

ONTARIO COURT OF JUSTICE
(South West Region)

B E T W E E N:

HIS MAJESTY THE KING

Respondent

- and -

SAMER AKILA

Applicant

AFFIDAVIT OF LUCAS SWAINE

I, Lucas Swaine, of the City of Hanover, in the State of New Hampshire, MAKE OATH AND SAY/AFFIRM:

1. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
 - (a) to provide opinion evidence that is fair, objective and non-partisan;
 - (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and
 - (c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.
2. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.
3. I am offering myself as an expert on the topics of thought, the history of thought, freedom of thought, the history of freedom of thought, liberties, and freedoms.

Personal Qualifications

4. Attached hereto and marked as exhibit A is a true copy of my CV.

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5. In 1999 I obtained my PhD in political science at Brown University. I currently work as a full professor of government at Dartmouth College.
6. I am the author of two books in political theory and philosophy, including *Ethical Autonomy: The Rise of Self-Rule*. I am completing a substantial book-length manuscript entitled *Freedom of Thought: First of the Liberties*.
7. I have presented scholarly papers on freedom of thought at several different conferences and meetings, and published versions of those papers as academic journal articles or as book chapters. Some of these papers include "Freedom of Thought as a Basic Liberty," "Freedom of Thought in Political History," "Does Hate Speech Violate Freedom of Thought?" and "Can Freedom of Thought Edify Democracy?".
8. I am currently engaged in writing scholarly papers entitled "Freedom of Thought and Democratic Repair," "The Priority of Freedom of Thought," "Freedom of Thought as a Check on Deliberative Demands," "Education, Indoctrination, and Freedom of Thought" and "Freedom of Thought, Religion, and Liberal Neutrality".
9. I am member of the "Freedom of Thought Network," an international academic working group studying freedom of thought. I am also a member of the Human Rights Section of the American Political Science Association.
10. I was a member of a group of scholars consulted by the UN Special Rapporteur on Freedom of Religion or Belief, in 2021. I was included to assist the Special Rapporteur with his consideration of the topic of freedom of thought, in particular. The central meeting with which I was involved was a virtual meeting called: "Respecting, Protecting, and Fulfilling Freedom of Thought: Consultation for the UN Special Rapporteur on Freedom of Religion or Belief," Ralph Bunche Institute for International Studies, New York, NY, June 2, 2021.
11. I have no involvement with psilocybin companies.

MY OPINION

What does thought include?

12. One can conceive of “thought” as “mental activity.” Understanding thought in this way accommodates a broad array of mental processes under the rubric of thought. Examples of thought include reasoning, reflecting, imagining, cogitating, remembering, wishing, questioning, desiring, believing, deliberating, and other activities of mind. Thought can take many forms and it can be directed toward a wide variety of objects. Conceiving of thought as mental activity allows that thought may be more or less rational or imaginative, that some thought may concern social or political phenomena, that thoughts may be about personal matters, and so on. This understanding allows for distinctions among different kinds and forms of thought, and it does not overemphasize the reasonableness or the rationality of persons.
13. Conceiving of thought as mental activity allows one to include both thinking and feeling within the category of thought. By “feeling” I mean simply “emotion or sentiment.” Martha Nussbaum proposes that some feelings have “rich intentional content,” whereby “feeling” is a terminological variant of “perception” or “judgment.”¹ Other feelings lack that content, she suggests, as may be seen in the examples of feeling energetic or fatigued.² Robert Gordon submits that emotions display “factive” qualities: they require that an agent believe propositions in order to be produced.³ This holds for anger, jealousy, love, shame, and so on. One can cover both standard human emotions and sentiments of unease, feeling unwell, feeling pleasure or pain, and so forth, all under the rubric of feeling.
14. Naturally compatible with the idea of thought as mental activity is the observation that thinking and feeling can be manifested in speech or in conduct. People often think and act in concert, with activities in the two spheres operating in combined and cooperative ways.

¹ Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (New York: Cambridge University Press, 2001), p. 60. See also Martha C. Nussbaum, *The Therapy of Desire: Theory and Practice in Hellenistic Ethics* (Princeton, NJ: Princeton University Press, 1994), pp. 89-95, 243-44, 424.

² Nussbaum (2001), p. 60.

³ Robert M. Gordon, *The Structure of Emotions: Investigations in Cognitive Philosophy* (Cambridge, U.K.: Cambridge University Press, 1987), pp. 52-64; Lucas Swaine, “Blameless, Constructive, and Political Anger,” *Journal for the Theory of Social Behaviour*, Vol. 26, No. 3 (1996): 257-74, at p. 263.

Emotions and sentiments often connect to action, as well, with strength or intensity of feeling appearing to correlate, at least in weakly positive ways, with people's behavior.

15. However, thought *per se* can be distinguished from both speech and conduct, respectively.

What a person thinks or feels is not identical to what they say. Nor is what a person thinks or feels identical to their conduct. What is more, thought is by its nature different from speech or conduct because one can have thoughts that one neither expresses to others nor puts into any form of conduct. A person might engage in imagination or reflection, for example, or form a desire, or think about a topic, without ever mentioning or revealing their mental activity to anyone. Similarly, one might have different kinds of emotions or sentiments on a topic but keep to oneself, never disclosing them in speech nor manifesting the feelings in conduct.

16. It is sensible to limit the category of thought to the "inward domain of consciousness" that John Stuart Mill describes in *On Liberty*.⁴ This is because when a person manifests thought in speech or in conduct, they produce something new and distinct, generating something that is different from the thoughts they have had *per se*. The correct description of an action may depend on the thoughts of the person who acts, but speech or conduct is nevertheless conceptually distinct from thought *per se*, mental activity that is not expressed or acted upon.

