

# LEGAL EXISTENTIALISM: REASONING BEYOND REASON IN THE LAW

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*Presented at the 'Judicial Reasoning: Art or Science ?' Conference (February 2009)  
National Judicial College of Australia/ ANU College of Law/Australian Academy of  
Forensic Sciences*

## *Part I: Introduction*

In Scott Turow's novel, *Presumed Innocent*, a prosecuting attorney describes himself as "a functionary of our only universally recognized system of telling wrong from right, a bureaucrat of good and evil."

There is something almost irresistible about the notion that legal reasoning is or at least could be a universal system, transcending competing claims of objectivity in ethics, both religious and secular, transcending even the post-modern assertion that there is no objectivity in these matters. It would be reassuring to imagine that the judicial process could distinguish between good and evil in a way that impartial people everywhere would find persuasive.

But judicial reasoning is neither universal nor systematic, if by that we mean a precise set of rules, procedures, and standards of proof. Nor can it be counted on to reach results that would qualify as scientifically valid or reliable.

The title of this conference—"Judicial Reasoning, Art or Science?"—could be construed to betray a touch of science envy. Does it suggest that we would be better off if judicial reasoning were scientific? Is there, perhaps, a hint of condescension in the word "art," as if it were preceded by an unstated "merely"?

The question could be rephrased in two ways, each subtly tendentious, but in opposite directions. We might ask whether judicial reasoning could ever achieve the precision and reliability of science. Answering this question in the negative would seem to imply that judicial reasoning is inferior to scientific reasoning.

We might also ask whether science is equipped to address the sorts of questions that courts must address. Answering this question in the negative would imply that it is scientific reasoning that is in some way limited, not the other way around.

Obviously, the short answer to either question is that it depends on how you define each field.

### *Part II: Why Legal Reasoning Cannot Be Scientific*

In practice, science and jurisprudence are fundamentally different discourses. Science can play a part in jurisprudence, particularly as an aid to fact finding in certain situations; but science is not equipped to find facts when reliable data are unavailable, nor to answer—or even to ask—the sorts of questions that courts routinely must address. However much we might wish otherwise, legal reasoning cannot escape patterns of soft logic that are excluded from science. Nor can it avoid language that is rotten with ambiguity. Legal reasoning is invariably implicated with “entities” that cannot be quantified or directly observed, quasi syllogisms that are ultimately ideological, reaching conclusions that may turn out to be false, invalid, or unjust.

The logic of science, as A. J. Ayer describes it, is very strict. It was Ayer who introduced logical positivism to the English speaking world in *Language, Truth, and*

*Logic* (1936). To be a genuine proposition, Ayer declared, a statement must be either tautological or capable of being tested empirically.<sup>i</sup>

In other words, statements that are neither tautological nor susceptible to empirical testing cannot count as science. They represent, as Ayer puts it, pseudo-concepts.

Legal reasoning, on the other hand, includes, tropes of soft logic that are methodologically excluded from science. Justice Richard Posner of the U.S. Court of Appeals for the Seventh Circuit describes it as “a grab bag that includes anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker’s authority, metaphor, analogy, precedent, custom, memory, ‘experience,’ intuition, and induction.” Posner, *Problems*, at 73.<sup>2</sup>

Anyone who finds Posner’s observations about legal reasoning disconcerting might find comfort in Paul Feyerabend’s description of scientific research in *Against Method*. Scientific discoveries often result from luck, serendipity, hunches, intuitions, and unanticipated consequences. Neither science nor legal reasoning is as systematic as we might like to believe. Neither is an algorithmic process. And neither reaches absolute certitude. But in the end, science achieves a degree of reliability beyond the reach of law.

Logical positivism has to a large extent accounted for the remarkable progress of science during the past century. It provided science’s exclusionary rules, drawing a line between scientific knowledge and other sorts of convictions, including beliefs, values, opinion, superstition, hunches, and speculation.

These exclusionary rules created a problem for non-scientific disciplines, including ethics and law. Because ethical judgments are neither tautological nor capable of empirical testing they are inevitably unscientific. Ayer puts it bluntly:

[I]n saying that a certain type of action is right or wrong . . . I am merely expressing certain moral sentiments. And the man who disagrees with me is merely expressing his moral sentiments. So that there is plainly no sense in asking which of us is in the right. For neither of us is asserting a genuine proposition. Ayer, at 107-8.

He gives an example that goes to the heart of both ethics and law:

[I]f I say to someone, "You acted wrongly in stealing that money," I am not stating anything more than if I had simply said, "You stole that money." In adding that this action is wrong I am not making any further statement about it. I am simply evincing my disapproval of it. Ayer, at 107.

If science cannot establish that stealing is wrong, neither can it establish that speeding, tax evasion, drug dealing, assault, battery, murder, or genocide is objectively wrong. This in itself should answer the question posed by this conference: judicial reasoning cannot be scientific because it is based, ultimately, on propositions that are neither tautological nor capable of empirical verification. In addition, because legal reasoning cannot escape the ambiguous language and soft logic that science has managed to escape, its findings of fact and conclusions of law generally lack even the provisional certitude characteristic of modern science.

