

DEPARTURISM: GENTLENESS AND PRACTICAL CONSISTENCY IN TRESPASSES INSIDE AND OUTSIDE THE WOMB

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Abstract: Libertarians approach the abortion controversy by viewing it through the lens of property rights. In an unwanted pregnancy, then, the fetus is to be seen as a trespasser occupying the premises of the mother’s womb. The prevailing libertarian position in this regard has been that the eviction rights of the mother should not be curtailed. This view, evictionism, maintains as much even when eviction will result in the death of the child in question. But does this property owner/trespasser relationship entail that the mother be legally permitted to act so strongly against the child in the upholding of her property rights? Is gentleness, that basic and NAP-preserving axiom of libertarianism, to be abandoned in such cases? According to the theory for which this paper argues, certainly not.

Keywords: abortion, evictionism, libertarianism, positive obligations, property rights

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“The first to speak seems right, until someone comes forward and cross-examines.”

—Proverbs 18:17

I. GENTLENESS

Gentleness is an element of law, like proportionality, that seeks to preclude the victim of an invasion from acting so strongly against the perpetrator that the victim, too, violates the libertarian code.² The distinction between these two legal aspects is where they stand in relation to an occurrence of initiatory aggression. Whereas gentleness concerns the degree of defense appropriate for use against a perpetrator to halt an aggression while it is taking place, proportionality has to do with proper punishment after the fact. And though it’s generally the case that harsher measures are more likely to be viewed as justified in stopping an invasion *as it is occurring* than in doling out punishment for it *afterward*, a victim cannot simply employ any old means that he wishes in the defense of his rights. Severe responses or overreactions place the victim at risk of falling

² It is the *victim* of a non-criminal invasion on which the gentleness principle places a restraint. This is because it would be libertarianally absurd for a restraint to be placed on any severe measures that the perpetrator might wish to inflict upon himself in the arresting of his own aggression. This should help to clarify confused concerns about there not being “enough ‘gentleness’ to go around” (Walter Block, “Rejoinder to Parr on Evictionism and Departurism,” *Journal of Peace, Prosperity & Freedom* 2 [2013]: 128). It is not egalitarianism but the very definition, the very purpose of gentleness that speaks to “who should be given this benefit” (ibid.); namely, the non-criminal perpetrator.

on the wrong side of the non-aggression principle (NAP);³ violating it to a degree far more egregious than the perpetrator.⁴

Because it is helpful in illustrating this very point (and a few others), the Example of the Inadvertent Misstep is included here below (footnotes omitted), and will be referenced throughout. It highlights the difference between two possible responses on the part of a property owner to aggression directed at his property:

One: an innocent person A, inadvertently sets foot on B’s lawn; B forthwith blows A away with a bazooka. Two: an innocent person A, inadvertently sets foot on B’s lawn; B notifies A of his misstep, and asks him, politely, to please cease and desist, and to avoid such action in [the] future. Only if A refuses to respect private property rights (at which point he ceases to be guilty, merely, of a tort, and now becomes a purposeful criminal, replete with *mens rea*) may B properly employ violence against A. And, even then, the bazooka would not be the first option. If B could remove A from his property in a more gentle (sic) manner... other things equal, B is obliged to do just that, by the libertarian legal code. If B, instead, utilizes the bazooka immediately, he is guilty of murder.⁵

A, in either case, is a non-criminal in his trespass *by virtue of the unintentional nature of the encroachment*. Further, he remains a non-criminal *so long as a respect for private property rights is demonstrated*⁶ (or until such

³ For the uninitiated, the NAP states that invasions against the persons or legitimately obtained property of innocent people is illicit. Too violent a response on the part of the victim in bringing to an end an instance of non-criminal aggression will equate to such an illicit act.

⁴ See Walter Block, “Response to Wisniewski on Abortion, Round Two,” *Libertarian Papers* 3, 4 (2011): 3–4.

⁵ Walter Block, “Rejoinder to Wisniewski on Abortion,” *Libertarian Papers* 32:2 (2010): 3–4.

⁶ It is necessary to establish what, if anything, makes A an innocent person. A, no doubt, is aggressing against B’s property, but, as is pointed out, he is inadvertently doing so. Evictionism, here, suggests that it is this inadvertence of trespass that causes A to be guilty, merely, of a tort, rather than of a crime. So, it seems that one of the factors that determines whether or not an aggressor is to be treated as a non-criminal is if his aggression is

time that he deliberately persists in his property rights violation or is bazooka-ed by B).

Gentleness, then, entails that folks like A, non-criminals, be treated in the gentlest manner possible consistent with stopping their aggression. And from this notion there have spawned two opposing “liberty and private property rights approach[es] to the issue of abortion:”⁷ evictionism and departurism. Each of these approaches acknowledges that the fetus is a distinct, living human being and, further, admits his personhood,⁸ as well as makes the case that if the occupation of a fetus in its mother’s womb is to be viewed as a trespass, then the fetus is to be treated by the mother in “the gentlest manner possible, for the trespasser in this case is certainly not guilty of *mens rea*.”⁹

purposefully initiated. A second factor, it appears, is whether or not this aggressor demonstrates a respect for private property rights (that is, once his occupation of the premises is deemed a trespass, his departure from there begins or continues).

⁷ Walter Block and Roy Whitehead, “Compromising the Uncompromisable: A Private Property Rights Approach to Resolving the Abortion Controversy,” *Appalachian Law Review* 4:1 (2005): 1.

⁸ The evictionist is on record as stating that the fetus becomes invested with human rights only once he is viable outside of the womb (Walter Block and William Barnett, “Continuums,” *Ethics & Politics* 10:1 [2008]: 158). But this is problematic—and not simply because there are no good reasons to believe that it’s true. It implies that the value of a human being is dependent upon something as arbitrary and inconsistent as the medical technology available at the time and in the place that he happens to be in utero. Such a view also calls into question the very reasoning behind developing the evictionist position in the first place. That is, it would just seem superfluous to try to justify the eviction and killing of an organism, like a tapeworm, that has precisely the degree of human rights that the evictionist here claims that the fetus has in the early stages of pregnancy; namely, none. The eviction of such an organism requires no gentleness, no justification whatsoever, and, thus, no need to craft a theory attempting to provide just that. Thankfully, it seems that the evictionist position on this matter has evolved to some degree. Cf. Block, “Response to Wisniewski, Round Two,” 1: The fetus becomes viable not when he graduates from medical school, not at birth, but when “human life begins at the fertilized egg stage.”

⁹ Walter Block, Stephan Kinsella, and Roy Whitehead, “The Duty to Defend Advertising Injuries Caused by Junk Faxes: An Analysis of Privacy, Spam, Detection and Blackmail,” *Whittier Law Review* 27:4 (2006): 925–949.

The feud between these competing views, then, principally stems from a disagreement concerning the constitution of the gentleness principle and what this principle ought to look like when it is properly applied to situations of trespass within the womb.

II. EVICTIONISM

According to evictionism, the mother may not directly kill the unwanted child (e.g., initiate a medical abortion with RU 486),¹⁰ but she may remove him from her premises. And if this eviction happens to necessitate the child’s death—which, given the current state of medicine, it quite frequently does—then “the owner of the land is still justified in upholding the entailed property rights.”¹¹ That is, the mother may kill the unwanted child but only indirectly by eviction.

However, the distinction between RU 486-ing the trespassing fetus and evicting him unto death seems a spurious one. As a matter of fact, when confronted with the reality that the lethal eviction of a trespasser is “tantamount precisely to blowing him away with a bazooka,”¹² the evictionist, without balking, has affirmed, “well, yes, it is,”¹³ and nonetheless deemed it justified.¹⁴ But what, then, if not merely its indirectness, does evictionism view as justifying of lethal eviction?

Here is where gentleness is said to come into play.

According to the evictionist, the indirect killing of the trespassing fetus is brought into accord with libertarianism only via the pre-eviction

¹⁰ Block and Whitehead, “Compromising the Uncompromisable,” 25: “RU 486... which kills and then flushes out the fetus, [should not] be legal.”

¹¹ Block, “Response to Wisniewski, Round Two,” 2.

¹² Jakub Bozydar Wisniewski, “Rejoinder to Block’s Defense of Evictionism,” *Libertarian Papers* 2:37 (2010): 2–3.

¹³ Block, “Response to Wisniewski, Round Two,” 4.

¹⁴ To the evictionist, this lethal eviction is warranted “when there exists [*sic*] no other ways of removing” (Wisniewski, “Rejoinder to Block,” 3) the trespasser. But it is warranted also, and much more radically, in situations like normal, unwanted pregnancies when there, in fact, do exist other ways of removing the trespasser.

notification of the authorities (e.g., “the hospital, the church or synagogue, the orphanage”¹⁵) And why does this notification justify lethal eviction? Because it is said to be a requisite of gentleness. That is, “the ‘gentlest manner possible’ in this case requires that the mother notify the authorities to see if they will take over responsibilities for keeping alive this [unwanted child].” The evictionist reasoning here is quite vague, but it would appear that it relies on the assumption that notifying others before killing a person is gentler than just killing this person. Demonstrating precisely how this notification requirement neither *derives from* nor *constitutes* the gentlest manner possible and, thus, is a positive obligation will be the key to dismantling evictionism as a libertarian theory of abortion. Such, however, is a project for a later section of this paper.

