

# Moralizing or legalizing? The 'Locus Classicus' of the Extreme Liberal Position on Abortion

## □ Introduction

A significant influence on Western morality, Christianity established an intolerance toward abortion as early as its first centuries (Sider 2012).

The post-war years of the 20th century witnessed a significant decline in the authority of traditional churches across war-torn nations. This included the Catholic Church's semi-reluctant willingness to revise some of its rigid positions. When Pope Pius XII (d. 1958) formally declared in 1951 that, from the Church's perspective, sex was permissible not only for procreation but also for pleasure (Miller 2014:15), the next question that emerged at the Church level was the legalization of contraceptive methods and techniques such as periodic abstinence.

By 1967, half of the U.S. states were already in the process of legalizing abortion laws, with some having already done so. At the same time, the Catholic Church in America began actively financing and establishing an anti-abortion coalition (Miller, *ibid*: 45). The *National Right to Life Committee* was created based on the *United States Catholic Conference*, with another key organization being the *United States Conference of Catholic Bishops*, particularly its *Family Life Bureau*.

In this heated atmosphere—one that intensified just before the publication of the articles under discussion, the writings of Michael Tooley (1972) and Mary Anne Warren (1973)

emerged. These have since been regarded as the *locus classicus* of the extreme liberal (henceforth:EL) position on abortion (Wreen 1987:241). In addition to Tooley and Warren, Wreen also highlights the slightly later works of Joel Steinberg (1980) and Stanley Benn (1984), summarizing that, according to all these scholars, "*neither the fetus, at any stage of development, nor the young infant has a right to life*" (ibid:241).

In the introduction to her article, Warren explicitly states that her goal is not merely an impartial academic inquiry but a "*satisfactory solution to the problem of the moral status of abortion*" (ibid:1). The, 'satisfactory' was defined through the lens of women's right to terminate a pregnancy or to permit third parties to offer abortion services. In her article, she largely opposes J.T. Noonan Jr. (d. 2017), whose writings (particularly Noonan 1968) prompted Warren's counterarguments. She describes Noonan's stance as "*a version of the official position of the Catholic Church*" (ibid:1).

As a lawyer by education and profession, Noonan's argument was persuasive due to its deliberate simplicity and appeal to human rights—like any piece of writing that offers an idealistic reader the illusion of supporting a noble cause. Declaring that "*human beings may not be discriminated against based on their varying potentialities*" (ibid:134) is an emotionally compelling statement, even though reality may not align with it. When Noonan's article was published in 1968, for example, the 19th Amendment, which granted women the right to vote, had yet to be ratified in six U.S. states.

Although the right to abortion is *de facto* a matter of women's rights, decision-making autonomy, and public interest, Warren's 1973 article focuses primarily on the moral evaluation of the fetus and, consequently, the legal status of abortion. In contrast, her later work on abortion (Warren 1991) examines the issue from a more pragmatic perspective, making it difficult to classify as an endorsement of extreme views.

## I. “On the Moral and Legal Status of Abortion”

Warren (1973) arrives at the EL position, which limits the right to life, through her own set of basic criteria for *personhood*. She concludes that the fetus does not satisfy any of these criteria at any stage of its development (ibid:1):

The criteria she defines are as follows:

I. "consciousness, particularly the capacity to feel pain"; II. "reasoning"; III. "self-motivated activity"; IV. "the capacity to communicate by whatever means"; V. "the presence of self-concepts, and self-awareness, either individual or racial, or both" (ibid:5).

In her original work, Warren does not analyze the right to life of an infant. She addresses this issue in later revisions (1982), where she considers the extension of the justification for killing to infants as well (ibid:7). The term "killing" used here is deliberate, referencing Warren's use of the word "being" in the earlier quotation. The act of taking the life of a "being" is described as "killing," regardless of whether the decision-maker considers its right to life to be null or not.

Feinberg defines this just as bluntly in the introduction to his article (1980): "abortion can be defined as the deliberate causing of the death of a fetus, either by directly killing it or by expulsion" (Feinberg 1992:37). Tooley alternates between using "being" and "thing," seemingly creating an association in which, for him, the denial of the right to life is equivalent to a *de facto* lifelessness that precedes the discussion itself.

