

The Nascent Right to Psychological Integrity and Mental Self-Determination

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30.1 INTRODUCTION

This chapter presents the case for recognising a slowly emerging human right that protects the human mind, the right to *psychological* or *mental self-determination*, along with some suggestions for a plausible construal. The human mind is an entity poorly protected by law and poorly understood by science: what it truly is, what it consists and what it is made of, the laws and dynamics by which it operates, and how it relates to the brain as its material substrate are among the last mysteries of science and metaphysics.¹ People, however, are intimately familiar with many facets of their minds from personal experience, and they constantly interact with minds of others. In light of Descartes' famous proposition *cogito ergo sum*, a thinking mind might well be the essence of being human. For legal purposes, a rough definition of the mind may suffice: it comprises all conscious and non-conscious mental states, events and processes, i.e. thoughts and beliefs, emotions and moods, as well as the underlying psychological mechanisms operating in the complex mental machinery.²

What is the legal status of the mind? What is the legal relation between a person and her own mind, and other persons' minds? Neither human rights law nor domestic law provide straightforward answers. In fact, these questions are rarely posed in this general way. By contrast, legal systems say much about bodies. Detailed rules and doctrines define permissible conduct with one's own body and bodies of others, including exceptional situations, from pregnancy over tattooing children to organ transplantation. These rules flow from, and draw limits to, the right to one's body, an idea found by different names in many jurisdictions and human rights systems. Strikingly, no corresponding rules and doctrines over permissible ways to treat minds exist.³

¹ Apart from the psy-sciences, philosophy of mind strives to shed light on the nature of the mind. For an introduction, see J. Kim, *Philosophy of Mind*, 3rd ed. (Boulder: Westview Press, 2011); D. J. Chalmers, *Philosophy of Mind: Classical and Contemporary Readings* (Oxford: Oxford University Press, 2002); and T. Metzinger, *The Ego Tunnel: The Science of the Mind and the Myth of the Self* (New York: Basic Books, 2009). An intriguing debate left aside here concerns limits of the mind. Some authors suggest the mind extends to tools conducive to thinking: A. Clark and D. Chalmers, 'The Extended Mind' (1998) 58(1) *Analysis* 7. For legal implications, see M. J. Blitz, 'Freedom of Thought for the Extended Mind: Cognitive Enhancement and the Constitution' (2010) *Wisconsin Law Review* 1049.

² Henceforth, mental states, events and processes are summarily referred to as 'mental states' to avoid repetition.

³ A comprehensive discussion of the legal status of the mind would require a systematic analysis of all norms pertaining to or affecting minds. A scholarly work of that magnitude exists neither for a specific jurisdiction, nor in a comparative perspective. Even a detailed analysis of the mind in international or human rights law exceeds the scope of this chapter, as the mind, by its nature, is affected by a great many norms. Nonetheless, a rough picture may suffice to substantiate the claim that the mind often enjoys only weak and indirect protection.

What does contemporary human rights law say about the mind? At a quick glance: a right to mental self-determination is not recognised *expressis verbis*. However, parts have been recognised in the jurisprudence of the European Court of Human Rights (ECtHR) as ‘mental’ or ‘psychological integrity’ within the scope of Article 8 (private life) of the European Convention (ECHR)⁴. This jurisprudence is reflected in the Charter of Fundamental Rights of the European Union (CFR)⁵ which came into force in 2009. Article 3(1) explicitly guarantees the right to respect for ‘physical and *mental integrity*’. However, meaning, scope and limits of the right are largely undefined and left for courts and scholars to render more precise.

In addition, the rights to freedom of thought, conscience, religion and opinion, among the oldest inhabitants in the human rights universe, protect parts of mental self-determination as their inner sides (*fora interna*). However, this protection has not played an important role in human rights litigation, nor in legal scholarship, and is largely empty in non-religious and non-conscientious matters.⁶ Accordingly, *cum grano salis*, no human right effectively protects the mind at present, but some (not well-developed) anchors exist upon which a mind-protecting right can be established.

Examining specific national systems would surely reveal more nuanced pictures. Broadly speaking, most seem hesitant, even resistant, to protect the mind comprehensively. Here are some observations. Some national constitutions secure mental integrity, but the effects of these provisions seem marginal. Some guarantee a right to health, which may include mental health.⁷ At the subconstitutional level, the weak protection of the mind is typically reflected in controversies as to whether emotional distress or anxiety can provide grounds for tort claims, or whether criminal offences cover infliction of ‘purely psychological’ harms.⁸ So while mental harms are sometimes legally relevant, jurisdictions draw many restrictions. Some have introduced narrowly tailored offences such as stalking for exceptionally severe attacks on minds.⁹ Furthermore, some offences capture some manipulative influences on decision-making (fraud, misleading information). But they frequently fail to capture manipulations more subtle than trickery, e.g.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221.

⁵ Charter of Fundamental Rights of the European Union, Nizza, 7 December 2000, in force 1 December 2009, OJ 2012 No. C 326/2.

⁶ A good analysis of *forum internum* protection is P. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005), chapters 2 and 3.

⁷ Although the claim ‘no health without mental health’ may appear evident, the protection of mental health as part of a right to health is not. For instance, the Federal Constitutional Court of Germany has repeatedly reserved judgment as to whether Art. 2(2) of the German Basic Law (*Grundgesetz*) (right to health) includes mental health. Constitutional Court of Germany, judgment, 14 January 1981, 1 BvR 612/72 (Fluglärm 1), BVerfGE 56, 54 (75).

⁸ Regarding US tort law, B. Grey, ‘Neuroscience and Emotional Harm in Tort Law: Rethinking the American Approach to Free-Standing Emotional Distress Claims’, in M. Freeman (ed.), *Law and Neuroscience: Current Legal Issues* (Oxford: Oxford University Press, 2011) speaks about emotional harm as a ‘second class citizen’. For European tort law see C. van Dam (ed.), *European Tort Law*, 2nd ed. (Oxford: Oxford University Press, 2013), pp. 714. For German law, see C. Bublitz, ‘If Man’s True Palace Is His Mind, What’s Its Adequate Protection? Mental Self-Determination and Legal Limits for Mind-Interventions’, in L. Klaming and N. van den Berg (eds.), *Technologies on the Stand: Legal and Ethical Questions in Neuroscience and Robotics* (Nijmegen: Wolf, 2011), p. 89, and C. Bublitz and R. Merkel, ‘Crimes against Minds: On Mental Manipulations, Harms, and a Human Right to Mental Self-Determination’ (2014) *Criminal law and Philosophy* 51 for a proposal of a novel criminal offence. H. Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (Oxford: Bloomsbury Publishing, 2008) is one of the few detailed studies on emotional harm in common law. Note that remedies for mental harms consequential on physical harm are less controversial, but present interest lies in stand-alone protections of minds.

⁹ For instance, §76 of the UK Serious Crime Act 2015 penalises ‘controlling and coercive behaviour in intimate or family relationships’ that causes, inter alia, ‘serious alarm or distress’ in victims (4b). §238 of the German Criminal Code penalises severe forms of stalking.

those exploiting cognitive weaknesses (e.g. Cambridge Analytica targeting people with messages that were finely but clandestinely crafted to appeal to their personalities, as revealed on social media).¹⁰ Broader mind-protecting provisions are regularly absent or poorly defined.

Against this backdrop, this chapter wishes to stimulate the idea that the mind be conceived as an entity worthy of full human rights protection. The key notion to guide the legal relation between a person and her mind should be mental self-determination – in essence: the right to self-determine what is in and on one's mind. First and foremost, it consists of claims against others to not-interfere with minds of right holders, by either factually altering minds or by imposing legal duties pertaining to them.¹¹ Section 30.2 addresses the need for such a right and Section 30.3 explores some objections to it. Some anchor points of the right in current law, along with some suggestions for its construal, are then sketched in Section 30.4. Section 30.5 reflects on whether mental self-determination is a novel human right.

