READING VICO FOR THE SCHOOL OF LAW

WILLEM J. WITTEVEEN*

INTRODUCTION

In today's world there are many law schools and there are many differences between them, but they all aim to prepare students for a career in law. The law student is supposed to become a legal specialist, somewhat in the way students of business or of medicine are supposed to become specialists in their chosen fields. The successful student of the law school learns to talk law, to read law, to think law; in short, to take part in the legal view of the world. The practices and organizations the students will later work in can be varied—we find lawyers on the boards of corporations, as managers of sports teams, and as writers of detective novels—but this does not detract from their image as specialists. Indeed, all legally trained persons are supposed to take the supreme court judge with her arcane knowledge of methods of interpretation as their role model, thus decisively removing the lawyer from the domain of ordinary mortals. Seen from outside of the academy, from a distance, people trained in law are perceived as inhabitants of a world of law, where people think, speak, and act differently from the rest of us, even when they deal with the conflicts and dilemmas that beset everyone. There is something called a legal rationality that is not easily accessible to outsiders, be they specialists in other fields or ordinary citizens. Law is so effectively banished from general education that even most American liberal arts colleges—catering to the whole spectrum of sciences and disciplines—tend to omit law subjects from their curriculum.

One consequence of this state of affairs is that there are no true schools of law, introducing aspiring citizens to the practical arts of jurisprudence. What Giambattista Vico laments, in his famous oration *On the Study Methods of Our Time*, is precisely this loss of a generalist and an idealized conception of legal education, one deriving from civic humanism and ultimately from the Greeks and Romans, and one that treats jurispru-

* Willem J. Witteveen (Rotterdam, 1952) is a Professor of Jurisprudence and Rhetoric at the law school of Tilburg University, the Netherlands, where he is also Dean of the liberal arts program. Between 1999 and 2007 he was a member of the Senate of the Netherlands. He has published extensively in the fields of rhetorical theory, constitutional law, law and literature, and political theory.

dence as an art rather than a body of knowledge and law as a special kind of practical wisdom rather than as a collection of rules and principles. The educated citizen, as Vico conceives of him, is well schooled in law and in rhetoric; he is an orator and a statesman. This ideal contrasts markedly with modern conceptions of the lawyer as primarily a rule-technician and a judge. It is this contrast that makes reading Vico such a worthwhile undertaking, as reading him we come to contemplate our own loss even as we acknowledge the great advances that have been made in legal science and jurisprudence since the eighteenth century. What do we fail to see and what do we fail to develop as we educate young people to model themselves on the ideal judge rather than on the ideal orator or statesman? Can we perhaps even learn something from Vico, this obscure Neapolitan lawyer and rhetorician who operated in the outer margins of the intellectual revolution of the Enlightenment?

I. FIRST IMPRESSIONS

Imagine an innocent reader in our own days, a law professor perhaps, picking up Vico's *On the Study Methods of Our Time*, handsomely published as a paperback, and leafing through the text to see where Vico stands on legal education. Very likely, the text gives an antiquated impression. Vico is clearly not an inhabitant of our modern world, as she sees him arguing vehemently against the methodology of Descartes and conceiving of jurisprudence the way Roman law scholars did, as a running commentary upon the Institutes and the Digest of Justinian. But Vico's passionate plea for a liberal arts education sounds vaguely familiar, as our imaginary reader stumbles upon this passage: "[Y]oung men should be taught the totality of sciences and arts, and their intellectual powers should be developed to the full; thus they will become familiar with the art of argument, drawn from the *ars topica*."[1] The *ars topica*, our reader would remember, is an important part of classical rhetoric, especially as conceived by Cicero and Quintilian, who developed lists of questions that could help a speechmaker discover the materials needed for a persuasive argument. It is not strange to think that a training in law should use something resembling such an *ars topica*, and Vico apparently believes that it requires knowledge of "the totality" of the arts and sciences. But isn't that asking a bit much? In the following passage, Vico clarifies his meaning, however, as he elaborates on what young persons should learn.

1. GIAMBATTISTA VICO, ON THE STUDY METHODS OF OUR TIME 19 (Elio Gianturco trans., Cornell Univ. Press 1990) (1709) [hereinafter STUDY METHODS].

> At the very outset, their common sense should be strengthened so that they can grow in prudence and eloquence. Let their imagination and memory be fortified so that they may be effective in those arts in which fantasy and the mnemonic faculty are predominant. At a later stage let them learn criticism, so that they can apply the fullness of their personal judgment to what they have been taught. And let them develop skill in debating on either side of any proposed argument.
>
> [This will make them] exact in science, clever in practical matters, fluent in eloquence, imaginative in understanding poetry or painting, and strong in memorizing what they have learned in their legal studies.[2]

There is a curriculum implied in this passage, our imaginary reader concludes. A strange one too, favoring the arts of the imagination and of memory over abstract reasoning, and moreover connecting criticism with the personal practice of rhetorical exercises. As our reader reads on, she is intrigued by a wonderful metaphor expressing a sense of loss; apparently, the unity of all the arts and sciences Vico thinks so important is situated in a golden age yet far before the eighteenth century.

> In the past, all arts and disciplines were interconnected and rested in the lap of philosophy; subsequently, they were sundered apart. Those responsible for this separation can be compared to a tyrannical ruler who, having seized mastery of a great, populous, and opulent city, should, in order to secure his own safety, destroy the city and scatter its inhabitants into a number of widely strewn villages. As a consequence, it is impossible for the townsmen to feel inspired, through the bold pride awakened by the sight of the splendor and wealth of their city and by the awareness of their number, to band together and conspire against him, lending one another help in their fight against the common oppressor.[3]

Pondering this metaphor of the university as a conquered city, our reader pictures herself as one of the townsfolk working there as teachers, but confined within the borders of a specialized subdiscipline and unable to see all the connections that there should be with other disciplines having relevance for the world of law. Vico's metaphor is only too apt, she acknowledges, stressing the difficulty for any individual of breaking through organizational formats and curricular decisions that severely limit the subjects of law to be taught and investigated. But would a turn to "all the arts and sciences" really be an answer, could it even be feasible?

Reading on, our imaginary reader, no longer so innocent now, sees Vico stating, once again, that "[a]rts and sciences, all of which in the past were embraced by philosophy and animated by it with a unitary spirit, are, in our day, unnaturally separated and disjointed,"[4] after which, instead of

2. *Id.*
3. *Id.* at 47.
4. *Id.* at 76.

unfolding his own curriculum, he attacks his enemies: the Aristotelians in discourse, Epicurean physicists, Cartesian metaphysics, Galen as a master of medicine, various warring schools teaching law from Justinian's Institutes in unsystematic ways. When Vico concludes that "our professors should so co-ordinate all disciplines into a single system so as to harmonize them with our religion and with the spirit of the political form under which we live,"[5] our reader feels she has lost Vico. Should religion and politics dictate what sciences are to be taught? How can this be a proposal for a valuable legal education? She is about to close the book and look elsewhere for enlightenment.

