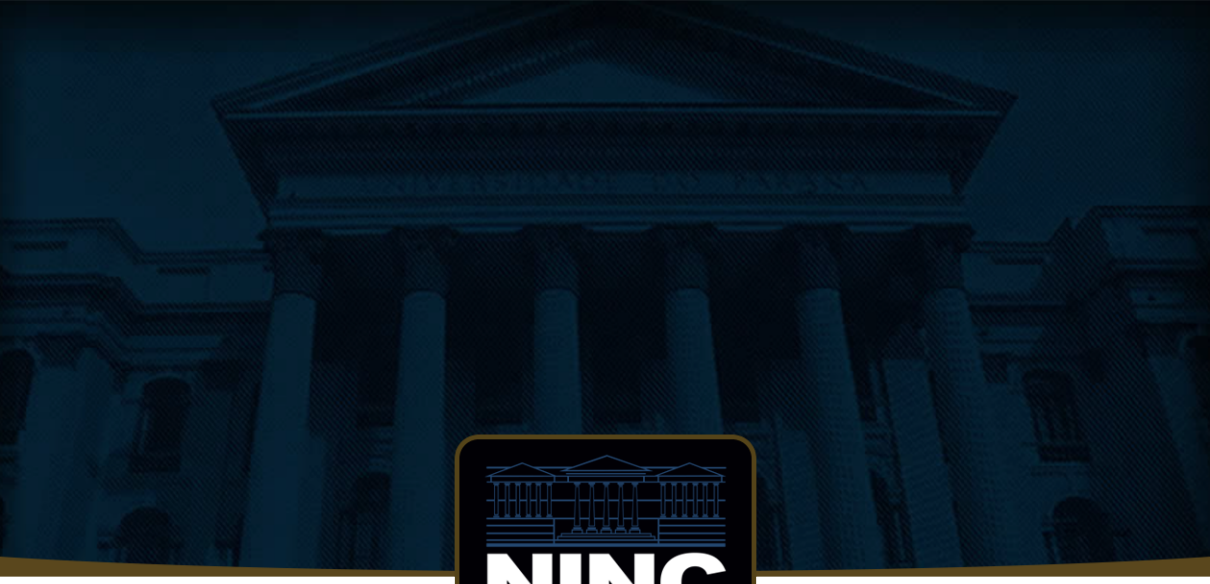

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Rejoinder to Ayres on defense, punishment and gentleness

Tréplica a Ayres sobre a defesa, punição e gentileza

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Abstract

Ayres maintains that both punishment after the fact of crime, and what the victim is allowed to do during the commission of the crime, should be based upon proportionality. I agree with him on the former contention, but not the latter. This paper is my attempt to make the case that the victim is entitled, based upon libertarian law, to do whatever is necessary to defend himself and his property, provided, only, that he employ the most gentle means compatible with this end. Ayres demurs.

Keywords: punishment; defense; libertarianism; gentleness; proportionality.

Resumo

Ayres sustenta que a punição depois da consumação do crime deve se basear na proporcionalidade, e o que a vítima pode fazer durante a sua prática também deve obedecer ao mesmo parâmetro. Eu concordo com ele na primeira assertiva, mas não na segunda. No presente artigo eu defendo que a vítima tem o direito, baseado no Direito libertário, de fazer o que for necessário para defender a si mesmo e a sua propriedade, contanto, apenas, que ele empregue os meios mais suaves compatíveis com este fim. Ayres discorda.

Palavras-chave*: punição; defesa; libertarianismo; gentileza; proporcionalidade.*

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Based on the title of his paper, I would have welcomed Ayres[1] to the libertarian discussion of abortion. However, in the event, he discussed proportionality and gentleness, not my views on evictionism. However, his treatment of this complex issue is as thorough as could be wished. Indeed, if there is any stone he leaves unturned in this matter, it has escaped me. It is, moreover, based upon his insightful understanding of advanced libertarian theory. Nevertheless there are several points at which this author and I diverge. The present paper is an attempt to set the libertarian record straight.

To begin with, Ayres quite properly sets the stage: he maintains that proportionality applies to every aspect of crime; the invasion itself, plus the punishment afterward. I take the position that proportionality is relevant to punishment, not crime. He takes the position that my "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 a deterrence penology".[2] I agree with him that positive rights are anathema to libertarian theory, properly understood; only negative rights are compatible with justice. However, I deny that my gentleness principle violates this precept. Also, in my view, the essence of libertarianism is deontology, rights, justice; deterrence is but a side benefit

In his section 1 "Introduction: the problem of indirectly deadly evictions" our author accurately states that my evictionist proposal is based upon the libertarian, notion of private property rights. Since the mother, not the baby, owns her womb, the unwanted fetus is in effect a trespasser. He may thus be removed from her premises; evicted but not killed. His rendition of my position is entirely accurate.[3] I only wish I could be as

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[1] All mention of this scholar, unless otherwise indicated, shall refer to this one publication of his: AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. DOI: 10.5380/rinc.v8i2.74518.