There is, in short, a fundamental indeterminacy in legal logic; and Justice Posner, who is sometimes characterized as a conservative jurist, candidly admits it in a passage eerily reminiscent of A. J. Ayer:

Almost a quarter century as a federal appellate judge has convinced me that it is rarely possible to say with a straight face of a Supreme Court constitutional decision that it was decided correctly or incorrectly. When one uses terms like "correct" and "incorrect" in this context, all one can actually mean is that one likes (approves of, agrees with, or is comfortable with) the decision in question or

dislikes (disapproves of, disagrees with, or is uncomfortable with) it. “A Political Court,” at 40.

Posner limits this observation to “constitutional cases”—which by definition turn upon the interpretation of a document that is, *pace* the originalists among us, rich with ambiguity. But the causes of indeterminacy—the soft logic, the ambiguous language, the frequent unavailability of replicable data, the ideological premises—are to some extent present in *every* case, lurking beneath what Posner calls a “veneer of legal reasoning,” or what Aristotle might have called “apparent” syllogisms—“apparent” because despite their formal resemblance to a classic categorical syllogisms, they are not air tight, like the irrefutable reasoning of geometry or symbolic logic.

If neither ethics nor legal reasoning can be science, what can they be? What claim to validity can they possibly have?

This is not a new philosophical problem. It was effectively acknowledged by Aristotle. The mark of an educated person, he tells us, is to know when certitude is achievable and when it is not: “It is equally unreasonable to accept merely probable conclusions from a mathematician and to demand strict demonstration from an orator [i.e., *rhetorikon*, or rhetorician].” *Nicomachean Ethics*, I:3(1498b).

At first this passage may seem nothing but common sense. Some things we can prove. Others we can't. And it's smart to know the difference.

On the other hand, it is remarkable that Aristotle, one of the most rational figures in the history of philosophy, would recognize the limits of logic. Like Ayer, he admits that some assertions cannot be proved.

Unlike Ayer, however, Aristotle does not dismiss all assertions of this kind as pseudo concepts. Instead, he goes on to formulate a system of ethics, including a chapter

on justice and an entire treatise on politics, reasoning from shared assumptions rather than proven fact, and employing various patterns of soft logic like those he describes in his *Rhetoric*.

By “rhetoric,” Aristotle meant not the verbal trickery for which Socrates excoriated the Sophists, nor the lessons in stylistic ornamentation that it subsequently became, nor the insincere or insubstantial assertions that today we might designate as “mere rhetoric.” Aristotle’s *Art of Rhetoric* is fundamentally a treatise on how we establish belief in areas where certitude is unattainable.

Why, we might wonder, would we settle for the uncertainty of rhetoric when we might have the comfort of scientific or mathematical certitude?

Well, we shouldn’t.

Except, as Aristotle advises, when we are dealing with questions for which certitude is unattainable.

Ayer’s contention that what cannot be proven is not worthy of discussion is oddly Platonic, representing a faith in logic and science that is simply not borne out by our by experience. It might be called an intellectual neurosis peculiar to Western philosophy, curable only by a more sophisticated understanding of language and logic, as well as the peculiar combinations of language and logic that define various realms of discourse.

### *Part III: Welcome to the Logosphere*

In *The Theory of Everything*, Stephen Hawking provides a provocative context for developing a philosophy of language. Since the eighteenth century, Hawking tells us, philosophers have “reduced the scope of their inquiries so much that Wittgenstein, the

most famous philosopher of [the twentieth] century, said, ‘The sole remaining task for philosophy is the analysis of language.’” To which Hawking adds, “What a comedown from the great tradition of philosophy from Aristotle to Kant.” (at 166).

Given the tendency of some twentieth and twenty-first century scholars to indulge in what George Steiner once called “profound trivialities” or to couch valuable insights in unnecessarily obscure language, it is easy to understand Hawking’s misgivings. Still, the philosophy of discourse—not just of language in isolation, but the particular combinations of logic, language, and subject matter that characterize various disciplines— need not be the trivial pursuit that Hawking laments. It is, or at least could be, the foundation of every intellectual inquiry, providing an antidote to what is perhaps the most dangerous intellectual error of our times: fundamentalism in all its forms— political, religious, judicial, and scientific—and the illusions of certitude it engenders.

We have already seen how by recognizing as genuine propositions only those that are either tautological or capable of being empirically tested, science escapes the less reliable tropes of legal logic—and for that matter, the pitfalls of ordinary debates (e.g., *ad hominem* arguments, *post hoc* inferences, anecdotal evidence, arguments from precedent, question begging, analogy, reliance on authority, and generalizations based on stereotypes or insufficient data).

At the same time, however, these limitations prevent science from recognizing the intrinsic value of all sorts of propositions that are neither tautological nor susceptible to empirical testing. Judged by Ayer’s criteria, all of the following are not genuine statements:

I regret  
I promise

I swear  
I apologize  
I declare you man and wife  
Stealing is wrong  
Genocide is immoral  
This computer is mine  
Justice has been served  
Barak Obama is American  
Workers have a right to fair wages  
Every adult should vote  
Citizens must pay taxes

The list is endless. In addition to being neither tautological nor testable, these propositions are couched in ordinary language, which is too imprecise to serve the ends of science.

