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Tara Smith

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# What Good Is Religious Freedom? Locke, Rand, and the Non-Religious Case for Respecting It

Tara Smith\*

*“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”* Justice Robert Jackson<sup>1</sup>

## I. INTRODUCTION

Religious freedom is in the limelight. In recent years, religiously inspired violence has slaughtered thousands around the world and provoked calls for the repression of adherents of various faiths.<sup>2</sup> Domestically, we have shrill debates: Should bakers be compelled to serve at gay weddings when they have religious objections to doing so?<sup>3</sup> Should government officials be compelled to facilitate gay marriages when they have religious

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1. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (Jehovah’s Witnesses objected to compulsory Pledge of Allegiance).

2. Tom Heneghan, *Religious Violence Across World Hits Six Year High According to Pew Study*, HUFFINGTON POST (Jan. 23, 2014), [http://www.huffingtonpost.com/2014/01/14/religious-violence-pew-survey\\_n\\_4596169.html](http://www.huffingtonpost.com/2014/01/14/religious-violence-pew-survey_n_4596169.html) [<https://perma.cc/8QLS-J89X>].

3. See John Corvino, “*Bake Me a Cake*”: *Three Paths for Balancing Liberty and Equality*, WHAT’S WRONG? THE NOT QUITE OFFICIAL BLOG OF CU-BOULDER’S CTR. FOR VALUES & SOC. POL’Y (Oct. 15, 2015), <https://whatswrongcvsp.com/2015/10/15/guest-post-from-john-corvino-bake-me-a-cake-three-paths-for-balancing-liberty-and-equality/> [<https://perma.cc/F4Z6-8XPE>] (concerning Sweet Cakes by Melissa, a bakery in Oregon that was fined for refusing to bake a wedding cake for a gay couple, in violation of the state’s equality laws); Eric Eckholm, *Baker Who Denied Cake to Gay Couple Loses Appeal*, N. Y. TIMES, Aug. 14, 2015, at A15 (describing a similar case in Colorado).

objections to doing so?<sup>4</sup> Should employers have to provide workers with medical insurance for practices that they disapprove of on religious grounds?<sup>5</sup> Prayer at town meetings,<sup>6</sup> zoning exemptions for church property,<sup>7</sup> embryonic stem cell research,<sup>8</sup> workplace dress codes,<sup>9</sup> beards on prisoners,<sup>10</sup> recognition of religious organizations at state universities<sup>11</sup>—a stream of contentious battles seems to pit religious freedom against equal protection.<sup>12</sup> The liberation of some, many charge, is coming at the expense of others (e.g., his freedom to marry versus her freedom to practice her faith). Each side digs in—some with lawsuits, others with legislation. In 2015 alone, eighty-seven religious refusal bills were introduced in twenty-eight states.<sup>13</sup>

The aim of this paper is to step back from these controversies so as to consider the larger value at stake. Its question: What

4. See Alan Blinder and Richard Perez-Pena, *Kentucky Clerk Defies Justices on Marriages*, N.Y. TIMES, Sept. 2, 2015, at A1.

5. See *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

6. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1815 (2014).

7. See Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc-1 (2012); Jess Bravin, *Church Turns to Higher Authority in Zoning Battle*, WALL ST. J., Nov. 16, 2011, at A1.

8. Federal funding for such research was cut back, amidst controversy, by President George W. Bush. See Mark Hanson, *Religion and Stem Cell Research*, U. OF MONT.: CTR. OF ETHICS, [http://www.umt.edu/ethics/imx/radioessays/comment\\_religionandstemcells.pdf](http://www.umt.edu/ethics/imx/radioessays/comment_religionandstemcells.pdf) [<https://perma.cc/ESQ3-DF6J>].

9. *EEOC v. Abercrombie & Fitch*, 135 S. Ct. 2028, 2031 (2015); *Mitchell v. McCall*, 143 So. 2d 629, 630 (Ala. 1962).

10. *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015); cf. *Fraternal Order of Police Newark Lodge # 12 v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (regarding a police department's policy requiring officers to shave their beards); Tara Bahrapour, *Police Force Eases Its Dress Code for Sikh Officers*, WASH. POST, May 17, 2012, at B5 (regarding a Washington D.C. police department policy that allows officers to wear beards and religious headgear).

11. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 668 (2010) (concerning Hastings College of Law); S. Alan Ray, *How Religion and Rights Align on Campus*, CHRONICLE OF HIGHER EDUC., Aug. 15, 2014, at A56.

12. These are merely a sample. See generally CHRISTOPHER EISGRUBER & LAWRENCE SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007) (discussing the conflicts that are created as freedom of religion is expanded); MARCI A. HAMILTON, *GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* (2d ed. 2014) (discussing the issues created by increasing religious liberty through the Religious Freedom Restoration Act); Diana B. Henriques, *As Exemptions Grow, Religion Outweighs Regulation*, N.Y. TIMES, Oct. 8, 2006, at A1 (discussing the expansion of protection for religious organizations at both the federal and state level).

13. Katherine Stewart, *Ted Cruz and the Anti-Gay Pastor: Commentary*, N.Y. TIMES, Nov. 16, 2015, at A23.

good is religious freedom? *Why* is it valuable? What is the source of its goodness and what is the benefit of respecting it? What does religious freedom add to a properly governed society?

I am not a religious believer, yet I regard religious freedom as a critical component of a proper legal system. What religious freedom is, however, is widely misunderstood in contemporary debate; it does not entail all of the protections that many profess.<sup>14</sup> My aim is to shed light on what religious freedom properly means and protects by examining its foundations. Only with a sound understanding of these can we establish its scope and justly resolve the endless disputes over its application. Basically, we cannot know *what* religious freedom protects until we know *why* it protects—the reasons for respecting religious freedom, in the first place. Getting the foundations right is critical to getting the legal rights right.

Unfortunately, the reigning accounts of religious freedom tend to be superficial and subjectivist. The operative thinking, evidenced in perennial calls for “balance” and the increasing reliance on exemptions,<sup>15</sup> is roughly the following: “Different people want different things and there’s no getting them to agree. We should accept that as our starting point and simply work out reasonable compromises to accommodate various parties’ demands.” While it may seem easier to settle for such pragmatic solutions, in the long run, this approach actually diminishes religious freedom—and all freedom—for it treats individual rights not as inviolable claims, but as tokens for barter, with government simply coordinating the horse-trading. The result is that no rights are secure.

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14. For an argument against religious exemptions in particular, see generally Tara Smith, *Religious Liberty or Religious License? Legal Schizophrenia and the Case Against Exemptions*, 32 J.L. & POL. 43, 47-58 (2016) (arguing that religious exemptions destroy the impartiality of the legal system).

15. See Dahlia Lithwick, *Conscience Creep: What’s so Wrong With Conscience Clauses?*, SLATE (Oct. 3, 2013), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/10/is\\_there\\_a\\_principled\\_way\\_to\\_respond\\_to\\_the\\_proliferation\\_of\\_conscience.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/10/is_there_a_principled_way_to_respond_to_the_proliferation_of_conscience.html) [https://perma.cc/6D79-84Y5]; Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2518-19 (2015) (documenting the particular rise in claims seeking exemptions from laws requiring a person’s complicity in sin—as distinguished from direct commission of sin).

To understand the objective value of religious freedom, I will draw on the neglected insights of John Locke and others.<sup>16</sup> Although the Lockean defense has been sharply criticized and widely dismissed (notably, by Brian Leiter and Jeremy Waldron), it is actually quite instructive.<sup>17</sup> While Locke's argument is admittedly deficient in certain respects, it raises the kind of consideration that points to the truer foundations of religious freedom and, correspondingly, offers its most secure protection. The Lockean case revolves around the nature of human belief.<sup>18</sup> Essentially, it contends that belief cannot be physically coerced.<sup>19</sup>

Building on Locke, I draw further on Ayn Rand's explanation of rights to show that the problem is not that *religion* cannot be served by force, as the Lockeans lament (true though that is). More deeply, force prevents autonomous reasoning and the attainment of knowledge—knowledge about any subject, religious or other. What we will find, therefore, is that religion is not special, for the purposes of a proper legal system; it warrants no special treatment *qua* religion. Religious freedom, however, *is* special; it is a vital right that must be respected. My broader thesis is that religious freedom is valuable because intellectual freedom is valuable. Intellectual freedom is valuable because it is the prerequisite of rational thought and human knowledge, along with all the further values that these make possible. Thus respect for religious freedom is part and parcel of the proper respect of intellectual freedom, which is valuable for all of us, religious and non-religious alike.

The plan is as follows. In Part II, I will explain the Lockean argument<sup>20</sup> on behalf of religious freedom. Locke and others presented a mind-focused account of religious freedom. That is, even while most of them were concerned to protect the religious

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16. Their arguments are not entirely neglected. See Ryan Pevnick, *The Lockean Case for Religious Tolerance: The Social Contract and the Irrationality of Persecution*, 57 POL. STUD. 846, 846-47 (2009).

17. See BRIAN LEITER, WHY TOLERATE RELIGION? 10-12 (2013); Jeremy Waldron, *Locke: Toleration and the Rationality of Persecution*, in JUSTIFYING TOLERATION: CONCEPTUAL AND HISTORICAL PERSPECTIVES 61-64 (Susan Mendus ed., 1988).

18. PETER J. STEINBERGER, THE IDEA OF THE STATE 154 (2004).

19. GLEN NEWAY, TOLERATION IN POLITICAL CONFLICT 108 (2013).

20. I will use "Lockean argument" to include others who share his basic view and not the views strictly of Locke alone. I see Rand as broadly within this tradition, but because I also emphasize new extensions that Rand offered, I will later contrast her view with the first-wave Lockeans. Also, I use "freedom" and "liberty" interchangeably, throughout.

beliefs of a particular sect (such as Lutheranism or Anglicanism), their defense of religious freedom fastened on the mechanics of a person's adoption of a religious belief rather than the content of particular creeds. "How does a person come to believe anything?" they asked, "and what does that believing consist of?"

In Part III, I will recount the reigning critique of the Lockean line. Essentially, the critics contend that the Lockean portrait of belief and of coercion's power to affect belief is naïve. Religious dictators' use of force is more effective than Lockeans appreciate.

The core of my argument will come in Part IV as I respond to this critique by examining the deeper foundations of religious freedom. This argument falls into three main segments. First, and most substantially, I will draw on Rand to tease out precisely what the instruments of force can and cannot accomplish in influencing a person's beliefs. Second, given that many people cite the First Amendment as the source of religious freedom, I will consider the Amendment's broader context and relation to the basic function of government to explain how these bear on freedom of the mind. Finally, having seen the strong affinities between Locke's and Rand's arguments, I will underscore the ways in which Rand's analysis develops and differs from the Lockeans'. Doing so will sharpen our understanding of both and deepen our grasp of the value of religious freedom.

Again, it is not only the religious who should be concerned with religious freedom. Because religious freedom is simply one form of intellectual freedom, as we shall see, and because intellectual freedom is crucial to human well-being, we all have reason to understand the *good* of religious freedom.

## II. THE LOCKEAN ARGUMENT: CONVICTION BY "LIGHT AND EVIDENCE"

John Locke, along with several others before and since,<sup>21</sup> offered an important, vastly underappreciated defense of religious freedom. The Lockeans argued that government should not seek to control people's religious beliefs because doing so is impossible.<sup>22</sup> Belief is not the kind of thing that force can manipulate. A government rules through laws. The physical means of law enforcement, however, (such devices as handcuffs,

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21. I will name a few of the others shortly. See *infra* Part II.

22. NEWBY, *supra* note 19.

clubs, guns, prison walls) are not capable of bringing about intellectual ends. Physical means cannot deliver non-physical results. Even if one considered it perfectly appropriate for a government to seek its members' uniformity of religious belief, on the Lockean view, the attempt to achieve it by coercive means would be futile.<sup>23</sup> Physical force simply cannot accomplish what religious dictators would like it to.<sup>24</sup>

Locke contends, "It is only Light and Evidence that can work a change in Mens [sic] Opinions; which Light can in no manner proceed from corporal Sufferings, or any other outward Penalties."<sup>25</sup> It is in "the nature of the Understanding, that it cannot be compell'd to the belief of any thing by outward force. Confiscation of Estate, Imprisonment, Torments, nothing of that nature can have any such Efficacy as to make Men change the inward Judgment that they have framed of things."<sup>26</sup> Consequently, a state-imposed belief would not truly be a belief for it would not be authentic.<sup>27</sup> As Locke observes in his *Essay Concerning Human Understanding*, "[W]e may as rationally hope to see with other men's eyes, as to know by other men's understandings . . . . The floating of other men's opinions in our brains, makes us not one jot the more knowing, [even if] they happen to be true."<sup>28</sup>

For a belief to be genuine, in other words, it must be "self-authored" in a crucial respect: the believer must affirm it because *his* mind regards certain evidence and inferences as demonstrating its truth.<sup>29</sup> He might be mistaken about whether that reasoning does, in fact, logically warrant his conclusion. The point here, though, is that in order for his belief to constitute a genuine belief (as opposed to the pretense of a belief), he must embrace it for reasons that make sense to him. He must endorse

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23. *See id.*

24. I will use "repressors," "censors," and "dictators" interchangeably to refer to all types of intellectual suppression by government, whether it specifically targets religion, the press, or wider forms of expression and intellectual activity. I use "coercion" to refer to pressure imposed by physical force, whether actual or threatened.

