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Does Personhood Begin with Conscious Desires?

Christopher Kaczor

ABSTRACT: David Boonin's *A Defense of Abortion* (2003) argues that without present desires of some kind a being cannot have the right to life. Since desires presuppose brain development of at least 25-32 weeks, abortion prior to this time does not kill a being with a right to live. This paper questions Boonin's thesis by arguing that (1) this criterion is under-inclusive, for it excludes beings that clearly are persons, (2) this conception is incompatible with inalienable rights, and thus cannot succeed, as Boonin hopes, on grounds that are already accepted by those that are pro-life, (3) this account does not exclude other grounds for thinking that killing is wrong, grounds that could include beings without desires, (4) this analysis cannot secure that people have equal rights to life, and (5) this justification of the right to life does not exclude infanticide.

IN HIS RECENT BOOK *A Defense of Abortion*¹ Daniel Boonin argues that an individual cannot acquire the right to life without at least some present desires. Why? Modifying arguments first given by Donald Marquis in his article "Why Abortion is Immoral" and by Michael Tooley in "Abortion and Infanticide," Boonin holds that killing you or me is wrong because it thwarts our desires, especially the (present, dispositional, and ideal) desire to have a future-like-ours:

For on the account of the wrongness of killing that results from this modification of the original future-like-ours argument, the existence of other individuals makes a legitimate moral demand on us in virtue of their having at least some actual desires about how their lives go.²

His present, dispositional, and ideal requirements for the desires reflect Tooley's difficulties in connecting desire and rights. The desire must

be *present* and not future, since if future desires count the desire-rights analysis would also include an embryo or fetus who will, unless killed, have desires in the future. Precisely this was what Marquis pointed to in arguing against abortion. So for Boonin, it is not future desires that make a difference to rights but present desires. This desire can be dispositional or habitual, that is it need not be occurrent or actually present in consciousness, so that those who are sleeping or in comas do not lose the right to life. The desire can be ideal, that is, it can concern what we ideally would want rather than what we in fact do want at the moment. Otherwise a suicidal, lovelorn teenager or someone whose desire not to live was created in part by false information would not have a right to life. However until we have desires of some kind, desires whose realization requires that we not be killed, we do not have the right to life. When then does the fetus obtain these desires?

A human fetus has no such desires prior to the point at which it has conscious experiences, and it has no conscious experiences prior to the point at which it has organized electrical activity in its cerebral cortex. It therefore has no such desires prior to the point at which it has organized electrical activity in its cerebral cortex.³

When exactly this takes place is itself subject to some dispute, but the range is fairly well known and for Boonin its significance should not be understated. When does a human being acquire organized electrical activity in its cerebral cortex and thereby the right to life? Boonin argues that conscious desires begin when there is “a certain kind of electrical activity in its cerebral cortex, and that this occurs at some point from 25 to 32 weeks after fertilization.”⁴

Although there is some “gray area” in determining the exact moment when this takes place, at some point between 25 and 32 weeks of gestation a human fetus begins to have conscious desires, including implicitly the desire to have a future-like-ours. Implicit desires are the necessary conditions for the fulfillment of explicit desires. The human being in the womb doesn’t explicitly desire to live but since no desires can be satisfied without existing, even the simple desires of a human fetus such as the desire to hear his or her mother’s voice implicitly includes the desire to live. A being with an explicit or implicit desire

to live and have a future like ours thereby attains a right to life. Until that point, the human fetus is not a person but merely a human being, and so before this point abortion does not kill a person but after this point abortion does.

A CRITIQUE OF BOONIN'S ARGUMENT

(1) According to Boonin, in a reworking of Tooley's account, an individual cannot acquire the right to life without at least some actual desires. For killing itself is wrong because it thwarts our (present, dispositional, ideal) desires, especially our desire to have a future, and the biological basis for having this desire begins between 25 and 32 weeks at which point the brain can become conscious. However, one can imagine beings who are indisputably persons but would be excluded by Boonin's understanding of personhood. Consider aliens, angelic, or divine persons who, given their vast differences from our fragile human physiology, have nothing that corresponds to what we experience as desire. Nor is it difficult to imagine alien, angelic, or divine persons whose experiences of time are so different from our own that they do not experience past, present, and future as we do and so have no present dispositional desires *for the future*.

Even among human persons, there are those such as Buddhists who believe that the extinguishing of all desire is possible. If a human being achieved this goal, then this human being would have achieved Nirvana from a Buddhist perspective but from Boonin's perspective this human would no longer have a right to life, since such a human being would not have a desire for the future.

One might argue that Buddhists desire to be free of desire. If they have a second-order desire about what they desire, then although they are perhaps free of first-order desires, those achieving Buddhist perfection do not entirely lack desires, since they retain second-order desires. However, this objection fails for Buddhist perfection forsakes even the desire for Nirvana as the last fetter. In other words, according to the theory, even second-order desires are overcome. So, if Boonin and Buddhists are right, then human beings who achieve the highest degree of perfection simultaneously lose their human dignity and right

to life.

