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'NEUROPHOBIA,' a Reply to Patterson

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Response

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Space limitations preclude my addressing all of Professor Patterson's misunderstanding, so I shall focus on the more troublesome instances:

Patterson dismisses my book ('Moral Conflict,' textual page references herein are to the book) in terms borrowed from McGinn's review of Changeux, concluding, with McGinn, that arguments promoting the neuroscientific perspective must be metaphysical. Applied to 'Moral Conflict', Patterson's central assertion is wrong, on at least three levels: first, McGinn was responding to Changeux's supposed reliance on neuroscience to inform critique of dualism and the establishment of materialism insofar as the *metaphysical* nature of 'the good, the true, and the beautiful' is concerned. 'Moral Conflict' is *not* concerned with the nature of such experiences; it *is* concerned with how the law takes account of brain states, a different matter altogether. We might be able to 'see' knowledge or even recklessness on an fMRI scan[1]; I make no argument about whether we will ever capture the experience of knowledge or recklessness in terms of brain state. Patterson here falls victim to the very Act/Object fallacy he accuses me of running 'up against' when he fails to see that McGinn's critique of Changeux was based on McGinn's writing about 'the activity of thinking'; I and the law care only about 'what one thinks'. Next, though my argument need not be metaphysical, it actually is, at least according to Bennett and Hacker, whose 'Philosophical Foundations of Neuroscience' provided the template for Patterson and Pardo's 'Minds, Brains, and Law'. My book follows the *metaphysical* eliminative materialism Bennett and Hacker attribute to Paul Churchland (at 70–73). Finally, asserting that promotion of neuroscience requires engagement with philosophy is akin to asserting that natural selection must account for theology.

[1] Iris Vilares et al., *Predicting the Knowledge-Recklessness Distinction in the Human Brain*, www.pnas./org/cgi/doi/10.1073/pnas.1619385114 (accessed May 30, 2018); perhaps Patterson foreshadowed that development in reply to an earlier work critical of his perspective, when he acknowledged that he and Pardo 'do not take issue with the possibility that advances in empirical knowledge may cause us to revise our concepts'. Dennis Patterson, *Symposium on Minds, Brains, and Law: A Reply*, 7 JURISPRUDENCE 181, 181–91 (2016). Apparently the Vilares et al.'s article did not occasion such revision.

Patterson observes that there exist 'things in the world that are not material'. But materialism can understand those 'things' as *manifestations* of the material. The ability *to do* mathematics is a manifestation of brain. The fact that mathematical truths are not *dependent* on neural function is no more significantly true than is the fact that the reflection of light waves is not dependent on the eye.

Patterson misunderstands (or misreads) my invocation of Raine's important work on the biological roots of crime. I do not assert Raine is a determinist (though he may be) and then cite his position to establish the truth of determinism. My citation of Raine's work supports the conclusion that 'we are the product of forces that act on us—and *only* the product, not the producer of such forces' (at 36). Raine read the draft of the chapter that cites him at length and then read the entire book before he wrote one of the promotional blurbs that appear on the back cover. He likely would not have ignored misrepresentation of his conclusions.

Patterson's positing Raine as an example of someone whose brain scan shares characteristics of psychopathy betrays Patterson's confusion of the empirical and the conceptual.[2] No one, and certainly not I, has ever concluded that we can now determine from a brain scan *without more* whether someone is, in fact, a psychopath. *Empirically* we cannot know, yet; there is no conceptual barrier to our eventually overcoming that empirical limitation. 'Moral Conflict' is considerate throughout of the current empirical limitations.

Patterson denies he is a dualist. Others too have reached the conclusion that Patterson's views are dualistic.[3] Patterson clarifies that he and Pardo conclude in 'Minds, Brains, and Law' that the mind is 'an array of capacities'. I see no difference between that phrasing and my characterization of their dualism as based on 'properties'. My characterization just makes their property dualism more transparent.

Patterson turns to my discussion of tort theory and concludes that '[w]hat is badly needed is a demonstration of how the neuroscientific conception of agency can both displace and replace our current regime of tort law'. Here, again, Patterson fails to read carefully. When he lists the tort theorists whose work I engage he omits reference to my extended discussion of Hurd. There (at 167–76) I make clear the displacement and replacement of the current tort regime, a regime based on the very 'moral responsibility' that neuroscientific insights undermine, in terms Hurd explains.[4]

I am not sure Patterson appreciates what it means to understand human agency in mechanical terms: 'Alces likens blaming humans for their actions to blaming a car for not starting …. Humans, like the cars they drive, are purely mechanical devices that occasionally require repair but benefit not at all from praise or blame.' I never suggest that human agents cannot benefit from praise or blame. In fact, the opposite is true.

