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The Right to Refuse Mental Health Treatment: A First Amendment Perspective

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The Right to Refuse Mental Health Treatment: A First Amendment Perspective*

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This Article is adapted from a chapter of the author's forthcoming book, *THE RIGHT TO REFUSE TREATMENT: CONSTITUTIONAL LIMITATIONS ON MENTAL HEALTH AND CORRECTIONAL THERAPY*. Professor Winick has previously addressed these issues in a number of published articles. See Winick, *The Right to Refuse Psychotropic Medication: Current State of the Law and Beyond*, in *THE RIGHT TO REFUSE ANTIPSYCHOTIC MEDICATION* 7 (D. Rapoport & J. Parry eds. 1986); Winick, *Legal Limitations on Correctional Therapy and Research*, 65 MINN. L. REV. 331 (1981); Winick, *A Preliminary Analysis of Legal Limitations on Rehabilitative Alternatives to Corrections and on Correctional Research*, in *NEW DIRECTIONS IN THE REHABILITATION OF CRIMINAL OFFENDERS* 328 (S. Martin, L. Sechrest & R. Redner eds. 1981) (National Academy of Sciences); Winick, *Psychotropic Medication and Competence to Stand Trial*, 1977 AM. B. FOUND. RES. J. 769, 810-14.

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I. INTRODUCTION

One of the most significant issues facing the United States Supreme Court in its 1989 Term is the extent to which the Constitution recognizes a right to refuse mental health treatment.¹ Involuntary treatment, provided in mental hospitals, prisons, and increasingly in the community as a condition for release from these institutions, has produced an expanding body of case law² and commentary³ con-

1. *Washington v. Harper*, 109 S. Ct. 1337 (1989), *granting cert. to Harper v. State*, 110 Wash. 2d 873, 759 P.2d 358 (1988) (en banc).

2. *E.g.*, *United States v. Charters*, 863 F.2d 302 (4th Cir. 1988) (en banc) (antipsychotic drugs); *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985) (antipsychotic drugs); *Lojuk v. Quandt*, 706 F.2d 1456 (7th Cir. 1983) (electroconvulsive therapy); *Rennie v. Klein*, 653 F.2d 836 (3d Cir. 1981) (en banc), *vacated and remanded*, 458 U.S. 1119 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983) (en banc) (psychotropic drugs); *Rogers v. Okin*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1st Cir. 1984) (psychotropic drugs); *Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976), *vacated and remanded*, 458 U.S. 1101, *on remand*, 691 F.2d 634 (3d Cir. 1982) (psychotropic drugs); *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973) (aversive conditioning); *Riese v. St. Mary's Hosp. & Medical Center*, 196 Cal. App. 3d 1388, 243 Cal. Rptr. 241 (1987), *appeal dismissed*, 259 Cal. Rptr. 669, 774 P.2d 698 (1989) (psychotropic drugs); *In re Mental Commitment of M.P.*, 500 N.E.2d 216 (Ind. 1986), *superseded*, 510 N.E.2d 645 (1987) (antipsychotic drugs); *Kaimowitz v. Michigan Dep't of Mental Health*, Civ. No. 73-19434-AW (Mich. Cir. Ct. [Wayne Cty.] July 10, 1973), *excerpted at* 42 U.S.L.W. 2063 (July 31, 1973), *reprinted in* A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 902 (1974) (psychosurgery); *Rivers v. Katz*, 67 N.Y.2d 485, 504 N.Y.S.2d 74, 495 N.E.2d 337 (1986) (antipsychotic drugs); *Harper v. State*, 110 Wash. 2d 873, 759 P.2d 358 (1988) (en banc), *cert. granted*, 109 S. Ct. 1337 (1989) (antipsychotic drugs).

3. *E.g.*, R. SCHWITZGEBEL, LEGAL ASPECTS OF THE ENFORCED TREATMENT OF

cerning the "right to refuse treatment." Psychotropic drugs, which by definition affect mental processes, intellectual functioning, and perception, mood, and emotion,⁴ is the treatment technique that usually provokes the controversy, and the one most easily administered on an involuntary basis. In 1982 the Supreme Court considered the right to refuse treatment in *Mills v. Rogers*,⁵ in which the Court reviewed a class-wide injunction restricting the involuntary administration of psychotropic medication at the Boston State Hospital. The Court, however, avoided resolving this difficult issue, remanding the case to determine whether an intervening state court decision grounded in state law had rendered unnecessary resolution of the federal constitutional questions.⁶ Lower federal courts and state courts have contin-

OFFENDERS, (DHEW Pub. No. (ADM) 79-831, 1979); Appelbaum, *The Right to Refuse Treatment with Antipsychotic Medications: Retrospect and Prospect*, 145 AM. J. PSYCHIATRY 413 (1988); Brooks, *The Constitutional Right to Refuse Antipsychotic Medications*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 179 (1980); Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39 (1975); Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. U.L. REV. 461 (1977); Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237 (1974); Wexler, *Token and Taboo: Behavior Modification, Token Economies and the Law*, 61 CALIF. L. REV. 81 (1973); Winick, *Legal Limitations on Correctional Therapy and Research*, 65 MINN. L. REV. 331 (1981); Winick, *The Right to Refuse Psychotropic Medication: Current State of the Law and Beyond*, in THE RIGHT TO REFUSE ANTIPSYCHOTIC MEDICATION 7 (D. Rapoport & J. Parry eds. 1986) [hereinafter *The Right to Refuse Psychotropic Medication*]; Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616 (1972); Comment, *Madness and Medicine: The Forcible Administration of Psychotropic Drugs*, 1980 WIS. L. REV. 497.

Some states have also enacted statutory protection for the right to refuse treatment. *E.g.*, CAL. PENAL CODE §§ 2670-2680 (West 1982); FLA. STAT. § 394.459(3) (1987); IDAHO CODE § 66-346(a)(4) (1989); WASH. REV. CODE § 11.92.040(3) (1987); *see also* *Keyhea v. Rushen*, 178 Cal. App. 3d 526, 223 Cal. Rptr. 746 (1986) (enforcing statutory right of prisoners to refuse psychotropic medication); *Conservatorship of Waltz*, 180 Cal. App. 3d 722, 227 Cal. Rptr. 436 (1986) (enforcing statutory right of competent patients to refuse electroconvulsive therapy). *See generally* S. BRAKEL, J. PARRY & B. WEINER, *THE MENTALLY DISABLED AND THE LAW* 347 & n.242, 357-65 (table 6.2, col. 13) (3d ed. 1985) (statutory compilation); Plotkin, *supra*, at 504-25 (statutory compilation). According to a survey published in 1985, 20 states had statutory provisions relating to the administration of psychotropic medication. S. BRAKEL, J. PARRY & B. WEINER, *supra*, at 347 & n.242. According to a survey published in 1983, 45 states recognized at least a qualified right to refuse psychotropic drugs. Callahan & Longmire, *Psychiatric Patients' Right to Refuse Psychotropic Medication: A National Survey*, 7 MENTAL DISABILITY L. REP. 494, 495 (1983).

4. *See generally* Winick, *The Right to Refuse Psychotropic Medication*, *supra* note 3, at 10; Winick, *Psychotropic Medication and Competence to Stand Trial*, 1977 AM. B. FOUND. RES. J. 769.

5. 457 U.S. 291 (1982).

6. *Mills v. Rogers*, 457 U.S. 291 (1982), *vacating* *Rogers v. Okin*, 634 F.2d 650 (1st Cir. 1980), *on remand*, 738 F.2d 1 (1st Cir. 1984). The Court vacated the decision of the court of appeals, which had recognized a federal constitutional right to refuse medication, and remanded to the lower court to consider the effect of Guardianship of Roe, 383 Mass. 415, 421 N.E.2d 40 (1981), an intervening decision of the Supreme Judicial Court of Massachusetts

ued to contend with these constitutional questions, and in *Washington v. Harper*, the Court has recently granted certiorari to consider a decision of the Washington Supreme Court which imposed constitutional limits on the administration of psychotropic drugs in a state correctional facility.⁷

In 1976, Walter Harper was convicted of robbery in Washington state court.⁸ No question was raised concerning Harper's competency to stand trial, and he did not assert an insanity defense.⁹ Harper was sentenced to the Washington State Penitentiary. Between 1976 and 1980, he was housed primarily at a mental health unit in the prison, where he voluntarily underwent antipsychotic drug therapy. He was paroled in 1980 on the condition that he participate in continued psychiatric treatment. He thereafter spent time at the psychiatric ward of a general hospital and at a state mental hospital to which he was civilly committed. In December of 1981, Harper's parole was revoked for assaulting two hospital nurses. Upon his return to prison, Harper was sent to the Special Offenders Center, a 144-bed correctional facility which provided diagnosis and treatment for convicted felons having "serious behavioral or mental disorders."¹⁰ Harper was diagnosed as mentally ill by psychiatrists at the center, and given antipsychotic drugs.¹¹ He voluntarily submitted to continued psychotropic drug treatment at the center, but in November 1982, refused to continue taking the prescribed drugs. Harper had a history of assaultive behavior in the institution, which his psychiatrists attributed to his mental illness, and which they believed increased when he did not take his medication.¹² His treating physician therefore initiated an administrative proceeding before a hearing committee at the center to determine whether medication should be administered against Harper's will. Following a hearing, the committee, finding Harper to

which had recognized a right to refuse grounded in state law. See *Mills*, 457 U.S. at 306. The Massachusetts courts subsequently reiterated a right to refuse antipsychotic drugs in *Rogers v. Commissioner of Department of Mental Health*, 390 Mass. 489, 458 N.E.2d 308 (1983), and the court of appeals thereafter approved the state procedures adopted in that case, finding them to "equal or exceed the rights provided in the federal Constitution." *Rogers*, 738 F.2d at 9.

7. 109 S. Ct. 1337 (1989). *Harper* was argued on October 11, 1989, and is awaiting decision. 58 U.S.L.W. 3270 (Oct. 24, 1989).

8. *Harper v. State*, 110 Wash. 2d 873, 874, 759 P.2d 358, 360 (1988).

9. Brief of Respondent at 1, *Washington v. Harper*, 109 S. Ct. 1337 (1989) (No. 88-599).

10. 110 Wash. 2d at 874-75, 759 P.2d at 360.

11. Brief of Respondent at 2, *Washington v. Harper*, 109 S. Ct. 1337 (1989) (No. 88-599). Harper was variously diagnosed as suffering from manic depression, schizo-affective disorder, or schizophrenia. *Id.* He was treated with a wide variety of antipsychotic drugs, including Trilafon, Haldol, Prolixin, Taractan, Loxitane, Mellaril, and Navane. *Id.* at 3 n.1.

12. *Id.* at 2.

be mentally ill and a danger to others, authorized involuntary medication. This decision was upheld by the superintendent of the center upon Harper's appeal.¹³

Between November 1982 and June 1985, Harper was administered antipsychotic drugs on an involuntary basis, the committee reviewing and approving of continued treatment approximately every two weeks.¹⁴ In February of 1985, Harper filed suit to challenge his forced medication. Upon the dismissal of his complaint following trial, Harper appealed directly to the Washington Supreme Court.¹⁵ The court considered Harper to have a fundamental right to refuse the drugs, and applied traditional strict scrutiny.¹⁶ The court held that involuntary administration of psychotropic drugs implicated a constitutionally protected liberty interest and required a prior judicial hearing, rather than the administrative hearing Harper received at the facility.¹⁷ Furthermore, the Washington court held that in order to administer medication involuntarily, the state at a judicial hearing must show "(1) a compelling state interest to administer antipsychotic drugs, and (2) the administration of the drugs is both necessary and effective for furthering that interest."¹⁸

The right to refuse treatment controversy raises significant theoretical constitutional issues, and has enormous practical implications concerning the treatment of hundreds of thousands of mental hospital patients and prisoners. The impact extends to even larger numbers of individuals residing in the community who are released from civil hospitals, diverted from the criminal justice system, or paroled from prison, on the basis that they accept treatment as a condition of their release. Moreover, although *Harper* involves antipsychotic drugs, the Court's decision will have inevitable implications for the application of other types of mental health treatment and correctional rehabilitation, both more and less intrusive than these drugs.

Most of the lower court cases recognizing a right to refuse treatment have grounded the right in constitutional privacy and substantive due process.¹⁹ Several, without extended analysis, have also

13. 110 Wash. 2d at 875, 759 P.2d at 360.

14. *Id.*

15. *Id.* at 875-76, 759 P.2d at 360-61.

16. *Id.* at 878, 759 P.2d at 362.

17. *Id.* at 881, 759 P.2d at 363.

18. *Id.* at 883, 759 P.2d at 364.

19. *See, e.g.*, *United States v. Charters*, 863 F.2d 302, 305 (4th Cir. 1988) (en banc) (antipsychotic drugs intrude sufficiently upon "bodily security" to implicate a "protectible liberty interest"); *Bee v. Greaves*, 744 F.2d 1387, 1393 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985) (constitutional "liberty interest in freedom from physical and mental restraint of the kind potentially imposed by antipsychotic drugs"); *Johnson v. Silvers*, 742 F.2d 823, 825

alluded to a first amendment right to be free of interference with mental processes as a supplemental basis.²⁰ Among other claims, Harper's complaint asserted that his involuntary medication with antipsychotic drugs violated his first amendment "right of freedom of speech and the right to freely generate ideas"²¹ Although the

(4th Cir. 1984) ("the forcible administration of antipsychotic drugs presents a sufficiently analogous intrusion upon bodily security [to the bodily restraints involved in *Youngberg v. Romeo*, 457 U.S. 307 (1982)] to give rise to such a protectible liberty interest"); *Project Release v. Prevost*, 722 F.2d 960, 971-79 (2d Cir. 1983) (liberty interest in refusing medication), *aff'g* 551 F. Supp. 1298, 1309 (E.D.N.Y. 1982) ("Forcible medication can alter mental processes and limit physical movement, and therefore is analogous to bodily restraint."); *Lojuk v. Quandt*, 706 F.2d 1456, 1465 (7th Cir. 1983) (electroconvulsive therapy implicates constitutional privacy interest in "bodily integrity, personal security and personal dignity"); *Rogers v. Okin*, 634 F.2d 650, 653 (1st Cir. 1980) (constitutional right "in being left free by the State to decide . . . whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs" derived from "the penumbral right to privacy, bodily integrity or personal security"); *Scott v. Plante*, 532 F.2d 939, 946 n.9 (3d Cir. 1976) ("right to bodily privacy"); *Osgood v. District of Columbia*, 567 F. Supp. 1026, 1032 (D.D.C. 1983); *Davis v. Hubbard*, 506 F. Supp. 915, 930 (N.D. Ohio 1980) ("bodily integrity" and "personal dignity"); *Rennie v. Klein*, 462 F. Supp. 1131, 1144 (D.N.J. 1978) ("the right of privacy is broad enough to include the right to protect one's mental processes from governmental interference" and the "individual's autonomy over his own body"); *Anderson v. State*, 135 Ariz. 578, 582, 633 P.2d 570, 574 (Ariz. Ct. App. 1982) (due process liberty interest in freedom from bodily restraint "[t]o the extent that medication is administered forcibly and/or for the purpose of accomplishing bodily restraint"); *Rogers v. Commissioner of Dep't of Mental Health*, 390 Mass. 489, 458 N.E.2d 308, 314 (1983) (right to refuse psychotropic medication "has constitutional and common law origins . . . which protect each person's 'strong interest in being free from nonconsensual invasion of his bodily integrity'"); *Opinion of the Justices*, 123 N.H. 554, 559, 465 A.2d 484, 488 (1983) (state constitution affords mentally ill persons "a right to be free from unjustified intrusion upon their personal security"); *In re K.K.B.*, 609 P.2d 747, 749-50 (Okla. 1980) (psychotropic drugs "are intrusive in nature and an invasion of the body" in violation of constitutional right to privacy).

20. *Bee v. Greaves*, 744 F.2d at 1393-94 (because psychotropic drugs could affect the "ability to think and communicate," their involuntary administration implicates the first amendment, which implicitly protects "the capacity to produce ideas"); *Lojuk v. Quandt*, 706 F.2d at 1465 (electroconvulsive therapy implicates a first amendment interest "in being able to think and communicate freely"); *Scott v. Plante*, 532 F.2d at 946 (The "involuntary administration of drugs which effect mental processes . . . could amount . . . to an interference with . . . rights under the First Amendment."); *Girouard v. O'Brien*, No. 83-3316-0 (D. Kan. April 4, 1988) (LEXIS, Genfed library, Dist. file) (1988 U.S. Dist. LEXIS 4342) (antipsychotic drugs can affect the "ability to think and communicate" and thus raise first amendment concerns) (quoting *Bee*, 744 F.2d at 1393-94); *Rogers v. Okin*, 478 F. Supp. 1342, 1366-67 (D. Mass. 1979), *aff'd in part and rev'd in part on other grounds*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982) (the "right to produce a thought—or refuse to do so" is protected by the first amendment, and is implicated by antipsychotic drugs, which have "the potential to affect and change a patient's mood, attitude and capacity to think"); *Kaimowitz v. Michigan Dep't of Mental Health*, Civ. No. 73-19434-AW (Mich. Cir. Ct. [Wayne Cty.] July 10, 1973), *reprinted in* A. BROOKS, *supra* note 2, at 917 (psychosurgery, by impairing the power to "generate ideas," implicates the first amendment).

21. Complaint § 5.3, Joint Appendix at 7, *Washington v. Harper*, 109 S. Ct. 1337 (1989) (No. 88-599).

lower court in *Harper* found that the antipsychotic drugs involved there "are by intention mind altering; they are meant to act upon the thought processes,"²² the court based its decision, without elaboration, on a constitutional liberty interest, and did not expressly invoke the first amendment.²³

Since the replacement of the moderate and centrist Justice Lewis Powell with Justice Anthony Kennedy, the Supreme Court seems disinclined to expand substantive due process protections,²⁴ and indeed, has embarked on a retrenchment of such protections in the abortion context.²⁵ In its 1988 Term, surely the most conservative in several decades, the Court, however, continued to demonstrate considerable deference to the first amendment.²⁶ Thus, whether the Court views

22. 110 Wash. 2d at 877, 759 P.2d at 361.

23. *Id.* at 876, 878, 759 P.2d at 361-62. Significantly, however, in rejecting the state's suggestion that the court apply the "reasonable relation analysis" of such first amendment prison cases as *Turner v. Safley*, 482 U.S. 78 (1987) (censorship of incoming inmate mail), and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (regulation of prisoner work rules having an impact on religious practices), the Washington Supreme Court found the "uniquely intrusive nature of antipsychotic drug treatment" to be distinguishable from "the First Amendment interests involved" in these prison cases, and hence deserving of greater protection. *Harper*, 110 Wash. 2d at 883 n.9, 759 P.2d at 364 n.9.

24. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1003 (1989) (rejecting the claim that a state's failure to protect a child against a known risk of physical abuse by his father violated due process; "the Due Process clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual"); *id.* at 1012 (Blackmun, J., dissenting) (The Court's attempt "to draw a sharp and rigid line between action and inaction" constitutes "formalistic reasoning" which "has no place in the interpretation of the broad and stirring clauses of the Fourteenth Amendment."); *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989) (plurality opinion) (rejecting contention that substantive due process protects a biological father's relationship with a child whose mother was married and cohabiting with another man at the time of the child's conception and birth); *id.* at 2349 (Brennan, J., dissenting, joined by Marshall & Blackmun, J.J.) (criticizing "the plurality opinion's exclusively historical analysis" of due process and suggesting that it "portends a significant and unfortunate departure from our prior cases"); see also *id.* at 2351 ("[T]he plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States. Transforming the protection afforded by the Due Process Clause into a redundancy mocks those, who, with care and purpose, wrote the Fourteenth Amendment.").

25. See *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989). The Court's recent grant of review in three additional abortion cases has prompted speculation concerning further retrenchments. See *Hodgson v. Minnesota*, 109 S. Ct. 3240 (1989); *Turnock v. Ragsdale*, 109 S. Ct. 3239 (1989); *Ohio v. Akron Center for Reproductive Health*, 109 S. Ct. 3239 (1989).

26. See *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989) (seizure under a state civil RICO statute of a large quantity of sexually explicit material prior to an adversary determination that it was obscene held an impermissible prior restraint in violation of the first amendment); *Eu v. San Francisco County Democratic Cent. Comm.*, 109 S. Ct. 1013 (1989) (election code prohibiting official governing bodies of political parties from endorsing candidates in party primaries, and dictating the organization and composition of political parties, held to abridge first amendment free speech and association rights); *Texas v. Johnson*,

the issues framed by the right to refuse treatment through the lens of substantive due process doctrine or that of the first amendment may have an important impact on the resolution of the complex questions presented.²⁷ The lower court opinions which have suggested a first amendment basis for a right to refuse treatment, however, have done so in a conclusional fashion or without extended analysis.²⁸ Moreover, the commentators have not discussed the first amendment issues in any detail.²⁹

This Article addresses the first amendment implications of involuntary mental health treatment, analyzing whether the first amendment should be read to provide constitutional protection against governmentally imposed treatment that interferes with mental processes. That the Constitution places thought control beyond the power of government cannot be doubted, although there is no clear doctrinal source for this principle. Because government has not pos-

109 S. Ct. 2533 (1989) (conviction for burning American flag in political demonstration held to violate first amendment); *id.* at 2548 (Kennedy, J., concurring) (joining "without reservation" the opinion of Justice Brennan for the Court, which broadly reaffirms traditional first amendment doctrine); *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989) (music is within the protection of the first amendment); *Florida Star v. B.J.F.*, 109 S. Ct. 2603 (1989) (imposing damages on newspaper for publishing name of rape victim held to violate first amendment); *Massachusetts v. Oakes*, 109 S. Ct. 2633, 2639-40 (1989) (opinion of 5 justices, concurring and dissenting in part) (first amendment overbreadth doctrine may be invoked to challenge a statute that has been amended or repealed); *Sable Communications, Inc. v. FCC*, 109 S. Ct. 2829, 2836-39 (1989) (prohibition on indecent but nonobscene "dial-a-porn" held to violate first amendment). In its 1988 Term, the Court has continued to apply traditional strict scrutiny in first amendment cases. *E.g.*, *Eu*, 109 S. Ct. at 1021, 1024-25; *Johnson*, 109 S. Ct. at 2543-44; *Florida Star*, 109 S. Ct. at 2613; *Sable Communications*, 109 S. Ct. at 2836. Nonetheless, the Court has in some circumstances rejected strict "least restrictive alternative" analysis in favor of somewhat more relaxed scrutiny. *E.g.*, *Ward*, 109 S. Ct. at 2756-59 (content-neutral time, place, and manner restrictions on speech); *Board of Trustees v. Fox*, 109 S. Ct. 3028, 3032-35 (1989) (commercial speech); *Thornburgh v. Abbott*, 109 S. Ct. 1874, 1879-85 (1989) (prison censorship of materials entering a correctional facility). For a further discussion of *Thornburgh*, see *infra* notes 485-91 and accompanying text.

27. Presumably because the Washington Supreme Court did not address Harper's first amendment claim, his brief in the United States Supreme Court merely refers to the first amendment implications of involuntary antipsychotic medication in two footnotes. Brief of Respondent at 11 n.12, 42 n.108, *Washington v. Harper*, 109 S. Ct. 1337 (1989) (No. 88-599). Harper instead grounded his constitutional contentions in "two separate aspects of the right to privacy." *Id.* at 9. In any event, the first amendment issue is plainly comprehended by Question II of the petitioner's brief on writ of certiorari:

If an incarcerated felon possesses a constitutionally protected liberty interest in refusing medically prescribed antipsychotic medication, must the State prove a compelling state interest to administer antipsychotic medication or does the "reasonable relation" standard of *Turner v. Safley*, [482] U.S. [78], 107 S. Ct. 2254 (1987), control?

Brief of Petitioners at i, *Washington v. Harper*, 109 S. Ct. 1337 (1989) (No. 88-599).

28. See *supra* note 20.

29. See *supra* note 3 (articles & books).

sessed the ability to intrude directly and powerfully into an individual's mental processes prior to the emergence of the organic treatment techniques of modern psychiatry, the Supreme Court has had no occasion to develop the doctrinal basis for this principle. Although a liberty interest in freedom from such intrusions into mental processes can be located in the due process clauses of the fifth and fourteenth amendments, this Article argues that the first amendment can and should be construed as a source for this protection. In order to ascertain the extent to which free speech doctrine can be used in resolving the right to refuse treatment question, the Article reviews existing first amendment jurisprudence developed in a variety of contexts. It then considers whether the values underlying the first amendment are implicated by treatment affecting mental processes. The Article gives special consideration to the question of whether the first amendment protects "insane" or "disordered" thoughts, and whether it should apply to treatment that has the effect of restoring mental processes to a "normal" or "healthy" state. The Article then analyzes the various mental health treatment techniques, including psychotropic medication, in an effort to construct a rough continuum of intrusiveness along which these treatment methods may be considered based on their effects on first amendment values. The Article determines that first amendment scrutiny is appropriate for some but not all of these techniques, and that with several minor exceptions, involuntary administration of psychotropic drugs should be examined under traditional first amendment standards. The Article concludes with an analysis of these standards. The circumstances under which these standards can be satisfied when either civil patients or criminal offenders are subjected to these treatment methods, however, are beyond the scope of this Article, as is the extent to which procedural due process protections may apply.³⁰ The Article merely suggests a framework through which these issues should be resolved.

II. THE ORIGINS AND SCOPE OF THE FIRST AMENDMENT

The first amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assem-

30. For a more detailed analysis of these issues, see Winick, *The Right to Refuse Psychotropic Medication*, *supra* note 3, at 16-21 (mental patients); Winick, *Legal Limitations on Correctional Therapy and Research*, *supra* note 3, at 373-83 (criminal offenders). The author will provide an extensive treatment in his forthcoming book, B. WINICK, *THE RIGHT TO REFUSE TREATMENT: CONSTITUTIONAL LIMITATIONS ON MENTAL HEALTH AND CORRECTIONAL THERAPY* (manuscript on file at the University of Miami Law Review).

ble, and to petition the Government for a redress of grievances."³¹ This language does not immediately seem applicable to involuntary mental health treatment; indeed, it does not even seem to reach the activities of state hospitals or prisons. By its terms, the first amendment restricts only the exercise of federal power, and it does not purport to apply to the states.³² Let us, as a preliminary matter, consider whether the principles of the first amendment can serve as limitations on state and local mental health and correctional institutions.

The first amendment is one of the first ten amendments to the Constitution, collectively known as the Bill of Rights. These amendments were passed by the First Congress and ratified by the states in 1791 in order to protect individual liberties against the new national government.³³ During the debates on ratification of the Constitution in the thirteen colonies, opponents of ratification suggested that the absence of a Bill of Rights guaranteeing individual liberty created a grave potential for tyranny by the new federal government. Indeed, five of the eleven colonies that ratified the Constitution by early 1789 proposed amendments guaranteeing individual liberty against encroachment by the federal government.³⁴ In response to these concerns, the Bill of Rights was adopted as a limitation on federal authority.

Although the original Constitution imposed several relatively minor limitations on state legislatures,³⁵ with these exceptions it did not place direct restrictions on the authority of the states to abridge personal rights until the adoption of the post-Civil War amendments: the thirteenth, fourteenth and fifteenth amendments. The fourteenth

31. U.S. CONST. amend. I.

32. *E.g.*, *Baron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Permol v. Municipality No. 1 of New Orleans*, 44 U.S. (3 How.) 589, 609 (1845); *see* Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 433-36 (1926). Moreover, the first amendment does not restrict the actions of private persons. *E.g.*, *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 461 (1952).

33. G. GUNTHER, *CONSTITUTIONAL LAW* 406 (11th ed. 1985); M. NIMMER, *NIMMER ON FREEDOM OF SPEECH* § 1.01, at 1-2 to 1-3 (1984); J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 315 (3d ed. 1986); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 1-2, at 3-4 (2d ed. 1988); Levy, *Bill of Rights*, in *ESSAYS ON THE MAKING OF THE CONSTITUTION* 258, 260, 266-67, 277 (L. Levy 2d ed. 1987).

34. *See* 1 J. ELLIOTT, *DEBATES ON THE FEDERAL CONSTITUTION* 328, 334 (1891); 3 *id.* at 659; 4 *id.* at 244. *See generally* B. SCHWARTZ, *THE GREAT RIGHTS OF MANKIND* 119-59 (1977).

35. *E.g.*, U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law Impairing the Obligation of Contracts . . ."); *id.* at art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); *id.* at art. IV, § 2 ("Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); *see* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 33, at 314-15.

amendment was ratified on July 28, 1868. It effected a fundamental reordering of the American constitutional system, providing considerably greater protection for individual liberties than was provided originally in the Constitution.³⁶ The fourteenth amendment by its terms prohibits the states from depriving "any person of life, liberty, or property, without due process of law," and from denying "to any person within its jurisdiction the equal protection of the laws."³⁷ These broad and general provisions embody an evolving concept of liberty subject to constitutional protection against state encroachment. As the second Justice Harlan put it, with characteristic eloquence and wisdom:

[T]he very breadth and generality of the Amendment's provisions suggest that its authors did not suppose that the Nation would always be limited to mid-19th century conceptions of "liberty" and "due process of law," but that the increasing experience and evolving conscience of the American people would add new "intermediate premises."³⁸

The Supreme Court has read the due process clause of the fourteenth amendment broadly, construing it to incorporate, on a selective basis, various protections of the Bill of Rights, thereby making these fundamental guarantees applicable to the states.³⁹ Although the Court stated in 1922 that "neither the Fourteenth Amendment nor any other provision of the Constitution . . . imposes upon the States any

36. See R. CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS* 11 (1981); Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship and Civil Rights After the Civil War*, 92 AMERICAN HIST. REV. 45 (1981). See generally W. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

37. U.S. CONST. amend. XIV, § 1.

38. *Duncan v. Louisiana*, 391 U.S. 145, 175 (1968) (Harlan, J., dissenting).

39. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 33, at 315-18, 360-72; L. TRIBE, *supra* note 33, § 11-2, at 772-74; see, e.g., *Benton v. Maryland*, 395 U.S. 784 (1969) (fifth amendment right against double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (sixth amendment right to jury trial); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (sixth amendment right to speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (sixth amendment right of confrontation); *Malloy v. Hogan*, 378 U.S. 1 (1964) (fifth amendment right against self-incrimination); *Robinson v. California*, 370 U.S. 660 (1962) (eighth amendment ban against cruel and unusual punishments); *Mapp v. Ohio*, 367 U.S. 643 (1961) (fourth amendment exclusionary rule); *Wolff v. Colorado*, 338 U.S. 25 (1949) (fourth amendment freedom from unreasonable searches and seizures); *In re Oliver*, 333 U.S. 257 (1948) (sixth amendment right to public trial); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (first amendment ban on establishment of religion); *Hague v. CIO*, 307 U.S. 496 (1939) (first amendment right to petition); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (first amendment right to petition); *Near v. Minnesota*, 283 U.S. 697 (1931) (first amendment right to freedom of press); *Fiske v. Kansas*, 274 U.S. 380 (1927) (first amendment right to freedom of speech); *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897) (fifth amendment right to just compensation).

restrictions about 'freedom of speech,'"⁴⁰ it backed away from that statement one year later,⁴¹ and in 1925 recognized that the first amendment applied to the states through the fourteenth amendment.⁴²

That recognition came in the case of Benjamin Gitlow, the New York Socialist whose conviction for advocating criminal anarchy the Court affirmed.⁴³ An official of the radical Left Wing Section of the Socialist Party, Gitlow printed and distributed the "Left Wing Manifesto," a statement of the faction's policies, published in its official organ, *The Revolutionary Age*.⁴⁴ The Manifesto repudiated the goal of introducing Socialism through legislative means and advocated a militant "revolutionary Socialism" based on the "class struggle," which through the "power of the proletariat" would produce "revolutionary mass action" to bring about a new "dictatorship of the proletariat."⁴⁵ As business manager of *The Revolutionary Age*, Gitlow was convicted in New York state court for advocating the overthrow of the government by unlawful means. Gitlow's counsel had challenged the applicable New York statute as "in contravention of" the due process clause of the fourteenth amendment,⁴⁶ arguing first, "[t]hat the 'liberty' protected by the Fourteenth Amendment includes the liberty of speech and the press," and second, that the statute infringed Gitlow's first amendment liberty interests.⁴⁷ Although the Court rejected the

40. *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543 (1922).

41. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court invalidated a state statute forbidding the teaching in school of any language other than English, and offered the following expansive definition of the "liberty" protected by the fourteenth amendment:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399. Plainly, the right of an individual to worship according to the dictates of his conscience, referred to by the Court, is protected by the free exercise clause of the first amendment.

42. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (dicta). For a discussion of the inclusion of the first amendment within the liberty protected by the due process clause of the fourteenth amendment, see Warren, *supra* note 32, at 455-59. The Court first used the first amendment to invalidate a state abridgement of free speech in *Fiske v. Kansas*, 274 U.S. 380 (1927).

43. *Gitlow v. New York*, 268 U.S. 652 (1925).

44. *Id.* at 655.

45. *Id.* at 657-58.

46. *Id.* at 660.

47. *Id.* at 664.

second contention,⁴⁸ it accepted the first, stating that “[f]or present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”⁴⁹ In subsequent decisions the Court has repeatedly considered the various protections of the first amendment to be limitations on state authority.⁵⁰ Indeed, a plurality of the Court recently had occasion to “recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.”⁵¹

The first amendment thus serves as a limitation on governmental action at all levels—federal, state, and local.⁵² The critical question is whether it can be construed to apply in the context of involuntary mental health treatment. Does the first amendment restrict the gov-

48. In finding that the statute’s application to Gitlow was constitutional, the Court invoked the metaphor of speech as fire:

A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.

Id. at 669. Justice Holmes, in dissent, responded: “Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration.” *Id.* at 673 (Holmes, J., dissenting, joined by Brandeis, J.). Responding to the argument that the Manifesto was “more than a theory,” but was an “incitement,” Holmes noted that “[e]very idea is an incitement.” *Id.*

49. *Id.* at 666.

50. *E.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 49-50 (1985) (plurality opinion) (ban on establishment of religion); *Board of Educ. v. Pico*, 457 U.S. 853, 855 n.1 (1982) (plurality opinion) (right to receive information and ideas); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (right against being required to display an offensive state motto); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (right to free speech); *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947) (ban on establishment of religion); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637-38 (1943) (right of students not to participate in flag salute); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (right to free exercise of religion); *Hague v. CIO*, 307 U.S. 496, 519 (1939) (right to petition); *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (right to assembly); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) (right to free press); *Fiske v. Kansas*, 274 U.S. 380, 387 (1927) (right to free speech).

51. *Wallace*, 472 U.S. at 48-49.

52. Although the fourteenth amendment restricts the actions of the states, its coverage extends to all state action, including that taken by local agencies. *E.g.*, *Barnette*, 319 U.S. at 637-38 (“The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures . . . There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution.”).

ernment when it seeks to treat mental patients or rehabilitate offenders?

III. CONSTRUING "FREEDOM OF SPEECH": DOES THE FIRST AMENDMENT PROTECT MENTAL PROCESSES?

A. *The Supreme Court's Methodology: Deriving Corollary Rights from Freedom of Speech*

Aside from the protection of the free exercise of religion, the only right mentioned in the first amendment that could conceivably apply to involuntary mental health treatment is freedom of speech, a right that at most seems to be only indirectly affected. Like other constitutional provisions, however, the protection of freedom of speech, one of the "majestic generalities of the Bill of Rights,"⁵³ is an ambiguous and open-ended concept capable of being construed broadly to realize the basic purposes the provision was designed to accomplish. While the first amendment "literally forbids the abridgement only of 'speech,'" the Supreme Court has long recognized that its protection "does not end at the spoken or written word."⁵⁴ In the most recent example, Justice Kennedy, writing for the Court, recognized that music is "a form of expression and communication" within the protection of the first amendment.⁵⁵ Similarly, in a variety of contexts the Court has derived from freedom of speech a number of corollary rights deemed essential to effectuate the purposes of the first amendment.

53. *Barnette*, 319 U.S. at 639; see also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) ("[W]e have long eschewed any 'narrow, literal conception' of the [First] Amendment's terms, . . . for the Framers were concerned with broad principles . . ."); *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.) ("[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 11 (1979).

54. *Texas v. Johnson*, 109 S. Ct. 2533, 2539 (1989). The Court in *Johnson* held that flag-burning when done for expressive purposes is within the protection of the first amendment. In so doing, the Court followed a long line of cases that recognized various kinds of conduct to be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)); see, e.g., *United States v. Grace*, 461 U.S. 171, 176 (1983) (picketing); *Spence*, 418 U.S. at 409-10 (attaching a peace sign to a flag); *Schacht v. United States*, 398 U.S. 58 (1970) (wearing of American military uniform in a dramatic presentation criticizing Vietnam War); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 505-06 (1969) (wearing of black arm bands to protest Vietnam War); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313-14 (1968) (picketing); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (sit-in demonstration); *Barnette*, 319 U.S. at 632 (refusing to salute the flag); *Stromberg v. California*, 283 U.S. 359, 368-69 (1931) (displaying a red flag).

55. *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989) (Kennedy, J.).

Illustrations of this methodology are useful in analyzing whether the first amendment can be read to limit involuntary mental health treatment. A leading example is freedom of association. The Supreme Court has recognized "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."⁵⁶ The Court has deemed freedom of association to be guaranteed by the Constitution because it is "an indispensable means of preserving" these enumerated liberties.⁵⁷ These explicitly guaranteed freedoms "could not be vigorously protected . . . unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."⁵⁸ Thus, the Court has long found "implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others" in pursuit of these activities.⁵⁹ Although freedom of association "is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful."⁶⁰ Without protection for association and other "peripheral rights the specific rights would be less secure."⁶¹

Not only is freedom of association a derivative safeguard of the liberties explicitly guaranteed by the first amendment, but other rights have in turn been derived from the freedom to associate. These include, for example, the right to make financial contributions to an organization for the purpose of spreading a political message.⁶² Because making such a contribution "enables like-minded persons to pool their resources in furtherance of common political goals,"⁶³ the Court has reasoned that limitations on the freedom to contribute "implicate fundamental First Amendment interests."⁶⁴ Moreover,

56. *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984); *see, e.g., NAACP v. Clairborne Hardware Co.*, 458 U.S. 886 (1982); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 (1977); *Elrod v. Burns*, 427 U.S. 347, 355-57 (1976) (plurality opinion); *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975) (right to choose political party); *Healy v. James*, 408 U.S. 169, 181 (1972); *United States v. Robel*, 389 U.S. 258, 263 n.7 (1967); *NAACP v. Button*, 371 U.S. 415 (1963) (group legal practice); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). *See generally* L. TRIBE, *supra* note 33, § 12-23, at 977-86.

57. *Roberts*, 468 U.S. at 618.

58. *Id.* at 622.

59. *Id.*

60. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

61. *Id.*

62. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976).

63. *Buckley*, 424 U.S. at 22.

64. *Id.* at 23.

the Court has held that the first amendment protects not only the right of an individual to associate with others in an organization and to contribute to that organization, but also a right not to be *compelled* by the government to join an organization⁶⁵ or to contribute financially to the support of an organization's efforts to advance an ideological cause he may oppose.⁶⁶ "Freedom of association . . . plainly presupposes a freedom not to associate."⁶⁷

An additional first amendment right derived from the freedom of association is the right to "privacy in one's associations"—the right to be free of compelled disclosure of membership in an association.⁶⁸ Because of the "vital relationship" between this right and the freedom to associate, the Court has deemed privacy in group association to be "indispensable to [the] preservation of freedom of association . . ."⁶⁹

Similarly, the Court has construed the first amendment to protect not only the right to speak freely, but also "the right to refrain from speaking at all."⁷⁰ The Court reasoned that "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts."⁷¹ The right to speak and the right to refrain from speaking are, in the Court's words, "complementary components," and are thus both within the protection of the first amendment.⁷²

In a 1982 case, the Court employed this methodology to recognize a "right to receive information and ideas" as "an inherent corollary of the right of free speech and press that are explicitly guaranteed" by the first amendment.⁷³ The Court stressed that effec-

65. *Elrod v. Burns*, 427 U.S. 347, 363-64 & n.17 (1976) (city prohibited from compelling individual to associate with a political party as a condition of retaining public employment).

66. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977) (Public school teachers could not be required, as a condition of employment, to contribute union dues to be used for union's expenditures for ideological causes not germane to collective bargaining.).

67. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

68. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

69. *Id.*

70. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (state could not require motor vehicles to bear license plates embossed with the state motto—"Live Free or Die"—over objection of Jehovah's Witnesses who viewed the motto as repugnant to their moral, religious, and political beliefs); *see also West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943) (public school students could not be required to participate in compulsory flag salute).

71. *Wooley*, 430 U.S. at 714; *see also Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8 (1986) (plurality opinion) ("a concomitant freedom *not* to speak publicly") (quoting *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985)).

72. *Wooley*, 430 U.S. at 714.

73. *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (Constitution prohibited school board from removing disagreeable books from school library). The plurality opinion, authored by Justice Brennan, cited prior cases recognizing a "right to receive information and ideas." *Id.*; *see First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978); *Lamont*

tive speech requires listeners,⁷⁴ and that recognition of a right to receive information was thus necessary to give meaning to the first amendment rights of speakers. Further, the Court found that the right to receive ideas and information was a "necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom."⁷⁵

Thus, in a number of contexts, by stressing that the right of freedom of speech "has broad scope,"⁷⁶ the Court has construed freedom of speech to protect other rights that it found to be "corollary" rights, "complimentary components" of the right, "concomitant rights," "corresponding rights," "peripheral rights," or rights that are "implicit in," "presupposed" by, "indispensable to" or "a necessary predicate" to the exercise of the right of freedom of speech.⁷⁷ In these cases the Court viewed these derivative rights as necessary to protect the purposes underlying the first amendment, and did not hesitate to read "freedom of speech" expansively to cover them as well.⁷⁸

B. *Supreme Court Protection for "Freedom of Belief," "Freedom of Mind," and "Freedom of Thought"*

The Supreme Court has applied this same approach in differing contexts to protect "freedom of belief," "freedom of mind," or "freedom of thought." Although the Court has never considered the application of the first amendment in the context of involuntary treatment of mental patients or criminal offenders, there is ample support in these cases for construing the first amendment to place limits on at least the more intrusive therapies. Indeed, a number of state and lower federal court decisions have applied the language in these

v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); see also *Pacific Gas*, 475 U.S. at 8 (plurality opinion) ("the First Amendment protects the public's interest in receiving information"); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940); *infra* notes 140-44 and accompanying text.

74. *Pico*, 457 U.S. at 867.

75. *Id.*

76. *E.g.*, *Martin*, 319 U.S. at 143; *Bridges v. California*, 314 U.S. 252, 263 (1941) (The first amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.").

77. See *supra* notes 53-75 and accompanying text.

78. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) ("The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful.").

Supreme Court cases to extend first amendment protection against such intrusive therapies as psychosurgery,⁷⁹ electroconvulsive therapy,⁸⁰ and psychotropic medication.⁸¹

Perhaps the Court's first reference to first amendment protection for mental processes came in Justice Brandeis' concurring opinion in *Whitney v. California*.⁸² In *Whitney*, Brandeis set forth his frequently quoted philosophy of the first amendment:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that *freedom to think as you will* and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and

79. *Kaimowitz v. Michigan Dep't of Mental Health*, Civ. No. 73-19434-AW (Mich. Cir. Ct. [Wayne Cty.] July 10, 1973), reprinted in A. BROOKS, *supra* note 2, at 902, 916-19 (1974).

80. *Lojuk v. Quandt*, 706 F.2d 1456 (7th Cir. 1983).

81. *Bee v. Greaves*, 744 F.2d 1387, 1393-94 (10th Cir. 1984), cert. denied, 469 U.S. 1214 (1985); *Scott v. Plante*, 532 F.2d 939, 946 (3d Cir. 1976), vacated and remanded, 458 U.S. 1101 (1982); *Davis v. Hubbard*, 506 F. Supp. 915, 933 (N.D. Ohio 1980); *Rogers v. Okin*, 478 F. Supp. 1342, 1366-67 (D. Mass. 1979), aff'd in part and rev'd in part on other grounds, 634 F.2d 650 (1st Cir. 1980), vacated and remanded sub nom. *Mill v. Rogers*, 457 U.S. 291 (1982), on remand sub nom. *Rogers v. Okin*, 738 F.2d 1 (1st Cir. 1984); see also *Mackey v. Procunier*, 477 F.2d 877, 878 (9th Cir. 1973) (The involuntary use of succinylcholine as part of an aversive conditioning program would raise serious constitutional questions concerning "impermissible tinkering with the mental processes.").

82. 274 U.S. 357 (1927).

assembly should be guaranteed.⁸³

The Court again treated the first amendment as providing protection for such a right in Justice Cardozo's opinion in *Palko v. Connecticut*.⁸⁴ Cardozo referred to "freedom of thought" together with freedom of speech as "the matrix, the indispensable condition, of nearly every other form of freedom."⁸⁵ In *Griswold v. Connecticut*, Justice Douglas also listed "freedom of thought" as one of the rights comprehended by freedom of speech.⁸⁶ In addition, the Court in a number of contexts has referred to the first amendment as protecting "freedom of mind."⁸⁷

C. *Freedom to Believe Distinguished from Freedom to Act*

In a number of Supreme Court cases that distinguish between the government's power to regulate conduct and its power to regulate thought or belief, the Court has recognized a first amendment freedom to believe. In a 1940 case, *Cantwell v. Connecticut*,⁸⁸ the Court upheld the breach of peace conviction of a Jehovah's Witness who stopped persons on a public street and played a phonograph record attacking Catholicism. In discussing the scope of the free exercise of religion clause of the first amendment, the Court distinguished "freedom to believe" from freedom to act.⁸⁹ "The first," the Court noted, "is absolute but, in the nature of things, the second cannot be."⁹⁰

The Court later reiterated the notion that freedom of belief is absolute in *American Communications Association v. Douds*.⁹¹ The

83. *Id.* at 375-76 (emphasis added).

84. 302 U.S. 319 (1937).

85. *Id.* at 326-27; see also *id.* ("liberty of the mind"). In an essay, Cardozo expounded on the importance of freedom of thought:

We are free only if we know, and so in proportion to our knowledge. There is no freedom without choice, and there is no choice without knowledge,—or none that is not illusory. Implicit, therefore, in the very notion of liberty is the liberty of the mind to absorb and to beget. . . . At the root of all liberty is the liberty to know. . . . Experimentation there may be in many things of deep concern, but not in setting boundaries to thought, for thought freely communicated is the indispensable condition of intelligent experimentation, the one test of its validity.

B. CARDOZO, *The Paradoxes of Legal Science*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 317-18 (M. Hall ed. 1947).

86. 381 U.S. 479, 481 (1965).

87. *E.g.*, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *Thomas v. Collins*, 323 U.S. 516, 531 (1945); *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

88. 310 U.S. 296 (1940).

89. *Id.* at 303-04.

90. *Id.*

91. 339 U.S. 382 (1950) (plurality opinion).

Court upheld the constitutionality of a section of the Taft-Hartley Act, which prohibited unions from receiving the benefits of the National Labor Relations Act (NLRA) unless each union officer filed an affidavit stating that he was not a member of the Communist Party and did not support an organization that advocated the overthrow of the government by force or other illegal means.⁹² Because no union could survive without access to the collective bargaining system established by the NLRA, this had the effect of denying Communists the right to hold union office and union members the right to elect leaders of their choice. Chief Justice Vinson, writing for a plurality of the Court in *Doubs*, again distinguished between the regulation of thought and the regulation of "conduct."⁹³ Citing *Cantwell*, the plurality found that although the government may regulate conduct, "[b]eliefs are inviolate."⁹⁴ In a strong dissent noting that "[f]reedom to think is inevitably abridged when beliefs are penalized by imposition of civil disabilities,"⁹⁵ Justice Black recalled prior Supreme Court language which established that "[f]reedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind."⁹⁶ Of course, given the emergence of the more intrusive mental health treatment techniques, the "inward workings of the mind" are now within the reach of government control, but Justice Black could not have had these developments in mind. Accusing the Court's plurality of merely mouthing the fundamental principle that "[b]eliefs are inviolate," Black's dissent warned that "[i]ndividual freedom and governmental thought-probing cannot live together."⁹⁷

92. *Id.* at 385-86, 415.

93. *Id.* at 391-93. The stated purpose of the challenged legislation was to remove the obstructions to the free flow of commerce resulting from disturbances instigated by Communists who had infiltrated the management of labor unions. Consequently, the Court upheld the constitutionality of the legislation as a permissible protection of the free flow of commerce, even though such legislation was not content-neutral. *Id.* at 387-93.

94. *Id.* at 393; *see also id.* at 408 ("[O]ne may not be imprisoned or executed because he holds particular beliefs.").

95. *Id.* at 446 (Black, J., dissenting).

96. *Id.* at 445 (quoting *Jones v. Opelika*, 316 U.S. 584, 618 (1942) (Murphy, J., dissenting), *rev'd*, 319 U.S. 103 (1943)).

97. *Id.* at 446. Justice Douglas has also expressed these views. *See Branzburg v. Hayes*, 408 U.S. 665, 714-15 (1972) (Douglas, J., dissenting) ("[T]he people, the ultimate governors, must have absolute freedom of, and therefore privacy of, their individual opinions and beliefs."); *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting) ("The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses, to believe what one wishes are important aspects of the constitutional right to be let alone."); *W. DOUGLAS, THE RIGHT OF THE PEOPLE* 110-11 (1958) ("Belief is entitled to refuge under the First Amendment where belief has not

In *Adler v. Board of Education*,⁹⁸ the Court considered a New York statute which also reflected the fear of Communism that gripped the country in the 1950's.⁹⁹ The state prohibited the New York school system from employing members of certain listed organizations that advocated the overthrow of the government. In upholding the constitutionality of the statute, the Court again distinguished the regulation of thought and the regulation of conduct. Under our Constitution individuals have the right to "think and believe as they will," the Court noted, but "they have no right to work for the State in the school system on their own terms."¹⁰⁰ In dissent, Justice Black criticized the Court's opinion as inconsistent with the policy embodied in the first amendment "that government should leave the mind and spirit of man absolutely free."¹⁰¹

In these cases the dispute between the dissenters and the majority focused on whether the regulation of certain kinds of conduct will diminish impermissibly the freedom of the individual to think and believe as he will. Both the majority and the dissenters recognized that freedom of thought and belief are immune from governmental control. Assuming the viability of a distinction between thoughts and beliefs on the one hand and conduct on the other, it would seem that most mental health interventions affect both. Although all of these treatment techniques will undoubtedly have an effect upon behavior, all except the behavioral techniques seek to bring about a change in mental processes—to affect attitudes, emotions, thoughts, and beliefs.

Of course, not every attempt by government to change attitudes or beliefs raises first amendment problems. Government in America has enormous power to disseminate ideas and information. It seeks to inculcate values in public school students, to warn consumers about health and safety hazards, and to persuade the public to give its

crossed the line into action . . . Freedom to believe has been conceived as absolute under the First Amendment, only action being subject to regulation in the public good.").

98. 342 U.S. 485 (1952).

99. See generally C. BELFRAGE, *THE AMERICAN INQUISITION: 1945-1960*, at 117-52 (1973); A. BESSIE, *INQUISITION IN EDEN* (1965); D. CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* (1979); J. COGLEY, *REPORT ON BLACKLISTING* (1956); F. DONNER, *THE UN-AMERICANS* (1961); A. LINK & W. CATTON, *AMERICAN EPOCH 682-87* (2d ed. 1963); P. STEINBERG, *THE GREAT 'RED MENACE': UNITED STATES PROSECUTIONS OF AMERICAN COMMUNISTS 1947-1952*, at 3-14 (1984); *THE NEW AMERICAN RIGHT* (D. Bell ed. 1955); Millis, *The Rise and Fall of the Radical Right*, 44 VA. L. REV. 1291 (1958); Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 854-55 (1989).

100. *Adler*, 342 U.S. at 492.

101. *Id.* at 497 (Black, J., dissenting); see also *id.* at 508 (Douglas, J., dissenting) ("the Constitution guarantees freedom of thought").

approval to a variety of policies and programs.¹⁰² Indeed, government is the largest communicator in our society.¹⁰³ Much of what government does undoubtedly has the effect of changing attitudes and beliefs, but it is sensible to distinguish between methods which individuals are free to resist, and the more systematic and intrusive methods of mental health treatment, which unwilling subjects may not resist. While not all of these treatments will intrude sufficiently on mental processes to trigger first amendment inquiry, the more intrusive of the treatment techniques do seem to implicate the first amendment values reflected in the Supreme Court cases.

D. *When Government Attempts to Impose Orthodoxy of Belief*

Another area of first amendment jurisprudence that suggests constitutional protection for thought and belief arose in response to various governmental attempts to impose orthodoxy of belief. In the seminal case of *West Virginia State Board of Education v. Barnette*,¹⁰⁴ the Supreme Court considered a challenge to a school requirement that all teachers and pupils participate in a flag salute ceremony involving a "stiff-arm" salute and the repeating of the Pledge of Allegiance. Jehovah's Witnesses challenged the compulsory ceremony as inconsistent with their religious beliefs, asserting what the Court characterized as "a right of self-determination in matters that touch individual opinion and personal attitude."¹⁰⁵ The Court distinguished instruction concerning the meaning of the flag, which would not offend the Constitution, from "a compulsion of students to declare a belief."¹⁰⁶ The Court considered a requirement that the individual "communicate by word and sign his acceptance of the political ideas . . . [the flag] bespeaks,"¹⁰⁷ to be an "affirmation of a belief and an attitude of mind."¹⁰⁸ Furthermore, the Court noted that determining whether the first amendment permitted the government to order observance of such a ritual did not depend upon the Court's assess-

102. See *Meese v. Keene*, 481 U.S. 465 (1987) (Department of Justice designation of foreign films as "political propaganda" held not to violate first amendment); *Block v. Meese*, 793 F.2d 1303, 1312-14 (D.C. Cir. 1986) (Scalia, J.) (discussing government speech designed to influence decision making). See generally J. TUSSMAN, *GOVERNMENT AND THE MIND* (1977).

103. See generally M. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983); Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 27-30; Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980); Ziegler, *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C.L. REV. 578 (1980).

104. 319 U.S. 624 (1943).

105. *Id.* at 631.

106. *Id.*

107. *Id.* at 633.

108. *Id.*

ment of the value of the exercise,¹⁰⁹ nor on whether the objection to participation in the compulsory ceremony was religious in nature.¹¹⁰ Finally, the Court rejected the notion that the benevolent motives of the school authorities would save the constitutionality of the requirement, noting that “[s]truggles to coerce uniformity of sentiment in support of some ends thought essential to their time and country have been waged by many good as well as by evil men.”¹¹¹

In emphatic language, the Court invalidated the compelled flag salute as an unconstitutional invasion of “the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from official control.”¹¹² “If there is any fixed star in our constitutional constellation,” the Court declared, “it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹¹³ According to the Court, the first amendment erects a constitutional preference for “individual freedom of mind” over “officially disciplined uniformity for which history indicates a disappointing and disastrous end.”¹¹⁴ Central to our American freedoms is the “freedom to be intellectually and spiritually diverse.”¹¹⁵ “We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds,” noted the Court, “only at the price of occasional eccentricity and abnormal attitudes.”¹¹⁶

The Court has followed the *Barnette* doctrine in other contexts, both within and without the school. In *Tinker v. Des Moines Independent Community School District*,¹¹⁷ the Court relied on *Barnette* in concluding that the first amendment prohibited the suspension of students who refused to remove black arm bands worn to protest the Vietnam War.¹¹⁸ The Court also reiterated its earlier

109. “[V]alidity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.” *Id.* at 634. The Court held that the students’ liberty of conscience could not be infringed in the name of “national unity” or “patriotism.” *Id.* at 640-41.

110. *Id.* at 634-35.

111. *Id.* at 640.

112. *Id.* at 642.

113. *Id.*; see also *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961) (finding a state constitutional requirement that a notary public declare his belief in God in order to receive his appointment, to be an unconstitutional invasion of the freedom of belief and religion).

114. *Barnette*, 319 U.S. at 637.

115. *Id.* at 641.

116. *Id.* at 641-42.

117. 393 U.S. 503 (1969).

118. *Id.* at 507, 514.

repudiation of the principle that a state could conduct its public schools so as to "foster a homogeneous people."¹¹⁹ "In our system," the Court warned, "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."¹²⁰

The Court also relied on *Barnette's* ban on government attempts to impose orthodoxy of belief in *Elrod v. Burns*,¹²¹ holding unconstitutional the discharge of Republican employees of a sheriff's department solely because of their political party affiliation.¹²² The Court explicitly recognized freedom of belief as a first amendment guarantee, stating that "freedom of belief and association constitute the core of those activities protected by the First Amendment."¹²³ The Court subsequently reaffirmed *Burns* and *Barnette* in *Branti v. Finkel*,¹²⁴ another patronage dismissal case, in which the Court concluded that the first amendment protects a public employee "from discharge based on what he believes."¹²⁵

The Court again invoked the principle of *Barnette* in two 1977 cases. In *Wooley v. Maynard*,¹²⁶ the Court considered a New Hampshire statutory requirement that noncommercial motor vehicles bear licence plates embossed with the state motto, "Live Free or Die." Two Jehovah's Witnesses attacked the requirement as repugnant to their moral, religious, and political beliefs. The Court invalidated the statute as inconsistent with "the right of freedom of thought protected by the First Amendment," which the Court found to include both the "right to speak freely and the right to refrain from speaking at all."¹²⁷ The Court considered the right to speak and the right to refrain from speaking to be "complementary components of the broader concept of 'individual freedom of mind.'"¹²⁸ As in *Barnette*, the statutory requirement in *Wooley* was a "state measure which forces an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."¹²⁹ The Court found this to invade "the sphere of intellect and spirit which it is the purpose of

119. *Id.* at 511 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)).

120. *Id.*

121. 427 U.S. 347 (1976).

122. *Id.* at 356.

123. *Id.*

124. 445 U.S. 507 (1980).

125. *Id.* at 515.

126. 430 U.S. 705 (1977).

127. *Id.* at 714; accord *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) ("Freedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all.'") (quoting *Wooley*, 430 U.S. at 714).

128. 430 U.S. at 714 (quoting *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

129. *Id.* at 715.

the First Amendment to our Constitution to reserve from all official control.”¹³⁰ “The First Amendment,” the Court noted, “protects the right of individuals to hold a point of view different from the majority”¹³¹

In *Abood v. Detroit Board of Education*,¹³² the Court considered a state statute that conditioned employment of public school teachers, whether or not union members, on their paying a service charge (equal in amount to union dues) to the union. The union used a portion of the revenue to advance various political and ideological activities. The Court held that this requirement violated the first amendment rights of teachers who objected to compulsory financial support for an ideological message with which they disagreed. The Court found that “at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.”¹³³ Moreover, the Court noted, this “freedom of belief is no incidental or secondary aspect of the First Amendment’s protections.”¹³⁴

Wooley and *Abood* thus extend the *Barnette* principle to recognize a negative speech right—the right of the individual to refrain from speaking or being compelled to associate with ideological views with which he disagrees. This principle had earlier been applied in *Miami Herald Publishing Co. v. Tornillo*,¹³⁵ which invalidated a statutory requirement that newspapers provide a right of reply to candidates whose character or record they had criticized.¹³⁶ The right-to-reply statute was unconstitutional because it required the newspaper to disseminate a message with which it disagreed.¹³⁷ The Court recently expanded the concept of negative speech rights in *Pacific Gas & Electric Co. v. Public Utilities Commission*.¹³⁸ In *Pacific Gas*, the Court held that an order of the Public Utilities Commission granting a consumer group access to the utility billing envelopes of a power

130. *Id.* (quoting *Barnette*, 319 U.S. at 642).

131. *Id.*

132. 431 U.S. 209 (1977).

133. *Id.* at 234-35; see also *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 816 (1978) (White, J., dissenting, joined by Brennan & Marshall, J.J.) (individuals have first amendment “right to adhere to [their] own beliefs and to refuse to support the . . . views of others”); *Elrod v. Burns*, 427 U.S. 347, 372 (1976) (first amendment recognizes the rights of every citizen “to believe as he will and to act and associate according to his beliefs”); *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944) (“freedom of the mind”).

134. *Abood*, 431 U.S. at 235.

135. 418 U.S. 241 (1974).

136. *Id.* at 258.

137. *Id.*

138. 475 U.S. 1 (1986) (plurality opinion).

company violated the company's first amendment rights. This "forced association with potentially hostile views burdens the expression of views different from" those of the consumer group and "risks forcing [the utility company] to speak where it would prefer to remain silent."¹³⁹ "[T]he choice to speak," the Court affirmed, "includes within it the choice of what not to say."¹⁴⁰

Barnette and its progeny thus recognize a broad constitutional interest in "freedom of conscience"¹⁴¹ and "freedom of mind."¹⁴² These cases provide further support for a first amendment right to be free of the invasions of mental processes brought about by at least the more intrusive of the mental health treatment techniques. If there is a "sphere of intellect and spirit" reserved from official control,¹⁴³ then that sphere must include the individual's basic personality, his emotions, attitudes, and beliefs. Again, not every government interference will constitute "official control"; certainly governmental attempts to influence attitudes, emotions, and beliefs will rarely rise to the level of "control." However, intrusive mental health treatment techniques, like psychosurgery, that effect massive changes in the individual's personality, mental processes, and emotional responsiveness which the individual is unable to resist, clearly constitute a direct and serious invasion of "individual freedom of mind."¹⁴⁴ If "at the heart of the First Amendment is the notion that . . . one's beliefs should be shaped by his mind and his conscience rather than coerced by the State,"¹⁴⁵ then treatment techniques that coerce beliefs, attitudes, and mental processes certainly implicate the values protected by the first amendment. Just as a public school may not require its students to affirm "a belief and an attitude of mind,"¹⁴⁶ or "to confess by word or act their faith" in some official orthodoxy,¹⁴⁷ the state may not subject mental patients and offenders to treatment which requires them to discard particular attitudes or beliefs and affirm attitudes and beliefs prescribed by state rehabilitators. Like car owners,¹⁴⁸ newspapers,¹⁴⁹ and

139. *Id.* at 18.

140. *Id.* at 16.

141. *Id.* at 32 (Rehnquist, J., dissenting, joined by White & Stevens, J.J.).

142. *Id.* (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)); see also *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

143. *Barnette*, 319 U.S. at 642, quoted in *Wooley*, 430 U.S. at 715.

144. *Wooley*, 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637).

145. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977).

146. *Barnette*, 319 U.S. at 633.

147. *Id.* at 642.

148. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977).

149. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

power companies,¹⁵⁰ mental patients and offenders may not be subjected to "forced association"¹⁵¹ with particular views. Moreover, *Barnette* teaches that the state may not justify coerced orthodoxy by the high value it places upon the objectives it seeks to achieve, or by the benevolent motives of governmental officials.¹⁵²

E. *First Amendment Protection of Private Thoughts*

The 1969 Supreme Court case of *Stanley v. Georgia*¹⁵³ provides an additional and significant source of support for the existence of a first amendment right to be free of interference with mental processes. *Stanley* involved a prosecution for the private possession of obscene materials that the defendant had kept in his home. The defendant asserted a constitutional "right to satisfy his intellectual and emotional needs in the privacy of his own home," and a "right to be free from state inquiry into the contents of his library."¹⁵⁴ In broad language, the Court stated that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds."¹⁵⁵ "Whatever the power of the state to control public dissemination of ideas inimical to the public morality," the Court noted, "it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."¹⁵⁶ So sweeping is this language that Professor Tribe has suggested it may place "the activities actually going on within the head" absolutely beyond government control.¹⁵⁷

Significantly, the Court in *Stanley* rejected Georgia's argument that just as it could protect the bodies of its citizens by prohibiting the possession of things thought detrimental to their welfare, it could also protect their minds from the effects of obscenity.¹⁵⁸ The Court, noting that obscenity is suppressed primarily for the protection of the individual rather than for that of the community,¹⁵⁹ expressed doubt "that this argument amounts to anything more than the assertion that

150. See, e.g., *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986).

151. *Id.* at 18 (plurality opinion).