- The Psychological Aspect

Like others (Tooley, Feinberg), Warren uses *psychological concepts* as fundamental criteria for defining *personhood*, such as "*consciousness, self-concepts, self-awareness*" (ibid).

However, none of these specific concepts inherently contain empirical certainty. Since their use is debatable, varies between schools of thought, and differs in application, employing them outside of psychology requires further clarification.

There is a basic consensus in psychology that a *person* in *psychological sense* carries certain psychological traits and characteristic behavioral parameters. This consensus has led to the development of disciplines such as developmental psychology, pedagogy, educational psychology etc where continuous dialogue seeks improved approaches and methodologies. These fields are based on the understanding of a continuous developmental process in which gradual attributes emerge from preceding ones.

The EL position, which Warren supports in her earlier works, and which considers an entity, fetus, being or thing (Tooley) as having an abstract *potential* for personhood, differs from psychological developmental concepts. Person in psychological terms can only be meaningfully described through temporal duration, influences, and corresponding processes. For instance, if a mother contracts a viral infection in the early months of pregnancy, thus increasing the likelihood of dopamine receptor hypertrophy in the child's brain - this pertains precisely to personality structure and formation and not to some external, autonomous "being" or "thing" whose influences are unknown, interchangeable, or nonexistent. On the contrary, we see the clear temporal continuity of personality, its essential traits, and experiences.

EL disregard for the continuity of personhood is also at odds with contemporary research on the intergenerational transmission of epigenetic influences. These findings, in contrast, align more closely with the African traditional conception of personhood. According to African tradition, three social groups are regarded as having moral status: the living-dead (ancestors), the living, and the unborn (Molefe 2020:76). Furthermore, *"the African view of man denies that persons can be defined by focusing on this or that physical or psychological characteristic of the lone individual"* (Menkiti 1984:171). The relevance of the African perspective to this discussion lies primarily in the multicultural nature of the United States and the significant size of its African American community.

In both Warren's and Tooley's works, psychological terminology is used without the necessary explanations or clarifications of its meaning. Since any conceptual language relies heavily on metaphors, the lack of precision significantly undermines the logical validity of their conclusions.

- Uncertainty

The author does not doubt that the burden on women's health and rights is difficult to justify without access to safe and legal abortion, a point also emphasized by Warren. The critique below is directed solely at the arguments that lead to the declaration of the fetus's lack of rights and, subsequently, the denial of any rights to infants.

In the author's view, Warren's early (1973) assessments of the criteria for personhood lack decisiveness, raising questions about the content, hierarchy, and objectivity of the evaluation criteria.

For instance, Warren suggests that fulfilling only some of the five conditions for personhood could be sufficient for recognition as a person. She argues that just two may be enough. Given that the first criterion includes "particularly the capacity to feel pain," and it is known that fetuses with a functioning nervous system, as well as even prematurely born infants clearly react to discomfort, the subsequent argumentation seems to lose much of its weight. Warren herself acknowledges fetal pain sensitivity in her later writings (Warren 1991:308).

Another example is the second criterion, "reasoning," which is a simplified description of a process long recognized in psychology as "*unconscious inference*" - more commonly known today as "*predictive coding*." From a psychological perspective, economy is essential - it manifests among others in the limited origin story of our attitudes we can claim being aware of. For instance, some aspects of the associative background, which later impact the process of unconscious inference, can be attributed to very early epigenetic influences. At the subjective level, both a conscious and a linguistic summary of these influences are almost certainly absent.

It is clear that a fetus's or infant's linguistic abilities are undeveloped; however, the *predictive coding* process does not require linguistic competence per se. *Predictive coding* is a universal protocol observed throughout the evolutionary tree—from higher vertebrates to invertebrates such as insects.

Consequently, *reasoning*, does not seem to offer a sufficiently clear definition, especially considering the gravity of the life/death dilemma at hand.

