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Proportionality trumps gentleness: reforming Block's evictionism (part I)

A proporcionalidade supera a gentileza: reformando o eviccionismo de Block (parte I)

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Abstract

This paper argues against the most important theoretical foundations which Walter Block uses to defend his thesis that Evictionism legitimizes indirectly deadly evictions of a progeny while simultaneously forbidding abortion. It begins by presenting Block's Gentleness principle and Rothbard's principle Proportionality separately. Then, it compares both principles to analyze how satisfactorily each of them deals with some important general problems of libertarian legal theory. The 'bubble gum theft' scenario is the main tool for this comparison because both authors uses 'petty theft' examples to illustrate their respective principles. This paper's conclusions are as follows: First, every moment of crime is interconnected. Second, proportionality applies to every moment of crime. Third, that Block's so-called 'gentleness principle' is not only redundant to proportionality, but also cannot be a libertarian principle for two reasons: (1) it implies positive rights and obligations; (2) it presupposes

Resumo

Este artigo argumenta contra as fundamentações teóricas mais importantes que Walter Block usa para defender a sua tese de que o eviccionismo legitima expulsões indiretamente fatais à prole enquanto simultaneamente proíbe abortos. O artigo começa apresentando o princípio da gentileza de Block e, separadamente, o princípio da proporcionalidade de Rothbard. Depois, comparam-se ambos os princípios para analisar o quão satisfatoriamente cada um deles lida com alguns importantes problemas gerais da teoria jurídica do libertarianismo. O cenário do 'roubo do chiclete' é a principal ferramenta para tal comparação porque ambos os autores usam exemplos de 'roubo de bagatela' para ilustrar os seus respectivos princípios. As conclusões deste artigo são as seguintes: Primeiro, cada momento do crime está interconectado. Segundo, a proporcionalidade se aplica a todos os momentos do crime. Terceiro, que o assim chamado 'princípio da gentileza' de Block é não apenas redundante à proporcionalidade, mas também não pode ser um

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a deterrence penology. This paper is the first in a series of three in an attempt to reform the standard libertarian stance on abortion.

Keywords: abortion; evictionism; libertarianism; proportionality; gentleness.

princípio libertário por duas razões: (1) implica em direitos e obrigações positivas; (2) pressupõe um penalismo dissuasivo. Este artigo é o primeiro em uma série de três na tentativa de reformar o posicionamento padrão do libertarianismo a respeito do aborto.

Palavras-chave: aborto; eviccionismo; libertarianismo; proporcionalidade; gentileza.

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1. INTRODUCTION: THE PROBLEM OF INDIRECTLY DEADLY EVICTIONS

The traditional libertarian stance on abortion has been based on Rothbard's insight of interpreting this issue as a matter of trespassing. Since the mother is the legitimate owner of her own body, if she considers her progeny¹ unwanted, then her progeny is a trespasser, and therefore may be aborted. Why? Because by removing the invader from her 'premisses', she would be acting in self-defense against a criminal trespasser².

Block builds Evictionism upon this original libertarian insight. He elaborates on it by making a logical distinction between the *act of evicting a progeny* and the *act of killing a progeny*. Under libertarian law, he argues, the first would be legitimate while the second would not. This is, in a nutshell, what he calls Evictionism.

¹ I use the term *progeny* because I believe it to be more neutral. It has several advantages: it can be used for every stage of both pre- and post-natal development; besides, although some may disagree on when human rights begin, by using this term they may still recognize the validity of my arguments regardless of their beliefs. To contextualize this discussion, Block himself argues from the point of view that human life, with the same rights as any other adult human, begins immediately at conception. Meanwhile, Rothbard thinks that a progeny is certainly not yet human before birth.

² As Rothbard states in *Ethics of Liberty*, "Abortion should be looked upon, not as 'murder' of a living person, but as the expulsion of an unwanted invader from the mother's body". He then adds that no humans "have the right to be coercive parasites within the body of an unwilling human host". ROTHBARD, Murray, **The Ethics of Liberty**, 2nd. ed. New York: NYU Press, 1998, p. 98 Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>... Also in *For a New Liberty*, he makes it very clear that "What the mother is doing in an abortion is [just] causing an unwanted entity within her body to be ejected from it: If the fetus dies, this does not rebut the point that no being has a right to live, unbidden, as a parasite within or upon some person's body" ROTHBARD, Murray, **For a New Liberty: The Libertarian Manifesto**, 2nd. ed. Auburn, Alabama: Ludwig von Mises Institute, 2006, p. 132. Available at: https://cdn.mises.org/For%20a%20New%20Liberty%20The%20Libertarian%20Manifesto_3.pdf.

As to *abortion*, Block defines it as *both* acts of evicting *and* killing (the order doesn't really matter). Thus, he argues that since abortion *necessarily* kills the progeny, it would be equivalent to murder, which makes it illegal under libertarian law.

I agree with Block's definitions and I believe that these evictionist distinctions should be standard in how the issue of abortion should be addressed. However, and this is my point of contention with Block, he claims that libertarian law should legitimize evictions that *indirectly* result in the death of a progeny. In other words, if a mother evicts her progeny using a normally non-deadly method, but the child dies anyway, then the mother wouldn't be guilty of 'murder'.

Block's salvo includes allowing a mother to evict her premature progeny *immediately* and according to her will. In his understanding, a mother's immediate Eviction rights stands even if she could save the progeny's life by waiting a few days or months until the progeny was a bit more mature. In other words, while a mother most certainly can't *kill* her progeny, she definitely doesn't have to *save* her progeny's life.

Therefore, I will try to argue against the legitimacy of deadly evictions in the course of three papers. Here, in the first, I will tackle Block's theoretical foundations. More specifically, his argument that there is a *sharp* division between two moments of crimes, thus making it necessary to have two different regulatory principles.

In order to dismantle this misconception on Block's part, I'll take three steps. First, I will explain Block's principle of gentleness and Rothbard's principle of proportionality. Second, I will compare them in order to show that the principle of proportionality actually applies to *every* moment of crime, not just punishment. Third, I will explain how 'gentleness', understood as a principle, is actually incompatible with libertarian law.

In my second paper, I will try to find a place for Block's 'gentleness' within libertarianism, although not as a principle, but as a tool of *epistemological appraisal*. In my third paper, I'll argue that the relationship between a mother and her progeny entails in trustee-guardianship duties. This point should make libertarians review the whole 'trespassing' analogy altogether.

As such, the issues regarding proportionality and epistemological appraisal have substantial implications within libertarian legal theory and beyond, since they are a part of *all* legal systems³. Meanwhile, the issue of abortion, being more specific, can only be properly addressed after those general aspects have been sufficiently settled. Thus, first we must settle on the libertarian stance regarding abortion, and only then we'll be able to compare it with other proposals, as to which best solves this important social issue.

³ ROTHBARD, Murray N., **The Ethics of Liberty**, New York: New York University Press, 1998, p. 85 n. 2. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

I agree with Block when he says that if we can't settle the issue of Evictionism within the libertarian tradition, then this position has little hope of attaining any relevance in the larger public forum⁴. Having that in mind, throughout this and the subsequent papers, my arguments will begin with the theoretical fundamentals of Libertarianism, then narrow it down to the issue of abortion as understood within Libertarian law and finally work toward a wider outreach.

2. BLOCK'S GENTLENESS

I believe that Block's Evictionism is correct in its initial premises⁵. What I contend is his conclusion that an *indirectly* deadly eviction should be legitimate. To that extent, I hope to engage on an ongoing debate, which has more recently resurfaced in 2010, on the *Libertarian Papers*, with Wisniewski⁶ and Parr⁷. These authors had used proportionality to challenge Block's views. Unfortunately, their challenges weren't properly addressed.

Take Wisniewski as an example. He uses Rothbard's principle of proportionality to claim that a deadly eviction of the fetus would be illegitimate because "the amount of physical harm done to the fetus [...] is grossly disproportionate to the amount of

⁴ BLOCK, Walter. Rejoinder to Wisniewski on Evictionism, Round four, **FBIM Transactions**, v. 2, p. 1–14, jul. 2014, p. 4. Available at: <https://fbim.meste.org/FBIM_2_2014/R4_01.pdf>

⁵ These could be listed as follows: 1) The mother considers that the progeny is trespassing; 2) There is an analytical distinction between evicting and killing the progeny; 3) Eviction would be legitimate within libertarian tradition, but killing wouldn't.