In any event, evictionism holds that once the notification of others has occurred, eviction is fair game. The mother then is within her rights to evict the unwanted child from her womb because, and despite the fact that, it is the alleged gentlest manner possible that “implies the death of this very young human being.”¹⁶

While evictionism twists the principle of gentleness into permitting the very sort of NAP-violating overresponse which is its purpose to prohibit, departurism stands firm in its pure comprehension of gentleness as “the least harmful manner possible”¹⁷ wholly consonant with seeing an end to the aggression.

III. DEPARTURISM

What, then, is departurism? Briefly, it is a theory of abortion that considers the relevant conditions of an unwanted pregnancy in order to arrive at the correct and practically consistent application of the gentleness

¹⁵ Block, “Response to Wisniewski, Round Two,” 2.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, 3.

principle in situations of trespass inside the womb and similar situations of trespass outside the womb.¹⁸ Departurism thus maintains that the fetus is not simply morally innocent of his trespass, but morally innocent on the grounds that he is incapable of human action. Moreover, departurism affirms that such a fetus retains his non-criminal status throughout pregnancy because the very process of gestation, by its innately certain and temporary duration,¹⁹ ensures that property rights are being respected.²⁰ In instances, then, when the mother’s life is not imperiled and when the eviction of this fetus equals his death, gentleness entails that the mother allow for him to carry on that which he is already doing: leaving her premises.

In short, like evictionism, departurism holds²¹ that the mother may evict but not kill the unwanted child in her womb, but, contrary to evictionism, neither may she kill him by eviction. This means that departurism does not view the uterine-eviction of a child as *per se* incongruous with libertarianism. That is, it is only the lethal (or otherwise debilitating) eviction of a fetus during a normal pregnancy that departurism views as discordant with gentleness and, thus, a violation of the NAP. This flexibility, which demonstrates just how moderate a position departurism actually is, will permit the non-lethal eviction of a fetus for the purpose of the *reasonable* upholding of the mother’s property

¹⁸ When this paper refers to situations of trespass outside the womb it does not mean abnormal, extrauterine pregnancies. Rather, it is referring to instances of trespass not at all occurring inside the body of the mother or any other person.

¹⁹ The duration of pregnancy is nearly always between 0 and approximately 37 to 42 weeks.

²⁰ All that is meant here and throughout by the notion of “respecting private property rights,” or some different way of phrasing this same sentiment, is that proper deference is, in some manner, being displayed with regard to them as evidenced by a marked discontinuation of their violation (e.g., an inadvertent trespass in the process of being brought to an end).

²¹ Under the conditions specified in the departurist argument.

rights²² and as the gentlest means of effecting his removal in the event that the unfettered natural course of fetal departure proves the more harmful alternative (such as those situations requiring a cesarean section).

(a) The Place of Departurism in the Libertarian Abortion Controversy

Before any warrant is provided for the departurist thesis, or potential objections to it addressed, it will be helpful to highlight some of the serious challenges to the evictionist position that are posed by and unique to departurism. While there is nothing novel in the departurist criticism that the lethal eviction of a trespassing fetus fails to live up to the principle of gentleness, precisely how it fails to do so, as well as its reliance on a less slipshod analogy, are just two of a number of concerns solely broached by the departurist position.

Departurism, further, has recognized in the libertarian anti-abortion literature a dearth in attempts to defend, from a property rights perspective, unwanted pre-birth children who are the result of rape from the NAP-violating reactions of their mothers. The departurist view takes account of these neglected persons in an effort to address this deficiency. To wit, departurism holds that placing importance on whether or not a trespassing fetus is the result of consensual intercourse (e.g., “one’s

²² See Block and Whitehead, “Compromising the Uncompromisable,” 28: “With advanced medical technology, based on [future breakthroughs], it is extremely likely that a greater and greater number of fetuses will be able to be safely transported from the (original) mother’s womb to another safe and supportive place.” Departurism thus would allow for a trespassing fetus to be transferred to another womb, natural or artificial, so long as this did not constitute an action on the part of the mother that was significantly more harmful than necessary in bringing the fetal trespass to an end. This has been the departurist view from the jump (see Sean Parr, “Departurism and the Libertarian Axiom of Gentleness,” *Libertarian Papers* 3:34 [2011]: 1-18, at 14), however sloppily articulated, but not until this paper has the notion of permitting the gentleness-upholding eviction of the unwanted child been incorporated into the departurist argumentation scheme.

[voluntary] actions”²³) only confounds what is rightly understood as an issue solely of warranted versus unwarranted response to non-criminal aggression.²⁴ Whether an unwanted child is the product of rape (or of incest, or is malformed) does nothing to affect his non-criminal status. In other words, gentleness is equally accessible to all fetuses because “they are all equally innocent.”²⁵ This, of course, is not to imply that all unwanted pre-birth children are due the *same* treatment at the hands of their mothers. The degree of severity necessary in the treatment of a fetus (wanted or unwanted) whose occupation of the womb seriously endangers the life of the mother would be more than is appropriate, nay, more than is compatible with libertarianism, in dealing with a fetus whose occupation represents a mere trespass.²⁶

Additionally, departurism points out a critical failure of evictionism as a libertarian theory namely, the evictionist notification requirement (ENR)—which is what is intended to square the theory with gentleness and, so, with libertarianism—places an arbitrary, positive, and, so, unlibertarian obligation on the mother.

(b) The Departurist Argument

Departurism is perhaps best explained, justified, and defended by means of the following argumentation scheme, where S_1 represents the situation of a trespasser who is (a) incapable of purposeful behavior, (b)

²³ Stephan Kinsella, “How We Come to Own Ourselves,” Mises Daily, September 7, 2006, par. 16, <https://mises.org/library/how-we-come-own-ourselves>.

²⁴ There seems to be no warrant for the proposition that, depending on how they come to find themselves in situations of aggression, only particular non-criminals should be subject to gentleness while others should not.

²⁵ Block, “Response to Wisniewski, Round Two,” 8.

²⁶ And this according to Block, “Rejoinder to Parr,” 132: “Most of the time, violations against property rights in the person are more important than those which attack non-person property rights.”

in the process of departing the property owner's²⁷ premises, (c) not jeopardizing the proprietor's life via aggression against his property rights in the person²⁸ and where, (d) eviction from said premises would necessitate the trespasser's death,²⁹ and S_2 represents the situation of an unwanted child in his mother's womb. Also, let A represent the continued departure of the trespasser until such time that eviction no longer entails his death.³⁰

- 1) The course of action that libertarian legal theory ought to endorse in S_1 is A .
- 2) S_2 is relevantly similar to S_1 .
- 3) Therefore, the course of action that libertarian legal theory ought to endorse in S_2 is A .

This argumentation scheme represents an argument from analogy and serves a few purposes. The first of these is to set the appropriate comparison. For the evictionist insistence that the fetus is analogous to your everyday, run-of-the-mill trespasser³¹ simply will not do—as it will lead us to conclusions about unwanted pregnancies that are problematic. To wit, such an unnuanced likening might cause us to err that unwanted womb-aged children are fit for treatment typically reserved for ordinary

²⁷ We can add, also, that this property owner knows (or, in any event, can be reasonably expected to know) that the trespasser in this instance is incapable of purposeful behavior.

²⁸ Any situation, then, in which the proprietor's life *is* at stake will constitute a different situation than S_1 and thus may call for a different course of action than A .

²⁹ The specific conditions of S_1 , but particularly that the trespasser is *in the process of departing the property owner's premises* and *not jeopardizing the proprietor's life via aggression against his property rights in the person*, may well be sufficient to differentiate it from, say, a situation involving an unconscious violinist requiring an odd form of emergency renal dialysis.

³⁰ It is the view of departurism that A entails that the property owner *allow for*, and not *ensure*, the continued departure of the trespasser. The property owner is not obliged to facilitate this trespasser's departure.

³¹ Block, "Response to Wisniewski, Round Two," 2: "The relation of the fetus to the mother is akin to the one that obtains between the ordinary trespasser and the owner of the property in question."

trespassers; criminals.³² The departurist view therefore takes into account the unique characteristics of an unwanted pregnancy, maintaining that it constitutes no standard instance of trespass. The idea is that when the appropriate comparison is made, it is all the more clearly demonstrable that evicting the trespasser unto death—whether inside or outside the womb—is anything but the gentlest manner possible of ending the aggression. It is aggression itself. And to a much more terrible and unjustifiable degree.

A second purpose of the above argumentation scheme is to elucidate the precise conditions of a situation of trespass that must be present in order for the departurist course of action to be applicable. This will reduce and limit the effectiveness of any attempts at *reductio* which might be leveled against departurism.

The third and final purpose for including the departurist argumentation scheme is to ensure an organized approach in providing warrant for each of departurism’s principal contentions. Such an approach will also permit the systematic presentation of possible criticisms of this paper’s thesis followed by the departurist response to them.

IV. PREMISE ONE

(a) The Conditions of S₁

³² The endeavor is to make the notion of trespass inside the womb less fuzzy (and our assessment more accurate) by incorporating the relevant conditions of such a trespass into our analogy, applying them to similar and more familiar situations in which the proper libertarian course of action might more readily present itself. We can then glean from these relevantly similar trespasses outside the womb what gentleness will entail in situations of unwanted pregnancy—as the trespasser must be subject to the same treatment in both cases. And this on the basis of the requirement of practical consistency which will not allow for a case to be treated differently if the compared cases are similar to each other in all relevant respects (see Douglas Walton, *Informal Logic: A Pragmatic Approach* [New York: Cambridge University Press, 2008], 306).