II. READING *STUDY METHODS* FOR OUR TIME

The simple thought experiment of an innocent reader confronting Vico has brought out an aspect of his work that is of some importance: it is impossible to draw lessons from the letter of the work; we should rather look for its spirit, manifesting itself at the level of metaphor. Or: a literal reading of a classical text such as this one is bound to be disappointing—we had better try to react more imaginatively to the text. And then, this will be in the spirit of the original, as Vico's *New Science* is rightly characterized as a work directed at stimulating the imagination of its readers.[6] Literalism in interpreting a classic text is often the best way of misrepresenting the views of its author. For an instructive analogy, think of Montesquieu, whose great book *The Spirit of the Laws* (1748), appearing at approximately the same date as the final version of Vico's *New Science* (1744), was misunderstood through selective quotation. Montesquieu is even now often falsely represented as the champion of a strict functional separation of powers (Kant would be a better choice of protagonist for this claim). Did not Montesquieu write that judges ought to refrain from mere interpretation of the laws, as they are "the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor"?[7] Read in context, Montesquieu's typification refers to the role of the jury in English law that indeed does not alter or interpret rules, but only deliberates about the facts. If taken in a more widely symbolical sense, the passage opens up the intriguing prospect of a metaphorical meaning, portraying the judge as the decisive "speaker" in the process of interpretation of the laws and op-

5. *Id.* at 77.

6. DONALD PHILLIP VERENE, VICO'S SCIENCE OF IMAGINATION (1981).

7. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 163 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., Cambridge Univ. Press 1989) [hereinafter MONTESQUIEU].

posing him to the King claiming sovereign power over lawmaking; both cannot simultaneously be the mouth of the law, so that Montesquieu seems to favor the judge over the King in their contest for interpretive supremacy.[8]

Like Vico, Montesquieu is fascinated by Roman history. His classic text is littered with references to episodes from the history of the Roman republic and manifests a thorough knowledge of Roman law. Our hypothetical reader, now trying Montesquieu for his views on legal education, would find him distinctly modern in comparison to Vico. Montesquieu is one of the founding fathers of the sociology of law. He recommends the study of all kinds of social facts that influence the function of law in various regimes. Like Vico, Montesquieu believes it is necessary to study many arts and sciences in order to be a prudent legislator and statesman. This is apparent from the famous passage in which he unfolds the goal of his researches:

> Law in general is human reason insofar as it governs all the peoples of the earth; and the political and civil laws of each nation should be only the particular cases to which human reason is applied.
>
> Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.
>
> Laws must relate to the nature and the principle of the government that is established or that one wants to establish, whether those laws form it as do political laws, or maintain it, as do civil laws.
>
> They should be related to the physical aspect of the country; to the climate, be it freezing, torrid, or temperate; to the properties of the terrain, its location and extent; to the way of life of the peoples, be they plowmen, hunters, or herdsmen; they should relate to the degree of liberty that the constitution can sustain, to the religion of the inhabitants, their inclinations, their wealth, their number, their commerce, their mores and their manners; finally, the laws are related to one another, to their origin, to the purpose of the legislator, and to the order of things on which they are established. They must be considered from all these points of view.
>
> This is what I undertake to do in this work. I shall examine all these relations; together they form what is called THE SPIRIT OF THE LAWS.[9]

8. This interpretation goes back to the struggle over interpretive supremacy between King James I and Judge Coke; it is supported by a reading of the metaphors found in debates over the lawmaking power in sixteenth and seventeenth century England, which is the culture referred to by Montesquieu in his analysis of the judicial function. *See also* KAREL MENZO SCHÖNFELD, MONTESQUIEU EN "LA BOUCHE DE LA LOI" (1979). On the medieval roots of the metaphorical expressions comparing Law and King in the language of the body, see ERNST H. KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY 87–192 (1957).

9. MONTESQUIEU, *supra* note 7, at 8–9.

Our reader concludes that a legislator who wants to perform well and aims to enact laws that are "appropriate to the people" must be well versed in philosophy and the social sciences. How must this knowledge be acquired? Nowhere in his vast masterpiece does Montesquieu discuss a curriculum for the enlightenment of the prudent kind of legislator he envisions—there are no clues as to what is needed for a school of law that will bring forth statesmen able to capture in words the spirit of the laws of their own society. Clearly, Montesquieu sees his ideal legislator as a wise and prudent individual who values knowledge and experience, and he does not treat of this individual as a participant in complex legal processes or in power struggles or interest politics. As with Vico, a literal application of the central idea of the spirit of the laws to our modern universities is impossible; a more imaginative approach is called for.

Returning to Vico after this excursus on Montesquieu, it becomes clear there are two pitfalls to be avoided in reading classical texts seemingly touching today's issues. The one is selective quotation, borrowing ideas as authoritative arguments for discussions that should be decided on other grounds. The other is burying ideas in history, explaining everything of enduring interest in a text as part of the outmoded vocabulary and the discursive politics of its time. The passages we quoted from Vico (and from Montesquieu) stimulate thought in their readers: they work on the imagination even when the readers studying them have immersed themselves in the history of ideas. And the seminal texts are perhaps even more suggestive when their modern readers have not entered the debates in the secondary literature. In order to avoid both pitfalls—selective quotation and burying of the ideas in history—the following steps can be taken: first, situate the author and the work in their historical conditions; second, engage in an act of translation, reading the text for a given theme or question and reimagining its response to current concerns; and third, read the text for its stimulating questions and organizing perspectives, rather than for its supposed solutions of contemporary problems.

If these three steps are taken, we treat Vico in the way a classical author is to be treated: we read him with an attitude akin to that of the serious student of Plato or Dante. With Italo Calvino in his famous essay on the classics we can then say that "[a] classic is a book which with each rereading offers as much of a sense of discovery as the first reading."[10] And even more to the point is Calvino's comment about moving back in time and forward into the present:

10. ITALO CALVINO, WHY READ THE CLASSICS? 5 (Martin McLaughlin trans., 1999).

> In order to read the classics, you have to establish where exactly you are reading them 'from', otherwise both the reader and the text tend to drift in a timeless haze. So what we can say is that the person who derives maximum benefit from a reading of the classics is the one who skilfully alternates classic readings with calibrated doses of contemporary material.[11]

III. HISTORICALLY SITUATING VICO: A REVOLUTIONARY TRADITIONALIST

Since Vico was re-discovered in the 1960s, a lot of work has been done to situate his work, and especially the *New Science*, in the historical circumstances in which it was written. There is not one clear picture emerging from these studies, however. There are many faces of the historically-situated Vico. He is seen as precursor of Karl Marx in laying bare the material conditions for societal change.[12] Alternatively, there is a pre-romantic Vico who, like Herder, defends a pluralism of values against monist conceptions of the good life.[13] In an influential and appealing revision, Vico is portrayed as the original inventor of a science of visual imagination and memory.[14] Vico is situated squarely in the rhetorical tradition, connecting Ciceronian *topica* with renaissance ideals of ornate style.[15] The theological background of Vico's anti-Cartesian project is highlighted, as well as his roots in Roman jurisprudence.[16] There are studies on Vico as a civic humanist, following in the footsteps of renaissance thinkers,[17] studies which highlight his indebtedness to Aristotle on the rhetoric of maxims and axioms,[18] and studies showing the background and further development of the idea of *sensus communis* grounding knowledge in social custom.[19] While many of these historical interpretations and evaluations hold that there is continuing relevance in Vico's ideas for the time in which we now live, the focus is always on an effort to recover the meaning of Vico's work in the history of ideas.

