

SUBSTANTIAL IDENTITY AND THE RIGHT TO LIFE: A REJOINDER TO DEAN STRETTON

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ABSTRACT

In this article, I reply to criticisms of Dean Stretton of the pro-life argument from substantial identity. When the criterion for the right to life proposed by most proponents of the pro-life position is rightly understood – being a person, a distinct substance of a rational nature – this position does not lead to the difficulties Stretton claims it does.

In various places I have argued that you and I have a right to life in virtue of what we are, and therefore we had a right to life at all times we existed. Since what we are are physical organisms (for which I have argued also), and human organisms come to be at conception (as most embryology texts attest, and for which I have argued as well), it follows that we once were human embryos and fetuses, that we had a right to life from conception onward, and that all human embryos and fetuses have a right to life.

In an article in *Bioethics* in 2004, I defended against criticisms the argument cited in the last paragraph. In that same issue, Dean Stretton replied to my article.¹ Here I will first reply to Stretton's arguments for his position and then reply to his attempted rebuttals of my arguments, showing that his main arguments stem from confusing a type of

substance with its basic capacities, viewed as inhering characteristics.

The first two arguments Stretton advances for his view logically depend on the rebuttals of my arguments. He first points out that most of the properties we have are accidental, and so, *since the arguments for the position that they are substantial fail* (he claims), then the property that confers a right to life probably also is accidental.² But I will show that his rebuttals to my arguments do not succeed, and so this argument by generalization is mistaken.

His second argument is that in no other case does having a natural capacity, instead of a developed one, entitle one to a significant level of respect. So, 'generalising from this background knowledge, we do not owe to beings, in virtue of their natural capacities (or any other essential property), any substantial type or level of respect.'³ But, first, there clearly are cases (other than the right to life) where natural capacities ground rights. For example, the bare ability to develop an immediately exercisable

¹ Patrick Lee. The Pro-Life Argument from Substantial Identity: A Defence. *Bioethics* 2004; 18(3): 249–263. Dean Stretton. Essential Properties and the Right to Life: A Response to Lee. *Bioethics* 2004; 18(3): 264–282. Also see Patrick Lee. 1996. *Abortion and Unborn Human Life*. Washington, D.C: Catholic University of America Press; Dean Stretton. The Argument from Intrinsic Value: A Critique. *Bioethics* 2000; 14(3): 228–239.

² Ibid: Stretton, 274–275.

³ Ibid: 275.

capacity to learn *does* give a child a right to instruction. And the basis for the immorality of the practice in some cultures of female genital mutilation of infants is not the developed sexual capacity, but the basic natural capacity for sexual acts.

Moreover, even if most rights and entitlements *were* based on developed capacities, the generalization would be hasty. The question of a right to life is about whether a being has basic rights *at all*, not a right or entitlement to a specific action. So, generalizing from rights of one kind to what should be true of such a unique right is fallacious.

Stretton's third argument appeals to supposed 'wide-spread' intuitions. 'Most of us believe intuitively that anencephalic infants and irreversibly comatose patients lack a full right to life.'⁴ The support for this intuition, says Stretton, is that killing such beings does not harm them, 'because it neither frustrates their desires (they have none) nor deprives them of valuable future life (merely of valueless life as a vegetable).' And yet, he says, the anencephalic human infant and the irreversibly comatose, *could have* developed normally (or remained normal) and then possessed a full right to life. Thus, Stretton concludes, the right to life is an accidental property. However, many people have intuitions contrary to Stretton's, as is obvious from the fact that these acts are illegal in both the United States and Australia. I submit that anencephalic infants and irreversibly comatose human beings *do* have a right to life, and so his argument does not go through.

The rationale Stretton proposes to support the alleged intuition also fails. There are counterexamples to the view that rights depend on (conscious) desires: children have rights to an education and to vitamins even though they may desire neither.⁵ Moreover, basing rights on desires in general is problematic since a desire is justified or reasonable because it bears on an object worthy to be desired, rather than *vice versa*.

Stretton also argues that brain-dead individuals lack a right to life but in some cases are surviving as human organisms (a point I did not see in my 1996

book on abortion, as Stretton points out). But if brain death is not always the death of the human being – which I think Alan Shewmon's work has shown⁶ – then the conclusion to be drawn is, not that some human beings (brain dead ones) lack a right to life, but that some brain dead individuals are still human beings and therefore have a right to life.

