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Evictionism Is Either Redundant or Contradicts Libertarianism

Response to Walter Block on Abortion***

Abstract: The present paper is a response to Walter Block's critique (Block 2024, 57–66) of our recent argument (Dominiak & Wysocki 2023, 527–540) against his

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theory of partial impermissibility of abortion called evictionism. This time, however, instead of targeting Block's thesis that the unwanted fetus is a trespasser again, we take it for granted – merely *arguendo*, to be sure – and argue that even if this problematic thesis is admitted, evictionism should still be rejected as either unlibertarian or redundant vis-à-vis the otherwise well-established doctrine of killing and letting die. Our main argument focuses on the problematic nature of eviction and shows that requiring eviction as the gentlest method of stopping the unwanted fetus's invasion of the woman's rights involves burdening her with positive duties, an anathema to libertarianism. Presumably, the notion of eviction could be interpreted in a way that does not introduce positive duties into libertarianism. However, then eviction would be reduced to letting the fetus die, rendering the entire project of evictionism essentially superfluous as compared with the age-old doctrine of doing and allowing.

Keywords: Walter Block, evictionism, abortion, libertarianism, killing and letting die, doing and allowing, property abandonment, gentleness principle

Introduction

In his paper "Evictionism: The Only Compromise Solution to the Abortion Controversy"[1] published in this journal, Walter Block once again puts forward his theory of evictionism, that is, the idea that the unwanted fetus, being a trespasser to the woman's self-owned body, may be removed from this property of hers as a matter of self-defense, provided that the means employed in the process are the gentlest possible. Since abortion is "defined as removal plus killing",[2] it can be the gentlest and thus permissible method of expelling the fetus only in cases in which it is impossible to remove it in a way that preserves its life. On the other hand, in cases in which it is possible to merely evict the fetus, that is, to remove it "in a manner that preserves the life of the baby",[3] it is only eviction, but not abortion, that is the gentlest and thus

[1] Walter Block, "Evictionism: The Only Compromise Solution to the Abortion Controversy", *Studia z Historii Filozofii* 15(1) (2024): 57–66.

[2] Ibidem, 60.

[3] Ibidem.

permissible method of defending the woman's rights. In making this argument, evictionism purports to offer a compromise solution to the abortion debate. It is a pro-choice position in cases in which it is impossible to remove the fetus in a way that preserves its life, and a pro-life position in cases in which it is possible to do so. However, the crucial point is that in these latter cases the woman is not doomed to carrying the unwanted fetus to term. She is permitted to evict it, that is, to remove it from her body "in a manner that preserves the life of the baby".[4]

A lion's share of Block's latest presentation of evictionism is devoted to his response to our recent paper[5] which focused on debunking the evictionist claim that the fetus is a trespasser. Block's response is a valuable piece of writing as it finally makes clear that instead of oftentimes declared allegiance to strict liability, Block actually embraces – at least in the innocent threats scenarios under which he subsumes unwanted pregnancies – the Thomsonian technical liability account, according to which not only *mens rea*, but also action is not required for being liable to defensive killing.[6] Although we are not persuaded by Block's arguments in this regard, in the present paper we would like to take a different tack of refuting evictionism than again discussing the question of whether the fetus can tenably be viewed as a trespasser. To wit, sharing for the sake of discussion evictionist assumptions that the unwanted fetus is a human person (or a self-owner, if you will) and that it is a trespasser and assuming that no special contractual arrangements limit the woman's liberty, we would like to argue that evictionism either (1) identifies eviction with letting the fetus die and therefore is redundant vis-à-vis the Killing and Letting Die Doctrine; or (2) does not identify eviction with letting the fetus die and therefore contradicts libertarianism as it imposes positive duties on the woman.

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[4] Ibidem.

[5] Łukasz Dominiak, Igor Wysocki, "Evictionism, Libertarianism, and Duties of the Fetus", *Journal of Medicine and Philosophy* 48(6) (2023): 527–540.

[6] Cf. Judith J. Thomson, "Rights and Deaths", *Philosophy and Public Affairs* 2(2) (1973): 154–155; Judith J. Thomson, "Self-defense", *Philosophy and Public Affairs* 20(4) (1991): 300–302.

However, before we develop our argument against evictionism in detail, we must make a comment on our broader exchange, both about evictionism and about other issues, with Walter Block. Although we sometimes disagree with this author, we are extremely grateful to him for his unfailing enthusiasm, open-mindedness, and goodwill – "Thy friendship makes us fresh. And doth beget new courage in our breasts"[7] – but, above all, for his contributions to the libertarian scholarship. Without them, this freedom philosophy would be much impoverished as Walter Block almost singlehandedly created the science and art of libertarian casuistry, that is, the craft of applying libertarian justice principles to almost every imaginable and minutest case and conundrum under the sun in order to find out how it should be solved from the libertarian point of view. In this endeavor, we are Walter Block's faithful disciples and fellow-travelers, we admire and learn from his works. But as our common strive cannot succeed without debating, challenging and criticizing each other, we will at times, inevitably, part company with this great scholar on some thorny issues. Abortion, unsurprisingly, is one of them.

The present paper is organized in the following way. Section 2 puts forth the main argument against evictionism according to which evictionism is either redundant vis-à-vis the Killing and Letting Die Doctrine or contradicts libertarianism. Section 3 deals with a possible criticism of our argument stemming from Block's theory of property abandonment. Section 4 develops the distinction between killing and letting die in more detail than we could afford in section 2, thereby strengthening retrospectively our main argument contained in the latter section. Section 5 concludes.

[7] William Shakespeare, "Henry VI", in: *The Collected Works of William Shakespeare with a Life of the Poet* (London: Atlantis, 1980), 86–87.

Killing, Evicting, and Letting Die

Under the standard reading of libertarianism there are no primary positive duties.[8] As pointed out by Block,[9] to say that libertarianism predicts the existence of such duties is "a serious charge to make against a libertarian, since it implies the acceptance of positive rights, anathema to this entire philosophy". Accordingly, under libertarianism as applied to the relation between parents and children, parents do not have any primary positive duties to their offspring. As argued by Murray Rothbard, "the parent should not have a *legal obligation* to feed, clothe, or educate his children, since such obligations

[8] In another paper, one of us contended that there are only two situations in which libertarianism recognizes positive duties, namely contract and creation of peril (Łukasz Dominiak, "Ewikcjonizm i zasada ubi ius, ibi remedium: Problem aborcji w filozofii politycznej libertarianizmu", *Studia Polityczne* 46 (2018): 215). This is not entirely correct, for it is a staple of the libertarian literature that there are positive remedial duties as well (such as compensatory, restitutive or punitive duties). What one of us must then have had in mind were only primary positive duties. But this is not correct either, for duties stemming from contracts and creation of peril are secondary rather than primary, the same as remedial duties. The criterion distinguishing primary and secondary duties seems to be the following: if a duty stems from an action of the duty-bearer, then it is a secondary duty (accordingly, a right correlative with such a duty is secondary too). Thus, duties stemming from contracts, creation of peril and infringements are secondary. In turn, duties correlative with self-ownership rights (such as duties not to kill, rape, maim etc.) and property rights (such as duties not to steal, defraud, embezzle or destroy property) are primary. Duties stemming from creation of peril are interesting though, for there seem to be two different kinds thereof, namely duties that involve breaches of primary duties and duties that do not involve such breaches, both kinds being yet secondary duties due to stemming from the duty-bearer's actions. For example, if B tries to punch A and A pushes B into a lake in self-defense, A does not breach any primary duty. However, if now, when B's attack has been successfully repelled, B is helplessly drowning in the lake, A leaving him there for certain death will exceed the limits of self-defense and end up as manslaughter. Thus, A has a secondary duty (to prevent himself from breaching a primary duty not to commit manslaughter) stemming from his own action (creating peril by pushing B into the lake) which as of yet has not breached any primary duty (as A acted in self-defense). On the other hand, if A pushes B into a lake unprovoked, A thereby breaches his primary duty not to commit battery. However, if now B is drowning, A has a duty to rescue him as doing so will prevent A from breaching yet another primary duty not to commit murder. On the distinction between primary and secondary duties compare Michael S. Moore, *Placing Blame: A Theory of the Criminal Law* (New York: Oxford University Press, 1997), 170–171.

