

# THE RIGHT TO DEATH



ANTONY FLEW

I want to start with a phrase from the Declaration of Independence, but by the slightly indirect approach of quotation within a quotation. With his usual shrewd grasp of fundamentals, the lawyer Lincoln once wrote: "The authors of that notable instrument ... did not intend to declare all men equal in all respects. They did not mean to say that all men were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness in what respects they did consider all men created equal - equal in certain 'unalienable rights, among which are life, liberty and the pursuit of happiness.'"

It is perhaps tempting to digress to support and to labour the point that neither Lincoln nor the Founding Fathers believed: either that "at birth human infants, regardless of heredity, are as equal as Fords" or that some such repudiation of genetic fact is implied or presupposed by any insistence upon an equality of fundamental human rights.<sup>1</sup> But our present concern is with the actual prescriptive and proscriptive content of these particular norms. For us the crux is that they are all, in M. P. Golding's terminology, *option* as opposed to *welfare* rights: the former forbid interference, within the spheres described, entitling everyone to act or not to act as they see fit; whereas the latter entitle everyone to be supplied with some good, by whom and at whose expense not normally being specified.<sup>2</sup> Hence, with that "peculiar felicity of expression" that led to his being given the drafting job, Thomas Jefferson spoke: not of rights to health, education, and welfare - and whatever else might be thought necessary to the *achievement* of happiness; but of rights to life, liberty, and the *pursuit* of happiness - it being up to you whether you do in fact pursue (and to the gods whether, if so, you capture) your prey. An option right is thus a right to be allowed, without interference, to do your own thing. A welfare right is a right to be supplied, by others, with something that is thought to be, and perhaps is, good for you, whether you actually want it or not.

To show that the Founding Fathers were indeed thinking of option rather than welfare rights, it should here be sufficient to cite a passage from Blackstone, which has the further merit of indicating upon what general feature of our peculiarly human nature such fundamental rights must be grounded. From their first publication in 1765, his *Commentaries on the Laws of England* had a profound influence on all the common law jurisdictions in North America, an influence that continued well into the Federal period. Blackstone wrote:

The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with the power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind ... The rights themselves ... will appear from what has been premised, to be no other, than that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to the public convenience; or else those civil privileges, which society has engaged to provide in lieu of the natural liberties so given up by individuals.<sup>3</sup>

But now, if those self-evident fundamental and universal rights are thus option rights, and they surely are, then the right to life must be at the same time and by the same token the right to death: the interference forbidden must be the killing of anyone against that person's will, and that person's entitlement, the entitlement to choose whether or not to go on living as long as nature would permit. In saying this I am not, of course, so rash as to maintain that it is something which all or any of the signers of the Declaration saw or intended. The claim is, rather, that, irrespective of what they or anyone else appreciated in 1776, this does necessarily follow from what they did then so solemnly attest and declare. It is today even more obvious that, if all men are endowed with certain natural and unalienable rights, then all must in-

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FOR LIFE, LIBERTY AND PROPERTY

clude all: black and white together. Yet this now so manifest consequences seems for many years to have escaped many people, up to and including justices of the Supreme Court. So a widespread failure to appreciate what may now appear an obvious implication is not sufficient to show it not really an implication at all.

### OPTION RIGHT OR WELFARE RIGHT?

In the lower court decision in the now famous case of Karen Ann Quinlan, Judge Muir denied the plaintiff's request to have the life-sustaining apparatus switched off, indicating that he did not find grounds in the Constitution for any right to die. Insofar as the Declaration is not part of the Constitution we might give him the point. Yet, in my very unlegal opinion, if the amendment on which *Roe v. Wade*<sup>4</sup> was decided really does warrant what the Supreme Court decided that it did warrant, then it must surely warrant both suicide and assisted suicide. For in abortion what the pregnant woman is killing, or getting her doctor to kill for her, is arguably - notwithstanding that this this is not an argument that I myself accept - another person with his or her right to life. So, if it would be a constitutionally unacceptable invasion of privacy to prevent a woman from killing a fetus or getting someone else to kill it for her, then surely it must be a far more unacceptable incursion to prevent women, or for that matter, men, from either killing themselves or getting someone else to kill them. For in all those secular systems of law in which suicide still is a crime, it is a much less serious crime than murder.

