

On Cognitive Liberty

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Part I

Thoughts are free and are subject to no rule — Paracelsus¹

As we frantically race into the third millennium, with microprocessors becoming faster, cheaper, and smaller, with surveillance cameras proliferating in public spaces, with the human genome program about to issue its first “working draft” of the human DNA sequence, and with an out-of-control Frankensteinian machine named the War on Drugs, all awirl in the ocean of modern day culture, it is imperative that we, as a society, expressly acknowledge the fundamental human right to cognitive liberty and immediately begin to define its contours.

Encroachments on cognitive liberty can take various forms. New technologies such as biogenetic modification, human-computer interfacing, brain-scanning, nanotechnology, neural-networking, so-called “neuro-therapy,” and new pharmaceuticals, raise exciting possibilities for human “evolution.” But, if not developed and used responsibly, they and the legislation they spawn, could also pose new threats to cognitive freedom.² The trend of technology is to overcome the limitations of the human body. And, the Web has been characterized as a virtual collective consciousness and unconsciousness. What are the implications for mental autonomy when wearable computers become wet-wired to our own minds and memory is augmented by a high-speed wireless connection to the Web? Similarly, advances in biotechnology and drug-design increasingly raise legal and ethical questions related to cognitive liberty, including what rights people will have to access these and other technologies, and what rights we will have to avoid them.

Calibrating Cognitive Liberty

Part of elucidating a theory of cognitive liberty is simply recognizing when free cognition is being infringed. Restrictions on physical liberty, for all their pain and terror, at least have the benefit of being relatively easy to recognize and call attention to. During World War II, the Nazi concentration camps for Jews, and the American internment camps for Japanese Americans, were marked by the machinery of physical control: fences, barbed wire, and guard towers. Similarly, from 1961 to 1989, a concrete and barbwire wall overseen by 116 guard towers divided the city of Berlin. Anyone who tried to cross that wall without a “special authorization” risked a bullet in the

¹ J. Jacobi, ed., *Selected Writings* (New York: Pantheon Books, 1951).

² One example of fiction-like technology looming just over the horizon was recently discussed by MIT-educated futurist Ray Kurzweil, who has forecasted the coming of nanobot brain scanners. These nanobots would be blood-cell-sized robots that travel through capillaries in the brain and take high-resolution scans of the neural features. These bots would be tied together on a wireless LAN, and comprise a distributed parallel computer with the same power as the brain that was scanned. (*The Story of the 21st Century* ‘in Technology Review Jan./Feb. 2000, 82-83.)

Kurzweil says that every aspect of this scenario is feasible today “except for size and cost.” For more of Kurzweil’s ideas, see his book *The Age of Spiritual Machines: When Computers Exceed Human Intelligence* (New York: Viking, 1999).

back of his or her skull. In contrast to the usual visibility of government restraints on physical liberty, restraints on cognitive liberty are most often difficult to recognize, if not invisible.

Consciousness is so complex and multifaceted that it may never be understood. Unfortunately, the inability to understand consciousness does not equate to an inability for others to control it. How then can we recognize nefarious attempts to control consciousness? In one respect, absolute control of one's own consciousness is an impossibility. While each of us carries our own brain in our own skull, the process of consciousness itself is interactive. All our senses continuously feed data into our brains, producing a dance of cognition that perpetually swirls the exterior world with the interior world creating a seamless, edgeless, apperceptive feedback loop. Our minds are continually changing, continually interfacing with "the other." Cognitive liberty clearly cannot mean cognitive isolation.

Mind control, like most everything else, comes in degrees. A discussion with a friend may make you change your opinion on a topic, it may even change your life, but does that amount to "mind control?" Was your cognitive liberty violated? Over \$US200 billion dollars is spent each year by companies unabashedly striving to manipulate our desires, to literally make us want their product. If you see an advertisement (or many) for a product and that advertisement, replete with imagery of the good life, causes you to purchase the product, have you been the victim of mind control? Has your cognitive liberty been violated?

What if the advertisement is embedded with auditory or visual subliminal messages? What if the advertisement is embedded in prime-time television programs, passing as program content, rather than demarked as a "commercial?"³ Or, suppose you are a 12-year-old placed on Prozac®, or Ritalin® largely because your schoolteacher has "diagnosed" you as depressed or suffering from Attention Deficit Disorder. Has your cognitive liberty been violated?

The answers to the above questions depend upon how finely one calibrates cognitive liberty. But some scenarios, some infringements on mental autonomy, are crystal clear and ought to present limit cases where general policies and specific rules emerge in high-definition clarity. Yet, even in so-called limit cases, the US government, including its legal system, has often acted inconsistently.

A (Very) Brief History of US Government Mind Control

In 1969, Justice Marshall wrote, without mincing words, "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."⁴ Yet, contrary to Justice Marshall's strong pronouncement, the US government has not consistently respected or protected cognitive liberty. Indeed, some of the government's offenses seem to come directly from the pages of a dystopian novel like George Orwell's *Nineteen Eighty-Four*.⁵

³ See *Big Brother Puts a New Twist on the Telescreen*, *infra*, 60.

⁴ *Stanley v. Georgia* (1969) 394 U.S. 557, 565.

⁵ Orwell, *Nineteen Eighty-Four* (New York: Harcourt, Brace & Co., Inc., 1949).

Imagine, for example, if the government passed a law mandating that all citizens receive monthly injections of time-release sedatives, justifying the law on the “public health” grounds that sedated people are more productive at routine repetitive tasks, are less violent, and are less of a drain on public resources. What if those who did not voluntarily report at the time and place appointed for their injection were rounded up by the police, and forcefully lobotomized? Would anyone doubt that such a law infringed not just on one’s physical freedom but also on one’s cognitive freedom? It’s not exactly an unthinkable scenario. From the 1920s through 1970, pursuant to the laws of at least 32 states, more than 60,000 people were deemed “eugenically unfit.” Many of these people were involuntarily sterilized, in part because of low scores on intelligence tests.⁶ When one of these laws was challenged, and the case reached the United States Supreme Court, it was upheld—with Justice Oliver Wendell Holmes smugly proclaiming, “Three generations of imbeciles are enough.”⁷

Until 1973, “homosexuality” was listed as a psychiatric disorder in the Diagnostic and Statistical Manual of Mental Disorders (DSM). People who admitted being homosexual, or who were “accused” of being gay or lesbian, were subject to involuntary confinement under mental health laws, and subjected to “reparative therapy” or “conversion therapy” designed to convert them into heterosexuals. “Treatment,” in addition to counseling, included penile plethysmograph (electronic shock triggered by penile erection), drugging, and hypnosis. Even though homosexuality was deleted from the DSM in 1973, it was not until December 1998 that the American Psychiatric Association finally disapproved of “reparative” or “conversion” therapy.⁸

In the 1950s, 60s, and early 70s, the US government illegally and unethically drugged unwitting US citizens with psychoactive substances, including LSD, as part of projects bluebird, artichoke, and mk-ultra, all in an attempt to develop techniques of mind control. Richard Helms, the chief planner of mk-ultra, wrote in a planning memorandum that the program was designed in part to:

Investigate the development of chemical material which causes a reversible non-toxic aberrant mental state, the specific nature of which can be reasonably well predicted for each individual. This material could potentially aid in discrediting individuals, eliciting information, and implanting suggestions and other forms of mental control.⁹

⁶ J. Robitscher, ed., *Eugenic Sterilization* (Springfield, IL: Charles C. Thomas, 1973), 118-119 [listing sterilization data for most states]; E. Brantlinger, *Sterilization of People with Mental Disabilities: Issues, Perspectives, and Cases* (Westport, Conn.: Auburn House, 1995) 25; E.J. Larson & L. Nelson III, *Involuntary Sexual Sterilization of Incompetents in Alabama: Past, Present, and Future* 43 Alabama L. Rev. 399 (1992), 407.

⁷ *Buck v. Bell* (1927) 274 US 200, 207. Eugenic sterilization, including the Norplant contraceptive device, will be further discussed in subsequent instalments of this essay.

