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Łukasz Dominiak<sup>1</sup>

Department of Social Philosophy

Faculty of Philosophy and Social Sciences

Nicolaus Copernicus University in Toruń, Poland

ORCID: 0000-0001-6192-8468

e-mail: cogito1@umk.pl

Igor Wysocki<sup>2</sup>

Interdisciplinary Doctoral School of Social Sciences

Nicolaus Copernicus University in Toruń, Poland

ORCID: 0000-0002-4926-4010

e-mail: wysocki@doktorant.umk.pl

## **Libertarianism, Defense of Property, and Absolute Rights<sup>3</sup>**

**Keywords:** libertarianism, defense of property, self-defense, proportionality, gentleness, absolute rights

### **Abstract**

The present paper argues that libertarians (e.g. Murray Rothbard, Stephan Kinsella) who subscribe to the proportionality principle while embracing the view that to have a right to property is to have a right to defend it run into what we call

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the Property Defense Dilemma. For if the only way to defend property is to defend it disproportionately, then a private property right – contrary to what these thinkers claim – is not accompanied by a right to defend it. The most plausible way out of the dilemma – the present paper argues – is to conceive of private property rights as only *weakly* absolute, to use Matthew H. Kramer’s illuminating distinction. On the other hand, libertarians who as Walter Block would like to escape the dilemma by replacing the proportionality standard with the gentleness principle run into other sorts of problems (moral implausibility, incoherence) which also shows that it is the libertarian view on rights as infinitely stringent side constraints that calls for revision and attenuation.

## 1. Introduction

Some libertarian scholars (Rothbard, 1998; Kinsella, 1996; Block, 2010, 2011a, 2011b, 2019a) embrace the view that to have a right to private property is to have a right to defend it against invasion. On the other hand, the same scholars support some version of the principle of proportionality, according to which the offender is exposed to defensive or punitive measures to the extent to which he violated the rights of another. In the present paper we argue that these two views do not square well, for if the only way to defend a right to private property against invasion is to use disproportionate force, then the principle of proportionality forbids such a defense, and having a private property right does not come with a right to defend it. Hence, either the principle of proportionality or the view that to have a right to private property is to have a right to defend it should be rejected. Since jettisoning the proportionality principle would be too big a cost to incur for the libertarian theory of justice, we conclude that it is the view that to have a right to private property is to have a right to defend it that should be rejected.

More specifically, we argue that holding both the principle of proportionality and the view that to have a property right is to have a right to defend it entails what we call the Property Defense Dilemma (henceforth PDD), that is, a logical predicament consisting in the fact that if the only available property defense happens to be excessive, then the ownership right in question – contrary to what the libertarian view on property rights declares – is not accompanied by a right to defend it. To the contrary, it is accompanied by a duty not to defend it. We submit that the most plausible

way in which the aforementioned libertarians can avoid PDD is to attenuate their account of property rights, that is, to conceive of these rights – to employ Matthew H. Kramer’s illuminating distinction – not as *strongly* absolute but instead as absolute only in a *weak* sense. As we contend, the same applies, *mutatis mutandis*, to those libertarians who would rather follow Walter Block’s footsteps and instead of attenuating stringency of property rights replace the proportionality standard with the gentleness principle, for although doing so would indeed allow them to escape PDD, it would nonetheless compromise the overall coherence of their theory and commit them to morally grotesque predictions.

The present paper is organized in the following order. Section 2 provides evidence for the belief of some libertarian thinkers that to have a right in property implies having a right to defend it, whether the former is to be construed as an *absolute* right (Rothbard) or simply as a right as such (Kinsella). In order to set the stage for the forthcoming dilemma, this section also shows that the same libertarian thinkers (i.e. both Rothbard and Kinsella) subscribe to the proportionality requirement in self-defense. Having established that, the burden of section 3 is to demonstrate how the Property Defense Dilemma (PDD) ensues on both Rothbardian and Kinsellian grounds. In turn, section 4 presents Block’s gentleness principle in self-defense and shows that this standard indeed prevents PDD from obtaining. However, as we contend, Block’s gentleness principle is problematic for other reasons. Section 5 argues that a solution to PDD lies in rejecting the proposition according to which having an absolute right (or even a right as such) in property is to have a right to defend it. Section 6 concludes.

## **2. Libertarian Rights and the Proportionality Principle**

Murray Rothbard claims (2011, p. 352) that the libertarian theory of justice has “two fundamental premises: (a) the absolute property right of each individual in his own person...; and (b) the absolute right in material property of the person who first finds an unused material resource and then in some way occupies or transforms that resource.” The first premise is famously known as the principle of self-ownership whereas the second one comes under the name of the homestead principle, or at least it is called so by Rothbard and his followers. Thus, the homestead principle has it that if one

transforms or mixes one's labor with an unowned resource, one thereby acquires the absolute private property right to this resource.