(a) Judge Muir next went on to say, that, if he were to grant the request of the plaintiff, then "such authorization would be homicide and a violation of the right to life".<sup>5</sup> Since it was not disputed that Karen Quinlan had on at least three occasions insisted that, should this sort of situation arise, she would not wish to be maintained in the condition in which she then was - and still is - Judge Muir's "right to life" becomes one that is at the same time a legal duty. Just that, or substantially that, does seem to be the present position in all those jurisdictions that recognize a right to life. For even where, as in my own country today, suicide itself is not a crime, to assist it still is; while, with very few exceptions, doctors and others are legally required to employ every available means to prolong life of any kind.

For good measure consider two further statements, one from each side of the Atlantic. The first was made by Mr. James Loucks, president of the Crozier Chester Medical Center of Chester, Pennsylvania. He had obtained a court order to permit his hospital to force a blood transfusion on a Jehovah's Witness who had previously requested in writing that, out of respect for her religious convictions, the hospital do no such thing. Mr. Loucks explained that he and his staff overrode her wishes "out of respect for her rights". The second statement was made by the chairman of a group calling itself the Human Rights Society, set up in 1969 to oppose the legalization of voluntary euthanasia. He said: "There are really no such things as rights. You are not entitled to anything in this universe. The function of the Human Rights Society is to tell men their duties."<sup>6</sup>

It has sometimes been suggested that it is contradictory to speak of a right where the exercise of that putative right is compulsory.<sup>7</sup> This is certainly a tempting suggestion, and it may be what led the chairman of the Human Rights Society thus categorically to deny what his society pretends to defend. But if we are going to allow welfare as well as option

rights, then this contradiction seems to arise only with the latter and not the former. If that is correct then we can pass, for instance, Article 26 of the 1948 United Nations Universal Declaration of Human Rights: "Everyone has the right to education ... Elementary education shall be compulsory." Yet it will still allow us to reject the combination of a right to join a labour union with any corresponding compulsion so to do. For if the exercise of a welfare right is to be made compulsory, then the justification of the compulsion can only be the good, the welfare, of the persons so compelled. Yet, in England at any rate, the spokesmen for the labour unions, and their political creatures in the Labour Party, try to justify forced recruitment on the grounds: not paternalistically, that membership is in the best interests even of those who fail to see this themselves; but indignantly, that all holdouts are freeloaders enjoying the benefits, which it is alleged that the union has brought, without undertaking the burdens of membership.

So, allowing that it can be coherent to speak of a right that its bearers are to be forced to exercise, could there be such a compulsory welfare right to life? The crux here is whether the prolongation of life which it is proposed to impose can plausibly be represented as being good for the actual recipients of this alleged benefit. But perhaps, before tackling that question, it needs to be said that any answer will leave open the different issues raised by considering the good of others. Certainly, while insisting on a universal human option right to life, in the sense explained earlier, and while urging always that it is overtime for this to be recognised and protected by our laws, I am myself ever ready to maintain that such most proper considerations of the good of others make some suicides morally imperative and others morally illicit: the suicide of Scott's last expedition, provides an example of the one; and of the other that of the English poetess Sylvia Plath, effected in another room of the house in which she was living with her two young and dependent children.

So long as we continue our attentions to what may vaguely but understandably be called normal times, and to the suicide and suicide attempts of the tolerably fit and not old, it is reasonable enough to hold that in general the frustration of such attempts does further the good of the attemptors. Indeed, any realistic discussion in this area has to take account of the facts, that a great many of what look like attempted suicides are in truth only dramatised appeals for help and that many of those genuine attemptors whose attempts are aborted by medical or other interferences survive to feel grateful to their interferers. But when we turn to the old, faced perhaps with the prospect of protracted senility, of helpless bedridden incontinence, of lives that will be nothing but a burden both to the liver and to everyone else, then the story is totally different. Here you do have to be some sort of infatuated doctrinaire to maintain an inflexible insistence that all life, any life, is good for the liver.