25. JOHN LOCKE, A LETTER CONCERNING TOLERATION 27 (James H. Tully ed., Hackett Publ'g Co. 1983) (1689) [hereinafter LOCKE, CONCERNING TOLERATION].

26. *Id.*

27. For our purposes, I am using "state" and "government" interchangeably.

28. 1 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 115 (Alexander Campbell Fraser ed., Dover Publ'ns 1959) (1689).

29. TARA SMITH, AYN RAND'S NORMATIVE ETHICS: THE VIRTUOUS EGOIST 117, 133-34 (2006) [hereinafter SMITH, THE VIRTUOUS EGOIST].

the conclusion “by his own lights,” by his own independent logical reckoning. The idea must stand on its merits, as far as he can tell, rather than on the say-so of someone else.<sup>30</sup>

Locke also pointed out that the pretense of a religious belief would hardly fool a knowing god.

Although the Magistrates Opinion in Religion be sound, and the way that he appoints be truly Evangelical, yet if I be not thoroughly perswaded thereof in my own mind, there will be no safety for me in following it. No way whatsoever that I shall walk in, against the Dictates of my Conscience, will ever bring me to the Mansions of the Blessed.<sup>31</sup>

Insincere professions of faith might keep a man out of trouble with Caesar, but they will not do him much good with the Lord. Thus anyone concerned with the actual condition of man’s soul should oppose attempts at its political manipulation.

While Locke’s point is fairly straightforward, a different angle might deepen our grasp of its logic. A government’s attempt to impose religious uniformity seeks to pressure a person into religious conviction—believe this, do that, *or else*. . . (or else some substantial penalty will be imposed). Yet conviction is not susceptible to the types of pressures that a government can exert. Why not? Because a person cannot acquire a conviction *at will*, by the sheer exertion of choice.<sup>32</sup> A person can acquire many things in that way, of course. He can get the glass on the top shelf by deciding to reach up and grab it; he can obtain a cup of coffee by placing his order and paying the cost; he can view the video “on demand” by clicking the appropriate tab on his tablet. Likewise, he can satisfy another person’s demands by deciding that the pressures exerted against him are greater than he chooses to bear: That knife is now too frightening, so I’ll surrender my wallet; the interrogator’s threats of harm to my family are too great for me to risk, so I’ll divulge the information he wants. However effective threats of force might be for advancing certain

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30. This is not to deny the wisdom of consulting with those who are more knowledgeable about certain subjects. What is important is to maintain independence concerning who *are* credible experts and the degree of confidence to be placed in their counsel. *See id.*

31. LOCKE, CONCERNING TOLERATION, *supra* note 25, at 38. Coerced worship would be “Hypocrisie, and Contempt of his Divine Majesty.” *Id.* at 26-27.

32. As philosopher Michael Lynch observes, “One does not simply will oneself to believe. Rather, we pursue truth indirectly, by pursuing evidence that supplies us with reasons for belief.” MICHAEL P. LYNCH, IN PRAISE OF REASON 125 (2012).



purposes, the problem is that a man cannot engage in the comparable calculation: “the threatened penalty is more than I wish to bear; therefore, I believe in Jesus Christ.” Belief does not work that way. Because the kinds of factors needed to change a man’s beliefs “can in no manner proceed from corporal Sufferings,”<sup>33</sup> as Locke puts it, it is pointless to try to induce beliefs by such means. Force might entice a person to say that he believes a particular doctrine, but it cannot make him believe it. For outward conformity is merely that: the observable imitation of some of the manifestations that typically accompany a particular belief. It is not the real thing.

Essentially, Locke argues by appeal to the basic difference in kind between reason and coercion. As he observes, “[I]t is one thing to persuade, another to command; one thing to press with Arguments, another with Penalties.”<sup>34</sup> The heart of Locke’s argument is that an unbridgeable gap prevents coercive means from advancing religious ends. Because belief results only from “Light and Evidence,” religious belief is impervious to coercive manipulation.<sup>35</sup>

Locke was not alone in detecting this obstacle to achieving religious belief through physical means. In 1644, John Milton argued that “if [a man] believe[s] things only because his pastor says so, or the Assembly so determines, without knowing other reason, though his belief be true, yet the very truth he holds becomes his heresy.”<sup>36</sup> Anticipating Locke, Milton held that “[w]hat matters is not outward conformity, but adherence to the inner light.”<sup>37</sup> The man who asserts faith without understanding surrenders the “locks and keys” to his soul.<sup>38</sup> Indeed, if a man professes a religious belief in order to comply with rulers’ coercive commands, what he believes in is actually the power of those men whom he obeys, rather than the divine object of their belief.<sup>39</sup>

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33. LOCKE, CONCERNING TOLERATION, *supra* note 25, at 27.

34. *Id.*

35. *Id.*

36. JOHN MILTON, AREOPAGITICA AND OF EDUCATION 37 (George H. Sabine ed., Harlan Davidson, Inc. 1951) (1644).

37. Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1851 (2009) (characterizing Milton’s view).

38. MILTON, *supra* note 36, at 38.

39. *Id.*

Other thinkers employed similar reasoning. Thomas Hobbes distinguished what the tools of the state could and could not accomplish: “It is true, that if he be my Sovereign, he may oblige me to obedience, so, as not by act or word to declare I believe him not . . . .”<sup>40</sup> What the sovereign cannot do, however, is have me “think any otherwise than my reason perswades me.”<sup>41</sup> Samuel Pufendorf maintained that “[i]t was not God Almighty’s pleasure to pull People head-long into Heaven, or to make use of the new French way of Converting them by Dragoons.”<sup>42</sup> Since “truth could only be imparted by convincing arguments,” God left the choice of salvation in a man’s own hands.<sup>43</sup> To exercise that choice, a man must be free.<sup>44</sup> The contemporary scholar Susan Jacoby notes that, historically, attempts to coercively impose religion have merely produced a false uniformity that tended to collapse once a breath of freedom was permitted.<sup>45</sup> Such a result is exactly what Lockean thinking would predict.<sup>46</sup>

This line of reasoning resonated for many of the American colonists and Founding Fathers. A prominent vein of their support for religious freedom was the concern that state involvement with religion would corrupt religion by the very means that Locke, et. al., had been calling attention to, namely, by corrupting beliefs’ authenticity and thus intruding on a man’s

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40. THOMAS HOBBS, *LEVIATHAN* 287 (W. G. Pogson Smith ed., Oxford Univ. Press 1958) (1651).

41. *Id.*

42. SAMUEL PUFENDORF, *OF THE NATURE AND QUALIFICATION OF RELIGION IN REFERENCE TO CIVIL SOCIETY* 33 (Simone Zurbuchen ed., Jodocus Crull trans., Liberty Fund, Inc. 2002) (1687).

43. Koppelman, *supra* note 37, at 1861.

44. See PUFENDORF, *supra* note 42, at 77-78; Koppelman, *supra* note 37, at 1860-61.

45. SUSAN JACOBY, *STRANGE GODS: A SECULAR HISTORY OF CONVERSION* 413-14 (2016). Jacoby also suggests that attempts at forced conversion reveal a lack of confidence in the relevant religion’s persuasive power. *Id.* at 414. One would only resort to force if he believed that voluntary means could not lead to the assent of the forcibly manipulated. *Id.*

46. The gradual “intellectualization” of religion over the centuries—the evolution of certain sects away from emphasis on piety and ritual toward a person’s intellectual assent to certain doctrines, alongside the shift from belief in select individuals as “chosen” and more toward the notion that an individual’s own choosing determines his relationship to god—may have motivated greater attention to the mechanics of the mind’s operations. That is, if a person’s own choices and beliefs are critical to the state of his soul, it becomes important to understand the conditions under which the salient choices and beliefs are truly possible. Further, the more that a man’s spiritual well-being was seen as his own responsibility rather than a matter of fate, the more reason he had to maintain the conditions that would allow him to fulfill that responsibility. For an instructive discussion, see ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 29, 136-138 (2013).

relationship with God.<sup>47</sup> The Baptist minister Isaac Backus, for instance, argued that only a voluntary obedience could constitute true devotion.<sup>48</sup> “As God is the only worthy object of all religious worship, and nothing can be true religion but a voluntary obedience unto his revealed will, of which each rational soul has an equal right to judge for itself, every person has an unalienable right to act in all religious affairs according to the full persuasion of his own mind, where others are not injured thereby.”<sup>49</sup> Roger Williams, a renowned champion of religious freedom, insisted that authenticity was indispensable to salvation and that it could not be secured by force.<sup>50</sup>

A carnal weapon or sword of steel may produce a carnal repentance, a show, an outside . . . uniformity through a state or kingdom . . . [Yet], an unbelieving soul, being dead in sin . . . cannot please God; and, consequently, whatever such an unbelieving and unregenerate person acts in worship or religion, it is but sin.<sup>51</sup>

A man might be induced to go through the motions of belief, Williams recognized, yet all that “the sword may make” is a “nation of hypocrites.”<sup>52</sup> “[T]he straining of men’s consciences by civil power is so far from making men faithful to God or man that it is the ready way to render a man false to both.”<sup>53</sup> Williams condemned any constraint of religious liberty as “soul rape,” his

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47. See Thomas Jefferson, *Letter to Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association, in the State of Connecticut* (Jan. 1, 1802), in THOMAS JEFFERSON: WRITINGS 510, 510 (Merrill D. Peterson ed., 1984) [hereinafter Jefferson, *Danbury Baptist Association*]; James Madison, *To the Honorable the General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance* (June 20, 1785), in THE PAPERS OF JAMES MADISON 298, 299 (Robert A. Rutland et al. eds., 1973) [hereinafter Madison, *A Memorial and Remonstrance*]; Isaac Backus, *Draft for a Bill of Rights for the Massachusetts Constitution* (1779), in ISAAC BACKUS ON CHURCH, STATE AND CALVINISM: PAMPHLETS, 1754-1789 app. 3 (William G. McLoughlin ed., 1968).

48. Backus, *supra* note 47.

49. *Id.*

50. See Koppelman, *supra* note 37, at 1855-56.

51. ROGER WILLIAMS, *The Bloody Tenent*, in ROGER WILLIAMS, JOHN COTTON AND RELIGIOUS FREEDOM: A CONTROVERSY IN NEW AND OLD ENGLAND 87, 88 (Irwin H. Polishook ed., 1967) (1644) (This work was originally published in the same year as Milton’s *Areopagitica*).

52. *Id.* at 92.

53. ROGER WILLIAMS, *The Bloody Tenet Yet More Bloody*, in ON RELIGIOUS LIBERTY: SELECTIONS FROM THE WORKS OF ROGER WILLIAMS 167, 195 (James Calvin Davis ed., 2008) (1652).

strong language being a reflection of his reverence for the sanctity of authentic conviction.<sup>54</sup>

Concerned as some were to separate church and state in order to protect the purity of a man's religious life, it is significant that many Founders who were not themselves committed to any particular religion (such as the Deists James Madison, Thomas Jefferson, and Thomas Paine) nonetheless staunchly defended religious freedom.<sup>55</sup> For they saw its value as rooted in something deeper than the value of religion (an issue we will explore further in Part IV).<sup>56</sup> Two of the First Amendment's greatest champions employed Lockean, mind-based reasoning on its behalf.<sup>57</sup>

Like Williams, Jefferson reasoned that "attempts to influence [the mind] by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness."<sup>58</sup> Rulers' attempts to assume "dominion over the faith of others" merely establish false religions.<sup>59</sup> Madison likewise argued:

"that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then

54. ROGER WILLIAMS, *The Bloody Tenet of Persecution, For Cause of Conscience, Discussed in a Conference Between Truth and Peace*, in ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 108, 142-43 (Perry Miller ed., 1965) (1644). Koppelman's discussion of Williams and others (including Baptist minister John Leland, Congregationalist minister Elisha Williams, and Thomas Paine) is instructive. See Koppelman, *supra* note 37, at 1854, 1862-63, 1869-71.

