

## SPECIOUS DELUSIONS: JOHN LOCKE, KNOWLEDGE AND RELIGIOUS TOLERATION

REID MORTENSEN\*

The law knows no heresy, and is committed to no dogma, the establishment of no sect.<sup>1</sup>

### I INTRODUCTION<sup>2</sup>

In his *History of England*, Lord Macaulay recounted a letter that King James II and VII had left Lord Godolphin when James fled England in 1688. Read to the House of Lords, James' letter betrayed his pique at 'a nation deluded by the specious names of religion and property'.<sup>3</sup> Not the most impartial of writers, Macaulay's disdain for James was never disguised. It was worth Macaulay's while telling of the letter to Godolphin in the *History* because it reinforced James' intellectual and emotional distance from the political turbulence he himself had initiated – and from the preoccupations of early Whiggism: security of property and freedom of religion. However, Macaulay's critique cannot be dismissed merely as a Whig colouring of history. Even more recent commentators admit that James' project was to replicate Louis XIV's 'modern Catholic polity' – 'a modern, centralizing, and extremely bureaucratic state apparatus' with an emphasis 'on ideological unity and unfettered sovereignty'.<sup>4</sup> James' rule was bolstered by the more efficient collection of taxes and, as a result, a larger government and army<sup>5</sup> – clearly a potential threat to the enjoyment of property. The forcing of King James' flight, though, cannot be explained without reference to his program for Romanising the religious life of the British Isles: suspending the Protestant tests for membership of Parliament and commissions; using the High Commission to intrude Catholics into Anglican Church discipline; issuing indulgences to Catholics and Protestant dissenters without Parliamentary warrant; and, ultimately, having the Archbishop of Canterbury and six other bishops tried for sedition.<sup>6</sup> The birth of a male Stuart heir, baptised a Catholic, precipitated the Glorious

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\* Professor of Law; Head, School of Law and Justice, University of Southern Queensland. This article is dedicated to my good friend and colleague Suri Ratnapala, who over his career has tirelessly modelled a commitment to law, philosophy and academic collegiality; as well as taking the 'sacred duty of the professoriate' seriously.

<sup>1</sup> *Watson v Jones* 80 US 679, 728 (1872) (per Miller J).

<sup>2</sup> In this article, references to 'Locke' are to John Locke, *The Works of John Locke* (Thomas Tegg, 1823).

<sup>3</sup> Thomas Macaulay, *History of England to the Death of William III* (Heron Books, 1967) II, 340.

<sup>4</sup> Steven Pincus, *1688: The First Modern Revolution* (Yale University Press, 2009) 475. See also *ibid* 118-42.

<sup>5</sup> *Ibid* 144-9.

<sup>6</sup> The bishops were acquitted: see *R v Sancroft and Ors (Case of the Seven Bishops)* (1688) 12 St Tr 188; 3 Mod 212; 87 ER 136. See generally, Reid Mortensen, 'Establishment and Toleration: The British Pattern of Secularisation' (1993) 17 *University of Queensland Law Journal* 185, 187-90; Richard Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500-1860* (Cambridge University Press, 2006) 81-2.

Revolution which, despite the historiography, would not be secured without extended warfare in Scotland and Ireland.<sup>7</sup>

The aspiration of a modern Catholic polity is the setting for John Locke's political philosophy, and what was both a liberal and Protestant reaction to the politics of the Restoration period. Having since 1666 been a *protégé* of the Parliamentary Whig leader Lord Ashley, later Earl of Shaftesbury, Locke was the intellectual *bête noir* of the Restoration Stuarts. He held a studentship at Christ Church, Oxford, from 1652, but was ejected from Christ Church on Charles II's express orders in 1684. He was already in exile in the Low Countries at that point, and did not set foot in England during James' reign, which began the next year. Locke accompanied the Princess Mary on her return to England, after her husband William, Prince of Orange, secured the success of the Revolution there in 1689.

The seminal works that define John Locke's philosophy were written while he was in exile: the *Essay Concerning Human Understanding*,<sup>8</sup> the *Two Treatises of Civil Government*<sup>9</sup> and the *First Letter Concerning Toleration*.<sup>10</sup> None were published until after the Revolution. Together, they collect Locke's abiding concerns: the nature of knowledge; entitlement to property; the legitimacy of government and its use of force; revolution; the nature of religious belief; liberty of opinion. In retrospect, these works have also been taken as intellectual justifications for the Revolution and its legislative settlement. That connection should not be exaggerated. For instance, the English *Toleration Act*<sup>11</sup> was in many respects a reward to Protestant dissenters for the support they gave to the Revolution, and the principled restraint they had shown – not without disagreement between them! – when refusing to take advantage of James' extra-Parliamentary declarations of indulgence. It was also all that was left of a broader package of measures intended to give effect to the post-Revolution religious settlement. This included an unsuccessful comprehension bill, by which the Church of England was to be restructured so as to absorb other Protestants – Presbyterians, Congregationalists and Baptists – back into its polity. The *Toleration Act*, though, did not extend liberty of worship to Unitarians or Jews.<sup>12</sup> The Revolution settlement naturally shored up the legal disabilities of Catholics<sup>13</sup> who, despite misconceptions that are still held about Locke's thought,<sup>14</sup> he would have tolerated. In Scotland, Presbyterianism was re-established after the Revolution,<sup>15</sup> but no legal toleration of dissent was recognised, even for Anglicans, until 1712.<sup>16</sup> And there was no *Toleration*

<sup>7</sup> Pincus, above n 4, 474-5.

<sup>8</sup> Locke, above n 2, I, 1-301; II, 1-397; III, 1-176.

<sup>9</sup> Ibid V, 206-496.

<sup>10</sup> Ibid VI, 5-58.

<sup>11</sup> 1 William III and Mary II c 18.

<sup>12</sup> S 14 *Toleration Act 1689* (Eng).

<sup>13</sup> S 3 *Coronation Oath Act 1689* (Eng) (1 William III and Mary II c 6); *Bill of Rights Act 1689* (Eng) (1 William III and Mary II sess 2 c 2); ss 1-3 *Act of Settlement 1700* (Eng) (12 and 13 William III c 2); s 3 *Treason Act 1702* (Eng) (1 Anne st 2 c 21); art 2 *Union with Scotland Act* (Eng) (6 Anne c 11); *Princess Sophia of Hanover's Precedence Act 1711* (UK) (10 Anne c 4).

<sup>14</sup> See John Gough, *John Locke's Political Philosophy* (Clarendon Press, 2<sup>nd</sup> ed, 1973) 197; David Lorenzo, 'Tradition and Prudence in Locke's Exceptions to Toleration' (2003) 47(2) *American Journal of Political Science* 248, 248; Timothy Stanton, 'Locke and the Politics and Theology of Toleration' (2006) 54 *Political Studies* 84, 91. See text accompanying below nn 79-90.

<sup>15</sup> *Act Establishing Presbytery 1690* (Scot).

<sup>16</sup> *Scottish Episcopalians Act 1711* (UK) (10 Anne c 10). The legislation was passed after *Greenshields v Edinburgh Magistrates* (1710) Coll 427; 1 ER 356 showed how precarious the position of Anglicans in Scotland was.

*Act* in Ireland until well after the Hanoverian succession.<sup>17</sup> Little of this is Lockean,<sup>18</sup> even if the pragmatic political commitment to a general toleration of Protestants after the Revolution partly rested on sympathies that Locke shared.

In a historically short time, though, Lockean thought took root in English-speaking culture. As George Grant reminded us, the triumph of the Whigs and the consolidation of the fundamental positions of Whiggism over most of the eighteenth century have meant that subsequent developments in English-speaking liberalism do little more than give detail to either Hobbesian utilitarianism or Lockean contractualism.<sup>19</sup> Grant also notes, for the English, the effect of the ‘co-penetration’ of Calvinist and Anglican Protestantism with political liberalism – with their shared commitments to individualism, freedom, will, capitalism, and progress (or millenarianism).<sup>20</sup> Locke was already a philosophical exemplar of this co-penetration,<sup>21</sup> but for centuries English-speaking Protestants in the British Isles and America gave ‘moral cement’ to Lockean-based contractualism, and plugged its normative gaps with their religious beliefs.<sup>22</sup> Locke’s readership marched with, but often leaned heavily on, its deeper commitment to Protestant Christianity until the late nineteenth century.

Locke’s political and legal influence has naturally been greater, and more direct, in the New World. That is entirely appropriate, given that ‘the woods of America’ were as much an inspiration for his depiction of the state of nature as was Locke’s understanding of the Garden of Eden.<sup>23</sup> If the *Second Treatise* can be taken, in retrospect, to justify the Glorious Revolution, it was certainly also an *a priori* legitimation and theoretical impulse of the American Revolution. Mediated through James Madison,<sup>24</sup> Locke’s political philosophy also set the basic parameters for the *United States Constitution*. He remains a commonly cited philosopher in American adjudication.<sup>25</sup> In an extraordinary example of a work of philosophy metamorphosing into legislation, Thomas Jefferson used passages from the *First Letter* when drafting the text of what became, in 1787, the *Virginia Religious Freedom Act*. Through the Supreme Court’s adjudication in the nineteenth and twentieth centuries, the *Virginia Act*, and therefore the *First Letter*, have been used as a lens for focusing the Court’s approach to the First Amendment’s religion clauses.<sup>26</sup> The use of the *United States Constitution* as the principal model for the *Australian Constitution* has also seen

<sup>17</sup> *Toleration Act 1719* (Ire) (6 George I c 5).

<sup>18</sup> John Marshall, *John Locke: Resistance, Religion and Responsibility* (Cambridge University Press, 1994) 371.

