and Fetus: Rights in Conflict?" *Reason,* April, pp. 18-25.

———. 1996. "O.J.'s Defense: A Reductio Ad Absurdum of the Economics of Ronald Coase and Richard Posner," *European Journal of Law and*

[34] Don't ask. It must be a particularly cruel and unusual society we are talking about.

Economics, Vol. 3, pp. 265-286; www.walterblock.com/publications/block_oj's-defense.pdf

———. 2001. "Stem Cell Research: The Libertarian Compromise"; September 3; www.lewrockwell.com/block/block5.html

———. 2004. "Libertarianism, Positive Obligations and Property Abandonment: Children's Rights," *International Journal of Social Economics*; Vol. 31, No. 3, pp 275-286; www.emeraldinsight.com/Insight/viewContainer.do?containerType=Issue&containerId=18709; www.walterblock.com/publications.php#recent-arts; www.walterblock.com/publications/block-children.pdf; www.walterblock.com/wp-content/uploads/publications/block-children.pdf

———. 2008. "Homesteading, ad coelum, owning views and forestalling." *The Social Sciences*. Vol. 3, No. 2, pp. 96-103; http://medwelljournals.com/new/5/archivedetails.php?id=5&jid=TSS&theme=5&issueno=12; www.medwelljournals.com/fulltext/TSS/2008/96-103.pdf

———. 2010A. "A libertarian perspective on the stem cell debate: compromising the uncompromisible," *Journal of Medicine and Philosophy*. Vol. 35: 429-448; http://jmp.oxfordjournals.org/cgi/content/full/jhq033?ijkey=oczT7ytzmoAD1cz&keytype=ref; http://jmp.oxfordjournals.org/cgi/reprint/jhq033?ijkey=oczT7ytzmoAD1cz&keytype=ref

———. 2010B. "Objections to the Libertarian Stem Cell Compromise," *Libertarian Papers* 2, 34; http://libertarianpapers.org/2010/34-block-objections-to-the-libertarian-stem-cell-compromise/

———. 2010C. "Rejoinder to Wisniewski on Abortion" *Libertarian Papers*, Vol. 2, No. 16; http://libertarianpapers.org/articles/2010/lp-2-32.pdf; http://libertarianpapers.org/2010/32-block-rejoinder-to-Wisniewski-on-abortion/;

———. 2011. "Response to Wisniewski on Abortion, Round Two" *Libertarian Papers*, Vol. 3, No. 4; http://libertarianpapers.org/articles/2011/lp-3-4.pdf

———. Forthcoming. "Terri Schiavo: A Libertarian Analysis" *Journal of Libertarian Studies* (414)

Block, Walter and William Barnett II. 2008. "Continuums" Journal Etica e Politica / Ethics & Politics, Vol. 1, pp. 151-166, June; www2.units.it/~etica/; www2.units.it/~etica/2008_1/BLOCKBARNETT.pdf

Block, Walter and Roy Whitehead. 2005. "Compromising the Uncompromisable: A Private Property Rights Approach to Resolving the Abortion Controversy," *Appalachian Law Review,* 4 (2) 1-45; www.walterblock.com/publications/block-whitehead_abortion-2005.pdf; www.walterblock.com/wp-content/uploads/publications/block-whitehead_abortion-2005.pdf

Cordato, Roy. 2000. "Chasing Phantoms in a Hollow Defense of Coase" *The Review of Austrian Economics*, Vol. 13, No. 2, September, pp. 193-208.