55. Koppelman, *supra* note 37, at 1863, 1866, 1870, 1874.

56. This accords with the (relatively) conceptual theory of language that the Founders employed. As Evan Bernick discusses, the Founders were influenced by Locke's portrait of words as referring to kinds, rather than to narrow particulars. See Evan Bernick, *Reason's Republic*, N.Y.U. J.L. & LIBERTY, 2016 (forthcoming) (manuscript at 17-18) (on file at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2798715](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798715)) [<https://perma.cc/969V-U2M2>].

57. While Jefferson is not as directly associated with specific constitutional provisions as are Madison and certain others, I call him one of the First Amendment's champions based on Jefferson's express commitment to the Constitution's guiding principles as well as to freedom of thought, in particular, as evidenced in such writings as the Declaration of Independence and Virginia Statute for Religious Freedom. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); VA. CONST. art. I, § 16. Moreover, Jefferson coined the metaphor of a wall between church and state. Jefferson, *Danbury Baptist Association*, *supra* note 47.

58. THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom*, in THOMAS JEFFERSON: WRITINGS 346, 346 (Merrill D. Peterson ed., 1984).

59. *Id.* Jefferson also observed that the effect of religious coercion has been "to make one half the world fools, and the other half hypocrites." THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 160 (William Peden ed., 1954) (1785).

of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men.<sup>60</sup>

Historically for over fifteen centuries, Madison observed, the effects of legal establishments of Christianity, far from serving the “purity and efficacy of Religion,” have begat only “pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution.”<sup>61</sup>

As instructive as I believe the Lockean reasoning for religious freedom is, its limitations are significant. First, it is a narrow defense of religious freedom. It argues against one particular rationale for government restriction of religion (albeit, a prominent one in its era), namely, the view that government coercion could “fix” a person’s convictions.<sup>62</sup> Accordingly, at most, the Lockean argument would defeat that rationale for religious repression, but could not underwrite any wider foundation for religious freedom. The more credence one thought that other defenses of repression might hold, therefore, the less potent the Lockean’s overall contribution.

More troublesome, Locke’s own understanding of “toleration” was severely limited. He did not believe that religious freedom extended to Roman Catholics or to atheists, for instance.<sup>63</sup> His reasoning was that Catholics and atheists both posed a threat to civil order; they could not be trusted to not interfere with the proper operations of government.<sup>64</sup> In Locke’s

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60. Madison, *A Memorial and Remonstrance*, *supra* note 47, at 298, 299. The internal quotation is from George Mason’s *Virginia Declaration of Rights*, which had been adopted in June 1776. VA. CONST. art. I, § 16.

61. Madison, *A Memorial and Remonstrance*, *supra* note 47, at 301.

62. Koppelman, *supra* note 37, at 1858-59.

63. *Id.* at 1859. Not all in the Lockean tradition necessarily agreed with him, yet his views were hardly unusual in his era. Isaac Kramnick and R. Laurence Moore discuss the Test and Corporation Actions of 1673, for example, which would have required all civil and military office holders of the British crown to receive sacraments by the rites of the Anglican Church. See ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE* 78-79 (2005).

64. Locke writes, “Those are not at all to be tolerated who deny the Being of a God. Promises, Covenants, and Oaths, which are the Bonds of Humane Society, can have no hold upon an Atheist. The taking away of God, tho but even in thought, dissolves all.” LOCKE, *CONCERNING TOLERATION*, *supra* note 25, at 51. In regard to Catholics’ devotion to Papal authority, “No Opinions contrary to human Society, or to those moral Rules which are

defense, note that this is the right kind of reason for denying rights—a person’s disruption of the government’s ability to fulfill its function. That is, a government properly restricts, apprehends, or punishes people exactly when they are endangering others’ rights or obstructing the government’s efficacy in protecting those rights. Thus, if certain people are known to pose such dangers, they would forfeit the usual legal rights. The problem, however, is that evidence and logic do not vindicate Locke’s contention that atheists and Catholics do pose such a threat. They are not known (and were not, even in Locke’s era) to create such disruptions.<sup>65</sup>

The upshot is this: The Lockean line of reasoning, by directing attention to the nature and conditions of thought formation, marks a major advance in our understanding of the value of religious freedom. Nonetheless, this reasoning is imperfect and incomplete. The critics we shall consider next, however, have not focused their attacks on these relatively peripheral shortcomings of the Lockean argument. Rather, they challenge its central claim about the connection between thinking, believing, and freedom.

### III. THE CRITICS’ DISMISSAL: WHAT FORCE CAN DO

Jeremy Waldron and Brian Leiter, among others, argue that the Lockean portrait of the relationship between thought and force is simplistic.<sup>66</sup> You *can* force a mind into embracing certain

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necessary to the preservation of Civil Society, are to be tolerated by the Magistrate.” *Id.* at 49. “That Church can have no right to be tolerated by the Magistrate, which is constituted upon such a bottom, that all those who enter into it, do thereby, *ipso facto*, deliver themselves up to the Protection and Service of another Prince. For by this means the Magistrate would give way to the settling of a foreign Jurisdiction in his own Country, and suffer his own People to be listed, as it were, for Souldiers against his own Government.” *Id.* at 50.

65. See Jim Powell, *John Locke: Natural Rights to Life, Liberty, and Property*, FOUND. FOR ECON. EDUC. (Aug. 1, 1996), <https://fee.org/articles/john-locke-natural-rights-to-life-liberty-and-property/> [<https://perma.cc/X5XL-E86W>]; Adam Lee, *If Peace on Earth is Our Goal, Atheism Might be the Means to that End*, THE GUARDIAN (Jan. 6, 2015), <https://www.theguardian.com/commentisfree/2015/jan/06/peace-on-earth-atheism> [<https://perma.cc/ZPY8-3633>].

66. See LEITER, *supra* note 17, at 10-12; Waldron, *supra* note 17, at 67-68, 85. Pevnick also criticizes this argument, although he contends that Locke has other resources by which to defend religious toleration. See Pevnick, *supra* note 16, 847-48. Because my focus is not on Locke *per se* but on the general line of reasoning he shares with others, I set aside such further discussion of Locke. Whether or not Pevnick proves right in maintaining that Locke can offer stronger arguments for toleration, my arguments about the merits of his futility argument will be unaffected.

ideas. Dictators successfully have, in numerous places: Red China, the Soviet Union, Cambodia, Cuba.<sup>67</sup> According to Leiter, history offers plentiful examples of societies in which the tyranny of the few is accepted by the many as desirable, showing that “states can successfully inculcate beliefs.”<sup>68</sup> Indeed, dictators employ repression and propaganda precisely because they are effective.<sup>69</sup> Millions of North Koreans believe the lies they are fed about Kim Jong Un, just as masses believed the lies they were fed about Mao or Stalin, or about Jews or other reputed state enemies.<sup>70</sup>

Like it or not, Locke’s critics claim, repression works. Dictators censor, muzzle, and deny people access to vast streams

67. See Alex Newman, *Communist Chinese Regime Forcing Rural Population Into Cities*, THE NEW AM. (June 19, 2013), <http://www.thenewamerican.com/world-news/asia/item/15755-communist-chinese-regime-forcing-rural-population-into-cities/> [https://perma.cc/VR75-XBVU]; Thomas Skallerup, *Historical Setting: 1917 to 1982*, in SOVIET UNION: A COUNTRY STUDY 56, 68-71 (Raymond E. Zickel ed., 2d ed. 1991); *Genocide in the 20th Century: Pol Pot in Cambodia 1975-1979*, THE HIST. PLACE (1999), <http://www.historyplace.com/worldhistory/genocide/pol-pot.htm> [https://perma.cc/E5RM-CJGP]; Lorenzo Canizares, *Commentary: Cuba: What Went Wrong?*, ENCYCLOPEDIA OF ANTI-REVOLUTIONISM ON-LINE (1983), <http://www.historyplace.com/worldhistory/genocide/pol-pot.htm> [https://perma.cc/M32F-NKM3].

68. LEITER, *supra* note 17, at 10-11.

69. The term “propaganda” is commonly used in at least two different ways. Sometimes, the term refers to information presented in a manner deliberately designed to foster its positive reception, although no coercion is involved. A candidate’s political campaign or a product’s advertising campaign, for example, present their messages in ways crafted to elicit strong, favorable reactions. Other times, “propaganda” refers to information that is managed *by the government* through such means as the silencing of critics, banning particular publications, shutting down websites, or the dissemination of government-created “information” to encourage people’s acceptance of certain ideas. See Kenneth A. Osgood, *Propaganda*, ENCYCLOPEDIA OF AM. FOREIGN POL’Y (2002), <http://www.encyclopedia.com/social-sciences-and-law/political-science-and-government/political-science-terms-and-concepts-62> [https://perma.cc/525H-XS8V]. Regimes that repress religious freedom employ propaganda in the latter sense.

70. See Ian Birrell, “*How Could our Country Lie so Completely?*”: *Meet the North Korean Defectors*, THE GUARDIAN (Aug. 27, 2016), <https://www.theguardian.com/global/2016/aug/27/north-korea-defectors-ian-birrell> [https://perma.cc/4H5M-3K68]; Bao Tong, *China: The Myth and the Lies of Mao Zedong still Oppress China*, ASIANEWS.IT (Dec. 31, 2013), <http://www.asianews.it/news-en/The-myth-and-the-lies-of-Mao-Zedong-still-oppress-China-29929.html> [https://perma.cc/W9Z4-UWTP]; Arnold Beichman, *Tyrant’s Death Recalled: Why did Intelligent People Believe Stalin’s Lies?*, WASH. TIMES (Mar. 6, 2003), <http://www.freerepublic.com/focus/news/858004/posts> [https://perma.cc/3TAH-SCQ3]; Jane McGrath, *10 of the Biggest Lies in History*, HOW STUFF WORKS (2016), <http://history.howstuffworks.com/history-vs-myth/10-biggest-lies-in-history10.htm> [https://perma.cc/L3RG-RNTR].

of information. The fact that dissidents persist and often produce impressive work while censored or imprisoned demonstrates that their minds are not incapacitated by the restrictions. (Consider Fyodor Dostoyevsky under Tsars Nicholas I and Alexander II, for instance,<sup>71</sup> or Alexander Solzhenitsyn and Joseph Brodsky in the USSR,<sup>72</sup> or political dissidents such as Andrei Sakharov and Natan Scharansky.<sup>73</sup>) Religious repressors often win wide compliance with their demands. As Leiter sums it up, Locke simply “fail[ed] to appreciate the full complexity of the psychology and sociology of belief inculcation.”<sup>74</sup> The Lockean argument, he contends, relies on a romanticized image of freedom that is out of touch with reality.<sup>75</sup>

Waldron offers a more extended and more penetrating probe of the Lockean line, but its thrust is basically the same. “Censors, inquisitors, and persecutors have usually known exactly what they were doing,” Waldron maintains, and thereby, have been able to manipulate their subjects’ beliefs.<sup>76</sup> While the physical tools of coercion may not be able to reach every corner of a person’s thinking process or directly install a belief in a person’s mind in the same way that a surgeon can implant a chip in a skull, these tools can steer belief toward a dictator’s desired conclusions.

Consider the portion of an individual’s thinking that may seem the least susceptible to external manipulation, his attention. Surely, one might suppose, whatever external pressures are applied against him, the individual can still direct or withhold his mental faculties from attending to various objects and ideas. Yet

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71. While Alexander was comparatively liberal and relaxed many of Nicholas’ repressive measures, his regime remained firmly autocratic and employed coercion to instill specific religious beliefs. See ALEXANDER POLUNOV, *RUSSIA IN THE NINETEENTH CENTURY: AUTOCRACY, REFORM, AND SOCIAL CHANGE, 1814-1914*, 35 (Thomas C. Owen & Larissa G. Zakharova eds., 2005); NICHOLAS V. RIASANOVSKY, *RUSSIAN IDENTITIES: A HISTORICAL SURVEY* 168, 172 (2005); W.E. Mosse, *Alexander II*, *ENCYCLOPEDIA BRITANNICA ONLINE* (June 22, 2016) <http://www.britannica.com/biography/Alexander-II-emperor-of-Russia> [<https://perma.cc/T3C3-J8PX>].

72. See Keith Gessen & Masha Gessen, *What Became of the Soviet Dissidents?*, *INST. FOR HUM. SCI.* (2016), <http://www.iwm.at/transit/transit-online/what-became-of-the-soviet-dissidents/> [<https://perma.cc/TG23-3Y6L>].

73. See Natalie Clifford Barney, *Natan Sharansky*, *NEW WORLD ENCYCLOPEDIA* (Dec. 20, 2014), [http://www.newworldencyclopedia.org/entry/Natan\\_Sharansky](http://www.newworldencyclopedia.org/entry/Natan_Sharansky) [<https://perma.cc/8XUM-SBAK>].