In turn by the concept of an absolute property right Rothbard understands a right that is accompanied by a right to defend it. As Rothbard writes:

If every man has the absolute right to his justly-held property, it then follows that he has the right to *keep* that property – to defend it by violence against violent invasion.... To say that someone has the absolute right to a certain property but lacks the right to defend it against attack or invasion is also to say that he does not have total right to that property.

(Rothbard, 1998, p. 88)

It therefore follows from these two views taken together that by homesteading an unowned resource one acquires the absolute property right to this resource, that is, a right that is accompanied by a right to defend that resource against invasion. Although for Rothbard the lack of a right to defend one's property would not entail the lack of the right to that property – for it would only entail the lack of the *absolute* or *total* right to that property – it seems that it would be impossible to acquire such a less-than-absolute right via the homestead principle. After all, “every man has an absolute right to the control and ownership of his own body, and to unused land resources that he finds and transforms” (Rothbard, 1998, p. 60).

Now it is important to note that at the same time Rothbard subscribes to the proportionality principle in the use of defensive force.<sup>4</sup> As he points out, “We have advanced the view that the criminal loses his rights to *the extent* that he deprives another of his rights: the theory of proportionality” (Rothbard, 1998, p. 85). The principle of proportionality in the use of defensive force applies both to attacks against self-ownership rights and invasions of private property rights. As explained by Rothbard (1998, p. 80), “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.”

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<sup>4</sup> It is worth noting that the Rothbardian proportionality requirement applies across the board, that is, both in self-defense and punishment. Specifically, for Rothbard the proportionality that applies to just punishment is derivable from the proportionality of self-defense as evidenced by his contention that “all rights of punishment derive from the victim's right of self-defense” (Rothbard, 1998, p. 90). And the proportionality of self-defense seems to be a corollary of the Rothbardian claim that the criminal loses his rights “to the same extent as he has taken away” from his victim.

The thus understood proportionality principle also determines that if the use of the defensive force exceeds the extent to which the offender forfeited his rights, then it becomes a violation of the offender's unforfeited rights. As Rothbard writes:

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 on 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.

(Rothbard, 1998, p. 77)

At the same time, it should be clear that regardless of where exactly lies the point at which the defender begins to infringe on the offender's rights or, what comes to the same thing, where exactly is the limit up to which the offender forfeits his rights, if defensive measures exceed this extent, they *ex hypothesi* become disproportionate and "itself constitute a criminal invasion."

Similar views are held by Stephan Kinsella, one of Rothbard's renowned followers. First, Kinsella believes that having a right ultimately comes to being able to legitimately defend it. Kinsella's position seems even more radical than Rothbard's, for in contradistinction to the latter, it does not deem having a right to the use of the defensive force as necessary for having an absolute right to private property, but rather as necessary for a having a right as such. As pointed out by Kinsella:

What would it mean to have a right? Whatever else rights might be, certainly it is the case that rights are legitimately enforceable; that is, one who is physically able to enforce his right may not be prevented from doing so. In short, having a right allows one to legitimately punish the violator of the right, or to legitimately use force to prevent another from violating the right.

(Kinsella, 1996, p. 317)

Second, Kinsella also subscribes to the proportionality principle. This is evidenced by the following citations. Thus, Kinsella (1999, p. 84) has it that a "right to use force can be utilized for a variety of purposes"; that is, among other things, "for self-defense during or before the act of aggression."

Moreover, he submits that “the aggressor is ‘estopped,’ or precluded, from denying the victim’s right to use (proportional) responsive force.” And, as we remember, what Kinsella’s doctrine of dialogical estoppel<sup>5</sup> infers from the invalidity of a denial of a given right is indeed its existence. This in turn conclusively establishes that Kinsella does believe in the “right to use (proportional) responsive force”. And, as in the case of Rothbard, establishing the fact that Kinsella does subscribe to some proportionality standard is sufficient for our purposes, for our forthcoming argument makes no use of any substantive reading of the proportionality requirement. It is enough to point out that if the defensive force exceeds the proportionality standard – whatever it is for Kinsella or otherwise – then it becomes *ex hypothesi* disproportionate.

Additionally, the connection between a right in a scarce resource and a right to defend it surfaces in Walter Block’s writings (2010, 2011a, 2011b, 2019a). For example, in this exposition of evictionism, Block (2011a) submits that “[i]n libertarian law, the property owner is entitled to remove the trespasser in the gentlest manner possible; if this necessitates the death of the trespasser, the owner of the land is still justified in upholding the entailed property rights.” Although Block indeed invokes a different principle constraining legitimate self-defense (i.e. *gentleness* rather than the Rothbardian *proportionality* requirement), it is incontrovertible that Block also subscribes to the proportionality principle as far as the libertarian theory of punishment is concerned. Even more, Block seems to recognize *proportionality* – with minor adjustments to the standard aside – as a more or less universal feature of the libertarian punishment theory, which is evidenced in the following quote:

Libertarian punishment theory is predicated on the notion that the punishment should be proportionate to the crime. Specifically, this translates into the formula that whatever the miscreant does to his victim is done to him, only twice over. Sometimes called “two teeth for a tooth” theory.