Demsetz, Harold. 1979. "Ethics and Efficiency in Property Rights Systems," in *Time, Uncertainty and Disequilibrium: Explorations of Austrian Themes,* Mario Rizzo, ed., Lexington Mass.: D.C.Heath and Co; http://tinyurl.com/lypvgl;

Fox, Glenn. 2007. "The Real Coase Theorems." *The Cato Journal: An Interdisciplinary Journal of Public Policy Analysis*. Volume 27 Number 3, Fall, pp. 373-396; www.cato.org/pubs/journal/cj27n3/cj27n3-5.pdf

Friedman, David. 1979. "Private creation and enforcement of law: a historical case." *University of Chicago Law Review.* www.daviddfriedman.com/Academic/Iceland/Iceland.html

———. 1989. *The Machinery of Freedom: Guide to a Radical Capitalism*, La Salle, IL: Open Court, 2nd ed. www.daviddfriedman.com/Libertarian/Machinery_of_Freedom/MofF_Chapter_41.html; www.daviddfriedman.com/Libertarian/Machinery_of_Freedom/MofF_Chapter_42.html

Hoppe, Hans-Hermann. 2001. Democracy - The God That Failed: The Economics and Politics of Monarchy, Democracy, and Natural Order, Rutgers University, N.J.: Transaction Publishers

———. 2004. "The Ethics and Economics of Private Property." October 11; www.lewrockwell.com/hoppe/hoppe11.html

———. 2006. The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy. Second Edition. Auburn, AL: Ludwig von Mises Institute; http://mises.org/books/economicsethics.pdf

Kinsella, Stephan. 1996. "Punishment and Proportionality: the Estoppel Approach," *The Journal of Libertarian Studies*, Vol. 12, No. 1, Spring, pp. 51-74; www.mises.org/journals/jls/12_1/12_1_3.pdf

———. 1997. "A Libertarian Theory of Punishment and Rights," 30 *Loy. L.A. L. Rev.* 607-45

———. 2003. "A libertarian theory of contract: title transfer, binding promises, and inalienability" *Journal of Libertarian Studies,* Vol. 17, No. 2, Spring, pp. 11–37; www.mises.org/journals/jls/17_2/17_2_2.pdf

Krauss, Michael. 1999. "Tort Law, Moral Accountability, and Efficiency: Reflections on the Current Crisis" *Markets and Morality*, Vol. 2, No. 1, Spring; www.acton.org/publicat/m_and_m/1999_spr/krauss.html

Krecke, Elisabeth. 1996. "Law and the Market Order: An Austrian Critique of the Economic Analysis of Law," *Journal des Economistes et des Etudes Humaines* 7(1), March, pp.19-37; *Commentaries on Law&Economics*, 1997 Yearbook, ed., Robert W. McGee, pp.86-109.

Lewin, Peter. 1982. "Pollution Externalities: Social Cost and Strict Liability." *Cato Journal*, vol. 2, no. 1, Spring, pp. 205-229.

Machan, Tibor R. 2010. "Rights May Never Be In Conflict," The Daily Bell. May 31; http://szatyor2693.wordpress.com/2010/05/29/column-on-why-basic-rights-cannot-conflict/; www.thedailybell.com/1088/Tibor-Machan-Rights-May-Never-Be-In-Conflict.html

Mill, John Stuart. 1947 [1859]. *On Liberty*, Northbrook, IL: Ahm Publishing, p. 36; www.bartleby.com/130/

Mises, Ludwig von. [1949] 1998. *Human Action,* Scholars' Edition. Auburn: Mises Institute; http://mises.org/resources/3250

North, Gary. 1992. *The Coase Theorem*, Tyler, TX: The Institute for Christian Economics

Olson, Charles B. 1979. "Law in Anarchy." *Libertarian Forum.* Vol. XII, No. 6, November-December, p. 4; http://64.233.167.104/u/Mises?q=cache:gFT18_ZusWoJ:www.mises.org/journals/lf/1979/1979_11-12.pdf+two+teeth+for+a+tooth&hl=en&ie=UTF-8

Osterfeld, David. 1989. "Anarchism and the Public Goods Issue: Law, Courts and the Police," *The Journal of Libertarian Studies*, Vol. 9, No. 1, Winter, pp. 47-68; www.mises.org/journals/jls/9_1/9_1_3.pdf

Peden, Joseph R. 1977. "Property rights in Celtic Irish law," *The Journal of Libertarian Studies*, Vol. 1. No. 2, Spring, pp. 81-96

Rand, Ayn. 1963. "Collectivized 'rights.'" June; www.aynrand.org/site/PageServer?pagename=arc_ayn_rand_collectivized_rights

Rothbard, Murray N. 1973. *For a New Liberty*, Macmillan, New York

———. 1973. "Free Market, Police, Courts, and Law." *Reason*, March, pp. 5-19.