30.2 IS THERE A NEED FOR A MIND-PROTECTING RIGHT?

What motivates this right – is there a need for it? Here are some preliminary answers. People change each other's minds (and brains) all the time. Accordingly, states, governments and private actors intervene in the minds of citizens in countless daily instances. Unless these interventions happen to interfere with other rights such as bodily integrity, they are, by and large, no concern for the law. How people change minds is not a legal topic in its own right; current protection of the mind is predominantly indirect and incidental. This is not an attractive state of affairs, for several reasons. First, opinions, beliefs, attitudes and emotions are targets of manifold and far-ranging attempts of influence and manipulation, from propaganda over advertisement and marketing that exploit psychological weaknesses to forceful administration of drugs. Legal protection against such interferences may prove insufficient.

Second, the present age is characterised by a high prevalence of psychological problems, at least in Western countries. Almost a third of the EU population suffers from neurological or psychiatric diseases *annually*.¹² Depression will soon become the disorder causing the highest burdens globally. First voices call upon the UN to initiate global action against the 'mental illness epidemic'.¹³ It is clear that causes of mental health problems are often poorly understood, a subject too manifold and complex to be rehearsed here, and the law is likely not the right forum for eliminating them. Nonetheless, the weak legal protection of human minds and their dire situation might not be only coincidental. The mental health epidemic urges the law to reconsider and potentially reform mind-protecting norms.

This is, third, also prompted by advances in cognitive sciences which afford novel technical means to alter minds. Minds are targeted by a range of psychological, medical and biotechnological interventions, from familiar forms of psychotherapy to pharmaceuticals to novel

¹⁰ Defining (normatively laden) terms as 'manipulative interferences' or 'undue influence' is almost impossible: see C. Coons and M. Weber, *Manipulation: Theory and Practice* (New York: Oxford University Press, 2014). Changing minds is, of course one, of the meta-themes of psychology. A classic work on influence through persuasion is R. B. Cialdini, *Influence: The Psychology of Persuasion* (New York: Collins Business, 2007).

¹¹ The right should also be conceived with a positive dimension and be applicable in the horizontal relation between private citizens, but these aspects are left aside in the following.

¹² H. U. Wittchen et al., 'The Size and Burden of Mental Disorders and Other Disorders of the Brain in Europe' (2011) 21 *European Neuropsychopharmacology* 655.

¹³ World Health Organization, *The Global Burden of Disease: 2004 Update* (Geneva: WHO, 2008), p. 43; J. K. Bass et al., 'A United Nations General Assembly Special Session for Mental, Neurological and Substance Disorders: *The Time Has Come...*' (2012) 9(1) *Plos Medicine* E1001159.

electro-magnetic methods of brain stimulation.¹⁴ Moreover, devices connecting brains with computers have become available.¹⁵ Such unparalleled means to access brains and minds call for renegotiations of the boundaries between personal and social spheres. Broadly speaking: the greater the extent to which the skull as the natural barrier of the mind becomes permeable, the more pressing the need to draw normative limits to interventions.

Reminiscent of calls for bodily self-determination in matters such as abortion, people demand the right to calibrate their minds through old and novel means, as renewed debates over legalisation of drugs for leisure and enhancement exemplify.¹⁶ Moreover, governments may show great interest in these technologies for purposes such as the military, law enforcement and criminal justice.¹⁷ However, fourth, it should be emphasised that the right does not only apply to cutting-edge technologies. In the construal suggested here, it applies to all forms of mind-interventions, from psychotherapy over advertisement to nudging,¹⁸ and thus calls for re-examining established practices.

A controversial example is coercive psychiatric medication.¹⁹ Administered without patient consent, psychiatric interventions aim at altering how patients think, feel or behave. They are paradigmatic examples of coercive state interventions into minds. It is remarkable and revealing that jurisprudence on coercive psychiatry routinely deals with minutiae of bodily effects of administered substances, and deprivations of liberty through confinement, but leaves the core question often strangely unaddressed: when is the state allowed to alter how a person thinks or feels?²⁰

¹⁴ See The President's Council on Bioethics (USA), *Beyond Therapy: Biotechnology and the Pursuit of Happiness* (New York: Dana Press, 2003); R. Merkel et al., *Intervening in the Brain: Changing Psyche and Society* (Berlin: Springer, 2007); Nuffield Council on Bioethics, *Novel Neurotechnologies: Intervening in the Brain* (London: Nuffield Council on Bioethics, 2013), available at www.nuffieldbioethics.org.

¹⁵ J. Wolpaw and E. W. Wolpaw, *Brain-Computer Interfaces: Principles and Practice* (Oxford: Oxford University Press, 2012).

¹⁶ Cognitive enhancement exemplifies the demand to alter one's mind and the corresponding right to do so: see R. G. Boire, 'Neurocops: The Politics of Prohibition and the Future of Enforcing Social Policy from Inside of the Body' (2005) *Journal of Law and Health* 215; H. Greely et al., 'Towards Responsible Use of Cognitive-Enhancing Drugs by the Healthy' (2008) 456 *Nature* 702; C. Walsh, 'Psychedelics and Cognitive Liberty: Reimagining Drug Policy through the Prism of Human Rights' (2016) 29 *International Journal of Drug Policy* 80; C. Bublitz, 'Drugs, Enhancements & Rights: Ten Points for Lawmakers to Consider', in F. Jotterlad and V. Dubljevic (eds.), *Cognitive Enhancement: Ethical and Policy Implications in International Perspective* (New York: Oxford University Press, 2016).

¹⁷ J. Moreno, *Mind Wars: Brain Science and the Military in the 21st Century* (New York: Bellevue Literary Press, 2012); T. Douglas, 'Criminal Rehabilitation through Medical Intervention: Moral Liability and the Right to Bodily Integrity' (2014) 18(2) *The Journal of Ethics* 101.

¹⁸ R. Thaler and C. Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (New Haven: Yale University Press, 2008). The nudging controversy is another example of the incomplete protection of the mind. But addressing limits of influence on choices ('choice architecture') with respect to nudges only tends to consider the more general issue of which nudges are only an instantiation.

¹⁹ The ongoing controversy over psychiatric treatment is underscored by the fact that the Council of Europe (2015) is currently drafting an additional protocol on involuntary placement and treatment to the so-called Oviedo Convention (Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Oviedo, 4 April 1997, in force 1 December 1999, ETS No. 164.)

²⁰ See H.-J. Albrecht, 'Legal Aspects of the Use of Coercive Measures in Psychiatry', in E. Völlm and N. Nedopil, *The Use of Coercive Measures in Forensic Psychiatric Care* (Berlin: Springer, 2016), p. 42. The ECtHR has made a range of decisions concerning psychiatry, but they concern issues other than interventions into minds. A case that comes close is ECtHR, *Wemmer v. Germany* (App. no. 62303/13), judgment, 1 September 2016 regarding mental suffering because of drug withdrawal symptoms. In a recent judgment, the Court, apparently for the first time, explicitly acknowledged the 'medical intervention in defiance of subject's will' in addition to confinement. However, it still ignores psychological integrity when it writes that such forced psychiatric medication 'will give rise to an interference with ... her right to physical integrity': ECtHR, *Plesó v. Hungary* (Appl. no. 4124/08), judgment, 2 October 2010, para. 65.)

