1-1-1994

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Recommended Citation
Steven L. Winter, One Size Fits All, 72 Tex. L. Rev. 1857, 1868 (1994)
Available at: https://digitalcommons.wayne.edu/lawfrp/298

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One Size Fits All

Steven L. Winter*

[The rational remains to be created and to be imagined, and it does not have the power of replacing the false with the true.]

I. Déjà Vu, All Over Again

Dennis Patterson’s caustic criticism forces me to make a confession. Many have wondered about my sustained productivity over the past several years. Friends and acquaintances—sometimes even strangers—have inquired whether there aren’t really several Steve Winters. It is time to come clean. There are. Four to be exact. Honest. Maybe more, but I know of only four. In addition to me, there is a Steve Winter in New Jersey who is a first cousin. Then, there is a second cousin, also named Steve, who lives in upstate New York. (My family, you see, was not very creative). Number four is an Australian native who lives in New York City. As far as I know, he is no relation.

You can just imagine the kind of postmodern decentering of the self that I have experienced over the years. When I lived in New York, I more than once received bills and dunning letters from doctors whom I had never even heard of. Sometimes, that took some clearing up. It was always easy, of course, to tell the misplaced phone calls by the Australian accent of the caller. College was not so easy. Cousin Steve and I went to the same school; he was two years ahead of me. I regularly got his mail, which was a real problem when his fiancée spent her junior year abroad. My parents once received his tuition bill; much to my father’s chagrin, Cousin Steve’s tuition was lower than mine. When I got in trouble, the college administration called my uncle. In my senior year, I edited the magazine that Cousin Steve had edited two years earlier. People used to


For P.J.S., whoever he is.

walk up to me on campus and exclaim: "Are you still the editor? I thought you graduated two years ago."

So, perhaps, you can empathize with my reaction when I read Dennis Patterson's commentary. Which Steve Winter, I wondered, could have been so silly and misguided this time? This Winter is evidently an "objectivist" 2 and a "metaphysical realist." 3 But I have painstakingly laid out "an approach to reason and knowledge" that "is neither objectivist and foundational nor radically relativist in a nihilist or 'anything goes' sense," one "that is simultaneously constrained, realist, and relativist." 4 This other Winter shares a picture of understanding with John Locke. 5 Yet, everyone knows that my work is all about the centrality of metaphor; Locke, in contrast, condemned metaphor and other figurative speech as "perfect cheat" and insisted upon literal prose "if we would speak of Things as they are." 6 Not surprisingly, the Lockean Winter carries the "burden of proof . . . to show that the fit 'between our thought and the world is determined independently of human cognition.'" 7 In contrast, I have argued that "reason, language, and knowledge can be understood only in terms of the cognitive process." 8 Indeed, I have repeatedly explained

3. Id. at 1854.
5. Patterson, supra note 2, at 1847 n. 63. The textual assertion to which Patterson appends this statement bears so little relation to any position taken by Lakoff, Johnson, or myself that one hardly knows where to begin in responding. Suffice it to say that, in describing my project as an attempt to "account[] for objectivity in judgment," id. at 1847, Patterson betrays his complete misapprehension of the nature and import of recent developments in cognitive theory. In point of fact, these developments both undermine and radically transform the conventional notion of "objectivity." See, e.g., GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 301-02 (1987) [hereinafter LAKOFF, WOMEN, FIRE] ("[T]o be objective requires one to be a relativist of an appropriate sort."); Steven L. Winter, Bull Durham and the Uses of Theory, 42 STAN. L. REV. 639, 685 (1990) [hereinafter, Winter, Bull Durham] (explaining that "'objectivity' becomes a question of transperspectivability. 'Impartiality,' in turn, is no longer a matter of an aperspectival position, but rather an exercise of . . . empathetic ability. . . ." (emphasis omitted)). Indeed, Patterson cites Mark Johnson for the very position that, as Johnson explains, has been discredited by developments in cognitive theory. Compare Patterson, supra note 2, at 1847 n.61 with MARK JOHNSON, THE BODY IN THE MIND: THE BODILY BASIS OF MEANING, IMAGINATION, AND REASON ix-xi (1987).
7. Patterson, supra note 2, at 1854 (quoting John Haldane & Crispin Wright, Introduction to Reality, Representation and Projection 3, 3-4 (John Haldane & Crispin Wright eds., 1993)). Patterson's contention confirms my earlier observation that the Wittgensteinian assumes "the same mistaken premise that [he] attributed to everyone else: the assumption that representation could only be a matter of a one-to-one correspondence with objective states of affairs in the world." Steven L. Winter, The Constitution of Conscience, 72 TEX. L. REV. 1805, 1822 (1994) [hereinafter Winter, Constitution of Conscience].
8. Winter, Transcendental Nonsense, supra note 4, at 1130.
that the import of cognitive processes such as metaphor is that there are no "determinate functions that link experiential input to linguistic output in a fixed or linear manner." I have contended, moreover, "that there is no objective description of reality separate from our conceptual schemes" and that these schemes are "dependent on the kinds of bodies that we have and the ways in which those bodies interact with our environment."11

