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"John Locke as Constitutional Theorist:

An Essay on the Role of Christian Lawyers and Judges within the Secular State"©

By

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TABLE OF CONTENTS

Preface

Introduction

Summary

Part I. John Locke- Biography[1]

Part II. "An Essay Concerning the True Original, Extent and End of Civil Government"

- **A. Universal Moral Law**
- **B. Reverend Richard Hooker (1554-1560)**
- **C. State of Nature**
- **D. Forfeiture and Slavery**
- **E. Property and Labor**
- **F. Marriage, Parental Authority and Children**

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[1] See Apostolate Paper #7, "Christian Philosophy of John Locke."

G. The Monarchy and Civil Government
H. The Declaration of Independence and the U.S. Constitution

Conclusion

The ideas expressed in this Apostolate Paper are wholly those of the author, and subject to modification as a result of on-going research into this subject matter. This paper is currently being revised and edited, but this version is submitted for the purpose of sharing Christian scholarship with clergy, the legal profession, and the general public.

PREFACE

The organized Christian church of the Twenty-First Century is in crisis and at a crossroad. Christianity as a whole is in flux. And I believe that Christian lawyers and judges are on the frontlines of the conflict and changes which are today challenging both the Christian church and the Christian religion. Christian lawyers and judges have the power to influence and shape the social, economic, political, and legal landscape in a way that will allow Christianity and other faith-based institutions to evangelize the world for the betterment of all human beings. I write this essay, and a series of future essays, in an effort to persuade the American legal profession to rethink and reconsider one of its most critical and important jurisprudential foundations: the Christian religion. To this end, I hereby present the eighth essay in this series: "John Locke as Constitutional Theorist."

INTRODUCTION[2]

John Locke's *An Essay Concerning the True Original, Extent and End of Civil Government*[3] provides a critical link between the thinking of the Founding

[2] This essay is written in memory of the entire Political Science faculty at Morgan State University during the late 1980s and early 1990s, including Professor Vernon Gray, Ph.D.; Professor Joseph Overton, Ph.D.; Professor Hudson, Ph.D.; and Professor Michael Kamara, J.D. These men developed my mind, critiqued my research and writings, and encouraged me to pursue law as a noble profession. (Unfortunately, there were also superb guest-lecturers and visiting professors whose names I cannot now recall.)

[3] I shall hereafter refer to this essay as the "Essay on Civil Government" or *Essay on Civil Government*.

Fathers, Christian and natural-law philosophy, and the United States Constitution. The modern-day conception of Church history, Church membership, Church ordination of pastors, and Church or ecclesiastical rules should not be confused with the Christian philosophy of natural law, which pre-dates the Christian religion itself and is much broader and universal in scope than the organized and institutional Christian Church. Failure to understand this distinction prohibits judges, lawyers, public officials and the general public from understanding the Christian origins and objectives of American jurisprudence in general and of the United States Constitution in general. I believe that Locke's *Essay on Civil Government* helps to alleviate this confusion.

The political philosophy of John Locke merged classical Anglo-Catholic theology into constitutional law, and this political philosophy became the foundation of my legal scholarship and training during the late 1980s and early 1990s. My understanding of the relationship between Christianity and American jurisprudence was shaped largely by Locke's writings. As I can recall now, as I progressed through my academic studies, Locke's shadow loomed large; with Locke's writings I could better comprehend the practical application of the Christian doctrine of love to human affairs in every human endeavor. As a college and law student, I could easily see Locke's ideas reflected in the following source material:

I. Natural Law Philosophy
   - A. Catholic Church Fathers
   - B. Writings of St. Augustine
   - C. Writings of St. Thomas
   - D. English Philosophers
   - E. French Philosophers
   - F. German Philosophers
   - G. Ancient Egyptian, Greek and Roman philosophy
   - H. International Human Rights

II. America's founding documents
   - A. Declaration of Independence
   - B. U.S. Constitution
   - C. The Federalist Papers

III. America's Founding Fathers
   - A. Thomas Jefferson
   - B. James Madison (The Federalist Papers)

C. Alexander Hamilton (The Federalist Papers)
D. John Jay (The Federalist Papers)
E. Thomas Paine

IV. Pre-Civil War American History
A. Revolutionary War Period
B. Pre-Civil War Anti-Slavery Movement
C. Writings and Speeches of Abraham Lincoln
D. Writings and Speeches of Frederick Douglass

V. Civil Rights Era
A. Liberation Theology
B. Black Church and the Civil Rights Movement
C. Writings and Speeches of Martin Luther King, Jr.

VI. Economics, Sociology and Political Economy
A. James Mill
B. W.E.B. Du Bois
C. John Kenneth Galbraith
D. Paul Samuelson

Locke thus became a foundational link in my intellectual, spiritual, and academic development.