In this context, the teleological tale in the *Book of Genesis* is richly evocative. In *Genesis* there are two languages. Adam uses language to name things that would seem to have existed before he named them. God, on the other hand, in addition to naming things already created (as in “the dry land He called earth”), also calls things into existence by naming them. “Let there be light,” God says, and there is light. “Let there be on earth plants bearing seed,” and voilà, there they are. Plants bearing seed.

For purposes of this discussion, it makes no difference whether you regard *Genesis* as myth or revelation. The point is that we, as a species, speak both languages. We name things that would seem to exist whether we name them or not. And we call things into existence by naming them. This ability to create things with language is one of the defining characteristics of our species, the means by which we give meaning to our lives.

Things created by language can exist only in what I like to call the logosphere, the sphere of language-logic,<sup>1</sup> which is as essential to their existence as the atmosphere is essential to plants and animals.

In *How to Do Things With Words*, J. L. Austin pointed out that we can *do* things with language: apologize, forgive, promise, etc. Austin tended to focus on verbs as examples of speech acts. My point is these acts often result in nouns, not only those conventionally recognized as abstract nouns, like “beauty,” “truth,” and “goodness,” but also in nouns that are so co-mingled with physical realities, relationships, or events, that we may fail to recognize that they are figments of the logosphere.

“Marriage” is one of the many things that did not exist until someone somewhere created it with language, saying “Let there be marriage,” or words to that effect. Marriage does not exist among creatures unable to name it. It is not a condition detectable by scientific instruments.

And yet anyone who has ever been married will have no trouble recognizing that it is a reality. As, of course, is divorce. These are both relationships that need language for their existence. Without language there is no marriage. And no divorce.

Because marriage is a figment of language, it cannot be defined with the objective criteria characteristic of scientific definitions. We are free to negotiate or modify its meaning in ways that individual scientists are not free to negotiate or modify the meaning of, say, symbols for elements on the periodic table. “You call this a marriage?” one disgruntled partner might say to the other. “If this were a real marriage, you would . . .” (adding whatever the disgruntled party thinks marriage should entail).

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<sup>1</sup> Logos (λογος) is, of course, Greek for “word.” It is also the etymological source of “logic.” Both meanings are relevant to the taxonomy proposed in this paper. Each realm is a combination of a peculiar kind of language and a peculiar kind of reasoning.

In the debate over same-sex marriage, partisans are inclined to claim knowledge of the “true” meaning of marriage. But “marriage” has no “true” meaning. Marriage, as Wittgenstein might have said, is what people call marriage. The only question is who, if anyone, has authority to define it.

“Property” is another example. Property is not the thing possessed. It is a linguistically constructed relationship between persons and things. When we use language to convey ownership from one person to another, nothing in the thing itself changes. No scientific instrument can find or measure ownership.

Property is an undeniable social reality; but it cannot exist without language. Creatures without language may occupy or possess things—a lion, its den, a bird, its nest—but they do not have “property” in the sense that they could give, bequeath, sell, devise or otherwise convey ownership to another lion or bird. Nor can they lay claim to a spare nest or den in some distant part of the world.

But humans have appropriated entire continents by simple acts of language, “claiming” them, with words, on behalf of monarchs thousands of miles away, even though these lands had been occupied for millennia by people whose culture happened not to include the habit of appropriating land with language. “To claim,” is one of the activities Austin would call a “speech act”—doing something with words. But the effect of claiming is not something science can detect. Claiming leaves no discernible alteration in the thing claimed.

There can be no Saturdays without language. No universities. No taxes. No war. No obligations. No contracts, statutes, or peace treaties. No comedy. No tragedy. Christians, Muslims, and Jews, Australians, Americans, and Malaysians are also

creatures of language. Not that their physical bodies are created by language; physical bodies are among the things that exist whether we name them or not. But religious and political designations are figments of language. People can be transformed from one designation, status, or category to another by ceremonial acts of language that may have enormous legal consequences even though they have no scientifically discernable effect in the people so transformed.

“This was not genocide,” defense counsel sometimes argue at the International Criminal Tribunal for Rwanda, in an effort to evade the Tribunal’s jurisdiction. “My client may have killed his neighbors, but it was in response to an insult, or an unpaid debt, or part of a frenzy of violence sparked by the assassination of President Habyarimana. Not genocide.” Science may have assisted in identifying victims and implicating the Accused with irrefutable forensic evidence. But it is powerless to establish the intent that would distinguish genocide from other instances of multiple murders.

Such is our faith in the efficacy of words that the President Barack Obama repeated the oath of office in a private ceremony because in the public ceremony, following a miscue by Chief Justice Roberts, he said “I will execute the Office of President of the United States faithfully,” instead of the Constitutionally sanctioned “I will faithfully execute the office of president to the United States.” (See Zeleny, “Oath of Office is Administered Again.”) Although there is no discernible difference in the meaning of these two versions, there was sufficient concern that saying “faithfully at the end of the clause instead of between “will” and “execute” could have been construed to nullify the inauguration. It was as if a priest had failed to say the words of forgiveness

precisely as prescribed, thereby rendering absolutism invalid.

Because science is not equipped to detect meaning, it cannot detect certain speech acts that are in themselves criminal offences: to bribe, to defame, to libel, to perjure, to conspire, to incite, to racially vilify, for example. These activities can occur only in the logosphere. They cannot occur without language, without a logosphere.