74. LEITER, *supra* note 17, at 11.

75. See *id.*

76. Waldron, *supra* note 17, at 85.



even this, Waldron argues, leaves ample berth for a government, through the coercive manipulation of a person's intellectual environment, to determine what that person is likely to regard as true.<sup>77</sup> By careful control over the material in a person's "information feed"—over what a person is exposed to as well as what he is kept from, along with the prominence given to certain ideas, the spin with which they are presented, the repetition of themes, their reinforcement across different spheres (political, artistic, athletic, social, occupational), and so on—coercion can go a long way to inculcating specific notions.<sup>78</sup> Waldron claims that any of a person's particular beliefs results, in part, from a surrounding "epistemic apparatus."<sup>79</sup> The manipulation of this apparatus by means of interference with a person's intellectual atmosphere will naturally affect the inferences that seem logical to him. If, for example, a regime compels people to memorize a catechism or to read a scripture daily or to participate in certain religious rituals, this may well increase the number of people who come to affirm the associated doctrines.<sup>80</sup> Certain outward displays of conformity to a belief, even if they are coerced, can, over time, encourage the adoption of that belief in earnest. While a law requiring daily attendance at mass might not itself make you a believer, in other words, it could incline you in that direction.

Waldron's point is that indirectly, coercion *can* advance the sought results.<sup>81</sup> Bear in mind, too, that even if a person comes to believe something under false pretenses (because he was systematically deprived of pertinent information, for instance), he believes it. This, the critics claim, refutes the Lockean contention that conviction cannot be coerced.<sup>82</sup> Much as we might wish it otherwise, canny manipulation by coercive means can achieve uniformity of belief.<sup>83</sup>

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77. *See id.* at 81.

78. *See id.*

79. *Id.* at 82. This is "the apparatus of selection, attention, concentration and so on— which, although it does not generate belief directly, nevertheless plays a sufficient role in its genesis to provide a point of leverage." *Id.* at 82.

80. Waldron, *supra* note 17, at 83-84.

81. *Id.* at 81.

82. *Id.*

83. For critical discussion of Waldron's reasoning on this, see Darryl Wright, *Reason, Force, and the Foundations of Politics*, in *THE PHILOSOPHY OF CAPITALISM: OBJECTIVISM AND ALTERNATIVE APPROACHES*, AYN RAND SOCIETY PHILOSOPHICAL STUDIES (Robert Mayhew & Gregory Salmieri eds.) (forthcoming) (manuscript at 44-54) (on file with author).

## IV. HOW THE CRITIQUE MISSES ITS MARK

## A. Force Impedes the Acquisition of Knowledge

The critics' charge holds a definite plausibility. For under dictatorships that deny intellectual freedom, some constructive thought, some knowledge, and correspondingly, some production of material values do continue to take place. Production does not grind to a halt. Yet the Lockean position does not entail that it should; it does not deny the possibility of all such values. What it challenges is a certain image of the relationship between these values. In particular, it challenges the assumption that knowledge and the creation of values can occur independently of the freedom or restriction of individuals' minds.<sup>84</sup>

The Lockean's critics argue as if, because certain intellectual and material goods can exist in a society that stifles intellectual freedom, such freedom must be irrelevant.<sup>85</sup> This is a stunningly superficial account of the situation, however. While the combination of "freedom denied, goods supplied" might, at a quick glance, appear to refute the Lockean argument, this accepts the goods at face value without inquiring into their origins. A simple question is critical: how do people acquire these goods? By means of what activities and by virtue of what conditions? Can intellectual or material goods (literature, science, airplanes, smartphones, penicillin) be had under simply *any* conditions? Are they impervious to the freedom of men's environment?

Hardly. Witness the dramatically different standards of living in free and intellectually constricted nations.<sup>86</sup> Witness the dearth of discoveries, inventions, and innovation that emerge from repressed societies. How many new ideas—novel

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84. By "values," I mean those goods, material or spiritual, that objectively contribute to human well-being. The concept thus encompasses such things as food, clothing, and medicine as well as knowledge, art, friendship, and self-esteem. See AYN RAND, *The Objectivist Ethics*, in THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM 10, 16-19, 25-27 (1964) [hereinafter RAND, *The Objectivist Ethics*]; LEONARD PEIKOFF, OBJECTIVISM: THE PHILOSOPHY OF AYN RAND 206-220, 241-249 (1991); TARA SMITH, VIABLE VALUES: A STUDY OF LIFE AS THE ROOT AND REWARD OF MORALITY 83-85 (2000); SMITH, THE VIRTUOUS EGOIST, *supra* note 29, at 19-32.

85. See Ruven Chu et al., *Censorship & Freedom of Speech*, STAN. COMPUTER SCI., <https://cs.stanford.edu/people/eroberts/cs201/projects/communism-computing-china/censorship.html> [<https://perma.cc/A4JM-VS5M>].

86. See *United States vs. North Korea*, INDEX MUNDI, <http://www.indexmundi.com/factbook/compare/united-states.north-korea> [<https://perma.cc/QN4C-NDVX>].

techniques, innovative processes, and useful products based on these—are spawned by the inhabitants of obedience regimes? How many scientific discoveries have been achieved under the intellectual dictatorships of North Korea or Afghani theocrats?<sup>87</sup> How many patents were held by the residents of Pol Pot’s Cambodia?<sup>88</sup> When entire areas of inquiry are legally forbidden, individuals’ minds are prevented from engaging with information that might be true and with ideas that might spark creative connections and the development of new knowledge.<sup>89</sup>

Intellectually repressive regimes tend to lag in material well-being by all the conventional measures of health, life expectancy, GNP, purchasing power, product quality, standard of living.<sup>90</sup> Numerous economic studies make plain the material fruits of freedom.<sup>91</sup> While these studies primarily measure the effects of economic freedom, rare is the regime that restricts economic freedom while respecting intellectual freedom. Indeed, doing so would be counter-productive from the standpoint of the repressors. For effective restriction of one requires restriction of the other. As Rand’s work emphasizes, for human beings, the

87. See *International Science Ranking*, SCIMAGO J. & COUNTRY RANK, <http://www.scimagojr.com/countryrank.php> [https://perma.cc/BM4J-7HB4].

88. See Dezan Shira, *Cambodia Recognizes First Patent Application*, ASEAN BRIEFING (Mar. 12, 2015) <http://www.aseanbriefing.com/news/2015/03/12/cambodia-recognizes-first-patent-application.html> [https://perma.cc/2XT6-YQBN].

89. See *Innovation in the Arab World: From Zero to Not Much More*, THE ECONOMIST, June 4, 2016, at 42.

90. See Matthew Nitch Smith, *The 17 Countries with the Worst Quality of Life in the World*, BUS. INSIDER (July 1, 2016), <http://www.businessinsider.com/social-progress-index-countries-with-the-worst-quality-of-life-2016-7> [https://perma.cc/R2JF-BUKG].

91. See *Economic Freedom Report*, FRASER INST., <http://www.freetheworld.com/> [https://perma.cc/2UEN-FB9Z]; *Economic Freedom Report: The Relationship Between Economic Freedom and Economic Well-Being*, FRASER INST., <http://www.freetheworld.com/efna/3EFNAch3.pdf> [https://perma.cc/Q9SZ-FT2X] (summary essay on the link between economic freedom and economic well-being); *2016 Index of Economic Freedom*, HERITAGE FOUND., <http://www.heritage.org/index/> [https://perma.cc/6RCK-2X9K]; *Center for Global Liberty and Prosperity*, CATO INST., <http://www.cato.org/centers/center-global-liberty-prosperity> [https://perma.cc/Z2CY-UUQ3]; Dan Mitchell, *The Amazing Hockey Stick of Economic Progress*, INT’L LIBERTY (June 27, 2014), <https://danieljmitchell.wordpress.com/2014/06/27/the-amazing-hockey-stick-of-economic-progress/> [https://perma.cc/Y89N-E32Y] (famous “hockey stick graph” of material growth resulting from greater freedom); Marginal Revolution Univ., *The Hockey Stick of Human Prosperity*, YOUTUBE, <https://www.youtube.com/watch?v=t9FSnvtcEbg> [https://perma.cc/7ELU-76R9]; Angus Maddison, *The Contours of World Development*, THE WORLD ECON. (May 17, 2010), <https://sites.google.com/site/econgeodata/maddison-data-on-population-gdp> [https://perma.cc/9XFY-3VLV] (original underlying research of economist Angus Maddison).

creation of any goods requires a process of thinking: identifying the relevant needs, adopting specific aims so as to meet them, and devising suitable means of achieving those aims.<sup>92</sup> “[E]verything man needs has to be discovered by his mind and produced by his effort,” she writes.<sup>93</sup> “Production is the application of reason to the problem of survival.”<sup>94</sup>

Don Watkins and Yaron Brook describe the “production of wealth [as] fundamentally an intellectual project.”<sup>95</sup> Wealth creation must be, in its inception, knowledge creation.<sup>96</sup> As the economist Deirdre McCloskey puts it, “Our riches were not made by piling brick upon brick . . . but by piling idea upon idea.”<sup>97</sup> Nobel laureate Amartya Sen has long been demonstrating that material well-being does not depend on economic freedom alone.<sup>98</sup> Sen considers what he calls political freedoms as “among the constituent components” of economic development.<sup>99</sup> Freedom of thought is part and parcel of the ability to devise new products, new techniques, and new means of trade. Consequently, for dictators to restrict people’s intellectual activities while leaving free their economic activities, in hopes of material prosperity, would be a doomed enterprise. The starvation of the mind necessarily constricts the products of the mind. By the same token, for dictators to restrict people’s

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92. See AYN RAND, *What is Capitalism?*, in CAPITALISM: THE UNKNOWN IDEAL 11, 16-17 (1967) [hereinafter RAND, *What is Capitalism?*]; RAND, *The Objectivist Ethics*, *supra* note 84, at 22-24. Rand illustrates this theme dramatically across her novel ATLAS SHRUGGED (1957). See generally AYN RAND, ATLAS SHRUGGED (1957) (describing the necessity of freedom for man to pursue his highest potential and the society that best enables him to do so).

93. See RAND, *What is Capitalism?*, *supra* note 92, at 17.

94. *Id.*

95. DON WATKINS & YARON BROOK, EQUAL IS UNFAIR: AMERICA’S MISGUIDED FIGHT AGAINST INCOME INEQUALITY 90, 102-103 (2016).

96. *Id.*

97. Deirdre McCloskey, *How Piketty Misses the Point*, CATO POL’Y REP. (July/Aug. 2015), <https://www.cato.org/policy-report/julyaugust-2015/how-piketty-misses-point> [<https://perma.cc/BY93-DJNP>]. For extensive elaboration, see generally Deirdre Nansen McCloskey, *Bourgeois Equality: How Ideas, Not Capital or Institutions, Enriched the World*, in 3 THE BOURGEOIS ERA (2016) (arguing that people across the world are richer than at any point in human history because of ideas and economic competition).

98. AMARTYA SEN, DEVELOPMENT AS FREEDOM 5 (1999).

99. *Id.* Sen counts as political freedoms “liberty of political participation and dissent,” “free speech and elections,” “democratic arrangements” such as “a multiparty democracy with elections and free media,” and freedom of “public discussion and participatory political decisions.” *Id.* at 5, 11, 51-52, 123. For his definitions of specific types of freedom, see *id.* at 38-40.

economic activities while leaving free their intellectual activities would court rebellion, since intellectually free people will be likely to realize how much better their material conditions could be.

The point is, the kind of “repeat after me” society created by intellectual repression is not conducive to breakthroughs that advance knowledge or to innovations that improve people’s lives. Obviously, intellectual repression does not cause the immediate annihilation of all life-enhancing values. People can still get by when their range of thought is restricted. The problem is that they cannot prosper.<sup>100</sup> They can produce only to the extent that they rely on the knowledge that freer minds had previously acquired; they are reduced to the position of parasites.<sup>101</sup> While those who are restricted may be able to coast on the knowledge of others for a while, the straitjacketing of *their* minds means that they will not be able to generate any further knowledge. “Intellectual go-along” can take these people only as far as the minds of the rulers who set the boundaries concerning which ideas will and will not be permitted.<sup>102</sup>

It is also significant that even people’s understanding of things that had previously been discovered will atrophy if they are not permitted robust and skeptical engagement with that knowledge. A person must grasp the basis for a claim, at least in rudimentary terms, in order for it to have the status of knowledge in his mind. As simple a claim as that water is H<sub>2</sub>O is meaningless in the mind of a person who has no comprehension of chemical elements. Indeed, it is people’s re-thinking of accepted ways and beliefs that frequently prompts better ideas—corrections,

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100. For Rand’s remarks on this, see AYN RAND, AYN RAND ANSWERS: THE BEST OF HER Q&A 32-34 (Robert Mayhew ed., 2005) [hereinafter RAND, THE BEST OF HER Q&A]. Bear in mind that these were made in spontaneous response to oral questions.