<sup>19</sup> George Grant, *English-Speaking Justice* (Anansi Press, 1998) 48-9.

<sup>20</sup> *Ibid.*, 58-63.

<sup>21</sup> See text accompanying below nn 62-70.

<sup>22</sup> Grant, above n 19, 62.

<sup>23</sup> Locke, above n 2, V, 402 (*Second Treatise*). ‘Thus in the beginning all the world was America, and more so than it is now’: *ibid.*, V, 366 (*Second Treatise*).

<sup>24</sup> As was the case for Locke’s more general theory of government in the *Second Treatise*: Suri Ratnapala, ‘Separation of Powers: The Cornerstone of Liberty under Law’ in Suri Ratnapala and Gabriel Moens (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2011) 54; Lael Weinberger, ‘Enforcing the Bill of Rights in the United States’ in *ibid.*, 106; and Lorraine Findlay, ‘The Erosion of Property Rights and Its Effect on Individual Liberty’, in *ibid.*, 467.

<sup>25</sup> Westlaw databases reveal Locke being cited in 288 US cases since 1793, including 17 Supreme Court decisions since 1944.

<sup>26</sup> Edward Carpenter, ‘Toleration and Establishment: 2’ in Geoffrey Nuttall and Owen Chadwick (eds), *From Uniformity to Unity 1662-1962* (SPCK, 1962) 292; SG Sandler, ‘Lockean Ideas in Thomas Jefferson’s *Bill for Establishing Religious Freedom*’ (1960) 21 *Journal of the History of Ideas* 110. See also *Reynolds v United States*, 98 US 1, 12-13 (1878); *Everson v Board of Education of the Township of Ewing*, 330 US 1, 12-13 (1947); *School District of the Township of Abington v Schempp*, 374 US 203, 231 (1962).

Lockean assumptions set deeply into Australian constitutional law, and especially in judicial approaches to the validity of legislation.<sup>27</sup> Locke is one of the philosophers more likely to be cited by the (generally anti-theoretical) High Court of Australia – although he is not as popular with Australian judges as Jeremy Bentham. The Australian citations are always to the *Second Treatise*.<sup>28</sup> As we will see,<sup>29</sup> a Lockean approach to religious toleration has only a partial resonance in Australian law – despite the *Australian Constitution*'s inclusion of the language of the First Amendment's religion clauses.<sup>30</sup>

The secularisation of nineteenth and twentieth century thought means that the most recent revivals of the Lockean tradition abandon the co-penetration that predominates in Locke's theories of property, government and religious toleration, and in his epistemology. Robert Nozick's *Anarchy, State, and Utopia*, for instance, was as challenging a critique of centralised, large state bureaucracies as Locke's political works were of modern Catholic polities, and its strong libertarianism rests entirely on Locke's social contract theory of the *Second Treatise of Civil Government*.<sup>31</sup> However, Nozick's account of Locke's state of nature, and of the powers of individuals in it,<sup>32</sup> airbrushes the religious groundwork laid for them: namely, Locke's exegesis of Genesis in the *First Treatise*;<sup>33</sup> his reliance on the Anglican divine Richard Hooker's account of the natural equality of all humans in the *Second Treatise*;<sup>34</sup> and his repeated statements in the *Second Treatise* that the state of nature is the condition that God has placed people in.<sup>35</sup> As fundamental as Locke's philosophy is to the argument of *Anarchy, State, and Utopia*, Nozick made no reference at all to any of his works but the *Second Treatise*<sup>36</sup> – failing to give even a nod to Locke's potentially relevant theory of knowledge in the *Essay Concerning Human Understanding*.<sup>37</sup>

The libertarian implications of the neo-Lockeanism of *Anarchy, State, and Utopia* are hotly contested,<sup>38</sup> but at least they represent a serious and sympathetic account of Locke's theory of property holdings. Locke's treatment of the second of King James' 'specious delusions' – religion – has not yet received a comparable

<sup>27</sup> Michael Stokes, 'Is the Constitution a Social Contract?' (1990) 12 *Adelaide Law Review* 249. Cf Chandran Kukathas, 'Liberalism: The International Context' in John Nethercote (ed), *Liberalism and the Australian Federation* (Federation Press, 2001) 14-15, 20.

<sup>28</sup> *Repatriation Commission v Kirkland* (1923) 32 CLR 1, 11-12; *S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, 403; *IceTV Pty Limited v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, 471; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 211; *Rowe v Electoral Commission* (2010) 243 CLR 1, 110-11. Lord Simonds' reference to the *Second Treatise* in the Privy Council appeal in *Attorney-General (Cth) v R and the Boilermakers' Society of Australia* [1957] AC 288, 314 is cited again in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 391; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 203; *Grollo v Palmer* (1995) 184 CLR 348, 392.

<sup>29</sup> See text accompanying below nn 148-169.

<sup>30</sup> S 116, *Australian Constitution*.

<sup>31</sup> Locke, above n 2, V, 338-496.

<sup>32</sup> Robert Nozick, *Anarchy, State, and Utopia* (Basil Blackwell, 1974) 10-17.

<sup>33</sup> Locke, above n 2, V, 217-337.

<sup>34</sup> *Ibid*, V, 340.

<sup>35</sup> *Ibid*, V, 342, 344, 345.

<sup>36</sup> Nozick, above n 2, 358.

<sup>37</sup> For recognition of the epistemological basis of Locke's political theory, see Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2<sup>nd</sup> ed, 2013)166.

<sup>38</sup> See generally, Jeffrey Paul (ed) *Reading Nozick: Essays on Anarchy, State, and Utopia* (Blackwell, 1982); David Johnston, *The Idea of a Liberal Theory: A Critique and Reconstruction* (Princeton University Press, 1994) 40-58; Maureen Ramsay, *What's Wrong with Liberalism? A Radical Critique of Liberal Political Philosophy* (Leicester University Press, 1997) 137-41.

reinterpretation. Few would deny that, as a political question in the twenty-first century, religion matters. The expectations of the 1960s that secularisation was inevitable have been dashed. In English-speaking countries, an assertive and diverse range of social challenges have been presented by religion since the late 60s. Modern religious life has been as differently expressed as Hippy-era eastern mysticism and its New Age spawn; Evangelical and Pentecostal revival; Catholic resurgence under John Paul II; Gaia and Apocalypse in environmental movements; rising anti-Semitism; and, of course, Islamism and the legal, political and cultural quagmire it creates for growing communities of moderate western Muslims.

A contemporary literature drawing on Locke's theories of toleration has nevertheless been developing,<sup>39</sup> precisely because, as a political question, religion matters. However, Locke's theories of toleration are yet to receive a systematic reinterpretation comparable to Nozick's account of property holdings in *Anarchy, State, and Utopia*. And any reprise of Locke's philosophy of toleration must address one influential modern critique – Jeremy Waldron's claim that it lacks comprehensiveness.<sup>40</sup> This article is a small contribution to that literature. I support the view that Locke's philosophy of toleration still has value, and that it is capable of addressing the importance of the rise of religion in the twenty-first century. Specifically, I suggest that a valuable politics of religious toleration remains possible with a renewed emphasis on Locke's multi-faceted approach to the limitations on government's capacity to deal with the religious life. The *Third Letter for Toleration*,<sup>41</sup> reinforced by the *Essay Concerning Human Understanding*, presents a set of resources for answering Waldron's critique with a developed epistemology of civil government's

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<sup>39</sup> For a selection, see Richard Ashcraft, 'Locke and the Problem of Toleration' in Hans Erich Bödeker, Clorinda Donato and Peter Reill (eds), *Discourses of Tolerance and Intolerance in the European Enlightenment* (University of Toronto Press, 2009) 53; Sam Black, 'Locke and the Skeptical Argument for Toleration' (2007) 24 *History of Philosophy Quarterly* 355; Paul Bou-Habib, 'Locke, Sincerity and the Rationality of Persecution' (2003) 51 *Political Studies* 611; David Durst, 'The Limits of Toleration in John Locke's Liberal Thought' (2001) 7 *Res Publica* 29; Lois Eveleth, 'John Locke and the Problem of Toleration' (2007) 28 *Contemporary Philosophy* 41; Ian Harris, 'John Locke and Natural Law: Free Worship and Toleration' in Joe Parkin and Timothy Stanton (eds), *Natural Law and Toleration in the Early Enlightenment* (Oxford University Press, 2013) 59; Linda McClain, 'Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect' (1998) 59 *Ohio State Law Journal* 59; David Mellroy, 'Locke and Rawls on Religious Toleration and Public Reason' (2013) 2(1) *Oxford Journal of Law and Religion* 1; J. Judd Owen, 'Locke's Case for Religious Toleration: Its Neglected Foundation in the Essay Concerning Human Understanding' (2007) 69(1) *Journal of Politics* 156; John Rogers, 'John Locke and the Authority of Church and State' (2005) 17 *Anglophonia* 289; Maria van der Schaar, 'Locke on Judgment and Toleration' (2012) 20 *British Journal for the History of Philosophy* 43; Micah Schwartzman, 'The Relevance of Locke's Religious Arguments for Toleration' (2005) 33 *Political Theory* 678; Stanton, above n 14; Timothy Stanton, 'Christian Foundations, or Some Loose Stones? Toleration and the Philosophy of John Locke's Politics' (2011) 14 *Critical Review of International Social and Political Philosophy* 323; John Tate, 'Locke and Toleration: Defending Locke's Liberal Credentials' 35 *Philosophy & Social Criticism* 761; John Tate, 'Locke, Rationality and Persecution' (2010) 58 *Political Studies* 988; Alex Tuckness, 'Rethinking the Intolerant Locke' (2002) 46 *American Journal of Political Science* 288; Lee Ward, 'Locke on Toleration and Inclusion' (2008) 21 *Ratio Juris* 518; Richard Vernon, 'Lockean Toleration, Dialogical Not Theological' (2013) 61 *Political Studies* 215.

