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EVICTIONISM, PRO-LIFE AND PRO-CHOICE

INTRODUCTION

We all know what is the pro-life position. The fetus is a human being, blessed with all rights that pertain to any other person, beginning with the fertilized egg stage. Unless the mother's health is in dire danger, she is obligated to carry her child for the full nine months. We all know the pro-choice philosophy. The fetus is no more and no less than a blob of protoplasm. It has no more rights than an unwanted appendix, or a cyst or a wart. It should only be considered a human being after birth, with rights equal to those of everyone else.

Less well known is the evictionist position. In this position, the fetus is first seen as a fully rights bearing human being from the fertilized egg stage and thereafter. Here, evictionism and the pro-life position are identical. Second, abortion is seen as a two-stage act. It consists not of one but of two entirely separate stages. Initially, the fetus is removed from the womb, or, evicted, if you will. Then, the fetus is killed.¹ The evictionist position maintains that the first is justified, at any stage of the pregnancy; the second, never. Now, it just so happens that at today's level of medical technology, the fetus is viable outside of the womb only in the third trimester, not for the first six months. So, if the eviction occurs in the earlier period, the result will be identical to the pro-choice stance: the baby will die. However, if it takes place

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¹ It is similar in this regard to a labor strike, which also consists of two completely separable acts: one, the workers down tools and walk off the job; two, they prevent competitors, labelled as "scabs" from taking up their temporarily renounced employment status.

during the later time-period, the result will be congruent with the pro-life position: the pre-born infant will survive. Thus, evictionism is a compromise between the other two viewpoints.

Here is a table summarizing the three positions:

	Pro-life	Pro-choice	Evictionism
May the fetus be evicted?	No	Yes	Yes
May the fetus be killed?	No	Yes	No

Let us look at this matter from yet another perspective.

Norman Malcolm said of his teacher and mentor, Ludwig Wittgenstein, “On one walk he ‘gave’ to me each tree that we passed, with the reservation that I was not to cut it down or do anything to it, or prevent the previous owners from doing anything to it: with those reservations it was henceforth mine” (1958, 31–32). The point is, unless the woman may evict people she regards as squatters, or trespassers, she is not fully the owner of her own body. If the unwanted fetus is not an intruder, then there is no such thing as intruding on, or in this case, inside, someone else’s body.

In section 1 we make the case that conception is all important, birth not at all in terms of determining when rights-bearing human life begins. The burden of section 2 is to compare and contrast evictionism and the pro-life positions. Section 3 is given over to an examination of how *ex post facto* law is relevant to these considerations. We address the issue of whether or not there are any problems with evictionism in section 4. In 5 we wrestle with the concept of positive obligations. We conclude in the final section.

1. CONCEPTION, NOT BIRTH

According to both the pro-life and the evictionist positions, feticide and infanticide are equally culpable, equally criminal. Certainly, there can be no doubt about the latter. This is a paradigm case of outright murder. Yet, the one tugs at our heartstrings far more than the other. Even the pro-choicers would agree with this negative assessment of infanticide, but not feticide. But, if the

infant and the fetus have equal rights, the position of both pro-life and evictionism, why this very different assessment on the part of, likely, the holders of all three positions?

One possible explanation is that many people believe that birth is a profound event. We all have birthdays. We celebrate them with birthday parties. It must be the rare individual who is even aware of his conception date, let alone knows it.² Even less likely, rejoices in it.

Yet, according to both pro-life and evictionism, birth is merely, usually, a very small change of address. At one point, you are inside your mother's womb. At a later time, you are outside of her, and she is holding you on top of and just outside of her stomach while she is lying on her back in a hospital bed. You have moved from inside of her to directly outside of her. No big deal at least not in terms of geography. The newborn and the pre-born baby one minute from birth are as alike each other as any of the rest of us, a few minutes apart.