⁸ *American Psychiatric Association Rebukes Reparative Therapy*, Press Release No. 98-56, December 14, 1998. Viewable online at http://www.psych.org/news_stand/rep_therapy.html. [Accessed: 23 January 2000.]

Alan Turing, one of the founding fathers of artificial intelligence theory, was arrested for violation of British homosexuality statutes in 1952 after he admitted having a homosexual affair. Believing that his sexual orientation was a personal matter, neither a sin nor a crime, he presented no defense at his trial, which occurred on 31 March 1952. In lieu of prison, he was ordered to submit to estrogen injections for a year. Following a period of depression, likely the result of the injections, he committed suicide on June 7, 1954.

⁹ Memorandum from ADDP items to DCI Dulles, 4/3/53 quoted in *The Mind Manipulators* (Paddington Press, 1978), 132.

While the mk-ultra program began with tests in the laboratory on willing volunteers, the CIA quickly saw the need to expand the testing to determine what the effects of drugs such as LSD would be on unsuspecting people. Thus, in 1953, the CIA moved its mind control program into the streets of America and began the “covert testing of materials on unwitting US citizens.”¹⁰

In subsequent instalments of this essay, we will see how the US Government continues to promulgate certain policies that, while cloaked in “public health” or “public safety” justifications, amount to an impermissible government action aimed at policing thought and interfering with the mental processes of citizens.

Freedom’s Invisible Landscape

The right to control one’s own consciousness is the quintessence of freedom. If freedom is to mean anything, it must mean that each person has an inviolable right to think for him or herself. It must mean, at a minimum, that each person is free to direct one’s own consciousness; one’s own underlying mental processes, and one’s beliefs, opinions, and worldview. This is self-evident and axiomatic.

In assessing what rights are fundamental and thus entitled to the most stringent legal protection, the US Supreme Court has stated that, fundamental liberties are those “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if [they] were sacrificed.”¹¹ Under another test, fundamental liberties were characterized by the Court as those liberties that are “deeply rooted in this Nation’s history and tradition.”¹²

Slightly over seventy years ago, Justice Brandies acknowledged in a landmark privacy case that cognitive freedom was one of the principal protections designed into the Constitution:

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 knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. 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 man.¹³

¹⁰ Inspector General’s Report on mkultra, (August 14, 1963), 7, quoted in *The Mind Manipulators*, supra, 133.

For more details on the government’s bluebird, artichoke, and mkultra programs (at least those details not lost forever when Richard Helms, ordered the destruction of all records related to the projects in January 1973) see A. Schefflin & E. Opton, *Tampering With The Mind (I) & (II)*, in *The Mind Manipulators*, supra, (1978), 106-212.

¹¹ In *Palko v. Connecticut* (1937) 302 U.S. 319, 325, 326.

¹² *Moore v. East Cleveland* (1977) 431 U.S. 494, 503 (opinion of Powell, J.).

¹³ *Olmstead v. United States* (1928) 277 U.S. 438, 478 (Brandies, J., dissenting).

But, while certain justices have, at times, pointedly acknowledged the fundamental nature of cognitive freedom and the nefarious nature of government (or other “outside”) interference with the intellect, this important freedom remains only obliquely defined within the US legal system. Ironically, the lack of a comprehensive treatment may be because cognitive freedom is so self-evidently a basic human right. Whatever the reason, without a coherent cognitive liberty jurisprudence, present and future infringements on cognitive liberty risk passing unnoticed or unremedied. In the next instalment of this essay, we will begin to dig deep into privacy, due process, and First Amendment cases, in an attempt to excavate a theoretical scaffolding for cognitive liberty. As I believe the cases will show, cognitive liberty is the invisible landscape from which springs some of our most cherished and protected freedoms.

On Cognitive Liberty

Part II

...without freedom of thought there can be no free society — U.S. Supreme Court Justice Felix Frankfurter¹⁴

An Introductory Note on Banned Books and other Controlled Substances

As you read this sentence you are receiving information. Words are carriers of thoughts, whether spoken from mouth to ear, digitized and passed electronically, or downloaded into ink and passed on paper across time and space. Because words are vehicles for thoughts, words can change your opinion, give you new ideas, reform your worldview, or foment a revolution.

Attempts to control the written word date from at least AD 325 when the Council of Nicaea ruled that Christ was 100 percent divine and forbade the dissemination of contrary beliefs. Since the invention of the printing press in 1452, governments have struggled to control the printed word. Presses were initially licensed and registered. Only certain people were permitted to own or control a printing press and only certain things could be printed or copied. (This was the origin of today's copyright rules.) Works printed without prior authorization were gathered up and destroyed, the authors and printers imprisoned.

Scholars disagree as to the exact date, but sometime around 1560, Pope Paul IV published the Index Librorum Prohibitorum a list of forbidden books (i.e., controlled substances) enforced by the Roman government. When the Index was (finally) abandoned in 1966, it listed over 4,000 forbidden books, including works by such people as Galileo, Kant, Pascal, Spinoza and John Locke.¹⁵ The history of censorship has been extensively recorded by others. My point is simply the obvious one that efforts to prohibit heterodox texts and to make criminals out of those who "manufactured" such texts, were not so much interested in controlling ink patterns on paper, as in controlling the ideas encoded in printed words.

I submit that in the same way, the so-called "war on drugs" is not a war on pills, powder, plants, and potions, it is war on mental states — a war on consciousness itself — how much, what sort we are permitted to experience, and who gets to control it. More than an unintentional misnomer, the government-termed "war on drugs" is a strategic decoy label; a slight-of-hand move by the government to redirect attention away from what lies at ground zero of the war — each individual's fundamental right to control his or her own consciousness.

¹⁴ *Kovacs v. Cooper* (1949) 336 U.S. 77, 97 (concurring opinion of J. Frankfurter)

¹⁵ For a fascinating survey of suppressed literature, see the multi-volume set *Banned Books*, published by Facts on File, which covers literature suppressed on religious, social, sexual, and political grounds.

Entheogenic Oldspeak v. Drug War Newspeak

In George Orwell's dystopian novel *Nineteen Eighty-Four*, the Oceania government diligently worked to establish "Newspeak" a carefully crafted language designed by the government for the purpose of making unapproved "modes of thought impossible."¹⁶ Prior to Newspeak, the people of Oceania communicated with "Oldspeak," an autonomous natural language capable of expressing nuanced emotions and multiple points of view. By controlling language through the imposition of Newspeak — by "eliminating undesirable words" — the government of Oceania was able to control and, in some cases, completely extinguish certain thoughts. As a character in *Nineteen Eighty-Four* explained to Winston Smith "Don't you see that the whole aim of Newspeak is to narrow the range of thought? ... Every year fewer and fewer words, and the range of consciousness always a little smaller."¹⁷ Those people raised with Newspeak, having never known the wider-range of Oldspeak, might fail to notice, indeed, might be unable to even perceive, that the Government was limiting consciousness.

In 1970, just four years after the Catholic Church finally abandoned the *Index Librorum Prohibitorum*, the United States government produced its own index of forbidden thought catalysts: the federal schedule of controlled substances. Included on the initial list of Schedule I substances were seventeen substances denoted as "hallucinogens," and declared to have "a high potential for abuse," "no currently accepted medical use" in the USA, and "a lack of accepted safety" even under medical supervision. Among the list of outlawed "hallucinogens" were psilocybin and psilocin, the active principles of psilocybe mushrooms; dimethyltryptamine (DMT), the active principle in ayahuasca and many visionary snuffs; ibogaine, mescaline, peyote, and LSD.¹⁸ The experience elicited by these substances in their chemical or natural plant forms is the par excellence of "Oldspeak"—a cognitive modality dating from pre-history.