<sup>40</sup> Jeremy Waldron, 'Locke, Toleration and the Rationality of Persecution' in S Mendus (ed), *Justifying Toleration: Conceptual and Historical Perspectives* (Cambridge University Press, 1988) 61; see text accompanying below 91-110.

<sup>41</sup> Locke, above n 2, VI, 141-546.

capacities. It gives an understanding of religious toleration that, if not quite libertarian, is certainly more generous and liberal than contemporary politics offer.<sup>42</sup>

## II LOCKE'S THEORIES OF TOLERATION

Locke wrote five separate pieces on religious toleration.<sup>43</sup> *An Essay on Toleration* was drafted in 1667, very much under Lord Ashley's influence. It also paralleled theories of toleration espoused by other Puritans – the poet John Milton and the colonial Roger Williams.<sup>44</sup> The ideas of the 1667 *Essay* would be rationalised in Locke's later works on toleration, although at this early stage he was carefully framing government's abilities to regulate an individual's religious life as a means by which it exercised its discretion to provide for 'the necessity of the state and the welfare of the people'.<sup>45</sup> In contrast to the position that he eventually settled on in the *Second Treatise of Civil Government*,<sup>46</sup> in 1667 Locke did not recognise that individuals themselves had any discretion to disobey government's judgments in religious questions, despite clearly stating that the sovereign's beliefs could be as mistaken as anyone else's.<sup>47</sup>

<sup>42</sup> Hence the selection of this topic for a *Festschrift* for Suri Ratnapala, with his scholarly interests in libertarianism and legal epistemology. For a selection of Professor Ratnapala's work on libertarianism, see Suri Ratnapala, 'Is Law without the State Possible' (1993) 9(3) *Policy* 37; 'Republican's Debt to Liberalism' (2000) 25(2) *Australian Journal of Legal Philosophy* 143; 'The Role of Government in a Liberal Society' [2008] (118) Centre for Independent Studies Occasional Papers 1; 'Law, Legislation and Liberty' in Chris Berg and John Roskam (eds), *100 Great Books of Liberty* (Connor Court Publishing, 2010; ) 22; 'The Theory of Moral Sentiments' in *ibid*, 199; 'The Chimera of the Adam Smith Problem' in Michael Zoeller and Manfred Petri (eds), *The Market Society and Morality: 250 Years of Adam Smith's Theory of Moral Sentiments* (Council on Public Policy, 2010) 39; 'Jurisprudence of Friedrich A Hayek' in Oliver Hartwich (ed), *The Multi-layered Hayek* (Centre for Independent Studies, 2010) 45; For a selection of works on legal epistemology, see Suri Ratnapala, 'The Trident Case and the Evolutionary Theory of F A Hayek' (1993) 13 *Oxford Journal of Legal Studies* 201; 'Complexity and the Law: Epstein's Profound Case for Simplicity' (1997) 4(3) *Agenda* 341; 'Eighteenth-century Evolutionary Thought and Its Relevance in the Age of Legislation' (2001) 12(1) *Constitutional Political Economy* 51; 'An Epistemological Approach to Customary Law' in Christopher Nyri (ed), *Tradition* (Verein Internationales Forschungszentrum Kulturwissenschaften, 1995) 61; 'Law as a Knowledge Process' in Suri Ratnapala and Gabriel Moens, above n 24, 175. For work specifically on John Locke, see Suri Ratnapala, 'John Locke's Doctrine of the Separation of Powers - A Re-evaluation' in Thom Brooks (ed), *Locke and Law, Philosophers and the Law Series* (Ashgate Publishing, 2007) 244; [1993] *American Journal of Jurisprudence* 225.

<sup>43</sup> For discussion of the chronology of Locke's works on toleration, see Maurice Cranston, *John Locke: A Biography* (Longmans, Green and Co, 1957) 259, 320-1, 331, 360, 362, 366-8, 406, 460, 466; Marshall, above n 18, 371.

<sup>44</sup> John Milton, 'Treatise of Civil Power in Ecclesiastical Causes' in John Milton and Frank Patterson, *The Works of John Milton* (Columbia University Press, 1932) VI, 4-41; John Coffey, 'Milton, Locke and the New History of Toleration' (2008) 5 *Modern Intellectual History* 619; Timothy Hall, 'Roger Williams and the Foundations of Religious Liberty' (1991) 71 *Boston University Law Review* 455. See also Ursula Henriques, *Religious Toleration in England 1787-1833* (Routledge and Kegan Paul, 1961) 19.

<sup>45</sup> An account of the *Essay on Toleration* is given in Gough, above n 14, 210-15; John Dunn, *Locke* (Oxford University Press, 1984) 25-7.

<sup>46</sup> In the *Second Treatise*, Locke recognised a right of lawful rebellion if the religion of the majority was threatened, 'or if the mischief and oppression has lighted on only some few, but in such cases, as the precedent and consequences seem to threaten all': Locke, above n 2, V, 462-3.

<sup>47</sup> Dunn, above n 45, 26, 27.

In the *Essay on Toleration*, Locke was really questioning the wisdom of the English *Uniformity Act*,<sup>48</sup> which demanded universal national conformity to Anglicanism as expressed in the 1662 revision of the *Book of Common Prayer*. However, he was not then challenging the political legitimacy of the Anglican monopoly. That challenge came with the more mature pieces that were published after the Revolution. The Latin *Epistola de tolerantia* was addressed to the Dutch theologian Philipp van Limborch, who was the probable publisher of the *Epistola* in 1689. This became, in English, the *First Letter*. Its popularity, though, saw a notable critical response from Jonas Proast. Exemplifying the traditional High Church support for an unqualified *Uniformity Act*, Proast agreed that individuals could not be converted by the direct application of coercion. However, he argued that coercion ‘indirectly, and at a distance, may do some service’.<sup>49</sup> In short, he argued that the threat of injury, or even its application, might make an individual pause, think more seriously and, having done so, become genuinely persuaded of the truth of the religious doctrine being enforced. Force could therefore structure conditions that enabled a saving faith. Proast’s published criticisms over the next 14 years led Locke to respond to him three times: in the *Second Letter Concerning Toleration* in 1690,<sup>50</sup> the *Third Letter for Toleration* in 1692,<sup>51</sup> and the *Fourth Letter for Toleration*<sup>52</sup> – which was unfinished when Locke died in 1704.

#### A *The Jurisdictional Argument*

Locke had theories or arguments of toleration, rather than a unified theory of toleration.<sup>53</sup> Nevertheless, throughout the post-Revolution *Letters*, he assumed that toleration is the absence of coercion applied to promote religious ends. In the *Second Letter*, Locke’s response to Proast was:<sup>54</sup>

Force, you allow, is improper to convert men to any religion. *Toleration is but the removing that force.*

The theories of toleration nevertheless reflect the co-penetration of theological and secular rationales for toleration, although this is muted in his *jurisdictional argument* of toleration.<sup>55</sup> In the *First Letter*, Locke sought to settle a political principle that properly divided the legitimate concerns of civil government from those of the life of faith.<sup>56</sup> The conclusions that he reached had implications for political relations between government and the individual citizen and, a consideration that is usually overlooked, social relations between citizens. So, civil government only has legitimate interests in ‘life, liberty, health, and indolence of body ... and the possession of outward things such as money, lands, houses, furniture, and the like’.<sup>57</sup> However, that

<sup>48</sup> 14 Charles II c 4.

<sup>49</sup> Locke reports Proast’s arguments in the *Second Letter*: Locke, above n 2, VI, 68, 69.

<sup>50</sup> Ibid, VI, 61-137.

<sup>51</sup> Ibid, VI, 141-546.

<sup>52</sup> Ibid, VI, 549-74.

<sup>53</sup> Just how many theories depends on how the arguments are grouped: eg, see McClain, above n 39, 25-6. Lorenzo, above n 14, 251 counts Locke as having as many as seven different theories of toleration.

<sup>54</sup> Locke, above n 2, VI, 62 (emphasis added). The use of the term ‘removing’ of force (rather than an ‘absence’ of force) must be taken in its context. In the post-Revolution period, Locke was explaining the *Toleration Act*’s partial removal of the coercion that had previously been generally applied by the *Uniformity Act*.

<sup>55</sup> Cf McClain, above n 39, 66-8.

<sup>56</sup> Locke, above n 2, VI, 9.

<sup>57</sup> Ibid, VI, 10.

is as far as it goes: ‘the whole jurisdiction of the magistrate reaches only to these civil concerns’ and accordingly ‘civil power ... neither can nor ought in any manner to be extended to the salvation of souls’.<sup>58</sup> ‘[T]he power of civil government relates only to men’s civil interests, is confined to the care of the things of this world, and hath nothing to do with the world to come’.<sup>59</sup> Strengthening the latent individualism in Locke’s thought, the jurisdictional argument not only leads to limitations on governmental power. It puts limitations on how individuals can treat each other: ‘[n]o private person has any right in any manner to prejudice another person in his civil enjoyments, because he is of another church or religion.’<sup>60</sup> Locke was quite prepared to recognise that a pagan’s personal security or property should not be violated by other individuals; his civil entitlements ‘are not the business of religion’.<sup>61</sup>

### B *The Anticompulsion Argument*

The second, *anticompulsion argument* of toleration<sup>62</sup> rests more directly on Protestant individualism, and is the point at which Locke hints at an epistemology of toleration. This theory originates in Locke’s theological mindset but, at the same time, drifts towards scepticism. The primary reason that Locke gave in the *First Letter* for a right to toleration was the individual’s spiritual independence. The individual, and the individual alone, is responsible for her own response to God’s grace:<sup>63</sup>

Whatever profession we make, to whatever outward worship we conform, if we are not fully satisfied in our own mind that the one is true, and the other well-pleasing to God, such profession and such practice, far from being any furtherance, are indeed great obstacles to our salvation.

