Unalienable:
A Pro-life, American Concept

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ABSTRACT: In this paper I consider the ideas of the American Founders about the "unalienable" aspect of rights and argue that this concept is inherently consistent with a pro-life perspective. The idea of unalienable rights that the Founders espoused implies a rich philosophical anthropology in which rights and duties cannot be justly separated from one's self. Consequently many pro-choice arguments, such as those in favor of allowing voluntary euthanasia, are in contradiction with the Founders' conception of rights. Their concept of unalienablility can be re-articulated to address the new circumstances that bioethics confronts in the twenty-first century and is an enduring important aspect of American public philosophy.

ON THE OCCASION OF THE BICENTENNIAL of the Declaration of Independence in 1976, the legal philosopher Joel Feinberg remarked that he was surprised that "we have not yet heard an argument that seems to bolster the case of opponents of voluntary euthanasia" based on the argument of the Declaration. It was surprising, Feinberg thought, because there would be "at least a superficial plausibility" to such an argument.[1] That was a big admission for a liberal philosopher like Feinberg who advocated euthanasia! But Feinberg was right: there is not only a *plausible* argument against euthanasia and other deprivations of human life to be made based on the ideas of the Declaration, but it is the *most* plausible argument that results from the Declaration. In particular, the idea of rights being "unalienable" is what is decisive; more so than the idea that rights are "endowed by their Creator," or that there are "Laws of Nature and of Nature's God," or that "all men are created equal."

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[1] Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," *Philosophy and Public Affairs* 7/2 (1977): 93-123.

The "unalienable" idea helps us resolve the question: "Who has the better claim to the Declaration of Independence? The pro-life movement or the pro-choice movement"? The pro-life movement points out that an assisted suicide patient's right to "life" is violated, while the pro-choice side argues that an assisted suicide patient's rights to "liberty" and the "pursuit of happiness" are violated through the restriction of it. Both sides to the assisted suicide issue claim the mantle of our founding document, just as both political parties do.

The question that I just introduced has a simple answer: the pro-life side has the better claim to the Declaration, because *both* the right to life and the right to liberty are said to be "unalienable." Just as a reminder, the Declaration states that: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights...." An "unalienable" right is one that cannot be given up or taken away from an individual at any point, and one that all parties have a duty to respect at all times. Since the right to life is unalienable, that means it is never just for the government or another individual (including a mother, in the case of abortion) to violate it. It also means that it is wrong for an individual to give up on his own life through suicide or assisted suicide; to commit suicide is to alienate your own right to life.

These preliminary conclusions about the concept of inalienability in the Declaration I have just made would surely be debated by our friends on the pro-choice side. My points about inalienability would be debated in part because they conflict with the historical case the pro-choice side makes regarding "liberty" in the Declaration. Their historical account would have us believe that the liberty to choose euthanasia is the ultimate logical conclusion of the classical liberal premises that the Founders themselves embraced, having been heavily influenced by the British philosopher John Locke.[2] Perhaps the Founders would not have agreed with voluntary euthanasia if asked about it back then, but that is where the argument goes, they say. As Justice Kennedy put it in his *Lawrence v. Texas* opinion, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."

Everyone, including Justice Kennedy, wants to argue that the Founding Fathers, if they were alive today, would side with *us*, if *our* reasons and circumstances could be explained to them. The most prominent book that

[2] See for example, Louis Hartz, *The Liberal Tradition in America* (New York NY: Harcourt Brace and Co., 1955).

recently attempted this kind of re-interpretation was Danielle Allen's *Our Declaration: A Reading of the Declaration of Independence in Defense of Equality*. Allen spilt a lot of ink parsing every phrase in America's founding creed, although I noticed she did not spend much time on the word "unalienable." She leaves the word out of her "Revised List of Truths."[3] We engage in such academic exercises because the Declaration of Independence is the political creed of almost every American, a "touchstone of legitimacy" and the core element of our public philosophy.[4] Historians and political philosophers (like myself) for many years have engaged in a conscious effort to elucidate the American public philosophy, to help our culture and government officials re-articulate it in a true way.[5] We turn back to the documents of American political thought, especially the Founders, in order to do so.

In this paper I will provide evidence to show that the philosophical anthropology presupposed by the Declaration of Independence must be a pro-life one. The easiest way to justify that claim is to direct the reader of the Declaration of Independence to the word "unalienable." The first part of this paper, then, will deal with the place of the concept of inalienability in the thought of John Locke, to consider the pro-choice historical arguments some liberals incorrectly draw from his philosophy. Second, I will turn to the American Founders themselves and discuss the how they saw concept of inalienability affecting natural rights. Lastly, I will briefly apply the concept of inalienability drawn from the American Founders to the current issue of assisted suicide, re-articulating this important aspect of the American public philosophy for a new circumstance.

