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# NEUROSCIENCE AND THE IN CORPORE-TED FIRST AMENDMENT

RODNEY J.S. DEATON \*

## INTRODUCTION

Late in the October 2002 term, the Justices of the Supreme Court decided the case *Sell v. United States* in which a criminal defendant pleaded to the Court to forbid his treating psychiatrists from forcing the administration of antipsychotic medication that would render him competent to stand trial.<sup>1</sup> *Sell* raised questions about a criminal defendant's "right to refuse treatment" - an issue

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1. *Sell v. United States*, 539 U.S. 166 (2003). "Psychotic" is a general term used to describe psychological states which may arise out of a variety of medical/psychiatric conditions. In psychosis, persons lose touch with reality as it is commonly understood, causing them to experience symptoms of hallucinations (false perceptions) and delusions (fixed, false beliefs not shared by members of a distinct subculture). See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, TEXT REVISION 821-27 (4th ed. 2000) [hereinafter DSM-IV-TR]. "Psychotropic medication" refers to the classes of medications used to treat psychiatric disorders. "Antipsychotic medication" refers to the class of psychotropic medications used to treat the severe symptoms of psychosis.

that courts and commentators have debated quite loudly for many years.<sup>2</sup>

Yet *Sell*, written by Justice Breyer, is itself a relatively quiet opinion, at least as far as Supreme Court opinions often go - short in length and calm in rhetoric.<sup>3</sup> *Sell* is a straightforward extension of the Court's previous cases on forced antipsychotic medication.<sup>4</sup>

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2. In this article, I will limit discussion of the "right to refuse treatment" to the right to refuse treatment with psychotropic medications. The term has also been applied generally to the right to refuse medical care such as, for example, at the time of death. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 819-21 (2d ed. 2002).

In terms of the right to refuse psychotropic medications, judicial and academic commentators have consistently divided between those who have tended to favor an approach with more judicial oversight of the treatment refusal process, see, e.g., *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982); *Rivers v. Katz*, 495 N.E.2d 337 (N.Y. 1986); MICHAEL L. PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* 125-56 (2000); Robert Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. U. L. REV. 461 (1977); and those who have tended to favor an approach more deferential to medical decision making. See, e.g., *United States v. Charters*, 863 F.2d 302 (4th Cir. 1988) (en banc); ROBERT I. SIMON, *CLINICAL PSYCHIATRY AND THE LAW* 95-120 (2d ed. 1991); Paul S. Appelbaum & Thomas G. Gutheil, "Rotting With Their Rights On": *Constitutional Theory and Clinical Reality in Drug Refusal by Psychiatric Patients*, 7 BULL. AM. ACAD. PSYCHIATRY & L. 306 (1979).

3. Justice Scalia, joined by Justices O'Connor and Thomas, dissented on procedural rather than on substantive grounds. *Sell*, 539 U.S. at 186-87 (Scalia, J., dissenting). However, the demarcation between procedure and substance in this case was not at all clear. See *The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 226, 307 (2003) [hereinafter *Leading Cases*]. Justice Scalia took issue with the court invoking an exception to the final judgment rule to consider *Sell*, 539 U.S. at 188-90, 193, but Justice Breyer justified the action by writing that "involuntary medical treatment raises questions of clear constitutional importance," *Id.* at 176, thereby linking the procedural posture of the case to the substantive issue to be decided. See *Leading Cases* at 313-15.

4. See *Riggins v. Nevada*, 504 U.S. 127, 137-38 (1992) (holding that the State failed to show that the antipsychotic drug treatment was medically appropriate or essential, thereby violating prisoner's due process rights under the Fourteenth Amendment); *Washington v. Harper*, 494 U.S. 210, 227 (1990) (denying a prisoner's due process claim and upholding the State's interest in forced treatment of antipsychotic drugs).

In this case, as in those earlier cases, the Court carefully delineated the right of defendants to refuse treatment as one protected under the Fifth Amendment's Due Process Clause.<sup>5</sup> This quiet opinion is especially interesting, though, for what it did not address and what may be unavoidable in the near future. Justice Breyer never mentioned the First Amendment's Free Speech Clause as a constitutional basis for the right-to-refuse-treatment doctrine.<sup>6</sup> Yet, for more than twenty years, judicial opinion<sup>7</sup> and academic commentary<sup>8</sup> have articulated that this right should be based on

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5. The Fifth Amendment states in part "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

6. "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

7. See, e.g., *United States v. Brandon*, 158 F.3d 947, 953 (6th Cir. 1998); *Bee v. Greaves*, 744 F.2d 1387, 1393-94 (10th Cir. 1984); *United States v. Santonio*, No. 2:00-CR-90C, 2001 U.S. Dist. LEXIS 5892, at \*3-\*4 (D. Utah May 4, 2001); *Rogers*, 478 F.Supp. at 1366-67. In *Harper*, the defendant raised a First Amendment claim in a lower state court, but the Washington Supreme Court did not rule on the claim. *Washington v. Harper*, 759 P. 2d 358, 361 n.2 (Wash. 1988). Therefore, the United States Supreme Court did not consider the claim for procedural reasons. *Harper*, 494 U.S. at 258 n.32 (Stevens, J., concurring in part and dissenting in part). But see *infra* note 51 (discussing Justice Stevens' reference in his dissent to First Amendment themes).

At the time of *Sell*, the Court had before it on a petition of certiorari another case in which the appellate court had considered First Amendment arguments when it found for a heightened scrutiny review in the case. *United States v. Gomes*, 289 F.3d 71, 84-85 (2d Cir. 2002). After *Sell* was decided, the Court accepted the petition, vacated the judgment, and remanded the case to the lower courts for re-decision in light of *Sell*. *United States v. Gomes*, 539 U.S. 939, 939 (2003). Eventually the district court, applying the *Sell* standard (with no First Amendment references) ordered the defendant to take antipsychotic medication to make him competent to stand trial. *United States v. Gomes*, 305 F. Supp. 2d 158, 169 (D. Conn. 2004).

8. Dennis E. Cichon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 LA. L. REV. 283, 319-26 (1992) (concluding that involuntarily hospitalized persons should be afforded full self-determination and bodily integrity rights); Bruce J. Winick, *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. MIAMI L. REV. 1 (1989) (arguing that, in most situations, the First Amendment should be the standard under which involuntary administration of psychotropic drugs is analyzed); Jennifer Gutterman, Note, *Waging a War*

First Amendment grounds. Furthermore, the briefs filed in *Sell* were anything but silent on this issue, whether arguing for<sup>9</sup> or against<sup>10</sup> the expansion of the right to refuse medication to incorporate the First Amendment. *Sell*, however, was decided only on Due Process grounds.<sup>11</sup>

In psychiatry, one must be careful about over-interpreting the silence of patients. In law, one must be similarly careful about the silence of a Supreme Court opinion. Often the only fruitful thing to do with silence is to see what ideas may arise out of it. The Justices' silence in *Sell* may, for example, reflect a lack of interest or a disbelief in the merit of arguments for the right to refuse treatment based on a traditional First Amendment theory of "freedom of thought."<sup>12</sup> Some very provocative ideas may arise from this silence of *Sell*, though, that are not only about an important doctrine in law and psychiatry. Within this silence, one may end up considering ideas that could prompt the Court to re-examine how one should talk not only about "freedom of thought," but also free speech jurisprudence as a whole. Such a re-

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*on Drugs: Administering a Lethal Dose to Kendra's Law*, 68 *FORDHAM L. REV.* 2401, 2416-18 (2000) (contending that a New York law for involuntary medication in the absence of an emergency or an incompetence declaration is unconstitutionally vague and violates the First and Fourteenth Amendments); cf. Kris W. Druhm, Comment, *A Welcome Return to Draconia: California Penal Law 645, the Castration of Sex Offenders and the Constitution*, 61 *ALB. L. REV.* 285, 332-36 (1997) (analyzing First Amendment implications of forcing sex offenders to take the potentially feminizing medication Depo-Provera).

9. Reply Brief of Petitioner at 2-6, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664); Brief for American Psychological Association as Amicus Curiae Supporting Petitioners at 9, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664); see also *infra* note 39 and accompanying text.

10. Brief for the United States at 36-38, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664); Brief for American Psychiatric Association and American Academy of Psychiatry and the Law as Amici Curiae Supporting Respondents at 9, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664) [hereinafter APA/AAPL Brief].

11. *Sell*, 539 U.S. at 177-78.

12. See *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (holding that the First and Fourteenth Amendments prohibit the State from criminalizing possession of obscene material since it attempts to control a person's private thoughts); see *infra* notes 29-34 and accompanying text.

examination would also be articulated in the discourse of neuroscience, a discourse that is playing an increasingly important role in our understanding of who we are as human beings<sup>13</sup> and how our lives together in society should best be regulated.<sup>14</sup>

If the Justices' silence reflects a reluctance to lead First Amendment jurisprudence into this realm of neuroscientific discourse, they may learn that this can only be avoided for so long. Whenever they do decide to take such a journey, their opinions and conclusions may lead us to a very different understanding of what

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13. The *New York Times Magazine* has, for example, devoted several articles to neuroscientific issues over the past few years, in articles about topics as diverse as the concept of "self," Chip Brown, *The Man Who Mistook His Wife for a Deer*, N.Y. TIMES MAG., Feb. 2, 2003, at 34 (analyzing how the science of sleep disorders complicates explanations of a unified self); gender roles, Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, at 42 (referring to possible biological explanations in article exploring decisions by professional women to leave the workforce); and even marketing strategies, Clive Thompson, *There's a Sucker Born in Every Medial Prefrontal Cortex*, N.Y. TIMES MAG., Oct. 26, 2003, at 54 (describing the use of specialized radiographic techniques to monitor subjects' responses to advertisements); see also Andrew Sullivan, *The He Hormone*, N.Y. TIMES MAG., Apr. 2, 2000, at 46 (relaying a first-person account of the psychological effects of testosterone therapy).

The lay scientific magazine *Scientific American* has also periodically published articles discussing the implications of neuroscience on how we view ourselves as persons. In fact, *Scientific American* recently published numerous stories on the issue and devoted the cover to it. See, e.g., *Special Issue: Better Brains*, SCI. AM., Sept. 2003, at 44-105.