In Locke as in Milton, this was also the basis of the individual’s political and legal responsibility for her own religious choices, and created the associated right to make those choices. It also meant that those rights and responsibilities were *inalienable*, for the individual could not price and exchange them, or give them to others: ‘no man can so far abandon the care of his own salvation as blindly to leave it to the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace.’<sup>64</sup> This is an early indication that toleration is not just a consequence of jurisdictional restrictions on civil government. There is a right to toleration – in fact, religious freedom – because of the individual’s inalienable responsibility for her own salvation. Therefore, toleration does not emerge merely as a restriction on what, given its motivations, government can legitimately do; it also emerges because of the side-constraints around an individual’s spiritual autonomy.<sup>65</sup> These side-constraints cannot be crossed by government action – except, presumably, when government is legitimately acting within its jurisdiction in matters of ‘life, liberty, health, and indolence of body ... and the possession of outward things’.<sup>66</sup>

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<sup>58</sup> Ibid, VI, 9-10.

<sup>59</sup> Ibid, VI, 12-13.

<sup>60</sup> Ibid, VI, 17.

<sup>61</sup> Ibid, VI, 17.

<sup>62</sup> Cf McClain, above n 39, 42-4.

<sup>63</sup> Ibid, VI, 11.

<sup>64</sup> Ibid, VI, 10. See also Milton, above n 44, 6, 9, 12, 14-20.

<sup>65</sup> I take the notion of side-constraints from Nozick, above n 32, 29-31, who gives a deontological expression to the inviolability of rights and the individual as an end, not a means. This discounts the idea of ordering rights so as to maximise some different political goal.

<sup>66</sup> Locke, above n 2, VI, 9-10.



There were other aspects of Protestant thought that Locke drew on to support this right-and-responsibility of spiritual freedom. The first was the doctrine of justification by faith. Since the individual's response to God's saving grace – the only means of salvation (*sola gratia*) – depended on faith alone (*sola fides*), 'true and saving religion consists on the inward persuasion of the mind'.<sup>67</sup> This is inherently beyond the reach of the coercive powers of civil government, so any attempt to coerce the individual to secure her compliance with any religious program that civil government might attempt to advance is futile. The second was the related monopoly that civil government had in the use of coercion. In the *First Letter*, Locke wrote 'that the church of Christ should persecute others, and force others by fire and sword to embrace her faith and doctrine, I could never yet find in any of the pages of the New Testament'.<sup>68</sup> At this point Locke departed from the Reformers, extending the principle of the swordless church to a civil government that could not use the sword on behalf of the church. It was close to Locke's own bones, uneasy as he had been with the high-water of Anglican monopoly under the *Uniformity Act* and of James' efforts at building a modern Catholic polity. To Locke, a church was not a territorial establishment but, paralleling the contractualist fundamentals of civil government in the *Second Treatise*, a voluntary association regulated by consensual agreement – in Nozickian terms, a spiritual protective association.<sup>69</sup> Individuals who accepted a religious association's beliefs, terms and conditions were at liberty to join it, and those who could no longer accept them could leave. The association itself could exercise discipline over an individual member by persuasion, censure or, ultimately, expulsion (or excommunication). And, again to use Nozick's analysis, just as civil protective associations could, on behalf of their members, contract between themselves and become a dominant protective association or, even, emerge as civil government, it seems possible that religious associations could also by agreement build enough contracted support to create a dominant religious association. Locke's theories of toleration were a response to religious pluralism, but he did not think that the goal of toleration had to be pluralism. A socially dominant church could still be legitimate. However, unlike the position for civil government, Locke's jurisdictional and anticomulsion arguments demand that a dominant church's powers would remain purely consensual, and that it lose those powers over an individual once her membership is relinquished. In any case, leaving the association amounted to voluntary excommunication.<sup>70</sup> As will be seen,<sup>71</sup> this is now the prevailing understanding in the New World of the legal quality of religious groups. Both civil government and religious associations might be the product of individuals' contracting with each other, but they were 'parallel rather than complicit'.<sup>72</sup> In Locke's time it was a challenge to the common view that people were born into a church, and did not choose it.<sup>73</sup>

### C *Limits to Toleration – Real and Imagined*

For Locke, an inalienable spiritual independence was primarily grounded in Christian obligation, and therefore, as he reiterated throughout his writings, is only

<sup>67</sup> Ibid, VI, 11. Locke nevertheless still assumed that a true Christian would 'show his faith by his works': see *Mr Locke's Reply to the Bishop of Worcester's Answer to his Second Letter*: ibid, IV, 299.

<sup>68</sup> Ibid, VI, 15.

<sup>69</sup> Cf Nozick, above n 32, 12-17.

<sup>70</sup> Locke, above n 2, VI, 12, 15-17, 25; Henriques, above n 44, 26.

<sup>71</sup> See text accompanying below nn 149-157.

<sup>72</sup> Stanton, above n 14, 93.

<sup>73</sup> Ibid, 88.

possible in a society in which everyone believes in God.<sup>74</sup> He therefore denied toleration to atheists. Religious freedom was an individual's right to choose between theisms: '[t]hose are not to be tolerated who deny the being of God.'<sup>75</sup> This qualification was based on the assumption that the moral hold of political, legal and social obligations on the individual depended on her recognising the existence of God, and so '[t]he taking away of God, though but even in thought, dissolves all'.<sup>76</sup> There is also some suggestion in the *First Letter* that, having no 'religion', the atheist has no basis on which to build a political right to any freedom.<sup>77</sup> Locke's religious beliefs gave him doctrines that demanded toleration. *The atheist's* rejection of those same beliefs therefore gave him no ground of toleration, and so the atheist lacked the resources to present a philosophical challenge to the intolerance of his position. While this qualification necessarily means that, to those of us reading Locke after the Enlightenment, his earliest theories of toleration do not give as large a space for individual spiritual autonomy, it also sits uncomfortably beside Locke's epistemology of toleration, elaborated especially in the *Third Letter*.<sup>78</sup>

The second group that Locke has been regarded as denying toleration to is Catholics. This intolerance was certainly expressed in the *Essay* of 1667, where Locke argued that Catholics' political allegiance to the Pope, their own political intolerance, and their unreliability as loyal subjects should exclude them from the toleration that, at that point, he was prepared to give to Protestant dissenters.<sup>79</sup> It may be thought that his experience of James II and VII, and the threat of a Catholic polity, should have led Locke to harden this position. On the other hand, James had tried to present himself as recognising a broad liberty of conscience by including Protestant dissenters as well as Catholics in his executive declarations of indulgence. But in truth, express statements about excluding Catholics from any principled toleration completely disappear in Locke's post-Revolution *Letters*.

The main argument against the toleration of Catholics, and one ventured well into the twentieth century, was divided loyalties – especially given the Pope's status as a political sovereign.<sup>80</sup> In the *First Letter*, Locke maintained that the divided political allegiances of a given religious association would justify excluding it from any toleration.<sup>81</sup> He did not pin the consequent risk of sedition, though, on Catholics – as he had in the 1667 *Essay*. Instead, he attributed divided loyalties to a Muslim who, 'bound to yield blind obedience to the mufti of Constantinople', would thereby owe allegiance to the Ottoman Emperor.<sup>82</sup> David Lorenzo believes that the reference to 'Muslims and the Mufti' was code for 'Catholics and the Pope', and that the *First Letter* therefore 'clearly' identified Catholics as unworthy of toleration.<sup>83</sup> However, this is at best an

<sup>74</sup> See Locke, above n 2, I, 61-4 (*Human Understanding*) and VI, 4, 9, 47 (*First Letter*), 165 (*Third Letter*); Richard Ashcraft, 'Faith and Knowledge in Locke's Philosophy' in John Yolton (ed), *John Locke: Problems and Perspectives* (Cambridge University Press, 1969) 203-5.

<sup>75</sup> Locke, above n 2, VI, 47.

<sup>76</sup> *Ibid.*, VI, 47.

<sup>77</sup> I base this on Locke's (admittedly vague) claim that 'those that by their atheism undermine and destroy all religion, can have no pretence of religion whereupon to challenge the privilege of a toleration': *ibid.*, VI, 47.

<sup>78</sup> *Ibid.*, VI, 141-546.

<sup>79</sup> Lorenzo, above n 14, 251.

<sup>80</sup> For an Australian example, see *Crittendon v Anderson*, Unreported, High Court of Australia (Fullagar J), 23 August 1950; (1950) 51 *Australian Law Journal* 170.

<sup>81</sup> Locke, above n 2, VI, 46-7.

<sup>82</sup> *Ibid.*, VI, 47.

<sup>83</sup> Lorenzo, above n 14, 251.

inference. It is more likely a guess, and it is certainly not 'clear'.<sup>84</sup> Locke just had no reason to disguise an intolerance of Catholics in the England of William and Mary – where they were not tolerated. In one of his later works on Locke, Waldron notes that the only reference to Catholics in the *First Letter* strongly suggested that they were within the toleration marked out by Locke's jurisdictional argument.<sup>85</sup> As Locke wrote:<sup>86</sup>

The Magistrate ought not to forbid the preaching or professing of any speculative opinions in any church, because they have no manner of relation to the civil rights of the subjects. If a Roman Catholick believe that to be really the body of Christ, which another man calls bread, he does no injury thereby to his neighbour.

