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INTRODUCTION TO RECALLING VICO'S LAMENT: THE ROLE OF  
PRUDENCE AND RHETORIC IN LAW AND LEGAL EDUCATION

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This Symposium marks the three-hundredth anniversary of Giambattista Vico's famous address to the University of Naples, *On the Study Methods of Our Time*.<sup>1</sup> In keeping with the tradition that a professor of rhetoric deliver the inaugural oration for the new school year, Vico delivered this address (his seventh) in 1708; it was published the following year. Vico is justly credited with providing in this address one of the most concise and incisive articulations of the peril of wholesale surrender to Cartesian methodologism, although by this time the intellectual die largely had been cast. Vico readily conceded that the battle of the ancients and moderns was over: the scientific method had proven its superiority in many areas of knowledge and undeniably was an engine for intellectual and technological development. Nevertheless, Vico urged scholars not to discard those elements of the classical tradition that fostered wisdom beyond the narrow confines of technical knowledge. Of greatest significance for this Symposium, Vico argued that the study and practice of law required a cultivation of the wisdom of the ancients regarding the rhetorical arts, and that it would be a great mistake to surrender law to the Cartesian method. As summarized by the translator of the Oration, the "antithesis Vico-Descartes is, at bottom, the contrast between the mentality of the jurist and that of the mathematician, between the spirit of erudition, and that fostered by the 'exact' sciences."<sup>2</sup>

Vico also challenged the incipient knowledge-based educational methods that reduced education to a form of behavioral conditioning, arguing that education must be constructive, critical, and active. Combined with his attention to law, his Oration suggests that legal education must focus on the cultivation of common sense and prudence, develop the skills of eloquence in deploying this knowledge, ensure that students are engaged actively in this process rather than subjected to the dissemination of

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

2. Elio Gianturco, *Translator's Introduction to VICO*, *supra* note 1, at xxviii.

information, and must not be premised on the employment of the Cartesian method of ubiquitous doubt in the absence of certainty.

Several selections from Vico's short address provide a flavor of these themes. In arguing against the growing tendency of universities to honor the Cartesian method of doubt and to neglect the art of rhetorical reasoning about matters that admit only of probabilities, Vico writes:

Nature and life are full of incertitude; the foremost, indeed, the only aim of our "arts" is to assure us that we have acted rightly. Criticism is the art of true speech; "*ars topica*," of eloquence. Traditional "topics" is the art of finding "the *medium*," i.e., the middle term: in the conventional language of scholasticism, "medium" indicates what the Latins call *argumentum*. Those who know all the *loci*, i.e., the lines of argument to be used, are able (by an operation not unlike reading the printed characters on a page) to grasp extemporaneously the elements of persuasion inherent in any question or case. Individuals who have not achieved this ability hardly deserve the name of orators. In pressing, urgent affairs, which do not admit of delay or postponement, as most frequently occurs in our law courts—especially when it is a question of criminal cases, which offer to the eloquent orator the greatest opportunity for the display of his powers—it is the orator's business to give *immediate* assistance to the accused, who is usually granted only a few hours in which to plead his defense. Our experts in philosophical criticism, instead, whenever they are confronted with some dubious point, are wont to say: "Give me some time to think it over!"<sup>3</sup>

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The difference, therefore, between abstract knowledge and prudence is this: in science, the outstanding intellect is that which succeeds in reducing a large multitude of physical effects to a single cause; in the domain of prudence, excellence is accorded to those who ferret out the greatest possible number of causes which may have produced a single event, and who are able to conjecture which of all these causes is the true one.<sup>4</sup>

Vico cleverly shows that inviting the complexities and uncertainties of rhetorical reasoning is often the only path to decisive action, especially in law and politics.

The classical account of rhetoric and eloquence did not divorce technique from normative correctness. In this vein, Vico suggests that preserving the art of eloquence will advance ethical understanding because eloquence is inextricably linked with wisdom. However, by abandoning the use of eloquence to deal with matters involving uncertainty we have abandoned the ethical landscape in favor of the natural landscape of empirical facts.

3. VICO, *supra* note 1, at 15.

4. *Id.* at 34.