(Block, 2003, pp. 79–77)

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<sup>5</sup> For Kinsella’s elaboration on and application of the doctrine of estoppel, see e.g. Kinsella, 1992, 1996, 1997.

However, as we will see in the fourth section below, the fact that Block subscribes to the gentleness principle in self-defense and to the proportionality standard in punishment will have a bearing on the coherence of Block's account of rights.

### 3. The Property Defense Dilemma

In order to see why the above views do not square well when held together by particular authors, let us first consider the Rothbardian variation of the dilemma that ensues when the proportionality principle is juxtaposed with the view that to have a right to private property is to have a right to defend it. As we remember, Rothbard claims that the homesteading of an unowned resource vests its appropriator with an absolute right to the resource. In turn, by the concept of absolute right to private property Rothbard understands a right that is accompanied by a right to defend this private property against attack or invasion. At the same time, Rothbard subscribes to the proportionality principle, according to which the defender has a right to use defensive force only to the extent to which the offender forfeited his rights by invading the rights of another.

Having reminded ourselves of these facts, suppose that *A* homesteaded an unowned resource *x*, acquiring thereby an absolute property right to *x*. Assume further that *B* is now on a course of attacking *x* and that *A* can successfully defend *x* against *B*'s attack. However, the only means by which *A* can defend *x* against *B*'s attack is disproportionate *vis-à-vis* the severity of the attack. In other words, the extent to which *B* forfeited his rights by attacking *x* (let's call this extent  $e_1$ ) is much smaller than the extent to which *A*'s use of force would violate *B*'s rights, had *B* abstained from attacking *x* (let's call it  $e_2$ ). Now since the difference between  $e_2$  and  $e_1$  signifies the extent to which *A* violates *B*'s rights by defending *x*, then by virtue of the proportionality principle *A* does not have a right to defend *x*. But by virtue of the homestead principle *A* has an absolute right to *x*, that is, a right that comes with a right to defend *x*. This, however, seems contradictory.

To spell out Rothbard's dilemma even more clearly, consider the following reasoning:

- (1) *A* has an absolute right to *x*. [by virtue of the homestead principle]
- (2) *A* has a right to defend *x*. [by virtue of the concept of absolute rights]



- (3) But, if A's defending  $x$  is disproportionate, then A has no right to defend  $x$ . [by virtue of the proportionality principle]
- (4) Defending  $x$  is disproportionate.
- (5) Therefore, A has no right to defend  $x$ .

However, this results in a dilemma – the Property Defense Dilemma or PDD, as we call it – for (5) clearly contradicts (2).

Now one way of solving PDD is to jettison (3), that is, the proportionality principle as applied to the use of defensive force. As we will see in the next section, Walter Block tries this tack by subscribing to the gentleness principle. Yet, as we argue below, this move has its own problems and appears disfavored by Rothbard himself, as demonstrated by his analysis of the bubble gum theft (see next paragraph). Another strategy is to reject (1), that is, the idea that homesteading vests the original appropriator with the absolute right to the homesteaded resource. Promising as it undoubtedly is, this move would not work across the board, for apparently it would not preclude similar dilemmas from besetting rights other than those acquired via homesteading, for example, self-ownership rights. Moreover, as we will shortly see, it would not work smoothly in the case of accounts, such as Kinsella's, which suggest that a right to a defensive force accompanies any right whatsoever, not only absolute rights. It therefore seems that the best strategy is to reject (2), that is, the idea that to have an absolute right is to have a right to defend it, a view that is independently problematic.

Interestingly enough, it is Rothbard himself who suggests exactly this sort of solution. In *The Ethics of Liberty*, specifically in the chapter devoted to the question of self-defense, Rothbard considers a case of bubble gum theft. An urchin enters a shop and steals a piece of bubble gum. Rothbard investigates the question of whether the storekeeper has a right to kill the urchin. About the affirmative answer to this question Rothbard concludes the following:

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?...



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.

(Rothbard, 1998, pp. 80–81)

Certainly, it is most natural to presume that Rothbard envisages the storekeeper as equipped with an absolute right to the bubble gum. After all, the storekeeper's right reduces back to the original appropriation of the factors of production that contribute to the manufacture of the bubble gum. But then, what if the *only* way to prevent the urchin from stealing the bubble gum is by killing him? Would this sort of defense of one's property also not suffer from "a grotesque lack of proportion?" Obviously, killing the lad would constitute a grossly disproportionate means of defending the bubble gum. After all, Rothbard's theory predicts that the thief could not forfeit as much as his right not to be killed by violating the owner's petty property right to the bubble gum. Hence, killing him would most clearly fail to meet Rothbard's proportionality requirement. However, if, *ex exemplo*, the only way in which the storekeeper can prevent the theft is the *disproportionate* – and hence right-violative – use of force, then the owner may not permissibly defend his bubble gum under the specified circumstances. And yet, by assumption, the storekeeper holds an absolute right in his bubble gum. Therefore, at first glance, something has to give. And as suggested by Rothbard himself, it is the idea that having an absolute right to property amounts to having a right to defend it that has to give, unless one wants to suffer from "a grotesque lack of proportion."