The episode, in sharp contrast, that makes all the difference philosophically, and legally, is the one where the sperm enters inside the egg. From that moment on, there is a human being with all the rights thereto of any other person on the planet. Birth is but a movement from outside the property of the mother, her womb, and into that of another entity, presumably that of the hospital. Conception is a profound, gigantic, change in status from non-existence to existence.

2. EVICTIONISM AND PRO-LIFE

Consider the case in which the mother evicts the fetus from her body, during the first semester. According to evictionism, she has committed no crime whatsoever. However, the pro-life viewpoint must analyze this situation very differently. If infanticide is a crime, and it certainly is, and if the fetus and the infant are equally rights bearing,³ then it ineluctably follows that anyone who evicts or aborts her fetus during the first trimester is a murderer. The doctor who performed this operation would be guilty of aiding and abetting an unjustified killing. This is profoundly counter-intuitive. Most people, even pro-lifers, would recoil in horror from any such conclusion.

² In virtually all cases, except for in vitro fertilization, the parents, too, are unaware of this date.

³ Both the pro-life and the evictionist theories concur on this.

This conclusion can be defended against by the pro-life forces, but their response would only suffice at best in the short run. It could be argued by them, for example, that at present people simply do not realize that such an act could be considered murder.⁴ It would only be after a number of years when this idea percolated throughout society that the death penalty could be justly imposed on a pregnant woman who resorts to eviction during the first trimester, which necessarily killed the unborn baby. But, yes, in the long run after this process took place, that is exactly what would occur. Such a woman would be treated exactly like any other murderer.

I doubt, however, that public opinion would be satisfied even with this moderate position. It is still and would remain profoundly counter-intuitive to accuse of murder a person who merely evicts a(n innocent) trespasser from her private property, her person.

However, such an analysis does not even suffice in the short run. For there is this basic premise in the legal field according to which ignorance of the law does not absolve the perpetrator who violates it. To be sure, it is not now against the law for a woman to have an eviction in the first trimester. However, we can easily modify this legal insight to read as follows: acting incompatibly with just law, whether or not well known, is no excuse. Those who violate it should still be subject to punishment.

Yet another problem with the pro-life philosophy concerns its position on abortion to save the mother's life. Invariably, advocates of this viewpoint make an exception in this case. But why? This is totally unjustified on the basis of their own principles. As far as they are concerned, there are two human beings involved, not just one. The rights of each are identical to the other. Why, invariably, choose the mother vis a vis the baby in cases where only one can live and the other must perish? To be sure the mother is larger and older than the pre-born baby. But they have equal rights, exactly equal rights in this pro-life perspective. If two exhausted swimmers were fighting over a piece of wood that could save the life of only one of them, we would scarcely always give the nod to the older, larger of the two of them. Assuming away the possibility that one of these swimmers is the rightful owner of the sliver of wood under contention and the other is not, we would presumably choose at random which one would live and which one would die. The pro-life position in favor of the mother is thus legally and philosophically unwarranted.

⁴ I owe this point to Czar Bernstein.

The evictionist theory suffers from no such irrationality. This perspective, too, supports the mother *vis a vis* the baby. The former is the owner of the property at issue. She has homesteaded that body long before the baby came along. In the case of rape, the pre-born baby is clearly a squatter, an innocent one of course. The pro-life position is akin to ignoring who is the proper owner of the wood, in the case of the two swimmers, one of whom must drown, according to that scenario. The evictionists, in sharp contrast, give thumbs up to the owner of the wood; and, to the mother in this case.

3. EX POST FACTO LAW

What is my warrant for taking this position? It is that *ex post facto* law is justified. Consider the end of slavery in 1865. During the preceding years it was perfectly legal, to whip, maim, rape and even murder slaves.⁵ But clearly any and all such violations of the non-aggression axiom are criminal and hence should be punishable by law. How should the court regard the possible defense that all such acts were perfectly legal before this epoch, not only in the South but in the North as well? The judge should give such a defense the back of his hand. Justice is justice and it should be illegal to treat human beings in any such manner at any point in our history, without exception, even if legal at the time.