I will not now repeat more than a word or two of what was last year said with such force and charm by the splendid Doris Portwood in her book *Common-sense Suicide*.<sup>8</sup> It should be enough to report that as a woman over 65 she sees herself as making, and encouraging her peers to join with her in making, a distinctive contribution to the women's movement. "How many of us," she asks those peers, "attending a friend or relative in her final days (or weeks, or months, or years) have said, 'It won't happen to me. I'll take care of that.' But did we say it aloud? It is time to say it loud and clear. And often." It is time, she concludes, mischievously

mimicking the jargon of her juniors, to “declare our intention to start a meaningful dialogue on common-sense suicide.”<sup>9</sup>

What I will quote instead comes from a newspaper letter written by Mrs. Margaret Murray, a still very active and much valued member of Britain’s Voluntary Euthanasia Society. Two years ago she published an article “declaring my intention to end my own life when increasing helplessness from multiple sclerosis makes it a hopeless, useless burden.” This led to the production of a memorable television programme. The present letter was a response to the statement by the medical director of St. Christopher’s Hospice that “requests to end life are nearly always requests to end pain”. That medical director had in that programme asserted “that though I might be helpless and actually fed and washed and have other sordid details attended to, my life has a value and I still had something to give.” Dismissing this particular piece of santimonious self-deception with the question “Who are these greedy takers?” Mrs. Murray proceeded to deploy three cases:

An eighty-year old army colonel, who realised that he was becoming senile, flung himself in front of an Inter-City express as it went through the village where I live. A few months later a Newbury coroner gave a verdict of “rational suicide” on a retired water bailiff who took his own life because increasing infirmities means it was no longer worthwhile to him.

And what of sufferers from Huntington’s Chorea, never still a moment and unable to speak clearly enough to be intelligible? One of these unfortunates who is well known to me has tried three times to end her own life.<sup>10</sup>

(b) The previous subsection dealt with the question whether there could be a right to life, the exercise of which is not allowed to be a matter for the choice of the individual: such a right, of course, could only be a welfare not an option right. The issue in the present subsection is whether the option right to life, as explicated above, covertly contains an incongruous and unacceptable welfare element. The suggestion is that a right to life which is at the same time and by the same token a right to anticipate the death that would otherwise have occurred later must impose on some other person or persons a corresponding duty to bring about that earlier death: “A person’s right to be killed gives rise to someone’s (or everyone’s) duty toward that person. If anyone can be said to have a right to be killed, someone else must have a duty to cooperate in the killing ... The important thing is that someone - a doctor, a nurse, a candystriper, a relative - intervene actively or passively to end the right-holder’s life.”<sup>11</sup>

This passage is, on the one hand, entirely sound insofar as it is insisting that all rights must impose corresponding duties; though, since all duties do not give rise to corresponding rights, the converse is false. This logical truth constitutes the best reason for saying that welfare rights do not belong in the Universal Declaration of Human Rights. For who are the people who have at all times and in all places been both able and obligated to provide for everyone: “social security” (Article 22), “periodic holidays with pay” (Article 24), “a standard of living ... including ... necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control” (Article 25 (1)); to say nothing of the provision that compulsory elementary education aforementioned “shall further the activities of the United Nations for the maintenance of peace” (Article 26 (2))?

But the same passage is, on the other hand, entirely wrong insofar as it is trying to draw out the implications of an option right to life. Such rights do necessarily and as such impose corresponding obligations. These obligations rest uniformly and indiscriminately upon everyone else, not just upon some unspecified and unspecifiable subclass of providers, who may or many not in fact be available and able to provide. But these obligations are obligations not to provision but to noninterference. In a jurisdiction, therefore, that recognised and sanctioned the option right to life, the people who decided that they wanted to suicide<sup>12</sup> would, if they needed assistance, have to find it where they could. Their legal right to noninterference imposes no legal duty on anyone else to take positive steps to assist, although, of course, this is quite consistent with its being the case that someone is under a moral obligation so to do. Here as always we have to distinguish questions about what the laws do or would permit or prohibit from questions about what people are morally obliged to do or not to do.

### DOCTORS AND THE RIGHT TO DIE

When, a quarter of a century or more ago, I first joined the Voluntary Euthanasia Society the emphasis was on extremes of physical pain. The main policy objective was to get a Voluntary Euthanasia Act that would establish official machinery to implement the wishes of those terminal patients who urgently and consistently asked for swift release. In response to medical and other developments in the intervening years the emphasis has shifted. It is now on irreversible decay into helpless futility and on operations resulting in prolonged but not especially painful survival at a subhuman level of existence. The chief and most immediate objectives are also different. The Young Turks, at any rate, as well as their more wide-awake and forward-looking seniors, are now pushing for amendment of the Suicide Act and for measures to enable patients and their representatives to ward off unwanted treatment and vexatious life-support, rather than for an act setting up the paraphernalia of panels considering applications and directing that their decisions be implemented.