In addition, even highly educated and intelligent adults can experience periods where they do not fully meet Warren's condition on so-called 'reasoning', whether due to sleep or temporary unconsciousness. Singer (1980:83) describes Tooley's later revision, arguing that for

personhood, it is essential to have experienced a period of possessing person-like qualities, to avoid paradoxes such as those involving sleep or temporary unconscious states.

In her 1991 overview, Warren focuses more on the social impact and value of abortion, as well as the rights and autonomy of those performing abortions. Her later position appears significantly more measured and even acceptable to the liberal wing of the Church—especially in light of Augustine’s remorse for the love he had felt at the expense of others throughout his life. Augustine understood the multi-layered nature of morality and assumed that circumstances which might bring him joy could be a source of pain for someone else. For example, a consoling rain that, during a drought, might be seen as an expression of divine love, yet when it falls on an opposing mountain slope, simply fails to alleviate the potential tragedy at neighboring village.

Warren only briefly touches on the concept of personhood in her later works, introducing a single new and still hypothetical criterion: "If the capacity for moral reciprocity is essential to personhood" (Warren 2000:311).

## **II. “Abortion and Infanticide”**

Also Tooley's discussion is fundamentally centered on the concept of *personhood*: “Let us turn now to the first and most fundamental question: What properties must something have in order to be a person, i.e., to have a serious right to life?” (ibid:44). Tooley's conception of personhood is based on what he himself summarizes as the so-called “self-consciousness requirement” (ibid).

Despite the seemingly straightforward nature of Tooley's conditions, they are more complex than they initially appear. As Wreen (ibid:245) acknowledges, there is a real possibility that not all adult humans—such as Buddhists or devoted adherents of certain Western philosophical traditions—would qualify under Tooley's criteria.

Tooley introduces an additional requirement approaching autobiographical awareness, where subject “believes that it is itself such a continuing entity” (Tooley ibid:62), which presupposes a rational and highly developed worldview. This requirement for autobiographical capability would certainly exclude not only primates and other highly intelligent non-human animals but also provides a relatively explicit written mandate for the exclusion of all “dissenters” — whether they be Siberian shamans with an alternative worldview, Amazonian hunters, or simply those who are perceived as “less valuable” members of *Homo sapiens*. If a passive observer, due to the unity of the esoteric dimension, may equate different worldviews and their adherents, then the requirement for uniformity in autobiographical reporting renders this problematic.

- Foundation: Desires

Tooley also attempts to distance himself from a purely biological conception of humanity, approaching instead a social constructivist perspective, albeit drawing rather haphazardly from psychological literature. In addition to ‘consciousness,’ he incorporates ‘desires’ into his composition of *personhood*:

The final stage in the argument is simply a matter of asking what must be the case if something is to be capable of having a desire to continue existing as a subject of experiences and other mental states. (ibid:46)

The origins of *desires* is phylogenetically linked to the evolutionarily older, *subcortical* parts of the brain. The upper *cortical* regions—which significantly distinguish humans from other animals—primarily serve as regulatory, refining, and contextualizing mechanisms. While the *cortex* provides the richness and nuances of our experiences, its final development, particularly the *prefrontal cortex*, is only fully realized by around the age of 25. This sheds some light on the widespread practice of killing adolescents, being parallel to infanticide, in most human societies. Especially before the transition to professional armies, most of those dying in the trenches were neither anatomically nor cognitively mature adults.

The anatomy and functionality of the brain, along with recent advances in *affective neuroscience*, have been extensively documented in contemporary empirical research (Solms and Turnbull 2002). However, early descriptions of these concepts date back over a century, to the work of Nobel laureate Professor Pavlov (d. 1936). The current spectrum of human values in all its unique diversity has not evolved in an unrestricted vacuum (A. Damasio 2005). Rather, its roots are visible alongside other alternatives such as longing, empathy, and the need to care—traits that are also present in other primates, whom Tooley's conception of personhood effectively excludes through the requirement of autobiographical self-awareness. Biology does matter.

The *ontological* aspect of the origins of *desires* carries even greater significance within this context.

