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## VICHIAN MORAL PHILOSOPHY: PRUDENCE AS JURISPRUDENCE

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### INTRODUCTION

In modern schemes of education, eloquence, prudence, and jurisprudence have disappeared from the liberal arts. The *artes liberales*, as Cicero understood them, were what was needed for human freedom, for human beings to understand themselves as capable of choice, authority, and self-determination. To speak well is to think well and to think well is to command the basis for acting well. Human happiness, at least as Aristotle understood it, as *eudaimonia*, is based on the ideal of acting in accord with excellence. Excellence requires the study of eloquence, prudence, and jurisprudence. The guide for human prudence is jurisprudence in the sense that the law is understood as the codification of civil wisdom. The law approached in this way, which is the way both Vico and the Ancients approached it, is the individual's guide to acting well. The laws are the individual's teacher. Seen in this way, the laws are not a system of restrictions on free actions but are the principles whereby man as both a social and a rational animal can engage in self-knowledge and self-determination.

My purpose in this essay is, following Vico, to address the question: Is it possible to reconceive eloquence, prudence, and jurisprudence as a necessary part of the liberal arts?

### I. A DEFENSE OF THE STUDIA HUMANITATIS

In his Latin pedagogical oration, *De nostri temporis studiorum ratione*, translated as *On the Study Methods of Our Time*, Vico takes up in a new way the famous *querelle des anciens et modernes* which took shape in France in the late 1600s in the writings of Bernard le Bovier de Fontenelle

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and Charles Perrault.<sup>1</sup> This quarrel, as formulated by these French thinkers, occurs within the domain of letters, raising the question of whether the writings of the moderns were equal or superior to those of the ancient poets. Vico recasts the quarrel as a more general one between two ideals of knowledge that have within them two conceptions of human education. He asks: “Which study method is finer and better, ours or the Ancients’?”<sup>2</sup>

Vico stands at a crossroads in the history of Western thought. He is the inheritor of Italian Renaissance Humanism that replaced the scholastic pedagogy of the trivium and quadrivium (the study of grammar, rhetoric, and logic coupled with arithmetic, music, geometry, and astronomy—the seven liberal arts) with the *studia humanitatis* (concentrating on grammar, rhetoric, history, poetry, and moral philosophy)<sup>3</sup> and the new mathematical sciences of nature extending from Galileo to Newton that replaced the old Aristotelian physics and metaphysics of primary and secondary substances.

Descartes, in his *Discourse on Method*, captured the essence of what it means to be a modern thinker. His fourfold method provided a simple and elegant statement of what it means to reason in the manner of the new sciences: (1) begin by accepting only what can be taken to be evidently true, (2) divide each of the difficulties involved in a problem into as many parts as possible, (3) ascend in considering them in a step-by-step fashion from the most simple to the most complex, and (4) proceed with such care and comprehensiveness as to leave nothing out.<sup>4</sup> Such right reasoning will provide the investigator with the solution to any problem in any proper field of study. Descartes’ method fulfills the distinctively modern quest, the quest for certainty. Since certainty is the goal, any field of study that is not by nature dedicated to it is not a proper field of study and is to be excluded from human knowledge.

1. GIAMBATTISTA VICO, ON THE STUDY METHODS OF OUR TIME (Elio Gianturco trans., Cornell Univ. Press 1990) (1709) [hereinafter STUDY METHODS]; 1 GIAMBATTISTA VICO, *De Nostris Temporis Studiorum Ratione*, in OPERE 87, 87–215 (Andrea Battistini ed., Mondadori 1990). An excellent treatment of the quarrel of the Ancients and Moderns is Hans Baron, *The Querelle of the Ancients and the Moderns as a Problem for Renaissance Scholarship*, in RENAISSANCE ESSAYS 95, 95–114 (Paul Oskar Kristeller & Philip P. Wiener eds., Univ. of Rochester Press 1992) (1968). In regard to Vico see Sergio Campailla, *A Proposito di Vico nella Querelle des Anciens et des Modernes*, in 3 BOLLETTINO DEL CENTRO DI STUDI VICHIANI 181–92 (1973). Campailla’s essay considers the quarrel as it relates to both Vico’s *De nostris* and his later oration, *De mente heroica*. For a translation of this see Giambattista Vico, *On the Heroic Mind*, in VICO AND CONTEMPORARY THOUGHT 228, 228–45 (Giorgio Tagliacozzo, Michael Mooney & Donald Phillip Verene eds., Humanities Press 1979).

2. STUDY METHODS, *supra* note 1, at 5.

3. For an account of the *studia humanitatis* see DONALD R. KELLEY, RENAISSANCE HUMANISM 1–13 (1991).

4. 1 RENÉ DESCARTES, *Discourse on the Method of Rightly Conducting One’s Reason and Seeking the Truth in the Sciences*, in THE PHILOSOPHICAL WRITINGS OF DESCARTES 111, 120–21 (John Cottingham, Robert Stoothoff, Dugald Murdoch & Anthony Kenny trans., Cambridge Univ. Press 1985) [hereinafter *Discourse on the Method*].

The pedagogy that is in accord with this conception of knowledge (as Vico notes in the *Study Methods*) is the *Port-Royal Logic* of Antoine Arnauld and Pierre Nicole.<sup>5</sup> It teaches that there are two methods of thinking—analysis and synthesis. Method as such is “the art of arranging well a succession of various thoughts, or for discerning the truth when we are ignorant of it, or for proving it to others when we already know it.”<sup>6</sup> The method of analysis offers training in critical thinking. We discover what something is by taking it apart and understanding its connections. The method of synthesis is a method of composition and offers training in how to make understandable to others what has been found. *Clarté* dominates both of these methods; the one produces clarity of thought and the other produces clarity of statement of it.

The Cartesian conception of knowledge and the doctrine of pedagogy implicit in it is based on the exclusion of humane letters from right reasoning. In the *Discourse*, Descartes explicitly excludes the study of fables and histories from the curriculum of those who would wish to acquire knowledge: “[T]hose who regulate their conduct by examples drawn from these works are liable to fall into the excesses of the knights-errant in our tales of chivalry, and conceive plans beyond their powers.”<sup>7</sup> He excludes oratory and poetry on the ground that they are gifts of the mind, not fruits of study. He says: “Those with the strongest reasoning and the most skill at ordering their thoughts so as to make them clear and intelligible are always the most persuasive, even if they speak only low Breton and have never learned rhetoric.”<sup>8</sup> He adds that the best poets need no theory of poetry.

In regard to the study of morals, he says he “compared the moral writings of the ancient pagans to very proud and magnificent palaces built only on sand and mud.”<sup>9</sup> With the exception of grammar, Descartes dismisses one by one the fields distinctive to the *studia humanitatis*, from rhetoric through moral philosophy. They, along with the study of ancient languages (Greek having a particular importance for the Humanists),<sup>10</sup> are broadening in the sense that travel, along with awareness of other customs, broadens, but at most they can afford pleasure, at worst they are corruptions of reasoning (or at least distractions from its proper employment).

5. ANTOINE ARNAULD & PIERRE NICOLE, *LA LOGIQUE OU L'ART DE PENSER* (Pierre Clair & François Girbal eds., Presses Universitaires de France 1965) (1662).

6. *Id.* at 299 (my translation).

7. *Discourse on the Method*, *supra* note 4, at 114.

