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John Locke, Liberal Totalitarianism, And the Trivialization Of Religion*

THOMAS STORCK

[N]o society will long survive if in its public structure it is built agnostically and materialistically and wishes to permit anything else to exist only below the threshold of the public.

—Joseph Cardinal Ratzinger¹

On April 17, 1990 the United States Supreme Court, speaking through Justice Antonin Scalia, decided the case of *Employment Division v. Smith*.² In this case, two men, Alfred Smith and Galen Black,

were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members. When [Smith and Black] applied to [the Oregon] Employment Division . . . for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related “misconduct.”³

On appeal from the Supreme Court of Oregon, the U.S. Supreme Court ruled against Smith and Black, because it determined that “neutral, generally applicable” laws, which are directed to some secular purpose, and only incidentally infringe on religious practice, may be enforced even though religious believers are thereby inconvenienced. Oregon’s laws against drug, and specifically peyote, use were not directed against members of the Native American Church as such, but were general prohibitions against any use.

The Court stated that, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."⁴ Moreover,

the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."⁵

The *Smith* decision provoked considerable protest. A concurring opinion by Justice O'Connor and a dissent by Justices Brennan, Marshall and Blackmun, strongly criticized the basis of the Court's opinion, charging that it departed from established jurisprudence which forbade governmental infringement with religious freedom "unless required by clear and compelling governmental interests 'of the highest order.'"⁶ The *Smith* decision spurred Congress to pass the Religious Freedom Restoration Act, Public Law 103-141, which was signed by President Clinton in November 1993. Although this law has since been judged unconstitutional by the Supreme Court, it is an important example of the "compelling governmental interest" approach to regulating religious conduct, and I will discuss the law further below.

One should note, though, that although many criticized the Court's opinion in the *Smith* case, those criticisms were within definite limits. For example, Justice O'Connor in her concurring opinion stated plainly: "Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute."⁷ Practically no one challenged the notion that government had the ultimate say over conduct, even when religiously based and motivated.

A few years later, on June 11, 1993, the Supreme Court decided another free exercise of religion case, *Church of Lukumi Babalu Aye v. City of Hialeah*.⁸ This case involved adherents of the Santeria religion, a religion which includes animal sacrifices in its rituals. The city of Hialeah, Florida, had proscribed such animal sacrifices in a series of measures that singled out only the

religious slaughter of animals, and exempted other animal killings. And so the Supreme Court found that these laws were indeed unconstitutional, because they obviously were targeted at *religious* practices per se, not simply that they happened to burden religious behavior incidentally. "It is a necessary conclusion that almost the only conduct subject to [the] Ordinances . . . is the religious exercise of Santeria church members. The texts show that they were drafted . . . to achieve this result."⁹ But the Court in this case also expressly reaffirmed the central and controversial point of *Smith*, "that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."¹⁰

The history of the treatment of the Free Exercise Clause¹¹ of the First Amendment by the United States judicial system, and in particular by the Supreme Court, varies, but as we shall see, it varies only within certain definite limits. In what seems to have been the first free exercise case, the 1878 case of *Reynolds v. United States*,¹² which upheld the law criminalizing the Mormon practice of polygamy, the Supreme Court took the view that there was no reason why government need hesitate about restricting religious *conduct* by general and neutral laws. The Court in *Reynolds* said, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."¹³ It also noted that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."¹⁴

In later cases the Supreme Court seemed to take a softer line. For example, in the 1940 case of *Cantwell v. Connecticut*,¹⁵ a case involving the selling of religious literature and soliciting of donations by two Jehovah's Witnesses, contrary to state law, the Court sided with the Witnesses, although it stated that the Constitution's requirements for the protection of religious behavior were nevertheless not absolute.