11. *Id.* at 8.
12. VICO AND MARX: AFFINITIES AND CONTRASTS (Giorgio Tagliacozzo ed., 1983).
13. ISAIAH BERLIN, VICO AND HERDER: TWO STUDIES IN THE HISTORY OF IDEAS (1976).
14. VERENE, *supra* note 6, at 20, 33–35.
15. MICHAEL MOONEY, VICO IN THE TRADITION OF RHETORIC (1985).
16. MARK LILLA, G.B. VICO: THE MAKING OF AN ANTI-MODERN (1993).
17. ERNESTO GRASSI, RHETORIC AS PHILOSOPHY: THE HUMANIST TRADITION (1980).
18. JAMES ROBERT GOETSCH, JR., VICO'S AXIOMS: THE GEOMETRY OF THE HUMAN WORLD (1995).
19. JOHN D. SCHAEFFER, *SENSUS COMMUNIS*: VICO, RHETORIC, AND THE LIMITS OF RELATIVISM (1990).

For a reader such as myself, innocent of the specialized knowledge needed to situate Vico historically, it is impossible to choose between these competing visions and interpretations. But some commentaries help deepen impressions gained from studying the primary texts. Donald Verene is surely right in stressing the originality of Vico, the way Vico creates a novel and very daring theoretical account of the recurrence in history of the three phases every civilization passes through in a process of eternal return. Also, I agree with Verene that Vico uses all the resources of the rhetorical tradition in order to work visually on the perception of the reader—his is a science of the imagination. Isaiah Berlin has convincingly shown how Vico (as Herder did in a different way) brings out the historical variations in human cultures, and in this way explodes not only Cartesian rationality, but also natural law monism that strives for one coherent, invariant, perpetually valid account of the good life. I have reservations, however, about Berlin's thesis that Vico belongs in the camp of the value pluralists, and find Lilla's critique on this point, showing the indebtedness and the faithfulness to theological doctrines about divine providence, a convincing counterargument.[20] The rhetoricians are on the right track in connecting the thinking that leads from the early orations to the *New Science* with the gradual development of Vico's *Art of Rhetoric*, as Perelman had perceived before them.[21] But these are just my interpretations of the interpretations produced by others, better qualified than myself, for situating Vico historically.

What I do offer as a gloss on these learned comments is the idea that Vico shows how an immersion in the materials kept alive by intellectual and cultural traditions can lead to revolutionary change in these traditions, as if it were from within.[22] The grand narrative of the *New Science* is a new, glorious, and tragic story about the history of man through the ages, a story bringing together gods, heroes, and men under the guidance of divine providence. It is told through etymological reconstruction of the terms that shape the poetic imagination and it contains the novel idea that the metaphors inherited from ancient times are in reality literal expressions of a people that had no other words to understand and name what happened to them. But in this grand narrative, we find recirculated fragments of Roman jurisprudence, dogmas of the Church, and elements of the art of rhetoric

20. LILLA, *supra* note 16, at 3–13.

21. CH. PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION (John Wilkinson & Purcell Weaver trans., paperback ed. 1971) (1958). Perelman is indebted to Vico especially in this treatment of the topics.

22. In making this suggestion, I am again standing on the shoulders of others, notably ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 206–07 (1981); Martin Krygier, *Law as Tradition*, 5 L. & PHIL. 237 (1986).

since Aristotle and Cicero. The traditions embodying these fragments and elements themselves look different after the upheaval that befell them, after the conceptual revolution that turns the story of life into an eternal revolution of fate. As this is of relevance to our theme of legal education, I will elaborate this comment for what in Vico's perspective are the twin sciences and arts of rhetoric and jurisprudence.

IV. THEMATICALLY RE-IMAGINING VICO: THE ORATOR AS A STATESMAN

In chapter XI of *Study Methods*, Vico contrasts ancient and modern ways of studying and practicing law. Both ways are, in retrospect, equally old fashioned: the main diet consists of the venerated texts from the Justinian Digest and a study of various schools of glossators and commentators. Aspiring jurists must of course also study and practice eloquence, which they can test in discussions of the legal cases of the *Corpus Juris*, constituting "a treatise on the forms of judicial argument (*ars topica judicialis*)."[23] Above all they must be well versed in history, especially regarding "the origin, the consolidation, the growth, the culmination, and the dissolution of a great polity like the Roman Empire."[24] As Vico explains these notions it becomes quite clear that for him there is indeed an ideal version of the jurist: the orator-statesman. This person, clearly modeled after Cicero, is a philosopher who is also a jurist, a person able to argue cases in light of the common good and to perform as a judge deciding disputes; he is always an eloquent person whose pronouncements carry weight in the community. The orator-statesman can perform various social functions, he can be an advocate and a judge, but is above all a rounded rhetorician who is able to advise the King (in a monarchy, such as Naples) and to propose legislation.

The internal connection between philosophy and law is discussed most clearly in Vico's account of the early Roman period. While the Greeks, according to Vico, did not develop a specialized legal profession but fused the philosophers' knowledge of theory, the pragmatics' conversancy with positive legislation, and the orators' forensic ability; the Romans still improved on this scheme.

> At Rome, the philosophers themselves were jurists since, in the Romans' view, the whole range and compass of knowledge was involved in legal expertise. The Roman jurists thus became the chief instruments for the preservation of the unadulterated "*sapientia*" of the "heroic epoch," . . . .

23. STUDY METHODS, *supra* note 1, at 48.
24. *Id.* at 66.

> Notice that the same definition served the Romans for jurisprudence and the Greeks for wisdom: "the knowledge of things divine and human." And since, in Rome, *sapientia* corresponded perfectly to justice and statesmanship, the Romans were in a better position than the Greeks to master the art of government and of justice, not by talking about it, but by direct experience in public affairs.[25]

There is also an internal connection between rhetoric and law. The same persons, in Vico's historical account of Roman history, can be both orators (arguing a case in court) and rhetoricians (reflecting on the art of persuasion) as well as judges and legislators. The configurations differ over time, so that sometimes there is a functional division between the offices of the orator and the judge or the legislator and sometimes these offices coincide. In fact, the modern period Vico speaks of (his own legal system at Naples) brought the various functions into an intricate interaction. Since equity complemented a system of formal laws, there was a need for all functions to perform their part in the creation, elaboration, interpretation and application of rules.

> In the past, *jurisprudentia* was properly the science of formal justice; today it is, instead, the art of the equitable. . . . Once it was the glory of jurisprudence to apply fictions in order to square acts of equity with the law; today it is that, through liberal interpretations, just laws measure up to the facts. It was formerly traditional, among the jurists, not to depart from the strict letter of the law; today it is to the spirit of the law that they constantly resort. In legal questions, jurists formerly clung to the literal wording, orators emphasized the spirit and the intent of the law; in our day, the jurist takes over the function of the orator. Since laws are few and well-defined, while facts are infinite, and law refers to statutes while facts concern equity, law books, which in the past were exceedingly few, today have become numerous beyond counting.[26]

In these passages, which I am tempted to call golden passages (as Vico himself used to do in quotation of the ancients), Vico articulates an idealized notion of the jurist as orator-statesman. Did he also believe that in all circumstances, in each phase of history, there would be a need for these orators and statesmen to guide the people and so to ensure the best chances of survival and flourishing? In any case, *Study Methods* makes clear that he believed that the Ciceronian ideal would have a new and heightened relevance in the conditions of a modern monarchy at Naples. Here he advises the modern monarch, who wishes his realm to prosper, to have Roman laws interpreted according to the method of equity and to have judges see to it that the advocates will argue their cases in the public rather than the private

25. *Id.* at 49. This passage also contains a quotation from Horace's *Ars Poetica*, which I have here omitted.