[2] AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 407.

[3] My views on abortion and evictionism, the targets of Ayres' criticism, are: BLOCK, Walter E. Toward a Libertarian Theory of Abortion. In: Rothbard, Murray N. **The Libertarian Forum**. Volume 2: 1976-1984. Auburn: Mises Institute, 2006 [1977]. Available at: <http://www.mises.org/journals/lf/1977/1977_09.pdf >; BLOCK, Walter E. Abortion, Woman and Fetus: Rights in Conflict? **Reason**, vol. 9, n. 12, April, p. 18-25, 1978; BLOCK, Walter E. **Stem Cell Research**: The Libertarian Compromise. September 3, 2001. Available at: <http://archive.lewrockwell.com/block/block5.html>; BLOCK, Walter E. Libertarianism, Positive Obligations and Property Abandonment: Children's Rights. **International Journal of Social Economics**, Bingley, vol. 31, n. 3, p. 275-286, 2004; BLOCK, Walter E. Homesteading, ad coelum, owning views and forestalling. **The Social Sciences**, Faisalabad, vol. 3, n. 2, p. 96-103, 2008. Available at: < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1890872>; BLOCK, Walter E. A libertarian perspective on the stem cell debate: compromising the uncompromisable. **Journal of Medicine and Philosophy**, Oxford, vol. 35, n. 4, p. 429-448, aug. 2010. Available at: <https://academic.oup.com/jmp/issue/35/4>; BLOCK, Walter E. Van Dun on Freedom and Property: A Critique. **Libertarian Papers**, Auburn, vol. 2, n. 4, 2010; BLOCK, Walter E. Response to Jakobsson on human body shields. **Libertarian Papers**, Auburn, vol. 2, article n. 25, p. 1-9, 2010. Availabe at: <https://cdn.mises.org/-2-25_2.pdf>; BLOCK, Walter E. Response to Wisniewski on Abortion, Round Two. **Libertarian Papers**, Auburn, vol. 3, article n. 4, p. 1-13, 2011. Available at: <http://libertarianpapers.org/articles/2011/lp-3-4.pdf>; BLOCK, Walter E. Terri Schiavo. **Journal of Libertarian Studies**, Auburn, vol. 22, n. 1, p. 527-536, 2011. Available at: <https://cdn.mises.org/22_1_26.pdf>; BLOCK, Walter E. The Human Body Shield. **Journal of Libertarian Studies**, Auburn, vol.

succinct as he. However, since the paper now under my review says virtually nothing else about abortion, I press on to the next section.

In section 2 of his paper, Ayres takes issue with (my) "Block's gentleness." He states:

> *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, proportionality applies, only, to the punishment stage". Thus, two distinct moments of a crime, each with its own distinct governing principle.*
>
> *(…)*
>
> *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 force.*[4]

I think there is a confusion here. The death penalty is not at all "a disproportionate form of defense". It is no defense at all. It takes place *after* the crime is committed and the perpetrator is brought to justice. Ayres realizes that "punishments only apply after the crime has already been committed" so it is difficult to discern why and how he has committed this error

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22, n. 1, p. 625-630, 2011. Available at: <https://cdn.mises.org/22_1_30.pdf>; BLOCK, Walter E. **A Not So Funny Thing Happened to Me in Tampa**. August 30, 2012. Available at: <http://archive.lewrockwell.com/block/block208.html>; BLOCK, Walter E. Should abortion be criminalized? Rejoinder to Akers, Davies and Shaffer on Abortion. **FBIM Transactions**, Belgrade, vol. 2, n. 1, p. 33-44, jan. 2014; BLOCK, Walter E. Evictionism and Libertarianism. **Journal of Medicine and Philosophy**, Oxford, vol. 39, n. 3, p. 248-257, jun. 2014; BLOCK, Walter E. Toward a libertarian theory of evictionism. **Journal of Family and Economic Issues**, vol 35, n. 2, p. 290-294, jun. 2014; BLOCK, Walter E. Judith Jarvis Thomson on abortion; a libertarian critique. **DePaul Journal of Health Care Law**, Chicago, vol. 19, n. 1, article n. 3, p. 1-17, mar./jun. 2017; BLOCK, Walter E. **Evictionism**: The compromise solution to the pro-life pro-choice debate controversy. New York: Springer Publishing Company, 2021; BLOCK, Walter E.; WHITEHEAD, Roy. Compromising the Uncompromisable: A Private Property Rights Approach to Resolving the Abortion Controversy. **Appalachian Law Review**, vol. 4, n. 2, p. 1-45, 2005; DYKE, Jeremiah; BLOCK, Walter E. Explorations in Property Rights: Conjoined Twins. **Libertarian Papers**, Auburn, vol. 3, article n. 38, p. 1-18, 2011. Available at: <http://libertarianpapers.org/38-explorations-property-rights-conjoined-twins/>.

