

---

---

ON THE (LEGAL) STUDY METHODS OF OUR TIME:  
VICO REDUX

MARIANNE CONSTABLE\*

I.	SUBJECT OF THE PRESENT DISCOURSE; INSTRUMENTS AND AIDS AS WAYS AND MEANS OF LEARNING; VICO’S AIM AND MINE .....	1304
II.	INSTRUMENTS OF LEARNING: INSTITUTIONS OF LEGAL STUDIES (USA); PROFESSIONAL LAW SCHOOLS AND ACADEMIC DISCIPLINES .....	1305
III.	PHILOSOPHY AND RHETORIC; THE IMPERATIVE BELONGING TO LAW: TELLING SOMEONE WHAT TO DO; IDENTIFYING LAW’S ADDRESSEE, WHAT LAW COUNTS AS DOING, AND LAW’S MANNER OF TELLING .....	1308
IV.	ECONOMICS AND PROFESSIONAL SCHOOL LAW: THEIR ABSTRACTIONS AS DISADVANTAGES .....	1311
V.	EMPIRICAL SOCIAL RESEARCH AS CORRECTIVE; STRENGTHS AND DEFICIENCIES OF LEGAL REALISM AND SOCIOLOGY OF LAW .....	1312
VI.	LEGAL SPEECH ACTS; CLAIMING AS MODERNITY’S SPEECH ACT <i>PAR EXCELLENCE</i> .....	1314
VII.	POLITICS, AS REALM OF APPEARANCE OF SPEECH AND ACTION, AND ITS DISREGARD IN MODERN LEGAL STUDY METHODS .....	1320
VIII.	POETRY AND MUSIC. UNDER SOME CONDITIONS, THE BUREAUCRACY AND JARGON OF MODERN LAW CAN LEND ITSELF POETIC APPEARANCE .....	1323
IX.	HISTORY AS LEGAL METHOD: LIMITS AND POSSIBILITIES .....	1324
X.	TWENTY-FIRST-CENTURY AIDS TO LEGAL LEARNING; COMPUTING .....	1324
XI.	IMAGES AND VISUAL LITERACY .....	1325
XII.	SYSTEMS-THINKING IN THE KNOWING OF LAW .....	1326
XIII.	USING CAMPUS SERVICES .....	1329
XIV.	UNIVERSITY AND COLLEGE PROFESSORS IN THE EDUCATION BUSINESS .....	1330
XV.	CONCLUSION .....	1331

\* Professor, Department of Rhetoric, University of California at Berkeley. The author can be reached at constable@berkeley.edu. This essay benefited from discussions following presentations in the University of British Columbia Law and Society series and at the University of Victoria Law School. The author thanks Sarah Mishnerghi for research assistance and Hunter Hogan for his help.

I. SUBJECT OF THE PRESENT DISCOURSE; INSTRUMENTS AND AIDS AS  
WAYS AND MEANS OF LEARNING; VICO'S AIM AND MINE

Three hundred years ago, rhetoric professor Giambattista Vico delivered an oration celebrating the opening of the school year at the University of Naples.<sup>1</sup> In a fifteen-part speech on the “method of knowledges” or approaches to education and studies of his time, Vico compared the learning of the “Ancients” and the “Moderns” and devoted a couple of long sections to law and legal education. He pleaded, in the face of the newly-predominant Cartesian “method,” for a so-called return to eloquence and for greater attention to the work of memory and imagination in education, foreshadowing what in his later work would become his “new science” of humanity: a combination of philology, philosophy, and history.

This essay draws loosely on the form and spirit of Vico's *On the Study Methods of Our Time* to comment critically on intellectual and institutional approaches to U.S. legal studies today. Like Vico's text, this essay began as a talk and has been revised for publication into fifteen parts of varying length.<sup>2</sup> After an introduction to legal education, Parts III through IX compare rhetoric to the various disciplines that take law as their subject matter. Parts X through XIV consider the current aids to legal learning. The essay as a whole explores the limits and possibilities of different approaches to law. In the context of the contemporary administrative state of university education, it argues that law and legal education are not only too important to leave to the lawyers, but also too important to leave to social scientists and policy makers. It shows what the contributions of rhetoric to contemporary legal studies could be.

Vico's address on the system of studies of his time, which was published with revisions a year after he delivered it, takes “Truth” to be the sole aim of all intellectual pursuits. Vico identifies the drawbacks and disadvantages of modern approaches to knowledge in light of this aim. He distinguishes *knowledges*, such as arts, sciences, and inventions, which concern the *materials* of learning, from *instruments* and *aids* of learning, which comprise the *ways and means* of learning. Vico limits the topic of his discourse to ways and means of learning, but discusses sciences and arts insofar as he finds that they constitute new or modern instruments of knowledge. The common instrument of all modern sciences and arts, Vico writes, is philosophical “critique” (or “method”). This rational method,

1. GIAMBATTISTA VICO, ON THE STUDY METHODS OF OUR TIME (Elio Gianturco trans., Cornell Univ. Press 1990) (1709).

2. Vico's original oration did not contain sections. The translator made divisions and derived a table of contents from Vico's summary of the talk. *Id.* at xlix (“Note on the Text”).

following Descartes, claims to begin with fundamental—necessary and universal—truths and to deduce consequences from them. The instrument of geometry is analysis; of physics, it is geometry; of medicine, chemistry; of astronomy, the telescope; and so forth. Contemporary complementary aids for learning include “orderly reduction to systematic rules” of that “which the Ancients were wont to entrust to practical common sense,” works of literature and fine arts, types used in printing, and universities as institutions of learning.<sup>3</sup> Law, “which the Ancients, balked by the difficulty of the task, gave up hope of organizing into a systematically arranged, methodical body of theory,” provides a prime example for Vico of a subject which the Ancients left to unaided common sense but which the Moderns have organized into an “arte.”<sup>4</sup>

Far be it from me to take on the ambitious task of addressing all fields of scholarship that Vico as rhetoric professor presented as both his “duty” and his “right.”<sup>5</sup> My aim instead is more circumscribed: in the course of an exploration of the ways and means of U.S. legal education, I will show what rhetorical study can offer to the study of law in early twenty-first-century United States academic institutions. I take truth to be the aim of intellectual pursuits; I do not presume that all contemporary pursuits of the legal art are intellectual ones. The current system of legal studies has, as Vico would put it, its own advantages and deficiencies—both as an intellectual pursuit and for the pursuit of law. Greater attention to the rhetoric of law, a twenty-first-century Vico would agree, would make legal studies “more correct and finer in every respect.”<sup>6</sup>

## II. INSTRUMENTS OF LEARNING: INSTITUTIONS OF LEGAL STUDIES (USA); PROFESSIONAL LAW SCHOOLS AND ACADEMIC DISCIPLINES

As most of you will know, law in the U.S.—in contrast to law in many other countries—involves a three-year professional training, acquired in post-baccalaureate or post-graduate schools. Undergraduate students with degrees in a wide array of fields come to law school to acquire what one U.S. law professor (with a PhD) irreverently calls a “second BA.” (In naming the degree “LLB,” Canadians make the status of the law degree explicit.) Although law schools offer some clinical training, the curriculum consists primarily of three years of coursework, typically interspersed with

3. *Id.* at 8.

4. *Id.* at 12, 24.

5. *Id.* at 79.

6. *Id.* at 77.

two summers of legal work, followed by one summer of “bar review courses” in preparation for a state licensing exam.

Entering law students may not have had exposure to the array of undergraduate courses on law offered in such fields as philosophy, economics, sociology, psychology, political science, anthropology, literature, business, interdisciplinary legal studies, and even rhetoric. (As a rhetoric professor, Vico’s main job was to prepare students for the study of law.) There is little doubt though that as undergraduate majors aspiring to law school, students have pored over the rankings of law schools announced annually since 1990 in *U.S. News & World Report*. Even as these rankings initially were accorded little credence by law school insiders, they have transformed the ways that law schools are run.<sup>7</sup> Originally intended simply to convey information describing the law schools to prospective students, the rankings have affected how law schools operate admissions, appointments, placements, and public relations. As Wendy Espeland and Michael Sauder put it:

Rankings “normalize” schools by creating a precise, relative system of classification which changes how law schools make sense of their schools’ identities and their relation to other schools. By transforming how law schools think about themselves and pressuring these schools to discipline themselves, rankings have become “embodied” in these institutions as they have become internalized standards of comparison and achievement.<sup>8</sup>

To raise a school’s rank, for instance, a school may decrease its number of acceptances of incoming students and increase its number of transfer students, thereby raising its average incoming LSAT score while keeping student body size constant—and irrespective of concern for the school’s “mission.” As donors and others look to rankings that administrators privately and sometimes publicly say are overrated, schools nevertheless use the rankings in their promotional materials. Management and promotion of the law school becomes an aspect of the business of learning.