26. *Id.* at 58–59.

interest. But while Vico sees perspective for the aspects of statesmanship relating to pleading and judging, he believes that the art of legislation has faltered:

> [O]ur lawyers are deficient in the knowledge of how to set in order and maintain a commonwealth through laws; this knowledge, as the source of all jurisprudence, should be taught first, but is not taught as the philosophers used to teach it, and as the Romans mastered it, by practical experience in the discharge of governmental duties.[27]

V. THE ORATOR-STATESMAN AS A LEGISLATOR

Completing our reading of chapter XI of *Study Methods* with the observation Vico makes at the end that his aim throughout has been to further "the possible systematization of law into an *art*,"[28] we can conclude that for Vico there is indeed a very intimate connection between rhetoric and jurisprudence, as both these arts or sciences contribute to the social and educational ideal of the orator-statesman which is necessary for a well-ordered society to flourish. It is also manifest that Vico in these considerations is both a traditionalist, who tries to revive old ideals of practical wisdom—especially Ciceronian eloquence—and a radical thinker, going to the roots of things, from whom we can perhaps expect novel uses of the traditional notions. His theory of legislation, for instance, is both oriented on the past, extolling as it does the virtue of elementary laws such as the Laws of the Twelve Tables over the more particularistic regulations of modern regimes, and it is also critical of the abilities of jurists working in the modern conditions of monarchy to pronounce authoritatively on legislative matters. Reasoning not unlike Montesquieu (while not in contact with him), Vico writes: "Whenever new laws are framed, it is imperative that they should be consonant with the institutions of the state to which they are destined; and they should be interpreted and applied with a constant view to the nature of those institutions."[29] But how will jurists be able to do this difficult work of institutional design? Vico refers to reason of state, a concept known to us in the realist approach to political life developed since Machiavelli started to advise the prince on how to control a city, and to equity, the rule of a judicial notion of reasonableness, as guiding concepts. He fails to make clear, however, what is so distinctive about these concepts under conditions of monarchy. In republican or democratic regimes, reason of state and equity could be just as useful (or even more so). Yet, the reader

27. *Id.* at 60.
28. *Id.* at 70.
29. *Id.* at 65.

senses possibilities here. Will the *New Science* unleash the revolutionary potential of Vico's return to the classics? It is interesting to follow him further on the topic of the art of legislation in his mature work.

What, after all, is a law? According to the classical doctrines of rhetoric and jurisprudence alike, laws distinguish themselves from other authoritative pronouncements (such as commands) in being general in application. The law is not a forceful speech or a maxim or an example nor even a verdict; it is a promulgated rule applicable to all concerned. Vico refers to this idea in *New Science* paragraph 501, in which he says that the essential property of law is that it must be universal, referring to the maxim of jurisprudence "that we must judge by the laws, not by examples (*Legibus, non exemplis, est iudicandum*)." But this is the conclusion of a reasoning that stands the classical doctrine on its head. Vico has, before this passage, already explained his three stages of eternal history. In the first stage of this cyclical interpretation of human history, the first legislators were unable to establish universal laws. They could only name particular constellations of (natural) forces that came before their own eyes—they had not yet learned to gain abstract thinking from their concrete poetic imaginings. And so Vico holds, against the common wisdom of the historians, that Minos, the first lawgiver of the gentile nations, Theseus at Athens, Lycurgus at Sparta, and Romulus at Rome each conceived their laws to command or forbid in a single case only; these laws were given universal application only much later. In retrospect, they have become universalized but this is a falsification of the historical process. "[F]irst came real examples and later the reasoned ones of logic and rhetoric,"[30] and still later appeared the intelligible universals and the universally-conceived laws.

So Vico struggles against those philosophers who are not imaginative enough to go back to the origins of human societies, to the world in its oral and oracular stage, to periods before written sources, to what lies hidden in time, to what can be surmised through etymological reconstructions. Axioms LXIV and LXV capture the whole sequence in simple lines: "The order of ideas must follow the order of institutions." And: "This was the order of human institutions: first the forests, after that the huts, then the villages, next the cities, and finally the academies."[31] These two axioms are the anchor for etymological observations imaginatively recovering our word "law" (*lex*) from the mists of prehistory: Vico notes that like almost all Latin words, *lex* has rustic origins.

30. GIAMBATTISTA VICO, THE NEW SCIENCE OF GIAMBATTISTA VICO ¶ 501 (Thomas Goddard Bergin & Max Harold Fisch trans., Cornell Univ. Press, paperback unabr. ed. 1984) (1744).

31. *Id.* ¶¶ 238–39.

> First it must have meant a collection of acorns. Thence we believe is derived *ilex*, as it were *illex*, the oak (as certainly *aquilex* means collector of waters); for the oak produces the acorns by which the swine are drawn together. *Lex* was next a collection of vegetables, from which the latter were called *legumina*. Later on, at a time when vulgar letters had not yet been invented for writing down the laws, *lex* by a necessity of civil nature must have meant a collection of citizens, or the public parliament; so that the presence of the people was the *lex*, or "law," that solemnized the wills that were made *calatis comitiis*, in the presence of the assembled *comitia*. Finally, collecting letters, and making, as it were, a sheaf of them for each word, was called *legere*, reading.[32]

The historical process, as Vico conceives of it, develops in an almost dialectical manner from one regime into the next one (which is where Marx was fascinated by Vico). After stating in Axiom LXIX that "[g]overnments must conform to the nature of the men governed," it is possible to give this concise analysis of the different motives that animate legislative acts. "The weak want laws; the powerful withhold them; the ambitious, to win a following, advocate them; princes, to equalize the strong with the weak, protect them."[33] There are all kinds of circumstances in which this field of forces is present and all kinds of scenarios are played out between the actors. But Vico can connect these historical stories, which he derives from his reading of Roman history, with the actual situation in monarchy, where indeed princes have come to the fore who uphold the laws in order to balance various social powers. In this way, Vico avoids an overly historical orientation, and manages to suggest to his readers that they themselves, in their own time and place and regime, are part of the eternally-recurring cycle of civilizations.

In what way is this a novel use of traditional materials? We need only compare Vico to Aristotle and Polybius, who also saw cycles of regimes in history, to note the difference: Vico sees not a cycle of regimes that follow each other in a logical order; instead, he sees a progression from simple to balanced to complex, ultimately followed by degeneration, and in this development he discerns divine guidance. His "proof" for this thesis is brief and beautiful:

> Legislation considers man as he is in order to turn him to good uses in human society. Out of ferocity, avarice, and ambition, the three vices which run throughout the human race, it creates the military, merchant, and governing classes, and thus the strength, riches, and wisdom of commonwealths. Out of these three great vices, which could certainly destroy all mankind on the face of the earth, it makes civil happiness.