1. The Philosophy of John Locke: an Unencumbered View of Human Life?

Whether or not the philosophy John Locke is decisive for understanding the ideas of the Declaration of Independence is, and always has been, a contentious topic among historians and even among the Founders themselves. We can set aside that question, and at least acknowledge the basic fact that Locke was in some way important. And so, it becomes important for us to

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[3] Danielle Allen, *Our Declaration: A Reading of the Declaration of Independence in Defense of Equality* (New York NY: Norton, 2014), p. 153.

[4] These phrases are from Christopher Wolfe's "Understanding Public Philosophy" (unpublished).

[5] See Michael Sandel's *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge MA: Harvard Univ. Press, 1996).

understand what place the idea of inalienability had in Locke's thought.

The *term* "unalienable" is not specifically employed by Locke in his *Two Treatises of Civil Government*, but the *concept* of inalienability is clearly entailed by the social contract theory. Locke does talk about rights that cannot be "prescribed," which is a similar term, but perhaps lacks the property law connotations involved with "alienage."[6] In the *First Treatise* Locke claims that the rights of parents over children are greater than those of government over children: "in grants and gifts, that have their original from God and nature...no inferior power of men can limit, nor make any law of *prescription* against them," Locke writes.[7] More to the point are the sections from the *Second Treatise* where Locke argues that it would be wrong to give up the natural rights to life and liberty by selling oneself into slavery or committing suicide:

> For a man not having the power of his own life, cannot, by compact or his own consent, enslave himself to anyone, nor put himself under the absolute, arbitrary power of another to take away his own life when he pleases. Nobody can give more power than he has himself, and he that cannot take away his life cannot give another power over it.[8]

> Though the legislative, whether placed in one or more, whether it be always in being, or only by intervals, though it be the supreme power in every commonwealth; yet, ... [the legislative power] can be no more than those persons had in a state of nature before they entered into society, and gave up to the community: for no body can transfer to another more power than he has in himself; and no body has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or

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[6] In *Inventing America: Jefferson's Declaration of Independence*, Garry Wills points out that "[i]nsofar as a sovereign had right or rule over something, it was properly his (*proprium*), an *alienum* to others. To transfer, he must 'alien' it–and the juridical literature first used 'alienable' about this power to surrender territory or peoples while retaining rule over the *proprium*. Fiefs and domains were defined in terms of their alienability from the prince or crown. The same legal language was used for any title-transfer over an estate or property (see Chambers Cyclopedia, s.v. 'alienation'). Whatever subsidiary holdings might be disposed of, the sovereign could never alien the realm's very substance. (Sovereignty, after all, implied that nothing can be 'supremer' than supremacy, so supremacy cannot yield its essence to another.) ... The right to alien property was a legal question Jefferson studied in Sir John Dalrymple, taking notes and copying extracts (Commonplace Book, 142-47)." Garry Wills, *Inventing America: Jefferson's Declaration of Independence* (New York NY: Houghton Mifflin Co., 1978), pp. 213-14.

[7] John Locke, *First Treatise*, §63. My emphasis.

[8] John Locke, *Second Treatise*, §23.

property of another. A man, as has been proved, cannot subject himself to the arbitrary power of another; and having in the state of nature no arbitrary power over the life, liberty, or possession of another, but only so much as the law of nature gave him for the preservation of himself, and the rest of mankind.[9]

The limitations on what an individual can give up carry over and are limitations on what the government can take from an individual having entered a social contract. Locke's social contract argument should be familiar to any reader of the Declaration of Independence:

(1) In the state of nature human beings have natural rights which individuals have a duty to respect and protect as much as they can.

(2) Individuals have reasons to band together and form a government to better protect natural rights such as the right to life (which is not alienated), while putting rights they once had in the state of nature into the hands of the government, such as the right to execute justice (which is alienated).

(3) If a government fails to protect individuals' unalienable rights, it has undermined its own reason for existence, and individuals should exercise their right to revolution and return to the state of nature until a better government can be formed.