[4] AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 411.

This author continues his misinterpretation of my position:

> *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.*[5]

To the contrary I never put matters that way. The view attributed to me is a misrepresentation. It implies that when someone is rushing at you with a knife yelling "kill" you are obligated to first try to reason with him, verbally.[6] If that doesn't work, perhaps you can escalate by begging for your life. If that too fails, you can again "gradually increase" your "method of self-defense". Perhaps you might now be entitled to wrestle the knife away from him or run away. This is very different from how I see matters. My thought is that if you have two guns, one with rubber bullets the other with lead, and both are 100% guaranteed to stop this maniac in his tracks, you obligated to employ the former weapon. Alternatively, if there is a net handy that will equally likely stop this madman in his tracks, then if you plug him with lead bullets anyway, you are certainly not being "gentle". There is no "gradual increase"[7] involved here at all. But Ayres does not at all misunderstand me for he continues:

> *So far, so good. Unfortunately, this is not Block' final word on 'gentleness'. According to him,*[8] *if there is 'no guarantee that [a] rubber bullet (or a net) will halt the perpetrator in his tracks', then a deadly gun could be used immediately against a trespasser, without the requirement of any other intermediate steps of gentle escalation" It is thus difficult to understand why then Ayres initially misconstrued my position. This far, not so good anymore. For this last point muddies the waters quite a bit.*[9]

He contradicts himself as to what my position is. First, he says it is X, then he denies this.

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5 AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 412.

6 States Ayres: "it is perfectly consistent to stop a crime with bare hands or even through dialogue and persuasive argumentation."

7 Ayres repeats this charge of "gentle escalation" several times. For example, he lays this at my doorstep: "First, a victim must follow his algorithm of gentle escalation. Then, and only then, may the trespasser be blown away." (AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 413). But this is erroneous each and every time he repeats this misinformation.

8 That is, me, Block.

9 AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 412.

What is this scholars' argument that I am guilty of "muddy waters"? First, he asks why should rubber bullets be considered the 'gentlest manner possible' to stop a crime? But this was merely an illustrative example. I am by no means committed to this means. Second, he queries: "why could the victim jump straight to normal bullets without trying out any other intermediary steps of escalation?"[10] Nor would I deny that if there were even more gentle modalities available, for example, eloquence, that this should not be employed. But remember, there is a maniac charging you, screaming, brandishing a knife; does Ayres really think that mere talk will turn the trick? It is only if we stipulate, arguendo, that that it would, that the victim is obliged to do this. Third he asks about the degree of certainty required before employing more gentle methods. I would say 100%. The target is not required by any libertarian law I am aware of, to be "gentle" with the perpetrator at risk to himself. I am assuming that the net and/or the rubber bullets will do just as well in stopping the criminal in his tracks as would the lead variety.

States Ayres:

> *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.*[11]

No, no. This author is still laboring under the conflation of defense and punishment. He continues to apply proportionality to defense, while the crime is in process. But there is no room for, need for, requirement of, proportionality upon this occasion. It is only properly applied, later on, after the crime has finished, and the criminal is in the dock, awaiting punishment.

Ayres is to be congratulated for derisively dismissing positive obligations from libertarian theory. There are, indeed, none. But I protest: I am not at all guilty of this misunderstanding. Rather, I am deducing from negative obligations, which this scholar and I, both of us libertarians, certainly support. Which negative obligations? The obligation not to initiate violence against innocent people.[12] But here we have to employ

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[10] AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 412.

[11] AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 412.

[12] If an onrushing truck is about to kill an innocent person, and I push him out of the way, saving his life, but breaking his ribs in the process, I am not guilty of a crime, at least according to my understanding of libertarian theory. The entire context must be taken into account. Similarly, for the case where I break someone's ribs correctly utilizing the Heimlich maneuver and saving him from choking to death.

relative innocence, or common sense. Consider not the knife-wielding maniac, but a relatively more innocent criminal: a shoplifter or a pickpocket, or someone guilty of inadvertent trespass. They pose no serious threat of bodily injury. If I can extrapolate from Ayres' comments, he thinks that it is my view that if a person were victimized in this manner, he would be justified in blowing away the offender with a bazooka, which would cut the miscreant in half. This is unjust. This is not at all my position. Not only would the non-libertarian feel that this action had gone beyond what should be legally permissible, but so would the libertarian. Yes, we would have to be looking at a "penumbra" of the non-aggression theory; that is, at its logical implication.