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But the greatest drawback of our educational methods is that we pay an excessive amount of attention to the natural sciences and not enough to ethics. Our chief fault is that we disregard that part of ethics which treats of human character, of its dispositions, its passions, and of the manner of adjusting these factors to public life and eloquence. . . . Since, in our time, the only target of our intellectual endeavors is truth, we devote all our efforts to the investigation of physical phenomena, because their nature seems unambiguous; but we fail to inquire into human nature which, because of the freedom of man's will, is difficult to determine. A serious drawback arises from the uncontrasted preponderance of our interest in the natural sciences.<sup>5</sup>

Working from these premises, Vico urged his university audience to change the educational preparation of future citizens in a manner that takes advantage of the wisdom of the ancients in dealing with matters of probability.

In conclusion: whosoever intends to devote his efforts, not to physics or mechanics, but to a political career, whether as a civil servant or as a member of the legal profession or of the judiciary, a political speaker or a pulpit orator, should not waste too much time, in his adolescence, on those subjects which are taught by abstract geometry. Let him instead, cultivate his mind with an ingenious method; let him study topics, and defend both sides of a controversy, be it on nature, man, or politics, in a freer and brighter style of expression. Let him not spurn reasons that wear a semblance of probability and verisimilitude. Let our efforts not be directed towards achieving superiority over the Ancients merely in the field of science, while they surpass us in wisdom; let us not be merely more exact and more true than the Ancients, while allowing them to be more eloquent than we are; let us equal the Ancients in the fields of wisdom and eloquence as we excel them in the domain of science.<sup>6</sup>

The anniversary of Vico's famous address provides an occasion to recall Vico's lament in the context of contemporary law and legal education. The essays in this Symposium do not simply engage in a careful exegesis of Vico's work, nor do they simply provide detailed recommendations for law and legal education. Rather, the purpose of the Symposium is to revive Vico's intellectual insights and examine whether they shed light on the character of law and the objectives of legal education from a theoretical, epistemological, or practical perspective. The participants have interpreted this charge broadly and creatively, and the essays that follow represent a diverse set of perspectives and interests. By recalling Vico's role in questioning the ascendancy of the Cartesian method, the contributions seek to explore the significance of his important intervention for understanding law and legal practice.

5. *Id.* at 33.

6. *Id.* at 41.

Donald Phillip Verene is widely acknowledged to be one of the world's leading scholars of Vico's thought, and his important contributions to the field span more than forty years. Verene directs the Vico Institute at Emory University, which provides scholars with abundant resources concerning Vico's work and its contemporary relevance to a broad variety of fields. Verene's article provides a necessary touchstone for the Symposium by reviewing the context for Vico's thought and then advancing an original argument about the significance of jurisprudence.<sup>7</sup> Verene begins by recalling how Descartes undermined the humanistic ideal of the related virtues of wisdom, eloquence, and prudence, and he emphasizes that jurisprudence cannot be developed by the Cartesian method. The humanistic ideal is fostered by an educational approach that acknowledges that wisdom is cultivated through the exercise of memory, imagination, and ingenuity, and that regards eloquence as an unfolding of wisdom.

Verene then connects prudence to this ideal through jurisprudence, arguing that Vico demonstrates that a "true science of ethics . . . can be formed on the basis of the science of law or jurisprudence."<sup>8</sup> In some respects this parallel's Gadamer's argument that legal practice exemplifies the hermeneutic situation of understanding through application,<sup>9</sup> and Perelman's contention that legal practice provides a model of moral reasoning,<sup>10</sup> but I believe that Verene is suggesting an even deeper connection. The cultural reality of law built through the ages is not simply a model of a certain kind of reasoning, but rather a full embodiment of the substantive ethical dimension of social life that makes ethical reasoning possible. This is a radical challenge to the positivist insistence on the separation of law and morals, and proposes an inversion of the ordinary understanding that law is a subset of, and derivative of, preexisting morality.

Fellow of the Vico Institute and noted scholar of the work of Vico and Ernst Cassirer, Thora Ilin Bayer continues to develop the broad themes of

7. Donald Phillip Verene, *Vichian Moral Philosophy: Prudence as Jurisprudence*, 83 CHI.-KENT L. REV. 1107 (2008).

8. *Id.* at 1128.