Entities, categories, statuses, and relationships that cannot exist without language are among the most important realities in our lives. They are undetectable by scientific instruments and incapable of being defined by observable criteria that give scientific definitions their precision and objectivity. But they are necessarily among the objects of inquiry that legal reasoning must address.

From a scientific perspective ordinary languages are seriously defective. They are bewildering in their multiplicity and rotten with ambiguity. Words change their meaning with their context, not necessarily yielding the same meaning to everyone who encounters them even in the same environment. Some words fade into obsolescence or disappear entirely. Others acquire new meanings. Dictionaries routinely list several definitions for each entry because it is impossible to designate a “true” meaning for any word.

To avoid these problems, scientists have invented artificial languages consisting of alpha-numeric symbols, arbitrary signs with precisely stipulated meanings ( $H_2SO_4$ ,  $NaCl$ ,  $e=mc^2$ , etc.), and terminology pirated from languages long dead and therefore immune to change, purposely limiting themselves to entities, relationships, sequences, and events that would seem to exist whether we name them or not. In natural languages there are numerous words for oak trees and hippopotamuses, fruit flies and uranium, and

natural objects of every sort. But for scientists the world over, there is no mistaking a *Hippopotamus amphibius* for a *Choeropsis liberiensis*, or a *Quercus virginiana* for a *Quercus negra*, or a *Drosophila melanogaster* for a *Ceratitis capitata*, or U<sup>235</sup> for U<sup>237</sup>.

Not exactly household terms, these, at least not in most households<sup>3</sup>—which, of course, is their *raison d'être*. Quarantined from the corruption and mutability of natural languages, the terminology of science achieves the Platonic ideal of linguistic perfection: a set of symbols with univocal meanings, defined by reference to empirically observable criteria. In addition, scientific languages are universal—presumably understood in exactly the same way by competent scientists throughout the world.

But scientific languages do not include symbols for figments of language. If they did—for example, if we said “M=marriage” or “Πρ=property,” these symbols would immediately encounter the problems of definition that plague natural languages. Who can give marriage a universally accepted definition? What constitutes property when there are many modes of possession? Figments of language have no universally recognized empirically observable characteristics by which they can be defined.

Legal reasoning cannot escape the ambiguity and corruptibility of natural language. There is no term in law—not “property,” nor “theft,” nor “estoppel,” nor even those seemingly scientific Latin terms, like *habeas corpus* and *res gestae*—no legal term whatsoever that can be bound to a single definition by universal agreement or empirically observable criteria, immune to mutability as its context changes. Even if we all agree that stealing is wrong, there are many fact situations that allow a defendant to argue that a particular act of appropriation was not “stealing,” but rather a perfectly legitimate form of taking.

Much legal writing represents a struggle against the ambiguity of natural language. Every statute, contract, and treaty involves an attempt to fix meanings and to control foreseeable and unforeseeable contingencies with language that may eventually be twisted to mean whatever future parties with particular interests want it to mean. Every judgment that turns on textual construction must plug semantic leaks that can never be entirely prevented or conclusively resolved.

Normally the intrinsic ambiguity of natural language does not pose a practical problem for legal logic. We know what it means to run a stop sign, or rob a bank, or fail to pay our rent on time, or mutilate our neighbors, and normally the law will not let us get away with such behavior. But when there is a genuine disagreement about the meaning of a clause in a contract, a statute, or a constitutional provision, there is no scientific way to extract the “true” meaning, or even to determine where meaning resides (i.e., in the text, in the intent of the author, in the mind of a contemporary reader, in the mind of a modern reader, etc.).

#### *Part IV: Three Realms of Discourse*

Were Aristotle alive today, he might have distinguished mathematics from empirical science and recognized at least three realms of discourse instead of the two mentioned in the *Nicomachean Ethics*: mathematics (and other forms of symbolic logic), empirical science, and rhetoric.

The relationships among these three realms can be diagrammed as a set of nesting boxes. Science is more precise and reliable than ordinary discourse, but less precise and less reliable than pure mathematics. Science achieves its precision and reliability by avoiding reference to anything that cannot be empirically observed, substituting artificial

languages for ordinary words, and limiting itself to the two patterns of logic mentioned by A. J. Ayer and approved by the logical positivists.

Mathematics, in turn, can be seen as a distillation of scientific discourse, taking refuge in unambiguous and artificial symbols referring to idealized entities in a mental universe, avoiding the imprecision and provisional nature of empirical data and limiting itself solely to deductive reasoning from tautologies, thereby assuring its absolute precision and validity. A proposition in pure mathematics does not have to be susceptible to empirical testing in order to be considered genuine.

There is no hierarchy in this scheme. Neither realm is superior to the other. Mathematics is in some sense the “perfect” discourse—if by “perfect” we mean a combination of unambiguous language and rigorous logic. But it is also perfectly useless—unless it becomes contaminated with physical data, thereby diminishing its absolute perfection. The Pythagorean theorem ( $a^2+b^2=c^2$ ) is always and everywhere true and absolutely precise as long as we accept the foundational definitions of Euclidean geometry and apply it to perfect theoretical triangles rather than to physical approximations.