Prior to my encounter with Locke's *An Essay Concerning the True Original, Extent and End of Civil Government*,[4] my understanding of Christianity was that it was pure theology and religion without a direct connection to law and secular philosophy. St. Augustine's and St. Thomas' writings had introduced me to the idea that God's will is eternal, irresistible law that ultimately reigned supreme over all human affairs; but John Locke's "Essay on Civil Government" clearly tied the Christian religion to modern-day law and jurisprudence. As a consequence, I began to question whether the Christian religion was actually the foundation of the United States Constitution and Anglo-American jurisprudence.

During my undergraduate years in college, I was first introduced to John Locke in a political theory course; and during law school, I found it necessary to re-read Locke's "Essay on Civil Government," as I studied constitutional law, international human rights, and international law. As I recall, these formal political

[4] I shall hereafter refer to this essay as the "Essay on Civil Government" or *Essay on Civil Government*.

science and law-school courses never suggested that God was the foundation and source of the inalienable rights of man; but John Locke's writings poignantly held, in a variety of ways, that God is the source of all law, thus incorporating the classical Christian view of law and government.

Without John Locke's Christian philosophy, I probably would have never tried to read and interpret the United States Constitution and American common law through the prism of natural law. Locke's essays made me desire to read general philosophy, including law and economics. Locke's essays included enough of the Christian religion in order to pull me into the depths of his essays; and, yet, simultaneously, Locke's essays also included just enough secular law and political theory to point me in the direction of general secular philosophy. Without Locke, I likely never would have commenced a life-long journey of reading secular philosophy; and I do not honestly think that I would have ever read David Hume, Jeremy Bentham, Karl Marx, John Stuart Mill, John Jacques Rousseau and the various other classical European philosophers. Hence, through Locke's and others' writings, I was slowly evolving from being merely a conservative, Southern, bible-belt Christian, into a Christian thinker with a more sophisticated, secular, and "catholic" worldview. So that by the year 1995, I began to place the Christian religion into what I conceptualized as its proper context and relationship to the secular justice system. To my mind, "reason," "nature," and "inalienable rights" were the critical links between the Christian religion and the Anglo-American constitutional and legal systems. But these links remained very vague and unclear for several years after I was graduated from law school, because the practical demands of law practice are simply not conducive to the in-depth research or application of this aspect of jurisprudence. I struggled to find the time to pursue this intellectual interest.

During the first ten years of my law-practice experience, American constitutional and common law thus vaguely appeared in my mind as expressions of natural law—i.e., what Locke called the "common law of nature"[5] and the "common law of reason."[6] However, as I gained more experience with labor and employment law, and with the practical application of law in courts and government agencies, I slowly began to see and understand that the human condition, which undergirds natural law theory, is fundamentally universal and constant; that the law of nature (i.e. reason) is an essential ingredient in every justice system; and that the dictates of the Christian law of love is fundamentally

[5] *The English Philosophers from Bacon to Mill* (New York, NY: The Modern Library, 1967), p. 469.
[6] Ibid., p. 410.

irresistible in the adjudication of human conflict. All jurisprudence and philosophy—as John Locke seemed to imply-- seemed to lead back to God, the Father of us all; and now, after twenty years of law practice experience, I am confident that the Christian conception of natural law is the foundation of American jurisprudence.[7]

SUMMARY

This paper analyzes John Locke's *Essay Concerning the True Original, Extent and End of Civil Government*.[8] In this landmark essay, Locke explains why all governments are prohibited from committing or administering its laws through tyranny, absolutism, and oppression. One reason is that, fundamentally, human beings have inalienable rights to life, liberty, and property; another reason is that human beings do not have the power to transfer inalienable rights to another human being or to the government (e.g., a parent does not have the right to sell his or her child into slavery). According to Locke, all legitimate civil governments originate with the *consent* of those who are governed. Under Locke's constitutional scheme, "consent" is the foundation of governmental legitimacy. Locke believed that since no sane, rational or reasonable human being would have given his or her consent to be governed by, then any government that acts through tyranny, or that takes tyrannical actions, does so in violation of the natural or universal moral law that is the *social contract* (i.e., constitutional law, due process of law),[9] which the Calvinists (Anglican Puritans) surmised was deeply-rooted in Abrahamic-Mosaic-Jewish covenant theology.

[7] This does not mean that Christianity is woven into the common law, or that Christianity is woven into the United States Constitution. However, I do contend that the Christian interpretation of natural law—as developed through the Catholic Church and the Church of England—is the foundation of American constitutional and common law jurisprudence.

[8] I shall hereafter refer to this essay as the "Essay on Civil Government."

[9] Fundamentally, according to Locke, nobody has the right to commit suicide; and so, nobody can grant to another person or government a right which he or she does not possess. Hence, from this reasoning, no other person or government has the right to murder another human being. Aside from the drastic act of murder, may be included less-drastic oppressive actions such as tyrannical acts, slavery, exploitation, etc. According to Locke, these oppressive actions also may not be committed against another human being without his or her *consent*. And since no rational, reasonable person would ever *consent* to tyranny, slavery, exploitation and the like, then no secular, civil government can ever be considered to have attained such a right over its citizens or subjects. Here, we find "consent of the governed" concept; "These are the bounds which the trust that is put in them by the society, and the law of God and Nature, have set to the legislative power of every commonwealth, in all forms of government." Under Locke's system, exceptions were made for criminal acts by individuals who may be deemed to have forfeited their constitutional rights. *The English Philosophers from Bacon to Mill* (New York, NY: The Modern Library, 1967), p. 461.