152. See *supra* text accompanying notes 109 & 111.

153. 394 U.S. 557 (1969).

154. *Id.* at 565.

155. *Id.*

156. *Id.* at 566.

157. L. TRIBE, *supra* note 33, § 15-5, at 1315.

158. *Stanley*, 394 U.S. at 560, 565.

159. "Much of it is suppressed for the purity of the community and for the salvation and welfare of the 'consumer.' Obscenity, at bottom, is not crime. Obscenity is sin." *Id.* at 565 n.8 (quoting Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 395 (1963)).

the State has the right to control the moral content of a person's thoughts."¹⁶⁰ "To some," the Court noted, "this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment."¹⁶¹

Although in subsequent cases the Court narrowed *Stanley* to the private possession of obscenity in the home and refused to extend it to prohibit state control over the public display or distribution of obscene material,¹⁶² the Court continued to recognize the validity of the principle *Stanley* had announced. Unlike in *Stanley*, the state in these subsequent cases was not attempting "to control the minds or thoughts" of those who patronized the theaters in question; the prevention of distribution of obscenity "is distinct from a control of reason and the intellect."¹⁶³ *Stanley* thus provides first amendment protection for the possession and use of material that itself is unprotected by the Constitution; although the state may make criminal the importation, mailing, or display of such material, or its sale to a willing buyer, it may not punish its private possession. The state's action was not unconstitutional merely because some human "'thoughts' may be incidentally affected" by the restrictions imposed.¹⁶⁴ The Court saw an analogy in the government's power to regulate the sale of drugs, although the Court conceded that "[t]he fantasies of a drug addict are his own and beyond the reach of government"¹⁶⁵ Justice Harlan, concurring in *United States v. Reidel*,¹⁶⁶ described the constitutional interest protected in *Stanley* as "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,"¹⁶⁷ and the "freedom from governmental manipulation of the content of a man's mind"¹⁶⁸

If government lacks the "power to control men's minds"¹⁶⁹ by regulating the content of their libraries, then surely it also must lack the power to do so more directly by imposing powerful therapies that

160. *Id.* at 565.

161. *Id.* at 565-66.

162. See *United States v. Orito*, 413 U.S. 139 (1973); *United States v. Twelve 200-Foot Reels*, 413 U.S. 123 (1973); *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973); *United States v. Reidel*, 402 U.S. 351 (1971).

163. *Paris Adult Theater*, 413 U.S. at 67; see also *Reidel*, 402 U.S. at 356 ("freedom of mind and thought" protected by *Stanley* does not require recognition of a right to distribute or sell obscene materials).

164. *Paris Adult Theater*, 413 U.S. at 67.

165. *Id.*

166. 402 U.S. 351 (1971).

167. *Id.* at 359 (Harlan, J., concurring).

168. *Id.*

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

regulate the content of the mind itself. Again, governmental programs or even imposed therapies that only incidentally affect thoughts and beliefs will not implicate the first amendment. Intrusive therapies that can be said to "control" the mind, on the other hand, would appear to raise first amendment problems. And, as *Stanley* teaches, the government's desire to protect the patient's welfare by rehabilitating his mind, however legitimate this motive may be, cuts strongly against the grain of first amendment jurisprudence.

F. *The First Amendment Right to Receive Information and Ideas*

An additional line of Supreme Court cases that supports first amendment protection of mental processes deals with the developing first amendment "right to receive information and ideas."¹⁷⁰ The Court has found this right, like freedom of association, to be an "inherent corollary" of the first amendment.¹⁷¹ Thus, in *Board of Education v. Pico*,¹⁷² the Court invoked the right to receive information in preventing the removal of unpopular books from a school library.¹⁷³ The Court expressed concern that a contrary ruling would encourage the kind of "officially prescribed orthodoxy" that the first amendment condemns.¹⁷⁴ "Our Constitution," the Court stressed, "does not permit the official suppression of *ideas*."¹⁷⁵

If the first amendment forbids government suppression of ideas through removal of certain books from the school library, then it clearly should forbid government suppression of ideas through the more direct methods of psychotechnology. If anything, the prospect of "officially prescribed orthodoxy" imposed surgically or pharmacologically is more ominous than the orthodoxy that could be brought about by controlling the contents of the school library. Indeed, as Justice Rehnquist noted in his dissenting opinion in *Pico*, "the denial of access to ideas inhibits one's own acquisition of knowledge only

170. *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion); see also *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 7 (1986) (plurality opinion); *Globe Newspaper Co., Inc. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality opinion); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976); *Procunier v. Martinez*, 416 U.S. 396, 408 (1974); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Stanley*, 394 U.S. at 564; *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). See generally Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1.

171. *Pico*, 457 U.S. at 867 (plurality opinion).

172. 457 U.S. 853 (1982).

173. *Id.* at 871-72.

174. *Id.* at 871.

175. *Id.*

when that denial is relatively complete."¹⁷⁶ Because "the removed books are readily available to students and non-students alike at the corner bookstore or the public library,"¹⁷⁷ in Justice Rehnquist's view the removal of books from the school library did not materially deny access to ideas in violation of the first amendment. Moreover, as the dissent pointed out, there is an inherent difference between official actions which impede access to ideas and official suppression of the ideas themselves.¹⁷⁸

Compared to the control of books in the school library, intrusive mental health therapy presents a much greater potential for suppression of ideas and the imposition of an "officially prescribed orthodoxy." Moreover, unlike censorship in the library, mental patients and offenders cannot resist such therapy or even mitigate its effects through exposure to competing ideas. To the extent that intrusive mental health treatment techniques can effectively suppress ideas and substitute new ones, the first amendment values protected by the Court in the school library case would be at much greater risk. If the Constitution protects "the right to receive information and ideas" as an "inherent corollary" of the right of free speech, then it would seem even more necessary that it protect the right to *hold* information and ideas—to maintain beliefs, attitudes, and emotions free of direct and irresistible government manipulation of mental processes.

G. *Freedom from Intrusion into Mental Processes as an Indispensable Condition for Freedom of Expression*

Several different strands of first amendment theory thus converge to support the existence of a first amendment right to be free of at least serious and irresistible intrusions on mental processes. The principles of "freedom of the mind," "freedom of belief," and "freedom of thought," apply in the context of coerced mental health treatment. "Freedom of belief" at its core concerns the right of individuals "to form and hold ideas and opinions which are not communicated to others."¹⁷⁹ This freedom must be a prerequisite to freedom of speech; without protection for freedom of the mind, freedom to speak would be meaningless. In fact the "inward activities" of thought, belief, and emotion are the very essence of speech, "for speech has meaning and

176. *Id.* at 913 (Rehnquist, J., dissenting).

177. *Id.*

178. *Id.* at 916.

179. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 64 (Random House ed. 1966).

value only insofar as it reflects these [inward] activities.”¹⁸⁰ Thus, although thoughts and beliefs are not literally speech, they are so interdependent with speech that a system of freedom of expression is inconceivable without protection for the integrity of mental processes.¹⁸¹ A Supreme Court faithful to the principle that freedom “to believe” lies “at the heart of the First Amendment”¹⁸² should have little difficulty extending first amendment protection to the inward activities of the mind.

A right to hold ideas and opinions free of government coercion, even more than the freedom to associate with others or the right of access to ideas, “makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner”¹⁸³ In the context of government imposition of mental health treatment, both courts¹⁸⁴ and commentators¹⁸⁵ have recognized this necessary connection between freedom from intrusion into mental processes and freedom of expression. Freedom of expression would be illusory if government could intrude directly into mental processes to alter the very thoughts, beliefs, or attitudes that would be expressed.¹⁸⁶

180. Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854, 1862 (1983).

181. T. EMERSON, *supra* note 179, at 64; *see also* T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 21-22 (1970). Emerson commented:

Belief . . . is not strictly “expression.” Forming or holding a belief occurs prior to expression. But it is the first stage in the process of expression, and it tends to progress into expression. Hence safeguarding the right to form and hold beliefs is essential in maintaining a system of freedom of expression. Freedom of belief, therefore, must be held included within the protection of the First Amendment.

Id.

182. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977); *see also* *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985) (plurality opinion) (“[T]he First Amendment was adopted to curtail the power of Congress to interfere with the individual’s freedom to believe”).

183. *Board of Educ. v. Pico*, 457 U.S. 853, 868 (1982) (plurality opinion).

184. *E.g.*, *Rogers v. Okin*, 478 F. Supp. 1342, 1367 (D. Mass. 1979), *aff’d in part and rev’d in part*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom.* *Mills v. Rogers*, 457 U.S. 291 (1982) (first amendment protection for the communication of ideas “presupposes a capacity to produce ideas,” which therefore “is entitled to comparable constitutional protection”); *Kaimowitz v. Michigan Dep’t of Mental Health*, Civ. No. 73-19434-AW (Mich. Cir. Ct. [Wayne Cty.] July 10, 1973), *reprinted in* A. BROOKS, *supra* note 2, at 902, 917 (“To the extent that the First Amendment protects the dissemination of ideas and the expression of thoughts, it equally must protect the individual’s right to generate ideas.”).

185. *E.g.*, L. TRIBE, *supra* note 33, § 15-7, at 1322 (“The guarantee of free expression is inextricably linked to the protection and preservation of open and unfettered mental activity”); Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237, 255-57 (1974) (If the first amendment protects communication, it must also protect “mentation”—“a person’s power to generate thought, ideas and mental activity.”).

186. One commentator stated:

Indeed, if the first amendment protected communication of ideas but allowed government manipulation of mental processes, "totalitarianism and freedom of expression could be characteristics of the same society."¹⁸⁷

The right to hold ideas and opinions, because it is a predicate to the exercise of other first amendment protected rights, must be accorded special protection. Whatever limited power government may have to interfere with freedom to express ideas, it must enjoy even less power to interfere with the holding of ideas. When the government attempts to coerce beliefs, it "[i]nvades the innermost privacy of the individual and cuts off the right of expression at its source."¹⁸⁸ Thus, government interference with thought processes and beliefs functions as a form of prior restraint on expression.¹⁸⁹ Like a prior restraint, such coercive intrusion into mental processes has "an immediate and irreversible" impact that irretrievably prevents exercise of the right of expression.¹⁹⁰ Like other prior restraints, such intrusions should be subject to a strong presumption of unconstitutionality.¹⁹¹

[T]he notion of a right of freedom of speech presupposes that the beliefs, opinions, and viewpoints expressed are not the products of deliberate governmental efforts to shape and condition those beliefs. The first amendment could serve no meaningful function in a society in which government preconditioned the speaker. Such a society could dispense with the right of freedom of speech as an irrelevancy.

van Geel, *The Search for Constitutional Limits on Government Authority to Inculcate Youth*, 62 TEX. L. REV. 197 (1983).

187. Arons & Lawrence, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 312 (1980); see also *id.* at 313 ("Today, the opportunity to manipulate consciousness precedes and may do away with the need to manipulate expression.").

188. T. EMERSON, *supra* note 179, at 64; see also *id.* at 6-7; West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (school may not "strangle the free mind at its source").

189. For applications of the prior restraint doctrine, see *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989); *City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Kunz v. New York*, 340 U.S. 290 (1951); *Saia v. New York*, 334 U.S. 558 (1948); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Near v. Minnesota*, 283 U.S. 697 (1931). See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 33, at 865-74; M. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 127-71 (1984); Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955); Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983); Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245 (1982); Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984). The prevention of prior restraints on expression "may have been the main purpose" of the first amendment. *Schenck v. United States*, 249 U.S. 47, 51-52 (1919); see *Patterson v. Colorado*, 205 U.S. 454, 462 (1907); G. GUNTHER, *supra* note 33, at 1157.

190. *Nebraska Press*, 427 U.S. at 559.

191. "Any prior restraint on expression comes to . . . [the] Court with a 'heavy

Indeed, Professor Emerson has argued that "the holding of a belief" should be "afforded complete protection from state coercion."¹⁹² Emerson's arguments for absolute protection, as well as those of other first amendment theorists,¹⁹³ have not, however, been judicially accepted, at least in other first amendment contexts. Although the first amendment clearly states that "Congress shall make *no* law . . . abridging the freedom of speech,"¹⁹⁴ and commentators have debated whether first amendment rights are "absolute,"¹⁹⁵ the Supreme Court has never accepted this view.¹⁹⁶ Rather, the Court's approach gives "nearly absolute" protection to certain expression, requiring that government demonstrate that any abridgment be justified as necessary to further a "compelling state interest."¹⁹⁷ Because the Court uses this approach for restriction of protected expression, governmental efforts to intrude on private thoughts and ideas should receive scrutiny at least as exacting. Thus, at a minimum, mental processes should be presumptively protected by the first amendment against intrusive interference by the state, and the presumption should be strong. Unless the government can demonstrate a compelling necessity to justify such interference, a person's private thoughts and mental processes should remain undisturbed.

IV. MENTAL PROCESSES AND THE VALUES OF THE FIRST AMENDMENT

Reading the first amendment to protect mental processes from the kind of direct governmental intrusion presented by at least some of the mental health treatment techniques thus is supported by the language of various Supreme Court cases, and by the logical and fac-

presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

192. T. EMERSON, *supra* note 179, at 64.

193. See, e.g., Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 257-58 ("A citizen may be told when and where and in what manner he may or may not speak, write, assemble, and so on. On the other hand, he may not be told what he shall or shall not believe. In that realm, each citizen is sovereign. He exercises powers that the body politic reserves for its own members.").

194. U.S. CONST. amend. I.

195. See, e.g., J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 33, at 838-39; L. TRIBE, *supra* note 33, § 12-2, at 791-93; Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962).

196. See *Konigsberg v. State Bar*, 366 U.S. 36 (1961) (Harlan, J.); *id.* at 56-80 (Black, J., dissenting); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); *Schenck v. United States*, 249 U.S. 47 (1919). Even the vigorous protection against prior restraints is not absolute. E.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

197. See L. TRIBE, *supra* note 33, § 12-8, at 832-36.

tual connection between such protection and freedom of expression. In addition, recognition of such protection is essential to the values underlying the first amendment. The framers of the first amendment "were concerned above all else with spiritual liberty: freedom to think, to believe, and to worship."¹⁹⁸ In wording the amendment, they therefore placed freedom of conscience first in their enumeration of rights, moving only then to freedom of speech and press, and then to the political rights of assembly and petition for the redress of grievances.¹⁹⁹ Although the framers considered these political rights to be critical, they recognized that such rights depended on the more basic freedoms to think and to believe. Jefferson, Madison, and the other makers of our Constitution were children of the Enlightenment.²⁰⁰

They believed above all else in the power of reason, in the search for truth, in progress and the ultimate perfectibility of man. Freedom of inquiry and liberty of expression were deemed essential to the discovery and spread of truth, for only by the endless testing of debate could error be exposed, truth emerge, and men enjoy the opportunities for human progress.²⁰¹

The first amendment serves a number of values central to our constitutional scheme. A frequently cited cataloguing of these basic values is that of Professor Emerson, a leading First Amendment scholar:

First, freedom of expression is essential as a means of assuring individual self-fulfillment Second, freedom of expression is an essential process for advancing knowledge and discovering truth Third, freedom of expression is essential to provide for participation in decisionmaking by all members of society Finally, freedom of expression is . . . an essential mechanism for maintaining the balance between stability and change.²⁰²

Each of these values would be served by affording constitutional protection for mental processes. Emerson derives the value of individual self-fulfillment "from the widely accepted premise of Western

198. Cox, *The Supreme Court, 1979 Term—Forward: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 1 (1980).

199. *Id.*

200. See B. BAILY, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 26-30 (1967). See generally H. MAY, *THE ENLIGHTENMENT IN AMERICA* (1976); G. WILLS, *INVENTING AMERICA* (1978); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969); Cox, *supra* note 198, at 1-2; Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175, 176-81 (1982).

201. Cox, *supra* note 198, at 2.

202. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION*, *supra* note 181, at 6; see also T. EMERSON, *supra* note 179, at 3; M. REDISH, *supra* note 189, at 9 (citing Emerson and describing him as "probably the leading modern theorist of free speech"); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 24-25 (1971).

thought that the proper end of man is the realization of his character and potentialities as a human being."²⁰³ This widely shared premise shapes much of our constitutional heritage, for as Justice Brandeis has noted, "[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties"²⁰⁴ Brandeis' emphasis on "freedom to think"²⁰⁵ makes it clear that he was referring to man's mental faculties. Our mental faculties are what distinguish our species from others that do not possess our unique cognitive and communicative capacities.²⁰⁶ Suppression of belief is thus "an affront to the dignity of man, a negation of man's essential nature."²⁰⁷

Development of the mind and the process of conscious thought—including the ability to think in abstract terms, to imagine, and to have and communicate emotions and thoughts—are essential to the identification and achievement of the goals of self-fulfillment. Indeed, these mental processes are central to the development of individual identity itself. Both man's individual and social nature are

203. T. EMERSON, *supra* note 179, at 4; *see also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 804-05 (1978) (White, J., dissenting, joined by Brennan & Marshall, J.J.) ("[S]ome have considered . . . the principal function of the First Amendment [to be] the use of communication as a means of self-expression, self-realization and self-fulfillment . . .") (citing T. EMERSON, *supra* note 179, at 4-7); *id.* at 777 n.12 (opinion of the Court) (citing T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, *supra* note 181, at 6); Doe v. Bolton, 410 U.S. 179, 211 (1973) (Douglas, J., concurring) (referring to "the autonomous control over the development and expression of one's intellect, interests, tastes, and personality" as "rights protected by the First Amendment") (emphasis omitted); Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972) (recognizing the assurance of "self-fulfillment for each individual" as an important goal of the first amendment); G. GUNTHER, *supra* note 33, at 978-79; M. NIMMER, *supra* note 33, § 1.03, at 1-49 to 1-52; F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 47-59 (1982); L. TRIBE, *supra* note 33, § 12-1, at 787-89; Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593-94 (1982) (emphasizing the value of "individual self-realization"); Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974); Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972) (emphasizing the value of personal autonomy); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 193 (1983) ("individual self-fulfillment").

204. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring, joined by Holmes, J.).

205. *Id.* (referring to "the deliberative forces" and "freedom to think as you will"); *see also* *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

206. *See* T. EMERSON, *supra* note 179, at 4; M. REDISH, *supra* note 189, at 18 (first amendment viewed as a "recognition of the overriding importance of developing the uniquely human abilities to think, reason and appreciate"); Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 545.

207. T. EMERSON, *supra* note 179, at 5; *see also* ARISTOTLE, NICHOMACHEAN ETHICS X.7 (J. Thomson trans. 1953) (the intellect is the "true self of the individual"; intellectual activity is the "best and pleasantist for man, because the intellectual more than anything else is the man"); L. TRIBE, *supra* note 33, § 12-1, at 785-87; Blasi, *supra* note 206, at 544-45; Cox, *supra* note 198, at 1.

dependent upon intellectual activities of thought, belief, and emotion. A constitutional scheme valuing individual self-fulfillment therefore must protect a right to form and hold beliefs and opinions, indeed must protect the right of each individual to develop his own unique personality.²⁰⁸ The makers of our Constitution recognized that individual self-fulfillment and the development of what Justice Brandeis characterized as "man's spiritual nature, of his feelings and of his intellect"²⁰⁹ are essential to the pursuit of happiness. To achieve these values the first amendment must protect not only outward manifestations of expression but also mental processes, those "inward activities" that are the essence of expression.²¹⁰

Thus, both freedom of mind and freedom of expression are central to our constitutional scheme, and worthy of protection because of their intrinsic and not merely instrumental value.²¹¹ Of course, both serve significant instrumental values as well,²¹² and these also support the argument for constitutional protection of freedom of mind and belief. Both freedoms are important social goods, and together constitute "the best process for advancing knowledge and discovering truth."²¹³ Brandeis defended "freedom to think as you will and to speak as you think" as "means indispensable to the discovery and spread of political truth."²¹⁴ The classic invocation of these values as justifications for freedom of expression came in a World War I era opinion authored by Justice Holmes. Holmes spoke of the marketplace of ideas in a celebrated dissenting opinion:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of

208. T. EMERSON, *supra* note 179, at 4-5.

209. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

210. *See Note, supra* note 180, at 1862-63.

211. L. TRIBE, *supra* note 33, § 12-1, at 786-89; Blasi, *supra* note 206, at 545; *see also* ARISTOTLE, *supra* note 207, at X.7 ("the activity of contemplation is the only one that is praised on its own account").

212. "The constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression." *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 7 (1986) (plurality opinion) (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978)).

213. T. EMERSON, *supra* note 179, at 7.

214. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring, joined by Holmes, J.).

our Constitution.²¹⁵

The marketplace of ideas metaphor has emerged as a dominant motif in first amendment jurisprudence.²¹⁶ This model admits all beliefs and opinions to the marketplace, for "the usefulness of an opinion is itself [a] matter of opinion."²¹⁷ Just as the attainment of truth will suffer if opinions are excluded from the marketplace because they are deemed to be incorrect, the exclusion of the ideas of those regarded as insane or criminal will also frustrate this goal. Differentiating the sane from the insane may be no easier than distinguishing true from false opinions;²¹⁸ indeed, similar assumptions of infallibility are involved.²¹⁹ Professor Chafee, an eminent first amendment scholar, noted that:

Whenever we authorize a particular restriction on liberty we ought not to forget that we are entrusting to fallible human beings a power over the minds of others. Benjamin Franklin . . . stated . . . that the desirability of stamping out evil thought is obvious, but the

215. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting, joined by Brandeis, J.); see also *Whitney*, 274 U.S. at 375 (defending "freedom to think as you will and to speak as you think" as "means indispensable to the discovery and spread of political truth"). See generally J. MILL, *ON LIBERTY* 19-67 (Liberal Arts Press ed. 1956) (Chapter II: Of the Liberty of Thought and Discussion); J. MILTON, *AREOPAGITICA* 51-52 (J. Hales rev. ed. 1949) (1st ed. 1644) ("Let . . . [Truth] and Fals[e]hood grapple; who ever knew Truth put to the wors[e], in a free and open encounter?").

216. E.g., *Texas v. Johnson*, 109 S. Ct. 2533, 2546 (1989); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986) (plurality opinion); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 642 (1985); *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981) (first amendment protects "a marketplace for the clash of different views and conflicting ideas"); *Consolidated Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537-38 (1980); *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 760 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 248 (1974); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Time, Inc. v. Hill*, 385 U.S. 374, 382 (1966); *Dennis v. United States*, 341 U.S. 494, 503 (1951); Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 136-38, 298 (1948); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 82-89 (1948); F. SCHAUER, *supra* note 203, at 15-34; L. TRIBE, *supra* note 33, § 12-1, at 785; see also *Johnson*, 109 S. Ct. at 2546 ("the joust of principles protected by the First Amendment"). See generally Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 967-81 (1978); Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857 (1986); Ingber, *supra* note 103; Winter, *Transcendental Nonsense, Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1188-95 (1989).

217. J. MILL, *supra* note 215, at 27.

218. See Rosenhan, *On Being Sane in Insane Places*, 179 SCIENCE 250 (1973); *infra* notes 266-317 and accompanying text; see also J. MILL, *supra* note 214, at 83-84. See generally T. SCHEFF, *BEING MENTALLY ILL* (1966).

219. See Z. CHAFEE, *supra* note 216, at 520; J. MILL, *supra* note 215, at 21-22; M. NIMMER, *supra* note 33, § 1.02[A], at 1-8 to 1-9.

question remains whether any human being is good and wise enough to exercise it.²²⁰

Clearly, if sophisticated treatment techniques are used to suppress what the government considers to be the disordered thoughts of mental patients and offenders, the competition of the marketplace of ideas is thereby reduced, inevitably decreasing the potential for truth to emerge. "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."²²¹

The additional values Professor Emerson invokes to justify our system of free expression are to some degree interrelated. The first amendment permits public participation in decisionmaking through a process of open discussion available to all members of society. This is particularly significant for political decisions; indeed, the first amendment is "indispensable to decisionmaking in a democracy."²²² In a related sense, the system of free expression is essential to maintaining the balance between stability and change in the community, helping to legitimize the political process and to foster greater cohesion in society.²²³

Not only is freedom of expression critical to securing these values, but freedom of mind and of belief, necessary predicates to any meaningful freedom of expression, are also essential to their attainment. The Supreme Court has described the central meaning of the first amendment as the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."²²⁴ Fostering such debate serves a "central purpose" of the amendment, "to protect the free discussion of governmental

220. Z. CHAFEE, *supra* note 216, at 520; *see also* American Communications Ass'n v. Douds, 339 U.S. 382, 442-43 (1950) (Jackson, J., concurring & dissenting) ("It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored.").

221. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

222. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978); *see* *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Stromberg v. California*, 283 U.S. 359, 369 (1931); T. EMERSON, *supra* note 179, at 10. *See generally* A. MEIKLEJOHN, *supra* note 216; A. MEIKLEJOHN, *POLITICAL FREEDOM* (1965); F. SCHAUER, *supra* note 203, at 35-46; Bork, *supra* note 202, at 26-28; Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1; 14-20 (1965); Stone, *supra* note 203, at 193.

223. T. EMERSON, *supra* note 179, at 11-12; Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 428 (1980); *see also* M. NIMMER, *supra* note 33, at § 1.04 (the "safety valve function"); Bork, *supra* note 202, at 25 ("safety valve for society").

224. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 204-10.

affairs."²²⁵ The Court has more recently reiterated that the "primary aim" of the first amendment "is the full protection of speech upon issues of public concern."²²⁶

Clearly, mental patients and criminal offenders may not be excluded from the public debate on governmental affairs. "[C]onditions in jails and prison," as well as in mental hospitals, "are clearly matters 'of great public importance,'"²²⁷ and "with greater information, the public can more intelligently form opinions about" these public issues.²²⁸ Indeed, in view of the high potential for abuse within the closed institutions of the prison and mental hospital, it is particularly important to encourage these groups to participate in political dialogue in order to serve what Professor Blasi has described as the "checking value" of the first amendment—the value that free speech can serve in limiting the abuse of power by public officials.²²⁹ The writings of institutionalized mental patients from the asylum have historically played an important role in reforming the mental health system.²³⁰ Courts have recognized that even convicted prisoners have a first amendment right to communicate outside the institu-

225. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (citing *Abood*, 431 U.S. at 259) (Powell, J., concurring) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)); accord *Globe Newspaper*, 457 U.S. at 604; *Bellotti*, 435 U.S. at 776-77; *Mills*, 384 U.S. at 218.

226. *Connick v. Myers*, 461 U.S. 138, 154 (1983); see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) ("speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values.'") (quoting *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980)); *id.* at 759 ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.") (quoting *Connick*, 461 U.S. at 145; *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)).

227. *Houchins v. KQED*, 438 U.S. 1, 8 (1978) (quoting *Pell v. Procunier*, 417 U.S. 817, 830 n.7 (1974)).

228. *Houchins*, 438 U.S. at 8.

229. Blasi, *supra* note 206, at 523; e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976); see J. GOBERT & N. COHEN, *RIGHTS OF PRISONERS* § 4.01, at 101 (1981).

230. See R. PORTER, *A SOCIAL HISTORY OF MADNESS: THE WORLD THROUGH THE EYES OF THE INSANE* 126-35, 167-209, 248-50 (1987) (discussing the work of a number of patient/reformers, including John Perceval, founder of the Alleged Lunatics' Friend Society, a pressure group to protect the interests of the improperly confined in mid-nineteenth century England, and Clifford Beers, the leading figure in the National Committee for Mental Hygiene and the evangelist of the influential Mental Hygiene Movement in early twentieth century America). Perceval's protests against the institutions in which he was confined were published in J. PERCEVAL, *A NARRATIVE OF THE TREATMENT RECEIVED BY A GENTLEMAN, DURING A STATE OF MENTAL DERANGEMENT*, contained in two volumes printed in 1838 and 1840, and reprinted as *PERCEVAL'S NARRATIVE: A PATIENT'S ACCOUNT OF HIS PSYCHOSIS* (G. Bateson ed. 1974). See R. PORTER, *supra*, at 248. Beers' book, *A MIND THAT FOUND ITSELF*, originally published in 1908, went through 22 editions in the next 25 years. See *id.* at 249.

tion.²³¹ Moreover, the public enjoys first amendment protection against unjustified governmental interference with communications from prisoners and patients.²³² Although the Supreme Court has upheld restrictions on the direct access of the news media to prison facilities, it did so in view of “[a] number of alternatives [that] are available to prevent problems in penal facilities from escaping public attention.”²³³ In addition, both prisoners²³⁴ and mental patients²³⁵ are accorded a right of relatively unrestricted communication with attorneys, courts, and other public officials, not only to effectuate their right to contest the legality of their confinement, but also to ensure that institutional abuses may be brought to public attention and redressed. The rights of prisoners and patients to communicate to those outside of the institution—to assert legal rights, to criticize officials, to report on conditions, or for other purposes—as well as the reciprocal right of the public to receive such communications, would

231. *E.g.*, *Pell v. Procunier*, 417 U.S. 817, 824 (1974) (rejecting claims of news media to conduct interviews with prisoners and of prisoners to participate in such interviews in order to inform the public about prison conditions in light of right of prisoners to write letters to the media); *Procunier v. Martinez*, 416 U.S. 396 (1974) (right of inmates to send written communications outside the prison), *overruled in part on other grounds*, *Thornburgh v. Abbot*, 109 S. Ct. 1874 (1989); *see* J. GOBERT & N. COHEN, *supra* note 229, §§ 4.00-4.07. Mental hospital patients also have a first amendment right to communicate outside the hospital. *See, e.g.*, *Brown v. Schubert*, 347 F. Supp. 1232, 1234 (E.D. Wis. 1972), *supplemented*, 389 F. Supp. 281, 283-84 (E.D. Wis. 1975); *Wyatt v. Stickney*, 344 F. Supp. 373, 379-80 (M.D. Ala. 1972), *aff'd in part and rev'd in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Stowers v. Wolodzko*, 386 Mich. 119, 191 N.W.2d 355 (1971) (statutory right). *See generally* Gostin, *Freedom of Expression and the Mentally Disordered: Philosophical and Constitutional Perspectives*, 50 NOTRE DAME LAW. 419 (1975); Note, *The Committed Mentally Ill and Their Right to Communicate*, 7 WAKE FOREST L. REV. 297 (1971).

232. *Procunier v. Martinez*, 416 U.S. at 412-13.

233. *Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978); *see Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell*, 417 U.S. at 824-28.

234. *See, e.g.*, *Bounds v. Smith*, 430 U.S. 817 (1977) (due process right of access to courts); *Wolff v. McDonnell*, 418 U.S. 539, 576-80 (1974) (due process right of access to courts, first amendment right of correspondence with attorneys); *Ex parte Hull*, 312 U.S. 546 (1941) (due process right of access to courts); *Taylor v. Sterrett*, 532 F.2d 462 (5th Cir. 1976) (outgoing mail to courts and judicial officials may not be opened); *Craig v. Hocker*, 405 F. Supp. 656 (D. Nev. 1975) (outgoing mail to attorneys may not be censored or confiscated). *See generally* J. GOBERT & N. COHEN, *supra* note 229, §§ 2.00-2.14.

235. *See, e.g.*, *Ward v. Kort*, 762 F.2d 856, 858 (10th Cir. 1985) (constitutional right of access to the courts); *Johnson v. Brelje*, 701 F.2d 1201, 1207 (7th Cir. 1983) (same); *Coe v. Maryland*, No. K-83-4248 (D. Md. April 4, 1985) (consent decree funding legal assistance program to secure constitutional right of access to courts); *Wyatt*, 344 F. Supp. at 379-80 (unrestricted right to send and receive sealed mail from attorneys, private physicians, courts and public officials); N.J. STAT. ANN. § 30.4-24.2g(1) (West 1981) (statutory right to communicate with lawyers); WIS. STAT. ANN. § 51.61(1)(c) (West 1987) (statutory right to communicate with officials, committing court and mental health agency); *Garvey*, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1772-73 (1981); Note, *supra* note 231, at 307-11.

be meaningless if institutional authorities could materially alter the mental processes of their charges through involuntary treatment techniques or modify the content of such communication or the individual's desire to engage in it.