The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compul-

sion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the [First] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.¹⁶

Thus the Court did not give up the government's stated right to regulate or restrict religious conduct in at least some cases. But generally the Court since then has shown more concern and deference toward believers who either were denied some governmental benefit or became subject to some governmental penalty because of their religion. It has often stated, for example, that in order to abridge someone's religious freedom the government must show that it has a "compelling state interest" which "no alternative form of regulation" could accomplish.¹⁷ The case in which it seems to have given the most latitude toward religious conduct was the 1972 case of *Wisconsin v. Yoder*,¹⁸ the Amish school case. Here the Court said:

But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.¹⁹

This represents the outer bounds to which the Supreme Court has approached, for in this case the Court appears to take the position that some religiously inspired conduct is entirely "beyond the power to the State to control," regardless of what state interests may exist.

Generally, however, the Court has not proceeded this far. More often the question is presented as one of balancing the religious interests of the individual against the proclaimed interests of the

authorities. When Congress legislatively attempted to overturn the *Smith* decision by passing the Religious Freedom Restoration Act, this balancing test was enacted as law. Section 3, subsection (b) of the law stated:

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

- (1) is in furtherance of a compelling governmental interest;
- and
- (2) is the least restrictive means of furthering that compelling governmental interest.²⁰

This attempt by Congress to establish a "compelling governmental interest" standard for regulating religious conduct did not, however, succeed. As I mentioned above, the Supreme Court overturned this act,²¹ basically asserting that it is the courts, not Congress, that have the authority to decide the limits of the First Amendment. In this decision, as in both *Smith* and *Church of Lukumi Babalu Aye*, the Court seems to have returned to a standard more similar to *Reynolds* than to *Yoder* and other post-World War II cases. Obviously one cannot say which way future decisions will go. But I think that one can confidently predict that they will fall within an area bounded on the one hand by *Yoder* and on the other by *Reynolds* and *Smith*. And although it might seem that these two extremes of opinion differ fundamentally, I will contend that in principle the differences between *Yoder* and *Smith* are simply differences of degree.

What can be said, then, of the differences between the attitude toward free exercise of religion contained in *Reynolds* and *Smith*, and that contained in the other cases and in the Religious Freedom Restoration Act itself? *Reynolds* and *Smith* claim that in making general and neutral laws that deal with matters under its competence, a government need not bother about the fact that some persons' exercise of religion is thereby burdened. To allow exemptions from law on account of religious belief "would be to make the professed doctrines of religious belief superior to the

law of the land, and in effect to permit every citizen to become a law unto himself."²² Or as the *Smith* opinion put it,

The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'²³

But the other approach, with the possible exception of some passages in the *Yoder* opinion,²⁴ also asserts the government's supremacy over all religious conduct—except that such regulation must justify itself by, as the Religious Freedom Restoration Act states, "a compelling governmental interest." We should remember, however, that it is the same government that enacts the statute restricting religious behavior, and that also asserts its "compelling interest" in seeing the statute obeyed. It is true that it must justify itself before an independent judicial branch, but is it that difficult to imagine circumstances in which all the branches of government would be united in the same (to them self-evident) opinion? What the government considers its compelling interest depends much on the cultural or intellectual milieu in which live not only congressmen and judges, but the entire body of persons whom congressmen and judges regard as their peers and fellows. Even within the short history of our own country we can see striking changes of opinion about the most important subjects, about religion, slavery, sexuality, the place of women in society, and many other matters. Who would doubt but that what seemed self-evident to a judge of 1800 would differ considerably from what seems self-evident to a judge of today? Not many years ago it seemed clear to most Americans that prohibition of "intoxicating liquors" was socially desirable.²⁵ Although the use of wine for Christian sacramental purposes was exempted from the law, does it require much imagination to think that the society of that time might have deemed even religious use of wine contrary to a "compelling governmental interest," and thus outlawed Catholic, Eastern Orthodox, Episcopal and other religious rituals, as some states do with peyote in

the Native American Church? Justice O'Connor, in her concurring opinion in *Smith*, reached the same result as the Court's majority, although she applied the "compelling interest test" in doing so.²⁶

