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Vico, Llewellyn and the Task of Legal Education*

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How does legal education fail students? This question invites a book rather than an essay, but I intend to focus on a particular deficiency as part of this mini-symposium. I agree with Max that legal education is too text-bound, and with Randy that it approaches texts in a manner that is far too circumscribed. In my contribution to the conversation I want to argue that legal education suppresses law's rhetorical roots, and that this failure is both textual and non-textual in nature. I draw inspiration from an oration delivered by Giambattista Vico exactly three hundred years ago, and from an aside in a short but provocative essay published by Karl Llewellyn exactly seventy-five years ago. In the wake of the recent Carnegie Report on the legal profession and legal education, the time is ripe to renew the unheeded calls by Vico and Llewellyn for a legal education that is rhetorical in nature.

1. *Law's Neglect of Rhetoric*

Law is a specialized rhetorical discourse, but lawyers tend not to understand the full depth of this reality. Too many lawyers regard law as a system of "given" narratives operating within a rigid semiotic economy, failing to recognize that law is a dynamic system that constantly is under construction. This failure is explained partly by their desire for law to be real, objective and enduring. An unfortunate result of this desire is that lawyers too readily resign themselves to making only technical interventions and engaging in instrumentalist strategies, parroting bits of the dominant narratives in response to certain discrete problems. This approach often is sufficient to permit them to achieve their clients' objectives, and so these instrumental efforts pay very well. Well-paid lawyers tend not to ask too many questions. Consequently, the rhetorical dimension of law is, at best, misunderstood by lawyers who equate it with showmanship and stylistic flourish; more likely it is wholly ignored.

* This essay is drawn from a talk first presented at the International Conference on the Future of Legal Education at Georgia State University School of Law on February 20-23, 2008. In its current form, the essay was presented at the 12th Annual Conference of the Association for the Study of Law, Culture and the Humanities at Suffolk University Law School on April 3-4, 2009. I thank the audiences and my fellow panelists at both events – Max Del Mar, Randy Gordon, and Chuck Marvin – for their stimulating conversation.

Why do lawyers understand their practice in such a shallow manner, and how can legal education correct this inadequacy? I already have suggested an initial, general answer to this question. Most lawyers would regard something as exotic as rhetorical theory to have no relevance to the real world of lawyering. And, if it can't help to win a case or to succeed in a negotiation, lawyers will see little point in learning about what appears to be solely an academic dalliance.

There are two general responses to this anti-intellectualism. First, one might argue that lawyers will become better lawyers if they understand rhetoric, even if there is no rhetorical methodology that can be studied, memorized and then applied in legal practice. Second, one might claim that the lawyer's avowed instrumentalism is the very problem to be addressed, and then suggest that the insights of rhetorical theory can assist us in understanding why lawyers suffer from this malady. The first response tends to affirm the instrumental and reductivist approach to law, which is the principal problem; therefore, it threatens to undermine the possibility for the second response. This article principally addresses the second point, but also suggests that this critical approach indirectly sheds light on how we might improve legal education in order to educate more effective lawyers, once we have broadened our notion of effectiveness beyond instrumentalism.

2. *Vico's Ingenious Method of Rhetorical Education*

I begin by recalling Vico's most famous oration delivered at the commencement of the academic year at the University of Naples in 1708 and published the following year. The scope of *On the Study Methods of Our Time*¹ is breathtaking: with the Cartesian "critical method" rapidly gaining ascendance in intellectual circles, Vico argued on behalf of the humanistic tradition in a manner that is neither ill-informed nor atavistic. He fully appreciated the power of the Cartesian method, but he also anticipated that its power would prove to be overbearing. He conceded that we must embrace the new rationalism, but that we should do so only without sacrificing ancient wisdom.² Vico's lament is not that we have abandoned a glorious intellectual past, but that we have failed to fulfill the intellectual promise of our future. It is no overstatement to say that Vico foresaw at the dawn of the

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

² As described by Elio Gianturco, Vico sets the seal of a philosophical conclusion upon the Quarrel of the Ancients and the Moderns. Vico draws, so to speak, the final balance-sheet of the great controversy; not only that, but transposes it to a ground where the problem posited can receive a solution. He is a reconciler of the two factions; he lifts their debate to a high philosophical plane, he rises to the concept of a modern culture harmonizing the scientific with the humanistic aspects of education. Elio Gianturco, *Translator's Introduction to STUDY METHODS*, *supra* note 1, at xxiii-xxiv.

modern rationalist era that lawyers would lose their ingenuity and become technocrats who are managed *by* legal narratives instead of them being equipped to exercise their rhetorical roles as managers *of* meaning.