The essential values justifying the first amendment thus would be substantially undermined if speech were to remain unimpaired but mental processes could be controlled. Governmental attempts to intrude directly into mental processes to effect changes in thoughts, beliefs, opinions, and emotions, must therefore be regarded as hostile to the principles of the first amendment.

V. ARGUMENTS AGAINST FIRST AMENDMENT PROTECTION FOR MENTAL PROCESSES

A. *Does the First Amendment Protect Insane or Disordered Thoughts?*

The above conclusion must be examined against the contention that although the first amendment protects thoughts, it does not protect insane or disordered thoughts.²³⁶ This contention is arguably supported by several Supreme Court cases holding that certain types of speech are totally unprotected by the first amendment. This approach was first articulated in the Court's 1942 opinion in *Chaplinsky v. New Hampshire*.²³⁷

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.²³⁸

From this dictum, the Court has derived a two-level theory of the first amendment, fully protecting most kinds of speech against government abridgement absent compelling necessity, but recognizing certain limited categories of expression as being so worthless that they are

236. See *Rennie v. Klein*, 462 F. Supp. 1131, 1144 (D.N.J. 1978) ("The court need not reach the question of whether insane or disordered thought is within the scope of first amendment protection."), *aff'd in part, modified in part, and remanded*, 653 F.2d 836 (3d Cir. 1981) (en banc), *vacated and remanded*, 458 U.S. 1119 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983) (en banc).

237. 315 U.S. 568 (1942).

238. *Id.* at 571-72.

beyond the amendment's protection.²³⁹ In addition to "fighting words," the Court has excluded libelous utterances²⁴⁰ and obscenity²⁴¹ from constitutional protection.

Although the Court had appeared to be moving away from this dichotomy between protected and unprotected speech,²⁴² its recent opinions continue to cite the distinction.²⁴³ In fact, in the 1982 case of

239. See L. TRIBE, *supra* note 33, § 12-18.

240. *Beauharnais v. Illinois*, 343 U.S. 250 (1952). *But see* *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (some libelous statements concerning public officials protected by first amendment); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (The first amendment protects defamatory statements in the absence of fault even for defendants who are not public figures.); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (extending *New York Times* to public figures). Although undercut, *Beauharnais* has recently been cited for the proposition that libelous utterances are not protected by the first amendment. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 504 (1984).

241. *Sable Communications, Inc. v. FCC*, 109 S. Ct. 2829, 2835-36 (1989); *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957). *But see* *Stanley v. Georgia*, 394 U.S. 561 (1969) (private possession and use of obscenity protected by first amendment). In *Miller*, the Court adopted a three-part test for defining obscenity: It must "appeal[] to the prurient interest"; it must portray specifically defined sexual conduct in a "patently offensive way"; and it must lack "serious literary, artistic, political or scientific value" when viewed as a whole. *Miller*, 413 U.S. at 24.

242. *Chaplinsky* has been substantially eviscerated in the "fighting words" context. See, e.g., *Brown v. Oklahoma*, 408 U.S. 914 (1972); *Lewis v. New Orleans*, 408 U.S. 913 (1972); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 403 U.S. 15 (1971). In *Texas v. Johnson*, the recent flag-burning case, the Court rejected an argument that the burning of a flag was within the "fighting words" exception of *Chaplinsky* and stated that "[n]o reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs." *Texas v. Johnson*, 109 S. Ct. 2533, 2542 (1989).

Beauharnais, the libelous utterances case, has been eclipsed by *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), *Garrison v. Louisiana*, 379 U.S. 64 (1964), and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Commercial advertising, once in the unprotected category, *Valentine v. Chrestensen*, 316 U.S. 52 (1942), is now deemed protected. *Board of Trustees v. Fox*, 109 S. Ct. 3028 (1989); *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Friedman v. Rogers*, 440 U.S. 1 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976). For the approach used by the Court in commercial speech cases, see *infra* notes 262-64 and accompanying text.

Perhaps only the obscenity category of noncovered speech survives today. See Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 303; see, e.g., *Sable Communications*, 109 S. Ct. at 2835-36; *Miller v. California*, 413 U.S. 15 (1973). *But see* *Stanley v. Georgia*, 394 U.S. 561 (1969) (private possession and use of pornography protected by first amendment). See generally Schauer, *supra*, at 302-04.

243. *Dun & Bradstreet, Inc. v. Greenmoss Buildings, Inc.*, 472 U.S. 749, 758 & n.5 (1985) (obscene speech and "fighting words" accorded no protection); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 504 & n.22 (1984) (obscenity and libel considered unprotected); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (child pornography unprotected).

New York v. Ferber, the Court seemed to define distribution of child pornography as a new category of unprotected speech.²⁴⁴ Although nonobscene, this material visually depicts sexual conduct by children. *Ferber*, however, may not signal a return to the *Chaplinsky* doctrine of noncovered expression. Whether the Court will actually treat child pornography as outside the coverage of the first amendment is an open question, for although the *Ferber* Court cited *Chaplinsky* and other unprotected speech cases, it did not determine that child pornography was totally devoid of first amendment value.²⁴⁵ Furthermore, the Court's discussion of the strong state interest in the regulation of child pornography²⁴⁶ would have been unnecessary had this category of expression been treated as altogether beyond the ambit of the first amendment. Citations to *Chaplinsky* and its progeny notwithstanding, the technique employed in *Ferber* thus does not seem to be one of noncoverage.²⁴⁷

To whatever extent the *Chaplinsky* doctrine survives, and it appears to have vitality at least in the obscenity area,²⁴⁸ it constitutes a recognition that at least some limited categories of unprotected speech are removed altogether from first amendment review, even though they involve regulation of the content of expression—for which exacting scrutiny is usually reserved. Rather than requiring a showing that the government restriction is necessary to further a “compelling state interest”—the usual standard for justifying abridgment of first amendment rights²⁴⁹—the government will be permitted to regulate these types of expression “subject only to the barest due process scrutiny.”²⁵⁰

In a related doctrinal development, the Court or several members of it have begun to treat certain categories of speech as having a “lower value” than, for example, political speech.²⁵¹ Restrictions on such “lower value” speech are then scrutinized under a standard that places a lesser burden of justification on government than would be applied to speech within the core values of the first amendment. A plurality of the Court in *Young v. American Mini Theatres, Inc.*, sug-

244. *Ferber*, 458 U.S. at 764 (“[C]hild pornography . . . , like obscenity, is unprotected by the First Amendment.”).

245. *Id.* at 763-64.

246. The Court described the state interest as both “compelling” and “of surpassing importance.” *Id.* at 757.

247. Schauer, *supra* note 242, at 303-04.

248. *See supra* notes 241-43.

249. *See infra* notes 525-32 and accompanying text.

250. L. TRIBE, *supra* note 33, § 12-8, at 832, 837.

251. *See G. GUNTHER, supra* note 33, at 1101 & n.4, 1109-10; L. TRIBE, *supra* note 33, § 12-18, at 928-34.

gested that nonobscene but sexually explicit speech deserves less constitutional protection than other types of protected speech.²⁵² The Court upheld a zoning ordinance restricting the location of theaters showing sexually explicit "adult" movies, finding that the societal interest in protecting the free flow of sexually explicit materials was of "a wholly different, and lesser, magnitude" than the interest in protecting other kinds of expression.²⁵³ The Court applied a balancing test, finding that the city's desire to protect its neighborhoods was sufficiently compelling to justify the ordinance.²⁵⁴

Another plurality of the Court employed a similar balancing approach in *FCC v. Pacifica Foundation*,²⁵⁵ upholding the authority of the Federal Communications Commission to regulate radio broadcasts that the Court considered indecent although not obscene.²⁵⁶ In a somewhat ambiguous 1986 opinion, a majority of the Court for the first time may have embraced the notion that nonobscene sexually explicit speech deserves less protection than other kinds of protected speech. In *City of Renton v. Playtime Theatres, Inc.*,²⁵⁷ the Court upheld a zoning ordinance that restricted the location of adult theaters, quoting in a footnote language from the *American Mini Theatres* plurality opinion which suggested that such sexually explicit speech is of a "wholly different, and lesser, magnitude than the interest of untrammelled political debate."²⁵⁸ This approach, however, may be limited to zoning restrictions and to radio or television broadcasting during times of the day when children are exposed to it. A unanimous Supreme Court recently distinguished *Pacifica* on this basis from indecent but nonobscene sexually oriented private commercial telephone communications, known as "dial-a-porn." In *Sable Com-*

252. 427 U.S. 50, 70 (1976) (plurality opinion).

253. *Id.* Only four Justices joined that part of the Court's opinion that suggested lesser first amendment protection for sexually explicit speech. Justice Stevens wrote the opinion for the Court, and this portion of it was joined by Chief Justice Burger and Justices White and Rehnquist. Justice Powell concurred, but did not join Justice Stevens' opinion on this point. *Id.* at 73.

254. *Id.* at 71-73.

255. 438 U.S. 726 (1978) (plurality opinion).

256. In this respect, Justice Stevens' opinion was joined only by Chief Justice Burger and Justice Rehnquist. *Id.* at 729. Justice Powell, in a concurring opinion joined by Justice Blackmun, refused to agree that offensive although nonobscene speech deserves less protection than other types of speech:

I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection and which is less "valuable" and hence deserving of less protection.

Id. at 761 (Powell, J., concurring).

257. 475 U.S. 41 (1986).

258. *Id.* at 49 n.2 (quoting *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976)).

munications, Inc. v. FCC,²⁵⁹ the Court invalidated a total ban on such communications, finding *Pacifica* to involve merely a partial ban on broadcasting and to be limited to contexts involving the "captive audience" problem presented there.²⁶⁰ Applying traditional strict scrutiny, the Court found that the total ban on such telephone communications "far exceeds that which is necessary to limit the access of minors to such messages,"²⁶¹ and was therefore unconstitutional. The Court thus treated the sexually explicit speech before it as entitled to full first amendment protection, although it acknowledged that at least in certain circumstances sexually explicit speech would be scrutinized under a lesser standard.

In addition to nonobscene sexually explicit speech, the Court has accorded "lesser value" to certain kinds of commercial speech under the first amendment. In *Central Hudson Gas & Electric Co. v. Public Service Commission*,²⁶² the Court explicitly recognized that "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."²⁶³ For commercial speech the Court employs a form of intermediate scrutiny, permitting restrictions only if they directly advance substantial government interests and are narrowly tailored to achieve them.²⁶⁴

These cases, involving what the Court or some members of it have regarded as "less valuable" speech, have not employed the approach of *Chaplinsky*, under which such communication would be excluded altogether from first amendment coverage. Rather, the Court has accorded these kinds of speech some constitutional protection, applying a balancing approach or a form of intermediate scrutiny, rather than the strict scrutiny usually applicable to intrusions on first amendment protected speech.

An argument could be framed based upon *Chaplinsky* and its

259. 109 S. Ct. 2829 (1989).

260. *Id.* at 2837-38.

261. *Id.* at 2839.

262. 447 U.S. 557 (1980).

263. *Id.* at 562-63; accord *Board of Trustees v. Fox*, 109 S. Ct. 3028, 3033 (1989) (referring to the "subordinate position [of commercial speech] in the scale of First Amendment values"); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (plurality opinion) ("not all speech is of equal First Amendment importance"; distinguishing speech "on matters of public concern" from speech "on matters of purely private concern," the latter being "of less First Amendment concern").

264. *Fox*, 109 S. Ct. at 3033; *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 339 (1986) (applying these tests somewhat deferentially); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 628 (1985); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1980). The Court in *Fox* recently clarified that the narrow tailoring standard is not as demanding as the "least-restrictive-means" requirement. 109 S. Ct. at 3032-35. For other commercial speech cases, see *supra* note 239.

progeny, or based upon the recent cases suggesting that certain "lesser value" speech be accorded lesser constitutional protection, that insane or disordered thought is without value and therefore outside the ambit of first amendment protection, or of lower value, and therefore deserving only of lesser scrutiny.²⁶⁵ This argument must fail, however, for a number of reasons. First, the distinction between sane and disordered thought is elusive,²⁶⁶ particularly in view of the imprecision of the diagnostic categories used in defining mental illness, as well as of the lack of consistency by clinicians in their application.²⁶⁷ Although the diagnostic criteria for mental illness have become more specific in recent years,²⁶⁸ particularly with the 1980 adoption (*DSM-III*)²⁶⁹ and 1987 revision (*DSM-III-R*)²⁷⁰ of the third edition of the *Diagnostic and Statistical Manual for Mental Disorder*, the criteria remain imprecise and value laden. *DSM-III-R*, developed by the American Psychiatric Association, is the official specification of diagnostic criteria widely used by mental health clinicians in America. The approach of *DSM-III* and *DSM-III-R* is animated by a strong commitment to Baconian empiricism in the definition of the diagnostic criteria,²⁷¹ which the drafters characterize as "'descriptive' in that the definitions of the disorders are generally limited to descriptions of

265. See *supra* note 236; Appelbaum & Gutheil, "Rotting With Their Rights On": *Constitutional Theory and Clinical Reality in Drug Refusal by Psychiatric Patients*, 7 BULL. AM. ACAD. PSYCHIATRY & L. 306, 312-13 (1979); Shapiro, *supra* note 157, at 270-71.

266. See Shapiro, *supra* note 185, at 270; Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CALIF. L. REV. 54, 64-65 (1982); Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 540, 572-74, 632-35 (1978); Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 970-71 (1985); *supra* notes 218-19 and accompanying text.

267. See *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) ("Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment"); *Addington v. Texas*, 441 U.S. 418, 432 (1979) (recognizing "the uncertainties of psychiatric diagnosis"); *O'Connor v. Donaldson*, 422 U.S. 563, 587 (1975) (Burger, C.J., concurring) (referring to the "wide divergence of medical opinion regarding the diagnosis of and proper therapy for mental abnormalities"). See generally J. ZISKIN, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* (3d ed. 1981); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974); Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, *supra* note 266, at 542-60.

268. Westermeyer, *Psychiatric Diagnosis Across Cultural Boundaries*, 142 AM. J. PSYCHIATRY 798, 799 (1985).

269. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3d ed. 1980) [hereinafter *DSM-III*].

270. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3d ed. rev. 1987) [hereinafter *DSM-III-R*].

271. Faust & Miner, *The Empiricist and His New Clothes: DSM-III in Perspective*, 143 AM. J. PSYCHIATRY 962, 962 (1986).

the clinical features of the disorders."²⁷² A diagnosis of mental abnormality calls for a clinician's interpretation of "behavioral signs or symptoms."²⁷³ Although this may appear to be an exercise in description, it inevitably involves "subjective cultural judgments about what is abnormal."²⁷⁴

The goal of strict empiricism has not and cannot be achieved because the label "mental disorder" contains an inherently evaluative component. Under *DSM-III* and *DSM-III-R*, "mental disorders" are defined through use of the concepts of "distress" and "impairment" in "important areas of functioning."²⁷⁵ The concept of "mental disorder" presupposes a standard of normality against which unusual behavior is measured. Consider the following hypothetical: Lawyers (and their spouses) understand well the aphorism, "Law is a jealous mistress." The work is demanding and frequently involves long hours. Some law firms expect their attorneys to bill 3200 hours per year, or even more. Indeed, some lawyers work so hard that their work interferes with their ability to function effectively in other aspects of their lives. Their role as spouses, parents, or friends may suffer; they lack the time to enjoy nature, read literature, listen to music, contemplate philosophy, or even to engage in physical exercise. Their family and friends complain that they lack balance in their lives and have become "workaholics." Some lawyers experience distress as a result of their professional choice. Yet others love the law, including the long hours, citing their pleasure in the craft of the work, or the economic rewards, or other reasons. For some, this behavior may have its roots in childhood conflicts; for some it may constitute a form of addiction to the adrenalin that the stress of the work stimulates.²⁷⁶ Suppose the American Psychiatric Association Board of Trustees was to add "workaholism" to the categories of mental disorder, and that a new medication was developed to treat this condition.²⁷⁷ Would these developments render the first amendment inapplicable to the involun-

272. *DSM-III-R*, *supra* note 270, at xxiii; *see also* *DSM-III*, *supra* note 269, at 7.

273. *DSM-III-R*, *supra* note 270, at xxiii.

274. Johnson, *Contributions of Anthropology to Psychiatry*, in *REVIEW OF GENERAL PSYCHIATRY* 180, 184 (H. Goldman ed. 1984).

275. *DSM-III*, *supra* note 269, at 6; *DSM-III-R*, *supra* note 270, at xxii.

276. *See* Lyons, *Stress Addiction: 'Life in the Fast Lane' May Have Its Benefits*, N.Y. Times, July 26, 1983, § C, at 1, col. 1 ("The Type A individual has perhaps become addicted to his own adrenaline and unconsciously seeks ways to get those little surges . . ."); *cf.* Roy, DeJong & Linnoila, *Extraversion in Pathological Gamblers: Correlates with Indexes of Noradrenergic Function*, 46 *ARCHIVES GEN. PSYCHIATRY* 679 (1989) (reporting on research suggesting that gamblers may have an abnormality of the adrenergic system and may engage in gambling behavior to increase the levels of certain brain chemicals).

277. *See* Machlowitz, *A New Take on Type A*, N.Y. Times, May 3, 1987, § 6, part 2 (Magazine) at 40 (predicting a pharmacological approach to treatment of "Type A" behavior).

tary administration of such treatment to lawyers diagnosed as "workaholics"?²⁷⁸

The chair of the American Psychiatric Association committees that developed both *DSM-III* and *DSM-III-R* concedes that "[t]he concept of 'disorder' always involves a value judgment."²⁷⁹ People are diagnosed as mentally ill based on a judgment that their behavior is abnormal. The criteria of "distress" and "impairment" in important areas of functioning "are permeated by dominant social values and are shaped, in part, by the preference for a statistical definition of normality and abnormality."²⁸⁰ "Attitudinal, political, historical, and perhaps even economic factors" can influence both the definition of diagnostic criteria and their application.²⁸¹

A recent illustration of the impact of social and moral values on the definition of diagnostic criteria concerns the classification of homosexuality as a mental disorder.²⁸² Although prior to 1973, homosexuality per se was defined as a disorder, in that year the American Psychiatric Association Board of Trustees, following heated debate, removed it from this category and substituted a new classification, "Sexual Orientation Disturbance," restricted to homosexuals

278. An example drawn from history provides an additional illustration of the inherent manipulability of categories like "disordered" or "mentally ill" based on political or social considerations masquerading as medical judgments. In the ante bellum South, a Louisiana doctor, Samuel W. Cartwright, attributed the behavior patterns of some slaves that overseers "erroneously" called "rascality," to a disease, peculiar to blacks, which he termed "*Dysaesthesia aethiopica*." K. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 102 (1968). The symptoms of this condition, which Dr. Cartwright attributed entirely to "the stupidity of mind and insensibility of the nerves induced by the disease," were described by the doctor as follows:

An African who suffered from this exotic affliction was "apt to do much mischief" which appeared "as if intentional." He destroyed or wasted everything he touched, abused the livestock, and injured the crops. When he was driven to his labor he performed his tasks "in a headlong, careless manner, treading down with his feet or cutting with his hoe the plants" he was supposed to cultivate, breaking his tools, and "spoiling everything."

Id. According to Dr. Cartwright, slaves who absconded from their masters suffered from a second "disease of the mind" that was unique to blacks, termed "*Drapetomania*," "the disease causing negroes to run away." *Id.* at 109. Most southern doctors rejected Cartwright's theories, and the *Charleston Medical Journal* criticized Cartwright's "mixture of medicine and politics." *Id.* at 309. However, had the treatments of modern psychiatry then been available, it is easily conceivable that their involuntary use for slaves afflicted with these "diseases of the mind" could have been defended by the same principles of benevolence and social utility advanced by Cartwright.

279. Spitzer, *The Diagnostic Status of Homosexuality in DSM-III: A Reformulation of the Issues*, 138 AM. J. PSYCHIATRY 210, 214 (1981).

280. Faust & Miner, *supra* note 271, at 963.

281. Westermeyer, *supra* note 268, at 799.

282. See Spitzer, *supra* note 279.

disturbed by their sexual orientation or wishing to change it.²⁸³ *DSM-III* further modified the definition of this category and renamed it "Ego-dystonic Homosexuality."²⁸⁴ The category was subsequently deleted in *DSM-III-R*, which merely lists "persistent and marked distress about one's sexual orientation," as an example of "Sexual Disorders Not Otherwise Specified."²⁸⁵ In light of the focus in the definition of mental disorders in *DSM-III* and *DSM-III-R* on the concepts of "distress" and "impairment" in "important areas of functioning,"²⁸⁶ homosexuals who do not experience distress as a result of their sexual orientation could nonetheless be considered disordered because of impairment in one or more important areas of functioning.²⁸⁷ The individual's occupational life would undoubtedly be considered one such area of functioning. Consider the case of a well-adjusted homosexual whose revelation of his sexual orientation impairs his occupational functioning because of the negative attitudes of his employer or co-workers. In this case, if such occupational impairment is deemed to justify considering the individual's homosexuality a mental disorder, the social and moral values of these others would constitute the determinative factor. Another area of functioning that might be considered impaired is the homosexual's sexuality itself. But whether sexual functioning should be deemed "an important area of functioning" and whether heterosexual functioning should be used as the norm both turn on value judgments, not empirical determinations.²⁸⁸

Even for conditions that by wide or even universal agreement produce distress and interfere in important areas of social and occupational functioning—schizophrenia, for example—and that, therefore, we agree should be considered mental disorders—the clinical determination of who suffers from the disorder raises similar problems. Diagnostic reliability—the probability that two clinicians will agree with each other's diagnosis—is only fifty to sixty percent for schizophrenia, and thirty to forty percent for depression and affective disorder.²⁸⁹ There is wide disagreement within psychiatry concerning the nature and causes of schizophrenia and many of the other mental illnesses.²⁹⁰ There simply is no "litmus test" available for the diagnosis of these

283. *Id.* at 210.

284. *Id.* at 210-11.

285. *DSM-III-R*, *supra* note 270, at 296.

286. *See supra* note 275.

287. *See Spitzer*, *supra* note 279, at 212.

288. *Id.*

289. Westermeyer, *supra* note 268, at 801. *See generally* Ennis & Litwack, *supra* note 267, at 697-708, 729-32.

290. *See, e.g.*, D. MECHANIC, MENTAL HEALTH AND SOCIAL POLICY 14-17 (1969).

conditions.²⁹¹ Unlike physical illnesses, for which objective investigatory procedures are usually available for making and confirming diagnoses, the assessment of mental illness depends almost exclusively on subjective clinical judgment.²⁹² The lack of theoretical consensus among clinicians concerning schizophrenia and other conditions inevitably produces varying application of diagnostic criteria. *DSM-III* and *DSM-III-R* seek to address this problem by claiming a "generally atheoretical approach" to etiology,²⁹³ one which focuses on the consequences of a condition rather than its causes.²⁹⁴ This claim reinforces the notion that clinicians applying the diagnostic criteria are merely observing and describing "facts." Facts, however, are not theory neutral. Diverse work in philosophy of science has repeatedly demonstrated that the observation and reporting of facts are inevitably theory driven.²⁹⁵ Medical diagnoses are by their nature "hypotheses based on some underlying theory or set of assumptions."²⁹⁶ Given the lack of consensus concerning the etiology of these conditions and the imprecision of their symptoms,²⁹⁷ divergence in the clinical application of the criteria used to define them is not surprising.²⁹⁸ Moreover,

291. Cancro, *Introduction to Etiologic Studies of the Schizophrenic Disorders*, in *PSYCHIATRY 1982 ANNUAL REVIEW* 91 (L. Grinspoon ed. 1982) ("There is no independent test to confirm or to reject the diagnosis of schizophrenia. There is no tissue or body fluid which can be sent to the laboratory to ascertain which individuals are false positives or false negatives.").

292. D. MECHANIC, *supra* note 290, at 17.

293. This excerpt is illustrative:

For most of the DSM-III-R disorders . . . the etiology is unknown. Many theories have been advanced and buttressed by evidence—not always convincing—attempting to explain how these disorders come about. The approach taken in DSM-III-R with regard to etiology is that the inclusion of etiologic theories would be an obstacle to use of the manual by clinicians of varying theoretical orientations, since it would not be possible to present all reasonable etiologic theories for each disorder.

DSM-III-R, *supra* note 270, at xxiii.

294. Spitzer, *supra* note 279, at 211-13.

295. See, e.g., W. GOODMAN, *WAYS OF WORLDMAKING* 2-3 (1978); R. HARE, *THE PHILOSOPHIES OF SCIENCE* 11 (1972); T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 66 (2d ed. 1970); K. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 94-95 (1959); H. PUTNAM, *REASON, TRUTH AND HISTORY* 54 (1981); N. RESCHER, *EMPIRICAL INQUIRY* 18, 70-72 (1982); M. TURNER, *PSYCHOLOGY AND THE PHILOSOPHY OF SCIENCE* 14-15 (1967); W. WEIMER, *NOTES ON THE METHODOLOGY OF SCIENTIFIC RESEARCH* 20-26 (1979); Faust & Miner, *supra* note 271, at 964-65; see also Casebeer, *Work on a Labor Theory of Meaning*, 10 *CARDOZO L. REV.* 1637, 1638 (1989); Winter, *supra* note 216, at 1131.

296. B. MECHANIC, *supra* note 290, at 18.

297. The introduction to DSM-III-R itself concedes that the manual's classification of mental disorders provides no "precise boundaries" or "sharp boundaries" for differentiating one disorder from another or from no disorder at all. DSM-III-R, *supra* note 270, at xxii-iii.

298. Cancro, *supra* note 291, at 91 ("Diagnosis remains a clinical activity based on arbitrarily selected clinical phenomena. The limitation of the diagnostic method guarantees

although *DSM-III* and *DSM-III-R* narrow the definition of schizophrenia and deemphasize the role of such inherently subjective criteria as dysfunction in personal relationships,²⁹⁹ many clinicians in practice may continue to apply a broader notion of schizophrenia.³⁰⁰

The problem of subjectivity in the application of psychiatric diagnostic criteria is exacerbated when white, middle-class, and overwhelmingly male clinicians are called upon to interpret the signs and symptoms of culturally foreign patients—a scenario that frequently occurs in our urban communities and in mental hospitals and prisons generally.³⁰¹ This problem produces erroneous commitment and unnecessary harmful intrusive treatment not only of ethnic and racial minorities,³⁰² but also increasingly of immigrant populations. Many immigrants cannot communicate effectively in English, with the result that their symptoms are easily misunderstood by clinicians whose cultural distance from these individuals is compounded by the additional

heterogeneity in the sample and in part accounts for the fact that all studies of the schizophrenic syndrome are less reliable than is desirable.”).

299. *Id.* at 85-86, 90.

300. Many of the divergent diagnoses of John Hinckley offered by the numerous psychiatrists who testified at his celebrated trial were not contained in *DSM-III*, and thus illustrate that even expert psychiatric witnesses “do not feel bound by the *DSM-III* diagnostic categories.” A. STONE, *LAW, PSYCHIATRY, AND MORALITY* 84-85, 91 (1984). The tendency of clinicians not to feel bound by *DSM-III* may be augmented by criticism of *DSM-III*'s artificial clarity and abbreviated character, and the suggestion that clinicians “go on to a broad-based assessment of other characteristics of the person, including his or her social functioning, distortions of meaning, psychological conflicts, and coping mechanisms. Strauss, *The Clinical Pictures and Diagnosis of the Schizophrenic Disorders*, in *PSYCHIATRY* 1982 ANNUAL REVIEW, *supra* note 291, at 87, 90-91.

301. See Johnson, *supra* note 274, at 184. Indeed, *DSM-III-R* specifically cautions clinicians concerning this problem. *DSM-III-R*, *supra* note 270, at xxvi-vii.

302. National statistics on admissions to state and county psychiatric hospitals reveal that black men are hospitalized at a rate 2.8 times greater than white men, and black women at a rate 2.5 times greater than white women. E. Rosenthal & L. Carty, *Impediments to Services for Black and Hispanic People with Mental Illness* 3 (June 1988) (unpublished manuscript prepared by Mental Health Law Project under contract with National Institute of Mental Health) (citing 1987 NIMH statistics). While 48.9% of whites were hospitalized involuntarily, 56.6% of nonwhites were so hospitalized. *Id.* Moreover, these statistics show that black inpatients were diagnosed as schizophrenics at almost twice the rate of white inpatients, and that this disparity is even greater for black women compared to white women. *Id.* at 4. Hispanic inpatients are diagnosed as schizophrenic at a rate 1.4 times that of white inpatients. *Id.* There is a growing concern that these disparities, rather than reflecting some inherent racial susceptibility to psychopathology, are the result of misdiagnosis caused by the socio-cultural distance between clinicians and these minority group patients. See Adebimpe, *Overview: White Norms and Psychiatric Diagnosis of Black Psychiatric Patients*, 138 AM. J. PSYCHIATRY 279, 279, 281-83 (1981); Jones & Gray, *Problems of Diagnosing Schizophrenia and Affective Disorders Among Blacks*, 37 HOSP. & COMMUNITY PSYCHIATRY 61, 61-65 (1986); E. Rosenthal & L. Carty, *supra*, at 4-7. “Language not understood is often considered evidence of thought disorder; styles of relating are sometimes misinterpreted as disturbances in affect; and unfamiliar mannerisms are considered bizarre.” Jones & Gray, *supra*, at 63.

language barrier. In an ironic variation of this problem, many institutional psychiatrists, accepting employment in state hospitals or prisons where full licensure often is not required, are foreign-born and foreign-trained clinicians, frequently with an even greater cultural and language distance from their patients.³⁰³

Thus, for several reasons, "DSM-III's appearance of objectivity is largely illusory."³⁰⁴ Although mental illness is not a myth,³⁰⁵ the criteria used to define it are subjective and imprecise and their application inevitably involves value judgments, often beyond the professional competence of clinicians. Indeed, except in the clearest of cases, determining who is mentally ill is a social and moral judgment as much as a clinical one.³⁰⁶

As a result, allowing application of the first amendment to turn upon this distinction is fraught with danger.³⁰⁷ The most familiar example is psychiatric practice in the Soviet Union, where there is no equivalent of the first amendment. Dissident political beliefs have been defined as disordered and their proponents declared mentally ill, committed to hospitals, and subjected to intrusive mental health treatment to change their beliefs.³⁰⁸ Surely many of the Soviet psychiatrists who participated in these practices in the pre-perestroika era did so out of what they considered to be benevolent motives.³⁰⁹ In the social and political context within which these psychiatrists lived and worked, political dissidents could be considered disordered, if only because they were so obviously self-destructive.³¹⁰ In any event, treat-

303. See E. Rosenthal & L. Carty, *supra* note 302, at 6; Solomon, *Racial Factors in Mental Health Service Utilization*, 11 PSYCHOSOCIAL REHABILITATION J. 3, 10 (1988).

304. Faust & Miner, *supra* note 271, at 963.

305. In his many writings, psychiatrist Thomas Szasz argues that mental illness is a myth and a metaphor. See, e.g., T. SZASZ, *THE MANUFACTURE OF MADNESS* (1970); T. SZASZ, *THE MYTH OF MENTAL ILLNESS* (1961). Many of Szasz's criticisms of how the law treats mental illness are valid. Compare, e.g., Winick, *supra* note 267 with T. SZASZ, *PSYCHIATRIC JUSTICE* (1965). However, Szasz's basic analysis is flawed. See, e.g., D. MECHANIC, *supra* note 290, at 17-19; Moore, *Some Myths About "Mental Illness,"* 32 ARCHIVES GEN. PSYCHIATRY 1483 (1975); Reiss, *A Critique of Thomas S. Szasz's "Myth of Mental Illness,"* 128 AM. J. PSYCHIATRY 1081 (1972).