The point, then, as I see it, is that U.S. jurisprudence unhesitatingly regards all religious conduct, even in religious rituals themselves, as subject to at least any important law that is passed, only provided that this law have a neutral and secular purpose, and burden the religious actions only incidentally. Is this something to be troubled about, or is it simply a common-sense approach to governing? After all, as the Court said in *Reynolds*,

Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?²⁷

I think, though, that before one evaluates the Supreme Court's jurisprudence, it is necessary to see the background and context of the Court's opinions, and these can be found in none other than John Locke's (first) *Letter Concerning Toleration* of 1689.²⁸

The kinds of situations which our Supreme Court has had to confront in Free Exercise Clause litigation were discussed some 300 years earlier by Locke, except that instead of the Santeria sacrifices of "chickens, pigeons, doves, ducks, guinea pigs, goats, sheep and turtles,"²⁹ Locke spoke only of calves. But before considering Locke's example further, we should begin by examining his entire argument.

Locke's *Letter Concerning Toleration* would seem to have been written to further mutual toleration among Christians. As he says in the very beginning of the letter, "I esteem that toleration to be the chief characteristic mark of the true Church."³⁰ And following on this genial statement, Locke continues in the same vein. He says, "If the Gospel and the apostles may be credited, no man can be a Christian without charity and without that faith which works, not by force, but by love."³¹ Or consider this:

The toleration of those that differ from others in matters of religion is so agreeable to the Gospel of Jesus Christ, and to the genuine reason of mankind, that it seems monstrous for men to be so blind as not to perceive the necessity and advantage of it in so clear a light.³²

But Locke is not seeking simply to denounce those whom he deems cruel to other Christians; he is also going to “distinguish exactly the business of civil government from that of religion” so that there can be an “end put to the controversies that will be always arising between those that have . . . on the one side, a concernment for the interest of men’s souls, and, on the other side, a care of the commonwealth.”³³

With this, Locke begins his arguments for his well-known position that governments exist “only for the procuring, preserving, and advancing [of] . . . civil interests.” And what are these civil interests? “Civil interests I call life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like.” Thus, the state’s duty is “by the impartial execution of equal laws, to secure unto all the people . . . the just possession of these things belonging to this life” and “neither can nor ought in any manner to be extended to the salvation of souls . . .”³⁴

Since he has limited men’s concerns when coming together into a political society to material affairs, all the laws and power of the state will likewise concern only material matters. Thus a fellow citizen’s religious opinions would seem to have nothing to do with how well he will obey the laws of the commonwealth, and are thus of no concern to his neighbor.

If a heathen doubt of both Testaments, he is not therefore to be punished as a pernicious citizen. The power of the magistrate and the estates of the people may be equally secure whether any man believe these things or no.³⁵

For “the business of laws is not to provide for the truth of opinions, but for the safety and security of the commonwealth and

of every particular man's goods and person."³⁶

Since the power of the ruler extends only to material things, he therefore "has no power to impose by his laws the use of any rites and ceremonies in any Church" nor "any power to forbid the use of such rites and ceremonies as are . . . practiced by any Church."³⁷ It would seem, then, that Locke has established a regime of the utmost religious freedom, in which each and every man could worship God or gods in any matter of his choosing. But Locke has to deal with an obvious objection, and his answer parallels closely the reasoning of our own Supreme Court.

The objection that naturally arises is that if entire freedom is granted to every religion, what if some religion performs outrageous rites in its worship—"if some congregations should have a mind to sacrifice infants, or . . . lustfully pollute themselves in promiscuous uncleanness"—should this be permitted on the grounds that the state may not meddle with spiritual matters? Locke answers thus: "No. These things are not lawful in the ordinary course of life, nor in any private house; and therefore neither are they so in the worship of God, or in any religious meeting."³⁸

One might think that this is indeed a reasonable response, since, after all, could anyone really expect that murder would be permitted under color of religious worship? But Locke immediately makes it clear that he is speaking not only of what lawyers call *malum in se*, but also of what they call *malum prohibitum*.³⁹

But, indeed, if any people congregated upon account of religion should be desirous to sacrifice a calf, I deny that they ought to be prohibited by a law. Meliboeus, whose calf it is, may lawfully kill his calf at home, and burn any part of it that he thinks fit. For no injury is thereby done to any one, no prejudice to another man's goods. And for the same reason he may kill his calf also in a religious meeting.