⁶ Cf. WISNIEWSKI, Jakub. A Critique of Block on Abortion and Child Abandonment, **Libertarian Papers**, v. 2, mai. 2010. Available at: <<http://libertarianpapers.org/wp-content/uploads/article/2010/lp-2-16.pdf>>; BLOCK, Walter. Rejoinder to Wisniewski on Abortion, **Libertarian Papers**, v. 2, p. 1–9, nov. 2010. Available at: <<http://libertarianpapers.org/wp-content/uploads/article/2010/lp-2-32.pdf>>; WIŚNIEWSKI, Jakub Bożydar. Rejoinder to Wisniewski on Abortion, Round Two, **Libertarian Papers**, v. 3, p. 1–13, mar. 2011, p. 3. Available at: <<http://libertarianpapers.org/wp-content/uploads/article/2011/lp-3-4.pdf>>; WIŚNIEWSKI, Jakub Bożydar. Response to Block on Abortion, Round Three, **Libertarian Papers**, v. 3, p. 1–6, mar. 2011. Available at: <<http://libertarianpapers.org/wp-content/uploads/article/2011/lp-3-37.pdf>>; BLOCK, Walter. Response to Wisniewski on Abortion, Round Three, **Libertarian Papers**, v. 3, p. 1–21, dez. 2011.; WISNIEWSKI, Jakub. Abortion, Libertarianism, and Evictionism: A Last Word, **Libertarian Papers**, v. 5, p. 1–10, jun. 2013. Available at: <<http://libertarianpapers.org/wp-content/uploads/article/2013/lp-5-1-6.pdf>>; BLOCK, Walter. Rejoinder to Wisniewski on Evictionism, Round four, **FBIM Transactions**, v. 2, p. 1–14, jul. 2014. Available at: <https://fbim.meste.org/FBIM_2_2014/R4_01.pdf>

⁷ Cf. PARR, Sean. Departurism and the Libertarian Axiom of Gentleness, **Libertarian Papers**, v. 3, p. 1–18, nov. 2011. Available at: <<http://libertarianpapers.org/articles/2011/lp-3-34.pdf>>; BLOCK, Walter. Evictionism is Libertarian; Departurism is Not: Critical Comment o Parr, **Libertarian Papers**, v. 3, p. 1–15, nov. 2012. <<http://libertarianpapers.org/wp-content/uploads/article/2011/lp-3-36.pdf>>; PARR, Sean. Departurism Redeemed - A Response to Walter Block's Evictionism Is Libertarian; Departurism Is Not: Critical Comment on Parr, **Journal of Peace, Prosperity and Freedom**, v. 2, p. 109–123, jan. 2013. <<http://libertarianpapers.org/wp-content/uploads/article/2011/lp-3-36.pdf>>

physical harm that the fetus can possibly do to the mother"⁸. He is excluding, of course, those rare situations in which the progeny threatens the mother's life. A fair point in my estimation.

However, Block hastily dismisses Wisniewski's contention by claiming that he is falling victim to a common "category mistake". Block claims that there is a *sharp* categorical distinction between legitimate defense (a) *while* and (b) *after* a crime happens. Thus, his view is that each single crime has two separate moments.

Given this separation, Block claims that each moment of a crime must be governed by a different principle of legitimacy. To that extent, he conjures up the 'principle of gentleness' which, he says, is "part and parcel of the ante punishment⁹ stage" of a crime. Meanwhile, and "*in sharp contrast*"¹⁰, proportionality applies, only, to the punishment stage¹¹. Thus, two distinct moments of a crime, each with its own distinct governing principle.

But that is not all. Block also adds that it's actually very common for people to commit Wisniewski's blunder of applying the principle of proportionality to the moment of self-defense. This happens, he argues, because both principles, although *sharply* contrasting, end up having one and the same goal: "To preclude the victim from acting so strongly against the perpetrator that the victim, too, violates the libertarian code"¹². In other words, both principles forbid a victim from making illegitimate aggressions during a defensive reaction. Thus, two moments, two principles; but one and the same purpose.

For example, in Block's view, to *punish* a rapist with the death penalty is a *disproportionate* form of defense, because punishments only apply *after* the crime has already been committed. Comparatively, *immediately killing* a trespasser, without any escalation, is an '*ungentle*' form of defense because defending oneself happens *during* the crime. Different principles, different moments; but both are illegitimate forms of defense for the exact same reason: the *excessive* use of force¹³.

⁸ WIŚNIEWSKI, Jakub Bożydar. Rejoinder to Block's Defense of Evictionism, **Libertarian Papers**, v. 2, p. 1–7, nov. 2010, p. 2. Available at: < https://cdn.mises.org/-2-37_3.pdf>.

⁹ I believe that when he says "ante punishment" he means "during the crime" because later he gives this rendition: "confusion between proper punishment after the fact, and, proper defense, during the time the crime is being perpetrated" BLOCK, Walter. Response to Wisniewski on Abortion, Round Three, **Libertarian Papers**, v. 3, p. 1–21, dez. 2011, p. 4. Available at: < <http://libertarianpapers.org/wp-content/uploads/article/2011/lp-3-37.pdf>>

¹⁰ Except when stated otherwise, every emphasis in citations are mine.

¹¹ BLOCK, Walter. Response to Wisniewski on Abortion, Round Two, **Libertarian Papers**, v. 3, p. 1–13, mar. 2011, p. 3. Available at: <<http://libertarianpapers.org/wp-content/uploads/article/2011/lp-3-4.pdf>>

¹² BLOCK, Walter. Response to Wisniewski on Abortion, Round Two, **Libertarian Papers**, v. 3, p. 1–13, mar. 2011, p. 3. Available at: <<http://libertarianpapers.org/wp-content/uploads/article/2011/lp-3-4.pdf>>

¹³ BLOCK, Walter. Response to Wisniewski on Abortion, Round Two, **Libertarian Papers**, v. 3, p. 1–13, mar. 2011, p. 3. Available at: <<http://libertarianpapers.org/wp-content/uploads/article/2011/lp-3-4.pdf>>

But what is this so-called ‘principle of gentleness’? It functions as an ‘algorithm’ of gradual escalation in the defensive use of force. According to Block, a defensive party may ultimately do whatever is necessary to stop a crime. But first, it must all begin with the ‘gentlest’ method of self-defense. Therefore, a victim may only *gradually* increase the level of defensive ‘roughness’ and only if gentler methods have been proven to be futile.

So far, so good. Unfortunately, this is not Block’s final word on ‘gentleness’. According to him, if there is “no guarantee that [a] rubber bullet (or a net) will halt the perpetrator in his tracks”¹⁴, then a deadly gun could be used *immediately* against a trespasser, without the requirement of any other intermediate steps of gentle escalation. This far, not so good anymore. For this last point muddles the waters quite a bit.

Yes, it’s true that crimes can be quite complex. But a simple scenario such as the one above is already enough to show serious cracks on Block’s process of gentle escalation. First of all, why should rubber bullets be considered the ‘gentlest manner possible’ to stop a crime¹⁵? Furthermore, even if rubber bullets are, indeed, the gentlest method available, why could the victim jump *straight* to normal bullets without trying out any other *intermediary* steps of escalation? Finally, how much *warranted* does one need to be regarding the (in)sufficiency of a given method of self-defense? Notice that none of these three questions are minor epistemological problems, but very difficult to settle.

So, what’s the real problem here? If I had to guess, I would say that Block was so much focused on dismissing proportionality’s imposition of a *maximum* limit of defensive force that he forgot to consider to address any *minimum* and *intermediary* limits. By the looks of it, even if we accept that there are no maximum limits for self-defense, it seems that gentleness still needs proportionality in order to establish the upper limits of the first and intermediary steps of escalation, until the criminal’s actions is finally interrupted.

Damning as this epistemological problem may be, what’s up next is even worse. Things start to get really trickier when Block claims that “not abiding by the ‘gentlest manner possible’ principle”¹⁶, is, in itself, a crime. Now, this is truly problematic. Here Block seems to turn gentleness into a *positive obligation* towards others, but Libertarian principles must be strictly *negative*. In fact, Libertarianism rejects any kind of gratuitously positive obligation, or rights, towards any non-contracting parties¹⁷.

