

Toward a Libertarian Theory of Evictionism

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Abstract There are not two but rather three views regarding the issue of abortion. The first two, pro life and pro choice, are well known. The present paper is dedicated to an elucidation of the third, evictionism. In this perspective, the pregnant woman is allowed to evict her unwanted fetus, but, if it is viable outside of the womb, she is not legally permitted, also, to put it to death, as would apply to abortion. In other words, abortion combines two very different acts, eviction and murder, and only the former is licit, under libertarian law.

Keywords Abortion · Pro life · Pro choice · Evictionism

Introduction

There is perhaps no more intractable philosophical conundrum than the one involving abortion. When does life begin? Does the fetus have any rights? Is partial birth abortion licit? Which of the contending parties has justice on its side: the pro lifers or the pro choicers?

This issue seems settled as a matter of law. The Supreme Court has spoken out clearly on this controversy.¹ However, only a legal positivist would accept the views of these nine judges merely because they came to a given conclusion. No matter how settled are the precedents in law in this matter, it is always possible to ask if they are correct.

Fortunately, there is a way out of this gigantic mare's nest: the doctrine of libertarian private property rights.² How does this contribute to our understanding of this vexing issue? We start out somewhat paradoxically not with the egg and the sperm nor the developing fetus, but, rather, with the property, the private property, in which this all occurs: the womb. And, who owns this very important piece of property? Why, the (pregnant) woman, of course. The so-called feminists have never been more correct when they assert a woman's ownership over her own body.³

In the second section of this paper we liken the unwanted fetus to the trespasser. The burden of the third section is to wrestle with the question of when human life begins: At birth? At conception? "A Comparison" section compares evictionism with its two competitors: pro choice and pro life. Objections to evictionism are considered, and rejected, in the fifth section. Then we conclude.

Trespasser

Given that the woman owns her body, any unwanted entity inside her, without her permission, takes on the status of a trespasser. What, under more ordinary circumstances, may properly be done with someone who trespasses on one's property? Suppose someone is found on your lawn. Should it be legal for you to, forthwith, blow him away with a

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¹ See <http://www.godandscience.org/abortion/sld019.html>; http://www.law.cornell.edu/supct/cases/topics/tog_abortion.html.

² For an analysis of this issue from that perspective, see Block (1976), Hoppe (1993), Huebert (2010) and Rothbard (1998/1982).

³ That this fealty to private property rights is very narrow and limited is entirely a different and unrelated matter. On this see Beutler (2011), McClarey (2011), Paul (2011) and Williams (2011).

bazooka? Of course not. Rather, the appropriate thing to do is to approach such a person and say something along the lines of “Sir, did you know you are now standing in my garden?” If he quickly apologizes, replying that he did not realize he was doing that, and starts moving off your property, that is pretty much the end of the matter. If, on the other hand, he attacks you, or refuses to budge, whereupon you try to forcibly remove him from your premises and he resists, then he is guilty of much more serious a rights violation than mere trespass, and, certainly, you are entitled to escalate the degree of force utilized until you succeed in repelling him.

Suppose, now, that he is unconscious, to move the analogy closer to the case in point. May you now plug him with your favorite weapon of choice, since he is incapable of exiting your backyard under his own steam? Not at all. That would be outright murder. No, instead, you call the police, or the hospital, or the relevant charity, and they come and take the trespasser away. Stipulate, now, that there are no such groups; assume the unlikely scenario that there is not a single solitary person on the entire planet willing to take charge of this unconscious trespasser, revive him, care for him, etc. Then, does it become your legal responsibility to do so, according to libertarian law? No. While it would be nice, it would be charitable, it would be supererogatory, it would be the kind act of a Good Samaritan to do so, the mere fact that he was found on your lawn conveys no particular responsibility upon you to engage in these acts. They are over and above the call of duty. For the libertarian, to require such charity would constitute a positive obligation, anathema for this philosophy. You may now eject him, but, the “gentlest manner possible” (before performing the eviction, or, as part of this process, I assume that everything humanly and medically possible should be done to and for the fetus to best assure its viability and health) is compatible with killing him.⁴