The Nuremberg Trial decisions support this analysis. The defense of the Nazi officers was that it was entirely legal to brutalize Jews, Gypsies, Blacks, homosexuals, all those who were not of acceptable Aryan background.

Thus the pro-life position still remains highly counter-intuitive. For a woman who engages in evictionism in the first trimester which leads to the death of her unborn baby, it inevitably follows that she is a murderer. Note that no such a criticism can also apply to the evictionist position. Why not? Here, the woman is not guilty, since she is the owner of the property in question, her body, and she gets to determine whether or not the fetus is a trespasser. If she makes this determination, and engages in eviction, even though the baby dies, she is not a murderer, merely a defender of her private property rights over herself. She engages in evictionism.

⁵ The latter was rare, but mainly for economic reasons. It is not profitable to engage in such acts; see FOGEL and ENGERMAN (1974) and HUMMEL (2022).

4. PROBLEMS WITH EVICTIONISM?

We have just discussed an embarrassing criticism of the pro-life position. Are there any such concerns that can be launched at evictionism? There are and we will soon discuss them, but my conclusion is that while they also pull at our heartstrings, they utterly fail as criticisms and thus evictionism escapes unscathed from them.

The first such attempt to undermine evictionism concerns the airplane. X drugs Y and deposits him in the airplane owned by Z. Y is an unconscious innocent trespasser now located inside the property of Z. Y is guiltless of any crime. He is an innocent victim. It is not at all his fault that he is unconscious, and hidden away in Z's plane.⁶

Z takes off in total ignorance of the existence of Y in his plane. The airplane owner Z discovers his stowaway, Y. Z tosses out Y off his property at 30,000 feet as soon as he discovers him. It must be conceded that this places Z in a bad light. All men of good will, at least initially, cry out for Z to keep Y in his airplane until it safely lands and Y can disembark with his skin fully intact. Presumably, that would be the moral thing to do. But we are not now concerned with ethics, or niceness. Rather, the question we face is: Is Z guilty of murder or of any crime whatsoever for booting Y out of his airplane, and dropping the latter to his death? The answer emanating from this present libertarian quarter is that no, Z is innocent of any legal wrongdoing. He is, instead, merely upholding, exercising, basing his actions on his private property rights over his aircraft. This, certainly, gives him the legal right to evict trespassers, even totally innocent squatters, such as Y.

Either we believe in the sanctity of private property right or we do not. We cannot have it both ways, or on a partial basis, not if we want the law to be objective. If we support private property rights, then Z is as innocent as is the driven snow for dropping Y to his death. However, an innocent man, Y, has just perished. Is there no guilty party at all in this little scenario? Of course there is: X. He is the one who drugged and then kidnapped Y, depositing him in Z's plane. So far, the indictment is merely kidnapping, not murder. However, Y is deceased as a result of X's illicit action. We base this insight on the legal maxim "the criminal must take the victim as he finds him," X is thus

⁶ Note the analogy to the fetus who is an innocent trespasser located inside the property of his mother; this certainly applies to the case where the unborn baby results from an act of rape.

responsible, additionally for Y's death. X is thus a murderer and should be punished thereof.

To summarize this section so far: either we respect private property rights or we denigrate them. Yes, it sounds horrid for Z to kill Y in the airplane case, but he is justified in so doing. Who, then, is the murderer? It is X, the person who drugged Y and then placed him in Z's plane.

But is there not a better solution than this the one offered by libertarian theory? Should we reject this perspective, at least on this one issue, because it gives us an answer that is difficult to swallow? Not so fast.

The improvement that might be offered could be along these lines: yes, by all means, accept private property rights as the general starting point. If we have learned anything from the almost perfectly fully controlled experiments of North and South Korea, East and West Germany, it is that societies which respect capitalism, free markets, property, are more prosperous, save more lives, than those which denigrate them. But why not make an exception in life and death crises such as this one? Why not sculpture the law books such that in cases of this sort, if Z tosses Y out of his plane at 30,000 feet, then Z is adjudicated as a murderer (along with X)?