The lacuna in the protection of the person with respect to the mind becomes evident here. If the law tests psychiatric interventions against bodily integrity only, it fails to engage with what affected persons are mostly concerned about: the forceful alteration of their thinking and feeling, the invasion of fundamental aspects of their subjectivity. These mental effects are not captured by bodily harms. While one might view paternalistic psychiatric interventions as a special case because patients are legally incompetent and treatments are solely for their benefit, structurally similar questions emerge with respect to punishing or rehabilitating offenders in forensic settings, controlling supposedly dangerous persons or restoring defendants' fitness to stand trial.²¹ The widely held belief that governments have no business over minds of citizens is thus misleading.²² States influence minds of citizens in many ways, from education to culture to regulation of mind-altering substances. It also bears noting that one of the paradoxes of democracies which permeated even Rousseau's Social Contract is that they require *homines democratici* – citizens with a specific mindset for the common good. This mindset has to be nurtured (instilled) through public education.²³ So, if states alter minds of citizens through interventions that are only unsystematically and indirectly covered by legal provisions, human rights law has good reasons to reconsider its accommodation of the mind.

30.3 REASONS AGAINST LEGAL PROTECTION OF THE MIND

There may be reasons for the weak protection of the mind, and they may affect construals of a human right to the mind. Let us briefly recapitulate the most important ones. Sometimes the law seems based on misleading metaphysical premises – dualisms that consider mind and brain as two separate entities (e.g. a Cartesian substance dualism). Only such a premise allows the law to draw clear-cut distinctions between mental and bodily properties like 'purely psychological harm' (there is no 'pure' mental harm if mind and brain are inseparably connected).²⁴ Moreover, such dualisms sustain beliefs that the mind is largely intangible and invincible. In the words of US Supreme Court Justice Murphy, '[f]reedom to think is absolute of its own nature' because even 'the most tyrannical government is powerless to control the inward workings of the mind'.²⁵ In the same vein, contemporary commentators on the ECHR note that 'thoughts and views, as long as they are not expressed, are intangible'.²⁶ Furthermore, the mind inhabits

²¹ United States Supreme Court, *Sell v. United States*, 539 U.S. 166 (2003) concerned fitness to stand trial and stirred debates among US scholars about limits to governmental interventions into minds: E. Schultz, 'Selling Your Soul to the Courts: Forced Medication to Achieve Trial Competency in the Wake of *Sell v. United States*' (2005) 38 *Akron Law Review* 503; Boire, 'Neurocops'.

²² J. Tussman, *Government and the Mind* (New York: Oxford University Press, 1977).

²³ N. Paulo and C. Bublitz, 'Pow(d)er to the People? Voter Manipulation, Legitimacy, and the Relevance of Moral Psychology for Democratic Theory' (2016) *Neuroethics* 1, available at <https://link.springer.com/article/10.1007/s12152-016-9266-7#citeas>; J. Fishkin, 'Manipulation and Democratic Theory', in W. Le Cheminant and J. M. Parrish (eds.), *Manipulating Democracy: Democratic Theory, Political Psychology, and Mass Media* (London: Routledge, 2011).

²⁴ Sabine Michalowski commented that the suggested right appears to be based on mind–brain dualism. It is, but not in a metaphysical sense. It is a *normative dualism* in the sense that the protection of the mind has to follow unique rules and doctrines, different to those that apply to bodies, for normative reasons. Doctrines of 'bodily harm' are insufficient for capturing mind-interventions which fail to change the body in a relevant way. Consider psychotherapy: although it changes brain activity, it is implausible to consider it as an interference with *bodily* integrity. More generally, every verbal communication induces brain activity in listeners, but considering talking to someone as interfering with her bodily integrity is implausible. Thus, though ontologically indivisible, mind and body require different legal frameworks.

²⁵ United States Supreme Court, *Jones v. Opelika*, 316 U.S. 584, 618 (1948) (Murphy dissenting).

²⁶ B. Vermeulen, 'Article 9', in P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights*, 4th ed. (Cambridge: Intersentia, 2006), p. 751.

a peculiar epistemic position. Mental entities (and their causal history) are hard to capture and operationalise with the forensic realities against which the law is conceived. They are, after all, subjective states that only indirectly or correlatively manifest themselves in the ‘objective’ world observable in the third-person perspective. This makes providing proofs of mental states complicated – though not impossible – and feeds into general concerns about malingering and avalanches of (unwarranted) claims flooding legal systems. Unsurprisingly, the legal role of the mind is reconsidered at a time in which scientific advancements promise to naturalise the mind, i.e. ground it in objectively accessible physiological (neurobiological) processes.

However, naturalising the mind remains an aspiration at present, and the degree to which it will reveal itself to external measurement is not clear.²⁷ Many other legally relevant questions also remain unclear (e.g. whether top-down mental causation exists).²⁸ This uncertainty generalises: the mind is studied by different disciplines, from reductionist strands in neuroscience to almost spiritual approaches in psychology, which offer quite diverging models of the mind, its elements and dynamics. Legal reluctance to deal with domains of scientific disagreement is understandable. But nonetheless, the law can no longer hide from regulations behind crude mind–body dualisms if effects of interventions are sufficiently clear. The fact that interventions from talk therapy to brain stimulation effectively alter minds is indubitable. The law then has to work with the best available scientific explanations, incomplete as they might be. If domains not fully understood by science were left unregulated, the law would fail to protect persons against many novel threats. Unsettled scientific questions are thus no argument against protection of the mind, but rather an instance of the familiar problem of legal decision-making under uncertainty.

Finally, do substantive normative considerations speak against mind protection? That it *deserves* full legal protection is rarely denied. A principled dismissal of the value of mental integrity would also be unpersuasive. Under the widely acknowledged premise that protection of freedom and autonomy as well as (capacities for) personhood are among the foundational reasons for human rights, it would be strange if self-determination did not extend to what is most central to the person – her mind. The importance of the mind is almost self-evident.

But there might be other worries. Stronger protection of minds may curb (too) many other valuable freedoms. After all, a mind-protecting right commands the duty-bearer – i.e. everyone – to constrain their behaviour to avoid causing (potential) mental effects in others. But social life is harmful and hurtful. People intentionally influence and hurt each other all the time as part of socially accepted and desirable ways of living. Refraining from all forms of mental influence and infliction of emotional pain cannot be a plausible legal obligation in free societies. In this connection, the right to mental integrity well illustrates a general point of the topic of this volume: *every novel human right necessarily undermines freedoms*.²⁹ The maxim that freedoms of one person end where those of others begin implies that any additional liberty of one person potentially affects freedoms of others. In standard accounts of rights, every novel right entails at least one novel duty *per definitionem*.³⁰ These new duties might appear neglectable in the vertical relation. But human rights regularly also apply, directly or indirectly, horizontally between

²⁷ See contributions in S. Richmond et al. (eds.), *I Know What You're Thinking: Brain Imaging and Mental Privacy* (Oxford: Oxford University Press, 2012).

²⁸ D. Robb and J. Heil, ‘Mental Causation’ (revised 10 October 2018), in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, available at <https://plato.stanford.edu/entries/mental-causation/>.

²⁹ See J. W. Nickel, *Making Sense of Human Rights*, 2nd ed. (Oxford: Blackwell, 2007), chapter 2.

³⁰ In the tradition of W. Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1964), rights are defined by their correlative duties.

citizens. Novel rights of one person therefore provide grounds for state actions against others. Just as economists remind us that there is no free lunch, legal scholars should bear in mind that there are *no free legal freedoms*. In a sense, freedoms can only be redistributed. This interdependence between rights and duties is especially salient with respect to those that have the potential to drastically limit other freedoms, such as mental self-determination.