It is worth noting that on Kinsellian grounds PDD arises even more easily, for it takes fewer assumptions. The reason for this is that, according to Kinsella, a right to defend property *x* is conceptually tied to having a property right in *x* in the first place. Hence, for PDD to get off the ground within the conceptual framework adopted by Kinsella, we do not need to stipulate an act of homesteading vesting an original appropriator with an absolute rather than less-than-absolute right in a resource in question. Instead, what we need to postulate is that person *A* simply holds *a right* to property *x*.

Now, suppose person *B* is on course to attack *x*. Imagine further that there is a set of successful ways for *A* to defend *x*, namely  $S_1:\{h_1, h_2, h_3\}$ . However, by assumption, all of the successful ways are disproportionate. This very fact would *not* render *B* estopped from claiming that the employment of such means is wrong. However, this, in turn, would imply that *A* does not have a right to respond to initial violence with such disproportionate means. Yet, as we remember, for Kinsella, to have a right in property *x* implies the right to defend *x*. Given this entailment, we must conclude, by contraposition, that *not* to have a right to defend a resource *x* is not to have a right in *x at all*. However, besides being independently problematic, this is clearly contradictory with our original assumption to the effect that *A* holds a right to property *x*.

Now, to appreciate even better why PDD ensues for Kinsella, consider the following reasoning:

- (1) *A* has a right to *x* [by assumption].
- (2) *A* has a right to defend *x* [follows analytically from (1)].
- (3) But, if *A*'s defending *x* is disproportionate, then *A* has no right to defend *x*. [by virtue of the proportionality principle].
- (4) Defending *x* is disproportionate.
- (5) Therefore, *A* has no right to defend *x*.

This again gives rise to PDD, for (5) clearly contradicts (2).

Now again, to avoid the ensuing contradiction, we would be forced to jettison one of the argument's premises. Surely, (4) cannot be denied since it is just an assumption allowing PDD to get off the ground. Therefore, at first, one might be tempted to deny (3). However, the proportionality standard adopted by Kinsella is a pretty plausible proposition in its own right. Kinsella derives his proportionality requirement from his doctrine of dialogical estoppel. Whatever the merits of estoppel, when applied to legitimate defensive measures, the doctrine in question seems to yield a conclusion with quite an intuitive appeal. For, it predicts that the offender would *not* be estopped from complaining about the use of excessive force by the defender. Positively speaking, the offender would have a valid complaint if the defender inflicted disproportionate harm. And since *estoppel* serves to infer the existence or non-existence of rights from the validity or invalidity of a complaint, respectively, we end up with the conclusion that the offender holds a right not to be harmed disproportionately.

Another solution is to jettison premise (1). This move would indeed block the ensuing contradiction. However, this strategy would be undesirable on two counts. First, the adoption of such a solution would imply that a person's right in  $x$  is extinguished once the person cannot defend  $x$  proportionately, which would effectively render the existence of rights or their exercise contingent on the occurrence of special circumstances, the ones under which a resource  $x$  cannot be defended proportionately. Given this, it is much more plausible to reject premise (2), that is, to revise the concept of *a right* so that a right in  $x$  would no longer necessitate the existence of a concomitant right to defend  $x$ . Such a solution would enable us to get rid of the contradiction in a less costly manner, for, instead of denying the existence of a right, we would only have to attenuate its force. Moreover, as we are about to see, it is jettisoning (2) that would work elegantly both in the Rothbardian and the Kinsellian version of PDD.

#### **4. Property Defense and the Gentleness Principle**

As mentioned before, Block envisages constraints on legitimate self-defense as stemming from a principle which is different from Rothbard's proportionality requirement. Actually, Block embraces the so-called gentleness principle. Block illustrates the principle in question as follows:

[I]f A sees B stepping on his lawn, as a first step A may not blow B away with a bazooka. Rather, A must notify B of his trespass, and if B immediately ceases and desists, perhaps even with an apology thrown in, that is the end of the matter. It is only if B turns surly, hostile and aggressive, and refuses to budge, that A may properly escalate. Not, immediately, to the bazooka stage, but a threat to call the police would not be considered at all inappropriate; even a physical push would not be untoward. If B at this point initiates physical aggression against A, say by pushing him back, throwing a punch at him, or pulling a gun or knife on him, then all bets are off, and A may appropriately escalate the violence sufficiently to protect himself and his property from invasion. That is the sum and sole element of "gentleness" in libertarianism.