He made a similar point about Jews.<sup>87</sup> Locke later argued in the *First Letter* that those who speak Latin in the marketplace should be entitled to do so in church as well.<sup>88</sup> Explicit statements of a Catholic entitlement to toleration – in lists beside Lutherans, Presbyterians and Quakers – are also made in the *Second* and *Third Letters*.<sup>89</sup> Waldron is therefore puzzled by the common view that Locke excluded Catholics from toleration. He believes that the belief is based entirely on Locke's exclusion from toleration of those who had divided loyalties – and specifically those (like Lorenzo) who identify his references to the divided political loyalties of Muslims as really referring to Catholics.<sup>90</sup> However, contrary to this view and despite the continuing Jacobite threat in the British Isles, the *Letters* actually gave direct and express support for the toleration of Catholics.

#### D *Waldron's Critique*

While restoring Locke's inclusion of Catholicism in his politics of toleration, Waldron has presented a more fundamental criticism of Locke's theories of toleration. The problem for Waldron stems from the co-penetration of the *First Letter* – the very feature of Locke's thought that in the centuries to follow enabled Protestants to embrace his liberalism. He begins with Locke's assumption that government is defined 'in terms of its means' – its legitimate monopoly on the use of force.<sup>91</sup> This neatly and rationally meant that toleration, as we have seen,<sup>92</sup> is characterised by 'the removing

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<sup>84</sup> Lorenzo said Locke used Muslims as a metaphor for Catholics in other passages, but does not cite any: *ibid*, 251. There is no such reference in any of the post-Revolution *Letters*. Jeremy Waldron also notes that, as there is no explicit identification of Catholics in the references to Muslims in Locke's works, the argument depends on always reading the references to Muslims metaphorically: *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (Cambridge University Press, 2002) 221. In fact, the reception of the *First Letter* suggests the opposite. The High Church clergyman Thomas Long thought it was pro-Catholic, and that the author was secretly a Jesuit trying to undermine the Church of England: Thomas Long, *The Letter for Toleration Decipher'd and the Absurdity and Impiety of an Absolute Toleration Demonstrated by the Judgment of Presbyterians, Independents, and by Mr Calvin, Mr. Baxter, and the Parliament, 1662* (EEBO Editions Proquest, 1992).

<sup>85</sup> Waldron, above n 84, 218.

<sup>86</sup> Locke, above n 2, 40.

<sup>87</sup> *Ibid*, 40.

<sup>88</sup> *Ibid*, 51.

<sup>89</sup> *Ibid*, 100 (*Second Letter*), 309 (*Third Letter*).

<sup>90</sup> Waldron, above n 84, 221.

<sup>91</sup> Waldron, above n 40, 65, 66.

<sup>92</sup> See above n 54.

that force'.<sup>93</sup> Leaving the means of government to one side, Waldron then concentrates on Locke's reasons for 'the removing that force'. And so he considers Locke's return to Protestant doctrine; namely, that saving religion rests on *sola fides*. As Waldron puts it, 'coercion works through the will and belief is not subject to the will'.<sup>94</sup> 'The effect of these two claims then ... is to render religious belief effectively immune from coercive manipulation,'<sup>95</sup> and therefore, we might add, government regulation. As Waldron understands Locke:<sup>96</sup>

The imposition of belief, then, by civil law has been shown to be an absurdity. Intolerance and persecution, at least for religious reasons, have been shown to be irrational.

As ever, in Locke's post-Revolution *Letters* one of the necessary targets is the *Uniformity Act* and his effort is to persuade a Protestant state church that, through coercive measures of that kind, it was denying its own doctrinal position on the nature of salvation. In philosophical terms, Waldron is therefore directing his attention to precisely the same Lockean argument of toleration as Proast did: anticomulsion. Indeed, some of Waldron's arguments parallel Proast's, suggesting that government compulsion of individuals, for instance, to learn a catechism or to ban heterodox literature 'can at least lead them to water' – and make them 'turn their attention in the direction' of truth.<sup>97</sup> This not the vain attempt to force belief, but force is used to focus an individual's attention on materials that are important for inculcating true belief. Waldron is prepared to go further, and questions why the reception of ideas outside a coercive environment matters so much for the establishing of a genuine belief.<sup>98</sup> Locke's 'case depended on the Protestant importance attached to sincere belief',<sup>99</sup> but Waldron doubts that the 'sensory input' that leads us to certain ideas is ever possible in completely free and autonomous conditions. It is governed more by 'upbringing, influence, accident, or constraint'.<sup>100</sup>

Leaving Waldron's reprise of Proast to one side, his more original claim is, in effect, that Lockean toleration proceeds from too narrow a motivation, and so lacks comprehensiveness. Locke's central argument about eliminating the place of coercion in the practice of religion is a negative one: 'it is not a right to freedom of worship as such, but rather ... a right not to have one's worship interfered with for religious ends'.<sup>101</sup> So, where John Stuart Mill saw that there was a political value in promoting religious pluralism,<sup>102</sup> Locke did not. An Anglican *social* monopoly would be perfectly acceptable in a Lockean religious settlement even though, given the illegitimacy of coercion in matters of religion, an Anglican *legal* monopoly would not.<sup>103</sup> Waldron's

<sup>93</sup> Locke, above n 2, VI, 61; Waldron, above n 40, 66-7.

<sup>94</sup> Waldron, above n 40, 68.

<sup>95</sup> *Ibid.*, 68.

<sup>96</sup> *Ibid.*, 68.

<sup>97</sup> *Ibid.*, 60-1. Although more recently Waldron himself has said, 'If people don't have religious faith, then there's no way in which you can force them back to it': 'Dignity, Human Rights, and Torture: A Conversation with Jeremy Waldron, April 23, 2009' <[http://globetrotter.berkeley.edu/people9/Waldron/transcript\\_waldron.pdf](http://globetrotter.berkeley.edu/people9/Waldron/transcript_waldron.pdf)> (accessed 25 October 2014).

<sup>98</sup> Waldron, above n 40, 82-3.

<sup>99</sup> *Ibid.*, 81.

<sup>100</sup> *Ibid.*, 83.

<sup>101</sup> *Ibid.*, 77.

<sup>102</sup> John Stuart Mill, *On Liberty* (Penguin, first published 1859, 1974 ed) 75-115.

<sup>103</sup> 'Locke does not see anything to be gained from the existence of a plurality of views, or anything that might be lost in monolithic unanimity, in these matters': Waldron, above n 40, 76.

attention then turns to the motivation for removing force: what he considers to be the defining quality of Locke's politics of toleration.<sup>104</sup> Because for Locke a religious motivation for prohibiting a different religious practice is illegitimate (because it does not promote saving faith), then it is *the religious motivation* for a politics of toleration that is rational. Waldron's argument is, therefore, that according to Locke a toleration that is motivated by any other consideration is irrational. The difference between rational and irrational toleration is illustrated by Locke's example of a religion that practises animal sacrifice – a practice that was no doubt offensive to seventeenth century Christians<sup>105</sup> but, given the biblical record of Temple Judaism, one they would have accepted as a practice motivated by religious belief. Locke suggested in the *First Letter* that civil government should not prohibit a religious group from killing and sacrificing a calf as a burnt offering – 'for no injury is thereby done to any one, no prejudice to another man's goods'.<sup>106</sup> Even if socially offensive as a rite, 'what may be spent on a feast may be spent on a sacrifice'.<sup>107</sup> But, say national cattle stocks had been depleted by disease, and civil government then imposes a moratorium on the slaughter of cattle to give herd numbers time to recover. That would be perfectly legitimate even though, as a consequence, animal-sacrificers were prohibited from practising an important religious rite. As Waldron notes, 'the *effect* of the economic ban on animal slaughter may be exactly the same as a ban that was originally inspired'.<sup>108</sup> The legitimacy of the ban would therefore depend entirely on civil government's motivation for it. In Waldron's terms, if the ban were motivated by the government's belief that, as a religious practice, animal sacrifice cannot lead anyone to saving faith or is unacceptable worship, it would be 'irrational'.<sup>109</sup> However, a measure regulating animal slaughter that is motivated by the need to maintain food security is not of that kind. It has an intolerant effect, but can be regarded as instrumentally rational. According to Waldron, *this* Lockean theory of toleration 'gets no grip whatsoever despite the fact that the coercion may discriminate unequally in its consequences against a particular group'.<sup>110</sup> The consequence is that Locke justifies toleration by the inconsistency – and so irrationality – of a Protestant government trying to compel genuine faith. But this does not provide a justification for religious toleration where government has other motivations for applying coercive measures with a potential impact on religious practice.

### III A MULTI-FACETED TOLERATION

#### A Waldron – *Initial Responses*

Waldron's critique of Lockean toleration can itself be regarded as lacking comprehensiveness. It does not recognise that Locke had more than one theory or argument to justify his politics of toleration. Even in the one argument that it does address – anticomulsion – Waldron's critique does not address the whole argument. In short, it elevates one aspect of the anticomulsion argument and gives it a centrality that it does not have in the Lockean scheme.<sup>111</sup> First of all, Waldron does not consider

<sup>104</sup> Ibid, 76.

<sup>105</sup> Ibid, 77.

<sup>106</sup> Locke, above n 2, VI, 34.

<sup>107</sup> Ibid, VI, 34.

<sup>108</sup> Waldron, above n 40, 77 (emphasis in original).

<sup>109</sup> Ibid, 68.

<sup>110</sup> Ibid, 77.