Once in law school, students begin with basic courses (contracts, torts, property, criminal law, civil procedure, legal writing, and occasionally constitutional law) taught by professors who are encouraged to publish in law reviews. Unlike other scholarly journals, law reviews are largely student, rather than peer, reviewed and edited. Publications in them (are said

7. Wendy Nelson Espeland & Michael Sauder, *Rankings and Reactivity: How Public Measures Recreate Social Worlds*, 113 *AM. J. SOC.* 1 (2007); see also Wendy Nelson Espeland & Michael Sauder, *The Discipline of Rankings: Public Measures, Decoupling, and Organizational Change*, *AM. SOC. REV.* (forthcoming 2008) (manuscript at 2, on file with the Chicago-Kent Law Review) [hereinafter *The Discipline of Rankings*].

8. *The Discipline of Rankings*, *supra* note 7 (manuscript at 5–6).

to) hold little value in academic promotions outside the professional law school.<sup>9</sup> Law thus constitutes its own field or discipline. Law, à la Foucault, has its own rules of exclusion, of internal construction, and of interpretation.<sup>10</sup> Elizabeth Mertz shows how in contracts, for instance, students learn to “think like a lawyer.”<sup>11</sup> Based on painstaking observation, transcription, and coding of the interactions in eight semester-long contracts law classes, Mertz shows how law students ultimately become strategists of speech. They learn to present themselves and the parties whom they animate in response to questions about cases in particular ways. They learn to privilege texts not for their stories of human conflicts but for their answers to “a series of nested questions about the authority of various courts deciding the case at issue, and also of the courts that authored precedents.”<sup>12</sup> They learn to treat legal texts as “detachable chunks of discourse” that can be moved from one context to another.<sup>13</sup> Through textbooks intent on categorizing and consolidating issues and precedents, vast differences in the cultural meanings of particular kinds of actions or items become elided into a common legal language<sup>14</sup> which reworks temporality and history.<sup>15</sup> Persons in conflicts become types; students come to know “parties” through occupational status and worldly belongings, referring to them as (the) “Buyer” or “Seller,” into whose mouths they put strategic language whose looseness contrasts to the precision demanded when quoting legal authorities. “Policy” becomes a catch-all phrase for matters unaddressed in written text.<sup>16</sup> As students ostensibly prepare for legal practice, Mertz argues, they engage in a landscape of argumentative positions, discourse frames, and participant roles, coming to inhabit and speak an “I” that is not “their own self.”<sup>17</sup>

Professional education is of course not the only route to knowing law. A plethora of other disciplines take law as their subject matter, even when they do not explicitly contribute to the training of legal practitioners and

9. For some sense of the reasons why, see Penelope Pether, *Negotiating the Structures of Violence; or, On Not Inventing “The Sullivans”*, 15 SOC. SEMIOTICS 5, 13–17 (2005).

10. See MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE* 215–37 (A.M. Sheridan Smith trans., Barnes & Noble 1993) (1969); see also *The Discipline of Rankings*, *supra* note 7 (manuscript at 2–3) (drawing on the “discipline” of Foucault’s *Discipline and Punish*).

11. ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* (2007).

12. *Id.* at 62.

13. *Id.* at 45.

14. *Id.* at 64.

15. *Id.* at 63.

16. *Id.* at 75–79.

17. *Id.* at 135.

the formal legal professoriate. Indeed, approaching law from the perspective of other knowledges has become so popular in recent years that there has been not only a proliferation of undergraduate legal studies programs but also the emergence of post-graduate (or “graduate” as they are known in the U.S.) PhD granting programs in interdisciplinary law and society.<sup>18</sup>

To understand the legal studies methods of our time then, it is necessary to consider not only the modes of legal reasoning taught in the professional law schools, but also the diverse disciplinary approaches to law.

### III. PHILOSOPHY AND RHETORIC; THE IMPERATIVE BELONGING TO LAW: TELLING SOMEONE WHAT TO DO; IDENTIFYING LAW’S ADDRESSEE, WHAT LAW COUNTS AS DOING, AND LAW’S MANNER OF TELLING

Philosophy may no longer be the queen of the sciences and philosophy of law may not have the *caché* for contemporary rhetoric professors that it once held for Vico, who long aspired to, yet failed to achieve, a chair in jurisprudence. (Vico consoled himself by writing what he considered his masterpiece, *The New Science*.) Philosophy *manquée* is still a convenient way to introduce rhetoric.

Today, as in Vico’s time, mainstream teaching presents philosophical debate about law as an argument between natural lawyers and positivists.<sup>19</sup> The conventional understanding of this debate identifies natural law with a higher moral (or, formerly, divine) law that claims to be the measure of what properly counts as law. It presents positivism as claiming that factual, non-moral criteria, such as procedural regularity or the command of a sovereign, comprise the entire test of a law’s existence and validity. Although there are differences within positivism—early legal positivists defined law as the command, backed by threats, of a sovereign, while latter-day positivists define law as a man-made system of rules—positivists maintain a conceptual separation between morality, justice, or the law that “ought” to be

18. For a description of undergraduate legal studies programs, see American Bar Association, Legal Studies Program Directory, <http://www.abanet.org/publiced/undergrad/home.html> (last visited Apr. 19, 2008), the ABA’s online directory of over sixty undergraduate programs focusing on law and the liberal arts across the United States and Canada. Graduate programs include the interdisciplinary Jurisprudence and Social Policy Program at the University of California at Berkeley and the Law and Society Program at New York University, as well as numerous other programs combining a PhD with a JD.

19. *E.g.*, FREDERICK SCHAUER & WALTER SINNOTT-ARMSTRONG, *THE PHILOSOPHY OF LAW* (1996) (Chapter 1 “What is Law?” includes two sections entitled “The Theory of Natural Law” and “Legal Positivism”); *see also* JOEL FEINBERG & JULES COLEMAN, *PHILOSOPHY OF LAW* (8th ed. 2008) (Part I “The Nature of Law” begins with chapters entitled “The Natural Law Tradition” and “Legal Positivism”).

and the law that exists.<sup>20</sup> They take law to be an empirical matter of human enactment, broadly understood. Within the conventional understanding of the philosophical debate, then, the subject matter of the philosophy of law becomes an argument about the proper reference or meaning of “law.”

A common understanding cuts across the philosophical differences about what law is or should be, however. Philosophical claims about law, whatever their differences, take for granted that law tells someone what to do or how to act. However well or poorly law is thought by philosophers and others to do so, its task, role, function, or aim appears to be the imparting of an imperative: a telling of what “must” be done. (The ambiguity of “must” as a single auxiliary verb that expresses both necessity by compulsion and necessity by obligation nicely represents the issue that joins natural law and legal positivism.) In any particular instance, a law that is relevant tells its addressee(s) what to do. In so doing, law does not make propositional assertions as such; it *makes claims*, so to speak, as to practical action.<sup>21</sup> Philosophical claims that discuss law or even action, by contrast to legal claims as to action, tend to assert propositions or statements of rules and leave open the practical question of what, in any particular instance, to do.

Today, the rhetorician sides with the rare political scientist who considers law to be something other than power politics, and who suggests that the regulatory practices of administrative and bureaucratic agencies (concerning, for instance, the environment, immigration, business, transportation, health, welfare, and education) are more important than the natural law/positive law debate for actually understanding how modern law tells us what to do. Rather than arguing with philosophers about the meaning of law, the rhetorician ponders the insight that law—not philosophy, despite some of its past claims to establish the law—tells us what to do.<sup>22</sup> In telling someone what to do, law—whether positive law, moral law, natural law, or custom; whether administrative regulation, bureaucratic rule, statute, com-

20. For early Positivism, see JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (John Murray 2d ed. 1861). For latter-day examples, see H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994); HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (Anders Wedberg trans., Russell & Russell 1961) (1945); JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* (2d ed. 1980); and JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (1975). See also works by Brian Bix, Jules Coleman, and Brian Leiter.