8. *Id.*

9. *Id.*

10. For example, see Battista Guarino's insistence (following Quintilian) on the importance of the study of Greek in Battista Guarino, *A Program of Teaching and Learning*, in *HUMANIST EDUCATIONAL TREATISES* 260, 281–83 (Craig W. Kallendorf ed. & trans., Harvard Univ. Press 2002).

The pedagogy of the Renaissance Humanists is devoted to the ideal of civil wisdom which they revive from the Ancients. The second-century writer Aulus Gellius holds that the Latin *humanitas* has the meaning of the Greek *paideia*—the education of the whole man by coursing through the whole circle of the human arts, literally the encyclo-paideia.<sup>11</sup> The completion of this circle produces the citizen, one who has the wisdom necessary to the prolongation of the *civitas*—civic order, the city. Descartes rejects the *studia humanitatis* because the fields it embraces are all by nature based upon reasoning that is probable, not reasoning that aims at certainty.

The aim of humanistic education is prudence. Vico says:

[I]n 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>12</sup>

He concludes further: “[I]t is an error to apply to the prudent conduct of life the abstract criterion of reasoning that obtains in the domain of science.”<sup>13</sup>

The counterpart textbook to the *Port-Royal Logic* for the Vichian humanist is the *Institutes of Justinian*, coupled with Cicero’s and Quintilian’s prescriptions for the instruction (*institutio*) of the orator. *Institutio* is a method, an arrangement or order. An institution is something “put in place,” established or constructed according to a particular order. Cicero’s *Orator* and Quintilian’s *Institutes* require that the orator have a command of the principles of rhetoric, poetics, history (from which to draw examples), and moral philosophy. The principles of moral philosophy come not from logic, but from law. In the law we find, as the *Institutes of Justinian* advocates, how to “live honourably; harm nobody; give everyone his due.”<sup>14</sup>

Vico reminds us in the *Study Methods* that what the Greeks call *philosophia* the Romans call *iusprudentia*. Behind the law as the repository of moral philosophy is the Socratic ideal of self-knowledge, which, as we find in *Alcibiades*<sup>15</sup> and as Socrates says in *Phaedrus*,<sup>16</sup> goes back to the Delphic inscription on the Temple of Apollo, *gnōthi seauton*, “know thy-

11. 2 AULUS GELLIUS, *ATTIC NIGHTS* 457 (John C. Rolfe trans., Harvard Univ. Press 1927).

12. *STUDY METHODS*, *supra* note 1, at 34.

13. *Id.* at 35.

14. J. INST. 1.1.3 (JUSTINIAN’S INSTITUTES (Peter Birks & Grant McLeod trans., Cornell Univ. Press 1987)).

15. PLATO, *Alcibiades*, in CHARMIDES, ALCIBIADES I AND II, HIPPARCHUS, THE LOVERS, THEAGES, MINOS, EPINOMIS 173 (W.R.M. Lamb trans., Harvard Univ. Press 1927).

16. PLATO, *Phaedrus*, in EUTHYPHRO, APOLOGY, CRITO, PHAEDO, PHAEDRUS 405, 421–23 (Harold North Fowler trans., Harvard Univ. Press 1914).

self.” Its corresponding instruction, *mēden agan*, “nothing too much” is the first assertion of prudence as the key to human action.

What Socratic moral philosophy seeks by the *elenchos*, the dialectic of question and answer, the study of jurisprudence or the science of law seeks by an understanding of the codification of custom which contains the wisdom or authority of human tradition. The single great Renaissance Humanist statement of moral philosophy is Pico della Mirandola’s *Oratio de hominis dignitate*, or *Oration on the Dignity of Man*, the work to which Vico compares his own conception of a “new science” as its successor and furtherance.<sup>17</sup>

The ideal of the Humanist pedagogical tradition is instruction in the interconnection of *sapientia*, *eloquentia*, and *prudencia*. This threefold ideal has its origin in Cicero’s *De partitione oratoria*. Cicero says:

Virtue has a twofold meaning, for it is exhibited either in knowledge or in conduct. The virtue that is designated prudence [*prudencia*] and intelligence and the most impressive name of all, wisdom [*sapientia*], exercises its influence by knowledge alone . . . . The virtue of prudence when displayed in a man’s private affairs is usually termed personal sagacity and when in public affairs political wisdom.<sup>18</sup>

Of eloquence and wisdom, Cicero says: “[E]loquence [*eloquentia*] is nothing else but wisdom [*sapientia*] delivering copious utterance . . . .”<sup>19</sup> Vico, in the *Study Methods*, echoes this assertion of Cicero: “What is eloquence, in effect, but wisdom, ornately and copiously delivered in words appropriate to the common opinion of mankind?”<sup>20</sup> Vico says: “There is only one ‘art’ of prudence, and this art is philosophy.”<sup>21</sup> He says further: “[A]t Rome, the philosophers themselves were jurists . . . . [I]n Rome, *sapientia* corresponded perfectly to justice and statesmanship.”<sup>22</sup>

Vico also says that there was a time when philosophy “was handed down by its teachers in a manner fitted to foster eloquence, i.e., the attempt was made to fuse philosophy with eloquence. Demosthenes was a product of the Lyceum; Cicero, of the Academy: there is no doubt that they were

17. Giovanni Pico della Mirandola, *Oration on the Dignity of Man*, in *THE RENAISSANCE PHILOSOPHY OF MAN* 223 (Ernst Cassirer, Paul Oskar Kristeller & John Herman Randall, Jr. eds., Elizabeth Livermore Forbes trans., Univ. of Chicago Press 1948). In Vico see GIAMBATTISTA VICO, *THE AUTOBIOGRAPHY OF GIAMBATTISTA VICO* 156–57 (Max Harold Fisch & Thomas Goddard Bergin trans., Cornell Univ. Press 1944) (1728 & 1731) [hereinafter *AUTOBIOGRAPHY*].

18. CICERO, *De Oratore*, in *DE ORATORE: BOOK III, DE FATO, PARADOXA STOICORUM, DE PARTITIONE ORATORIA* 2, 367 (H. Rackham trans., Harvard Univ. Press 1942).

19. *Id.* at 369.

20. *STUDY METHODS*, *supra* note 1, at 78.

21. *Id.* at 48.

22. *Id.* at 49.

the two foremost speakers of the two most splendid of languages.”<sup>23</sup> He goes on to say that among the moderns philosophy is taught in an abstract way such that all of its ancient connection with eloquence is lost. There is no jurisprudence that can be constructed from Descartes’ method. “Law” and “jurisprudence” are not key terms that appear in the indexing of Descartes’ major writings. Although the tree of knowledge that Descartes describes in his letter prefacing the *Principles* contains morals as a top branch, all his philosophy as a whole offers or can offer is his provisional code of conduct, placed in the third part of the *Discourse*, and his stoical views expressed in his exchange of letters with Princess Elizabeth of Bohemia.<sup>24</sup> Descartes has no conception of prudence beyond that typical of modern moral philosophy: that prudent action is recommended when no clearly rational criterion can be formulated.

Vico’s approach in the *Study Methods* is not the opposite side of the coin that Descartes mints. Descartes denies the validity of those forms of thought in which the Ancients and their Humanist successors excel. But Vico does not deny the validity of the types of knowledge produced by the Moderns. He states at the onset of the *Study Methods* that his intention is to seek a balance between the scientific rationalism of the Moderns and the rhetorical civil wisdom of the Ancients.<sup>25</sup> The principle of balance allows Vico to resurrect the study of the Ancients as necessary to a proper human education. This education must follow a twofold pattern and to comprehend this it is necessary to be precise concerning what Vico means by “method.”