<sup>111</sup> Stanton, above n 14, 84, 98.

any deeper development of Locke's arguments in the *Second*, *Third* and *Fourth Letters*. He merely regarded them as 'boring and inordinately repetitive', and too dependent on 'Christian premisses'.<sup>112</sup> He therefore discounted them and limited his critique to the *First Letter*.<sup>113</sup> However, Waldron's different use of aspects of the *Third Letter* and the *Essay Concerning Human Understanding* to advance his critique of the *First Letter* should have alerted him to the possibility that Locke's account of the politics of toleration was richer than he was assuming.<sup>114</sup>

Secondly, Waldron sharpens the expression of Locke's anticomulsion argument by consistently referring to a religious motivation for religious 'persecution' as 'irrational' and, so, implying and assuming that, in Locke's scheme for a politics of toleration, a non-religious motivation for 'persecution' must be 'rational'.<sup>115</sup> The language is emotive, as the claim of a rational persecution also suggests a moral weakness in Locke's theory. This is polemical. Nowhere in the *First Letter* does Locke ever use the term 'rational' or 'irrational', or any derivative of them. Certainly, persecution is the correct term for the background of expulsions of Presbyterian clergy from the Church of England, the imprisonments of English dissenters under the *Uniformity Act* and the Clarendon Code that reinforced it,<sup>116</sup> and the murderous enforcement of Anglicanism in Scotland.<sup>117</sup> However, it is a gross exaggeration to describe the indirect restrictions on animal sacrifice imposed under food security regulations – which Locke and Waldron used as examples of permissible lawmaking – as 'persecution'.<sup>118</sup> It is really more like the modern description of a 'regulatory burden' on religious practice that, while at times intrusive and constitutionally doubtful, does not warrant the sinister connotations of 'persecution'.<sup>119</sup> Indeed, there was no need for Waldron to make a negative inference that Locke necessarily gave space to 'rational persecution' simply because his fundamental argument was that religious motivations required anticomulsion. This ignores Locke's whole positive project in the *Second Treatise of Civil Government* for outlining the legitimate powers of government and, as expressed in the jurisdictional argument of the *First Letter*, limiting them again to 'life, liberty, health, and indolence of body, ... and the possession of outward things'.<sup>120</sup> Directed at avoiding or dismantling a centralised bureaucratic apparatus, the powers of the Lockean state allow only small government and, as a consequence, are unlikely to authorise much that could lead to the indirect persecution of the members of a religious group. How small Lockean government must be is open to debate.<sup>121</sup> But in contemporary terms it is possible to envisage national

<sup>112</sup> Waldron, above n 40, 63.

<sup>113</sup> Although Waldron still looks to the *Second Letter* for Locke's definition of toleration: *ibid.*, 67 n 17, 76.

<sup>114</sup> *Ibid.*, 72, 80.

<sup>115</sup> *Ibid.*, 77, 85.

<sup>116</sup> *Corporation Act 1661* (Eng) (13 Charles II st 2 c 1); *Quaker Act 1662* (Eng) (14 Charles II c 1); *Conventicle Act 1664* (Eng) (16 Charles II c 4); *Five Mile Act 1665* (Eng) (17 Charles II c 2); *Conventicle Act 1670* (Eng) (22 Charles II c 1).

<sup>117</sup> *Act Rescissory 1661* (Scot); *Act of Restitution 1661* (Scot); *Act Enforcing the Ecclesiastical Settlement 1663* (Scot) m (13 Charles II st 2 c 1); *Order of Council Against Ejected Ministers 1663* (Scot); *Assertory Act 1669* (Scot); *Test Act 1681* (Scot). The Restoration period in Scotland has been called 'the Killing Time': see WL Mathieson, *Politics and Religion in Scotland* (Edinburgh University Press, 1902) II, 181.

<sup>118</sup> See text accompanying above nn 101-110.

<sup>119</sup> Cf Stanton, above n 14, 93.

<sup>120</sup> Locke, above n 2, VI, 10.

<sup>121</sup> Nozick, above n 32, 26-8 regards it as 'minimal'. Waldron, though, suggests that government could still satisfy the *Second Treatise* even if it had some confessional quality: Waldron, above n 40, 73. This seems unlikely: the *First Letter* denies that any power over religion can be given to government by the consent of the people: Locke, above n 2, VI, 10.

security laws that, though neutrally expressed, could have an impact on only religious groups – and on only one religious group (say, Islamists) at that.<sup>122</sup> There is little question that (leaving other obligations to give due process to one side) this is legitimate government action in Lockean terms, and yet it still does not amount to religious persecution. Furthermore, Waldron downplays the role in the *First Letter* of rights as side-constraints, and therefore the individual's inalienable right-and-responsibility of spiritual freedom. Regardless of whether government's motivation for action is religious or secular, this will necessarily place limits on laws and regulations that, even indirectly, could potentially burden an individual's religious practice.

### B *An Epistemology of Toleration*

The hint of the potential importance of a theory of knowledge in Locke's anticomulsion argument also leads us into his deeper epistemology of toleration, which is more prominent in the *Third Letter for Toleration* and its overt reliance on the categories that Locke developed in the *Essay Concerning Human Understanding*.

Locke's epistemology denies any conception of innate knowledge. The human is born *tabula rasa* or, in Locke's words, like a sheet of 'white paper, void of all characters, without any ideas'.<sup>123</sup> As a consequence, knowledge and other forms of apprehension and assent come to individuals by 'experience'<sup>124</sup> – which amounts to the use of the physical senses and reflection.<sup>125</sup> It is the different nature of those experiences, and the different forms of apprehension, that give rise to Locke's different epistemological categories. So, the first distinction to be made is between 'knowledge' and 'opinion'. In Locke's epistemology, 'knowledge' usually means something that is absolutely certain. It is especially the product of intuiting simple ideas, but can also be based on demonstration by 'pains' and 'proofs'. In either case, the ultimate criterion of whether what is apprehended is 'knowledge' is its certainty.<sup>126</sup> This limits what an individual can properly 'know' – it is much less than the total sum of her ideas.<sup>127</sup> In most cases the individual must give her assent to propositions on the basis of probabilities – 'opinion'.<sup>128</sup> Then, a second distinction is made between reason and faith. Reason is the means by which the individual obtains knowledge and opinion – by sensory perception and reflection. In contrast, when a person assents to a proposition because, despite the absence of direct sensory perception, another source is believed and trusted, it is called 'faith'. The archetypal example is an individual's assent to divine revelation – reliance on what is believed to be God-inspired.<sup>129</sup> Even here, though, it might be another's testimony or trustworthiness that leads the individual to accept a religious belief. After all, it is the 'persuasions' of, in effect, the surrounding culture that gives people 'reasons to be Heathens in Japan, Mahometans in Turkey, Papists in Spain, Protestants in England, and Lutherans in Sweden'.<sup>130</sup> As a result,

<sup>122</sup> Eg, see the *Counter-Terrorism Amendment Act (No 1) 2014* (Cth) – popularly called the 'Foreign Fighters Act'. It is intended to create security offences applicable to Australians who engage in hostilities in foreign countries, but specifically in Iraq or Syria.

<sup>123</sup> Locke, above n 2, I, 53, 82 (*Human Understanding*); Owen, above n 39, 159.

<sup>124</sup> *Ibid.*, I, 82 (*Human Understanding*).

<sup>125</sup> Owen, above n 39, 159-60.

<sup>126</sup> Locke, above n 2, II, 321-30 (*Human Understanding*).

<sup>127</sup> *Ibid.*, II, 330.

<sup>128</sup> *Ibid.*, II, 327.

<sup>129</sup> 'The assent to any proposition not thus made out by deductions of reason, but on the credit of the proposer, as coming from God, in some extraordinary way of communication. This way of discovering truths to men we call revelation': *ibid.*, III, 138. See also Ashcraft, above n 74, 215-16.

<sup>130</sup> Locke, above n 2, III, 100 (*Human Understanding*).

knowledge of propositions and faith in them *might* differ in the degrees of assurance by which they are held, but they *must* differ in the means by which they are apprehended. This explains how, in the *Third Letter*, Locke could say that he believed Christ's Resurrection to be true but did not know it to be true – and no agent of civil government could make any stronger claim.<sup>131</sup> This also means that 'faith' is a category that, like other forms of opinion, depends on probabilities. As Locke wrote to the Bishop of Worcester, '[b]ring it to certainty, and it ceases to be faith'.<sup>132</sup> The space that 'faith' therefore leaves for error in the propositions held naturally means that coercion could not be used with any epistemological justification to compel people to hold propositions believed by faith. Faith is therefore opinion and a mental assent held on probabilities, but also for those who are baptised a quality subsequently nurtured by the grace of God.

Two further points can be developed here. First, Locke's understanding of the effects of original sin, and of the human capacity to apprehend truth, was more positive than was common in seventeenth century theology. Individuals had a capacity for self-direction that underlined both their right-and-responsibility of spiritual independence and their capacity to join and leave a church as they pleased. Force was not needed to overcome any severe natural inability to comprehend spiritual truth, as the Augustinian tradition insisted. In the post-Revolution period, if not before,<sup>133</sup> Locke was adamant that the effects of The Fall were just those outlined in Genesis itself – being turned out of Eden, physical death.<sup>134</sup> Adam's Fall did not lead to a crippling human inability to assent to the truth. An individual's capacity to respond by mental assent to the Gospel, without physical compulsion, was therefore assumed.