One problem with this "solution" is that it opens up a Pandora's box. If we are to ignore property rights in the airplane case, if we are to consider Z a murderer, not merely a property owner evicting a(n innocent) squatter by right, then we are *all* murderers, every last one of us without exception. How so? There are starving people in Asia, Africa, South America, and we are sitting pretty, enjoying our first world lives. We, all of us, and Z are in the same boat. All of us together, place our own property above the lives of those of the starving masses.

If we condemn Z, and want to defend ourselves against the charge of hypocrisy, we must also denounce ourselves. But I do not see any massive self-condemnation for the plight of people in faraway lands.

Then there is the matter of deontology. If we are all justified in not condemning ourselves as murderers, even though we refuse to give our wealth to the starving the same should apply to Z.

Let us now consider this matter from a pragmatic or utilitarian point of view. How many people will likely be in Y's position? The number would be slim to none. This is a totally contrived example, the only purpose of which is to put paid to evictionism. Perhaps over the last millennium, there have been a dozen people in Y's shoes. In contrast, how many people starved to death

during this time period? Unhappily, not tens of millions⁷ but presumably hundreds of millions if not billions. So, the critics of evictionism are willing to weaken property rights, which are the last best hope for the prosperity of the human race, the best guarantor against starvation known to man, to save the lives of a few people in Y's place and perhaps none at all.

How can we best characterize people who oppose private property rights? Socialism is the usual nomenclature applied to such folk. We are thus logically compelled to conclude that conservatives who favor the pro-life position are socialists. They cannot be considered full-blown socialists to be sure. But their adherence to the alternative system, capitalism, can only be skin deep as a result.

Western civilization is now under attack from all sides. The woke movement, Cultural Marxists, economic Marxists, fascists, communists, socialists all reject laissez faire capitalism. One would have expected at least a modicum of support from pro-life conservatives upon such an occasion. Sadly, it is not forthcoming. Instead, they exult in airplane examples, which are an attempt to undermine evictionism, by throwing stones at private property rights.

Let us consider one more example in this vein.⁸ Suppose there were a magic button which, when pushed, would result in the creation of an adult human being. Where is this newborn but in every other way adult person located? Why, on the property of the button pusher. So, he is not a trespasser because he was in this unusual way invited. Or was he uninvited?⁹ I think the difficulty here is that the words "invited" and "uninvited" are not able to fully acquit the job they are being asked to do in this weird context.

On the one hand, there clearly was an invitation. Someone pressed a button and we stipulate that he full well knew that as a result a new human being, an adult, would come into being. And, as expected, he did indeed appear, as if out of the thin air. On the other hand, for there to be an invitation there must be not only an inviter, but also an invitee. However, before the button was pushed the latter did not exist. Thus, there could not have been an invitation issued to anyone.

Assume first, as a contrary to fact conditional, that there was indeed an invitation. Posit that the inviter's property was so large that with the best will in the world it would take a nine months "walk" to come to the end of it, and

⁷ Stalin, alone, accounted for that many.

⁸ I owe this one to Czar Bernstein.

⁹ One is tempted to dismiss this objection to evictionism on the ground that we have already addressed the issue with XYZ and the airplane example. I shall, however, resist the temptation on the ground that it opens up yet more vistas in this examination.

be on someone else's property where he would be, finally, safe. Does the button-pushing landowner have to put up with that new person for this length of time? Obviously, the implication is that when an invitation is offered to the fetus, it is for a nine-month duration. But does this follow logically? Can Jones not invite Smith to his house for dinner, and then when 10pm passes start making hints that Smith should depart? And then at 11pm passes and Smith is still there, Jones becomes more forthright about this desired state of events? At this point Smith announces he will leave the premises, only, after a full nine months has ensued whether or not Jones agrees to this interminably long "visit." Is Smith justified in taking this stance? Hardly. It does not follow even if we regard voluntary sexual intercourse as an invitation that the duration should be for this amount of time.