14. See Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 388 (2002) (examining the validity of categorizing criminal acts solely as voluntary or involuntary as we learn more about insanity and how the brain works); Andrew E. Lelling, Comment, *Eliminative Materialism, Neuroscience and the Criminal Law*, 141 U. PA. L. REV. 1471, 1564 (1993) (claiming that advances in neuroscience are challenging basic assumptions about the law and will lead to profound changes in people's perspectives about themselves and society); Laura Reider, Comment, *Toward a New Test for the Insanity Defense: Incorporating the Discoveries of Neuroscience into Moral and Legal Theories*, 46 UCLA L. REV. 289, 295 (1998) (arguing for a new version of the insanity defense based on neuroscientific data); see also STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 22-42 (2001) (discussing how specific neural networks may be involved in the development of certain metaphoric forms of legal reasoning).

we mean when, in the First Amendment context, we speak of “incorporation.”<sup>15</sup> Such a journey will have profound implications for how we speak of the First Amendment in all contexts.

Part I of this Article outlines the facts of *Sell* and the Due Process arguments put forth by Justice Breyer to support a limited right to refuse psychiatric treatment. Part II briefly outlines the cases and commentaries that have argued for a protected “freedom of thought” or “autonomy” under the First Amendment. This part will also detail the arguments used by Dr. Sell and others in support of a First Amendment-based right to refuse unwanted psychotropic medication.

Part III examines the limitations of metaphors of “control” when they are used to justify First Amendment protections for this right, while Part IV analyzes the applicability of and the jurisprudential challenges inherent in metaphors of “invasion” to describe such First Amendment protections. Finally, in light of these discussions, Part V discusses the potentially revolutionary consequences that the Court may need to consider in the future if First Amendment jurisprudence comes to reflect our advancing knowledge of neuroscience. This knowledge encompasses the neuroscience of thought, how the brain processes information designed to influence thought, and the speech arising from such thought.

## I. *SELL* AND THE FIFTH AMENDMENT

Dr. Charles Sell was a dentist with a long history of psychiatric difficulties.<sup>16</sup> He had been charged with multiple counts of mail fraud, Medicaid fraud, and money laundering, and

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15. In constitutional law, “incorporation” refers to the process whereby certain rights guaranteed by the Bill of Rights may be asserted not only against actions taken by the federal government, but also, via “incorporation” into the Fourteenth Amendment, against actions taken by the individual states as well. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 772-74 (2d ed. 1988). The speech clause of the First Amendment was incorporated through the Fourteenth Amendment in the case of *Fiske v. Kansas*, 274 U.S. 380 (1927). *Id.* at 772.

16. *Sell*, 539 U.S. at 169.

eventually with the attempted murder of an FBI agent and a former employee.<sup>17</sup> During the course of the pre-trial proceedings, the federal magistrate in charge of his case questioned Dr. Sell's competency to stand trial and ordered a psychiatric evaluation.<sup>18</sup> Eventually the Magistrate found Dr. Sell incompetent to stand trial and ordered him into treatment.<sup>19</sup> After Dr. Sell refused to take the antipsychotic medication recommended by his treatment team, the government sought judicial permission to forcibly administer the drugs.<sup>20</sup>

The United States Supreme Court had twice previously addressed the issue of forced antipsychotic medication. In *Washington v. Harper*, the Court held that convicted prisoners had a liberty interest in being free from the forced administration of antipsychotic medication.<sup>21</sup> This liberty interest was to be balanced against "the State's interests in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others."<sup>22</sup> In *Riggins v. Nevada*, the Court extended this liberty interest to defendants facing trial for murder, holding that if the government sought to compel competency through antipsychotic medication, it must prove that "it [cannot] obtain an adjudication of [a defendant's] guilt or innocence by using less intrusive means."<sup>23</sup>

In the right-to-refuse-treatment cases, the argument for protection of the body is straightforward. With the tacit or explicit

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17. *Id.* at 170.

18. *Id.* at 170-71.

19. *Id.* Dr. Sell was admitted to the United States Medical Center for Federal Prisoners in Springfield, Missouri. While there, his treating psychiatrists recommended a trial of antipsychotic medications. *Id.*

20. *Id.*

21. *Washington v. Harper*, 494 U.S. 210, 221-22 (1990).

22. *Id.* at 236. The Court did require that evidence be presented showing that inmates are "dangerous to [themselves] or others and the treatment is in the inmate[s'] medical interest." *Id.* at 227.

23. *Riggins v. Nevada*, 504 U.S. 127, 135 (1992). The Court reiterated that the *Harper* standard was appropriate as alternative grounds in that the "treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of [a defendant's] own safety or the safety of others." *Id.*



permission of the State, a doctor would force physical substances into the body of a patient, substances which then chemically interact with the patient's neurons, causing changes in brain functioning. It is a literal invasion of the body, leading to literal changes in the body. Given the history of substantive due process jurisprudence as a doctrine protecting physical choices,<sup>24</sup> one can understand how the Court has upheld a liberty interest in being free from such coerced physical invasions.

With this jurisprudential background, Justice Breyer united in *Sell* the holdings of the previous right-to-refuse treatment cases into a more general standard, writing that

the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.<sup>25</sup>

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24. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (protecting the choice of sexual expression); *Cruzan v. Director, Mo. Dep't. of Health*, 497 U.S. 261 (1990) (protecting the choice to refuse end-of-life medical care); *Roe v. Wade*, 410 U.S. 113 (1973) (protecting the choice to have an abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (protecting the choice to use contraception).

25. 539 U.S. at 179. In the months since the *Sell* decision came down, Dr. Sell has shown no improvement in his condition. Douglas MacCourt & Alan A. Stone, *Caught in Limbo Between Law and Psychiatry*, *PSYCHIATRIC TIMES*, June 2005, at 1. He has continued to refuse medication, and according to Drs. MacCourt and Stone, his legal—and clinical—situation has apparently “degenerated into a contest of wills” between Dr. Sell and federal prosecutors. *Id.* at 9. There have also been reports of abuse of Dr. Sell at the hands of prison guards, leading both authors to wonder whether the continuing legal battles are only serving to reinforce Dr. Sell's beliefs about the injustice of the legal system, all the while as he refuses any medical treatment which, at least in theory, might be able to assuage some of his most severe anxiety states. *Id.*

By adding the phrase “substantially unlikely to have side effects that may undermine the fairness of the trial,” the Court included within the new standard the concern that Justice Kennedy had raised in his concurrence in *Riggins*: that the government must prove that the administration of the antipsychotic medication will not interfere with the defendant’s ability to assist with his or her defense.<sup>26</sup> In *Sell*, the Court concluded that the government had not met its burden to prove the need to force the defendant to take antipsychotic medication.<sup>27</sup>

The Court has yet to rule on the applicability of this substantive due process analysis to a situation in which antipsychotic medications are to be administered forcibly to persons who have been civilly, rather than criminally, committed for treatment. Nevertheless, after *Sell*, one could suspect that the Court may analyze civil cases using a similar standard.<sup>28</sup> If advocates are to have any hope of finding arguments in support of strict scrutiny review in civil cases, their most promising avenue still appears to be analysis under the First Amendment.

## II. *SELL* AND THE FIRST AMENDMENT

### A. *The First Amendment, “Freedom of Thought,” and Autonomy*

“Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”<sup>29</sup> With these words, Justice Marshall summarized an argument that, while not often referenced explicitly in First Amendment jurisprudence,

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26. *Sell*, 539 U.S. at 179 (citing *Riggins*, 504 U.S. at 144-45 (Kennedy, J., concurring)).

27. *Id.* at 183-86.

28. At oral argument, one of the Justices said to Dr. Sell’s counsel: “So a person who’s in a mental hospital, civilly committed, and he’s dangerous, going to commit suicide or possibly kill someone, that the doctors in that civil setting are forbidden to administer psychotic drugs? That’s not my understanding.” Transcript of Oral Argument at 17, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664) (questioning Petitioner’s counsel, Barry A. Short).

29. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

nevertheless remains a powerful foundation for it. The First Amendment protects those who wish to speak *against* some state action since those who speak for the State rarely, if ever, need protection. Then, by simple logic, if the State cannot, without compelling reasons, control the content of what you say against the action, then the State should not, without similarly compelling reasons, control what information you have with which to formulate the content of what you say. As Professor Tribe has noted, understood in this way, the First Amendment prohibits the “governmental shaping of the mind” by the “screening [of] the sources of [persons’] consciousness.”<sup>30</sup>

Justice Marshall’s quotation comes from the case always referenced when advocates argue for a First Amendment right to “freedom of thought”: *Stanley v. Georgia*.<sup>31</sup> In that case, invalidating a man’s conviction for the possession of pornographic materials in his own home, Justice Marshall wrote that governments violate the First Amendment when they attempt to “control men’s minds” by trying to “control the moral content of a person’s thoughts.”<sup>32</sup> It is important to note that *Stanley* and cases like it limit the state’s ability to restrict access to materials about which one may wish to ponder.<sup>33</sup> It is in this sense, then, that the *Stanley* interpretation of the First Amendment protects “freedom of thought.” *Stanley* says nothing about the pondering itself. In Justice Marshall’s memorable words, “[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”<sup>34</sup> *Stanley*, therefore, is a “pre-brain” opinion, if

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30. TRIBE, *supra* note 15, at 1321-22.

31. 394 U.S. 557 (1969)

32. *Id.* at 565. Later the Court did go on to affirm the constitutionality of statutes designed to prohibit the distribution of materials protected under *Stanley*. See *United States v. Reidel*, 402 U.S. 351, 356 (1971). Nevertheless, the idea that “the First Amendment right of the individual to be free from governmental programs of thought control, however such programs might be justified in terms of permissible state objectives,” has remained intact. *Id.* at 359-60 (Harlan, J., concurring).

33. “It is now well established that the Constitution protects the right to receive information and ideas.” *Stanley*, 394 U.S. at 564.

34. *Id.* at 565.

you will. What happens after the content of a book or film enters one's brain, and what the state can or cannot do once that happens, is not addressed by the case.

More recently, scholars have been arguing how and to what extent the First Amendment protects the "autonomy" of the individual.<sup>35</sup> Professor Fried has noted, for example, that:

[N]o such necessity requires, indeed self-respect forbids, that I cede to the state the authority to limit my use of my rational powers . . . the state has no claim to dominion over our minds: what we believe, what we are persuaded to believe, and (derivatively) what others may try to persuade us to believe.<sup>36</sup>

Even though references are not usually made to *Stanley* or "freedom of thought" arguments in these discussions, the idea that the state cannot, without compelling reasons, control your thinking by restricting what you can think about remains a core value universally accepted by all.<sup>37</sup> Restricting what a person can think about and restricting a person's actual thoughts are two very

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35. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233-34 (1992); see also Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 875 (1994) (claiming that autonomy is best classified as either descriptive, the impact of causal factors on an individual's liberty; or ascriptive, describing an individual's sovereignty over moral choices); Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 160-61 (1997) (contending that protecting an individual's autonomy should include a respect for other people's individual autonomy).