This other Winter, in fact, is very confused about his philosophers. He cites Charles Taylor but, apparently, is in direct conflict with Taylor's claim that: "My embodied understanding exists in me, not only as an individual agent, but as the co-agent of common actions."12 I, on the other hand, have argued that it is in the framework of our "embodied experiences that we are most powerfully situated"13 and repeatedly—though, evidently, not often enough—quoted in support Merleau-Ponty's claim that:

In so far as I have hands, feet, a body, I sustain around me intentions which are not dependent upon my decisions and which affect my surroundings in a way which I do not choose. These intentions are general . . . in the sense that they are not simply mine, they originate from other than myself, and I am not surprised to find them in all psycho-physical subjects organized as I am.14

On the subject of sedimentation, this other Winter is even more perplexed. This other Winter thinks that sedimentations stand as "something outside ourselves" that "regulates what we do in law."15 But I have explained that "the concept expresses the way meanings and assumptions build up within the subject and, once internalized, operate without the subject's conscious awareness."16 This other Winter has yet failed to


10. Winter, Transcendental Nonsense, supra note 4, at 1131 (emphasis omitted).

11. Id.

12. Charles Taylor, To Follow a Rule, in RULES AND CONVENTIONS 177 (Mette Hjort ed., 1992); see Patterson, supra note 2, at 1853-54.


14. MAURO MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION 440 (Colin Smith trans., 1962), quoted in Winter, Bull Durham, supra note 5, at 658 n.96; Steven L. Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 CAL. L. REV. 1441, 1451 n.30 (1990) [hereinafter Winter, Indeterminacy and Incommensurability]; Steven L. Winter, Human Values in a Postmodern World, 6 YALE J. L. & HUMANITIES 233, 243 n.42 (1994). There are, of course, subtle differences between these statements by Taylor and Merleau-Ponty. But these positions hardly "run counter" to one another as Patterson seems to suppose. Patterson, supra note 2, at 1853.

15. Patterson, supra note 2, at 1854.

16. Winter, Indeterminacy and Incommensurability, supra note 14, at 1487. As Merleau-Ponty explains, "there is a 'world of thoughts', or a sediment left by our mental processes, which enables us
show that "objectified sedimentations' give rise to meaning in the same way as human practices." Yet my claim was precisely that "social experiences such as routine or habitual interactions between subjects give rise to mutual or reciprocal sedimentations." Indeed, I have explained that the claim that cognition is grounded means that "already existing social practices and conditions ... form both the grounds of intelligibility for and the horizons of our world." In much the same vein, this other Winter appears oblivious to the "general movement away from the individual as the foundation of empirical, linguistic, and moral judgment." Yet, as we just saw, I have taken pains to point out that the grounded nature of cognition is necessarily synonymous with a socially situated view of knowledge, meaning, and value. "Like the 'state of nature,' the solitary subject is a theoretical construct impossible in the real world."

When we turn to questions of legal theory, this other Steve Winter is yet more wrongheaded. Apparently, this person still believes that there must be "something standing between the Constitution and our understanding of it" in order to have a theory of constitutional interpretation. I have argued, in contrast, that "the production and maintenance of legal meaning is dependent upon lived human experience" and that "the meaning of [the Court's] constitutional interpretation is as much a matter of our understanding, our interpretive commitments, as it is a matter of the understanding of the Justices." Indeed, I have criticized as utterly beside the point the conventional dependence on "external" theory.