As early as the 19th century, von Baer observed that embryonic development mirrors species evolution in miniature. For instance, in its early stages, a human embryo resembles that of a reptile. Correspondingly, the first part of the human brain to develop is the so-called "*reptilian brain*," the evolutionarily oldest region that continues to play a role in fundamental survival responses, such as fear. The manifestation of fundamental drives and derivatory

emotions is also observable in prematurely born infants and in those born without a cerebral cortex. There are rare cases (Solms 2021) where progressive infections have led to the near-complete removal of the cortex. Declarative consciousness, which serves as the basis for self-reporting, consists of only a few isolated fragments of a complex process.

In other words, from the ontological perspective of brain development, Tooley's argument inadvertently provides significant support for the opposing viewpoint. He himself acknowledges that desires can be understood as "states necessarily standing in some sort of relationship to states of consciousness" (ibid:45), a claim that contemporary neuroscience supports.

The theme of desires and passions frequently appears in various descriptions and is conveniently utilized within conceptual frameworks. For example, in discussing animal rights, Scruton (1996) draws analogies to human experience. However, the reverse practice—assigning absolute values to circumstances or making radical existential decisions based solely on the superficial appropriateness, or inappropriateness of such a conditional framework—is problematic.

Thus, we assume that Tooley did not intend his concept of 'desires' to refer merely to a poetic-metaphorical "will to live" that can be applied to any anonymous or even social organism's development and endurance. If he did, then an analysis of human desires would need to begin with homeostasis—the tendency of a self-regulating organism to maintain optimal parameters. Such an approach would inevitably lead back to the fundamental, species-specific set of drives, which are inextricably linked to an evolutionary context. Although Tooley would presumably attempt to distinguish *drive* from *conscious desires*, the transition between the two cannot be precisely defined for two reasons. First, all later, more detailed desires are derivatives of the original *drives*. Second, so-called *conscious desire* is a fiction based on

speculative assumptions, such as the presumed absence of temporal perception in the animal kingdom more broadly. At the same time, the transmission of learned or, in other words, future-oriented skills (for example hierarchical) has been sufficiently documented among animals.

Here, Noonan's words are apt: "This argument is an appeal to probabilities that actually exist, not to any and all states of affairs which may be imagined" (Noonan *ibid*:136). The issue is of utmost seriousness—indeed, it concerns life and death.

- Cornerstone: Consciousness

One of the unresolved aspects of Tooley's composition is his conception of consciousness, which, in its simplest and most widely accepted definition, entails the awareness of an object or state—whether external or internal.

The term "consciousness," which has historically carried varied connotations, gained widespread use in the second half of the 19th century. The previously mentioned Helmholtz (d. 1894) introduced the concept of "*unconscious inference*," which revolutionized psychology, later inspiring Freud and leaving a lasting impact that persists today.

However, what initially served as a *process-based* definition (conscious vs. unconscious) quickly turned into something else—a supposed but not defined topographical and functional core of the human psyche. The influence of post-Helmholtz's era on pseudopsychological theories was criticized by Bertrand Russell (d. 1970) in the first chapter of his "Analysis of Mind" (1921), where he summarized his stance using William James' (d. 1910) words:

*"It is the name of a nonentity, and has no right to a place among first principles. Those who still cling to it are clinging to a mere echo, the faint rumour left behind by the disappearing 'soul' upon the air of philosophy."* (Russell 1922:22)

A.J. Ayer reaffirmed this position in early 70's-just briefly before the early articles by Tooley and Warren: "*I am not at this stage committing myself to any view about the way in which this notion of consciousness should be analysed.*" (Ayer, 1963:82)

Russell's critique underscores an oddity in the history of human cognition: for tens or even hundreds of thousands of years, languages evolved to reflect this cognition, attributing animacy to all living beings (from the Latin *anima* – 'soul'). After the marginalization of the term "soul," the debate shifted to whether animals should now be linked to the new and flashy "consciousness-concept" or whether they should only matter insofar as they serve as human food.

Today, there exist numerous interpretations of consciousness, many of which are not complementary but mutually exclusive. Each interpretation applies a unique set of qualitative attributes and corresponding quantitative scales. Nobel laureate Roger Penrose, who draws parallels between consciousness and quantum physics, argues that the gap between current concepts and the actual nature of consciousness leaves ample room not just for new theories but also for fundamental discoveries.