17. In calibrating the boundaries of thought, therefore, it is sensible to exclude expression.⁵ Thought is different from speech, written messages or tracts, artistic works, publications, and other expressive acts.⁶ Expressive acts do not represent instances of thought alone. In listing deliberation as a form of thinking, therefore, I mean here to include only intrapersonal deliberation. This coheres with Philip Pettit and Michael Smith's suggestion that "thinking itself is a kind of intrapersonal conversation,"⁷ but it may be noted that

⁴ John Stuart Mill, *On Liberty*, ed. Elizabeth Rapaport (Indianapolis, IN: Hackett Publishing Co., 1978 [1859]), p. 11.

⁵ Cf. Mill (1978), p. 28.

⁶ Cf. T. M. Scanlon, "A Theory of Freedom of Expression," *Philosophy & Public Affairs*, Vol. 1, No. 2 (1972): 204-26, at p. 206.

⁷ Philip Pettit and Michael Smith, "Freedom in Belief and Desire," *Journal of Philosophy*, Vol. 93, No. 9 (1996): 429-49, at p. 447.

intrapersonal deliberation remains just one form of thought, on the conception that I employ here.

Has thought played an important role in human history?

18. Thought has been fundamentally important in human history. In form and in content, people's mental activity has mattered to others. Cultures and communities far and wide show concern with the interior life of their membership. Thought has proven salient in central domains of complex societies. It contributes to the success or failure of associations and communities, and it is a fixation of social and educational institutions. Thought is highly important in law, commerce and trade, artistry and innovation, and collective action, furthermore. Religion is another sphere in which people's mental activity has mattered to communities. One can see why this might be so. Social and political concerns have often been entangled with religiosity, with people's religious beliefs and practices in numerous cases transformed into political and legal issues.
19. Social and political concern with thought has a long history. Surviving reports of the trial of Socrates suggest that Socrates' adversaries were concerned about what he thought, not just with what he said or did. Early Christians worked to clarify true doctrine and to determine correct elements of faith. People's thoughts were implicated closely in those developments, particularly when it came to the identification of heresy and in efforts to eliminate it. There was a public rationale for such endeavors, tenuous though it was. Some who privately doubted or disbelieved accepted theological views would "[feign] to acknowledge the truth of the ideas which they were assailing," as John Bagnell Bury notes, putting themselves and their communities at spiritual risk.⁸
20. Thought clearly played a role in the Reformation, in the social and political developments of modernity, and in the emergence of the modern era. Thought has also been crucial in the recognition of individual rights and freedoms, in the expansion of individual-level

⁸ J. B. Bury, *A History of Freedom of Thought* (New York: Henry Holt and Co., 1913), p. 134; see also pp. 136-39, 148-49, 162-63. See also William Thomas Walsh, *Characters of the Inquisition* (Rockford, IL: Tan Books and Publishers, 1987 [1940]), pp. 61-64.

autonomy, and in the development of democracy.⁹ Contemporary constitutional democracies emphasize the value and the importance of individual persons, appreciating that each person is a thinking agent who has prerogative to direct their own life. This is evident in the rights and freedoms afforded to persons, which are predicated on people being agents who can engage responsibly in thought and in action. Democratic citizenship depends on thought, as well, to the extent that citizens are encouraged to form their own ideas, to plan their lives, to make their own decisions, and ultimately to participate constructively in social and political life.

What is freedom of thought?

21. I answer this question in two parts. First, I provide a definition of “freedom of thought”; and second, I note the distinctiveness of freedom of thought.

22. A. Definition of “Freedom of Thought”

“Freedom of thought” may be properly construed as “the ability to engage in mental activity without interference by others.” By “interference,” in this context, I mean “hindering, obstructing, impeding, breaching, or sanctioning” mental activity. The interference that diminishes freedom of thought must be placed or imposed by other parties. This means that not just any situation in which a person is unable to think or to feel something implies that there has been interference with their freedom of thought. For example, suppose that a person is unable to imagine something that is entirely red and entirely white all over at the same time. That inability would not reasonably be seen as a form of interference, in the relevant sense, and one would not count it as a diminution of the person’s freedom of thought.

23. Freedom of thought consists in the ability to engage in thinking and feeling without others interfering in those activities. It covers the full range of thinking, including imagining, reflecting, cogitating, planning, wondering, assessing, believing, desiring, and so on. Freedom of thought also covers one’s feelings: being happy, sad, angry, forlorn, apprehensive, having misgivings, and so forth. All of these are included under freedom of

⁹ Lucas Swaine, *Ethical Autonomy: The Rise of Self-Rule* (New York: Oxford University Press, 2020), pp. 28-30.

thought. External actions, speech, behaviors, and similar outward phenomena are not included under freedom of thought. They are covered under other freedoms.

24. B. The Distinctiveness of Freedom of Thought

Freedom of thought is a distinctive freedom that is different from other freedoms. To see how this is so, one may consider whether freedom of thought has a discrete and robust set of qualities when compared against other freedoms. One can pick out freedoms that are broadly acknowledged in scholarly literature and which are largely uncontroversial, and then compare freedom of thought to them. This strategy is useful because thought is elusive. Thought is easily overlooked when one sets it against more prominent and visible practices of expression, association, movement, and so forth. It is also plausible that whether freedom of thought merits consideration as a meaningful freedom depends partly on the extent to which it is distinguishable from other established and accepted freedoms.