What about the pre-born baby who results from rape? Surely, there can be no suggestion that there was any invitation at all on the mother's part. How will the button-pressing example save the pro-life position from the rape example? It cannot do any such thing. I dare not think anything good about this crime, but it cannot be denied that this example blows up out of the water the pro-life thesis.

On the other hand, evictionism is able to withstand this intellectual attack. The pregnant rape victim is able to remove the fetus from her person at any time during the nine-month period, in that while human, and innocent, to be sure, he is still a trespasser.¹⁰

5. POSITIVE OBLIGATIONS

Next, consider the case of the parents who bring home their baby from the hospital, place him in his crib, and then do not feed him. He dies of starvation. Are they murderers? You are darn tootin' they are. If they are not murderers, then no one in the history of the universe has ever been a murderer.

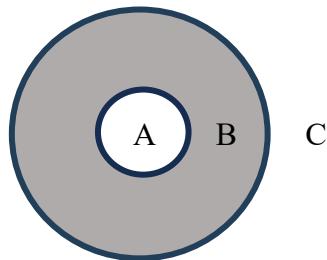
But does this claim not run dab smack against the libertarian rejection of positive rights, positive obligations? Is it not a positive obligation for parents

¹⁰ These radical philosophical hypothetical scenarios are all well and good. They stretch out our brains. However, we must be aware of their limitations. They can undermine even accepted law. For example, murder is and should be illegal. Even murderers do not want to be murdered. However, suppose that the all-powerful Martians threaten to blow up the entire Earth unless we murder innocent person Joe. Joe will have to go, and we will justify his demise somehow, thus undermining the law against murder.

to feed their children? Why should they be required to feed their progeny when they have no such legal obligation, at least not according to the libertarianism upon which evictionism is based? In this view, no one has a positive obligation, not previously agreed upon, to feed starving people in Africa, Asia or Mars for that matter, should any prove to exist on the fourth planet.

No, admittedly, this is a powerful criticism of libertarianism but it cannot be logically sustained. Why not? The way to become an owner of land or wild animals is to homestead them, or mix your labor with them, in the immortal words of John Locke (1948).¹¹ No one, of course, can legitimately own another human being¹² but parents may become guardians of their children. How can they do so? By “homesteading” their progeny, that is, mixing their labor with them.

Specifically, they care for them, feed them, diaper them and in all such other ways support them. These parents, by taking their baby home from the hospital started this process, but then ceased. There are no positive obligations so they have a right to cease and desist from their guardianship. However, if they want to do so they are legally required to bring their baby back to the hospital or to an orphanage or other such place that will provide care to the baby. This, to be sure, sounds a lot like a positive obligation, but it is not.



Consider the diagram above. There are two concentric circles; it is the picture of a bagel, or a donut. The innermost circle is labelled A, the intermediate one is B¹³ and outside that is area C. Is it licit to homestead in the B format?

¹¹ See also on this matter: BLOCK (1990, 2002a, 2002b), BLOCK and EDELSTEIN (2012), BLOCK and NELSON (2015), BLOCK and YEATTS (1999), BLOCK vs EPSTEIN (2005), BYLUND (2005, 2012), GORDON (2019a, 2019b), GROTIUS (1814), HOPPE (1993, 2011), KINSELLA (2003, 2006a, 2006b, 2007, 2009a, 2009b, 2009c), LOCKE (1948), McMAKEN (2016), PAUL (1987), PUFENDORF (1927), ROTHBARD (1969, 1973, 32), ROZEFF (2005), WATNER (1982).

¹² Apart from voluntary slavery on which see BLOCK (1969, 1979, 1988, 1999, 2001a, 2002b, 2003, 2004a, 2005, 2006, 2007a, 2007b, 2009a, 2009b, 2013, 2014, 2015), LESTER (2000), NOZICK (1974, 58, 283, 331), PHILMORE (1982).