Locke's *Essay on Civil Government* reflects the classical idea of law as established by non-human hands within nature. This idea of law certainly pre-dates Christianity, but it was incorporated into Christian thought and flowed through to modern Christendom from the Catholic Church, and to the United States through the Church of England and other Protestant Churches. Most importantly for American lawyers and judges, this idea of natural law was the foundation of the American Declaration of Independence and U.S. Constitution. For American clergy, Locke postulates that this idea of natural law is a reflection of the Golden Rule and the Christian law of love. From Locke's *Essay on Civil Government*, one might easily conclude that the Christian idea of "natural law" has been thoroughly woven into Anglo-American jurisprudence, for indeed, Locke refers to the secular common law as the "common law of nature" and the "fundamental law of nature and government."[10] From Locke's idea of the power of the government to do justice, equity and good, we find elements of St. Augustine's view of the secular civil state and law; and from Locke's idea "reason" as the foundation of law, we find St. Thomas Aquinas' summation of law and theology. Locke apparently weaves together these classical Christian doctrines with 18th century European political theory in order to create a theory of the Social Contract, which ultimately has a persuasive impact upon the American Founding Fathers. I would be remiss, here, if I did not stress the fact that, inasmuch as John Locke's ideas have influenced the founding documents of the United States, the "idea of the inalienable rights of human beings" and "government by the consent of the governed" were woven out of the fabric of the Christian law of love and the Christian religion.

But to limit Locke's constitutional theory to "Christian" commonwealths or states would do grave injustice to his philosophy of constitutional law. I read Locke's views on the "state of nature" as those of a universal moralist and legal theorists; for, indeed, the factual basis upon which he rests his constitutional claims stem from archeological and universal human history. For this reason, I consider Locke's constitutional philosophy to be truly universal and cross-cultural, rather than a mere expression of Anglo-European political theory. (This is the essential essence of the Christian faith). The impression this made upon me was that I began to believe that all law and constitutions (and not just the United States Constitution) are inherently sacred, because of their inherent objective, which is the good of the body politic. And all of this was reinforced by my readings of St. Paul, who had opined that "[l]et every soul be subject unto higher powers. For there is no power but of God: the powers that be are ordained of God…. For rulers

[10] Ibid., p. 469.

are not a terror to good works, but to the evil…. For he is the minister of God to thee for good."[11] Thus, from my readings of the earliest of Christian thinking on law and government, and as I matriculated through upper-level courses in law school, I began to grapple with the idea of a universal God whose mandate was interfaith and cross-cultural, and I began to consider the teachings of Jesus Christ to be much more than how they were presented to me through conventional or orthodox Christian sources. In any event, John Locke seemed to have also concluded that Christianity and Jesus Christ were much more than conventional religion, but rather *expressions of ultimate reality* and *universal truth*. And so, since my days as a law student, and on through my early years as a lawyer, I believed that the secular American legal system was not excluded from this ultimate reality and universal truth.

Part I. John Locke- Biography[12]

[See Apostolate Paper #7, "Christian Philosophy of John Locke"][13]

Part II. "An Essay Concerning the True Original, Extent and End of Civil Government"

A. Universal Moral Law

John Locke believed in a universal moral law that was reflected in the Old and New Testaments, and which served as the foundation of the law of nature ("reason") and civil governments.[14] To understand Locke, one should first read

[11] Romans 13:1-4.
[12] See Apostolate Paper #7, "Christian Philosophy of John Locke."
[13] Ibid.
[14] See, e.g., *Catechism of the Catholic Church*, Part Three: Life in Christ, Chapter Three, Article 1: The Moral Law. ("The moral law is the work of divine Wisdom. Its biblical meaning can be defined as fatherly instruction, God's pedagogy. It prescribes for man the ways, the rules of conduct that lead to the promised beatitude; it proscribes the ways of evil which turn him away from God and his love. It is at once firm in its precepts and, in its promises, worthy of love. Law is a rule of conduct enacted by competent authority for the sake of the common good. The moral law presupposes the rational order, established among creatures for their good and to serve their final end, by the power, wisdom, and goodness of the Creator. All law finds its first and ultimate truth in the eternal law. Law is declared and established by reason as a participation in the providence of the living God, Creator and Redeemer of all. 'Such an ordinance of reason is what one calls law.' [Leo XIII, *Libertas praestantissimum*: AAS 20 (1887/88), 597; cf. St. Thomas Aquinas, STh I-II 90, 1.]").

both the Roman Catholic Church's and the Church of England's classical interpretations of natural law. The following definition of natural law is found in the *Catechism of the Catholic Church*:

I. The Natural Moral Law

1954 Man participates in the wisdom and goodness of the Creator who gives him mastery over his acts and the ability to govern himself with a view to the true and the good. The natural law expresses the original moral sense which enables man to discern by reason the good and the evil, the truth and the lie:

> The natural law is written and engraved in the soul of each and every man, because it is human reason ordaining him to do good and forbidding him to sin…. But this command of human reason would not have the force of law if it were not the voice and interpreter of a higher reason to which our spirit and our freedom must be submitted. [Leo XIII, *Libertas praestantissimum*, 597.]