(Block, 2011b, p. 5)

In other words, the defender of a property right in question is obligated to resort to the possibly mildest means of defense out of all the means available.

If, conversely, the defender defends his rights by excessive means, it is he that starts behaving impermissibly. Note that Block's gentleness principle makes a different prediction as to legitimate defense from Rothbard's proportionality requirement. The critical difference is that Block's gentleness principle implies that there are always, that is, regardless of circumstances, means of permissible defense, provided there are some means of defense in the first place. To wit, specify all available means of defense and pick up the mildest and the latter is guaranteed to constitute a permissible way of defending one's rights. By contrast, as we saw, Rothbard's proportionality requirement predicts that there are situations wherein one does not have a right to defend one's property simply because there are no *proportionate* means to defend it available. To summarize, Block would allow for even grossly disproportionate self-defensive force providing the force still constitutes the mildest defensive means available, whereas Rothbard would ban the employment of disproportionate force even if the force in question counted as the mildest defensive means.

Having thus marked the differences in the predictive power between the Rothbardian and the Blockian account of defense, it is time to probe the question of whether the latter's theory fares any better than the former's. First of all, we should test whether Block's gentleness principle coupled with his commitment to the view that to have a right to property is to have a right to defend it is vulnerable to the same objection as Rothbard's account, that is, whether it entails PDD. At first glance, it appears as though Block – unlike Rothbard – does not run into the contradiction. That is, it seems that Block can consistently hold his view about rights and maintain his gentleness standard in property defense. For, on the face of it, it looks plausible that once a right in property  $x$  is granted, it must inevitably be accompanied by a right to defend  $x$ . After all, however scant and inadequate means of defense might happen to be at the defender's disposal, there is always the gentlest one among them and that is the one the defender seems to have a right to employ. Generally speaking, as long as there are *any* defensive means available to a defender, the defender equipped with a property right in  $x$  unproblematically enjoys a concomitant right to defend  $x$ . Therefore, it seems that Block's account avoids the above contradiction.

However, it should be obvious that Block's gentleness principle, if unsupported by the principle of proportionality, leads to morally

counterintuitive predictions. To prove that, let us consider what Block's gentleness standard predicts in the above-adduced scenario of the bubble gum thief. And again, for the sake of argument, assume that killing the thief is the *only* means of defending the bubble gum. Now, what follows trivially from the fact that killing the urchin constitutes the only defensive recourse is that killing him is also *the gentlest* defensive means. But remember, in Block's account of self-defense, the defender is permitted to employ the gentlest defensive measures. Consequently, in the scenario under consideration, the Blockian theory predicts that the storekeeper is permitted to kill the urchin. Still, the moral verdict reached on Block's grounds is most definitely implausible. After all, it is hard to deny that killing the bubble gum thief suffers from "a grotesque lack of proportion." And we contend that since this implication of the Blockian theory of legitimate self-defense is highly unpalatable, this in itself casts doubt on the gentleness principle. Moreover, if we analyze Block's aforementioned thought experiment involving *B*'s stepping on *A*'s lawn, we can see that it might be the case that probably even Block himself is not ready to bite the bullet and conclude that ultimately *A* may blow *B* away with the bazooka. After all, Block considers successively more severe means aimed at defending *A*'s property right in the lawn. Specifically, Block suggests that *A* ought to start with relatively mild defensive measures employed against *B* such as notifying "B of his trespass" and only then to proceed with "a threat to call the police". But why the need to gradually escalate the severity of defensive means? If Block sincerely believes in his gentleness principle, then it is a matter of fact that in his imaginary scenario nothing less than a bazooka would do for the purpose of property defense. But if so, then blowing *B* away with the bazooka would be *justified* in the first place.

Granted, it might, of course, be the case that *A* does not know that blowing *B* away with the bazooka is objectively justified. Still, whatever mental state motivated *A* to shoot *B* with the bazooka, shooting *B* would amount to the gentlest means of defending *A*'s property and so to a justified action.<sup>6</sup> Certainly, Block might reply that it is precisely because *A* does not know which is the gentlest defensive measure against *B* that *A* does not use the bazooka, lest blowing *B* away with the bazooka turns out unjustified

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<sup>6</sup> For an elaboration of the fascinating problem of unknowingly justified actors, see e.g. Robinson, 1997; Alexander, 2004.