———. 1977. "Punishment and Proportionality." R. E. Barnett and J. Hagel, III (eds.), *Assessing the Criminal: Restitution, Retribution, and the Legal Process*. Cambridge, MA: Ballinger Publishing Co., pp. 259-270.

———. 1982; *The Ethics of Liberty*, Humanities Press, Atlantic Highlands, N.J.

———. 1982. "Law, Property Rights, and Air Pollution," *Cato Journal*, Vol. 2, No. 1, Spring; reprinted in *Economics and the Environment: A Reconciliation*, Walter Block, ed., Vancouver: The Fraser Institute, 1990, pp. 233-279. www.mises.org/rothbard/lawproperty.pdf; http://mises.org/story/2120

———. 1991. "On Denationalizing the Courts," *Rothbard-Rockwell Report*. Burlingame, CA: Center for Libertarian Studies, Vol. 2, No. 10, October.

———. 1998 *The Ethics of Liberty,* New York: New York University Press. www.mises.org/rothbard/ethics/ethics.asp;

———. 2005. "The Heresy of Prudence." www.lewrockwell.com/rothbard/rothbard65.html

Steiner, Hillel. 1994. *An Essay on Rights*. Oxford: Blackwell

Stringham, Edward. 1998-1999. "Justice Without Government," *Journal of Libertarian Studies*, Vol. 14, No. 1, Winter, pp. 53-77

Stringham, Edward Peter, and Mark White. 2004. "Economic Analysis of Tort Law: Austrian and Kantian Perspectives." In Law and Economics: Alternative Economic Approaches to Legal and Regulatory Issues, ed. Margaret Oppenheimer and Nicholas Mercuro, 374-392. New York: M.E. Sharpe. www.sjsu.edu/stringham/docs/Stringham.and.White2005.pdf

Tannehill, Morris and Linda. 1984. *The Market for Liberty*, New York: Laissez Faire Books

Terrell, Timothy D. 1999. "Property Rights and Externality: The Ethics of the Austrian School." *Journal of Markets and Morality*. Vol. 2, No. 2, Fall; www.acton.org/publications/mandm/mandm_article_114.php

Thompson, Judith Jarvis. 1986. Rights, Restitution and Risk, Cambridge: Harvard University Press

———. 1990. The Realm of Rights, Cambridge: Harvard University Press

———. 1991. "Self-Defense." *Philosophy and Public Affairs*, Vol. 20, No. 4, Autumn, pp. 283-310.

Touchstone, Kathleen. 2010. "Rand, Rothbard, and rights reconsidered." Libertarian Papers, Vol. 2, Art. No. 18, http://libertarianpapers.org/articles/2010/lp-2-18.pdf

Whitehead, Roy and Walter Block. 2003. "Taking the assets of the criminal to compensate victims of violence: a legal and philosophical approach," *Wayne State University Law School Journal of Law in Society* Vol. 5, No. 1, Fall, pp.229-254

Wisniewski, Jakub Bozydar. 2010a. "A Critique of Block on Abortion and Child Abandonment." *Libertarian Papers* Vol. 2, No. 16; http://libertarianpapers.org/2010/16-Wisniewski-block-on-abortion/

———. 2010b. "Rejoinder to Block's Defense of Evictionism." *Libertarian Papers*. Vol. 2, Art No. 27; http://libertarianpapers.org/articles/2010/lp-2-37.pdf

———. 2011. "Response to Block on Abortion, Round Three," http://libertarianpapers.org/2011/6-winiewski-response-to-block-on-abortion-round-three/

Woolridge, William C. 1970. *Uncle Sam the Monopoly Man*, New Rochelle, N.Y.: Arlington House