32. *Id.* ¶ 240.
33. *Id.* ¶ 283.

> This axiom proves that there is divine providence and further that it is a divine legislative mind. For out of the passions of men each bent on his private advantage, for the sake of which they would live like wild beasts in the wilderness, it has made the civil institutions by which they may live in human society.[34]

VI. DIVINE PROVIDENCE

We have here reached a crucial point in the argument: the dependence of human wisdom on divine providence. Vico termed this in his late writings a "rational civil theology of divine providence."[35] The art of legislation, which can have such useful social results (civil happiness is the goal), is always subservient to the designs of providence. What can it mean for a human legislator to accept this doctrine, that is, to imagine the work of the legislator under the aegis of an unknown and unknowable divine guidance or intervention? Such a reflective legislator, orienting himself on a rational civil theology (the terminology implies a double orientation, on the divine and on the civil) will not easily conclude that the art of legislation itself is superfluous. On the contrary, it is likely that such a legislator will try to attune his interventions to what he imagines to be divine intentions, as it is only through the efforts at the creation of peace and happiness in the human community that divine providence can work. But the reflective legislator can never be certain that the work of lawmaking succeeds in aiding this higher purpose. I am tempted to think here again of the Vichian principle of *verum certum*: only what man makes himself can he know fully. The human laws, as artifacts made by men, can be known fully, but the trust men can have in their beneficial effects on civil happiness and the general good depend on the workings of a sphere man does not and cannot know: providence. While wise men make laws, the divine will steers circumstances. Men have no control over history, but will reach their destiny nevertheless.

We see here how Vico uses traditional ideas about legislation and revolutionizes them by placing the interventions of a divine legislator alongside those of fallible human legislators in such a way as to suggest that human legislators should try to guess what providence will approve of (such as the motive of protection of the weak by the powerful and older motives such as equity and reason of state). Vico's legislator will be guided in his work by a motive known from the realm of fiction. He will act as if it were possible to guess something of the intentions of divine providence and adapt his rules and regulations to this fiction. This is a fictional undertaking

34. *Id.* ¶ 132–33.

35. LILLA, *supra* note 16, at 121–32.

precisely because there is no way of being certain what providence aims to achieve and because the imagination of what kind of rules would be suitable uses the mechanism of the willing suspension of disbelief. Interestingly, the effect of legislating as if under divine guidance is both to be daring in promoting arrangements that are in line with Biblical precepts (such as the protection of the weak against the strong) and to be honest about the limitations of available knowledge of social facts. The effect might well be a kind of legislative realism as regards the circumstances of this world, guided by an idealist notion of what laws are for. The mechanism meant here, of a willing suspension of disbelief, is acceptable insofar as it is a stimulus to prudential thought, and insofar as it leads the legislator to aspire to the Greek and Roman ideals of *sapientia*.

Is there, then, an invisible hand working through human legislative efforts? Not in the sense Adam Smith used this metaphor to describe the cumulative effect of market transactions that were undertaken by all participants only with their own interests in view. The working of the free marketplace can be computed; the workings of providence through and around human actions will forever be intangible. Vico differs from Montesquieu as well. This thinker also develops a reflective art of human legislation, catering to diverse circumstances and adapting institutions to the men who have to live under them in certain regimes, but Montesquieu dispenses with all notions of a divine legislator, notwithstanding the theological overtones of his title (*The Spirit of the Laws*).

VII. LAW AS A CULTURE OF ARGUMENT

We have now discussed one of the roles an orator-statesman can perform in a regime that makes productive use of the connections between the arts and sciences of rhetoric and jurisprudence as the basis of its legal education. There is another such connection working in the domain of legal practices engaged in by lawyers and judges. This link is much more obvious: it is the nexus between rhetoric as performative speech and law as ongoing argumentation. In all legal systems there is some awareness of this connection, since rules and principles of law can never be completely stabilized; in upcoming cases as in actual legislative debates the old law will be tested by new arguments, based on fresh facts and novel interpretations of social desirables. But the connection is often obscured from view by focusing instead on the division of labor between advocates and judges or between speech experts and legal commentators. When law is seen as a "culture of argument," as a continual process of articulation, contestation, interpretation, translation, application, and whatever qualifications we want

to give the activities going on in the legal process, the specialized roles are less important than their organization and the quality of their interactions. "The law is an art of persuasion that creates the objects of its persuasion, for it constitutes both the community and the culture it commends."[36] Vico underpins the link between rhetoric and law as culture of argumentation by his *verum factum* principle. This principle holds, after all, that we can discover the truth about something by engaging in the process of producing it. Law has to be produced again and again, refashioned out of a heap of given materials of the culture (and sometimes crafting entirely new laws in the process). The facts under discussion have to be described and interpreted for their legal meaning. Both processes, joined in the institutions where rhetoricians and judges meet each other, make use of the age-old procedures of the *ars topica*, developed by Cicero and Quintilian.[37] Vico repeatedly stresses the importance of teaching an orator-statesman the art of inventing new but fitting arguments and of critically assessing given ones. On this score, at least, he seems to be a clear traditionalist, without revolutionary intentions.

It would be possible to go more deeply into the way Vico unites oratory, law, and philosophy into an art to be practiced by the orator-statesman. But in demonstrating how these three arts or sciences converge in the important (and too often neglected) role of the prudent legislator, a point has already been made about the aims of legal education. Vico wants his students to prepare for a noble career as public speakers rather than as private practitioners (even if within the confines of monarchy). He wants them to become authoritative speakers, not authoritarian functionaries.[38] They need all the resources that rhetoric and jurisprudence can muster to become those rare individuals who are able to make a difference, by formulating at the right time, in the right place, and in the right manner the maxims that can guide people's lives.

VIII. READING VICO: RE-ORGANIZING OUR PERSPECTIVE ON THE SCHOOL OF LAW

This brings us as readers of Vico to the point where we can see that the picture he holds in his mind about an ideal legal education—the train-

36. I am here quoting, out of context, but in good faith, JAMES BOYD WHITE, *Rhetoric and Law: The Arts of Cultural and Communal Life*, *in* HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 28, 35 (1985).

37. Willem J. Witteveen, *The Jurisprudence of Quintilian*, *in* QUINTILIAN AND THE LAW: THE ART OF PERSUASION IN LAW AND POLITICS 303 (Olga Tellegen-Couperus ed., 2003).

38. On the crucial difference between the two, see JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN (1986).

ing of the orator-statesman as a legislator—differs significantly from all modern conceptions. The question, then, is what if anything can we learn from this exercise in the recovery of the historic Vico? To answer such a question, we will have to say more about what characterizes the assumptions underlying legal education today. Not pretending to be representative—the practices in legal education are varied indeed, especially across legal systems[39]—but suggesting an interesting line of inquiry, we may then observe that nowhere is it attempted to offer the full range of arts and sciences as building blocks for the curriculum of a law school. Not "all the arts and sciences" are the aim, but a small selection of those social studies that are deemed useful for practicing lawyers. Generally, this means that microeconomics is taught in law schools, as applicable to legal problems (law and economics) and there will almost always be some philosophy course focusing on the art of interpretation and on legal theory in the narrow sense of the debate between positivism and natural law. Less prevalent are courses in social studies, such as criminology or trial psychology. Incidentally, there are courses in law and literature or moot courts using rhetorical methods. Here, it is not the general teachings of these social studies that is the focus, but instead a selected subpart that is of clear application to the law. And even in a rare case where a law school encourages law students to take up a number of social studies, there is no attempt to offer the full range of them. Usually, the choice as to which domain to get (superficially) acquainted with is left to the students within a narrow margin of choice which does not endanger the space reserved for the "real" law courses devoted to the rules and principles of private law, criminal law, constitutional law, et cetera.

