RESPONSE TO WISNIEWSKI ON ABORTION, ROUND TWO

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Introduction

I HAVE WRITTEN MORE THAN SEVERAL TIMES in behalf of the evictionism theory of abortion over the last five decades.[1] True confession here: I have thought, on more than one occasion, that this perspective would one day come to sweep away the two alternative mainstream views on this question, pro life and pro choice. Not only has this not occurred, not only have there been no signs whatsoever that any such breakthrough was in the offing, but, these publications of mine have all but been ignored.[2]

Happily for the prospects of spreading what I at least consider as this intellectual breakthrough, or, at least, keeping it alive in the literature, Wisniewski (2010A), and now Wisniewski (2010B), the subject of this present rejoinder, has stepped up to the plate in criticism of it. My reply to him allows me to further elaborate on the evictionist thesis, and once again to more deeply plumb its depths. I am also grateful to this author for the elegant, genteel manner he utilizes in his criticism of my perspective on this issue. Further, I appreciate the compliments he makes about my views on this matter, despite the fact that he cannot embrace them.

To briefly review, my version of the evictionist hypothesis stipulates that human life begins at the fertilized egg stage, not nine months later, at birth.[3] However, the placenta, upon which it will reside for this duration of

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[1] Block, 1977, 1978, 2001, 2004, 2008, 2010A, 2010B, 2010C, forthcoming; Block and Whitehead, 2005

[2] Exceptions include Dyke, 2009; Wisniewski, 2010A, 2010B.

[3] Jewish joke: When is the fetus viable? When it graduates from medical school.

time, is owned by an entirely different person, the mother. The womb is *her* property, and, in libertarian law, she, I contend, properly maintains control over it. If she wishes to house the fetus there until natural gestation is completed, well and good. But, if she does not, what rights does she have over this small human being who now resides within her body? May she kill it, and then eject it? May she remove it from her body, that is, evict it? In my view, the relation of the fetus to the mother is akin to the one that obtains between the ordinary trespasser and the owner of the property in question. In libertarian law, the property owner is entitled to remove the trespasser in the gentlest manner possible; if this necessitates the death of the trespasser, the owner of the land is still justified in upholding the entailed property rights. My conclusion, then, is that the mother is within her rights to evict, but not kill, the fetus. The "gentlest manner possible" in this case requires that the mother notify the authorities[4] to see if they will take over responsibilities for keeping alive this very young human being.[5] However, if the "gentlest manner possible" implies the death of this very young human being, then so be it: the mother still has that right.

With this introduction, I am now ready to respond to Wisniewski's (2010B) critique of my position.

To begin, Wisniewski and I are now in full agreement concerning the four "'semantic' or 'terminological' issues" he mentions, to wit, with regard to first, "may/can," second, the equation of "abortion with eviction plus killing," third "psychological harm," and fourth "surrogate motherhood."

Gentleness

The first substantive criticism of Block (2010C) by Wisniewski (2010B) concerns the role of "gentleness" in libertarian theory. Let me allow my critic to put this matter in his own words:

> It seems to me that the morally relevant aspects of the principle of gentleness boil down to the commonsensical principle of proportionality: the severity of reactions must be proportionate to the moral turpitude of actions (Rothbard 1998, 80-1). And while I acknowledge that incorporating the principle of proportionality into his theory allows Block to avert my charge of falling back on the aforementioned arbitrary complication, I also recognize that it fatally damages his pro-choice conclusions in the cases where no nonlethal ways of evicting the fetus are available. The reason for this is simple:

[4] E.g., the hospital, the church or synagogue, the orphanage.

[5] I have strenuously argued that this required does not constitute a positive obligation.

> barring the scenarios in which carrying the fetus to term threatens the life of the mother, abortion (i.e., lethal eviction) involves the amount of physical harm done to the fetus that is grossly disproportionate to the amount of physical harm that the fetus can possibly do to the mother. It is tantamount precisely to blowing the trespasser away with a bazooka when there exist no other ways of removing him from one's lawn. Hence, invoking the principle of gentleness allows Block to avoid one problem only to be confronted with an even more serious one.