¹⁴ BLOCK, Walter. Response to Wisniewski on Abortion, Round Two, **Libertarian Papers**, v. 3, p. 1–13, mar. 2011, p. 4. Available at: <<http://libertarianpapers.org/wp-content/uploads/article/2011/lp-3-4.pdf>>

¹⁵ Block uses the caveat ‘the gentlest way possible’ *consistent with stopping a crime*. Nonetheless, it is perfectly consistent to stop a crime with bare hands or even through dialogue and persuasive argumentation.

¹⁶ BLOCK, Walter. Response to Wisniewski on Abortion, Round Two, **Libertarian Papers**, v. 3, p. 1–13, mar. 2011, p. 4. Available at: <<http://libertarianpapers.org/wp-content/uploads/article/2011/lp-3-4.pdf>>

¹⁷ In case you are not familiarized with the libertarian distinction between *positive* or *negative* rights and obligations, here is a summary: “No man can therefore have a “right” to compel someone to do a positive act,

Besides all of these problems with the theoretical foundation of the gentleness principle, which are general, we still have to talk about the specific problems of *indirectly deadly evictions*. Block's critics frame it as akin to shooting a wandering, unintentional trespasser with a bazooka. Atrociously surreal, isn't it?

Still, you might be surprised to find out that Block ultimately agrees with his critics' description. And, yet, he holds that it would still "be justified for the property owner to kill the trespasser"¹⁸. Hardly any gentleness in that, wouldn't you say?

Curiously enough, Block meticulously claims that one can't just shoot trespassers with a bazooka immediately. That would actually incur in the crime of being way too 'ungentle' against criminals. First, a victim must follow his algorithm of gentle escalation. Then, and only then, may the trespasser be blown away. After all, if you *must* overkill because it's the only, or the gentlest, immediately effective method of self-defense against a minor crime, you might as well do it with style¹⁹!

Jokes aside, there are at least major two problems here in how Block justifies his views. The first is his claim regarding a *sharp contrast* between the moments of crime, such that each is governed by *sharply distinct* principles. The second is his claim that, ultimately, there isn't a fixed *maximum* limit to force in legitimate self-defense.

Therefore, I will now focus on the first, namely, Block's *sharp division* between self-defense and punishment and his confinement of proportionality to punishment²⁰. Against Block, I will argue that proportionality actually applies to *every* moment of a crime. But in order to expose my arguments, I'll first have to try to show how Rothbard himself understands the principle of proportionality.

3. ROTHBARD'S PROPORTIONALITY

Rothbard opens up the *Punishment and Proportionality* chapter of his *Ethics of Liberty* by talking about his 'theory of proportionality' already in the first paragraph.

for in that case the compulsion violates the right of person or property of the individual being coerced [...] in the free society, no man may be saddled with the legal obligation to do anything for another, since that would invade the former's rights; the only legal obligation one man has to another is to respect the other man's rights. ROTHBARD, *The Ethics of Liberty*, p. 100. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

¹⁸ BLOCK, Walter. Response to Wisniewski on Abortion, Round Two, *Libertarian Papers*, v. 3, p. 1–13, mar. 2011, p. 4. Available at: <<http://libertarianpapers.org/wp-content/uploads/article/2011/lp-3-4.pdf>>

¹⁹ BLOCK, Walter. Response to Wisniewski on Abortion, Round Two, *Libertarian Papers*, v. 3, p. 1–13, mar. 2011, p. 4. Available at: <<http://libertarianpapers.org/wp-content/uploads/article/2011/lp-3-4.pdf>>

²⁰ In his own words, "I draw a *sharp distinction* between what a target may properly do to defend himself from an imminent or ongoing attack (pretty much anything within reason necessary to safeguard himself assuming he confines his reactive violence to the attacker) and what punishment may be inflicted on the perpetrator afterwards. As to the latter, I maintain that proportional punishment is the only response compatible with the libertarian philosophy." BLOCK, Rejoinder to Wisniewski on Evictionism, Round four, p. 4. Available at: <https://fbim.meste.org/FBIM_2_2014/R4_01.pdf>

There, we learn that this theory deals with the *criminal's actions* and not with the *victim's reactions*. In his own words, "the criminal loses his rights to the extent that [the criminal] deprives [the victim] of his rights"²¹. I believe that this is already a strong indication that proportionality is an active concern since the beginning of any criminal activity.

In fact, while it's true that he didn't name it as such, I will argue that Rothbard had already talked about this broader view of proportionality in his immediately preceding chapter on *Self-defense*. While analyzing the use of force in self-defense, Rothbard argued that it must be constrained within limits proportional to the aggressive force of a criminal.

Take, for instance, when Rothbard asks the rhetorical question regarding how "*extensive is a man's right of self-defense*" and his reply that it only goes "*up to the point* at which [the criminal] begins to infringe the property rights of someone else"²². Here we have 'proportional limits' being applied to self-defense. Furthermore, he adds that if a victim extrapolates these limits, then the victim's so-called 'defense' would actually "in itself constitute a criminal invasion of the property of some other man, [who, in turn,] could properly defend himself against"²³ victim's excessive 'defense'. Thus, the prohibition against an extrapolation of force beyond 'proportional limits' is the same, either during self-defense or punishment.

This is so because, in Rothbard's view, proportionality in self-defense and in punishment are actually just two specific instances of a more general rule: that of "*proportionality in crime*". This general rule follows from the fact that libertarian law is primarily about what a criminal has *negatively* given up through aggressive actions, not about what a victim may *positively* do as means of a defensive reaction. The rationale behind it is clearly stated in the following passage, where Rothbard explains that proportionality is to be seen as a *fundamental rule of crime*:

On what basis must we hold that a minuscule invasion of another's property lays one forfeit to the total loss of one's own? I propose another²⁴ fundamental rule regarding crime: the criminal, or invader, loses his own right to the extent that he has deprived another man of his. If a man deprives another man of some of his self-ownership or its extension in physical property, to that extent does he lose his own rights.²⁵

²¹ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 85. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

²² ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 77. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

²³ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 77. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

²⁴ The other fundamental rule of crime is the Non-Aggression Principle (NAP).

²⁵ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 80. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

Once again, and as we saw above, although Rothbard doesn't explicitly call it by its name, he is clearly describing proportionality. Moreover, by focusing on the criminal's actions, he levels proportionality with the Non-Aggression Principle, making them two complementary *fundamental rules of crime* in libertarianism.

This underlying aspect of proportionality, which underpins *every* moment of a crime, becomes clearer when Rothbard adds that "from this [fundamental] principle [of crime] immediately derives the proportionality theory of punishment — best summed up in the old adage: 'let the punishment fit the crime'²⁶". This means that the proportionality of *punishment* isn't just an *ad hoc* solution. Actually, it derives from a more fundamental and perennial rule. The only reason why punishment must be proportional is because the criminal had only lost his own rights *in proportion* to the severity of the aggressions.

So, with that in mind, we are now in a position to better understand why Rothbard began his chapter on *Punishment and Proportionality* as he did. In the very first paragraph Rothbard states that he had already advanced "the view that the criminal loses his rights to the extent that he deprives another of his rights"²⁷ and he expressively names it as "the theory of 'proportionality'"²⁸. Thus, the proportionality regarding a criminal's loss of rights connects both the proportionality of self-defense and of punishment. Therefore, Rothbard leaves Block no wiggle room to confine proportionality strictly to punishment.

4. THE UNDERLYING PRINCIPLE OF CRIME

Now that I have presented Block's gentleness and Rothbard's proportionality, it is time to compare them so we can see how each principle deals with the unavoidable legal problem of legitimizing defensive force, both in self-defense and punishment.

Block had argued that while an inflexible maximum limit to *punishment* makes sense, there couldn't be an inflexible maximum limit of force in *self-defense*. Thus, and sidestepping proportionality, he sets up 'gentleness' to curb the absurd cases of *instantly* overkilling criminals. Even so, Block argues that a victim must *always* have the right to stop an ongoing crime. Thus, his algorithm of gradual escalation allows a victim to eventually use maximum force against a minimally invasive crime, if that's what it takes.