1955 The 'divine and natural' law shows man the way to follow so as to practice the good and attain his end. The natural law states that first and essential precepts which govern the moral life. It hinges upon the desire for God and submission to him, who is the source and judge of all that is good, as well as upon the sense that the other is one's equal. Its principal precepts are expressed in the Decalogue. This law is called 'natural,' not in reference to the nature of irrational beings, but because reason which decrees it properly belongs to human nature:

> Where then are these rules written, if not in the book of that light we call the truth? In it is written every just law; from it the law passes into the heart of the man who does justice, not that it migrates into it, but that it places its imprint on it, like a seal on a ring that passes onto wax, without leaving the ring. [St. Augustine, De Trin. 14, 15, 21: PL 42, 1052].
> The natural law is nothing other than the light of understanding placed in us by God; through it we know what we must do and what we must avoid. God has given this light or law at the creation. [St. Thomas Aquinas, Dec. praec.I.].

1956 The natural law, present in the heart of each man and established by reason, is universal in its precepts and its authority extends to all men. It expresses the dignity of the person and determines the basis for his fundamental rights and duties:

> For there is a true law: right reason. It is in conformity with nature, is diffused among all men, and is immutable and eternal; its orders summon the duty; its prohibitions turn away from offense…. To replace it with a contrary law is a sacrilege; failure to apply even one of its provisions is forbidden; no one can abrogate it entirely. [Cicero, Rep. III, 22, 33.]

1957 Application of the natural law varies greatly; it can demand reflection that takes account of various conditions of life according to places, times, and circumstances. Nevertheless, in the diversity of cultures, the natural law remains as a rule that binds men among themselves and imposes on them, beyond the inevitable differences, common principles.

1958 The natural law is immutable and permanent throughout the variations of history; it subsists under the flux of ideas and customs and supports their progress. The rules that express it remain substantially valid. Even when it is rejected in its very principles, it cannot be destroyed or removed from the heart of man. It always rises again in the life of individuals and societies: 'Theft is surely punished by your law, O Lord, and by the law that is written in the human heart, the law that iniquity itself does not efface. "[St. Augustine, Conf. 2, 4, 9: PL 32, 678.].

1959 the natural law, the Creator's very good work, provides the solid foundation on which man can build the structure of moral rules to guide his choices. It also provides the indispensable moral foundation for building the human community. Finally, it provides the necessary basis for the civil law with which it is connected, whether by a reflection that draws conclusions from its principles, or by additions of a positive and juridical nature.

B. Reverend Richard Hooker (1554-1600)[15]

Locke also appears to have been greatly influenced on these points from the renowned Anglican priest Richard Hooker's *Of the Laws of Ecclesiastical Polity* (1594). Locke believed that all political power is derived from a state of nature where all human beings are naturally free, but that in order to remain free, human beings have no other choice but to respect each other's right of freedom. This imposes a mutual obligation, which Locke concedes is a "duty to love others," as he paraphrased Richard Hooker.[16] Locke does not here consider "love" to be the romantic, emotional love; but, rather, he considers "love" as the duty civility and the imposition of the "Golden Rule."

Locke states, "[t]he state of nature has a law of nature to govern it, which obliges everyone; and reason, which is that law, teaches all mankind who will but consult it, that, being all equal and independent, no one ought to harm another in

[15]" **Richard Hooker** (March 1554 – 3 November 1600) was an English priest in the Church of England and an influential theologian.[2] He was one of the most important English theologians of the sixteenth century.[3] His defence of the role of redeemed reason informed the theology of the seventeenth century Caroline divines and later provided many members of the Church of England with a theological method which combined the claims of revelation, reason and tradition.[3] Scholars disagree regarding Hooker's relationship with what would be called "Anglicanism" and the Reformed theological tradition. Traditionally, he has been regarded as the originator of the Anglican *via media* between Protestantism and Catholicism.[4]:1 However, a growing number of scholars have argued that he should be positioned in the mainstream Reformed theology of his time, and only sought to oppose extremist Puritans rather than moving the Church of England away from Protestantism.[4]:4"

[16] *The English Philosophers from Bacon to Mill* (New York, NY: The Modern Library, 1967), p. 405.

his life, health, liberty, or possessions. For men being all the workmanship of one omnipotent and infinitely wise Maker—all the servants of one sovereign Master, sent into the world by His order, and about His business—they are His property… and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us, that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours."[17]