36. Fried, *supra* note 35, at 233.

37. Instead, writers tend to disagree either with how to conceptualize autonomy, e.g., whether to deviate from the standard classification of positive and negative liberty interests, Fallon, *supra* note 35, at 876-77, or with how to define adequate compelling reasons that do not interfere with the "moral[] and legal[] obligat[ion] to use speech in a manner that respects the thought processes of others." Wells, *supra* note 35, at 196; cf. Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 249 (2004) (exploring how Speech Clause jurisprudence may not prove to be an adequate basis for the protection and/or regulation of new forms of information).

different matters. Neuroscience has little to say about the former. It has much to say about the latter.

*B. The First Amendment and Coerced Administration of Psychotropic Agents*

Using *Stanley* and other cases and commentaries as support, Dr. Sell and several amici curiae did argue for a First Amendment basis for the Court's decision in *Sell*.<sup>38</sup> The most comprehensive arguments in support of this view were made in the amicus curiae brief of the Center for Cognitive Liberty and Ethics (CCLE), an advocacy group out of Davis, California.<sup>39</sup>

The CCLE often uses the word "alter" when describing the effects of psychotropic medications.<sup>40</sup> Such medications affect the functioning of neurons, altering them in some way, if only by changing their chemical environment. Mental processes, whether cognitive or emotional, arise out of neuronal activity. Therefore, psychotropic medications alter mental processes. Even the most

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38. See *supra* note 9; see also Brief for American Civil Liberties Union of Eastern Missouri as Amicus Curiae Supporting Petitioner at 6-9, *Sell v. United States*, 539 U.S. 166 (2003) (No. 02-5664) [hereinafter Mo. ACLU Brief]. The only substantive mention of the First Amendment at oral argument, however, was when Deputy Solicitor General Michael R. Dreeben, counsel for the United States, answered Justice O'Connor's question by stating that he thought the First Amendment claims ought to be balanced against the government's interests under heightened judicial review. Transcript of Oral Argument, *supra* note 28, at 34-35.

39. The CCLE describes its mission as follows:

The CCLE is a nonprofit education, law, and policy center working in the public interest to foster cognitive liberty - the right of each individual to think independently, to use the full spectrum of his or her mind, and to have autonomy over his or her own brain chemistry. The CCLE encourages social policies that respect and protect the full potential and dignity of the human intellect.

Brief for Center for Cognitive Liberty and Ethics as Amicus Curiae Supporting Petitioner at 1, *Sell v. United States*, 539 U.S. 166 (No. 02-5664) [hereinafter CCLE Brief].

40. Some form of the word "alter" is used a total of twenty-nine times in the brief, often in a form of the phrase "mind-altering." *Id.* at 1-29.

ardent supporter of the forced medication of psychiatric patients could not quibble with this claim.<sup>41</sup>

As the brief goes on, however, the CCLE begins to use the word “control,” first by referencing *Stanley*<sup>42</sup> and other famous First Amendment cases that express various Justices’ concerns over the government’s ability to infringe on “the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from official control.”<sup>43</sup> The brief then implies that psychiatrists who use psychotropic medications to restore competency to criminal defendants are doing so to control the defendants’ thoughts.<sup>44</sup> In other parts of the brief, the CCLE writes of such psychiatrists as “commandeering”<sup>45</sup> and “suppressing”<sup>46</sup> defendants’ thoughts by “invading”<sup>47</sup> and

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41. At least one member of the Court recognized, though, the difference between the denotation and the connotation of the phrase “mind-altering.” The Justice said to Dr. Sell’s counsel, “I imagine that the slogan, *mind-altering drugs*, is not a very good slogan for present purposes, because there are a lot of seriously ill people whom these drugs do help a lot,” to which counsel responded, “That’s correct.” Transcript of Oral Argument, *supra* note 28, at 21 (emphasis added).

42. CCLE Brief, *supra* note 39, at 6 (quoting *Stanley v. Georgia*, 394 U.S. 557, 565 (1969)).

43. *Id.* at 5 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that local authorities cannot compel schoolchildren to salute the flag)).

44. *See, e.g., id.* at 10 (“Since the advent of powerful antipsychotic drugs in the 1950s (as well as other technologies . . .), the government now does have the capability to ‘control the inward workings of the mind.’”) (contrasting the holding of *Jones v. Opelika*, 316 U.S. 584, 618 (1942)); *id.* at 16 (“The absence of such an unambiguous bright-line rule at the jurisprudential crossroads of psychiatry and technology, exposes the very foundation of the First Amendment to erosion, and grants ‘government the power to control men’s minds.’”) (quoting *Stanley*, 394 U.S. at 565); *id.* at 20-21 (“Technological progress is indeed turning ‘mind control’ fiction into fact, with the possibility that neurochemical drugs or other technology could be deployed as tools of individual and social control.”).

45. CCLE Brief, *supra* note 39, at 12 (“By forcing a person to take a mind-altering drug against his or her will, the government is *commandeering* that person’s mind, and forcibly changing his or her very ability to formulate particular thoughts.”) (emphasis added).

46. *Id.* (“By manipulating the way that Dr. Sell thinks, through the forcible act of administering mind-altering drugs to him, the state commits a

“intruding”<sup>48</sup> into their brain with psychotropic medications. In their briefs, Dr. Sell and other amici curiae use synonymous terms:

Dr. Sell has an interest in his own thought process that is separate and distinct from his right to communicate those thoughts to others. The government’s efforts are directed to changing the manner in which Dr. Sell thinks. The restriction is pre-content. As this Court has found: ‘First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that permissible end.’<sup>49</sup>

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type of cognitive censorship - *suppressing* Dr. Sell’s own thoughts in favor of state-approved, drug-induced, ‘normal,’ ‘acceptable,’ or ‘competent’ thoughts.”) (emphasis added). The CCLE stated:

Even in the absence of physical and mental “side effects,” the fact remains that antipsychotic drugs strongly affect thought processes. The First Amendment should be read to allocate to the individual, as opposed to the government, the final say about whether to manipulate his or her own brain for the purpose of occasioning or *suppressing* thoughts.

*Id.* at 11 n.6 (emphasis added).

47. *Id.* at 23-24 (“[T]he First Amendment guarantee of freedom of thought demands an answer by this Court that establishes unequivocal limits on the government’s power to *invade* the inner workings of a person’s mind.”) (emphasis added).

48. CCLE Brief, *supra* note 39, at 24-25 (“[A] bare determination of a defendant’s incompetence to stand trial, regardless of the ‘seriousness’ of the offense, may not, standing alone, serve as the overriding justification for the state directly *intruding* into a person’s brain and manipulating how he or she thinks.”) (emphasis added).

49. Reply Brief of Petitioner, *supra* note 9, at 6 (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002)); see also Mo. ACLU Brief, *supra* note 38, at 2 (“In upholding the trial court’s decision, a split panel of the Court of Appeals for the Eighth Circuit failed to consider Dr. Sell’s First and Fifth Amendment interests to be free from the government’s control of his thoughts, emotions, and ability to communicate with his lawyers.”).

Since the *Sell* decision, commentators critical of the Court’s avoidance of the First Amendment issue have continued to use these words in their critiques. See, e.g., Aaron R. Dias, *Constitutional Law: Just Say Yes: Sell v. United States and Inadequate Limitations on the Forced Medication of*

Metaphorically speaking,<sup>50</sup> psychiatrists are “doing” bad things “in places” where they should not, according to these advocates, be allowed to “go.”<sup>51</sup>

For one to argue that a First Amendment analysis covers territory not covered by a substantive due process analysis, one must emphasize that the physical invasion alters the products of neuronal activities, the mind. Stated that simply, the physical invasion does do that. But, also stated that simply, it is hard to argue that one is dealing with an interest that is more than a protected liberty interest. Metaphysical questions notwithstanding,

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*Defendants in Order to Render Competence for Trial*, 55 S.C. L. REV. 517, 527 (2005) (“Such forcible medication is tantamount to the government’s controlling its citizens’ minds. Few propositions are more frightening.”); Megan Quinlan, Note, *Forcible Medication and Personal Autonomy: The Case of Charles Thomas Sell*, 84 B.U. L. REV. 275, 291-92 (2004) (“[Antipsychotic medications] commandeer an individual’s mind and forcibly change the manner in which that individual formulates and processes thought.”); Elizabeth G. Schultz, Note: *Sell-ing Your Soul to the Courts: Forced Medication to Achieve Trial Competency in the Wake of Sell v. United States*, 38 AKRON L. REV. 503, 532 (2005) (“Mental health treatments that ‘coerce beliefs, attitudes, and mental processes’ involve potential violations of First Amendment principles.”) (citing Winick, *supra* note 8, at 6).

50. Cf. Rodney J.S. Deaton, *Law and Psychiatry, Metaphorically Speaking*, 37 NEW ENG. L. REV. 221 (2003) (outlining several different metaphor systems psychiatrists use when talking about their work in a legal context).

51. At various times, some of the Justices have used similar metaphors. For example, Justice Stevens bolstered his claim that treatment refusals should have been accorded strict scrutiny review, saying that “[t]he liberty of citizens to resist the administration of mind altering drugs arises from our Nation’s most basic values.” *Washington v. Harper*, 494 U.S. 210, 238 (1990) (Stevens, J., dissenting). In a footnote, Justice Stevens wrote of mind “control” (quoting *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969)), as well as of mind “manipulation” (quoting Hearings Before the Subcomm. on Human Rights and Int’l Orgs. of the H. Comm. on Foreign Affairs, 98th Cong. 1st Sess. 106 (1983) (focusing on the abuse of psychiatry in the former Soviet Union)). *Harper*, 494 U.S. at 238 n.3. At oral argument in *Sell*, Justice Kennedy asked the Government’s counsel, “what is the authority of the Government to go out and force [a voluntarily-admitted patient] to be medicated so that he behaves the way the Government wants him to at trial?” Transcript of Oral Argument, *supra* note 28, at 28. Justice Kennedy’s implication is that he assumes that psychiatrists could indeed deliver up such behavior.



mind arises out of body, the body must be constitutionally protected from unwarranted government coercion, and it is—under the Fifth Amendment’s Due Process clause.<sup>52</sup>

To avoid the specter of the Due Process clause in these forced treatment situations, one must do exactly what the CCLE did in its brief: switch from literal arguments to metaphoric ones. One must claim that through the literal invasion of the medication, one is metaphorically “controlling” and/or “invading” the mind.<sup>53</sup>

This shift into metaphor changes the argument significantly. At first glance, this may not appear to be the case because there is a rhetorical allure to the argument. Defendants have been found incompetent. The whole purpose of giving medication would seem to be to change defendants’ ways of thinking from incompetent to competent. Psychiatrists try to alter the thought processes of the defendants, thereby exerting some “control” over their brain functioning. Using a “control” metaphor, thoughts are things that are, depending on one’s orientation, either “altered” or “replaced.” Even in the amicus brief submitted by the American Psychiatric

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52. Even the *Gomes* court, which was not hostile to the defendant’s First Amendment claims, *see supra* note 7, wrote that:

To the extent that Gomes’s concerns about the drugs’ effect on his mental processes and personality are an expression of fears that the antipsychotic medication will “alter the chemical balance in [his] brain, leading to changes, intended to be beneficial, in his . . . cognitive processes,” Gomes’s First Amendment rights are in large part co-extensive with his due process liberty interest in avoiding unwanted medication.

