“You shall have the thought”: *habeas cогитatio* as a writ to enforce neurorights

José Manuel Muñoz  
Mind-Brain Group, Institute for Culture and Society (ICS), University of Navarra, Spain  
Gordon Center for Medical Imaging, Massachusetts Gener; Hospital and Harvard Medical School, USA  
International Center for Neuroscience and Ethics (CINET), Tatiana Foundation, Spain

José Ángel Marinaro  
Universidad Nacional de La Matanza, Argentina
Neurotechnology and fundamental rights

- The impressive progress of neurotechnology in recent decades, as well as the expectations of its progress in the coming years, cannot be ignored and invite us to be optimistic regarding the design of tools for the diagnosis, prevention, and treatment of neurological and psychiatric disorders. At the same time, they appeal to us to anticipate the potential risks to an individual’s fundamental rights.

- In this context, proposals have emerged in recent years either to design new ad hoc human rights or to update the pre-existing ones. These rights are now widely referred to as ‘neurorights’ and include mental privacy, mental integrity, and personal identity, among others [1–3, 11]
- There is still **no consensus** on the specific content of these rights, their mutual relations, and their mode of application, among other aspects [4–7].

- Nevertheless, there is a considerable amount of academic work related to updating the right to **freedom of thought** in order to include the protection of **thought itself**, and not only its social manifestations [3]. Rights/concepts such as **cognitive liberty** [1, 8–10], **free will** [2, 4, 11], **mental freedom** [12], and **mental self-determination** [13] come into play here.
Legal remedies: from rights to writs

- However, just as other rights require additional legal instruments to guarantee their compliance, neurorights will probably require specific complementary remedies.

- In relation to this, there is a long tradition of *habeas corpus* as an emergency remedy to enforce the rights of a citizen against illegal or arbitrary detention.
Habeas corpus (1)

- The **writ of habeas corpus** is a legal procedure that has its roots in Antiquity and the Middle Ages (Ancient Rome, John I of England, Kingdoms of Aragon and Biscay) and was consolidated through the Habeas Corpus Act 1816 (Parliament of the United Kingdom)

- According to the *Oxford English Dictionary* [14], the Latin *habeas corpus* means “**thou (shalt) have the body**” and it is described as “the prerogative writ [...] requiring the body of a person restrained of liberty to be brought before the judge or into court, that the lawfulness of the restraint may be investigated and determined”
Habeas corpus (2)

- This writ is considered the most important instrument designed to **protect individual liberty** against arbitrary detention, illegal imprisonment, isolation, torture and mistreatment, state terrorism, and other similar types of abuse.

- It is, therefore, an essential means to **apply the system of protection** of human rights, and this is why it is often referred to as “The Great Writ”.
Habeas data

- The practice of obtaining and storing personal data, which is a product of the growing computerization of society, has generated new forms of control over persons. These emerging threats justified the creation of the habeas data writ (“you shall have the data”) in the 20th century to protect the right to privacy related to objective aspects of people

- Habeas data allows them to initiate urgent legal action to access their personal information held by either public or private entities, as well as its modification or elimination. The concept of informational self-determination is an essential element here
Toward a third *habeas*

- So far, we have described procedural writs aimed at protecting either **bodily self-determination** (*habeas corpus*) or **informational self-determination** (*habeas data*)

- However, novel risks associated with the misuse of technological innovations are arising, including the neurotechnological abuses on the person. These risks are related to another type of freedom: the **self-determination of our mental states and contents**
Protecting freedom of thought

- Among all the objects of protection that come under neurorights, a critical one is personal autonomy. Five neurorights denominations seem clearly aimed at protecting this autonomy via the self-determination of our mental states and contents: cognitive liberty [1, 8–10], free will [2, 4, 11], mental freedom [12], and mental self-determination [13].

- For the sake of simplicity and effectiveness, it seems reasonable to propose an umbrella neuroright that encompasses all of these denominations. This is the view of Ienca [3], who proposes to take freedom of thought as this umbrella denomination.
“Freedom of thinking”

- Following this view, but further emphasising Ienca’s view on the necessity of protecting the internal process of thinking (i.e. thought itself, including cognition and emotion), we suggest using *freedom of thinking* as an all-encompassing term.