21. The particularity of the legal act of “claiming” is discussed further in Part VI, *infra*. One might say of claims what J.L. Austin says of statements: “[T]he statement itself is a ‘logical construction’ out of the [active] makings of statements.” J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 1 n.1 (2d ed. 1975) (1962).

22. The foundation and gist of what follows, through the penultimate paragraph of this section, summarizes and reworks MARIANNE CONSTABLE, *JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW* 18–21 (2005).

mand, or tradition; whether rightly or wrongly; whether as power or as justice—addresses subjects and their actions. Thus any view of, or appeal to, law—whether claim of law or proposition about law—can be examined rhetorically: for who or what the addressee of law is taken to be (in other words, its subject), for an understanding of what it is for that subject to do or to act, and for how law does its telling.

In other words, the expression of a so-called “imperative”—the telling of “what must be done” that characterizes and is the particular activity of law—manifests and has manifested itself variously: in custom, tradition, practice, obligation, command, declaration, rule, statute, sign, calculation, judgment, socialization, and more. One can begin to identify, in claims describing law and appealing to it, as well as in the claims of law, the following:

- *An addressee or subject, the one or ones whom law addresses.* Natural lawyers consider law’s addressees to be Christians, sinners, or religious or moral persons. Kantians consider them to be reasonable persons belonging to a kingdom of ends who have obligations to do their duty for its own sake. Utilitarians consider law’s addressees to be sentient, rational beings who calculate to maximize their pleasures and minimize their pains. Positivists consider the addressees of humanly-enacted laws to be citizens, persons, residents, officials, human beings, or would-be spouses. The history of jurisprudence can be interpreted as the story of changes in conceptions of the subject of law.<sup>23</sup> Both the claims of jurisprudence and those of law can be analyzed for whom they take the legal subject to be.
- *A manner of doing.* Law—and those who describe it—may consider the doing that law calls for to be moral action, to be determined or motivated behavior, to be unreasoned rule following, to be deliberated, or to be coerced. Depending on one’s conception of law, which may be only implicit, the doing enabled by law may constitute a conscientious act of will by a subject (as in retributive theories of punishment); socially-acceptable behavior or socialization (as in some deterrence or “socio-pedagogical” theories); an indication of health or illness; the result of calculation; the triumph of reason over passion, of force over reason, or of collective over individual; and so forth. To particular doings correspond particular addressees. The transgression

23. See FRIEDRICH NIETZSCHE, *How the ‘Real World’ at Last Became a Myth*, in TWILIGHT OF THE IDOLS/THE ANTI-CHRIST 40 (R.J. Hollingdale trans., Penguin Books 1968); Marianne Constable, *Genealogy and Jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law*, 19 LAW & SOC. INQUIRY 551 (1994).



---

---

taken as sign of illness will be met with the treatment of a subject whose “normal” state is thought to be “health.” The transgression viewed as miscalculation will prompt changes in the system of incentives and disincentives to which a calculating subject ostensibly refers. The transgression viewed as ignorance prompts education. Doings conceived as moral choices correspond with autonomous actors; those conceived as regulations correspond with options available to administrators and to those whom they administer.

- *A manner of telling.* Law claims what to do through communication of statements of rules, by command, via example, through revelation, through moral knowledge or legal reasoning, by consensus, through persuasion, by threat, through the formulation of options or hypothetical imperatives, and more. Again, to particular sorts of telling correspond particular conceptions of doings and subjects. The commandments of sovereigns correspond to the obedient behavior of subjects. The transmission of custom corresponds to the practices of members of a community. To democratic deliberation belong citizens whose actions determine their way of life. And to the dissemination of bureaucratic regulations correspond the administration or management of segments of a population. In our time, the participation of subjects in their own governance (e.g., through the input and feedback techniques of surveys and polls) suggests the timeliness of questions about how best to characterize the seemingly simultaneously democratic and bureaucratic procedures of our law.

In sum, while philosophy of law posits and interrogates its own assertions about the “what-ness” of law, rhetoric refuses to engage directly in that debate. Instead, it examines the making of claims—by philosophers and others—about and in the name of law.

#### IV. ECONOMICS AND PROFESSIONAL SCHOOL LAW: THEIR ABSTRACTIONS AS DISADVANTAGES

Nowhere are explicit claims about law more finely constructed than in the science of economics, which very much informs law today. Vico claimed that physics, which was taught on the basis of the geometric method, gave to physical knowledge a false abstracted sense that it could be derived from axioms.<sup>24</sup> Likewise, in law’s application and reliance on the economic method, deductions follow insofar as they ground themselves in economic axioms and models. Yet insofar as law is concerned with the

24. VICO, *supra* note 1, at 21–25.

practical matter of telling someone what to do, its ostensible and exhaustive grounding in principle, however elegant, is inappropriate and inadequate.

An overemphasis on principle fails to take into account the particularity of a given situation. In addition, at yet another practical level, the communication of a deductive claim based on principle presumes that the audience to whom such a claim is made has the same logical capacities and attunement to the starting principle as does the speaker. To be successful, the communication of a principle—no less than any other telling—must take into account its audience: whether, for instance, it is comprised of beginning students or experts.

In many professional schools, the combination in civil law subjects of economic terminology and analysis with the rule-based method of legal reasoning (issue → rule → analysis → conclusion), smothered, in Vico's terms, the faculties and capacities of a student to perceive analogies, which constitute the source of "all ingenious, acute, and brilliant forms of expression."<sup>25</sup> As Mertz shows, legal precedent (admittedly an artifact of the common law and not of the law that Vico was concerned with) juxtaposes and conflates differences in times and cases, insisting on particular analogies and not on others. Students of the common law who learn only "correct" analogies taught in law school or who seek out only "black-letter law" or statements of rules miss the opportunity to develop into creative legal thinkers and eloquent practitioners.

#### V. EMPIRICAL SOCIAL RESEARCH AS CORRECTIVE; STRENGTHS AND DEFICIENCIES OF LEGAL REALISM AND SOCIOLOGY OF LAW

In response to their perception that law is overly informed by the abstractness of principles, models, and statements of rules at the expense of attention to actuality, sociolegal scholars turn to social science as a corrective. Mertz, a linguistic anthropologist of law, calls, for instance, for social research to inform and reshape the catchall "policy" category that legal doctrine, at least as taught in many law school classrooms, sets aside.<sup>26</sup> Taking their cue from the legal realism of the early twentieth century,<sup>27</sup>

25. *Id.* at 24.

26. MERTZ, *supra* note 11, at 75–79.

27. *E.g.*, MORRIS R. COHEN & FELIX S. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY (1951); JEROME FRANK, LAW AND THE MODERN MIND (Anchor Books 1963) (1930); LAURA KALMAN, LEGAL REALISM AT YALE 1927–1960 (1986); WILFRID E. RUMBLE, JR., AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS (1968); WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (Univ. of Oklahoma Press 1985) (1973).

law and society scholars<sup>28</sup> and new legal realists<sup>29</sup> turn to empirical studies of law-in-action to counter what they perceive as law professors' and economists' unwarranted emphases on principle and doctrine.

Legal realists and others who turn to the empirical study of law are correct that formal rules alone do not describe legal behavior. They are correct that legal reasoning bereft of any correspondence with actuality is vacuous. But in distinguishing law-on-the-books from law-in-action and rejecting legal texts as simply law-on-the-books, realists move too quickly away from the ways in which legal speech still matters, insofar as legal speech involves claims about what to do.

Likewise, sociology or social science serves as a helpful antidote to a formal rule-like propositional law that models itself on logical truths and economic models. As Vico might say, however, the antidote also has its own deficiency or failure of imagination. As an empirical knowledge, the science of society has a limited sense of reality, which is grounded exclusively in observation.<sup>30</sup> Even scholars interested in what they would call the "normative" aspect of law situate law in an empirical social world. Religious law, customary law, the law of First Nations, and the law of indigenous peoples, for instance, are taken by social researchers to be fundamentally products or constructs of society. That "society" is real, that "reality" is social and empirical, holds such sway that one wonders what else law could possibly be.