In his fourth argument, Stretton attempts to reprise his claim made in an earlier article that, theoretically at least, one could transplant a human cerebrum into a hitherto non-rational being, and this organism would become capable of conceptual thought and therefore then have a right to life. This shows, said Stretton, that the same organism may at one time lack a right to life (before the transplant) but at a later time possess a right to life (after the transplant), and so the right to life is an accidental property. I replied that if such a transplant were possible it would generate a new substance – it would produce a rational animal, a distinct type of substance, not merely the same organism with an additional capacity.⁷

To this, Stretton replies that I am assuming that after the transplant the animal with the newly acquired cerebrum would have a *natural capacity* for conceptual thought and free choice. Rather, he says, 'for all Lee has shown, the higher mental functions of the creature after the transplant could arise from an *unnatural* capacity for such functions.'⁸ Moreover, since its genetic code has not changed, the capacity would indeed be unnatural. And just as the transplant of a liver does not generate a new organism, neither would the transplant of a cerebrum. Stretton concludes that the change would be accidental and the right to life acquired also accidental.⁹

True, a material organism's genetic structure is *normally* a sufficient indication of its natural capacities. But the proposed thought-experiment is far from a normal situation. Here, after the transplant, the animal *itself* would perform actions of

⁴ Ibid: 276.

⁵ Michael Tooley. 1983. *Abortion and Infanticide*. New York: Oxford University Press: 117. Lee 1996, *op. cit.* note 1, ch. 1.

⁶ For example, D. Alan Shewmon. The Brain and Somatic Integration: Insights into the Standard Biological Rationale for Equating 'Brain Death' with Death. *J Med Philos* 2001; 26: 457–478.

⁷ Lee, 2004, *op. cit.* note 1, pp. 255–256.

⁸ Ibid: Stretton, 279.

⁹ Ibid: Stretton, 279.

conceptual thought and free choice. But if *he or she* performs these actions – rather than these actions simply occurring in it, from an external agent – then the new structure of this agent would have to be such as to be capable of these actions. Hence despite the genetic structure of most of this organism's cells, the subject of the action, the intelligible source of the action, would be the agent herself, and so these actions would be *natural* to this new being.

Even in the natural world the combination of smaller constituents regularly produces new substances, and the evidence for this is the emergence of new types of actions. But conceptual thought and free choice are new types of actions, and so the fusion of the organs of the original organism and the new cerebrum would generate a new being, a new substance.¹⁰ Moreover, Stretton ignores the traditional Aristotelian point that conceptual thought and free choice cannot be simply added onto a being's repertoire of performances, but change this being's whole way of life. Being rational, as Aristotle insisted, is a specific and distinctive way of being an animal. So the addition – whether through a cerebrum transplant or through some miracle – of the capacities for conceptual thought and free choice, would generate a new type of animal.

Finally, Stretton's last argument to support his position borrows an imaginative scenario from Jeff McMahan:

Suppose puppies, by a fluke of evolution, possess a latent brain mechanism that allows them to become rational and self-conscious. To activate the mechanism, they must be subjected to years of 'cognitive therapy': an intensive learning regime occupying virtually every waking hour of the dog's life.¹¹

This event would produce two groups of dogs: those with the latent mechanism but without the cognitive therapy and those who had undergone the therapy. Stretton again appeals to an intuition: 'Intuitively, the discovery that dogs have this latent

mechanism would not lead us to conclude that they all have a right to life.'¹²

There are three problems with this argument. First, the conceptual possibility of the scenario supposes that the capacity for rationality and self-consciousness could simply arise through an evolutionary process. However, I hold (along with many others) that these capacities are such that they could *not* be produced by material forces working on their own, since such operations evidence an independence of matter (their objects – universals – are not restricted to a particular time and place).

Second, it is not plausible that an animal would have a latent capacity for rationality and self-consciousness but not manifest that capacity given a reasonably favorable environment. One piece of evidence that humans and other animals do differ in kind is that, even with apes, the amount of energy required to bring them up to the level of even a disputed possession of the rudiments of language is in stark contrast to the effortless manner in which human infants attain clear and undeniable syntactical speech.¹³

And the third problem with this argument is that even if one granted the possibility of the imagined scenario, it is not clear one should share Stretton's alleged intuition. If the dogs really did have a basic, natural capacity for conceptual thought and free choice, but (inexplicably) could actualize that capacity only through gargantuan efforts, why should this last fact determine whether or not they are intrinsically valuable as subjects of rights? In other words, partly because the scenario is so extraordinary, there is reason both to doubt what people's intuitions about it would be, and to disagree with their intuitions if they clashed with basic moral principles.