[9] Walter Block, "Forestalling, Positive Obligations and the Lockean and Blockian Provisos: Rejoinder to Stephan Kinsella", *Ekonomia – Wroclaw Economic Review* 22(3) (2016): 32.

would entail positive acts coerced upon the parent and depriving the parent of his rights".[10] *A fortiori*, under libertarianism – and so under evictionism – the woman does not have any primary positive duties to the fetus either. In this regard, she has only negative obligations. For example, the woman has a duty not to remove the fetus from her body, even if the fetus were to survive such a procedure, because doing so would amount to causing an unauthorized bodily contact with the fetus, that is, battery and so would violate the fetus's rights. Of course, under the evictionist assumption that the unwanted fetus is a trespasser, these negative duties of the woman are to some extent extinguished as the unwanted fetus forfeits some of its correlative rights by committing the trespass. This forfeiture in turn creates room for permissible defense of the woman's rights. Now the crucial question is how much room.

Evictionism says that only so much room as is necessary for stopping the trespass in the gentlest possible way, the requirement labeled the Gentleness Principle.[11] Thus, if it is *possible* to remove the fetus from the woman's body "in a manner that preserves the life of the baby",[12] aborting it – where abortion is "defined as removal plus killing"[13] – certainly fails to be the gentlest

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[10] Murray N. Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998), 100.

[11] Block explains the Gentleness Principle, *inter alia*, in the following way: "[I]f A sees B stepping on his lawn, as a first step A may not blow B away with a bazooka. Rather, A must notify B of his trespass, and if B immediately ceases and desists, perhaps even with an apology thrown in, that is the end of the matter. It is only if B turns surly, hostile and aggressive, and refuses to budge, that A may properly escalate. Not, immediately, to the bazooka stage, but a threat to call the police would not be considered at all inappropriate; even a physical push would not be untoward. If B at this point initiates physical aggression against A, say by pushing him back, throwing a punch at him, or pulling a gun or knife on him, then all bets are off, and A may appropriately escalate the violence sufficiently to protect himself and his property from invasion. That is the sum and sole element of 'gentleness' in libertarianism" (Walter Block, "Evictionism is Libertarian; Departurism Is Not: Critical Comment on Parr", *Libertarian Papers* 3(36) (2011): 5).

[12] Block, "Evictionism: The Only Compromise Solution to the Abortion Controversy", 60.

[13] Ibidem. This way of defining abortion might be confusing, for removing plus killing might suggest that the fetus is first removed from the woman's body and only then killed. While such a way of aborting the fetus is certainly possible, typical methods of abortion such as, for example, dilation and curettage (D&C), involve killing the fetus in the process of removing it – something that is better construed as one act type rather than two, that is, as killing rather than removing plus killing. It seems that Block would like to draw a distinction between evic-

possible way of stopping the trespass. In such a case, abortion is impermissible. However, since the unwanted fetus is a trespasser who forfeits some of its rights by residing in the woman's body without her consent, evicting it, that is, removing it "in a manner that preserves the life of the baby",[14] which in such a case is assumed to be the gentlest possible way of stopping the trespass, does not constitute battery and is thus permissible. On the other hand, if it is *impossible* to evict the fetus, then abortion might indeed constitute the gentlest possible way of stopping the trespass and therefore become permissible. Or so argues evictionism.

Before we put forth our argument against evictionism, let us first take stock of the above conceptual framework and slice it into relevant theses. Thus, according to evictionism, the woman does not have primary positive duties to the fetus. Let us call this claim *No Positive Duties Thesis*. Besides, abortion is "defined as removal plus killing".[15] Adjusted for such procedures as, for example, dilation and curettage in which killing of the fetus happens in the process of removing it from the woman's body rather than in addition to removing it, abortion under evictionism can be understood as simply killing the fetus. Let us call this claim *Abortion As Killing Thesis*. Moreover, eviction is understood as removing the fetus from the woman's body "in a manner that preserves the life of the baby".[16] Let us call this claim *Eviction As Life Preserving Thesis*. Finally, it seems possible to remove the fetus in a way that neither kills it nor preserves its life but simply lets it die. Arguably, there are actual medical procedures that do just that, that is, let the fetus die.[17] What

tion which removes the fetus "in a manner that preserves the life of the baby" (ibidem) and abortion which removes the fetus in a manner that kills it (or perhaps in a manner that does not preserve its life – which is the crucial question of the present paper). Yet, drawing this distinction does not require construing abortion in an artificial way as "removal plus killing" (ibidem).

[14] Ibidem.

[15] Ibidem.

[16] Ibidem.

[17] These methods include the so-called abortion pill, hysterotomy and hysterectomy. Cf. Jeff McMahan, "Killing, Letting Die, and Withdrawing Aid", in: *Killing and Letting Die*, ed. Bonnie Steinbock, Alastair Norcross (New York: Fordham University Press, 1995); Kate Greasley, *Arguments About Abortion* (Oxford: Oxford University Press, 2017); David Boonin, *A Defense of Abortion* (New York: Cambridge University Press, 2002); David Boonin, *Beyond*

letting the fetus die actually amounts to in the context of abortion, we discuss in more detail in section 4. For the time being let us basically point out that there seems to be a difference between (a) killing the fetus by, for example, dismembering it; (b) letting it die by removing an obstacle to its death, that is, by disconnecting it from the woman's body which provides the natural life-support to the developing fetus; (c) letting the fetus die by omitting to prevent its death from pathologies as when, for example, the fetus suffers from some disease and the medical treatment is withheld from it; and (d) removing the fetus from the woman's body but instead of leaving it to die, providing it with external life-support or other necessary aid.[18] Thus, let us call the contention that it is possible to remove the fetus in a way that neither kills it nor preserves its life but simply lets it die *Removal As Letting Die Thesis*.

Now to our argument. Consider the question:

According to evictionism, is eviction identical with letting the fetus die or not?

Roe: Why Abortion Should Be Legal – Even If the Fetus Is a Person (New York: Oxford University Press, 2019); Bruce Blackshaw, "Can Prolife Theorists Justify an Exception for Rape?", *Bioethics* 36(1) (2022): 49–53; Łukasz Dominiak, "Abortion Ban Advocates and Rape Exception", *Journal of Bioethical Inquiry* (2024): 1–13.

