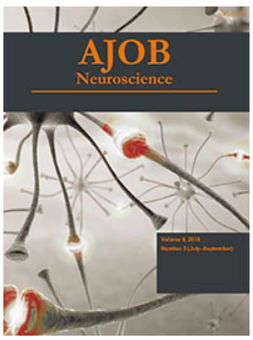

AJOB Neuroscience

ISSN: 2150-7740 (Print) 2150-7759 (Online) Journal homepage: http://www.tandfonline.com/loi/uabn20

Mandatory Neurointerventions and the Risk of Racial Disparity

Timothy Emmanuel Brown

To cite this article: Timothy Emmanuel Brown (2018) Mandatory Neurointerventions and the Risk of Racial Disparity, AJOB Neuroscience, 9:3, 156-157, DOI: 10.1080/21507740.2018.1496183

To link to this article: https://doi.org/10.1080/21507740.2018.1496183

Published online: 20 Sep 2018.

Baum, M. L. 2013. The Monoamine Oxidase A (MAOA) genetic predisposition to impulsive violence: Is it relevant to criminal trials? *Neuroethics* 6(2): 287–306.

Birks. D., and Buyx, A. 2018. Punishing intentions and neurointerventions. *AJOB Neuroscience* 9(3): 133–143.

Douglas, T. 2014. Criminal rehabilitation through medical intervention: Moral liability and the right to bodily integrity. *The Journal of Ethics* 18(2): 101–22.

Gazzaniga, M. S., Ivry, R. B., Mangun, G. R. 2013. *Cognitive neuroscience: The biology of the mind*, 4th Edition. New York: W. W. Norton & Company.

Greene, J., and Cohen, J. 2004. For the law, neuroscience changes nothing and everything. In eds. S. Zeki, O.R. Goodenough, 207–226. *Law and the brain*. Oxford: Oxford University Press.

Lavazza, A. 2017. Neurolaw and punishment: A naturalistic and humanitarian view, and its overlooked perils. *Teoria* 37(2): 81–97.

Lavazza, A. 2018. Freedom of thought and mental integrity: The moral requirements for any neural prosthesis. *Frontiers in Neuroscience* 12:82. doi: 10.3389/fnins.2018.00082

Pardo, M. S., and Patterson, D. 2014. *Minds, brains, and law: The conceptual foundations of law and neuroscience*. New York: Oxford University Press.

Schaefer, G. O., Kahane, G., Savulescu, J. 2014. Autonomy and enhancement. *Neuroethics* 7(2): 123–136.

Mandatory Neurointerventions and the Risk of Racial Disparity

Timothy Emmanuel Brown, University of Washington

In "Punishing Intentions and Neurointerventions," Birks and Buyx (2018) consider the possibility that criminal offenders could one day be punished by means of neurotechnical interventions—whereby the offender is subjected to a treatment that alters the brain in ways that make them less likely to reoffend. The authors argue that these interventions are impermissible insofar as they cause secondary changes to the offender's mental state unrelated to the primary changes necessary to keep the offender from reoffending. We should, they argue, count these secondary changes as violations of the offender's liberty. I agree that these secondary changes are violations, but I believe this line of argument (and even the terminology of the debate) misses a crucial problem with the very idea of using neurointerventions as a means of correcting an offender's behavior. That is, in some cases, neurointerventions are impermissible even when the intervention seems to have been administered to an appropriate "offender," precisely because some (potentially prejudiced) other (or group of others) is given the ability to judge which of the offender's mental states is "valuable" or "disvaluable" and take action to thwart those mental states directly. In what follows, I argue that neurointerventions are impermissible insofar as they will likely be applied in ways that enact prejudiced attitudes toward marginalized groups.

To begin, Birks and Buyx consider an *expansive question* about neurointerventions—or the question of whether it's permissible to use a neurointervention on an offender if that intervention changes the offender's behaviors in ways unrelated to his or her offense. The authors believe their question brings to light the moral problems with mandatory neurointerventions that are obscured by their interlocutors' *constrained question*—or the question of whether it's permissible to use an intervention on an offender if it means the offender is less likely to offend. When we ask the constrained question, Birks and Buyx argue, we "[idealize] the effects of the neurointervention" for the sake of determining if it is wrong to alter a person's mental states in the first place. This idealization, on their view, "does not provide practical guidance for the permissibility of neurointerventions in any scenario we will face for the foreseeable future" (133). One could argue, to use their example from the literature, that "neurointerventions are wrongful in virtue of a person's interest in not having at least some of his mental states intentionally altered by others in certain ways" (7). Birks and Buyx suggest, however, that it matters which mental states are changed, and whether or not those changes were the intended changes. If it were possible to say that neurointerventions change only the mental states that cause the offender to reoffend, then (perhaps) it would be permissible to administer these interventions. But it is, on their view, unlikely that these interventions will work without causing side-effects and changes in mental state that have nothing to do with the offender's offense. Mandating the use of an intervention that causes these kinds of changes, the authors conclude, constitutes a unique form of harm.