Before attempting to show what the proper libertarian approach should be in S_1 , it's helpful to first illustrate what such a situation of trespass might actually look like (see Figure 1). In formulating such an illustration (which is just one of a number of possible expressions of S_1) we must, to begin with, posit a property. A property that, for the purposes of our analogy, abuts a cliff on one of its borders; its southern border, say.

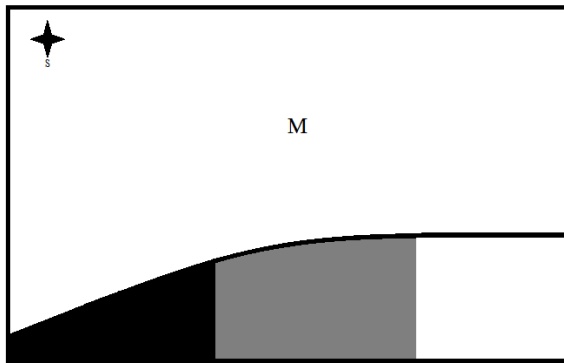


Figure 1

The owner of this property, M, is aware that a fall from this cliff would more than likely prove fatal. Certainly fatal, if it occurred toward the western end of the premises where the height differential from cliffside to terrain below is the most severe (the black area); not fatal at all, if it occurred toward the eastern end of the premises where the height differential from cliffside to terrain below is the least severe (the white area); and possibly fatal, if it occurred somewhere in between these two ends (the gray area).³³

³³ Whether or not a fall from the gray area is fatal depends on the technology available at the time to prevent it from becoming so. To wit, 1000 years ago the gray area would have been all black; 1000 years from now, with technological advances, the gray area will be all white. Currently, falls from the gray area are more likely to result in death and serious injury the closer they are to the black area, and less likely to result in the same the closer they are to the white area.

Let’s imagine that M is, say, gathering vegetables from the on-site garden when F is perceived as a trespasser.³⁴ F is morally innocent of his trespass because he is *incapable of purposeful behavior*; F cannot know that he is trespassing. It could be the case that F is a very young child which, continuum problems notwithstanding,³⁵ is incapable of making informed decisions. Or perhaps F is a full-grown adult in an altered mental state (e.g., suffering from hypoxia, hypoglycemia, traumatic brain injury, ethanol toxicity, Alzheimer’s, etc.). We could just as easily settle on a person of any age with pronounced Down’s Syndrome or Intellectual Disability. As far as concerns F’s non-criminal status, it makes no difference (see Figure 2).

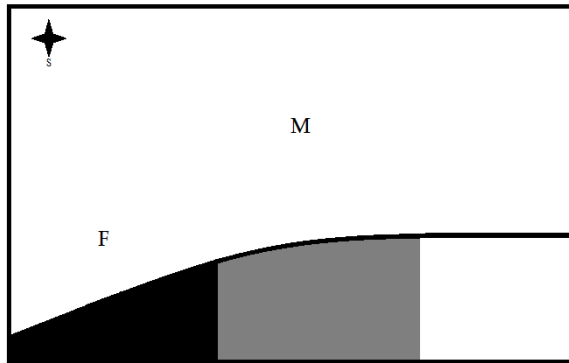


Figure 2

Now, it could be the case that F was once M’s guest but now, as the result of a rescinded invitation, is no longer welcome.³⁶ Or perhaps F was

³⁴ Importantly, the duration of F’s trespass is wholly dependent upon when, or the point at which, M acknowledges F as a trespasser and when, or the point at which, F’s trespass ceases. This cessation of trespass could be the result of M no longer acknowledging F as a trespasser, M evicting or otherwise having F removed from the property, M bazooka-ing F, or F departing the premises.

³⁵ Block and Barnett, “Continuums,” 157.

³⁶ There seems to be no reason that F could not be M’s own child. There’s nothing in evictionism to suggest that post-birth children of any age are immune from the evicting whims of their parents.

abducted by villains and has been heaved onto M's premises. As a matter of fact, F's presence on M's property might well be a necessary condition of his very existence. As far as concerns F's non-criminal status, it makes no difference.

Further, F, in this instance, is not obstinately sitting crisscross-applesauce aside M's garden. He is *in the process of departing the property owner's premises*; steadily travelling eastward off M's property.³⁷ It could be the case that F is an unwitting passenger on a moving walkway that runs along the extreme southern perimeter. Or perhaps F is being driven by hurricane-force winds. As a matter of fact, F might very well be in the throes of dementia and reliving what he takes to be his heady days as a civil servant in the Ministry of Silly Walks. As far as concerns F's non-criminal status, it makes no difference (see Figure 3).

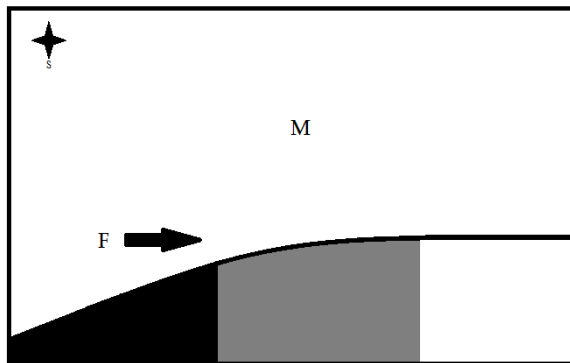


Figure 3

We might also add that F is engaged in an aggression only against M's property rights in external things and is *not jeopardizing the proprietor's life*

³⁷ We might, if we wished, posit that F is further aggressing against M's property by instinctively eating some of the garden vegetables as he proceeds eastward. An aggravating aggression, to be sure. But, like his current trespass, an inadvertent, property-directed one that is in the process of ending and is not justly ended sooner by the quashing of F's innocent life.

via aggression against his property rights in the person. F is not, as could be the case, crazily brandishing an assault rifle and zipping off shots willy-nilly in all directions. F is not, as is perhaps possible, clutching a basket of grenades and chucking its contents one-by-one this way and that. As a matter of fact, F is not doing anything at all that could seriously threaten the life of M.³⁸

S₁, then, is concerned primarily with evictions of trespassers like F, on premises like those belonging to M, from the black area where *eviction from said premises would necessitate the trespasser’s death* (and those from the gray area which, if they didn’t necessitate the trespasser’s death, would result in serious injury and nonetheless constitute a monstrous overresponse on the part of the property owner).

(b) The Course of Action

Before the departurist-proposed course of action is discussed, it’s helpful to again consider that which evictionism would proffer as the gentlest manner possible consistent with stopping F’s trespass.

Curiously, what fits the libertarian bill according to the evictionist is *not* that M be legally prohibited from killing F in response to his unwitting violation; M, in fact, may kill F. But if M does so anywhere on the premises directly, or indirectly without first telling someone about it, well, that’s

³⁸ Were F doing such, M would be justified in employing much harsher means to end the aggression than would otherwise be appropriate for use in S₁, and as soon as is necessary, in defense of M’s life. To spell it out: If it’s a choice between the proprietor’s and the trespasser’s life, departurism’s nod would not go to the latter in such a case. The property owner, if he chose to do so, would be justified in tragically killing the trespasser. And this, yes, as an exercise in gentleness: employing measures against a non-criminal in defense of one’s rights the severity of which is appropriate for ending the aggression to be combated. This, again and obviously, has everything to do with “a rights-based libertarianism” (Block, “Rejoinder to Parr,” 129).

murder.³⁹ If, however, M perceives poor F as a trespasser, notifies others of his impending eviction, and then proceeds to shove him headlong off the cliffside while he happens to be situated toward the western end of the premises, well, that's justified killing.

The present target is to demonstrate the madness required in maintaining the evictionist position: one must champion (as a gentle manner, nay, as *the gentlest possible manner!*) the proposition that innocent people who don't even know that they are trespassing, from the imbecile to the senile, can be lawfully killed despite their not threatening the lives of the property owners whose premises they happen to be vacating. This is nothing if not a textbook example of the very response on the part of the victim that gentleness was placed into libertarian law so as to preclude.

This can't be right. And it isn't.

What, then, is the course of action that libertarian law ought to endorse in S₁? What reaction on the part of the property owner will see an end to the aggression and not represent a much more heinous violation of the NAP than that which has been initiated by the trespasser?

The simple, rational, and singularly libertarian departurist position is that M be precluded from evicting F from the premises when doing so represents a degree of severity inappropriate for bringing to an end this particular situation of trespass. That is, if M perceives F as a trespasser while F is situated toward the western end of the premises, then M must allow for *the continued departure of the trespasser until such time that eviction no longer entails his death*. The property owner must allow for A.

The important issue when considering the evictionist and departurist courses of action is which of them better comports to the principle of gentleness. The answer is uncontroversial. Departurism's means are consistent with stopping the aggression, and this by the evictionist's own

³⁹ "Well, murder with an asterisk. That is, [M] is guilty only of a lesser crime, perhaps manslaughter, since [M] is not the initiator of the violence, [F] is." (Block, "Rejoinder to Wisniewski," 4).

admission,⁴⁰ and comparatively less harmful than evictionism’s means (e.g., they don’t entail that the non-criminal perpetrator be subjected to unwarranted life-taking or NAP-violating violence of any kind). So, then, it’s clear that, at least in relation to departurism, evictionism *cannot* constitute the gentlest manner possible. And it is for this reason that *A* should receive the endorsement of libertarian law.