When, in their times, Vico and Montesquieu insisted on the relevance and reality of social factors for understanding law, they were challenging the then-dominant "reality" of law as divine or natural. Today the dominant reality has become that of empirical social study. The powerful hold of empirical reality is evidenced by the new "empirical legal studies," an effort in recent years by economists and rational choice theorists to operationalize their terms and those of legal doctrine in quantitative empirical studies.<sup>31</sup> While legal realists, latter-day law and society scholars, and now the "new legal realists" largely criticize the way that legal terms are taken

28. The law and society "movement" began in the mid-1960s. It has organized itself into the U.S.-based Law and Society Association, which publishes the *Law and Society Review*. There are now numerous non-U.S. professional societies and many journals. "Law and society" has now become a descriptor of many undergraduate liberal arts programs of law. See, for instance, the ABA website on undergrad programs, *supra* note 18.

29. *E.g.*, Symposium, *New Legal Realism Symposium: Is it Time for a New Legal Realism?*, 2005 WIS. L. REV. 335.

30. CONSTABLE, *supra* note 22, at 9, for the remainder of this paragraph.

31. For information on the organization, publications, conferences and views of the new empirical legal studies, consult the Society for Empirical Legal Studies, <http://www.blackwellpublishing.com/society.asp?ref=1740-1453&site=1> (last visited Apr. 21, 2008), and the Empirical Legal Studies Blog, <http://www.elsblog.org> (last visited Apr. 21, 2008).

for granted, seeking through empirical research to disabuse one of the notion that doctrine captures social reality, the new empirical legal studies accepts the use of legal-doctrinal and economic terms and categories to research facts as truth about society. Thus, even as these new economists of law and more traditional sociologists of law dispute the relevance and significance of legal formulations and economic principles, they both turn to empirical data to grasp the indisputably social reality that they perceive law to be.

VI. LEGAL SPEECH ACTS; CLAIMING AS MODERNITY'S SPEECH ACT  
*PAR EXCELLENCE*

Legal realists and sociologists of law are handicapped by the fact that, in distinguishing law-in-action from law-on-the-books and directing attention away from law as a set of propositional rules or economically-generated formulas toward the behaviors and effects of actors and structures in society, they neglect legal texts and presume a peculiar empirical reality. Rhetoric addresses these drawbacks by attending to the telling of law. Activities of telling, however conventional, are best understood neither as a set of propositional rules, nor as simply the behaviors of legal actors, but as speech acts making claims. Rhetoric draws attention, following J.L. Austin, to "claims of law" not as nouns, but as the "verbing"—or activity or making of claims—out of which a "claim" (as noun) is constructed. Far from being empty verbiage, the telling of law—considered as speech act—reveals aspects of law-in-action.

The language of "speech acts" comes from Austin, a philosopher of language whose twelve lectures on the topic were published as *How To Do Things with Words* fifty years ago.<sup>32</sup> Sentences or "statements" are not only propositions, Austin argued, but the making of statements out of which true-false propositions are constructed.<sup>33</sup> So too, legal claims are not simply propositional, but involve particular sorts of speaking, which are themselves acts or actions. Law, as we shall see, is full of speech acts: parties complain and defend; lawyers object and rebut; trial judges overrule and sustain objections; juries find defendants guilty (or not); parties appeal and respond; appellate courts affirm and vacate lower court orders; legislatures enact statutes; statutes declare law; officials approve, nominate, suspend, and grant; and so forth.

32. AUSTIN, *supra* note 21.

33. *Id.* at 1 n.1.

Austin emphasized the act-like character of speech by identifying ways in which sentences or utterances were not simply true or false, but could go wrong. They could go wrong or be “unhappy” in the same way as other kinds of acts, by being coerced, for instance.<sup>34</sup> But speech acts could also go wrong their own way, not only by being misunderstood, but by being “infelicitous” or failing to fulfill the conventions required for the speech act to take.<sup>35</sup> In requiring that specific procedures be followed for legal speech acts to be valid, law formalizes and focuses attention on the “infelicities” to which its speech acts are susceptible.

Austin introduces infelicities by discussing the apparent distinction between two types of sentences: those which purport to describe or report a state of affairs and which, as propositions, can be evaluated as true or false; and those which, in being said, *do something* such that truth or falsity does not seem the main issue for understanding the sentence. Austin calls the former “constative”; he dubs the latter “performative.” Explicit performative utterances include: “I pronounce you man and wife,” “I promise I will be on time,” and “I hereby order the courtroom cleared.” Performative utterances may be void, hollow, or insincere, rather than simply false. Austin then identifies the sorts of infelicities to which performative utterances seem particularly susceptible. The act that the performative purports to do may be void, for example: no conventions may exist for carrying it out; the conventions may have been misapplied; the procedure may have been carried out incorrectly or incompletely; or it may be that the requisite conventions for the act, though carried out, have been “abused” in some way.<sup>36</sup> The parties may not have had the requisite feelings, thoughts, attitudes, or subsequent conduct required, for instance, for the act to be felicitous.<sup>37</sup> Such would be the case when a promisor has no intention of keeping what is nevertheless a promise.<sup>38</sup>

Over the course of Austin’s lectures, the distinction between constative and performative utterances breaks down. Even constative utterances do something *in* being said: they state, they assert, they report a state of affairs, or they describe something. And performative utterances turn out to be susceptible not only to what Austin calls “infelicities,” but also to being incorrect—false—about a state of affairs. “I warn you that the bull is about to charge” may be false if the speaker is mistaken about what the bull is

34. *Id.* at 14.

35. *Id.* at 1–7.

36. *Id.* at 12–38.

37. *Id.* at 39–52.

38. *Id.* at 9–11.

about to do. Ultimately then, Austin redescribes both constative and performative utterances as speech acts.

Speech acts occur as events. Like non-speech acts, speech acts can be described in various ways. (The same non-speech act can be described as “walking to the side of the room, turning a handle, and pushing,” “opening the door of the classroom,” or “letting in some fresh air,” for instance.) Speech acts can be described as doing things or using language in three more or less distinct ways: they may be considered locutionary, illocutionary, or perlocutionary. They may be “locutionary acts,” that is, acts of making sounds (phonetic), in a vocabulary and grammar (phatic), which has meaning (rhetic). One is focusing on the locutionary aspect of a speech act when one considers the truth value of a “statement.” Speech acts may be “illocutionary acts” in which the saying of words *constitutes* the doing of the act (e.g., promising, betting, or apologizing). They may also be “perlocutionary acts,” in which case their descriptions often invoke the effects *produced by* the saying. Take an example: a man says to his parents, “I am engaged.” Locutionarily, he said to his parents that he was engaged, (presuming ordinary circumstances) meaning that he had committed himself to marry. Illocutionarily, (again) presuming ordinary circumstances, he *announced* his engagement to his parents. (The illocutionary “force” of an act does not always require an explicit performance utterance; one need not say “I announce such-and-such” to announce such-and-such.) Perlocutionarily, he may have produced any number of effects: he may simply have made his parents aware of his future plans—or he may have alarmed them or made them very happy.