I have remarked on the term “method” in my preface to the republished edition of Elio Gianturco’s translation.<sup>26</sup> In the Latin title the genitive plural “*studiorum*” should be “studies” and “*ratione*” should be singular, “method.” Thus correct to Vico’s original is “method of studies,” not “study methods.” “*Ratio*” is a prominent word in Latin, well known for the difficulties attached to it in rendering it into English. Among its straightforward meanings are “a drawing up,” “a reckoning” or “account”; it also has the sense of a scheme, system, order, or method. Vico’s “*studiorum ratione*” is a “system or curriculum of studies,” implying a theory of the temporal order in which certain studies in a student’s education should occur. A strong reason for retaining “method,” however, is Vico’s reference in his autobiography to this oration as “*del metodo di studiare*,” which is cognate to the English “of the method of study.”

23. *Id.* at 37.

24. *Discourse on the Method*, *supra* note 4, at 186; 3 RENÉ DESCARTES, *Letters*, in THE PHILOSOPHICAL WRITINGS OF DESCARTES, *supra* note 4, at 256–83.

25. *STUDY METHODS*, *supra* note 1, at 5–6.

26. Donald Phillip Verene, *Preface to STUDY METHODS*, *supra* note 1, at xii–xiii.

Vico's autobiography is written as a work in opposition to Descartes' claim that the *Discourse* is an autobiographical account of how he made his discovery. In it Vico says: "We shall not here feign what René Descartes craftily feigned as to the method of his studies simply in order to exalt his own philosophy and mathematics and degrade all the other studies included in divine and human erudition."<sup>27</sup> In this statement Vico is using "*metodo*" in the sense of Descartes' claim to an order or *ratio* of the development of his thought. Descartes' "*méthode*" in the title of his *Discourse* clearly refers to the fourfold method he formulates, but Vico here takes it in a second sense—that of the genesis of Descartes' own thought. Vico's method is the "genetic method."<sup>28</sup> For, as Vico says, he wrote his autobiography as a historian, narrating step-by-step the series of his studies that is at the basis of his development as a man of letters.

## II. MEMORY AND WISDOM

Vico's balance between the Moderns' and the Ancients' conceptions of knowledge is not one of weighing the pros and cons of each. His solution is to apply the genetic method to human education. Thus the abstraction of thought that is required for analytic geometry, the sciences, and for comprehending the terms of metaphysics is to be taught to mature minds. The education of children should focus on the development of those powers of mind that will later be required for civil wisdom: "[T]he teacher should give the greatest care to the cultivation of the pupil's memory, which, though not exactly the same as imagination, is almost identical with it."<sup>29</sup> Vico could agree with the Renaissance program of teaching and learning of Battista Guarino, that the young should first attempt "to acquire spontaneously a real desire to learn—something a teacher cannot give them from the outside . . . . Let them always keep in mind the teaching of the Greek Socrates: if you are eager to learn, you will learn much."<sup>30</sup>

Vico says the arts in which memory and imagination are combined are especially painting, poetry, oratory, and jurisprudence. Instead of the abstractions of logic the young pupil should—as known to the Ancients—be taught plane geometry because it requires and depends upon the use of vivid images and trains in the capacity to form them. If early education is

27. AUTOBIOGRAPHY, *supra* note 17, at 113; see DONALD PHILLIP VERENE, THE NEW ART OF AUTOBIOGRAPHY: AN ESSAY ON THE LIFE OF GIAMBATTISTA VICO WRITTEN BY HIMSELF (1991).

28. Max Fisch, in his Preface to the autobiography, writes: "Vico's [autobiography] has the unique interest of being the first application of the genetic method by an original thinker to his own writings." Max Fisch, *Preface to AUTOBIOGRAPHY*, *supra* note 17, at v.

29. STUDY METHODS, *supra* note 1, at 14.

30. Guarino, *supra* note 10, at 263.

not directed to the development of memory and imagination, we will produce a hollow mind and personality that is capable of manipulating abstractions and following methodological forms of thought but incapable of originality, especially of forming new beginning points for thought. One simple way to say this is that such blank-minded adults will lack the ability of *metapherein*, of making metaphors. Aristotle says: “[T]he greatest asset is a capacity for metaphor. This alone cannot be acquired from another, and is a sign of natural gifts . . . .”<sup>31</sup>

Memory and imagination, as Vico says in the *New Science*, are closely connected to ingenuity (in Italian, *ingegno*; in Latin, *ingenium*)<sup>32</sup> as the power to form hypotheses in science and metaphors in the arts, to perceive the similarity in dissimilars. Ingenuity, like metaphor, its product, cannot be learned from others as an adult. The mind must be led to it at the earliest age. Ingenuity is not method. There is no method for ingenuity because method is rigidified ingenuity. Once ingenuity leads us to a discovery, the means of the discovery can be articulated and formulated as a method to then be followed. Descartes’ method is not a product of method. It is a product of his own ingenuity that then can be apprehended by everyone with *bon sens*, adapted, and followed.

Vico would look on in horror at the current basing of the earliest years of children’s education on mastery of the computer and electronic-based activity. Students whose sole object of concentration is thus directed will, as adults, have no ability to tell a story, certainly not a good story, nor to narrate their existence to themselves. In such education, wonder (*thauma*), in which philosophy originates and continues to require, as Aristotle says,<sup>33</sup> will never appear because the pupil never stands before things pure and simple, unaided by the medium which is itself the message. As Gianturco says, in beginning his introduction to the translation of the *Study Methods*: “We live in a Cartesian world, a world of scientific research, technology, and gadgets, which invade and condition our lives . . . .”<sup>34</sup> In such a world, education in social management and counseling replaces education in civil wisdom.

31. Aristotle, *Poetics*, in *POETICS, ON THE SUBLIME, ON STYLE* 27, 115 (Stephen Halliwell ed. & trans., Harvard Univ. Press corr. ed. 1999).

32. GIAMBATTISTA VICO, *THE NEW SCIENCE OF GIAMBATTISTA VICO* ¶ 819 (Thomas Goddard Bergin & Max Harold Fisch trans., Cornell Univ. Press, paperback unabridged ed. 1984) (1744) [hereinafter *NEW SCIENCE*].

33. 1 ARISTOTLE, *METAPHYSICS* 13 (Hugh Tredennick trans., Harvard Univ. Press 1933) [hereinafter *METAPHYSICS*].

34. Elio Gianturco, *Translator’s Introduction* to *STUDY METHODS*, *supra* note 1, at xxi.

Vico's understanding of the human world of nations is itself based on what he calls "a jurisprudence of mankind,"<sup>35</sup> that he derives from the Roman conception of *ius gentium*, that claim of the *Digest* or *Corpus iuris civilis* that there is a part of Roman law that it has in common with all other systems of law. Vico's claim is that the *ius gentium* is not static in its universality. It is tied to his law of the three ages that describe the development of each nation in its rise, maturity, and fall—the "ideal eternal history" of an age of gods, of heroes, and of men. In each of these ages there is a different sense of law but each sense is universal or common to all nations.<sup>36</sup>

Vico adapts *ius gentium* to a doctrine of history that comprehends history as cyclic. For Vico as for the *Digest*, as mentioned above, jurisprudence is philosophy. Of his *First New Science* he says "we proposed to the universities of Europe that jurisprudence should be treated in the whole context of human and divine erudition, and on that account we put it above all the other sciences."<sup>37</sup> Vico's jurisprudence of *ius gentium*, that he calls *ius gentium naturale* or "the natural law of the peoples" is his answer to the seventeenth-century natural-law theorists who adhere to a doctrine of the origin of society in a social contract or covenant. This *ius naturale* of social contract theory he calls the "law of the philosophers," that is, as an abstract ideal based on an abstract sense of reason.