However, as it was established above, Rothbard's principle of proportionality actually regulates both self-defense *and* punishment. This is because both modes of

²⁶ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 80-81. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

²⁷ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 85. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

²⁸ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 85. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

defense derive their legitimacy from a more general, and more fundamental, rule of crime. This fundamental rule states that a criminal gives up his own rights *proportionally* to that of his aggressions. This, as we see, puts Block's interpretation in an awkward position.

Aside from that, Block's view is also problematic on other accounts. But before we continue, I must first try to fully expose how closely tied together self-defense and punishment actually are. It is *not* that the proportionality of *crime* applies in parallel to both modes of defense, making them only *indirectly* connected to each other. In truth, they are *directly* connected in such a way that the subsequent moment of punishment is essentially subordinated to the previous moment of self-defense.

As Rothbard himself puts it, the relationship the moments of crime is such that "*all rights of punishment derive from the victim's right of self-defense*"²⁹. This means that the only reason why there is a maximum limit in the proportionality of punishment is because it is determined by a preexisting maximum limit in the proportionality of self-defense.

That being so, it is impossible to confine the principle of proportionality to punishment only. Actually, there is a transitional normative order regarding the application of proportionality which follows this hierarchy: (1) in crime; (2) in self-defense; (3) and, finally, in punishment.

Thus, since Block already recognizes proportionality as a fundamental principle of punishment³⁰, he is bound to also accept this hierarchical order. There is no other way around it as there is no *sharp contrast* between them.

To put it in more precise terms, the legitimacy of future punishment depends on the legitimacy of present self-defense. Which, in turn, depends on what rights has the criminal given up by his aggressive behavior. Consequently, 'punishment' is nothing more than the temporal extension of 'self-defense', but exercised by other means.

Anyhow, this temporal connection between moments still needs further clarification. Under libertarian law, 'self-defense' is a broader, more inclusive concept. It may also imply the defense of a third party (not just *yourself*) as well as of any property (not just *the self*). In other words, if we are to be strict in our word choice, in the composite expression 'self-defense', the term 'self' is merely accidental, while 'defense' is essential.

As such, there are at least two modes of 'defense'. One happens *during* the crime, in the form of an immediate thwarting of an aggression. The other happens *after* the

²⁹ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 90. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

³⁰ In his own words: "I reiterate: there is certainly "proportionality built into" libertarian punishment theory, but it is not at all "built into" the NAP. That is, the punishment must be proportional to the crime, but there is no such requirement that rests on the victim for his self-defense during the commission of the crime." BLOCK, Walter. Response to Wisniewski on Abortion, Round Three, **Libertarian Papers**, v. 3, p. 1–21, dez. 2011, p. 3. Available at: <<http://libertarianpapers.org/wp-content/uploads/article/2011/lp-3-37.pdf>>

crime, in the form of later restitution³¹ for the losses suffered. Nonetheless, both are just different types of defense and, as such, there is no need for different principles at different moments of a crime. Since proportionality governs defense, it is already enough to govern both modes. There is no need for 'gentleness' or any other competing principle.

The point is that, under libertarian law, it matters less *how* the defense is actually accomplished, but rather *that* justice is served³². Thus, it is up to the victim to choose whichever method of defense seems the most convenient. Obviously, depending on the crime being committed, each defensive method will have different costs, risks and yields. And this choice also includes *when* such defensive measures are to take place.

Ultimately, a victim may decide what's in his or hers own best interest at each specific situation. At least theoretically, I mean, for sometimes there may be not much of an option³³. In spite of that, to arbitrarily force one legitimate method of defense over another is to impose a *positive obligation*, and contrary to the spirit of the Libertarian code of law. As Rothbard explains it, no man has "a 'right' to compel someone to do a positive act, for in that case the compulsion violates the right of person or property of the individual being coerced"³⁴. Thus, positing an obligation for victims to use the 'gentlest' method of self-defense when other 'rougher-yet-still-proportional' methods available are just as legitimate, is the logically equivalent of establishing the 'positive rights' for criminals to be treated in the gentlest manner possible. This absurd consequence of Block's principle of gentleness makes it unacceptable to Libertarianism.

Since the purpose of punishments in Libertarian law is to fulfill the criminal's 'debt' to the victim³⁵, we can infer that every moment of a crime, is in a way, logically interconnected. After all, this 'debt' could be collected immediately, in the form of self-defense; or afterwards, through punishment³⁶. Thus, since the goal of a legitimate defense

³¹ As Rothbard explains: "for proportionate punishment to be levied we would also have to add more than double so as to compensate the victim in some way for the uncertain and fearful aspects of his particular ordeal" ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 89. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

³² As long as no other crimes are being committed in the process of self-defense, of course. But I'll address this point later in sections 6 and 8.

³³ For example: the victim may suffer a sneak attack or come home to find a burglary took place.

³⁴ ROTHBARD, **The Ethics of Liberty**, p. 100. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

³⁵ "Punishment must be not on paying one's debt to "society," whatever that may mean, but in paying one's "debt" to the victim. ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 86. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

³⁶ Perhaps you are unfamiliar with libertarian theory of law and this idea of 'debt' collection in self-defense sounds weird to you. I will briefly address this issue further ahead when I talk about the purely 'retributive' characteristic of libertarian law, but if you want to further explore, c.f. ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 86-89. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

is to non-aggressively collect debt, we may conclude the principle of proportionality must persist through any type of defense and at any moment of crime³⁷.

Now that we have a better understanding of the temporal connection between the moments of a crime, it will make sense to see that Rothbard used one and the same example to explore how proportionality works in both 'self-defense' and 'punishment'. The hypothetical dilemma is quite simple: Can a store clerk shoot and kill a child who steals bubble gum from his store as a legitimate form of self-defense?

Fortunately for us, Block also addresses the same kind of example throughout his discussion with his critics. However, you might be surprised to find out that Block's answer to this thought experiment is quite the opposite of Rothbard's. Thus, the 'bubble gum theft' is the best tool that we have to contrast Rothbard's proportionality and Block's gentleness in how they understand the legitimacy of self-defense.

5. HOW HARMFUL CAN A BUBBLE GUM THIEF REALLY BE?

The first time Rothbard mentions the bubble gum theft example is in his chapter on *Self-defense*. He uses it to argue against *maximalism* in self-defense, a position Rothbard deems to suffer "from a grotesque *lack of proportion*"³⁸. Notice that he is talking about proportion in self-defense, not 'gentleness' nor 'punishment'. Keep that in mind.

According to Rothbard, maximalism's mistake lies in prioritizing the victim's right of self-defense at the cost of the criminal's rights. Under the bubble gum theft scenario, for example, this means that "by concentrating on the storekeeper's right to his bubble gum, [the maximalist] totally ignores another highly precious property-right: every man's — including the urchin's — right of self-ownership"³⁹. In other words, the defensive rights of the victim must also be kept in check and not allowed to transgress against the legitimate rights of a criminal. But what rights does a criminal have anyway? Well, one thing is for certain, these rights cannot be the same as those of an innocent person.

If it were up to the maximalists, "a minuscule invasion of another's property lays one forfeit to the total loss of one's own"⁴⁰. Imagine life under that rule: if you feel like killing someone legally, just put yourself in the way of harms way and hope that

³⁷ Perhaps Block would claim that 'debt collecting' is only a part of punishment, while self-defense only regards 'stopping crime'. We will address this point later when we talk about 'threats'.

³⁸ ROTHBARD, Murray N. *The Ethics of Liberty*, New York: New York University Press, 1998, p. 80. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

³⁹ ROTHBARD, Murray N. *The Ethics of Liberty*, New York: New York University Press, 1998, p. 80. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

⁴⁰ ROTHBARD, Murray N. *The Ethics of Liberty*, New York: New York University Press, 1998, p. 80. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

someone ends up causing any minor aggressions against you⁴¹. But Rothbard outright rejects maximalism. In his view, a criminal loses⁴² his rights only *proportionately* to the aggressions that he made against the rights of others. It's this loss of rights by the criminal what informs how much defensive force is legitimate. Thus, the proportionality of defense begins weighing down instantly, as soon as the criminal starts his aggression, and it doesn't have to wait for end of a crime and for beginning of a punishment⁴³.