*United States v. Gomes*, 289 F.3d 71, 84 (2d Cir. 2002) (quoting *Riggins v. Nevada*, 504 U.S. 127, 134 (1992)). For an interesting argument that the Fourth Amendment should be used as a basis upon which to ground defendants’ rights to refuse involuntary treatment under these conditions, see Rebekah W. Page, Comment, *Forcible Medication and the Fourth Amendment: A New Framework for Protecting Nondangerous Mentally Ill Pretrial Detainees Against Unreasonable Governmental Intrusion into the Body*, 79 TUL. L. REV. 1065 (2005).

53. *See* WINTER, *supra* note 14, at 43-68 (describing a theory of the role of metaphor in legal reasoning). *See generally* GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980) (describing a theory of the structuring role of metaphor in human thought and its persuasiveness in thought and action).

Association and the American Academy of Psychiatry and the Law, the psychiatrists in these associations do not question these underlying metaphors. They simply seek to put a more positive spin on them. In quoting psychiatrist Dr. Alan Felthous and his colleagues, the brief contends that “Rather than mind restricting, the medication is mind liberating.”<sup>54</sup> If one is liberating, one is controlling some thing long enough so that something else is set free.

What some people claim psychiatrists are doing by giving psychotropic medications and what psychiatrists are actually doing, however, turn out to be quite different matters. In shifting from the literal to the metaphoric, people making such claims become susceptible to a significant category mistake. This shift causes one to overstate the effects of forced psychiatric medication—and to understate the effects of psychological treatment in general. To understand this, let us examine each of the two major metaphor categories already noted: “control” metaphors<sup>55</sup> and “invasion” metaphors<sup>56</sup> In doing so, we will find that “control” metaphors tell us something about the right to refuse treatment, while “invasion” metaphors tell us something about the First Amendment.

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54. APA/AAPL Brief, *supra* note 10, at 26 (quoting Alan R. Felthous et al., *Are Persecutory Delusions Amenable to Treatment?*, 29 J. AM. ACAD. PSYCHIATRY & L. 461, 466 (2001)); *see also* Thomas G. Gutheil & Paul S. Appelbaum, “Mind Control,” “Synthetic Sanity,” “Artificial Competence,” and *Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 HOFSTRA L. REV. 77 (1983) (describing in detail the positive effects of antipsychotic medication). Using a similar metaphor, Dr. Douglas Mossman argues that due to advances in the safety and efficiency of newer drugs, “[c]hemical straitjacketing is rapidly becoming an unusual phenomenon for patients who take antipsychotic medication.” Douglas Mossman, *Unbuckling the “Chemical Straitjacket”: The Legal Significance of Recent Advances in the Pharmacological Treatment of Psychosis*, 39 SAN DIEGO L. REV. 1033, 1156 (2002).

55. *See supra* notes 39-43 and 46.

56. *See supra* notes 44-45.

III. THE RIGHT TO REFUSE TREATMENT AND CONTROL  
METAPHORS: THE LIMITATIONS OF THE PHARMACOLOGIC

When one uses metaphors of “control,” one overstates what psychiatrists are accomplishing with psychotropic medication. Even if certain psychiatrists may be hoping to control the thoughts of defendants, there is no evidence to support that they are doing anything of the kind.

Dr. Shitij Kapur of the University of Toronto has written the most current, cogent explanation of what actually occurs when a person takes antipsychotic medication.<sup>57</sup> He describes the psychotic experience as one of “aberrant salience,” which he explains as follows:

[I]n psychosis there is a dysregulated dopamine transmission that leads to stimulus-independent release of dopamine. This neurochemical aberration usurps the normal process of contextually driven salience attribution and leads to *aberrant assignment of salience to external objects and internal representations*.<sup>58</sup>

In other words, a brain cell communicates with another brain cell by means of naturally-occurring chemicals (neurotransmitters) that are released from the first cell. The neurotransmitter combines with proteins on the second cell (receptors) to induce or alter the functioning of the second cell. Dopamine is one such neurotransmitter, and it has long been implicated both in the etiology and in the treatment of psychosis.<sup>59</sup>

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57. Shitij Kapur, *Psychosis as a State of Aberrant Salience: A Framework Linking Biology, Phenomenology, and Pharmacology in Schizophrenia*, 160 AM. J. PSYCHIATRY 13 (2003). Dr. Kapur’s article was a special review article in arguably the premier psychiatric journal, the *American Journal of Psychiatry* published by the American Psychiatric Association. Articles such as this one are subject to rigorous peer review and therefore represent examples of the most well thought-out and current arguments in the field of psychiatry.

58. *Id.* at 15.

59. Anissa Abi-Dargham, *Do We Still Believe in the Dopamine Hypothesis? New Data Bring New Evidence*, 7 INT. J. NEUROPSYCHOPHARMACOLOGY (Supp. S1) (2004).

In addition, dopamine has been implicated as a neurotransmitter important for the experience of pleasure and motivation.<sup>60</sup>

It is dopamine's role in the experience of pleasure and motivation that, in Dr. Kapur's view, helps explain its role in the etiology of psychosis.<sup>61</sup> Dopamine is not necessarily involved in the processes underlying whether one has a particular thought or perception. It appears primarily important in making those mental events matter.<sup>62</sup> If dopamine release becomes dysregulated, a process the etiology of which remains unknown, then it is as if the brain is saying "pay attention!" to ideas and perceptions which may not ordinarily merit such focus. As Dr. Kapur puts it:

It is postulated that before experiencing psychosis, patients develop an exaggerated release of dopamine, independent of and out of synchrony with the context. This leads to the assignment of inappropriate salience and motivational significance to external and internal stimuli. At its earliest stage this induces a somewhat novel and perplexing state marked by exaggerated importance of certain percepts and ideas . . . . Most patients report that something in the world around them is changing, leaving them somewhat confused and looking for an explanation . . . . If this were an

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60. Kapur, *supra* note 57, at 13-15.

61. After reviewing different hypotheses about the role of dopamine in the brain's reward system, Dr. Kapur argues:

[D]opamine mediates the conversion of the neural representation of an external stimulus from a neutral and cold bit of information into an attractive or aversive entity. In particular, [it] is seen as a critical component in the 'attribution of salience,' a process whereby events and thoughts come to grab attention, drive action, and influence goal-directed behavior because of their association with reward or punishment.

*Id.* at 14.

62. *Id.* at 15 ("Dopamine *mediates* the process of salience acquisition and expression, but under normal circumstances it *does not create* this process.").

isolated incident, perhaps it would be no different from the everyday life experience of having one's attention drawn to or distracted by something that is momentarily salient and then passes. What is unique about the aberrant saliences that lead to psychosis is their persistence in the absence of sustaining stimuli . . . . From days to years (the prodrome), patients continue in this state of subtly altered experience of the world, accumulating experiences of aberrant salience without a clear reason or explanation for the patient.<sup>63</sup>

Antipsychotic medications are antidopaminergic agents that, depending on the particular properties of the particular drug, block effective dopamine transmission between cells and thereby "lead[] to an attenuation of the salience of these ideas and perceptions."<sup>64</sup> Even though Dr. Kapur admits that these ideas remain hypotheses, they are quite consistent with clinical observations dating to the introduction of antipsychotic medication back in the 1950's.<sup>65</sup>

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63. *Id.* According to his counsel at oral argument, Dr. Sell had "thoughts that are plausible, thoughts that can conceivably come true, [but] probably won't . . . he believes the FBI is out to discredit or harm him. . . [and] because of his delusion he can't focus on the trial [or] on anything else other than the FBI." Transcript of Oral Argument, *supra* note 28, at 11-12.

64. Kapur, *supra* note 57, at 16-17.

65. The following observations made by Dr. Kapur, square not only with my personal experience as a treating psychiatrist, but also with my discussions with colleagues and students over the years:

[A]ntipsychotics do not primarily change thoughts or ideas; instead, they provide a neurochemical milieu wherein new aberrant saliences are less likely to form and previously aberrant saliences are more likely to extinguish . . . . Patients do not immediately abandon the psychotic idea or percept but report that the idea or percept "doesn't bother me as much." In fact, for many patients this is as good a resolution as antipsychotics can provide. This concept is implicitly accepted by the field, as on most rating scales for psychosis the severity of psychosis is rated not so much

Given this, one can then better understand the complexities that one faces when one uses terms such as “control,” “commandeer,” and “suppress” to describe metaphorically the actions of antipsychotic medications. First, one must face exactly what is being controlled by these medications. Second, one must face how what is being controlled does and does not affect the particular ideas and perceptions defendants bring to their cases.

#### A. *Aberrant Salience and Freedom of Thought*

Antipsychotic medications do not *control* the specific content of defendants’ mental processes; they only *alter* the intensity with which defendants experience those mental processes.<sup>66</sup> It is true that by reducing dopaminergic influence within the brain, psychiatrists can generally be assured that the intensity will decrease and thus that they will alter defendants’ mental process in a specific direction. The better metaphor for such a process, however, is “set in motion.” By adjusting dosages, psychiatrists may be able to control, in a gross fashion, the degree of decrease, but such control never reaches a degree of exactness such that “commandeer” would even approximate the resulting state of affairs.

The *Sell* standard now includes the phrase “substantially unlikely to have side effects that may undermine the fairness of the

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on the content of the idea/percept as on the degree to which it preoccupies the mind and affects behavior. Thus, antipsychotics at first remove not the core content of the symptom but the degree to which the symptoms occupy the mind, distress the patient, and drive action. It is only later, over the ensuing weeks, that the fundamental content of the delusions and hallucinations is deconstructed and (only for some) recedes entirely from awareness.