Archeological evidence suggests that humans have communed with visionary plants and potions for thousands of years. Peyote, for example, has been used for over 10,000 years. Lysergic acid diethylamide (LSD) was created by Dr. Albert Hofmann, a chemist employed by Sandoz Laboratories in Basel, Switzerland. In 1938, Dr. Hofmann synthesized LSD from a fungus commonly found in rye seeds. Its affect on consciousness remained undiscovered until April 16, 1943, when Dr. Hofmann accidentally ingested a minute amount of the substance and experienced a strange inebriation in which "the external world became changed as in a dream." Several years later, Hofmann discovered that the chemical structure of LSD is nearly identical to

¹⁶ George Orwell, *Nineteen Eighty-Four* (New York: Harcourt, Brace & Co., Inc., 1949), Appendix *The Principles of Newspeak*, 246.

¹⁷ *Ibid.*, 46.

¹⁸ The substances initially listed in Schedule I as "hallucinogenic substances" were: (1) 3,4-methylenedioxy amphetamine; (2) 5-methoxy-3,4-methylenedioxy amphetamine; (3) 3,4,5-trimethoxy amphetamine; (4) Bufotenine; (5) Diethyltryptamine; (6) Dimethyltryptamine; (7) 4-methyl-2,5-dimethoxyamphetamine; (8) Ibogaine; (9) Lysergic acid diethylamide; (10) Marihuana; (11) Mescaline; (12) Peyote; (13) N-ethyl-3-piperidyl nezilate; (14) N-methyl-3-piperidyl benzilate; (15) Psilocybin; (16) Psilocyn; (17) Tetrahydrocannabinols. (PL 91-513, Oct. 27, 1970; 21 U.S.C. sec. 812, subd. (b) (1970).) The list of Schedule I "hallucinogenic substances" now numbers 31 items. (21 CFR § 1308.11(d) (April 1999)).

that of the sacred entheogen *ololihqui*, prepared from morning glory seeds and used ritually by the Aztecs for thousands of years.

Mushrooms, of the genus *psilocybe*, were used to produce visionary states at least as early as 4000 B.C. The *psilocybe* mushroom was used in religious ceremonies long before the Aztec civilization. It was named *teonanácatl*, meaning "sacred mushroom." In 1957, working with mushrooms obtained by R. Gordon Wasson from the now famous curandera Maria Sabina, Dr. Hofmann isolated and later synthesized two active substances derived from the *psilocybe* mushroom. He named these substances *psilocybin* and *psilocin*. In 1962, Dr. Hofmann traveled to Mexico and met with Maria Sabina. During a night ceremony, she ingested 30 milligrams of the synthetic *psilocybin* and later said the effect was indistinguishable from that elicited with the sacred mushrooms themselves.

Another substance placed on the government's 1970 list of criminalized "hallucinogens" was N,N-dimethyltryptamine (DMT). This substance was first synthesized in 1931, but its entheogenic properties were not discovered until 1956. It was subsequently learned that DMT is the principal active ingredient in numerous snuffs and brews long-used by various South American Indians during religious ceremonies. The DMT containing plant *psychotria viridis* is a well-known admixture to the entheogenic brew known as *ayahuasca* or *yajé*, which archeological evidence suggests dates back as many as five thousand years.¹⁹

Some who ingest visionary plants believe that the plants talk to them and open up channels of communication with animals and other entities. Mazatec eaters of *psilocybe* mushrooms, for example, are adamant that the mushrooms speak to them:

The Mazatecs say that the mushrooms speak. If you ask a shaman where his imagery comes from, he is likely to reply: "I didn't say it, the mushrooms did." ...he who eats these mushrooms, if he is a man of language, becomes endowed with an inspired capacity to speak...The spontaneity they liberate is not only perceptual, but linguistic, the spontaneity of speech, of fervent, lucid discourse, of the logos in activity. For the shaman it is as if existence were uttering itself through him...words are materializations of consciousness; language is a privileged vehicle of our relation to reality.²⁰

Just as Newspeak was intended to make certain Old(speak) thoughts literally unthinkable, so the War on Entheogens makes certain sorts of cognition and awareness all but inaccessible.

¹⁹ For more on the historic and pre-historic use of entheogens, see Peter Furst, *Hallucinogens and Culture* (Novato, CA: Chandler & Sharp Publishers, Inc., 1976); R.E. Schultes, and A. Hofmann, *The Botany and Chemistry of Hallucinogenic Plants* (Springfield, IL: Charles C. Thomas, 1973).

²⁰ H. Munn, in, *Hallucinogens and Shamanism*, ed. M. Harner (New York: Oxford University Press, 1973), 88-89.

Philosopher and ethnobotanist Terence McKenna suggested that early man's ingestion of visionary plants may have been the very catalyst that led to the sudden expansion of human brain size between three and six million years ago, and the event which spawned the subsequent emergence of language itself. (See Terence McKenna, *Food of the Gods* (New York: Bantam Books, 1993), 25.)

Religious scholar Peter Lamborn Wilson has aptly framed the War on Entheogens as a battle over the nature of thought itself:

The War on Drugs is a war on cognition itself, about thought itself as the human condition. Is thought this dualist Cartesian reason? Or is cognition this mysterious, complex, organic, magical thing with little mushroom elves dancing around. Which is it to be?²¹

In Orwell's vision of 1984, Newspeak's power to control and limit thought depended, in part, upon the passing of time and the birth of new generations that never knew Oldspeak. As explained by Orwell in the Appendix to *Nineteen Eighty-Four*, "It was intended that when Newspeak had been adopted once and for all and Oldspeak forgotten, a heretical thought—that is a thought diverging from the principles of Ingsoc—should be literally unthinkable, at least so far as thought is dependent on words."²²

Just as Newspeak depended in part upon time eradicating knowledge of Oldspeak, today's War on Entheogens is sustainable, in part, because the current generation of young adults (those 21 - 30 years old) have never known a time when most entheogens were not illicit. Those who have never experienced the mental states that are now prohibited do not realize what the laws are denying them. It is as if nothing is being taken away, at least nothing noticeable, nothing that is missed. As pointed out by the authors of a law review article on how mandatory schooling raises issues of mass-consciousness control: "[t]he more the government regulates formation of beliefs so as to interfere with personal consciousness,...the fewer people can conceive dissenting ideas or perceive contradictions between self-interest and government sustained ideological orthodoxy."²³

Because of the personal experiential nature of entheogen-elicited cognition, only those who have been initiated into the modern day Mysteries — those who have tasted the forbidden fruit from the visionary plants of knowledge and have not fallen victim to the stigmatizing psycho-impact of "being a drug user" — are acutely aware of the gravity of what is being prohibited: powerful modalities for thinking, perceiving, and experiencing.

The very best argument for the potential value of entheogen-elicited mind states is in the entheogenic experience itself; an experience that has, in almost every case, been outlawed. That is the dilemma of entheogen policy reformation. The advocate for entheogenic consciousness is left in an even worse position than the proverbial sighted man who must describe colors to a blind person. With regard to entheogen policy, the position is worse because the "blind" are in power and have declared it a crime to see colors.

Left with the impossible task of saying the unsayable, of describing the indescribable, those who have tasted the forbidden fruit must plead their case on the fundamental philosophical and

²¹ Peter Lamborn Wilson, *Neurospace*, in 21-C (Newark, NJ: Gordon and Breach Publishers, 1996), (3)32.

²² George Orwell, *Nineteen Eighty Four*, supra, Appendix: *The Principles of Newspeak*, 246.

²³ Stephen Arons and Charles Lawrence, *The Manipulation of Consciousness: A First Amendment Critique of Schooling* in 15(2) *Harvard Civil Rights-Civil Liberties Law Review* 309-361 (Fall 1980), 312.

political level of what it means to be truly free. They must state their appeal on the ground that, with respect to the inner-workings of each person's mind, the values of tolerance and respect are far weightier and far more conducive to the basic principles of democracy, than is the chillingly named "zero-tolerance" policy that is currently in vogue. This brings us, once again, to cognitive liberty as an essential substrate of freedom.