C. State of Nature

According to Locke, the "state of nature" is not a jungle of self-centered, irrational greed, as so many wrongly suppose, but rather the "state of nature" is governed by a "law of nature" which is "reason."[18] He again borrows from Richard Hooker, where he writes: "of the judicious Hooker—(Eccl. Pol., lib. i., sect. 10), where he says, 'The laws of which have been hitherto mentioned," i.e., the laws of nature, 'do bind men absolutely, even as they are men, although they have never any settled fellowship, and never any solemn agreement amongst themselves what to do or not to do….'"[19] In other words, according to Locke, in the "state of nature," where there is no civil government, human beings can coexist only through a "law of nature" which is "reason." "Want of a common judge with authority puts all men in a state of nature," Locke concluded.[20] In this state of nature, the law of nature (reason) governs; but where the law of nature (reason) is suspended or breached (e.g., where there is murder, theft, etc.) , then a "state of war" ensures. This "state of war" is what St. Augustine describes in the *City of God* as the privation of peace or harmony within nature, which St. Augustine calls the natural law of peace or the law of God. In the *Essay on Civil Government*, Locke describes this "state of war" as a breach of the law of nature (i.e., the privation of "reason"), as follows:[21]

State of Nature	**State of War**
Peace, good-will, mutual assistance	Enmity, malice, violence and mutual

[17] Ibid.
[18] Ibid.
[19] Ibid., p. 409.
[20] Ibid., p. 411.
[21] Ibid., p. 410-411.

and preservation	destruction.

What, then, distinguishes the "state of nature" from the "state of war" is the nature of human interactions with each other. And Locke held that the "law of nature," which he also called "reason," was the glue that kept human societies from falling apart. This law, according to Locke, was established at the foundation of Creation; for the "law that was to govern Adam was the same that was to govern all posterity, the law of reason."[22] Thus, *reason* is a key component to Locke's constitutional and political theory. For without reason (i.e., natural law), no society of human beings can long last. For this reason, Locke concludes that the "obligations of the law of nature [i.e., reason] cease not in society, but only in many cases are drawn closer, and have by human laws known penalties annexed to them to enforce their observation. Thus the law of nature [i.e., reason] stands as an eternal rule to all men, legislators as well as others."[23]

According to Locke, the "state of war" is the absence of reason; and it may be caused by a person or group of persons acting irrationally or without the use of reason. Thus, the fundamental right of self-defense against a criminal leads to the "state of war," for a man has a natural right of self-preservation. For Locke, to act without reason is to lower oneself to the status of an irrational animal, and should be thus treated: this is the "state of war."

"For by the fundamental law of nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred; and one may destroy a man who makes war upon him, or has discovered an enmity to his being, for the same reason that he may kill a wolf or a lion; because they are not under the ties of the common law of reason, have no other rule but that of force and violence, and so may be treated as a beast of prey, those dangerous and noxious creatures that will be sure to destroy him whenever he falls into their power."[24]

"And thus it is that every man in the state of nature has a power to kill a murderer, both to deter others from doing the like injury, which no reparation can compensate, by the example of the punishment that attends it from everybody, and

[22] Ibid., p. 424.
[23] Ibid., p. 458.
[24] Ibid., p. 410.

also to secure men from the attempts of a criminal who having renounced reason, the common rule and measure God hath given to mankind…."[25]

It thus follows that Locke's "law of nature [i.e., reason]" does not cease whenever groups of persons for civil societies and governments, because "the municipal laws of countries, which are only so far right as they are founded on the law of nature, by which they are to be regulated and interpreted."[26]

D. Forfeiture and Slavery

Slavery is a condition whereby one man is brought under the absolute authority of another man. For Locke, the "state of nature" and the "law of nature" make slavery unlawful,[27] except where the person being enslaved has renounced the "law of reason" and committed a crime against another, and has thus forfeited his or her natural right to freedom.[28] Otherwise, Locke believed that "every man has a property in his own person; this nobody has any right to but himself."[29] In fact, Locke believed that this form of self-ownership was inalienable. "This freedom from absolute arbitrary power is so necessary to, and closely joined with, a man's preservation, that he cannot part with it but by what forfeits his preservation, that he cannot part with it but by what forfeits his preservation and life together. 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 hi life when he pleases."[30]

Fundamentally, Locke conceptualized "slavery" as " the state of war continued between a lawful conqueror and a captive."[31] Locke inquired into the history of slavery in general and concluded that slavery came into the world through warfare and conquest.[32] Here, Locke contends that the law of nature (i.e., reason) must govern even warfare, conquest, and the treatment of captives. Unjust wars violate this law of nature (i.e., reason); but because the criminals who wage

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[25] Ibid., p. 407.
[26] Ibid., p. 408.
[27] "This freedom from absolute arbitrary power is so necessary to, and closely joined with, a man's preservation, that he cannot part with it but by what forfeits his preservation and life together. 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 than he has himself; and he that cannot take away his own life, cannot give another power over it." Ibid., p. 412.
[28] Ibid., pp. 411-412.
[29] Ibid., p. 413.
[30] Ibid., p.. 412.
[31] Ibid.
[32] Ibid., pp. 475-484.