Take the person who sets one step on your lawn, by mistake. We stipulate that if you merely mention this to the offender he will apologize and immediately remove his foot. The property owner kills him anyway. My objection to this over-use of violence is not based on the victims' positive obligation not to commit such a crime. It is based upon taking seriously the libertarian opposition to negative rights violations. This trespasser still has *some* rights. In what Ayres is mistakenly attributing to me, he loses all rights. This act would not be punishment; if it were, it would be wildly disproportionate, of course. It takes place during the rights violation on the part of the trespasser. But, it is still markedly unjust, because it is patently not the "gentlest manner possible" to obviate the incursion.

Our author tries to turn things around 180 degrees. He correctly quotes me as writing that it would "be justified for the property owner to kill the trespasser".[13] But Ayres does so out of context. Of course this would be justified: but only if the trespasser refuses to budge, and, worse, launches an attack on the property owner.

In section 3 of his paper, "Rothbard's proportionality", Ayres tries to show that he applies proportionality not only to punishment, but, also, to what the victim may do to ward off attacks on himself and his property. I fear that Ayres also misconstrues Rothbard as well as me. Ayres sets himself the task of demonstrating that "Rothbard argued that … (force) … must be constrained within limits proportional to the aggressive force of a criminal."[14] He does not succeed in showing any such thing, at least not yet.[15]

Here is Ayres' first attempt in this regard:

> *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*

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[13] AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 413.

[14] AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 414.

[15] Continue reading; you're be in store for a surprise.

> *[the criminal] begins to infringe the property rights of someone else'. Here we have 'proportional limits' being applied to self-defense.*[16]

Not so, not so. All Rothbard is saying here is that the target of an initiation of violence is not warranted to use defensive violence against the perpetrator until he begins his attack. Ayres to the contrary notwithstanding, this is by no means equivalent to the claim that "'proportional limits' (should be) applied to self-defense."

Here are Rothbard's actual words:

> *How extensive is a man's right of self-defense of person and property? The basic answer must be: up to the point at which he begins to infringe opon the property rights of someone else. For, in that case, his 'defense' would in itself constitute a criminal invasion of the just property of some other man, which the latter could properly defend himself against.*[17]

There is not a scintilla of "proportionality" involved here, again, contrary to Ayres' interpretation. All Rothbard is saying is that defensive violence may not be employed unless and until the perpetrator initiates a rights violation.

Compare and contrast this with what Ayres has Rothbard saying:

> *Furthermore, he (Rothbard) 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" the victim's excessive 'defense'.* ***Thus, the prohibition against an extrapolation of force beyond 'proportional limits' is the same, either during self-defense or punishment****.*[18] *(Emphasis added by present author)*

This is an improper interpretation.

Here is a third try on the part of our author. No, scratch that. Rather, it is an explicit concession that Mr. Libertarian says no such thing: "although Rothbard doesn't explicitly call it by its name, he is clearly describing proportionality."[19] If Rothbard meant that the victim of a crime should limit his response to a proportional one, he would have said so. Ayres is in effect confessing that he is mistaken about Rothbard's views.

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[16] AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 414.

[17] ROTHBARD, Murray N. **The Ethics of Liberty**. New York: New York University Press, 1998 [1982]. p. 77. Available at: <https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>

[18] AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 414.

[19] AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 415.

Is this so important? Yes and no. Yes it is important to be accurate in assessing anyone's views, certainly those of a world-class theoretician such as Murray N. Rothbard. But no, since we are scholars and do not adhere to the informal fallacy of argument from authority. Yes, Rothbard is certainly an authority on libertarian issues.[20] However, suppose Ayres, contrary to fact conditional coming up so beware, is correct in his claim that in Rothbard's view, proportionality is appropriate not only for punishment, but also for defense. That still does not render this truthful. For Rothbard is only human, and all members of our species sometimes err. If, and to the degree that Rothbard actually championed this position, he was just plain wrong.

We can tread lightly over section 4 of this paper, "The underlying principle of crime" since Ayres devotes this to a comparison of "Block's gentleness and Rothbard's proportionality"[21] and this author simply does not understand the latter.[22] Let me, however, comment on just one claim of his herein: his goal "…to fully expose how closely tied together self-defense and punishment actually are."[23] They are not at all that "closely tied." If the only way to stop the "bubble gum thief"[24] is to kill him, that would be justified under libertarian law, at least in the manner in which I understand it. However, the punishment for stealing one piece of bubble gum would come nowhere near a compulsory death sentence. That is not "too close" indeed.

In his section 5 "How harmful can a bubble gum thief really be?" Ayres writes as follows:

> *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'. Notice that he is talking about proportion in self-defense, not 'gentleness' nor 'punishment'.'*[25]

This will not suffice, but I acknowledge this is Ayres' best example of Rothbard maintaining proportionality not only for punishment, but, also, for defense; here is the full quote in context:

> *… must we go along with those libertarians who claim that a storekeeper has the right to kill a lad as punishment for snatching a piece of his bubble gum? What we might call*

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20 And much more of course, certainly including economics and history, and, again, much else.