25. Freedom of thought has close connections to a variety of established freedoms, each of whose political and legal significance proves foundational to constitutional democratic orders. Freedom of thought and freedom of conscience are often mentioned together. Both appear to be linked to freedom of religion, and each one connects to freedom of expression. These freedoms are quite plausibly interdependent in practice. For instance, it is hard to see how a society could reliably institute and guarantee religious freedom without protections for freedom of speech or freedom of conscience. Scholars also tend to suggest that, as a political and legal matter, people need these freedoms together, along with cognate freedoms of association, of petitioning government, of the press, and so on, to generate stable and well-functioning democracies. Freedoms of religion, conscience, and expression tend to be bundled, such that societies must develop and value protections for them as a group, if any of the freedoms are to flourish.

26. At a more involved level of observation, writers have tended to muddle freedom of thought with more commonly recognized basic freedoms. The problem is evident in Bury's *A History of Freedom of Thought*, which jumbles freedom of thought with related freedoms of expression, conscience, and religion.¹⁰ Justice Benjamin Cardozo provides another

¹⁰ See Bury (1913), especially pp. 233-53.

example, running together freedoms of thought and speech in a famous and influential United States Supreme Court decision.¹¹ It is difficult to say what accounts for this tendency. Perhaps writers lump freedom of thought in with cognate freedoms because, as a political or legal matter, freedom of thought has seemed relatively secure when some combination of freedoms of expression, conscience, association, and religion are guaranteed. Another possibility is that freedom of thought has been overlooked because thought is subtle and difficult to see.¹² One can add to this the fact that people gain familiarity with others' thoughts through speech and behavior, for which there already exists an established moral discourse of rights and freedoms.

27. Whatever the reasons for failing to give freedom of thought its due, many writers appear not even to have considered whether or how this freedom might be a distinctive freedom. And here it may be noted that one cannot take for granted that guarantees for other basic freedoms suffice to protect freedom of thought, just as one should not suppose that close correlation between two phenomena implies that they are identical.

28. Consider how freedom of thought relates to freedom of expression. Even though the two are closely linked, freedom of thought appears different, sufficiently so to leave it unable to be fitted within the framework of free speech theory.¹³ The central reason for this is that one can think a wide variety of thoughts without ever expressing them. People can think things that they do not disclose to others, and this marks a decisive difference between thought and expression. Bury suggests that people wish naturally to express their thoughts to others.¹⁴ That is a fair point, but it does not hold for all the thoughts people generate. Furthermore,

¹¹ See *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937). In delivering the opinion of the Court in *Palko*, Justice Cardozo refers to "freedom of thought, and speech" as a single freedom; his statement is often misquoted. Cardozo writes, "[o]f that freedom [i.e., freedom of thought, and speech] one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom" (pp. 326-27). *Palko* was reversed and overruled in *Benton v. Maryland*, 395 U.S. 784 (1969).

¹² Cf. Eberhard P. Deutsch, "Concept of Freedom of Religion in American Constitutional Philosophy," *Georgetown Law Journal*, Vol. 28, No. 4 (1940): 487-99. Deutsch claims that while religious liberty is juridical, freedom of thought is "purely metaphysical" (p. 487).

¹³ See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002); *Stanley v. Georgia*, 394 U.S. 557 (1969); cf. Martin H. Redish, "Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory," *Criminal Justice Ethics*, Vol. 11, No. 2 (1992): 29-42. Redish attempts to "rationalize judicial protection of freedom of thought with the text of the First Amendment" (p. 34). Cf. also Amy Adler, "Inverting the First Amendment," *University of Pennsylvania Law Review*, Vol. 149, No. 4 (2001): 921-1002.

¹⁴ Bury (1913), p. 8.

whether someone wishes to state or otherwise to convey what he or she desires, believes, imagines, assumes, feels, expects, or remembers, thoughts themselves are different from expressions. These considerations scuttle attempts to subsume, as a conceptual matter, freedom of thought under freedom of expression.

29. The idea of freedom of thought is special. It captures the sense of being able to engage in mental activity without legal penalization for one's thoughts, and without undue incursion into one's mental life. This marks off a further difference between the respective freedoms of thought and speech. The latter is commonly understood to consist in the ability to engage in discussion, to air one's views, to express views artistically or through deployment of symbols, and so forth, without facing legal punishment for so doing, or without having the expressive acts undermined—for example, having newspapers confiscated or artwork destroyed. Alexander Meiklejohn makes an impressive attempt to include freedom of thought within the protections of the First Amendment to the United States Constitution.¹⁵ However, no realistic freedom-of-speech concern exists in cases in which nobody desires, attempts, or performs an expressive act, whereas freedom-of-thought concerns can and do obtain in precisely those circumstances. Thought and action may go naturally together, but in situations in which no speech act has been attempted and none is quashed, no display of opinion made or even desired, nothing said and things only thought, freedom of speech theory is silent.

30. Other basic freedoms are more readily distinguishable from freedom of thought. Consider how freedom of thought compares to freedom of conscience, where one understands conscience to be a capacity to bond with notions of what is right and good.¹⁶ First, the variety of mental activity included under the rubric of thought is considerably broader than that of conscience. Thinking encompasses a broad range of moral and non-moral beliefs and desires, along with imaginings, remembrances, and so forth, and many instances of thought may not be constitutive of conscience or its affirmations. This gives cause to hold

¹⁵ See Alexander Meiklejohn, "The First Amendment Is an Absolute," *Supreme Court Review*, Vol. 1961 (1961): 245-66. Meiklejohn proposes that a citizen "may not be told what he shall or shall not believe" (p. 257; see also p. 258), but he does not indicate how that important stipulation can be coherently subsumed under First Amendment theory.

