

140: Matters of Life and Death – 22 – Tooley on abortion and infanticide

1 Tooley's argument

Tooley proceeds via an analysis of the concept of *a right*, arguing that rights presuppose desires, and lapse in the absence of desires.

E.g. "If someone asks me to destroy, or tells me that they no longer want, something to which they have a right, then I don't violate their right by destroying it."

He proposes:

A has a right to X = Provided A desires X then no one ought (prima facie) to interfere with A having X.

So the desire for X is a necessary condition of having a right to X. But you can only desire what you are capable of conceiving of or thinking of.

So: a right to life \Rightarrow a desire for life \Rightarrow a capacity to conceive of your own existence / non-existence.

2 Do animals and infants desire life?

Surely animals and infants will *struggle to survive*. What explains these struggles if not the desire for life?

Reply: lower-level, more specific, less abstract desires. E.g. desires to satisfy hunger or thirst; desires to get away from *this threat*; etc.

Moreover, Tooley argues that the right to life is not just the right to continued biological existence.

E.g. someone who puts me in a permanent coma has infringed the relevant right? Ditto for someone who wipes my brain clean of all psychological states and personality traits? In such cases I (qua person, qua subject) no longer exist.

The right to life is rather the right to continue as a subject of experiences and other psychological states.

So (Tooley argues) the desire presupposed by the right to life is the desire to continue *as a being with psychological states*.

Neither animals (except maybe other great apes) nor infants can have this desire, because neither as yet has the *concept* of a psychological state. (Children only acquire this concept at about the age of 3 or 4.)

So: only a thinking self-conscious agent (*a person* in the sense defined in #14) has a right to life.

So: neither abortion *nor* infanticide violate the rights of those killed. The only arguments against infanticide are (normally) the *indirect* ones deriving from feelings of parents etc.

3 When do rights lapse?

Do rights lapse in the absence of desire?

E.g. I *overhear* you saying that you no longer want the old bike in your shed. Does that mean it is *not stealing* if I take it?

Surely not! There is an important difference between being *told* by you that you don't want it, or *told* that I may take it, and learning in other ways that you no longer want it.

Suggestion: we need to replace the phrase 'Provided A desires X' in the analysis above with 'Unless A grants permission'? –

A has a right to X = Unless A grants permission, then no one ought (prima facie) to interfere with A having X.

Rights remain in force until they are explicitly waived? Then there need be no presupposition that in order for A to have a right, A must be *capable of waiving* that right.

Reply: ownership rights depend not on the desire to *use* a thing, but on the desire to *dispose of it as one sees fit*. For this is what the right in question *is*.

And *this* desire may be presumed to exist even when the desire to use the thing has lapsed, as in the example above.

But: suppose I overhear you say, “I don’t want it, and can’t be bothered to think how to dispose of it”. Still it counts as theft if I take it?

So Tooley is wrong: the right to life need not presuppose a desire for life, and so there is no reason, yet, to deny that infants have the right to life.

Another argument against Tooley’s proposal is that he has to add on clauses that look arbitrary, in order to accommodate intuitive beliefs.

He has to claim that if A doesn’t desire X, the right to X only lapses if –

- (a) A is not emotionally unbalanced;
- (b) A is not asleep or unconscious;
- (c) the desire has not been removed by conditioning, hypnosis, etc.

These clauses are easily explained if what matters is not desire, but *failure to waive*. For you cannot waive your rights when asleep!

And it is reasonable that waivers of right should only count as genuine if someone is of sound mind and capable of autonomous decision.

4 **Grounding rights**

Tooley takes our ordinary notion of *a right* for granted, giving no account of its basis, and making no attempt to ground it in deeper theory.

So his argument is highly vulnerable under reflective equilibrium.

Even if he were correct in his analysis of what we mean by ‘a right’, the consequence might motivate a *revision* in our ordinary notion.

We might say: if our ordinary notion of ‘rights’ entails that infants don’t have rights, then so much the worse for our ordinary notion!

If we try to ground rights via Contractualism, then we can ask which general form of rights, and lapse of rights, should be preferred.

Surely rational contractors wouldn’t want to make rights conditional upon desire, because desire is something *inner* – we don’t want people using their own judgment about what we do or don’t want. Rather, we should choose explicit and public conditions for a right to lapse – insisting on a formal waiver.

(But see the discussion of non-voluntary euthanasia. Maybe the right to life shouldn’t be given to infants, precisely because they *can’t* waive it. Maybe it should be the right not to be killed *except in their own interests*.)

So from all points of view (intuitive and theoretical) the “waiver” analysis is to be preferred to the “desire” analysis of rights.

In which case Tooley’s argument for the permissibility of abortion and infanticide collapses.

But maybe rights are there to protect people’s legitimate desires? In which case a desire for X is a necessary condition of having a right to X after all?

No: rights are to protect legitimate *interests*. And interests can depend upon future (in the absence of present) desires.

E.g. the young orphan has an interest in not having its inheritance squandered by the trustees, because of what it *will* want in the future.

⇒ Analysis of the notion of *a right* cannot establish a Liberal position on abortion.

We still need to ask *in virtue of what properties a human being comes to possess rights* in the first place. (See the discussion in #21.)