Secondly, the development of faith still relies on God's grace. As Locke indicated in his *Paraphrase and Notes on Ephesians*, the Holy Spirit would work in the individual to deepen her faith and the personal assurance of the beliefs she held. However, this still did not give reasons to consider that the believer had a superior knowledge even of the supernatural.<sup>135</sup> Faith remains the category at the heart of religious experience and individual salvation, and the biblical understanding of God's grace in the development of faith is still maintained. As repeated in the *Third* and *Fourth Letters*, it is still the case that the assent of faith may be held with a high degree of assurance, and might popularly be called 'knowledge' but, as it lacks demonstration by proofs, it remains of a different category and kind of assent to knowledge.<sup>136</sup>

Momentarily conceding Proast's and Waldron's argument that coercion might possibly lead someone to reflect and come at length to a saving faith, Locke's point is therefore a simple one. Coercion may help, but it is not a necessary condition of faith.

<sup>131</sup> Ibid, VI, 144-5.

<sup>132</sup> 'With what assurance soever of believing, I assent to any article of faith, so that I steadfastly venture my all upon it, it is still but believing. Bring it to certainty and it ceases to be faith. I believe that Jesus Christ was crucified, dead and buried, rose again the third day from the dead, and ascended into heaven; let now such methods of knowledge or certainty be started, as leave men's minds more doubtful than before: let the grounds of knowledge be resolved in to what one pleases, it touches not my faith': *Mr Locke's Reply to the Bishop of Worcester's Answer to his Second Letter*, above n 2, IV, 146-7.

<sup>133</sup> See Stanton, above n 14, 95-8.

<sup>134</sup> *The Reasonableness of Christianity as Delivered in the Scriptures*: Locke, above n 2, VII, 5-9; Stanton, above n 14, 97.

<sup>135</sup> See Locke's notes on Ephesians 2.6-8: 'Thus faith, we see, is the gift of God, and with it, when men by baptism are admitted into the kingdom of God, comes the Spirit of God, which brings life with it: for the attaining this gift of faith, men do, or can do, nothing; grace hitherto does all': Locke, above n 2, VIII, 414; Stanton, above n 14, 92, 100.

<sup>136</sup> Locke, above n 2, VI, 144, 424 (*Third Letter*), 558 (*Fourth Letter*).



The individual can respond to the preaching of the Gospel, and God is trusted to bring people to saving faith. In the *Third Letter*, he replied to Proast by noting:<sup>137</sup>

Force, too, without grace, you acknowledge can do nothing; but joined with preaching and grace it can prevail. Why then ... is it a more competent means than preaching; or why necessary, where preaching prevails not? since it can do nothing without that, which if joined to preaching, can make preaching effectual without it.

If coercion is not necessary for the inculcation and development of faith, then what legitimate capacity does civil government – defined by its monopoly on force – have to promote it? After preaching, there is no human means left to bring people to this kind of faith, and the grace of God must be left to do its work.<sup>138</sup>

The net effect of the distinctions between knowledge, reason and faith – coupled with the central place that faith has in Protestant Christianity – is to eliminate the political authority of confessional government.<sup>139</sup> In many respects, matters of faith are of an importance, uncertainty and yet a quality that the tools of civil government cannot address. In his last words on toleration in the *Fourth Letter*, Locke brought this mix of probability in assent to religious beliefs and the action of God in the deepening of faith to a point of intellectual humility. He treated the zealotry with which an individual expressed her belief as irrelevant to its truth.<sup>140</sup> This resonated with earlier views expressed in the *Essay Concerning Human Understanding*, that those who firmly held their beliefs without ever modifying them were the least likely to have examined them.<sup>141</sup> Indeed, it seems that the *Essay* concedes the important place of doubt inside faith, and therefore the deeply tolerant attitude that all thoughtful people should adopt – especially when they are exercising the agency of government. It is worth quoting at length.<sup>142</sup>

We should do well to commiserate our mutual ignorance, and endeavour to remove it in all the gentle and fair ways of information; and not instantly treat others ill, as obstinate and perverse, because they will not renounce their own, and receive our opinions, or at least those who would force upon them, when it is more probable that we are no less obstinate in not embracing some of theirs ... The necessity of believing, without knowledge, nay, often upon very slight grounds, in this fleeting state of action and blindness we are in, should make us more busy and careful to inform ourselves than constrain others. At least those, who have not thoroughly examined to the bottom their own tenets, must confess they are unfit to prescribe to others; and are unreasonable to impose that as truth on other men's belief which they themselves have not searched into, nor weighed the arguments of probability on which they should receive or reject it.

This comes back to the *First Letter's* position that the true church is marked by tolerance,<sup>143</sup> but it is now also extended as a political value. The very epistemological structure of faith directs civil government, irrespective of its motive when planning to regulate the lives of others, both to respect religious belief and to do its best to leave it alone.<sup>144</sup> This continues to depend on the co-penetration of Locke's thought, and the

<sup>137</sup> Ibid, VI, 508-9. See Stanton, above n 14, 94.

<sup>138</sup> Locke, above n 2, VI, 509.

<sup>139</sup> Owen, above n 39, 158.

<sup>140</sup> Locke, above n 2, VI, 565.

<sup>141</sup> Ibid, III, 102.

<sup>142</sup> Ibid, III, 104. See also Owen, above n 39, 166.

<sup>143</sup> Locke, above n 2, VI, 5.

<sup>144</sup> It equally applies to toleration in social relations between individuals: *ibid*, VI, 143 (*Third Letter*).

insights brought to the nature of religious faith by the Protestant doctrine of *sola fides*. In Locke's epistemology and its application to the political status of religious belief lies what is technically and literally agnostic – 'unknowing' – government. The civil power has at most no knowledge of, and at least should consciously exercise a humility in, questions of religion, and therefore the person who holds public office must not, *in that capacity*, give preference to any religious ideas over any others. This has sometimes had an intuitive appeal to common law judges, and that has been used by them to state principles of agnostic law.

#### IV LOCKEAN FRAGMENTS

Locke's account of toleration was a radical Whig rejection of the unqualified *Uniformity Act*, and of King James' project of a modern Catholic polity. It remained a challenge to the religious settlement in the British Isles under William and Mary, even as that stood after the passage of the *Toleration Act*.<sup>145</sup> It is still a challenge.

It would naturally be expected that Lockean ideas were more likely to be taken up in the New World where, despite the explicit reception of English law in North America and Australasia, colonists were more likely to see the political setting as something closer to a 'white paper'<sup>146</sup> that allowed them a greater degree of legal invention. The extent to which this happened in the United States is extraordinary – even, as we have seen,<sup>147</sup> with the *First Letter Concerning Toleration* passing into Virginian and federal constitutional law. The Lockean influence in Australia, though, is indirect and submerged; largely coming through the borrowing of American structures of governmental powers, federalism and judicial review in the *Australian Constitution*.<sup>148</sup> There are nevertheless fragments of Locke's multi-faceted account of toleration that have parallels in Australian law.

Easily the strongest resonance with Lockean arguments of toleration in Australian law is the basic character of a church or religious group as a voluntary association. It is a legal position that is underpinned by contractualist assumptions. This is a direct consequence of the *Toleration Act*, and the need to identify a legal basis for dealing with dissenting groups once they began bringing their disputes to law. Initially the English courts used the charitable trust as a ground for dealing with dissenting churches,<sup>149</sup> but a significant breakthrough came when the common law recognised that, in self-governing colonies, the Church of England itself was nothing more than a voluntary association organised on consensual lines.<sup>150</sup> That remains the position in

<sup>145</sup> See text accompanying above nn 11-18.

<sup>146</sup> Locke, above n 2, I, 53, 82 (*Human Understanding*).

<sup>147</sup> See text accompanying above n 26.

<sup>148</sup> See text accompanying above nn 27-28.

<sup>149</sup> *R v Barker* (1762) 3 Burr 1265; 97 ER 823; *Attorney-General v Cock* (1751) 2 Ves Sen 273; 28 ER 177; *Craigdallie v Aickman* (1813) 1 Dow 1; 3 ER 601; *Attorney-General v Pearson* (1817) 3 Mer 353; 36 ER 135; *Milligan v Mitchell* (1837) 2 My & Cr 72; 40 ER 852; *Broom v Summers* (1840) 11 Sim 353; 59 ER 909; *Shore v Wilson* (1839-42) 9 Cl & F 355; 4 St Tr (NS) 1370; 8 ER 450; *Attorney-General v Welsh* (1844) 4 Hare 572; 67 ER 775; *Drummond v Attorney-General* (1849) 2 HLC 837; 9 ER 1312; *Attorney-General v Clapham* (1853) 10 Hare 540; 68 ER 1155; (1855) 4 De G M & G 591; 43 ER 638; *Attorney-General v Gould* (1860) 28 Beav 485; 54 ER 542.

<sup>150</sup> *Long v Bishop of Cape Town* (1863) 1 Moo PC (NS) 411; 15 ER 756; *Re Bishop of Natal* (1864) 3 Moo PC (NS) 115; 16 ER 43; *Bishop of Natal v Gladstone* (1866) LR 3 Eq 1, 35, 38; *Merriman v Williams* (1882) 7 App Cas 484, 502; *Dodwell v Bishop of Wellington* (1886) 5 NZLR 263; *Fielding v Houison* (1908) 7 CLR 393, 402; *Wylde v Attorney-General (NSW) (ex rel Ashelford)* (1948) 78 CLR 224, 262, 293; *Gent v Robin* [1958] SASR 328, 347-8, 349-50.

Australia where, in general, courts will not interfere in the consensual arrangements that churches and other religious associations have themselves made unless ‘the possession of outward things’<sup>151</sup> gives rise to a civil interest that attracts their jurisdiction.