¹⁶ See Lucas Swaine, *The Liberal Conscience: Politics and Principle in a World of Religious Pluralism* (New York: Columbia University Press, 2006), p. 47.

that freedoms of thought and conscience are, respectively, meaningfully distinct. Second, one can inform or persuade a person's conscience in ways qualitatively different from merely changing someone's thoughts. Not all modifications to a person's thoughts are alterations to their conscience, and the hallmark ability of conscience to bond to ideas of what is right and good distinguishes it from forms of mental activity that thinking includes. Third, while individuals can act against the dictates of their consciences, they may face significant emotional or cognitive obstacles in their attempts to do so. Acting contrary merely to what one thinks, in contrast, need not be an especially difficult task. This is yet another way in which thought and conscience are distinguishable. Finally, with regard to direct differences between freedom of thought and freedom of conscience, the latter involves external action in a way that the former need not. An important part of freedom of conscience is the ability to act, or to refrain from acting, based on one's conscientious commitments, whereas that is not an essential element of freedom of thought.

31. Like freedom of conscience, freedom of religion consists partly in the ability to engage in outward activities, and it, too, can be distinguished from freedom of thought. Part of freedom of religion is the ability to believe in such things as otherworldly powers without facing persecution for those affirmations. However, freedom of religion also encompasses protections for worshipful practices and other outward behavior understood as part of religious expression. Furthermore, while some forms of thinking may be religious in nature, not all thinking has that quality. For instance, a person's opinion of a political official might possess no religious qualities if the opinion were neither derived from any religious idea or belief, nor composed of any essentially religious content.¹⁷ One can distinguish freedom of thought from freedom of association, furthermore, and more readily still. Freedom of association consists in the ability of people to join together in different kinds of groups and associations, with outward actions being one of that freedom's central concerns. The individual capability of forming, expressing, or modifying one's thoughts may of course benefit from associational liberty, and perhaps even depend upon it, but that is again a separate consideration.

¹⁷ Cf. Robert Audi, *Religious Commitment and Secular Reason* (New York: Cambridge University Press, 2000), pp. 70, 71, 73; Swaine (2006), chap. 2.

32. Second, people's experiences of their own thoughts can affect them significantly, ultimately prompting them to refrain from acting in harmful ways and turning them toward good action. How one experiences one's thoughts and feelings can change one's mindset and modify existing desires or intentions to act, especially given the complex interactions and many environmental factors that continually affect people in democratic societies.

Has freedom of thought played an important role in human history?

33. Freedom of thought has been very important in human history. One can distinguish a slowly growing appreciation of freedom of thought through the modern era and into the present, both in the discourse of Western social and political theory and in terms of the expansion of that freedom under political and legal institutions. The progress of freedom of thought has not been linear, however. Its story is one of qualified movement, of partial advancement in some areas and setbacks in others, not of categorical or unreserved success.

34. For example, it is sometimes said that the moderns showed that freedom of thought is, by its nature, the kind of liberty that cannot be violated. Consider John Locke's influential claims in *A Letter Concerning Toleration*, which provided groundwork for this conclusion and for subsequent understandings. Locke proposes that a person "cannot be compell'd" to believe anything through the use of outward force.¹⁸ Only "Light and Evidence" can modify people's opinions, Locke maintains, and such light "can in no manner proceed from corporal Sufferings, or any other outward Penalties."¹⁹ His points cover the faculty of human understanding, offering a sense of freedom of thought for religious beliefs, for opinions, and for thought.

35. Locke's point resonates in Benjamin Constant's subsequent remarks on the "absurdity of any attempt by society to control the inner opinions of its members."²⁰ Constant declares:

¹⁸ John Locke, *A Letter Concerning Toleration* (London: Awnsham Churchill, 1689), p. 7. Locke's claim is similar but not identical to Thomas Hobbes' contention, in *Leviathan*, that belief and disbelief "never follow mens Commands"; see Hobbes, *Leviathan, or The Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill* (London: Andrew Crooke, 1651), pp. 98, 343. See also Jeffrey Collins, *The Allegiance of Thomas Hobbes* (New York: Oxford University Press), p. 123 ff. Cf. Bury (1913), discussing early Christians' claims that religious belief is "not a thing which can be enforced" (p. 52).

¹⁹ Locke (1689), p. 8.

²⁰ Benjamin Constant, *Principles of Politics Applicable to All Governments*, trans. Dennis O'Keeffe (Indianapolis: Liberty Fund, 2003 [1815]), p. 103.

There is no such possibility. Nature has given man's thought an impregnable shelter. She has created for it a sanctuary no power can penetrate.²¹

36. It is believable that people's thoughts and opinions cannot be changed by the immediate application of force, at least not in the way that authorities might desire. Even so, there are three qualifications to keep in view. First, powerful parties can change people's thought over time. For example, societies may use the power of the law to disallow a cultural or religious practice, thereby leading practitioners ultimately to forswear it.²² Second, authorities can damage or limit people's mental faculties. That may not be a way of controlling opinions, strictly speaking, but humans can restrict, degrade and destroy others' capabilities, adversely affecting or even extinguishing their processes of reasoning, their emotions, their imaginative capabilities, and so on. These considerations lead one to conclude that the human mind is not as impervious to external force as Constant's statements might lead one to believe.