101. People who do not think “can survive only by imitating and repeating a routine of work discovered by others—but those others had to discover it, or none would have survived.” RAND, *What is Capitalism*, *supra* note 92, at 17. While the context of this statement was people who willfully refuse to think, the point applies equally to those who are forcibly prevented from thinking. Non-thinkers’ survival is made possible by those who are free to discover the knowledge that the satisfaction of their needs requires. See RAND, *The Objectivist Ethics*, *supra* note 84, at 19-20.

102. Wright discusses the comparable impairment of literary work, particularly drawing on the reflections of Polish author Czeslaw Milosz. Wright, *supra* note 83, at 63. Censored writers may continue to generate output, but “[w]hat is impeded is the ability to write fluidly, authentically and insightfully.” *Id.* at 64.

refinements, extensions, fresh applications. This is how knowledge advances. More on this, later.

Let us return from this probing of intellectual freedom more directly to the dispute between Lockeans and their detractors. The thrust of the critics' charge is that repression works.<sup>103</sup> Contrary to Lockean assertions of coercive instruments' impotence to alter people's beliefs, Leiter and Waldron maintain that dictators successfully use such means to accomplish exactly what they want.<sup>104</sup> It is crucial to ask, however, repression "works" to accomplish what, precisely? Coercion certainly can deliver the obedience that a dictator wants. If some dictators do not care what the masses believe but simply want certain conduct, force *can* achieve that. It cannot alter belief, however, according to the Lockeans, and this is what they find problematic.<sup>105</sup> While they recognize that physical force can compel physical compliance, outward conformity with a dictators' demands does not necessarily signify genuine conviction. You cannot "get religion" via cattle-prod. In this, I think, the Lockeans are leading us to a significant truth. They do not grasp it fully, however, as we shall see.

Undeniably, as Leiter and Waldron point out, through the systematic dissemination of propaganda and tight control over the thoughts and theories that people are permitted to be aware of, repressors can lead people to accept false conclusions.<sup>106</sup> Forcible restrictions can limit the materials that are available for a person to consider as well as the incentives that he has to entertain various lines of thought (incentives posed by the punishments attached to deviation from the state-approved orthodoxy). Such manipulation of the intellectual environment will naturally influence the conclusions that people draw, even if they are scrupulously rational with the material they are fed. Yet none of this touches the heart of the Lockean claim, which concerns the nature of rational *thought*.

What the critics regard as the censors' "success" rests in the fact that some of their victims do end up believing the censors' desired conclusions as a result of the regime's deliberate

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103. LEITER, *supra* note 17, at 10-11.

104. *Id.*; WALDRON, *supra* note 17, at 81.

105. *See* LEITER, *supra* note 17, at 10-11.

106. *Id.*

distortions.<sup>107</sup> Even this is not precisely what the Lockeans dispute, however. The problem, as the Lockeans see it, is that these people will embrace false ideas.<sup>108</sup> One does not need to agree about the truth of a particular religious doctrine to appreciate that they are on to an important epistemological fact. This is where Rand takes their insight further. By examining more closely the necessary conditions of rational thought and knowledge, she deepens and fortifies the Lockean line.

Rand explains that “[a] rational mind does not work under compulsion.”<sup>109</sup> A human mind cannot function cognitively—in a way that enables it to understand a phenomenon, to know reality—while it is bound by the standing order to affirm what the dictators decree. By demanding that a person act against his own judgment, “[f]orce invalidates and paralyzes” his capacity for judgment; it renders it moot.<sup>110</sup> Yet while a person’s mind “may be hampered by others, . . . silenced, proscribed, imprisoned,” Rand observes, “it cannot be forced; a gun is not an argument.”<sup>111</sup>

To be still more precise, a mind cannot be forced to understand a particular argument or to know a particular conclusion. It cannot be forced to do the kinds of things that a human mind uniquely can.

Those who manipulate an intellectual environment *can* foster people’s assent to the manipulators’ specific goals. That is not the same as fostering rational inquiry, however. And rational inquiry is the only path to genuine knowledge (concerning god or any subject). The laws of a censor cannot compel a person’s inferences to be logical or his conclusions to be valid. They cannot force a person to think *in the way* that generates knowledge, that brings awareness of reality. Therein rests its ultimate bankruptcy.<sup>112</sup>

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107. See LEITER, *supra* note 17, at 10-11.

108. See LORD KING, *THE LIFE AND LETTERS OF JOHN LOCKE* 364 (1884) (discussing what the Lockeans regard as false, that is, given their own beliefs about religious truth). Not all those who I have dubbed “Lockeans” shared the same faith, but they did each hold definite views concerning what constitutes religious truth.

109. RAND, *What is Capitalism?*, *supra* note 92, at 17, 23.

110. *Id.* at 2; see also PEIKOFF, *supra* note 84, at 313.

111. RAND, *What is Capitalism?*, *supra* note 92, at 17.

112. Recent testimony of this comes from a victim of such intellectual repression. See generally Fang Lizhi, *The Most Wanted Man in China: My Journey from Scientist to Enemy of the State* (Perry Link trans., 2016) (Fang Lizhi describing the intellectual repression he faced as a scientist in China). His book’s theme is the “fundamental incompatibility between science and the kind of faith in their own infallibility demanded by China’s leaders.” Richard

John Stuart Mill offered a famous defense of intellectual freedom that touches on some kindred claims.<sup>113</sup> While Mill's aim was to defend the political freedom of thought, his observations also address the basic conditions that are necessary for knowledge.<sup>114</sup>

Even true ideas will deteriorate, Mill reasoned, in the minds of people who are not accustomed to challenging them.<sup>115</sup> If a person does not understand the grounds of an idea, that which *makes* it true, it will sit as a mere prejudice or superstition in his mind. Moreover, “[h]e who knows only his own side of the case, knows little of that,” Mill observes.<sup>116</sup> A person can only rationally assess the merits of competing views when he grapples with opposing positions and understands the arguments beneath them.<sup>117</sup> The upshot is, the acquisition of knowledge depends on unrestricted access to ideas and unrestricted engagement with them. This is exactly what intellectual repression expunges.

### 1. *The Process, Not the Conclusion*

While recognizing the limited things that force *can* accomplish, the Lockeans' focus on what force cannot deliver helps us to recognize how destructive it is. To understand the correlative value of intellectual freedom more fully, we need to investigate the mechanics of human thought more closely. What follows is an attempt to elaborate Rand's account at a more fine-grained level.<sup>118</sup> From the outset, bear in mind that thinking is not an end in itself, but serves a definite purpose—namely, the acquisition of knowledge. Knowledge, in turn, is valuable in order to inform action—to guide human beings to the kinds of actions that can advance our well-being. The process by which a

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Bernstein, *'The Most Wanted Man in China' and 'The Cowshed'*, N.Y. TIMES (Feb. 19, 2016), [http://www.nytimes.com/2016/02/21/books/review/the-most-wanted-man-in-china-and-the-cowshed.html?\\_r=0](http://www.nytimes.com/2016/02/21/books/review/the-most-wanted-man-in-china-and-the-cowshed.html?_r=0) [https://perma.cc/Q76V-RXDK].

113. See JOHN STUART MILL, *On the Liberty of Thought and Discussion*, in ON LIBERTY 86-95 (David Brownwich & Gorge Kateb eds., Yale Univ. Press 2003) (1859).

114. See *id.* at 86. While Mill and Rand are sometimes classified together as “libertarians,” my invoking Mill here should not be taken to suggest any deep affinities between his and Rand's political thought. Rand had several serious differences with Mill concerning utilitarianism and individual rights, among other things.

115. *Id.* at 102.

116. *Id.* at 104.

117. *Id.* at 104-05.

118. Peikoff and Wright provide good analysis of the impact of physical force. See PEIKOFF, *supra* note 84, at 310-23; Wright, *supra* note 83, at 1-2.



person forms conclusions determines whether or not he is able to do that.

In assessing any defense of religious freedom, therefore, it would be a mistake to focus on the value of religion or on the value of one particular religion versus another (such as Anglicanism versus Catholicism). Rather, we should consider how a person comes to his religious belief. What are the sorts of things that a person does as a means of reaching a religious conviction? While the exact steps vary in different cases, typically, he will engage in some assortment of the following: he thinks; he prays; he observes others; he emulates others in certain respects; he talks to others about their religious beliefs; he reads the doctrines and arguments of a particular religion or he reads about a religion—some of its history, its detractors' criticisms. However extended or abbreviated a given person's process, however deep or shallow, systematic or casual, ultimately, he *makes up his mind*. He decides whether to learn more about other people's beliefs or whether to "try out" alternative religions. He decides whether he will continue to participate in the rituals that he practiced as a child or whether to suspend all religious belief or all interest in finding answers to the kinds of questions that religion characteristically addresses (questions about mortality, meaning, value, etc.). The point is, a person thinks in order to embrace whatever religious views he does have. Even if a particular person's thinking is minimal or relatively un-inquisitive, it is he who chooses to follow a given path. What is significant for us is that religion represents a conclusion. A person must be free in order to be able to investigate the relevant evidence and draw that conclusion rationally.

Ultimately, a person must be free in order to reach valid conclusions—the rational, reality-hugging conclusions that enable him to understand the world around him, to act on that basis, and thereby advance his well-being. Such freedom naturally brings with it the opportunity to think irrationally and to make poor decisions. The immediate point, however, is that it is not the sanctity of any particular conclusion that underwrites the value of religious freedom. Rather, it is the process by which human beings reach conclusions and can attain the understanding of the world that their well-being depends on. Freedom of the mind is indispensable to that process. This is the foundation of

intellectual freedom's value—and correlatively, of religious freedom's value.

## 2. *How Force Obstructs Rational Thinking*

Consider: What does thinking consist of? What is required to reach a conclusion and what is required to reach it rationally—in a way that can yield knowledge? Milton's observation that "reason is but choosing" captures a crucial part of the answer.<sup>119</sup>

A process of thinking involves confronting a series of choices. To think about whether some proposition is true, a person must choose between ever-shifting arrays of alternatives that his mind lobs up to him—including those as basic as what thoughts to attend to. He must decide which thoughts, of the many that might occur to him, to consider further and which to set aside; which to consider the relevance of and, if he deems some relevant, which to assign credence to. To do this, in turn, he must determine how to assess the relevance and credence of each idea.

Further, he must figure out what weight to assign to those ideas that he does regard as true. What is their probative significance? How strongly do they support a particular conclusion? He must also consider the implications of various possible answers for the issue at hand and for other beliefs about other issues. If this conclusion about this presidential candidate is valid, for instance, am I logically compelled to revise my previous conclusions about his overall merit or about who to vote for? Or about whether to vote at all, this year?

Let us take a fairly commonplace example by which to examine thought more closely. Consider an eighteen year-old confronting the following question: *Should I attend this university or one of the other two that has accepted me?* What are some of the sub-questions he would need to answer, to answer that? A barrage of questions will need his attention.

*How expensive would it be to attend that school? What is the financial aid package? How much debt can I afford to take on? How much wage-earning work can I handle while in school? When would I be able to pay off the accumulated debt? What are some realistic timetables? To what extent would the pay offered by a job after graduation have to become a primary concern in*

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119. Milton, *supra* note 36, at 25.

*deciding whether to take a job? What are the odds that I could land jobs that would deliver the needed pay-scale? How much pressure would that much debt create? Is it worth it?*

*What are my job prospects, holding a degree from that school? How much do I care about those? How much should I care about those? Should that be the deciding factor—my likelihood of securing a sufficiently remunerative job immediately after graduating? What about a job that is rewarding in other respects? Which other respects?*

*What is the school's environment like, the quality of life that I can expect? Is its strength in literature but its weakness in so many other areas a problem if I decide to abandon literature and change majors? Is the school's large size a plus or a minus? Are the benefits of its broad range of courses, people, and extracurricular activities offset by the danger of feeling overwhelmed or anonymous at such a large institution? What about those frigid winters? What about its distance from an airport, for when I need to go home? How much should those things affect my decision?*

Obviously, parallel questions will arise for the other schools. Further, a person might wonder: *Should I postpone starting school and re-apply next year? Should I really go to a university at all? Is this a better option for me than working in Uncle Joe's company? Or than joining the Marines, which has worked out so well for my cousin?*

The above is easily twenty-plus questions, generated without venturing beyond the most obvious. One might object that I over-complicate issues. After all, most of us engage in this kind of thinking quite routinely and less laboriously. My point, though, is that however attentive or deliberate a person might be, thinking largely *consists of* addressing a cascade of intellectual intersections, a sprawling network of questions demanding answers, and answers spawning additional questions. The number and complexity obviously depend on the primary issue. "Pepper on your salad?" does not normally warrant extended analysis. "Should I marry her?" normally does. What is important for understanding the value of religious freedom (and wider intellectual freedom) is the fact that these choices can only be made rationally if the roads to logical answers are unobstructed. If, instead, a person lives under a repressive regime in which evidence is withheld, "truth" is dictated, and permitted

conclusions are strictly controlled, his process of thinking is short-circuited, stymied by *No Go* zones, regions of cognitive activity declared *Off Limits*.