But almost immediately he goes on to say:

But if peradventure such were the state of things that the interest of the commonwealth required all slaughter of beasts

should be forborne for some while, in order to the increasing of the stock of cattle that had been destroyed by some extraordinary murrain, who sees not that the magistrate, in such a case, may forbid all his subjects to kill any calves for any use whatsoever? Only it is to be observed that, in this case, the law is not made about a religious, but a political matter . . .⁴⁰

In other words, "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."⁴¹ Whenever Locke's established-only-for-the-sake-of-property government decides about some this-worldly matter, the fact that it requires believers to abstain from, or perform, some act contrary to their religious beliefs matters not at all. Locke himself opines that "this will seldom happen." But in answer to his question, "What if the magistrate should enjoin anything by his authority that appears unlawful to the conscience of a private person?" he replies,

that such a private person is to abstain from the action that he judges unlawful, and he is to undergo the punishment. . . . For the private judgement [sic] of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation.⁴²

From the foregoing, one can easily discern that the frameworks within which both Locke and our own First Amendment jurisprudence take place are identical.⁴³ The legislative enactments of neither deal with religious belief itself. Locke has no explicit prohibition, such as our First Amendment, against government legislating on religious belief. But he does not need one, because since his government is limited to only "civil interests" in its enactments, it can never touch religious belief itself. And as to religious *conduct*, both assert their right to prohibit or regulate it, whenever some "civil interest" of sufficient importance makes this necessary.

This method of dealing with conflict between civil and religious prescriptions, especially when applied using the "compelling governmental interest" standard sometimes used by the Supreme Court, might seem to establish a reasonable *modus vivendi*. In a country such as the United States, where we have every kind of religion from Appalachian snake handlers to Zen Buddhists, there would surely be chaos if every one were allowed to ignore any law which conflicted with his sincere religious beliefs. Nevertheless, I suggest that present in Locke's doctrine, and our own, is a latent totalitarianism.

In a liberal society, whenever there is an overwhelming consensus, if not belief, about what kinds of *conduct* are reasonable or customary, these totalitarian implications are not likely to come to the fore. Almost all the religious liberty cases that have come before our courts, for example, have involved minority religions, whose adherents do things like sacrifice animals, marry more than one wife, fail to salute the flag,⁴⁴ observe Saturday as their day of rest,⁴⁵ or take peyote, things not part of the way most Americans have traditionally behaved. And it is easy to see how one of these unusual practices is more likely to fall afoul of "generally applicable and otherwise valid" laws, even if the laws are not targeted at religious conduct in particular. For since general laws that deal with secular matters naturally are framed to apply to the way the majority of citizens live, or to how they have traditionally lived, whenever minority religions depart from this way of life, there is a possibility that one of their religiously mandated norms of conduct will come into conflict with these laws.

But it should be clear that this approach to the question subordinates potentially *all* religious conduct to policy decisions of legislatures and courts. For it is not difficult to imagine, given the right climate of opinion, a general law being passed prohibiting almost any act which any religion might mandate. Thus in the 1920s, the state of Oregon sought by general laws to prohibit all but public school education. Although the U.S. Supreme Court in this case decided against the state,⁴⁶ in the *Smith* opinion the Court asserted that the only reason the *Pierce* case was decided in that

way was because the religious freedom claim was “in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children.”⁴⁷ While it is true that a skeptical Supreme Court has often invalidated legislation held to violate the Free Exercise Clause, it is not hard, as I said, to imagine a unanimity of opinion between both the legislature and the courts.⁴⁸