9. HANS-GEORG GADAMER, TRUTH AND METHOD 324-41 (Joel Weinsheimer & Donald G. Marshall trans., Crossroad Publ'g Corp. 2d rev. ed. 1989) (1960) ("The Exemplary Significance of Legal Hermeneutics").

10. CHAÏM PERELMAN, JUSTICE, LAW AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING (William Kluback et. al. trans., 1980). Perelman writes provocatively:

If the new concept of law spreads, which is basically a very old one, and which has been forgotten for centuries, philosophers will have much to learn from it. They will look to the techniques of the jurist to learn how to reason about values, how to realize an equilibrium, how to bring about a synthesis of values.

*Id.* at 146.

Vichian philosophy as they relate to law and legal practice.<sup>11</sup> Bayer notes that the students hearing Vico's address were primarily law students, and that his address reveals how much our conception of law has changed over the past 300 years. Vico understood legal education as the cultivation of civil wisdom through the development of self-knowledge and an understanding of the historical development of society; he had no concept of law as a technical and dogmatic exercise. Although Bayer notes that we have lost the Roman idea of law as a "severe poem," she suggests that Vico's elaboration of this idea in the face of Cartesian challenges indicates a view of education that might serve us well today as we struggle to renew legal professionalism.

In the course of her article, Bayer provides detailed elaborations of key concepts from Vico's philosophy. First, she identifies how the term *sensus communis* (common sense) has been deployed through history, and notes how Vico unites these different approaches into an encompassing notion of a historically-developing ground for the exercise of judgment without need for recourse to Cartesian reflection. Second, she elaborates Vico's defense of the *topoi* (topics) that serve as a storehouse of arguments to be deployed artfully in argumentation. The topics are not just a checklist of technical arguments; rather, they constitute something more akin to a roadmap of common sense. Bayer writes:

The orator needs to know not only topics in the sense of the universal forms of argumentation (that is, definition, partition, and so forth), but topics in the sense of the memory-places out of which the civil world itself is formed. To speak in the law courts and convince a judge and jury requires that the speaker has command of a whole education so that he can take his hearers if needed back to meanings they all share in the back of their minds and bring his specific arguments forward from these meanings, from the mental dictionary of humanity.<sup>12</sup>

Bayer's analysis demonstrates why relating the humanistic ideals of education to law is an inspiring, even if daunting, endeavor.

Richard Sherwin is the nation's leading scholar of visual rhetoric in the digital age and the implications that this development holds for law and society, and he directs the Visual Persuasion Project at New York Law School. Sherwin begins his contribution by reminding us that Vico was woefully out of step with his time, a period in which most thinkers hungered for certainty in the face of unceasing social, religious, and political

11. Thora Ilin Bayer, *Vico's Principle of Sensus Communis and Forensic Eloquence*, 83 CHI.-KENT L. REV. 1131 (2008).

12. *Id.* at 1149.

conflict.<sup>13</sup> He then argues that we find ourselves in a similar period of unrest today due to seemingly unconstrained construction of simulacra, as powerfully depicted in the movie *The Matrix*. Descartes appeared to meet the needs of his age by proposing that rationalism could steer between the dogmatism of religion and the uncertainties of baroque sensuality, but we have come to see the severe inadequacies of our Cartesian modernity. Sherwin argues that a Vichian alternative to Cartesian thinking might be timely, at long last.

Vico's notion of the sublime and poetic imagination reveals that we can foster an inventive and dynamic reasonableness that does not purport to rise above our cultural context: in effect, Vico provides a path between Plato and Nietzsche as we take up our cultural inheritance and envision ethics, justice, and law in response to contemporary challenges. Sherwin contends that the dislocations of our visual age can be developed productively through poetic imagination without pretending to overcome the uncertainties that this reality engenders. Sherwin's essay operates as a caution as much as an inspiration, given our predisposition to seek certainty as we did under the banner of Cartesianism. Vico's power lies in his refusal to grant us easy exit from this angst; he provides a sound pedagogic method opening the way to a sublime jurisprudence, but offers no guarantees regarding our response to the vicissitudes of political and legal strife.