But the harms suffered by people of color who collide with the US criminal justice system are often the result of

Address correspondence to Timothy Emmanuel Brown, Department of Philosophy, University of Washington, Savery Hall, Room 361, Box 353350, Seattle, WA, 98195-3350, USA. E-mail: timbr@uw.edu

prejudices against them. As such, we cannot tell a coherent story about incarceration in the United States without also telling a story about the racial disparities in the culture broadly. It is hard to deny, for example, that Black Americans are disenfranchized in the United States—and this disenfranchisement is both systemic and pervasive. Black children are diagnosed with childhood disorders (e.g., oppositional defiant disorder) more than their white counterparts (Schwartz and Feisthamel 2009). Black children are also disciplined in school for misbehavior often than their whites classmates (Crenshaw 2012). Law enforcement officers target blacks more often than they target whites (Weatherspoon et al. 2004), and judges likely incarcerate blacks more often than they incarcerate whites (Abrams et al. 2012). It should be, perhaps, no surprise that blacks make up 37.8% of US federal prison inmates (United States, Federal Bureau of Prisons 2018) when they only make up 14% of the US' population (United States, Census Bureau 2016). That is, since blacks are incarcerated at rates higher than their white counterparts, they are overrepresented in most US prisons. These injustices play out on a backdrop of general distaste for black people in a wide variety of contexts that often peaks into disgust (Yancy 2016; Taylor 2016).

We must consider the possibility that mandatory neurointerventions could play some role in these already present racial disparities in the US criminal justice system. After all, if mandatory neurointerventions replace incarceration at all, it stands to reason that blacks would be disproportionately targeted for neurointerventions as well. Further, even if a black person is detained, convicted, and sentenced justly—given some loose reading of the word "just"—the over-application of just laws for ulterior reasons still constitutes a unique harm to black people. Similarly, the over-administration of neurointerventions would constitute a unique harm to black people. Further, and perhaps most alarmingly, insofar as the personalities and behaviors of people of color are considered distasteful (Yancy 2016), the over-administration of neurointerventions to black people may seem like an attempt to "correct" the moral character of black people directly.

But neither the constrained nor the expansive question considers these possibilities—that mandatory neurointerventions may perpetuate and extend systems of oppression that disadvantage some groups and advantage others. If we accept the aforementioned story about racial disparities in law enforcement and prison populations, and if we accept the possibility mandatory neurointerventions would be administered to blacks disproportionately more than whites, we might think of these neurointerventions as a form of moral enhancement forced on people of color—even when such an intervention "[has no effect] beside interfering with disvaluable mental states" (133), and even when "the law is just and reasonable" (133). The very language used here hides the problem: It matters who determines which (and whose) mental states are "disvaluable," how those mental states arose in the person's cultural context, and how central those "disvaluable" mental states might still be to the experiences of the person. To forcibly interfere with black people's mental states is a violation—no matter what the mental states are. Further, it matters who is responsible for enforcing laws, what attitudes they have toward the people who break those laws, and what measures are being used to equalize the enforcement of laws—even when the laws are just.

As such, I propose that we consider a third, even more expansive question: Is it permissible to administer a mandatory neurointervention on a person if that intervention would possibly be overadministered to that person's social group as the result of a legacy of prejudice? We can call this the *administration question*. Where the expansive question calls us to remember that these neurointerventions will likely be imperfect, the administration question calls us to remember that neurointerventions will likely be administered in ways that comply with systems of oppression. This question, I believe, represents an important shift in how we make sense of the moral salience of neurointerventions. It is not enough to consider the harms caused by the technologies themselves; we must also consider the oppressive contexts these technologies are used in. If we fail to answer the administration question, it's possible that we will entirely neglect the possible impact of these interventions on the groups that stand to lose the most. ■

REFERENCES

Abrams, D., M. Bertrand, and S. Mullainathan. 2012. Do judges vary in their treatment of race? *Journal of Legal Studies* 41 (2): 347–83.

Birks, D., and A. Buyx. 2018. Punishing intentions and neurointerventions. *AJOB Neuroscience* 9(3): 133–143.

Crenshaw, K. W. 2012. From private violence to mass incarceration: Thinking intersectionally about women, race, and social control. *UCLA Law Review* 1418–1472.

Schwartz, R. C., and K. P. Feisthamel. 2009. Disproportionate diagnosis of mental disorders among African American versus European American Clients: Implications for counseling theory, research, and practice. *Journal of Counseling & Development* 87(3): 295–301.

Taylor, P. C. 2016. *Black is beautiful: A philosophy of black aesthetics*. Hoboken, NJ: John Wiley & Sons.

United States Census Bureau. 2016. Quick facts: Population estimates by race and hispanic origin. https://www.census.gov/quickfacts/fact/table/US/PST045216. Retrieved June 13th, 2018.

United States, Federal Bureau of Prisons. 2018. Inmate statistics: Inmate race. https://www.bop.gov/about/statistics/statistics_inmate_race.jsp. Retrieved June 13th, 2018.

Weatherspoon, F. D. 2004. Racial profiling of African-American males: Stopped, searched, and stripped of constitutional protection. *The John Marshall Law Review* 38: 439–68.

Yancy, G. 2016. *Black bodies, white gazes: The continuing significance of race in America*. Rowman & Littlefield.