[18] It is not clear whether evicting the fetus, that is, removing it "in a manner that preserves the life of the baby" (Block "Evictionism: The Only Compromise Solution to the Abortion Controversy", 60), encompasses letting the fetus die (b and c) or only includes the last mode of removing the fetus (d). Block is hardly clear on this point. His definition of abortion as "removal plus killing" suggests that letting the fetus die does not qualify as abortion. On the other hand, his requirement that the fetus is removed "in a manner that preserves the life of the baby" (ibidem) suggests that letting the fetus die does not qualify as eviction either. However, it is also possible to understand Block's condition of removing the fetus "in a manner that preserves the life of the baby" (ibidem) as pertaining solely to the removal procedure, not to what happens afterwards. In this sense, letting the fetus die would also qualify – in contradistinction to killing or removing plus killing – as removing the fetus "in a manner that preserves the life of the baby" (ibidem), even if the fetus so removed is then left to die. We would like to avoid being prejudicial against Block from the get-go and so instead of venturing an interpretation of what eviction really encompasses and what it excludes, we take a purely formal tack and examine each option in its turn, that is, an option according to which eviction amounts to letting the fetus die and an option according to which it does not because the condition of preserving the fetus's life extends beyond the removal procedure alone. As we are going to show, neither option works for evictionism, for the first one renders it redundant vis-à-vis the classical doctrine of killing and letting die, whereas the second one results in evictionism contradicting libertarianism.

Since there are only two options, that is, it is either identical or not, our argument unfolds in the following way:

(1) Eviction is either identical with letting the fetus die or not.
(2) If it is identical, then *Eviction As Life Preserving Thesis* collapses into *Removal As Letting Die Thesis* and evictionism loses its distinctiveness as a philosophical position vis-à-vis the Doctrine of Killing and Letting Die (KLD). Thus, evictionism becomes redundant.
(3) If it is not identical, then *Eviction As Life Preserving Thesis* contradicts *No Positive Duties Thesis* and evictionism loses its libertarian character by entailing the existence of primary positive duties on the part of the woman. Thus, evictionism contradicts libertarianism.

Let us explain. If removing the fetus "in a manner that preserves the life of the baby" merely means that the fetus is not killed in the process of removing it or is not killed in addition to removing it, then letting the fetus die clearly qualifies as removing it "in a manner that preserves the life of the baby".[19] But then *Eviction As Life Preserving Thesis* collapses into *Abortion As Letting Die Thesis* and evictionism collapses into KLD as applied to abortion. For under this interpretation evictionism is simply saying that it is permissible to evict the fetus, that is, to let it die, but impermissible to abort it, that is, to kill it. This, however, is nothing else than repeating the standard thesis of KLD. In such a case evictionism loses its distinctiveness as a philosophical position and in this sense turns out to be redundant vis-à-vis KLD.

If, on the other hand, removing the fetus "in a manner that preserves the life of the baby"[20] does not merely mean letting it die – a more likely interpretation – then eviction has to involve some additional action (for example, putting the evicted fetus in the incubator)over and above removing the fetus and allowing it to die, that is, an action that instantiates or brings about the preserving of the fetus's life (or at least attempts to do so). In such a case, *Eviction as Life Preserving Thesis* does not collapse into *Abortion As Letting Die*

[19] Ibidem.
[20] Block, "Evictionism: The Only Compromise Solution to the Abortion Controversy", 60.

Thesis and preserves its philosophical originality or distinctiveness. However, then it contradicts *No Positive Duties Thesis* and so contradicts libertarianism. After all, such an additional action instantiating the preserving of the fetus's life as, for example, putting the evicted fetus in the incubator would have to be required of the woman as a matter ofher primary positive duty and we know otherwise that libertarianism does not recognize any such duties.

Another option to consider in this regard is the option that providing the removed fetus with external life-support or some other aid can be viewed as the woman's secondary duty rather than a primary one. After all, getting pregnant normally involves an action on the woman's part and so if this action were of a kind that gives rise to positive duties – as, for example, an action of creating peril is – then *Eviction as Life Preserving Thesis* would not contradict *No Positive Duties Thesis*, for the latter thesis pertains only to primary duties. However, the problem with this option is that we know otherwise that neither evictionism nor libertarianism – as evidenced by the above quotes and arguments – recognizes the woman's positive duty, be it primary or secondary, to take care of her offspring. Again, as pointed out by Rothbard,[21] "the parent should not have a *legal obligation* to feed, clothe, or educate his children, since such obligations would entail positive acts coerced upon the parent and depriving the parent of his rights". Thus, this option seems closed for evictionism although it might merit a separate paper developing it into a fully-fledged argument to the effect that libertarianism is *logically compelled to* recognize, in some circumstances, the woman's secondary duty to take care of her offspring.[22]

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[21] Rothbard, *The Ethics of Liberty*, 100.

[22] An anonymous referee pushes back on this dodge of ours. Says he: "Why take Rothbard's position on child abandonment for granted, nearly to the point of defining it into the concept of libertarianism? Perhaps Rothbard's view should be rejected on the grounds of peril creation? I believe the authors should elaborate on this point at least a bit more. To put it bluntly, it seems rather bizarre to say that a prima facie valid point will not be discussed since it would merit not just another article but a piece yielding a conclusion opposite to the one defended. Perhaps it is that paper that should have been written? For if I understand correctly, if abortion does amount to peril creation, then the authors discard evictionism for all the wrong reasons: evictionism is erroneous not because it entails positive duties but because the mother did, by getting pregnant, assume the positive duty to sustain the fetus". Well, the referee is right. In our defense we can only say two things. First, that we do not have a fully-fledged *internal* –

Positive Duties and Property Abandonment

Having thus presented our main argument against evictionism, let us preempt a possible criticism thereof that could be issued by the proponents of evictionism and that consists in questioning our claim that preserving the fetus's life involves a positive duty, be it primary or secondary, on the part of the woman.

As we see it, this possible criticism draws on Block's argument about abandoning children.[23] Block's position in this regard is that to abandon one's property under libertarianism, one has to perform some action (notify others, remove obstacles etc.) that constitutes property abandonment. Yet, the requirement to do so is not a positive duty foisted upon the owner of the property. Rather, it is some sort of success requirement. By the same token, evictionism requiring the woman to remove the fetus in a way that preserves its life might be seen as simply spelling out the success condition for the fetus's abandonment rather than burdening the woman with a positive duty. In this way, *Eviction As Life Preserving Thesis* could be sustained and reconciled with *No Positive Duties Thesis* while evictionism could avoid contradicting libertarianism. Writes Block:

> This follows not from any positive obligation whatsoever, but rather from the logical implication of what it means to abandon something. You cannot (logically) abandon something if you do not notify others of its availability for their ownership. At most, if you do not undertake any notification, you have not abandoned it, but rather are simply the absentee owner over it […]. In order to succeed in fully or truly abandoning your property, you must take two steps: first, you must notify others that you have indeed abandoned your property, and second, you must not set up roadblocks preventing others from homesteading your

that is, *libertarian* – argument from peril creation (or any other *internal* argument to the same effect, for that matter) at our disposal at the current moment and, second, that resorting to an *external* argument would, to paraphrase Quine, offend the aesthetic sense of us who have a taste for landscapes viewed from within (Willard van Orman Quine, *From a Logical Point of View* (New York: Harper Torchbooks, 1961), 4).

[23] Walter Block, "Libertarianism, Positive Obligations and Property Abandonment: Children's Rights", *International Journal of Social Economics* 31(3) (2004): 275–286.

> now abandoned property. If you do not accord your actions with both of these requirements, it cannot be said of you that you have successfully engaged in an abandonment of your property.[24]

We are going to pass over the question of whether Block's point about property abandonment is as such correct or not because even if it is correct, it still fails to reach our argument. For one thing, to suggest that requiring the woman to remove the fetus in a way that preserves its life is not burdening her with a positive duty but simply spelling out what it takes to successfully abandon the fetus is to presuppose that the woman who is letting the fetus die is abandoning it. This presupposition is yet false. If the woman wants to let the fetus die and acts upon her intention, then what she wants and does is to give limited license to clearly specified persons to deal with the fetus in a clearly specified way while excluding all other interferences with the fetus by all other persons, especially any interference that could possibly thwart the (letting die) abortion procedure and preserve the fetus's life. Moreover, she normally continues to exercise this authority over the fetus way beyond just the procedure by giving directions about the fetus's corpse and licensing such posthumous arrangements as, for example, the postmortem examination, tissue donation or funeral. Now to give license to specific persons to deal with one's property and to exclude all other interference with this property is to do the exact opposite of property abandonment, namely it is to exercise the very hard core of one's ownership rights. Thus, letting the fetus die is not an attempt to abandon it.