Where mainstream efforts treat constitutional law as if it were (or, rather, should be) the product of a consistent theory, I suggest that

to rely on our concepts and acquired judgments as we might on things there in front of us ... without there being any need for us to resynthesize them." MERLEAU-PONTY, supra note 14, at 130.

17. Patterson, supra note 2, at 1850.
18. Winter, Indeterminacy and Incommensurability, supra note 14, at 1488.
19. Id. at 1452.
20. Patterson, supra note 2, at 1854-55.
21. Supra text accompanying note 19; see also Steven L. Winter, Contingency and Community in Normative Practice, 139 U. PA. L. REV. 963, 987, 987-91 (1991) (arguing that "self, role, and community form a single, indivisible ecological system"); Winter, "Color of* Law, supra note 9, at 387 ("[T]he grounded nature of our cognition means that we unconsciously replicate and sustain the stabilized, socially constructed contexts in which we are situated.").
22. Winter, Indeterminacy and Incommensurability, supra note 14, at 1486.
23. Patterson, supra note 2, at 1846.
24. Winter, Transcendental Nonsense, supra note 4, at 1231.
25. Id. at 1229 (emphasis in original).
26. On the problems of separating theory from practice, see Winter, Indeterminacy and Incommensurability, supra note 14, at 1444-46, 1446 ("Regardless of whether we take the route of governing theory or of theory as rhetorical product, ... we have already separated law from theory and placed the latter on the outside trying to get back in."); see also id. at 1507-11 (explaining how a dynamic understanding of human action confutes conventional constitutional assumptions that reify the past).
it must be seen as the dynamic product of the relentlessly jurisgener-
ative processes of social and cultural construction. In this view, the
Constitution necessarily slips the bonds of mainstream theory as the
advent of constitutional meanings play out in an unceasing process
of situated jurisgenesis.27

This other “Winter asserts that to interpret the Constitution, one must have
a lens . . . that gives the Constitution meaning” but cannot explain “what
tells you how to use the lens.”28 In contrast, I have cautioned that it is
a mistake to reify an abstraction like a paradigm, stabilized matrix, or—in
Patterson’s terms—a “lens” and treat it

as somehow separate from the actual community that embodies it.

. . . [T]he subject and its objects cannot be separated in this
fashion: A stabilized matrix is nothing more than the beliefs, as-
sumptions, and mental processes of actual people; it is not a property
of the texts that they draft and interpret. It follows that no anteced-
ent matrix can determine subsequent interpretations by other people
at a later time.29

You will understand, therefore, if my first reaction to Patterson’s
commentary was a genuine Alfred E. Newman “What, me worry?” In
fact, I was all prepared to write a teasing note to one of my cousins when
I realized that this was not a simple case of mistaken identity. After all,
Cousin Steve is a successful cardiologist. Last I heard, my other cousin,
Steve, had a thriving medical practice. The Australian Steve Winter was,
as I remembered, an architect. Of course, there is always the possibility
of an error. But I was reasonably sure that none of them had been publish-
ing in the law reviews. I guessed that Patterson meant me after all.

Then, I realized why I was having such an acute sensation of déjá vu.
It wasn’t college I was reliving, but something much closer at hand. In
fact, it was something at the beginning of this very volume of the Texas
Law Review. I was having flashbacks of Patterson’s monstrous misreading
of Stanley Fish.30 “My god,” I thought, “this must be Stanley’s revenge
for Bull Durham!”31 Patterson was doing to me just what he had done to
Fish. It was a great stunt, and he had done it twice. Hats off to him.

Nevertheless, I have decided to play the spoiler and reveal the secret.
Here is how Patterson does it. First, he sets up an a priori requirement
that must be true of any claim (except his and Bobbitt’s). Then, he mis-

27. Id. at 1506.
28. Patterson, supra note 2, at 1850-51.
29. Winter, Indeterminacy and Incommensurability, supra note 14, at 1507.
30. See Dennis Patterson, The Poverty of Interpretive Universalism: Toward the Reconstruction
31. See Winter, Bull Durham, supra note 5.
construes every claim accordingly so that he can invoke the standard Wittgensteinian critique. Just watch. "Theoretical approaches to law," Patterson declares with utter certainty, "all take the position that understanding the activity requires the identification of something that mediates between the participant and the activity itself."\(^{32}\) Dworkin does; Fish does; Winter does.\(^{33}\) With this ipse dixit in place, it is a simple matter to trot out the standard Wittgensteinian critique that we now know only too well: Language (or "interpretation,"\(^{34}\) or "interpretive community,"\(^{35}\) or "metaphoric devices"\(^{36}\)) cannot be a "third thing" that mediates between the mind and the world because there is no way to get access to the world without language, no way to describe what language does or how well it does it without using language, no "way of breaking out of language in order to compare it with something else."\(^{37}\) In short, Patterson runs around reifying everything in sight and then complains that everyone else is confused because they fail to understand that these "things" cannot really stand outside ourselves, separate from the actual communities of human beings whose practices they are.