(c) Objections from Gentleness

Objection: Departurism elevates gentleness to a basic premise of libertarianism, and to do so “is to very seriously misconstrue this philosophy. Libertarianism is based, rather, on the [NAP] coupled with private property rights based initially on homesteading.”⁴¹

Departurism views gentleness in precisely the same way that evictionism at least pretends to: as, in the evictionist’s words, “a basic axiom of libertarianism”⁴² that comes into play “when it comes to the question of how to deal with [non-] criminals, trespassers”⁴³ (that is, *now*; it comes into play *presently*). The entire point of gentleness is to prevent victims from violating the NAP in the defense of their rights. The evictionist admitted as much when he pronounced: “From whence, then, does [gentleness] spring? I contend that it stems from the [NAP].”⁴⁴ Foregoing gentleness, harming non-criminal perpetrators more than is necessary, *just is* to violate the NAP.

⁴⁰ Block, “Rejoinder to Parr,” 131: “I agree... that ‘gestation constitutes a process that works to affect the cessation of property-directed aggression.’”

⁴¹ *Ibid.*, 127.

⁴² Block, “Rejoinder to Wisniewski,” 3.

⁴³ Block, “Rejoinder to Parr,” 127.

⁴⁴ Walter Block, “Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr,” *Libertarian Papers* 3, 36 (2011): 5.

Objection: Departurism doesn't uphold the eviction rights of property owners.

According to the evictionist, non-criminal perpetrators are due gentleness, sure, but "provided, only, that the rights (sic) of the property owner to evict trespassers is upheld."⁴⁵ And by this, of course, he means the right to kill them by eviction where such is unnecessary to end their trespass. However, to tout gentleness before offering such a proviso

is something like saying, "I'm all for monogamous relationships. Provided, only, that either member of them is free to date other people." Such would be defining monogamy in a way that absolutely precludes a relationship with only one person at a time.⁴⁶

In like manner, evictionism attempts to preempt departurism from the jump by implying that non-criminals aren't really due gentleness at all (or that the only legitimate gentleness is that which allows for the total effacement of the distinction between the treatment of criminal and non-criminal aggressors). Evictionism has elsewhere employed similar verbiage if not to likewise settle the debate by definition—leaving no place *in* gentleness *for* gentleness—then to make itself into an ever-shrinking target. For example, where once it was the evictionist's conviction that the property owner must remove the trespasser in the gentlest manner possible consistent with stopping the aggression, now and suddenly the evictionist holds that the property owner must do so in the gentlest manner possible consistent with "retaining full rights over his own property."⁴⁷ But what the evictionist implies by this latter comprehension is really just a way of telling the NAP to go kick rocks. Retaining full rights over one's own property does not mean that one may cliff-toss F when less

⁴⁵ *Ibid.*, 2.

⁴⁶ Sean Parr, "Departurism Redeemed—A Response to Walter Block's 'Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr,'" *Journal of Peace, Prosperity & Freedom* 2 (2013): 112.

⁴⁷ Block, "Rejoinder to Parr," 126.

injurious means exist of affecting his removal. Prohibiting people from violating the NAP may infringe on their right to kill folks without proper warrant on their own property, but said prohibition is nonetheless licit – at least for the libertarian.

Then there is the further evictionist claim that “innocence must not be allowed to prevail over private property rights,”⁴⁸ The departurist’s point is not that *innocence* must prevail in this instance, but *the NAP*. In other words, when all of the conditions of S_1 are met, the right of the property owner to evict the trespasser should and must be curtailed when the former means to deal with the latter “more severely than libertarian punishment theory allows.”⁴⁹ To refuse to acknowledge this is just to proceed as though gentleness serves no purpose, or wish that it had no place, in libertarian law.⁵⁰

The evictionist view is well understood. It does not support the gentlest manner possible in S_1 because allowing for *A* would prevent the property owner from evicting the trespasser *right now!* or precisely when he might wish to. Departurism, on the other hand, indeed supports the eviction rights of property owners provided, only, that the libertarian axiom of gentleness and, thus, the NAP are not violated.

(d) Objections from Positive Obligation

⁴⁸ Ibid., 128.

⁴⁹ Ibid., 132.

⁵⁰ The vehemence with which the evictionist has repeatedly attempted to make fatuous this principle is curiously self-destructive given that he has staked the libertarianism of his entire theory on it (remember, the ENR is said to be entailed by the gentlest manner possible). As it turns out, the meaninglessness of the evictionist conception of gentleness is matched only by the pointlessness of its subsequent use of the principle to justify its libertarian *bona fides*.

Objection: Allowing for *A* is to place a positive obligation on the property owner. As “there are no positive obligations in the libertarian lexicon,”⁵¹ departurism has no place in libertarian law.

Both departurism and evictionism entail a requirement that *S*₁'s property owner withhold the eviction of the trespasser for some length of time. That duration represents, for the former, the amount of time required for *F*'s continued departure to reach the point at which his eviction no longer necessitates a NAP-violation, and, for the latter, the amount of time required for *M*'s notification of the authorities.

Whether or not either of these requirements place a positive obligation on the property owner is arrived at not by attempting to measure the time liability incidental to fulfilling each requirement, but by simply discerning the genesis of these requirements. That is, it is irrelevant whether or not it takes only a trifling amount of time for *M* to notify others of *F*'s imminent and fatal ousting. If this notification requirement is a positive one, whether it be snappily satisfied or drawn out over the course of a decade, it is anathema to libertarianism. What then must generate these requirements if their associated theories are to jive with libertarianism? Well, if the departurist or evictionist requirements originate from and are applications of the gentleness principle, they cannot be positive obligations. Again, this is what the evictionist himself has laid down as the rules of the game: “The ‘gentlest manner possible’ ... requires that the mother notify the authorities to see if they will take over responsibilities for keeping alive this [unwanted child].”⁵²

In light of this, it is fairly easy to consider departurism's requirement and conclude that in this instance it does not simply derive from the

⁵¹ Walter Block, “Libertarianism, Positive Obligations and Property Abandonment: Children's Rights,” *International Journal of Social Economics* 31:3 (2004): at 281.

⁵² Block, “Response to Wisniewski, Round Two,” 2.

principle of, but *just is*, the gentlest manner possible.⁵³ That is, allowing for F to continue his departure is imposing no positive obligation on M. And this for the same reason that the prohibition on bazooka-ing Innocent Person A is imposing no positive obligation on B: such is necessary in order that the victim in either case avoid violating the NAP. In other words, allowing for A is a requirement of gentleness exercised so as to have the victim’s response to the perpetrator’s aggression comport with libertarian law.

Now let us establish how evictionism weathers this particular storm. Does the ENR constitute a positive obligation? Well, in short, yes. This accusation, of course, carries with it a serious consequence, for if it hits its mark evictionism is doomed as a libertarian theory. Demonstrating the failure of evictionism is difficult, but only because the evictionist has, deliberately or not, rather obfuscated the libertarian justification for his notification requirement.⁵⁴

A comprehensive look into the view shows that the evictionist has concealed his theory’s fatal flaw in the dust cloud kicked up by two dancing analogies. And here we do well to separate our analysis of the issue into two parts: (1) navigating through this fog of analogies so that

⁵³ If not the gentlest manner possible, then, at a minimum, it can certainly be said of departurism’s means that they employ less harmful measures to stop the trespass than evictionism’s means.

⁵⁴ Without even treading terribly far into the weeds it’s apparent that the evictionist is in trouble. He has recognized that something is amiss with his theory’s notification requirement. To this end, the evictionist has in effect beseeched libertarian law to turn a blind-eye to his view’s predominant shortcoming. “If [the evictionist is] indeed guilty of making an exception to the general libertarian stricture against positive obligations, it is a very narrow and limited one” (Block and Whitehead, “Compromising the Uncompromisable,” 36). But, of course, exceptions cannot be made. And though the evictionist “strenuously argued that this required does not constitute a positive obligation” (Block, “Response to Wisniewski, Round Two,” 2), it will be shown that this strenuous argument fails.

we can, at last, (2) consider just how the ENR relates, if at all, to the gentleness principle.

(1) The Problem of Analogy

So, what are these analogies?

The first is the one claimed by evictionism, that an unwanted child is to a mother what a trespasser is to a property owner.

The second is the one smuggled into evictionism, that an unwanted child is to a mother what physical land⁵⁵ is to a property owner.

This second analogy, which is supposed to somehow impart or transmit legitimacy to the notification requirement of the first, concerns not the eviction of trespassers, but the homesteading of property. To explain: it is the evictionist view that territory “cannot be homesteaded in a manner that shuts off virgin [or, more to the point, relinquished] land to the activities of other people, as in the form of a bagel or donut with a hole in the middle of it”⁵⁶ and, for the same reason, a child cannot be abandoned “sans notification to the proper authorities.”⁵⁷ That is, such would be an example of the illicit preclusion of others from “accessing that which is no longer... wanted, the land in one case, the baby in the other.”⁵⁸ Failing to notify others is failing to give them a chance to care for a no longer wanted child, which is equivalent to preventing folks from homesteading the relinquished land that comprises the hole in the donut.

It’s the evictionist view that this notification requirement does not place a positive burden on the property owner/mother:

Must the man who wishes to abandon the interior portion of his land notify others of his act? Yes. And this follows not from any positive

⁵⁵ Well, a particular configuration of unwanted physical land.