21 AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 415.

22 At least not so far.

23 AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 416.

24 Or any other minor pilferage crime. Wimp that I am, I make an exception for children, however.

25 AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 418.

> *the 'maximalist' position goes as follows: by stealing the bubble gum, the urchin puts himself outside the law. He demonstrates by his action that he does not hold or respect the correct theory of property rights. Therefore, he loses all of his rights, and the storekeeper is within his rights to kill the lad in retaliation.*
>
> *I propose that this position suffers from a grotesque lack of* ***proportion.*** *By concentrating on the storekeeper's right to his bubble gum, it totally ignores another highly precious property-right: every man's including the urchin's- right of self-ownership. 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 another 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. From this principle immediately derives the* ***proportionality*** *theory of punishment-best summed up in the old adage: 'let the punishment fit the crime.'*
>
> *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.*[26] *(emphasis added)*

There are several problems, even here, with Ayres' interpretation. First, Rothbard mentions "lad" and "urchin". This means "children". But, wuss that I am, I have already acknowledged that children set up special problems for libertarian theory, as they do for all philosophies of law. Second, I have italicized all of Rothbard's uses of "proportion" words. In none of the three instances, is he using any of these words in the manner that Ayres keeps trying to shove down his throat. In all three cases, Rothbard is using this word as a synonym for "appropriate" or "proper" or "suitable" or "fitting", etc.[27] In none of these three cases can Rothbard be properly interpreted along the lines set out for him by Ayres.

Here is a powerful argument against our author. It is a contrary to fact hypothetical. Let us ask Rothbard this hypothetical question: Suppose that the bubble gum thief is clearly an adult; no children are involved. And the only way he can be kept from this robbery is to shoot him to death. Whose 'rights' matter more? Those of the store owner, over this miniscule property of his, or those of the robber, in his own life? That is, may

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[26] ROTHBARD, Murray N. **The Ethics of Liberty**. New York: New York University Press, 1998 [1982]. p. 80-81. Available at: <https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>.

[27] The reader is invited to try this as an experiment: substitute any of these synonyms for the "proportionate" word, and see if it changes the meaning of what he says. It will not.

the grocer shoot him in the back, if need be, or, must he allow himself to suffer from this stealing?

I know not what answers others will give, but in my understanding of libertarianism, matters are very clear.[28] Hooligans, beware.[29]

Nothing loath, and intent upon perverting Rothbard's views, our author tries once again, and quotes Rothbard:

> *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.*[30]

But, as is his wont' Ayres again puts words into Rothbard's mouth. He neglects to quote the sentence immediately preceding the material he quotes. This reads as follows: "Thus, it should be quite clear that, under libertarian law, capital punishment would have to be confined strictly to the crime of murder. For a criminal would only lose his right to life…"[31] Thus, clearly, Rothbard is now speaking of punishment, *not* defense against criminality.[32]

We now arrive at section 6. "Positive defense or negative offense?" Here Ayres maintains that my theory of "gentleness" logically implies that the "criminal has the positive right of being treated in the gentlest way possible." Since this author and I both agree that in libertarianism there are only negative, not positive rights, it would appear that I have some "splaining" to do. I do not at all agree that stopping a criminal with rubber rather than lead bullets is an instance of the perpetrator having a positive right to be treated in a gentle manner. Rather this stems from the non-aggression principle. All people, criminals certainly included, retain some rights; there is not a total abnegation of rights for them. To the extent that the victim's defense exceeds the bounds of "gentleness" he is violating the negative rights of the culprit, which the latter still retains.[33]

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[28] But see below for a direct quote from Rothbard concerning "looters."

[29] This sounds callous, even to my hardened ears. However, if robbery is allowed, our entire civilization is at risk. Many more people will perish if the crook is given carte blanche, even under these limited circumstances. So, the real callousness lies in the direction of not supporting private property rights in bubble gum, of all things. As the Reverend Niemoller might have said, "First they came for the bubble gum..."

[30] ROTHBARD, Murray N. **The Ethics of Liberty**. New York: New York University Press, 1998 [1982]. p. 85. Available at: <https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>.

[31] ROTHBARD, Murray N. **The Ethics of Liberty**. New York: New York University Press, 1998 [1982]. p. 85. Available at: <https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>.

[32] We must award Ayres an "A" for effort, but not for accuracy.