But even if letting the fetus die were abandoning it, Block's argument would still fail to establish that it is obligatory to evict the viable fetus and so impermissible to let it die. For note that to fail to abandon one's property is not to commit any wrong or incur any remedial duty. After all, notifying others or removing roadblocks is not a positive duty, a violation of which could constitute a wrongdoing or give rise to some remedial duties. Rather, it is a mere success requirement, a mere "logical implication of what it means to abandon something".[25] And as far as libertarianism is concerned, any owner

[24] Ibidem, 279.
[25] Ibidem, 280.

is permitted to fail to abandon, sell, donate or otherwise alienate his property. There is no duty to succeed at disposing of one's property. Accordingly, the woman who fails to abandon her fetus by failing to preserve its life does not commit any wrong or incur any remedial duty. She simply fails to abandon it and so keeps being its owner. Thus, unless she has some independent positive duty under evictionism to preserve the fetus's life, she is permitted to fail to abandon it by letting it die. But of course, her having such a duty would mean that evictionism contradicts libertarianism.

Now Block's reply to this analysis could be that fetuses and "babies, of course, cannot be owned in the same manner as applies to land, or to domesticated animals. Instead, what can be 'owned' is merely the right to continue to homestead the baby, e.g. feed and care for it and raise it".[26] Thus, the woman who is letting the unwanted fetus die is not exercising any hard core of her ownership rights over the fetus by excluding any unauthorized interference with it, but rather is failing to continue to homestead it while forestalling others from appropriating it. Since forestalling is impermissible under libertarianism (it is somehow similar to stealing the resource from its would-be homesteaders), the woman is responsible for the fetus's death (in a somehow similar way to being responsible for letting another person's fetus die without this person's consent). This, of course, is the famous Blockian Proviso[27] (which we in principle embrace)[28] as applied to fetuses and children. Explains Block:

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[26] Ibidem.

[27] Cf. Walter Block, "Libertarianism, Positive Obligations and Property Abandonment: Children's Rights"; Walter Block, "Van Dun on Freedom and Property: A Critique", *Libertarian Papers* 2(4) (2010): 1–11; Walter Block, "Evictionism is Libertarian; Departurism Is Not: Critical Comment on Parr", *Libertarian Papers* 3(36) (2011): 1–15; Walter Block, "Forestalling, Positive Obligations and the Lockean and Blockian Provisos: Rejoinder to Stephan Kinsella", *Ekonomia – Wroclaw Economic Review* 22(3) (2016): 27–41; Walter Block, "Rejoinder to Dominiak on the Necessity of Easements", *Ekonomia – Wroclaw Economic Review* 27(1) (2021): 9–25.

[28] Cf. Łukasz Dominiak, "The Blockian Proviso and Rationality of Property Rights", *Libertarian Papers* 9(1) (2017): 114–128; Łukasz Dominiak, "Must Right-Libertarians Embrace Easements by Necessity?", *Diametros: An Online Journal of Philosophy* 16(60) (2019): 34–51; Łukasz Dominiak, "Libertarian Easements Revisited", *Ekonomia – Wrocław Economic Review* 27(1) (2021): 27–35.

> Ordinarily, in the case of forestalling new ownership of land which has been abandoned, not allowing newcomers access to one's own property (the donut) for this purpose would be equivalent to land theft, and punished accordingly. But in the present case what is being shielded from homesteading is not land, but rather a baby. This would be equivalent to murder, and those responsible for be treated very severely.[29]

Although Block's general point about libertarian easements or what came to be known as the Blockian Proviso is correct, its application to the current case unfortunately suffers from several problems. Let us pick up the most obvious ones. First of all, it is highly unlibertarian and ad hoc to say that the woman who mixed her labor with the fetus – who actually created it – all of a sudden ceases to be its owner only because she stopped to care for it for a brief moment of the (letting die) abortion procedure. What happened with all this labor of hers which she joined to the fetus throughout the pregnancy? It could not have dissipated in the blink of an eye.[30] And we know otherwise that she "hath by this *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no man but [s]he can have a right to what that is once joyned to".[31] Thus, it is unlibertarian to say that the woman who joined her labor to the fetus lost her ownership thereof just by stopping to continue to mix her labor with it.

Second, it is true that if *A* prevents *B* from homesteading an unowned land, *A* violates *B*'s rights. However, it is a stretch to say that *A*'s actions are "equivalent to land theft".[32] How could that possibly be? After all, *B* has not yet mixed his labor with the said land and so under libertarianism he could not have appropriated it. Consequently, the land stays in the state of nature

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[29] Block, "Libertarianism, Positive Obligations and Property Abandonment", 282.

[30] Cf. Garett Roth, "Reconciling Competing Systems of Property Rights Through Adverse Possession", *Libertarian Papers* 10(1) (2018): 113–126.

[31] John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 2003), 288.

[32] Block, "Libertarianism, Positive Obligations and Property Abandonment: Children's Rights", 282.

and cannot be the object of land theft. The only right of *B* that *A* could possibly violate by forestalling *B* from homesteading the unowned land is *B*'s right of way, not *B*'s property right to the land. By the same token, even if the woman lost her title to the once homesteaded fetus by undergoing the (letting die) abortion procedure, the fetus reverted to the state of nature and so forestalling others from appropriating it could at most violate *their right of way*, not *the fetus's rights*, and so could hardly be equivalent to murder (unless evictionism again entails, to its own detriment, that the fetus has a positive right to have its life preserved).Now violating potential homesteaders' right of way is a minor infringement that can proportionately be taken care of by compensation. It is not a serious offense that could justify depriving the woman of her fundamental right to self-defense against the unwanted fetus, the trespasser.[33] Hence, Block's forestalling point does not invalidate the woman's right to defend herself against the fetus's trespass by way of letting the fetus die.

Finally, Block's idea that "what can be 'owned' [in the case of children] is merely the right to continue to homestead the baby, e.g. feed and care for it and raise it"[34]contradicts his theory of "the logical implication of what it means to abandon something".[35] For note that "were the parents to instead abuse their child, this would not at all be compatible with homesteading it [and] they would lose all rights to continue to keep the child".[36] However, by merely abusing the child or failing to properly care for it the parents "cannot

[33] Suppose *A* is about to murder *B* and the only way in which *B* can defend himself is to duck his assailant so that *A* falls down the stairs. But if *B* ducks *A* and *A* falls down the stairs, then *A* will block *C*'s way and *C* will be late for his only train to an important business meeting. May *C* prevent *B* from ducking *A* so that *A* murders *B* but *C* catches his train? We submit that the answer is an emphatic 'No!' and hope that Block agrees. What *C* might at most do in this case is to try to get some compensation for his unused ticket and lost business opportunities. A separate question is from whom ultimately should *C* seek this compensation, from *B* or from *A*? Since *B* forestalled *C* from getting into the train in the process of defending himself against *A*, the offender, then there are good reasons to think that it is ultimately *A* from whom *C* should seek the compensation. But then, by parity of reasoning, it should be the fetus, not the woman, who should compensate the would-be homesteaders for being forestalled in our abortion case. Thus, we have one more reason for which Block's forestalling reply does not work against our argument.