on the grounds that there were less drastic means available that might have served *A* equally well. However, *A*'s ignorance aside, the gentleness principle eventually does predict that if the use of bazooka were the gentlest means of enforcing *A*'s property right in the lawn, *A* may indeed blow *B* away with the bazooka. We submit that this is the most morally implausible conclusion and as such it constitutes a decisive reason to reject either Block's standard of property defense or to attenuate his uncompromising commitment to the view that to have a private property right is to have a right to defend it. It is important to note, however, that this implausibility of Block's position is still arrived at by way of a highly charitable interpretation of his gentleness principle and that it would have been even bigger had we read this author less generously. For, it seems that Block's illustration of the escalating severity of defensive measures fails to make good on the *ceteris paribus* clause. That is, if the trespasser were to simply stay on *B*'s lawn, then Block could indeed make his point of testing what are the truly mildest means of enforcing *A*'s property right in the lawn. And it may well turn out that in the face of *A*'s firmly standing on *B*'s lawn it is as much as the employment of the bazooka that is the mildest means of enforcing *B*'s property right. Then, we submit, it would be extremely difficult to swallow such a conclusion – even for Block himself, as is evidenced by the fact that his thought experiment introduces consecutive and increasingly violent reactions on the part of the trespasser in order to finally justify the use of the bazooka. To wit, there is a point at which *B* “initiates physical aggression against *A*”. *B* pushes *A* and finally even pulls a knife on him. But if so, then *A*'s employing the bazooka as a defensive resource is not only the mildest but perhaps even proportionate means – which it would most definitely not have been had *B* simply stayed on the lawn. Therefore, for Block's thought experiment to illustrate the plausibility of the gentleness standard, the disproportionality of defensive measures should be held equal. Otherwise, as his imaginary scenario actually unfolds, it might be the case that we would be ready to grant the permissibility of using the bazooka but not because this means is the mildest but rather because it is simply proportionate.

Our last objection against Block's theory of property defense is that it does not cohere with his account of punishment. As far as punishment is concerned, Block (2019b) holds on to proportionality standard in the form of “two teeth for a tooth”, with minor qualifications aside. To highlight how



grossly Block's account of self-defense and of punishment diverge, let us demonstrate what the former would counsel in a slightly modified bubble gum scenario. Suppose that, unbeknownst to the storekeeper, the urchin has succeeded in stealing the bubble gum. This stipulation is designed to rule out the self-defense-related considerations so that the only question arising now is what the storekeeper may exact from the victim in the form of punishment. Roughly speaking, Block's proportionality standard in punishment predicts that in the scenario in question, the storekeeper is entitled to two things: (1) to a restitution, that is to one piece of bubble gum, which would effectively render the storekeeper as well off as if no crime had been committed at all and (2) to *purely* punitive measures, that is, the offender may "be served in the manner he applied" to the victim. (Block, 2019b, p. 104) In other words, when applied to our present scenario, condition (2) predicts that the storekeeper may deprive the thief of about as much as another piece of bubble gum. After all, *purely* punitive measures reduce to depriving the offender of such a right that he himself took from his victim.

But now, note that the constraints Block imposes on legitimate self-defense are entirely different, for there are no upper limits to legitimate self-defense at all. Any gross disproportionality of defensive means as compared to the harm suffered will do as long as the said means are the mildest. Yet, how can such a disparity of the two standards be justified? After all, Block holds that for punishment to be legitimate it may not exceed the limit determined by the extent to which the urchin forfeited his rights. Hence, in our variation on the original Rothbardian thought experiment (i.e. in which the thief absconds with the bubble gum), the prediction is that the storekeeper may roughly exact two pieces of bubble gum from the urchin. On the other hand, Block's gentleness standard would allow for grossly disproportionate *defensive* measures. Remember, Block's theory of self-defense would unreservedly grant the storekeeper permission to shoot the urchin under the circumstances envisaged. However, such defensive means go way beyond what the urchin apparently forfeited. Given this, how can shooting the urchin in the defense of the bubble gum not violate his unforfeited rights? Unfortunately, Block does not offer any explanation. Hence, we are warranted in concluding that his adherence to these two divergent standards remains unprincipled and thus problematic.



## 5. Absolute Rights

Having elaborated on how PDD ensues on both Rothbardian and Kinsellian grounds and having cast doubts on the Blockian gentleness principle as incoherent with the otherwise plausible proportionality standard that this author endorses in punishment, it is time to put forward an escape route from PDD. To this end, we should more or less freely avail ourselves of the exquisite conceptual framework originally put forward by Matthew H. Kramer (2014, pp. 2–11).

Crucially, Kramer (2014, p. 9) distinguishes between *strongly* and *weakly* absolute rights.<sup>7</sup> The former kind of right he characterizes as such that “it is not only binding at all times in all places in all possible worlds” as a weakly absolute right would also be, but also as one that is “always of greater normative importance than any possible countervailing” rights. In other words, a strongly absolute right is such that it not only overtops any countervailing rights or moral considerations in the actual world but also it overtops any reasons to infringe the right in question in any merely possible world.