This leads to a peculiarity of human minds and its implications. The law usually conceives of bodies as systems closed-off from the external world, with the bodily envelope forming a layer of separation between person and world. This layer regularly marks the normative border between the person and society. Whatever crosses it potentially infringes with rights (e.g. bodily integrity, battery). Although the notion of a sealed-off body becomes implausible on a closer look, since bodies constantly interact with the physical environment, it has proven useful for normative purposes. The mind, by contrast, cannot be conceptualised, even in an idealised fashion, as closed-off from the world because minds are almost constantly connected to it through the senses. Through perception, minds mediate between organisms' inner functioning and external demands. Accordingly, every change in the external world is a potential mind-changing stimulus. But legally, not every action that changes the external world can be considered, not even *prima facie*, to interfere with mental integrity.³¹ This marks an important difference between bodies and minds and suggests asymmetries in their legal protection.

Another difference, the ubiquity of interferences with minds, has already been mentioned. People influence and hurt each other all the time. Conversely, everyone is influenced by a myriad of factors, often operating outside their awareness. Ordinary conversations may change thoughts, opinions or behaviour through non-rational or non-conscious factors, and so may trivial situational factors. Similarly, mental harm is ubiquitous. People 'emotionally' hurt each other all the time. From group-exclusion to betrayal by partners, people frequently induce negative emotions in others. While some of these harms reflect a non-respectful way of dealing with the psyche of others, many are simply inevitable consequences of accepted forms of social interaction, of diverging interests or of expectations that are too high. Some forms of inflicting mental harm may even be (ethically) valuable. Consider criticism. Although it foreseeably has the potential to hurt people, it is a valuable social practice that hardly calls for restriction. It also highlights that mental harms often depend on the *psychological reactions* of affected persons. A stoic will be less disappointed and emotionally hurt than a narcissist. Thus the common law doctrine to 'take victims as they are', in conjunction with a ban on inflicting emotional harm, does not seem promising unless one is prepared to severely curb social interactions. Thus, I suggest that ordinary negatively valenced mental states cannot be the domain of (human rights) law; only exceptional attacks on the mind may qualify.

These are considerable but not insurmountable objections to the legal protection of the mind. They provide some desiderata: protection of the mind must be limited to severe, exceptionally worrisome interferences. Models and doctrines have to be developed that define impermissible actions more concretely and provide workable criteria while observing the setbacks to other freedoms they imply. In fact, one of the main hurdles for recognising the right to mental self-determination seems to be the lack of a plausible and feasible construal of scope and limits.

³¹ C. Bublitz, 'Why Means Matter: Legally Relevant Differences between Direct And Indirect Interventions into Other Minds', in N. A. Vincent (ed.), *Neuro-Interventions and the Law: Regulating Human Mental Capacity* (New York: Oxford University Press, forthcoming).

30.4 ANCHOR POINTS

30.4.1 *Freedom of Thought*

In theory, some of the oldest human rights protect parts of the mind – freedom of thought, conscience and religion, which are enshrined in every human rights treaty (e.g. Article 18 Universal Declaration of Human Rights, Article 19 International Covenant on Civil and Political Rights (ICCPR), Article 12(1) American Convention on Human Rights, Article 9 European Convention on Human Rights (ECHR)) have an inner side (*forum internum*).³² Additionally, the ‘freedom to hold opinions without interference’ (Art. 19(1) ICCPR, Art. 10(1) ECHR) protects the inner sphere of opinion-formation. These guarantees are regularly considered unconditional or absolute, interferences are not justifiable and freedom of thought is even non-derogable (Art. 4(2) ICCPR).³³ The ECtHR calls freedom of thought a ‘foundation of democracy’.³⁴ Some of the strongest human rights thus protect the formation of thoughts, beliefs and opinions. This means, I suggest, the psychological processes of thinking, acquiring and processing data, memory, judgment and their like. However, in stark contrast to the proclaimed importance of freedom of thought stands its practical insignificance.³⁵ Leaving the special cases of religion and conscience aside, there seems to be not a single case in international human rights law in which the inner side of freedom of thought played a decisive role.³⁶ This is surprising, as many potential interferences are conceivable.

The not-well-defined scope of the right raises several questions. What is the *forum internum* precisely? Does it protect particular thoughts or the activity of thinking? And, echoing Frege, what is a thought? Is it different to an emotion, is it merely a psychological phenomenon, or does it have an objective existence?³⁷ Does the right encompass all thoughts, or only those about important matters? Are there rationality constraints, e.g., are ‘delusional’ thoughts targeted by psychiatry within the ambit?³⁸ Moreover, what interferes with thought?

Such questions have not been thoroughly examined by courts or scholarship. The literature on freedom of thought is sparse.³⁹ Some seem to view freedom of thought more as a guiding

³² Whether freedom of thought, conscience and religion is *one* right with a shared *forum internum* or a heading for several rights is an open question. While the ECtHR speaks about it in the singular, different scopes suggest a plurality.

³³ HRC, CCPR General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion, 27 September 1993, UN Doc. CCPR/C/21/Rev.1/Add.4; The non-derogable nature is reiterated in HRC, CCPR, General Comment No. 29: States of Emergency, 31 August 2001, UN Doc. CCPR/C/21/Rev.1/Add.11.

³⁴ ECtHR, *Kokkinkakis v. Greece* (Appl. no. 14307/88), judgment, 25 May 1993, para. 31.

³⁵ See the comprehensive treatment in C. Bublitz, ‘Freedom of Thought in the Age of Neuroscience’ (2014) 100 *Archiv für Rechts- und Sozialphilosophie* 1.

³⁶ See the overview on Art. 18 in S. Joseph and M. Castan, *International Covenant on Civil and Political Rights*, 3rd ed. (Oxford: Oxford University Press, 2013), p. 563.

³⁷ G. Frege, ‘The Thought: A Logical Inquiry’ (1956) 65 *Mind* 289.

³⁸ The evident tension between freedom of thought and psychiatry has rarely been addressed by human rights courts or scholarship. Of the few exceptions, M. Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, 2nd ed. (Kehl: Engel, 2015), p. 413 mentions ‘influencing the ... mind with psychoactive drugs’ without applying this to psychiatric praxis. M. Stenlund, ‘Is There a Right to Hold a Delusion? Delusions as a Challenge for Human Rights Discussions’ (2013) 16 *Ethical Theory and Moral Practice* 829 and M. Stenlund, ‘The Freedom of Belief and Opinion of People with Psychosis: The Viewpoint of the Capabilities Approach’ (2017) 46 *International Journal of Mental Health* 18 provide philosophically informed attempts to lessen the tension.

³⁹ Jurisprudence and scholarship focus almost exclusively on freedom of religion and ‘conscientious objections’: see E. Wicks et al., *European Convention on Human Rights*, 6th ed. (Oxford: Oxford University Press, 2014), p. 411; D. J. Harris et al., *Law of the European Convention on Human Rights*, 3rd ed. (Oxford: Oxford University Press, 2014); W. Schabas, *The European Convention on Human Rights. A Commentary* (Oxford: Oxford University Press, 2015). Notable exceptions mentioning freedom of thought in commentaries are Vermeulen, ‘Article 9’; B. Vermeulen and M. Roosmalen, ‘Freedom of Thought, Conscience and Religion’, in P. van Dijk et al. (eds.), *Theory and Practice of*

idea – the motto of Enlightenment – rather than a specific and effective subjective right.⁴⁰ This is related to the (mis-)conception that it can be interfered with only by exceptional means ('brainwashing', indoctrination, 'inquisitorial' methods). Former ECtHR judge Loucaides summarises that 'very little has been written about' the right, which 'may be attributed to the fact that freedom of thought as a general rule may create a problem only when manifested through the expression of ideas'.⁴¹ He reiterates a widely shared presupposition: unexpressed thoughts are invincible.⁴² However, given manifold ways to change thinking, from cognitive therapy to drugs administered without patient consent to psychological priming or thought-changing institutions like schools and universities, this premise seems unsustainable.⁴³ To become an effective 'living right', freedom of thought has to be reconstructed in light of plausible empirical premises. Political calls for a stronger protection of thought were voiced, particularly in the USA, under the banner of 'cognitive liberty'.⁴⁴ I have proposed four principles for its reconstruction elsewhere.⁴⁵ Instead of rehearsing them here, I will expand them into a broader right to mental self-determination.