⁵⁶ Block, “Rejoinder to Parr,” 133.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

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 own ownership.⁵⁹

If others have not been made aware of the availability of that which is no longer wanted (let’s call it P), then P is not *really* available for homesteading because ownership over it has not in fact been relinquished; it is still under the absentee ownership of the proprietor (O) who has failed to notify others of its supposed availability. O, then, has “not yet succeeded”⁶⁰ in abandoning P.⁶¹ This equates to a *definitional justification* of the notification requirement in that, in the absence of notification, abandonment simply does not take place. One needs to notify to abandon.

This is fine and there is nothing at this time to say against it. For argument’s sake, it’s licit to require a mother⁶² to notify the authorities prior to giving up her kid. It is an alright theory on the subject of property homesteading. But what on earth has it to do with trespasser eviction; with the first analogy on which the evictionist thesis relies? Briefly, nothing. But this will not stop the evictionist from ascribing to trespasser evictors what is rightly applicable only to property abandoners.

⁵⁹ Block, “Children’s Rights,” 279 (footnotes omitted).

⁶⁰ Ibid.

⁶¹ It’s unclear and, in any event, not germane to the discussion whether or not O *must* advise others of any and every P. In other words, it’s a bit irrelevant for our purposes to consider if proper homesteading entails that property owners relinquish control over property, anything they own, that they no longer want or use (which would seem to criminalize the notion of absentee ownership). The important point is that O must make P available for new ownership *if he abandons it*, and abandonment is accomplished only via the notification of others. And if O does fail to notify others of his intent to abandon P, of P’s homesteadability (whether or not this omission is itself an illegitimate act), and then proceeds as though he has actually abandoned it, then he is responsible for any negative outcome that may ensue as a result of his neglect (see Block, “Children’s Rights,” 282).

⁶² The term *mother* is consistently used in lieu of *parents* due to the fact that in homesteading theory the mother’s rights are weightier than the father’s “in that she did far more of the ‘work’ of gestating the baby than did the father” (Block, “Children’s Rights,” 284).

Pay close attention because here comes the Ol' Switcheroo (or is it the Kansas City Shuffle?). The evictionist would have it that even pre-birth children (fetuses) fall prey to this second analogy. They, too, are to parents what no longer wanted donut hole land is to property owners. Claims the evictionist, "the exact same analysis holds."⁶³ So, the evictionist requirement that M withhold eviction for the duration of notification is not, by this understanding, a positive obligation.

"But wait a tick, were not pre-birth children (fetuses) to be viewed as *trespassers*?"⁶⁴ Did not the evictionist state that "the relation of the fetus to the mother is akin to the one that obtains between the ordinary trespasser and the owner of the property in question"⁶⁵? "Is it not *this* analogy that is the thrust of the entire evictionist thesis?"⁶⁶ And when we return to considering this first analogy, the unwanted child as trespasser, the haze begins to lift as we dwell on notification: why it's required for homesteading and why it's gratuitous for eviction. The debilitating trouble concerns that which the evictionist holds as justifying of notification in each analogy; that of which notification is said to be a requirement.

For trespasser eviction, it is the principle of gentleness.

For property homesteading, it is what proper homesteading means.

However, in order for the second analogy to rescue the first, these justifications would have to be *identical*, or else an argument would have to be made that the notification of others is part and parcel not only of "the rights/responsibilities of owning property in the first place,"⁶⁷ but also of evicting trespassers. It is thus only in a strange world that evictionism's notification requirement is not a positive obligation. A world in which

⁶³ Block, "Critical Comment on Parr," 7.

⁶⁴ Parr, "Departurism Redeemed," 116.

⁶⁵ Block, "Response to Wisniewski, Round Two," 2.

⁶⁶ Parr, "Departurism Redeemed," 116.

⁶⁷ Block, "Children's Rights," 280.

property owners are capable of abandoning the trespassers on their premises so that these perpetrators may be made available for ownership. A world in which evictions that actually take place can be said to have never really occurred because nobody was told about them. A world in which the idea of absentee trespasser evictors is not nonsense on stilts.

To make it plain, there is *no* definitional justification of the notification requirement in which, in the absence of notification, eviction does not take place. One need not notify to evict. This means that notification is *not* a requirement for eviction in the same way that it is for homesteading. And it must be if the evictionist position is to be a coherent one.

This fact presents very little wiggle room for the evictionist. He has no choice but to keep the notification requirement. Without it, the first analogy’s evicting action is reduced to unjustified homicide and the second analogy’s relinquishing action to neglect—the result of which is either abuse (and potentially murder) in the case of children, or merely weeds and dilapidation⁶⁸ in the case of physical land. The only question now concerns the analogy to which the evictionist opts to adhere, unwanted child as trespasser or unwanted child as no longer wanted donut hole. And this is the conundrum. If he adheres to the former, his theory will break under the weight of its positive obligation. If he adheres to the latter, he loses his theory altogether because without a *trespasser to evict* there simply is no *eviction to -ism*. In other words, because there is no way of excising the notification requirement, evictionism must either die the death of positive obligation or else (forgive the pun) abandon eviction altogether, and so vamoose from the libertarian literature.⁶⁹

⁶⁸ Or if proper homesteading requires that one must abandon all that he owns but no longer wants/uses, then non-notification would represent a purely illicit act, the equivalent of land theft. This, again, is fuzzy, and ostensibly problematic to the legitimacy of the concept of absentee ownership, but thankfully beside the point.

⁶⁹ If this does not constitute a knockdown argument against the evictionist position, then it nonetheless convincingly makes the case that evictionism cannot be stomachied by

Of course, however, the evictionist is not without a life vest—well, a pair of life vests; contingencies upon which to rest in the event that his theory is capsized by the problem of analogy. By engaging in this first maneuver, which acts more as an anchor than a buoy, he is doing a bit of damage control. The evictionist reasoning here is that even if the astute recognize the implications of the departurist critique of the ENR—that it is a positive and pointless obligation—the prevalence of this requirement’s arbitrariness can nonetheless be minimized. To this end, the evictionist now holds that notification is really only a characteristic of S₂:

There is an important distinction between an adult trespasser and an infant one: the former can take care of himself, the latter is helpless without adult supervision. The question of notification simply does not arise in the first case, it is of the greatest moment in the second.⁷⁰

The evictionist here is again guilty of straddling both analogies. Yes, if we are in relinquished donut hole territory, parents don’t need to inform anyone of their wish to relinquish control of their grownup kids who can provide for themselves just fine (because the latter, as full self-owners, are no longer under the control of the former). But in eviction territory, we’re not trying to convert our non-criminal trespasser, infant or otherwise, from unowned into owned property. We’re trying to make him scam without breaking the libertarian rules. In any event, the supposed important distinction cited by the evictionist vanishes once we realize that F, to begin with, isn’t necessarily an adult and, more significant, is akin to a pre-birth child in a manner most relevant: he is incapable of purposeful

libertarianism and, consequently, is a theory which, when henceforth referenced, ought to be placed within quotation marks or else precede an asterisk.

⁷⁰ Block, “Rejoinder to Parr,” 133. Is the evictionist here saying that if a person can look after himself, then a property owner doesn’t have to comport this person’s removal with the NAP via pre-eviction notification? Do self-owners have no expectation of justice in an evictionist libertarian society?

behavior. The evictionist’s attempt to draw out this alleged distinction falls flat on its face.

The evictionist’s second fallback position, which camouflages itself quite well as a defeater of the above departurist critique, is that “an analogy is merely a story that attempts to explain, to clarify, an otherwise complicated issue.”⁷¹ The second analogy, thus, was strictly used “so as to elucidate the concept of forestalling.”⁷² The chess move here is to imply that departurism takes all of this analogy business far too seriously.⁷³ The evictionist wasn’t really making a case for anything, he was just making “an attempt at explication.”⁷⁴ This line represents a rather clever tactic on the part of the evictionist, as it’s no secret that “analogies are often used nonargumentatively, for example...to explain something unfamiliar by comparing it to something more familiar.”⁷⁵ But is this what the evictionist has done, used a nonargumentative form of analogy? Or has he succumbed to the above-described problem of analogy by committing himself to something more formal?

Now, reaching a verdict here is not intractable. There is, luckily for us, a means by which we can discern between the forms of analogy and assess whether or not the evictionist was innocently employing a comparison for clarity’s sake.

When approaching any corpus, a first question is always to ask what is the conclusion, or if there is a conclusion to be established by the arguer.

So in this instance too, it is well at the first point of examining a corpus

⁷¹ Ibid.

⁷² Ibid.

⁷³ At the outset, the evictionist attempted to preempt any criticism of his requirement by asking that an exception be made for it. *Even if my theory contains a positive obligation, it’s only a little one*, the appeal went. Now, confronted with the reality that eviction is not given meaning by notification, he has, in like manner, tried to downplay the significance of being caught out. *Even if there is a disconnect between my analogies that spells a dark result for my theory, I wasn’t making a proper analogy anyway*, the entreaty goes.

⁷⁴ Block, “Rejoinder to Parr,” 133.

⁷⁵ Walton, *Informal Logic*, 311.

containing an analogy to carefully distinguish whether there is an argument from analogy or whether it is an instance of the nonargumentative use of analogy.⁷⁶

So, what are we to make of the fact that the evictionist deigned to chronicle the legitimacy of the notification requirement in the homesteading of property? Did he do this simply as a fun and educational excursus? Or was the matter detailed in order to *argue, make the point, conclude* that the notification requirement should likewise be licit in the eviction of trespassers?