Free Thought and the First Amendment

Benjamin Cardozo, one of the most respected and influential American legal scholars of the last century and a former Justice of the U.S. Supreme Court, affirmed cognitive liberty as central to most every other freedom:

...freedom of thought...one may say...is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.²⁴

Cognitive liberty jurisprudence must begin, then, with an effort to distil the legal principles that support some of our most cherished and well-established freedoms, and then, over time, crystallize these principles into the foundation for a coherent legal scheme governing issues related to an individual's right to control his or her own consciousness.

Given the importance of the First Amendment to U.S. and even international law, we will begin by examining how courts have construed the First Amendment—searching for evidence that the right of each person to autonomy over his or her own mind and thought processes is central to First Amendment jurisprudence.

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 assemble, and to petition the Government for a redress of grievances. (The First Amendment.)²⁵

The First Amendment's guarantees were designed to bar the government from controlling or prohibiting the dissemination of unpopular or dissenting ideas. Central to all five guarantees is the acknowledgement that people must be treated by the government as ends not means; each person free to develop his or her mind and own belief system, and encouraged to express his or her thoughts in the so-called "marketplace of ideas."²⁶ As U.S. Supreme Court Justice Felix

²⁴ *Palko v. Connecticut* (1937) 302 U.S. 319, 326-327.

²⁵ Although the First Amendment only mentions "Congress," the U.S. Supreme Court has held that the Fourteenth Amendment's Due Process Clause incorporates the First Amendment guarantees and thus makes those guarantees applicable to State governments as well as Congress. (See *Gitlow v. New York* (1925) 268 U.S. 652, 666; *Board of Education v. Pico* (1981) 457 U.S. 853, 855, fn. 1.)

²⁶ The concept of a laissez faire marketplace where ideas compete for buyers appears to date from 1919 when U.S. Supreme Court Justice Holmes wrote in *Abrams v. United States* (1919) 250 U.S. 616, 630 "[T]he ultimate good desired is better reached by free trade in ideas ... the best test of truth is the power of the thought to get itself accepted in the

Frankfurter emphasized in 1949, the freedom of expression guaranteed by the First Amendment guards against "thought becom[ing] checked and atrophied."²⁷

Free speech, free exercise, free association, a free press and the right to assemble, are all moot if the thought that underlies these actions has already been constrained by the government. If the government is permitted to prohibit the experiencing of certain thought processes, or otherwise manipulate consciousness at its very roots—via drug prohibitions, religious indoctrination, monopolizing media, or any number of methods—it need not even worry about controlling the expression of such thoughts. By prohibiting the very formation of mind states—by strangling the free mind itself—free expression is made meaningless.

Thus, in order to prevent the erosion of the First Amendment's protection of expression, the Amendment must also provide at least as strong a protection for the underlying consciousness that forms the ideas that are later expressed. Indeed, the First Amendment was infused with the principle that each individual—not the government—ought to have control over his or her own mind, to think what he or she wants to think, and to freely form and express opinions and beliefs based on all the information at his or her disposal. The First Amendment, in other words, embraces cognitive liberty not simply as the desired outcome of the articulated guarantees (i.e., a right to express one's ideas), but also as a necessary precondition to those guaranteed freedoms (i.e., a right to form one's own ideas).

Mother May I Control My Own Consciousness?

In (the apropos year of) 1984, the Tenth Circuit Court of Appeal issued an opinion in a case involving a man who was involuntarily drugged with the "antipsychotic drug" thiorazine while he was being held for trial on murder charges.²⁸ The threshold issue was whether pre-trial detainees have a fundamental right to refuse treatment with anti-psychotic drugs. To answer this question, the Tenth Circuit analogized to a 1982 case in which the U.S. Supreme Court held that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due

competition of the market") (Holmes, J., dissenting). Using a "marketplace" analogy for the interaction and acceptance or rejection of ideas is problematic:

"Using market mechanisms to determine the logic or merit of ideas reduces ideas to commodities. When this happens the circulation of ideas is determined by their sales profiles. The 'consumer' is described as voting for the products of the Consciousness Industry [a term coined by Hans Magnus Enzensberger in his 1974 collection of essays of the same name] with his or her dollars (consumer sovereignty). Such metaphors suggest democracy and freedom of choice. They deflect attention away from the tightly controlled decision-making process that actually determine what ideas will gain entry into the commodity system. That is, they render the control system of the capitalistic consciousness industry invisible and thereby permit subterranean censorship based upon both market and political considerations. In sum, they permit elites to rule but preserve the semiotics of democracy." (Sue Curry Jansen, *Censorship: The Knot that Binds Power and Knowledge* (New York; Oxford: Oxford University Press, 1988), 134.)

²⁷ *Kovacs v. Cooper*, supra, at p. 95.

²⁸ *Bee v. Greaves* (10th Cir. 1984) 744 F.2d 1387, 1393, cert. denied, (1985) 469 U.S. 1214.

Process Clause from arbitrary governmental action."²⁹ The Tenth Circuit reasoned that if freedom from bodily restraints is a fundamental right, then individuals must also have a liberty interest in freedom from "mental restraint of the kind potentially imposed by antipsychotic drugs."³⁰

Thus, the Tenth Circuit found that freedom from government imposed mental restraints was just as fundamental as freedom from government imposed physical restraints – both were protected by the Due Process Clause. Furthermore, the Tenth Circuit found that the First Amendment was also implicated when the government attempts to involuntarily psycho-medicate a person awaiting trial. In unequivocal language, the Tenth Circuit explained "[t]he First Amendment protects communication of ideas, which itself implies protection of the capacity to produce ideas."³¹

As professor Laurence Tribe of Harvard Law School has cautioned:

In a society whose 'whole constitutional heritage rebels at the thought of giving government the power to control men's own minds,' the governing institutions, and especially the courts, must not only reject direct attempts to exercise forbidden domination over mental processes; they must strictly examine as well oblique intrusions likely to produce or designed to produce, the same result.³²

Prohibiting an otherwise law-abiding person from using entheogens is more than merely an "oblique intrusion" on the right to control one's own mental processes, or a slight trespass on the "protected capacity to produce ideas" — it is a direct frontal attack. Under the recently released National Drug Control Strategy 2000, the federal government will spend just shy of \$20 billion (\$20,000,000,000) on an all out attempt to keep people from evoking alternative states of consciousness by the use of controlled substances.³³

As I will show in the next instalment of this essay, the government's War on Unapproved Mental States, besides violating core principles of the First Amendment, also violates the very essence of the right to privacy.

²⁹ *Youngberg v. Romeo* (1982) 457 U.S. 307, 316.

³⁰ *Bee v. Greaves*, *supra*, at p. 1393.

³¹ *Ibid.*, 1393-1394; *Accord, Rogers v. Okin* (D.Mass. 1979) 478 F.Supp. 1342, 1366-1367. Other courts have held that inmates in mental hospitals have a constitutional "liberty interest" in maintaining the autonomy over their own minds in the face of doctors who want to involuntarily medicate them. (See, e.g., *United States v. Charters* (4th Cir.1988) (en banc) 863 F.2d 302, 305 (antipsychotic drugs intrude sufficiently upon "bodily security" to implicate a "protectable liberty interest"); And, still other courts have held that there is a constitutional "privacy protection" that encompasses "the right to protect one's mental processes from governmental interference." See, e.g., *Rennie v. Klein* (D.N.J. 1978) 462 F. Supp. 1131, 1144 ("the right of privacy is broad enough to include the right to protect one's mental processes from governmental interference").

For a comprehensive survey of forced mental treatment cases, see Bruce J. Winick, *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, University of Miami Law Review (September 1989), 44(1) 1-103.

³² L. Tribe, American Constitutional Law Sec. 15-5, at p. 889 (1978) (quoting *Stanley v. Georgia* (1969) 394 U.S. 557, 565.)

³³ The National Drug Control Strategy 2000 can be read online via the CCLE's Drug Law Library at www.cognitiveliberty.org/DLL/[Accessed: May 17, 2000.]