Einstein’s celebrated formula,  $e=mc^2$ , is only an approximation. No serious physicist imagines that light travels at exactly, exactly 186,000 miles per exactly, exactly one second. It would be a remarkable coincidence if it did, and in any case we would be unable to measure it with the precision of Euclidean geometry. In expressing this relationship as a mathematical formula, Einstein displays one of the guiding ambitions of physical science: to approach the absolute certitude and precision of pure mathematics, which, because of its contamination with empirical data, it can never achieve.

Science may not be perfect, but it achieves its own degree of validity and reliability by means of exclusions. It escapes the ambiguity and multiplicity of natural languages by using artificial and unambiguous languages. It avoids the unreliable logic of ordinary discourse by limiting itself to tautology and inferences from random, sufficient, relevant and preferably replicable empirical data.

What science gains in precision, it loses in scope. It cannot traffic in figments of language because these are not empirically observable. Science also eliminates modes of predication that are essential to politics, metaphysics, ethics, esthetics, and jurisprudence. There is no “should” in science, no “ought,” “must,” “good,” beautiful” or any of their opposites. No “good” or “bad.” Science operates in the indicative mode. It tells us what *is* in the universe accessible to it, and in some cases infers what *was* and what *will be*. But it cannot, as science, say what ought to be. Science can describe the behavior of quark or the structure of an isotope; but it is purposely and systematically incapable of saying how a quark *ought* to behave, or how a particular isotope *ought* to be structured. Science describes; it does not pass judgment. It can describe nuclear fission and predict its consequences; but it is powerless to tell us whether we should build a reactor. That is the sort of decision science is not equipped to make.

Rhetoric is the most inclusive of these three realms of discourse. It can exploit science and mathematics when they can provide relevant data; but if the question is one that *could* be settled scientifically or mathematically, there would be no need to resort to rhetoric. In jurisprudence, forensic science can often settle fact questions—identifying the gun from which a bullet was fired, examining DNA traces to identify or exonerate a suspect, distinguishing a real from a feigned injury. But it cannot tell us whether the gun

was fired in real or imagined self defence, or rage, or planned and premeditated homicide. Even DNA evidence, which seems unassailable in itself, can be contested by persuasive rhetoric, as it was in the case of O. J. Simpson.

To return briefly to *Genesis*, in addition to creating and naming things, God's language issues moral decrees. If Adam or Eve had had the temerity to ask, like normal children, *why* they could not eat the fruit of a particular tree, we can imagine God answering, like a normal parent, "Because I said so."

This is another way in which human language resembles the divine language as described in *Genesis*. If asked why genocide, stealing, and assault are wrong, we have to concede ultimately that Ayer had it right. These things are wrong because we as individuals or as societies say so. We don't discover morality; we create it. With language. We may have our reasons—reasons that may not be universally persuasive. But ultimately ethics and law are founded not on scientific knowledge, but on choices we make based on nothing more than our utopian preferences, our intuitive sense of what is good for us as individuals, as a society, and as a species.

This position might be dubbed legal existentialism: the notion that in the absence of divine or scientific authority, we must create ethical standards and express them first as contracts, statutes, or regulations, but ultimately as judicial decisions. In effect, the rule of law does what God does in *Genesis*.

An awesome responsibility for mere humans.

Little wonder the existentialists talked about "the anxiety of choice."

### *Part V: Implications*

Stanley Fish, the distinguished literary critic and legal theorist, is fond of saying that “theory has no consequences” (*Doing What Comes Naturally*, at 27). I’m sure that’s true, particularly if construed to mean that theory has no *necessary* consequences. Especially the sort of theory that dispels illusions of certitude. Once we concede that statements of belief, values, and ethics cannot be grounded in science or irrefutable logic, we cannot assert that theory favors one political or moral or esthetic agenda over another.

But if the theory of discourse proposed in this paper—really, more a taxonomy than a theory—has no necessary consequences, it does at least have implications. Among them is what I hope is a useful distinction between belief and ideology.

Belief can be defined as adherence to an assertion that can be neither proved nor disproved by logical or scientific evidence. We believe all sorts of things that are simultaneously unprovable and irrefutable. We believe that the world we experience is not just a personal illusion—but we cannot prove it. There is no irrefutable argument against radical solipsism, since the solipsist can always retreat to the belief that all arguments and people making them are personal illusions. But we would starve if we did not believe there was a real grocery store down an apparent street, with real food to nourish what certainly feels like our real bodies.

If we have political interests, we are likely to believe in the superiority of a particular party or particular policies; but if this belief were based on conclusive evidence or irrefutable logic, all rational people would belong to the same party and support the same policies.

We may believe in the rule of law, although science is incapable of demonstrating that the rule of law is a good thing. We may have religious beliefs or disbeliefs: but

metaphysical assertions and metaphysical denials are equally beyond proof and refutation. The assertion that there is no God is neither more nor less capable of scientific demonstration than its opposite.

Some of our beliefs can be described as values—including values by which we judge the quality of art or the morality of human behavior. And some beliefs are what Aristotle called probabilities—assumptions about how people are likely to behave and about which events more likely or less likely to occur. These beliefs often form the basis of determining whether a story told in court is credible, and to what degree.

“Ideology” has been defined in many ways, but I like to think of it as belief of a specific type: a non-negotiable belief, a rigid adherence to an assertion that is simultaneously unprovable and irrefutable. Some ideologies are idiosyncratic and personal; others are shared with a tribe of some sort—political, ethnic, social status, profession, gender. The list is infinite. I suspect that for most of us, regardless of tribe, the notion that stealing is wrong is non-negotiable, even if it lacks the blessing of A. J. Ayer. But it is not a universal belief: for many people, theft is a skilled profession. When caught by the law, they feel no compunction.