(2) Even if this difficulty could be overcome, an important problem can be raised about the conscious desires argument. If one believes in “certain inalienable rights, that among these are life, liberty and the pursuit of happiness” as it is put in the *Declaration of Independence* (1776), then the link between desires and rights is not as Boonin portrays it. Inalienable rights are rights that a person cannot waive or give up whatever their desires. Alienable rights, on the other hand, are rights that depend on the desires of the person and so one can waive such rights. For instance, the right you have to your watch is an alienable right, and so you can give up your claim to this watch and give it to another as a gift without violating anyone’s rights. On the other hand, one’s desires, whatever they may be, have no bearing on *inalienable* rights. A common example of an inalienable right is the right to liberty. Even if a person desires to be a slave, and another person desires to be a slave master, if the right to liberty is inalienable, then slavery violates the right to liberty. Inalienable rights may only be made void by legitimate public authority in the case of just punishment. So, if liberty is an inalienable right, then only just punishment for criminal wrongdoing could make void that right. The right to life is another prototypical example of an inalienable right. If the right to life is inalienable, as most theorists of human rights have held, then Boonin’s account of why killing is wrong is false. One’s right to life does not depend in any way on one’s (present, dispositional, ideal) desires.

(3) Even if killing *is* wrong because it takes away our present dispositional desire for a future, and even if this is the best account of why killing is wrong, the conscious desires account of personhood requires that this be the *only reason* why killing is wrong. But this is unreasonable. An act is often wrong for a number of reasons at once. For example, a nasty caricature of a black woman might be cruel, racist, *and* sexist. There are a myriad of possible reasons to believe killing is wrong. For instance, killing takes away your present good, the good of life. Killing undermines your bodily well-being. Killing takes away

your freedom. If killing is wrong for one of these reasons, or if killing is wrong for *any other* reason unconnected with my or your (present, dispositional, ideal) desires (e.g. divine command, societal cohesion, rule-utilitarianism, Rawls's maximin principle, contractarianism), then the suggested criterion for distinguishing persons from non-persons fails. The conscious desires account of personhood requires not just that killing is wrong because it takes away your or my (present, dispositional, and ideal) desires for a future. The conscious desires account of personhood requires that killing is wrong *only* for this reason. In other words, for the conscious desires argument to work it is also necessary that all other actual and possible accounts of the impermissibility of killing unrelated to desire are mistaken. Of course, this has not been demonstrated by advocates of the desire account, nor does demonstrating it seem at all likely. Indeed, one would have to refute Kant, Aristotle, Mill, and virtually every other philosopher who has given an account of the impermissibility of killing in order for this version of personhood to work.

(4) However, let's assume for the sake of argument that killing is wrong because and *only* because it thwarts a human being's present desires for a future. It is important to note that the desires of human beings for various ends, including life, vary considerably, and so it would seem that the wrongness of acting against someone's desires would vary considerably too. After all, if what is wrong with some act is that it contradicts someone's desires, then it would seem to follow that the more someone desires something, the more wrong it would be to contradict the person's desire. If you steal my favorite heirloom given to me by my grandfather on his death bed, you have wronged me more than if you steal my can of Mountain Dew. As Boonin himself notes: "It is in general *prima facie* wrong to act in ways that frustrate the desires of others, and in general more seriously *prima facie* wrong to act in ways that frustrate their stronger desires."⁵

This makes sense with property rights because property clearly has different values for the person whose rights are violated. It is more wrong to steal \$10,000 than \$10, and more wrong to steal from a poor widow than from Bill Gates.

But when one considers the value of human persons, it is a truism to affirm their fundamental equality. We generally do not hold some murders to be “better” murders than others are. They are all bad, and bad for the same reason(s); and the concept of equal rights leads us to hold they are *equally* wrong. One might object that killing a parent who cares for his or her 3 young children is worse than killing a person without dependent children. But the truth of this does not undermine the equality of persons which leads one to hold that all murder is equally bad considered in itself, even if circumstances may make some murders worse in terms of consequences for others. Thus, the murder of a parent is wrong both because it is murder, which is wrong for whatever reason(s), and in addition because it deprives the young children of someone upon whom they depend. This additional aspect of wrongness could be in play in non-murderous situations, such as kidnapping or permanently and seriously injuring the parent. The murder of the person who does not have dependent children is equally wrong considered as murder. If human persons have equal rights, then murdering human persons is equally bad whether the person is rich or poor, black or white, man or woman.