You have to admire Patterson. It is a neat trick if you can get away with it. Repeatedly. Just like Yogi Berra said: "It's déjà vu, all over again."

II. The Procrustes Effect

This revelation did not put me out of my misery, however. True, it was a comfort to discover that none of this was really about me. The person who was so "philosophically confused"\(^{38}\) was just my science fiction twin, and he had the great good fortune to inhabit the same planet as Stanley's doppelganger. At least he had someone smart and witty to talk to. But then I realized that I had only managed to double the mystery. Over and over again, in theorist after theorist, Patterson keeps seeing exactly the same mistake regardless of how diverse their actual views, of how carefully these people have staked out those positions, or of how close those positions are to his own. How can that be?

\(^{32}\) Patterson, supra note 2, at 1845 (emphasis added).

\(^{33}\) At least, I am in illustrious company.

\(^{34}\) RONALD DWORKIN, LAW'S EMPIRE 87-90, 225-38 (1986).

\(^{35}\) STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 14 (1980).

\(^{36}\) Patterson, supra note 2, at 1850.

\(^{37}\) RICHARD RORTY, Introduction: Pragmatism and Philosophy, Introduction to CONSEQUENCES OF PRAGMATISM xiii, xix (1982). This is one take on the now familiar dictum that: "It is what human beings say that is true and false; and they agree in the language they use. That is not agreement in opinions but in form of life." LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 241 (G.E.M. Anscombe trans., 1953) (emphasis in original).

\(^{38}\) Patterson, supra note 2, at 1852.
Fortunately, I am also a student of cognition. We know that the brain processes new input in terms of existing knowledge, seeking out comparable global mappings and adjusting them until they match. This is why the distinguished neuroscientist Gerald Edelman refers to consciousness and perception as "the remembered present." Although working in a very different tradition, Paul Ricoeur has identified this process—in which the very act of perception already entails a transfiguration and assimilation of the idea or event in terms of an existing concept or understanding—as the phenomenon he calls "prefiguration."

Usually, this process does not cause too much distortion because the normal human mind works with a "myriad" of prefigurations. Moreover, these prefigurations are not actual entities in the brain, but patterns of neural firings and attendant cross-mappings that develop through interaction with the physical and social world. They are, accordingly, dynamic rather than static processes. As Edelman explains: "[A global mapping] is . . . a dynamic structure that is altered as the sampling by different sensory sheets and its input-output correlations are changed by motion or behavior." To put the same point in a more conventional way, we have many categories and they operate flexibly rather than rigidly.

Still, it is easy enough to see how this process can misfire. Consider the parent’s familiar parapraxis in which he or she cries out to one child using the other’s name. (Now that I am the parent of two, it is starting to happen to me too.) One tries to call to consciousness the image and name of a loved one and out pops the name of another. Another example is Thomas Kuhn’s observation that scientific paradigms can remain oblivious to anomalous data for extended periods. "[N]ovelty emerges only with difficulty, manifested by resistance, against a background provided by expectation."


40. EDELMAN, THE REMEMBERED PRESENT, supra note 39. No doubt, Patterson thinks that Edelman, too, is "philosophically confused." Perhaps so. But, then, he won a Nobel Prize for his work in immunology and is rumored to be in line for a second in neuroscience. So, you decide.

41. 1 PAUL RICOEUR, TIME AND NARRATIVE 53-57 (Kathleen McLaughlin & David Pellauer trans., 1984).

42. In other words, none of this is "hard-wired," as some cognitive theorists once believed. Rather, the genes that determine the overall makeup of the brain are insufficient to determine its internal structure. Instead, the million billion or so neurons and synapses that compose the brain compete to form various connections during the course of the human organism’s experience in the world. See EDELMAN, NEURAL DARWINISM, supra note 39.