It is possible to give a more precise characterization of modern law and its teachings. Marianne Constable notices a convergence between legal positivism (as the dominant approach in legal thinking) and sociology (as the dominant view of the way the modern world operates). She sees a cluster of characteristics binding the philosophy of legal positivism to the world view and the methodology of sociology and she terms the resulting configuration "sociolegal positivism." Sociolegal positivism turns out to be an embedded way of seeing, a perspective that organizes the modern perception of the realities of law, power, and justice. Law as seen through the double lens of sociolegal positivism consists of rules, principles, and regulations that have been officially declared law. It is a complete, closed system that can be studied empirically for the way it functions (or disfunctions) in all human relations.

39. *See, e.g.*, WILLIAM TWINING, BLACKSTONE'S TOWER: THE ENGLISH LAW SCHOOL (1994).

> [S]ociolegal positivism presumes that positive law is humanly articulable power in at least two senses: as the declarations of officials or in scholars' descriptions—conceptual or empirical—of the order and dynamics of human social systems. Even when positive law is not the command of a distinct human sovereign or the official unification of a system of rules, it appears as a humanly made creation of society—whether as norms or practices or network of institutions—that is describable in sociological terms.[40]

It follows that the connection between law (as tangible, empirical, or institutional facts, or as acts of power in the human world) and justice (as a silent ideal) is conceptually severed and re-united only, if at all, in the form of theses about "empirically contingent social realities."[41] Constable notes that this focus on the empirical and observable tends to discount the history of law as being unobservable. We may add that it even more drastically removes the possibility of law motivated internally by considerations of justice, when it is a human artifact,[42] or of law being governed by an Invisible Providential Power acting through the always imperfect (but in optimal conditions, prudent) designs and perceptions of human actors. Vico, clearly, is the exact opposite of a sociolegal positivist.

Where the road of sociolegal positivism ultimately leads can be glimpsed in an interesting and stimulating book by Ward Farnsworth, who has assembled a "toolkit" for thinking about the law.[43] Farnsworth has attempted to collect practical tools for thinking about legal problems, tools which can be applied by anyone interested in applying the rules of law to a problematic case. The thirty-one chapters of this book, each describing a particular tool, are heavily influenced by the paradigm of microeconomics now on the rise in American law schools. There are eight chapters on incentives and also eight chapters on game theory. As against five chapters on the application of notions from psychology, there are also five chapters on problems of evidence, again heavily oriented on economic concepts. The five chapters devoted to what Farnsworth terms jurisprudence contain just one traditional topic of this discipline (working with rules and standards) and offer more economic analyses of law. Nowhere are the traditional tools of jurisprudence, such as the methods of interpretation, the precepts of rhetoric, or the basic categories of legal reasoning. There is virtually no overlap between Farnsworth's toolkit and a classic work such

40. MARIANNE CONSTABLE, JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW 10 (2005).

41. *Id.*

42. LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

43. WARD FARNSWORTH, THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW (2007).

as Llewellyn's *The Common Law Tradition*, which in retrospect is a work of general jurisprudence that forms a culmination of traditional jurisprudence dating back to the Middle Ages.[44] The point to note is that while Farnsworth's book is a highly innovative and inventive educational text, this primer of sociolegal positivist methodology has completely eliminated all valuable elements of the legal tradition.[45]

By comparing Vico's classical educational ideal with the forms of legal education developing under modern conditions of sociolegal positivism, we can raise interesting questions about the future of legal education. True enough, these questions cannot be answered in the terms of reference to a bygone age. Nevertheless, they can help develop a new frame of mind, one more open to the discoveries Vico made about law as a form of social order which is an integral part of the poetic imagination of a historically-situated culture.

IX. SHIFTING AIMS AND AMBITIONS

The first thing to notice is the enormous shift in the aims and ambitions of legal education. What is a good jurist? On what model of legal man or woman should an educational strategy be based? Vico's ambition is to teach aspiring jurists how to become orators and statesmen, able to act like prudent legislators in organizing and changing societies. In modern times, the picture of the good jurist has shifted away from the orator and the lawmaker toward an almost exclusive emphasis on the good jurist as a judge. (Interestingly, the art of judging is a topic on which Vico does not have much to say beyond the verities of the legal profession of his day, and the chapter on three kinds of judges in the *New Science*, describing what profile a judge will have in the different historical stages of a civilization, is a very short one.) In juxtaposing Llewellyn and Farnsworth, as we have just done, we can see that there have been two stages in the articulation of the ideal of the good judge as role model for the legal profession. In the older model, the judge is a prudent, even wise interpreter of authoritative texts. When Llewellyn elaborates on the grand style of judging, which he prefers for appellate courts, we can discern this model of the judge as an interpreter very clearly and we can even see remnants of the older ideal of the judge as an orator. Under the influence of legal realism, the judge is later seen as a social engineer. This model also usually emphasizes interpretation, but now

44. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

45. For an overview of these elements, see HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 37–39 (1983).

as a craft of law that must be used in a purposive manner in order to achieve desirable social consequences. Sociolegal positivists see the judge as an interpreter who is acting the part of a social engineer, and thus as a functionary, wielding power preferably for the good of society. Farnsworth takes a decisive step further towards the articulation of an ideal of the judge as social engineer. He omits the instruments of the art of interpretation largely from his description of the "toolbox." (Given the whole idea of what law is about—the pragmatic handling of social problems—this is a revealing metaphor.) So, between Vico and Farnsworth, even the judge has turned from an orator in command of the topics of the art of persuasion into an engineer with a toolbox.

The limitations of the role model of the judge as social engineer have been the subject of much debate. Critique has been directed especially against the instrumentalist conception of law and society justifying the new role model.[46] But even some of the alternative approaches, advocating for instance a responsive or reflexive law, lend themselves to instrumentalist interpretations. What has been lost from view during this whole debate is the momentous conceptual shift away from the older notion of the jurist as an orator and a statesman engaging in lawmaking toward the picture of the judge as primarily someone taking the judgmental point of view. What we can learn from Vico, then, is that it may be worthwhile to return to this old tradition of thinking about law. Vico is only one spokesman, albeit an interesting and outspoken advocate, for the classical view, which dates back to Cicero.

While it is unquestionably important to pay serious attention to judges as legal practitioners, as interpreters *par excellence*, and even as general role models for jurists, there is a price paid for overexposure to the judicial function. It means loss of attention to the regulative functions performed in the modern world by the state and by many regulatory agencies and modified and adapted within countless semi-autonomous social fields.[47] As a result of this neglect, the activity of making laws is often redefined as an activity not properly belonging to the domain of law, but being situated in entirely different fields of activity, called "politics" or "bureaucracy," as if people performing a political or administrative function need no longer be

46. I am here thinking of the whole debate engendered by Nonet and Selznick in the seventies, followed up on the European continent by Schuyt and Peters in the Netherlands, and by Teubner in Germany. PHILIPPE NONET & PHILIP SELZNICK, LAW & SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (2d ed., Transaction Publishers 2001) (1978); A.A.G. PETERS, RECHT ALS KRITISCHE DISCUSSIE (1993); C.J.M. SCHUYT, OP ZOEK NAAR HET HART VAN DE VERZORGINGSSTAAT (1991); GUNTHER TEUBNER, RECHT ALS AUTOPOIETISCHES SYSTEM (1989).