If our beliefs about the morality of terrorism, or abortion, or physician assisted suicide, socialism or capitalism, totalitarianism or democracy, are non-negotiable, they are ideologies.

Legislative assemblies routinely turn ideology into law. Every statute forbidding or requiring specific behavior is ultimately ideological, based on unprovable and irrefutable assumptions about what is good for the social order. For this reason, every judgment of every court is ultimately based on ideology, not scientific fact.

Ideologies are inevitable and essential. It is not just the bizarre cases that are ideological—the detentions at Guantanamo, terrorism as a political tool, adultery as a capital offence. *Every* law is ideological. We just don't notice it when the ideology in question is widely accepted by our culture. Science itself is based on a belief that the physical world behaves in regular ways that can be observed and described with mathematical models. For some scientists this belief is non-negotiable. But it is a belief nonetheless, unprovable, irrefutable, and at variance with the apparent randomness in certain types of physical events.

Justice itself is a figment of language. It cannot be defined or detected scientifically. A non-negotiable belief in justice is an ideology.

The “self-evident” truths enumerated in the American Declaration of Independence are ideological. The notion that “all men are created equal”—in addition to raising questions of theology, gender, and the nature of equality—was certainly not self-evident to King George III, who, presumably, would have been astounded by the proposition that his butler, his gardener, and his guests at the Old Bailey were in some significant way on equal footing with His Majesty.

Ideology is not necessarily a bad thing. It is, however, naïve to mistake ideology for objective knowledge. And ideology can be downright dangerous when it justifies behavior harmful to ourselves or to our neighbors.

We all have ideologies—non-negotiable beliefs. We can't function without them. We either possess them, or they possess us. To possess them is to recognize that they are, in fact, ideologies. Recognizing that our most cherished beliefs and values are necessarily ideological is a prerequisite to tolerance of cultures different from our own or

negotiation with those with whom we have what would otherwise be intractable differences.

In legal reasoning, one of the sure signs of an ideological assertion is the use of any of the modal verbs indicating value or obligation. A recent example occurs in a decision upholding the conviction of Bennie Dean Herring on the basis of evidence seized under a search warrant that had been withdrawn five months earlier. Because the arresting officers seemed not to know the warrant had been withdrawn, the majority of the U.S. Supreme Court found the evidence admissible. “To trigger the exclusionary rule,” Chief Justice Roberts writes for the majority, “police conduct *must* be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” *Herring v U. S.*, at 9, emphasis added.

*Must* be?

There can be no conclusive, irrefutable evidence for “must” assertions. They are intrinsically ideological. And the standards Justice Roberts enumerates, presumably as guidance for future courts—“sufficiently deliberate,” “meaningfully deter,” “sufficiently culpable” and “worth the price paid by the justice system”—are inherently subjective, not the sorts of measurements people in white coats can calibrate with anything approaching scientific accuracy.

It must be admitted that those of us who disagree with this decision do so on grounds that are equally ideological and unscientific—our intuitive sense, based perhaps on experience or hearsay, about how investigators operate in real life, and the unhappy consequences of sanctioning warrantless search and seizure whenever investigators can persuade a court that they mistakenly believed they were acting within the law.

The recognition that legal reasoning includes but is not limited to the strict logic of science has interesting implications for legal education. Instruction in advocacy, oral or written, might include both an introduction to the limited tropes of classical logic and modern science, but also to the limitless tropes of soft logic. As a tool of critical reading, Justice Posner's "grab bag" could be used as a heuristic to penetrate what he calls the "veneer of legal reasoning" to reach a more accurate and nuanced understanding of how judges actually think, at least to the extent that their motives are revealed in their judgments.

Judges sometimes speak of "suspending" their personal beliefs to hear arguments objectively and impartially, and no doubt in some cases they succeed, applying a law or a legal principle with which they personally disagree. But at least in the United States, judicial ideology is sometimes so transparent that we can predict the judgment even before the arguments have begun.

The distinction between belief and ideology implies a distinction between persuasion and conversion. Beliefs are negotiable. Judges can be persuaded when they are genuinely disinterested in the outcome of a case. But ideologies are non-negotiable. Judges, like everyone else, are likely to have non-negotiable beliefs about abortion, war, sexual or religious freedom, affirmative action, aboriginal rights, capital punishment, or any of the other hot button issues of our day. To abandon or alter beliefs of this sort is not just a matter of persuasion, but a matter of conversion. Anyone who has experienced a conversion knows that it can be a painful experience, in part because we must abandon what were once comfortable certitudes, and in part because abandoning these certitudes often involves alienation from others with whom we once shared them. Counsel who face

judges with adverse ideologies, and judges whose colleagues on the bench are committed to ideologies incompatible with their own know that they have about as much chance of converting others as they have of being converted themselves. Belief, after all, cannot be compelled, any more than hunger can, or desire. Neither logic nor torture can effect conversion.

