

ABORTION, LIBERTARIANISM, AND EVICTIONISM: A LAST WORD

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I INTEND THE PRESENT PAPER TO BE MY LAST WORD¹ in the debate I have been having with Walter Block (2010, 2011a, 2011b) on the subject of evictionism as an alleged libertarian “third way,” capable of transcending the familiar “pro-life” and “pro-choice” dichotomy. In this debate, I myself defended what might be regarded as a qualified “pro-life” position, while Block consistently argued for his view that the mother is morally allowed to expel the fetus from her womb provided that no non-lethal methods of its eviction are available.

Interestingly, we both derived our respective arguments from the same set of principles—the libertarian axioms of self-ownership and non-aggression—thus providing yet another illustration of the fact that, despite being clearly distinct from other political and moral philosophies, libertarianism is a complex and internally heterogeneous body of thought, riddled with many thorny and contentious issues.

Throughout our debate, we invoked a number of relatively complex thought experiments, which, in order to help us advance our dialogue, touched upon some of the broader issues and concepts typically regarded as foundational to libertarian theory. Some of these ideas include the nature and applicability of proportionality in retaliatory violence, the scope of convention as a potential qualifier of the applicability of the non-aggression principle, and the nature of implicit contracts. I therefore hope that my exchange with Block will serve not only as a step forward in understanding the relationship between libertarianism and one of the thorniest issues in the

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¹ At least as far as the present journal is concerned.

area of bioethics—i.e., the moral justifiability (or lack thereof) of aborting unwanted fetuses—but also as a valuable discussion of some of the related complexities of libertarian philosophy.

Having made the above introductory remarks, since I remain unconvinced by Block's (2011b) latest battery of arguments defending the compatibility of evictionism with libertarianism, I feel obliged to reply with one final set of counterarguments before concluding my participation in the debate. Without further ado, let me proceed the substantive points he raises in his latest rejoinder to my criticisms (Wisniewski, 2010a, 2010b, 2011).

First, Block uses the thought experiment of the “pure Austrian snow tree” (hereafter PAST), which he borrows from Demsetz (1979), in order to argue that there is no proportionality built into the Non-Aggression Principle (hereafter NAP). In Block's own words, “there is no (...) requirement [of proportionality] that rests on the victim for his self-defense *during* the commission of the crime” (Block, 2011b). Here is Block's description of the thought experiment in question:

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.” *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. (Block, 2011b)

As I see it, this thought experiment, far from refuting my argument for NAP proportionality, actually provides an illustration of its validity. In the envisioned scenario, X does not just trespass on Y's land, but also, by the very act of trespassing, threatens the lives of 50 people. In other words, as I put it in one of my previous contributions to the debate, in the scenario under consideration X is a “necessary cause” of those 50 people's deadly harm (Wisniewski, 2011). This makes it a paradigmatic case of a situation where an act of self-defense (even one resulting in the trespasser's death) does not violate the principle of proportionality. Notice that this observation does not commit us to making interpersonal comparisons of utility, and hence to the utilitarian philosophy, since it involves no more than a simple recognition that Y can justifiably deprive X of his life only if X threatens Y's

life (as in the situation where carrying the fetus to term threatens the mother's life).

Next, Block suggests that an unwanted fetus commits an offense against a person rather than a person's *property*, and "offenses against the *person* are more serious, much more serious, than those against mere property" (Block 2011b; emphasis in original). He then presents the following thought experiment, borrowed from Thomson (1986, 1990, 1991), to buttress his claim:

The needy, desperate X is now connected to Y's body through an umbilical cord, which alone can save X's life. Must Y remain attached to X for 9 months, whether through the umbilical cord or internal to his body? When the matter is put in these terms, this hardly follows, as Wisniewski would have it. It is difficult to see how any such requirement can be reconciled with libertarian theory, which clearly eschews all such positive obligations. (Block 2011b)

In response to the above scenario, it should first be noted that if it is Y who is causally responsible for having X connected to his body, then there is no way in which X can be considered a trespasser. Thus, in the event of the latter's death via disconnection, Y would have to bear the whole responsibility for it, hence becoming guilty of an instance of lethal aggression.