37. Third, while Constant takes an admirable stand against those who would attempt to control people's thoughts and opinions, it remains possible for authorities to persecute people for their thought. This point Constant seems ultimately to acknowledge, despite his apparent ambivalence on the subject.²³ Constant is right to suggest that clumsy threats of violence do not alter people's views of what is reasonable: that sort of coercion cannot be expected to change one's mind in the way that the threatening party might desire. But more systematic strategies and defter techniques can transform people's understandings of what is reasonable, or their conceptions of reasonableness itself, especially when those techniques are used in combination and over lengthier periods of time. When powerful actors can threaten, frighten, torment, defame, injure, jail, traumatize, propagandize, manipulate, or gaslight people, and when they can do so in environments over which they

²¹ Constant (2003), p. 103.

²² The disavowal of polygamy by the Church of Jesus Christ of Latter-day Saints is an example; see Swaine (2006), pp. 61-62, 74.

²³ Constant (2003), p. 104. Cf. Benjamin Constant, *The Spirit of Conquest and Usurpation and Their Relation to European Civilization*, in Constant, *Political Writings*, ed. and trans. Biancamaria Fontana (New York: Cambridge University Press, 1988 [1814]), pp. 43-167, at pp. 112, 120-26. Constant writes: "Thought is the basis of everything: [...] [h]uman existence, attacked in its noblest parts, soon feels the poison gradually spreading to the remotest. You think you have only deprived it of some superfluous liberty or cut back on some useless pomp, while your poisoned weapon has wounded it right to the heart" (1988, p. 124).

have considerable control, they can effectuate broad changes in subjects' views, reworking people's thought in a variety of ways.

38. Factors such as these prompt one to reconsider prominent statements on freedom of thought in the American tradition. Thomas Jefferson's words in "A Bill for Establishing Religious Freedom" are important touchstones in this respect. Jefferson claims there that "Almighty God hath created the mind free," and that "free it shall remain [by being made] altogether insusceptible of restraint."²⁴ God is Lord of both body and mind, Jefferson writes, and He "chose not to propagate [His plan] by coercions on either."²⁵ Once the Virginia Assembly passed Jefferson's bill into law, James Madison wrote to Jefferson to relay the good news, stating in his letter: "I flatter myself [that we] have in this Country extinguished for ever the ambitious hope of making laws for the human mind."²⁶

39. Jefferson's insistence on freedom of the human mind is admirable and one agrees that there are ways in which the mind is insusceptible of restraint. Even so, that does not mean that people cannot degrade others' thinking or infringe freedom of thought otherwise. Similarly, to agree that the mind in some respects cannot be restrained, is not necessarily to concede that people are incapable of using coercive measures and other techniques to alter beliefs or feelings, or to change or even extinguish various kinds of thought.

40. Freedom of thought has subsequently won acclaim in various philosophical corners, hailed as a fundamental freedom. Mill distinguishes a prominent place for "liberty of thought and feeling," for example, arguing that it forms part of human liberty's "first" realm.²⁷ He invokes freedom of thought at the outset of *On Liberty*, mentioning it in his delineation of the appropriate realm of human liberty. As Mill describes it, that sphere includes: the inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense, liberty of thought and feeling, absolute freedom of opinion

²⁴ Thomas Jefferson, "A Bill for Establishing Religious Freedom," in *The Papers of Thomas Jefferson, Vol. 2: January 1777 to 18 June 1779*, ed. Julian P. Boyd. (Princeton, NJ: Princeton University Press, 1950 [1779]), p. 303.

²⁵ Jefferson (1950), p. 303.

²⁶ "From James Madison to Thomas Jefferson, 22 January 1786," *Founders Online*, National Archives, version of January 18, 2019, <https://founders.archives.gov/documents/Madison/01-08-02-0249>. [Original source: *The Papers of James Madison, Vol. 8, 10 March 1784–28 March 1786*, ed. Robert Rutland and William Rachal (Chicago: University of Chicago Press, 1973), pp. 472–482.]

²⁷ Mill (1978), p. 11.

and sentiment on all subjects, practical or speculative, scientific, moral, or theological.²⁸

41. This domain comprises the “first” realm of human freedom, Mill proposes.²⁹ His description does not imply that liberty of thought is identical to liberty of conscience, nor does it suggest that the latter encapsulates the former. To the contrary, Mill’s depiction suggests a difference between freedom of thought and freedom of conscience, that the two are not identical liberties. Also noteworthy is his recognition of freedom of sentiment, which, he suggests, manifests qualities different from freedom of opinion. The distinction is sensible: how one thinks or feels about something can be different from the opinion one holds on the subject, and both are distinguishable from what one opines to others.³⁰
42. The freedom to express and publish opinions, Mill reflects, might “seem to fall under a different principle [than liberty of thought]” because it involves conduct that often concerns others.³¹ However, he adds that the freedom to express and publish opinions is “practically inseparable” from freedom of thought, and “almost of as much importance as the liberty of thought itself.”³² His statements are highly provocative, especially given Isaiah Berlin’s portrayal of Mill as the “greatest champion” of liberty and the founder of modern liberalism.³³ In the first place, to say that freedoms of thought and speech are practically inseparable is not to propose that those freedoms are analytically or logically indistinguishable. Second, Mill claims that freedom of thought is more important than the freedom to express and publish opinions; this gives reason to think that, for Mill at least, the respective freedoms are indeed divisible analytically, whether they may be distinguishable in practice. Third, and perhaps most interestingly, Mill proposes that at least some features or forms of freedom of expression, if not all of them, are less important than freedom of thought.³⁴

²⁸ Mill (1978), p. 11. Cf. Wilhelm von Humboldt, *The Limits of State Action*, ed. J. W. Burrow (Indianapolis, IN: Liberty Fund (1993 [1791-92/1850]), pp. 66-68.