30.4.2 The Right to Mental Integrity

There is a second anchor, the right to mental integrity in the ECHR, recently codified in Article 3(1) CFR: 'Everyone has the right to respect for physical and mental integrity.' In the drafting process, 'mental integrity' was introduced next to 'physical integrity' to provide comprehensive protection of the person, especially against novel technologies. Nonetheless, meaning and scope were not thoroughly discussed. During final debates a delegate remarked that the 'concept of mental integrity remains a mystery to Swedish experts who cannot find it in either the Convention on Biomedicine or any other international instrument'.⁴⁶ However, the right was not created *ex nihilo*; it emerged from the jurisprudence of the ECtHR on Article 8 (private life) under the heading of 'psychological integrity'.⁴⁷ Although 'mental' and 'psychological' might

the European Convention on Human Rights, 5th ed. (Cambridge: Intersentia, 2018), and Nowak, *CCPR Commentary*, p. 412, who defines it as the right to 'develop autonomously thoughts and a conscience free from impermissible influence'. See also P.-H. Teitgen, 'Establishment of a Collective Guarantee of Essential Freedoms and Fundamental Rights', Report for the Parliamentary Assembly of the Council of Europe, 5 September 1949, Doc. 77, p. 7 (the Teitgen Report).

⁴⁰ Even in philosophy and the discipline of free thought, the concept has not received much attention. The standard work about its history was written a century ago and concerns mainly the tension between religion and Enlightenment: J. B. Bury, *Freedom of Thought: A History* (Amherst: Prometheus Books, 2007).

⁴¹ L. Loucaides, 'The Right to Freedom of Thought as Protected by the European Convention on Human Rights' (2012) 1 *Cyprus Human Rights Law Review* 79.

⁴² Vermeulen, 'Article 9'.

⁴³ The Teitgen report (p. 12) suggested protection of thought against 'those abominable methods of police enquiry or judicial process which rob the suspected or accused person of control of his intellectual faculties and of Conscience'. This shows that drafters did not view thoughts as intangible.

⁴⁴ See R. Boire, 'On Cognitive Liberty (Part 1)' (1999) 1 *Journal of Cognitive Liberties* 7; R. Boire, 'On Cognitive Liberty (Part 2)' (2001) 2 *Journal of Cognitive Liberties* 7; W. Sententia, 'Neuroethical Considerations: Cognitive Liberty and Converging Technologies for Improving Human Cognition' (2004) 1013(1) *Annals of the New York Academy of Sciences* 221.

⁴⁵ Bublitz, 'Freedom of Thought in the Age of Neuroscience', 1–25.

⁴⁶ M. Borowski, 'Art. 3 Recht auf Unversertheit', in J. Meyer (ed.), *Charta der Grundrechte der Europäischen Union*, 3rd ed. (Baden-Baden, Nomos: 2011), p. 120. See the correct remark by M. Nowak, 'Article 3 CFR', in EU Network of Independent Experts on Fundamental Rights (eds.), *Commentary of the Charter of Fundamental Rights of the European Union* (Brussels: European Commission, June 2006), p. 36.

⁴⁷ In the history of legal ideas, one might view Art. 1 of the Oviedo Convention from 1997 as a predecessor demanding 'respect for integrity' of persons. Art. 19(1) of the Convention on the Rights of the Child (CRC), 20 November 1989, in force 2 September 1990, 1577 UNTS 3, protects *children* against 'physical and mental violence', but that clearly

have slightly diverging meanings, there are no indications that they refer to different concepts in the Convention. The ECtHR repeatedly emphasised a broad understanding of ‘private life’ including bodily and psychological integrity:

The Court ... reiterates that private life is a broad term, encompassing, inter alia, aspects of an individual’s physical and social identity including the right to personal autonomy, personal development and ... a person’s physical and psychological integrity ... [T]he State is also under a positive obligation to secure to its citizens their right to effective respect for this integrity.⁴⁸

This understanding echoes the notion of privacy as the ‘right to be let alone’ in Warren & Brandeis’ sense.⁴⁹ The secluded private sphere is not conceptually tied to the house or physical spaces; it may encompass the mental sphere.⁵⁰ Privacy is ‘freedom from unwanted intrusions – be that in the head or home’.⁵¹ But what is the scope of the right, what is an interference, where are its limits? Although reference to ‘psychological integrity’ has been well established in the ECtHR’s case law since the 1990s, the term remains undertheorised. No more than twenty rulings concern psychological integrity, and nowhere does the Court elaborate on the concept. Still, some observations can be made. Psychological integrity is sometimes understood as mental health. In *Bensaid v. UK*, which concerned the expulsion of a mentally disordered person to a country where psychiatric treatment was unavailable, the Court wrote:

Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of *mental stability* is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.⁵²

Although the Court did not find a violation, it considered mental health and stability as elements in the ambit of Article 8. But ‘mental integrity’ seems conceptually even broader and may capture interventions with effects that do not amount to setbacks to mental health or stability. The ECtHR seems to share such a wide understanding. For instance, it has considered harms to reputation as harms to psychological integrity.⁵³ Maltreatment in police custody which left applicants ‘insulted, deprived of sleep for several days and subjected to assault’ (without leaving physical marks) can harm mental integrity⁵⁴, as can repeated harassment of mentally disordered persons in public places.⁵⁵ The Court held that mental integrity was implicated even though the applicants did not suffer from mental disorders in a clinical-pathological sense.

aims at much narrower cases of child maltreatment. Finally, Art. 17 of the Convention on Rights of Persons with Disabilities (CRPD), New York, 13 December 2006, in force 3 May 2008, 2515 UNTS 3 guarantees respect for ‘physical and mental integrity’.

⁴⁸ ECtHR, *Tysiac v. Poland* (Appl. no. 5410/03), judgment, 20 March 2007.

⁴⁹ S. D. Warren and L. D. Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193.

⁵⁰ Accordingly, ‘integrity’ is viewed as being protected by Art. 17 CCPR: see Nowak, *CCPR Commentary*, p. 386.

⁵¹ J. Marshall, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights* (Leiden: Martinus Nijhoff, 2009), p. 3.

⁵² ECtHR, *Bensaid v. United Kingdom* (Appl. no. 44599/98), judgment, 6 February 2001; *Dolenec v. Croatia* (Appl. no. 25282/06), judgment, 26 November 2009, para. 165 (emphasis added).

⁵³ ECtHR, *Kyriakides v. Cyprus* (Appl. no. 39058/05), judgment, 16 October 2008; *Taliadorou and Stylianou v. Cyprus* (Appl. nos. 39627/05 and 39631/05), judgment, 16 October 2008; *A. v. Norway* (App. no. 28070/06), judgment, 9 April 2009, para. 74; *Pfeifer v. Austria* (Appl. no. 12556/03), judgment, 15 November 2007, para. 35; also *Karako v. Hungary* (Appl. no. 39311/05), judgment, 28 April 2009, and partly concurring opinion of Judge Jociene; *Axel Springer AG v. Germany* (Appl. no. 39954/08), judgment, 7 February 2012, para. 83.