[33] States our author: "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." This is not the first instance in which one of my views has been characterized and castigated as supporting the evil and fallacious doctrine of

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 child, 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.*

Indeed, we call 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

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positive rights. This occurred, too, with my analysis of whether a couple would be free to starve their baby after bringing him home from the hospital from whence he was born. The parents are not, at least not explicitly, violation the non-aggression principle (NAP). They are not murdering him. They merely refuse to feed him, and he dies. My claim is that they are still criminals, murderers. They have an obligation, if they do not wish to care for him, to bring him to an orphanage, a hospital, a police station, etc., so that others may care for him. For an explanation of why this does not count as a positive obligation on the part of the parents, see: BLOCK, Walter E. Toward a Libertarian Theory of Abortion. In: Rothbard, Murray N. **The Libertarian Forum**. Volume 2: 1976-1984. Auburn: Mises Institute, 2006 [1977]. Available at: <http://www.mises.org/journals/lf/1977/1977_09.pdf >; BLOCK, Walter E. **Stem Cell Research**: The Libertarian Compromise. September 3, 2001. Available at: <http://archive.lewrockwell.com/block/block5.html>; BLOCK, Walter E. Libertarianism vs. Objectivism; A Response to Peter Schwartz. **Reason Papers**, Tempe, vol. 26, p. 29-62, jun./aug. 2003. Available at: < https://reasonpapers.com/pdf/26/rp_26.pdf>; BLOCK, Walter E. Libertarianism, Positive Obligations and Property Abandonment: Children's Rights. **International Journal of Social Economics**, Bingley, vol. 31, n. 3, p. 275-286, 2004; BLOCK, Walter E. Homesteading, ad coelum, owning views and forestalling. **The Social Sciences**, Faisalabad, vol. 3, n. 2, p. 96-103, 2008. Available at: < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1890872>; BLOCK, Walter E. A libertarian perspective on the stem cell debate: compromising the uncompromisable. **Journal of Medicine and Philosophy**, Oxford, vol. 35, n. 4, p. 429-448, aug. 2010. Available at: <https://academic.oup.com/jmp/issue/35/4>; BLOCK, Walter E. Van Dun on Freedom and Property: A Critique. **Libertarian Papers**, Auburn, vol. 2, n. 4, 2010; BLOCK, Walter E. Response to Jakobsson on human body shields. **Libertarian Papers**, Auburn, vol. 2, article n. 25, p. 1-9, 2010. Availabe at: <https://cdn.mises.org/-2-25_2.pdf>; BLOCK, Walter E. Response to Wisniewski on Abortion, Round Two. **Libertarian Papers**, Auburn, vol. 3, article n. 4, p. 1-13, 2011. Available at: <http://libertarianpapers.org/articles/2011/lp-3-4.pdf>; BLOCK, Walter E. Terri Schiavo. **Journal of Libertarian Studies**, Auburn, vol. 22, n. 1, p. 527-536, 2011. Available at: <https://cdn.mises.org/22_1_26.pdf>; BLOCK, Walter E. The Human Body Shield. **Journal of Libertarian Studies**, Auburn, vol. 22, n. 1, p. 625-630, 2011. Available at: <https://cdn.mises.org/22_1_30.pdf>; BLOCK, Walter E. Forestalling, positive obligations and the Lockean and Blockian provisos: Rejoinder to Stephan Kinsella. **Ekonomia Wroclaw Economic Review**, Wrocław, vol. 22, n. 3, p. 27-41, 2016; BLOCK, Walter E.; WHITEHEAD, Roy. Compromising the Uncompromisable: A Private Property Rights Approach to Resolving the Abortion Controversy. **Appalachian Law Review**, vol. 4, n. 2, p. 1-45, 2005; BLOCK, Walter E.; EPSTEIN, Richard. Debate on Eminent Domain. **NYU Journal of Law & Liberty**, New York, vol. 1, n. 3, pp. 1144-1169, 2005. Available at: <https://www.law.nyu.edu/sites/default/files/ECM_PRO_060927.pdf>. Hint: this concerns forestalling and precluding. I articulate this in my bagel or donut theory.

> *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.*[34]

Our author then sets up a challenge to me:

> *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". 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"? This omitted information is pivotal for us to judge his hypothetical example. After all, people don't magically vanish all of a sudden.*[35]

The difficulty here is that I have already clearly explained this.[36] If he had a specific objection, I would try to counter it here. As he only asks "what exactly does Block mean" I will content myself by referring him to a rereading of this essay of mine.

My critic then launches this reproach of me:

> *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'.*[37]

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34 AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 418.

35 AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 422.

36 BLOCK, Walter E. Response to Wisniewski on Abortion, Round Two. **Libertarian Papers**, Auburn, vol. 3, article n. 4, p. 1-13, 2011. Available at: <http://libertarianpapers.org/articles/2011/lp-3-4.pdf>. I just reread this and am tempted to say, "explained this brilliantly" but I will forebear.

37 AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 422.

My response? I simply do not understand what he is talking about. Surely, all libertarians both oppose crime as well as favor defense? Perhaps if he had offered an illustrative example, this would have clarified matters.