To return to the person choosing a school, suppose his government denies people information about specific schools or fields of study that it deems threatening. This means that his thinking about his principal question and its numerous offshoots must be diverted to thinking about the consequences of his pursuing what he deems the logical course. That is, if he continues to explore the principal question as *his* judgment sees fit, he will be penalized. He must now consider the penalties attached to his course—penalties that have nothing to do with the nature of the alternatives (the schools, their programs, costs, etc.) and everything to do with the rulers' wishes. Absent the government restrictions, he is able to assess the issue on its merits. With them, he must assess it on the basis of the external penalties he will suffer if he reaches conclusions that the authorities disapprove of.

Simply put, force is a game-changer. The threat of coercion changes the subject. It diverts a person from thinking about the best answer to a substantive question by evidence and logic to calculating, instead, *what penalties would be imposed if I conclude a or b or c? How likely am I to suffer those penalties? How severe are they? Are they worth risking?* This is a completely different set of questions, the pursuit of which does not advance him at all on finding the logical answer to his original question (be it about schooling, religion, or anything else). The investigation of those is sidetracked, at best, burdened by the imposition of this new cascade of questions, the answers to which tell him nothing about the merits of one school—or one religion—versus another.

In short, laws that deny intellectual freedom pre-empt a person's ability to reach conclusions about an issue rationally—by the relevant evidence and logic. For the threat to punish deviant thoughts does not offer *reasons* why one conclusion is more sound than another. It does not illuminate the actual character of the alternatives. By attaching penalties to particular lanes of thought, such laws simply impose arbitrary barriers (arbitrary, insofar as they bear no relation to the logic of alternative conclusions about the substantive question).

Consider two kinds of propositions:

(1) If you do x, it will be bad for you because of the nature of x (e.g., If you maintain that diet, you are likely to suffer from heart disease).

(2) If you do x, it will be bad for you because we will punish you (e.g., If you maintain that diet, we will fine you).

Laws repressing religious freedom are of the second type. In the minds of those subject to them, their commands will stand as random roadblocks to reasoning about the issue. The restricted person is given no evidence to consider and no arguments to examine. For the purposes of rationally answering a substantive question (What *should* my religious views be?), they are useless. Indeed, Rand claims that they are worse than useless<sup>120</sup> because such arbitrary imperatives impose barriers to cognition.<sup>121</sup> Since the victim is given no reason to believe these state-ordained ideas but only reason to obey the attendant orders, they will paralyze his ability to proceed rationally. Proceeding rationally, as we have seen, would require interrogating the truth of premises, examining their logical implications, identifying the relationships between one hypothesis and other hypotheses and conclusions, and so on. When ideas are presented to a person not as entrants in the enterprise of rational examination of an issue but as edicts that stand on force, however, they will function in the mind as red lights—*Stops!*—to the logical progression of thought.<sup>122</sup>

To be clear, Rand's claim is not that laws that deny intellectual freedom render a person incapable of all rational thought.<sup>123</sup> They render him incapable of proceeding rationally within the sphere of compliance. That is, they make it impossible for him to proceed in a way that at once complies with the arbitrary demand and that follows the rational course that can lead to knowledge on the relevant question. For he must continually second-guess his mind's rational inferences: *But will this please*

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120. PEIKOFF, *supra* note 84, at 316.

121. See RAND, *What is Capitalism?*, *supra* note 92, at 17, 23; PEIKOFF, *supra* note 84, at 313.

122. Yet another way to frame the difference: "Do as he says" and "Be rational" issue very different kinds of instructions. When a law commands you to "Do as we say" *simply because* we say it and we will hurt you if you do not (rather than because that law is rationally justified by the proper mission of government), that command is incompatible with the direction to be rational.

123. See RAND, *What is Capitalism?*, *supra* note 92, at 17.

*the authorities? Will this step satisfy them, or might it appear a sign of my insubordination? Might it lead me to another inference that would upset them? If so, should I really continue along that line of thought?* Appeasing those in power becomes the paramount concern, since their disfavor could quash all of a person's plans. It is in this way that intellectual repression thwarts the use of reason and obstructs the acquisition of knowledge.<sup>124</sup>

### B. No "Interviews With the Gods": The First Amendment and the Function of Government

Because many defenders of religious freedom invoke the First Amendment as its foundation, it is important to understand how the Amendment relates to the Lockean line of defense. Far from its serving to privilege religion, the full context reveals that the Amendment's treatment of religion is perfectly consonant with Lockean reasoning. The Founders established a deliberately secular government.<sup>125</sup> They did so based on the same appreciation of the importance of mind freedom (rather than religion-specific freedom) that flows out of the Lockean insight. Ultimately, this discussion should thus reinforce our appreciation that the propriety of religious freedom does not rely upon any special value of religion.<sup>126</sup>

In the American legal system, freedom of religion stands on the conviction that religious belief falls beyond the scope of a government's legitimate authority. The premise beneath the First

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124. Other sources further explain the difference between engaging with a question when free and when under coercive threat of penalties. See TARA SMITH, MORAL RIGHTS AND POLITICAL FREEDOM 143-155 (1995) [hereinafter SMITH, MORAL RIGHTS]; TARA SMITH, JUDICIAL REVIEW IN AN OBJECTIVE LEGAL SYSTEM 99-105 (2015) [hereinafter SMITH, JUDICIAL REVIEW]; PEIKOFF, *supra* note 84, at 310-323. Wright offers an extended breakdown of Rand's view of the relationship between force and the human mind. Wright, *supra* note 83, at 35-75; Darryl Wright, "A Human Society": *Rand's Social Philosophy*, in *A Companion to Ayn Rand* 235-37 (Allan Gotthelf & Gregory Salmieri eds., 2016). Rand frequently discussed intellectual freedom. See generally AYN RAND, PHILOSOPHY: WHO NEEDS IT 211-230 (1982) (discussing various views of Supreme Court justices on intellectual freedom). See *id.* at 197-209 (discussing the problems associated with even minimal government censorship); AYN RAND, THE RETURN OF THE PRIMITIVE: THE ANTI-INDUSTRIAL REVOLUTION 176-78 (Peter Schwartz ed., 1999).

125. SUSAN JACOBY, FREETHINKERS: A HISTORY OF AMERICAN SECULARISM 5-6 (2004).

126. None of what follows is to suggest that the Founders adhered to a single, uniform position on religious and intellectual freedom, nor that they had a fully developed understanding of such freedom's philosophical foundations. What I present was, however, the overwhelmingly dominant view. See KRAMNICK & MOORE, *supra* note 63, at 16.

Amendment is that a person's ideas are of no concern to the government.<sup>127</sup> Ideas as such—a person's ideas about god or religion or his ideas about politics, morals, medicine, science, literature, leisure, the weather, whatever—are simply not germane to a government's responsibilities. Whether a given individual thinks, what he thinks about, and the conclusions he might reach alter not at all his status as a rights holder. This is the sole concern of government: what are the individual's rights, and do a particular person's actions interfere with the rights of others?

The reason that we should separate church and state, in other words, is that a person's religion *makes no difference* to the proper functioning of government. The government has a specific, circumscribed mission: the protection of individual rights.<sup>128</sup> People's religious beliefs do not affect its ability to accomplish that mission.<sup>129</sup> Madison affirmed as much when he wrote:

A just Government instituted to secure & perpetuate [liberty] needs [ecclesiastical establishments] not. Such a Government will be best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither

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127. See Ben Clements, Note, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532, 534 (1989).

128. See generally U.S. CONST. (the Constitution was created to "secure the Blessings of Liberty to ourselves . . ."); THE DECLARATION OF INDEPENDENCE (U.S. 1776) (outlining our inalienable rights including "Liberty"); THE FEDERALIST NO. 10, at 78 (James Madison). See also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 47 (2004) (discussing the meaning of the Necessary and Proper Clause); RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* 167-68 (2016) (discussing the purpose of the Constitution); TIMOTHY SANDEFUR, *THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY* 12-13 (2014) (discussing Jefferson's and Madison's views on the need to protect individual liberty); SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 6 (1995) (discussing that, according to Jefferson, the Constitution should be interpreted to protect natural rights); KRAMNICK & MOORE, *supra* note 63, at 73 (discussing that Locke argued that the function of government is to protect liberty). As Evan Bernick puts it, notwithstanding their other differences, "[the Framers] shared the same fundamental understanding of the proper function of government. For the Framers, as for Locke, government was a means of protecting the natural rights of the individual 'to dispose, and order as he lists, his person, actions, possessions, and his whole property.'" Bernick, *supra* note 56, at 21.

129. Function is central to the structure and operations of a proper legal system. See SMITH, *JUDICIAL REVIEW*, *supra* note 124, at 257.

invading the equal rights of any Sect, nor suffering any Sect to invade those of another.<sup>130</sup>

Accordingly, Madison held, “the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience’ is held by the same tenure with all our other rights.”<sup>131</sup> Note that the importance of religion (either actual or perceived) gives it no greater weight among legal considerations. Jefferson similarly held that a person’s religious views should neither expand nor shrink his legal freedom.<sup>132</sup>

All of this fits perfectly with the Lockean conception of force and of government (not surprisingly, since Locke’s writings were a primary influence on the Founders).<sup>133</sup> According to Locke, “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 mans [sic] Goods and Person.”<sup>134</sup> Men contract to obey civil authority not to be told “what to believe or how to pray but simply for it to keep the peace.”<sup>135</sup> While a person may “employ as many Exhortations and Arguments as he pleases, towards the promoting of another man’s Salvation,” on Locke’s view, “Force and Compulsion are to be forborne.”<sup>136</sup> Every man “has the supreme and absolute Authority of judging for himself. And the Reason is, because no body else is concerned in it, nor can receive any prejudice from his Conduct therein.”<sup>137</sup> As the influential thinker Joseph Priestley asked, “How is any person injured by my holding religious opinions which he disapproves of?”<sup>138</sup> The state should be involved only if I threaten my

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130. Madison, *A Memorial and Remonstrance*, *supra* note 47.

131. *Id.*

132. Jefferson, observing that “opinion[s] in matters of religion . . . shall in no wise diminish, enlarge, or affect their civil capacities.” *Thomas Jefferson and the Virginia Statute for Religious Freedom*, VA. HIST. SOC’Y, <http://www.vahistorical.org/collections-and-resources/virginia-history-explorer/thomas-jefferson> [https://perma.cc/EZ53-ELM9].

133. It was not only Locke’s political thought that was influential. Locke’s arguments dominated eighteenth century views on epistemology and language. “To the extent that Americans engaged in epistemological thought about language, including constitutional language, they began with the remarkable arguments in Locke’s *Essay*.” Philip Hamburger, *The Constitution’s Accommodation of Social Change*, 88 MICH. L. REV. 239, 306 (1989).

134. LOCKE, CONCERNING TOLERATION, *supra* note 25, at 46.

135. KRAMNICK & MOORE, *supra* note 63, at 75 (characterizing the Lockean view).

136. LOCKE, CONCERNING TOLERATION, *supra* note 25, at 47.

137. *Id.*

138. KRAMNICK & MOORE, *supra* note 63, at 82. Quote from Priestley, the British chemist who discovered oxygen, emigrated to America, and was a close friend of Franklin and Jefferson, exerting influence in the Founders’ intellectual circles. *Id.* at 80-81.



neighbor's "person, property or good name."<sup>139</sup> As Jefferson memorably put the thought, "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."<sup>140</sup>

In the same vein, Rand held that government should take no "judicial cognizance whatever of [a man's] ideology."<sup>141</sup> As Leonard Peikoff explains her view, "The goal of a proper society . . . is not to compel truth or virtue (which would be a contradiction in terms), but to make them *possible*" by preserving individuals' freedom.<sup>142</sup>

The point is, the Lockean view that the function of government is the protection of individual rights—a view that was constitutionally enacted by the American Founders—is a logical outgrowth of recognition of the impotence of physical instruments to achieve intellectual ends. (Handcuffs, pistols, and prisons cannot assist cognitive functioning.) What Rand brought out more fully is the reason why the function of government is limited to the protection of individual rights, namely, the fact that man's life requires freedom from force.<sup>143</sup> That is, man's material well-being depends on the exercise of reason—on his ability to engage in rational, knowledge-generating thought. All those needs-satisfying goods that we spoke of earlier—everything from the most basic food and shelter to the most sophisticated medical, transportation, or communications devices—can only be had by means of logical inferences. The requisite rational thought, in turn, requires the absence of physical force, as we detailed in the previous section, IV. A. If a man is to be respected as entitled to seek to enjoy his life, he must be free of others' forceful interference.