⁵⁴ ECtHR, *Bati and others v. Turkey* (Appl. nos. 33097/96 and 57834/00), judgment, 3 June 2004.

⁵⁵ ECtHR, *Dordevic v. Croatia* (App. no. 41526/10), judgment, 24 July 2012.

Furthermore, a judgment of a Chamber in the second section in *Gross v. Switzerland* (later dismissed by the Grand Chamber for formal reasons) merits consideration.⁵⁶ The applicant suffered a ‘considerable degree of anguish’ because Swiss law was uncertain as to whether non-terminally-ill patients could acquire lethal substances. The request by the applicant who wanted to end her life was rejected by the authorities. The Court took issue because of the applicant’s uncertainty during ordinary administrative and court proceedings which lasted two years, including two appeals, one to the Federal Supreme Court. One might imagine the dire psychological situation of the applicant and the burdens that legal proceedings had caused her. However, such burdens seemed like manifestations of the ‘ordinary’ uncertainties and anxieties of life. Although it did not become final, this decision indicates the potential broadness of a right to mental integrity.

Unfortunately, neither the Court nor scholarship provide guidance on how to separate the innumerable negative mental effects which social life entails from those warranting special concern.⁵⁷ Given the fact that millions of Europeans suffer from mental disorders, and probably many more from non-pathological anxieties, it remains unclear why only about twenty cases concerning psychological integrity have reached the Court, and whether there is a doctrine separating the negative mental effects worth considering from the many others. Moreover, the jurisprudence does not provide hints as to whether mind-interventions problematic for other reasons, such as manipulations of decision-making, fall within the ambit of mental integrity. This touches upon the more general question of what ‘integrity’ means more precisely with respect to a highly dynamic and constantly evolving system as the mind. Lastly, does the right also encompass a *pro tanto* permission to change one’s own mind, e.g. mind-doping through brain-stimulation? This touches upon a broader norm-theoretical question: what is an integrity right?

Although there is no settled understanding, a right to the integrity of X seems to denote the *preservation* of the intactness, unity or identity of X. Alterations of these features then constitute interferences. However, some commentators understand a right to integrity as entailing self-determination.⁵⁸ The existing right to mental integrity therefore *is* the right to mental self-determination proposed here. However, an entailment relation seems unfounded. Claims against others to preserve the integrity of X do not logically entail that claimholders can freely determine to *disintegrate* X. They might equally be bound to preserve its integrity. Consider the right to life: claims against others to not-interfere with one’s life do not necessarily entail a permission to commit suicide. Surely, the *reasons* in favour of protecting the integrity of X may also apply to protecting self-determination. But that is a *substantive* argument about the scope of the

⁵⁶ ECtHR, *Gross v. Switzerland* (Appl. no. 67810/10), judgment, 30 September 2014.

⁵⁷ Although scholarship views freedom from interference with physical and psychological integrity as one of the main elements of Art. 8, ‘psychological integrity’ is rarely examined closely. For instance, discussions in Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 6th ed. (Oxford: Oxford University Press, 2014), pp. 366ff. do not address psychology. The voluminous commentary by W. Schabas (*The European Convention on Human Rights*) mentions the term four times in 1,400 pages. Some notable exceptions in commentaries provide some gloss. J. G. Merrills and A. H. Robertson, *Human Rights in Europe: A Study of the European Convention on Human Rights*, 4th ed. (Manchester: Manchester University Press, 2004), p. 138 speak of ‘mental inviolability’ and ‘intellectual freedom’; S. Michalowski, ‘Article 3’, in S. Peers et al. (eds.), *EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart Publishers, 2014) understands mental integrity as ‘freedom from psychological pressure’ and ‘imposition of mental suffering’. K. de Vries, ‘Article 8’, in P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights*, 5th ed. (Cambridge: Intersentia, 2018), p. 690 notes it can be affected by well-founded anxiety or fear caused by threats or harassment.

⁵⁸ W. Höfling and S. Kempny, ‘Kommentierung zu Art. 3 GrCh’, in K. Stern and M. Sachs (eds.), *Europäische Grundrechte-Charta* (Munich: Beck, 2016), p. 164.

right. Thus, properly understood, integrity rights do not entail the liberties characteristic of self-determination (e.g. power of waiver). This does not, of course, speak against adding them to an integrity right (as suggested here).

After all, one of the oldest and strongest rights – freedom of thought – protects (ill-defined) parts of the mind in theory, but is empty in practice. A young European right protects broader (though still unclear) parts of the mind against undefined interferences. Both raise a range of intriguing and unaddressed questions.

30.5 TOWARDS A RIGHT TO MENTAL SELF-DETERMINATION

30.5.1 *General Considerations*

In the following, some suggestions for construing the right are sketched. A modern legal protection of the mind should be based in one unified right that comprises the entire mind, including emotions and non-rational processes. The alternative, categorical distinctions between mental entities as ‘thoughts’, ‘opinions’ or ‘emotions’ seems futile. Cognitive science shows that the dichotomy between reason and emotion is misleading. Mental entities are highly interwoven and interdependent, and interventions into one frequently alter the other. Categorical distinctions are also questionable on substantive grounds. Why should all thoughts, even trivial ones, enjoy absolute protection whereas emotional states are only weakly protected, if at all?

Establishing one right that protects the mind in its entirety fills the yet unprotected gaps between mental integrity and freedom of thought. It creates a more general rather than a more specific right. In addition to the integrity dimension, it should encompass self-determination, i.e. the liberty to alter one’s mind or waive protection. The right then protects the freedom to determine what is in and on one’s mind. A strong, but not absolute right that allows for finer differentiations with respect to the importance of affected mental elements seems best suited.

As the special protection of thought, conscience and religion shows, not all mental entities are equally important (see Figure 30.1). Some arguably deserve a high level of protection (e.g. political decision-making, religious beliefs). But these particularly important elements are not helpfully captured by the current terminology of ‘thought’ or ‘opinion’, which is too broad. Rather, normative arguments identifying the salient parts more precisely are necessary. Here are some candidates: first, political will formation. Freedom of thought is considered foundational for democracy because it secures preconditions in individual minds. The free formation of the popular will requires free formation of individual wills. Therefore, democracies have to provide protection against manipulative interferences with political will formation, including moral views more broadly (freedom of conscience).⁵⁹

The second candidate is mental capacities for autonomous decision-making. Legal orders, criminal and private law presuppose personal autonomy. It grounds the respect of the legal system for decisions and actions, but also holding personal responsibility. But the legally presupposed autonomy of persons does not always correspond to their factual autonomy. Persons are much weaker, malleable and susceptible to influences than the legal ideal of the autonomous agent suggests (let alone metaphysical challenges to free will). In short, the law treats persons as autonomous although their factual capacities fall short of those presupposed in ideal-theory. Such a set-up is a viable *political arrangement* of liberalism. But it has consequences. Persons treated as autonomous by the law must possess the legal powers to keep others from

⁵⁹ Paulo and Bublitz, ‘Pow(d)er to the People?’

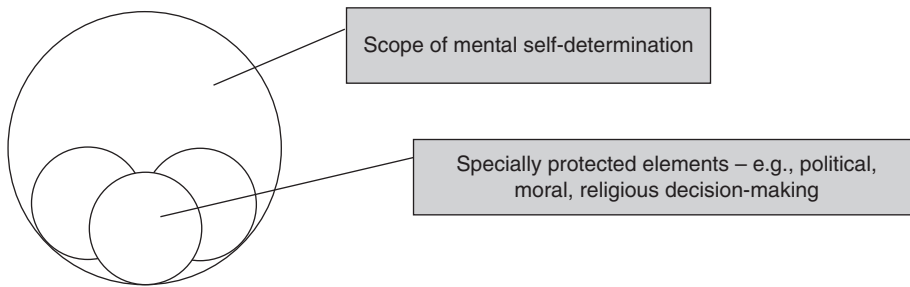


FIGURE 30.1. Mental self-determination

interfering manipulatively or exploitatively with their autonomy. Otherwise the law would run into internal incoherences.