On the other hand, according to Kramer, a weakly absolute right is also “binding everywhere and always in all possible worlds.” That is, it exerts, *qua* right, its normative pressure even in the presence of some possible countervailing moral requirements. However, since a right in question is only weakly absolute, this means that there are possible worlds in which “competing moral requirements are more stringent” than the weakly absolute right. And if so, then respecting such a right “would not even be weakly justified” (Kramer, 2014, p. 9). Still in other words, according to Kramer, what it means for a right to be weakly absolute is not that it is extinguished, or that it ceases to be binding, in the face of overtoppingly competing moral considerations. Quite the contrary, a weakly absolute right is binding even under such circumstances. It is binding in the sense that infringing upon such a right still triggers corresponding duties for remedial actions.<sup>8</sup> In conclusion then, even though, in the presence of overtopping duties, the compliance

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<sup>7</sup> In all fairness, Kramer talks here of a strongly absolute moral prohibition instead of a strongly absolute right. However, we took the liberty to apply his vernacular to the problem at hand, which is libertarian rights.

<sup>8</sup> For an excellent illumination of the problem of the violation of overtopped moral prohibitions as still giving rise to remedial actions, see Kramer, 2005.

with a weakly absolute right might not amount to a morally optimal course of action, infringing upon such a right is still morally impermissible (although morally optimal) and thus calls for remedial actions, such as, say, restitution to the victim.

Now, how does the adduced framework bear on PDD as pertaining to the aforementioned libertarian authors? Let us start with the Rothbardian version of the dilemma. As we remember, premise (1) granted for the sake of argument that *A* has an absolute right to *x*. At this point, we should test what would be implied were the absolute right in question to be strongly rather than weakly absolute. Were it to be so, this would imply that such a right could be overtopped in its moral stringency. Then, if the moral right in question were to be construed as always and everywhere overtopping any competing moral requirements, it would necessarily count for more than any other moral consideration. Specifically and as far as the Rothbardian bubble gum scenario is concerned, were the storekeeper's right in the bubble gum to be genuinely strongly absolute, then the fact that the only defensive measures available to the storekeeper would be disproportionate cannot constitute a conclusive moral reason not to employ them. For, if the said lack of proportionality were to overtop the property right in the bubble gum itself, this would mean that we end up with *two* overtopping moral considerations, a sheer logical impossibility. Therefore, given the assumption of the strongly absolute property right in the bubble gum, even the fact that the only defensive means available to the victim are disproportionate cannot disallow the property defense. However, this is precisely why there is a dilemma in the first place. A strongly absolute right seems to render its defense unproblematically permissible and yet there is a plausible requirement of proportionality pulling in the opposite direction. And it is the adherence to the proportionality standard which makes Rothbard conclude that killing the bubble thief would suffer from a "grotesque lack of proportion." Therefore, it is only an alternative construal of the right in the bubble gum that can at the same time satisfy the Rothbardian proportionality requirement. We submit that once we conceive of the right in the bubble gum as only weakly absolute, then PDD is solved. Remember, if the right is only weakly absolute, there are (even if merely possible) such moral reasons that overtop the right in question. And, we believe, we are dealing with precisely such overtopping moral requirements in the bubble gum scenario itself. That is, what clearly constitutes a morally optimal course of action is to let

the bubble gum thief go and subsequently claim restitution. Such a solution fits perfectly with the posited weakly absolute character of the property right in the bubble gum. Namely, the storekeeper's right in the bubble gum is not extinguished because there are no proportionate means of defending it available. Quite the contrary, the right in question still exerts its normative pressure in the sense that it triggers a second-order duty of compensation (and possibly even punishment) once it is violated. All in all, it seems that it is the denial of premise (2) that solves PDD. Positively speaking, we suggest that an absolute right in property  $x$  does not necessarily come accompanied with a concomitant right to defend  $x$ , something which the Kramerian notion of weakly absolute rights captures perfectly well. Concluding, the rejection of premise (2) would indeed block that dilemma as it would follow that the storekeeper may not shoot the thief. And yet, this fact would not threaten his absolute right at all, for he would still have recourse to the law in the form of claiming restitution.

One more merit of this way to solve the dilemma, i.e. denying premise (2) rather than premise (1), is that it simultaneously works well against the Kinsellian version of PDD. Remember, according to Kinsella, it is a conceptual truth that a right to property  $x$  implies a right to defend  $x$ . That is, a corollary of the Kinsellian view on rights is that once a person does not have a right to defend  $x$ , he cannot have a property right in  $x$  either. However, we already *independently* argued for such an *absolute* right in property  $x$  (i.e. weakly absolute one) that does not necessarily come with a right to defend  $x$ . And since there are even *absolute* property rights that are not accompanied with a right to defend property in question, then *a fortiori* there are rights in property  $x$  that do not imply rights to defend  $x$ . Hence, it appears that Kinsella himself has a reason to accordingly revise his concept of a right so that it should no longer entail a right to defend the property.