[34] Ibidem, 280.

[35] Ibidem, 279.

[36] Ibidem, 280.

(logically) abandon [it unless they] notify others of its availability for their ownership".[37] These two views cannot be squared in any systematic way. One either cannot (logically!) abandon something without notifying others or can abandon something by merely abusing it. But even if one could, as a matter of ad hoc exception to the general rule – abandon the child by abusing it, Block's ad hoc clause would still contradict his claim that the notification requirement "follows not from any positive obligation whatsoever"[38] but from success considerations. For then what could the notification requirement be if not a positive duty? It could be a success requirement not for abandonment but for avoiding forestalling. Unless one notifies others, one will forestall them from homesteading the child. But since there is a negative duty not to forestall others to begin with and one cannot abide by this duty unless one notifies others, then by way of logical closure one also has a positive duty to notify others, and evictionism again contradicts libertarianism.

Killing and Letting Die Further Explained

In this section, we are going to elaborate on the doctrine of doing and allowing (hereinafter also referred to as DDA), that is, the doctrine which becomes KLD when death is what is done or allowed. Roughly speaking, the idea is that "*doing* something awful is prohibited, allowing that awful thing to occur is not".[39] Or from a different angle, *ceteris paribus*, bringing about a certain bad upshot *via* doing is harder to justify than merely allowing it to happen.

However, the distinction between doing and allowing is indeed subtle, as its relation to, say, the distinction between action and inaction or to the one between action and omission is still open to debate.[40] Still, we are going

[37] Ibidem, 279,

[38] Ibidem.

[39] Michael S. Moore, *Causation and Responsibility: An Essay in Law, Morals and Metaphysics* (Oxford: Oxford University Press, 2009), 52.

[40] For the sake of illustration, let us take the relation between doing and allowing on the one hand and between action and inaction on the other. Woolard submits that "[i]t is easy to confuse two distinctions because we speak of performing an action as *doing* something" (Fiona Woolard, *Doing and Allowing Harm* (Oxford: Oxford University Press, 2015), 9). However,

to shed some light on the subject below. Moreover, as an aside, we will cast doubt upon any moralized account of DDA. After all, in the end, we would like to appeal to a morally relevant (albeit natural) difference between doing and allowing to come up with a differential moral verdict, thus buying into the thesis of the moral as supervening on the natural – more on this later. After having cleared the conceptual ground, we shall for the sake of argument construe the distinction in question along the lines of a physicalist theory of causation. The reason is that, as we shall shortly demonstrate, libertarians themselves interpret the difference between doing and allowing in thus understood causal terms. Happily, this move will in turn allow us to make a *theory-internal* argument against Block.

But now, what are the main contenders for what counts as doing and what as allowing? There are indeed numerous theories trying to shed light on the distinction at stake.[41] However, for the sake of brevity, we are going to present

in Woolard's terms, "[t]here are many examples in which an agent clearly counts as merely allowing harm even though he is relevant to the harm through an action". The author considers a scenario of *Impoverished Village*, in which the agent does indeed perform an *action* (i.e., she speaks to the accountant on the phone) but the action involves ordering the accountant not to send the money to impoverished villagers. Clearly, the agent thus merely *allows* the villagers to die. Yet, she is relevant to this upshot *via* action. Woolard (ibidem, 10) then goes on to argue that both distinctions matter morally. That is, everything else equal, "[a]llowing harm is easier to justify than doing harm". Similarly, given *the allowing* of harm, "active allowing is harder to justify than allowing through inaction". It is also worth mentioning that omissions might as well be so construed that they turn out not to be co-extensive with allowings. For instance, Foot has it that "there is no other general correlation between omission and allowing, commission and bringing about or doing. An actor who fails to turn up for a performance will generally spoil it rather than allow it to be spoiled" (Philippa Foot, "The Problem of Abortion and the Doctrine of the Double Effect", in: *Virtues and Vices and Other Essays* (Berkeley, CA: University of California Press, 1978), 26) – although this example, as well as Foot's general view on the distinction between doing and allowing, is problematically driven (e.g., due to supervenience considerations discussed in this section) by linguistic and moral intuitions. On this last point see Moore, *Placing Blame: A Theory of the Criminal Law*, 699. Finally, it is also Moore (*Causation and Responsibility: An Essay in Law, Morals and Metaphysics*, 51–61) who does *not* find allowings and omissions co-extensive, as he distinguishes between omissive and non-omissive allowings.

[41] Still, at the very outset, we would like to dismiss *any* moralized theory of doing and allowing. To wit, we are prone to discredit any such theory according to which whether an agent does harm or merely allows it ultimately depends on the *moral* assessment of her behavior. For example, if such a theory is to infer that the agent merely allowed harm since she

first a highly original theory by Jonathan Bennett,[42] also built upon by Fiona Woolard,[43] and only then some account construing the distinction in physicalist causal terms,[44] with the latter account being the one libertarians subscribe to. So, let us now turn to Bennett's (1995) account of doing and allowing.[45]

Bennett's analysis of this distinction presupposes the so-called behavior space; that is, the space of all bodily movements available to a given agent at a given time. Moreover, according to Bennett, whether an actor's behav-

is, say, not blameworthy or that her behavior is, after all, morally justified, then appealing to whether the agent does or rather allows harm to reach a moral verdict would make the whole reasoning circular. For this sort of reasoning would, first, draw on moral properties (e.g., the actor's blameworthiness, an act being morally unjustified etc.) to model the difference between doing and allowing and then appeal to this very distinction in order to reason into the previously mentioned moral properties themselves, nothing short of circularity. Instead, we stick firmly to the moral supervenience thesis (see, e.g., Richard M. Hare, *The Language of Morals* (Oxford: Oxford University Press, 1952; Gerald Harrison, "The Moral Supervenience Thesis is Not a Conceptual Truth, *Analysis* 73 (2013): 62–68), according to which moral properties supervene on natural ones. That is to say, there cannot be a change in moral properties without a concomitant change in the natural ones but not the other way round. It is in this sense that the moral depends on the natural or that, in other words, the natural fixes the moral. What is also noteworthy is that the moral supervenience thesis is free of circularity, for the natural ontologically determines the moral and hence to know the moral we must *only* appeal to the natural, quite unlike in the said moralized theories of doing and allowing.

[42] Jonathan Bennett, *The Act Itself* (Oxford: Clarendon Press, 1995). One anonymous referee reasonably charges that our exposition of the Bennettian account of doing and allowing is rather lengthy, especially given the fact that it is ultimately rejected. However, there seems to be a good reason for us to elaborate on various accounts of the distinction in question. The reason is that we would not like the discussion of the problem to be skewed either in favor or against libertarians. Granted, as demonstrated in the course of the text, we do attribute to libertarians (and to Block in particular) a causal understanding of the *doing* side of the distinction. And yet, libertarians might perhaps resort to some other account of doing and allowing to take the sting out of our argument against them. This is what makes our presentation of Bennett's account far from dispensable.

[43] Woolard, *Doing and Allowing Harm*.

[44] For example, Richard A. Epstein, *A Theory of Strict Liability: Toward a Reformulation of Tort Law* (San Francisco: Cato Institute, 1980); Michael S. Moore, *Causation and Responsibility: An Essay in Law, Morals and Metaphysics* (Oxford: Oxford University Press, 2009).