*Id.* at 17. For early examples of the recognition of this phenomenon, see J. Elkes & Charmian Elkes, *Effect of Chlorpromazine on the Behaviour of Chronically Overactive Psychotic Patients*, 2 BRIT. MED. J. 560 (1954), and N. William Winkelman, *Chlorpromazine in the Treatment of Neuropsychiatric Disorders*, 155 JAMA 18 (1954).

66. See *supra* notes 57-65 and accompanying text.

trial,”<sup>67</sup> meaning that prosecutors must now put forward credible medical evidence that the proposed medication treatment will not interfere with defendants’ abilities to participate meaningfully in their proceedings.<sup>68</sup> It has long been known that antipsychotic medications can cause individuals to feel less engaged in life, resulting in states described as “‘neuroleptic-induced dysphoria,’ ‘decreased motivational drive,’ or ‘neuroleptic-induced deficit state.’”<sup>69</sup> If such effects could undermine the fairness of the trial, then they must be shown in each case not to do so substantially. The Court has recognized the important role such physical states could play in a defendant obtaining a fair trial - by incorporating the concern into a Due Process basis for the right.<sup>70</sup>

Nevertheless, advocates could still claim a First Amendment basis for the right in civil cases, because the decision to medicate is never thought content-neutral. Psychiatrists seek to decrease aberrant salience after they have heard defendants speak of delusions and hallucinations.<sup>71</sup> You speak, you get the diagnosis, you get the medication.

Professor Winick has written that “the distinction between sane and disordered thought is elusive, particularly in view of the

67. *Sell v. United States*, 539 U.S. 166, 179 (2003); *see supra* notes 25-27 and accompanying text.

68. *See Sell*, 539 U.S. at 183 (stating the question a court facing this issue must address: “Has the Government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual’s protected interest in refusing it?”).

69. Kapur, *supra* note 57, at 18. “Neuroleptic” is another term used to refer to antipsychotic medication.

70. *See supra* notes 21-25 and accompanying text.

71. As Dr. Kapur points out:

So long as . . . delusions and hallucinations . . . remain private affairs, they are not an illness by society’s standards. It is only when the patient chooses to share these mental experiences with others, or when these thoughts and percepts become so salient that they start affecting the behavior of the individual, that they cross over into the domain of clinical psychosis.

imprecision of the diagnostic categories used in defining mental illness, as well as of the lack of consistency by clinicians in their application.”<sup>72</sup> By itself, such a statement is probably too skeptical of the day-to-day realities of psychiatric practice. No matter what one’s political or social orientation may be, most persons would have little problem labeling as “disordered” thoughts of huge conspiracies by multiple governmental agencies being promulgated *specifically* upon a *single* individual who has not distinguished himself or herself in any way from anyone else in the country. Yet if one were to speak of huge conspiracies by multiple governmental agencies being promulgated upon *individuals* who have not distinguished themselves in any way from anyone else in the country, one could easily find persons - most likely, many - who would heartily assent to the proposition. By labeling an idea as “delusional” or a perception as “hallucinatory,” one has already made value judgments that are always, at least to some degree, laden with cultural assumptions.

Still, even if psychiatrists are not using content-neutral criteria in identifying defendants to receive the intervention, they are clearly intervening with medications that are content-neutral in their effects. By themselves, antipsychotic medications will not change the contents of a defendant’s ideas or perceptions. At most (and not invariably) they will only alter the intensity with which those beliefs are held. For advocates to claim that the First Amendment should provide an underpinning for the right beyond that provided by the Due Process Clause, they must argue that the First Amendment not only protects what one thinks, but also how strongly one thinks about what one thinks. One would not just be seeking protection for “freedom of thought.” One would also be asking for a “freedom of intense thought.” A colorable argument, perhaps, but one should be quite skeptical about the prospect of getting the current Supreme Court to open up First Amendment jurisprudence to such a possibility.<sup>73</sup>

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72. Winick, *supra* note 8, at 46.

73. As Professor Tribe has pointed out, such a doctrine would open up the possibility that governments could not regulate the usage of illicit psychoactive drugs such as cocaine and hallucinogens. TRIBE, *supra* note 15, at 1324. *But see* Employment Div. v. Smith, 485 U.S. 660 (1988) (holding that the



That is not to say that a future Court might not be interested in the argument, but almost certainly that will depend upon what possibilities advancements in neuropharmacology may bring us. In their brief, the CCLE worries about the “dark prospect . . . [that t]echnological progress is indeed turning ‘mind control’ fiction into fact, with the possibility that neurochemical drugs or other technology could be deployed as tools of individual and social control.”<sup>74</sup> They speak of “brain fingerprinting” machines<sup>75</sup> and nanotechnologies of insertable monitoring devices,<sup>76</sup> and they remind the Court of the specter of “Soma,” the mind-controlling substance used in Aldous Huxley’s dystopic novel, *Brave New World*.<sup>77</sup>

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government has the right to enforce drug laws as the firing of a state employee for using a hallucinogen in a religious rite did not violate the Free Exercise Clause of the First Amendment).

Moreover, this would do nothing to reduce the dueling perspectives of the right-to-refuse treatment debate; it would only change the location of the battlefield. *See supra* note 2 and accompanying text. When one is concerned about “freedom of thought,” one focuses on the person who is free or not free to think. This leads one to the problem noted by one legal commentator: “[I]t is not clear which identity - medicated or unmedicated - the law should defend when [persons are] not simply erratic, but dysfunctional.” *Leading Cases, supra* note 3, at 315.

In contrast, if one were to be concerned about “freedom of intense thought,” one would focus not on who the person is, but on what the person has. Furthermore, one would not only ask about what thoughts the person has, but one would also have to ask about the quality of those thoughts, turning the whole matter into a different duel. One camp (psychiatrists) would say the person’s thoughts are too intense, the other (advocates) that they are just right (or at least, for the particular person, right enough). As always, everyone wishes to protect the value of what Professor Michael Shapiro calls “mental integrity.” Michael H. Shapiro, *Constitutional Adjudication and Standards of Review Under Pressure from Biological Technologies*, 11 *HEALTH MATRIX* 351, 440 (2001). It is simply that advocates believe that they are preserving that integrity, while psychiatrists believe that they are restoring it.

74. CCLE Brief, *supra* note 39, at 20-21 (citations omitted).

75. *Id.* at 21.

76. *Id.* at 19 n.15.

77. *Id.* at 21 n.17. (Soma is the pleasure inducing drug that dopes human beings into a feeling of universal happiness so that the powers-that-be can effectively control society.).

Whether or not a real-life “Soma” has indeed already been discovered, we do know one thing: the antipsychotic medications currently available are not Soma. As Dr. Kapur notes, “[n]either normal volunteers nor patients find antipsychotics pleasant; in both populations they are associated with a plethora of unpleasant subjective effects.”<sup>78</sup> This is a fact which daily complicates the lives of psychiatrists and patients as they work, even when cooperatively, to reduce the usually-terrifying effects of psychotic symptoms.<sup>79</sup>

Given that antipsychotic medication is content-neutral in its effect, advocates must then face how alterations in ideas and perceptions actually occur. In cases involving competence to stand trial, the whole purpose of giving the medications may be to alter defendants’ ideas and perceptions so that they can state an understanding of the legal process and assist their counsels in their

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78. Kapur, *supra* note 57, at 17-18; *cf. Leading Cases, supra* note 3, at 314 (“The medicated patient may think more efficiently but still not feel like himself.”).

79. *Id.* at 18 (“Perhaps this dampening of pleasurable drives is why patients with schizophrenia have a much higher incidence of drug abuse, self-medication and other ways of overcoming this dampening.”). For purposes of the right to refuse treatment, this is an important point, for legal commentators often worry that “[p]sychotropic drugs . . . can be accompanied by a lessening of normal anxiety, and can permit a ‘don’t care’ mental status rather than responses based on self-protection.” David M. Siegel et al., *Old Law Meets New Medicine: Revisiting Involuntary Psychotropic Medication of the Criminal Defendant*, 2001 WISC. L. REV. 307, 347 (2001). First, decrease of anxiety does not equate with decrease of motivation, for one certainly does not need to be anxious to be motivated. Second, “dampening of pleasurable drives” is a different matter altogether from some hypothetical emotional anesthesia.

Based on my personal clinical experience, I would agree with Dr. Kapur. No matter what one’s problem, people do not like the side effects he describes—and they know it. If defendants (and patients) say that they “don’t care” to involve themselves in matters when they take antipsychotic medications, they say this because they are tired or because they are irritable, not because they have been rendered docile or manipulable. The “don’t care” attitude could still pose a problem for the legal proceedings and for “self protection,” and therefore the government would still have to prove that the administration of drugs is “substantially unlikely to have side effects that may undermine the fairness of the trial.” *Sell v. United States*, 539 U.S. 166, 179 (2003). That said, no one takes an antipsychotic medication and ends up in some sort of pleasurable trance.

defense. The actual alteration, though, is not accomplished with the bodily invasion of a medication. It is accomplished through speech itself. Antipsychotic medication may make defendants more amenable to considering alternatives to their ideas and perceptions, but only speech and interpersonal processes bring about those actual alternatives within their minds. This is as much a fact of daily clinical life as it is of daily legal life.<sup>80</sup> Restoring competency is therefore a matter more of education and persuasion than it is of pharmacology. One would be hard pressed to argue that defendants have a First Amendment right to prevent their psychiatrists from trying to persuade them to accept certain viewpoints about “reality” in order to enhance their chances of proceeding more speedily through the legal process. As Professor Winick points out, a defendant always “retains a veto over the ability of the verbal techniques to effect changes in attitudes and behavior.”<sup>81</sup>

Professor Winick’s observation, however, opens up a far more complicated implication of these First Amendment arguments for the jurisprudence not only of the right-to-refuse treatment doctrine, but for the entire doctrine of freedom of speech as well. In the light of the same neuroscience that explicates the effects of antipsychotic medications, one cannot so easily brush aside arguments that psychiatrists “invade” the minds of defendants. They do not, however, invade with their medications. They invade with their words.

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80. Dr. Kapur writes:

Patients who have been psychotic for some time incorporate their psychotic beliefs into their larger cognitive schemas. In such a situation, blocking the neurochemical abnormality (no matter how quickly and completely) will only take away the driving force but will not demolish the schemas already constructed. Improvement of psychosis, although assisted by drugs, finally involves psychological strategies that have timelines of weeks and months, rather than seconds and minutes.

Kapur, *supra* note 57, at 17.