Beginning of Life

When does a fetus become a rights bearing human being? Answers to this question vary from one extreme to another. At one end of the political spectrum, call it the left wing, we do not become human⁵ until we are born. Here, partial birth abortion (removing the brains of the 9 month old

fetus while it is still in the womb and thus killing it, murdering it, before it can be born) would be justified. Indeed, this extremist position stretches even further. Singer (1996)⁶ advocates even infant murder, for children with biological flaws. There are also more moderate views. One such is the fetus is not a rights bearing creature until it is viable outsider of the womb. With present early 21st century technology, this implies somewhere in the third trimester. According to Jewish law, the fetus attains rights when it has a heart beat, which is far earlier in the gestation process.⁷

At the other extreme, call it the right wing, is the Catholic Church. For the purpose of the present analysis, we adopt precisely their assumption: That the beginning of human life, with all rights attaining thereto, is at the fertile egg stage. Before that phrase, with no other interventions, a human being will not arise. But under proper environmental conditions (inside the womb of a healthy woman, for example), a fertilized egg will eventuate into a human person. Yes, the fertilized egg requires physical support, but, so does the infant. Neither is viable all on its own. Indeed, most *adults* would not be capable of maintaining their lives marooned on a fertile island; we all need civilization, specialization, division of labor, cooperation with others, to survive.

In a sense there is No unambiguously correct answer to the question of when human life begins. It is a continuum problem,⁸ and hence there is no non arbitrary solution to it. The fertilized egg stage is as good as any of the other possible responses, and better than some.

But there is another more important reason to adopt this as the starting point. My (evictionism) solution to the abortion problem will, under certain circumstances, conclude that the mother has the right to evict the fetus even though this will result in the death of her baby. Were I to assume that life does not begin until birth, I would be taking the easy way out. There would not be much of a hurdle to overcome, to defend this thesis. I want, instead, to operate under an assumption that will be more of a challenge for my thesis. In other words, I want to make it as difficult as is reasonably possible, for evictionism to survive objections that can be leveled against it. This supposition deflects any possible charges of confronting a straw man argument.

⁴ We are now operating under very stringent assumptions.

⁵ A referee of this journal points out that there is a debate over whether or not “humans” and “persons” are synonyms. I regard them as such. But to enter into this debate would take me very far afield of the aims of this paper, so I will not do so.

⁶ See also DeMarco (2003) and Parish (1996).

⁷ According to Jewish tradition, however, the fetus is not viable until it graduates from medical school.

⁸ It is similar to the issue of how far, and in what context, does A’s fist have to be from B’s chin before the latter is justified in taking violent defensive action. Or, to what is the proper age of consent for statutory rape laws. For more on this see Block and Barnett (2008).

A Comparison

What, then, is the solution to the problem that emanates from this quarter? It is that the mother may evict, but not kill, the fetus at *any* stage of its development, for good, bad, or no reason at all. It is on her property that the fetus is now residing. And the unwanted baby is a trespasser, just as in the garden case. Here, even worse, it is a parasite, in that it is “stealing” her bodily fluids. It is an invader, a rights violator. Eviction then falls under the category of self defense. Of course eviction may cause death if performed early in pregnancy and death and/or severe disability if performed later.

Before considering objections to this modest proposal, let us trace out some of its implications.

First, this constitutes a true compromise between the pro life and the pro choice positions. It is a true philosophical middle ground between them. It is not as if someone said that $2 + 2 = 4$, and someone else averred that $2 + 2 = 6$, and we compromised by taking the mean of these two claims, concluding that $2 + 2 = 5$. Rather, evictionism is a true third alternative, with its own distinct philosophical justifications. Consider the following table:

	Pro life	Evictionism	Pro choice
1. Does the mother have the right to kill the fetus?	No	No	Yes
2. Does the mother have the right to evict the fetus?	No	Yes	Yes
3. Is medical technology relevant?	No	Yes	Yes

Second, medical technology is relevant to evictionism, but not to either of the other two alternatives. For example, with the skills of doctors in the year 1700, there is no difference whatsoever between the results of the evictionist and pro choice positions. The latter allows either killing and/or evicting the fetus, while the former countenances eviction, only. But at that level of medical technique, to evict at any state of fetal development was equivalent to killing, so the results would have been indistinguishable. However, posit that advances in prenatal care by the year 2300 are such that at *any* stage of development, the fetus may be evicted from the womb without any harm to it whatsoever. Then, the results of the pro life view and the evictionism will be precisely the same: No small children will be killed. All will live for 9 months as fetuses, whereupon they will be “born.”