The whole rationale behind this is neatly exposed in the following passage. Here, Rothbard concludes his take on the bubble gum scenario, shows the role of proportionality in the libertarian legal system and how it fits neatly with common sense:

*We conclude that the shopkeeper's shooting of the erring lad went beyond this proportionate loss of rights, to wounding or killing the criminal; this going beyond is in itself an invasion of the property right in his own person of the bubble gum thief. In fact, the storekeeper has become a far greater criminal than the thief, for he has killed or wounded his victim — a far graver invasion of another's rights than the original shoplifting.*⁴⁴

This conclusion, which was exposed in the chapter on *Self-defense*, undoubtedly shows that proportionality doesn't just spring out of nowhere, *ad hoc*, at the moment of punishment. As we have emphasized, proportionality is already at play since the beginning of the entire process. It begins with the criminal's *proportionate loss of rights*, then it passes to the issue of *proportionate self-defense* and, finally, to that of a *proportionate punishment*. To put it in an organized fashion, here is how proportionality works:

- a. First, an aggression harms a limited amount of property rights of an innocent person;
- b. Second, the criminal gives up his own rights in proportion to the amount of rights against which he has transgressed (taking into account both restitution and compensation);
- c. Thence, the legitimate limits of force in self-defense are proportionately established;

⁴¹ Here I have in mind South Park's episode 'World War Zimmerman', which makes the perfect satire against the maximalism position in regards to 'standing one's ground' as a form of self-defense against the crime of 'trespassing'.

⁴² If it seems weird to talk about 'losing' rights, you may prefer to read it as 'suspend'. After all, in most cases, it wouldn't be proportional for a criminal to actually 'lose' his right 'forever' just because he caused a temporary harm. Proportionality states that a temporary and partial harm calls for a temporary and partial loss, or suspension.

⁴³ Supposing it had to wait for the crime to 'finish' and that the moments of crimes are *strictly* distinct, how does one transition into the other? Furthermore, are there yet other moments of crime in-between that of *self-defense* and *punishment*? I will address these issues in my next paper, when I try to explain the *epistemological appraisal*.

⁴⁴ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 81. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

- d. Finally, based on the proportional rights of self-defense, it becomes possible to determine the proportional rights of legitimate punishment.

Actually, this fourth step only comes to play more clearly in the chapter on *Punishment and Proportionality*. There, Rothbard returns to the same bubble gum scenario, thus further cements through proportionality this connection between the moments of self-defense and punishment. So, to better understand this fourth step, we must first read the next passage attentively and see how proportionality plays the exactly same role in the moment of punishment as it had played in the moment of self-defense:

*a criminal would only lose his right to life if he had first deprived some victim of that same right. it would not be permissible, then, for a merchant whose bubble gum had been stolen, to execute the convicted bubble gum thief. If he did so, then he, the merchant, would be an unjustifiable murderer, who could be brought to the bar of justice by the heirs or assigns of the bubble gum thief.*⁴⁵

This passage is immensely important because it presupposes the idea that all rights of punishment derive from the rights of self-defense⁴⁶. Perhaps reverse-engineering the rationale will help us leave no stones unturned. Since it is not legitimate to kill a petty thief *during* the crime as a form of self-defense⁴⁷, then, evidently, it is also not legitimate to kill him *after* the crime as a form of punishment. However, in both cases, the ultimate justification of this lack of proportionality is based on the criminal's actions, for such a small theft doesn't entail in the loss of one's own life. Thus, if a clerk tries to kill a kid to save his gum from being stolen, this is an *aggression* and that kid could kill the murderous clerk in *legitimate self-defense*. Consequently, if the kid had the right to kill the clerk in self-defense, then the 'bar of justice' could also do it as legitimate punishment.

6. POSITIVE DEFENSE OR NEGATIVE OFFENSE?

Notwithstanding Rothbard's arguments, Block subverts this fundamental order of proportionality. This subversion ultimately leads to an attenuates 'maximalism' in self-defense. Block's gentleness imposes on the victim the *positive obligation* of following an algorithm of escalation. Which means, in other words, that the criminal has the

⁴⁵ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 85. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

⁴⁶ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 90. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

⁴⁷ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 80. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

positive right of being treated in the gentlest way possible⁴⁸. Even so, this positive prescription is nothing more than a utilitarian attenuation of 'maximalism', not a rejection. Yes, it's true that the victim is *forced* to undergo a process of gradual escalation, but still, in the end of the process, a victim is allowed to unleash maximum force even against a minimal crime⁴⁹.

Since Block addresses the same type of 'petty theft' examples as the one discussed by Rothbard, I'll show Block's rendition in its entirety. Thus, we'll be able to compare how both proposals, gentleness and proportionality, address to the same scenario:

I speak only for myself when I say that the only time this would be justified is if the only way the shopkeeper could stop the theft is by shooting. For example, he might be a paraplegic with only the trigger finger functioning. For the libertarian, property rights are sacrosanct. We cannot support children stealing candy bars; if we do, utilitarian point coming up, the practice will become widespread. Assuming the child is young enough not to constitute a threat, the mighty presumption is that the able-bodied property owner will be able to stop the theft with far less violence than the proverbial shot in the back; certainly, such a baby constitutes no threat of bodily harm. The reason he may do so to an adult, or, even, an armed child⁵⁰, is that, then, there is a threat of dire consequences, and if property rights are to be upheld, then force, yes, deadly force, is justified.⁵¹

Indeed, we all rejoice that Block speaks only for himself! While he is correct in stating that *property rights* are sacrosanct for libertarianism, he is wrong in extending this characteristic to the *rights of defense*. Actually, these two types or rights are different aspects of Libertarianism. While property rights are absolute, the rights of defense must always be proportionally relative to the crime against which it is reacting. Therefore, an absolute defensive reaction would only be legitimate against an absolute criminal action.

⁴⁸ Here it might be opportune to remember that "one vital distinction between a genuine and a spurious 'right' is that the former requires no positive action by anyone except noninterference" ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 249. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.. But I will further elaborate this point in my next paper, when I talk about *epistemological appraisal*.

⁴⁹ We'll examine this point in the next section.

⁵⁰ I certainly don't know why Block armed this hypothetical child. As we will explore in my next paper when I address the issue of *threats*, libertarian theory is clear in assuming that an overt threat is akin to the crime itself. As Rothbard puts it: "suppose someone approaches you on the street, whips out a gun, and demands your wallet. He might not have molested you physically during this encounter, but he has extracted money from you on the basis of a direct, overt threat that he would shoot you if you disobeyed his commands. *He has used the threat of invasion to obtain your obedience to his commands, and this is equivalent to the invasion itself.*" ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 78. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>..

⁵¹ BLOCK, Walter. Abortion Once Again: a response to Feser, Goodwin, Mosquito, Sadowsky, Vance and Watkins, **Revista de Investigações Constitucionais**, v. 4, n. 1, p. 11–41, jan. 2017, p. 20. Available at: <<http://revistas.ufpr.br/rinc/article/view/50328>>

In order to expose the mistake in Block's deduction, I will use as a counter-example an analogous 'petty theft' scenario which he used elsewhere. This time, Block claims that the (in)justice of a punishment is not affected by the eventual consequences of actually applying that punishment, whatever it may be.

He asks us to suppose that a \$100 fine is to be deemed a just and proportionate punishment against the crime of stealing a candy bar. If that's so, "justice thought the heavens fall" — says Block. According to him, it wouldn't matter if fifty 'proverbial' people simply "perish" as a consequence of actually punishing the criminal because "proportionality applies to ex post punishment, but not at all to ex ante violations of the NAP. QED"⁵². Unfortunately for him, that's not a 'demonstration' at all!

Abstract hypotheticals oftentimes lack the concreteness needed for making valid analogies. In this specific case, what exactly does Block mean when he says that fifty people will "perish"⁵³? This omitted information is pivotal for us to judge his hypothetical example. After all, people don't magically vanish all of a sudden.

If Block means to say that collecting \$100 dollars requires a method of punishment (or even self-defense) which involve an *aggression* against fifty *innocent* people, then this punishment is actually *unjust*. Rothbard himself argues that it is absolutely illegitimate "to commit aggressive violence against innocent third parties *in the course of his legitimate defense*"⁵⁴. Thus, justice must hold heavens from falling down, if the fall of heavens implies in committing aggressions against an innocent third party.