Conversions do occur, even among judges. Justice Hugo Black, for example, was once a member of a white supremacist organization before being appointed to the US Supreme Court where he became a champion of civil rights for minorities. Legal reasoning could benefit from a study of conversions like Justice Black's. A science of conversion leading to methods of engineering the conversion of others is probably impossible, and for that we can be grateful—at least those of us who believe that the engineering of orthodoxy is not a good thing. But an anthropological study of representative conversion stories could reveal, at least partially, why we believe what we do, and what makes us, on occasion, abandon beliefs we once considered unassailable.

Another timely question emerging from acknowledging the ideological basis of jurisprudence is this: When does a state have the right to impose ideologies on people who do not share them?

We have no problem asserting that the prohibition of stealing, murder, sexual assault, and most other behaviors sanctioned by law are properly imposed even if they have no scientific basis, and even if some people seem not to share these convictions. But when is it proper for a state to impose religious beliefs on its citizens? Or the consequences of religious beliefs on issues related abortion, stem cell research, blood

transfusion, or the ritual use of narcotics? When is it proper for a state to require citizens to support or participate in a war they oppose?

The taxonomy of discourse proposed in this paper also raises the question of the role of the judiciary in a secular democracy. The problem was neatly put in *The Poisonwood Bible*, a novel by Barbara Kingsolver describing the disastrous attempts of an American missionary to convert the Congolese. “To the Congolese,” observes Anatole, a voice of radical innocence:

[I]t seems odd that if one man gets fifty votes and the other gets fort-nine, the first one wins altogether and the second one plumb loses. That means almost half the people will be unhappy, and . . . in a village that’s left halfway unhappy . . . [t]here is sure to be trouble down the line. (NY: HarperTorch, 1998, p. 318.)

What seems like radical innocence is actually radical sophistication. Majority rule is inherently flawed, a recipe for perpetual civil unrest, unless the power of the majority is somehow held in check. What Anatole does not seem to know, however, is that democracies work best when the power of the majority is buffered by an inherently undemocratic institution: an independent judiciary, in many places unelected, a tiny group of men and women who can tell the majority, or for that matter, an overreaching executive or oligarchy, when it has exceeded its power by infringing on the rights of the minority. Elected officials represent the will of society. An independent judiciary is its conscience. At times, the conscience must tell the will things it does not particularly want to hear.

The former Chief Justice of Malawi, Richard Banda, once told an assembly of judges in Ethiopia that it makes no difference what the constitution says about the independence of the judiciary. Ethiopia had recently adopted a new constitution at that

time. What matters, Justice Banda said, is whether judicial independence is supported by the culture of the country. Courts everywhere must continually *earn* the respect of ordinary people as well as people in power. It is not a simple task. It requires the ability to transcend partisan politics, religious orthodoxy, special interests, and popular passions and prejudices. It also requires the ability to write judgments that are transparent and accessible to the broadest possible segment of the population—not just to the exclusive club comprised of members of the bench and bar.

Finally, the recognition that judicial reasoning cannot be scientific raises the question of how we might distinguish good judges from bad. It may seem pious to suggest that along with knowledge of the law, impartiality, a commitment to due process, and what is often described as judicial demeanor, “wisdom” is an essential qualification, the sort of wisdom exhibited by Solomon, an ability to “read” people, to know what is best for them and for society, and to be right, at least most of the time.

In Solomon’s case, we cannot know for sure that he correctly discerned the biological mother of the child. That was a fact-finding question that could have been settled definitively by modern science. The more important question would have required an application of a modern legal standard: what was likely to be in the best interest of the child. Solomon seems to have got it right no matter what laboratory tests might have revealed.

In addition to the three realms of discourse described above, there is a fourth, more inclusive than the others and even less precise. The realm of literature. Literature can be about mathematics, about science, about anything within the realm of rhetoric.

I once encountered a scholarly judgment in which a Shari'a judge in Hausaland ruled against the admission of DVD movies in his jurisdiction on the grounds that the material they contained was, not obscene, but simply fictional, and fictions are, essentially lies.

At first I thought this was a curiously naïve position. Then I remembered that it was also one of the reasons the Puritans objected to theatre in England, and why authors like Chaucer always referred to the source of his stories, as “myn auctor,” in deference to those who might think that creating fictions would be a form of lying. In fact, the judge in Hausaland might well have invoked Plato as an authority. When Plato banned “poets” from his Republic, he was not thinking of versifiers. He was thinking of the sorts of people who made up stories about gods and goddesses, filling the minds of their audiences with palpable lies.

Sir Phillip Sidney provided the best response to Plato and the Puritans in his Defence of Poesy. Sidney argued that fiction is the only form of discourse that never lies, because every informed reader knows that it does not even pretend to tell the truth. Every other discourse, including history, is only a partial representation of the truth, biased by the perspective of the observer, but often concealing this bias and claiming objectivity.

If ordinary language and legal language are rotten with ambiguity, the language of literature is *rich* with ambiguity. It is the same language, of course; but ambiguity can be regarded as either a problem or a source of pleasure, depending on what we expect from the text. In law, ambiguity is often a problem. We value great literature, however,

precisely because we can return to it again and again and discover meaning we had not seen before.