On Cognitive Liberty

Part 3

In the last decade, new computer-based methods for storing, searching, and sharing data about individuals have proliferated. With the popularization and commercialization of the Internet, the tracking of individuals and their databodies has become big business, one in which governments increasingly participate. In a similar vein, optical devices have become smaller and cheaper, leading to an expansion of government and corporate surveillance cameras, which continuously monitor an ever-increasing number of private and public spaces. These technologically-facilitated developments have revitalized the ongoing debate about privacy. At issue is what form privacy will take—both as a principle, as well as a legal protection—in the so-called Information Age.

While it is commonly thought of as a fundamental right, privacy is not expressly protected by the U.S. Constitution. In the United States, the law of privacy has developed in a hodgepodge manner, largely by Supreme Court decisions in which the Court was presented with a specific factual scenario and determined whether or not a privacy right existed in that specific instance. This development pattern has led some legal scholars to declare that rather than an overarching “right to privacy,” citizens of the United States enjoy only particularized “rights” to privacy—those that the U.S. Supreme Court has established in various cases, or that the U.S. Congress has enacted as specific statutory protections.

The U.S. Supreme Court, for example, has found a fundamental right to privacy in the following basic areas: (1) reproduction, (2) marriage, (3) activities inside the home, (4) the right to refuse medical treatment, and (5) raising children. Similarly, Congress has passed federal laws or regulations that grant (to a greater or lesser degree) privacy protection in a host of areas, including the contents of first-class mail, information concerning which videotapes you rent, and information about your bank records.

Although these protections were created by particular court decisions or by specific statutory enactments, they share an underlying reasoning and common principles, revealing that a general concept of privacy does indeed exist.

The legal concept of privacy has developed in fits and starts, often in union with technological developments. Up until the late 1800s, “privacy” was by-and-large limited to providing a remedy when someone physically interfered with your (private) property or with your physical body. A hundred years ago, the right to privacy was not much more than a right to be free from physical battery and a right to repel invaders from your land. A major development occurred in 1890, when Samuel Warren and Louis Brandies penned an influential law review article titled “The Right to Privacy.”³⁴ Warren and Brandies wrote at the time when portable cameras and audio recording devices were—for the first time—available to common people, and newspaper reporters aggressively embraced these new devices. It was the genesis of the paparazzi.

³⁴ L.D. Brandies and S. Warren, *The Right to Privacy. The Implicit Made Explicit*, in Harvard L.R., 4; (1890) 193-220.

In their article, Warren and Brandies articulated a legal principle, based on general concepts of privacy, which would provide people with protection against reporters' efforts to publicize personal information. As Warren and Brandies wrote:

Instantaneous photographs and newspaper enterprises have invaded the sacred precinct or private and domestic life; and numerous mechanical devices threaten to make good the [biblical] prediction that “what is whispered in the closet shall be proclaimed from the housetops.”³⁵

With their focus on the events of their time, Warren and Brandies sketched out a theory of privacy that was an extension of the common law protection of (private) property—a new theory designed to encompass and protect the public disclosure by reporters of private or personal information. This broader right they succinctly termed “the right to be let alone.”

Over 100 years later, this basic phrase remains the touchstone of what is commonly meant by the “right to privacy.”

Cognitive Liberty and the Right to Privacy

Just as Warren and Brandies called for a revisioning of “privacy” in the then-new age of portable cameras and audio recorders, as we enter into the third millennium, with ongoing developments in drug creation, nano-technology, genetic engineering, and mind-machine interfacing, it is again time to explore the meaning of privacy and the scope of what is to receive legal protection as “private” in this (post)modern age. As the U.S. Supreme Court noted in 1910:

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of Constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, “designed to approach immortality as nearly as human institutions can approach it.”³⁶

Thus, while the current privacy debate has centered on new computer surveillance technology with the power to capture and control more and more data about each of us, it is time for the privacy debate to acknowledge, and make explicit, that a person's mind and mental processes must be protected as private. “[T]he concept of privacy embodies the ‘moral fact that a person

³⁵ *Ibid.*, 82.

³⁶ *Weems v. United States* (1910) 217 U.S. 349, 373.

belongs to himself and not others nor to society as a whole.”³⁷ Certainly, a person’s thoughts and thought processes belong to himself or herself, and not to society, the government, or any other meddlesome external force.

Inasmuch as a right to privacy entails the right to be let alone, and centers on the interior and intimate aspects of a person’s life, cognitive freedom and autonomy should become a central touchstone for how we conceive of, and apply, a modern right to privacy. The areas in which the Supreme Court or Congress has expressly declared a right to privacy all center on interior spaces as opposed to exterior spaces, and serve to strengthen and protect the autonomy of the personal, or individual self. There is nothing more interior, and nothing more important and central to individual autonomy than one’s consciousness. Indeed, without independent consciousness, no sense of self is even possible.

Despite its self-evident importance to us today, the idea that a person is entitled to privacy over his or her own thoughts and thought processes is actually a fairly recent concept. For most of history, the inner workings of the mind have been perceived as a threat to the Church-State. Broad expanses of the U.S. legal system are premised on an Aristotelian-Thomistic world view. Both Aristotle and Thomas Aquinas viewed God as a “Supreme Being” who exists outside of and above humankind. In contrast to God, evil was located within the individual. The concept of privacy that developed under the Aristotelian-Thomistic belief system was one inherently skeptical of the human interior and sought to essentially force into private—to shield behind closed doors—such things as death, birth, and personal hygienic matters. Under the Aristotelian-Thomistic tradition, the privacy protections that did exist were limited to those that would benefit the community and ultimately promote the pleasure of God. Privacy, then, to the extent that it exists under a Aristotelian-Thomistic paradigm is there to serve and promote the “general will” rather than to advance individual autonomy and self-actualization.

A Platonic or Buddhist belief system is just one among a host of other ways to view the world. In these systems of thought (and many other “religions,” and/or “philosophies”), god(s) exists both inside and outside of each person. Thus, a person’s interior thoughts and thought processes are not feared, but are instead cultivated, revered, and protected.

Today, however, the U.S. prides itself on being a secular, pluralist country, free from the shackles of a dominating Church power. As such, it is no longer appropriate to limit the concept of privacy to centuries-old models; indeed, just as Brandies and Warren did over a century ago, it is imperative that we continue to update our concept of privacy to fit current circumstances.

A modern conception of privacy must shed the long-standing allegiance to a single way of conceiving of Reality, and recognize that privacy is rooted in furthering human dignity and autonomy, and in protecting each person’s right to conceive of the world in his or her own way. Describing the contours of a modern right to privacy, Robert Ellis Smith, attorney and publisher

³⁷ *Thornburgh v. American College of Obstetricians & Gynecologists* (1986) 476 U.S. 747, 777, n. 5 (Stevens, J., concurring), quoting Fried, *Correspondence*, 6 Phil. & Pub. Affairs (1977) 288-289.

of the Privacy Journal, aptly included “a sense of autonomy, a right to develop a unique personality and living space, and a right to distinguish one’s own persona from everyone else’s.”³⁸

As noted earlier, the U.S. Supreme Court has a spotty record with regard to upholding individual privacy. The Court has found a narrow range of situations in which a protected privacy right exists, and a host of situations in which it does not. In 1928, for example, the Supreme Court ruled that the police could tap a person’s telephone so long as they did not enter the person’s home in order to place the tap.³⁹ Not until 1967 did the Court rule that the content of telephone conversations was protected as private regardless of whether the line was tapped from inside or outside of the home.⁴⁰ In 1984, the Supreme Court held that people have no legitimate privacy right with respect to garbage cans that they have placed on the curb for pickup. Such garbage, held the Court, may be examined by a police officer without any need to obtain a warrant.⁴¹ In 1989, the Court held that the police did not violate the privacy right of an individual when they flew over his home in a helicopter and peered through a hole in his roof in a search for marijuana plants.⁴² The latter two cases grew out of the War on (certain) Drugs, but their holdings extend far beyond drug cases, significantly reducing the right of privacy for all Americans.