these unjust wars often go unpunished, Locke admonished the victims to appeal "to Heave, and repeat their appeal till they have recovered the native right of their ancestors."[33] For not unlike St. Augustine, Locke sees no difference between small and petty criminals and the rich and powerful criminals who wage unjust wars and capture innocent victims as slaves: they are both violators of the law of nature. "The injury and the crime is equal," wrote Locke, "whether committed by the wearer of a crown or some petty villain. The title of the offender and the number of his followers make no difference in the offense, unless it be to aggravate it. The only difference is, great robbers punish little ones to keep them in their obedience; but the great ones are rewarded with laurels and triumphs, because they are too big for the week hands of justice in this world…."[34]

Finally, Locke turns to the slaves attained from just wars. In these circumstances, "the conqueror gets no power but only over those who have actually assisted, concurred, or consented to that unjust force that is used against him…. For the conqueror's power over the lives of the conquered being only because they have used force to do or maintain an injustice, he can have that power only over those who have concurred in that force; all the rest are innocent, and he has no more title over the people of that country who have done him no injury, and so have made no forfeiture of their lives, then he has over any other who, without any injuries or provocations, have lived upon fair terms with him."[35] Locke believed in the "reservation of the right of the innocent wife and children."[36] He writes: "I am conquered; my life, it is true, as forfeit, is at mercy, but not my wife's and children's." [37] Hence, from Locke's ideas on slavery, I reached the conclusion that the genre of race-based, multi-generational chattel slavery that was practiced in the United States and throughout the Western Hemisphere would have repulsed John Locke as a most barbaric violation of reason and the law of nature.

E. Property and Labor

John Locke's *Essay on Civil Government* also introduced me the idea of "property"; where does it come from, and how it is created? According to Locke, property is the legal or natural right to the possession of land and chattels, and is

[33] Ibid., p. 476.
[34] Ibid.
[35] Ibid., p. 477.
[36] Ibid., p. 479.
[37] Ibid.

fundamentally derived from a person's labor.[38] God gave the world to all human beings "in common… to make use of it to the best advantage of life and convenience."[39] But Locke believed that God did not intend or require that earth remain possessed merely "in common," but that as "much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property."[40] The labor used to take property out of the common state of nature is the source of the property interest:

> The labor that was mine removing them out of that common state they were in, hath fixed my property in them…. Though the water running in the fountain be everyone's, yet who can doubt but that in the pitcher is his only who drew it out? His labor hath taken it out of the hands of Nature where it was common, and belonged equally to all her children, and hath thereby appropriated it to himself. Thus this law of reason makes the deer that Indian's who hat killed it; it is allowed to be his goods who hath bestowed his labor upon it, though, before, it was the common right of everyone.[41]

On the other hand, Locke makes clear that the law of nature (i.e., reason) prohibits one person (or a group of persons) from taking more than they deserve or need, thus resulting in the deprivation of resources to others. Locke reasoned that in the earlier stages of social development, prior to the commercial development of societies, the determination of what a man has earned, and thus was equally entitled to, was "easily seen, and it was useless, as well as dishonest, to carve himself too much, or take more than he needed."[42] However, as societies became more sophisticated and complex, the determination of a just distribution of property and resources became more complicated. Locke believed that there were natural limits to hoarding unnecessary property: "The measure of property nature has well set by the extent of men's labor and the conveniency of life. No man's labor could subdue or appropriate all, nor could his enjoyment consume more than a small part; so that it was impossible for any man, this way, to entrench upon the right of another or acquire to himself a property to the prejudice of his

[38] "God, when He gave the world in common to all mankind, commanded man also to labor, and the penury of his condition required it of him." Ibid., p. 415.
[39] Ibid., p. 413.
[40] Ibid.
[41] Ibid., p. 414.
[42] Ibid., p. 423.

neighbor…."[43] Here, Locke sets forth certain moral laws that prefigured modern labor policy and economics; the problem of poverty, taxation, minimum wages, collective bargaining, and the redistribution of accumulated wealth all find their moral foundations in Locke's natural-law ideas of property.

F. Marriage, Parental Authority, and Children—Nucleus of the Civil Government

In order to understand Locke's political theory of the monarchy and the civil government, we must first analyze his fundamental conception of the family unit.