I regard this as an important criticism, but I cannot see my way clear to fully agreeing with it. First of all, minor point, I do not regard gentleness and proportionality as being part of the same aspect of law; I see them as separate, and thus Wisniewski's (2010B) conflation of them as a category mistake. The key element about the gentleness principle (the mother, and the trespassee, must remove the fetus and the trespasser, respectively, from their domains in the least harmful manner possible) is that it is part and parcel of the ante punishment stage of the scenario; in sharp contrast, proportionality applies, only, to the punishment stage. Surely, the victim's rights are greater before than after punishment. If someone comes at me brandishing a knife with murder in his heart, I am certainly entitled to shoot him dead before he reaches me, if necessary to save my life. But, after the fact, it is likely that a far lesser punishment than the death penalty would be justified for a "mere" attempted murder. So, the two occupy different categories of libertarian law. However, I can understand, and am sympathetic with what I regard as Wisniewski's error here. For both of elements of libertarianism, the pre and post violation of the non aggression principle (NAP), the gentleness as well as the proportionality aspects, are placed in law so as to preclude the victim from acting so strongly against the perpetrator that the victim, too, violates the libertarian code. If someone merely steps on my lawn and I kill him for that minor violation of property rights, I am violating the NAP, and, indeed, violating the NAP to a far greater extent than is the trespasser. Gentleness, here, precludes me from engaging in so monstrous a violation of the NAP. Similarly, to punish a rapist by putting him to death would also be a crime on the part of the court that leveled so draconian a penalty.[6]

I regard Wisniewski's major error here, in contrast, as misunderstanding the "gentlest manner possible" principle. My critic focuses entirely on the "gentlest manner possible" part of the principle, but neglects this aspect of libertarian law in its entirety. The victim is supposed to treat the perpetrator in the "gentlest manner possible" possible, alright, but only when it is fully

[6] There is a scene in *Godfather I* where the baker asks Vito Andolini Corleone to kill his daughter's rapist. The Godfather properly demurs, and, instead, offers a severe beating as punishment.

compatible *with stopping the crime*! Let us return to the scenario where the knifeman is making a frontal attack on me. If I have two guns, one with a rubber bullet which will stop the knifing by rendering the assailant unconscious,[7] and the other with a lead bullet which will kill him, then, the libertarian legal code requires that I use the rubber bullet. If I, instead, avail myself of the lead bullet, then I, too, am guilty of a crime, that of not abiding by the "gentlest manner possible" principle. But, suppose there is no guarantee that the rubber bullet (or a net) will halt the perpetrator in his tracks; that the only way to stop him for sure will be to plug him full of lead, thus causing his death. Do I have a right to do so? Of *course* I do. For the full principle ruling this matter is the "gentlest manner possible consistent *with stopping the crime*." Thus, Wisniewski is not justified in claiming that Block (2010C) "avoid(s) one problem only to be confronted with an even more serious one." It may or may not be true that "abortion (i.e., lethal eviction) involves the amount of physical harm done to the fetus that is grossly disproportionate to the amount of physical harm that the fetus can possibly do to the mother." Harm, after all, is subjective. A young girl impregnated by a rapist, and forced to bear his child, might feel so much shame that she commits suicide, and it is not at all clear that this would be "disproportionate" to the harm that such a mother does to the fetus. But, let us suppose that it is. Still, just who's *property* are we talking about here? Surely, it is the *mother's* domain; it is *her* womb. She has a right to determine which entities may occupy her terrain, and which ones may not. In Wisniewski's view, allowing the mother to evict the fetus when this results in the death of the latter "is tantamount precisely to blowing the trespasser away with a bazooka when there exists no other ways of removing him from one's lawn." Well, yes, it is. Where W and I part company is that he thinks that under these circumstances it would *not* be justified for the property owner to kill the trespasser, while I maintain that it would.[8] After all, if we are to accurately employ the libertarian legal nostrum, "gentlest manner possible consistent *with stopping the crime,*" then that trespasser *must* be stopped.[9] And, I contend, Wisniewski is lead into this erroneous interpretation of libertarian law because of his confusion between proper punishment after the fact, and, proper defense, during the time the crime is being perpetrated.