Willem Witteveen brings a distinctive voice to the Symposium: he is a law professor with particular expertise in legal rhetoric and the relationship between law and literature, he has served in the legislature of the Netherlands, and he now is Dean of the faculty of Liberal Arts at Tilburg University. Witteveen begins by noting that Vico worked within a different worldview from our own, and consequently that we must read him as inventively and metaphorically as he read the ancients.<sup>14</sup> This inventive reading requires that we navigate between reading him literally and ahistorically and reading him in a historicist manner. The central premise of Vico's address that we can develop for our time, Witteveen suggests, is his ideal of the orator-statesman who reveals the intrinsic connections of rhetoric, jurisprudence, and politics.

Vico provokes us to overcome the stifling positivism and instrumentalism that define contemporary law and legal education by embracing a holistic view of practical wisdom that integrates different forms of knowledge. Witteveen suggests a few measures that might achieve this reorienta-

13. Richard K. Sherwin, *Sublime Jurisprudence: On the Ethical Education of the Legal Imagination in Our Time*, 83 CHI.-KENT L. REV. 1157 (2008).

14. Willem J. Witteveen, *Reading Vico for the School of Law*, 83 CHI.-KENT L. REV. 1197 (2008).

tion of legal education: the development of a modern set of “topics,” the cultivation of imagination by means of literature and rhetorical exercises, education in the varied uses of language, and finally a spirit of experimentalism. Witteveen’s suggestions remain true to the spirit of Vico’s oration but are attentive to the situation in which law and legal education find themselves.

Guy Haarscher takes up the central problem of all rhetorical theory: Can we differentiate appropriate uses of rhetoric from abuses of rhetorical techniques?<sup>15</sup> Haarscher studied with Chaïm Perelman—who revived rhetorical philosophy in the twentieth century by promoting a “new rhetoric” that returned to Aristotelian themes—and eventually succeeded to Perelman’s chair and became the President of the Perelman Center at the Free University of Brussels. Haarscher champions the renewed attention to rhetoric in our time as a sign that Vico may finally have triumphed, but he also interrogates the rhetorical turn by asking how it can respond to the Cartesian charge that it eliminates the distinction between truth and sophistry. He poses the question dramatically: how can modern citizens avoid “Trojan horse” rhetoric that undermines liberal democracies by using their own rhetoric?

Haarscher uses several examples involving censorship and free speech to explore the rhetorical construction of arguments that amount to a sophistic “translation” of censorship into activities that ostensibly show respect for human rights. This use of pseudo-arguments should be exposed as such in order to maintain a well-functioning democracy, Haarscher argues, and it is precisely rhetorical education that provides the skills necessary for this demystification. Although most would agree that, in our day, Vico has “defeated” the ideological fixation with Cartesian thinking that he saw emerging in the eighteenth century, Haarscher insists that this will be a hollow victory if we do not tend to the integrity of our rhetorical practices in order to avoid the misleading guidance offered by sophists. The suppression of rhetoric was harmful to society, but the resuscitation of rhetoric in the form of sophistry can be equally debilitating. Haarscher does not, nor can he, provide us with a methodology to draw these distinctions with certainty. He urges us to remember that we must constantly take up this question in our rhetorical exchanges.

In my contribution I link Vico’s oration to the contemporary pleas for reform of American legal education that recently culminated in the Carne-

15. Guy Haarscher, *Rhetoric and its Abuses: How to Oppose Liberal Democracy While Speaking its Language*, 83 CHI.-KENT L. REV. 1225 (2008).

gie Report.<sup>16</sup> In my previous scholarship, I have argued that we must combine the insights of hermeneutical and rhetorical philosophy to provide an adequate account of law. I begin by connecting the critiques of law and legal education by Anthony Kronman and Karl Llewellyn to the Carnegie Report, revealing that the core of our contemporary dissatisfaction relates to more than pedagogical techniques. By asking whether we can teach law students to become professionals who exhibit prudence and eloquence, the contemporary critiques return to the age-old debate between Plato and Isocrates.