However problematic this may be, I think the root of the matter lies still deeper. For it is not simply a question of the asserted right to regulate potentially any religious conduct whatsoever. It is that both Locke and American jurisprudence render religion entirely irrelevant to the real concerns of the political community. This is most strikingly stated in *Reynolds v. United States*. There the Court quotes from the preamble to the Virginia statute of 1785, authored by Thomas Jefferson, establishing religious freedom, that “to suffer the civil magistrate to intrude his powers into the field of opinion . . . is a dangerous fallacy.”⁴⁹ And on the next page, commenting on the adoption of the First Amendment to the U.S. Constitution, the Court says, “Congress was deprived of all legislative power over mere opinion.” The reason why the Lockean state, both on paper and as realized in the United States, can so calmly assert its right to regulate religious conduct when it comes into conflict with its secular laws, is because at bottom it considers religion not only a private affair, and hence subject to the political order, but merely a matter of *opinion*. Locke’s political community is concerned exclusively with such weighty matters as “life, liberty, health, and indolency [sic] of body . . . money, lands, houses, furniture, and the like.” To such a community religion—both belief and practice—is at best something to be benignly tolerated, so long as it does not get in the way of the state’s business. But the state itself is either atheistic or agnostic. How could it not be when it regards religious beliefs as so many “opinions,” and officially removes itself from any consideration of them?⁵⁰

Locke’s example of the magistrate who may prohibit the sacrifice of calves when “some extraordinary murrain” makes it necessary that “all slaughter of beasts should be forborne for some while,” and the real life example of the prohibition of peyote use

by the state of Oregon, illustrate this well. If God were really pleased by the sacrifice of calves, or by the use of peyote, then clearly the secular purposes that were held to justify these respective prohibitions would count as nothing—that is, provided that the governmental authorities believed and acknowledged this fact. But in fact neither Locke's putative magistrate nor the Supreme Court has the slightest interest in whether or not God is propitiated by the sacrifice of calves or the use of peyote or by men marrying more than one wife⁵¹ or by any of the other kinds of conduct at issue in the course of Free Exercise Clause litigation. These religious behaviors are permitted, regulated or prohibited (as the case may be), simply according to how they fit in with the secular purposes that alone are held to be proper to government. Religion is just not part of the serious business of the state. The political community is secular, not only in the sense that its legislative concerns are exclusively secular, but also and more importantly because it is wholly uninterested, not only in the truth of any of the religions which its laws regulate, but in the very question of whether there *is* any religious truth at all. But surely, if in fact we could please God by the sacrifice of "chickens, pigeons, doves, ducks, guinea pigs, goats, sheep and turtles," or even of mere calves, would not a regime that wanted even secular prosperity be interested in promoting such acts in order to gain the blessing of God upon itself? Though the Supreme Court allowed the Santeria sacrifices to continue, it did not do so because it thought those sacrifices might be potent tools in the fight against budget deficits or illegal drug use or political corruption. It was only because the City of Hialeah singled out the Santeria sacrifices and failed to demonstrate any "compelling governmental interest" in its prohibitions, that the Court prevented it from proscribing them.

We should note further that since religion is not part of the serious business with which the political authorities are occupied, neither is it part of the real business of society either, for society is ultimately governed and shaped by the political.⁵² It is not only that the government will not officially sponsor the sacrifices of animals or investigate whether or not such sacrifices are pleasing to God. But since the government permits or prohibits such acts

based on its own secular criteria, society is able to engage in such acts based solely on whether they satisfy the secular criteria employed by the authorities. I and my co-religionists might be convinced that it is our duty to perform one of the acts which are held to violate some "compelling governmental interest," and we might not care about the alleged interest asserted by the state. But nonetheless, according to the methods of the Lockean state and of the U.S. Constitution, we too are compelled to live and act according to secular criteria. The fact that we are permitted to *believe* whatever we like would seem to have little meaning if our external acts are forced to conform to secularist standards. Thus it is society as much as the political order that is rendered secular. The obvious retort, that there is in fact much religious activity taking place in our society undisturbed by the police or the courts, is actually neither here nor there. For potentially any and all of this religious activity could be stopped if the state declared it had a sufficient interest in doing so. In theory, all religious activity exists simply by virtue of the fact that it does not interfere with any important—and necessarily secular—state purpose. If so, the state can safely ignore it. It is like children playing—as long as their noise and commotion is below a certain level, the parents will ignore it. But in principle it exists simply by their sufferance.