(a) It is in consequence no longer so true as once it was that “supporters of voluntary euthanasia do not merely want suicide or refusal of treatment or allowing a patient to die. They want the patient dead when he wants to be dead, and they want this accomplished through the physician’s agency.”<sup>13</sup> In the great majority of cases such as Doris Portwood and Margaret Murray have in mind, the agent would be the patient or, with patients too far gone to act themselves, the spouse or other close relative or friend. Consider, for example, Lael Wertenbaker’s *Death of a Man* or Derek Humphry’s *Jean’s Way*:<sup>14</sup> as both would have wished, the prime agent in the former was the wife and in the latter the husband. The only necessary involvement of the medical profession here is through the providing of advice on instruments, and maybe the instruments themselves; and not insisting on mounting an all-out campaign to revive the patients.

The desired amendment of the United Kingdom Suicide Act 1961, an act that already decriminalises the deed itself, would replace the present general offence of “aiding, abetting, counselling or procuring the suicide of another” by the limited and in fact very rare one of doing this “with intent to gain or for other selfish or malicious reasons”, leaving the courts to decide, as they so often do elsewhere, when the motives of the assistance were indeed discreditable.<sup>15</sup> From a libertarian point of view this suggestion has, as against any

Voluntary Euthanasia Act, the great advantage of specifying, not what is legal, but what is illegal.

(b) Finally, and with special but not exclusive reference to the other sort of case, in which it is almost bound to be the doctors who would be either killing or letting die, I have a few brief and insufficient words about the absolute sanctity of all (human) life and the idea that killing (people) is always wrong. My suggestion is that, if these so often mentioned principles are to stand any chance of being ultimately acceptable, then both need to be amended in at least two ways.

The first amendment is already accepted almost universally when people think of it. It consists in actually inserting the unstated qualification "innocent". The point is to take account of killing in self-defence and of the execution of those who have committed capital offenses. In our terms, people who launch potentially lethal assaults thereby renounce their own claims to the option right to life. Reciprocity is of the essence; just as one person's option right gives rise to the corresponding obligations of all others to respect that right, so, if people violate the rights of others, then that nullifies the obligations of those others to recognise any corresponding rights vested in the violators.<sup>16</sup>

The second amendment consists in adding some indication that what is to be held sacred and inviolate is a person's wish to go on living. This takes account of the enormous, and in almost all contexts crucial, differences between murder and suicide. These are that murderers kill other people, against their will, whereas suicides kill themselves, as they themselves wish. It is perverse and preposterous to characterise suicide, and to condemn it, as self-murder. You might as well denounce intramarital sex as own-spouse adultery.

In the present context the importance of this second amendment is that it attends to those particular human essentials that provide the grounds upon which all claims to universal human rights must be based. It was to these that Blackstone was referring when, in discussing "the absolute rights of man", he wrote "of man, considered as a free agent, endowed with discernment to know good from evil, and with the power of choosing these measures which appear to him to be the most desirable." It was on these same universal features that Thomas Jefferson himself insisted. In Query (XIV) to the *Notes on the State of Virginia* he made various lamentable remarks about blacks, remarks that I shall not repeat and that would today disqualify him from all elective office. For Jefferson, it was notwithstanding all these alleged racial deficiencies that blacks (and Indians) certainly do have what it takes to be endowed with the "rights to life, liberty, and the pursuit of happiness." Again, it was to these same essential features of people as beings capable of choosing values and objectives for themselves, and of having their own reasons for these choices, that Immanuel Kant was referring when he laid down that famous but most confused formula: "Act in such a way that you always treat humanity, whether in your own person or in the person of another, never simply as a means, but always at the same time as an end."<sup>17</sup>

On some other occasion I might try to spell out more fully the rationale for the fundamental option rights and, in particular, to dispose of Kant's topsy-turvy contention that the respect for persons as self-legislating choosers of their own ends requires that they not choose their own end as an end. But here and how I will instead conclude by relating that right to die, which I take to be part of the option right to life, to the Hippocratic Oath. This is still often cited as a decisive reason why doctors and other health-care professionals must

strive always and by all means to maintain life, irrespective both of the quality of that life and of the wishes of its liver. This reason is still frequently flourished, notwithstanding that nowadays probably only a small minority of doctors outside the ever-expanding socialist bloc do in fact swear that oath. (It is, of course, within the socialist bloc outlawed, precisely because it makes doctors the servants of their patients, rather than of society or the state.)