Such equality is not found in people’s desires. Just as there is wide diversity in human desires generally, it is undoubtedly true that people do not have equal desires to live. As Victor Frankl noted in his book *Man’s Search for Meaning*, in Nazi concentration camps, some people ended their own lives after just a few days while others were determined to live in spite of all obstacles. Even in less extreme circumstances, it is obvious that people value their lives differently. Some people absolutely minimize all risks to bodily safety; other people take great risks with their lives; still other people take their own lives. It would follow from the account of wrongfulness given by Boonin that killing those who didn’t want to live wasn’t wrong at all, killing those who wanted to live a little bit was worse, and killing those who really wanted to live was the worst of all. But this would mean that the victims in the camp, indeed persons in general, do not enjoy fundamentally equal rights to life—which of course is problematic if one wants to affirm the fundamental equality of all persons. If Boonin’s argument were correct, it would show not only that the human fetus does not have the same

right to life as you or I, but also that you and I don't have the same right to life. Indeed, since no two human persons have *exactly* the same desire to live, so no two human persons have equal rights to life. Since life is necessary to exercise any other right, if Boonin's account is correct, equal rights are an illusion.

(5) However, let's assume that all these critiques of the conscious desires argument for personhood are mistaken. Let's assume that all persons must have desires for a future and that killing is wrong only because it thwarts our present desire to have a future and that the argument about equal rights doesn't succeed or isn't important. Nevertheless, the conscious desires argument for personhood still fails because it proves too much. Each year in the United States alone, nearly half a million babies, more than 10 percent of births, are born prematurely. According to the 2002 National Vital Statistics report, more than 28,895 babies were born in the United States before 28 weeks and more than 48,624 babies were born between 28 and 31 weeks during the year 2000 alone. If human beings do not have the desires which grant them a right to life until 32 weeks following conception, then more than 77,000 babies born during a single year in the United States alone would not be persons.

Could we draw the line earlier still at say 20 weeks? Citing the work of others (Morowitz and Terfil 1992), Boonin states that "Adopting this very conservative estimate [of personhood beginning at 20 weeks] seems advisable given our lack of more definitive knowledge."⁶

The idea seems to be that when definitive knowledge is lacking, one should err on the side of granting rights. But it is not at all clear why definitive knowledge is not present, if it is also true that "there is no evidence to suggest that this [conscious desire] occurs prior to approximately the 25th week of gestation, and ample evidence to suggest that it does begin to occur sometime between the 25th and 32nd week."⁷

If there is no evidence that the line should be at 20 weeks and ample evidence that the line should not be at 20 weeks (but rather between the 25th and 32nd week), then it seems reasonable to say we have definitive knowledge that the line is not at 20 weeks. If our

standards for “definitive knowledge” are higher still, approaching absolute certainty, then it is hard to see why we should not grant the right to life to the human being in utero from conception onward, if protection of human life is the default position when lacking definitive knowledge. After all, it would be hard to claim near absolute certainty about virtually anything, let alone something as controversial as the beginnings of human personhood.

Even if the line were drawn at 20 weeks, many newborns would still not count as persons according to this theory. As noted earlier, newborns have survived earlier than 20 weeks, and there is no reason to think that they will not survive earlier and earlier as technology progresses. So depending on how it is construed, the conscious desire theory of personhood excludes either thousands of newborns each year from personhood or a lesser number, but it certainly excludes *some* newborns. For Boonin, this would appear to be a problem since he criticizes other theories for being “unable to account for the presumed wrongness of killing infants.”⁸

Infanticide is undoubtedly a problem for anyone affirming that every newborn human baby should be protected by law and welcomed in life. (Nor should the advocate of euthanasizing newborn babies doomed to ill health take consolation in Boonin’s account. Although, unfortunately, many of these prematurely born children face serious health problems, others become perfectly healthy and at their first birthdays weigh as much as their full term peers. At birth, present technology is unable to determine precisely who among these premature infants will have lasting problems and who among the premature infants will later in life be perfectly healthy.)

In conclusion, although Boonin’s version of the conscious desires argument avoids some of the pit-falls that Tooley’s version fell into, he has still provided us with no good reason to believe that personhood begins with conscious desires. Of course, in Boonin’s book *A Defense of Abortion*, he ultimately goes on to argue that even if personhood begins at conception, abortion is still permissible since the Violinist argument given by Judith Jarvis Thomson can be defended from all significant objections. I think Boonin fails to defend abortion here also (I have evaluated Boonin’s defense of the violinist argument in chapter

seven of my book in progress, *The Ethics of Abortion: Women's Rights, Human Life, and the Question of Justice*, but that critique will have to wait for another occasion.

NOTES

1. Daniel Boonin, *A Defense of Abortion* (Cambridge: Cambridge Univ. Press, 2003).
2. *Ibid.*, p. 125.
3. *Ibid.*, p. 126.
4. *Ibid.*, p. 127.
5. *Ibid.*, p. 67.
6. *Ibid.*, p. 128.
7. *Ibid.*, p. 115.
8. *Ibid.*, p. 125.