²⁹ Mill (1978), p. 11.

³⁰ Mill (1978), p. 87.

³¹ Mill (1978), p. 11.

³² Mill (1978), pp. 11-12.

³³ See Isaiah Berlin, “John Stuart Mill and the Ends of Life,” in *Four Essays on Liberty* (New York: Oxford University Press, 1969), pp. 173-206, at pp. 173, 174.

³⁴ See Mill (1978), pp. 11-12; cf. pp. 15-52, *passim*.

43. Mill's discussion of freedom of thought owes a debt to the work of Wilhelm von Humboldt, who, in *The Limits of State Action*, emphasizes the significance of freedom of thought to free inquiry and enlightenment. Humboldt warns that "pernicious results [arise] from restrictions on freedom of thought," noting that free inquiry is imperative for "our whole manner of thinking, and even acting."³⁵ While the use of reason arouses doubt in an inquiring mind, intellectual investigations can be part of enlightening and liberating experiences.³⁶ The power and value of thinking are generally more important than the particular results or conclusions one reaches in thought, Humboldt suggests—and one should not suppose that further ideas or truths depend necessarily on established conclusions.³⁷ That outlook tends to stifle inquiry and bring it to a halt; this prompts one to appreciate why freedom of thought is "so vital," with anything that diminishes it being "so fatal."³⁸ And while Humboldt praises the "self-reliance and firmness [of] the inquiring thinker," he submits that freedom of thought and enlightenment are not "for a few only"; instead, they spread their purpose and their worth across the body politic.³⁹ A well-formed society should allow "complete" freedom of thought, he concludes: so doing can improve "the mind and character of [an] entire nation," extending beneficial results "even to [the] humblest individuals."⁴⁰

44. John Rawls adds further important statements on freedom of thought to the liberal catalog. Like Mill, Rawls suggests that freedom of thought is central to the basic structure of a just society. In *Political Liberalism*, he proposes that one should include freedom of thought as part of what he calls a "fully adequate scheme of basic liberties."⁴¹ Rawls is clear that freedom of thought counts among the basic liberties—he places it first on the list—and he suggests that the basic liberties jointly hold the status of a primary good.⁴² Freedom of

³⁵ Humboldt (1993), p. 66. Cf. p. 69, where Humboldt argues that it is wrong to "restrict freedom of thought."

³⁶ Humboldt (1993), pp. 66-67.

³⁷ Humboldt (1993), p. 67.

³⁸ Humboldt (1993), p. 67.

³⁹ Humboldt (1993), pp. 66, 67. Humboldt suggests that "[t]here is something degrading to human nature" in the very of idea of refusing to people their right to be their own person (p. 68).

⁴⁰ Humboldt (1993), p. 68.

⁴¹ John Rawls, *Political Liberalism*, expanded edition (New York: Columbia University Press, 2005 [1993]), p. 334.

⁴² Rawls (2005), p. 308; see also see also 178-82 ff.; cf. Rawls's early discussion of "liberty of thought" in "Distributive Justice," in *Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999 [1967] [hereinafter Rawls, 1999a]), p. 138.

thought does not appear to be a political liberty for Rawls, however. One infers this from his comment that “the equal political liberties and freedom of thought” have a special role in securing “the free and informed application of the principles of justice, by means of the full and effective exercise of citizens’ sense of justice, to the basic structure of society.”⁴³ Rawls draws a nearly identical distinction nearby in the text: he proposes that “the political liberties and freedom of thought” have an essential role in specifying a “just political procedure,”⁴⁴ maintaining that the constitution of a well-ordered democracy must guarantee freedom of thought in order for political liberties to be exercised in a “free and informed” manner.⁴⁵

45. Rawls’s account of the basic liberties includes requirements of representative democracy and protections for freedom of speech, freedom of the press, and free association.⁴⁶ Freedom of thought and liberty of conscience figure prominently in Rawls’s argument, however; this coheres with his case in the revised edition of *A Theory of Justice*, wherein Rawls emphasizes the “high place [that] must be accorded to liberty of conscience and freedom of thought.”⁴⁷ He clarifies this position by proposing that, from the perspective of the “constitutional convention,” arguments for equal liberty of conscience support regimes “guaranteeing moral liberty and freedom of thought and belief, and of religious practice, although these may be regulated as always by the state’s interest in public order and security.”⁴⁸ One notes Rawls’s allowance that government may potentially or actually regulate freedom of thought, even though he does not describe exactly how regulation of that kind might proceed.

46. Rawls extends these positions in his 1993 essay “The Law of Peoples,” arguing in favor of

⁴³ Rawls (2005), pp. 334-35.

⁴⁴ Rawls (2005), p. 336.

⁴⁵ Rawls (2005), p. 337.

⁴⁶ Rawls (2005), p. 335.

⁴⁷ John Rawls, *A Theory of Justice*, revised edition (Cambridge, MA: Harvard University Press, 1999 [1971] [hereinafter Rawls, 1999b]), p. 187. Here as well, Rawls’s language implies that liberty of conscience and freedom of thought are different. In “Distributive Justice,” Rawls states that a just constitutional democracy will require “liberty of the person and political equality as well as liberty of conscience and freedom of thought” (1999a, p. 138).