In effect, the entire social contract theory that John Locke proposes is dependent on the idea that some rights are unalienable. There are a few nuances that must be added to this, the most important of which has to do with the forfeiture of rights by criminals. As the philosopher Edward Feser puts it:

[Locke] would reject the claim that all our rights are "unalienable" on the grounds that violators forfeit their own rights by virtue of their wrongdoing, that property rights are of their very nature alienable insofar as a property owner has the right to sell or give away what he or she owns, and that all individuals renounce their right to punish rights violators by leaving the state of nature and entering into political society.[10]

Some Locke scholars have engaged in a debate over how his various statements regarding inalienability all fit together and which rights are unalienable. For example, the political theorist Willmoore Kendall wrote a book in which he argued that ultimately *all* rights are alienable to the legislative power in Locke's system.[11] I and most other commentators think that Kendall was wrong

[9] John Locke, *Second Treatise*, §135.

[10] Edward Feser, *Locke* (Oxford UK: Oneworld Publications, 2007), p. 104.

[11] Willmoore Kendall, *John Locke and the Doctrine of Majority Rule* (Champaign IL: Univ. of Illinois Press, 1959).

about that,[12] but instead of engaging in an inside baseball debate within the scholarship on Locke, I want to consider the implications of the idea of inalienable rights for Locke's philosophical anthropology.

If it is true (as I think it is) that Locke presupposes that certain rights are inalienably attached to a human being *qua* human, then Locke's concept of the self is far richer than the concept of the self held by contemporary liberals and libertarians. As A.J. Simmons has pointed out, the libertarian philosopher Robert Nozick in his classic *Anarchy, State, and Utopia* denied that rights are inalienable, "in spite of his acceptance of many Lockean principles."[13] Nozick wrote that:

> Locke would hold that your giving your permission cannot make it morally permissible for another to kill you, because you have no right to commit suicide. My nonpaternalistic position holds that someone may choose (or permit another) to do to himself *anything*, unless he has acquired an obligation to some third party not to do or allow it.[14] (Nozick's emphasis)

From Nozick's point of view, it is paternalistic for Locke say that a person is not morally within his rights to alienate his own right to life, especially when it is indirectly done through assisted suicide. The difference between Locke and Nozick here is one of philosophical anthropology. For Nozick, just as much for his liberal philosophical opponent John Rawls, *anything* can be separated from the notion of the self, and the distinction between persons is the only essential quality the human self inherently has. All other qualities of human beings, including their basic motivations, are possessions that individuals may divest themselves of. This denuded philosophical anthropology is what philosopher Michael Sandel called "the unencumbered self."[15] It is this unencumbered

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[12] See, for example, Michael Zuckert, *Natural Rights and the New Republicanism* (Princeton NJ: Princeton Univ. Press, 1994). Zuckert writes: "[c]ontrary to Grotius..., Locke unqualifiedly affirms inalienability" (p. 218). Zuckert also believes Locke's belief in the inalienability of rights was stronger than another influence on the founders, Pufendorf: "Contrary to the conclusion Locke draws from the workmanship argument, Pufendorf concludes that suicide is permissible in the state of nature, in that no one has an obligation to self" (p. 365 n80).

[13] A.J. Simmons, "Inalienable Rights and Locke's Treatises," *Philosophy & Public Affairs* 12/3 (1983): 175 n2.

[14] Robert Nozick, *Anarchy, State, and Utopia* (New York NY: Basic Books, 1974), p. 58.

[15] Michael Sandel, *Liberalism and the Limits of Justice* (New York NY:

notion of the self presupposed in modern liberal philosophy that yields the radical autonomy of the individual from any moral obligation. Most of the "autonomy" arguments for the pro-choice view can be traced back to this aspect of philosophical anthropology. Locke's idea of the inalienability of rights is inherently inconsistent with that sort of philosophical anthropology, because in a sense moral obligations are "logically welded" to the human essence, to borrow a phrase from Bernard Williams.[16] Unalienable rights are "welded on" to the self; they cannot be broken off and given away.

Inasmuch as these modern liberals and libertarians abandon the richer notion of the self, which yields pro-life conclusions, they are not truly followers of John Locke, and they do not believe that the rights of the American Declaration of Independence are inalienable.

2. The Political Theory of the American Founding on Inalienability

The idea of inalienability is a core notion in the Declaration of Independence, and in the thought of the Founding generation in general. There are, of course, many Founding fathers besides Thomas Jefferson who discussed unalienable rights, and many Founding documents besides the Declaration that mention them. The different ways that these documents talk about inalienability tell us a good deal more about the idea.