Vico begins his oration with a reminder that all human knowledge is partial and fallible, and therefore that we should always be ready to assess our beliefs and correct them. However, he exhorts his audience to recognize that Cartesian radical doubt undermines not only false beliefs that should be discarded but also beliefs grounded in the probable, without which we could not live.³ The critical method undermines the cultivation of common sense, which subtends both practical judgment and eloquence, thereby restricting knowledge to an arid and abstract intellectualism.⁴ It is important to stress that Vico does not seek to abandon the Cartesian method in order to return to ancient rhetoric. Instead, he counsels a prudent understanding of the role that each can play: “a severely intellectualistic criticism enables us to achieve truth, while *ars topica* makes us eloquent. . . . Each procedure, then, has its defects. The specialists in topics fall in with falsehood; the philosophical critics disdain any traffic with probability.”⁵

Vico argues that relentless criticism leaves no room for the rhetorical arts, but it is only in rhetorical engagement that we can deal with questions that admit of no definitive answer. The law purports to seek certainty, but when this goal is understood to mean “truth” in the sense of the Cartesian method it become a debilitating straitjacket for legal practice.

Nature and life are full of incertitude; the foremost, indeed, the only aim of our [rhetorical] “arts” is to assure us that we have acted rightly. . . . Those who know all the *loci*, i.e., the lines of argument to be used, are able (by an operation not unlike reading the printed characters on a page) to grasp extemporaneously the elements of persuasion inherent in any question or case. . . . In pressing, urgent affairs, which do not admit of delay or postponement, as most frequently occurs in our law courts . . . it is the orator’s business to give *immediate* assistance . . . Our experts in philosophical criticism, instead, whenever they are confronted with some dubious point, are wont to say: “Give me some time to think it over!”⁶

³ Indeed, if a person were to try to live life by utilizing only Cartesian reasoning she would be incapable of action and most likely would be regarded as having a serious mental disturbance.

⁴ STUDY METHODS, *supra* note 1, at 13.

⁵ *Id.* at 17, 19.

⁶ *Id.* at 15.

Rhetoric is unavoidable just because life is uncertain. The Cartesian philosopher vainly seeks to determine the truth of the matter, and therefore is impotent when faced with a choice between two proposed courses of action that are equally valid from a logical perspective. In contrast, one who is capable of determining the relevant arguments “for and against” the proposed action on the basis of the probabilities of the given circumstances, and is then able to persuade others as to the best approach, exhibits a wisdom that is far superior for this task than the more limited scope of definitive truth.

Vico provocatively compares the ability to “grasp extemporaneously” the lines of argument to “reading the printed characters on a page.” We speak colloquially about “reading a situation,” but Vico is suggesting that we take this metaphor to a deeper level. The abstract characters that form a written language are capable of generating an infinite number of expressions as speakers combine them in new and inventive ways over time. Reading social situations is not an unmediated perceptual facility; rather, it is an art that develops over time as one develops familiarity with the commonplaces that can be deployed in creative ways. An education in eloquence is an education in arraying lines of argument inventively to respond to the situation, and this art rests on ingenuity in “seeing” which arguments best match the situation. The sage understands that this capacity is distinct from philosophical criticism, and is not so foolish as to “apply to the prudent conduct of life the abstract criterion of reasoning that obtains in the domain of science.”⁷