81. Winick, *supra* note 8, at 83.

#### IV. PSYCHOLOGICAL TREATMENT AND INVASION METAPHORS: THE PHYSICALITY OF THE INTERPERSONAL

To use a metaphor of “invasion,” one has understated the First Amendment implications of other mental health treatments which may be forced on an individual: verbal treatments. Patients may or may not be able to resist verbal treatments more easily than somatic treatments. When using an “invasion” metaphor, one is not worried so much about the invasion of a medication. One is worried about the invasion of the ideas that come after the medication has been given.

The only commentator who has addressed the constitutionality of forced verbal treatments at any length is Professor Bruce Winick, who has analyzed the First Amendment implications both of psychotherapy and of coerced counseling programs.<sup>82</sup> It is useful to examine these analyses separately, as psychotherapy reveals the true physical implications of a neuroscientific discourse of the First Amendment, while coerced counseling reveals the true legal implications of such an discourse.

##### *A. The First Amendment and Psychotherapy*

Winick’s analysis of the First Amendment implications of psychotherapy is so short, it can be reproduced here in full:

At the lower end of the intrusiveness continuum are the verbal techniques—psychoanalysis, psychotherapy, counseling, and educational programs. These verbal techniques, unlike the behavioral therapies, usually focus upon changing thought processes, emotions, and perceptions. Moreover, when successful, they can have a massive impact upon attitudes, beliefs, and personality. Nevertheless, the verbal techniques work in essentially a non-intrusive fashion. Those compelled to participate in a verbal therapy

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82. *Id.* at 83-85.

program who seek to resist attitudinal or personality change seem readily able to frustrate these approaches and avoid their effects simply by withholding cooperation.

### 1. Psychotherapy

Psychotherapy works slowly, affording the patients time to contemplate the meaning of behavior change and to accept or resist such change. Unlike with the organic therapies, which are incapable of being resisted, the patient retains a veto over the ability of the verbal techniques to effect changes in attitudes and behavior. “[W]e imagine ourselves as patients to be free agents throughout the process, free to reject it and free to leave with no more scar than in any other human transaction.” A patient who seeks to resist the effects of psychotherapy can thus totally frustrate treatment by withholding his cooperation. The “fundamental rule” of psychotherapy requires the patient to communicate openly and candidly with his therapist. The therapeutic process cannot progress if the patient is unwilling to play this role. Trust is an indispensable condition for successful therapy. Moreover, even if the patient does cooperate in at least the surface rituals of the therapeutic process, he can effectively avoid the gradual and non-intrusive effects of psychotherapy with a minimal degree of mental resistance. “[I]n the psychotherapy scheme one may go through treatment as a form of game playing, such as showing up for appointments and even making verbal utterances, in the absence of the type and degree of commitment required for a meaningful therapeutic relationship.” A patient who is resistant to therapy can thus avoid its effects even if compelled to play the role of patient.<sup>83</sup>

Professor’s Winick’s arguments depend for their cogency on one phrase: “non-intrusive effects.”<sup>84</sup> He appears to equate effects

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83. *Id.*

84. *Id.* at 83. The CCLE uses similar language in its brief: “far less intrusive therapies, such as psychotherapy, psychoanalysis, counseling, group therapy, and a panoply of behavior therapies have yet to be tried in the instant case.” CCLE Brief, *supra* note 39, at 29.

with “changing thought processes, emotions, and perceptions.”<sup>85</sup> Furthermore, he appears to equate changes with “attitudinal” or “personality change[s],”<sup>86</sup> which are the type of changes therapists hope will result. Understood this way, one can see that his argument has a certain force. If one is comparing the possibility of someone with a free will resisting an idea to someone with a body resisting a exogenous chemical, then yes, one can conclude that it is easier to resist an idea rather than medicine, at least in the short term.

But notice the metaphor that Professor Winick is using in reference to ideas: “resist.” One has to resist something. Before one can resist something, one must see it and think about it. Only then can one decide whether to avoid it, frustrate it, veto it, withhold something from it, or cooperate with it. A lot of work is being done. One could say that such work is just mental work, but mental work always arises out of neuronal work. In psychotherapy, exogenous chemicals (medications) are not combining with proteins located on neurons. Instead, endogenous chemicals (neurotransmitters) are being mobilized to combine with (perhaps) different proteins on neurons to accomplish the physical processes out of which arise all the thoughts, resistances, avoidances, and so forth.

Precisely because such neuronal work is going on, another set of neurotransmitters is activated to combine with different proteins on different neurons to assure that another very important task occurs: memory.<sup>87</sup> By inducing memory circuitry, patients will remember the ideas that therapists keep placing in front of them, as well as remember all the brain work being done with them. In fact, they will almost certainly never be able to forget these ideas. Can the patients ignore them? Yes, but more neurons have to be activated to do this. Can patients forget many, if not most of the details of these ideas? Possibly, but still more neurons will be activated. But can patients forget the ideas that are being

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85. Winick, *supra* note 8, at 83.

86. *Id.*

87. See generally DANIEL L. SCHACTER, *SEARCHING FOR MEMORY: THE BRAIN, THE MIND, AND THE PAST* (1996) (discussing the neurobiology and phenomenology of memory).

repeatedly placed in front of them? No. Even if one wishes to argue the possible “repression” of these memories, still more neurons would have to be activated for that function.<sup>88</sup>

All of these neuronal processes are brought about by the “invasion” - or to modify one of Professor Winick’s words, the “intrusion” - of the words of the therapist working with the patient. Thoughts and ideas engendered by those words are physically encoded into literal neuronal changes that then are managed by the memory system of the brain, forcing neuronal mechanisms to process the words and ideas. This processing ranges from attitudinal and behavioral change to ignoring. If one is going to talk about “invasion” as a metaphor for the First Amendment implications of mental health treatment, then the words of the psychiatrist do not just “invade” but “colonize” the mind of the patient. Since medications have a natural half-life, meaning that they eventually break down chemically and are excreted from the body, their ability to impact treatment vanishes once the level of medication is below a certain threshold level.<sup>89</sup> The only residue that always remains from an episode of forced medication is the interpersonal residue of the episode itself. Memories of words, memories of interactions—these stick around. Practitioners who give forced medication regret that fact. Memories of such interactions are never pleasant. In contrast, psychotherapists count on their words sticking around. It is the nature of their business.

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88. A classic definition for “repression” as a psychoanalytic concept is “an operation whereby the subject attempts to *repel*, or to *confine* to the unconscious, representations (thoughts, images, memories) which are bound to an instinct.” JEAN LAPLANCHE & JEAN-BERTRAND PONTALIS, *THE LANGUAGE OF PSYCHO-ANALYSIS* 390 (Donald Nicholson-Smith trans., The Hogarth Press Ltd. 1973) (1967) (emphasis added).

89. This is not to say that the changes induced in the body necessarily go away with the excretion of the medication. For example, one of the most infamous long-term side effects of certain psychotropic medications is tardive dyskinesia, a permanent change in muscular functioning (involuntary and abnormal movements of the tongue, jaw, trunk, and extremities) caused by antipsychotic medications. See *DSM-IV-TR*, *supra* note 1, at 803-05. But long-term side effects arise from the physical invasion of the medication into body tissue, not from the metaphoric invasion into the mind. Once again, one finds oneself arguing effects that have traditionally been subsumed under a due process analysis.

One needs not confine oneself, though, to metaphor. Neuroscientists now know enough about the neurobiology underlying social interactions to hypothesize, with some confidence, the literal neuronal changes that most likely occur when therapists communicate with patients.<sup>90</sup> Using theories developed from the interdisciplinary study of “social neuroscience,”<sup>91</sup> one can identify the major brain structures involved in the neural circuitry of what Dr. Louis Cozolino has called the “social brain.”<sup>92</sup>

In brief, several areas of the brain coordinate input from external sources such as the five senses and speech, and internal sources such as memories, internal sensations, and linguistic processing.<sup>93</sup> This coordinated input allows persons to evaluate interpersonal interactions and take purposeful actions based on those evaluations. One of the most critical areas coordinating these functions is the orbitofrontal cortex, a part of the brain located just behind the eyes.<sup>94</sup>

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90. See generally RICHARD BROCKMAN, *A MAP OF THE MIND: TOWARD A SCIENCE OF PSYCHOTHERAPY* (1998); LOUIS J. COZOLINO, *THE NEUROSCIENCE OF PSYCHOTHERAPY: BUILDING AND REBUILDING THE HUMAN BRAIN* (2002) (correlating neuroscientific findings with various aspects of psychotherapeutic theory and practice).

Two scientific papers are often cited to support the proposition that physical changes can result from environmental influence alone. In the first, Dr. Eric Kandel described the neuronal changes that occur in the sea snail *Aplysia* when the environmental conditions surrounding it vary, postulating that similar cellular changes occur in humans when they learn and unlearn anxiety responses. Eric R. Kandel, *From Metapsychology to Molecular Biology: Explorations into the Nature of Anxiety*, 140 AM. J. PSYCHIATRY 1277 (1983). Later Dr. Jeffrey Schwartz and his colleagues documented the changes that occur in the brain metabolism of subjects with obsessive-compulsive disorder (an anxiety disorder) after they participate in a course of psychotherapeutic treatment known as cognitive-behavioral therapy. Jeffrey M. Schwartz et al., *Systematic Changes in Cerebral Glucose Metabolic Rate After Successful Behavior Modification Treatment of Obsessive-Compulsive Disorder*, 53 ARCHIVES GEN. PSYCHIATRY 109 (1996).

91. ALLAN N. SCHORE, *AFFECT REGULATION AND THE REPAIR OF THE SELF* xii (2003).

92. COZOLINO, *supra* note 90, at 172-214.

93. *Id.*

94. As Dr. Daniel Siegel has described it, this area is an



Other important structures include the amygdala, a region important for the appraisal of danger and therefore essential to one's capacity to assess whom one can trust and whom one cannot;<sup>95</sup> the anterior cingulate gyrus, a region important for the establishment and maintenance of interpersonal attachment;<sup>96</sup> and

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integrating region . . . involved in stimulus appraisal (the meaning, value, or emotional valence given to a stimulus), affect regulation (the capacity of the brain to modulate its psychophysiological state), social cognition (the complex process by which one individual is able to have "mindsight" or the ability to perceive the mental state of another), and auto-noetic consciousness (the ability to perform mental time travel).