Things become more complicated if we are to think of X as connected to Y's body against the latter's will. In such case the emotional force of the thought experiment adduced by Block greatly increases. However, since Block did not construct a deductive counterargument against the claim that the principle of proportionality is built into the NAP, but instead resorted to an intuitive argument based on a thought experiment, I feel justified in replying with an equally intuition-based *reductio ad absurdum*. Let us not in any way alter Thomson's original scenario except for one detail: now X can survive by staying attached to Y for just one minute. Does this slightly modified scenario suggest that disconnecting X within this short period of time counts as an unacceptable violation of the principle of proportionality? If it does, then it would seem that the validity of this principle is purely a matter of contextual judgment, a conclusion I think both of us would wish to avoid.

However, I believe I understand what Block's concerns in this context may be. If we sufficiently indulge our SF imagination, we can easily come up with a story in which a particularly perverse government (or any other coercive entity operating on a sufficiently large scale) puts millions of people in a situation exactly similar to that of X in Thomson's original thought experiment. Then, Block might say, if all of Ys in my story are forcibly

prevented from getting rid of their unwanted companions, the government in question has established a de facto welfare state, while I, a supposed libertarian, am suggesting that an attempt to dismantle it in the most immediate and straightforward manner should be considered unlibertarian.

Thus, let me make what Block might consider a major concession, which I consider a natural, though hitherto not explicitly articulated extension of my thinking on our debate. That is, while I regard using disproportionately severe retaliatory violence against harmful non-aggressors^{2, 3} as inconsistent with the libertarian ethic, and while I certainly regard not using such violence as a strictly *negative*⁴ libertarian duty, I also regard it as, to use a Kantian term, an *imperfect* duty. In other words, it is a duty that cannot be physically enforced, and which therefore occupies a middle ground between perfect (i.e., physically enforceable) duties and supererogatory actions.

In other words, in view of the fact that a raped woman and Y from Thomson's story were aggressed against in the first place, and assuming there exists no method whereby they can non-violently sever the connection between themselves and the entities whose lives depend on their continued support, I can find no justification for applying further (punitive) violence to them if they refuse to keep these entities alive. However, in view of the fact that the dependants are entirely innocent, and that depriving them of their lives deprives them of the crucial precondition for enjoying any of their liberties to any degree whatsoever, I must nonetheless consider not killing those dependants as an imperfect duty of their involuntary supporters. This, it seems to me, makes the view I espouse markedly different from that of the pro-life welfare statist, but also more appreciative of the value of liberty—i.e., more libertarian—than Block's evictionism.

As regards Block's question "why should we favor the life of the mother over that of the fetus" (2011b), posited in the context of scenarios in which carrying the fetus to term threatens the life of the mother, and his suggestion that no coherent libertarian answer can be formulated without explicit reference to property rights, I have to say that I clearly acknowledge

² As I emphasized several times over the course of our debate, a fetus cannot be regarded as an aggressor, since aggression presupposes intention; earthquakes, hurricanes, and meteorites cannot be meaningfully thought of as aggressing against us.

³ I of course mean only those harmful non-aggressors whose undesirable influence is not caused by the previous conscious actions of the agent who regards their influence as undesirable. In other words, my "concession" does not at all apply to, e.g., the fetuses brought into existence as a result of consensual intercourse.

⁴ In other words, a duty not to do something rather than a duty to do something, despite Block's continued suggestions that my position implies the acceptance of positive obligations.

the necessity of making such a reference. However, I also emphasize that this reference has to be circumscribed by the principle of proportionality. This is in fact why I side with the mother (the owner of the womb) in those scenarios where the principle of proportionality is clearly satisfied, and with the fetus in those scenarios where the mother voluntarily brought it onto her property (in which case it cannot be considered as a trespasser, and thus the property rights of the mother have to be weighed against the property rights of the fetus according to the principle of proportionality). Proportionality is also why in the remaining cases (such as those of rape) I approach the issue in the way expounded in the previous paragraph.

The above considerations also help to realize that, contrary to Block's assertion, my view of the matter does not come "perilously close to adopting the view that rights can clash" (2011b). Instead, it consists in determining whether, in any given case, the appeal to property rights allows for expelling someone from one's property, or whether such an appeal is inadmissible due to one's pre-existing (implicitly) contractual obligations. In addition, it consists in determining whether an act of expulsion is morally warranted in light of the principle of proportionality. In other words, it identifies *prima facie* conflicts of rights, and then logically resolves them by appealing to the morally relevant elements of each specific case of putative conflict.