⁴⁸ Rawls (1999b), p. 186.

a measure of liberty of conscience and freedom of thought for peoples around the globe.⁴⁹ In his subsequent book-length treatment of the subject, he contends that the basic human rights include “a sufficient measure of liberty of conscience to ensure freedom of religion and thought.”⁵⁰ These freedoms are not irreducibly liberal or particular to Western tradition, Rawls maintains; neither are they “politically parochial,”⁵¹ and any decent society must respect them.⁵²

47. Rawls’s discussions of freedom of thought, and of closely related rights and freedoms, track larger trends and developments in international human rights discourse. His standpoint fits with language expressed in Article 18 of the 1948 *United Nations Declaration of Human Rights* (UDHR), for instance, which proposes that: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.⁵³

48. The UDHR places freedom of thought in close proximity to freedom of conscience. Article 18 includes direct mention of freedom of religion, as well, suggesting that the three freedoms are meaningfully distinguishable even if they are all subsumed under one single right. The language of the UDHR neither expressly requires nor conveys the sense that the three freedoms are identical; nor does Article 18 indicate that either freedom of conscience or freedom of religion, respectively, covers freedom of thought. With Mill and Rawls, Article 18 implies to the contrary: that the three freedoms are meaningfully different from each other in at least some respect. One notes furthermore that the language of Article 18 proposes that the right in question “includes” the freedom to change one’s “religion or belief”; so it is not obviously exhausted by modifications of that kind, and

⁴⁹ John Rawls, “The Law of Peoples,” in *On Human Rights: The Oxford Amnesty Lectures 1993*, ed. Stephen Shute and Susan Hurley (New York: BasicBooks, 1993), pp. 41-82, p. 63.

⁵⁰ John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999 [hereinafter Rawls, 1999c]), p. 65.

⁵¹ Rawls (1999c), p. 65.

⁵² Rawls (1999c), pp. 64-65, 62-70, 74-75.

⁵³ G.A. res. 217A (III), UN Doc A/810 at 71 (1948), Article 18. Cf. *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, European Treaty Series No. 5; 213 U.N.T.S. 221.

freedom to hold a variety of thoughts, or to change them, could reasonably be argued to be covered under the UDHR.

49. The UDHR's affirmations have generated subsequent United Nations provisions reiterating the importance of freedom of thought. For example, Article 18 of the *International Covenant on Political and Civil Rights (ICCPR)* maintains that the right to freedom of thought, conscience and religion includes freedom "to manifest [one's] belief in worship, observance, practice and teaching," and it provides that "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."⁵⁴ The *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* affirms, in the second paragraph of its preamble, that the UDHR and the International Covenants on Human Rights "proclaim the principles of non-discrimination and equality before the law and the right to freedom of thought, conscience, religion or belief."⁵⁵ United Nations declarations and covenants repeatedly affirm the value of freedom of thought,⁵⁶ striving to convey the sense that something valuable and distinctive graces that freedom's nature.⁵⁷

Is freedom of thought important for the exercise of other rights such as freedom of conscience, belief, opinion, expression, religion, and the right to vote or run for office?

50. In response to Question 3, I proposed that freedom of thought is the ability to engage in mental activity without interference from others. I noted also that freedom of thought is a

⁵⁴ G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967), Part III, Article 18.

⁵⁵ G.A. res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/51 (1981). Cf. the *Cairo Declaration on Human Rights in Islam*, August 5, 1990, U.N. GAOR, World Conference on Human Rights, 4th Session, Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993), Articles 10, 11, 18, 20. See generally Donna J. Sullivan, "Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination," *American Journal of International Law*, Vol. 82, No. 3 (1988), pp. 487-520.

⁵⁶ See, for example, the recent U.N. resolution reaffirming the EAFIR (U.N. Doc. A/RES/65/211 [2010]), in which the sixth paragraph of the preamble states that "everyone has the right to freedom of thought, conscience and [sic] religion or belief." A previous reaffirmation of the EAFIR, from 2000, emphasizes that "the right to freedom of thought, conscience, religion and [sic] belief is far-reaching and profound and [it] encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others, and in public or private" (U.N. Doc. A/RES/55/97 [2000]).

⁵⁷ See Sullivan (1988), pp. 487-88; cf. Sidney Liskofsky, "The UN Declaration on the Elimination of Religious Intolerance and Discrimination: Historical and Legal Perspectives," in *Religion and the State: Essays in Honor of Leo Pfeffer*, ed. James E. Wood, Jr. (Waco, TX: Baylor University Press, 1985), pp. 441-83.

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freedom that is different and distinctive in its nature and importance.

51. Freedom of thought is very important for each of the respective freedoms of conscience, belief, opinion, expression, religion, and the right to vote or run for office. I will address each of these in turn.
52. Freedom of thought is of great significance for freedom of conscience. To form conscientious commitments of one's own, to pursue them, or to revise them, a person must not face interference in their mental activity. Interference by others makes it difficult to generate or to exercise one's conscience, under one's own power. It also makes it harder to revise conscientious commitments. When others hinder, obstruct, impede, breach, or sanction one's thought, it diminishes one's ability to form authentic commitments of conscience. Freedom of conscience requires that people be able to engage freely in their own mental activity, for freedom of conscience to be robust.
53. Freedom of thought matters greatly for freedom of belief. Belief is a key product or element of one's mental activity, although it is not the only product or element thereof. As I have noted, thought includes considerably more forms of mental activity than believing. A person needs freedom of thought to form beliefs of their own, and to do so under their own power. Freedom of thought is important also to allow one to reflect on beliefs, to assess them, to change them, and so forth. Interference by others, in one's mental activity, diminishes and negates freedom of belief.
54. Freedom of thought is similarly significant with respect to freedom of opinion. Whether one's opinion is voiced publicly or made manifest to others, or merely kept private, the ability to engage in mental activity without interference is again crucial. Freedom of thought matters here because it enables people to generate their own opinions, to modify them, or to affirm them, under one's own direction. Freedom of thought also allows people to reckon with other opinions that they encounter. The ability to engage in a full range of mental activity, without interference from others, gives one space to consider opinions, to adopt them or adapt them, and so forth.
55. Freedom of expression is strongly supported by freedom of thought. The latter is