[45] Although Bennett's preferred vocabulary is *the agent's relevance to a given upshot*. Now, if this relevance is *positive*, this can be read as the agent's behavior falling on the side of doing, whereas if the relevance in question is negative, then the agent's behavior falls on the part of allowing. The idea of both positive and negative relevance to a given upshot is going to be explained in the body of the text.

ior constitutes doing or merely allowing is always *relative* to a given upshot. Crucially, the judgment as to whether an actor *did*, say, certain harm or rather *allowed* it hinges on a comparison of the cardinality of the set of all possible bodily movements that would lead to the harm in question with the cardinality of the set of all possible movements that would not lead to the harm in question. Specifically, if *most* ways in which the agent could have behaved would have led to the harm, then the agent's relevance to this harm is, in Bennett's preferred vernacular, *negative*. Rendered in our favored terms, the above says that if the majority of bodily movements available to the agent at a given time would have led to the harm in question, then the agent merely allowed harm. On the other hand, Bennett has it that if *most* ways in which the agent could have behaved would not have led to the harm, then the agent's relevance to the harm is *positive*. Again, we would say then with the wording we favor that in the latter case the agent *did* the harm.

This is undeniably an original and surprising way of explicating the difference between doing and allowing. As one should expect though, its high originality leads at times to counterintuitive predictions. Moreover, for libertarians who, as we argue below, are committed to a causal-physicalist account of doing and allowing, it gives all predictions, be them correct or incorrect, for the wrong reasons. However, before we get into some more problematic aspects of Bennett's account, let us first consider some cases in which it clearly makes intuitively correct predictions. Consider the following scenario.

Drowning Man

> There is a man (*M*) drowning in a nearby lake. *P* is the only passer-by and can easily save him. However, *P* is having an important business conversation on the phone. Preferring concluding a business deal on the phone to coming to the man's rescue, *P* decides to remain insensitive to the drowning man's calling. *M* finally drowns.

What is the relevance of the passer-by's behavior to the upshot envisaged (i.e., the patient's death by drowning)? Bennett's theory makes the following prediction. Since the majority of ways in which the passer-by could behave would lead to *M*'s demise, *P*'s actual behavior was *negatively* relevant to *M*'s

death. After all, *P* could have danced a break dance, started running, waved his hands, or what have you, and *M* would have still drowned. If so, then, to put it in our preferred terms, *P* merely *allowed M* to die. Now, consider a contrasting scenario.

Successful Assassination

> Person *A* (an assassin) is after his victim (person *B*). *B* has just left his office and is heading towards his car. The assassin enters his hiding and starts aiming at *B*. He finally pulls the trigger. *B* dies as a result.

What is the relevance of *A*'s behavior to *B*'s death? Since most ways in which *A* could have behaved would not have led to *B*'s demise, *A*'s actual behavior is *positively* relevant to the upshot under consideration. After all, *A* could have walked away, pulled out his phone (instead of a gun) or what have you. Clearly, the majority of ways in which *A* could have behaved would not have led to *B*'s death. Given this, to put it in terms of our choosing, *A*'s behavior is connected to *B*'s death *via* doing. In other words, *A* kills *B* rather than allows him to die. Now, it must be conceded that Bennet's general account of doing and allowing successfully predicts at least particular paradigm cases of killing and letting die. However, it runs into a couple of allegedly fatal objections.

The scenario which apparently amounts to such an objection was presented by Bennett himself.

> Henry is in a sealed room where there is fine metallic dust suspended in the air. If he keeps stock still for two minutes, some dust will settle in such a way as to close a tiny electric circuit which will lead to some notable upshot U. Thus, any movement from Henry, and U will not obtain; perfect immobility, and we shall get U.[46]

[46] Bennett, *The Act Itself*, 97–98.

Quinn[47]takes the above prediction as a *reductio ad absurdum* of Bennett's theory. After all, by Bennett's standard, Henry's standing still is *positively* relevant to U, for it is only *ex hypothesi* "perfect immobility" that would lead to U, as compared to *all possible* bodily movements (however inconspicuous) that would prevent U from obtaining. Hence, Bennett's account predicts, to put it in terms we prefer, that Henry's lack of behavior fell on the side of *doing* relative to U. Or negatively speaking, Henry did *not* merely allow U to obtain. And the latter seems clearly counter-intuitive, as Henry remained motionless. And one intuitively ties rest to allowings and motion to doings. Bennett's theory then seems to get things upside down.

Now, to test how Bennett's theory of doing and allowing fares when applied to a more particular distinction between killing and letting die, let us substitute the victim's (*V*) death for abstract U in the above scenario. Then, Bennett's account predicts that Henry's "perfect immobility" would kill rather than merely allow *V* to die. This particular consequence of Bennett's theory makes it clearly wanting as an account of killing *vs* letting die distinction. After all, it is hard to imagine one can kill by remaining motionless, with remaining motionless being normally (and rightly so) associated with inaction.

By way of contrast, let us cite a type of theory of doing and allowing which quite plausibly ties doings to causally efficacious bodily movements,[48] whereas it conceptualizes allowings (whether omissive or non-omissive) in non-causal terms. Incidentally, this sort of construal of the distinction between doing and allowing normally goes hand in hand with the advocacy of a physicalist theory of causation. Happily, it is precisely this kind of theory of causation that is adhered to by libertarians themselves; so, we have all the reason to closely scrutinize the doing/allowing distinction in the light of the said theory of causation.

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[47] Warren S. Quinn, "Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing", *Philosophical Review* 98(3) (1998): 295–296.

[48] Quite unlike in Bennett (1995). Remember, according to Bennett, some cases of doings involve remaining motionless, something that definitely has no pretense to amount to a *causal* contribution to a certain upshot.

For an elaboration on the above-mentioned interpretation of doing and allowing in physicalist causal terms we are now turning to Moore,[49] a paragon of clarity on the topic.[50] As alluded to above, for Moore, a distinctive feature of doings is that they are *causative*. Moore[51] mentions such "[c]ausative act-types like killing, raping, torturing, maiming". Let us take killing and maiming act-types to illustrate what makes them *causative* in nature. Roughly speaking, an act of killing consists in a killer's willed bodily movement ultimately *causing* the victim's death. Similarly, if person *A* maims person *B*, *A* by her willed bodily movement *causes B*'s disfigurement.

On the Moorean grounds, the causation in question is a singularist and *physicalist* relation. Interestingly, what this view on causation implies in particular is that an event *x* causing an event *y* does not reduce to *y* merely counterfactually depending on *x*. Rather, *x* operates via some physical mechanism to bring about *y*. By contrast, counterfactual theory of causation equates a cause of a certain event with its necessary condition. And thus, to illustrate the point, according to the counterfactual theory of causation, being a rectangle should count as a cause of being a square (because being the former is necessary for being the latter).[52] However, clearly, no *physicalist* about causa-

[49] Moore, *Causation and Responsibility*, 52–55.

[50] To make clear, Moore's account of causation – and so of doing and allowing – is best classified as either physicalist or primitivist, with the latter classification being probably most pertinent. However, for our current purposes these otherwise important philosophical differences are secondary. With this caveat in mind, Moore's theory of causation can be (and herein is) taken as one of the best explications of the physicalist account. Cf. Heidi M. Hurd, "Living with Genius: The Life and Work of Michael S. Moore", in: *Legal, Moral, and Metaphysical Truths: The Philosophy of Michael S. Moore*, ed. K. K. Kessler, S. J. Morse (Oxford: Oxford University Press, 2016).

[51] Moore, *Causation and Responsibility*, 52.