Moreover, if the political community has no interest in religion, it is hard to see why any private person should. If religion cannot play any role in the political or public life of a nation, then why should it be important to the individual either, except perhaps as a psychological crutch or a merely subjective aid to personal rectitude? A God whom our rulers can officially ignore would hardly be a God that private citizens need worry much about. And it is surely an odd kind of religion that must be put into one's pocket whenever one ventures into the political realm, just as it is surely odd to have to defend religious activity, not on the ground that it is pleasing to God, but on the ground that it fits in with the secular interests of the state.

But is there anything wrong with this? Is there any reason why a government should not ignore the question of religious truth? Has not America's history been sufficient justification for its phi-

osophy? Is not the large amount of freedom which is allowed to the Christian, and to other believers, by a Lockean regime adequate in most circumstances? Perhaps our state is not ideal, so it is argued, but it is surely better than incessant strife, or worse still, a situation in which one religious party has gained the upper hand and actually persecutes its opponents.

These are the types of arguments raised by defenders of the Lockean state. Americans are all too ready to assent to them without much thought, for as soon as the specter of religious strife or religious persecution is raised, most of us are only too happy to embrace Locke as an escape from these difficulties. But this is done without much consideration of the assumptions and implications of the Lockean program. For it would seem that if there is a God, and if it is possible to know anything about what is pleasing to him, then this would be a matter of interest to mankind. For just that reason people have been interested in religious questions. And it is difficult to understand, when joining into a political community, why the government they form would not likewise be interested in these questions. For unless God has no concern with human affairs, knowledge of His will would seem to be one of the best means of obtaining His blessing on all our human undertakings.

It is no doubt true, as I said above, that Locke and the Founding Fathers strove to sequester religion from state concern at least partly because of their memory of two-hundred years of religious warfare in Europe. Confessional states and official religions seemed to them to invite strife and persecution and to work against prosperity in human affairs. But to say that men who are joined into a government may legitimately have a concern about religious truth does not mean that there need be an established church or the persecution of dissenters. The thirteen colonies that became the United States contained a plurality of religions nearly from their beginning, and whatever arrangements the Founding Fathers made would have had to have taken that into account. But to adopt the Lockean solution to the problem of religious pluralism makes religion forever after into merely a private hobby, worthy of being protected perhaps, but not because it might be able to make any truth claims

and be taken seriously in the political or intellectual arena. For the First Amendment bars religion from ever being a relevant factor at the level of political life.

I am not, of course, suggesting here the opposite solution, that of the confessional state, an obvious absurdity in this country. I simply want to point out to those who unthinkingly have accepted Locke's version of the correct relations between religion and society, that it is not the self-evident truth it is usually imagined to be. The Lockean solution to the problem of religious pluralism seems so obvious to most Americans as to need little or no defense. But in reality this is not so. The assumptions and implications of such a means of dealing with religion are rarely brought out and not readily perceived in the United States, but if they were to be, perhaps then a new debate, on the Lockean doctrine itself and on other possible roles for religion, could begin. Then, regardless of the practical steps that might be taken to allow diverse religious believers (and non-believers) to live together in peace, Americans could see that claims to religious truth, if really taken seriously, might have implications even for the political and public order. At the very least, regardless of what changes we might or might not make, we would understand that the Lockean solution is not the only method for dealing with pluralism, and that it involves a definite relegation of religion to a private and inconsequential role. And we would be able to ask ourselves whether we truly desired a public order which deliberately excluded religion. For it is not just "money, lands, houses, furniture, and the like" which men seek when they join together into community, but the good, and how to achieve that elusive goal.