But, what real choices does one hypothesis or another about this speculative fiction justify?

Does a newborn have a soul? Or does it simply lack the education required to construct a sufficiently sophisticated worldview? What are the consequences, and where does adult responsibility lie?

When discussing consciousness, one might refer to a blend of awareness, felt experience, and sentience. Others emphasize "conscious awareness." Some stress computational activity, while others argue that consciousness transcends computation.

A newborn reacts to its surroundings. A fetus responds to stimuli. One could argue that they are aware of their environment to the extent of their reactions. Can a self-regulating organism—no matter how primitive—be separated from self-awareness? Tooley appears to believe so. However, every response of such an organism, including flawed responses, involves a preceding felt need.

Tooley seems to have recognized the inadequacy of his "self-consciousness requirement" (ibid:44) and attempted to compensate for it. As a result, his actual definition diverges from his initial declaration. Instead of being based on self-awareness, it hinges on the ability and quality of later reporting—described in the literature as the "autobiographic self." Because Tooley extends his concept to include a requirement for self-confidence, expressed as a belief in oneself as a temporally persistent subject, this raises issues regarding dissenting adults, who, under Tooley's criteria, might lack the right to life simply because they do not fit his description.

How significant is this?

Let me rephrase: should life, death, and the future depend on ambiguity?

As recently as the latter half of the 20th century, self-aware and supposedly democratic governments implemented eugenics-based programs targeting indigenous populations in Scandinavia, Canada, the United States, and elsewhere. First, through misunderstanding and negligence, they created social inequality and hopelessness. Then, they used the resulting conditions as justification for physical repression, including forced sterilization.

- Concepts of Convenience

If we consider mental work as the integration of processed cognitive units, then psychological terminology has evolved to convey a particular type of content: situational information-processing capacity and individuality.

A rich and nuanced psychological spectrum cannot be reduced to a linear equation of the legalistic rights and obligations. If such an attempt is made, the result is characterized by inaccuracies, evident in the eccentric use of terms and the confusion surrounding their application. Yet even this is often insufficient for constructing tendentious arguments.

Tooley's text also contains speculations based on hypothetical assumptions, which might be dismissed as mere thought experiments if their conclusions were not presented as definitive evidence. For instance:

*"Suppose, for example (hypothetical—author's emphasis), that by some technology of the future the brain of an adult human were to be completely reprogrammed ...*

*... In such a case one would surely say (speculative—author's emphasis) that an individual had been destroyed,... This example shows that the expression 'right to life' is misleading."*

(Tooley *ibid*:46)

This is, of course, a valuable line of reasoning that raises the question of what constitutes a person. However, in form, it appears just as tendentious as referring to a living being as a 'thing,' as Tooley does. This is essentially the same issue that Thomson criticizes in anti-abortion rhetoric—the use of *slippery slope* arguments (Thomson *ibid*:47).

The fight between these two camps must have been rather fierce.

### **III. From a Legal Criterion to a Semi-Philosophical Concept**

Having previously examined the definitions of personhood by Warren and Tooley, the question arises regarding the lack of consensus.

Additionally, Feinberg, who largely agreed with Warren and Tooley's earlier position that a fetus does not automatically have the right to life due to its lack of moral status, "presents a series of arguments against **four** (author's emphasis) popular proposals for the criterion of *moral personhood* and defends a **fifth** (author's emphasis) proposal" (Hudson 1996:311).

Feinberg's logical path in this situation appears to focus on the fetus's potential moral status, illustrated by borrowing from Benn (1986) the analogy of a president-elect, who clearly has not yet assumed presidential duties (Feinberg *ibid*:48-49). The issue with the analogy to the president is that, both before and after the election and inauguration, the president is still the same *person*.

- Context

The rising importance of the indeterminate *person* criterion in philosophical discussions surrounding abortion may seem at odds with economic principles at first glance. For example, Thomson's (*ibid*) proposed feminist approach, which both Tooley and Warren referenced, appeared to provide a more suitable platform for discussion and reaching consensus.