From this digression, let me return to the threefold principle of *sapientia-eloquentia-prudentia*. What Vico offers us, I think, is captured in the meanings of these three terms. What they express is what we can set against the domination of the modern in an effort to balance the modern with what they contain. They suggest a standpoint from which to attempt to reclaim the human in a world in which we risk rational madness, for Cartesianism offers no genuine guide for life. My remarks are only a modest attempt at the resurrection of the Ancients in a world which sees no reason for them. I am in the position of Vico, when he returned to Naples from nine years of service as tutor to the children of the Rocca family in their castle in the Cilento—a stranger in my own land.<sup>38</sup>

35. The title of chapter 12 of book 1 in the *First New Science* is "On the Idea of a Jurisprudence of Mankind [*del genere umano*]." See GIAMBATTISTA VICO, *THE FIRST NEW SCIENCE* (Leon Pompa ed. & trans., Cambridge Univ. Press 2002) (1725).

36. *NEW SCIENCE*, *supra* note 32, ¶¶ 922–24, 937–41.

37. *Id.* ¶ 1411.

38. *AUTOBIOGRAPHY*, *supra* note 17, at 134.

Wisdom, eloquence, and prudence are parallel to what is attributed to the poets by Horace<sup>39</sup> and to the orator by Cicero<sup>40</sup>: to instruct, delight, and move. These two sets of terms can be seen as the key to moral philosophy as part of the *studia humanitatis*. Moral philosophy is the love of wisdom as it relates to the comprehension of human nature. This wisdom, in order to be comprehended, must be put into words that attract human attention, and once wisdom is made to speak in this way, what is said should have an effect on the hearers. The effect of the speech on the passions will move the hearers to act in a particular manner. Wisdom rightly spoken becomes wisdom rightly realized in action. Let us take each of these in turn and examine how they guide forensics.

*Sapientia* or wisdom, Cicero says in the *Tusculan Disputations*, “is the knowledge of things divine and human and acquaintance with the cause of each of them.”<sup>41</sup> He repeats this definition in *De officiis*, adding that this is how wisdom is defined “by the philosophers of old.”<sup>42</sup> Vico, in the *New Science*, referring to Marcus Varro’s lost work on *The Antiquities of Divine and Human Things*, says: “True wisdom [*sapienza*], then, should teach the knowledge of divine institutions in order to conduct human institutions to the highest good.”<sup>43</sup> He adds that “Wisdom among the gentiles began with the Muse defined by Homer in a golden passage in the *Odyssey* as ‘knowledge of good and evil,’ and later called divination.”<sup>44</sup> Vico says of the Muses that they “‘sing’ in the sense in which the Latin verbs *canere* and *cantare* mean ‘foretell’.”<sup>45</sup> Vico has in mind the power of the Muses first attributed to them by Hesiod: that they sing of what was, is, and is to come. Their songs then are divinatory. The purpose of divination is to acquire a knowledge of the actions of the divine as they affect natural and human events—as above, so below. Divination is the origin of our need to acquire a knowledge of good and evil. Wisdom from its earliest beginnings, then, is in Vico’s view tied to a moral or civil aim.

Vico’s claim that true wisdom must conduct human things or institutions toward the highest good is a Socratic claim. Socrates wishes to make no one the worse for knowing him and to live such that he can pass from

39. HORACE, *Ars Poetica*, in SATIRES, EPISTLES AND ARS POETICA 442, 479 (H. Rushton Fairclough trans., Harvard Univ. Press rev. ed. 1929).

40. CICERO, *Brutus*, in BRUTUS, ORATOR 18, 157 (G.L. Hendrickson & H.M. Hubbell trans., Harvard Univ. Press 1939).

41. CICERO, TUSCULAN DISPUTATIONS 393 (J.E. King trans., Harvard Univ. Press rev. ed. 1945) [hereinafter TUSCULAN DISPUTATIONS].

42. CICERO, DE OFFICIIS 173 (Walter Miller trans., Harvard Univ. Press 1975).

43. NEW SCIENCE, *supra* note 32, ¶ 364.

44. *Id.* ¶ 365.

45. *Id.* ¶ 508.

life into death following the maxim that no harm can come to a good man. Cicero says: “Socrates . . . was the first to call philosophy down from the heavens and set her in the cities of men and bring her also into their homes and compel her to ask questions about life and morality and things good and evil . . . .”<sup>46</sup> Vico, in his address to the Academy of Oziosi, the last oration of his career, claims that eloquence requires “the study of morals, which principally informs the wisdom of man, to which more than in the other parts of philosophy Socrates divinely applied himself, whence of him it was said: ‘Socrates recalled moral philosophy from the heavens.’”<sup>47</sup> With Socrates, philosophy reorients itself from the Pre-Socratic’s concern with the heavens and the cosmos to concern for the human or civil world. Socrates also ties philosophy to the device of the question, which is the essence of dialectic and forensic oratory.

The basis of moral philosophy or moral wisdom is not a matter of the definition of terms, the formulation of arguments, and the logical analysis of problems. Moral philosophy ultimately rests on seeing whatever is in question as a whole, and, as Vico says in the *Study Methods*, “the whole is really the flower of wisdom.”<sup>48</sup> To see anything as a whole is to comprehend it by the genetic method of the Muses—to grasp it in terms of what it was, is, and will become. The Renaissance Florentine historian Francesco Guicciardini puts it thus:

All that which has been in the past and is at present will be again in the future. But both the names and the appearances of things change, so that he who does not have a good eye will not recognize them. Nor will he know how to grasp a norm of conduct or make a judgment by means of observation.<sup>49</sup>

Guicciardini’s “good eye,” *buono occhio*, is the element necessary to moral wisdom. The good eye is the mind’s eye coupled with the body’s eye. Ingenuity is rooted in memory. Memory or Mnemosyne is the mother of the Muses. Wisdom is the memory of the past connected through imagination to the present and projected by the power of ingenuity into a future state. Thus wisdom, like divination, is an attempt to master time, to see beyond present circumstances by recalling their basis in the past. To pursue moral philosophy is to think in time, to think in terms of origins and the ends implicit in them that are likely to develop. Such thought is always

46. TUSCULAN DISPUTATIONS, *supra* note 41, at 435.

47. GIAMBATTISTA VICO, *The Academies and the Relation Between Philosophy and Eloquence*, in *STUDY METHODS*, *supra* note 1, at 89 (translated by Donald Phillip Verene). Vico is paraphrasing Horace, *supra* note 39, at 477.

48. *STUDY METHODS*, *supra* note 1, at 77.

49. FRANCESCO GUICCIARDINI, *RICORDI* 131 (rev. ed. 1977) (my translation).

probable; it never follows Descartes' method or satisfies his criterion of certainty. Moral reasoning does not aim at certainty but it does aim at knowledge *per causas*.