Also, I need to stress again in this context that the approach in question in no way commits us to utilitarianism or Coasean wealth maximization. It involves no more than a simple recognition that Y can justifiably deprive X of his life only if X threatens Y's life, and it does not matter in this connection whether we are dealing with just one X or 50 Xs (Taurek, 1977), since a lethal threat from one X is sufficient to meet the criterion of proportionality.

In the next section, Block claims, in reference to the airplane ride example recurring throughout our debate, that "if our X drags an unconscious Y into *danger*, then it should be clear, a fortiori, that he has engaged in a coercive activity" (Block, 2011b). In my opinion, this view is correct. However, I regard it as incorrect to assert that the mere act of dragging Y onboard the plane puts him in danger. Clearly, it is only X's decision to order Y to jump out that adds the element of danger to the story, and since the decision to drag Y onboard and the decision to evict him afterwards are logically fully separable, it cannot be claimed that the former is coercive on the grounds that it jeopardizes Y's well-being.

Furthermore, Block claims that there is an important disanalogy between evicting a fetus into an environment that will kill it, and X forcing Y out of the former's plane:

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. Rather, the infant was *created* there. (2011b)

However, I fail to see the moral relevance of the fact that the fetus was created in the womb rather than forcibly placed there. Let us modify our airplane example and imagine that, rather than being unconsciously dragged onboard the plane by X, Y was biologically engineered by X in his flying laboratory and then ordered to jump out. Would X be any more justified in ordering Y out of his property in such a situation? If Block thinks he would, I fail to see why.

Next, Block suggests that someone who pushes another person off the track into a lake, thus saving her from a certain death by being crushed by the oncoming train, but also resulting in her drowning, should be considered a hero rather than a murderer (2011b), since the temporarily-saved person's drowning was an unintended consequence of an otherwise unambiguously positive act. But why should that matter? It is surely better to be no hero than to be a would-be hero whose interferences ultimately result in the death of those whom he tries to save. If A did not push B off the track, anticipating that he is unable to calculate the force of the push so as to avoid throwing B into the lake, then A would clearly be blameless according to the libertarian ethic, since no causal connection could be established between his actions and B's death. However, the requisite causal connection clearly exists in the case of B ending up in the lake as a direct result of A's actions, even if the result in question is unintended.

Moreover, Block attempts a *reductio ad absurdum* of my position on the basis of the following supposed analogy:

K is starving on day 1. J gives K enough food to survive on day 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. (2011b)

However, this alleged analogy is clearly fallacious, since K's starvation is not caused by any of J's actions—in other words, it is not the case that J steals food from K or otherwise prevents K from obtaining food on his own. On the contrary, B's ending up in the lake is directly caused by A's actions. It is best to elucidate the existence (or lack thereof) of the relevant causal chains on the basis of counterfactual reasoning, and such reasoning reveals that

while K would starve to death in the absence of J's actions (or, better still, in the absence of J), B would not drown in the absence of A's actions (or, better still, in the absence of A).

Block concludes the section under consideration by stating the following:

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 on her private property rights in her womb. (2011b)

This, of course, will not do, since, as I have stressed repeatedly throughout my previous three papers on the topic, if one voluntarily initiates the causal chain which leads to someone else ending up on her property, the latter person cannot be considered a trespasser. From this it follows that, barring scenarios of rape, an ex post unwanted fetus is not a trespasser and cannot be evicted to its death if the evictor is to act consistently with the libertarian ethic.

Regarding implicit contracts, I agree with Block that all cases of pregnancy due to rape have to be excluded from the category of situations that can give rise to such contracts. However, in connection with the claim that “for many years, numerous people, and even some nowadays, simply did not know that sexual intercourse led to pregnancy” (2011b), I can only say that ignorance does not annul responsibility. I suppose Block would agree with me that there exists an implicit non-aggression contract between any two previously non-aggressive individuals, and one stabbing the other with a knife could not be excused on the grounds that he did not realize that plunging a knife into someone's chest could result in serious injury. The same, I would argue, applies to maternal ignorance.