- Importantly, freedom of thought (or thinking) has often been considered a *prerequisite for all other fundamental freedoms and rights* [1, 3].
Foundations of *habeas cogitatio* (1)

We thus propose to expand the procedural apparatus by incorporating a third habeas, which we call *habeas cogitatio*: a writ aimed primarily at enforcing freedom of thinking and, subsidiarily, the rest of neurorights linked to this principle as well. Its foundations are the following:

<table>
<thead>
<tr>
<th>Meaning</th>
<th>Etymology (Latin)</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>“You shall have the thought”</td>
<td>A prerogative writ used to challenge the validity of a neurotechnological interference in a person’s thought process, either in official or private hands</td>
</tr>
</tbody>
</table>
## Foundations of *habeas cogitatio* (2)

<table>
<thead>
<tr>
<th>Typology</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type of right</strong></td>
<td>Procedural right (writ)</td>
</tr>
<tr>
<td><strong>Sense</strong></td>
<td>Negative (compels to inaction towards a person)</td>
</tr>
<tr>
<td><strong>Jurisdiction</strong></td>
<td>National/federal level (as it befits a constitutional writ)</td>
</tr>
<tr>
<td><strong>Essential principles</strong></td>
<td>Agility (fast process), simplicity (no formalities), generality (no one is exempt from the investigation), universality (applicable both to illegal interferences and to the legal ones kept illegally)</td>
</tr>
</tbody>
</table>
Foundations of *habeas cogitatio* (3)

<table>
<thead>
<tr>
<th>Guarantee</th>
<th>Object of protection</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Personal autonomy (through the self-determination of mental states and contents)</td>
</tr>
<tr>
<td>Right enforced</td>
<td>Freedom of thinking (or freedom of thought, cognitive liberty, mental self-determination, mental freedom, free will)</td>
</tr>
<tr>
<td>(primarily)</td>
<td></td>
</tr>
<tr>
<td>Rights enforced</td>
<td>The rest of neurorights, except for arguably mental privacy</td>
</tr>
<tr>
<td>(subsidiarily)</td>
<td>(depending on the scope of <em>habeas data</em>)</td>
</tr>
</tbody>
</table>
Foundations of *habeas cogitatio* (4)

<table>
<thead>
<tr>
<th>Investigation</th>
<th>Interferences to investigate</th>
<th>Potential perpetrators</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Direct, harmful interferences in a person’s thought process (i.e. those that directly affect the nervous system through neurotechnologies)</td>
<td>Both public (e.g., state, government, officials, police, army, judges) and private (esp. corporations and attorneys)</td>
</tr>
</tbody>
</table>
Final remarks (1)

We think that the writ to *habeas cogitatio* could effectively complement the other habeas existing to date and thus be able to **protect all personal liberties** through urgent procedural remedies:

- **Physical freedom**: via *habeas corpus*

- **Mental freedom**: via *habeas data* (in case that this writ covers mental privacy) and *habeas cogitatio*

- **Behavioral/social freedom**: via *habeas data* (protecting personal information that people have ever made available) and *habeas cogitatio* (protecting the thought process that precedes and triggers action)
With this proposal, we hope to contribute toward exploring new avenues of remedy that can serve to **broaden the framework of guarantees** for citizens against abuses to their liberties. Because freedom, after all, is worth all the “bleeding, fighting, and living on”
Para la libertad sangro, lucho, pervivo.
Para la libertad, mis ojos y mis manos,
como un árbol carnal, generoso y cautivo,
doy a los cirujanos

For freedom I bleed, I fight, I live on.
For freedom, my eyes and my hands,
like a carnal tree, generous and captive,
I give to the surgeons

Miguel Hernández*

* Miguel Hernández (born 1910) was a Spanish poet and playwright. In 1939, due to his political ideas, he was taken by the Francoist authorities to prison, where he died of tuberculosis in 1942. These lines were written in tribute to the combatants wounded during the Spanish civil war.
References