It is often said that Socrates said that he only knows that he knows nothing—the doctrine of “Socratic ignorance.” This is only partially true. Socratic philosophy approaches any subject matter from this standpoint, but in the *Apology*, Socrates, in his examination of the claim of the Delphic oracle that he possessed wisdom, concludes that he is wise at least in human things.<sup>50</sup> However, to be wise in human things requires some knowledge of divine things or one could not know the difference between them and human things. Only the gods are truly wise because only they can stand outside of time. To say what a thing is is to say what it is and what it is not. Socrates knows or can aspire to know, as can we, this much: what the human is or what it is not. The human is always in time and the knowledge of it always requires memory, imagination, and ingenuity.

These are the three elements that Vico says define memory in the sense that Memory or Mnemosyne is the mother of the Muses: “Memory thus has three different aspects: memory [*memoria*] when it remembers things, imagination [*fantasia*] when it alters or imitates them, and ingenuity [*ingegno*] when it gives them a new turn or puts them into proper arrangement and relationship.”<sup>51</sup> The three Vichian elements that define memory also define wisdom. Thus wisdom is nothing but memory considered from a further perspective. Wisdom requires the art of the Muses to join past, present, and future in order to achieve the narrative that brings thought into a whole concerning the particular subject matter to which thought is directed.

This narrative of past, present, and future becomes wisdom when we add to this sequence the principle of necessity, and the narrative then offers an account of causes—of what had, has, and will have to be. The narrative of the whole combines philology with philosophy in that it answers, of a given subject matter, the questions of both what and why. Memory, the instrument of philological investigations, brings forth the details of the subject, or its “what,” and once the “what” is structured by the middle term of the imagination, ingenuity, the instrument of philosophical reasoning, produces the “why.” The subject matter so ordered as a whole in thought must then be put fully into language.

50. PLATO, *Apology*, in EUTHYPHRO, APOLOGY, CRITO, PHAEDO, PHAEDRUS, *supra* note 16, at 79.

51. NEW SCIENCE, *supra* note 32, ¶ 819.

## III. ELOQUENCE

The ideal of the Humanist is to be “wisdom speaking,” “*la sapienza che parla*.” If wisdom is to grasp a subject matter as a whole and hold it in thought, eloquence is the ability to make it into a complete speech. Quintilian says: “The verb *eloqui* means to bring out and communicate to an audience the thoughts you have formed in your mind. Without this, everything that has gone before is useless, like a sword that is put up and will not come out of its scabbard.”<sup>52</sup> Eloquence is necessary for all three types of oration—forensic, epideictic, and deliberative. Our interest here is forensic, specifically judicial eloquence. The parts and principles of forensic speech have been well known since the Latins, who took them from the Greeks. We find them referred to in Plato’s *Phaedrus*,<sup>53</sup> and Quintilian, in introducing each part, discusses the Greek term for it.

All eloquence requires *copia*. The successful orator should attempt to imitate the copiousness of Demosthenes and Cicero. In his oration to the Academy of Oziosi Vico speaks of the “invincible enthymeme” of Demosthenes, “which he formed by means of a very well regulated excess, going outside his case into quite distant things with which he tempered the lightning flashes of his arguments, which, when striking, amazed the listeners so much the more by how much he had diverted them.”<sup>54</sup> Vico says Cicero was “endowed with the felicity of his copiousness, which, like a great winter torrent, overflows its banks, floods countrysides, crashes down over cliffs and hillsides, rolling before it heavy stones and ancient oaks; and triumphant over all that had given him resistance, he returns to the proper riverbed of his case.”<sup>55</sup> The eloquent speech has within it all that there is on its subject, great and small. It is *copia* that distinguishes the great orator.

Cicero raises the question of into how many parts a speech in the courts falls: “Four parts. Two of them, the statement of the facts [*narratio*] and the proof [*confirmatio*], serve to establish the case, and two, the exordium [*principium*] and the peroration [*peroratio*], to influence the mind of the audience.”<sup>56</sup> The rhetorical principles of each of these parts are most fully discussed in the fourth, fifth, and sixth books of Quintilian’s *Institutio oratoria* or *The Orator’s Education*. They appear in condensed form in

52. 3 QUINTILIAN, THE ORATOR’S EDUCATION 317 (Donald A. Russell ed. & trans., Harvard Univ. Press 2001).

53. PLATO, *supra* note 16, at 537.

54. VICO, *supra* note 47, at 87.

55. *Id.* at 88.

56. CICERO, *supra* note 18, at 313.

Vico's own *Institutes*, the textbook he wrote in Latin and from which he taught rhetoric and jurisprudence throughout his career.<sup>57</sup> My remarks that follow are a characterization of each of these parts.

The four parts are four separate but connected speeches which form a tetralogy. *Tetralogia* is a Greek term originally used in oratory to refer to the group of speeches (*logoi*) delivered in a lawsuit. It is connected with the Attic orator Antiphon (c. 480–411 B.C.), who was the first *logographos*, writing speeches for litigants. According to Plutarch, Antiphon was the first to publish rules for oratory.<sup>58</sup> Tetralogy is further associated with the set of three tragedies accompanied by a satyr play as performed on the Attic stage at the festival of Dionysus. Antiphon is also said to have written tragedies.<sup>59</sup> In ancient medicine, Galen attributes to Hippocrates the principle of four mutually interacting qualities that function in the genesis and destruction of all things. These concern the opposites, warm and cold and moist and dry.<sup>60</sup> They have association with the four kinds of motion that Aristotle analyzes in his famous doctrine of four causes—material, formal, efficient, final.<sup>61</sup>

I mention these examples because tetralogy is a very strong form in ordering thought and human affairs, whether in the law, in art, or in science. A four-part sequence is a natural sequence of completion. There is great strength in a beginning, a double middle, and an end (birth, youth-old age, death).

Quintilian states the following concerning the “layout of forensic Causes”:

[W]hat is the function of a Prooemium; what are the principles of Narrative; how credibility is achieved in Proofs, either in confirming our own propositions or in demolishing those of our opponents; wherein lies the force of the Epilogue, if we have either to refresh the judge's memory by brief recapitulation of the facts, or (much more important) to stir his emotions.<sup>62</sup>

The purpose of the Prooemium (the term from Greek signifying simply “beginning” that Quintilian prefers) or Peroration is threefold: to “pre-

57. GIAMBATTISTA VICO, *Institutiones Oratoriae*, in *THE ART OF RHETORIC (INSTITUTIONES ORATORIAE, 1711–1741)* (Giorgio A. Pinton & Arthur W. Shippee eds. & trans., Rodopi 1996) [hereinafter *Institutiones Oratoriae*].

58. 10 PLUTARCH, *Lives of the Ten Orators*, in *MORALIA* 345–47 (Harold North Fowler trans., Harvard Univ. Press 1936).

59. *Id.* at 351.

60. GALEN, *ON THE NATURAL FACILITIES* 13–15 (Arthur John Brock trans., Harvard Univ. Press 1916).

61. 1 ARISTOTLE, *THE PHYSICS* 123–31 (Philip H. Wicksteed & Francis M. Cornford trans., Harvard Univ. Press rev. ed. 1957); *METAPHYSICS*, *supra* note 33, at 211–21.

62. 2 QUINTILIAN, *supra* note 52, at 179.

pare the hearer to be more favorably inclined toward [the speaker] for the rest of the proceedings,” to make him attentive, and to make him ready to learn.<sup>63</sup> These must be maintained throughout the proceedings, but they are especially important to establish in the initial stage. The goodwill that is sought can be derived either from persons or from the case itself. The dignity and effort of the judge or those hearing the case can be praised, or, if the cause itself contains positive features to which those involved may relate, such features can be emphasized.