However, the legal position in Australia still shows the importance of a multi-faceted toleration, and how a one-dimensional approach toleration can actually confound it. American courts, beginning with the same fundamental position that religious associations are consensual arrangements, have been restrained from meddling in religious doctrine by two additional Lockean considerations. The first is agnostic government. A ringing claim made in 1872 that ‘[t]he law knows no heresy, and is committed to no dogma, the establishment of no sect’<sup>152</sup> has motivated judges to avoid involvement in religious groups’ internal disputes, and to defer to the groups’ own decision-making processes or the decisions of their own tribunals.<sup>153</sup> The second is a clear recognition of side-constraints: rights and responsibilities of spiritual independence guaranteed by the First Amendment. Here, American constitutional law emphasises the inalienable *responsibilities* of spiritual independence. The religious association cannot ask the civil power to solve its doctrinal disputes for it, as the First Amendment ‘commands civil courts to decide [religious groups’ property disputes] without resolving underlying controversies over religious doctrine’.<sup>154</sup>

The constitutional law in Australia lacks a strong recognition of the importance of agnostic government, or even of an explicit judicial humility in approaching questions of religion. Side-constraints to protect individuals from government action in religious questions or to require them to solve spiritual disputes themselves are also extremely thin. Despite the status of churches or other religious groups as voluntary associations, there are no real checks on the civil judicial power’s capacity to interfere in doctrinal questions. In the late 1940s, in a case eerily reminiscent of the circumstances of the Restoration period *Uniformity Act*, the High Court of Australia used coercion – an injunction – to enforce the liturgy of the 1662 *Book of Common Prayer* inside the Church of England in New South Wales.<sup>155</sup> And while the civil courts ultimately bowed out of the Church’s later efforts at having them decide whether women could be ordained as priests,<sup>156</sup> they did not deny that, with an appropriate jurisdictional basis in property law, the civil courts could deal with the question.<sup>157</sup>

Agnostic government received some recognition in Australia from Justice Lionel Murphy, when he appealed in a number of judgments to the American principle that ‘[t]he law knows no heresy’.<sup>158</sup> However, Murphy’s judicial agnosticism was certainly

<sup>151</sup> Locke, above n 2, VI, 10 (*First Letter*).

<sup>152</sup> *Watson v Jones*, 80 US 679, 728 (1872).

<sup>153</sup> *Ibid*, 722-7. See also *Gonzalez v Roman Catholic Archbishop of Manila*, 280 US 1, 16-17 (1929); *Serbian Eastern Orthodox Diocese v Milivojevich*, 426 US 696, 713 (1976).

<sup>154</sup> *Presbyterian Church v Mary Elizabeth Blue Hull Memorial Church*, 393 US 440, 449 (1969). See also *Kedroff v Saint Nicholas Cathedral of the Russian Orthodox Church of North America*, 344 US 94 (1952); *Kreshik v Saint Nicholas Cathedral of the Russian Orthodox Church of North America*, 363 US 190 (1959); *Maryland and Virginia Eldership of the Churches of God v Church of God at Sharpsburg*, 396 US 367, 368 (1970); *Jones v Wolf*, 443 US 595, 602-3 (1979).

<sup>155</sup> *Wylde v Attorney-General (NSW) (ex rel Ashelford)* (1948) 78 CLR 224.

<sup>156</sup> *Scandrett v Dowling* (1992) 27 NSWLR 483.

<sup>157</sup> Importantly, however, in this litigation the New South Wales Court of Appeal did disapprove of the trial judge’s claim that he was giving effect to a biblical command – presumably 1 Corinthians 6.1-6 – when declining to hear the case: see *Scandrett v Dowling*, Unreported, New South Wales Court of Appeal, 30 January 1992, 28-9.

<sup>158</sup> *Attorney-General (NSW) v Grant* (1976) 135 CLR 587, 600; *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 150 (*Scientology Case*). Cf

not consistent. His usual approach in his role as a judge was that of the convinced Humanist, and Humanism would, in Lockean terms, be regarded as a position held on faith.<sup>159</sup> Murphy tended to treat religion as a specious delusion. In the school funding litigation, he alone in the High Court adopted an anti-religious interpretation of the *Australian Constitution* – even though no precedent he cited actually supported his stance.<sup>160</sup> Murphy even took the opportunity to advocate Secular Humanism and lampoon the religious life from the Bench.<sup>161</sup> All of this is incompatible with Locke's epistemology of toleration, and is arguably intolerant. It certainly lacks the humble recognition that both Humanist and religionist share a degree of ignorance, and the respect for others' beliefs that Locke recommended to civil government in the *Essay Concerning Human Understanding*.<sup>162</sup>

In the earliest definitive interpretation of the *Australian Constitution's* religion clauses, Sir John Latham recognised an extremely thick side-constraint for resisting any federal measure that bore on Australians' religious life. Locke did not enter Latham's thinking about this right. Rather, he openly relied on John Stuart Mill.<sup>163</sup> According to Latham, religious practices could be properly regulated by federal law only if they were 'actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community'.<sup>164</sup> From the 1980s, this approach to religious toleration in Australian federal law was pegged back by a narrower interpretation of the *Constitution* that only required legislation to have a secular purpose, in the sense that a measure would only offend the *Australian Constitution's* religion clauses if it were *intended* to create a national church or prohibit the free exercise of religion.<sup>165</sup> It now parallels an aspect of Locke's anticomulsion argument; the very aspect of that argument that Waldron's critique concentrated on. Federal legislation cannot have religious (or specifically anti-religious) intent when applying coercion in ways that burden an individual's religious life. This nevertheless remains a weak limitation. The see-sawing arrangements for federal funding of chaplains in government schools has seen a scheme providing for religious chaplains – overwhelmingly Evangelicals – next become a more even-handed arrangement allowing religious chaplains and non-religious welfare workers; only again to arrive at a scheme exclusively for religious chaplains.<sup>166</sup> This appears more

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*Attorney-General (Qld) (ex rel Nye) v Cathedral Church of Brisbane* (1977) 136 CLR 353, 377.

<sup>159</sup> See *Hozack v Church of Jesus Christ of Latter Day Saints* (1997) 79 FCR 441, 445 for effective recognition that an anti-religious belief is, paradoxically, a faith-based position.

<sup>160</sup> *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559, 656-7 (*DOGS Case*). For a more complete analysis of Murphy J's judgment, see Reid Mortensen, 'The Establishment Clause: A Search for Meaning' (2014) 33(1) *University of Queensland Law Journal* 109, 118-19.

<sup>161</sup> *Scientology Case* (1983) 154 CLR 120, 149-52.

<sup>162</sup> See text accompanying above n 142.

<sup>163</sup> *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 131.

<sup>164</sup> *Ibid*, 161-2.

<sup>165</sup> *DOGS Case* (1981) 146 CLR 559; *Minister for Immigration & Ethnic Affairs v Lebanese Moslem Association* (1987) 71 ALR 578.

<sup>166</sup> The invalidation of the school chaplains schemes in *Williams v Commonwealth (No 1)* (2012) 288 ALR 410 and *Williams v Commonwealth (No 2)* [2014] HCA 23 was on the basis of how the federal government established the schemes, and not because of the nature or objects of the scheme. The most recent scheme is to be funded as a grant to the states and territories, but is to exclude the secular welfare workers that were included in the National School Chaplaincy and Welfare Programme, which was struck down in *Williams (No 2)*: see Honourable Scott Ryan, 'Government Welcomes Victoria, WA, Tasmania and Northern Territory's Commitment to National School Chaplaincy Programme', Media Release, 26 September 2014. See also Mortensen, above n 160, 127-9; Jeremy Patrick, 'Religion,

like a government means of leading children to the waters of religious belief,<sup>167</sup> and (although lacking coercion) in that respect is more Proast than Locke. However, the more significant weakness in the recognition of side-constraints that protect religious practice is their almost complete absence from the constitutional law of the Australian states.<sup>168</sup> At least one state has explicitly prohibited a religious group.<sup>169</sup>

It may be suggested that the development of a contemporary account of Locke's theories of toleration is really a superfluous exercise. If the state apparatus is small – as any view of the *Second Treatise of Civil Government* would suggest – anything that happens beyond its few powers would be allowed.<sup>170</sup> Nozick seems to have taken this approach. In *Anarchy, State, and Utopia*, he listed (amongst others) a broad range of religionists whose way of life would be available to them in Nozick's nightwatchman state: Thomas Merton, Harry Wolfson, The Lubavitcher Rebbe, Moses, Baba Ram Dass, Gandhi, Buddha.<sup>171</sup> However, given the renewed importance of religion as a contemporary political question, a mere presentation of the legitimacy of small government is unlikely to be sufficient to deal with the different expressions of contemporary religious life and the social challenges they present. Locke's works on religious toleration therefore remain a valuable resource for addressing twenty-first century religious life. They are unique in tying together the Protestant belief of the supreme importance of faith and Locke's conception of its necessary uncertainties. Their multiple dimensions, and their rich substratum of epistemological ideas, continue to support an official approach to religious life that gives it deep respect, and cautions us from interfering with it unless that is for the most limited civil purposes.

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Secularism, and the National School Chaplaincy and Student Welfare Program' (2014) 33(1) *University of Queensland Law Journal* 187.

<sup>167</sup> Waldron, above n 40, 60-1.

<sup>168</sup> But see s 46, *Constitution Act 1934* (Tas).

<sup>169</sup> See s 3, *Scientology Act 1968* (WA): 'A person shall not practise scientology'. Admittedly, this legislation was passed before the courts conclusively determined that Scientology was a religion: *Scientology Case* (1983) 154 CLR 120.

<sup>170</sup> Stanton, above n 14, 91.

<sup>171</sup> Nozick, above n 32, 310. The historical span of religionists naturally makes the list unrealistic. It is difficult to see the historical Moses or Buddha being comfortable with the inevitable religious pluralism of a libertarian Utopia, even if any of their contemporary disciples are.