I believe that Block's greatest mistake lies in his emphasis on the *positive rights* of self-defense. Whereas, in truth, the aspect of property rights which libertarian law declares as sacrosanct is actually is the *negative prohibition* of aggressive offenses against the innocent. In other words, libertarianism is above all 'against crime', not 'for defense'.

Indeed, negative prohibition is the hallmark of libertarian law. Rothbard is crystal clear when it comes to the 'negative limits' of defensive force in the following passage: "the rule *prohibiting violence against the persons or property of innocent men is absolute*; it holds regardless of the subjective motives for the aggression."⁵⁵. This rule is nothing more than the NAP. Thus, it holds even if the subjective motive for using *aggressive* violence is the that of preserving one's own property rights in the course of self-defense.

Moreover, just in case Block tries to dismiss this point by appealing once again to his arbitrary distinction between self-defense and punishment, I'll showcase here a

⁵² BLOCK, Walter. Response to Wisniewski on Abortion, Round Three, **Libertarian Papers**, v. 3, p. 1–21, dez. 2011, p. 3. Available at: < <http://libertarianpapers.org/wp-content/uploads/article/2011/lp-3-37.pdf>>

⁵³ BLOCK, Walter. Response to Wisniewski on Abortion, Round Three, **Libertarian Papers**, v. 3, p. 1–21, dez. 2011, p. 3. Available at: < <http://libertarianpapers.org/wp-content/uploads/article/2011/lp-3-37.pdf>>

⁵⁴ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 189. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

⁵⁵ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 189. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

passage in which Rothbard unambiguously applies the same prohibition against aggressions to the moment of self-defense: “no man, in an attempt to exercise his right of self-defense, may coerce anyone else into defending him. For that would mean that the defender himself would be a criminal invader of the rights of others”⁵⁶. In other words, any *aggressive* attack against an innocent person — even for defensive reasons and even to uphold property rights — is illegitimate. Thus, there is no such a thing as a *positive right of defense*. Actually, the Libertarian legal prohibition against aggressions holds no matter when, why and how.

One might protest that these passages only forbid aggressions and coercions against an *innocent* third party. Meanwhile, this discussion with Block regards criminals who, by definition, aren't innocent. Does it mean that the libertarian *negative prohibition* against aggressions doesn't apply to criminals? Are we allowed treat criminals as we wish in order to benefit a victim's defensive effort? Let us examine it further.

7. INNOCENCE: RELATIVE OR ABSOLUTE?

The truth is that, in libertarian law, no one could ever be an *absolute* criminal. Guilt is necessarily related to a *specific crime* against a *specific victim*. Therefore, the criminal only loses his rights *in proportion* to his *specific aggressions*. No criminal ever “loses all of his rights”⁵⁷ just because he committed a single offense against a single victim. And this, my dear reader, is the ultimate reason of why in libertarianism *any* maximalism is wrong regardless if it is ‘gentle’ or not.

Think about it, after all, this point of libertarianism is very much in tone with common sense. No one is ever guilty of *every* conceivable crime against *every* conceivable victim. As a matter of fact, person ‘A’ might be *guilty* of committing crime ‘X’ against victim ‘B’ while simultaneously being *innocent* of crime ‘Y’ against victim ‘C’.

Let's use the same bubble gum theft example in order to illustrate it. We could say that, indeed, that ‘damned’ kid is guilty of the crime of *shoplifting* against the *store clerk*. However, the same kid is also innocent of killing (or raping, defrauding, kidnaping, etc.) the same clerk (and also completely innocent in relation to everyone else).

The corollary of the relativity of guilt is twofold. First, a petty thief is innocent *in relation* to the crime of murder; therefore, killing the kid is illegitimate regardless if it is in self-defense or punishment. Second, the crime was only against the clerk's property rights and nobody else's; therefore, if the clerk doesn't wish to pursue defense, no one else could override his wishes and *impose* a violent reprimand (or punishment) on the kid.

⁵⁶ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 83. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

⁵⁷ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 80. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

This relativity of guilt is actually derived from two important fundamental characteristics of libertarian law. The first is *methodological individualism*, which is permeates every aspect of libertarian theory, not being restricted to its legal issues⁵⁸. The second is Libertarianism's *strictly retributionist* theory of justice. Let's see them.

Methodological individualism makes Libertarianism rejects crimes against 'society'. From the fact that only individuals act⁵⁹, it follows that only individuals commit crimes and that only individuals are victims. As such, it is up to the victim (or the victim's heirs) to choose whether or not to press charges against a crime. Additionally, restitution and retribution are owed to the victim only (or the victim's heirs). In sum, there are no such things as collective guilt, collective crimes or collective victims. Thus, society can't override one's decision regarding how one chooses to pursue his own rights of defense⁶⁰.

Meanwhile, the *strictly retributionist* aspect of libertarian law makes this theory outright reject any reasons regarding rehabilitation or deterrence in an analysis to determine the legitimate use of defensive force in a situation. Since Block uses deterrence to justify his gentleness 'principle', I will further elaborate this point in the next section.

8. PROPORTIONAL RETRIBUTION OR GENTLE DETERRENCE?

I have already gone over on how the principle of proportionality is a legal constant, such that it applies to every type of defense and to every moment of crime. Furthermore, I have just talked about how proportionality in defense is, first and foremost, *negatively* determined by taking in consideration what rights a criminal has given up for his aggressive behavior. Therefore, defense cannot be understood as the victim's *positive* right of self-preservation but as a *negative* prohibition against aggressions.

This means that, if defense is not a positive right, then it is illegal to aggress against someone else's legitimate property rights, even if the goal is to stop a crime. Such prohibition protects the remaining property rights of a criminal which are still legitimate.

⁵⁸ Cf. VON MISES, Ludwig. **Human action: a treatise on economics**, Scholar's ed. Auburn, Ala: Ludwig Von Mises Institute, 1998, p. 21.

⁵⁹ One could also say 'groups' of individuals. But, nonetheless, groups must be understood as are reducible to individuals. Cf. ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 55. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

⁶⁰ C.f.: "The legal concept of "crime" is confined to offenses against the State or Community. It will be seen below that we deny the latter concept altogether, with all legally punishable offenses confined to invasions of the person or property of other individuals. In short, in the libertarian conception, its "crimes" correspond to legally designated "torts," although there is no particular reason for redress or punishment to be confined to monetary payment, as was the case in ancient tort law." ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 51, n.2. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

To continue my argument, I must now show how the justification for defensive reaction in Libertarianism is its *strictly retributivist* objective. This means that deterrence or rehabilitation may *not* be used as reasons to legally estipulate the proportionality of force at any level, be it of a crime, of defense, or of punishment.

For example, in Block's rendition of the bubble gum theft there is the consequentialist claim that "we cannot support children stealing candy bars; if we do, utilitarian point coming up, the practice will become widespread"⁶¹. Yes, Block seriously brings this 'ominous' scenario of widespread candy theft as a justification for allowing clerks to 'gently' shoot children in the back⁶².

First of all, there is no doubt that in Libertarianism *any* theft is illegitimate. But, since Block brought up the issue of consequentialist claims, allow me to address it briefly. To be frank, realistically speaking, so what if juvenile candy theft becomes 'rampant'? In the worst-case scenario, shops would simply stop selling candy in places that are accessible to children. There we go, the problem is solved and society is saved. The truth is that, contrarily to Block's beliefs, we certainly could support *some* juvenile theft without *having* to kill any children in order to prevent the fall of all civil society.

In either case, Libertarianism is beyond utilitarian points. What is really important here, what I wish to highlight, is that 'defense' is not limited to the *immediate* moment of crime. Actually, defensive reaction extends to both before *and* after the criminal's action. Therefore, even if there is a situation in which it is indeed impossible for a victim to use proportional methods of self-defense *during* a crime, the victim must still abnegate to using proportional methods of defense either *before* or *after* a crime happens.

Before the infamous candy heist takes place, the owner could take preemptive defensive precautions against such 'barbaric' children. For example, he could bar their entrance or maybe even inspect children's pockets before allowing them to leave the store. Subsequently, after the crime has taken place, it's possible to catch and punish those brats. So, once again, the problem is solved and society is saved all within proportionality.