It is especially necessary “that no unfamiliar word, no overbold metaphor, no anachronism or poeticism should be detected in the Prooemium.”<sup>64</sup> The speaker should employ commonplaces that are rich in content and easily shared by the hearers. If a long and difficult statement of the facts is to follow in the Narrative, Cicero’s line in *Pro Cluentio* is recommended: “I request you, gentlemen, not to take it amiss if I open my case at a point in the somewhat distant past; for you will much more easily grasp the ultimate issues in this case if you are aware of its first beginnings.”<sup>65</sup>

The Narrative is to cover not only the facts presented in a coherent progressive relation but also an account of the nature of the person involved (who he is), of the place (where the events of the cause occurred), of the time (when they occurred), and of the causes involved. Quintilian points out that addressing the causes is like what “historians very often introduce when they explain how a war or a rebellion or a plague came about.”<sup>66</sup> Quintilian holds that there are two types of Narrative in forensic cases—one is the exposition of the cause itself and the other is the exposition of matters that are relevant to the cause. The Narrative is not often one simple story. If there are multiple charges, each may require a narrative within the Narrative.

The Narrative, however, should be lucid and as brief as possible in order to be persuasive. Most important to the Narrative is that it be plausible. Quintilian is emphatic that plausibility is crucial even if the case being made is clearly true. He says: “a Narrative which is wholly in our favor should be plausible, when it is in fact true. There are many true things that are not very credible, and false things are frequently plausible.”<sup>67</sup>

63. *Id.* at 181–82.

64. *Id.* at 209.

65. CICERO, *Pro Cluentio*, in *PRO LEGE MANILIA, PRO CAECINA, PRO CLUENTIO, PRO RABIRIO, PERDUELLIONIS* 222, 233 (H. Grose Hodge trans., Harvard Univ. Press 1927).

66. 2 QUINTILIAN, *supra* note 52, at 221.

67. *Id.* at 237.

This striving for credibility is especially important in the Narrative because it is not so that the facts are just the facts and speak for themselves, as Descartes believes of the use of language—with his comment, in the *Discourse*, that the person speaks well who speaks but low Breton and has never learned rhetoric.<sup>68</sup> Events need not be narrated in chronological order. Credibility may dictate that they be told in the manner that is most advantageous. Everything which is said throughout the proceedings must be credible, but if the initial presentation of the facts of the case is not credible, those hearing it will be lost from the start.<sup>69</sup>

The Narrative as such must be free of obscurity or digression, but between the Narrative and Proof or Confirmation a deliberate Digression may be appropriate. The Narration sets out the things to be proved and the Confirmation must now prove them. But before entering into it the Digression may act as an end of the Narrative and beginning of the Proof. The Digression, Quintilian says, is a second kind of Prooemium to win over the judge and hearers to the Proof.<sup>70</sup> Quintilian expresses some skepticism concerning the necessity or value in all cases for the Digression. The Digression, he claims, can simply be an opportunity for the skilled speaker to display his oratorical ability, calling attention to and advertising himself rather than something essential to the case.

Vico, in his *Institutes*, is more positive. He sees the Digression as functioning such that “after having narrated the case in a straightforward manner, to formulate and propose the proposition of the case (*causae propositio*) so that it seems to flow spontaneously by itself from the narration.”<sup>71</sup> A traditional example of Digression is in Cicero’s *Second Speech against Verres*, which concerned the pillage of Sicily under Verres’ office as praetor. Cicero in his Digression took opportunity to praise the high position, antiquity, and merits of Sicily as a province, which provided the brilliant transition in his case.<sup>72</sup> There is an old principle in philosophy that the most important philosophy is done in digression. Cicero’s digression in this speech may not offer a close example of this, but Vico’s statement of the principle of Digression makes the Digression as a rhetorical principle similar to the philosophical.

The beginning of the Proof, or Confirmation, in the Proposition puts in a few words what the orator must prove and about which the judge or jury

68. See *supra* notes 7–8 and accompanying text.

69. 2 QUINTILIAN, *supra* note 52, at 249.

70. *Id.* at 289.

71. *Institutiones Oratoriae*, *supra* note 57, at 81.

72. 1 CICERO, THE VERRINE ORATIONS 295–301 (L.H.G. Greenwood trans., Harvard Univ. Press 1928).

must pronounce sentence at the end of the proceeding. It thus puts forward the Question—is the accused guilty or not of this particular charge under the particular law or laws that apply? The Proposition is followed by the Partition, which is the orderly enumeration of the divisions or parts of the Partition involved. The Partition, as Vico says, is that “by which we list how many, about what things, and in what order we shall present them.”<sup>73</sup> These are added to the Proposition for the benefit of the hearers.

The Proofs or Confirmation can be divided into two types, nontechnical and technical. Quintilian takes this division from Aristotle’s description of the two types of persuasion in the *Rhetoric*. Two important parts of nontechnical proofs are the use of previous legal judgments or precedents and the employment of witnesses. Technical proofs, Aristotle says, are “all that can be constructed by system and by our own efforts. Thus we have only to make use of the former [nontechnical], whereas we must invent the latter [technical].”<sup>74</sup> Precedents are the result of legal knowledge and legal research. According to Quintilian, “Confirmation of such judgments is made in two main ways: by the authority of the judges in the previous case, and by the similarity of the cases in question.”<sup>75</sup> Witnesses can appear in evidence either in the form of written statements (which Quintilian says can most easily be challenged) or in person. Witnesses appearing in person are subject to examination by both the prosecution and the defense. Precedents and witnesses are particular and internal to the case itself. They must be given rhetorical context, but they are essentially evidence to be used.

Technical proofs concern various means of creating beliefs. They require, most importantly, the invention of arguments according to the principles of rhetoric. In addition to arguments, Quintilian says, among technical proofs are “signs” and examples. Signs are such as murder being inferred from the presence of blood. A sign is usually not enough in itself to convince, but it can be taken in combination with others such that it becomes a decisive piece of evidence.<sup>76</sup> Examples, Quintilian says, are paradigms. They are what historians often use in historical arguments and investigation and they are what Socrates often used in his method of question and answer.<sup>77</sup> Examples or paradigms are adduced and made the basis of arguments from analogy, forcing one’s opponent to admit, of the thing in question, what must obviously be true of the analogical example. Signs,

73. *Institutiones Oratoriae*, *supra* note 57, at 85.

74. ARISTOTLE, THE “ART” OF RHETORIC 15 (John Henry Freese trans., Harvard Univ. Press 1926).

75. 2 QUINTILIAN, *supra* note 52, at 327.

76. *Id.* at 363.

77. *Id.* at 431–33.

examples, and arguments are based on techniques that are external to the case. They employ a general logic by which what is needed in the cause can be invented.

Quintilian says that a further kind of external proof is authority. This is the introduction of testimonials that are given by minds free of prejudice.<sup>78</sup> But the heart of the Proofs or Confirmation is argument. To employ arguments the speaker must be schooled in the full range of what Cicero and Aristotle treat in their writings on topics (*loci* or *topoi*), that is, in the principles for inventing arguments appropriate to any subject. A knowledge of topics requires extensive study, but it allows the orator to go in his mind to various argument types, depending on whether, for example, the point at issue is one of definition, similarity, contrariety, antecedent and consequent, cause and effect, and the like. These are to be employed both in pursuing a cause and in the refutation of the opponent's views. Arguments take the two basic forms found in Aristotle—the syllogism (which Aristotle thought to be a natural form of reason) and the enthymeme (logically a condensed form of syllogism, omitting one proposition).