To ask this question is to answer it. That the evictionist would run away from the very point that he is trying to make by claiming a nonargumentative form of analogy shows just how devastating the departurist critique of his view is and the desperate lengths to which he will go, scrambling in vain, to keep his sinking theory afloat.

(2) *The Problem of Origin and Constitution*

Now that we've shed the analytical burden of juggling two analogies, we can refocus our attention on notification *vis-à-vis* gentleness. There are two points to make in this regard.

First, as we've just seen, the ENR does not *derive from* the gentlest manner possible. The evictionist, from one side of his mouth, will *claim* that it does—because he recognizes that it must so derive for his theory of trespasser eviction to be a libertarian one—but, from the other side of his mouth, he will revert to the second analogy and concede that this notification requirement stems, rather, from the homesteading of property and has nothing whatever to do with the gentleness principle nor, even, with the eviction of trespassers.

⁷⁶ *Ibid.*, 312.

Second, the ENR does not *constitute* the gentlest manner possible. How could it?⁷⁷ There’s nothing about curbing overly violent responses to non-criminal trespass that entails the pre- eviction notification of others because there’s nothing about the pre- eviction notification of others that curbs overly violent responses to non-criminal trespass. With respect to gentleness, what does notification of the authorities accomplish prior to evictions from the white or eastern gray areas where death or serious injury *will not* result? Well, nothing. Technology is such that the height differential from cliffside to terrain below will not prove injurious and so notifying an authority of any kind will have no impact on F’s treatment at the hands of M. Were such an authority to be contacted they would likely tell M to evict away, as no NAP-violations are looming.⁷⁸ And how about prior to evictions from the black or western gray areas which *will* prove deadly or disproportionately injurious? What does notification provide as far as mitigating the overwhelming severity of M’s reaction? Well, in the future, when technological breakthroughs transform these areas such that they are white,⁷⁹ notification likewise achieves nothing because such future evictions, like all white area evictions, do not represent a violation of the NAP. Presently, however, western end evictions do lend themselves to this unfavorable outcome. So, *currently*, how does the notification of the authorities temper the heinous evicting actions of M; where does evictionist gentleness come into play nowadays? Very simply put, it just

⁷⁷ Particularly, with departurism present in the arena of ideas.

⁷⁸ Of course, taking F’s life after such a harmless eviction would simply be illicit, even in an evictionist libertarianism where the killing of F is justified only post-notification and as a result of eviction. And it is not the intervention of the authorities, nor their mere notification, that forbids this but laws already on the books criminalizing murder.

⁷⁹ Getting ahead of ourselves for a moment, what this future looks like in S_2 is that pro-life forces will ensure that the relevant doctors’ offices are continuously stocked with state-of-the-art artificial wombs, or some such, for the purpose of successful first trimester fetus-transplantation. If we ever do reach a point at which we’re capable of transforming the black area into a gray or even white area, it will be the eventuation not of the notification of others, but of advances in science and technology and the vigilance and tenacity of organizations eager to utilize said advances to prevent historically fatal evictions from remaining such.

does not. The evictionist asserts that the property owner must merely make others aware of what's to come, and he balks at the idea that M will actually have to *wait* for these others to intervene before initiating an eviction. The evictionist thinking is: if the authorities are capable of preventing a fatal eviction, good; if not, so be it. But in what way does simply telling other people of one's intent to indirectly kill an unwitting intruder, before just indirectly killing him, *equal* the gentlest manner possible of ending his trespass? Merely notifying of the eviction those who would, if possible, prevent it from being lethal is, after all, simply giving them knowledge of the impending violent act—and the knowledge of others will not and cannot somehow or magically imbue the act itself with legal permissibility. So, we need the evictionist to provide some warrant for the proposition that a simple notification of others will bestow gentleness on the subsequent lethal eviction of the trespasser, and some explanation as to how it will do so apart from any silly allusions to a theory concerning the homesteading of relinquished property. Now, the authorities might suggest that M withhold the eviction of F until he approaches the eastern part of the premises. But, again, the evictionist will have none of that; he'll insist that M has every right, post-notification, to fatally remove F. The authorities will complain that someday the terrain below the cliffside, all areas, will be white. And the evictionist will feign remorse and offer that when that day comes the NAP will once again be something observed by libertarianism. The point here is that—whether unto the white, gray, or black areas; whether presently or in the future—it will be the available technology and not the ENR that determines if M's cliffside eviction of F constitutes just an abhorrent violation of the principle of non-aggression. The ENR is a directive required of M which, given its superfluity, borders on the macabre; it is no more than

burdensome red-tape through which M must navigate so as to make legal the murder of F.⁸⁰

(e) Objections from Duration

Objection: The property owner must be able to stop the trespass when he sees fit to do so, or else libertarianism is transformed into an ideology of squatters.

⁸⁰ In order to be comprehensive, it's necessary to mention that it's not just notification that the evictionist requires. Rather, M must notify others and then *refrain from setting up roadblocks*. Justification for this addition to the notification requirement is again borrowed from the second analogy. That is, it's not enough that the property owner be made to provide "'mental egress' through the miasma of lack of information" (Block, "Children's Rights," 280) by notifying someone that he is abandoning property. He must also provide "physical egress [to the donut hole land] through what would otherwise be considered his property" (ibid.). A child-abandoner can't notify all and sundry about his no longer wanted kid and then barricade the tot so that no one can care for him. This makes since, as to do the latter would be to engage in forestalling. So, if one abandons physical land/a child, really abandons it, then he has to "notify someone who will spread the word about this; and refrain from preventing others from homesteading it (e.g., setting up a blockade against their doing so)" (ibid., 282). (It has yet to be investigated in the relevant [e.g., homesteading] literature whether imposing an arbitrary time-frame on those who would take over responsibilities for P, outside of which they are precluded from doing so, is not tantamount to creating a homesteading roadblock. Such is an invitation for further research in the area of property homesteading/abandonment, though a digression.) And just how would this additional step in the notification requirement translate to S_1 ? It would mean that, apart from notification, the property owner must not impede others from preventing the eviction from being lethal. That is, M contacts the private police (the equivalent in S_2 of notifying the church, orphanage, etc.), ensures that the front door is unlocked (the equivalent in S_2 of removing barriers to pro-life intervention in the abortion), and then proceeds to intercept F at the cliffside (the equivalent in S_2 of setting up and attending the abortion appointment). F may then lawfully be shuffled loose the mortal coil (the equivalent in S_2 of pulling the womb-aged child apart with forceps). Thus, this further implication of the ENR is likewise superfluous with regard to gentleness. The dual-mechanism of notification and non-hindrance has no effect on the severity of the property owner's response because it does not, cannot, convert a black area eviction into a white (or even gray) area eviction. The ENR thus is simply a duo of tedium that M must exercise which, as has been shown, has no correlation to that which is proposed to lend it libertarian legitimacy, the gentleness principle.

This objection arises from the evictionist observation that if the law requires M to allow for A, then the law, essentially, is permitting F to squat on M's premises for that duration. Now, the initial departurist response to this sally was basically *Yeah? You and me both*. Why? Because if the law requires M to withhold the eviction of F until such time that the authorities have been notified (and roadblocks removed), then the law, likewise, is allowing for F to squat on M's premises for *that* duration. This was an especially devastating response given that the evictionist, at that time, held that "it matters not one whit how long a duration we are talking about."⁸¹ That is, even if the duration of notification were as little as nine minutes, that amount of time "could be turned to nine or even ninety years, without any change in principle whatsoever."⁸² This reasoning proved inescapable, so the evictionist promptly changed his position on duration, stating suddenly that "the amount of time is crucial."⁸³ Now, this play operates on the assumption that the evictionist requirement has a less onerous time liability than does the departurist requirement, and so should be preferred. There is a two-fold trouble here for the evictionist. First, as already noted, it makes no difference if the ENR will be over in a jiffy if it places a positive obligation on the property owner, which it most certainly does. Second, there really is no way of demonstrating that one requirement has an inherently more oppressive time liability than the other.

Consider first evictionism. How long does it take for M to notify others of the intent to lethally evict F? The evictionist may find solace in his assertion that it takes only "a *de minimus* amount of time,"⁸⁴ but the rest of us might not be so confident. In reality, who's to say? Does M already know just whom to notify, or is research required? Does M possess the means to conduct said research? Will a simple email or phone call to one

⁸¹ Block, "Response to Wisniewski, Round Two," 11.

⁸² *Ibid.*

⁸³ Block, "Critical Comment on Parr," 8.

⁸⁴ *Ibid.*, 9.

person suffice? Or are “two qualified witnesses”⁸⁵ required? What characterizes a witness as qualified? How does M discover such? Does M have a computer? A phone? If not, does M have a car or some other means by which to rapidly reach the authorities in order to notify them? Where are the authorities located? Does M live in the boonies? How far away are the authorities? Is Snail Mail M’s only option? What further time hindrances are placed on M in the removal of roadblocks? It may take a *substantial*, nay, an *oppressive* amount of time to satisfy the ENR.⁸⁶ In fact, by the time it’s satisfied F may well have reached a point in his departure where M’s evicting ideations no longer portend death.⁸⁷ Which is great, for both F and society, but it does not bode well for the supposed great *toot sweetness* of the ENR.