Let us now turn to Stretton's attempted rebuttals of my arguments. I had argued that if someone claimed that the right to life depends on an accidental attribute then that attribute cannot be an *actual behavior*, but must be a capacity of some sort. I distinguished between *developed* capacities and *natural* capacities. I then argued that defenders of abortion have no good reason for basing the right to

¹⁰ Or at least dispose toward the creation of a new substance by a higher power. See the penultimate paragraph of this article. Joel Wallman. 1992. *Aping Language*. New York: Cambridge University Press.

¹¹ Stretton, *op. cit.* note 1, p. 280. Jeff McMahan. 2002. *The Ethics of Killing: Problems at the Margins of Life*. New York: Oxford University Press: 24–25, 316.

¹² *Ibid.*

¹³ Wallman, *op. cit.* note 10.

life on *developed* capacities (immediately, or nearly immediately, exercisable) rather than on basic natural capacities (potentialities to develop in oneself immediately exercisable capacities).

One argument I briefly presented in 2004 in my *Bioethics* article was that only this position (that is, basing the right to life on the substantial nature of a being) can ground the evident truth that people in a (reversible) coma have a right to life.¹⁴ To this, Stretton replies that one could define developed capacities for mental functions in such a way that the reversibly comatose do possess them. One could say that a being had a developed capacity (for self-consciousness, etc., and so a right to life) if it had an immediately exercisable capacity, *or* if at some time *in the past* it had such a capacity *and* has not permanently lost it.¹⁵

It is true that such a criterion would allow one to attribute a right to life to reversibly comatose human beings. However, the criterion does not give an *account* of why the reversibly comatose have a right to life, but is an *ad hoc* move, tantamount merely to adding the reversibly comatose to the list of those one deems worthy of the right to life.

The proposed criterion is also arbitrary. Suppose baby Susan has developed a brain and nervous system, and gained sufficient experience so that, though she does not yet have the immediately exercisable capacity for conceptual thought, she will acquire it very soon. Why should she be in a wholly different category then, say, baby Mary, who is just like Susan except that in the past she *did* actually have the immediately exercisable capacity for conceptual thought? Attributing rights to Mary but not to Susan would clearly be arbitrary.

Stretton then argues that one could hold that the right to life arises, ‘not from a mere *capacity* for, but from *actually having*, certain complex mental states,’ in the sense that a being retains the appropriate neurological configurations in the brain.¹⁶ However, in comatose people the neurological configurations necessary for sustaining consciousness are *not* present – that is precisely why they are *unconscious*.

In a footnote Stretton notes that defenders of abortion have often noted that, ‘so-called “disposi-

tional” (as opposed to “occurrent”) mental states continue to exist while one is unconscious.’¹⁷ I see no problem in saying that the comatose have *dispositions* for mental acts, but then one should also say that a being who has the potentiality actively to develop in herself the organs (brain and nervous system) necessary for consciousness also will have a disposition for mental acts.

Finally, Stretton claims that the defender of abortion could hold that ‘the reversibly comatose have a right to life in virtue of having a certain kind of *future*,’ a future, he adds, to which they are psychologically connected.¹⁸ Stretton needs this last addition since without it most unborn human beings also would have a right to life. But why should that addition be made? If we are essentially human organisms, then most human beings from the moment they come to be have a future-like-ours.¹⁹ But that requirement is certainly not justified here, for we would not say that the comatose individual who will suffer complete amnesia after recovery (and so lack any psychological continuity with his earlier self) lacks a right to life.

I had also argued that the accidental attributes proposed as conferring a right to life come in degrees (whereas whether one has a human nature is not a matter of degree) so that, according to defenders of abortion the difference between those human beings who do and those who do not have a right to life will be merely a quantitative difference. But it is unjust to base a *radical* moral difference (a radical difference of treatment) on a mere difference in degree, while ignoring a radical, ontological difference. In addition, if an accidental attribute is required, the selection of a cut-off point for membership in the moral community will necessarily be arbitrary – whereas, basing the cut-off point on the *nature* of a being bases the right to life on a difference of kind. Finally, I argued that if persons had a right to life only because of accidental qualities, which vary in degrees, then basic rights would also

¹⁷ Ibid: Stretton, 267, note 10.

¹⁸ Ibid: Stretton, 268.