For the purpose of understanding the value of religious freedom in relation to the First Amendment, it is significant that

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139. *Id.*

140. THOMAS JEFFERSON, THE FEDERALIST PAPERS PROJECT: NOTES ON THE STATE OF VIRGINIA 176 (1781), <http://www.thefederalistpapers.org/wp-content/uploads/2012/12/Thomas-Jefferson-Notes-On-The-State-Of-Virginia.pdf> [<https://perma.cc/WHQ5-WMDG>].

141. AYN RAND, THE NEW LEFT: THE ANTI-INDUSTRIAL REVOLUTION 99 (1971).

142. PEIKOFF, *supra* note 84, at 367. He adds that while "[a] proper government is based on a definite philosophy, [it may] play no role in promoting that philosophy." *Id.*

143. Ayn Rand, *Man's Rights*, in CAPITALISM: THE UNKNOWN IDEAL 320, 322-28 (1967) [hereinafter Rand, *Man's Rights*]; PEIKOFF, *supra* note 84, at 310-23.

the Amendment does not solely address religion.<sup>144</sup> Its concern is intellectual freedom, more broadly. Each of its specified subjects—religion, speech, assembly, petition, and press—involves the exercise of thought.<sup>145</sup> As Onkar Ghate has observed, the now-familiar idea of the separation of church and state is actually a shorthand for the separation of state and ideas.<sup>146</sup> The rationale for carving out this intellectual domain is, in the words of Jefferson, that “the legislative powers of government reach actions only, and not opinions.”<sup>147</sup> The fact that Jefferson made this point in the course of discussing religious freedom testifies to his conviction that even religious freedom is simply one aspect of wider intellectual freedom. Moreover, Jefferson held that whatever violates any aspect of the First Amendment “throws down the sanctuary which covers the others”—further evidence of his belief in the unity of the Amendment’s concerns.<sup>148</sup> Indeed, it is on exactly this premise that U.S. courts have often resolved disputes ostensibly over freedom of religion by invoking the broader right of secular conscience.<sup>149</sup>

The Founders’ regard for human intellect is well-known. Thomas Paine proclaimed, “The most formidable weapon against errors of every kind is Reason.”<sup>150</sup> “My own mind is my own church.”<sup>151</sup> Jefferson pledged “eternal hostility against every form of tyranny over the mind of man.”<sup>152</sup> Madison urged that a

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144. See U.S. CONST. amend. I.

145. U.S. CONST. amend. I.

146. Onkar Ghate, *A Wall of Separation Between Church and State: Understanding This Principle’s Supporting Argument and Far-Reaching Implications*, in *THE PHILOSOPHY OF CAPITALISM: OBJECTIVISM AND ALTERNATIVE APPROACHES*, AYN RAND SOCIETY PHILOSOPHICAL STUDIES (Gregory Salmieri & Robert Mayhew eds.) (forthcoming 2017) (manuscript at 19) (on file with author).

147. Thomas Jefferson, *A Wall of Separation*, in *THE SEPARATION OF CHURCH AND STATE* 124, 130 (Forrest Church ed., 2004).

148. DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 63 (2002).

149. See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943); *U.S. v. Seeger*, 380 U.S. 163, 180, 186 (1965); *Welsh v. U.S.*, 380 U.S. 333, 339 (1970) (concerning military conscription). Warren Burger’s claim that freedom of association and freedom of expression are “two peas from the same pod” is another latter-day reflection of this holistic understanding of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 244 (1976) (Burger, C.J., dissenting).

150. THOMAS PAINE, *THE AGE OF REASON* 3 (1794).

151. *Id.* at 6.

152. Thomas Jefferson, *Letter to Dr. Benjamin Rush, September 23, 1800*, U. OF GRONINGEN,

clause explicitly asserting the right to conscience be added to Article I of the Constitution, prior to any discussion of Amendments.<sup>153</sup> The proposal was not adopted, according to some, only because it was considered a needless redundancy; the wider right to intellectual freedom was well-understood.<sup>154</sup> The point is, this respect for intellectual activity helps to explain the First Amendment's explicit protection of several of its forms.<sup>155</sup>

If this much shows that the First Amendment was not designed to reflect any special reverence for religion,<sup>156</sup> neither was the Founders' conception of the *authority* of government wedded to theism. Rather, as John Adams explained, the United States is a "government[] erected on the simple principles of nature."<sup>157</sup> Its architects never "had interviews with the gods or were in any degree under the inspiration of Heaven."<sup>158</sup> This is a government "founded on the natural authority of the people alone, without a pretense of miracle or mystery."<sup>159</sup> Correspondingly,

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<http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl134.php> [<https://perma.cc/ZVY4-TQNM>]. Jefferson also famously advised, "Fix reason firmly in her seat, and call to her tribunal every fact, every opinion. Question with boldness even the existence of a god; because, if there be one, he must more approve of the homage of reason, than that of blindfolded fear." Thomas Jefferson, *Letter to Peter Carr Paris, Aug. 10, 1787*, U. OF GRONINGEN, <http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl61.php> [<https://perma.cc/SGK2-BZ6V>].

153. BURT NEUBORNE, *MADISON'S MUSIC: ON READING THE FIRST AMENDMENT* 209 (2015).

154. *Id.* at 209-10. The proposed clause read, "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.* at 209.

155. See generally Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002) (arguing that the Framers were basically unified in their reasoning for separation of church and state on the grounds of liberty of conscience).

156. David Anderson has argued that in conceiving of the First Amendment, the Founders did not begin with a general theory of intellectual freedom, but rather, forged solutions to specific grievances as circumstances demanded (e.g., restrictions on the press). See David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 488 (1983); David A. Anderson, *The Origins of the Press Clause*, in *THE FIRST AMENDMENT, FREEDOM OF SPEECH: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE* 65, 72-74 (Vikram David Amar ed., 2009). As a matter of history, this may be correct. If it is, however, their having come gradually to an increasingly robust understanding of intellectual freedom would not tell against the validity of the idea that intellectual freedom is a deeper and wider principle than religious freedom and that that is the essence of what they sought to safeguard in the First Amendment.

157. KRAMNICK & MOORE, *supra* note 63, at 41.

158. *Id.*

159. *Id.*

as Oliver Ellsworth<sup>160</sup> encapsulated the reigning view, “The business of civil government is to protect the citizen in his rights . . . civil government has no business to meddle with the private opinions of the people . . . . Legislatures have no right to set up an inquisition and examine into the private opinions of men.”<sup>161</sup>

The larger lesson for reconciling the First Amendment’s reference to religious freedom with the Locke-Rand line that I have defended is straightforward. The Founders’ commitment to a secular government whose authority is limited by its specific function and their conception of the First Amendment as safeguarding intellectual freedom are entirely consonant with the Lockean thesis that coercion cannot compel conviction and that the exercise of reason requires freedom from force. Even in the thinking of those who framed the First Amendment, the fundamental justification of religious freedom was not radiated by the value of religion. Rather, religious devotion was recognized as merely one of myriad options that a person had for exercising his freedom.<sup>162</sup> Inserting the word “religious” before the term “liberty” neither widens the scope of an individual’s rights nor shrinks the legal system’s responsibility to safeguard others’ rights. “Religious liberty” designates one of the types of uses that a person might make of his rights—no more and no less.<sup>163</sup>

The fact that a great number of people espouse religion and that it has at times exerted great influence over the fate of nations bestows on it no different value *as the object of legal protection*

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160. TOM W. CAMPBELL, *FOUR SCORE FORGOTTEN MEN: SKETCHES OF THE JUSTICES OF THE U.S. SUPREME COURT 95-99* (1950) (discussing that Ellsworth was a delegate to the Constitutional Convention, member of the first Congress, and briefly Chief Justice of the Supreme Court).

161. KRAMNICK & MOORE, *supra* note 63, at 42.

162. This reflected the prevailing conception of rights. “Both Federalists and Anti-Federalists agreed that the rights of Americans were innumerable. In particular, they agreed that they had countless natural rights . . . to eat, sleep, shave and do any number of other things of which human beings were capable . . . .” Philip A. Hamburger, *Trivial Rights*, 70 *NOTRE DAME L. REV.* 1, 30 (1994).

163. It is crucial to understand that this concerns only the proper *freedom* of a person’s actions rather than the larger, “all things considered” moral character of his action. It can be perfectly logical to condemn a person’s action as wrong or immoral, while affirming his right to take the action—that is, as something that the person should be free to do. (It might be wrong to attend the Catholic mass, for example, or to drink alcohol or to watch pornographic film, but a person should be free to engage in these activities; the two are distinct questions.) See SMITH, *MORAL RIGHTS*, *supra* note 124, at 186.

than any of the less momentous ways that a person might exercise his freedom. Without question, religion has exerted monumental influence in countless people's lives. Because of this, we tend to assume that it has special weight. In certain respects, it does. From the perspective of a proper legal system, however—whose singular mission is the protection of individuals' liberty—it does not. For again, whether or not a person embraces a religion in itself makes no difference to his status as a bearer of rights—either to the rights that he possesses or to his obligations to the rights of others. If a person is inspired by religion to act in ways that threaten others' rights, he *is* properly subject to government's forcible restriction. The justification of this is the person's action, however, not his beliefs, since only actions can impinge on others' rights.

What the Founders understood and what Rand would especially emphasize is that the right to engage in a particular action (be it intellectual or physical) does not depend on the value of that action.<sup>164</sup> Rather, it stems from the fact that a person's life is his, morally, to lead as he likes.<sup>165</sup> As long as he does not infringe on others' rights, a man is entitled to do with it as he pleases.<sup>166</sup> Religious laissez-faire is of a piece with economic laissez-faire.<sup>167</sup> Consequently, one does not need to believe in the

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164. Rand, *Man's Rights*, *supra* note 143, at 321-22.

165. *Id.*

166. Rand writes, "Under a proper social system, a private individual is legally free to take any action he pleases (so long as he does not violate the rights of others) . . ." Ayn Rand, *The Nature of Government*, in *CAPITALISM: THE UNKNOWN IDEAL* 329, 331-32 (1967). Rand outlines her basic conception of rights in "Man's Rights." Rand, *Man's Rights*, *supra* note 143, at 322.

167. Recall the interplay between economic and intellectual freedom discussed in Section IV.A. The Eighteenth Century Anglo-American conception of material and intellectual freedom united marketplace freedom, political freedom, and spiritual freedom. See KRAMNICK & MOORE, *supra* 63, at 70. Rand understood the intimate connection between these types of freedom. See AYN RAND, *FOR THE NEW INTELLECTUAL: THE PHILOSOPHY OF AYN RAND* 23 (1961) [hereinafter *RAND, FOR THE NEW INTELLECTUAL*] ("*Intellectual freedom cannot exist without political freedom; political freedom cannot exist without economic freedom; a free mind and a free market are corollaries.*"); PEIKOFF, *supra* note 84, at 353 ("*Freedom is indivisible*" and "*There can be no right to think apart from the right to act.*"); *Id.* at 313 ("*Since man is an integrated being of mind and body, any attempt to force his mind necessarily represents an attempt to rule his actions and, vice versa.*"); Onkar Ghatge, "*A Free Mind and a Free Market Are Corollaries*": *Rand's Philosophical Perspective on Capitalism*, in *A COMPANION TO AYN RAND* 222-242 (Allan Gotthelf & Gregory Salmieri eds., 2016) explaining that regardless of whether a person wielding force demands that you surrender your wallet or that you accept a certain religious view, the fundamental demand for surrender of your judgment is the same. On the importance of

value of religion to make sense of the First Amendment's protection of religious liberty. As both the historical and philosophical context make clear, religious freedom is not *about* religion. The propriety of religious freedom stems, fundamentally, from the value of intellectual freedom. The Lockean's recognition of the futility of force to deliver certain kinds of intellectual results, fortified by Rand's more exact recognition that force obstructs *rational* thought and the acquisition of knowledge, is a major contribution to our understanding of this value. Thus the First Amendment does not present an alternative to the Lockean defense of religious freedom. When its context and rationale are properly understood, it is a logical manifestation of that defense

### C. A Forced Mind Is Not a Valuable Mind: Rand's Development of the Lockean Line

Having covered a good deal of territory, let us take stock. Where do things stand in the debate between Lockean and their critics, and how do Rand's views fit in?