In cases raising issues that directly concern the privacy of a person’s body in the face of government intrusion, the decisional trend has been more in favor of individual autonomy. For example, in 1965 the Supreme Court held that the decision of whether to use birth control was a private issue for married couples (a ruling later extended to unmarried couples).⁴³ That case involved a Connecticut law prohibiting the use of “any drug, medicinal article or instrument for the purpose of preventing conception.” Such a law, held the Court, infringed upon a constitutionally protected “zone of privacy” reserved to individuals—the right to make their own decisions about reproduction. The Court struck down the Connecticut law based on what it called “the familiar principle, so often applied by this Court, that a ‘governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.’”⁴⁴

In *Roe v. Wade*, the court held that the “zone of privacy” encompasses and protects a woman’s decision to terminate her pregnancy.⁴⁵

The principles underlying the Supreme Court’s privacy rulings, especially those invoked in cases concerning an individual’s right to make decisions about the interior of his or her body, support

³⁸ Quoted in D. Brin, *The Transparent Society* (Reading, Mass.: Addison-Wesley, 1998) 77.

³⁹ *Olmstead v. United States* (1928) 227 U.S. 438.

⁴⁰ *Katz v. United States* (1967) 389 U.S. 347.

⁴¹ *California v. Greenwood* (1988) 486 U.S. 35.

⁴² *Florida v. Riley* (1989) 488 U.S. 445.

⁴³ *Griswold v. Connecticut* (1965) 381 U.S. 479.

⁴⁴ *Ibid.*, 485, quoting, *NAACP v. Alabama* (1964) 377 U.S. 288, 307.

⁴⁵ *Roe v. Wade* (1973) 410 U.S. 113.

the proposition that personal decisions about how to manage one's interior thought processes and consciousness fall within a protected zone of privacy reserved for individuals, and protected against governmental invasion or usurpation. Just as the Connecticut law that banned all use of contraceptives was struck down as "unnecessarily broad," today's drug prohibition laws, which outlaw all use of certain plants and psychoactive chemicals, trespass upon the zone of privacy that protects an adult's right to make decisions about how to manage his or her own consciousness.

Society recognizes cognitive privacy as reasonable. What goes on exclusively inside a person's mind has traditionally been a private affair. The specter of Orwell's "mind police" is universally chilling, as is the idea of a government employing mind control or thought-manipulation techniques on its citizenry. It is, indeed, a conservative position to state that if freedom is to mean anything, it must mean that what goes on inside a person's skull is a private matter and something which that person—not the government—has the right to control.

Just about the only time this cognitive privacy principle is questioned is when it is applied to "drugs." For example, in 1968, the U.S. Supreme Court held that "the mere private possession of obscene matter cannot be made a crime."⁴⁶ In this case, Mr. Stanley was found in possession (in his own home) of some pornographic films. He was prosecuted under a Georgia law that made possession of "obscene matter" a crime. The U.S. Supreme Court struck down the Georgia law, finding that the law violated the First Amendment. The Court distinguished laws that regulate the public distribution of "obscene material" from the Georgia law, which unlawfully targeted mere private possession of such matter. Hidden away in a footnote, however, the Court remarked that the same reasoning did not apply to drugs:

What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal.⁴⁷

This was non-binding dictum (commentary that is superfluous to the actual holding in the case). The Supreme Court has never been squarely presented with the argument that cognitive liberty is a fundamental right, or that outlawing mere possession or use of psychoactive drugs infringes on that fundamental right.

Aside from the comment in the footnote, the reasoning that pervades the Court's opinion in Stanley supports the fundamental principle that what goes on inside a person's head, the processing and information therein, is entitled to privacy. The Court emphasized that the Constitution "protects the right to receive information and ideas," and that this right holds

⁴⁶ *Stanley v. Georgia* (1968) 394 U.S. 557, 559.

⁴⁷ *Ibid.*, 568, fn. 11.

irrespective of an idea's "social worth."⁴⁸ The Court also accepted Mr. Stanley's argument that he had a constitutional right to control his own intellect—to determine for himself what to read or watch in the privacy of his own home:

[Mr. Stanley] is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own home, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.⁴⁹

When Georgia countered that its law was necessary to protect people from the detrimental effects of obscenity, the U.S. Supreme Court recoiled, noting that Georgia's argument was an inappropriate attempt "to control the moral content of a person's thoughts... an action wholly inconsistent with the philosophy of the First Amendment."⁵⁰ The government, explained the Court, "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."⁵¹

In the end, the Court in Stanley concluded that the government may regulate obscenity, but "that power simply does not extend to mere possession by an individual in the privacy of his own home."⁵²

The same principles ought to apply with regard to psychoactive drugs that are used by adults in the privacy of their own homes. If, as Justice Marshall wrote in Stanley, "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds," the State has no business telling a man or woman sitting in his or her own home, what states of consciousness are acceptable and what states of consciousness are not.

While the U.S. Supreme Court has never considered a case in which the issue was framed as "cognitive privacy," several state courts have examined the issue of whether drug use falls within

⁴⁸ Ibid., 564.

⁴⁹ Ibid., 565.

⁵⁰ Ibid., 565-566.

⁵¹ Ibid., 566.

⁵² Ibid., 568.

a protected privacy right.⁵³ In all but one case, these state courts have stacked the deck against cognitive privacy, by narrowly framing the issue as whether or not there is a fundamental right to use drug x, rather than whether or not there is a fundamental right to control one's own consciousness—a fundamental right upon which drug prohibition laws substantially infringe.

One interesting case was decided in 1975 by the Alaska Supreme Court. In *Ravin v. State*,⁵⁴ the Alaska Supreme Court held that the possession and use of marijuana within one's own home was included within the scope of the privacy protection guaranteed by the Alaska Constitution. The case centered on Irwin Ravin, a man arrested and charged with possession of marijuana. Mr. Ravin filed a motion to dismiss, arguing that Alaska's laws prohibiting marijuana use unconstitutionally infringed upon his right to privacy as guaranteed by both the U.S. and Alaska Constitutions.

The Alaska court examined U.S. Supreme Court precedent and concluded that the opinions by the high court do not support a privacy right to possess marijuana, because “the federal right to privacy only arises in connection with other fundamental rights.” The Alaska court then went on to examine whether the privacy protection of the Alaska Constitution protects an adult's possession of marijuana in his or her home.⁵⁵ The court noted that in a previous case,⁵⁶ it struck down a public school rule that prohibited long hair, finding that the school's rule was prohibited by the Alaska Constitution's privacy protection. In that case, the Alaska Supreme Court explained that “the right ‘to be let alone’—including the right to determine one's own hairstyle in accordance with individual preferences and without interference of governmental officials and agents—is a fundamental right under the constitution of Alaska.”

The court then revealed an anti-marijuana bias, stating “few would believe they have been deprived of something of critical importance if deprived of marijuana, though they would if stripped of control over their personal appearance.” Here, the court was making an assumption without evidentiary support, and was also incorrectly framing the issue. Some people consider their marijuana use at least as important as their choice of hairstyle. Further, the court drew a

⁵³ *State v. Murphy*, 570 P.2d 1070, 1073 (Ariz. 1977); *Kreisher v. State*, 319 A.2d 31, 32 (Del. Super. Ct. 1974); *Laird v. State*, 342 So.2d 962, 963 (Fla. 1977); *Borras v. State*, 229 So.2d 244, 246 (Fla. 1969); *Blincoe v. State*, 204 S.E.2d 597, 599 (Ga. 1974); *State v. Renfro*, 542 P.2d 366, 368-69 (Haw. 1975); *State v. Baker*, 535 P.2d 1394, 1399 (Haw. 1975); *State v. Kincaid*, 566 P.2d 763, 765 (Idaho 1977); *State v. O'Bryan*, 531 P.2d 1193, 1198 (Idaho 1975); *NORML v. Scott*, 383 N.E.2d 1330, 1332-33 (Ill. App. Ct. 1978); *State v. Chrisman*, 364 So.2d 906, 907 (La. 1978); *Marcoux v. Attorney Gen.*, 375 N.E.2d 688, 691 (Mass. 1978); *Commonwealth v. Leis*, 243 N.E.2d 898, 903-04 (Mass. 1969); *People v. Alexander*, 223 N.W.2d 750, 752 (Mich. App. 1974); *State v. Kells*, 259 N.W.2d 19, 24 (Neb. 1977); *State v. Nugent*, 312 A.2d 158, 162 (N.J. Super. Ct. App. Div. 1973); *Miller v. State*, 458 S.W.2d 680, 684 (Tex. Crim. App. 1970); *State v. Anderson*, 558 P.2d 307, 309 (Wash. Ct. App. 1976); *State ex rel. Scott v. Conaty*, 187 S.E.2d 119, 123 (W.Va. 1972).