Locke believed that the union between mother and father (i.e., marriage) was the most important "society" within the civil state, and that it was ordained by God, and should last for so long as the children born to that marriage remained minors. "For the end of conjunction between male and female being not barely procreation, but the continuation of the species, this conjunction betwixt male and female ought to last, even after procreation, so long as is necessary to the nourishment and support of the young ones, who are to be sustained by those that got them till they are able to shift and provide for themselves."[44]

Within this society of marriage, the parents (mother and father) have the duty to educate and care for their children, since children do not have the full power of adult reason, and "because the ignorance and infirmities of childhood stand in need of restraint and correction."[45]

Moreover, the laws of nature (i.e., reason) dictated that the natural affections between parent and child rendered marriage an essential institution for the development of free and independent citizens who are capable of "the use of reason."[46] "The nourishment and education of their children is a charge so incumbent on parents for their children's good," wrote Locke, "that nothing can absolve them from taking care of it. And though the power of commanding and chastising the go along with it, yet God hath woven into the principles of human nature such a tenderness for their offspring, that there is little fear that parents should use their power with too much rigor."[47]

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[43] Ibid., pp. 416-417.
[44] Ibid., p. 434.
[45] Ibid., p. 430.
[46] Ibid., p. 427.
[47] Ibid., p. 429.

Again, for Locke, the chief purpose of marriage is continuation of the human species through the education and nourishment of children.

G. The Monarchy and Civil Government

We turn now to Locke's thesis on the form of government called "monarchy." Locke understood the monarchy to be a natural extension of the family, where the father and mother evolved into being kings and queens over extended families, clans, and tribal groups. Typically, the father of the family had the natural authority and respect of sons, and thus early and largely became the earliest kings in human history. Hence, the relationship between parent and child served as the foundation for Locke's understanding of the relationship between the monarchy and subjects. In both of these relationships, the parent's authority over children (and hence the monarchy's authority over subjects) were limited by natural law (i.e., the law of reason) from tyranny and oppression. Locke reasoned that just as parents have a natural responsibility to care for the best interests of children, so too does the monarchy have a duty to care for the best interests of the entire nation. The only difference is that, with respect to the monarchy, the authority further limited by the "consent of those governed," since, within a state of nature, adult human beings, after having reached the age of majority and attained the capacity of the use of reason, may choose to disavow themselves of the social contract, and move to some other part of the world. Locke reasoned that this was true of every form of government—not just the monarchy. "And thus that which begins and actually constitutes any political society is nothing but the consent of any number of freemen capable of a majority to unite and incorporate into such a society. And this is that, and that only, which did or could give beginning to any lawful government in the world."[48]

In fact, Locke defends the institution of the monarchy by pointing out that the first monarchies in the world were "elective" in nature. They were not hereditary. In addition, Locke points out that these first monarchies were limited to the vital function of waging war and to protecting the commonwealth; while the power of legislation traditionally rested largely with elders and the people. In essence, the typical kings were really "generals" of armies in times of warfare; and they did not traditionally have absolute, tyrannical authority over their subjects. Locke is careful, however, to point out that with the institution of hereditary

[48] Ibid., p. 442.

monarchies around the world, the power of the monarchy, along with its terrible abuses, increased. But Locke is careful not to criticize the inherent power of the monarchy; rather, he does criticize the misuse and abuse of that inherent power. "I will not dispute now whether princes are exempt from the law of their country, " Locke wrote, "but this I am sure, they owe subjection to the law of God and nature. Nobody, no power can exempt them from the obligations of the eternal law."[49]

What this means, then, is that Locke held to the viewpoint of a Higher Law, which would later serve as the foundation for constitutional law, civil and human rights law, and restraints against government abuse. Locke thus extends his analysis of the power of the monarchy to other forms of government as well, because all governments, regardless of form, faced the same essential challenges: abuse of government power.[50] According to Locke, when human beings voluntarily choose to exit the "state of nature," they do so only with the primary objective of improving, not weakening, their security and prosperity. Nor do they, by exiting the "state of nature," give up their natural rights to life, liberty and property; but by exiting the "state of nature," and entering into a "social compact," human beings seek to improve their security, prosperity and dignity. For this reason, Locke held that once individuals exit the "state of nature," and cede legitimate power to a governmental authority, then that governmental authority may take no measures that do not ultimately promote "the public good."[51]

Furthermore, Locke conceptualized the secular civil law as subservient to God's eternal and natural law. His ideas on this point closely parallels the Christian theology of St. Thomas Aquinas, who had purported the following hierarchy of law as: Eternal Law → Divine Law → Natural Law →Human Law. Similarly, Locke concluded that the "law of nature cease not in society, but only in many cases are drawn closer, and have by human laws known penalties annexed to the to enforce their observation. Thus the law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions must, as well as their own, and other men's actions be conformable to the law of nature, i.e., to the will of God, of which that is a declaration, and the fundamental law of nature being the preservation of mankind, no human sanction can be good or valid against it."[52] Locke held to this viewpoint even though he was not unmindful that "[t]hings of this world are in so constant a flux that nothing remains

[49] Ibid., p. 483.
[50] Ibid., pp. 453-473.
[51] Ibid, pp 471-472..
[52] Ibid., p. 458.

long in the same state."[53] For Locke, the law of nature ("reason") is flexible enough to change with the times, in order to ensure the public good.[54]

Here, I would be remiss if I did not point out how closely Locke's ideas on government resembled the political philosophies of the various American Founding Fathers, only several decades following Locke's death. For instance, Locke wrote that:

> These are the bounds which the trust that is put in them by the society, and the law of God and Nature, have set to the legislative power of every commonwealth, in all forms of government.
>
> First, They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.
>
> Secondly, These laws also ought to be designed for no other end ultimately but the good of the people.
>
> Thirdly, They must not raise taxes on the property of the people without the consent of the people, given by themselves or their deputies. And this property concerns only such governments where the legislative is always in being, or at least where the people have not reserved any part of the legislative to deputies, to be from time to tie chosen by themselves.
>
> Fourthly, The legislative neither must nor can transfer the power on making laws to anybody else, or place it anywhere but where the people have.[55]

In addition, Locke believed that the people have "a right of self-defense… even against the king himself," but should not avenge or show disrespect toward the king or sovereign.[56]

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[53] Ibid., p. 467.
[54] Ibid.
[55] Ibid., p. 461.

Thus, the history of the founding of the United States, the American Declaration of Independence, and the United States Constitution appear to have been significantly influenced by John Locke's Christian theology and ideas of freedom and civil government.

Finally, in law school I began to consider not only whether American constitutional law had solid natural-law origins, but I also began to conceptualize Anglo-American common law as an exemplification of the law of nature (i.e., "reason"), upon which the entire American legal system was built, and as having been derived from what Locke referred to as the "common law of nature"[57] and the "common law of reason"[58]. Locke certainly instilled in my mind, as I approached my first-year law school subjects (e.g., property law, torts, criminal law and procedure, and contracts), that Anglo-American common law was actually expression of the classical Catholic definitions[59] of the law of nature (i.e., "reason"). As I reconsider my ideas over twenty years later, I am satisfied that my initial observations and assumptions proved to be correct legal conclusion, because the "law of reason" is the foundation of American jurisprudence.

H. The American Declaration of Independence and United States Constitution

I now turn to the American Declaration of Independence and to the preamble to the United States Constitution. I here contend that it has Lockean and natural-law origins. The Declaration of Independence provides the legal basis for America's separation from Great Britain, and that basis legal basis found founded upon the Roman Catholic and Anglican churches' conceptions of the inalienable and natural rights of human beings. The immortal words of Thomas Jefferson are rooted in Lockean and natural-law theology:

[56] Ibid., p. 499.
[57] Ibid., p. 469.
[58] Ibid., p. 410.
[59] See, e.g., St. Augustine's *The City of God* and St. Thomas Aquinas' *Summa Theologica*.

THE DECLARATION OF INDEPENDENCE

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

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, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security….

The United States Constitution thus flows from the Declaration of Independence as the primary constitutional document that was founded upon natural-law principles. The Declaration of Independence pre-dates the United States Constitution. Without the Declaration of Independence, the United States Constitution is invalid, without a lawful objective, and can have no existence. It thus follows that the Declaration of Independence sets forth the natural-law foundations of the United States Constitution. From that natural-law foundation, the Preamble of the United States Constitution sets forth the natural-law objectives of the American federal government, which is to promote the public and common good, as follows:

PREAMBLE TO THE U.S. CONSTITUTION

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The Christian religion's imprint on American jurisprudence is thus most easily seen on the Declaration of Independence and the United States Constitution.

And, to a lesser degree, Anglo-American common law are expressions of what Locke called "the common law of nature" and the "common law of reason," which were extracted from the Christian law of love and the law of nature (i.e., reason). It thus follows that, without question, American law and jurisprudence (however secular in scope they may appear to be) are thoroughly Christian in origin, design, and objective. I reach these conclusions with no formal reaffirmations from the bar and bench, the law school academy, or pastors and theologians; for these are my own conclusions, extracted from my own experiences, observations, and research. I am, after twenty years of formal law practice, confident that these conclusion are most probable and accurate.

CONCLUSION

John Locke's *Essay on Civil Government* provides a critical link between the thinking of the Founding Fathers, Christian and natural-law philosophy, and the United States Constitution. The modern-day conception of Church history, Church membership, Church ordination of pastors, and Church or ecclesiastical rules should not be confused with the Christian philosophy of natural law, which pre-dates the Christian religion itself and is much broader and universal in scope that the organized and institutional Christian Church. Failure to understand this distinction prohibits judges, lawyers, public officials and the general public from understanding the Christian origins and objectives of American jurisprudence in general and of the United States Constitution in general. To a great degree, American lawyers and judges are not trained as theologians, and most American law schools systematically ignore the Christian foundations of law. I contend that these developments have been a tragic mistake, not only because they undermine the true objectives of law, but the end result is that it prohibits the diverse appreciation and understanding of humanity. This universalism is ancient; it is not a twenty-first century creation. The seventeenth-century philosopher John Locke's essays laid the groundwork not only for the American Founding Fathers during the late eighteenth century, but also for today's Christian lawyers and judges during the twenty-first century, to continue to build a legal system that establishes justice and the public good.

THE END

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