[7] Similarly, if I have a net that will render the knife wielder harmless

[8] W's is here a very heroic assumption. One wonders why the property owner did not put up a sign to the effect that "trespass is forbidden," or "I will shoot trespassers," or some such.

[9] If that is indeed the wish of the property owner. W might take some solace from the fact that his neighbors might boycott him, unless the trespasser was shown to be dangerous.

Airplane

Wisniewski (2010A, 2) offered an "airplane thought experiment." Here, "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."

In Block (2010C, 4) I rejected this as an analogy to the pregnant woman: "In no manner, shape or form can X's kidnapping of Y, and then placing the latter on the airplane in order to subsequently throw him off, be construed as an improvement in Y's welfare. Rather, the very reverse. Further, in order to carry out this despicable deed, X had to violate the libertarian non aggression principle (NAP). In contrast, in very sharp contrast indeed, merely becoming pregnant does not at all constitute a per se violation of the NAP."

But Wisniewski (2010B) is not without a rejoinder to this sally of mine. He states:

> The above quotation indicates that Block seems to have either overlooked or misunderstood some of the crucial elements of my argument. First, dragging Y onboard the plane by X cannot be interpreted as kidnapping. In my original paper, I explicitly say with respect to the interactions between X and Y (up to the point where Y is threatened with being thrown out of the plane) that "there is no contract involved, and for the sake of the argument we can even suppose there is no *implicit* contract involved (we might assume that X and Y disclaim any reliance on standard hospitality customs)" (Wisniewski 2010, 2). Think of X and Y as drinking buddies who accept the rule whereby the one who stays conscious longer can play pranks on the other. Hence, waking up onboard the plane not only does not in any sense decrease Y's welfare, but might even improve it to the extent that he might enjoy being a 'victim' in a game of pranks that he voluntarily decided to take part in. In sum, in terms of changes in welfare and the presence or absence of the NAP violations my thought experiment and the case of pregnancy are at worst strictly parallel, and at best my scenario is morally safer insofar as it leaves place for enjoyment on the part of Y (which cannot possibly be said with regard to the fetus, an unconscious being, by definition unable to derive enjoyment from anything). Second, notice that in my scenario there is no necessary causal connection between dragging Y onboard the plane and deciding to throw him out. Similarly, there is no necessary causal connection between getting pregnant and deciding to abort. The future is as uncertain for Y as it is for the fetus. The mother is a prospective death dealer just as much (or as little) as X is. Thus, it is not only the case that 'not every woman who gets pregnant terminates it before the nine month

> period' (Block 2010, 5). It is also the case that not in every possible world X intends to throw Y out of the plane, let alone executes this intention. Again, in this regard there is no disanalogy between the two cases.

I don't think that in Block (2010C) I "either overlooked or misunderstood some of the crucial elements of" Wisniewski's (2010A) point about the airplane. "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" still sounds to me like a (coercive) kidnapping, not at all analogous to a voluntary pregnancy. The way I read Wisniewski (2010B), he is now radically changing the scenario. There was simply no mention in Wisniewski (2010A) of his (2010B's) "X and Y as drinking buddies who accept the rule whereby the one who stays conscious longer can play pranks on the other." It seems a bit harsh to accuse me of careless inattention to what Wisniewski (2010B) said, when I (in Block, 2010C) was commenting on Wisniewski (2010A), not Wisniewski (2010B), and the two versions of what my critic says are altogether different. Indeed, they contradict one another. The first is a clear kidnapping; the second is a completely voluntary interaction. If Y is so stupid as to agree to these "pranks," then, as far as I am concerned, he deserves whatever he gets, that is, whatever X wishes to dish out to him, up to an including insisting that Y depart from the airplane in mid flight. This sounds, after all, like the voluntary sado masochist example, if on steroids, and it thus black letter law within libertarianism: these weird agreements do not violate the NAP, and therefore, if X tosses Y out of his plane, he is entirely within his rights. In similar manner, when the sadist beats the voluntary masochist, there is no assault and battery. But, in neither of these cases does Wisniewski lay a glove on the evictionism thesis.