*Excursus: Persecution of the Mormons
by the United States Government*

In order to discover how a liberal government might proceed against an unpopular religion, one ought to look at the federal government's campaign against the Mormons during the nineteenth century. The antipathy toward the Mormons was shared by all

branches of government, so that the courts readily sanctioned each new action of Congress and the territorial legislatures.

Congress in 1862 prohibited polygamy in the territories, of which Utah was then one. In *Reynolds v. United States* the Supreme Court not only upheld the act of Congress, but its opinion makes clear that it was far from neutral in this matter. The Court stated that:

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.⁵³

The Court then went on to say:

In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.⁵⁴

The Court also refused to find any judicial error in the instructions to the jury given by the trial judge in Utah, which included the sentence, "I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion."⁵⁵

In 1882 Congress made it an offense in the territories to cohabit with more than one woman (an act easier to prove than the fact of plural marriage), deprived polygamists or "any person cohabiting with more than one woman" of the right to vote, barred them from public office and excluded them and anyone who "believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman" from juries in trials for these offenses. This was upheld by the Supreme Court.⁵⁶

In *Davis v. Beason*⁵⁷ the Court unanimously upheld a law of the Territory of Idaho forbidding not merely actual polygamists, but “any person . . . who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists . . . or who is a member of any order, organization, or association which teaches, advises, counsels, or encourages its members . . . to commit the crime of bigamy or polygamy” from voting or holding public office.⁵⁸ This of course prevented *any* Mormon from voting, although according to an authoritative judicial estimate, not over “twenty per cent of the marriageable members, male and female, were engaged in the actual practice of polygamy.”⁵⁹

Finally, Congress, by an act of 1887, dissolved the legal corporation of the Mormon church and confiscated all its property, except for a portion actually used for religious worship. This act was upheld six to three by the Supreme Court in *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*.⁶⁰

I am not, of course, suggesting that the practice of polygamy is right or is merely a *malum prohibitum*. Rather, I am pointing out that the extremes of the government’s actions against the Mormon church could, in other circumstances, be directed against any religion, given the right climate of opinion.⁶¹

Notes

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¹ *A Turning Point for Europe?* (San Francisco: Ignatius, 1994), 171.

² 494 U.S. 872.

³ *Ibid.*, 874.

⁴ *Ibid.*, 878-79.

⁵ *Ibid.*, 879.

⁶ *Ibid.*, 895.

⁷ *Ibid.*, 894.

⁸ 508 U.S. 520.

⁹ *Ibid.*, 535.

¹⁰ *Ibid.*, 531.

¹¹ This is the second clause of the First Amendment to the U.S. Con-

stitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ." (emphasis added).

¹² 98 U.S. 145.

¹³ *Ibid.*, 164.

¹⁴ *Ibid.*, 166.

¹⁵ 310 U.S. 296.

¹⁶ *Ibid.*, 303-304.

¹⁷ From *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁸ 406 U.S. 205.

¹⁹ *Ibid.*, 220.

²⁰ 107 Stat. 1488 and 1489.

²¹ *City of Boerne v. Flores* (521 U.S. 507), decided June 25, 1997.

²² *Reynolds*, 167.

²³ *Smith*, 885.

²⁴ *Yoder* is not always clear or consistent. On an earlier page (215), the Court wrote, "The essence of all that has been said and written on the subject [i.e., on free exercise of religion] is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." This appears to be the balancing test again, the approach Congress attempted to consolidate by the Religious Freedom Restoration Act.

²⁵ Section 1 of the Eighteenth Amendment to the U.S. Constitution stated: "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." This amendment was ratified in 1919 and repealed in 1933 by the Twenty-First Amendment.

²⁶ *Smith*, 903-907.

²⁷ *Reynolds*, 166.

²⁸ Locke later published a *Second* (1690) and a *Third Letter Concerning Toleration* (1692).

²⁹ *Church of Lukumi Babalu Aye*, 525.