306. See H. FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* 37 (1972); Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, *supra* note 266, at 559-60; Shapiro, *supra* note 185, at 270; Winick, *supra* note 266, at 966-67.

307. See *supra* notes 217-20 and accompanying text.

308. See S. BLOCH & P. REDDWAY, *PSYCHIATRIC TERROR: HOW SOVIET PSYCHIATRY IS USED TO SUPPRESS DISSENT* (1977); H. FIRESIDE, *SOVIET PSYCHOPRISONS* (1979); Chalidze, *A Comparison of Norms—Rights of the Mentally Ill and Allegedly Mentally Ill*, 1 N.Y.L. SCH. HUM. RTS. ANN. 75, 85-86 (1983); Clarity, *A Freed Dissident Says Soviet Doctors Sought to Break His Political Beliefs*, N.Y. Times, Feb. 4, 1976, at A1, 8.

309. See A. STONE, *supra* note 300, at 6; Wing, *Psychiatry in the Soviet Union*, BRITISH MED. J. 433 (1974).

310. See A. STONE, *supra* note 300, at 21.

ment could be justified as better for such individuals than the alternative treatment they would receive at the hands of the KGB.³¹¹

Such "benevolence" is not unknown among American psychiatrists. In the American criminal justice system, for example, many psychiatrists have traditionally overdiagnosed incompetency to stand trial based on the often mistaken belief that incompetency commitment would be better for the defendant than the criminal process.³¹² This has frequently resulted in lengthy commitment of defendants to substandard forensic hospitals. When fundamental constitutional values are at stake, close judicial scrutiny of governmental action is appropriate even (and perhaps especially) when that action is justified by benevolent motives.³¹³ Especially when first amendment values are at risk, courts have traditionally been concerned with leaving unstructured discretion in the hands of enforcement officials.³¹⁴ We can no more trust the "good psychiatrist" than we can the "good cop."

The first amendment plays a central role in American society; in many ways it is one of the most important defining characteristics of our political system. A society often defines itself reactively by renouncing alternative visions; we characterize ourselves by disavowing what we are not. This approach is reflected in Justice Kennedy's recent opinion for the Court in *Ward v. Rock Against Racism*.³¹⁵ In analyzing why music, although not speech, is protected by the first amendment, Justice Kennedy compared our society to totalitarian regimes in which certain kinds of music have been suppressed as threatening the interests of the state.³¹⁶ The first amendment, Justice Kennedy affirmed, "prohibits any like attempts in our own legal order."³¹⁷ The first amendment similarly demands strict scrutiny of intrusive treatments of the kind employed to treat "disordered" thought in the Soviet Union, and of any like attempts here.

311. See *id.* at 6.

312. See R. ROESCH & S. GOLDING, COMPETENCY TO STAND TRIAL 48-49 (1980); A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 205-06 (DHEW Pub. No. (ADM) 76-176, 1975); Hess & Thomas, *Incompetency to Stand Trial: Procedures, Results and Problems*, 119 AM. J. PSYCHIATRY 713 (1963); Winick, *supra* note 266, at 983.

313. See *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 724 (1989); *In re Gault*, 387 U.S. 1, 18 (1967).

314. See, e.g., *City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138, 2143-44 (1988); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969).

315. 109 S. Ct. 2746 (1989).

316. *Id.* at 2753 (citing 2 DIALOGUES OF PLATO, REPUBLIC, bk. III, at 231, 245-48 (B. Jowett trans., 4th ed. 1953); *Musical Freedom and Why Dictators Fear It*, N.Y. Times, Aug. 23, 1981, § 2, at 1, col. 5; *Soviet Schizophrenia Toward Stravinsky*, N.Y. Times, June 26, 1982, § 1, at 25, col. 2; *Symphonic Voice from China is Heard Again*, N.Y. Times, Oct. 11, 1987, § 2, p. 27, col. 1).

317. *Ward*, 109 S. Ct. at 2753.

Even if the potential for abusive application of categories like "mentally ill" or "disordered" is considered small in our system,³¹⁸ accepting the legitimacy of these categories as a basis for avoiding first amendment scrutiny presents serious risks to basic first amendment values. Even those who are clearly and seriously mentally ill—suffering from a severe case of schizophrenia, for example, a condition manifested by gross disturbances in thinking and perception³¹⁹—have fluctuating periods of relatively undisturbed thought.³²⁰ Many schizophrenics engage in such creative activity as art and poetry.³²¹ Although schizophrenia is undeniably a painful and distressing condition, it includes aspects that lead some psychiatrists to regard it as a "great growth experience, an inner voyage of discovery."³²² "[S]ome schizophrenic experiences . . . can be definitely seen as an enlargement and enrichment of human life."³²³ Certain aspects of schizophrenic thinking "permit an enlargement of the human experience, can open new horizons and lead to new paths of feeling and understanding."³²⁴ Indeed, some psychiatrists, although in a distinct minority, interpret the condition "as a positive development that reveals truths to fellow

318. *But see* A. STONE, *supra* note 300, at 3-36 (discussing the political misuse of psychiatry in the cases of Soviet general Petro Grigorenko and American general Edwin Walker).

319. Lehmann, *Schizophrenia: Clinical Features*, in 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1153, 1155-62 (3d ed. 1980); *infra* note 414 and accompanying text.

320. Lehmann, *supra* note 319, at 1155 ("A schizophrenic patient may be incapable, at a certain time, of carrying on a rational, simple conversation, and yet half an hour later he may write a sensible and remarkably well-composed letter to a relative."); Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, *supra* note 266, at 573, 588 (mentally ill people have a significant capacity for normal and rational behavior); Winick, *supra* note 266, at 970-71. The fluctuating nature of mental illness is also revealed by empirical studies demonstrating that competency of mental patients is intermittent. C. LIDZ, A. MEISEL, E. ZERUBAVEL, M. CARTER, R. SESTAK & L. ROTH, INFORMED CONSENT: A STUDY OF DECISIONMAKING IN PSYCHIATRY 198-99 (1984); *see also* Appelbaum & Roth, *Clinical Issues in the Assessment of Competency*, 138 AM. J. PSYCHIATRY 1462, 1465 (1981) (competency fluctuates over time).

321. *See* S. ARIETI, INTERPRETATION OF SCHIZOPHRENIA 351-74 (2d ed. 1974). *See generally* R. PORTER, *supra* note 230 (examining autobiographical writings of the mentally ill).

322. May & Simpson, *Schizophrenia: Overview of Treatment Methods*, in 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, *supra* note 319, at 1193. Gregory Bateson, in his introduction to John Perceval's NARRATIVE, also invokes this metaphor, characterizing schizophrenia as a "voyage of discovery" from which the patient "comes back with insights different from those of the inhabitants who never embarked on such a voyage." Bateson, *Introduction* to J. PERCEVAL, A NARRATIVE OF THE TREATMENT EXPERIENCED BY A GENTLEMAN, DURING A STATE OF MENTAL DERANGEMENT at v, xiii-xiv (G. Bateson rev. ed. 1961) (1840). Similarly, R.D. Laing portrays schizophrenia as a "journey" by the patient "to explore the inner space and time of consciousness." R. LAING, THE POLITICS OF EXPERIENCE 126-27 (1967). Laing suggests that in the future, we will come to see "that what we call 'schizophrenia' was one of the forms in which, often through quite ordinary people, the light began to break through the cracks in the all-too-closed minds." *Id.* at 129.

323. S. ARIETI, *supra* note 321, at 378-79.

324. *Id.* at 379.

men and opens new paths toward greater moral values."³²⁵ We may have much to learn from schizophrenics: "From [their] protestations we may learn many sociological truths, generally hidden from the average citizen, and we may learn to recognize every day hypocrisies which we meekly accept as ineluctable facts of life"³²⁶ As the poet Emily Dickinson put it: "Much madness is divinest Sense—To a discerning Eye. . . ."³²⁷ In a sense, the mentally ill hold up a mirror to the rest of society, and we look away only at our peril.³²⁸

Unlike "fighting words" and obscenity, which by definition is "utterly without redeeming social importance,"³²⁹ the mentation and expressive conduct of the mentally ill may well have social value, and in any event may possess intrinsic value. Moreover, both of these are within the core values protected by the first amendment.³³⁰ Under the *Chaplinsky* doctrine, the category of unprotected expression is limited

325. *Id.* at 125.

326. *Id.* at 379. Social historian Roy Porter's analysis of the autobiographies of the insane led him to conclude that:

The writings of the mad can be read not just as symptoms of diseases or syndromes, but as coherent communications in their own right. . . .

. . . [T]heir testaments plainly echo, albeit often in an unconventional or distorted idiom, the ideas, values, aspirations, hopes and fears of their contemporaries. They use the language of their age, though often in ways which are highly unorthodox. When we read the writings of the mad, we gain an enhanced insight into the sheer range of what could be thought and felt, at the margins. We might compare the way historians of popular culture have told us to listen sympathetically to the popular idiom of graffiti, to riddles, to the lore and language of schoolchildren, or to the cosmologies of heretics arraigned before the Inquisition.

R. PORTER, *supra* note 230, at 2.

327. THE POEMS OF EMILY DICKINSON 337 (T. Johnson ed. 1955).

328. See R. PORTER, *supra* note 230, at 3:

[W]hat the mad say is illuminating because it presents a world through the looking-glass, or indeed holds up the mirror to the logic (and psycho-logic) of sane society. It focuses and puts to the test the nature and limits of the rationality, humanity and 'understanding' of the normal. In that sense, the late French philosopher Michel Foucault was quite right to insist that the history of unreason must be coterminous with the history of reason. They are doubles.

Furthermore, examined in this light, the consciousness of the mad confronts that of the sane to constitute a kind of hall of mirrors. When we juxtapose the mind of the insane with that of reason, society and culture, we see two facets, two expressions, two faces, and each puts the question to the other. If normality condemns madness as irrational, subhuman, perverse, madness typically replies in kind, has its own *tu quoque*. Rather like children playing at being adults, the mad highlight the hypocrisies, double standards and sheer callous obliviousness of sane society. The writings of the mad challenge the discourse of the normal, challenge its right to be the objective mouthpiece of the times. The assumption that there exist definitive and unitary standards of truth and falsehood, reality and delusion, is put to the test.

329. *Brandenburg v. United States*, 354 U.S. 476, 484 (1957).

330. See *supra* notes 202-35 and accompanying text.

only to expression that is deemed totally unrelated to the purposes of the first amendment.³³¹ Expression implicating first amendment values, however, even if of limited or no social utility, is within the protection of the Constitution. The Supreme Court has recognized the "right to receive information and ideas, regardless of their social worth."³³² It has reiterated that first amendment protection does not turn upon the "social utility of the ideas and beliefs which are offered."³³³ Even ideas deemed "offensive,"³³⁴ "loathsome,"³³⁵ "noxious,"³³⁶ and "immoral"³³⁷ may be protected. Thoughts deemed "disordered" would seem no less entitled to first amendment protection. Furthermore, because the mentation and expressive conduct of the mentally ill serve values within the core of those traditionally protected by the first amendment,³³⁸ the reduced scrutiny approach that has emerged from cases involving what some members of the Court regard as "lesser value" speech—the sexually explicit speech presented in *American Mini Theaters*, *Pacifica*, and *Playtime Theaters*,³³⁹ and some forms of commercial speech³⁴⁰ would also seem inapplicable.

Stanley v. Georgia,³⁴¹ which involved the right to possess obscen-

331. Schauer, *supra* note 242, at 303-04.

332. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also* *Winters v. New York*, 333 U.S. 507, 510 (1948) ("Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.").

333. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)); *see also* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-41 (1974) (false assertions of fact are protected by the first amendment even though they do not contribute to the search for truth and hence have no constitutional value).

334. *Texas v. Johnson*, 109 S. Ct. 2533, 2544 (1989) (citing cases).

335. *See* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Thus, although loathsome, the ideas of the Nazi party are protected by the first amendment. *See* *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); *Village of Skokie v. National Socialist Party of Am.*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978). *See generally* A. NEIER, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM* (1979).

336. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, J.J., concurring).

337. *Stanley v. Georgia*, 394 U.S. 557, 565 n.8 (1969) (quoting Henkins, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 395 (1963)); *see also* *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 689 (1959) (invalidating statute prohibiting exhibition of motion pictures portraying adultery favorably as inconsistent with the first amendment, which "is not confined to the expression of ideas that are conventional or shared by a majority").

338. *See supra* notes 202-35 and accompanying text.

339. *See supra* notes 251-62 and accompanying text.

340. *See supra* notes 263-64 and accompanying text. For an analysis concluding that commercial speech does not serve the core values of the first amendment, *see* Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

341. 394 U.S. 557 (1969).

ity in the privacy of the home, seems especially relevant to the question of first amendment protection for "disordered" thought and expression. In *Stanley*, the Court rejected as inconsistent with the first amendment the state's assertion of the right "to protect the individual's mind from the effects of obscenity."³⁴² Many would undoubtedly label as "disordered" the thoughts and emotions of the individual observing obscene films. Thus, the Court's rejection of the state's argument as little more than an "assertion that the State has the right to control the moral content of a person's thoughts"³⁴³ should preclude a similar argument that the state may intervene into mental processes to protect the individual's mind from "disordered" thoughts.

Stanley can be reconciled with the cases holding that obscenity is outside the ambit of the first amendment by drawing a distinction between the public display or distribution of obscenity and its private possession for personal use in the home.³⁴⁴ Although the government may prohibit the former, the first amendment insulates from government control "a person's private thoughts"³⁴⁵ even if they are regarded as disordered. The Court in *Stanley* endorsed the views expressed in Justice Brandeis' celebrated dissenting opinion in *Olmstead v. United States*.³⁴⁶ Brandeis, writing in the 1928 wiretapping case, had warned against future advances in science and technology that could provide "means of exploring unexpressed beliefs, thoughts and emotions."³⁴⁷ The Constitution, Brandeis affirmed, protects against such intrusions:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.³⁴⁸

Justice Brandeis' eloquent language has frequently been quoted. On one such occasion, former Chief Justice Burger, while a judge on the United States Court of Appeals for the District of Columbia Circuit, invoked Brandeis' words to reject the notion that the exercise of con-

342. *Id.* at 565.

343. *Id.*

344. See *supra* notes 163-65 and accompanying text.

345. *Stanley*, 394 U.S. at 566.

346. *Id.* at 564 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

347. *Olmstead*, 277 U.S. at 474.

348. *Id.* at 478.

stitutional rights may turn on a judgment concerning the wisdom or propriety of an individual's choices:

Nothing in this utterance suggests that Justice Brandeis thought an individual possessed these rights only as to *sensible* beliefs, *valid* thoughts, *reasonable* emotions, or *well-founded* sensations. I suggest he intended to include a great many foolish, unreasonable and even absurd ideas which do not conform, such as refusing medical treatment even at great risk.³⁴⁹

Full first amendment protection should therefore extend to all thoughts and mental processes, even those labeled as insane or disordered.

B. *Is the First Amendment Implicated by Treatment that Restores Mental Processes to a "Normal" or "Healthy" State?*

The above analysis will also meet the related contention that mental health treatment cannot raise first amendment problems because, rather than interfering with mental processes, such treatment enhances the patient's capacity to think and liberates the mind by freeing it from mental illness.³⁵⁰ It is true that when properly used, many of these treatments—the psychotropic drugs, for example—are “normative in their mechanism of action: that is, they restore existing imbalance toward the balanced norm.”³⁵¹ The fact remains, however, that even though these treatments may be beneficial and clinically desirable they nonetheless constitute government alteration of thought processes. Distinguishing “normal” from “abnormal” mental states may be no easier and no less dangerous than distinguishing “sane” from “disordered” thought.³⁵² Moreover, treatment designed to restore the thought processes of a patient or offender to a “normal” state of functioning seems analogous to governmental efforts to inculcate patriotic values in school children by use of the

349. *In re* President of Georgetown College, Inc., 331 F.2d 1010, 1017 (D.C. Cir. 1964) (separate statement of Burger, J., respecting denial of rehearing en banc).

350. See Appelbaum & Gutheil, *supra* note 265, at 311-12; Cole, *Patients' Rights vs. Doctors' Rights: Which Should Take Precedence?*, in REFUSING TREATMENT IN MENTAL HEALTH INSTITUTIONS—VALUES IN CONFLICT 56, 69 (A. Doudera & J. Swazey eds. 1982); Gutheil, *In Search of True Freedom: Drug Refusal, Involuntary Medication, and "Rotting with Your Rights On,"* 137 AM. J. PSYCHIATRY 327, 327 (1980).

351. Appelbaum & Gutheil, *supra* note 265, at 308; see also Gutheil & Appelbaum, “Mind Control,” “Synthetic Sanity,” “Artificial Competence,” and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication, 12 HOFSTRA L. REV. 77, 101 (1983) (the “acknowledged normalizing effects of the antipsychotic medications”); *id.* at 118 (referring to the “normalizing effects” of the drugs; the drugs facilitate “the re-emergence of normal patterns of cognition”; “their effect is to alter mental functioning in the direction of normality”).

352. See *supra* notes 266-308 and accompanying text.

compulsory flag salute invalidated in *West Virginia State Board of Education v. Barnette*,³⁵³ or to protect the minds of citizens from the effects of obscenity by the methods condemned in *Stanley v. Georgia*.³⁵⁴ In both *Barnette* and *Stanley* the governmental intrusions into mental privacy can be defended as attempts to bring about a state of normality. The analogy is particularly strong in *Stanley* because the prohibition on private possession and use of obscenity involved there could be defended as an attempt to enhance the citizen's capacity to think normally and liberate his mind by freeing it from invasion by material that tends "to deprave and corrupt those whose minds are open to such immoral influences."³⁵⁵

Mental processes must remain presumptively immune from governmental control in a system committed to the values of the first amendment. Government alteration of mental processes, even if designed to restore the individual to some prior or "normal" mental state, or to accomplish other beneficial results, should be subject to scrutiny under the first amendment. In a related context, a California appellate court applied first amendment scrutiny to statutory requirements that imposed procedural impediments on a patient's choice of undergoing psychosurgery and electroconvulsive therapy.³⁵⁶ These regulations on the use of psychosurgery and ECT were designed to protect patients from what the legislature viewed as intrusive and hazardous treatments. The regulations mandated special consent and record-keeping procedures, and a review of the patient's capacity to consent by three appointed physicians.³⁵⁷ The court recognized that these were plainly not attempts by the state "to control . . . what is thought by mental patients, nor how they think . . ." ³⁵⁸ Rather, they were exercises of the state's police power designed to protect patient safety.³⁵⁹ Nonetheless, the court found that "despite the lack of any showing the state has attempted to regulate freedom of thought, this legislation may diminish this right."³⁶⁰ These statutory impediments on patient access to therapies that "touch upon thought processes in significant ways" accordingly required strict constitutional

353. 319 U.S. 624 (1943); see *supra* notes 104-16 and accompanying text.

354. 394 U.S. 557 (1969); see *supra* notes 153-57 and accompanying text.

355. This was the test for obscenity put forth by Lord Chief Justice Cockburn in *Regina v. Hicklin*, 3 L.R.-Q.B. 360, 368 (1868), a test that was widely adopted by American courts. See L. TRIBE, *supra* note 33, § 12-16, at 906.

356. *Aden v. Younger*, 57 Cal. App. 3d 662, 129 Cal. Rptr. 535 (Cal. Ct. App. 1976).

357. *Id.* at 669, 129 Cal. Rptr. at 539.

358. *Id.* at 679, 129 Cal. Rptr. at 546.

359. *Id.* at 678-80, 129 Cal. Rptr. at 545-46.

360. *Id.* at 679, 129 Cal. Rptr. at 546.

scrutiny.³⁶¹

Subjecting the imposition of mental health treatment to first amendment scrutiny does not necessarily condemn the mentally ill to their psychoses, so that they may enjoy merely the dubious freedom to "rot with their rights on," as some commentators have suggested.³⁶² Rather, it erects a presumption against forced governmental intrusion into the mind, one that may be overcome only on a showing of compelling necessity, thus requiring careful scrutiny both of the ends sought by intrusive treatment and the means selected to accomplish those ends. In this sense the contention that the first amendment should not be implicated by mental health treatment designed to restore the individual's control over his own mind by liberating it from the effects of his illness misses the mark. Although this argument may be relevant, and indeed perhaps even persuasive on the question of whether an individual's first amendment right to resist unwanted mental intrusions may be outweighed in particular circumstances, as an argument against first amendment consideration of these issues, it must be rejected.

VI. JUDICIAL RECOGNITION OF A FIRST AMENDMENT RIGHT TO REFUSE TREATMENT: THE LOWER COURT DECISIONS

A number of state and lower federal court decisions that recognize a first amendment basis for a right of patients to refuse treatment have reached the conclusion that government alteration of mental processes through mental health treatment is also subject to first amendment scrutiny. As the first amendment protects freedom of expression, these courts reason, then it must also protect the more basic right to generate and to hold ideas. The first such case to apply the first amendment in this context was *Kaimowitz v. Michigan Department of Mental Health*,³⁶³ a 1973 state court decision arising out of an attempt to administer psychosurgery, the most intrusive of the mental health treatment techniques.³⁶⁴ *Kaimowitz* involved a defendant charged with murder and rape who was held in a state mental hospital under the Michigan sexual psychopath law. The defendant, "John Doe," was transferred to the Lafayette Clinic, a facility operated by the state department of mental health, for the purposes of experimental psychosurgery for the treatment of uncontrolla-

361. *Id.*

362. Appelbaum & Gutheil, *supra* note 265; Gutheil, *supra* note 350.

363. Civ. No. 73-19434-AW (Mich. Cir. Ct. [Wayne Cty.] July 10, 1973), *reprinted in* A. BROOKS, *supra* note 2, at 902.

364. *See infra* notes 389-93 and accompanying text.

ble aggression. The proposed study in which Doe was to participate, funded by the legislature, involved an experimental design comparing the effects of surgery on the amygdaloid portion of the limbic system of the brain with the effects of a drug on male hormone flow. Although Doe had signed an "informed consent" form to become an experimental subject and although the procedure was approved by both a scientific review committee and a human rights committee, a public interest lawyer learned of the experiment and filed suit to enjoin it. Finding psychosurgery to be clearly experimental and posing substantial and in some cases unknown dangers to research subjects, the court ruled that its imposition on an involuntarily detained patient would violate the first amendment.³⁶⁵ The court held that the first amendment protects the individual's "mental processes, the communication of ideas, and the generation of ideas,"³⁶⁶ reasoning that "to the extent that the First Amendment protects the dissemination of ideas and the expression of thoughts it equally must protect the individual's right to generate ideas."³⁶⁷ Finding that psychosurgery seriously and irreversibly impairs "the power to generate ideas," the court held that its imposition would be unconstitutional.³⁶⁸

Government has no power or right to control men's minds, thoughts, and expressions. This is the command of the First Amendment. . . . [I]f the First Amendment protects the freedom to express ideas, it necessarily follows that it must protect the freedom to generate ideas. Without the latter protection, the former is meaningless. . . . The State's interest in performing psychosurgery . . . must bow to the First Amendment, which protects the generation and free flow of ideas from unwarranted interference with one's mental processes.³⁶⁹

The first federal court opinion to suggest the possibility that the first amendment might limit involuntary treatment was *Mackey v. Procunier*.³⁷⁰ That case involved the involuntary use of the drug succinylcholine in an aversive conditioning program at a state prison medical facility. The drug, characterized as a "breath-stopping and

365. *Kaimowitz v. Michigan Dep't of Mental Health*, Civ. No. 73-19434-AW (Mich. Cir. Ct. [Wayne Cty.] July 10, 1973), reprinted in A. BROOKS, *supra* note 2, at 918-19.

366. *Id.*, reprinted in A. BROOKS, *supra* note 2, at 917.

367. *Id.*

368. *Id.*, reprinted in A. BROOKS, *supra* note 2, at 918; see also *Aden v. Younger*, 57 Cal. App. 3d 662, 679-80, 129 Cal. Rptr. 535, 546 (Cal. Ct. App. 1976) (statutory procedures impeding patient access to psychosurgery and electroconvulsive therapy implicate first amendment freedom of thought).

369. *Kaimowitz v. Michigan Dep't of Mental Health*, Civ. No. 73-19434-AW (Mich. Cir. Ct. [Wayne Cty.] July 10, 1973), reprinted in A. BROOKS, *supra* note 2, at 918-19.

370. 477 F.2d 877 (9th Cir. 1973).

paralyzing 'fright drug,'” resulted in the prisoner-subject regularly suffering “nightmares in which he relives the frightening experience and awakens unable to breathe.”³⁷¹ These allegations of mental intrusion and effect were sufficient for the United States Court of Appeals for the Ninth Circuit to rule that the prisoner’s complaint raised serious constitutional questions of “impermissible tinkering with the mental processes.”³⁷²

The first amendment has also been invoked in a number of cases involving the involuntary administration of antipsychotic medication to state mental hospital patients and pretrial detainees. In *Scott v. Plante*,³⁷³ the United States Court of Appeals for the Third Circuit reversed the dismissal for failure to state a claim of a complaint filed by a patient at a state mental hospital that attacked the involuntary administration of antipsychotic medication. The court held that “the involuntary administration of drugs which affect mental processes, if it occurred, could amount, under an appropriate set of facts, to an interference with Scott’s rights under the First Amendment.”³⁷⁴ Because of the procedural posture of the case, the appellate court did not determine what would be an appropriate set of facts sufficient to violate the first amendment, but merely decided that Scott’s complaint should not have been dismissed because it was possible that the evidence would show a first amendment violation.³⁷⁵

In *Bee v. Greaves*, pretrial detainees challenged the involuntary administration of antipsychotic drugs. The United States Court of Appeals for the Tenth Circuit, finding that the drugs can affect the “ability to think and communicate,”³⁷⁶ recognized a right to refuse them protected by the first amendment, which the court held implicitly protects “the capacity to produce ideas.”³⁷⁷ The district court in *Rogers v. Okin*,³⁷⁸ the Boston State Hospital case, also found a first amendment basis for a right to refuse psychotropic drugs, which the court concluded have “the potential to affect and change a patient’s

371. *Id.* at 877.

372. *Id.* at 878.

373. 532 F.2d 939 (3d Cir. 1976), *vacated and remanded*, 458 U.S. 1101 (1982).

374. *Id.* at 946 (citing *Mackey* and *Kaimowitz*).

375. The court cited the customary rule that “[a] complaint should not be dismissed for insufficiency unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.” *Id.* at 945.

376. 744 F.2d 1387, 1394 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985).

377. *Id.*; accord *Girouard v. O'Brien*, No. 83-3316-0 (D. Kan. April 4, 1988) (LEXIS, Genfed library, Dist. file) (1988 U.S. Dist. LEXIS 4342).

378. 478 F. Supp. 1342 (D. Mass. 1979), *aff'd in part and rev'd in part on other grounds*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1st Cir. 1984).

mood, attitude and capacity to think.”³⁷⁹ The court found the “right to produce a thought—or refuse to do so” to be protected by the first amendment.³⁸⁰ “Without the capacity to think, we merely exist, not function,” the court reasoned.³⁸¹ “Realistically, the capacity to think and decide is a fundamental element of freedom.”³⁸² The court derived the “right to produce a thought” from the first amendment’s protection of the communication of ideas which, in the court’s view, “presupposes a capacity to produce ideas.”³⁸³ “Whatever powers the Constitution has granted our government,” the court concluded, “involuntary mind control is not one of them, absent extraordinary circumstances.”³⁸⁴

The United States Court of Appeals for the Seventh Circuit applied this approach to the imposition of unwanted electroconvulsive therapy in a tort suit brought by a voluntary patient in a Veteran’s Administration hospital.³⁸⁵ Noting that “compulsory treatment with mind-altering drugs may invade a patient’s First Amendment interests in being able to think and communicate freely,” the court found the same interests to be implicated by compulsory electroconvulsive therapy.³⁸⁶

VII. MENTAL HEALTH TREATMENT TECHNIQUES AND THE FIRST AMENDMENT: A CONTINUUM OF INTRUSIVENESS

Although these lower court cases fail to analyze the issues in

379. *Id.* at 1366.

380. *Id.* at 1367.

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.* On appeal, the United States Court of Appeals for the First Circuit, affirming based on privacy grounds, found it unnecessary to address the first amendment issue. *Rogers v. Okin*, 634 F.2d 650, 653, 654 n.2 (1st Cir. 1980); *see also* *Davis v. Hubbard*, 506 F. Supp. 915, 933 (N.D. Ohio 1980), discussing the first amendment, but grounding a right to refuse psychotropic medication on constitutional privacy. The court noted that the forced administration of these drugs “implicates a person’s interest in being able to think and to communicate freely.” 506 F. Supp. at 933. At another point, the court, mentioning the “serious, long term, if not permanent, side effects” of the drugs, stated that they “deadened the patient’s ability to think.” *Id.* at 936. Referring to the state’s “attempts to use treatment as a means of controlling thought, either by inhibiting an inmate’s ability to think or by coercing acceptance of particular thoughts and beliefs,” the court suggested that “government action which directly affects the mental processes would be unconstitutional under the First Amendment.” *Id.* at 933 (*dicta*).

385. *Lojuk v. Quandt*, 706 F.2d 1456 (7th Cir. 1983).

386. *Id.* at 1465; *see also* *Aden v. Younger*, 57 Cal. App. 3d 662, 679-80, 129 Cal. Rptr. 535, 546 (Cal. Ct. App. 1976) (statutory procedures impeding patient access to psychosurgery and electroconvulsive therapy implicate first amendment freedom of thought).

detail, their determination—that the first amendment limits the imposition of intrusive therapies—seems essentially correct. But to conclude that the first amendment protects mental processes against certain kinds of governmental intrusions does not mean that all mental health treatment techniques will raise first amendment questions. As previously noted, government in America has broad power to communicate ideas and take other actions which undoubtedly have enormous effects on the mental processes of at least some individuals.³⁸⁷ Surely these kinds of effects do not alone render the governmental conduct in question suspect under the first amendment. In a complex society such as ours, in which government plays a significant role, governmental attempts to educate, to persuade, and to induce a variety of actions are essential to any meaningful exercise of governmental power. It is only when these government activities pass a certain threshold of intrusiveness—imposing particular beliefs or thoughts, or displacing others, by means that may not be avoided or resisted, and when the duration of these effects is sufficiently long-lasting as not to fall within a *de minimis* category—that the first amendment will be implicated.³⁸⁸ Rather than concluding that all involuntary mental health treatment automatically triggers first amendment scrutiny, it therefore seems essential to examine separately each of the various treatment techniques. The critical question is whether the nature, extent, and duration of the particular technique's effects will intrude sufficiently on mental processes to raise first amendment concerns. It is appropriate, for this purpose, to construct a rough continuum of intrusiveness along which these treatment techniques may be considered based on their effects on first amendment values.

A. *Psychosurgery*

Psychosurgery, at the upper reaches of the continuum, presents the strongest case for first amendment scrutiny. It is difficult to imagine a more intrusive invasion of mental processes than this procedure, which consists of the surgical removal or destruction of brain tissues performed with the intent of altering emotions and behavior.³⁸⁹ The

387. See *supra* text accompanying note 103.

388. See L. TRIBE, *supra* note 33, § 15-8, at 1328-29; Shapiro, *supra* note 3, at 262-67; Winick, *Legal Limitations on Correctional Therapy and Research*, *supra* note 3, at 351.