At the present time, matters are more complex. At the beginning of the 21st century, babies in the third trimester can survive without harm in the environment’s alternative

to the womb. However, improvements in technology are an ongoing process. Let us suppose that in 50 years from now all fetuses 5 month old, in 100 years, 4 months old, and in 150 years 3 months old, and so on, will be viable in artificial settings. That means that as calendar time marches on we reach back, earlier and earlier, in terms of viability, growing closer and closer to the time that all fetuses can be saved via evictionism. Is it now time for full disclosure. My heart is on the pro life side. I regard each and every human life as indescribably precious. It agonizes me no end that under present institutional and legal arrangements, large numbers of very young human beings are and will continue to be slaughtered, without end. It greatly gratifies me that if evictionism were to be adopted right now, at one fell swoop the lives of one third of all premature babies would be saved, forthwith. And, that every ensuing decade or so we are likely to reach back a few more days into the gestation process and save more and more very young infants. So, there is a case for adoption of evictionism on the part of pro lifers. One, if they come to agree with this philosophy on its substantive merits. Two, even if they do not, even if they never do, then at least on utilitarian grounds. For the pro life side of this debate is presently losing. Pro choice is now the law of the land.⁹ If Obama wins reelection as president in 2012 as seems likely at the time of this writing, there is little reason for being optimistic about the likelihood of our jettisoning of pro choice law and replacing it pro life legislation. Extrapolating into the future, if the pro life movement does not embrace libertarian evictionism, it entirely possible that in the year 2300 when by assumption all fetuses could be saved, that none of them, no more in any case than at present, will be preserved.

Objections to Evictionism

Invitation

The woman of child bearing years who voluntarily engages in sexual relations knows full well that pregnancy may well be the result. Thus, in participating in such an act, she is in effect inviting the fetus into her territory, to adopt the crude, weird and seemingly unwarranted language of the evictionists, the better to employ the argumentum ad absurdum against them. As such, she is not justified in evicting the fetus before it is viable. If A invites B onto her airplane, she may not demand that B leave while they are at 30,000 ft, and certainly not without a parachute.

⁹ This statement was once upon a time correct. However, recent changes in the law in North Dakota, Kansas, Arkansas and other states belie that sweeping statement. I thank a referee of this journal for pointing this out to me.

There are flaws in this objection. First, it is by no means true that all women know that the result of intercourse may well be pregnancy. Sex education has not yet spread to some backward parts of the world. Certainly, this blithe assumption of full knowledge cannot be maintained when we travel not geographically, but back in time. This information was not at all prevalent many centuries and even millennia ago. If so, and we posit that ancient woman had no such knowledge, it cannot be rationally maintained that to engage in sexual intercourse is to *necessarily* invite a fetus into or onto one's private property.

Then, too, there are cases where pregnancy cannot at all be interpreted as issuing an invitation: rape. Indeed, the very opposite is true. Some jurisdictions make an exception for the fetus who¹⁰ is the result of forced sex. But this is adventitious and unwarranted. All fetuses are innocent, and equally so. To draw invidious distinctions between them, this one may be aborted, that one may not, is thus unjustified.

Third, even stipulating that consent to sexual intercourse amounts to an invitation, more must be demonstrated before evictionism may be rejected. To wit, the invitation must be for 9 months. But if A invites B to have dinner in the former's house, A's expectation is that B will leave after a few hours. If B insists upon remaining for 9 months, A would be properly aggrieved. If this were the common pattern it would radically reduce dinner invitations. There is simply no reason to assume that if intercourse constitutes an invitation (and we have seen that it need not), that it comes with a requirement for any given duration, let alone 9 months.