DANIEL J. SIEGEL, *THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE* 140 (1999); *see also* Edmund T. Rolls, *The Functions of the Orbitofrontal Cortex*, in *PRINCIPLES OF FRONTAL LOBE FUNCTION* 354 (Donald T. Stuss & Robert T. Knight eds., 2002) (summarizing current research findings). This area of the brain is also involved in "complex mentalizing task[s] that require[] the use of language [e.g., speech] and active imagining of another person's mental state." Chadi Calarge et al., *Visualizing How One Brain Understands Another: A PET Study of Theory of Mind*, 160 *AM. J. PSYCHIATRY* 1954, 1957 (2003). *See generally* ALLAN N. SCHORE, *AFFECT REGULATION AND THE ORIGIN OF THE SELF: THE NEUROBIOLOGY OF EMOTIONAL DEVELOPMENT* (1994) (discussing, in detail, the biology of the orbitofrontal cortex and its importance in the development and maintenance of attachment behaviors and a perceived sense of "self").

95. *See* Ralph Adolphs et al., *The Human Amygdala in Social Judgment*, 393 *NATURE* 470 (1998); *see also* ANTONIO R. DAMASIO, *LOOKING FOR SPINOZA: JOY, SORROW, AND THE FEELING BRAIN* 58-60 (2003) (discussing the role of the amygdala in emotional processing). The amygdala also plays an important role in the experience of and reaction to fear. *See infra* notes 98-99 and accompanying text. *See generally* THE AMYGDALA: A FUNCTIONAL ANALYSIS (John P. Aggleton ed., 2d ed. 2000) (describing the role of the amygdala in a variety of mental processes).

96. ALLAN N. SCHORE, *AFFECT DYSREGULATION AND DISORDERS OF THE SELF* 158-59 (2003). The anterior cingulate gyrus region of the brain is also thought to be involved in processes of memory, attention focusing, decision making, and self-control. *See* JOSEPH LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* 277 (1996); John M. Allman et al., *The Anterior Cingulate Cortex: The Evolution of an Interface Between Emotion and Cognition*, 935 *ANNALS N.Y. ACAD. SCI.* 107 (2001).

the medial prefrontal cortex, a region important for the processing of emotion to improve decision making.<sup>97</sup> Together these structures form “the core of the social brain [which,] [d]eveloping from birth . . . contains our . . . memories of our early interpersonal learning history [and] stores information about the safety and danger of others, what we can expect when they come close, and if we can depend on them for nurturance and support.”<sup>98</sup> Thanks to these brain structures, trusted psychotherapists will be experienced and remembered one way, feared medication prescribers will be experienced and remembered in another. Either way, neuronal work goes on in now-identifiable areas of the brain, leading to lasting brain changes which will impact the future of patients in ways both predictable and unpredictable.

While interesting from a clinical standpoint, one can easily ask what legal relevance these scientific findings might have. As Professor Winick wrote, the metaphoric scar left by unpleasant personal interactions such as forced treatment are no more than those left “in any other human transaction.”<sup>99</sup> If one introduces arguments based on social neuroscience into a First Amendment analysis of the right to refuse treatment, one is in danger of proving too much. Precisely because we are becoming increasingly able to identify the neurobiological coordinates of such scars, though, a

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97. See, e.g., ANTONIO R. DAMASIO, *DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* 31-33 (1994) (documenting how damage to this region most likely caused the behavioral problems experienced by Phineas Gage, a man famous in the late nineteenth century for having survived an iron rod piercing his brain and head); Philippe Fossati et al., *In Search of the Emotional Self: An fMRI Study Using Positive and Negative Emotional Words*, 160 AM. J. PSYCHIATRY 1938 (2003) (finding an important role for the right dorsomedial prefrontal cortex in the self-guided processing of emotion); Daniel Tranel, *Emotion, Decision Making, and the Ventromedial Prefrontal Cortex*, in *PRINCIPLES OF FRONTAL LOBE FUNCTION* 338 (Donald T. Stuss & Robert T. Knight eds., 2002) (describing the critical role of emotion in logical decision making); cf. Thompson, *supra* note 13 (describing how researchers analyze this and other areas of the brain to improve consumer responses to advertising).

98. COZOLINO, *supra* note 90, at 183.

99. Winick, *supra* note 8, at 83 (quoting Robert Michels, *Ethical Issues of Psychological and Psychotherapeutic Means of Behavior Control: Is the Moral Contract Being Observed?*, 3 HASTINGS CTR. REP. 11, 11 (1973)).

neuroscientific discourse of not only the right to refuse treatment, but also of the entire free speech jurisprudence is becoming possible. To see why such a discourse could prove troubling, one need only examine Professor Winick's arguments about the First Amendment implications of coerced counseling.

*B. The First Amendment and Coerced Counseling*

In general Professor Winick's arguments related to coerced counseling follow the same form as those about psychotherapy. His analysis hinges on how effective therapists can be in getting patients to achieve the therapists' desired results.<sup>100</sup> "Intrusion" in this context appears to mean a metaphoric intrusion into a lifestyle that should lead to some sort of attitude adjustment resulting in a positive outcome for the individual and/or society. The more likely - and more importantly, the more automatically - an attitude adjustment occurs, apparently the more intrusive the therapy is. Precisely because counselors in prisons are, in his view, less effective therapists,<sup>101</sup> and because persons in prisons often have more "attitude" than the average person in psychotherapy,<sup>102</sup> Professor Winick sees little cause for concern about First Amendment violations in these situations.

As in the case of psychotherapy, he places much importance on the prisoners' ability to "resist" the therapists' interventions.<sup>103</sup>

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100. Winick, *supra* note 8, at 89 ("[T]he verbal techniques are similar to the behavioral therapies; both can effectively change attitudes and behavior, but both are ultimately dependent upon the subject's cooperation and willingness to change.").

101. *Id.* at 84 ("Certainly if a patient in psychotherapy can resist or avoid the effects of this technique at will, an offender can even more easily avoid the intrusions of the 'counseling' provided by counselors in prison and community programs who generally lack the professional abilities of those administering psychotherapy.").

102. *Id.* at 84-86 ("[A]ll students no doubt share the common experience of having been able to 'tune out' the efforts of their teachers. In any event, prisoners and even adolescents adjudged juvenile delinquents, long past their formative years, generally have the power to resist unwanted education.").

103. *Id.* at 89 ("In view of the ability of patients and offenders to resist the effects of these essentially verbal interventions, they may readily be distinguished from the more coercive treatment methods found to violate the

Once again, resistance has to mean resistance against something - something which, in the case of prisoners, can be quite dramatic and therefore quite memorable. Nevertheless, he does not worry too much about the First Amendment implications, for “[e]ven the strong verbal exhortation of prison inmates, bordering on threats of physical abuse and typical of direct confrontation-style programs, such as the Juvenile Awareness Project at Rahway State Prison portrayed in the film “Scared Straight,” are within the complete power of the listener to accept or reject.”<sup>104</sup>

The “Scared” in the film title, though, implicates yet another neuroscientific discourse system: the neural circuitry system in the brain called by Dr. Louis Cozolino the “fearful brain.”<sup>105</sup> The fear system, centered around the brain area called the amygdala, is perhaps one of the most well-studied emotional systems of the brain and affects multiple areas of brain and body function.<sup>106</sup> In some individuals, the stress hormones activated by the fear system can lead to wide-ranging changes in memory and even body function, the well-documented effects of “trauma.”<sup>107</sup> Metaphorically speaking, fear is quite intrusive in its effects on the body, leading to physical changes that are anything but transitory. Professor Winick is almost certainly correct when he concludes that the Justices of the Court would likely find no First Amendment

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first amendment in cases involving psychosurgery, electroconvulsive therapy, or psychotropic medication.”).

104. *Id.* at 86.

105. COZOLINO, *supra* note 90, at 235-56.

106. *See id.* at 244; LEDOUX, *supra* note 96, at 225-66; Kevin S. LaBar et al., *Human Amygdala Activation During Conditioned Fear Acquisition and Extinction: A Mixed-Trial fMRI Study*, 20 NEURON 937 (1998); Joseph E. LeDoux, *Emotion, Memory and the Brain*, 270 SCI. AM. June 1994, at 50. *See generally* THE AMYGDALA: A FUNCTIONAL ANALYSIS, *supra* note 95.

107. *See* COZOLINO, *supra* note 90, at 257-85; Dennis S. Charney, *Psychobiological Mechanisms of Resilience and Vulnerability: Implications for Successful Adaptation to Extreme Stress*, 161 AM. J. PSYCHIATRY 195 (2004); Ruth A. Lanius et al., *The Nature of Traumatic Memories: A 4-T fMRI Functional Connectivity Analysis*, 161 AM. J. PSYCHIATRY 36 (2004); David J. Nutt & Andrea L. Malizia, *Structural and Functional Brain Changes in Posttraumatic Stress Disorder*, 65 J. CLINICAL PSYCHIATRY 11 (Supp. 1 2004); *see also* BROCKMAN, *supra* note 90, at 223-48; SIEGEL, *supra* note 94, at 50-55 (discussing the role of stress in the formation of traumatic memories).

violation if they were asked to evaluate “coerced counseling” programs.<sup>108</sup> If amygdalae could talk, however, those of the inmates who have participated in such coerced counseling programs might not be quite as matter-of-fact about that conclusion as Professor Winick appears to be.

Still, if one wishes to consider the ramifications of a neuroscientific discourse of the First Amendment, Professor Winick’s case analogies used to support his claim for the constitutionality of coerced counseling are instructive. Having no cases directly on point to offer judicial support for his argument, he compares coerced counseling to the education of children: if the Court has upheld the government’s right to instruct (sometimes) unwilling students, it should also uphold the government’s right to instruct (often) unwilling prisoners.<sup>109</sup> The State has a compelling interest in using speech to form and/or reform minds and hearts in both these contexts. In making these arguments, Professor Winick fills his footnotes with memorable quotations from some of the great opinions of the school speech cases decided up to the date of the writing of his article.<sup>110</sup> All the quotations speak forcefully of the State’s interest in using words not only to teach the 3R’s, but also to teach the values of a civil society.<sup>111</sup>

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108. As Professor Tribe notes, “Since confinement itself may be regarded as a crude form of behavior modification, it seems clear that there can be no general prohibition against a governmental decision to subject persons who have caused harm to at least some [behavior modification] techniques.” TRIBE, *supra* note 15, at 1327.

109. Winick, *supra* note 8, at 84-85.

110. *Id.* at 84 n.499 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (upholding a student’s right to wear black armbands as a passive protest)); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 696 (1986) (holding that punishing a student for his speech at an assembly, which included sexual metaphor and lewd speech, was not a violation of his right to free speech under the First Amendment); *Bd. of Educ. v. Pico*, 457 U.S. 853, 875 (1982) (finding a genuine issue of fact regarding a school board’s removal of books from a school library based upon political ideology).