³⁰ *Letter*, 1. All references to the *Letter* are to the edition published in the *Encyclopaedia Britannica Great Books Series* (Chicago: Encyclopaedia Britannica, 1952), vol. 35.

³¹ *Ibid.*

³² *Ibid.*, 2.

³³ *Ibid.*, 2-3.

³⁴ *Ibid.*, 3.

³⁵ *Ibid.*, 15.

³⁶ *Ibid.*, 15.

³⁷ *Ibid.*, 12.

³⁸ *Ibid.*

³⁹ *Malum in se*, of course, is something evil in itself, whereas *malum prohibitum* is something evil merely because some governmental enactment has made it such.

⁴⁰ Locke, *Letter*, 12-13.

⁴¹ *Smith v. Employment Division*, 879.

⁴² *Letter*, 16.

⁴³ Many historians have remarked on the pervasive influence of John Locke in the United States. For example, Louis Hartz says that in America Locke is a "massive national cliché" and that he "dominates American political thought, as no thinker anywhere dominates the political thought of a nation." See *The Liberal Tradition in America* (New York: Harcourt, Brace & World, 1955), 140.

Moreover, it is most interesting to note the following from the concurring opinion by Justice Scalia in *City of Boerne v. Flores*, the decision striking down the Religious Freedom Restoration Act:

This limitation upon the scope of religious exercise would have been in accord with the background political philosophy of the age (*associated most prominently with John Locke*), which regarded freedom as the right "to do only what was not lawfully prohibited" (540, *emphasis mine*).

Scalia, at least, is clear about what he thinks of Locke and why.

⁴⁴ The two flag salute cases were *Minersville School District Board of Education v. Gobitis*, 310 U.S. 586 (1940) and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Both involved Jehovah's Witnesses.

⁴⁵ There have been several cases involving those who observe Saturday as the weekly holy day. They include *Braunfeld v. Brown*, 366 U.S. 599 (1961), which concerned Orthodox Jews, and *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987), both of which concerned Seventh-Day Adventists.

⁴⁶ *Pierce v. Society of Sisters*, 268 U.S. 510.

⁴⁷ *Smith*, 881.

⁴⁸ See the excursus on the government's persecution of the Mormons at the end of this article.

⁴⁹ Reynolds, 163.

⁵⁰ One might take issue with what I have just said by pointing out that Congress, many state legislatures, the armed services and many courts employ chaplains or have official opening prayers. Presidents have often invoked the name of God in their official addresses and proclamations. Indeed, the U.S. Supreme Court in *Zorach v. Clauson*, 343 U.S. 306 (1952), wrote as follows: "We are a religious people whose institutions presuppose a Supreme Being" (313). But the real meaning of this becomes clear a few sentences later. "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs" (313-314). Any benign governmental acts toward religion are based on the private, but pervasive, religious beliefs of the people. The government as such is not interested in whether the prayers that open legislative sessions actually are pleasing to God, any more than whether sacrifices of animals would be, but "accommodates" its actions to popular belief.

⁵¹ At his trial, George Reynolds offered evidence that according to the doctrine of the Mormon Church, of which he was a member, "the failing or refusing to practise [sic] polygamy by . . . male members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come." *Reynolds v. United States*, 161.

⁵² There are exceptions to this rule, as when the political order is controlled by an occupying power whose way of life is at odds with that of the population. Thus Ireland under English domination and Poland under Communist largely preserved their own cultures, but not without suffering damage, as for example, the loss of the Irish language.

⁵³ Reynolds, 164.

⁵⁴ Ibid., 165-166.

⁵⁵ Ibid., 167.

⁵⁶ See *Murphy v. Ramsey*, 114 U.S. 15 (1885).

⁵⁷ 133 U.S. 333 (1890).

⁵⁸ Ibid., 335-36.

⁵⁹ Cited in *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, at 27.

⁶⁰ 136 U.S. 1 (1890).

⁶¹ Does it take much imagination to see possible dangers to the Catholic Church over either the ordination of women or approval of homosexual conduct?