Welfare rights

A sees B trapped on the railroad tracks. The train can be heard close by, speeding toward B. We stipulate that if A doesn't help free B, the latter will surely die. So A, a good Samaritan, rushes to the aid of B. Just in the nick of time, A pushes B off the rails, and thus saves his life. Unhappily for B, the tracks abut a lake, and A, in saving B from the choo choo, accidently pushes B into the water. A cannot swim, or, better yet, refuses to swim; perhaps he just doesn't like getting all wet.[10] He cannot or will not save B. B dies from drowning. If we carry forth with Wisniewski's views on abortion, he would say that since A saved B once, from the train, he therefore *owes* it to B to save

[10] Instead of showers, or immersing himself in the bath tub, he takes sponge baths. Go figure that A, our hero, should be so weird.

him, also, and once again, from the raging waters. I say to Wisniewski, get a life.[11] Just because A saved B once does not mean he is *obligated* to preserve his life a second time. Now, it would be *nice* if A were to ward off his water hatred, and serve as a swimming life guard, as well as a rescuer from the big bad train. But, there is nothing in all the world of libertarian legal theory that *compels* A to save B a second time. In like manner, the pregnant woman gives life to the fetus (akin to A saving B from the train). Just because she does so, she is not at all duty-bound to save the fetus a second time, by allowing it to reside in her body, something over which she is the entire 100% owner, for nine months,[12] Wisniewski to the contrary notwithstanding. Wisniewski's error, here, is in maintaining a rather unusual version of positive obligations. If you save someone (or give him life) once, you are legally required to do so a second time. But, what about on a third (fourth, fifth, etc.) occasion. To wit, suppose that A first saves B from the train, and, then, a second time, from drowning. Is A obligated to follow B around for the rest of B's natural life, functioning as a sort of guardian angel over B? After all, if B got into trouble once, with the train, and a second time with the lake, he is likely to be endangered a third (fourth, fifth, etc.) time as well, and, if A allows B to be killed on *any* of these other occasions, Wisniewski is logically compelled to characterize A as taking on the role of a murderer. Extrapolating from Wisniewski's views, if he is to be logically consistent, he must say that not only must the mother keep the fetus safe from harm in *her*[13] womb for nine months, but, for the rest of her child's life, too. So, if she predeceases her progeny, the usual occurrence, Wisniewski must then accuse the mother of murder, since she is not living up to the obligations that Wisniewski places upon her, and in the name, forsooth, of the libertarian legal code.

Wisniewski (2010B) avers that these considerations are merely "just an expression of an intuition" on my part. I think not. Once one opens the Pandora's box of positive obligations, there is no stopping on the path to full egalitarianism, and beyond. The welfare state is merely a point along this misbegotten road. It is not an "intuition" to say that if A, after he saves B once, must continually save B again and again; rather, this amounts to a claim of positive rights on B's part. It is not an "intuition" to say that the essence of the welfare state is positive rights. It is not an "intuition" to say that if a mother is forced to house a trespasser against her will for nine months, that this amounts to the imposition of the fetus's positive rights upon the pregnant woman who is unwilling to bear this burden.

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[11] Pardon the pun. I just couldn't help myself.

[12] Or for *any* other amount of time, see below, should that prove necessary.

[13] I put this word in italics to emphasize the point that it is the mother, not the fetus, contrary to Wisniewski, who is the rightful owner of this bit of private property.

Most pro-life advocates such as Wisniewski will make an exception for the fetus who[14] is the result of a rape. But, all fetuses have equal rights; they are all equally innocent of any NAP violation. If the mother may evict, even unto death, such a fetus, she may do so for *any* trespasser in her body. But, it might be objected, in ordinary intercourse, the mother in effect *invites* the fetus onto her (womb) property. Wisniewski's mistake lies in thinking that a mere invitation constitutes an open ended obligation. Yes, in Block (2010C) I charged that Wisniewski's position amounted to a support for welfare rights, in the sense of positive obligations. Nothing in Wisniewski (2010B) offers reason for any change in my position on this matter.