[52] At this point, an anonymous reviewer suggested that we are strawmanning against a counterfactual theory of causation, as we apparently unjustifiably view this sort of theory of causation as merely taking a necessary condition of a certain effect to count as its cause. Hence, our illustration: being a rectangle is indeed a necessary condition for being a square. However, according to the reviewer's suggestion, this construal is not true to the letter of a theory in question. For the reviewer holds that it also takes a certain event to temporally precede the other for the former to be a cause of the latter. Of course, the referee is right insofar as both the cause precedes the effect and the counterfactual theory incorporates this condition into its account of causation. Alas, there is nothing counterfactual about the temporal precedence *per se* and so we submit that it is only an *ad hoc* addition to the theory. That is why our example is

tion would concur with this prediction. So then again, what marks doings off allowings is that the former are *causative*, whereas the latter are not.

So, how does Moore (2009) construe allowings and why they are non-causal in character? First come *omissive allowings*, which Moore sees "no harm in calling […] simply omission cases".[53] These, for Moore basically consist in the actor doing "nothing to prevent some mishap that is about to happen, from happening: e.g., he watches the baby drown rather than prevent it from drowning".[54] As such, omissions simply stand in contrast to actions. For example, an omission to kill reduces to an absence of an event of killing.[55] More technically, to say that person *A* omitted to kill *B* at t_1 is equivalent with saying that there was no instantiation at t_1 of an act-type involving *A* killing *B*.

Also, as Moore[56] interestingly reminds us, an omission to kill does not entail staying motionless. Quite the contrary, *A* can omit to kill *B* in numerous ways. For instance, *A* might shake hands with *B*, start a conversation with *B* or what have you. The only point is that *A* does not volitionally move her body in a such a way that causes *B*'s death.[57] A similar analysis applies to an omission to save. Since omissions to save are in the end omissions to prevent

justified – it picks out the flawed logic of the counterfactual theory as it stands without *ad hoc* amendments. Be that as it may, we also submit that we can easily come up with an example that would target the amended theory. For we can think of two events E_1 and E_2 satisfying the following two conditions: (1) E_1 temporally precedes E_2 and (2) E_1 is a necessary condition of E_2, while maintaining that E_1 does not rank as a cause of E_2, with the cause being understood in the physicalist sense. Consider the following example. There is an event E_4 of Mary counting to four on her fingers. However, for Mary to count to four on her fingers, it was necessary for her to count to three – denote the latter event by "E_3". Now, clearly the two above conditions are met. First, E_3 both temporally precedes E_4 and E_3 is necessary for E_4. However, E_3 does not cause in the physicalist sense E_4.

[53] Moore, *Causation and Responsibility*, 52.

[54] Ibidem.

[55] Ibidem.

[56] Ibidem, 53.

[57] In fact, as noted by Moore (ibidem), since there are a few necessary conditions for the performance of killing (or any act for that matter), the non-satisfaction of even one of them constitutes an already sufficient condition for non-action. Hence, if *A* does not move her body, then *A* will trivially not kill *B* in the first place. If *A* moves her body but does not do so volitionally, no killing again. If *A* volitionally moves her body but the movement does not cause *B*'s death, then no killing occurs either.

a certain upshot from obtaining, omissions to save are in final analysis *absent preventions*.[58]

Now, as Moore urges "[p]reventions are the causings of things incompatible with the occurrence of any instance of the type of thing prevented".[59] So, for example, for person *A* to save *B* from getting shot is to *cause* any event incompatible with *B*'s getting shot. However, omissions are just *absent* preventions. And, as remarked by Moore, "[a]bsent events […] can no more be effects than they can be causes".[60] But since omissions are just *absences*, they cannot cause anything either. So much for omissive allowings.

What is left to prove is that it is also non-omissive allowings (also known as *enabling allowings*) that are not *causal* by nature. As pointed out by Moore,[61] a non-omissive allowing is metaphysically a double prevention. Let us illustrate this insight in a context which is of special interest to us in the present paper. That is, let us see how the Moorean framework of causings *vs* omissive or non-omissive allowings maps onto the distinction between killing and letting die, with the latter distinction being, as we remember, what we are trying to illuminate in the present essay. For that purpose, let us analyze the scenario involving the doctor's unplugging a respirator and thus allegedly letting the patient die. In this scenario, the doctor apparently *does* something. He unplugs the respirator. As it seems, at least that much should be conceded. However, does the doctor thereby *cause* the patient's death? First, note that the respirator itself does not do any causal work vis-à-vis the patient's survival. After all, remember, absences such as survival, which is non-death at the bottom, cannot be caused. The work done by the respirator is *merely preventive* with respect to the patient's death. Hence, if the respirator stops operating, what takes place is an omission to save the patient, an absent prevention. But as we know, an omission to save the patient is not a cause of her death. That

[58] Ibidem. Some care should be exercised at this point. Following Moore (ibidem, 53–54), we should bear it in mind that *preventing* somebody's death is *not* causal either. For *A* by preventing *B* from dying did not cause *B*'s survival. The reason is that survival is basically an absence (i.e., a non-death). And on the Moorean view on causation, an absence is neither relatum of a causal relation.

[59] Ibidem, 54.

[60] Ibidem.

[61] Ibidem, 62.

is to say, the respirator being off cannot cause the patient's death. But then, how can the doctor's act (i.e., turning off the respirator) which consisted in the removal of the prevention be causal vis-à-vis the patient's death? It is not. In other words, if the fact that a respirator is off cannot cause the patient's death,[62] so an event of turning off a respirator cannot cause the patient's death either. And this verdict stemming from the Moorean theory tallies rather well with a well-considered judgment to the effect that unplugging the respirator lets the patient die rather than kills him.

Having completed our case that a distinct mark of doings is that they are causative in nature, whereas all allowings (whether omissive or non-omissive) are not, it is time for us to gather some evidence to the effect that libertarians themselves subscribe to a physicalist theory of causation. Remember, once we have proved that, this will allow us to argue against evictionism, still a received view on abortion among libertarians, *internally*. For the crucial distinction between doing and allowing that we resort to is construed precisely in physical causal terms. Hence, if we level at libertarians in general and at Block in particular a criticism making use of the doing/allowing distinction, they are barred from complaining that we fight them on the conceptual grounds alien to them.

Now, one of the most outspoken expositions of a physicalist theory of causation among libertarians is Epstein.[63] Epstein distinguishes[64] four sorts of cases in which *causal* links are instantiated in law.[65] The first of them Epstein dubs as *Force*.[66] The paradigm case thereof is of the form "*A* hit *B*". This *Force* category of causal influences is indeed worthy of its name, for the harm occurs as a result of an "application of force to a person or thing".

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[62] Negative facts are just absences and hence cannot be causes.

[63] Epstein, *A Theory of Strict Liability*.

[64] Ibidem, 15–49.

[65] Although in Epstein's *A Theory of Strict Liability* there are as many as four types of causal relationships in law, there is a uniform structure to them in that in all of them we can easily distinguish between a subject and an object of harm. In other words, the relation of causation is asymmetric, just as it is construed in common parlance. For example, from the fact that *A* hits *B* and thus harms *B* it does not follow that *B* caused *A* some harm too. Thus, the causal relation is for Epstein non-reciprocal, quite unlike in the Coasean economic analysis (Ronald Coase, "The Problem of Social Cost", *Journal of Law and Economics* 3 (1960): 1–44).

[66] Ibidem, 22–23.