389. See generally V. MARK & F. ERVIN, *VIOLENCE AND THE BRAIN* (1970); *MODERN CONCEPTS IN PSYCHIATRIC SURGERY* (R. Hitchcock, T. Ballantine & A. Meyerson eds. 1979); *OPERATING ON THE MIND: THE PSYCHOSURGERY CONFLICT* (W. Gaylin, J. Meister & R. Neville eds. 1975); *THE PSYCHOSURGERY DEBATE: SCIENTIFIC, LEGAL AND ETHICAL PERSPECTIVES* (E. Valenstein ed. 1980); S. SHUMAN, *PSYCHOSURGERY AND THE MEDICAL*

procedure, now rarely used, typically has a massive impact on intellectual functioning. Aside from a number of substantial physical risks, psychosurgery frequently results in intellectual deterioration and emotional blunting.³⁹⁰ The *Kaimowitz* court, which found that involuntary psychosurgery would violate the first amendment, premised its conclusion on extensive expert testimony concerning the serious adverse affects of the procedure on mental processes. The court stated: "Psychosurgery flattens emotional responses, leads to lack of abstract reasoning ability, leads to a loss of capacity for new learning, and causes general sedation and apathy. It can lead to impairment of memory, and in some instances unexpected responses to psychosurgery are observed."³⁹¹ Although the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, in its review of psychosurgery, found the *Kaimowitz* court's conclusions concerning the hazards of the newer psychosurgical procedures to be somewhat overstated,³⁹² it did not seriously question the conclusion that intellectual change frequently occurs. Indeed, Dr. Valenstein's review of the literature, conducted for the National Commission, rejected the claim that psychosurgery does not result in intellectual change.³⁹³ Although the empirical evidence concerning the effects of the newer procedures is seriously incomplete, there appears to be little doubt that what might be characterized as unwanted personality changes following the surgery do occur, as does some amount of intellectual deterioration.

Clearly, any impairment of intellectual and emotional capacities brought about by psychosurgery would implicate first amendment concerns, even if the incidence and duration of these serious effects occur less frequently than is commonly supposed. Moreover, psycho-

CONTROL OF VIOLENCE: AUTONOMY AND DEVIANCE (1977); E. VALENSTEIN, *BRAIN CONTROL: A CRITICAL EXAMINATION OF BRAIN STIMULATION AND PSYCHOSURGERY* (1973); Chorover, *Psychosurgery: A Neuropsychological Perspective*, 54 B.U.L. REV. 231 (1974); Winick, *Legal Limitations on Correctional Therapy and Research*, *supra* note 3.

390. See Chorover, *supra* note 389, at 247; Valenstein, *The Practice of Psychosurgery: A Survey of the Literature (1971-1976)*, in NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, *Appendix to PSYCHOSURGERY I-56, I-80* (1977).

391. *Kaimowitz v. Michigan Dep't of Mental Health*, Civ. No. 73-19434-AW (Mich. Cir. Ct. [Wayne Cty.] July 10, 1973), reprinted in A. BROOKS, *supra* note 2, at 909.

392. NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, *PSYCHOSURGERY 22* (1977).

393. Valenstein, *supra* note 390, at I-58. Dr. Valenstein did conclude, however, that personality changes are "relatively infrequent and characterized as 'mild' and 'transient,'" *id.* at I-89, and that "[t]he risk of permanent adverse intellectual, emotional, and physical side effects is reported as minimal . . . in sharp contrast to the results from the older lobotomy operations." *Id.* at I-96.

surgery is irreversible, at least in the sense that destroyed brain tissue does not regenerate, and perhaps also in the sense that permanent alteration in personality may result in at least some cases. Psychosurgery is a direct intervention into the brain itself, incapable of being resisted by the subject, that surgically alters the individual's thoughts, feelings, behavior, and perhaps his very identity. Based on the substantial risks of psychosurgery, and at least until new research can demonstrate that the newer, more refined procedures do not have these effects, courts will agree with the basic conclusion of *Kaimowitz*, the only case to consider the issue, that psychosurgery imposed on an involuntary basis will at least presumptively violate the first amendment.

B. *Electronic Stimulation of the Brain*

Electronic Stimulation of the Brain (ESB),³⁹⁴ another surgical intervention into the brain itself, although somewhat less threatening to first amendment values than psychosurgery, should also trigger first amendment scrutiny. Electrodes are planted directly into certain regions of the brain and stimulated electrically, inducing or inhibiting behaviors and sensations. ESB has been used for "inducing and blocking . . . an assortment of thought patterns, hallucinations [sic], laughter, memories, sexual expressions, and pleasant shifts of moods"³⁹⁵ It can be used directly to interfere with thought and communication:

[T]hinking has been blocked by ESB, so that people oriented in time and space and able to follow the doctor's instructions in other ways, could not answer questions or pronounce a single word. "I could not coordinate my thoughts," one explained. "My head felt as if I had drunk a lot of beer." Another said, "I don't know why, but I could not speak."³⁹⁶

ESB operates with a "peculiar directness of effect which removes it from the subject's monitoring or control."³⁹⁷ In general, the effects of ESB seem to be short-lived.³⁹⁸ Even if only of short duration, however—and there is virtually no empirical evidence concerning the long-term effects of this highly experimental procedure—the ability of

394. See generally J. DELGADO, *PHYSICAL CONTROL OF THE MIND: TOWARD A PSYCHOCIVILIZED SOCIETY* (1969); E. VALENSTEIN, *supra* note 389; Heath, *Modulation of Emotion With a Brain Pacemaker*, 165 J. NERVOUS & MENTAL DISEASE 300 (1977); Winick, *Legal Limitations on Correctional Therapy and Research*, *supra* note 3, at 370-71.

395. P. LONDON, *BEHAVIOR CONTROL* 146 (1969).

396. *Id.* at 147.

397. Vaughan, *Psychosurgery and Brain Stimulation in Historical Perspective*, in *OPERATING ON THE MIND: THE PSYCHOSURGERY CONFLICT*, *supra* note 389, at 24.

398. E. VALENSTEIN, *supra* note 389, at 105; Vaughan, *supra* note 397, at 60.

ESB to block thoughts and communication by directly modifying the state of the brain itself in a manner the patient is incapable of resisting raises fundamental first amendment concerns. Like psychosurgery, ESB's direct interference with mental processes must be regarded as presumptively invalid under the first amendment.

C. *Electroconvulsive Therapy*

Electroconvulsive Therapy (ECT)³⁹⁹ also directly affects the brain. Electrical current is passed directly through the brain, inducing convulsions and unconsciousness (unless unconsciousness has previously been induced through general anesthesia). Although the period of unconsciousness lasts only several minutes, patients remain in a state of confusion and disorientation for fifteen to thirty minutes, and some patients claim persisting confusion and loss of memory. After several treatments, periods of disorientation and confusion lasting several days occur.

The mental confusion and loss of memory that occurs in virtually all cases⁴⁰⁰ directly implicate first amendment concerns. The more ECT treatments administered, and the older the patient, the longer such confusion and memory loss will continue.⁴⁰¹ Although there is considerable controversy concerning whether ECT results in brain damage and permanent memory loss, many patients claim permanent memory impairment.⁴⁰² Because ECT traditionally has been so controversial, the National Institute of Health in conjunction with the National Institute of Mental Health convened a Consensus Development Conference on ECT in 1985.⁴⁰³ After hearing reports from experts, health professionals, and former patients, a consensus panel representing psychiatry, psychology, neurology, psychopharmacology, epidemiology, law, and the general public issued a consensus

399. See generally T. DETRE & H. GARECKI, MODERN PSYCHIATRIC TREATMENT 635-55 (1971); PSYCHOBIOLOGY OF CONVULSIVE THERAPY (M. Fink, S. Kety, J. McGaugh & T. Williams eds. 1974); L. KALINOWSKY & P. HOCH, SOMATIC TREATMENT IN PSYCHIATRY 128-207 (1961); Hurwitz, *Electroconvulsive Therapy: A Review*, 15 COMPREHENSIVE PSYCHIATRY 303 (1974); Winick, *Legal Limitations on Correctional Therapy and Research*, *supra* note 3, at 368-70.

400. T. DETRE & H. JARECKI, *supra* note 399, at 641-44; Dornbush & Williams, *Memory and ECT*, in PSYCHOBIOLOGY OF CONVULSIVE THERAPY, *supra* note 399, at 199; Harper & Wiens, *Electroconvulsive Therapy and Memory*, 161 J. NERVOUS & MENTAL DISEASES 245 (1975).

401. T. DETRE & H. JARECKI, *supra* note 399, at 642-43.

402. *Id.* at 643.

403. 5 NATIONAL INSTITUTE OF HEALTH & NATIONAL INSTITUTE OF MENTAL HEALTH, ELECTROCONVULSIVE THERAPY: CONSENSUS DEVELOPMENT CONFERENCE STATEMENT, No. 11 (1985), reprinted in R. SPRING, R. LACOURSIERE & G. WEISSENBERGER, PATIENTS, PSYCHIATRISTS AND LAWYERS: LAW AND THE MENTAL HEALTH SYSTEM 129 (1989).

statement. It concluded that it was "well established" that ECT produces deficits in memory function "which have been demonstrated objectively and repeatedly, [and which] persist after termination of a normal course of ECT."⁴⁰⁴ The consensus statement also concluded that the "ability to learn and retain new information is adversely affected" for several weeks following the administration of ECT.⁴⁰⁵ Although "objective evidence based on neuropsychological testing" was found to demonstrate loss of memory for several weeks, such "objective tests have not firmly established persistent or permanent deficits for a more extensive period"⁴⁰⁶ Nevertheless, research conducted as long as three years after treatment found that many patients report continued impairment of memory.⁴⁰⁷ Some patients were found to perceive ECT as a "terrifying experience," "an abusive invasion of personal autonomy," and the cause of "extreme distress from persistent memory deficits."⁴⁰⁸

Because it induces unconsciousness, mental confusion, and memory loss, ECT certainly raises first amendment problems. Further, the effects of the procedure are incapable of being resisted and, at least in some cases, ECT may result in irreversible memory impairment. As the United States Court of Appeals for the Seventh Circuit found in *Lojuk v. Quandt*,⁴⁰⁹ the effects of ECT on mental processes, and particularly on memory, clearly implicate first amendment concerns.⁴¹⁰

D. Psychotropic Medication

Psychotropic drugs by definition are compounds that affect the mind, intellectual functions, perception, moods, and emotions.⁴¹¹ Indeed, the Supreme Court in *Mills v. Rogers* acknowledged that these drugs are "'mind-altering.' Their effectiveness resides in their capacity to achieve such effects."⁴¹² They directly intrude upon mental processes and cannot be resisted. Moreover, not only do their primary effects work an alteration of mental processes (usually in a clinically beneficial way, although a change nonetheless), but the toxic reactions and adverse side effects accompanying most of the drugs

404. *Id.* at 132.

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. 706 F.2d 1456 (7th Cir. 1983); see *supra* notes 385-86 and accompanying text.

410. *Lojuk*, 706 F.2d at 1465.

411. V. LONGO, NEUROPHARMACOLOGY AND BEHAVIOR 182 (1972); Klerman, *Psychotropic Drugs as Therapeutic Agents*, 2 HASTINGS CENTER STUD., Jan. 1974, at 81, 82 n.1; see *supra* note 4.

412. 457 U.S. 291, 293 n.1 (1982).

also frequently have a debilitating effect on mental processes. Because the differing classes of drugs present somewhat different effects, they will be analyzed separately.

1. ANTIPSYCHOTIC DRUGS

Antipsychotic drugs, the treatment involved in *Harper*,⁴¹³ have a dramatic effect on mental processes, often in a beneficial direction, by promoting thought coherence and reducing thought disorder in the schizophrenic. Schizophrenia is typically marked by disturbances in content of thought, such as bizarre delusions; form of thought, such as loosening of associations, in which ideas shift from one subject to an unrelated one; perception, such as auditory or visual hallucinations; and affect, such as blunting, flattening, or inappropriateness of emotional response.⁴¹⁴ Antipsychotic drugs reduce these and other symptoms of schizophrenia,⁴¹⁵ altering mental functioning in the direction of normality,⁴¹⁶ but altering it nonetheless.

In a 1983 article Professors Gutheil and Appelbaum conducted a review of the literature concerning the effects of antipsychotic medication on mentation⁴¹⁷ in order to challenge the conclusion reached in several of the right to refuse treatment cases that these drugs affect thought processes in ways that can be described as "mind control."⁴¹⁸ Three of four studies testing the effects of the drugs on memory concluded that there was no effect, although one study showed a significant decrease in the ability of patients to recall digits.⁴¹⁹ Most experimental studies of the effects of the drugs on psychomotor functioning showed no effect, although some earlier studies found some impairment. Furthermore, considerable clinical experience documented in the literature revealed that impaired motor function was often one of the side effects of the drugs.⁴²⁰ Studies of the effects of the drugs on attention and perception showed mixed results, with roughly equal numbers of studies showing impairment in function,

413. *State v. Harper*, 110 Wash. 2d 873, 759 P.2d 358 (1988) (en banc), *cert. granted*, 109 S. Ct. 1337 (1989).

414. DSM-III-R, *supra* note 270, at 194-95.

415. Gutheil & Appelbaum, *supra* note 351, at 100-01 (citing studies).

416. *Id.* at 118.

417. *Id.* at 101-17.

418. *See, e.g., Davis v. Hubbard*, 506 F. Supp. 915, 933 (N.D. Ohio 1980) ("controlling thought"); *Rogers v. Okin*, 478 F. Supp. 1342, 1367 (D. Mass. 1979) ("involuntary mind control"), *aff'd in part and rev'd in part on other grounds*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1st Cir. 1984).

419. Gutheil & Appelbaum, *supra* note 351, at 104-05.

420. *Id.* at 104-09.

improvement in function, or no change.⁴²¹ Most studies of the effects on complex cognitive functions indicated that the drugs improve functioning, although a few studies demonstrated negative effects.⁴²² Gutheil and Appelbaum concluded that the available evidence suggests "that antipsychotic medications lack the subtle, deleterious effects on mental functioning" attributed to them in several of the right to refuse treatment cases.⁴²³ In their view, this evidence is inconsistent with a conception of the drugs as "mind-altering, thoughtinhibiting, or destructive of personality in a negative sense."⁴²⁴ Although the specter of "mind control" brought about by these drugs may thus be misleading, the studies examined by Gutheil and Appelbaum demonstrate that the drugs do affect mental processes. Although the effect on mental functioning is usually positive, some of the studies did show impairment in functioning. Moreover, Gutheil and Appelbaum concede that some of the side effects of the drugs, particularly akinesia and akathisia, often affect mentation adversely.⁴²⁵

The side effects of antipsychotic drugs⁴²⁶ cannot be ignored in analyzing the first amendment question. Indeed, it has always seemed to me to be misleading to call them "side effects," a label that denigrates their impact on patients. Although these side effects are unintended, they are intrinsic to the drugs' benevolent properties and should not be trivialized, particularly since patients frequently experience them to be distressing enough to outweigh the drugs' positive clinical effects. All of the antipsychotic drugs are sedating, particularly the low-potency phenothiazines.⁴²⁷ In early periods of drug administration, the subject often experiences heavy sedation, clouding of consciousness, and impairment of judgment.⁴²⁸ The sedation itself has a dramatic effect on mental processes, frequently interfering with

421. *Id.* at 110-13.

422. *Id.* at 113-17.

423. *Id.* at 119.

424. *Id.*

425. *Id.* at 106-09, 119.

426. For a summary of these side effects, see Winick, *The Right to Refuse Psychotropic Medication*, *supra* note 3, at 10-11; Winick, *Psychotropic Medication and Competency to Stand Trial*, *supra* note 4, at 782-83 (citing authorities). The following discussion of drug side effects is drawn largely from these prior articles.

427. AMERICAN MEDICAL ASSOCIATION, *DRUG EVALUATIONS* 111-50 (6th ed. 1986), reprinted in R. SPRING, R. LACOURSIERE & G. WEISSENBERGER, *PATIENTS, PSYCHIATRISTS AND LAWYERS: LAW AND THE MENTAL HEALTH SYSTEM* 104, 109-10 (1989).

428. See Jarvik, *Drugs Used in the Treatment of Psychiatric Disorders*, in *THE PHARMACOLOGICAL BASIS OF THERAPEUTICS* 151, 167 (L. Goodman & A. Gilman eds. 1970).

the ability to think and almost always curtailing concentration.⁴²⁹ Although many patients become habituated to the drugs over time, with the result that after several days or weeks cognitive functions are little affected and sedation is minimal, some patients never accommodate to the effects of the drugs.⁴³⁰

Many of the physical side effects accompanying these drugs, although not directly affecting mental processes, are so distressing that they frequently interfere with a patient's power of concentration and ability to think clearly. Among the autonomic side effects of these drugs, for example, dizziness, faintness, drowsiness, and fatigue all interfere with concentration. Hypotension, resulting in decreased blood flow to the brain, leaves patients feeling light-headed, and also interferes with concentration. The extrapyramidal reactions to these drugs, although again primarily physical in effect, also often are so distressing that concentration is affected. Akathisia, in particular, presents this problem. The patient experiences a constant motor restlessness and fidgeting, and is driven to pace about impatiently and tap his foot incessantly. Dystonia, involving bizarre muscular spasms accompanied by facial grimacing, and involuntary spasms of the tongue, can seriously interfere with communicative ability. Similarly, the dyskinesias produce a broad range of bizarre tongue, face, and neck movements, which substantially limit both verbal and non-verbal communication, and often impair concentration. Tardive dyskinesia, a persistent neurological syndrome affecting a substantial percentage of patients subjected to long-term antipsychotic drug treatment,⁴³¹ is often experienced as extremely distressing, to the extent that concentration is impaired. There is no known effective treatment for the condition, and it is thought to effect permanent

429. Appelbaum, *Can Mental Patients Say No to Drugs?*, N.Y. Times, March 21, 1982, § 6 (Magazine), at 46, 51 ("The drugs' sedative effects may lead to drowsiness or, in the extreme, a spaced-out state in which thinking itself becomes difficult.").

430. See Solow, *Drug Therapy of Mental Illness: Tranquilizers and Other Depressant Drugs*, in AN INTRODUCTION TO PSYCHOPHARMACOLOGY 289, 307 (R. Rech & K. Moore eds. 1971).

431. An American Psychiatric Association Task Force reported that 10% to 20% of patients given antipsychotic drugs for one year or more develop the condition. AMERICAN PSYCHIATRIC ASSOCIATION TASK FORCE ON LATE NEUROLOGICAL EFFECTS OF ANTIPSYCHOTIC DRUGS, TARDIVE DYSKINESIA 43-44 (1979) [hereinafter TARDIVE DYSKINESIA]. More recent estimates are much higher. See SCHATZBERG & COLE, MANUAL OF CLINICAL PSYCHOPHARMACOLOGY 99 (1986) (50% to 60%); Hollister, *Antipsychotic and Antimanic Drugs (Lithium)*, in REVIEW OF GENERAL PSYCHIATRY 507 (H. Goldman ed. 1984) (20% to 40%); Jeste & Wyatt, *Changing Epidemiology of Tardive Dyskinesia: An Overview*, 138 AM. J. PSYCHIATRY 297 (1981) (25%, with prevalence progressively rising). Moreover, the condition is "underdiagnosed at an alarming rate." Weiden, Mann, Hass, Mattson & Francis, *Clinical NonRecognition of Neuroleptic-Induced Movement Disorders: A Cautionary Study*, 144 AM. J. PSYCHIATRY 1148, 1151 (1987).

structural changes in the brain.⁴³² Another serious side effect is neuroleptic malignant syndrome, a rare but underdiagnosed condition that is fatal in twenty-five percent of cases.⁴³³ This condition is characterized by muscular rigidity, rhythmic movements, and alterations in consciousness.

Professor Brooks has summarized the "cognitive side effects" of the antipsychotic drugs as follows: "Some patients cannot concentrate or think straight because of their medications. Reading or talking becomes impossible, and the patient retreats into an intellectual vacuum. For a patient who has even modest intellectual interests, cognitive side effects can be extremely distressing."⁴³⁴ Moreover, the antipsychotic drugs have similarly dramatic emotional side effects. All of them produce a depression of mood.⁴³⁵ Patients experience the typical "flattening" of emotional affect as boredom, lethargy, docility, listlessness, apathy, and purposelessness.⁴³⁶ It is this effect that patients frequently complain of when they describe the drugs as placing them in a "chemical straight-jacket" or inducing "zombiism."⁴³⁷

Although tardive dyskinesia may be an irreversible condition, the other side effects of the drugs are short-acting, and disappear within hours or days of drug discontinuation. Similarly, the primary therapeutic effects of the drugs are only short-acting. With the exception of Prolixin and other long-acting phenothiazines, the effects of which last for several weeks, the primary effects of the drugs may last only several hours or days. Nevertheless, many patients are continued on the drugs for lengthy periods and thus experience the effects on a continued basis. Long-term drug treatment may impair memory, reasoning ability, mental speed, learning capacity, and efficiency of mental

432. TARDIVE DYSKINESIA, *supra* note 431, at 57; SCHATZBERG & COLE, *supra* note 431, at 100; Christensen, Moller & Faurbye, *Neuropathological Investigation of 28 Brains from Patients with Dyskinesia*, 46 ACTA PSYCHIATRY SCAND. 14 (1970).

433. See Addonizio, Susman & Roth, *Symptoms of Neuroleptic Malignant Syndrome in 82 Consecutive Inpatients*, 143 AM. J. PSYCHIATRY 1587 (1986); Pope, Keck & McElroy, *Frequency of Presentation of Neuroleptic Malignant Syndrome in A Large Psychiatric Hospital*, 143 AM. J. PSYCHIATRY 1227 (1986).

434. Brooks, *The Constitutional Right to Refuse Antipsychotic Medication*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 179, 184 (1980). A prisoner who was given the drugs described the mental effects as follows: "Your thoughts are broken, incoherent; you can't hold a train of thought for even a minute. Your mind is like a slot machine, every wheel spinning a different thought" Opton, *Psychiatric Violence Against Prisoners: When Therapy is Punishment*, 45 MISS. L.J. 605, 641 (1974).

435. AMERICAN MEDICAL ASSOCIATION, *supra* note 427, reprinted in R. SPRING, R. LACOURSIERE & G. WEISSENBARGER, *supra* note 427, at 109.

436. Van Putten & May, *Subjective Response as a Predictor of Outcome of Pharmacotherapy*, 35 ARCHIVES GEN. PSYCHIATRY 477, 479 (1978).

437. See Brooks, *supra* note 434, at 184.

functioning in general.⁴³⁸ Plainly these results directly implicate basic first amendment values.

The primary effects of antipsychotic drugs are concededly normalizing or restorative, and reduce the level of grossly distorted thinking characteristic of schizophrenia.⁴³⁹ The drugs "are generally incapable of creating thoughts, views, ideas, or opinions *de novo* or of permanently inhibiting the process of thought generation."⁴⁴⁰ In view of the beneficial effects of the drugs on mental processes, it may seem paradoxical to regard them as intrusions on mental processes that trigger first amendment scrutiny. Nonetheless, they are undeniably "mind-altering,"⁴⁴¹ even if not "mind-controlling." And, although for most patients the drugs do restore the ability to concentrate that had been so impaired by the patient's psychosis, some patients experience the drugs themselves as interfering with concentration, particularly in view of the serious side effects they produce.

Antipsychotic drugs thus have both positive and negative effects on mental processes. These effects on mentation have led virtually all courts that have considered the question to conclude that the first amendment provides a basis for a right to refuse antipsychotic drug treatment.⁴⁴² One court, however, has expressly rejected a first amendment theory, finding instead a right to refuse the drugs grounded in constitutional privacy.⁴⁴³ Although accepting the premise that the first amendment protects against certain kinds of interferences with mental processes, the district court in *Rennie v. Klein* declined to apply the first amendment to the facts before it.⁴⁴⁴ Because the plaintiff, a mental patient, had asserted a desire to be cured, and indeed had claimed a right to treatment, the *Rennie* court in effect found that he had waived any first amendment right which he might have raised in objection to the hospital's efforts to treat his thought disorder with medication. Moreover, the court based its deci-

438. See DiMascio, Shader & Giller, *Behavioral Toxicity Part III: Perceptual-Cognitive Functions and Part IV: Emotional (Mood) States*, in *PSYCHOTROPIC DRUGS SIDE EFFECTS* 132, 133 (R. Shader & A. DiMascio eds. 1977).

439. Davis, *Antipsychotic Drugs*, in 3 *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY*, *supra* note 319, at 2257, 2260.

440. Appelbaum & Gutheil, *supra* note 265, at 308.

441. *Mills v. Rogers*, 457 U.S. 291, 293 n.1 (1982); *Rogers v. Okin*, 478 F. Supp. 1342, 1360 (D. Mass. 1979), *aff'd in part and rev'd in part on other grounds*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1st Cir. 1984).

442. See *supra* note 81 (cases); see also *supra* notes 372-83 and accompanying text.

443. *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978), *aff'd in part, modified in part, and remanded*, 653 F.2d 836 (3d Cir. 1981) (en banc), *vacated and remanded*, 458 U.S. 1119 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983) (en banc).

444. *Id.* at 1144.

sion on the evidence that the patient's ability to perform on intelligence tests was not impaired and that the drugs' side effects were "temporary and expected to last only a few days or a couple of weeks."⁴⁴⁵ In the court's view, these effects on "mentation" differed sharply from the effects involved in the *Kaimowitz* psychosurgery case.⁴⁴⁶ The court concluded that "if forced medication is otherwise proper"—a conclusion that it thereafter questioned on privacy grounds—"the temporary dulling of the senses accompanying it does not rise to the level of the First Amendment violations found in *Kaimowitz*."⁴⁴⁷

Every other court to have considered a first amendment contention in the context of antipsychotic drugs has found a first amendment basis for drug refusal, and in light of the *Rennie* court's acceptance of a constitutional privacy basis for such a right, its rejection of the contention must be considered dicta. The United States Court of Appeals for the Tenth Circuit in *Bee v. Greaves*⁴⁴⁸ found that the first amendment implicitly protects "the capacity to produce ideas."⁴⁴⁹ Finding that "[a]ntipsychotic drugs have the capacity to severely and even permanently affect an individual's ability to think and communicate,"⁴⁵⁰ the court recognized a first amendment right of pretrial detainees to resist the drugs.⁴⁵¹ The district court in *Rogers v. Okin* based its finding of a first amendment violation on evidence showing that "psychotropic medication has the potential to affect and change a patient's mood, attitude and capacity to think."⁴⁵² Although conceding that such effects may be considered "positive steps on the road to recovery,"⁴⁵³ the court noted that "the validity of psychotropic drugs as a reasonable course of medical treatment is not the core issue here."⁴⁵⁴ Rather, the court found the fundamental question to be whether the state may impose upon the patient "by forcibly injecting mind-altering drugs into his system in a non-emergency situation."⁴⁵⁵

The courts in *Bee* and *Rogers* both correctly concluded that

445. *Id.*

446. *Id.*

447. *Id.*

448. 744 F.2d 1387 (10th Cir. 1984), *cert. denied*, 105 S.Ct. 1187 (1985).

449. *Id.* at 1394.

450. *Id.*

451. *Id.*

452. 478 F. Supp. 1342, 1366 (D. Mass. 1979), *aff'd in part and rev'd in part on other grounds*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1st Cir. 1984).

453. *Id.* at 1366-67.

454. *Id.* at 1367.

455. *Id.*

antipsychotic drugs have the capacity to affect the patient's ability to think and communicate. Administered in sufficiently high dosages and for long periods, these drugs undeniably have serious effects on mentation and communication, and should accordingly receive first amendment scrutiny. However, the *Rennie* dicta suggests that future application of the first amendment to psychotropic medication may turn upon the evidentiary showing concerning the effects of the drug in question on the particular patient involved. Some of the antipsychotic drugs intrude more on mental processes than others, and the length of drug administration and perhaps even the dosage used will also be relevant to the first amendment question. Thus, brief administration of one of the milder drugs, or administration in a moderate dosage that is not heavily sedating, may be thought of as not intruding sufficiently on first amendment values. The courts may also draw a distinction between a brief course of emergency treatment to stabilize an acute patient and long-term drug administration for a chronic patient where the risk of serious and lingering side effects is greater.⁴⁵⁶

On the other hand, all of these drugs by their nature have an effect upon mental processes even if administered for only a brief period. When the side effects interfere with concentration and the ability to think and to communicate, first amendment values are plainly implicated. Although there may well be a *de minimis* level of intrusion below which the courts will not apply first amendment scrutiny,⁴⁵⁷ a typical course of treatment with medication for hospitalized patients will pass any such threshold. The conclusion that involuntary treatment with these drugs generally requires scrutiny under the first amendment thus seems correct.

At this stage of the inquiry we need not determine whether the governmental interest in imposing such therapy justifies involuntary drug treatment; rather, the question here is whether such treatment must receive first amendment consideration. The question of whether such treatment can be justified, even though it implicates first amendment values, is beyond the scope of this Article.⁴⁵⁸ At this point it is sufficient to conclude that the dramatic effects of the antipsychotic

456. See *infra* notes 577-91 and accompanying text.

457. See *City of Dallas v. Stanglin*, 109 S. Ct. 1591, 1595 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street, or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.") (rejecting first amendment freedom of association claim against licensing of dance halls in which admission was restricted to persons between the ages of 14 and 18 on the ground that coming together to engage in recreational dancing is not protected by the first amendment).

458. See *supra* note 30.

drugs on mental processes demand first amendment scrutiny,⁴⁵⁹ thus erecting a presumption (that may in appropriate cases be rebutted) against such treatment and requiring strict scrutiny of government attempts to impose it.

2. ANTIDEPRESSANT DRUGS

Antidepressant drugs act largely on mood or emotion, rather than on thoughts, but, of course, emotions and thoughts are closely interrelated. Indeed, emotion and emotional expression are essential elements of any definition of personality. An individual's emotions and how he expresses them vitally affect both the content and the form and style of communication.

Moreover, the physical side effects accompanying use of most of the antidepressant drugs, albeit not usually as serious as those related to the antipsychotic drugs, are essentially similar.⁴⁶⁰ Like the antipsychotic drugs, the antidepressants are often highly sedating, and therefore interfere with concentration. Antidepressants occasionally result in confusion, memory impairment, disorientation, and episodes of schizophrenic excitement or mania, although these symptoms usually subside within one to two days after withdrawal of the drug.⁴⁶¹

In general, the antidepressant drugs have the effect of restoring the ability to concentrate, but some patients report the opposite effect. Although considerably less serious than the effects of the antipsychotic drugs, the effects of the antidepressants on mental processes also appear to be sufficiently intrusive to trigger first amendment scrutiny.

3. ANTIANXIETY DRUGS

Although the anti-anxiety drugs are rarely administered on an involuntary basis, their occasional coercive use merits constitutional consideration. The side effects of these drugs are relatively minor compared to those of the antipsychotics and antidepressants. The drugs do not cause extrapyramidal or autonomic effects. These drugs do, however, depress the central nervous system, causing their most common side effects, sedation and drowsiness.⁴⁶² In some patients,

459. For an analysis of these issues, see Winick, *The Right to Refuse Psychotropic Medication*, *supra* note 3, at 16-21 (mental patients); Winick, *Legal Limitations on Correctional Therapy and Research*, *supra* note 3, at 373-83 (criminal offenders).

460. See Winick, *Psychotropic Medication and Competency to Stand Trial*, *supra* note 4, at 786-89.

461. Davis, *Antidepressant Drugs*, in 3 *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY*, *supra* note 319, at 2290, 2299.

462. Davis, *Minor Tranquilizers, Sedatives, and Hypnotics*, in 3 *COMPREHENSIVE*

particularly the elderly, visual-motor performance and judgment may be impaired.⁴⁶³ Because these effects are short-acting, the anti-anxiety drugs, particularly at low dosages, may not be sufficient to trigger first amendment scrutiny. On the other hand, at dosages sufficient to produce sedation and resulting impairment of concentration the effects on mental processes are arguably sufficient to implicate the first amendment.