The point is that no social chaos would emerge just because clerks were forbidden to shoot kids in the back, while they were still at range, in order to save their precious bubble gum. Here Block is making the classic interventionist mistake of using

⁶¹ BLOCK, Walter. Abortion Once Again: a response to Feser, Goodwin, Mosquito, Sadowsky, Vance and Watkins, *Revista de Investigações Constitucionais*, v. 4, n. 1, p. 11–41, jan. 2017, p. 20. Available at: <<http://revistas.ufpr.br/rinc/article/view/50328>>

⁶² That is to say only if the clerk had 'gently' escalated up to the point when shooting becomes the only effective way to defend his precious bubble gum, of course. After all, Block is quite moderate with his *gentle* maximalism, unlike the '*pure* maximalism' of those extremists who allows people to *immediately* shoot children in the back without even giving a fair warning. But then again, even Draco seems gentle when compared to those full-blown Maximalists.

aggressive force in order to fix problems up expediently. However, Libertarianism holds that there is no right to use aggressive force in order to reach goals of your own interest just because you can't figure out a 'non-aggressive' way of doing so. And this, of course, also includes the goal of defending and preserving one's property rights⁶³.

However, just for the sake of argumentation, let us grant Block's point. Now, imagine yourself in a world where the downfall of all civil society is being caused by rampant juvenile candy theft and that these Machiavellian 'rugrats' always get away scot-free. Well, even if the respecting proportionality led to such a silly apocalyptic scenario, it wouldn't matter at all. After all, Libertarianism grounds defensive reaction strictly on retributive reasons and any arguments based on crime deterrence must be rejected⁶⁴.

Strictly speaking, in a retributionist penology, the defensive reaction is strictly based on the aggression itself. Meanwhile, in a deterrence penology, defense is not really answering to an aggression, but preventing the possible consequences of that aggression.

To that regard, Rothbard quotes Robert Gahringer: "An absolute offense requires an absolute negation [...] a lesser penalty would indicate a less significant crime"⁶⁵. In other words, legitimate defensive force must be proportionally connected to *the crime itself*, not to its eventual consequences.

We must have in mind that methodological individualism in Libertarianism holds that guilt is non-transferrable. However, using deterrence as a justification for defense is equivalent to gathering the *potential* guilt of multiple criminals from a hypothetical future, transferring it to a single present criminal and making him *actually* pay for it. To use our bubble gum example, since Libertarian law is strictly retributive, no child shall be actually sacrificed in the now for the potential sins of future others.

This proportionately *retributive* relationship between the intensity of crime and the intensity of defense is precisely what leads Rothbard to state that: "under libertarian law, capital punishment would have to be confined strictly to the crime of murder"⁶⁶.

⁶³ Think of those in the 19th century who used to argue against the end of slavery while relying on utilitarian claim that, supposedly, without slaves it would be impossible to produce enough food for everybody. Libertarianism would answer that "there was only one possible moral solution for the slave question: immediate and unconditional abolition, with no compensation to the slavemasters. Indeed, any compensation should have been the other way" ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 75. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

⁶⁴ I will further elaborate on the issue of threats in my next paper. However, we have already mentioned that in Libertarianism the threat of a crime is on parity with the crime itself. Thus, defense is *always* reactive because to stop an attempt of a murder is getting on parity of getting retribution of the murder itself. It was not prevention of a future crime, but reaction to a crime that has already happened (namely, the threat of murdering).

⁶⁵ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 91 n.12. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

⁶⁶ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 85. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

Consequently, since the legitimacy of punishment is *derived* from the legitimacy of self-defense, we could also infer that the act of killing in self-defense must also be confined to stopping the crime of murder. Well, at least certainly not to stopping a bubble gum theft⁶⁷.

Fortunately for us, Rothbard addresses this issue of proportional *retributive* defense and even shows how it applies to a petty theft scenario. This passage, for example, seems to be a direct rebuttal of Block's gentle-yet-maximalist *deterrent* defense:

*If there were no punishment for crime at all, a great number of people would commit petty theft, such as stealing fruit from a fruit-stand. On the other hand, most people have a far greater built-in inner objection to themselves committing murder than they have to petty shoplifting, and would be far less apt to commit the grosser crime. Therefore, if the object of punishment is to deter from crime, then a far greater punishment would be required for preventing shoplifting than for preventing murder, a system that goes against most people's ethical standards. As a result, with deterrence as the criterion there would have to be stringent capital punishment for petty thievery — for the theft of bubble gum — while murderers might only incur the penalty of a few months in jail.*⁶⁸

Rothbard's argument means that the consequentialist benefit of *stopping* a crime can't ever be used as a legitimate justification for the excessive use of defensive force. Therefore, any 'maximalist' conception of defense (gentle or not) is a complete subversion of the libertarian theory of crime. How so, you might ask?

According to Rothbard, it is because "instead of the punishment 'fitting the crime' [this relationship between crime and punishment] is now graded in inverse proportion to [the crime's] severity or [punishment] is meted out to the innocent rather than the guilty"⁶⁹. There we have it, Block's gentleness commits *both* of these sins against Libertarianism. In order to justify the *deterrence* of a present crime, gentleness (1) inverts the proportions of criminal action and defensive reaction; and (2) metes out defensive force against the (relatively) innocent, rather than against the actually guilty.

I believe that what ultimately led Block to this subversion was his emphasis on the *positive rights* of defense rather than on the *negative prohibition* of aggressions is. Therefore, we will return this point in the next section in hopes that we can interweave everything that we have discussed and finally unwind the whole confusion at its source.

⁶⁷ Perhaps there are crimes so dreadful that, for defensive matters, they may be treated as equivalent to murder.

⁶⁸ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 93. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

⁶⁹ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 94. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

9. THE POSITIVE RIGHTS OF VICTIMS OR THE NEGATIVE PROHIBITION OF CRIMINALS?

Superficially, this distinction between the *positive rights of defense* and the *negative prohibition of aggressions* might seem like academic nit picking on my part. But, as a matter of fact, this distinction is crucial to the libertarian theory of law as a whole. Furthermore, understanding it clearly will be essential to understand the debate regarding Evictionism and abortion. Therefore, we must contrast these two positions side by side.

On the one hand, if we absolutize the *positive right of self-defense*, we end up with a ‘maximalist’ position. Maximalism — gentle or full-blown — *allows* the use of *any* amount of force in order to stop *any* crime while it’s still happening⁷⁰. On the other hand, if we absolutize the *negative prohibition of aggressions* against the innocent, we end up with Rothbard’s ‘proportional’ position. Proportionality *prohibits* any defensive force which is *disproportionately more aggressive* than the crime itself⁷¹. This prohibition holds even if, tragically, a victim can’t proportionately stop a crime or punish a criminal.

I hope that by this brief summary of both positions, side by side, was enough to ascertain to their mutual incompatibility. That said, I believe that perhaps Block mistakenly focused on the victim’s right of self-defense due to a crass confusion between what Rothbard calls the ‘theory of the rights of property’ and ‘the theory of criminality’.

First, we have the ‘theory of rights of property’, which establishes that “every man has an *absolute right to the control and ownership* of his own body, and to the unused land resources that he finds and transforms”⁷². So, indeed, here we have an ‘absolute right’ when it comes to the control and the use of *legitimate* ownership. Notice, however, that there is nothing being said about ‘defense’. Like I have argued, property rights does not entail in the *positive* rights of defense or maintenance of said property. After all, the *positive* aspect implies in an aggression against the property of others.

Consequently, it is precisely to address the issue of aggressions that a ‘theory of criminality’ becomes necessary. As Rothbard explains, the libertarian theory of criminality holds that “a criminal is someone who aggresses against such property. Any criminal titles to property should be invalidated and turned over to the victim or his heirs”⁷³. This passage is important because here we have both principles which compose the fundamental rules of crime in Libertarianism. In the first sentence we have the NAP, establishing that any aggressor is a criminal. In the second sentence we have the Principle

⁷⁰ Either immediately, as in full-blown maximalism, or after a process of escalation, as in Block’s gentle rendition.

⁷¹ Because that would incur in an aggression against rights that weren’t given up by the criminal.

⁷² ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 60. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

⁷³ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 60. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

of Proportionality, which states that only *criminal titles* to property should be invalidated⁷⁴. In sum, proportionality and the NAP are inexorable partners of crime.