It seems likely that when Thomas Jefferson mentioned that certain rights were "inalienable" in his "rough draft" of the Declaration, he was arguing for nothing new or out of the ordinary for an American Whig to argue. The Declaration went through three drafts: the first "rough draft" was written by Jefferson, the second "committee report" draft was lightly edited by the other members of the "Committee of Five" (John Adams, Benjamin Franklin, Roger Sherman, and Robert Livingston), and the "final draft" that we read today was heavily revised by the full chamber of the Continental Congress. The first thing to note is that in his rough draft, Jefferson did not use the word "unalienable" but instead the word "inalienable," with an "i." But there is probably no real difference between "inalienable" and "unalienable"; they are interchangeable. As Carl Becker noted in his flawed[17] but classic study[18] of the Declaration,

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Cambridge Univ. Press, 1982), p. 121.

[16] Bernard Williams, *Morality: An Introduction to Ethics* (New York NY: Cambridge Univ. Press, 1972), p. 52.

[17] The reason I consider Carl Becker's study flawed has to do with what Harry Jaffa points out in his *New Birth of Freedom* (Lanham MD: Rowman and Littlefield,

John Adams likely made the word change to the "committee report" for merely stylistic reasons. Becker writes that "'unalienable' may have been the more customary form in the eighteenth century."[19] That has been what I have noticed in surveying other eighteenth-century documents as well, that "unalienable" is more commonly used than "inalienable."

Some commentators claim that Jefferson's inclusion of a discussion of "inalienable" rights was unusual or out of the ordinary, but I disagree. Garry Wills, in one of the many far-fetched claims he makes in *Inventing America: Jefferson's Declaration of Independence*, argues that Jefferson's use of the concept of inalienable rights in the Declaration proves that he was more influenced by the philosophy of the Scottish Enlightenment than the philosophy of Locke, since Locke does not use the term "inalienable."[20] It is true that a Scottish influence on the Founders, Francis Hutcheson, discussed inalienability at length in his moral philosophy. For example, in *An Enquiry into the Original of Ideas of Beauty and Virtue*, Hutcheson wrote:

> There is another important Difference of Rights, according as they are Alienable or Unalienable. To determine what Rights are alienable and what are not, we must make these two Marks: 1st. If Alienation be within our natural Power, so that it be possible for us in Fact to transfer our Right; and if it be so, then, 2dly. It must appear that [to transfer] such rights must serve some valuable Purpose.... A direct Right over our Lives or Limbs, is not alienable to any Person; so that he might at Pleasure put us to death, or maim us. We have indeed a Right to hazard our Lives in any good Action which is of importance to the Publick; and it may often serve a most valuable end, to subject the direction of such perilous Actions.[21]

2000), Ch. 2: "The Declaration of Independence, the Gettysburg Address, and the Historians." Becker wrote that it was a "meaningless question" whether the Declaration's principles were true or false, which is patently wrong.

[18] Carl Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York NY: Vintage Books, 1922).

[19] Ibid., p. 175 n1.

[20] Garry Wills, *Inventing America*, Ch. 16. Michael Zuckert argues in *The Natural Rights Republic* (Notre Dame IN: Univ. of Notre Dame Press, 1996) that "Wills presents no evidence other than Jefferson's use of the term 'unalienable' to establish his claim that Jefferson understood rights as he says Hutcheson did. The notion of 'unalienable rights' is not sufficiently Hutchesonian for that purpose, however. Even Hobbes identified some rights as inalienable, and the entire thrust of Locke's liberal version of rights theory rests on an acceptance of inalienability" (p. 72).

[21] Francis Hutcheson, *An Enquiry into the Original of Ideas of Beauty and Virtue*, Treatise II, §VII.

The ground that Hutcheson states for not alienating natural rights is "valuable Purpose" rather than justice, but his statement is similar enough to that of the American Founders that he may have been an influence on them. However, as I argued in the previous section, the *concept* of inalienability is clearly to be found in Locke even if the *term* is not. And as Jefferson himself claimed in his 1825 letter to Henry Lee, the Declaration was "[n]either aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing," and "[a]ll its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, &c."[22] Jefferson probably had many influences that led him to believe in inalienable rights, and the many other Americans whom he spoke for believed in inalienability too.

In other founding documents we find various phrases regarding how rights are not to be violated through alienation. In the buildup to the revolution James Otis wrote a pamphlet called "Vindication of the British Colonies" that defended the "inherent, indefeasible rights of the subject" originating in the law of nature.[23] There are also many statements about the inalienability of rights to be found in the documents of the state governments following the revolution. For example, the Virginia Declaration of Rights, approved on June 12, 1776 (before the Declaration) and initially written by George Mason, argued that all men "have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their prosperity."[24] Mason uses the word "inherent" instead of "unalienable," but the function of rights as part of the typical social contract theory is clear. In response to the drafting of a new Massachusetts state constitution, Theophilus Parsons claimed in his famous "Essex Result" statement that:

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[22] *Thomas Jefferson: Writings*, ed. Merrill D. Peterson (New York NY: Library of America, 1984).

