



Minding Rights: Mapping Ethical and Legal Foundations of 'Neurorights'

Description

Abstract

The rise of neurotechnologies, especially in combination with artificial intelligence (AI)-based methods for brain data analytics, has given rise to concerns around the protection of mental privacy, mental integrity and cognitive liberty – often framed as “neurorights” in ethical, legal, and policy discussions. Several states are now looking at including neurorights into their constitutional legal frameworks, and international institutions and organizations, such as UNESCO and the Council of Europe, are taking an active interest in developing international policy and governance guidelines on this issue. However, in many discussions of neurorights the philosophical assumptions, ethical frames of reference and legal interpretation are either not made explicit or conflict with each other. The aim of this multidisciplinary work is to provide conceptual, ethical, and legal foundations that allow for facilitating a common minimalist conceptual understanding of mental privacy, mental integrity, and cognitive liberty to facilitate scholarly, legal, and policy discussions.

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Further References

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Report on Respecting, Protecting and Fulfilling the Right to Freedom of Thought, to the 76th Session of the General Assembly, October 2021; United Nations, Our Common Agenda—Report of the Secretary-General, New York 2021, para 35.

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Committee on Bioethics of the Council of Europe. Strategic Action Plan on Human Rights and Technologies in Biomedicine (2020–2025), Adopted by the Committee on Bioethics (DH-BIO) at its 16th meeting (19–21 November 2019).

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See note 1, Ienca, Andorno 2017, at 5; Genser J, Hermann S, Yuste R. International Human Rights Protection Gaps in the Age of Neurotechnology, report of the NeuroRights Foundation; 2022.

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14

See note 5, Navarro 2022.

15

As is often the case in interdisciplinary work, not all authors that contributed to the discussions and the resulting paper agree with every point made in the paper. We have made substantial efforts in harmonizing views and interpretations but also want to acknowledge the reality of "reasonable disagreement".

16



It might be argued that drawing a distinction between bodily and mental integrity implicitly endorses a form of dualism between the body (including the brain) and the mind. To avoid this risk, some have proposed recognising a single right to "identity integrity". However, since the rights to bodily and mental integrity are widely used in the academic literature and acknowledged in the law, such as by the EU Charter of Fundamental Rights, we will stick to this terminology in this paper. In adopting this terminology, we do not mean to endorse dualism.

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30

See note 12, Ienca 2021.

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In our discussion here, we will refer to specific “neurorights” as “human rights” if they are conceptualized (or discussed) within an international and universal context (e.g., in discussions at the level of the UN).

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Criticism of the implementation of legal language for moral rights addresses structural problems such as the integration of a vertical view typical of human rights jurisprudence, which runs counter to the traditional horizontal view in ethical reasoning. Legal language too often implies the violation of rights, whereas ethical language presupposes reciprocal dialogue between actors without implying that rights have been previously violated or duties not fulfilled. Sperling D. Law and bioethics: A rights-based relationship and its troubling implications. In: Freeman M, ed. *Law and Bioethics: Current Legal Issues*, Vol. 11. Oxford: Oxford University Press; 2008. Moreover, ethical choices can be made between two legally acceptable solutions, which helps to ground the reasoning about which ethical and moral concepts should be condensed into law. Additionally, in order to do justice to ethical decisions, it is not always enough to meet legal standards. See Sperling 2008, at 65, 71.

38

Henceforth, our use of “rights” means “legal rights.”

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It may be the case that dualist ideas have a more pervasive influence on legal systems. See Fox, D,



Stein, A. Dualism and doctrine. *Indiana Law Journal* 2015;90(3):975 Google Scholar.

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An important conceptual question here could be whether we can conceive of a mind without a brain? As discussed in this section, reflecting common theorizing in philosophy and cognitive science accounts, many accounts of mental integrity assume embodiment (and some degree of bodily integrity). But this might imply remnant notions of mind–body dualism that would need to be addressed (which exceeds the scope of the discussion here). A member of our group has suggested to use the terminology “identity integrity” instead. For further consideration see, inter alia, Jotterand F. Personal identity, neuroprosthetics, and alzheimer’s disease. In: Jotterand, F, Ienca, M, Wangmo, T, Elger, BS, Jotterand, F, Ienca, M, et al. eds. *Intelligent Assistive Technologies for Dementia: Clinical, Ethical, Social, and Regulatory Implications*. Oxford: Oxford University Press; 2019 CrossRefGoogle Scholar; Jotterand F. Neuroethics as an anthropological project. In: Farisco M, ed. *Neuroethics and Cultural Diversity* (forthcoming); Jotterand, F. *The Unfit Brain and the Limits of Moral Bioenhancement*. Singapore: Springer; 2022 CrossRefGoogle Scholar.

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See note 1, Ienca, Andorno 2017, at 11.

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See note 36, Lavazza 2018.

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Report commissioned by the Committee on Bioethics of COE; 2021; available at www.rm-coe.int/report; See note 13, Ienca 2021.

60

See note 56, Farahany 2023.

61

A potential precedent in addressing this worry may be found in the latest version of the Chilean Bill on neuroprotection (still being drafted), which proposes that medical as well as non-medical neurotechnologies must be registered by the National Institute of Public Health for their use in humans.

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64

See note 1, Bublitz 2020, at 388, 395.

65

See note 1, Michalowski 2020, at 406; see note 64, de Vries 2018, at 690.