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[2] This is an error Patterson makes often. See Dennis Patterson, *Neuromania*, 5 J. L. & BIOSCI. 27, 29 (2018).

[3] See Neil Levy, *Is Neurolaw Conceptually Confused?*, J. ETHICS 171, 174 (2014); Walter Glannon, *Brain, Behavior, and Knowledge,* 4 NEUROETHICS 194 (2011); MARTIN ROTH, 4–5 PHILOSOPHICAL FOUNDATIONS OF NEUROLAW 122, 184 (2018).

[4] Here Patterson also criticizes my frequent use of the adjective 'incoherent' to describe disappointment with applications of non-instrumental theory to legal doctrine. But he misunderstands: 'incoherent' is not an epithet; to say that an argument is 'incoherent' is to say that the argument assumes characteristics of the subject that are not present. Any normative theory based on the moral responsibility of human agents is *incoherent* because human agents do not have moral responsibility, and it is Waller's arguments 'Against Moral Responsibility' that support my conclusion.

Patterson's confusion is a product of his conclusion that because humans respond to reasons they are not mechanistic. Reasons are just another 'cause', empirically but not conceptually different from other more obviously mechanical causes.

Patterson asserts my failure to cite neuroscientific research to bear on tort law doctrine and theory. Again, he may not have read the whole book carefully. I cite more than 150 neuroscientific studies pertinent to the book's conclusions and note, at the outset, that '[n]either each chapter nor any pair of chapters is a self-contained whole …. The argument builds through the book to, ultimately, sustain the weight of the conclusion that the premise that founds much if not all law—moral responsibility—is chimerical' (at xiv). Another instance of Patterson's misreading is his assertion that with regard to both the tort and contract law I 'ignore the implications of behavioral economics for law'. But just *three paragraphs earlier* in his review he notes my citation of Daniel Kahneman, and 'Moral Conflict' as well cites and discusses the behavioral economics of Kahneman, Bar-Gill, Hanson, Kysar, Ben-Shahar, Schneider, Marotta-Wurgler, Tversky, Yosifon, and others. Indeed, I cite the very book, by Bar-Gill, that Patterson criticizes me for *not* considering.

Ultimately it becomes clear that Patterson's problem is neither with my particular argument nor with the authorities I have collected nor even with how I have presented them. He simply refuses to believe that neuroscience can tell us anything about human agency so far as law is concerned. That is 'neurophobia'. Patterson makes the same argument in his book with Pardo, and critics have not been favorably impressed. Faigman, in particular, responds convincingly to that argument.[5] Faigman discovers confusion of the conceptual and the empirical and that same confusion persists in 'Neuromania'. Faigman questions the contribution that philosophy could make to the introduction of neuroscientific insights into legal analysis. In defense, Pardo and Patterson reply to Faigman that 'sure', philosophy is not necessary to our understanding of what constitutes, for example, 'lying,' '[b]ut we think it helps'.[6] The persistent problem for philosopher-neurophobes is that they cannot explain how their philosophy 'helps'; Faigman reveals how philosophy may hurt.

The law can steer through the straits of neuromania and neurophobia.[7] We must appreciate the limitations of the science as well as problematic doctrine and misplaced enthusiasm for non-instrumental normative theory that is inconsiderate of the nature of human agency neuroscientific insights can reveal.

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[5] David L. Faigman, *Science and Law 101: Bringing Clarity to Pardo and Patterson's Confused Conception of the Conceptual Confusion of Law and Neuroscience*, 7 JURISPRUDENCE 171, 171–80 (2016).

[6] Patterson cites to his conclusion that philosophy provides the meaning of lying when he criticizes my suggesting that neuroscience can, without help from philosophy, provide a concept of consent. And so he relies on the same conceptual obfuscation that he was forced to abandon in his reply to Faigman.

[7] Indeed, I believe the Supreme Court has demonstrated that. Patterson, following Morse, though, would argue that the Court did not embrace neuroscience in Roper v. Simmons, 543 U.S. 551 (2005). We could quibble about that, but it seems clear to me that Justice Kennedy, the author of *Roper*, thought neuroscience mattered to that decision when he later concluded in Graham v. Florida, 560 U.S. 48, 68 (2010), that since *Roper* 'developments in psychology and brain science *continue* to show fundamental differences between juvenile and adult minds' (Emphasis added).