important so that one can have something to express that is one's own, expression that comes from what one thinks or feels. Freedom of thought is key for freedom of expression also so that one can endorse others' expression, following reflection. Freedom of thought may be seen as crucial for expression in its many forms: for artistic and other creative works, for interpersonal interactions, for political expression, and so on. All of these are supported by freedom of thought, and all are stunted by that freedom's suppression.

56. Freedom of thought is extremely important for freedom of religion. Freedom of thought enables one to consider and to affirm one's religious commitments. It permits one to ponder religious issues, and to develop religious views, without fear of persecution. Freedom of thought makes it possible for people to reflect on whether to join or to leave different religious communities. It allows people to develop different ideas and feelings about issues pertaining to one's religion, to fellow members, to nonmembers, and so forth.
57. The right to vote or to run for office is also supported, and essentially so, by freedom of thought. In order for the right to vote or to run for office to be robust, it is vital that people's mental activity not to be interfered with by others. Freedom of thought allows people to consider different political candidates, to ruminate on party platforms, to ponder different candidates, to have and freely to assess different feelings they may have about candidates for office, and to come to conclusions about whether or how to vote in an election. Freedom of thought also permits people to think for themselves about how or whether to be involved in politics, whether to join a political party, whether to run for office, what platform to create or to endorse, and so on. Interference with thought diminishes a citizen's right to vote or to run for office by making it more arduous for them to develop their own thinking and feeling, and to reach their own conclusions about how to involve themselves in political matters fundamentally important for democratic political orders.

Is there significance to the coupling of thought with "belief, opinion and expression, including freedom of the press and other media of communication" in Section 2(b) of the Canadian Charter of Rights and Freedoms as opposed to coupling of thought with conscience and religion in Article 18 of the 1948 Universal Declaration of Human Rights and Article 18

of the 1966 *International Covenant on Civil and Political Rights*?

58. The coupling that you mention does appear to be significant. It suggests that thought *per se* is nearer to belief, opinion, and expression, and to press and other media communication, than it is to conscience or religion. The order of the freedoms listed in Section 2(b) is suggestive, as well. Freedom of thought is listed first, in Section 2(b), with freedoms that are closer cognates of freedom of thought listed more proximately to it. Freedom of belief may reasonably be construed as being the closest cognate of freedom of thought. The next closest cognate is freedom of opinion, then freedom of expression, and then freedom of the press and other media of communication.⁵⁸
59. The coupling of freedom of thought with “belief, opinion and expression, including freedom of the press and other media of communication” is quite sensible, as one can see with a simple understanding of thought as mental activity. Freedom of thought supports, and is likewise supported by, freedoms of belief, opinion and expression, and freedom of the press and other forms of media.
60. To have freedom of thought coupled with the freedoms listed in Section 2(b), and not expressly with freedom of conscience and religion, does not imply that thought is unimportant for conscience or religion. Nor does it imply that freedom of thought does not matter for respective freedoms of conscience or religion. However, conscience and religion are normally understood to have implications for a person’s outward conduct, as I have suggested. Religion generally involves practices of worship, and not just religious belief. Similarly, conscientious commitments may require a person to act or to forbear from acting in certain ways. Freedom of thought supports freedom of conscience and religion, but it is more proximate to freedoms of belief, opinion, and expression.
61. Attached hereto and marked as exhibit B is a true copy of a 2018 article written by me and

⁵⁸ Cf. Dwight Newman, “Freedom of Thought in Canada: The History of a Forgetting and the Potential of a Remembering,” *European Journal of Comparative Law and Governance*, Vol. 8 (2021): 226-244, at pp. 231-32 ff. Newman discusses the “*ejusdem generis* rule” and its role in determining the placement of freedom of thought in Section 2(b) of the Canadian *Charter* (p. 232).

published in the journal *Sage Publications* entitled "Freedom of Thought is a Basic Liberty" which I accept and adopt as part of my evidence.


62. Attached hereto and marked as exhibit C is a true copy of a 2021 chapter written by me entitled "Freedom of Thought in Political Theory" and published in the book *The Laws and Ethics of Freedom of Thought, Vol. 1* which I accept and adopt as part of my evidence.

63. Attached hereto and marked as exhibit D is a true copy of a 2018 United Nations General Assembly Interim Report entitled "Freedom of Religion or Belief" which I accept and adopt as part of my evidence.

Sworn remotely via video conference)
 by Lucas Swaine in the city of Hanover,)
 New Hampshire, United States of America,)
 and the commissioner Joanna Shaw in the)
 city of Toronto, Ontario this 26th day)
 of April 2024.)


 Commissioner for taking affidavits

Joanna Shaw


 Lucas Swaine

JOANNA KATHLEEN SHAW,
 a Commissioner, etc., Province of Ontario,
 for LEWIN & SAGARA LLP,
 BARRISTERS AND SOLICITORS.
 Expires October 16, 2026.