Wisniewski relies on the libertarian principle of *pacta sunt servanda*, fancy language for the idea that agreements must be kept. Yes, yes, of course, agreements, in the sense contracts, must be maintained.[15] However, the decision on the part of a woman to become pregnant, voluntarily, cannot be considered to be on a par with a contract. It might well be asked, "Contract with *whom*?" Wisniewski and I both agree that in the case of contractual surrogate motherhood no eviction of the fetus would be licit. But when the male parent is removed from the equation, there is no one for the voluntarily pregnant woman to have a contract *with!* At the time of intercourse, the fetus does not (yet) exist. Surely, it would be a more than passing curious "contract" with only *one* party to it. So much for Wisniewski's reliance on the *pacta sunt servanda.*

States Wisniewski (2010B):

> If it were customary in the society under consideration to remember that one is not allowed to overstay one's welcome no matter the external circumstances, then B would not be allowed to remain on A's property indefinitely, even if the storm were to persist for an indefinite amount of time. If, on the other hand, the opposite custom were in force, and if A did not make it explicit to his prospective guest that he is not an observant member of the local tradition, then, yes, A would be under a positive obligation to be B's host for as long as the storm persists (sponsored, in the Longian (1993) fashion, by the corresponding negative obligation of *pacta sunt servanda*).

[14] I employ this verbiage purposefully. The fetus, in my view, is already a (very undeveloped) human being.

[15] However, this does not at all apply to agreements in the sense of promises. On this Rothbard (1998) states: " Our contention here is that mere *promises* are not a transfer of property title; that while it may well be the *moral* thing to keep one's promises, that it is not and cannot be the function of law (i.e., legal violence) in a libertarian system to enforce morality (in this case the keeping of promises)." But see Kinsella (2003) for an alternative view. Surely, an invitation is more like a promise than a contract?

> Perhaps one might want to reply that in view of the above the permissibility of abortion too is ultimately a matter of custom, but I think Block would agree with me that it would not be a libertarian answer. As far as my understanding of their role goes, customs and conventions can help specify the ambit of applicability of the NAP, but their prescriptions apply only to those who can in the first place choose whether to accept or reject any given set of tradition-based rules (such as B, who can choose whether to accept or reject A's invitation). The fetus, on the other hand, cannot make such a choice. Its situation could be likened to that of B if the latter were forcibly dragged into A's house. As a result, the type of the NAP that applies to the moral assessment of its handling by the mother is independent of any customs and conventions that the mother might subscribe to. Thus, notwithstanding the ingenuity of Block's defensive counterargument, evicting the fetus to its death still counts as murder (barring the cases in which carrying the fetus to term threatens the life of the mother, due to the principle of proportionality).

I have no doubt that Wisniewski is correct in apportioning an important role in matters of NAP violations to custom. Certainly, it is determinative of the *meaning* of words, gestures, invitations, etc. For example, the middle single finger salute must be translated into something hostile in countries such as the U.S. However, it is entirely possible that this hand gesture is commonly interpreted in a very different manner elsewhere. However, in Wisniewski's rendition, the NAP becomes, almost, a handmaiden of custom, rather than the other way around, as it would be in the libertarian philosophy. That is, the libertarian NAP must be the dog that wags the customary tail, not the other way around.

For example, the practice of suttee was quite entrenched in the customs of India. It had been engaged in there from time immemorial, before the British arrived and stamped out that pernicious institution. The logical implication of Wisniewski's emphasis on custom is that suttee would be justified on NAP grounds, surely an inference to be avoided. Note how Wisniewski gets himself once again snared into the delusion of positive rights. For, suppose that the "custom" is that when you invite someone to your house, you are not required, merely, to host him for the duration of the "storm." Posit, instead, that the "custom" is that you must care for him, feed him, clothe him, provide health services for him, for the rest of his life. Based on Wisniewski (2010B) this author could not object to such goings on, at least not on the basis of NAP, for in his view, "custom" trumps the libertarian legal code. I find most disquieting Wisniewski's contention that "The fetus, on the other hand, cannot make such a choice. Its situation could be likened to that of B if the latter were forcibly dragged into A's house." The