The Peroration or Epilogue is the concluding speech of the total oration. Its purpose is to place the whole cause before the judge and jury at once and to make a powerful impression. This impression is gained by recapitulation of the case coupled with appeal to emotion. Emotion is that above all in which eloquence excels. Quintilian says that for the philosophers emotion is a vice and it seems immoral for the judge to be distracted from truth, but he holds that “emotional appeals are necessary if truth, justice, and the common good cannot be secured by other means.”<sup>79</sup> The appeal to emotion may be made visually as well as verbally. Quintilian says, all knew that Caesar had been killed. His body lay on the bier, “but it was the clothing, wet with blood, that made the image of the crime so vivid that Caesar seemed not to have been murdered, but to be being murdered there and then.”<sup>80</sup>

The business of the Peroration is above all Amplification. Emotions are played on throughout the proceedings, but this is especially important at the point of its conclusion. Of the relation of Proofs to the Peroration Quintilian says: “Proofs may lead the judges to *think* our Cause the better one, but it is our emotional appeals that make them also *want* it to be so; and what they want, they also believe.”<sup>81</sup> The Cartesian conception of knowl-

78. *Id.* at 451–43.

79. 3 *id.* at 21.

80. *Id.* at 33.

81. *Id.* at 47.

edge and human judgment acts as if truth is eloquent in itself. It is not. If it should seem so in a given case, it is because the emotion it stirs is ignored. The orator knows that the rational and the emotional are true counterparts. Vico makes this point in his address to the Academy of Oziosi, and he attributes it to Socrates. He says of the Academy of Oziosi, "heart and language [literally *lingua*, "tongue"] are here reunited in their natural bond, which Socrates 'full of philosophy in language and breast,' had firmly brought together."<sup>82</sup> The ideal philosopher must balance the speech of the heart and the mind, but cannot attempt to settle an issue strictly by appeal to emotion, as Quintilian allows in juridical oration.

Thought, especially in moral, legal, aesthetic, political, and human matters, generally never exists or functions apart from the passions and emotion. To proceed otherwise is a mistake. Thus eloquence must affect both reason and feeling. Every formulation of language has at once a cognitive power and an emotional power, both of which affect the hearer. The key to eloquence is to direct one's words to both of these powers. The speaker must address the subject matter as a whole and in so doing use language as a whole.

#### IV. PRUDENCE, JURISPRUDENCE, AND APPLIED ETHICS

Nowhere is this twofold nature of language more overlooked than in modern moral theory. Modern ethics acts always as though moral choice and moral decision, if rightly done, are the result of what can be placed in arguments pro and con. Moral argument fills professional journals. It is indeed a living for what are now legions of academics attached to universities, centers for ethics, environmental programs, hospitals, public health programs, and agencies of social research. In this world the sun never sets on the production of ethical arguments, which spill over into the world of journalism. The dominant interest of modern ethics is "applied ethics."

Alasdair MacIntyre, in a little-known article, has rightly argued that applied ethics rests on a mistake and that such an approach to ethics is dangerous.<sup>83</sup> The mistake is to think that there can be or that there is a body of ethical theoretical knowledge that can be applied to specific human problems. It is dangerous because when there is the semblance of such application those involved can and do act upon it, potentially or actually, producing consequences about which there is no real understanding. It is as if one can do in ethics what can in fact be done in the fields of engineering,

82. VICO, *supra* note 47, at 86.

83. Alasdair MacIntyre, *Does Applied Ethics Rest on a Mistake?*, 67 *MONIST* 498, 512 (1984).

in which principles once proved out can be applied to produce a desired product or result. Applied ethics is a modern industry or pseudo-industry, keeping those in it forever busy.

How does the menagerie of the world of applied ethics come about? Is there any alternative to it? The answer to this, I think, lies in recovering the meaning of prudence from the Ancients and the Humanists—the third term in the sequence of wisdom, eloquence, and prudence. Wisdom as characterized above is thought directed to the whole. It agrees with G.W.F. Hegel's maxim, "The True is the whole."<sup>84</sup> To know something as true is to know the whole course of what it is. Eloquence is to put the sense of the whole into words.

Forensic oratory is a key to this principle because it shows how eloquence actually functions in human affairs. The parts of the speech of the law courts are the parts of eloquence itself. In a small work, *The Art of Humane Education*, I have argued that teaching is a form of eloquence.<sup>85</sup> To speak as a whole requires a beginning. The beginning expands into a complete narration of the subject under consideration, and from the narration arguments are brought forth to demonstrate its importance and significance.<sup>86</sup> Once all is said, it is resaid in brief, and impressed upon the hearers' minds and their hearts. The hearers have been instructed and delighted. It remains for them to be moved. The essence of moral philosophy is prudence.

Ancient ethics centered on the question of what is the best life—pleasure, honor, or contemplation. Aristotle mentions a fourth, the pursuit of business, but this merges with pleasure and honor. The Aristotelian mean (*meson*) is a method for the cultivation of virtues. It is a way for the individual to learn how to act in accordance with virtue by attempting to avoid extremes. Thus to pursue generosity in a given area, such as the use of money, the actor attempts to avoid the extremes of being either a spendthrift or a miser. In making his choice he must choose, choose knowingly, and choose from a consistent character—he must be himself when attempting to be virtuous. Attempting to realize the virtues as guides to his actions in all areas of human affairs, the actor may with practice achieve *eudaimonia*—the happiness of acting in accord with excellence in all he does. I select this Aristotelian model because it is in accord with Vico's insistence

84. G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT 11 (A.V. Miller trans., Oxford Univ. Press 1977).

85. DONALD PHILLIP VERENE, THE ART OF HUMANE EDUCATION 1–14 (2002).

86. See Donald Phillip Verene, *Philosophy, Argument, and Narration*, 22 PHIL. & RHETORIC 141, 141–44 (1989).

that ethics be social. Vico eschews both Stoicism and Epicureanism as ethics of solitaries.

Modern ethics—Kantian deontological ethics or utilitarian ethics—are criterion-oriented. They embody the view that ethics is decision-making and decisions require a criterion to guide them. This criterion must be rational and unvarying. It is a principle of certainty that can be applied to situations that are contingent, thus directing us out of the contingency to a correct determination of what we are to do. As John Dewey points out, there is customary morality and reflective morality.<sup>87</sup> Customary morality is generally unproblematic: a situation presents itself and we follow custom in acting on or in it. Reflective morality occurs when custom offers no clear course in a situation that is problematic in that it contains a conflict of two or more courses of action, each of which has moral attractions or merits. The reflective nature of the problematic situation leads us to seek a criterion by which a decision can be made. We can resort to some version of the categorical imperative of Kantian ethics or we can resort to seeking the greatest good for the greatest number, as advocated by Utilitarianism.

Neither of these as such offers us a means to resolve the pros and cons of a particular ethical issue. More is needed. The door is open to applied ethics, and it crosses the threshold to enter every aspect of life and society. In fact-finding coupled with elaborate argumentations, distinctions, and projections, the applied ethicist bears down in problematic situations, advancing toward possible decisions. When we examine these we are left with an unease. It is the same unease that technological man has about the world—that something is left out. What is left out is self-knowledge. There is no technique for the ancient ideal of self-knowledge, which is the key to wisdom. The *cogito* knows only that it is. It does not know and has no principle of access to what it is or what it means to be what it is.