Illocutionary acts happen *in* something’s being (locutionarily) said; they follow the conventions required for something to be a successful—or, again, in Austin’s terms, felicitous—announcement (or promise or warning). A perlocutionary act is not itself conventional (although it may be brought off by a conventional act). Perlocutionary acts happen contingently, rather than by convention. They are the products or effects of illocutionary acts; they occur *by* (rather than *in*) something’s being said.<sup>39</sup> As Austin puts it in one of his many suggestive references to law, “A judge should be able to decide, by hearing what was said, what locutionary and

39. Illocutionary acts are not different acts than perlocutionary acts. They are different aspects of a speech act. Sometimes the success of an illocutionary act will depend on the achievement of a certain effect, but “[t]his is not to say that the illocutionary act *is* the achieving of a certain effect.” *Id.* at 116 (emphasis added). A warning cannot be said to be successful unless its audience has heard the warning and taken it a certain way. But this does not make the illocutionary act of warning into the procuring of effects. The act of warning may achieve a perlocutionary object of alerting and a perlocutionary sequel of alarming. *See id.* at 116–18.

illocutionary acts were performed, but not what perlocutionary acts were achieved.”<sup>40</sup>

When a statement or utterance is evaluated in terms of its truth or falsity, one is focusing on the locutionary aspect of a speech act of, for instance, stating. One abstracts—to some degree—from the illocutionary aspect of the speech act to ascertain its correspondence with the facts. (One abstracts only to some degree because correspondence with the facts indeed also relies in part on what kind of statement the speaker is taken to be engaging in. Austin offers as example the utterance, “France is a hexagon.”<sup>41</sup> This may be true on an elementary school test, although false to a geographer.) When an utterance is assessed not so much for its truth or falsity but for its happiness or felicity as, for instance, an apology, a promise, a declaration, or an order, one is considering it as an illocutionary act, the status of which will depend on particular conventions having been met.<sup>42</sup> If the conventions for the performance of the illocutionary act have not been met, the act is infelicitous the same way that performative utterances were said to have been infelicitous.<sup>43</sup>

Despite familiarity in legal practice with the issue of the felicitousness of speech acts, in the form of attention to proper procedure, legal scholarship tends to succumb to Austin’s criticism of philosophers that they have neglected the study of illocutionary acts. Austin writes that “for too long philosophers have . . . treat[ed] all problems as problems of ‘locutionary usage.’”<sup>44</sup> Sociolegal scholars, conversely, have treated all problems of legal speech as problems of perlocutionary force or effect. Neither philosophers nor sociolegal scholars have paid enough attention to the illocutionary acts of law. Not enough attention has been paid to what happens *in* (rather than by) the *act* (rather than “content”) of speaking in law.

Legal analysts tend to embroil themselves, on the one hand, in discussions of the correctness of rules and the soundness of arguments and, on the other hand, in discussions of the consequences of particular legal acts. Thus discussion of the landmark *Miranda* opinion at the time of its issuance, for instance, revolved around the correctness of its legal principles and reasoning and the effect it would have on police practices and prosecutorial outcomes. The debate continues today, with few commentators considering seriously what is at stake in the “warning” and in the “holding” that inter-

40. *Id.* at 122.

41. *Id.* at 143.

42. *Id.* at 145–46.

43. *Id.* at 12–38.

44. *Id.* at 100.

rogators must warn an accused of the right to remain silent before prosecutors will be allowed to introduce confessions and other statements as evidence in court.

Orienting oneself toward law as a chain of speech acts allows one to interpret the *Miranda* warning, and hence the holding, differently. In brief,<sup>45</sup> *Miranda*'s safeguarding of an opportunity for silence in response to the possibility of coerced speech need not be grounded simply in current justifications of fairness to the defendant and the need for reliable evidence. When law is a matter of speech, the justice of law refers at least in part to the conditions of speech. The *Miranda* warning and the *Miranda* holding acknowledge the dependence of the law on speech acts and acknowledge limits to the justice of the actual system. The intelligibility of statements introduced as evidence at trial requires that they meet minimal conditions for the proper hearing and understanding of utterances; they must take place under proper speech conditions. A felicitous *Miranda* warning and waiver and so forth seek to ensure the continuity of these conditions during interrogation, so that the statements of an accused who does speak have value as speech and thus as evidence.

A *Miranda* warning thus does something different than allow decision-makers to figure out after the fact whether a defendant's statements were freely or voluntarily given. It does something in addition to serving the interests of defendants or constraining the behavior of state officials. A felicitous or successful warning (illocutionarily) cautions an addressee as to a danger, such that normally she will (perlocutionarily) avoid the danger or proceed more carefully than she otherwise would. The danger to an accused is the danger named in the warning: utterances made in the extraordinary conditions of the in-custody interrogatory phase of the legal process carry different import than when those utterances are made in more ordinary conditions. A felicitous *Miranda* warning thus acknowledges the possibility that the conditions in which the accused is asked to speak may not be those in which the accused's truths can be properly heard. (We are here considering the felicity of the warning that is required for an accused's speech acts to count as speech acts, not whether an accused's speech acts are themselves felicitous.) Should a felicitous warning be given (admittedly a question if one accepts current sociolegal and empirical research into police practices), the silence of an accused may constitute an appropriate response. Such silence may indeed be prudent and in the accused's interest, as commentators are quick to remind us. But it may also constitute an ac-

45. This paragraph summarizes CONSTABLE, *supra* note 22, ch. 7.



---

ceptance, by the accused, of the acknowledgment that the procedures that follow may not do justice to her speech. In this instance, the silence of the accused does not assure justice. It does disable one particular possibility of injustice, however (while opening up the possibility of other injustices—in, for instance, the manner of giving of the warning).

Focusing on the illocutionary aspects of speech acts thus draws attention to aspects of law other than its reasoning and its effects, namely, to what law does *in* speaking. Legal speech—whether that of judges, lawyers, lawmakers, civil servants, or citizens—consists of chains of illocutionary acts. A contract, for example, must be formed by an offer and an acceptance. The chain of speech acts—invitation to offer, offer, counter-offer, counter-counter-offer, and acceptance—forms the contract. Likewise, a party objects, the court sustains the objection, and the opposing party takes an exception. A trial court convicts, the defendant appeals, the appellate court finds that the trial judge erred in accepting particular evidence or instructing the jury a particular way, and the appellate court remands the case. Law formalizes the conventions for these and other legal speech acts in part by establishing the procedures without which a given action cannot be said to have properly occurred.

The language of speech acts also introduces a vocabulary for understanding and clarifying disputes about law. Take for example the “green-card marriage.” The language of speech acts and of the infelicities of performative utterances reorients the issues surrounding green-card marriages away from both rule-like definitions of marriage and the implications and consequences of particular policies. It allows one to ask whether carrying out the marriage ritual in a particular instance leads to a professed but hollow marriage (insofar as the parties did not have the thoughts, feelings, or intentions of the sorts that characterize parties for whom marriage procedures are designed) or not a marriage at all. Likewise, the language of speech acts and their infelicities allows one to move away from sterile disputes about statements of rules about marriage and the values of particular outcomes. One can come to distinguish between the implications of understanding there to be no convention for gay marriage and of understanding there to be a convention for marriage that is misapplied when used by gay couples.

Finally, analyzing law in terms of speech acts lets one think about relations between law and justice differently. The discussion of the *Miranda* warnings above suggests that one understand the Supreme Court’s holding not simply as a correct or incorrect argument about the Fifth Amendment

or as a strategy for producing constraints on police and prosecutors, but as concerned with the requirements of a just hearing.

In these examples and others, legal speech acts consist of claims—or rather acts of making claims about or claiming—as to what an addressee is to do. Some legal speech acts make the act of claiming explicit. A plaintiff's complaint is an appeal to law: it is a claim that her injury is one that the law addresses. Likewise, a demurrer is an appeal to law: the defendant claims that law will not recognize the claims of the plaintiff as formulated and presented. At stake in both of these claims is the issue that both joins and divides the parties: the matter of what to do in this case. The parties' claims are not fundamentally noun-like assertions or propositions or statements of rules but acts of claiming, even if *in* so doing they assert, propose, or state.

Even legal speech acts that do not explicitly claim, such as questioning in interrogation or in cross-examination, take place in a context for considering claims that belong to law, insofar as they concern what someone is told to do. These speech acts may be understood as implicitly framed by “in the name of the law, answer me this” (or “I warn you, in the name of the law, that . . .”). “In the name of the law” introduces a claim about what someone, in some legal sense, must do. The ambiguity of law's claims about what “must” be—the necessity of force or the necessity of obligation—suggests that the speech acts of law cannot be limited to commanding. Law consists neither of sets of statements of rules nor of the commands of a sovereign. Claiming, rather than commanding or stating, constitutes modernity's legal speech act *par excellence*.