43. EDELMAN, THE REMEMBERED PRESENT, supra note 39, at 55.

44. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 64 (2d ed. 1970). For this reason, Kuhn notes that "[p]aradigms are not corrigeable by normal science at all." Id. at 122.
In an extreme version of this phenomenon, everything would start to appear the same. It would be like a mind with only a single category. Understand. It would not be a matter of misinterpretation, but of misperception. Paranoids, for example, do not interpret events in terms of the assumption that everyone is out to get them, they experience everything that way. We can call this phenomenon "the Procrustes effect." Like the Procrustes of Greek mythology, this mind has but one bed and every cognitive visitor must be made to fit. The unfortunate guest that is too short is stretched; the one that is too tall has his or her legs chopped off.

Patterson, I realized, is a philosophical Procrustes. He assimilates everything he reads to a single conceptual grid in which any referent other than "practice" is a "third thing"—an external "entity" that arbitrates all relations between the individual consciousness and the world. It does not matter whether you agree with him or not. It does not matter whether this "third thing" is an interpretive community, a cognitive schema, or a metaphoric projection with no ontological status whatsoever. It does not matter how often you explain that this "thing" is internal to the self or a part and consequence of socially situated action. If you do not see it or put it exactly the way that Ludwig would, the only thing that Patterson will see is that you have committed precisely the philosophical error that Wittgenstein (and he) have been working so hard to cure us of.

I thought that solving the mystery of misconstrual would satisfy. But it did not. I could hear a little voice in the back of my head whispering—in tones that sounded suspiciously like my friend Schlegel—that I had made yet another philosophical error and confused explanation with causation. Even if this were an accurate account of Patterson's error, it would only explain the what. It would not explain why Patterson keeps running around trying to chop off everyone's feet.

Fortunately, I recalled a story Judge Sofaer recounted in my first-year property course almost twenty years ago. He told us that at the United States Attorney's Office where he had worked, one could always tell which issue was the most troublesome for the government's case—it was the point that had been buried in a footnote. So, I decided to scrutinize Patterson's footnotes. There it was in footnote 57. And there again in footnote 58.

Inquiring minds want to know: Am I a structuralist or not? When am I going to decide what my position is? The problem is clear. "Professor

45. See Winter, Constitution of Conscience, supra note 7, at 1822 ("[T]o say that folklore is some 'thing' we 'have' is not to say either that it is an object or that it is an objective reality. That would be the fallacy of reification—that is, to confound metaphor with reality and, as a consequence, to treat abstract ideas as if they were concrete and real." (emphasis in original)); see also id. at 1821 (explaining that, although the "objectivity" generated by the social construction of the world is "real as a phenomenological matter," it "has no independent ontological status").
Winter is never as clear in his use of these terms as one would like." Then again in the next footnote: "Professor Winter does not speak in terms of propositions of law, nor does he speak of truth and falsity. Because he fails to employ the terms and arguments familiar to those in jurisprudence, it is sometimes difficult to discern exactly what his claims and criticisms are."

Now we can see exactly where the difficulty lies. Patterson has not the foggiest idea what I am talking about because my positions just do not fit into his pregiven pigeonholes. Without those pigeonholes, he is incapacitated. Either an argument fits or it just jams up his perceptual apparatus. Patterson falls victim to the Procrustes effect for the simple reason that nothing I have said computes. His categories are not working, and the resulting discomfiture is precipitating an analytic anxiety attack.

You know, I'll wager that Patterson thinks Jacques Derrida is just "somebody who would like to have a proper, disciplined, philosophical view about, e.g., words and the world, but can't quite manage to get it together into a coherent, rigorous form." In fact, I'll bet the farm Patterson thinks Derrida is "philosophically confused." You see, I know. He has been heard to say so.

III. Dennis Patterson and the End of History

But what, you ask, are the substantive differences between Patterson and me? One can only say that, given the imperious nature of his commentary, it is a little hard to tell. First, Patterson mistakes me for Christopher Columbus Langdell. Then, he has the audacity to claim an epistimological privilege for his almost complete inversion of my position, while he simultaneously disclaims the need even to consider any of my careful expositions of these complex theoretical issues. The hubris would be breathtaking were it not so absurd.