Vico insists that the art of making arguments through an inventive use of commonplaces “is by nature prior to the judgment of their validity,” and so the art of rhetoric should be granted priority rather than being suppressed.⁸ First, one must locate the means of persuasion within a given situation before it is even possible to test the reasoning with philosophical criticism. Even more important, not all prudential decisions can or should be subjected to second-guessing by the philosopher. Many of life’s issues simply are not amenable to philosophical analysis in the Cartesian tradition; instead, they call for mature judgment that Vico identifies with the ancient rhetorical tradition. The ingenuity of finding similarities among seemingly different factors, the imaginative capacity to create a new understanding of reality, and the prudence to choose appropriately when the matter is not subject to calculation: these are the humanistic capabilities that Vico championed, despite the vigorous Cartesian criticism that their uncertain basis introduces the possibility of error. The sage must be committed to truth, but also ready to act when the frailties of the human condition preclude an analysis that demonstrates the truth of the matter. The sage, “through all the obliquities and uncertainties of human actions and events, keeps his eye steadily

⁷ *Id.* at 35.

⁸ *Id.* at 14.

focused on eternal truth, manages to follow a roundabout way whenever he cannot travel in a straight line, and makes decisions, in the field of action, which, in the course of time, prove to be as profitable as the nature of things permit.”⁹

These considerations lead directly to Vico’s recommendations for organizing education. Building on the oration he had delivered in the previous year,¹⁰ Vico insists that students must first develop their rhetorical skills before being introduced to philosophical criticism. Vico fears that the student might lose forever her capacity for ingenuity, imagination and eloquence if she is exposed to the abstract intellectualism of the Cartesian method without first cultivating the humanistic arts. Vico brings his thesis to bear in very concrete ways in a detailed discussion of law and legal education. He recounts the emergence of law as a distinct discipline. The Greeks regarded law as a site of the activity of conjoining philosophy and oratorical skills.¹¹ Similarly, the Romans maintained written laws strictly, but utilized legal fictions that were generated by the orator to avoid injustice.¹² In modern times, though, the law has expanded beyond the stark written text and enveloped within itself the moderating force of equity as a matter of interpretation rather than eloquence.¹³

The law now claims the mantle of justice, which represents both a positive development and a loss: although the law has become directly equitable, we have now lost the connection between law and eloquence, understood as wisdom speaking appropriately to the given situation. Vico regards it as a clear advantage that “the professions of legal expert and orator are, in our age, joined in the same person,”¹⁴ but as justice was absorbed into law it became too easy for private parties to manipulate the levers of legal authority for their own gain without any check or limit. It was the decay of eloquence in favor of the pursuit of self-interest, Vico emphasizes, that sealed Rome’s fate.¹⁵ The law has now become a fully self-sufficient discourse that is susceptible to technical manipulation because

⁹ *Id.*

¹⁰ GIAMBATTISTA VICO, *On the Proper Order of Studies*, in ON HUMANISTIC EDUCATION 125-40 (SIX INAUGURAL ORATIONS, 1699-1707) (Giorgio A. Pinton & Arthur W. Shippee trans., Cornell Univ. Press 1993) (delivered 1707).

¹¹ STUDY METHODS, *supra* note 1, at 49.

¹² *Id.* at 50-52.

¹³ *Id.* at 59.

¹⁴ *Id.* at 62.

¹⁵ *Id.* at 69.

there is no external discourse to which it must answer through rhetorical argumentation. The problem facing 18th-century European society, he believes, is the need to bring legal doctrine back into contact with eloquence and practical wisdom.¹⁶

One might wonder if Vico's reference to law and legal education in the oration is wholly happenstance, such that the musings of this eighteenth-century rhetorician have no intrinsic connection to law. In fact, Vico was educated in law, sought a Chair on the law faculty, wrote one of his early works on law, and rooted his thinking in legal reasoning and eloquence. Donald Kelley's reading of Vico leads him to suggest that the modern "social and cultural sciences seem to be the ghosts of dead jurisprudences"¹⁷ as capaciously understood by Vico, and that it was jurisprudence as a "human system of moral, social, and political thought . . . rather than the tradition of Greek, scholastic, or Cartesian metaphysics that provided Vico with his principal model and central ideas."¹⁸ In a similar assessment, Michael Mooney emphasizes that Vico's conception of "rhetoric" was "not a literary but judicial rhetoric – rhetoric as argumentation, a process of reasoning," and that his *New Science* was premised on the belief that the principles of argumentative discourse provide access to the origin of humanity and undermine the intellectualist fantasy expressed by the Cartesian critical method.¹⁹ Law is not just an example of one practice among many for Vico. Law is the practice in which our civic life is born and renewed, and it is of central importance to Vico's philosophy.²⁰

Vico's oration speaks directly to the question that motivates my paper. A technocratic approach to law and legal education suppresses the imagination and intellectual virtues necessary to practice law in a manner that genuinely unites eloquence – which Vico defines as "wisdom, ornately and copiously delivered in words appropriate to the common opinion

¹⁶ *Id.* at 69-70.