The third candidate is mental capacities for legal competence. Only legally competent persons are free and equal citizens in a full sense. Stripping a person of their factual mental capacities necessary for competence is tantamount to depriving them of many basic rights. In a community of free and equal citizens, everyone needs to have the legal powers to keep others from interfering with the mental capacities that are preconditions of legal competence. Furthermore, additional aspects such as religious beliefs or important intimate matters (e.g. sexual orientation) may warrant the strongest protection. Further analysis to identify zones of special protection more precisely is necessary.

30.5.2 *Scope of the Right*

30.5.2.1 No Claims over Right Holders' Minds

Concerning the substance of the right, I wish to propose four principles. The first and most abstract is that states have no claims over right holders' minds, i.e. claims that right holders be in a specific mental state, entertain specific thoughts, feel in specific ways, etc. This follows almost with necessity from the idea of a legal freedom or liberty. A liberty to X can be defined as the absence of claims of others against X. Accordingly, the right prohibits impositions of duties over one's mind.

Note that right holders may incur mental duties *voluntarily*. In a mental economy, for instance, employment contracts imply that employees *think* about their assignments. Driving a car requires soberness. But these duties are taken on voluntarily, sometimes as part of a permit for dangerous conduct such as driving. Moreover, the right has arguable limits. One example is the mental duty of summoned witnesses to testify truthfully, which implies the duty to perform mental activities such as remembering. Imposing such trivial mental duties on witnesses might be justifiable, at least as long as it does not cause *further* mental setbacks (e.g. trauma).⁶⁰ Finally, on a technical note, this liberty implies that interventions into minds of right holders cannot be justified by a duty on them to be in a specific state (other justifications notwithstanding).

⁶⁰ On a right to freedom of memory, which would be a part of mental self-determination, see A. Kolber, 'Therapeutic Forgetting: The Legal and Ethical Implications of Memory Dampening' (2006) 59 *Vanderbilt Law Review* 1559; C. Bublitz and M. Dresler, 'A Duty to Remember, a Right to Forget? Memory Manipulations and the Law', in J. Clausen and N. Levy (eds.), *Handbook of Neuroethics* (Dordrecht: Springer, 2015), p. 1279.

30.5.2.2 Claims against Others regarding Non-Interference

Furthermore, the right comprises claims against others to not-interfere with one's mind (mental integrity). As previously noted, one of the thorny open questions in the construal of the right concerns interferences. A more fine-grained taxonomy of mind-interventions has to be developed. Moreover, from the conjunction of the claim to non-interference and the absence of mental duties, a liberty of right holders to freely change their minds follows. This liberty raises the question whether it extends to using the necessary means to change one's mind (e.g. drugs, neurotools). Prima facie, it does, at least insofar as these means are necessary to attain particular mental states. A right to X usually entails the right to use the means to achieve X, at least as a supplementary right (freedom of expression entails a right to use a pen). Supplementary rights can surely be restricted, but this requires sound justification.⁶¹

30.5.2.3 No Negative Sanctions for Thoughts, Beliefs, Opinions

Much of the historic Enlightenment idea of freedom of thought and expression was directed against governments imposing negative sanctions, even non-punitive, for unwelcome ideas or opinions. The Roman maxim *cogitationis poenam nemo patitur* already secured this inner freedom. In its tradition, the right to mental self-determination should protect right holders against negative sanctions which are based only on mental states. This corresponds to the understanding of 'holding opinions without interference' in Article 18(1) ICCPR by the Human Rights Committee (HRC), which bars 'impairment of any rights under the Covenant on the basis of ... opinions'.⁶² Despite this strong proclamation, state measures are often motivated and justified by reference to opinions of persons, primarily regarding security concerns (consider Jihadi beliefs). The same is true for mental states such as aggression or sexual proclivities. Furthermore, criminal sentencing is sometimes aggravated if offences are motivated by specific beliefs (e.g. racism). This is a negative sanction for a belief (punishment would be less severe in its absence). Arguably, such measures are morally justifiable. But freedom of opinion is protected unconditionally. This marks another discrepancy between strong proclamations of human rights and the lived realities in legal practice. Rendering the scope of 'interference with opinions' more precise will raise thorny questions in the future.

30.5.2.4 Mental Privacy

Finally, mental self-determination also encompasses the liberty to not disclose one's thoughts or feelings – mental privacy. This right will become more pressing as neuroscience advances. However, legal issues might largely be addressed by (reformed) privacy laws.

30.5.3 Interferences

This bare sketch of the scope of the right prompts a range of questions requiring further discussion. The same is true for potential interferences. Defining them is a key challenge for a plausible construal of the right, as people change each other's minds all the time, in a myriad of ways that are of no concern. Neither case law nor scholarship systematically addresses possible

⁶¹ A standard which international drug conventions may not always fulfil as they fail to engage with any interest in the actions they prohibit. The idea that people may have a right to determine their emotional or cognitive states is strangely absent in documents, commentaries and statements of the treaty organs: see Bublitz, 'Drugs, Enhancements & Rights'.

⁶² HRC, CCPR General Comment No. 34: Art. 19: Freedoms of opinion and expression, 12 September 2011, UN Doc. CCPR/C/GC/34, para. 9.

interferences with psychological integrity or freedom of thought. Some traces can be found in Article 18(2) ICCPR. It qualifies the modalities for interfering with the right by demanding ‘coercion which would impair his freedom to have or adopt’ a belief. The common meaning of coercion – use of illicit threats to motivate another party to act – captures at least some (but not all) potential interferences.⁶³ A case in point is *Kang v. Republic of Korea*, in which better prison conditions and early release were offered if the detainee renounced his communist beliefs. The HRC adopted the view that such a system is coercive.⁶⁴ However, it is worth noting that the interference lay in external threats (continuing confinement), rather than in more direct interventions into brains or psychological processes.

Moreover, psychological techniques of coercive persuasion (‘brainwashing’) have been studied since the Second World War. In many historical prisoner-of-war cases, targets were indoctrinated while they were confined in poor living conditions. In combination, detainment and desperateness, physical maltreatment, undernourishment and ideological classes inducing guilt can have powerful psychological effects.⁶⁵ The legal assessment of such cases is evident. Interventions are effective and hard to resist, they utilise hard-to-control processes – fear, isolation, desperation – and are brought about by means that by themselves are ethically and legally condemnable. Conceiving them as interferences with Article 18 ICCPR does not undermine any valuable freedom.

More challenging are less evident cases. If, for instance, the right bars treatments ‘intended to change the process of thinking’ or ‘to change opinions’,⁶⁶ or ‘influencing the conscious or subconscious mind ... with means of manipulation’,⁶⁷ attempts of persuasion with non-rational elements that exploit cognitive weaknesses, emotional susceptibilities or other vulnerabilities may suffice (sophisticated marketing methods). The law must develop a model of interferences with the strength of the intervention and its mode of operation as some of the relevant criteria.⁶⁸

The right raises a range of further substantive and evidential questions. Conflicts between mental self-determination and permissions to send mind-altering stimuli, such as freedom of expression, may have to be reconciled. Limits on mental self-determination for paternalistic reasons or public interest have to be drawn. Detailed arguments require scenarios such as mandatory mind-interventions (e.g. treatment to stand trial, coercive psychiatry, rehabilitation of criminal offenders) or prohibitions of mind-interventions for reasons of social solidarity (‘mind doping’).⁶⁹

⁶³ One of the best works on the concept of coercion is A. Wertheimer, *Coercion* (Princeton: Princeton University Press, 1987). In General Comment No. 22, para. 5, the HRC does not provide a definition but lists ‘use of threat or physical force or penal sanctions’ or other practices with the same intention or effect.