111. *Id.*; see *Bethel*, 478 U.S. at 683 (“The inculcation of these values is truly the ‘work of the schools.’”); *Pico*, 457 U.S. 853 at 864 (“[L]ocal school boards must be permitted ‘to establish and apply their curriculum in such a way as to transmit community values . . . .’”). Professor Winick also quotes school cases from Establishment Clause jurisprudence, *Abington School*

These quotations remind one, however, of far more. They remind one that all state actors are speakers whether the person is a therapist, teacher, or a government official. Furthermore, all speakers hope to make an impact upon their audiences. If the government funds one speech activity rather than another, it does so precisely because it wants the hearers of that speech not only to hear the message but also to remember it. If the State supports patriotism, it wants people to become and/or remain patriotic. The purpose of the First Amendment is to promote a marketplace for ideas for people to be able to listen, compare, and decide on the value of the words of speakers.<sup>112</sup> In other words, why speak if one is not going to make a difference in the minds and thought processes of those who listen?<sup>113</sup>

#### V. FREE SPEECH JURISPRUDENCE AND NEUROSCIENTIFIC DISCOURSE

The government must have an interest in promoting at least some messages, even if they are as basic as “respect your country” or “crime does not pay.” The government wants citizens to remember these messages and feel their impact. Therefore, the government wants all the requisite brain areas of citizens to fire their neurons when they think of and respond to these messages. Mind arises out of brain activity, so whenever one is trying to influence a mind, one is trying to change a brain. This argument is

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*District v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (“[T]he public school [is] a most vital civic institution for the preservation of a democratic system of government.”), and Equal Protection jurisprudence, *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“[E]ducation has a fundamental role in maintaining the fabric of our society,” and “the pivotal role of education [is] in sustaining our political and cultural heritage . . .”).

112. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* 25-26 (1948).

113. Cf. LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 10 (1986) (“[F]ree speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to *control feelings* evoked by a host of social encounters.”) (emphasis added).

obvious. If neuroscientific discourse is to have any meaning in the First Amendment, it must rise to something not so trivial.

Solely as a matter of legal rules, perhaps it is trivial. People speak. People listen. Governments must be prevented from unduly interfering with both those activities. Rules will have to be made. As a matter of rhetoric, however, of discourse, of the justification for the legal rules that must be made and followed, one should not be so dismissive.<sup>114</sup> As one commentator put it, “having bitten into the neuroscientific apple, can we go back to the Garden as though nothing has happened?”<sup>115</sup>

Consider the following hypothetical. The government begins a campaign urging citizens to vote in the next election. Officials post billboards and publish advertisements in the media and on the Internet urging citizens to vote. No one feels uneasy with that. Officials conduct focus groups and surveys to determine the most effective means of conveying their message. Again, probably few feel uneasy with that.

But imagine that the government now conducts extensive research with subjects by monitoring the changes in their brain glucose metabolism in response to the messages. Researchers see which parts of the subjects’ brains light up in response to which message. They search for metabolic activity in various emotion-

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114. Commentators describe this rhetorical problem as being one of “folk psychology,” defined as:

[T]he prescientific, commonsense conceptual framework that all normally socialized humans deploy in order to comprehend, predict, explain, and manipulate the behavior of humans and the higher animals. This framework includes concepts such as *belief, desire, pain, pleasure, love, hate, joy, fear, suspicion, memory, recognition, anger, sympathy, intention*, and so forth.

Robert Birmingham, *Folk Psychology and Legal Understanding*, 32 CONN. L. REV. 1715, 1716 (2000) (citing Paul M. Churchland, *Folk Psychology*, in PAUL M. CHURCHLAND & PATRICIA S. CHURCHLAND, ON THE CONTRARY: CRITICAL ESSAYS 1987-1997 3, 3 (1998)). See generally Lelling, *supra* note 14 (analyzing how certain understandings of neuroscience appear to make such folk psychology assumptions untenable).

115. Birmingham, *supra* note 114, at 1726.

related parts of the brain. They correlate such activity with any metabolic activity occurring in those areas of the brain associated with other functions such as language recognition, executive control of attention processes, nonconscious recognition of nonlinguistic elements of a message, and so forth. The researchers monitor subjects' brain functioning over time to determine how they might increase the likelihood that a message will not only be evaluated positively, but also remembered. Based on this data, the government then tailors its message to maximize its impact on the long-term cognitive and emotional memory circuitry of persons who hear that message. By this point, I suspect that most persons will have become at least a bit uneasy with the implications of all this.

Unlike Soma, this is not the stuff of dystopic fiction. Similar research is already being conducted to influence an individual's choices about consumer products.<sup>116</sup> Government officials may even be conducting such research for their own interests at this moment.<sup>117</sup> Even if one cannot guarantee that a particular message will produce a particular neuronal effect on any particular individual, with enough research one may be able to get enough information about brain functioning to get enough of the message out to get enough of the vote in. To get persons' brains to respond in such a way as to maximize their chances of voting is one thing. To get their brains to respond so as to maximize their chances of voting a certain way is quite another.

Yet, the message that arises out of all that research will be speech and speech alone – no chemical or nanotechnological device has been inserted in anyone. Research may be expensive, but talk is cheap. Everyone is free to follow one's conscience. Everyone is free to ignore as one chooses.

All of that is true. But the real possibility of that well-researched message returns us to *Sell*, to metaphor, and to silence.

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116. *See supra* note 13 and accompanying text.

117. In fact, private researchers are already looking at the differences in brain functioning (for example, amygdala activation with perceived threats) between Republican and Democratic voters when asked to respond to specific issues. John Tierney, *Using M.R.I.'s To See Politics On the Brain*, N.Y. TIMES, Apr. 20, 2004, at A1.



Out of what the opinion does not say, *Sell* reminds us that the real residue of any psychiatric encounter, long after the last molecule of medication has passed through the liver on its way to the kidney, is always in the neuronal traces of the personal encounters that happened during the treatment. Those neuronal traces – those real, physical, neuronal memories and their associated mental representations – are the real invasions and colonizations of the body brought on by treatment that is not desired and that potentially intrudes on First Amendment protections.<sup>118</sup> But to know that is to take seriously the true physiological impacts of human relationships. It is to endorse a discourse of nature that brings with it a discourse of permanence and of uncertain effect. We never know when events will so trigger neuronal structures so that a person is forced to remember, either representationally or viscerally, some event of the past. Forced medications may come and go, but encounters stick with us, even if only to require some degree of neuropsychological energy to keep them ejected from consciousness. Moreover, forced encounters do not happen only in

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118. In a brief otherwise devoted to concerns about the ramifications of physical invasions into the mind, the CCLE added support to this conclusion by including the following quotation:

[M]ost of us suppose that we are endowed with free will. But if choices by free will are simply the resolution of conflicts of neurological subsystems, and we become consciously aware of those subsystems and are able to intervene in their processes, do we run the risk of runaway instabilities at the deepest levels of what we presently call our ‘minds’? Will we find that these instabilities are profound counterparts to the maladies we currently designate as epilepsy, or psychosomatic illnesses? In any redesigns of our brains which would involve opening doors to, quite literally, the ultrastructure of our thoughts, we could become ‘naked to ourselves’ in ways that we can only vaguely speculate about at present. Along with any other dangers we might encounter, this will raise entirely new issues of the proper role of psychotherapy and the sanctity of personal privacy.

CCLE Brief, *supra* note 39, at 19 n.15 (quoting ROBERT A. FREITAS, JR., 1 NANOMEDICINE: BASIC CAPABILITIES § 1.2.5 (1999)).

psychiatric hospitals or their prison counterparts. Every student who is forced to listen to a particular view of history, every prisoner who is forced to listen to a particular view of moral behavior, and even every person who is forced to decide whether to pay attention to a public service announcement is being “invaded” neuronally – always, of course, for a compelling state interest.

As a result, through this neuroscientific discourse, we can come to understand that the First Amendment becomes “incorporated” in a genuinely different manner from the way we have come to associate with that term. Ideas and perceptions are not just meant to enter someone *in corpore*. They are meant to stay *in corpore*.<sup>119</sup> This is the whole purpose of the transmission of ideas and speech. Neuroscientific discourse may not tell us something new about what the First Amendment should protect, but it does give us a more embodied sense of the seriousness of the whole matter. It is not just the Fifth, Fourth<sup>120</sup> or the Eighth<sup>121</sup> Amendments that protect our bodies. It is also the First.

## VI. CONCLUSION

Law is a pragmatic discipline. What is obscene or not obscene, for example – and just how one’s eyes and brains will get access to it – will never be a question to which neuroscientists will have much to say. True, scientists certainly have much to say about the effects of bodily invasions of the brain, and they will continue to

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119. The Latin phrase *in corpore* is in the accusative case, indicating motion toward something and thus translatable as “into the body.” The phrase *in corpore*, in contrast, is in the ablative case, indicating static location within something and thus translatable as “in(side) the body.”

120. The Fourth Amendment grants:

The right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

121. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

do so; but, after *Sell*, in the criminal context at least, the only laws that will have much to say back to them are the Fifth and Fourteenth Amendments.<sup>122</sup>

Law is, however, a socially-situated discipline as well. Eventually it must speak to what people are talking about. Neuroscientists will certainly continue to talk about both their findings and the implication of those findings, thereby causing lay people to notice and think. In this context, jurists and scholars will eventually have to confront the fact that neuroscientists will not only have much to say to the Law, but that also they will almost certainly keep on saying what they have to say, over and over. As scientists do so, as they continue to talk about orbitofrontal cortices and amygdalae, these concepts will translate into everyday speech and language. Phrases such as motivational saliences and interpersonal processes will eventually become linked to words such as fear, belief, trust, and action.<sup>123</sup> Arcane medical jargon will give way to easily comprehensible expressions of human experience, and the promotion and regulation of human experiences is, after all, ultimately what Law is all about. “Freedom of thought” and the First Amendment may never be the same because of the impact of such words and the underlying neuroscientific research. With talk like that circulating around them, the Justices of the Court will one day, *Sell* notwithstanding, no longer have the luxury of maintaining silence—no matter what the reason.<sup>124</sup>

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122. The Fourteenth Amendment states that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. XIV, § 1.

123. Already these nonscientific terms are finding their way not only into serious books about the subject, e.g., GREGORY BERNS, M.D., Ph.D., *SATISFACTION: THE SCIENCE OF FINDING TRUE FULFILLMENT* (2005), but also into the most respected scientific publications. See Laura Helmuth, *Caudate-Over-Heels in Love*, 302 *SCI.* 1320 (2003).

124. Cf. Jeffrey Rosen, *Roberts v. the Future*, *N.Y. TIMES MAG.*, August 28, 2005, at 24 (discussing how scientific and technological advances will impact cases that may come before the Court in the next ten years).