[23] James Otis, "Vindication of the British Colonies," Boston, London, reprinted for J. Almon, Burlington-House, in Piccadilly., 1769. I learned of Otis's discussion from Bernard Bailyn's *The Ideological Origins of the American Revolution* (Cambridge MA: Harvard Univ. Press, 1967) p. 186. The document is also discussed in Gordon Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill NC: Univ. of North Carolina Press, 1969).

[24] "Final Draft of the Virginia Declaration of Rights," from *The Papers of George Mason 1727-1792*, ed. Robert Ruland (Chapel Hill NC: Univ. of North Carolina Press, 1970).

All men are born equally free. The rights they possess at their births are equal, and of the same kind. Some of those rights are alienable, and may be parted with for an equivalent. Others are unalienable and inherent, and of that importance, that no equivalent can be received in exchange. Sometimes we shall mention the surrendering of a power to controul our natural rights, which perhaps is speaking with more precision, than when we use the expression of parting with natural rights -- but the same thing is intended. Those rights which are unalienable, and of that importance, are called the rights of conscience. We have duties, for the discharge of which we are accountable to our Creator and benefactor, which no human power can cancel. What those duties are, is determinable by right reason, which may be, and is called, a well informed conscience. What this conscience dictates as our duty, is so; and that power which assumes a controul over it, is an usurper; for no consent can be pleaded to justify the controul, as any consent in this case is void. The alienation of some rights, in themselves alienable, may be also void, if the bargain is of that nature, that no equivalent can be received. Thus, if a man surrender all his alienable rights, without reserving a controul over the supreme power, or a right to resume in certain cases, the surrender is void, for he becomes a slave; and a slave can receive no equivalent. Common equity would set aside this bargain.[25]

We have in the "Essex Result" a full account of the philosophical anthropology that the concept of inalienability requires, including conscience, right reason, ideas of equity, and duty. For Parsons, we humans not only do not deserve power over inalienable rights, but we also cannot escape what our well-formed consciences tell us about them. That latter point is an important one that will bear repeating in the "Re-application" part of this essay.

In American history after the Founding, the idea of inalienability has remained a part of people's ideas as often as the Declaration principles have been defended. And quite often when the principles of the Declaration have been rejected or abandoned, such as they were by the Progressives, the idea of inalienability is one of the first ideas to be thrown out. It is not a surprise that Frank Goodnow, the Progressive founder of the American Political Science Association, wrote that there was "no historical justification" for the idea that there were rights that "could neither be taken away or limited without the consent of the individual affected."[26] Such an idea obviously interferes with collectivist ideas of government, just as much as it interferes with pro-choice

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[25] *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780*, ed. Oscar Handlin and Mary Handlin (Cambridge MA: Belknap Press of Harvard Univ. Press, 1966).

[26] Frank Goodnow, *The American Conception of Liberty* (Providence RI: Standard Printing Co., 1916).

views of what choices the individual should be able to make.

3. Re-application

In this last section, I would like to briefly re-apply the American idea of "inalienability" to a present controversy. In 2016, California changed its state laws to allow for "the right to die," allowing patients to be assisted by doctors in committing suicide. Brittany Maynard, a victim of cancer who pushed for the California law to be changed, wanted to choose the time and place that her suffering (and life) would end. Sadly, she died in 2014 by traveling to Oregon and being assisted in suicide there. Governor Jerry Brown, who signed the "End of Life Option Act" into law, defended his action by saying that "it would be a comfort to be able to consider the options afforded by this bill" and that he "wouldn't deny that right to others," in spite of the fact that such a law conflicted with his own Catholic beliefs.

The Declaration of Independence's right to life is inalienable, though. Brittany Maynard alienated her own right to life. In keeping with her American values, she ought not to have arranged her own suicide, in spite of the suffering she was enduring. And as for Governor Brown, he should remember what Theophilus Parsons wrote in the "Essex Result," that "[w]e have duties, for the discharge of which we are accountable to our Creator and benefactor, which no human power can cancel." His Catholic conscience determines that he not allow the right to life be alienated through assisted suicide.

This is, I think, the most plausible reading of what we can say in today's circumstances in light of the public philosophy embodied in the Declaration. Our thinking about what is right ought to seriously take into account what is unalienable.