The critics contend that the Lockean argument fails to prove the futility of force for determining people's beliefs.<sup>168</sup> Through coercive if indirect means (such as by limiting people's exposure to certain ideas or requiring their participation in certain activities), a government allegedly can manipulate people into forming desired conclusions.<sup>169</sup> For the purpose of inculcating certain beliefs, the tools of state coercion are more potent than Lockean allow.

In this, the critics are correct, although the Lockean do not deny force's power to incentivize overt behavior. What the first-wave Lockean and their critics both fail to appreciate, however, is that what is at stake is much more than people's espousal of a particular creed, such as Anglicanism. The problem is not that *religion* cannot be served by force, as Locke laments.<sup>170</sup> The problem, on Rand's analysis, is that force prevents the exercise of reason and the attainment of genuine knowledge about any

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intellectual freedom, see Darryl Wright, "A Human Society": *Rand's Social Philosophy*, in *A COMPANION TO AYN RAND* 217-37 (Allan Gotthelf & Gregory Salmieri eds., 2016).

168. Jennifer Biess, *Locke's Theory of Intolerance*, 15 *RES PUBLICA: J. UNDERGRADUATE RES.* 1, 93-94 (2010).

169. LEITER, *supra* note 17, at 10-12; Waldron, *supra* note 17, at 61-64.

170. LOCKE, A LETTER CONCERNING TOLERATION, *supra* note 25, at 47.

subject—religion, biology, physics, metaphysics, psychology, economics, human relationships—the gamut.<sup>171</sup> Knowledge can only be had when a person's thinking is, in its fundamentals, evidence-based rather than force-decreed; when it is logic-guided rather than weapon-averting. Dodging bullets is not the path to curing cancer.

Even as the Lockean argument marks a real advance, then, it is at best transitional, pointing us to a previously under-appreciated fact, yet still hamstrung by allegiance to particular conclusions.<sup>172</sup> Locke's own denial of religious freedom to Catholics and atheists reflects this failure to understand fully the basis for religious freedom (which would justify that freedom for everyone, not only those of a certain faith).<sup>173</sup> Nonetheless, by exploring the roots of religious freedom in the nature of thought—in the *process* of thinking—Lockeans lead us to consider the conditions necessary for all thinking, not only that concerning religion.

I have argued that the content of what a person believes, whether religious or not, is immaterial to his right to religious freedom. What the Lockeans glimpsed and what Rand appreciates more fully is that without freedom, a person would not be able to use his rational faculty *as* the rational faculty.<sup>174</sup> He would not be able to apply reason to all facets of reality, to all available information on a given subject and to all the thoughts that might be relevant to it. When a person's thinking is constricted by coercive penalties he will suffer if he raises *that* question or if he considers *that* evidence or if he presses *that* objection, he is permitted only to contemplate a subset of reality, the redacted version that the government approves. This will hamper his ability to know things (to put it mildly).

Rand's contention is that a forced mind is not a valuable mind.<sup>175</sup> It is valuable neither to its owner nor to the people

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171. LEONARD PEIKOFF, *THE OMINOUS PARALLELS: THE END OF FREEDOM IN AMERICA* 336 (1982).

172. While some of the Lockeans were more wed to particular religious conclusions than were others, as a group, they did not fully grasp the relationship between force and rational thought.

173. Frederick C. Giffin, *John Locke and Religious Toleration*, 9 J. CHURCH & ST. 3, 379-80, 84 (1967).

174. RAND, *What is Capitalism?*, *supra* note 92, at 322.

175. RAND, *What is Capitalism?*, *supra* note 92, at 11, 17, 23; RAND, *The Objectivist Ethics*, *supra* note 84, at 25-26; Rand, *Man's Rights*, *supra* note 143, at 322.

around him—not as a human mind. When the threat of force obstructs a person’s exercise of reason, it destroys that person’s prize feature—man’s “comparative advantage,” in the language of economists.<sup>176</sup> Religious repressors may be correct that if you treat a man like a dog, you can get him to act like a dog; physical stings can train obedience. Yet, you will reap no greater value than that: compliance with dictated orders. The intellectual capacity of the forcers will limit the intellectual capacity of their victims. Under intellectual repression, you will reap a society no more creative, no more inventive, no more clever or resourceful or innovative or insightful for battling the Zika virus or engineering a safer car or unleashing the powers of silicon than are the minds of the force-wielders.<sup>177</sup> Their intellectual abilities set the ceiling on that society’s potential.<sup>178</sup>

We might thus cast the difference between the original Lockeans and Rand as follows. First-wave Lockeans claimed that a coerced belief cannot be authentic. When adopted due to pressure from the magistrate’s sword, a person’s “conclusions” are not truly his. (And this is the nub that the critics challenge.) Rand’s claim, by contrast, is that a coerced belief cannot be rational. It cannot be a means of cognition. For it cannot stand on a full logical reckoning with all the relevant evidence, but only with that portion of evidence that escapes the censors’ scissiors. A person’s conclusion about a given topic might be rational within the narrow parameters of the information he is permitted to consider, but such a shrunken, distorted image of reality cannot yield knowledge of reality. Yet that is what human well-being depends on. No fact is extinguished by being misrepresented. Withholding information about Zika does not change what people need to know to avoid it or what researchers need to know to treat

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176. Frank H. Easterbrook, *Comparative Advantage and Antitrust Law*, 75 CAL. L. REV. 983, 984 (1987).

177. See Trevor McAllister-Day, *UW Researchers Make Progress Fighting Zika*, THE DAILY OF THE U. OF WASH. (Oct. 11, 2016), [http://www.dailyuw.com/science/biology\\_and\\_medicine/article\\_07863950-8e90-11e6-98ab-03dc2962cbc9.html](http://www.dailyuw.com/science/biology_and_medicine/article_07863950-8e90-11e6-98ab-03dc2962cbc9.html) [https://perma.cc/SGR8-QUYF]; Ezra Dyer, *Why Cars Are Safer Than They’ve Ever Been*, POPULAR MECHANICS (Sept. 11, 2014), <http://www.popularmechanics.com/cars/a11201/why-cars-are-safer-than-theyve-ever-been-17194116/> [https://perma.cc/N4UM-8ERL].

178. See RAND, FOR THE NEW INTELLECTUAL, *supra* note 167, at 134-35; RAND, *The Objectivist Ethics*, *supra* note 84, at 25-26; RAND, *What is Capitalism?*, *supra* note 92, at 17.



it. Whereas for Lockeans, then, it is salvation that requires a free mind, for Rand, it is life, humans' ability to survive and flourish. Only a mind that is uninhibited by force in its pursuit of evidence and logic can answer the challenges that human well-being naturally presents.

## V. CONCLUSION

Clashes between religiously inspired political ideologies as well as demands for religion-based exemptions from certain laws have, over the past several years, inflamed debates over religious freedom. What is its meaning? What is its scope? My contention is that we cannot understand what religious freedom properly protects until we understand *why* it protects—its basic justification and its value. The inadequacy of reigning accounts is evidenced by the ceaseless stream of precarious balancing acts that only temporarily quiet conflict.

I have argued that an important line of support for religious freedom raised by John Locke, John Milton, and other Seventeenth and Eighteenth Century thinkers has been too casually dismissed by contemporary scholars. While their analysis was far from perfect, the Lockeans advanced the debate over religious freedom to more fundamental and more instructive territory concerned with the very nature of rational thought. What the Lockeans help us appreciate is that the propriety of religious freedom is not *sui generis*; it is not rooted in a distinct value of religion.<sup>179</sup> Rather, it lies in the nature and needs of the human mind. Building on the Lockeans' advance, Ayn Rand has more recently argued that freedom is the precondition of man's ability to exercise his rational faculty and, thereby, gain knowledge. Accordingly, the case for religious freedom is part of the deeper and wider case for intellectual freedom. Its value stems from the value of a free mind.<sup>180</sup>

The Lockeans argued that a government's instruments of physical force cannot deliver intellectual results. While a government can declare certain ideas to be true, impose penalties

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179. This was not necessarily all of their intention, but it is the implication and the lesson of their arguments.

180. See SMITH, MORAL RIGHTS, *supra* note 124, at 52-52; Rand, *Man's Rights*, *supra* note 143, at 320-33; PEIKOFF, *supra* note 84, at 311 (discussions of force); Wright, *supra* note 83, at 43-79.

for dissent, and thereby incentivize people to say what it wants them to say and to act as it wants them to act, it cannot, by these means, transform people into true believers. What Rand adds, more exactly, is that physical tools cannot make those who are coerced *rational* believers. Such methods cannot make a person *understand* that which reason shows.

In the larger scheme of things, this is what most matters. Human life requires the satisfaction of certain needs; knowledge is required to be able to meet those needs. If our ultimate aim is to advance human well-being, getting people to believe and act as a given government decrees does no good. It might accomplish what particular rulers want, but that, in itself, has no objective value.<sup>181</sup> Coerced intellectual conformity is not a viable route to progress.

Why does this matter? If we do not understand the basis of religious freedom, we will not understand its proper application—exactly what the law should protect, in specific disputes. The consequences redound to everyone, not only the religious. Misunderstandings of religious freedom reflect misunderstandings of freedom. When “religious freedom” is warped to assume unwarranted dimensions, rightful freedom suffers. An erroneous notion of religious freedom can only be respected by means that encroach on others, as other individuals are made to provide the time off, for instance, or to pay for the medical insurance or to lose the limbs in fighting the wars that religious citizens object to. Some people’s freedom will be wrongly denied in order to accommodate the beliefs of the religious.

Further, the repression of religion, by obstructing a person’s exercise of reason in the ways that we have examined, will naturally require wider repression and inflict wider damage. Ideas are interrelated. Because an idea carries logical implications, the affirmation or rejection of any one idea inescapably carries implications concerning others—concerning their truth, their relevance on a given issue, their relative weight

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181. It cannot make the rulers’ ideas true. If some of them are true, it cannot make people understand those ideas. And it cannot make beliefs that are adopted at the point of a gun (to avert force) rather than by means of independent inference a sound basis for individuals’ beliefs, for individuals’ actions, or for government policy.

in supporting or weakening other hypotheses, and so on.<sup>182</sup> That the bridge is rickety entails that anyone concerned with safety should use it with caution. That the daily consumption of red wine has this effect, that gun control has that effect, that the biopsy shows this quality, each conceivably carries consequential implications for other beliefs and sensible actions.

Given the inherently relational character of ideas, for a government to enforce a particular religious creed (or any intellectual doctrine, for that matter) will require repressors to confine people much more tightly than we might initially suppose. The study of geology can throw into question religious doctrines concerning the origin of the universe; the study of physics can throw into question religious doctrines concerning miracles or an afterlife. Certain conclusions in biology or human psychology threaten religious doctrines about male-female relationships or marriage or women in the workplace or women driving cars.

In short, to uphold a particular orthodoxy, it is not simply that the Catholic may not study the teachings of Calvin, for example. He should not study *anything* that might threaten his embrace of the anointed orthodoxy. Thus religious repression naturally bleeds into other areas. Even if a regime's laws officially address only inquiry concerning a specific religion, their effect will extend to encompass inquiry about related matters—and about matters related to those questions, and other matters related to those, and so on. To be safe, the individual should avoid all such temptations and the state, if it is serious about its mandated orthodoxy, should not allow exposure to such temptations.<sup>183</sup> On the repressors' premise that some ideas must be accepted *no matter what*—regardless of what the evidence and logic indicate—the safest course is for the individual not to entertain any ideas in a dangerous neighborhood and for the state not to permit him to entertain such ideas.

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182. On knowledge as interconnected, see AYN RAND, INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY 10 (Harry Binswanger & Leonard Peikoff eds., 1979); PEIKOFF, *supra* note 84, at 121-41; HARRY BINSWANGER, HOW WE KNOW: EPISTEMOLOGY ON AN OBJECTIVIST FOUNDATION 194-95, 198 (2014); RAND, THE BEST OF HER Q&A, *supra* note 100, at 32-33.

183. It should limit the "occasion" of sin. Lots of fruit on the tree of knowledge will have to be forbidden.

Policing the orthodox is full-time work. For all manner of ideas stand to threaten it. If religious repression is to be effective, its subject matter cannot be contained.

The upshot is, religious beliefs are not the only casualty of religious repression. Because such repression is, more fundamentally, an obstruction of the rationally functioning mind, it stifles all kinds of thinking about all kinds of subjects. Correspondingly, anyone who values rational inquiry and knowledge needs to understand the value of religious freedom. Only with an accurate grasp of its basis can we properly respect it and preserve that value—and, correspondingly, the value of all freedom.