Some of these cases, as well as others not listed here, have compelling dissenting opinions in which judges elaborated certain aspects of cognitive liberty. For example, in *State v. Kramer* (Hawaii 1972) 493 P.2d 306, a case upholding the defendant's conviction for marijuana possession, Justice Levinson filed a dissenting opinion in which he argued that the experiences generated by the use of marijuana are mental in nature, and thus among the most personal and private experiences possible. (Id. at p. 315.)

⁵⁴ *Ravin v. State* (1975) 537 P.2d 494.

⁵⁵ Unlike the U.S. Constitution, the Alaska constitution expressly provides for a right to privacy. Article I, Sec. 22 of the Alaska constitution states: “The right of the people to privacy is recognized and shall not be infringed.”

⁵⁶ *Breese v. Smith* (Alaska 1972) 501 P.2d 159.

false comparison: comparing a broad principle: “to control one’s appearance;” with a narrower principle: “to smoke marijuana.” The correct analogy would have been to compare the two actions *at the same level of generality*; thus, the right to control one’s *outward appearance* ought to have been compared to the right to control one’s *inner cognition*.

Based on its faulty comparison, the Ravin court refused to find that marijuana smoking was within the Alaska constitution’s privacy protection. Instead, the court relied on the well-established privacy protections surrounding the home. The court explained, “if there is any area of human activity to which a right to privacy pertains more than any other, it is the home.”⁵⁷ The right to privacy within the home, held the court, “encompass[es] the possession and ingestion of substances such as marijuana in a purely non-commercial context in the home, unless the state can [show that outlawing possession of marijuana in the home is necessary to achieve a legitimate state interest.]” More specifically, the court noted that the government had the “burden of showing a close and substantial relationship between the public welfare and control of ingestion or possession of marijuana in the home for personal use.”⁵⁸

Having shifted the burden to the government, the court then examined whether the government had met its burden. At trial, the government claimed that the use of marijuana caused a host of health problems to the marijuana user, including damage to the immune system and chromosomal structure, extreme panic reactions, long-term psychological problems, loss of motivation, and occasional violent behavior.

Before addressing these assertions, the Alaska Supreme Court questioned whether the government has a legitimate interest in “protecting” a person from him or herself. While the court was able to conceive of some circumstances in which the government may have a legitimate interest in protecting a person from him or herself, such government paternalism was the exception rather than the rule:

...the authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large as it relates to matters of public health or safety, or to provide for the general welfare. We believe this tenet to be basic to a free society. The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals. The right of the individual to do as he pleases is not absolute, of course: it can be made to yield when it begins to infringe on the rights and welfare of others.⁵⁹

Having stressed that the government should not be in the business of protecting people from themselves, the court nevertheless examined the government’s claims that marijuana was dangerous to its users, finding the evidence of serious harm unpersuasive. The court explained:

⁵⁷ Ravin, *supra*, 537 P.2d at p. 503.

⁵⁸ *Ibid.*, 504.

⁵⁹ *Ibid.*, 509.

It appears that the effects of marijuana on the individual are not serious enough to justify widespread concern, at least as compared with the far more dangerous effects of alcohol, barbiturates and amphetamines.⁶⁰

Ultimately, the Alaska Supreme Court concluded “no adequate justification for the state’s intrusion into the citizen’s right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown.”⁶¹

While the *Ravin* case was a clear victory for marijuana users, and for privacy advocates in general, it was more about the privacy of the home, than about cognitive freedom and privacy.⁶² As mentioned earlier, the court did not consider whether cognitive liberty was protected by the United States Constitution or by the Alaska constitution. Instead, the decision simply underscored the longstanding and socially accepted principle that a “man’s home is his castle.” The case has yet to be forcefully made that our minds, as much as our homes, are a private inward domain entitled to protection against unwanted governmental intrusions and prohibitions.

⁶⁰ *Ibid.*, 509-510.

⁶¹ *Ibid.*, 511.

⁶² In 1982, the Alaska legislature codified *Ravin* in the state’s criminal code by legalizing possession of up to four ounces of marijuana in a private place. (See 1982 Alaska Sess. Laws 2 ch. 45.) In 1990, Alaska voters adopted a Voter Initiative that amended Alaska Statutes section 11.71.060 so as to again make possession of marijuana in a private place illegal. The (state) constitutional validity of this initiative is dubious because the initiative merely altered the general Alaska Criminal Code, not the Alaska Constitution itself, upon which *Ravin* was based. (See, e.g., *State v. McNeil*, No. 1KE-93-947 (D. Alaska Oct. 29, 1993).

On Cognitive Liberty

Part IV

John Stuart Mill and the Liberty of Inebriation

As an important nineteenth or twentieth century work on political and social theory, John Stuart Mill's essay *On Liberty* ([1859] 1975)⁶³ is considered to be second only to the Communist Manifesto. Written in the midst of the growing political power of Christian temperance groups pushing for alcohol prohibition and speaking directly to the issue of the rights of individuals and the limits of authoritarian control, *On Liberty* is a seminal anti-prohibition text, which assumes ever greater importance and relevance when considered in the context of today's \$19 billion "war on drugs." Drafted in the tumult of the first societal debates over alcohol prohibition, Mill's essay examines "the nature and limits of the power which can be legitimately exercised by society over the individual" (3) and is one of the earliest political statements against drug prohibition as well as a vindication of cognitive liberty.

On Liberty was published in 1859 but was penned in 1855, only four years after the state of Maine enacted the first law in the United States prohibiting the sale of alcohol, an action that kicked off a wave of prohibition laws in the country. By 1855, thirteen states had passed alcohol prohibition laws, and the American Temperance Society had long since shifted from a call for "temperance" to a demand for wholesale prohibition. In England, where Mill wrote, the United Kingdom Alliance of Legislative Suppression of the Sale of Intoxicating Liquors sprang up in 1853, and it used the Maine law as a model in pushing for alcohol prohibition in England. Thus, it is not surprising that Mill's consideration of the rights of individuals vis-à-vis society and the government, forged in the midst of such heated social controversy, would confront directly the important question of cognitive liberty.

"The object of this Essay," wrote Mill, "is to assert one very simple principle...that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection... that is to prevent harm to others" (10–11). Government interference, wrote Mill, is appropriate only when a person engages in conduct that threatens the interests of others. What happens inside a person's body or mind is that person's private business, not the business of society and certainly not the business of the government. He expressed this point unambiguously: "Over himself, over his own body and mind, the individual is sovereign" (11).

So long as a person's decision and subsequent conduct did not threaten others with harm, Mill considered the person's action to lie within a protected "region of human liberty" (13).

⁶³ Mill, John Stuart. [1859]1975. *On Liberty*. Edited by David Spitz. Toronto: W. W. Norton.

Encompassed within this domain of liberty is:

the inward domain of consciousness; demanding liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological...liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. (13)

For Mill, a society that refuses to recognize and respect this sphere of liberty is not a free society, and laws that invade this province are unjustifiable; freedom demands this protected domain. “The only freedom which deserves the name,” writes Mill, “is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it” (14).