I argue that Vico's oration was a prescient warning about the emerging Cartesian worldview, and therefore it can serve as a distant mirror in which we can view our contemporary predicament. Beyond this diagnostic benefit, Vico also describes the philosophical reorientation necessary to overcome our lamentable situation. I conclude that Vico articulates an account of rhetorical knowledge that we must embrace if we are to recover from the disabling effects of our collective Cartesian fantasy. Rhetorical knowledge is unavoidable and multifaceted, and only by appreciating the contours of rhetorical knowledge can we reorient law schools to provide professional education.

Marianne Constable is a professor of rhetoric at Berkeley who has written about law and legal discourse in an inventive and stimulating manner. Constable provides a Vichian oration for our time, concluding that law is too important to be left to the lawyers, the philosophers, or the social scientists.<sup>17</sup> Rhetoricians refuse to be enchanted by philosophical debates about the nature of law, economic analysis of the patent structure of law, and empirical descriptions of the law in action. Scholars of rhetoric resolutely insist that we must attend to legal speech—to the claiming and telling that is law—and must acknowledge the ethical and political dimensions of these speech acts.

Constable suggests that this reorientation would broaden legal education to encompass the "singing" of the poets and the storytelling of the historians. Positive law would no longer be "the law," to be manipulated and dissected as lifeless abstractions. This vision runs up against the mod-

16. Francis J. Mootz III, *Vico's "Ingenious Method" and Legal Education*, 83 CHI.-KENT L. REV. 1261 (2008) (discussing WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007), which was published as part of The Preparation for the Professions Series of The Carnegie Foundation for the Advancement of Teaching). Legal educators have adopted the shorthand name "the Carnegie Report" to refer to this legal education report; all references in the text to "the Carnegie Report" refer to this 2007 publication.

17. Marianne Constable, *On the (Legal) Study Methods of Our Time: Vico Redux*, 83 CHI.-KENT L. REV. 1303 (2008).

ern bureaucratic organization of the university, the commodification of education, and the ubiquity of information delivered electronically. Only rhetoric, Constable argues, can illuminate the path for legal education and provide the point of access for discussing these developments.

Lief Carter's contribution to the Symposium mimics Vico's ambitious audacity in attempting to chart the course and character of the history of humanity.<sup>18</sup> Carter, a highly-regarded expert in constitutional law and legal theory who teaches at an institution devoted to the liberal arts tradition championed by Vico, imaginatively attempts to subvert the liberal legal order's fascination with individual rights and duties in favor a model of rule-guided competitive play that joins (political) actors in a shared contest. Carter argues that fundamentalism in politics is a particularly warped instance of the Cartesian desire for certainty, and it is particularly dangerous in light of our propensity to brutalize the heretics who interfere with presumed verities.

If we designed political and legal institutions to channel disputes into play, Carter suggests, we would be better able to contain brutality by fostering something akin to a civic sportsmanship. He reaches this conclusion by looking at the operation of sports in contemporary culture and drawing from Vico's insights that the human world is socially constructed and involves human capacities and characteristics that extend well beyond our rational and calculative abilities. Games help to reconstruct our plastic brains because participants do not regard opponents as having bad motives (it is only a game, not personal) and they can accept the legitimacy of losing without retaliation. Carter notes that evolving rules can develop only if there is an umpire or referee with legitimacy, and this feature of the game model of politics is certainly the most difficult to implement. However, the efforts of the legal system to thwart revenge violence through the highly choreographed contest of a trial provides an intriguing starting point.

In these essays a diverse group of talented scholars bring Vico's oration to life for our time, probing how his wisdom might yet provide guidance as we attempt to come to grips with the powerful urge to rationalize that is most strongly exhibited in the Cartesian tradition of critical philosophy. A common theme in these articles is the necessity, and difficulty, of paying heed to Vico's lament in our day. The goal of this Symposium—to advance down this difficult path—has been realized, but much work remains for us to reimagine our thinking, practices, and pedagogies.

18. Lief H. Carter, *Law and Politics as Play*, 83 CHL.-KENT L. REV. 1333 (2008).