What about departurism’s requirement? How long does it take for F to reach the point in his continued departure where M’s eviction of him does not result in his unjustified death or debilitation? Well, this depends on when, or the point at which, F is perceived as a trespasser—which can take place anywhere on the spectrum from the western to the eastern end of M’s premises—and the height differential between the cliffside and the terrain below (the technology available to prevent F from succumbing to eviction-tragedy). That is, there are situations in which M might perceive F as a trespasser and not have to withhold eviction for any duration whatsoever because said eviction would not constitute a NAP-violating

⁸⁵ Block, “Children’s Rights,” 283.

⁸⁶ The evictionist will not begrudge departurism ascribing such modest time-estimates to his notification requirement, particularly after the evictionist has stipulated a nine-month long rape (see Section V [c] of this paper) in his effort to undercut the departurist position.

⁸⁷ The duration of notification may be such that F has time enough to continue on his way to the point where his eviction at the hands of M happens to fall within the bounds of the NAP—which would be a welcomed, happy, and justified outcome—but, to stress a point, this would not at all concern notification. The evictionist could just as well require that the property owner do a handstand or milk a German Shepherd, actions that are sillier but no less arbitrary than notification, and the trespasser might likewise be lucky enough to escape the eviction danger-zone.

overresponse. The evictionist has even heaped high praise on the so-called pro-life authorities in their ability to speedily achieve their goal of making, where they're capable, evictions non-lethal. How long does M have to wait before evicting F? Anywhere from "not too long"⁸⁸ to no time "at all."⁸⁹

In any event, assessing the time liability entailed by the requirements of departurism or evictionism is a highly shaky basis on which to petition for the unlibertarianism of either view. So, we turn now from the quite exaggerated and double-edged evictionist accusation that departurism transforms libertarianism into an ideology of squatters, to the departurist response that evictionism transforms libertarianism "into an ideology of corpses."⁹⁰

How does evictionism so transform libertarianism? This criticism finds its basis in those instances where a trespasser becomes such as a result of a rescinded invitation; the property owner initially welcomes but now rejects an invitee's presence on the premises. Does evictionism permit that the property owner may simply evict unto death this newly-designated trespasser? Well, this depends on one of two things.

First, it depends on whether or not the trespasser's duration of departure falls within the limits of that which is covered by the phenomenon of implicit contracts. If, given the situational context, it's a reasonable duration of departure, then the trespasser certainly may not be lethally removed. That is, the now-unwanted invitee (and libertarian law) would be properly aggrieved if his host could just rescind his invitation and then fatally evict him⁹¹ on the grounds of not wanting to bear the burden of his, say, nine-minute departure. Without the notion of implicit contracts, we might expect to see the justified murders of such guests occurring all over the fruited plain.

⁸⁸ Block, "Critical Comment on Parr," 9.

⁸⁹ Ibid.

⁹⁰ Parr, "Departurism," 13.

⁹¹ Sigh, after notifying others.

Second, it depends on whether or not the phenomenon of implicit contracts is even applicable to the guest in question. Here’s where evictionism faces real trouble. That which stays the execution of the ordinary no-longer-welcomed guest simply does not extend to F. Why not? “Because a necessary condition for a contract ... is that there be *two* contracting parties.”⁹² Much like the babe in the womb, who simply did not exist at the time that any contract between him and his mother could be said to have occurred, the trespasser in S_1 cannot “be a partner in a contract in any case.”⁹³ Why? Because he has not the capacity to “understand and agree to a contract.”⁹⁴ So, “how could there be a *contract* of any type or variety”⁹⁵ with him? The point here is what the evictionist full well knows. Because both the unwanted fetus and the trespasser in S_1 are incapable of purposeful behavior, that aspect of implicit contracts which condemns the babe in the womb condemns also F, “a category of persons to which much more than simply very young human beings belong.”⁹⁶ The phenomenon of implicit contracts is thus impotent to rescue poor F—whether the duration of his trespass is onerous or whether it is reasonable. Now this impotence may not amount to a genocidal holocaust, but it certainly does allow for the legally justified homicide of innocent persons, and not just really young ones in their mothers’ wombs. It is open season on anyone whom a property owner can argue is just like F. As to whether or not the evictionist would grant the validity of the above critique of his view, if he would admit that “it is logically possible for such a sad state of events to take place,”⁹⁷ we need not even speculate. The evictionist has flat out conceded that the departurist “does make the not totally unreasonable point that under evictionism, ‘libertarianism is

⁹² Block, “Critical Comment on Parr,” 10.

⁹³ *Ibid.*, 11.

⁹⁴ Walter Block, “Response to Wisniewski on Abortion, Round Three,” *Libertarian Papers* 37:3 (2011): 12.

⁹⁵ *Ibid.*, 11.

⁹⁶ Parr, “Departurism Redeemed,” 120.

⁹⁷ Block, “Children’s Rights,” 281.

transformed into an ideology of corpses.”⁹⁸ He further affirmed that this “of course sounds horrible,”⁹⁹ before trying to justify it on utilitarian or Coasean grounds.¹⁰⁰ But just because *he* would not blush at lawfully permitting the intentional life-taking of innocent people, of all ages and stages of development, “does not mean that this is not a telling argument against the position he has staked out. The point is, no one else would make this sort of legal judgment.”¹⁰¹

F, whether a little kid or a stroke patient, is on his way off the premises. He is not threatening the life of M. Would libertarian law permit the proprietor to cliff-toss such a trespasser, even if he first tells someone about it, when doing so *just is* to kill this innocent person? This paper argues that libertarian law would not. And it should not. The conditions of S_1 , seen together with the requirement that such a trespass be stopped by the least harmful possible means, argue against such a course of action. But does S_2 possess these same conditions, those which prohibit as a course of action any eviction of the trespasser that would necessitate a violation of the NAP up to and including murder?

V. PREMISE TWO

All that is required to demonstrate that the situations compared in premise two are relevantly similar is to show that the conditions of S_1 are to be found in S_2 . If the same conditions are to be found in both situations, the notion that this comparison is strong and relevant will have a firm foundation.

⁹⁸ Block, “Rejoinder to Parr,” 134.

⁹⁹ *Ibid.*

¹⁰⁰ The evictionist ploy here was to acknowledge that his view results in a lot of dead babies, just not as many dead babies as under pro-choice—which spells doom for those fetuses even in their third trimester of gestation. Of course, a justification based on the counting of scalps has no place in a deontological libertarianism—the evictionist notwithstanding.

¹⁰¹ Block, “Response to Wisniewski, Round Two,” 10.

(a) The Conditions of S₂

Both that the fetus is *incapable of purposeful behavior* and that he is *in the process of departing the property owner’s premises*¹⁰² are seemingly uncontroversial propositions, as evictionism has affirmed the presence of these conditions in S₂. Concerning the former condition, the evictionist has maintained:

Of course, this baby human being lacks *mens rea*, and thus cannot be considered a criminal.... It cannot be denied that the fetus is totally devoid of any intention to trespass.... The same can be said for the unconscious adult.¹⁰³

And, regarding the latter condition, the evictionist has agreed that gestation constitutes a process that works to affect the cessation of property-directed aggression.¹⁰⁴

With respect to the remaining two conditions of S₁, it is unlikely that the evictionist would begrudge departurism focusing its attention on those instances of trespass within the womb which are the most prevalent (those in which the trespasser is *not jeopardizing the proprietor’s life via aggression against his property rights in the person*) and, with regard to the principle of gentleness, the most relevant (those in which *eviction from said premises would necessitate the trespasser’s death*).

(b) Objections from Gentleness

¹⁰² It can be assumed that every pregnancy begins at the western end of M’s premises. From fertilization to parturition, the process of gestation takes the fetus from the western to the eastern end (and off) of M’s premises. The fetus, as a matter of fact, is departing the premises of the property owner and he is so doing from the moment that he first arrives there—regardless of the point at which he is deemed a trespasser.

¹⁰³ Block, “Rejoinder to Parr,” 127.

¹⁰⁴ *Ibid.*, 131.

Objection: The trespassing fetus, though totally without *mens rea*, is not a non-criminal *in effect*, and so the gentleness principle is not applicable to him.¹⁰⁵

What if this objection were spot-on? What if the fetus, despite previous authoritative and assiduous declarations by the evictionist to the contrary, were nothing more than a criminal? Would this mean that his trespass should not be stopped in the gentlest manner possible? Well, no—and this by the evictionist’s own admission. In the Example of the Inadvertent Missetp, it is stated that the proprietor may only properly employ violence against Innocent Person A if the latter refuses to respect private property rights. And,

even then, the bazooka would not be the first option. If B could remove A from his property in a more gentle (sic) manner... B is obliged to do just that, by the libertarian legal code.¹⁰⁶

The take-away here is that the evictionist believes that gentleness should apply even to criminals, which removes the teeth of the present objection.¹⁰⁷ Now it’s profitable to turn from *What if this objection were true?* to *What good reasons are there to think that this objection is true?* Not surprisingly, an investigation into this latter consideration reveals a scarcity of warrant.

Here is that from which evictionism would like to escape: the unwanted fetus is a non-criminal and so is due gentleness which means A. To evade this course of action, the evictionist has opted to back-pedal by claiming of the fetus that, though he is morally innocent, “he is still

¹⁰⁵ *Ibid.*, 128.

¹⁰⁶ Block, “Rejoinder to Wisniewski,” 3–4. Italics added.