With respect to Bobbitt, the reader can see for herself whether Patterson's account is different than mine in even a single particular. With respect to "the Wittgensteinian," the careful reader will have discerned, I

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46. Patterson, supra note 2, at 1846 n.57 (emphasis added).
47. Id. at 1846 n.58 (emphasis added).
48. RICHARD RORTY, Philosophy as a Kind of Writing: An Essay on Derrida, in RORTY, supra note 37, at 90, 108 (describing and playfully teasing the way in which analytic philosophers—"the Kantians"—respond to post-Hegelians such as Derrida).
49. See Patterson, supra note 2, at 1855 ("Professor Winter seeks a quasi-scientific account of the law, one that can bring the objectivity of the scientific enterprise to the human sciences.").
50. Id. at 1854. For the record, I am not a scientific or metaphysical realist, but rather a Kuhnian. See Winter, Bull Durham, supra note 5, at 664-81; Winter, Indeterminacy and Incommensurability, supra note 14, at 1447-73.
51. Patterson, supra note 2, at 1843 n.35.
trust, that this was not old Ludwig himself but a composite of Bobbitt, Rorty, and Fish as documented by my citations. With respect to language, Patterson and I plainly disagree. I think that analysis and empirical work are revealing the structure of language. He is convinced that that is impossible.

Behind all this are two important points of disagreement. The first is jurisprudential; the second is methodological.

I knew I was in trouble as soon as I had reached the third paragraph of Patterson's comment. He says there are "two familiar ways to evaluate the law from a jurisprudential point of view," and then goes on to describe each. One takes the law as it is and seeks the underlying principles that explain it. The other identifies an ideal theory of the particular area of law, pressing a purely normative account of what the law should be.

Now, I have written about law (a little), and nothing I have done fits into either of these categories. In fact, I have criticized both these approaches. I have, on several occasions, argued that general principles are inadequate means for explaining any area of law. This is a point of congruence with Unger. And, as I have already explained, I have criticized the second approach as feckless idealism. I have argued that legal scholarship should neither "seek[] to transform the world with a better theory" nor "seek a determinate formula to govern practice," but undertake, instead, "to unravel or trace back the strands by which our constructions weave our [socio-legal] world together."

Patterson proclaims that there are two traditional ways to do jurisprudence and only one alternative—Bobbitt's. I think there is another, more pragmatic project. Patterson believes that there is only the choice between the pseudo-objectivism of a Langdellian "law as science" and the aesthetics of a Wittgensteinian "law as practice." He writes: "By aping the aspirations of natural scientists, legal theorists manage not only to miss the beauty of law, but worse, they make of it a vulgar illusion." My entire project has been to chart a jurisprudential course that avoids conventional dichotomies such as objectivism and radical relativism or formalism and historicism and so avoids just this kind of all-or-nothing mistake. It is not

52. Id. at 1837.
53. Id. at 1837-38.
54. E.g., Winter, Transcendental Nonsense, supra note 4, at 1109-11, 1224-33; Winter, Constitution of Conscience, supra note 7, at 1827-28; Steven L. Winter, Fast Food and False Friends in the Shopping Mall of Ideas, 64 U. COLO. L. REV. 965, 967, 967-68 (1993).
55. Patterson incorrectly attributes to me all of Unger's position, including the part I was careful to disclaim. Compare Patterson, supra note 2, at 1852 with Winter, Constitution of Conscience, supra note 7, at 1828.
56. Winter, Indeterminacy and Incommensurability, supra note 14, at 1501-02 (quoting Winter, Bull Durham, supra note 5, at 685).
57. Patterson, supra note 2, at 1855.
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a matter of beauty or vulgar illusion anymore than it is a choice between the determinacy aspired to by analytic logic and the arbitrariness assumed by social coherence theories.

It is all well and fine to say that law is a practice. Of course it is. But of what exactly does that practice consist? And how does it develop and change? My project is the more detailed and pragmatic one of mapping the diverse cognitive and cultural infrastructures that animate legal doctrine and structure judicial decisionmaking. For this we need a new set of tools, which is why I have devoted so much effort to the elaboration of the new conceptual developments in cognitive science. Ultimately, I think that this endeavor will best aid legal actors—whether advocates or decisionmakers—who wish to understand the law better in order to act more effectively.