Mill was quick to emphasize that these principles apply only to adults. Children, while they are still under the care of an adult, “must be protected against their own actions as well as against external injury” (12), and it is therefore appropriate for society or the government to act paternalistically toward them. Mill also acknowledges and repeatedly underscores that when a person’s behavior does directly affect other people, it is, by its very nature, social conduct and thus becomes an appropriate object for social and government control. The roots of alcohol prohibition grew out of Protestant Christianity. In 1832, James Teare, founder of the Preston General Temperance Society in England, was speaking for many temperance advocates of the time when he took the floor at a temperance meeting in Manchester and declared all intoxicating liquor anathema to religious people: “the sooner it is put out of this world, the better”.⁶⁴ Not surprisingly, therefore, woven throughout *On Liberty* are subtle and not so subtle jabs at both the timidity (“essentially a doctrine of passive obedience,” (48)) and the coerciveness of Christianity. Religion, says Mill, is an “engine of moral repression” (14), seeking “control over every department of human conduct” (14). In some of his harshest words, Mill admonishes:

Christian morality (so called) has all the characters of a reaction; it is, in great part, a protest against Paganism. Its ideal is negative rather than positive; passive rather than active; Innocence rather than Nobleness; Abstinence from Evil, rather than energetic Pursuit of Good: in its precepts (as has been well said) “thou shalt not” predominates unduly over “thou shalt.” In its horror of sensuality, it made an idol of asceticism, which has been gradually compromised away into one of legality.(47–48)

Mill’s most fundamental objection to the Christianity of the mid–nineteenth century was to its complete capitulation to authority, coupled with its all-encompassing dogmatism and a singular way of conceiving of the world; these latter traits, Mill believed, often led Christians to suppress eccentricity, individuality, original thought, and simple pleasures.

⁶⁴ Inglis, Brian. 1975. *The Forbidden Game: A Social History of Drugs*. New York: Charles Scribner’s Sons, p.137.

On Liberty champions responsible alcohol inebriation as a private pleasure, which the government has no authority to interfere with as long as the drinker is not harming another person. Provided that a person's conduct does not affect the interests of other people, writes Mill, that person should have "perfect freedom, legal and social, to do the action and stand the consequences" (70).

Mill rejects challenges that assert that a person's actions inherently have some effect on society or that an act that harms the individual also harms society. Mill responds to these challenges on two levels. First, he acknowledges that if a person's "self-regarding" conduct disables him from performing some public duty or produces identifiable harm to another person, then that conduct properly cannot be considered "self-regarding," and society may control or punish the person. Using alcohol intoxication as an example, Mill explains: "No person ought to be punished simply for being drunk; but a soldier or a policeman should be punished for being drunk on duty. Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law" (76). To the extent that the "harm" to others from drinking alcohol is amorphous or that the drinker violates no specific duty, Mill views the ancillary "harm" from the drinker's action as an "inconvenience...which society can afford to bear, for the sake of the greater good of human freedom" (76).

In essence, Mill views the temperance challenge as embodying a Puritanical perspective that considers innumerable self-regarding actions to be morally wrong and thus inherently injurious to the society. He rejects this position as religious moralizing cloaked in claims for social policy. As an example, he quotes the secretary of the United Kingdom Alliance for the Legislative Suppression of the Sale of Intoxicating Liquors, who wrote:

If anything invades my social rights, certainly the traffic in strong drink does. It destroys my primary right of security, by constantly creating and stimulating social disorder. It invades my right of equality, by deriving a profit from the creation of a misery I am taxed to support. It impedes my right to free moral and intellectual development, by surrounding my path with dangers, and by weakening and demoralizing society, from which I have a right to claim mutual aid and intercourse. (83)

Mill calls the secretary's definition of social rights a "monstrous principle" (83) that, if accepted, would vitiate the meaning of liberty entirely: "there is no violation of liberty which it would not justify; it acknowledges no right to any freedom whatever....The doctrine ascribes to all mankind a vested interest in each other's moral, intellectual, and even physical perfection, to be defined by each claimant according to his own standard" (84).

Although Mill is perfectly capable of presenting his argument in theoretical terms, he turns his attention to what he calls "gross usurpations upon the liberty of private life actually practiced" (82) and without equivocation responds to efforts under way at that time to prohibit the drinking of alcohol:

Under the name of preventing intemperance, the people of one English colony, and of nearly half the United States, have been interdicted by law from making any use whatever

of fermented drinks, except for medical purposes: for prohibition of their sale is in fact, as it is intended to be, prohibition of their use. And though the impracticability of executing the law has caused its repeal in several of the States which had adopted it...an attempt has notwithstanding been commenced, and is prosecuted with considerable zeal by many of the professed philanthropists, to agitate for a similar law in this country. (82–83)

Mill acknowledges that selling alcohol is a social act because it inherently involves a buyer and a seller, but, as he notes, the underlying aim of the laws that prohibit sales of alcohol is to squelch the use of alcohol. “The infringement complained of is not on the liberty of the seller,” notes Mill, “but on that of the buyer and consumer; since the state might just as well forbid him to drink wine as purposely make it impossible for him to obtain it” (83). Mill remarks that when a “trade law” has the effect of prohibiting a commodity, it is really a prohibition law in disguise.

Similarly, Mill is skeptical of so-called sin taxes, which artificially inflate the price of a product in order to discourage its use. Such a tax, he explains, “is a prohibition, to those whose means do not come up to the augmented price; and to those who do, it is a penalty laid on them for gratifying a particular taste” (93). A person’s “choice of pleasures,” writes Mill, ought to be each person’s “own concern, and must rest with his own judgment” (93). Ultimately, however, Mill would permit a special tax on products such as alcohol, but only to the extent that the tax increased revenue for the government. A “sin tax” would be inappropriate if set so high that it actually dissuaded a sufficient number of buyers so as to result in a decrease in total tax revenues from sales of the product.

With respect to items that can be abused, such as “poisons,” Mill notes that “there is hardly any part of the legitimate form of action of a human being which would not admit of being represented, and fairly too, as increasing the facilities for some form or other of delinquency” (89). Thus, if a person desires to purchase a poison, it is inappropriate for the government to enjoin the purchase merely because the person might abuse the poison or use it to commit a crime. Instead, the laws should stop after requiring that drugs and poisons be labeled with cautionary statements. Mill does not believe that doctors should be the gatekeepers to drugs, noting that “to require in all cases the certificate of a medical practitioner would make it sometimes impossible, always expensive, to obtain the article for legitimate uses” (90). At most, any adults who wish to purchase such an item may be required to register their name, address, and an explanation of why they are purchasing a particular item.

Although Mill firmly believes it would be an illegitimate use of power for the government to prohibit inebriation based on an inchoate concern that an inebriated person might cause harm to others, he concedes that if an inebriated person does harm another person, then the government rightfully may prohibit that person from becoming inebriated in the future. “Drunkenness,” Mill explains, “in ordinary cases, is not a fit subject for legislative interference; but I should deem it perfectly legitimate that a person, who had once been convicted of any act of violence to others under the influence of drink, should be placed under a special legal restriction, personal to himself; that if he were afterwards found drunk, he should be liable to a penalty...The making himself drunk, in a person whom drunkenness excites to do harm to others, is a crime against others” (90).

On Liberty even considers whether the government properly may regulate pubs where alcohol is served. In this regard, Mill concludes that because such places are necessarily social and because public harms associated with drunkenness are more likely to occur in or near such establishments (at least relative to other public places), the government may regulate them, setting closing times and restricting operating licenses to “persons of known or vouched for respectability” (94). Any other restrictions, however, including setting a limit on how many pubs may exist in any given area, would be overreaching. Such a limit “for the express purpose of rendering them more difficult of access, and diminishing the occasions of temptation, not only exposes all to an inconvenience...but is suited only to a state of society in which the labouring classes are avowedly treated as children or savages” (94).

On Liberty stands as a classic document in defense of individual freedom, as relevant and persuasive today as it was in 1859. All elected officials, jurists, and public-policy makers should read *On Liberty*, along with the Bill of Rights. Whereas modern-day politicians, entranced by the “war on drugs,” rapaciously violate “the inward domain of consciousness” (13) by imposing ever more drug prohibitions and placing hundreds of thousands of citizens behind bars for drug offenses, *On Liberty* powerfully avows that a government grossly exceeds its legitimate power when it interferes with matters of the mind and the interior condition of its citizenry.