The applied ethicist is Epimethean, “heedless.”<sup>88</sup> The approach of the applied ethicist to the human condition through facts and argumentation leaves out all of human tradition and, most importantly, how human tradition has formed itself as a wisdom in the law.

The name of Prometheus is prudence, foresight. Aristotle’s method of the mean is a method of prudence. By acting in a manner guided by a virtue, something is learned about bringing a specific virtue into practice. To act subsequently on it is to become progressively attuned to the virtue. No criterion is applied. The pursuit of a criterion is a false science of ethics. It

87. JOHN DEWEY, *THEORY OF THE MORAL LIFE* 3–28 (Irvington Publishers, Inc. 1980) (1908).

88. On Prometheus and Epimetheus, see PLATO, *Protagoras*, in LACHES, PROTAGORAS, MENO, EUTHYDEMUS 85, 129–33 (W.R.M. Lamb trans., Harvard Univ. Press 1924).

is modeled on the idea of applied science. It is no accident that Immanuel Kant condemns both prudence in ethics and rhetoric in theory of knowledge.<sup>89</sup> Descartes and Locke, the founders of modern epistemology, also condemn rhetoric. Descartes does so in the *Discourse*, as we have seen; John Locke, in the *Essay*, calls rhetorical speeches “perfect cheats.”<sup>90</sup> A true science of ethics, I believe, can be formed on the basis of the science of law or jurisprudence. My claim is simple and it is difficult to think that it has not been claimed before, but so far as I know it is new.

This view agrees with the Roman view that the law can be regarded as philosophy in the sense of civil wisdom—a knowledge of things human and divine. The study of the law is the basis of the wisdom needed to be applied in any particular case that calls for moral choice and action. Thus the law stands in the place of the criterion sought in Kantian or Utilitarian ethics as the basis of applied ethics. What is required to act in a moral situation is foresight into it: how it has arisen, how it has developed, and what course it is most likely to take. For this the above-mentioned “good eye” is needed. All true ethics is “applied” ethics, but not in the sense of universal principles that are rationally applied to particular cases to resolve or seem to resolve what is problematic in them. I hold with MacIntyre that all ethical judgments develop within traditions, and when they become known, principles of conduct within them are applied back to the moral situations that are bounded within that tradition. This dialectical moment is exactly how Aristotle’s mean functions. It requires tradition to be effective.

The view that any ethics requires a tradition has been criticized on the grounds of relativism—is one tradition simply as good as another? The answer to this criticism lies in the principle of *ius gentium*. Any doctrine of prudence that looks to the law as a basis for ethical judgment cannot consider only the *ius civile* of a given tradition for its precedents. It must look within a given tradition for that part of its *ius civile* that is universal, that connects to the principle of *ius gentium*.

Ethical principles arise out of human practice, not out of abstract formulation of universal rules that are held to apply to all human conditions at all times. These principles are themselves practice, but they are not simply customary morality, as they have an element of reflection in them. They are

89. Immanuel Kant dismisses prudence (*Klugheit*) as a proper understanding of moral action. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 33 n.5 (Lewis White Beck trans., Bobbs-Merrill Co., Inc. 1959) (1785). In the *Critique of Judgment*, Kant dismisses *ars oratoria*, claiming it “*ist gar keiner Actung würdig*”—“unworthy of any respect whatsoever.” IMMANUEL KANT, CRITIQUE OF JUDGMENT 198 n.63 (Werner S. Pluhar trans., Hackett Publishing Co. 1987) (1790).

90. 2 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 146 (Alexander Campbell Fraser ed., Oxford Clarendon Press 1894) (1689).

recognized as principles of that tradition and are guides to the sense of the Good that is within it. This process of the interaction of situation and principle is jurisprudential in its form, as it has behind it the sense of precedent cases. It is further jurisprudential as it actually looks to the law as a system of wisdom to guide and form ethical or moral conscience.

The prudence needed to guide choice is to be found in jurisprudence—in what can be learned from the law; what principles of the human world can be brought to bear; and further, what precedents may be appealed to. All has happened in human affairs, and no particular situation that arises is without analog with the past. New precedents arise, but they arise always in relation to what has gone before. All that has happened has made its way into the law and resides there, to be drawn forth. On this view, then, jurisprudence and the law become the basis of ethics, just as ethics in the form of custom was originally the basis of the law itself in any society. All laws, however, in order truly to be laws must be embodiments of Law, that is, they must be in accord with the authority of human reason. In contrast to the vacuity of criterion-based ethics, ethics based on jurisprudence supplies any situation requiring a moral decision with a content. What has gone before in human affairs that applies to a particular situation is the beginning point for a moral decision. The decision will be based on reasoning by analogy from past resolutions of similar situations.

Ethics is not a realm separate from the law in which various rights are pursued or weighed in given circumstances. Attention to jurisprudence as an active guide to human prudence puts aside any need for rights-theory. Ethics becomes a part of jurisprudence, not something separate from it requiring different principles. Although no commentator has brought this out, I believe the foregoing is the view implicit in Vico's approach to jurisprudence in the *Study Methods* and it is his explicit intent in his *Universal Law*. Prudence is at once a virtue and a practical wisdom.

In his *Synopsis of Universal Law*, the condensed statement of his doctrine of jurisprudence, Vico says:

He makes of virtue three parts—prudence, temperance, and fortitude—that regulate the three parts of man: prudence, intelligence; temperance, caprice; fortitude, force; and that human reason embraced by the will is virtue insofar as it combats cupidity, and this same virtue is justice insofar as it gauges utilities. And thus from the three parts of virtue he brings forth three rights or reasons: dominion, liberty, and tutelage [i.e., guardianship, security]. From prudence, or just choice of utilities, comes dominion; from temperance or moderation of the self's will and things pertaining to it, comes liberty; from fortitude, or moderated force, comes

tutelage, and these three parts of justice are the three sources of all commonwealths and all laws.<sup>91</sup>

Prudence is what regulates temperance and fortitude that are all required in any act of moral choice. On these the law is based and it is from their presence in the law that we may learn how they are to function in particular human affairs. This view of the law as the basis of morals takes the law beyond its confinement in police departments, the courts, and the law offices and restores it as the wisdom necessary to human actions in society. It makes the study of the law and jurisprudence, just as Vico conceives it, one of the humanities, something that needs to be learned by everyone, not as an abstract subject-matter but as part of the circle of studies that is the ground of self-knowledge.

If it is true, as Cicero claims, and Vico quotes, that children on the streets of Rome sang the Law of the Twelve Tables as a song,<sup>92</sup> the view I have proposed would restore this sense of the law as the prime formulation of human behavior in the *civitas*. In saying this I intend no encomium of the law but only to give it its due, its own justice.

91. Giambattista Vico, *Synopsis of Universal Law*, in 21 NEW VICO STUDIES 1, 4 (Donald Phillip Verene trans., 2003).

92. CICERO, *De Legibus*, in DE REPUBLICA, DE LEGIBUS 12, 445 (Clinton Walker Keyes trans., Harvard Univ. Press 1928); NEW SCIENCE, *supra* note 32, ¶ 469. On Vico's *Universal Law* and rights theory see DONALD PHILLIP VERENE, KNOWLEDGE OF THINGS HUMAN AND DIVINE 119–42 (2003); on memory and ethics see DONALD PHILLIP VERENE, PHILOSOPHY AND THE RETURN TO SELF-KNOWLEDGE 192–242 (1997).