Concerning Block's assertion that it “seems like a gigantic and unwarranted stretch to say that [the mother's] ‘invitation’ [of the fetus into her body] is for nine months” (2011b), my reply is: but what other period of time could possibly be appropriate in this context? Block plausibly suggests that no diner would agree to pay one billion dollars for a coffee. But what person would retrospectively (or, per impossibile, what conscious fetus would prospectively) agree to any invitation shorter than one necessary for allowing the fetal development required to withstand the conditions of the outer world? As I see it, if in the context of implicit contracts the acceptable (i.e., judicially enforceable) range of coffee prices is dictated purely by cultural convention, in the case of fetal development the acceptable minimum time the maternal invitation lasts must be dictated by biological considerations.

These considerations (since they are grounded in the nature of reality more objectively than cultural conventions) should result in Block accepting the character of the above invitation all the more strongly.

Finally, Block concludes his section on implicit contracts by saying the following:

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 fortiori, if it is impermissible for children to be contractual signatories, this applies with even great [*sic*] force to fertilized eggs. (2011b)

But clearly, we are still talking about implicit contracts, and these do not require signing or even being understood. The fact that very young children cannot sign or even understand contracts surely does not change the fact that there exists an implicit non-aggression contract between themselves and more mature individuals. Why should the situation be any different with respect to fetuses, who are, as Block agrees, human persons?

In the penultimate section of his paper, Block comments once again on the drinking scenario that I used for illustrative purposes throughout my three preceding papers:

I cannot comprehend how, when X plies Y with liquor until the latter is drunk and then “forcibly (though not involuntarily)” 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. (2011b)

This comment contains several serious errors. First of all, the phrase “X plies Y with liquor until the latter is drunk” carries undertones of coerciveness, while the situation under consideration takes place in a purely voluntary social context. Second, slipping the date rape drug rohypnol into someone’s drink without that person’s knowledge is an instance of malicious fraud. My drinking scenario includes no such element—the participating parties are perfectly aware of the potential consequences of their actions. Third, Block himself suggested that someone who pushes another person off the track into a lake, thus saving her from a certain death by being crushed by

the oncoming train, but also resulting in her drowning, should be considered a hero rather than a murderer. How then can he possibly regard escorting a benumbed person out of a drinking party and placing her in the safety and quiet of one's home as kidnapping? Surely the former situation involves greater use of physical force, and yet Block considers such use as heroic according to the libertarian ethic. Is he then prepared to consider an instance of alleged kidnapping as heroic too?

In the same section, Block makes the following curious statement:

Based on his actions, [Wisniewski] prefers existence to non existence. Were this not the case, he would have committed suicide, God forbid. But he did not [*sic*] 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. (2011b)

This is a major non sequitur, since from the fact that I, whose existence is quite enjoyable, prefer it to nonexistence, it does not follow that there are no kinds of existence so miserable that nonexistence is preferable to them. In fact, Block himself clearly realizes this, since he says in the footnote to the comment quoted above: "I do not take the position that existence is *necessarily* better than nonexistence. For example, if a person was suffering from continual excruciating pain, from [*sic*] an incurable disease, he may very well prefer to commit suicide" (2011b).

Finally, Block suggests that I should adopt his view on utilitarian-legal grounds. This, however, sounds surprising coming from someone who, unless I'm gravely mistaken, regards himself as a deontological, natural rights libertarian. If it was my view that the general public decided to adopt, it would make no difference for all those fetuses that can presently survive outside the mother's womb—they would be saved anyway. Hence, what really matters in the context under consideration is the principled question of whether aborting a voluntarily conceived fetus constitutes a violation of the non-aggression axiom, and I cannot imagine that Block could approve of circumventing this question by appealing to the practical consequences of the current legal consensus.

In conclusion, while my position articulated in this paper contains an element of what Block might consider a concession on my part—i.e., an explicit declaration that I regard abstaining from lethal evictions of fetuses conceived as a result of rape as a libertarian duty, but only an imperfect one—my views on the subject remain otherwise unchanged. In other words, I continue to regard an unqualified defense of the theory of evictionism as indefensible on libertarian grounds, and with this let me conclude my participation in the present discussion.

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