66

See note 1, Bublitz 2020; see note 1, Ienca, Andorno 2017, at 18.

67

ECtHR 26 November 2009, appl.no. 25282/06 (Dolenec/Croatia), § 165; ECtHR 6 February 2001, appl.no. 44599/98 (Bensaid/UK), § 47.

68



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69

ECtHR 30 November 2010, appl.no. 2660/03 (Hajduová/Slovakia), § 49.

70

ECtHR 28 October 2014, appl.no. 20531/06 (Ion Cârstea/Romania) § 38; ECtHR 21 November 2013, appl. no. 16882/03 (Putistin/Ukraine), § 32; See note 1, Michalowski 2020, at 406

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See note 33, Hertz 2022; UN Report FoT 2021; see note 1, McCarthy-Jones 2019; see note 1, Alegre 2017; Bublitz JC. Novel neurorights: From nonsense to substance. Neuroethics 2022;15:7.

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UN Human Rights Council, The right to privacy in the digital age, A/HRC/39/29, 3 August 2018, para. 5.

86



CCPR General Comment No. 16: Article 17 (Right to Privacy), para. 1.

87

UN Human Rights Council, The right to privacy in the digital age, A/HRC/39/29, 3 August 2018, para. 5.

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UN Human Rights Council, The right to privacy in the digital age, A/HRC/39/29, 3 August 2018, para. 5.

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UN Human Rights Council, The right to privacy in the digital age, A/HRC/39/29, 3 August 2018, para.

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ECtHR (GC) 5 September 2017, appl.no. 61496/08 (Bărbulescu/Romania), § 70.

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ECtHR (GC) 27 June 2017, appl.no. 931/13 (Satakunnan Markkinapörssi Oy and Satamedia Oy/Finland), § 137 (emphasis added).

92

ECtHR (GC) 4 December 2008, appl.nos. 30562/04 and 30566/04 (S. & Marper/UK), § 67; ECtHR 13 February 2020, appl.no. 45245/15 (Gaughran/UK), § 70. See note 64, de Vries 2018, at 673.

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Council of Europe. The European Convention on Human Rights: A Living Instrument. Strasbourg 2020:7.

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See note 4, Rainey et al. 2020; see note 1, Ienca, Andorno 2017.

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100

See 82, Ligthart et al. 2022.

101

Rainey, B, Wicks, E, Jacobs, Ovey C., White and Ovey: The European Convention on Human Rights. 8th edn. Oxford: Oxford University Press; 2020 CrossRefGoogle Scholar; see note 77, Harris 2018.

102

General comment No. 34 Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, paras 11–12; ECtHR (GC) 15 December 2005, appl.no 73797/01 (Kyprianou/Cyprus), § 174; Interamerican Commission on Human Rights, Declaration of Principles on Freedom of Expression, principle 2; Grossman, C. Freedom of expression in the inter-american system for the protection of human rights. ILSA Journal of International & Comparative Law 2001;7(3):619–47Google Scholar.

103

General comment No. 34 Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, para. 10.

104

See note 77, Harris 2018, at 595. See, for example, EComHR 7 April 1994, appl.no. 20871/92 (Strohal/Austria); ECtHR (GC) 3 April 2012, appl.no. 41723/06 (Gillberg/Sweden), § 86; ECtHR 23 October 2018, appl.no. 26892/12 (Wanner/Germany), § 39–42. An important note: This suggests that the right to silence has been protected by the ECtHR. The response of the ECtHR to English attacks on the right to silence suggests otherwise. One can remain silent, but adverse inferences can be drawn from the person's silence, which does not amount to much of a protection of the right to silence. In the future we might expect the ECtHR to extend its approach by saying a person can refuse brain-based lie detection that the state wants to employ, but if the person does so, adverse inferences can be drawn from the refusal.

105

See note 33, Ligthart 2022; see note 1, Ligthart 2020.

106

See note 33, Ligthart 2022.

107

Sententia, W. Neuroethical considerations: Cognitive liberty and converging technologies for improving human cognition. Annals of the New York Academy of Sciences 2004; 1013:221–28CrossRefGoogle Scholar; Bublitz, C, Cognitive liberty or the international human right to freedom of thought. In: Clausen, J, Levy, N, eds. Handbook of Neuroethics. Dordrecht, Netherlands: Springer; 2015:1309–33CrossRefGoogle Scholar.

108



See note 56, Farahany 2019, 2023.

109

See note 1, Bublitiz 2020; see note 1, Ienca, Andorno 2017; see note 41, Bublitiz, Merkel 2014.

110

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111

See note 4, Committee on Bioethics of the Council of Europe 2019; § 21–22 (emphasis added).

112

See note 1, Bublitiz 2020, at 397.

113

ECtHR 12 October 2006, appl.no. 13178/03 (Mayeka and Kaniki Mitunga/Belgium), § 83.

114

ECtHR (GC) 27 August 2015, appl.no. 46470/11 (Parrillo/Italy), § 153.

115

ECtHR (GC) 27 June 2017, appl.no. 931/13 (Satakunnan Markkinapörssi Oy and Satamedia Oy/Finland), § 137.

116

Either as an individual notion or as part of the right to mental integrity.

117

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Category

1. General

Tags

1. Cognitive liberty
2. mental integrity
3. mental privacy
4. neurorights
5. neurotechnology

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