4. LITHIUM

Lithium functions as a mood normalizer, preventing the severe mood swings that characterize bipolar (formerly known as manic-depressive) illness, a major affective disorder in which recurring periods of mania alternate with periods of depression. Lithium functions to stabilize the patient's mood within a range deemed more clinically acceptable. At proper therapeutic levels, lithium rarely causes adverse reactions;⁴⁶⁴ however, administration of excessive amounts of lithium, or failure of renal mechanisms properly to eliminate the drug, may result in lithium toxicity, a serious condition involving the central nervous system that may cause confusion, impairment of consciousness, and even coma.⁴⁶⁵ Because therapeutic and toxic levels of the drug are so close, toxicity is a constant risk and must be closely monitored.⁴⁶⁶ At therapeutic levels, none of the relatively mild side effects of the drug interfere with mental processes. Unlike the other psychotropic drugs, lithium has no general sedating properties.⁴⁶⁷

The most troubling first amendment issue concerning the use of lithium relates to its effect on creativity. There appears to be a definite association between mood swings and creativity. In fact, many of the world's great artists—the composers Handel, Rossini, and Schumann, writers such as Balzac and Hemingway, artists such as Van Gogh and Jackson Pollock, and theatrical director Joshua Logan, to name a few, have been either manic or manic depressive.⁴⁶⁸ Periods

TEXTBOOK OF PSYCHIATRY, *supra* note 319, at 2328; T. DETRE & H. JARECKI, *supra* note 399, at 599; Jarvik, *supra* note 428, at 176; Meyers & Solomon, *Psychopharmacology*, in HANDBOOK OF PSYCHIATRY 427, 436-37 (P. Solomon & V. Patch eds. 2d ed. 1974).

463. Meyers & Solomon, *supra* note 462, at 436-37.

464. Brown, *Side Effects of Lithium Therapy and Their Treatment*, 21 CAN. PSYCHIATRY ASS'N J. 13 (1976).

465. Brown, *supra* note 464, at 18-19; Fieve, *Lithium Therapy*, in 3 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, *supra* note 319, at 2350.

466. Fieve, *supra* note 464, at 2351.

467. Jarvik, *supra* note 428, at 193; Meyers & Solomon, *supra* note 462, at 448.

468. R. FIEVE, MOODSWING: THE THIRD REVOLUTION IN PSYCHIATRY 55-59 (Morrow Book ed. 1975). Although some have suggested that Jackson Pollock suffered from schizophrenia, this diagnosis is in dispute, and his symptoms strongly suggest the possibility of

of great creativity frequently coincide with the manic phase of the condition.⁴⁶⁹ "There is a fine and at times invisible line between mania and creativity."⁴⁷⁰ Dr. Fieve, one of the pioneers in the use of lithium, concedes that treatment with lithium may interfere with creativity. Because many artists fear that such treatment will deprive them of their talent, the drug's effects on creativity present difficult questions for psychiatrists.⁴⁷¹ In a study of 24 artists treated with lithium,⁴⁷² six thought that the treatment lowered their creativity, and four stopped treatment for this reason. Six artists reported no change in creativity, and twelve reported positive effects—greater quantity and quality, and more artistic discipline. Plainly, at least for some artists, their mood inspires and enhances their creativity. The mood and emotion expressed in the work of certain artists, composers, and writers is what we respond to so strongly. Indeed, that expression is precisely what has led us to classify the work of some such artists—Van Gogh and Jackson Pollock, for example, as Expressionists.

Dr. Fieve concludes that moods, energy states, and creativity are inextricably linked, but that when abnormally low or high moods occur in the creative artist, his creative work will suffer.⁴⁷³ Lithium may therefore assist many creative patients. Although Dr. Fieve concludes that overall creative output becomes more consistent with lithium, and that the drug does not interfere with the quality of the work, he concedes that the potential effect on creativity may make lithium treatment inadvisable when symptoms of mood swing are not debilitating or destructive.⁴⁷⁴ In Dr. Fieve's view, each patient should be considered on an individual basis. "Some artists become so accommodated to their mild highs and lows that they consider these episodes as basic facets of their personalities and really want no change in their way of life. These patients should be left alone."⁴⁷⁵

Although lithium is undeniably helpful in the treatment of bipolar or manic-depressive illness, some patients complain that it "controls" them, by controlling their mood. Clearly the possibility that lithium may blunt creative processes or capacity raises grave first amendment concerns for patients who wish to resist this treatment.

manic depressive illness. See B. FRIEDMAN, JACKSON POLLOCK: ENERGY MADE VISIBLE 42, 47 (1972) ("depressive mania," "overintensity").

469. R. FIEVE, *supra* note 468, at 55.

470. *Id.* at 60.

471. *Id.*

472. Shou, *Artistic Productivity and Lithium Prophylaxis in Manic Depressive Illness*, 135 BRITISH J. PSYCHIATRY 97 (1979).

473. R. FIEVE, *supra* note 468, at 69.

474. *Id.*

475. *Id.* at 69-70.

Lithium treatment to control a patient's emotional tone or mood by keeping it within some government official's notion of acceptable levels may be compared to and distinguished from the regulation of sound levels at concerts in the park, recently upheld by the Supreme Court against a first amendment challenge. In *Ward v. Rock Against Racism*,⁴⁷⁶ the Court considered guidelines mandated by the New York City Department of Parks and Recreation for concerts held at the Central Park Bandshell. In order to control excessive volume at such concerts in the interests of other users of the park and residents of nearby areas, the guidelines required use of sound equipment furnished by the Department and administered by an independent professional sound technician. During musical performances, the city's sound technicians controlled the sound and volume, but they gave sponsors of the events autonomy with respect to sound mix and balance.⁴⁷⁷ Conceding that "[m]usic, as a form of expression and communication, is protected under the First Amendment,"⁴⁷⁸ the Court found the regulations at issue to be content-neutral—justified without regard to the artistic content of the performance.⁴⁷⁹ The Court conceded, however, that any attempt by government to interfere with sound mix for aesthetic purposes "would raise serious First Amendment concerns."⁴⁸⁰

Regulating a patient's mood within governmentally approved levels would seem more like government interference in artistic judgment, such as by controlling the sound mix or balance at a concert, than the reasonable restrictions on time, place, and manner that the Court found the volume regulations in *Ward* to be. Mood is an inherent and significant component of personality itself. The content and expression of ideas are heavily influenced by mood. In this sense, regulation of mood inevitably regulates the content of expression. For this reason, involuntary imposition of lithium should be deemed to trigger first amendment scrutiny.

Psychotropic drugs in general thus present primary and side effects that are mentally intrusive, rapidly occurring, and incapable of being resisted by unwilling patients. Although the primary effects of the drugs may last only several hours, the side effects of many may be long-lasting and in some cases irreversible. Not surprisingly, patients frequently consider the side effects of some of these drugs to be highly unpleasant, painful, and debilitating. Frequently, the effects are so

476. 109 S. Ct. 2746 (1989).

477. *Id.* at 2752.

478. *Id.* at 2753.

479. *Id.* at 2754.

480. *Id.* at 2755.

distressing that they interfere with the ability to concentrate and to communicate. Because of their direct effect upon mental processes and intellectual functioning, involuntary use of psychotropic medication, as several lower courts have concluded, should raise first amendment problems.

E. Behavior Therapy

Behavior therapy⁴⁸¹ focuses not on mental processes but on behavior. Unlike even the verbal techniques, which focus upon changing thought processes and perceptions as a means to change behavior, the behavioral techniques focus exclusively upon changing the external environment, and ignore mental processes.⁴⁸² Both in theory and usually in practice, therefore, the behavioral techniques are the least intrusive upon mental processes.⁴⁸³ These techniques may well raise constitutional privacy concerns. Moreover, some aversive conditioning techniques—using drugs, electric shocks, and other physically intrusive stimuli—may infringe a liberty interest in personal security. With extremely few exceptions, however, these techniques do not appear to present sufficiently serious effects on mental processes to trigger first amendment scrutiny.

Not only do these techniques not change mental processes, but there is evidence that they bring about behavioral changes only in cooperative patients. For treatment to be successful, it cannot be forced on patients against their will.⁴⁸⁴ Reinforcers do not work in a mechanical fashion to induce behavior change automatically without the cooperation of the subject, but function as "motivators," depending for their success on the "incentive preferences of those undergoing change."⁴⁸⁵

481. "Behavior therapy, often called behavior modification, involves clinical application of experimentally derived principles of psychological learning theory, using systematic manipulation of the environment to teach adaptive behavior or modify maladaptive behavior." Winick, *Legal Limitations on Correctional Therapy and Research*, *supra* note 3, at 357. For a description of several of the behavioral techniques and of the constitutional issues they present, see *id.* at 357-65.

482. See R. SCHWITZGEBEL, *supra* note 3, at 66.

483. *Id.*

484. See E. ERWIN, *BEHAVIOR THERAPY: SCIENTIFIC, PHILOSOPHICAL AND MORAL FOUNDATIONS* 180-81 (1978) (citing Marks, *The Current Status of Behavioral Psychotherapy: Theory and Practice*, 133 AM. J. PSYCHIATRY 253, 255 (1976)); Winick, *Legal Limitations on Correctional Therapy and Research*, *supra* note 3, at 360.

485. Bandura, *Behavior Therapy and the Models of Man*, 29 AM. PSYCHOLOGIST 859, 862 (1974); Winick, *Legal Limitations on Correctional Therapy and Research*, *supra* note 3, at 360-61.

1. POSITIVE REINFORCEMENT TECHNIQUES

The positive reinforcement techniques seem to raise few first amendment concerns. Surely the use of certain reinforcers may prove too tantalizing for at least some patients and offenders to resist—color TV, air conditioning, better physical conditions, more appetizing food, monetary rewards, or the approval of the parole board or hospital release committee, for example. But even these strong inducements to change do not seem to alter mental processes in any way sufficient to trigger constitutional scrutiny. Indeed, society outside of prisons and hospitals is pervaded by governmental incentives designed to induce a variety of behaviors and attitudes. Businessmen are offered an investment tax credit. Students are given “A’s” if they perform well in school. Army recruits are given bonuses and other incentives to persuade them to enlist. Moreover, variable reinforcers, such as the chance to hit the financial jackpot in the lottery, are powerful inducers of gambling behavior. Even within the prison, inmates are granted “good time” credit toward parole eligibility for good conduct and participation in rehabilitative programs as “a tangible reward for positive efforts made during incarceration.”⁴⁸⁶ In each case the government provides rewards for the explicit purpose of inducing or reinforcing certain behavior. However, few would contend that these positive reinforcements implicate first amendment freedom of thought.⁴⁸⁷ Although the use of reinforcers in a structured behavior modification program in a hospital or prison may induce behavior change more effectively than outside such an environment, it is difficult to see how a patient or offender who decides to alter his behavior in order to obtain a color TV or other reward could argue that his first amendment rights have thereby been violated.⁴⁸⁸

Whatever effects positive reinforcement may have, considerable evidence suggests that these effects are short-lived, and perhaps restricted to the controlled clinical setting in which conditioning occurs.⁴⁸⁹ Nor do these techniques appear to work in such a direct

486. N.Y. COMP. CODES R. & REGS. tit. 7, § 260.1(a) (1983).

487. See *Maher v. Roe*, 432 U.S. 464, 475-76 (1977) (“There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy . . . [w]hen the State attempts to impose its will by force of law; the State’s power to encourage actions deemed to be in the public interest is necessarily far broader.”) (footnote omitted); accord *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3052 (1989).

488. Winick, *Legal Limitations on Correctional Therapy and Research*, *supra* note 3, at 361-62.

489. See B. BROWN, L. WIENCKOWSKI & S. STOLZ, *BEHAVIOR MODIFICATION: PERSPECTIVES ON A CURRENT ISSUE* 14 (1975); Gruber, *Behavior Therapy: Problems in Generalization*, 2 *BEHAV. THERAPY* 361, 361-68 (1971).

and intrusive fashion as to deprive the subject of effective control over his own behavior, as do the organic therapies. In view of the temporary nature of the effects of positive reinforcement and the subject's ability to resist behavioral changes facilitated by this technique, it seems unlikely that application of these techniques without consent will be found to violate the first amendment.

2. AVERSIVE THERAPY

The aversive techniques could present differing problems, depending upon the aversive stimulus that is used. For example, the court in *Mackey v. Procunier* found that the use of the drug succinylcholine in a prison mental hospital aversive conditioning program raised serious first amendment concerns.⁴⁹⁰ So distressing were the effects of this drug, which paralyzed the diaphragm, producing sensations of suffocation and drowning, that the court concluded that the prisoner's allegations of mental intrusion and effect were sufficient to raise serious constitutional questions of "impermissible tinkering with the mental processes."⁴⁹¹ Aside from the use of negative stimuli which either directly or indirectly affect mental processes, however, the aversive techniques do not seem to raise first amendment concerns. Like other behavioral approaches, they are ineffective with uncooperative subjects.⁴⁹² Any behavioral changes accomplished against the subject's will are impermanent and reversible. In this respect, even the aversive approaches are substantially distinct from the more direct, mentally intrusive organic techniques, which do not depend for their effects on the subject's cooperation.

3. OTHER BEHAVIORAL TREATMENT TECHNIQUES

Other behavioral techniques, such as systematic desensitization, shaping, and contingency contracting, are also purely dependent upon the subject's willing cooperation, and do not seem to involve any mental intrusions. Modeling presents the least difficulties of any technique considered, and would certainly raise no first amendment concerns. In general, although some of the behavioral techniques may raise other constitutional problems, the first amendment does not seem implicated by these approaches.

490. 477 F.2d 877 (9th Cir. 1973); see *supra* notes 370-72 and accompanying text.

491. *Mackey*, 477 F.2d at 878.

492. See Bandura, *The Ethical and Social Purposes of Behavior Modification*, in ANNUAL REVIEW OF BEHAVIOR THERAPY: THEORY AND PRACTICE 16 (C. Franks & G. Wilson eds. 1975); Note, *Aversion Therapy: Its Limited Potential for Use in a Correctional Setting*, 26 STAN. L. REV. 1327 (1974).

F. *Psychotherapy and Other Verbal Techniques*

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 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.⁴⁹³ 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.”⁴⁹⁴ 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.⁴⁹⁵ 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

493. See Halleck, *Legal and Ethical Aspects of Behavior Control*, 131 AM. J. PSYCHIATRY 381, 381 (1974); Katz, *The Rights to Treatment—An Enchanting Legal Fiction?*, 36 U. CHI. L. REV. 755, 777 (1969). In this sense psychotherapy should be distinguished from the more concentrated application of techniques that have come to be known as “brainwashing” or “coercive persuasion.” See generally *Peterson v. Sorlien*, 299 N.W.2d 123, 126 (Minn. 1980), cert. denied, 450 U.S. 1031 (1981); R. LIFTON, *THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM* (1961); E. SCHEIN, *COERCIVE PERSUASION* (1961); Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded (“Brainwashed”) Defendant*, 63 MINN. L. REV. 1 (1978).

494. Michels, *Ethical Issues of Psychological and Psychotherapeutic Means of Behavior Control: Is the Moral Contract Being Observed?*, 3 HASTINGS CENTER REP. 11, 11 (1973).

495. See S. FREUD, *AN OUTLINE OF PSYCHOANALYSIS*, in 23 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 141 (1964); Stewart, *Psychoanalysis and Psychoanalytical Psychotherapy*, in 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, supra note 272, at 2113, 2117; Schwartz & Solomon, *Psychoanalysis*, in HANDBOOK OF PSYCHIATRY 489, 513 (P. Solomon & V. Patch eds. 2d ed. 1974).

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."⁴⁹⁶ A patient who is resistant to therapy can thus avoid its effects even if compelled to play the role of patient.

2. COUNSELING PROGRAMS FOR OFFENDERS

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. This was confirmed by a review of thirteen studies of correctional psychotherapy in institutional and community settings, which concluded that such therapy is more likely to be effective, if at all, "when the subjects are amenable to treatment rather than nonamenable."⁴⁹⁷

Educational and vocational programs, which prisoners and offenders in the community are frequently required to attend, are no more effective or intrusive than counseling for those disinterested in learning. Students in primary and secondary schools, in their "most formative and impressionable years,"⁴⁹⁸ may be vulnerable to the socialization process that occurs in our educational systems whether or not they are willing participants,⁴⁹⁹ although all students no doubt

496. COMMITTEE ON PSYCHIATRY & LAW OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30s TO THE 80s*, at 889 (1977).

497. D. LIPTON, R. MARTINSON & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT* 213 (1975).

498. *Board of Educ. v. Pico*, 457 U.S. 853, 894 (1982) (Powell, J., dissenting).

499. The essential role of the public schools in America has been recognized by the Supreme Court to be one of "inculcating fundamental values necessary to the maintenance of a democratic political system." *Ambach v. Norwick*, 441 U.S. 68, 77 (1979); *accord Bethel School Dist. v. Fraser*, 478 U.S. 675, 683 (1986) ("The inculcation of . . . values is truly the 'work of the schools.'") (quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969)); *Pico*, 457 U.S. at 864 (plurality opinion) ("local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values'"); *id.* at 876 (referring to "the essential socializing function of schools") (Blackmun, J., concurring); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (public school is "the primary vehicle for transmitting the values on which our society rests") (quoting *Ambach*, 441 U.S. at 76); *see J. DEWEY, DEMOCRACY AND EDUCATION* 2-4, 8-9 (1916); E. DURKHEIM, *EDUCATION AND SOCIOLOGY* 71-78, 123-24 (S. Fox trans. 1956); R. HESS & J. TORNEY, *THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN* 101 (1967) ("The public school appears to be the most important and effective instrument of political socialization in the United States."); *id.* at 101-15 (empirical study); J. KOZOL, *THE NIGHT IS DARK AND I AM FAR FROM HOME* 1

share the common experience of having been able to "tune out" the

(1975) (arguing that the term "socialization" is a euphemism for "state indoctrination"); Arons & Lawrence, *supra* note 187; Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477 (1981); Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1342-43 (1976); van Geel, *supra* note 186.

Yet despite this essentially inculcative function of the school and the vulnerability of school age students to its socializing function, few would consider compulsory education to violate the first amendment. See J. TUSSMAN, *supra* note 102, at 129; M. YUDOF, *supra* note 103, at 52-55, 213-22; Garvey, *supra* note 235, at 1769; Goldstein, *supra*, at 1350-51; Shapiro, *supra* note 185, at 261; Yudof, *When Government Speaks: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 874-75 (1979). But see van Geel, *supra* note 186 (urging that value inculcation in the public schools should be deemed to violate the first amendment). Although schools may present a significant enough impact on mental processes to justify first amendment scrutiny, courts will undoubtedly find the state interest in compulsory education sufficiently compelling to survive first amendment challenge. See *Plyler*, 457 U.S. at 221 ("education has a fundamental role in maintaining the fabric of our society"; "the pivotal role of education in sustaining our political and cultural heritage"); *Ambach*, 441 U.S. at 76 ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions"); *Abington School Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (referring to "the public school as a most vital civic institution for the preservation of a democratic system of government"); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments.").

Moreover, a number of Supreme Court cases dealing with education have applied the Constitution in ways that tend substantially to mitigate the concern that public education undermines first amendment values. The Court has "long recognized certain constitutional limits upon the power of the State to control even the curriculum and classroom." *Pico*, 457 U.S. at 861 (plurality opinion); e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968) (declaring unconstitutional a state law prohibiting the teaching of the Darwinian theory of evolution in any state-supported school); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating a state law forbidding the teaching of modern foreign languages in public and private schools); see also *Pico*, 457 U.S. 853 (1982) (local school boards may not remove books from school library because they dislike the ideas they convey). The Court has stressed that public schools may not be "enclaves of totalitarianism" and that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Tinker*, 393 U.S. at 511. The Court has also observed that "[t]he classroom is peculiarly the 'marketplace of ideas'" and that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Moreover in a number of cases the Court has ruled that "the First Amendment . . . does not tolerate laws which cast a pall of orthodoxy over the classroom." *Id.*; see *Epperson*, 393 U.S. at 104-05; *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). In addition, the Court recognizes academic freedom for teachers. E.g., *Epperson*, 393 U.S. 97 (1968); see T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION*, *supra* note 181, at 593-626; Goldstein, *supra*; Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L. J. 841. Thus, by providing a measure of teacher independence, the Court has substantially mitigated the potential for governmental indoctrination through compulsory education. M. YUDOF, *supra* note 103, at 215-18.

Perhaps an ultimate safety valve, for first amendment purposes, is the freedom of parents to satisfy compulsory schooling laws by placing their children in private rather than public schools. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (unconstitutional to require compulsory education in public schools only); M. YUDOF, *supra* note 103, at 227-30; van Geel, *supra* note 186, at 242-43. Parents could also satisfy compulsory schooling laws by, in limited

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.⁵⁰⁰

Even 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. Rutgers University School of Criminal Justice completed two evaluations of the Juvenile Awareness Project which confirm this observation.⁵⁰¹ The evaluations compared attitude and behavior changes in a group of juveniles that had attended the project with a control group that had not. The results were mixed, with no significant changes in attitude or behavior shown conclusively to be due to participation in the project. Thus it would seem that the participants were able to accept or reject what

circumstances, removing their children from school altogether. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish parents could remove their children from school after the eighth grade on religious grounds); J. COONS & S. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978); J. HOLT, *TEACH YOUR OWN: A HOPEFUL PATH FOR EDUCATION* 271-95 (1981) (discussing state cases upholding right of parents to educate their children at home); M. YUDOF, *supra* note 103, at 233 (instruction at home sanctioned in many states). Finally, parents can satisfy the schooling laws by removing children from certain portions of the compulsory school curriculum. See *id.* (states commonly provide for parental control over attendance in controversial courses like sex education); Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?*, 50 S. CAL. L. REV. 871 (1977).

In any event, "the public school remains an open institution," *Ingraham v. Wright*, 430 U.S. 651, 670 (1977), open to public scrutiny and substantial supervision by parents and the community:

[T]he governance of elementary and secondary education traditionally has been placed in the hands of a local board, responsible locally to the parents and citizens of school districts. Through parent-teacher associations (PTA's), and even less formal arrangements that vary with schools, parents are informed and often may influence decisions of the board. Frequently, parents know the teachers and visit classes. It is fair to say that no single agency of government at any level is closer to the people whom it serves than the typical school board.

Pico, 457 U.S. at 894 (Powell, J., dissenting). Moreover, children in school "are captive only a few hours a day, they have ready access to information outside of the school environment, and school messages tend to be consistent with what other important sources of socialization (family, church, clubs, etc.) are imparting." M. YUDOF, *supra* note 103, at 213.

500. *But see* Garvey, *supra* note 235, at 1769 ("[I]t would be a massive infringement of the first amendment for the state to herd adults together and propagandize them for seven hours a day."); Yudof, *supra* note 499, at 902 (suggesting that the degree to which the government has captured its audience, the maturity of the audience, the techniques of persuasion employed and the receptiveness of the institution and its captive audience to counter messages are critical factors in assessing the constitutionality of government speech).

501. J. Finckenhauer & J. Storti, *Juvenile Awareness Project Help: Evaluation Report No. 1* (1979) (unpublished); J. Finckenhauer, *Juvenile Awareness Project Evaluation Report No. 2* (April 18, 1979) (unpublished).

the program offered. On the other hand, although these programs apparently effected no profound changes in attitude or behavior, prison confinement—which such programs are designed to scare future offenders into avoiding—may itself produce profound changes in both. Indeed, the Supreme Court, in another context, recognized “the institutional goal of modifying the behavior and value systems of prison inmates sufficiently to permit them to live within the law when they are released.”⁵⁰² The prison, particularly its correctional therapy and educational programs, had long been dominated by the attempt to indoctrinate inmates in traditional middle-class values.⁵⁰³ Nevertheless, confinement alone, whatever its effects on mental processes, is not thought to violate the first amendment.⁵⁰⁴ This is so in part for reasons that apply as well to verbal rehabilitative approaches: any changes in attitude and behavior they produce are gradual and capable of being resisted. Despite the great potential for indoctrination within “total institutions” such as prisons and hospitals,⁵⁰⁵ there is little evidence that these attempts have succeeded in instilling attitudinal or behavioral change in unwilling inmates. We speak of prisoners who “take advantage” of these rehabilitative programs, implying that the choice is largely voluntary.

Prison and parole systems place a premium on participation in rehabilitative programs, and most prisoners are well aware of this. In fact, much inmate participation in educational programs may be motivated by little more than the desire to increase their chances for parole.⁵⁰⁶ In any event, even if this motivation produces attendance that can be regarded as involuntary, participation in verbal rehabilitative efforts does not ensure accomplishment of program goals, particularly for the many prisoners for whom participation is little more than a facade.⁵⁰⁷ Even if inmate participation is coerced by the potential rewards, prisoners remain free to reject any substantial intrusion or permanent change in mental processes. However, education programs and treatment efforts in general are constitutionally limited by the principle expressed in *West Virginia State Board of Education v. Barnette*,⁵⁰⁸ the compulsory flag salute case, that the state may not attempt to impose orthodoxy of belief.⁵⁰⁹ Neither patients nor offend-

502. *Wolff v. McDonnell*, 418 U.S. 539, 562-63 (1974).

503. AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 43 (1971) [hereinafter STRUGGLE FOR JUSTICE].

504. See L. TRIBE, *supra* note 33, § 15-8, at 1327; Shapiro, *supra* note 185, at 261.

505. See generally E. GOFFMAN, ASYLUMS (1961).

506. STRUGGLE FOR JUSTICE, *supra* note 503, at 97-98.

507. *Id.*

508. 319 U.S. 624, 642 (1943).

509. See *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977); *Wooley v. Maynard*,

ers, therefore, may be required to affirm their belief in any officially held view on a matter of religion, politics, or opinion.⁵¹⁰

Only two reported decisions have involved challenges to the involuntary application of purely verbal techniques. Both suits arose from compulsory attendance at prison education classes in Arkansas. In *Rutherford v. Hutto*,⁵¹¹ the prisoner, classified as illiterate although possessing some slight ability to read and write, was forced to attend classes at the prison pursuant to an Arkansas statute. He claimed that such compulsory attendance violated his first amendment rights as well as other constitutional provisions. The prison school required eight hours of attendance one day a week; classes were ungraded, and students were permitted to move along at their own pace. The United States District Court for the Eastern District of Arkansas noted that "no particular pressure [is] put on any student to achieve or to achieve at any particular rate. No sanctions are imposed if a student performs poorly."⁵¹² Although it noted that an inmate "cannot be forced to learn," the court concluded that the state may "lead the horse to water even though it knows that the horse cannot be made to drink."⁵¹³ In view of the state's authority to compel the performance of uncompensated labor, the court could find nothing constitutionally objectionable in compelling participation in the school program. Declaring there is no "constitutional right to be ignorant" or "to remain uneducated," the court rejected the prisoner's constitutional challenge.⁵¹⁴

In the second Arkansas prison education case, *Jackson v. McLemore*,⁵¹⁵ a prisoner, forced to attend an education program, was placed in segregated confinement for refusing his teacher's order to spell certain words. The district court dismissed the complaint, which had asserted a "constitutional right to be let alone,"⁵¹⁶ and the United States Court of Appeals for the Eighth Circuit affirmed.⁵¹⁷ Expressing agreement with the approach taken in *Rutherford*, the circuit

430 U.S. 705, 714-15 (1977); *Epperson v. Arkansas*, 393 U.S. 97, 104-05 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (first amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom"); *Abington School Dist. v. Schempp*, 374 U.S. 203, 222-24 (1963); *Engel v. Vitale*, 370 U.S. 421, 425, 435 (1962); *Barnette*, 319 U.S. at 642; *supra* notes 104-34 and accompanying text.

510. *Barnette*, 319 U.S. at 642.

511. 377 F. Supp. 268 (E.D. Ark. 1974).

512. *Id.* at 271.

513. *Id.* at 272-73.

514. *Id.* at 272.

515. 523 F.2d 838 (8th Cir. 1975).

516. *Id.* at 839.

517. *Id.* at 840.

court stressed that “[i]t would defeat the purpose of rehabilitation if access to [rehabilitative] programs could be at the option of the prisoner.”⁵¹⁸ The court, however, limited its holding to the type of rehabilitative program before it, finding that no showing had been made that the program was “being purposefully used to infringe upon protected constitutional rights.”⁵¹⁹ Moreover, the court indicated that although a prisoner may be required to participate in the school program, he “may not be punished simply because he failed to learn, either through inability or lack of motivation.”⁵²⁰

A 1952 Supreme Court case, involving a captive audience of a quite different kind, also suggests that unwanted verbal exhortation may not create constitutional difficulties.⁵²¹ A transit company regulated by an agency of the District of Columbia installed FM radios in its buses and street cars which broadcast commercial advertising. Two passengers protested in the federal courts, but the Supreme Court rejected their claim that, as captive auditors, their first amendment or fifth amendment privacy rights had been violated.⁵²² Although public buses and public prisons and hospitals have little in common, the effects of mandatory “verbal programming,” in terms of the listener’s ability to resist, are nonetheless substantially similar.

Even the subtle kind of persuasion that marks much of psychotherapy, including sophisticated manipulation of transference and counter-transference phenomena, occurs so gradually and is so dependent upon the willingness of the subject to participate meaningfully and to seek change that it should not be deemed to intrude sufficiently on mental processes to trigger first amendment scrutiny. 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 first amendment in cases involving psychosurgery, electroconvulsive therapy, or psychotropic medication. In this sense, the 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. Accordingly, neither of these

518. *Id.* at 839.

519. *Id.*

520. *Id.*

521. *Public Utils. Comm’n v. Pollak*, 343 U.S. 451 (1952).

522. *Id.* at 461-63; *see also Redrup v. New York*, 386 U.S. 767, 769 (1967) (reversing obscenity convictions on the basis that there was no “assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.”).

treatment approaches should be deemed to violate the first amendment.

VIII. THE BURDEN IMPOSED ON GOVERNMENT TO JUSTIFY ABRIDGMENTS OF FIRST AMENDMENT RIGHTS

Although the first amendment should be construed to protect mental processes against the kinds of intrusions characterized by the organic therapies, this conclusion does not mean that such protection is absolute.⁵²³ Constitutional rights are not absolute, and even fundamental rights, such as those protected by the first amendment, must yield to government restriction when necessary to advance a compelling governmental interest.⁵²⁴ Thus, in other first amendment contexts, the Supreme Court has subjected to "the most exacting scrutiny"⁵²⁵ state attempts to abridge protected interests. The Court has indicated that in balancing individual interests against governmental interests, "the State may prevail only upon showing a subordinating interest which is compelling."⁵²⁶ The governmental interest advanced "must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest."⁵²⁷ "To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong."⁵²⁸

Even when this heavy burden is carried, the government is required to employ means "narrowly tailored"⁵²⁹ or "closely drawn to avoid unnecessary abridgment"⁵³⁰ of the first amendment interest in

523. See *supra* note 76 and accompanying text.

524. *E.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("The right to associate for expressive purposes is not, however, absolute.").

525. *Texas v. Johnson*, 109 S. Ct. 2533, 2543 (1989); *Boos v. Barry*, 485 U.S. 312, 321 (1988); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978); *Elrod v. Burns*, 427 U.S. 347, 362 (1976).

526. *Bellotti*, 435 U.S. at 786; *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

527. *Elrod*, 427 U.S. at 362; see *Bellotti*, 435 U.S. at 786; *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

528. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (footnote omitted); see also *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2613 (1989) ("a state interest of the highest order").

529. *Florida Star*, 109 S. Ct. at 2613; *Boos*, 485 U.S. at 329; *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 19 (1986) (plurality opinion); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610 (1982); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1980).

530. *E.g.*, *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982); *Bellotti*, 435 U.S. at 786; see *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943); *Schneider v. State*, 308 U.S. 147, 164 (1939); *L. TRIBE*, *supra* note 33, § 12-8, at 833 ("The Court also requires an especially close nexus between ends and means. A statute must be

question. The "limitation of First Amendment freedoms" must be "no greater than is necessary or essential to the protection of the particular governmental interest involved."⁵³¹ To justify an infringement on first amendment rights, it must be found that the state interest "cannot be achieved through means significantly less restrictive" of the right involved.⁵³²

This "exacting scrutiny"—insisting on compelling governmental interests and least restrictive means to accomplish them in order to justify infringement of first amendment protected activity—is applied generally in first amendment cases, but not in certain contexts. As previously discussed,⁵³³ in certain limited areas the Supreme Court has used less stringent standards of review—for example, in cases dealing with sexually explicit speech,⁵³⁴ child pornography,⁵³⁵ and commercial speech.⁵³⁶ Unlike these activities, however, the mentation and expressive conduct of the mentally ill serve important values within the core of those traditionally protected by the first amendment.⁵³⁷ As a result, this lesser scrutiny applied in cases involving what some members of the Court regard as "lower value" speech should be inapplicable in the context of forced treatment of the mentally ill. Because freedom of mental processes is a predicate for the

narrowly drawn so that a challenged act of government is clearly an efficacious means to achieve permissible objectives of government and is narrowly aimed at those permissible objectives so as not unnecessarily to reach expressive conduct protected by the first amendment." The Court most recently put the test this way:

The government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." It is not enough to show that the government's ends are compelling; the means must be carefully tailored to achieve those ends.