#### VII. POLITICS, AS REALM OF APPEARANCE OF SPEECH AND ACTION, AND ITS DISREGARD IN MODERN LEGAL STUDY METHODS

The greatest drawbacks to properly learning law are the ways in which many fail to see that speech and action are matters of ethics and politics. Legal documents most often consider legal speech and action as politically neutral. Political theorists, with the exception of constitutional law buffs and occasional others, largely ignore law.<sup>46</sup> Political scientists study law as a politically powerful and strategic instrument. Seldom is law taught as a matter of ethics and justice, much less considered—as in Hannah Arendt's

46. As example of political theorist turning to law, see JENNIFER L. CULBERT, *DEAD CERTAINTY: THE DEATH PENALTY AND THE PROBLEM OF JUDGMENT* (2008).

words—the walls of the polis which give shape to the realm in which properly political speech and action appear.<sup>47</sup>

Even texts by sociolegal researchers in which justice appears reveal an uneasy grasp of relations between legal research, speech, action, and politics. Almost thirty years ago, law and society scholars Austin Sarat and Susan Silbey warned of the “pull of the policy audience” for domestic law and society research.<sup>48</sup> Today those warnings need reissuing. Sociolegal scholars need to be alerted to the politics of their work, itself a form of speech and action. Even former Law and Society Association president, anthropologist Sally Engle Merry, for instance, seems to take for granted that the dissemination of her observations in *Human Rights and Gender Violence: Translating International Law into Local Justice*<sup>49</sup> is, if not objective, politically neutral or progressive.

Merry argues that two conceptions of culture, both of which posit culture as static and unchanging (one as national, the other as traditional), get in the way of the effective use of human rights and international law to secure women’s rights. These conceptions, she argues, prevent well-intentioned international actors from understanding local struggles and differences. Merry argues that culture should instead be considered anthropologically, as “a consensual, interconnected system of beliefs and values,”<sup>50</sup> as a fluid “repertoire[] of ideas and practices that are not homogeneous but continually changing because of contradictions among them or because new ideas and institutions are adopted by members,”<sup>51</sup> possibly as a “repertoire of argument that allowed powerful people to control weaker ones.”<sup>52</sup> Thinking of culture this way allows one to see, Merry writes, how the transnational culture around human rights is itself a culture in our global postcolonial world. And should one be interested in promoting human rights, thinking of culture in this way would allow one to act in more sophisticated ways in relation to local cultures and practices than some of the transnational culture’s state, international, and nongovernmental actors whom Merry encountered currently do.

Merry’s book takes its readers to be the very transnational elites that are in large part its subject matter and whose authority it often accepts: the non-governmental organization (NGO) actors and activists who use inter-

47. HANNAH ARENDT, *THE HUMAN CONDITION* 63 n.63 (1958).

48. AUSTIN SARAT & SUSAN SILBEY, *The Pull of the Policy Audience*, 10 *LAW & POL’Y* 97 (1988).

49. SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE* (2006).

50. *Id.* at 6.

51. *Id.* at 11.

52. *Id.* at 17.

national law to struggle for women's rights and whose cause would benefit from more effective—read, anthropologically-informed—use of human rights discourse. Transnational elites are not only the audience for the book, though. They are also its heroes, or rather, heroines, admirably shifting between domains as they aim both to hold states responsible for international violations of gender equality within their territories and to improve local conditions for women. Merry very much seems to identify with the perspectives of this elite, who indeed and understandably—with the local activists she met—constitute the bulk of her informants. As critics of states rather than formal state officials and as critical spectators rather than mere observers of the “global stage,” NGO activists are more subtle about their roles than are state representatives, Merry writes. As Western-educated individuals, they are more articulate within the terms of the English-speaking United Nations than are the indigenous subjects about whom they are concerned. And as non-U.S. and non-European natives, they have better access to at least some aspects of the politics and practices of the societies from which they come than would native Westerners. Herself a Western-educated, English-speaking spectator of cultures, Merry has access to these subjects by virtue of the status bestowed on her as an affiliate of a Wellesley College research center that is an NGO institution. And yet, in her book, Merry appears oblivious not only to the politics of her scholarship (and the implications of its publication and distribution by a prestigious U.S. university press) but also to the political implications of granting her imprimatur to a particular global vision.

Following a sophisticated but all-too-brief consideration of whether human rights could constitute a new imperialism, Merry concludes:

Despite drawbacks in the way the concept of human rights has been developed and used, it is still *the only global vision of social justice* currently available. With all its flaws, it is *the best we have*. It provides at least some constraint on the operation of markets and offers a potentially powerful tool to those who learn to use it. Like the language of law itself, it serves those in power but is always in danger of escaping its bounds and working in a genuinely emancipatory way.<sup>53</sup>

Merry's timely work thus provokes—perhaps unintentionally—the issue of how well served “we” are by even “the best” of “global visions of social justice.” Shouldn't sociolegal scholarship be wary of global visions of whatever sort? And shouldn't sociolegal scholarship be self-conscious about how texts such as this one, with their claims to expertise of and about law, participate in a circulation of knowledge that helps legitimize the particular political arrangements, institutions, and practices that would consti-

53. *Id.* at 231 (emphasis added).

tute and perpetuate an ostensibly global system? Such questions remind us that law and legal studies, like other kinds of speech and action, are matters of politics.

VIII. POETRY AND MUSIC. UNDER SOME CONDITIONS, THE BUREAUCRACY AND JARGON OF MODERN LAW CAN LEND ITSELF POETIC APPEARANCE

Like Vico, who writes that “poetical genius is a gift from heaven, and there exists no instrument by which it can be attained,” I have so far “said nothing about poetry” or music. Although poetry may seem extraneous to the symmetry of my discourse, “a few words about poetry will not be amiss at this point.”<sup>54</sup> Poetry appears not to belong in institutions of law. It seems that absorbing the sterile abstractions of law and observing the empirical realities of society harm poets. These practices benumb the imagination and stupefy the memory, two faculties on which poetry depends. Further, the passions and insights of the poet are seldom the concerns of the modern administrator or sociolegal researcher. The poet neither constructs realities nor dispels illusions, but sings of what appears. Hence Desmond Manderson sounds out the harmonies and tones of forms of law to play variations on the theme that justice is always poetic.<sup>55</sup> Peter Goodrich distills the cases and rules of romantic love in troubadour poetry into what is, in effect, a contracts casebook that reveals the broken promises of modern law.<sup>56</sup> And even the mundane expressions and experiences of modern governance allow Franz Kafka, Milan Kundera, T.S. Eliot, and Wallace Stevens, for instance, to depict today’s law precisely as fantastic daytime nightmare.<sup>57</sup>

In sum, readers and writers attuned to the sounds of song and speech comprehend that contemporary regulations favor the utilization of Latinate terminology. Such phrasing deadens the soul as well as the ears. The multiple linguistic traditions<sup>58</sup> and complicated institutional procedures contributing to the formulation and articulation of contemporary social policies nevertheless may be acknowledged to provide opportunities for aspiring poets to excavate the subversive expressive legacies of legality. Or: law still lets poets dig up another way with words.

54. VICO, *supra* note 1, at 41–42.

55. DESMOND MANDERSON, *SONGS WITHOUT MUSIC: AESTHETIC DIMENSIONS OF LAW AND JUSTICE* (2000).

56. PETER GOODRICH, *THE LAWS OF LOVE* (2006).

57. *E.g.*, FRANZ KAFKA, *THE CASTLE* (Edwin Muir & Willa Muir trans., Alfred A. Knopf 2d ed. 1941) (1926); MILAN KUNDERA, *THE JOKE* (Milan Kundera trans., HarperPerennial 1993) (1967). Closer to home, see LAWRENCE JOSEPH, *LAWYERLAND: WHAT LAWYERS TALK ABOUT WHEN THEY TALK ABOUT LAW* (1997).

58. DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* (1963).

## IX. HISTORY AS LEGAL METHOD: LIMITS AND POSSIBILITIES

Perhaps you have been wondering why, in speaking of the instruments or disciplines by which legal knowledge is procured, I have not mentioned history, which was so important to Vico.