In case there remains any doubt in regards to the relationship of these principles, perhaps a last analogy will help me illustrate it more clearly. On the one hand, the 'theory of rights of property' establishes legitimate borders in a map. On the other hand, the 'theory of criminality' refers to the conditions and criteria which determines if a border-crossing legitimate or not. Thus, border-crossing is necessarily relative to preexisting borders, which are themselves absolute.

Furthermore, within the 'theory of criminality' we have two principles. While the NAP says that 'invading' borders is *always* wrong, the principle of proportionality states that suffering a minor incursion doesn't justify total war against the whole world. The reason being that the 'property', to which we have rights, is not a single, monolithic and all-encompassing entity, but to relative to multiple, distinct and scarce objects. Thus, a defensive reaction must be compatible to the aggression in relation to what was actually invaded and to whom actually invaded.

10. CONCLUSION: PROPORTIONAL EVICTIONISM OR GENTLE ABORTION?

The 'Maximalist' position claims that it is legitimate to immediately shoot children in the back for the crime of stealing a simple bubble gum. In this view, if a person criminally takes possession of a single title of property, then, as result, this person loses *every* title of property it currently has, legitimate or not. This loss includes even the criminal's right to life. To put it bluntly, in a Maximalist world, only voluntary mercy could prevent society from laying out death on every criminal.

Block's self-proclaimed 'moderation'⁷⁵ makes him restrain this 'maximalism' with his so-called 'principle' of gentleness. His solution is to *positively* force a process of gradual escalation in order to avoid the tragedy of defensive overkill from becoming a far too common occurrence. This means that every criminal⁷⁶ has the right to force their victims to use the strictly gentlest-yet-efficient method of self-defense. As such, Block understands that a noncompliant victim who doesn't fulfill their positive obligation and who uses 'unnecessary roughness' against a criminal is himself committing a crime. However, Libertarianism outright rejects positive rights or positive obligations, which makes gentleness incompatible with a libertarian legal theory.

⁷⁴ Notice that this is general to crime, it doesn't matter if it is during self-defense or punishment.

⁷⁵ In his own words: "I regard myself as a moderate on this question." BLOCK, Walter E; CEKEREVAC, Zoran. Should abortions be criminalized? Rejoinder to Akers, Davies and Shaffer on abortion, **FBIM Transactions**, v. 2, p. 33-44, jan. 2014, p. 4. Available at: <https://fbim.meste.org/FBIM_1_2014/_04.pdf>

⁷⁶ Or non-criminal, he is a bit ambiguous about this point, but I will return to this point in my next paper about the *epistemological appraisal*.

Another problem with Block's gentleness is that it can be seen as a *consequentialist* compromise in order to salvage 'maximalism' from the fierce criticism of good old-fashioned common sense. After all, following the algorithm of gentle escalation would indeed decrease the number of time that a symbolic child ends up proverbially shot in the back. However, this means that gentleness is just a *method of crime deterrence*, thus making it once again incompatible with the libertarian theory of crime, which sees defense as strictly *retributive*.

Against Block's 'gentle maximalism', we have explored Rothbard's proportionality. As I have argued, proportionality is not limited to punishment, as Block had claimed, but it is actually a principle of the general Libertarian 'theory of crime'. As such, proportionality is a structural aspect of criminal law and thus applies to *every moment* of crime and to *every type* of defense. Therefore, Block's gentleness is not only incompatible with Libertarianism, but also redundant to proportionality.

During his debates with his critics on the matter of Evictionism, Block extensively used this arbitrary *sharp division* between the moments of crime to restrict proportionality only to moment of punishment. This was his ultimate theoretical fallback against many critiques against his thesis that *indirectly* killing a progeny should be legitimate under Evictionism. Unfortunately, none of his critics called him out on that, which ultimately left this debate without any satisfactory resolution.

I hope that I have done enough to demonstrate that gentleness *cannot* be a libertarian principle for the following reasons: it arbitrarily separates logically connected moments of a crime; it disregards proportionality; it entails positive rights; and it uses deterrence as a justification for self-defense. If I have succeeded in my goal, then we have advanced in the purpose of addressing the issue of *indirectly deadly evictions*.

However, you may notice that I have not yet proven anything regarding whether or not these *indirectly deadly evictions* are legitimate or not. This paper only intended to refute Block's fundamental premises. Since gentleness is not a principle, the legitimacy of a defensive reaction against any crime must be settled by proportionality alone. This includes, of course, the crimes of trespassing, which, in turn, include the issue of abortion and Evictionism. As such, although this paper plays an important and necessary role in this discussion, it's also true that I have not as of yet addressed the issue of Evictionism *per se* nor have I argued in against indirectly deadly evictions.

After all, Block might still argue that "there is all the world of difference between trespassing into an airplane, and into the body of a person"⁷⁷. If he is correct in his statement, and that trespassing a body is indeed such a horrendous crime, maybe even akin

⁷⁷ BLOCK, Walter. Abortion Once Again: a response to Feser, Goodwin, Mosquito, Sadowsky, Vance and Watkins, *Revista de Investigações Constitucionais*, v. 4, n. 1, p. 11–41, jan. 2017, p. 29. Available at: <<http://revistas.ufpr.br/rinc/article/view/50328>>

to murder, then perhaps eviction method which is *indirectly deadly* could be reasonably understood as a proportionate method of self-defense against trespassers of a body⁷⁸.

If that comes to be Block's actual position, then it seems that he would be following Rothbard's take on the subject. Rothbard actually predicates himself only on the principle of proportionality and concludes that "a woman should have the right to eject an unwanted parasite within her body *as rapidly as possible* — whether or not the parasite is considered 'human'⁷⁹". At first sight, this might seem like a contradiction of Rothbard's previous claim that the death penalty would be strictly restricted to the crime of murder⁸⁰. But then again, some crimes might be so horrendous that it is reasonable to think that the principle 'two teeth for a tooth' would allow capital punishment, even though there was no actual murder involved in that criminal activity.

However, the truth is that Rothbard is actually *pro-abortion*. Furthermore, He doesn't even believe that a progeny is a full human being, endowed with natural rights. Well, at least not until very far in development and most certainly not before birth⁸¹. Thus, Rothbard can coherently defend the proportionality of killing a body trespasser. After all, he is already in favor of unrestricted abortion at any time during the pregnancy⁸².

Contrariwise, Block is actually *against abortion*. Furthermore, he believes that a progeny is already a human being since the moment of conception and thus has the same rights as any other human being. Perhaps Block simply didn't think Rothbard's arguments through when he used it to dismiss his critic's arguments.

Without gentleness, then, if Block wishes to maintain any semblance of coherence, he must choose one of two options: (1) in order to save Evictionism he must give up the legitimacy of *indirectly deadly evictions*; or (2) he may abandon Evictionism altogether in favor of abortions and, with that, save the legitimacy of *indirectly deadly evictions*. One way or the other, proportionality makes it that *indirectly deadly evictions* are incompatible with Evictionism.

Independently of his choice, I believe that there is an important aspect of Block's gentleness which may be partially salvaged within the Libertarian theory. My view is that Block's algorithm of gentle escalation, although not a principle, is actually a

⁷⁸ ROTHBARD, Murray N. **The complete Libertarian Forum: 1969-1984**, 1. ed. Auburn, Alabama: Ludwig von Mises Institute, 2012, p. 847. Available at: <<https://mises.org/library/complete-libertarian-forum-1969-1984>>.

⁷⁹ ROTHBARD, Murray N. **The complete Libertarian Forum: 1969-1984**, 1. ed. Auburn, Alabama: Ludwig von Mises Institute, 2012, p. 832. Available at: <<https://mises.org/library/complete-libertarian-forum-1969-1984>>.

⁸⁰ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 85. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

⁸¹ ROTHBARD, Murray N. **The Ethics of Liberty**, New York: New York University Press, 1998, p. 97-98. Available at: <<https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>>.

⁸² This idea is not without its problems, of course. But we will address this argument on another paper of this series.

method of *epistemological appraisal*. But this no longer concerns us here. I'll tackle that on a following paper, on which I will be able to propose positive arguments in favor of the *illegitimacy of indirectly deadly evictions*. As I continue my revision of Evictionism, I shall explore other important issues to Libertarianism as a whole, such as the problems of 'threats' and 'procedural justice'.

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