¹⁰⁷ A second take-away amounts to a bit of a semantical low-blow: it is *only* if the trespassing fetus refuses to respect private property rights that he can be viewed as a criminal. But the trespasser in an unwanted pregnancy is incapable of refusing anything *at all* (he’s a fetus for crying out loud!). Playing by evictionism’s own rules, then, the trespassing fetus cannot be viewed as a criminal.

occupying territory owned by another person, his mother, against the will of the latter. If that is not (ok, non) criminal trespass, then nothing is.”¹⁰⁸ However, this does not amount to an argument for the permissibility of the harsh treatment of the fetus. It’s just a nugatory observation. After all, departurism and evictionism are in agreement that a trespass is occurring in an unwanted pregnancy. But the whole point of the dispute is to establish whether or not the severity appropriate for seeing an end to a trespass within the womb should be equivalent to that required in combating an ordinary, criminal trespass. Just repeating the reality that a trespass is taking place is not enough to swing the libertarian pendulum in the direction of evictionism, nor is it sufficient to erase gentleness from libertarian law.

Objection: Allowing for a trespassing fetus to continue his departure is not the gentlest manner possible consistent with stopping the aggression. It is hardly upholding the private property rights of the mother; it is not at all *stopping* the aggression.¹⁰⁹

The evictionist has put forth a thought experiment that involves a knifeman making a frontal attack on him (footnotes omitted):

If I have two guns, one with a rubber bullet which will stop the knifing by rendering the assailant unconscious, and the other with a lead bullet which will kill him, then, the libertarian legal code requires that I use the rubber bullet. If I, instead, avail myself of the lead bullet, then I, too, am guilty of a crime, that of not abiding by the “gentlest manner possible” principle. But, suppose there is no guarantee that the rubber bullet... will halt the perpetrator in his tracks; that the only way to stop him for sure will be to plug him full of lead, thus causing his death. Do I have a right to do so? Of *course* I do.¹¹⁰

¹⁰⁸ Block, “Rejoinder to Parr,” 128.

¹⁰⁹ See Block, “Critical Comment on Parr,” 4.

¹¹⁰ Block, “Response to Wisniewski, Round Two,” 4.

What is the relevance of the foregoing? Well, plugging the knifeman full of lead is only licit in the event that other means of stopping the aggression do not exist; that there are no rubber bullets or that said bullets would prove ineffectual in halting the aggressive act. However, the moment that the evictionist acknowledged that gestation is a process that works to affect the cessation of property-directed aggression, he conceded that his own theory is tantamount to icing the knifeman where he ought instead to render him unconscious.¹¹¹ The real evictionist objection here, it seems, is that departurism's means entail too long of an aggression-stoppage. And to address this particular gripe we must move on to the next subsection.

(c) Objections from Duration

Objection: The owner's property rights should not be held in abeyance for a nine-month period of time.¹¹²

The charge that departurism necessitates that the mother endure a nine-month unwanted pregnancy is simply false. A nine-month occupation of an unwanted fetus in its mother's womb is *possible*, assuming that the fetus is perceived as a trespasser from the very outset of pregnancy and the mother chooses to carry the child to term.¹¹³ But the duration of departure might be as little as nine minutes, assuming that the pregnancy becomes unwanted during or proximal to the period in which the fetus can be removed without incurring unjustified harm or at the very end of gestation when he can be delivered without incident. The duration of trespasser departure all depends on when, or the point at which, the

¹¹¹ Notice, again, that the evictionist is wont to extend the gentleness principle to actual criminals, like the knifeman, which simply nullifies his charge that it shouldn't apply to so-called criminals *in effect*, like, allegedly, the unwanted fetus.

¹¹² See Block, "Rejoinder to Parr," 131.

¹¹³ Rather than evict him, sans death, prematurely.

pregnancy becomes unwanted and when, or the point at which, the unwanted pregnancy ceases.¹¹⁴

To say that departurism *requires* a mother to withhold the eviction of an unwanted fetus for a full nine months is just to miscomprehend the view. And it is because of this misunderstanding that the evictionist cooks up silly scenarios, like the following (footnotes omitted), which are intended to reveal a chink in departurism’s armor which simply does not exist.

Suppose an ordinary man, a non-rapist, is drugged or hypnotized into engaging in this sort of evil attack on a woman. Then, this “rapist” would lack *mens rea*, just like the baby. If this is the case, then according to departurism, he would indeed be entitled to “just a little more time” to complete his despicable act, provided, only, that to not allow him to do so might injure him... very seriously, even leading to his death.... The departurist, if he consistently cleaves to his misbegotten views, would have to urge “gentleness” for the rapist. Perhaps, even, if this were physically possible, to allow him to continue his rape of this unfortunate woman for a full nine months. We now assume that rape, not only gestation requires “time to finish up.”¹¹⁵

Rape, like any consideration of pregnancy in which the mother’s life is at stake, is an aggression against property rights in the person, and not one against property rights in external things, and so simply is not germane to the present discussion. And this based on the very conditions

¹¹⁴ This cessation of unwanted pregnancy could be the result of the mother no longer acknowledging the fetus as unwanted, the mother evicting or otherwise having the fetus removed from her womb (whether over-injurious/fatally or as a result of medical technology precluding an instance of unjustified counter-violence), the mother RU 486-ing the fetus, or parturition.

¹¹⁵ Block, “Rejoinder to Parr,” 131.

of S_1 .¹¹⁶ The degree of harshness appropriate in dealing with a rapist, even a drugged or hypnotized one, even a non-criminal one, even if he's finishing up, would not be equal to that which is appropriate in dealing with F, the evictionist's illegitimate criticism notwithstanding.¹¹⁷

VI. PREMISE THREE

Because of the extent to which S_2 is similar to S_1 , there exists no reason to suggest that the course of action appropriate for the latter should not also be appropriate for the former. In fact, the requirement of practical consistency will not permit these cases to be treated differently. So just as it ought to be illicit for M to send F fatally off into the wild blue yonder, it ought also to be illicit for a mother to kill, or otherwise unjustifiably maim, the unwanted fetus in her womb by eviction.

VII. CONCLUSION

¹¹⁶ There's another manner by which this rape scenario is disanalogous to an unwanted pregnancy. A calls for the *continued* departure of the trespasser until the mother's evicting action would not equate to a NAP-violation. Because one cannot continue that which has not already begun, A as a course of action would only be applicable to situations in which the perpetrator was already in the process of ceasing his aggression. For this evictionist sally to even come close to doing the devastation intended by its author, the perpetrator in this failed example would have to be not only (a) unintentionally engaged in a violation that (b) at least approximates a mere trespass, but, forgive the image, (c) zipping up his fly. In other words, whatever this *reductio* was intended to indict, it's a swing and a miss with regard to departurism.

¹¹⁷ There is an old pun which seems appropriate to mention here: "Do you know the difference between a living room and a bathroom?" The joke is, if you say "no", I say, "Don't come to my house." Well, the analog joke is: "Do you know the difference between rape and inadvertent trespass?" If you don't know the difference between those two things, I say, "Don't get into legal theory." This bit was borrowed (and modified) from Walter Block and Richard Epstein, "Debate on Eminent Domain," *NYU Journal of Law & Liberty* 1:3 (2005): at 1144.

The evictionism-departurism debate concerns that which is the weightier libertarian concern: the eviction rights of property owners or the NAP. Which one trumps the other in situations of, and relevantly similar to, trespass in the womb? The evictionist argues that it's the NAP which ought to get short shrift. Currently, his theory runs afoul of libertarianism for the sake of swiftness of trespasser removal, and much is sacrificed at this altar. The great casualty is the gentleness principle—to which the evictionist only feigns an allegiance, yet neuters and perverts (much like the law in Bastiat's estimation) to allow for “that very inequity which it was its mission to punish.”¹¹⁸ An evictionist libertarianism is one that champions the most *expedient* manner possible consistent with stopping not the aggression but the *aggressor*, a principle that does nothing to avert the overly severe treatment of non-criminals, nothing to uphold the NAP.¹¹⁹ What's more is that the evictionist accomplishes this debasement of libertarian theory only by debasing it further, requiring a positive obligation to see it through. And the dire results of evictionism do not end with the preceding. Because said obligation is positive, a direct consequence of adhering to it is that property owners are made to unjustifiably permit the trespassers on their property to squat there while this obligation is satisfied.¹²⁰ Under evictionism, libertarianism must acquiesce not only to squatters, but also to dead folks in numbers that dwarf those of merely unwanted fetuses. And this because it's not just to womb-aged children that the phenomenon of implicit contracts does not

¹¹⁸ Frederic Bastiat, *The Bastiat Collection: Volume I* (Alabama: Ludwig von Mises Institute, 2007), 49.

¹¹⁹ “In the *Godfather* movies, certain members of the Corleone family often employed the phrase ‘I’m gonna make him an offer he can’t refuse,’ in order to imply a particular point. Under the evictionist view, the Corleone family might as well have employed the phrase ‘I’m gonna make him leave my property in the gentlest manner possible.’” (Parr, “Departurism,” 12).

¹²⁰ Not so for adherence to the departurist requirement, which boasts libertarian justification in that it is not a positive obligation as it both derives from and is an application of the NAP-preserving gentleness principle.

apply, but *anyone* who is mentally or developmentally incapable of entering into a contract. An evictionist libertarianism cannot prevent all such people from potentially becoming the gruesome results of (supposedly) justifiably upheld property rights.

Now, rather than make the departurist case all over again in summation, it's perhaps enough to end with the following as a safe, though only generally applicable, libertarian rule: Innocent Person A should not be bazooka-ed, knifemen should not be plugged full of lead when rubber bullets will do, F should not be fatally cliff-tossed, and babies should not be aborted.