What about the woman who voluntarily engages in sexual intercourse, with the express hope and intention of giving birth to a baby. Later on, after she becomes pregnant, she changes her mind and no longer wishes to carry the fetus to term. Is this akin to a modified invitation? My claim is that this is not at all an "invitation." How could it be? *Who* precisely, could she be inviting? Certainly not the fetus, for, at the time of intercourse, this entity did not (yet) exist? But, let us, *arguendo*, assume that this very young person was already in existence at that time, and that he was indeed invited? Would this obligate the woman to maintain him for 9 months? Not at all. Why cannot the invitation be on a day by day basis? Or, for a month at a time? If A invites B to dinner, this does not mean B can stick around for 9 months. Nor, does it even logically imply that the invitation has to last for more than 9 min; to

wit, at the that point A may tell B he has changed his mind, and B is no longer welcome at his dinner table.

Implicit Contract

Voluntary sexual congress constitutes not an invitation, but an implicit contract. When A invites B for a ride in his airplane, there is now an implicit contract in force. It implies that A will deliver B safely back onto the ground, or at the very least, in case of an accident, that A will deal with B in no worse a manner than any other passenger, and for that matter, no worse than A treats himself.

I have no objection to implicit contracts, *per se*. If A goes to B, the restaurant owner, orders a coffee, and gulps it down, A may not then be presented by B with a bill for one million dollars. If this occurred, A would be victimized by very sharp practice on the part of B. There was in force an implicit contract between A and B such that if there were anything unusual, including price,¹¹ about the coffee B served to A, then B is obligated to tell A all about this, and get his consent.

Does sexual intercourse establish an implicit contract between the mother and the baby such that the former must grant to the latter domicile in her body for 9 months? Or, perhaps, the mother owes the father this obligation?

We can answer the latter question in the positive, but only when there is a surrogate mother contract in effect between the father and the pregnant woman. The would be father hires the surrogate mother to one have sexual congress with him,¹² and two to ensure a safe 9 month haven for the issue of this transaction. Then and only then would the (surrogate) mother be precluded from either evicting or aborting (abortion equals eviction plus killing the fetus) the baby. To do so would constitute a contractual violation. But this is an explicit contract, not an implicit one.

What about the supposed implicit contract between the mother and the baby? A minor difficulty here is that the baby is too young to enter into any such contract. A major problem is that at the very time of intercourse, there was no fetus in existence. The fetus, defined here as a fertilized egg, only came into being some minutes after ejaculation. Say what you will about implicit contracts, it must be conceded that there need to be at least *two* parties to it, and, at the time of intercourse, there was only *one* of the supposed contractors in existence, the mother. We now ignore the father, except in the cases where there was an explicit surrogate contract in force.

¹⁰ My computer program objects to my use of the word "who" in this context. When I substitute "that" for "who" this satisfies the program. However, since I maintain that the fetus is a rights bearing human being, I shall confound my computer. Ha! Take that!

¹¹ This would certainly cover B placing poison in the drink he serves to A.

¹² Or in other ways allow his sperm to interact with her egg.

Conclusion

We have found both pro choice and pro life wanting. Not so for evictionism, despite sharp objections launched against it. We conclude that the latter is the only correct analysis of the abortion conundrum.

What may be the likely reactions to this eviction theory from pro-choice and pro-life points of view? Although the first articulations of this theory date from 1977 and 1978, and although there have been some half dozen follow up publications on this issue over the first decade of the 21st century, there have been no responses from either the pro choice or pro life perspectives, outside of the libertarian community.¹³ So, it is difficult to predict what will be the likely response. If evictionism is correct, then, presumably, the scholarly reaction will be to jettison both the pro life and pro choice philosophies. If not, then, hopefully, the rebuttals, when they are written and evictionism thus ceases to be totally ignored, will point out the errors in this latter view.

What are the ramifications for public policy if the evictionist theory somehow wins out, and becomes widely adopted? Although it is difficult to predict the future of human action, one likely scenario is that, eventually, finally, the pro-life side will triumph, and have its program adopted, fully.¹⁴ Assume medical technology is fully able to ensure the life of all fetuses, outside of the womb. Then, with murder prohibited, but eviction lawful, no small human being will ever again be put to death. He will only be evicted from the home in which he is trespassing, but not the slightest harm will befall him.

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¹³ For articulation of the evictionist theory see Block and Whitehead (2005); for a critique, see Wisniewski (2011); for a defense of evictionism against this criticism, see Block (2011).

¹⁴ It is in this way, and *only* in this way, that evictionism is tied more to the pro life than to the pro choice side. Otherwise, and in every other way, evictionism is a true compromise between the two of them.