47. SALLY FALK MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH 54–81 (1978).

viewed under the aspect of the legal quality of their work. "They do things differently there!" The critique of sociolegal positivism explains this attitude as a loss in terms of law and justice, since laws and regulations are reductively declared to be mere acts of (legitimated) power.

Looking back on the debate over legal instrumentalism, there is much to be said for the view that it is worthwhile to recover a role model of the jurist as a reflective practitioner of the art of lawmaking. Such a jurist would, in a legislative capacity, be fully part of the modern world and would participate in the sociolegal paradigm and the forms of social order maintained under it, but would be able to draw strength from the resources of the tradition embodying knowledge about the art of lawmaking conceived along the lines of the ideal of the orator-statesman. While the insights to be found in Vico are mostly symbolic, not literally applicable, they can inspire an attitude towards the object of regulation that is significantly different from the view that regulation is the exercise of social power; a legislator mindful of Vico's system would always ask where the limits of this power lie and how it can be assured that human interventions in society are in concord with the state of development of the society and the culture as a whole. In Montesquieu or in Fuller can be found more concrete considerations (*topoi*) of relevance to the art and craft of lawmaking that would seem to fit in with this attitude.[48]

The return to an older ideal of the legal profession has been argued for many times. Anthony Kronman has published an eloquent argument for the restoration of the ideal of the lawyer-statesman which he discerns in the history of the common law and connects philosophically with the Aristotelean and Ciceronian tradition of practical wisdom. This comes close to the argument that can be distilled from Vico about the orator-statesman, in which the whole business of jurisprudence is defined as the art of practical wisdom. There is a difference, however. Where Kronman in the end concentrates his attention on judges (and as a result also on trial lawyers and barristers), Vico takes an interest in the role of the legislator as the pinnacle of oratorical achievement. When Kronman speaks of political statesmanship, he does not discuss how politicians or bureaucrats should work with rules and standards and other legislative instruments in order to further the common good, but he stresses the deliberative ideal of sympathetic understanding, which is another manifestation of the idea of responsiveness in

48. Willem J. Witteveen, *Laws of Lawmaking*, *in* REDISCOVERING FULLER: ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN 312 (Willem J. Witteveen & Wibren van der Burg eds., 1999).

governance.[49] But, valuable as this is, seen from the perspective of the orator-statesman who is primarily a lawmaker the focus on sympathetic understanding is not enough; it is just one (important) condition for a rhetorical performance able to acquire authority in the community of citizens. While this is a difference, it is not a vital difference. It must be possible to accommodate within the reasoning employed by Kronman an ideal of the legal profession that focuses not only on lawyers and judges, but also on legislators as prototypical legal actors, concerned with questions of law and justice.

X. RESTORING THE CONNECTION BETWEEN RHETORIC AND JURISPRUDENCE

At first sight, both the modern sociolegal paradigm and the classical ideal of the orator-statesman-lawmaker depend upon the admission and integration of many different scientific disciplines in the curriculum of the law school. Positivist lawyers, believing law to be a socially constructed institutional fact, will have to admit that empirical relationships affect the way law works and that social research is needed to gain insight into the conditions under which law can be socially effective. Lawyers aspiring to be orators, statesmen, or legislators will realize that they will have to know and practice many disciplines and arts in order to achieve their calling. In practice, of course, both liberal arts standpoints have to be severely curtailed. Knowledge of all the arts and sciences is simply impossible to acquire in a lifetime. In practice, one accepts that one cannot attain the broad educational ideal. For the moderns, it is tempting to seek refuge in the idea of specialization and to say that the law student should know about laws and regulations, while the empirical researcher should stick to doing the field work and analyzing the data, to be summarized in a handy report. In fact, so little is done in training law students to be minimally proficient in social science methods that they have great difficulty assessing research reports for their value as empirical information. Moreover, the tendency is strong to limit the whole range of the social sciences to economics, which is guaranteed to lead to a biased view of the social reality law is acting in and upon.[50] The "ancients," by comparison, did not believe in specialization but in integration of knowledge from diverse domains, although they

49. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 93–101 (1993).

50. For an early critique of the world view of law and economics that still stands, see JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 46–86 (1990).

often accepted a superficial—even crude—knowledge of these domains as sufficient to their lofty ends. The problem would then be that the practitioner possessed only elementary or shallow knowledge of a discipline, which in principle could be very fruitful but would be underused as a cognitive resource. How many professed lawyer-statesmen or orator-legislators would have been able to make full use of the conceptual tools provided by the tradition?

Although Vico argues that the ideal education of the orator-statesman requires knowledge of all the arts and sciences, as he does in the *Study Methods*, it is necessary to make some choices as to which arts and sciences are the most important ones to delve into deeply. And Vico of course makes such a choice. He mentions philosophy and history, but above all he believes much good will come from the combined study of rhetoric and jurisprudence. A Vichian approach to legal education includes then, as its second recommendation, the effort to restore in the curriculum the close connection between rhetoric and jurisprudence.

XI. A RHETORIC FOR JURISPRUDENCE

While this is not the place to formulate concrete proposals for a curriculum uniting rhetoric and jurisprudence, it is possible to derive from our reading of Vico a number of suggestions about its general aims.

A. Design Modern Equivalents of the Topical Method

We have seen that Vico recommends an education for the orator-statesman leading up to the speakers' command of the topical method deriving from the rhetorical tradition (Aristotle, Cicero, Quintilian). Working with topics has taken a variety of forms. For the classical writers, they were the headings under which arguments could be classified. Perelman notes: "They are associated with a concern to help a speaker's inventive efforts and involve the grouping of relevant material, so that it can easily be found again when required. *Loci* have accordingly been defined as storehouses for arguments."[51] During the stage of the rhetorical process called "invention," a speaker needs to make an inventory of all the possible lines of argumentation for or against a thesis. Topics organize the enormous variety of possibly relevant argumentation material. They do so by describing some feature of their function. Cicero's teachings on the topics distinguishes different argumentation structures, such as an argument by analogy, an argument

51. PERELMAN & OLBRECHTS-TYTECA, *supra* note 21, at 83 (citations omitted).

pointing at the cause of something, a strategy of definition of terms, et cetera. It is possible to formulate all these topics in the form of questions about the material one is working with: Is A here compared to B? Is A the cause of B? Is A defined as B? et cetera. Experience in asking and answering these kinds of very general questions leads to an awareness that here we have elementary starting points for the meaningful organization of phenomena. Perelman points out that topics often are contrary. When one approaches a problem in qualitative terms, it is also possible to approach the same problem from its quantitative aspect, often to vastly different result. The analogy argument can be opposed by an argument to the contrary (*a contrario*). The search for the cause of something can be contrasted with the question of its possible effects. The definition of terms stands opposed to a metaphorical typification. Apart from such common topics, there are also specialized ones having relevance for a particular domain of argumentation, such as the law. Advocates use opposing *topoi* to generate arguments for or against a legal issue. A beautiful example of a whole list of opposing topics relating to the interpretation of legal texts is provided in an appendix to Llewellyn's *The Common Law Tradition*, where he describes twenty-eight kinds of "thrust and parry" between the canons of statutory interpretation.[52]