Most clearly then, doing harm or damage by an application of *force* is nothing short of an influence that is *physical* by nature. The second type of causal relation Epstein mentions is *Fright and Shock*.[67] The paradigm case of this category is "*A* frightened *B*". And, as the author makes clear, whether *A* indeed frightened *B* (and that *B* has a therefore *prima facie* case against *A*) is primarily a causal question. For example, Epstein conceives of "the defendant frighten[ing] the plaintiff when he raised his hand to mop the sweat off his face at a time when the plaintiff was standing about fifty yards away". Without a doubt, a *physical causal* story might be told running from the defendant's willed bodily movements to the plaintiff's resultant fright (although the story might not be enough to assign causal liability in this particular case of the plaintiff's moral feebleness). The third category of causal influences considered by Epstein is *Compulsion*.[68] Its paradigm case is "*A* compelled *B* to hit *C*". The author views this form simply as an extension of the form "*A* hit *B*" in that the latter constitutes an object of the former. Hence, there is at least as much physical causal influence to "*A* compelled *B* to hit *C*" as to "*A* hit *B*", as the truth of the former is predicated upon the truth of the latter. Finally, Epstein analyzes *Causation and Dangerous Conditions*.[69] The agent's use of *force* thus endowing an object with *potential energy* permeates this type. Just to illustrate the above sort of causal contribution, Epstein imagines "the defendant plac[ing] a boulder perilously close to the edge of a ravine".[70] Then one day, "*X* tips the boulder over the side of the ravine where it falls upon the plaintiff, severely injuring him". Now, quite apart from what *X* did, the defendant's action uncontroversially counts as setting dangerous conditions, and this involves using the physical force to endow a boulder with potential energy. So then again, the analysis of causal contribution (i.e., the defendant's behavior) runs in physical terms.

Finally, we need some textual support that libertarians (Block in particular) follow the lead of Epstein and thus embrace the above-described physicalist theory of causation. First off, it is worth noting that Rothbard regards

[67] Ibidem, 29–32..
[68] Ibidem, 32–39.
[69] Ibidem, 35–49.
[70] Ibidem, 41.

the *causation* of harm as a necessary condition for ascribing liability to the doer of the said harm. For, says this author:

> […] the question of causation could be put far more sharply […] nonaction also being a form of "action" is praxeologically correct, but it is irrelevant to the law. For the law is trying to discover who, if anyone, in a given situation has aggressed against the person or property of another […] A nonaction may be an "action" in a praxeological sense, but it sets no positive chain of consequences into motion, and therefore cannot be an act of aggression.[71]

Interestingly enough, we can see that Rothbard implicitly subscribes to a physicalist view on causation, as he states that omissions (i.e., "nonaction") do not cause anything. Remember, that was the wisdom flowing from Moore's *Causation and Responsibility*. Now, we argue that Block himself does subscribe to a physical idea of causation, as he quite explicitly embraces the Epsteinian-Rothbardian doctrine of strict liability, which is physicalist in character. As Block and Block firmly say: "regarding innocence or guilt, we… follow Rothbard in eschewing the 'reasonable man' standard in favor of strict liability".[72]

Having established that libertarians (Block inclusive) embrace a physicalist theory of causation, let us now, crucially, uncover what normative importance they attach to the distinction between doing and allowing, with the distinction being, as we remember, construed along causal lines. Rothbard is crystal-clear on what constitutes an invasion of first-order libertarian rights. Says he: "[t]he invasion must be concrete and physical".[73] Then he adds: "Legal and political theory have committed much mischief by failing to pinpoint physical invasion as the only human action that should be illegal and that justifies the use of physical violence to combat it".[74] Eventually, he claims that

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[71] Murray N. Rothbard, "Comment: The Myth of Efficiency", in: *Time, Uncertainty, and Disequilibrium*, ed. Mario J. Rizzo (Lexington, MA: Lexington Books, 1979), 94–95.

[72] Walter Block, Mathew Block, "Toward a Universal Libertarian Theory of Gun (Weapon) Control: A Spatial and Georgraphical Analysis", *Ethics, Place & Environment: A Journal of Philosophy and Geography* 3(3) (2000): 297.

[73] Rothbard, *The Ethics of Liberty*, 127–130.

[74] Ibidem, 127–128.

"no one has the right to legally prevent or retaliate against 'harms' to his property unless it is an act of physical invasion".[75] Thus, Rothbard leaves no doubt that he believes that it takes no less than some physical causal influence to invade rights. To put it in our preferred terms, libertarian first-order rights can be invaded only *via* doings but not *via* allowings.[76] Remember, once we model the distinction between doing and allowing around a physical theory of causation,[77] then it is only doings that exhibit causal powers with respect to a certain upshot, whereas allowings constitute mere absences and are thus causally inert with respect to some definite upshot.

But what if eviction is metaphysically distinct from letting die?

Now, having established that Block himself willy-nilly buys into the doing/allowing distinction understood in causal terms, let us restate the dilemma this author is (and must be) facing. First, if evicting the fetus is metaphysically on a par with letting it die, then evictionism has no work to do over and above the doctrine of doing and allowing, as construed by libertarians. After all, with eviction understood as letting die, the mother by evicting the fetus does not cause its death. And it is – as established above – only causings (*via* physical routes) of physical harms that are found impermissible by libertarians. Hence, under the interpretation of eviction as letting die, evictionism simply collapses into DDA. Or, as we put it earlier, *Eviction As Life Preserving Thesis* collapses into *Removal As Letting Die Thesis*. All in all, the moral verdict reached by evictionism is the same as the one reached by the application of DDA to the case of abortion.

But what if eviction is metaphysically distinct from letting die? More specifically, what if eviction is something over and above letting the fetus die? As it seems, under this scenario eviction would involve the mother being duty-bound to take up some additional action, something clearly incompatible with libertarianism, given the working assumption that the fetus is a trespass-

[75] Ibidem, 128.

[76] Certainly, once we are in the realm of contracts, omissions might be right-violative as well. If *A* strikes a contract with *B* that he should redecorate *B*'s house next weekend and *B* does not turn up to do so thus omitting to redecorate *B*'s house, this omission clearly violates *A*'s contractual right held against *B*.

[77] It should be borne in mind that Block himself as an advocate of the strict liability standard subscribes to a physicalist theory of causation.

er. So, in the end, whatever eviction is, Block is facing an insuperable dilemma anyway. Or still in other words, evictionism has no moral work to do at best or it makes false predictions at worst.

Conclusions

In the present paper we took a different route (than in "Evictionism, Libertarianism, and Duties of the Fetus", 527–540) of arguing against Block's evictionism. To wit, we bought into Block's otherwise problematic assumption that the unwanted fetus is a trespasser. Nevertheless, we argued that even if this assumption is granted for the sake of discussion, evictionism is still an unstable position. For one thing, requiring eviction as the gentlest way of stopping the trespass involves burdening the woman with positive duties which in turn renders evictionism hostile to libertarianism. However, even if eviction is interpreted in a manner that blocks imposition of any positive duties, evictionism still faces a threat of collapsing into the doctrine of killing and letting die. For under this interpretation, eviction becomes nothing more than letting the fetus die by way of removing the obstacle (that is, the woman's body) to its death. This, in turn, reduces the originality of evictionism to merely offering a different manner of slicing the same conceptual cake. Instead of talking about abortions that kill the fetus and abortions that let it die, evictionism talks about abortions that by definition always kill the fetus and evictions which by definition always let it die (or involve imposition of positive duties to preserve the life of the fetus). Yet, a different way of naming the same things does not change the things themselves. Under libertarianism the woman has a liberty to let the unwanted fetus die simply because letting or allowing physical harm to happen is not the method by which she can possibly invade another's primary rights. By the same token, she does not have a primary positive duty to preserve the fetus's life beyond the letting die procedure simply because libertarianism does not recognize any primary positive duties (and so far no one has conclusively proved that she has any secondary duties to the fetus). These are the basic facts about the libertarian theory of justice. The way one calls them is secondary.

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