¹³ Which stands for the bagel or donut, since it takes on that appearance.

We assume there are no helicopters, no bridges, tunnels or any other way to arrive at area A from C. The answer is then No. Why not? This is because the owner of B would be controlling A even though he did not so much as even set foot in that territory, let alone successfully homestead it. B is guilty of the crime of preventing other people, located in C, from homesteading and coming to own area A. B would be guilty of the crime of precluding, or preventing, or thwarting.

In order to avoid this crime, B must allow a path through his property¹⁴ so that people located in C can get through his territory to access A. Is this a positive obligation of his? Not at all. Rather, it is the only way he can obviate, defend against, the crime of precluding others from going about their lawful business and accessing A, homesteading it, coming to own it.

The parents who refuse to feed their child are in the same precise situation as is B. They, too, are precluding other people, potential adoptive parents, from also going about their lawful business of becoming guardians of that baby, by taking care of him. The analogy between area A and the baby is a strong one. Just as B is legally obligated to allow access to A without it constituting a positive obligation,¹⁵ the same applies to the extraordinary parents. Just as B must allow paths through his property for C to reach A, the parents must notify churches, orphanages, hospitals, etc., of the availability of their baby for adoption. It is only if no one in C wants to access the A territory that B is not required to build paths through his holdings. In like manner, it is if there is no one on the in the entire world who wishes to adopt that baby that it would not be a crime to refrain from feeding, caring for, the infant.

Is this analogy perfect? No. No analogy is. There are differences between babies and land masses. But the analogy is close enough to demonstrate that legally requiring parents to either care for their young children, and/or notify potential adoptive agencies does not constitute a positive obligation.

CONCLUSION

The weakest aspect of the pro-life position, when carried to its logical conclusion, concerns the rape of a twelve-year old girl. Her well-being is severely

¹⁴ This is sometimes referred to as the Blockian proviso: BLOCK (1977, 1978, 1998, 2001b, 2004b, 2011), BLOCK and WHITEHEAD (2005), LONG (2007), DOMINIAK (2017), KINSELLA (2003, 2007).

¹⁵ Rather, a defense against the criminal charge of precluding.

challenged by this horrid experience. Then, to add insult to injury, the pro-lifers, if they are logically consistent, would charge her with no less than murder if she took the morning after pill. The weakest aspect of the pro-choice perspective is that advocates, if they fully adhere to their position, see no crime whatsoever in butchering a fetus 10 minutes from being born. The fully developed infant, in their view, is merely a bunch of cells, similar to an appendix, and his obliteration is not at all criminal. Only evictionism escapes both these failures.

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EVICTIONISM, PRO-LIFE AND PRO-CHOICE

Summary

Private property rights and evictions are two sides of the same coin. You can't have one without the other. If you really own something, anything, you have the right to evict trespassers. If you cannot evict them, then, to that extent, you do not fully, really, own the property in question. The present paper will apply this insight to abortion, regarding the pro-life, pro-choice and evictionism positions on this matter.

Keywords: abortion; pro-life; pro-choice; evictionism

EWIKCJONIZM, PRO-LIFE I PRO-CHOICE

Streszczenie

Prawa własności prywatnej i ewikcje to dwie strony tego samego medalu. Nie da się ich rozdzielić. Jeśli naprawdę jesteś właścicielem czegoś, czegokolwiek, to masz prawo usunąć intruzów. Jeśli nie możesz tego zrobić, to w pewnej mierze nie jesteś w pełni właścicielem danej posiadłości. W niniejszym artykule zastosowano tę analogię do kwestii aborcji, analizując stanowiska pro-life, pro-choice oraz ewikcjonizmu w tej sprawie.

Slowa kluczowe: aborcja; pro-life; pro-choice; ewikcjonizm