On the one hand, history shares with contemporary law a faith in the primacy and authoritativeness of the written text. Positivist legal histories incessantly reiterate moments of founding and conquest as origins and causes of law.<sup>59</sup>

On the other hand, as a discipline on the cusp of the humanities and the social sciences, history faces challenges to its methods from all sides. Confronting discussions of documents as both text and artifact,<sup>60</sup> questions about the tried and trite distinction between primary and secondary sources, and considerations about the silences of voices and texts, history now has the chance to understand both itself and the law differently. History and law emerge as creative, expressive—rhetorical—practices that make use of particular conventions for selecting their evidence and constructing their narratives and arguments. In so doing, they open themselves to the possibility of recognizing as law something that is currently unrecognized as law, something that is other than positive law. Acknowledging that law once was something different than what it is now opens the legal historian and others not only to newly-discovered pasts (to which one can of course not return), but also to a possibility that law may yet be otherwise than the positivist, social regulation that it is presently taken to be.<sup>61</sup>

## X. TWENTY-FIRST-CENTURY AIDS TO LEGAL LEARNING; COMPUTING

Hitherto I have discussed the disciplines as instruments for knowing law. Let us, like Vico, examine the aids to learning that complement these instruments. For Vico, learning aids include the reduction to systematic rules, especially in law (Parts X–XI, *infra*), masterpieces of art (Part XII), typographical characters (Part XIII), and universities (Part XIV). Today's learning aids superficially resemble those of Vico's time, but they are not the same. Computers and systems-thinking (Parts X and XII, *infra*), digital images (Part XI), campus services (Part XIII), and the college or university

59. MARIANNE CONSTABLE, *THE LAW OF THE OTHER* 67–95 (1994).

60. *DOCUMENTS: ARTIFACTS OF MODERN KNOWLEDGE* (Annelise Riles ed., 2006).

61. See CONSTABLE, *supra* note 59, at 89; PETER GOODRICH, *LANGUAGES OF LAW* (1990); PETER GOODRICH, *LAW IN THE COURTS OF LOVE* (1996); JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* (2006)

professor (Part XIV) aid the enterprise of legal education and contribute to learning about and knowing law.

According to Vico, “The systematization in preceptive form of many subjects that depend on common sense . . . harm[s] rather than benefit[s] . . . our study methods.”<sup>62</sup> Computing today takes systematization to an extreme. Students now access legal materials, standardized outlines, and case briefs from across the country through the Internet. Just as some children today believe that vegetables simply come from a store, undergraduates seem to believe that law is found on the web. Legal research is transformed, as even law firms subscribe to briefing services which allow practitioners and their assistants to “cut and paste” canned arguments without scissors or glue.

The speed and convenience of the learning aid of computing has also changed institutions of learning more broadly. Students apply, are admitted or denied, and pay fees and register, online. From workstations and laptops, they enroll for classes and read, prepare, and submit assignments posted on course websites. Laptops allow students to take simultaneous notes or even to make in-class recordings. They interact with their professors not in office hours, but over email. Variations in their educational experiences across institutions seem to erode, and not only because computing enables long-distance learning. Institutions of higher education establish the same infrastructures and information technologies. Former research libraries constitute networks of information retrieval systems in which all (who are licensed) partake. Universities vie to participate in the newly-configured information marketplace: producing and piloting preprint servers, submissions-management programs for journals, and interactive websites. Schools come to share common measures of achievement and evaluation (as witnessed by the *U.S. News & World Report* rankings). They employ standard language of, for instance, “capstone experiences” to express the type of learning encouraged across fields.

## XI. IMAGES AND VISUAL LITERACY

Unquestionably, the invention of the silicon chip is of signal assistance to legal studies education. Computing has enabled us to obviate the disadvantages from which, in retrospect, even Vico’s Moderns suffered, such as the enormous cost of books and the necessity to travel long distances to procure them and to acquire a good education. The Moderns were often denied access to books or education by virtue of practices of owner-

62. VICO, *supra* note 1, at 46.

ship and personal status. Practices of censorship and discrimination affected even public lending libraries until well into the twentieth century. Today, by contrast, cheap paperbacks are abundant and online access makes file-sharing simple and cheap. One might fear, however, what Vico feared of printing and books: “[T]he abundance and cheapness” of virtual access could “cause us to become less industrious.”<sup>63</sup> Vico might compare us then to “banqueters, who, being surfeited with gorgeous and sumptuous dinners, wave away ordinary and nourishing food and prefer to stuff themselves with elaborately prepared but less healthy repasts.”<sup>64</sup>

All the more reason, then, that visual literacy and familiarity with new media should be taught in the law schools and required of any accomplished legal practitioner. Not only at trial, but also in the information-gathering and reporting of legal and governmental commissions and elsewhere, visual and audio materials increasingly come into play.<sup>65</sup> The student trained to read and produce images will be able to present and interpret evidence more clearly. She will also gain through her own encounters with technology a more personal understanding of how such innovations produce stress on the taken-for-granted rubrics of intellectual property and copyright law.<sup>66</sup>

## XII. SYSTEMS-THINKING IN THE KNOWING OF LAW

The systematization of legal education via the computer is emblematic of changes occurring throughout twenty-first-century law and society. Electronic communications replace paper not only in legal education, but also in law. The Court of Appeals for the Seventh Circuit recently held that an electronically-filed notice of appeal, in a jurisdiction where the district court’s local rule requires filing a notice of appeal “conventionally on paper” and defendant’s paper notice had not been filed until two months after the deadline, properly conferred jurisdiction on the Seventh Circuit.<sup>67</sup> The

63. *Id.* at 72.

64. *Id.*

65. Richard K. Sherwin, Neal Feigenson & Christina Spiesel, *Law in the Digital Age: How Visual Communication Technologies Are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. SCI. & TECH. L. 227 (2006); Alison Young, *Images in the Aftermath of Trauma: Responding to September 11th*, 3 CRIME, MEDIA, CULTURE 30 (2007).

66. JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS (1996); LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999); LAWRENCE LESSIG, CODE: VERSION 2.0 (2006); *see also* Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319 (2008).

67. *United States v. Harvey*, 516 F.3d 553, 555–56 (7th Cir. 2008); *see also* David Ziemer, *Court: E-mailed Notice of Appeal is OK*, WISC. L.J., Feb. 18, 2008, at 9A, available at <http://www.wislawjournal.com/print.cfm?recID=69641>.



public gets its news increasingly online, rather than through television or print.

The import of computing is not limited to changes in media, however. Its significance is as great in terms of the expansion of what one could call “systems-thinking.” Political scientists have long identified their interest in law as a concern with “the legal system” (and the “legal process”). Contemporary positivist philosophers consider law to be “a system of rules,” while sociologists study law as, for instance, “a system of social control.” (Indeed, even “non-positivist” philosophers such as Ronald Dworkin, who would deny the systematicity of legal rules as such, consider law to be that of a state system which maintains, as for sociologist Max Weber, a legitimate monopoly over violence.) Analyses of law as a system tend to focus on issues of the law’s coherence and the interrelatedness of its elements. In the analysis of a system, parts or elements are not governed by any central command in the entity. Rather they react to what Gregory Bateson described as “news of a difference” that is relevant to the responding element and which an observer conceives of as “information.”<sup>68</sup> (Information triggers a response in an element, which behaves somewhat in the manner of students today who expect not questions but “prompts” for their assignments.) A system, then, is defined not merely by its parts, but by the relations that constitute it as a network of activity.

In the context of systems-thinking, new ways of knowing law emerge. Knowing law is no longer limited to what legal scholars and practitioners know and what students must learn. Knowing the law becomes something that, some think, even software can do.<sup>69</sup> Thus a U.S. District Court in Texas in 1999 enjoined a software manufacturer from selling legal software in Texas under a statute regulating the “unauthorized practice of law” (UPL). The Texas Unauthorized Practice of Law Commission (UPLC) had alleged that a program, Quicken Family Lawyer (QFL), “acts as a ‘high tech lawyer by interacting with its ‘client’ while preparing legal instruments, giving legal advice, and suggesting legal instruments that should be employed by the user.’ In other words, QFL is a ‘cyber-lawyer.’”<sup>70</sup> The court agreed with the UPLC that since the program asked questions on the basis of which it selected forms, filled in blanks, and deleted clauses, the software was performing legal tasks. In addition, the court noted, the soft-

68. GREGORY BATESON, *Form, Substance and Difference*, in STEPS TO AN ECOLOGY OF MIND 454, 460–61 (1972).

69. The analysis that follows is abbreviated from Marianne Constable, *The Shuffle of Things: Law and Knowledge in “Modern Society”*, 8 THEORETICAL INQ. L. 73, 79–80 (2007).

70. *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. 3:97-CV-2859-H, 1999 U.S. Dist. LEXIS 813, at \*13–14 (N.D. Tex. Jan. 22, 1999) (quotation marks and citation omitted).

ware package contained few disclaimers and encouraged users' reliance on the program as a substitute for a lawyer's advice.