The relevant sentences of the Hippocratic Oath read: "I will use treatments to help the sick according to my ability and judgement, but never with a view to injury and wrong-doing. I will not give anyone a lethal dose if asked to do so, nor will I suggest such a course."<sup>18</sup> It is obvious that, in the area of today's gerontological concerns, the second and subsidiary undertaking may come into conflict with the primary promise to "use treatments to help the sick according to my ability and judgement."

In such situations it is impossible to keep the oath. Happily, these is no doubt which of the incompatibles should then be preserved. For at the heart of the entire Hippocratic tradition is the idea of the independent professional who - always, of course, within the framework formed by the universal imperatives of moral duty - puts his skills at the service of his patients. So it is quite clear, to me at any rate, that, given a more libertarian system of public law, that service must: not only exclude forcing unwanted treatment upon those who have, either directly or indirectly, asked to be left alone; but also include providing instrumental advice on suicide, and maybe the means too, if suicide is the considered wish of their patients.

## NOTES

1. The quotation is borrowed from F. A. Hayek, *New Essays* (London: Routledge and Kegan Paul, 1977), p. 290, and it is there said only to be taken from an old *Encyclopedia of the Social Sciences*. On the substantive issues see "The Jensen Uproar" in my *Sociology, Equality and Education* (New York: Barnes and Noble, 1976).
2. See E. L. Bandman and B. Bandman, eds., *Bioethics and Human Rights* (Boston: Little Brown, 1978), chap. 4.
3. Pp. 125 and 128 in the Cadell and Butterworth edition (London, 1825).
4. 410 U.S. 113, 93 S.A. 705 (1973).
5. In the Opinion of Robert Muir, Jr., in the Matter of Karen Quinlan: An Alleged Incompetent. Super, A.N.J., Chancery Division, Morris Company, C-201-75 (Nov. 10, 1975).
6. The first statement is copied from a report in *The General Practitioner* (London), Nov. 26, 1978. The other comes from the September 1978 issue of that doughtily libertarian magazine *Reason*.
7. See, for instance, Bertram Bandman in Bandman and Bandman, *Bioethics and Human Rights*, chap. 5.
8. New York: Dodd Mead, 1978.
9. *Ibid.*, p. 10.
10. *The Guardian* (London), Jan. 20, 1979.
11. Bandman and Bandman *loc. cit.*, p. 141.
12. My employment of either the single word as an intransitive verb or the affected-sounding gallicism "suicide themselves" is calculated. For the ordinary English expression "commit suicide" is one of those expressions - first noted in Aristotle's *Nicomachean Ethics*, 1107A 8-13 - that "already imply badness". Since I do not hold that suicide is always wrong I deliberately eschew that implication.
13. Bandman and Bandman, *Bioethics and Human Rights*, p. 130.
14. Boston: Beacon, 1957.
15. We owe the precise terms of this suggestion to Tom Parramore, secretary of our sibling society in Australia.
16. It is here to the point to quote words from a now perhaps no longer disfavoured Sage. A pupil once asked Confucius whether his rule of conduct might not perhaps be epitomised in a single word: "The Master replied, 'Is not "reciprocity" the word?'" See *The Analects*, translated and edited by W. E. Soothill (Taiyuanfu, Shansi: Soothill, 1910), XV§23.
17. *Groundwork of the Metaphysics of Morals*, in *The Moral Law*, trans. H. J. Paton (London: Hutchinson, 1968), p. 94 (italics removed).
18. *Hippocrates and the Fragments of Heraclitus*, ed. and trans. W. H. S. Jones and E. T. Withington (Cambridge, Mass.: Harvard University Press; and London: Heinemann, 1959), 1: 298. The translation here is in fact my own.