Now, how could the above solution remedy the problems inhering in Block's account of self-defense? As we remember, Block's gentleness principle yields morally implausible verdicts. That is, it predicts that even though defensive measures may turn out to be grossly disproportionate, they would still be permissible as long as they count as the mildest ones. And, as we saw in the bubble gum scenario, Block's theory of legitimate self-defense leads to the conclusion that shooting the urchin is permissible since this act constitutes the mildest defensive means available, something

which pretty much reduces Block's position to absurdity. And yet, we submit that the attenuation of the absoluteness of rights would work for Block equally well as it does for Rothbard and Kinsella. Namely, instead of presuming that there are rights to property that are necessarily accompanied by a right to defend it, it is better to assume that a right in property  $x$  has weaker remedies attached to it. That is, it is not the case that the right holder is permitted to defend his property come what may. Rather, as the bubble gum scenario demonstrates, there are circumstances in which not even remotely proportionate defense is available and the gentleness standard seems to yield morally unacceptable conclusions. But this does not mean that we should give up the right talk altogether. Rather, it is the right to defend the property that should give way then. However, giving up on this right would not force Block to invalidate the assumption of having a property right in the bubble gum in the first place. Quite the contrary, a storekeeper would keep his right to the bubble gum but with a different remedy necessarily attached to it. That is, although the storekeeper would not be permitted to shoot the urchin in defense of his property, the former may still let the urchin go and then claim restitution coupled with the application of appropriate punitive measures. To use the Kramerian vernacular, the reason for this attenuation of a property right in the bubble gum is that the duty not to use disproportionate force incumbent on the storekeeper *overtops* the property right in question. Still in other words, the said duty is deontically more stringent than the storekeeper's property right. However, and crucially, this fact does not mean that the storekeeper's right is overridden, extinguished and has all the way been nonexistent. After all, as illuminated by Kramer (2014, p. 10), there is the world of a difference between overtopped rights and overridden ones. The latter are such that they cease "to be operative" once they come in conflict with more stringent moral requirements. Therefore, "overriding involves cancellation or supersession or suspension" of a less pressing right. None of that applies to overtopped rights or duties. As Kramer has it, "[a]n overtopped moral obligation is not cancelled or superseded or suspended by the overtoppingly stringent moral obligation(s) with which it conflicts; rather, it retains its full force as such." To put it another way, when a given right is overtopped, this fact does not imply that the right in question ceases to exist. Even if our behavior is in compliance with the overtopping right, the failure to respect the overtopped right still renders our overall conduct

weakly impermissible, which clearly shows that overtopped rights – unlike overridden ones – retain their normative weight even in the presence of more pressing moral requirements.

The very same point might be expressed using the more familiar language of *prima facie* duties (remember that duties are correlates of rights<sup>9</sup>). An overridden duty would be a merely *prima facie* duty, that is such that *only* appears to be one. However, when all things are considered, a duty in question transpires to be no duty at all. In other words, when all the relevant information is taken into account, an alleged duty would turn out not to be binding. Rather, it would reduce to mere appearance. By contrast, overtopped duties are genuine duties. Although acting in compliance with them would not amount to a morally optimal course of action, breaching them would still be (weakly) impermissible. Given this, it is no surprise that when over- topped duties are breached, corresponding right holders are still entitled to, for example, restitution.

Now, coming back to the bubble gum scenario, we submit that the storekeeper's property right – even though overtopped by a duty not to shoot the urchin – still exerts its normative pressure. After all, it is due to this pressure that the storekeeper is now at the very least entitled to restitution. Concluding, it seems that the attenuation of the absoluteness of rights in property *x* would be the happiest result for Block's theory of self-defense. Most importantly, he would avoid running into a morally implausible verdict in cases under which only grossly disproportionate defensive measures are available. Second, he would not have to deny that the defender held a right in property *x* in the first place. Rather, he would have to *only* concede that the right in question may be now less strongly enforced.

## 6. Conclusions

In the present paper we argued that the view – held by prominent libertarians including Murray Rothbard, Walter Block or Stephan Kinsella – according to which to have a right to private property is to have a right to defend it entails, when coupled with the principle of proportionality, a dilemma consisting in the fact that if the only way to defend such a property is to defend it disproportionately, then, contrary to what this view requires, the private property

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<sup>9</sup> On the correlativity of rights and duties see e.g. Hohfeld, 1913; Kramer, 2002.

right in question is not accompanied by a right to defend it. We suggested that the most plausible way to avoid this dilemma is to attenuate the stringency of private property rights so as to conceive of these rights as only *weakly* absolute. This maneuver by no means implies that the property rights in question have been merely *prima facie* all the way down, a conclusion that no libertarian thinker would ever accept. Quite the contrary, such weakly absolute rights exert their moral force at all times and in all places. However, if it happens to be the case that they become overtopped by duties stemming from the principle of proportionality, their moral force simply does not reach up to the level of having a right to defend them. Remedies that accompany these rights are of a different sort.

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