⁶⁴ HRC, *Yong-Joo Kang v. Republic of Korea*, Communication No. 878/1999, 16 July 2003, CCPR/C/78/D/878/1999, at 7.2.

⁶⁵ K. Taylor, *Brainwashing: The Science of Thought Control* (Oxford: Oxford University Press, 2006).

⁶⁶ Vermeulen, ‘Article 9’, p. 752. In the fifth edition the formulation is narrower, requiring ‘coercive steps’ to change beliefs, or governments ‘dictating’ beliefs: B. Vermeulen and M. van Roosmalen, ‘Article 9’, in P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights*, 5th ed. (Cambridge: Intersentia, 2018), p. 738.

⁶⁷ Nowak, *CCPR Commentary*, p. 413, who stresses that line-drawing between ordinary, daily and worrisome forms of influence is hard.

⁶⁸ Whether the mode by which an intervention operates is ethically or legally relevant is a key controversy of neuroethics. See N. Levy, *Neuroethics* (Cambridge: Cambridge University Press, 2007); N. Levy, ‘Cognitive Enhancement: Defending the Parity Principle’, in N. A. Vincent (ed.), *Neuro-Interventions and the Law: Regulating Human Mental Capacity* (New York: Oxford University Press, forthcoming) for a dismissive argument, and Bublitz, ‘Why Means Matter’ for an affirmative argument.

⁶⁹ See the contributions in D. Birks and T. Douglas, *Treatment for Crime: Philosophical Essays on Neurointerventions in Criminal Justice* (Oxford: Oxford University Press, 2018).

These brief remarks have hopefully indicated that the law is, in principle, capable of dealing with minds and mind-interventions, but fails to do so in practice. Recognising a human right to mental self-determination would reverberate in many areas of law and life. Advertisements, interior design of supermarkets, recruitment methods of spiritual sects or virtual reality are domains that warrant further scrutiny. The right may provide grounds for tort claims and lead to the establishment of criminal offences protecting the mind. Last but not least, it may affect how people treat each other's minds in mundane interpersonal interactions.

30.6 A NOVEL HUMAN RIGHT?

Let us finally reflect on the overarching theme of this volume. Is mental self-determination really a novel human right, or rather another example of magically conjured up rights?⁷⁰ The question splits into two parts and partly dissolves into a third: is it (a) novel, (b) a human right and (c) sufficiently distinct?

Regarding novelty, a key part of the right – mental integrity – was explicitly enumerated in the main treaties for the first time in the Convention on the Rights of Persons with Disabilities 2008 and the CFR 2009. It had made previous appearances in supporting roles in the jurisprudence of the ECtHR in the 1990s. As yet, its content is largely empty and its practical relevance low. Other parts of the right are captured by freedom of thought, a venerable idea already recognised in Roman law. Yet again, its scope is blurry and it has been without impact in legal practice for decades. Still other parts of mental self-determination in the construal suggested here are unknown to all jurisdictions. Thus, some parts are old, some new, some are borrowed and some are proposals existing only somewhere out in the wide blue yonder. So while the right partially exists in a nascent stage, its debut on the international scene and its full realisation are yet to come.⁷¹

Is it sufficiently distinct? It has grown out of and thus specifies Article 8 ECHR, 'the nursery of rights'. But that is no decisive reason against its recognition as a stand-alone right. Ultimately, many rights are derivable from top-level principles such as dignity, autonomy and equality, or life, liberty and the pursuit of happiness. Nonetheless, defining rights more specifically is often necessary. One might say that legal systems have an inherent *desire for lex specialis*, for reductions of complexity through concretely tailored rules.⁷² In this sense, human rights are *not* indivisible. Specifications are not instances of worrisome rights proliferations.⁷³ Rather than diluting or devaluing rights, they are sharpened and their significance is highlighted. Consequently, for clarity and coherence, bills enumerating hundreds of rights might be preferable to the current short-lists mainly written for universal political appeal (and a good bit of poetry and pathos). Accordingly, good reasons speak in favour of viewing mental self-determination as a right sufficiently distinct from others.

Finally, does mental self-determination deserve to be elevated into the pantheon of human rights? Definite answers require a comprehensive theory of grounds of human rights and likely involve value judgments. A more modest start is the assumption that a right is a human right

⁷⁰ P. Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78 *American Journal of International Law* 607.

⁷¹ If scholarly treatment of a right is an indication of its existence, a dearth of such treatment supports the idea that the right has not yet come fully into existence.

⁷² This is, in a crude form, an idea that can be traced to N. Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2008).

⁷³ For the proliferation critique, see e.g. Nickel, *Making Sense of Human Rights*, chapter 6.

if it meets the criteria for which other rights qualify as such. So, *if* there are human rights for reasons other than their positive recognition, these reasons would have to apply to mental self-determination as well. And they likely do. These reasons regularly refer to the relevance of a right for the person or the legal order. For instance, one of the key criteria forwarded by James Nickel is that they address substantial and recurrent threats.⁷⁴ The human mind is the target of a wide range of interventions, and the prevalence of mental problems is at record levels. A threat to mental self-determination seems thus substantial. Moreover, Nickel and Philip Alston require a universal appeal of novel rights. They must be relevant for people in diverse cultures. The sovereignty over one's mind seems to be an interest shared by almost everyone. It is a basic good that is valuable for the pursuit of diverse conceptions of a good life.

Mental self-determination thus passes these rather loose tests for novel rights in the literature.⁷⁵ But the case for its recognition is stronger. If human rights are about protecting essential qualities of humans against state powers, the central aspect that defines humans – their minds – should be encompassed. If they are about protecting freedoms, free decision-making is surely among their main concerns. If they seek to protect the vulnerable aspects of persons against pain, suffering and injury, they already pertain to (specific) mental states. If they are about human 'capabilities', they should include mental capabilities.⁷⁶ If they are about protecting 'normative agency', they have to encompass the mental faculties necessary for forming and executing wills and intentions.⁷⁷ Accordingly, central parts of the right to mental self-determination are almost inseparably connected to the goals and interests invoked to justify the human rights system itself. And of course, it is one of the background conditions for exercising and enjoying almost all other specific rights.

Finally, mental self-determination secures the factual human capacities which the law regularly presupposes. Thereby, it secures the conditions of the possibility of liberal legal orders centred on autonomous subjects. If the law fails to protect mental freedoms against interferences, the entire legal structure grounded on the idea of free persons may collapse. Mental self-determination is thus among the foundation stones of legal orders, and this, if anything, seems to warrant its inclusion in the international bill of human rights.

⁷⁴ Ibid., chapter 5.

⁷⁵ Alston, 'Conjuring Up New Human Rights', p. 616.

⁷⁶ M. Nussbaum, *Creating Capabilities* (Cambridge, MA: Harvard University Press, 2011), pp. 33–34 provides a list of ten central capabilities in her famous approach. Three of them concern capabilities that would fall under the scope of mental self-determination (using one's senses, imagination and thoughts; emotional capabilities; the ability for practical reasoning).

⁷⁷ J. Griffin (ed.), *On Human Rights* (Oxford: Oxford University Press, 2008).