¹⁹ Don Marquis’s future-like-ours criterion (which does not have a psychological continuity requirement) does *not* fall under this criticism (namely, negating the reversibly comatose’s right to life). However, if having-a-future-like-ours is an accidental property, then it does face the other difficulties I have presented against accidental attributes criteria.

¹⁴ Lee, *op. cit.* note 1.

¹⁵ Ibid: Stretton, 267.

¹⁶ Ibid.

be possessed by human beings in varying degrees, a denial of equal basic rights.

Stretton contends that these arguments are self-defeating – that natural capacities, as well as developed capacities, come in degrees. Chimpanzees, as well as other animals, Stretton maintains, also have a natural capacity for higher mental functions – just to a less degree than normal human beings. And so, according to Stretton, my denial that these other animals have a right to life can only be because they have *less of a natural capacity for higher mental functions*. Moreover (claims Stretton) both the problem of arbitrariness, and the problem of basing a radical moral difference on a mere quantitative ontological difference, plague my criterion for the right to life just as much as any criterion based on an accidental attribute.

However, Stretton has misconstrued my argument and the criterion I (along with many others) propose for the right to life. I argued that defenders of abortion have no good reason to base the right to life on developed capacities for conceptual thought and free choice rather than on basic, natural capacities for such acts – capacities which are possessed by unborn, as well as more mature, human beings. However, the conclusion of my argument was not that the criterion for the right to life is natural capacities, but that it is, being a certain type of substance. I then proposed that the genuine criterion for having a right to life is *being a person*, that is, a distinct substance of a rational nature (the classic Boethian or Thomistic definition of ‘person’).²⁰

Stretton treats the natural capacity for higher mental functions as just another accidental attribute – as a property inhering in the thing (substance), as opposed to an expression of what the thing is. So it is not surprising that ‘the natural capacities view’ seems to raise the same problems as do other accidental characteristics proposed as conferring a right to life. However, in my 2004 *Bioethics* article I stressed that the criterion for the right to life is not a capacity which inheres in an entity, but ‘being a certain kind of thing, that is, having a specific type of substantial nature’.²¹ A *rational animal* (I said) is ‘a type of substance, and . . . being rational (having

the natural capacity for conceptual thought and free choice) is a specific difference, a feature expressing (in part) what the substance is instead of an accidental characteristic.’²²

If the right to life is based on being a certain type of substance, having a certain substantial nature, then just having such a substantial nature will qualify one as having full moral worth and a right to life. To be sure, persons (substances with a rational nature) are not all equal – some are more intelligent or morally better than others. But if having a right to life follows upon just *being a person*, then being a person is sufficient to give one *full* moral worth, and so in that sense *equal* dignity – just as, by analogy, if a property simply follows upon being an animal then it is fully possessed by every animal, even though not all animals are equal.

Moreover, Stretton’s claim that my arguments against the developed capacities view are self-defeating presupposes that there is only a difference in degree, or a mere quantitative difference, between human beings and their natural capacities, on the one hand, and other animals and their natural capacities, on the other hand. But I hold that human beings (and some of their natural capacities, such as those for conceptual thought and free choice) *do* differ in kind, and not just in degree, from other animals (and their natural capacities).²³ In short, the position that the right to life is based on being a person (a distinct substance of a rational nature)²⁴ does not base fundamental rights or basic moral worth on a feature that varies in degrees, and so Stretton’s arguments to show that it is self-defeating fail.

Stretton’s attempts to refute the main arguments in my *Bioethics* 2004 article seem to me unsuccessful, and the overall argument I presented for the proposition that the right to life is not dependent on accidental attributes still seems sound.

²² Ibid: 256.

²³ There is not space here to defend this point. See, however, John Haldane. 2000. *The Source and Destination of Thought*. In *Referring to God, Jewish and Christian Philosophical and Theological Perspectives*. Paul Helm, ed. New York: St. Martin’s Press; Russell Pannier & Thomas D. Sullivan. 2000. *The Mind-Marker*. In *Theos, Anthropos: A Compendium of Philosophical Theology*. Roy Abraham Varghese, ed. New York: P. Lang.

²⁴ For a defense of this position, see Patrick Lee and Robert P. George, *Body-Self Dualism and Contemporary Ethical and Political Issues*, Cambridge University Press, forthcoming.

²⁰ This is an intrinsic right-conferring property in *each* human individual, not just in the paradigm instances of humans.

²¹ Lee, *op. cit.* note 1, p. 254.