Next in the batter's box is this complaint:

> *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.' 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.*[38]

It is not clear to me where in my analysis of evictionism I justify the use of violence against innocent people; a linkage in this regard would have been helpful. However, in another context, I do indeed justify such behavior, despite Rothbard's "crystal clarity" to the effect that it is always unjustified. I fear that Ayres is under the impression that Rothbard is the only libertarian worth mentioning. He does indeed deserve the appellation of being "Mr. Libertarian." His contributions to our philosophy are nothing less than astounding. But not all others are obliged to agree with him in every jot and tittle. In any case, in my series on "negative homesteading" I do indeed offer arguments that are incompatible with Rothbard's view of this matter. To wit, I claim that if A grabs totally innocent B, and hides behind him, while shooting at equally innocent C, then the latter has the right to shoot back at A, even if the only way he can get to him is by putting a bullet through the body of innocent B.[39] This runs counter to this statement of Rothbard's, "any aggressive attack against an innocent person - even for defensive reasons and even to uphold property rights - is illegitimate,"[40] as Ayres correctly sees.

We now respond to section 7 of Ayres' paper: "Innocence: relative or absolute?" Here, Ayres' assessment of Rothbard is entirely correct. But, he might well be advised to think for himself. Just because Rothbard says something does not necessarily make it right. And in this case of violating the rights of innocents in order to save yourself, he is wrong, as I have previously indicated.

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38 AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 422.

39 See on this: BLOCK, Walter E. Response to Jakobsson on human body shields. **Libertarian Papers**, Auburn, vol. 2, article 25, p. 1-9, 2010. Availabe at: <https://cdn.mises.org/-2-25_2.pdf>; BLOCK, Walter E. The Human Body Shield. **Journal of Libertarian Studies**, Auburn, vol. 22, n. 1, p. 625-630, 2011. Available at: <https://cdn.mises.org/22_1_30.pdf>; BLOCK, Walter E. Human shields, missiles, negative homesteading and libertarianism. **Ekonomia Wroclaw Economic Review**, Wrocław, vol. 25, n. 1, p. 9- 22, 2019.

40 AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 423.

Forget about bubble gum for the moment. Let us consider the latest type of crime prevalent in the US: smash and grab. Groups of people[41] invade a store and make off with whatever therein that is not nailed down. Would Rothbard really support their depredations, if the only way to stop them would be to shoot them? What about "shoot the looters" a popular refrain in times of unrest in all civilized societies?

Here is Rothbard's view on this matter:

> *The crucial point is that whether the motivation or the goal is rage, kicks, or loot, the rioters, with a devotion to present gratification as against future concerns, engaged in the joys of beating, robbing, and burning, and of massive theft, because they saw they could get away with it. Devotion to the sanctity of person and property is not part of their value-system. That's why, in the short term, all we can do is shoot the looters and incarcerate the rioters.*[42]

How is that for proportionality in active defense, Ayres?

On the other hand, to be fair to my debating partner, here is Rothbard with a very different point of view:

> *Those libertarians who favor maximum force to stop looting had best reconsider their position. Would they, for example, favor executing a young lad who steals an apple from a fruit stand? If not, why not? Are not property rights sacred?*
>
> *The confusion here comes not from a disagreement on the right of the merchant to his property, but from an absence, among libertarians, of a well-thought-out theory of punishing invasions of that property right…. I believe that everyone has the right to use violence in defense of his property against invasion, but only in some kind of proportion to the crime itself. Any punishment must be limited to being proportionate to the crime; in the old phrase, "let the punishment fit the crime." Therefore, if a man is attacked by a criminal and his life is in danger, he has, in my view, a perfect right to defend himself by any means necessary, up to and including the killing of the attacker. But if a merchant sees a kid running off with his apple, he has no right whatever to shoot that kid, because that would be tantamount to capital punishment for a minor property offense; the punishment would be grossly disproportionate, to such an extent that the merchant himself would then be an invader of the right of the looting kid to his own person and his own life. The merchant would then be an unjustified murderer.*

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41 They are adults, not children

42 ROTHBARD, Murray N. **The Ethics of Liberty**. New York: New York University Press, 1998 [1982]. p. 67. Available at: <https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>.

> *Hence, the use of lethal weapons in self-defense, or in defense of others, is only morally justifiable if the victim's life is in danger. If it is not, then such excessive violence is in itself just as criminal and invasive of the looter's right to life as is any other capital crime.*[43]

Score one point for Ayres in my debate with him on this matter. No, better make that two points! Maybe even three.