A year after the decision, the Texas legislature amended its statutory description of the practice of law. To its original definition of "practice,"<sup>71</sup> it simply added disclaimer requirements.<sup>72</sup> If the manufacturer made clear that its software was not a substitute for consulting a lawyer, then the manufacture, sale, and distribution of QFL would no longer be enjoined.<sup>73</sup>

This odd Texas case, admittedly an outlier in UPL jurisprudence, nevertheless raises nice questions about what it is to know the law today. It highlights the difference between current legal self-help products and those of 125 years ago, which proudly announced that one could rely on them implicitly and with no need for a lawyer.<sup>74</sup> The legal self-help movement's faith in laypersons' abilities to judge when to consult professionals collides with UPL regulators' apprehension—in Texas as elsewhere—regarding a layperson's ability to rely on, or to accurately evaluate the reliability of, legal products. Indeed, concern for reliability spawned many recommendations in law review articles and bar association reports for evaluating legal software in Texas. Recommendations included creating mandatory model disclosure language, requiring low cost or free attorney review of documents, unbundling attorney services, having state bars compile and publish customer complaints on websites, partnering the state bar with software manufacturers to produce materials, and gathering product information and ratings to be published in magazines or on specialized online sites.<sup>75</sup> These recommendations all feed into an ever-expanding cycle or system of information creation and supply that generates itself in the name of quality con-

71. TEX. GOV'T CODE ANN. § 81.101(a) (Vernon 2005) stated:

In this chapter the "practice of law" means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.

72. "The 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney." *Id.* at § 81.101(c); 1999 Tex. Gen. Laws 3423 (amending § 81.101).

73. *See* *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956 (5th Cir. 1990).

74. *E.g.*, JOHN G. WELLS, *EVERY MAN HIS OWN LAWYER AND BUSINESS FORM BOOK 3* (H.H. Bancroft & Co. rev. ed. 1869).

75. *E.g.*, William H. Brown, *Legal Software and the Unauthorized Practice of Law: Protection or Protectionism*, 36 CAL. W. L. REV. 157, 171 (1999) (suggesting auditing, testing, or licensing); Steve French, Note, *When Public Policies Collide . . . Legal "Self-Help" Software and the Unauthorized Practice of Law*, 27 RUTGERS COMPUTER & TECH. L.J. 93, 125-29 (2001) (proposing multiple solutions).

trol. The measures ostensibly control quality through increased access and integration of additional users and experts into increasingly sophisticated systems of assessment. Knowing law becomes a matter of seemingly limitless communication in a system that perpetuates itself in the name of equating better knowledge with more information.

In the context of systems-thinking, law becomes a matter not of memorizing precepts and rules, nor of observing how societies work, nor even of acquiring the skills to engage in eloquent and felicitous legal speech acts. It becomes an activity of information feedback and circulation.

### XIII. USING CAMPUS SERVICES

The epitome of systems-thinking happens in the service economy. On one campus, a quick search for services revealed offices explicitly designed for alumni career services, assessment and analytical services, adult and advisory services, billing and payment services, business services, central computing services, data services, wireless services, communication and network services, conference services, and so on down the alphabet through health services and housing and dining services to visitor services and workstation support services. (In addition, services such as “law enforcement services” and “shuttle services” appear in descriptions of units in which “service” is not found in the units’ titles.) Students, like legal practitioners and other twenty-first-century denizens, use both public and private “services” to access information about themselves and the world, procure forms and permissions, verify their status in institutions, pay their bills, manage their health care, clean their houses, commute to work, and otherwise carry on the business of their lives. The growth of the welfare state once made the “license” and entitlement to government largess into a “new property.”<sup>76</sup> The development of the neo-liberal state offers a diffusion of services.

Such services are often characterized in part by service providers’ invitations to users to partner as stakeholders in the service enterprise or system with either the government or private entities. As civic entities then, service users represent a particular sort of legal subject. Service providers generally structure the options from among which users may select. They construe the user as neither active nor passive, neither autonomous moral actor nor mere product of socialization. One might conceive of the “user” as the offspring of rational choice and marketing theory.<sup>77</sup> She embodies

76. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733–38 (1964).

77. The remainder of this paragraph is from CONSTABLE, *supra* note 22, at 22–23.

the joint hopes born from the shortcomings of both “rational actor” and “consumer.” While the “rational actor” assumed by economists and policy-makers is too abstract and ethereal, too ungrounded in the things of the world, to serve as a model citizen, the market “consumer” is too indiscriminating and materially-oriented to be taken seriously as an expert.

The “service user” is heir to both. The user combines the techniques of cost-benefit analysis and concern for economic efficiency with utilitarian calculations as to satisfactions—in new civic form. Unlike the rational actor, the user manipulates things of this world. Unlike the consumer, the user distinguishes needs from desires. The user provides input about the satisfaction of her service needs and desires implicitly through patterns of credit card transactions and other utility use. She does so explicitly through the registration of warranties that guarantee (or limit) the servicing of products, through online surveys and telephone polls designed for feedback about “how well we are doing,” in membership and enrollment forms, and through interactive and pop-up windows. Students entering a university-sponsored “gateway” to course websites, for instance, are presented with short weekly surveys about when their professors actually hold exams or how helpful students find library programs.

As modern campuses offer menus of services to their students, students become “users” who participate in the construction and elaboration of those services. By graduation, students will have learned how to participate in the civic world of services. They will be adept at providing feedback on their satisfaction with the options offered by service enterprises. As local residents, they may set up their own neighborhood watch or mediation programs, informing and working with officials about their concerns. On school boards and elsewhere they will offer, as both entitlement and duty, their views about the available options.

#### XIV. UNIVERSITY AND COLLEGE PROFESSORS IN THE EDUCATION BUSINESS

As to university professors, “at the present time,” wrote Vico, “no person can master a single subject.”<sup>78</sup> In contrast to Ancient Greece, when “a single philosopher synthesized in himself a whole university,”<sup>79</sup> the modern university in our time, as in Vico’s, is necessary. Its advantage is that students are taught by experts; its disadvantage, again as *per* Vico, is that

78. VICO, *supra* note 1, at 76.

79. *Id.* at 74.

the disciplines to be learned no longer form a single system or coherent unity.<sup>80</sup>

One might argue that systematization of university education does occur today, although not at the level of the disciplines, which if anything have become more specialized and distinct than in Vico's time. Systematization occurs—or is attempted—through administration. University administrators, for instance, have been known to distribute lists of action verbs to accompany requests to departments to articulate unit-specific “learning goals” and “curriculum maps” or narratives to show how such goals “intersect with” courses in the major.

In this context, the university or college professor is a different kind of aid to education than she was in Vico's time. Formerly, her primary educational role was to teach in the area of scholarship in which she had expertise. Today she has become a local expert and an administrative assistant in the education business. She spends as much or more time doing administrative work online than she does preparing for and teaching her classes: overseeing websites and uploading, downloading and emailing attachments, syllabi, assignments, and reading materials. For her campus alone (setting aside her “service” to professional associations and academic societies), she fills out forms about resources and production, signs student petitions, writes letters of recommendation, serves on policy and review committees, submits grant applications, allocates fellowships, reports on budgets, re-vamps curricula, and completes online sexual harassment and professional responsibility courses. In responding to solicitations from the administration for her opinions on subjects ranging from parking to recreational facilities to libraries to campus eating options to instructional technology, does she become a potentially empowered member of an academic community, or has she become a tool for the legitimation of campus policies that stem from indeterminate origin? Her embeddedness, like that of her students, in the system of regulations and services at her university appears to epitomize (in microcosm) the embeddedness of subjects in the systems of administrative law of twenty-first-century neo-liberal polities.

## XV. CONCLUSION

I have now set forth the remarks suggested to me by a comparison of common approaches to legal studies in our time with rhetorical approaches. Not only have I compared other approaches to law—those of the professional law school, of philosophy, of economics, of sociology, of political

80. *Id.* at 76–77.

---

---

science and anthropology, of poetry, of history—to those of rhetoric, but I have indicated the rhetoricity of those approaches and of law. All these approaches, like law itself, make claims. They presume addressees or audiences with particular capacities and attunements. They all do something more than stating true/false propositions in speaking or writing as they do. And all reveal something, for better and for worse, of our world and of the law and legal subjects imagined in our time.

In sum, I have drawn out what can be done with legal rhetoric and I have shown how little can be done by, or said about, law without it.