

# Mind Wars: Brain Research and National Defense

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# Paradigm of Neuro-Imaging

- Assume that functional Magnetic Resonance Imaging (“fMRI”) really can serve as a reliable measure of truth telling (an assumption that the law does not make about current lie detector technology)
- What are the legal constraints on its use?

# Legal Issues Raised by Defense Oriented Brain Research

- Legal issues differ greatly according to persons affected; characterization of activity and place where event takes place.
- Very different legal structure depending on whether topic is research or application.

# Legal Analysis Cannot Exist Without Reference to a Specific Factual Situation

- First task is defining how Brain Research will be used:
  - As a Weapon?
    - Pacification
    - Changing behavior
  - As an Interrogation Method?
  - As a Surveillance Tool?

# Who is the Target?

- American Soldiers?
- American Civilians?
- Foreign Soldiers or Civilians?
- Potential Terrorists?
- Criminals?
- Persons with important information?

# Where is it going to be used?

- In the United States?

In a court room?

An Airport?

In a Foreign Country?

One where we are at war?

One where we the U.S. has a specific, narrow interest (ex. Rescuing soldiers or civilians)?

# Why is it going to be used?

- To enhance law enforcement or security?
- To intervene in a dangerous situation?
- To get needed information?

# Legal Views on Enhancement

- In the context of law enforcement, the law does not make the distinctions between activity acceptable if done by humans without enhancements and those with.
- Surveillance law has explicitly embraced technological advances so that if visual surveillance of property (to look for marijuana plants for example) is legal, then infra red surveillance is also o.k.

# Laws for Use of “Non-Lethal” Weapons Complex and Detailed

- Sean Kevin Thompson, “The Legality of the Use of Psychiatric Neuroimaging in Intelligence Interrogation”, 90 Cornell Law Review 1601 (2005)
- David P. Fidler, “The International Legal Implications of “Non-Lethal Weapons”, 21 Michigan Journal of International Lw 51 (1999)
- David A. Koplow, “Tangled Up In Khaki and Blue: Lethal and Non-Lethal Weapons in Recent Confrontations”, 36 Georgetown Journal of International Lw 703 (2005)
- Stephen J. Schulhofer, “The New World of Intelligence Surveillance”, 17 Stanford Law and Policy Review 531 (2006)
- Simcha Herzog, “Constitutional Problems Posed by Aviation Security Post September Eleventh”, 6 Florida Coastal Law Review 361 (2005)

# U.S. Constitutional Law

- Much of U.S. Constitutional Law about acceptable practices in prisoner interrogation are based on the 4<sup>th</sup> Amendment protection against unlawful search and seizure and are based on admissibility of the evidence at trial.
- 5<sup>th</sup> Amendment protection against self-incrimination can be eliminated by giving the individual immunity from prosecution.
- 8<sup>th</sup> Amendment protection against “cruel and unusual” punishment always balances rights of the detained against the legitimate needs of the prison or jail.

# Use of fMRI in Surveillance: Privacy

- No explicit right to privacy in the Constitution.
- Protections against surveillance by government are based on 4<sup>th</sup> A. search and seizure
- Gov't need for information always weighed against potential threat.
- Almost any non-invasive screening device is likely to be deemed acceptable in today's climate of threat.

# Fundamental Legal Principal

- At root, all legal protections in the U.S. depend on someone making a determination on the level of threat.
- If you don't trust that person's decision, then there is no real protection.
- Ex: Almost anything permissible in face of imminent threat. Obtaining evidence for a criminal trial is not such a threat, but knowledge that may prevent harm to others in the near future would be.

# Effect of Refusing fMRI in U.S. Criminal Proceeding

- At worst, effect of refusing fMRI (in the absence of an effort to prevent future harm) would be a negative inference at trial.
- Likely that if law enforcement has any plausible urgent need for information (ex. Location of kidnapped child) then they will be allowed to conduct involuntary fMRI.

# Basic Structure of the Law of Interrogation of Foreign Detainees

- “POWS and Civilians detained during an international armed conflict”
  - International Humanitarian Law (“IHL”) /Geneva Conventions
  - Prohibition against “coercion” in interrogation
- “Unlawful combatants held within U.S. territory”
  - IHL does not apply
  - International Human Rights Law (IHRL) protects against torture and “cruel, inhumane or degrading (CID) treatment”
- “Unlawful combatants held outside U.S. Territory”
  - U.S. contends neither IHL or human rights treaties apply
  - Federal Torture Statute, 18 U.S.C. Sec. 2340-2340B
- Sean Kevin Tompson, 90 Cornell L. Rev. 1601, 1604

# Principles of International Humanitarian Law

- Avoidance of “superfluous injury” and “unnecessary suffering”
- Discrimination or Distinction among who weapons are used against.
- Koplow, 36 Geo.J. Int’l L. 703, 743

# Interrogation Use

- Law of acceptable interrogation technique is elaborate but not very useful.