The error of fundamentalism is to approach texts with inappropriate expectations—to miss the richness of literary and sacred texts by reducing them to what are essentially more reductive and less capacious forms of discourse. On the U.S. Supreme Court, the debate occasioned by the “originalists”—Justices Scalia and Thomas—is rooted in this distinction. Is the Constitution to be regarded as a text rotten with ambiguity (belonging to the realm of rhetoric) or rich with ambiguity (a kind of literature)? How *should* the Constitution be read? What is the *proper* way to read it?

The words “should” and “proper” tell us immediately that there is no scientific answer to these questions. Any response is ultimately based on an argument from consequence. For legal fundamentalists, political and social stability depends upon a belief in the Constitution as an unambiguous document whose meaning can be objectively determined. To rule otherwise would invite judges to become rulers, making law instead of applying laws made by another branch of government..

For others, the indisputable ambiguity of the Constitution, whether intended by its authors or not, enables us to strive toward utopian conditions enshrined in principles that must be applied in contexts the authors could not have imagined.

A. J. Ayer was certainly correct in saying that ethical propositions, and by extension legal reasoning, can have no basis in science—not unless science abandons the rules that make it scientific. But this does not prevent us from having beliefs, often non-negotiable beliefs, and constructing lives and social orders around them. Ayer may have had little regard for ethical preferences because they were not scientific, but he clearly

demonstrated that he had them in his famous confrontation with Mike Tyson who was harassing a young model, Naomi Campbell. As his biographer, Ben Rogers, tells the story, Tyson said, "Do you know who the fuck I am? I'm the heavyweight champion of the world." To which Ayer replied: "And I am the former Wykeham Professor of Logic. We are both pre-eminent in our field. I suggest that we talk about this like rational men." Rogers, 344.

Tyson must not have read *Language, Truth, and Logic*. Or if he had, he must of forgotten it. Otherwise he might have argued that if the proposition "stealing is wrong" is a pseudo-concept, merely a matter of personal preference, then Ayer's objection to assaulting women would be equally devoid of scientific grounds. Both men, therefore, would be equally entitled to their preferences.

TKO.

Unless, of course, Ayer countered, as he no doubt did, with various tropes of soft logic, however unscientific, to persuade Mr. Tyson to cease and desist.

The prosecutor in Scott Turow's *Presumed Innocent* was partially and importantly right. The rule of law and the reasoning that it implies may be neither rigorously systematic nor universally recognized. It is, however, our best hope, when all else fails, of resolving conflicts— domestic, political, ethnic, or international—without resorting to violence.

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<sup>1</sup> An example of tautology is water at sea level boils at 100 °C. We know this because 100 °C is defined as the point at which water boils. And the statement that mercury boils at 357 °C is scientifically acceptable, because once the Celsius scale had been established, it became a simple matter to measure the temperature of mercury when it begins to boil.

<sup>2</sup> To Posner's grab bag I would add two other common tropes: arguments from consequence and likely stories.

Arguments from consequence are often introduced by a phrase like "to rule otherwise would be to invite . . ." followed by a recitation of manifestly unacceptable consequences. When judges use this phrase, they have generally run out of law to support their conclusions. But rule they must, for one reason or another, so they choose the result that entails the fewest or least undesirable consequences.

Likely stories are narratives that we find intuitively credible. Judges and juries often decide whether a story is so likely as to exclude reasonable doubt; or, when the standard of proof is "the balance of probabilities," which of various proposed narratives is the more likely. The evidence is often merely circumstantial, and the judgment based on the decider's assumptions about how the world normally works or how people generally behave. Likely stories are the equivalent of "probabilities" in Aristotle's *Rhetoric*—not statistical probabilities, but intuitive probabilities. They are not scientific, but they are inevitable as the basis for finding facts in legal reasoning.

Of course legal logic is disciplined by its own exclusionary rules, standards of proof, codes and canons for construing statutes and contracts, and a constantly evolving set of evidentiary rules that judges and juries are obliged to apply when they ponder questions of fact—rules that, despite their intricacy and erudition are not universal and cannot be counted on to produce a scientifically valid result. As one juror in a Manhattan murder trial aptly phrased it, "Justice is perfect, but the law can only be careful. Burnett, at 138.

<sup>3</sup> Scientific languages can be potently seductive. Paul and Pat Churchland, for example—brilliant scientists who are trying to figure out how the physical stuff of our brains produces consciousness—are said to speak scientific languages to each other, even around the house. When Pat has had a bad day, she might say, "Paul, don't speak to me, my serotonin levels have hit bottom, my brain is awash in glucocorticoids, my blood vessels are full of adrenaline, and if it weren't for my endogenous opiates I'd have driven the car into a tree on the way home. My dopamine levels need lifting." MacFarquhar, at 69.

When Paul hears this sort of talk, he knows immediately that it's time to offer Pat a glass of Chardonnay—though he might not call it Chardonnay if he happened to know its chemical constituents.

The Churchlands' devotion to scientific language is charming in its own way, no doubt providing them with a cocoon of intimacy that few people could penetrate. But it would seem to ignore the intrinsic and purposeful limits of scientific language—and also to ignore the scope and richness of ordinary language. Paul, we are told, looks forward to the day when language disappears altogether, and humans (or perhaps humanoids) can communicate their thoughts directly, like the two hemispheres of our brains.

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Of course, not all scientists abandon natural languages in their non-scientific lives— or for that matter, even when they discuss science with their peers. But ultimately, scientific conclusions must be capable of being expressed in scientific language.