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 plans for example) is legal, then infra red surveillance is also o.k.
Laws for Use of “Non-Lethal” Weapons Complex and Detailed

U.S. Constitutional Law

- Much of U.S. Constitutional Law about acceptable practices in prisoner interrogation are based on the 4th Amendment protection against unlawful search and seizure and are based on admissibility of the evidence at trial.
- 5th Amendment protection against self-incrimination can be eliminated by giving the individual immunity from prosecution.
- 8th 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 4th 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.