The legal focus on *personhood* and the associated rights was initially adopted by anti-abortion advocates. Warren opposed the jurist Noonan in her 1973 article, who, at the end of his career, was an esteemed Senior Judge of the United States Court of Appeals for the Ninth Circuit. Even the Catholic Church lacked a clear stance on the nature of personhood (Miller 2014:294), making any opposition improvisational.

The conservative platform related to abortion was eloquently summarized in G.G. Grisetz's (1970) monograph, where the *person* criterion was linked to "consistency in the law" (ibid:402) through his view of the U.S. Constitution, starting with its epic beginning "We, the People of the United States...":

"a *person* is not merely part of the subject matter of the law. No, a *person* is a member of the community from which law originates... We, the people, are the first source of the law...

"people" simply designates *persons*" (Grisetz 1970:406).

In other words, the discussion began with the legal criterion of *personhood* but continued as the crafting of a philosophical concept that would fulfill the desired legal conditions:

"when we are considering the provisions of the Fourteenth Amendment of the U.S. Constitution, according to which no State may ' . . . deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws'" (Grisetz ibid:409).

The mixing of legal rights with philosophy has been criticized before due to the lack of clarity, explanations, contestability, and the unclear origins of the concepts (Lester 2020:1).

The United States is also a multicultural society, meaning that, for example, considering the large Afro-American population, purely moral discussions should have taken their different cultural backgrounds into account.

The traditional African view of *personhood* differs significantly from the Western world's traditional spectrum as mentioned in the first chapter. However, since the discussion was primarily based on legal foundations and largely in the interest of legal interpretation, there was no need to highlight this cultural difference – because the law itself did not foresee it.

- Critical Events at the Turn of the Decade

The expressed position of EL was a response to an already initiated discussion, primarily aimed at lawmakers and the judiciary.

The success of the pro-abortion movement at the end of the previous decade marked a turning point starting from the 1970s. In the following years, “abortion reform efforts failed state by state” (Miller 2014:54).

One of the most significant wake-up calls came from New York, where, after strong efforts from the opposing side, the abortion advocates experienced a “near death experience” (ibid), and were only saved by Governor Rockefeller’s veto. His decision was motivated by the disproportionate lobbying efforts from the opposing interest group, which should not have outweighed the interests of all others at the legal level (Greenhouse & Siegel 2012:159).

1970 was also the year when J. Roe filed a lawsuit against H. Wade, the district attorney of Dallas County, Texas. The lawsuit concerned women’s rights and their protection.

The motion was granted in 1971, and at the first hearing, Judge White raised the issue of the contradiction between abortion rights and the potential rights of the fetus. Roe’s representative countered this by claiming that constitutional protection only applies after birth (U.S. Supreme Court 1971:20). During the further debate, the opposing side admitted that they did not have scientific evidence at that time to claim that a fetus should be granted rights starting from a certain age (ibid:44-45).

However, based on this, the scope of the homework was clear to both sides of the dispute.

This was followed by papers from Tooley (1972) and Warren. The latter was completed and peer-reviewed in 1972 and published just before the Supreme Court’s decision in January 1973.

The Court did not see the need to conduct further research and concluded that “the unborn have never been recognized in the law as *persons* in the whole sense” (U.S. Supreme Court 1973:162).

## □ Summary

As Tooley stated: “X is a *person*” will be synonymous with the sentence “X has a (serious) moral right to life” (Tooley *ibid*:40). He did, however, not clarify what he meant by ‘serious.’

By representing *personhood* with the symbol ‘P’ and the ‘right to life’ with ‘RL,’ we get:

$P \Rightarrow RL$  and therefore  $\neg P \Rightarrow \neg RL$

However, since there has been no consensus on the nature of *personhood* over a long period of time, and the same can be said about its significant but unclear and borrowed components, it may also be represented as ‘NC’ (‘no consensus’ or ‘not clear’). Substituting, we get:

**$NC \Rightarrow \neg RL$**

Which is nonsense from the moral point of view.

But, as Singer (1980:130) admits, it is wrong to assume that the law must always be a moralizing force.

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