Sable Communications, Inc. v. FCC, 109 S. Ct. 2829, 2836 (1989) (citations omitted).

531. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)).

532. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); see *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-92 (1982); *Democratic Party v. Wisconsin*, 450 U.S. 107, 124 (1981); *Elrod v. Burns*, 427 U.S. 347, 363 (1976); *Buckley*, 424 U.S. at 25; *Button*, 371 U.S. at 438; *Shelton*, 364 U.S. at 488.

533. See *supra* notes 244-47 & 251-64 and accompanying text.

534. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (plurality opinion); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opinion); see *supra* notes 251-58 and accompanying text.

535. *Ferber v. New York*, 458 U.S. 747 (1982); see *supra* notes 244-47 and accompanying text.

536. See, e.g., *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986); *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *supra* notes 262-64 and accompanying text.

537. See *supra* notes 319-40 and accompanying text.

exercise of all first amendment protected rights,⁵³⁸ it should be entitled to full first amendment protection, including the "exacting scrutiny" typically applied in the first amendment context.

The Supreme Court also has applied lesser scrutiny to "content-neutral" restrictions on first amendment activity.⁵³⁹ For example, laws prohibiting speech near hospitals, banning billboards in residential communities, imposing license fees for demonstrations, or forbidding the distribution of leaflets in public places⁵⁴⁰ are content-neutral restrictions which limit communication without regard to the message conveyed.⁵⁴¹ By contrast, "content-based" restrictions, which are subject to exacting scrutiny, limit communication because of the message conveyed.⁵⁴² Content-neutral restrictions are subjected to lesser scrutiny, under which the Court employs a balancing test considering the extent to which the restriction limits communication, whether it is "narrowly tailored to serve a significant governmental interest," and whether it "leave[s] open ample alternative channels of communication."⁵⁴³ Unlike content-based restrictions, which are presumed to violate the first amendment, "'content-neutral' time, place and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."⁵⁴⁴

Is involuntary mental health treatment content-based or content-neutral within this dichotomy? The distinction seems awkward in the context of mental health treatment, which is directed not primarily at communication, but rather at mental processes. But, mental health treatment restricts thoughts, beliefs, and mental attitudes precisely

538. See *supra* notes 179-87 and accompanying text.

539. See, e.g., *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989); *Frisby v. Schultz*, 108 S. Ct. 2495, 2500-01 (1988); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); see also Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Note, *supra* note 180.

540. Stone, *supra* note 539, at 189-90.

541. See *Ward*, 109 S. Ct. at 2753; Stone, *supra* note 539, at 189.

542. See, e.g., *City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988); *Boos v. Barry*, 485 U.S. 312 (1988); *Regan v. Time, Inc.*, 468 U.S. 641 (1984); *Carey v. Brown*, 447 U.S. 455 (1980); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Police Dep't v. Mosley*, 408 U.S. 92 (1972); Stone, *supra* note 539, at 190.

543. *Ward*, 109 S. Ct. at 2753; *Frisby*, 108 S. Ct. at 2501 (quoting *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983)). To be "narrowly tailored" to serve the government's interest, the Court recently clarified, does not require that it be "the least-restrictive or least-intrusive means of doing so." *Ward*, 109 S. Ct. at 2757-58.

544. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); accord *Frisby*, 108 S. Ct. at 2501; *Perry*, 460 U.S. at 45.

because they are deemed disordered, that is, because of their content. It simply cannot be said that the justification for such treatment “ha[s] nothing to do with content.”⁵⁴⁵ Moreover, such treatment would seem content-based because it restricts the opportunity for the expression itself—the very ability to maintain the thoughts, beliefs, and mental attitudes that themselves are the precursors to expression—not merely a particular means of expression. Such treatment therefore does not merely restrict the time, place, and manner of expression or of the exercise of mental processes; it directly changes mental processes. Nothing could be a greater threat to first amendment values. Because mental processes unimpaired by government are a predicate to the exercise of all other first amendment protected interests, intrusive treatment designed to change such processes should generally be subjected to the exacting scrutiny usually applied in the first amendment area, rather than the balancing approach applied to content-neutral restrictions.

The conclusion that strict first amendment scrutiny should be applied to intrusive treatment imposed on an involuntary basis could be subject to one other potential qualification. The Supreme Court has recognized that “First Amendment guarantees must be ‘applied in light of the special characteristics of the . . . environment.’”⁵⁴⁶ In the prison context, the Court has shown special sensitivity to the need to maintain institutional security, applying a form of intermediate scrutiny in cases involving certain first amendment claims raised by prisoners.⁵⁴⁷ In these cases the Court has relaxed the rigors of traditional strict scrutiny that would apply in contexts outside of the prison, particularly the requirement that the means chosen by correctional administrators to accomplish compelling ends be the “least restrictive alternative” available.

The Court has justified this relaxed scrutiny on the basis that in prison, first amendment and other constitutional rights “must be exercised with due regard for the ‘inordinate difficult undertaking’ that is modern prison administration.”⁵⁴⁸ In these cases the Court has emphasized that “protecting prison security” is a purpose that is

545. *Ward*, 109 S. Ct. at 2754 (quoting *Boos*, 485 U.S. at 320).

546. *Procunier v. Martinez*, 416 U.S. 396, 413 (1974), *overruled in part*, *Thornburg v. Abbott*, 109 S. Ct. 1874 (1989); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969).

547. *E.g.*, *Thornburg v. Abbott*, 109 S. Ct. 1874 (1989); *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Turner v. Safley*, 482 U.S. 78 (1987); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119 (1977); *Pell v. Procunier*, 417 U.S. 817 (1974); *Procunier v. Martinez*, 416 U.S. 396 (1974), *overruled in part*, *Thornburg v. Abbott*, 109 S. Ct. 1874 (1989).

548. *Abbott*, 109 S. Ct. at 1878 (quoting *Turner*, 482 U.S. at 85).

“central to all other correctional goals.”⁵⁴⁹ Acknowledging the expertise of prison officials in matters of maintaining order and security and that “the judiciary is ‘ill equipped’ to deal with the difficult and delicate problems of prison management,” the Court has afforded “considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world.”⁵⁵⁰

In *Pell v. Procunier*,⁵⁵¹ the Court refused to invalidate a prison ban on face-to-face interviews with members of the press. The Court noted that alternative means of communication were available to inmates, including their relatively unfettered ability to communicate in writing to the press. The Court emphasized that the “internal problems of state prisons involve issues . . . peculiarly within state authority and expertise,”⁵⁵² and found that “security considerations are sufficiently paramount in the administration of the prison” to justify the limitations on first amendment rights at issue.⁵⁵³ Similarly, in *Bell v. Wolfish*,⁵⁵⁴ the Court concluded that “[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgement are needed to preserve internal order and discipline and to maintain institutional security.”⁵⁵⁵ The Court in *Bell* upheld a rule prohibiting inmate receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores, because the rule was a “rational response by prison officials to an obvious security problem,”⁵⁵⁶ and because alternative means of obtaining reading material were readily available.⁵⁵⁷ In *Jones v. North Carolina Prisoners’ Labor Union, Inc.*,⁵⁵⁸ the Court sustained regulations that permitted membership in a prisoner union but prohibited inmate solicitation of other inmates to join the union, barred union meetings, and banned bulk mailing by the union. The Court deemed these limitations “rationally related to the reasonable . . . objectives of prison administration,”⁵⁵⁹ finding first amendment speech rights to be “barely implicated.”⁵⁶⁰ Although conceding

549. *Id.* at 1882 (quoting *Pell*, 417 U.S. at 823).

550. *Id.* at 1878 (quoting *Martinez*, 416 U.S. at 404-05).

551. 417 U.S. 817 (1974).

552. *Id.* at 826.

553. *Id.* at 827.

554. 441 U.S. 520 (1979).

555. *Id.* at 547.

556. *Id.* at 550.

557. *Id.* at 552.

558. 433 U.S. 119 (1977).

559. *Id.* at 129.

560. *Id.* at 130.

that first amendment associational rights were "perhaps more directly implicated,"⁵⁶¹ the Court found that they nevertheless must "give way to the reasonable considerations of penal management."⁵⁶²

In *Procunier v. Martinez*,⁵⁶³ the Court, although showing deference to prison authorities, applied a form of the "least restrictive alternative" principle. The Court held that censorship of prison mail may be justified only if the regulation or practice in question furthers a "substantial governmental interest" and is "no greater than is necessary or essential to the protection of the particular governmental interest involved."⁵⁶⁴ The Court characterized this as a form of "intermediate" scrutiny.⁵⁶⁵ Finding the censorship of prisoner mail involved "far broader than any legitimate interest of penal administration demands," the Court invalidated the restrictions.⁵⁶⁶

In *Thornburg v. Abbott*⁵⁶⁷ and other recent cases,⁵⁶⁸ the Court has backed away from the "least restrictive alternative" language of *Martinez*. Limiting *Martinez* to regulations concerning outgoing correspondence from the prison,⁵⁶⁹ which presents implications for prison security "of a categorically lesser magnitude than the implications of incoming materials,"⁵⁷⁰ the Court rejected a "least restrictive alternative" test for censorship of such incoming material. Instead, the Court applied "a standard of review that focuses on the reasonableness of prison regulations: the relevant inquiry is whether the actions of prison officials were 'reasonably related to legitimate penological interests.'"⁵⁷¹ Concerned that the language in *Martinez* "could be (and had been) read to require a strict 'least restrictive alternative' analysis, without sufficient sensitivity to the need for discretion in meeting legitimate prison needs,"⁵⁷² the Court determined that "such a strict standard simply was not appropriate for consideration of regulations that are centrally concerned with the maintenance of order and security within prisons."⁵⁷³ The "reasonableness standard" adopted by the Court, is not, however, the equivalent of a

561. *Id.* at 132.

562. *Id.*

563. 416 U.S. 396 (1974), *overruled in part*, *Thornburg v. Abbott*, 109 S. Ct. 1874 (1989).

564. *Id.* at 413.

565. *Id.* at 407.

566. *Id.* at 416.

567. 109 S. Ct. 1874 (1989).

568. *Id.* at 1879-85; *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987); *Turner v. Safley*, 482 U.S. 78, 89-90 (1987).

569. *Abbott*, 109 S. Ct. at 1881.

570. *Id.*

571. *Id.* at 1879 (quoting *Turner*, 482 U.S. at 89).

572. *Id.* at 1880.

573. *Id.* at 1879.

“rational basis” test, under which any conceivable rational relationship to a legitimate governmental interest will suffice; rather, the Court warned, its reasonableness standard “is not toothless.”⁵⁷⁴

Will the Court apply its newly adopted “reasonableness standard” in the context of mental health treatment administered in correctional facilities, or perhaps even in mental hospitals, which sometimes present similar security problems? The intrusive mental health therapies in question would seem distinguishable from the restrictions involved in the prison cases. The regulations involved in the prison cases were security measures which controlled the entry of materials and individuals into the institution, and can be seen as merely incidental restrictions on first amendment rights in light of the alternative means of expression and communication available. By contrast, the intrusive therapies discussed here are not, with limited exceptions, justified as security measures. Moreover, rather than being merely incidental restrictions on first amendment activities, they result in direct, severe, and long-lasting invasions of mental processes and impede the very capacity to generate ideas. Unlike the interview and mail restrictions involved in the prison cases, there are no alternative means of exercising the fundamental rights invaded by involuntary imposition of organic therapies. Moreover, at least some of the organic therapies intrude on mental processes in a way that is permanent and irreversible. The fact of confinement and the need for prison security and order certainly may make some first amendment restrictions necessary, but these considerations do not justify the imposition of intrusive therapy. Prison restrictions related to “security considerations . . . paramount in the administration of the prison”⁵⁷⁵ are accordingly entitled to considerably more deference than correctional choices of rehabilitative techniques. Rehabilitation is a less important governmental interest than the need to protect institutional order and security. Furthermore, prison authorities may be expert in matters of security, but in view of the total absence of consensus as to “what works” in the way of correctional rehabilitation,⁵⁷⁶ correctional authorities can make no similar claim for judicial

574. *Id.* at 1882.

575. *Pell v. Procunier*, 417 U.S. 817, 827 (1974).

576. See D. LIPTON, R. MARTINSON & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT* (1975); Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 *PUB. INTEREST* 22 (1974); SUB-COMM. ON PENITENTIARIES AND CORRECTIONS OF THE SENATE COMM. ON THE JUDICIARY, ANNUAL REPORT, S. REP. NO. 95-909, 95th Cong., 2d Sess. (1978). *But see* T. PALMER, *CORRECTIONAL INTERVENTION AND RESEARCH* 15-36 (1978). Although noting that more recent programs may show more promise, a recent study of offender rehabilitation performed under the auspices of the National Academy of Sciences found Lipton, Martinson and Wilks' conclusions to be “reasonably accurate and fair.” See

deference in their choice of rehabilitative means.

The justifications for an especially deferential approach to restrictions grounded in security considerations are substantially reduced in contexts outside of the prison. In the case of community-based correctional programs, some of which are not residential, security considerations and the deference they justify would seem minor or even nonexistent. Moreover, to whatever extent the Supreme Court may feel inclined to apply its "reasonableness standard" adopted in the prison context to mental institutions, in view of the security needs of such facilities, patients receiving treatment in community settings would similarly not present the concern for security that animates the prison cases. Nor, for that matter, is it likely that this concern would arise often in mental hospital wards housing exclusively *parens patriae* patients who are committed because of their treatment needs, rather than any danger they may present to the community.

Indeed, even within an institution—either prison or hospital—there would seem to be only one context in which involuntary administration of intrusive mental health treatment would even arguably merit the deferential approach applied to first amendment restrictions in the prison. That context is the use of psychotropic drugs to tranquilize a prisoner or patient in an effort to defuse an emergency in which that individual's behavior is manifestly dangerous to the individual himself, other inmates, or institutional staff.⁵⁷⁷ Although isolating or restraining the patient or prisoner will in most cases be sufficient to defuse such an emergency situation,⁵⁷⁸ institutional administrators who choose what might be termed a "chemical

PANEL ON RESEARCH ON REHABILITATIVE TECHNIQUES, NATIONAL RESEARCH COUNCIL, THE REHABILITATION OF CRIMINAL OFFENDERS: PROBLEMS AND PROSPECTS 5 (L. Sechrest, S. White & E. Brown eds. 1979). However, the study found that Palmer's "optimistic view cannot be supported. . . ." *Id.* at 31. The Panel study concluded that:

The entire body of research appears to justify only the conclusion that we do not now know of any program or method of rehabilitation that could be guaranteed to reduce the criminal activity of released offenders. Although a generous reviewer of the literature might discern some glimmers of hope, those glimmers are so few, so scattered, and so inconsistent that they do not serve as a basis for any recommendation other than continued research.

Id. at 3. For a critical analysis of the evaluation literature finding most studies inadequate for failure to measure the "strength" or intensity of the treatment, or its "integrity" or consistency in administration, see Sechrest & Redner, *Strength and Integrity in Evaluation Studies*, in NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, HOW WELL DOES IT WORK? REVIEW OF CRIMINAL JUSTICE EVALUATION, 1978, at 19 (1979).

577. See Tupin, *Psychopharmacology and Aggression*, in CLINICAL TREATMENT OF THE VIOLENT PERSON 79, 80-81 (L. Roth ed. 1987).

578. Solaff, *Physical Controls: The Use of Seclusion and Restraint in Modern Psychiatric Practice*, in CLINICAL TREATMENT OF THE VIOLENT PERSON, *supra* note 577, at 119. See generally THE PSYCHIATRIC USES OF SECLUSION AND RESTRAINT (K. Tardiff ed. 1984).

restraint" in such circumstances may assert a claim to deference in their choice of means to regain institutional order and security. Particularly since a single administration of such medication will usually not present a substantial risk of irreversible side effects such as tardive dyskinesia,⁵⁷⁹ and because the high-potency antipsychotic drugs usually used for this purpose are less sedating,⁵⁸⁰ and consequently present a lesser intrusion on first amendment interests, the arguments in favor of a more deferential judicial approach to the brief use of such drugs in an emergency may be persuasive. Indeed, a number of state and lower federal courts have recognized that the government's police power interest in protecting hospital or prison staff and other patients or prisoners from violence is sufficiently compelling to justify forced medication, at least in an emergency.⁵⁸¹ Although in these cases the courts did not discuss the first amendment, and as a result made no attempt to square their conclusions with traditional first amendment scrutiny, their approach seems consistent with first amendment doctrine.

In the case of a patient or prisoner who is behaving violently toward a fellow inmate or an institutional staff member, the government's compelling interests in restoring order and maintaining safety and security certainly justify a suitable intervention into the *conduct* of the patient or prisoner. When, as here, the intervention involved affects not only the *conduct* of the individual, but his first amendment interests as well, additional scrutiny should be required. Under traditional first amendment doctrine, a regulation of conduct that also affects first amendment interests is permitted only if the effect on first

579. TARDIVE DYSKINESIA, *supra* note 431, at 24-25; Tupin, *supra* note 577, at 82.

580. Tupin, *supra* note 577, at 82-83.

581. *See, e.g.,* Bee v. Greaves, 744 F.2d 1387, 1394 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985) (In an emergency, a "jail's duty to maintain security and to prevent a violent and dangerous mentally ill prisoner from injuring himself and others" would justify forcible medication with antipsychotic drugs.); Rennie v. Klein, 720 F.2d 266, 269 (3d Cir. 1983) (en banc) (Antipsychotic drugs constitutionally may be administered to members of a class of dangerous involuntarily committed patients "whenever, in the exercise of professional judgment, such an action is deemed necessary to prevent the patient from endangering himself or others."); Rogers v. Okin, 634 F.2d 650, 656-57 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982); William v. Martin, 589 F. Supp. 680, 682 (W.D. Okla. 1984); Weiss v. Missouri Dep't of Mental Health, 587 F. Supp. 1157, 1161 (E.D. Mo. 1984); Project Release v. Prevost, 551 F. Supp. 1298, 1309 (E.D.N.Y. 1982), *aff'd*, 722 F.2d 960 (2d Cir. 1983); Davis v. Hubbard, 506 F. Supp. 915, 934-38 (N.D. Ohio 1980); Large v. Superior Court, 148 Ariz. 229, 236-39, 714 P.2d 399, 406-08 (1986) (en banc); People v. Medina, 705 P.2d 961, 973-74 (Colo. 1985) (en banc); *In re Orr*, 176 Ill. App. 3d 498, 507, 531 N.E.2d 64, 72 (1988); Rogers v. Commissioner, 390 Mass. 489, 507-11, 458 N.E.2d 308, 319-22 (1983); Opinion of the Justices, 123 N.H. 554, 561, 465 A.2d 484, 489 (1983); Rivers v. Katz, 67 N.Y.2d 485, 495-96, 504 N.Y.S.2d 74, 80, 495 N.E.2d 337, 343 (1986); *In re K.K.B.*, 609 P.2d 747, 750 (Okla. 1980).

amendment freedoms is merely incidental, and the government interest in regulating the conduct in question is sufficiently important and is unrelated to the suppression of first amendment freedoms.⁵⁸²

These standards would seem to be satisfied when the government, in an effort to defuse an emergency, seeks to administer a psychotropic drug to a patient or prisoner who, in the midst of a psychotic episode, is acting violently. Although my intent here is to identify and analyze the appropriate standards of review mandated by the first amendment, rather than to discuss how these standards would apply to various justifications for involuntary treatment, a brief analysis of how these standards would apply in the context of a drug administered for reasons of institutional security is appropriate. A single administration of such a drug would directly affect mental processes for a period lasting only several hours. The risk of adverse side effects lasting longer than this is small. Such drug administration will not prevent the generation or maintenance of ideas, and will only at most temporarily affect expression or communication. Although such use of psychotropic drugs undeniably affects mental processes, the duration of the impact on such processes is sufficiently short that the effects can be characterized as merely incidental to the government's regulation of the individual's conduct. Moreover, the government's interests in protecting institutional security and order and the safety of inmates and staff would seem both compelling and unrelated to the suppression of the patient's first amendment interests. Although the patient's *conduct* is being suppressed, by a means which incidentally limits his first amendment protected mentation, and although the patient's mental processes may well be related to his violent conduct, the government interest is in suppressing the conduct itself, without regard to the mental processes that may have brought it about. Thus, first amendment standards would seem to be satisfied by the administration of drugs in an emergency situation, when the patient is acting violently or such violence appears imminent.

When violence is not imminent, however, administration of psychotropic drugs on an on-going basis as a preventative measure would not seem to satisfy these standards. When violent conduct is not at least imminent, the government interest in administering such drugs as a preventative would be directed primarily at the patient's mental processes themselves and their potential to produce future conduct of a violent nature. When the invasion of first amendment interests is as serious and long-lasting as it is here, the mere preven-

582. See, e.g., *Texas v. Johnson*, 109 S. Ct. 2533, 2538-39 (1989); *Spence v. Washington*, 418 U.S. 405, 414 n.8 (1974); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

tion of future dangerous conduct predicted to occur as a result of the patient's disordered mental processes should not suffice to invoke the reduced scrutiny justified by deference to the need to maintain institutional security unless the danger to be prevented has some degree of imminence.⁵⁸³ In other first amendment contexts, when the government has attempted to interfere directly with speech or other first amendment protected activity on the ground that it is thought likely to produce crime, riot, revolution, or some other substantive harm within the government's power to prevent, the Supreme Court has insisted that there be a "clear and present danger" that those substantive evils will occur.⁵⁸⁴ Thus, the Court has not "permitted the Government to assume that every expression of a provocative idea will incite a riot," but has instead engaged in "careful consideration of the actual circumstances surrounding such expression, asking whether the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'"⁵⁸⁵ Similarly, the government's direct interference with protected first amendment mental processes through on-going administration of psychotropic drugs designed to prevent future violence that is not imminent should not qualify for the reduced scrutiny that might be appropriate for an institution's response to an emergency. Although in the recent prison security cases, the Court has not insisted on this degree of imminence, upholding regulations that censored materials entering the prison because of their potential impact on order and security,⁵⁸⁶ these regulations imposed far less serious burdens on first amendment interests than on-going intrusive treatment. The censorship of incoming materials in *Abbot*, for example, left open a "broad range of publications" to be sent, received, and read by the prisoners.⁵⁸⁷ When the

583. See *Johnson*, 109 S. Ct. at 2542 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)) ("imminent lawless action"); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

584. E.g., *Landmark Communications*, 435 U.S. at 843 ("the imminence and magnitude of the danger"); *Brandenburg*, 395 U.S. at 447 ("imminent lawless action"); *Wood v. Georgia*, 370 U.S. 375, 384 (1962) ("the degree of imminence [must be] extremely high"); *Pennkamp v. Florida*, 328 U.S. 331, 350 (1946) ("clearness and immediacy"); *Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("grave and impending public danger"); *id.* at 536 ("clear and present, grave and immediate danger"); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) ("grave and immediate danger"); *Bridges v. California*, 314 U.S. 252, 263 (1941) ("the degree of imminence [must be] extremely high"); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) ("clear and present danger . . . or other immediate threat"); *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("clear and present danger"). See generally L. TRIBE, *supra* note 33, § 12-9.

585. *Johnson*, 109 S. Ct. at 2542 (quoting *Brandenburg*, 395 U.S. at 447).

586. E.g., *Thornburgh v. Abbott*, 109 S. Ct. 1878, 1883 (1989).

587. *Id.* at 1884. As a result, the Court found that there were "alternative means of exercising the [first amendment] right that remain open to prison inmates." *Id.* at 1883 (quoting *Turner v. Safley*, 482 U.S. 78, 90 (1987)).

intrusions involved are as serious and long-lasting as the on-going use of antipsychotic drugs, a higher degree of imminence should be required. Just as the Court in *Texas v. Johnson*, the recent flag-burning case, rejected the state's argument that the mere "potential for a breach of peace" should suffice as a basis for criminalizing flag-burning,⁵⁸⁸ the mere potential of future dangerous behavior by a mentally ill patient or prisoner should not alone justify the long-term use of a psychotropic drug as a preventative. The "likelihood, however great, that a substantive evil will result" cannot alone suffice.⁵⁸⁹ "[T]he substantive evil must be extremely serious and the degree of imminence extremely high"⁵⁹⁰ before such direct and long-lasting invasions of first amendment interests may be sanctioned, at least in the absence of other justifications for such action that satisfy traditional strict first amendment scrutiny.

Thus, in contexts other than the emergency use of medication, decisions to impose intrusive mental health treatment, because such treatment will be on-going and the resulting invasion of first amendment interests will be far from merely incidental, raise more serious first amendment concerns. Such decisions should accordingly be subjected to the "exacting" scrutiny generally applied in other first amendment contexts.⁵⁹¹

IX. CONCLUSION

Whether and in what circumstances these "exacting" standards can be satisfied in the context of involuntary mental health treatment for either mental patients or criminal offenders is beyond the scope of this Article. Its purpose has been to identify the first amendment implications of the treatment involved in *Washington v. Harper*. In my view, the first amendment provides the appropriate lens through which the Supreme Court should resolve the difficult issues it is about to confront. In any event, these issues should not be resolved without an awareness of the significant first amendment values that are implicated.

Harper does not involve medication administered in response to an emergency affecting prison security or order. It does not involve the prevention of imminent violence. Harper periodically assaulted staff and other inmates;⁵⁹² indeed, in 1981, his parole was revoked for

588. *Johnson*, 109 S. Ct. at 2542.

589. *Bridges v. California*, 314 U.S. 252, 262 (1941).

590. *Wood v. Georgia*, 370 U.S. 375, 384 (1962); *Bridges*, 314 U.S. at 263.

591. See *supra* notes 525-32 and accompanying text.

592. Brief of Respondent at 2, *Washington v. Harper*, 109 S. Ct. 1337 (1989) (No. 88-599).

assaulting two nurses at a state mental hospital.⁵⁹³ Harper's treating physician decided to administer antipsychotic medication against Harper's will under the belief that Harper's assaultiveness increased when he was not taking his medication.⁵⁹⁴ Nevertheless, the record does not show that Harper's assaultiveness was imminent at the time, nor does it show that other means of preventing assaultive behavior—segregation,⁵⁹⁵ physical restraints,⁵⁹⁶ prison discipline,⁵⁹⁷ or even psychotherapeutic⁵⁹⁸ or behavioral⁵⁹⁹ techniques, for example—had been attempted and proved unavailing.

Harper does not involve an isolated administration of antipsychotic drugs, or a treatment period of brief duration. For four to five years, Harper had voluntarily undergone antipsychotic drug therapy.⁶⁰⁰ After he initially refused to continue taking the drugs, he was administered them on an involuntary basis for an additional two and two-thirds years before seeking an injunction.⁶⁰¹ Harper was thus subjected to a prolonged course of drug treatment, augmenting the risks of serious adverse side effects such as tardive dyskinesia, and resulting in an interference with his mental processes for an extended and continuous period. Moreover, although Harper is mentally ill,⁶⁰² there is no claim that his illness rendered him incompetent to participate in treatment decisionmaking, to weigh for *himself* the risks and benefits of continuing a treatment he had tried for many years. *Harper*, therefore, does not present an asserted justification for involuntary medication grounded in the state's *parens patriae* power.⁶⁰³

593. *Harper v. State*, 110 Wash. 2d 873, 874-75, 759 P.2d 358, 360 (1988) (en banc).

594. *Id.* at 875, 759 P.2d at 360.

595. See Soloff, *supra* note 578. See generally THE PSYCHIATRIC USES OF SECLUSION AND RESTRAINT, *supra* note 578.

596. See Soloff, *supra* note 578.

597. See *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Wolff v. McDonnell*, 418 U.S. 539 (1974).

598. See Madden, *Psychotherapeutic Approaches in the Treatment of Violent Persons*, in CLINICAL TREATMENT OF THE VIOLENT PERSON, *supra* note 577, at 54.

599. See Liberman & Wong, *Behavior Analysis and Therapy Procedures Related to Seclusion and Restraint*, in THE PSYCHIATRIC USES OF SECLUSION AND RESTRAINT, *supra* note 578, at 35; Wong, Slama & Liberman, *Behavioral Analysis and Therapy for Aggressive Psychiatric and Developmentally Disabled Patients*, in CLINICAL TREATMENT OF THE VIOLENT PERSON, *supra* note 577, at 20.

600. *Harper v. State*, 110 Wash. 2d 873, 874, 759 P.2d 358, 360 (1988) (en banc).

601. *Id.* at 875, 759 P.2d at 360.

602. See *supra* note 10.

603. The *parens patriae* power involves government decisionmaking in the best interest of persons who by reason of age or disability are incapable of making such decisions for themselves. See *Mills v. Rogers*, 457 U.S. 291, 296 (1982); *Addington v. Texas*, 441 U.S. 418, 426 (1979); *O'Connor v. Donaldson*, 422 U.S. 563, 583 (1975) (Burger, C.J., concurring); *Bee v. Greaves*, 744 F.2d 1387, 1395 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985); *Project Release v. Prevost*, 722 F.2d 960, 978 (2d Cir. 1983); *Rogers v. Okin* 634 F.2d 650, 657 (1st

Viewed through the lens of the first amendment, *Harper* thus raises the question of whether, in the absence of a demonstration that other available and less intrusive means have failed, the state's interest in preventing future but nonimminent harm within an institution meets the "exacting" standards that I have argued the first amendment should compel for the involuntary administration of intrusive treatments like antipsychotic medication.

Cir. 1980), *vacated and remanded on other grounds sub nom. Mills v. Rogers*, 457 U.S. 291 (1982); *Winters v. Miller*, 446 F.2d 65, 68-71 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971); *Davis v. Hubbard*, 506 F. Supp. 915, 935-36 (N.D. Ohio 1980); *Rogers v. Commissioner*, 390 Mass. 489, 511-12, 458 N.E.2d 308, 322 (1983); Opinion of the Justices, 123 N.H. 554, 560-61, 465 A.2d 484, 489-90 (1983); *Rivers v. Katz*, 67 N.Y.2d 485, 496-97, 504 N.Y.S.2d 74, 80, 495 N.E.2d 337, 343-44 (1986); *In re K.K.B.*, 609 P.2d 747, 750-52 (Okla. 1980); Winick, *Legal Limitations on Correctional Therapy and Research*, *supra* note 3, at 374; Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1212-16 (1974). The courts have also recognized that the existence of mental illness alone cannot justify the conclusion that the patient is incompetent to participate in treatment decisions. *E.g.*, *Rennie v. Klein*, 653 F.2d 836, 847 & n.12 (3d Cir. 1981) (en banc), *vacated and remanded*, 458 U.S. 1119 (1982); *Rogers*, 634 F.2d at 591; *Winters*, 446 F.2d at 71; *Davis*, 506 F. Supp. at 935-36; *Anderson v. State*, 135 Ariz. 578, 584, 663 P.2d 570, 576 (Ariz. Ct. App. 1982); *People v. Medina*, 705 P.2d 961, 973 (Colo. 1985) (en banc); *In re Boyd*, 403 A.2d 744, 747 n.5 (D.C. 1979); *Rivers*, 67 N.Y.2d at 494-95, 504 N.Y.S.2d at 79, 495 N.E.2d at 342; *In re Orr*, 176 Ill. App. 3d 498, 509, 531 N.E.2d 64, 73 (1988); *Gundy v. Pauley*, 619 S.W.2d 730, 731 (Ky. Ct. App. 1981); *In re K.K.B.*, 609 P.2d at 749; *Rogers v. Commissioner*, 390 Mass. 489, 511-12, 458 N.E.2d 308, 322 (1983).