Because Patterson mistakes me for a metaphysical realist, he mistakes my work for an attempt to justify law. Aside from this failure of his categorical apparatus, there is a perfectly good reason why he does not understand my project. Like Bobbitt, Patterson esteems the status quo. Bobbitt’s work is important, Patterson tells us, because “[a]t a time when so many who stand as professors of the law can manage only to condemn or trivialize it, Bobbitt’s book teaches us that law is, and will remain, a noble—and ennobling—endeavor.” Now, I’ve been out there. I spent eight years representing convicted and condemned prisoners, parents whose children were shot by the police, and hard-working people who were treated as second-class citizens and second-class workers solely because of their race. I am saddened to report that the everyday character of law as I saw it was not always an edifying sight—neither what was done, nor how it was done. Patterson wants to leave the law as it is. I think we might do things a little better.

The second, closely related difference is discernible from Patterson’s closing paragraphs. Philosophy, according to Wittgenstein, “leaves every-

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58. This is why I “eschew[ ] the language of moral philosophy, economics, history, or sociology.” Id. at 1850. To put the matter most succinctly, I’m not doing “normal science.” No doubt, Patterson would be more comfortable if I were.

59. This is why Patterson’s remarks about the infinite regress, id. at 1850-51, are utterly beside the point. I haven’t the least interest in explaining how the Constitution is properly to be interpreted, because mine is not a normative enterprise of that sort. I don’t believe there is or should be a single correct or objective reading. That is why I don’t speak of truth or falsity. See id. at 1846-47. In much the same vein, Patterson’s observation that I “often confuse” metaphysical and epistemological objectivity, id. at 1846 n. 57, misses the mark entirely. Here’s a clue: I don’t believe in either. See supra notes 4-11 and accompanying text.

60. Dennis Patterson, Conscience and the Constitution, 93 COLUM. L. REV. 270, 307 (1993) (reviewing PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991)). That evil Winter, in contrast, “condemns and trivializes” the way lawyers think about their craft. But, as I noted in my principal contribution, so does Judge Posner. So where does that leave us?
thing as it is.”61 Thus, Patterson concludes his comment with a succinct, but definitive summary of the edifying lessons of twentieth-century philosophy: 62 “That’s it,” he tells us. “We professional philosophers have thoroughly surveyed this territory. We know everything there is to know about these things, and there is nothing more to be done.”

I don’t think so. The philosophers may have thought this through and concluded that there can be nothing new to say on these issues, but those foolhardy cognitivists just won’t quit. There is a virtual revolution going on in the cognitive sciences, and it is plain that Patterson knows nothing about it. Basic-level categorization, radial categories, image-schemata, conceptual metaphor—this must all be a bunch of social science mumbo-jumbo to him. But the evidence is out there.63 I think cognitive theory, including developments that are not even on the horizon yet, is going to transform the way we see a lot of things.

But I want to be completely candid here. It is entirely possible that Patterson is right. Only time will tell. Still, if the contest is between a priori philosophizing and the empirical and theoretical advances of an indeterminate future, I’ll bet on the future every time. There is every likelihood that many of these questions will look radically different a hundred years from now. But don’t tell Ptolemy. Or Newton.

In the meantime, I am certain of three things. Presupposition is no substitute for conscientious scholarship. Erudition is no substitute for intellectual engagement. And arrogance is no substitute for an argument.

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61. WITTGENSTEIN, supra note 37, § 124.
62. See Patterson, supra note 2, at 1855.
63. For an extensive canvass of the empirical evidence on categorization, see LAKOFF, WOMEN, FIRE, supra note 5. On image-schemata, Edelman notes:

The evidence that image schemata are developed in humans comes from the classic studies of Head and from more recent analyses like those of Johnson and of Spelke. Such schemata, frequently reflected as metaphors in the language of Homo sapiens, may already function in animals with conceptual capabilities and primary consciousness. EDELMAN, THE REMEMBERED PRESENT, supra note 39, at 195 (emphasis in original) (footnote omitted) (discussing JOHNSON, supra note 5; Spelke, The Origins of Physical Knowledge, in THOUGHT WITHOUT LANGUAGE 168 (L. Weiskrantz ed., 1988)).

Also momentous is Sweetser’s observation of striking metaphoric consistency in trajectories of etymological development across time, languages, and cultures. EVE SWEETSER, FROM ETYMOLOGY TO PRAGMATICS: METAPHORICAL AND CULTURAL ASPECTS OF SEMANTIC STRUCTURE 9, 22 (1990).