Topical thinking can be developed for new contexts. It can be designed for courses that bridge theoretical materials and practical tasks, such as courses about advocacy, judging, or legislation. As an example, for use in thinking about the issues a legislator might face in contemplating new rules for a pre-existing social practice, I offer this list of eleven topics that I previously advocated in the debate in the Netherlands on the choice between a strategy of governmental regulation and a strategy of government-supported self-regulation in autonomous fields where professionals manage their own affairs. They translate into the following questions:

(1) What is the appropriate level of organization of the field where regulation can be most successful?
(2) What forces will help or obstruct professional self-regulation?
(3) Which kind of local knowledge is required for effective regulation by an outside agency?
(4) Which empirical information is or must be made available about the actual working of the field?
(5) How can an acceptable level of legal certainty be achieved for all concerned actors?

52. LLEWELLYN, *supra* note 44, app. C, at 521–35.

(6) How can a system of scrutiny by a controlling agency be designed that is most likely to benefit the field?
(7) What is or should be the balance of powers (legislative, executive and judicial) within the field?
(8) How can there be a balance of expectations between government agencies and actors in the field (the issue of reciprocity)?
(9) What is the optimal scale of regulatory activities and how can undue bureaucratic arrangements be avoided?
(10) How can the professional integrity of those working under the new arrangement be respected?
(11) How can self-regulatory arrangements be set up that do not degenerate into obstacles to the general interest of society as a whole?

At first sight this list of topics seems to be rather far removed from the concerns found in Vico's writings on law and justice. There is obviously no literal application here, but an imaginative reworking of ancient rhetorical principles—such as the principle of fair hearing, to be found behind topics (4), (8) and (10) and the principle of equal treatment, behind topics (5) and (8). Yet, these topics are not so distant in spirit to the idea of a topical art for practicing jurists, as all of them provide a starting point for reasonings that are relevant to the art of legislation as reconceived in modern conditions of bureaucratic governance.

B. Make Use of the Resources of the Poetic Imagination

We saw that Vico believed students should first train their imagination and their memory, in order that they develop prudence, learn to be eloquent, and discover the common outlooks of their community (the *sensus communis*). Abstract reasoning and conceptual thinking—well known to Vico, as these were so important in Roman law—should be reserved for a later stage of their training. In today's legal education it is precisely conceptual thinking and abstract reasoning that are important, albeit checked by a firm dose of the case method. What is lacking is early and systematic training of the imagination and the memory. The balance can be redressed in many different ways, at all stages of a legal curriculum. This is a line of thinking that has once again begun to slowly grow in influence in Western legal culture. The field of law and literature is especially outspoken about the vital need to re-introduce the poetic imagination into the rational argumentation practices of the law. Martha Nussbaum is one of many authors who are convinced "that storytelling and the literary imagining are not opposed to rational argument, but can provide essential ingredients in a

rational argument."[53] Reading stories, novels, and poems can enhance awareness of the emotional component in fair reasoning processes. Being able to enter imaginatively into the viewpoint of a person in a story may be the prerequisite for being able to judge, in a responsive manner, real-life stories. The rhetoric of storytelling, teaching its practitioners how varied stories about events can be and how they are constructed, is a useful antidote to the idea that there exists something called "the facts of the case" to which rules only need to be applied. These are some of the lessons of law and literature that would fit in well with Vico's admonition to train the imagination. The difficulty here is how to redesign law school in such a way as to make them a first priority, rather than an optional afterthought.

The stimulation of the poetic imagination is important for practicing lawyers and for legal thinkers alike. Vico shows by his example that rhetorical reflections on the working of language can be related to matters ethical, legal, political and spiritual. James Boyd White refers to this wide realm of reflection when he discusses what happens when language meets the mind. That leads him to formulate this programmatic statement about the potential use of the poetic imagination:

> [A]ll work in philosophy, in literature, in history, in law, in economics, in sociology, in science, in our actual political and social lives, ought to be concerned not only with the explicit subjects of the discourse—the causes of revolution, or the meaning of Shakespeare's sonnets, or the nature of criminal responsibility, or the character of social wealth, or the structure of certain institutions, or the evolution of birdsongs, or the propriety of a proposal for public health care or of a plan to go to war—but also simultaneously with:
>
> > (1) the language in which it is carried on, and the culture of which it is a part;
> >
> > (2) the way in which that language and culture acts on our minds, and the minds of others, as well as the way in which it can be resisted or transformed; and
> >
> > (3) the selves and communities and institutions, the possibilities for individual and collective life, that can be created in this language, this culture, and by what art.[54]

It is hard to think of a better way to formulate the intellectual challenge for an orator-statesman today.

53. MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE, at xiii (1995).

54. JAMES BOYD WHITE, WHEN LANGUAGE MEETS THE MIND: THREE QUESTIONS 35 (2007).

C. Do Not Confuse All the Other Arts of Language with the Art of Interpretation

There is also a negative lesson to be learned from the reconnection of rhetoric and jurisprudence. Reading Vico's *The Art of Rhetoric*, and even more so reading the classical texts on persuasion by Aristotle, Cicero, and Quintilian, we are struck with the fine distinctions made between many different uses of language for many different ends. We come away from them with the realization that all of the different uses of language have their own value and their own limitations and can be used both for strategic reasons and in order to achieve open communication. Defining is not yet classifying, arguing is not the same as deliberating, telling is not showing, rhetoric may differ from dialectics. The orator has to be able to engage in many games within language. After the recent interpretive turn in modern academia, it seems as if all legal argumentative work involving language is a form, a subspecies of interpretation. This is an idea to be resisted by those combining rhetoric and jurisprudence. The differences may be subtle, but they matter. By seeing, for instance, that legislating is not interpreting, and in what way the differences matter, the orator-statesman is better able to perform useful social functions. As an added advantage, the art of interpretation, when limited to its true domain, again comes into its own.

D. Let a Hundred Flowers Blossom

As a final consideration, let us remember Vico's suggestion that we will need all of the arts and sciences in order to develop into orators, statesmen, judges, and legislators. It is unlikely there will ever be one ideal curriculum that can fulfill this unreasonable but appealing demand. Rather, it is necessary to develop many different programs, try many educational strategies, and involve teachers and students in creating ever new ways of reflecting on law and justice in our historically changing societies. While this effort should lead to some changes within the law schools, it is also necessary to expand this ambition to the liberal arts programs at colleges giving access to law school.[55] Why would the law be a closed book to citizens not wanting to specialize in the law, yet in need of an understanding of its place in the order of things, in order to be able to participate in a democratic polity or to live with the demands and the promises of the rule of law? Reading Vico, we reconsider the law school, but we find the prospect of a true school of law. Let a hundred flowers blossom.

55. LAW IN THE LIBERAL ARTS (Austin Sarat ed., 2004).