I think the most accurate assessment of Rothbard on proportional defense is that he was confused. This most recent statement can be interpreted as a blatant contradiction of the one presently previously. But, even here, within this statement, he seems a bit muddled. Remember, he is still discussing "a young lad." Why would he do that if not to acquiesce in the well-established libertarian view that exceptions are properly made for children?[44]

Next, let us consider section 8 of this paper, "Proportional retribution or gentle deterrence?" Ayres makes hay while the sun shines about my more than Draconian support for shooting child criminals:

> *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 back*[62]*.*[45]

He continues:

> *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.*[46]

Were it up to him, when Jean Valjean stole that loaf of bread to feed his starving child, Judge Ayres would have either let him off with a slap on the wrist, or, perhaps, even, given him a medal. But what would then happen is that bakers would leave their

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43 ROTHBARD, Murray N. **The Ethics of Liberty**. New York: New York University Press, 1998 [1982]. Available at: <https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>.

44 For example, courts will properly set aside contracts made by underaged children.

45 AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 425.

46 AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 425.

ovens and masses of children, and adults too, would starve to death. Hazlitt[47] advises us to look at any public policy not only for the immediate effects, but the long run ones too; not only for the implications of one person, but all people. Ayres would be wise to study up on this economic tractate.

But our author is not without a rejoinder. He writes:

> *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.*[48]

Ayres is correct on one matter: deontology is more important to libertarianism, far more important, than mere utilitarian considerations. I mention them only to take the sting out of, and rebut the charge of callousness, in my harsh response to child theft. For the deontological libertarian, the only issue is that a rights violation has occurred.[49]

But the actual results of such a policy, I think, would be far more serious than in Ayres view. First of all, these children grow up. Who says that habits ingrained in their youths, to the effect that stealing may not be defended against, will entirely vanish? Second, this message says in effect that robbery is not to be opposed, at least not when undertaken by children. But, then, surely, other groups will try to pile on the bandwagon: the handicapped, those discriminated against, etc. Again, I urge a perusal of Hazlitt for Ayres.[50]

Ayres makes great play with this excellent analysis of Rothbard's against justifying punishment on the basis of deterrence:

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47 HAZLITT, Henry. **Economics in One Lesson**. Auburn: Mises Institute, 2008 [1946]. Available at: <http://mises.org/books/economics_in_one_lesson_hazlitt.pdf>.

48 AYRES, Cedric John. Proportionality trumps gentleness: reforming Block's evictionism (part I). **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 407-433, maio/ago. 2021. p. 425.

49 My favorite example to illustrate this point is the following: an innocent black man is in jail, falsely accused of raping a white woman. An unruly mob demands of the sheriff that he turn this prisoner over to them for immediate "justice" with a rope. If he acquiesces, one innocent person will die. If the sheriff upholds real justice and refuses to comply with this demand, he, along with his prisoner, half the vicious mob, and dozens of innocent passersby townsfolk will perish in the ensuing melee. Would the consistent libertarian give into this demand? Of course not. Death before dishonor. What about the negative utilitarian precedent this would set up? We can ignore that by assuming that the world ends one second after this episode.

50 Moreover, where are the parents in this scenario? Let one "rugrat" be shot, and the guardians of all of them would likely take harsh steps to nip this behavior in the bud. Another point: decent people would be so outraged by anyone shooting a child to defend against pilferage that this alone would render such behavior almost inconceivable. Yes, yes, I am fully aware of the fact that this is a utilitarian consideration. But, I insist, it is not totally irrelevant to libertarianism. We do try to establish, after all, the righteousness leads to happiness.

> *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.* [51]

However, this does not at all apply to anything I have written. First of all, Rothbard is now talking about punishment, not defense. Evidently, Ayres see such a great connection between these two he does not even distinguish between them. Secondly, I am not at all basing my analysis of proper defense behavior on deterrence, as Ayres implies. I am a deontologist, not a utilitarian. I merely mention this in passing. Are deontologists to be forbidden to mention practical implications of different laws?

I conclude my examination of this paper by commenting on Ayres' section 10 "Proportional evictionism or gentle abortion?"

At long last we arrive at the main goal of Ayres: to demonstrate that my views on evictionism, abortion, the pro-life and pro-choice positions are all wrong. What has so far been discussed is only preliminary to this goal. I greatly looked forward to learning precisely where I erred in this analysis of mine. In the event, I was sorely disappointed. He says not one word of substantive criticism of my examination of this issue. Rather, he avers: "I have not as of yet addressed the issue of Evictionism per se nor have I argued in against indirectly deadly evictions."[52] Well, I along with many others will wait with bated breath for his promised two follow up essays exposing my numerous and serious blunders on this topic. In the meantime, I shall have to be content with responding to his views regarding my present defense of person and property.

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[51] ROTHBARD, Murray N. **The Ethics of Liberty**. New York: New York University Press, 1998 [1982]. p. 93. Available at: <https://cdn.mises.org/The%20Ethics%20of%20Liberty%2020191108.pdf>.

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