difficulty here is that Wisniewski likens the situation of the fetus as a *worsening* of his welfare when he is conceived. It is as if the fetus is kidnapped. But this line of argument can easily be disposed of by asked oneself, "Which would I prefer? To have a sperm enter an egg, and thereby create me, or to not have this meeting occur, and therefore to be non existent? Surely, speaking now in behalf of the fetuses of the world,[16] w eall prefer existence to non existence. To liken what the parents do, in bringing forth a new human being, giving it life, to being kidnapped, must surely count, then, as a logical howler. I thus cannot see my way clear to agreeing with Wisniewski (2010B) when he asserts "evicting the fetus to its death still counts as murder." It there is any unsupported "intuition" in this piece, unconnected to the facts or to basic libertarian theory, it is this contention of Wisniewski's.

Suicide

Wisniewski writes as follows:

> Block states that my theory is vulnerable to the objection that a mother who dies through suicide while pregnant should be considered a murderer (Block 2010, 6). To be honest, I fail to see why this should be an objection to my theory. Yes, I would consider such a person a murderer, just as I would consider X from the airplane story a murderer if, having dragged Y onboard, he would decide to crash the plane in an act of suicide. In both of these cases the mother and X, respectively, are the ultimate cause of their "guests'" death.

I fear that Wisniewski does not fully appreciate the power of the reductio ad absurdum. Just because *he* would consider the pregnant suicide a murderer does not mean that this is not a telling argument against the position he has staked out. The point is, no one else would make this sort of legal judgment. More important, it is simply incorrect to regard the pregnant woman who commits suicide as a murderer, also. This is because she has no (positive) obligation to keep her fetus alive. She owes it nothing. She has not made any contract with it. At the time of sexual intercourse, she could not even promise it anything, let alone its life, since it did not *exist* at that time. It is only with the greatest use of poetic license that we can say that the pregnant woman "invited" the fetus onto her property. For an invitation to be made, it has to be made to *someone.*[17] Now, while I am perfectly willing to stipulate that the fetus is a human being even at its earliest existence as a

[16] All of us, that is, except perhaps for suicides who no longer wish to exist; and even they might only wish to die at the present time, and do not regret that they existed for a while.

[17] Apart from surrogacy, we rule out the father as a promise.

fertilized egg, *at the time of intercourse* it did not *yet* exist. How can it reasonably said, then, that the women *invited* a not as yet existent human being into her body? I claim that if Wisniewski left off relying on literary metaphors, he might be able to see the precariousness of his position.

In Wisniewski's (2010B) view, it would "be particularly unlibertarian to oblige A to entertain B in his house if the storm lasted for years (which may or may not happen), whereas pregnancy lasts for approximately 37–42 weeks (which nearly always happens). Thus, the two cases are very unlike each other: both in terms of duration and uncertainty."

However, we are talking *principle* here. It matters not one whit how long a duration we are talking about. If the fetus as a positive right to squat on what would ordinarily be considered the mother's private property (her womb), then the nine months could be turned to nine or even ninety years, without any change in principle whatsoever. And, as for the uncertainty of the matter, the abortion issue is intractable enough without resort to this complexity. In my writings I have adopted the "God's eye view." This enables us to posit, stipulate, assume, the facts of the matter. *Given* that thus and such is now the situation, what is the position of the libertarian legal code on the matter? Uncertainty, entrepreneurship, while to be sure, are part and parcel of Austrian economics, have no place in the present context.

Conclusion

In this present essay I have attempted to show the wide divergences between my views on abortion, and Wisniewski's. More, I have tried to demonstrate that his are invalid; that my thesis is impervious to his criticisms. Notwithstanding that, I still think that Wisniewski has made an important and thoughtful contribution to our understanding of this vexing and highly complex issue. There have been so far very few scholars willing to go to the mat with me on this issue. Wisniewski should thus be complemented for his courage if for nothing else. But more. As I said in Block (2010C) his sharp and highly focused criticisms have forced me to delve more deeply into this issue, certainly more thoroughly than I would have been able to do without his very able efforts.

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