¹⁷ Donald R. Kelley, *In Vico Veritas: The True Philosophy and the New Science*, 43 SOC. RES. 601, 611 (1976).

¹⁸ Donald R. Kelley, *Vico's Road: From Philology to Jurisprudence and Back*, in GIAMBATTISTA VICO'S SCIENCE OF HUMANITY 15, 27 (Girogio Tagliacozzo & Donald Phillip Verene eds., 1976). Kelley concludes that the "debts owed by Vico to jurisprudence are incalculable and in some cases almost indemonstrable . . . for they involve matters not only of content but of form and method, not only *exempla* but, much more significantly, also *principia* of human behavior." *Id.* at 19.

¹⁹ MICHAEL MOONEY, VICO IN THE TRADITION OF RHETORIC xiii, 82-83 (1985) [hereinafter TRADITION OF RHETORIC].

²⁰ For discussions of the centrality of law to Vico's thinking, *see generally* SYMPOSIUM: RECALLING VICO'S LAMENT: THE ROLE OF PRUDENCE AND RHETORIC IN LAW AND LEGAL EDUCATION 83 CHI-KENT L. REV. 1097-1384 (2008).

of mankind”²¹ – with the re-fashioning of legal doctrine to address the case at hand. Legal hermeneutics has supplanted rhetoric, but many contemporary theorists remain ignorant of the rhetorical core of legal hermeneutics and so it devolves into a deductive-empirical exercise of identifying the “original meaning” intended by the drafters or the “plain meaning” of the legal text before the court. The law is now justice, but a methodological hermeneutics that seeks certainty in the application of the law excises this dimension of law. As a result, lawyers devolve into the mouthpieces of a voiceless wisdom that is equipped only to manipulate legal formulae.

Vico’s “ingenious method” – studying topics and learning how to persuade others in a situation of uncertainty – is a recommendation to use one’s common sense to imagine new solutions to problems, to “see” a new path of persuasion by drawing connections that are not already recognized. A well-chosen metaphor does just this, carrying meaning from one situation to a new situation, seemingly instantaneously as if we suddenly see something that previously had been hidden from view.²²

The ingenious faculty assumes the important function of supplying arguments which the rational process itself is not capable of “finding” . . . But it is exclusively on the basis of revealing common elements that a transfer can be made, and that is why Vico defines the ingenious faculty as a requisite for metaphorical thought. . . . Based on the ingenious faculty, which establishes relationships or common factors, imagination, according to Vico, confers meanings on sense perceptions. Through its transfers, imagination is the original faculty of “letting see” (*phainestai*), so that Vico calls it “the eye of the ingenium.”²³

It is necessary to exercise the imagination through topical argumentation because there is no substitute for the accumulation of experience. One cannot become prudent by deducing answers to practical problems; one becomes prudent through the exercise of judgment based on “insight,” which is really a “new sight,” or a “broader view.” To express this metaphorically, consider how it is possible to improve one’s eyesight by using one’s eye in a certain manner – as happens by the using a patch on one eye to force the other eye to focus

²¹ STUDY METHODS, *supra* note 1, at 78.

²² The original meaning of “metaphor” was to physically carry an item from one place to another, but gradually it came to be used “metaphorically” as a transfer of meaning that Aristotle recognized as being foundational to education because it generated knowledge not through a chain of deductions that might fail but rather through immediate insight. ERNESTO GRASSI, *RHETORIC AS PHILOSOPHY* 94-95 (1980).

²³ Ernesto Grassi, *The Priority of Common Sense and the Imagination: Vico’s Philosophical Relevance Today*, 43 SOC. RES. 553, 562 (1976).

properly – but we can be sure that reading about the biological structure of our optical sensations will not improve this capacity. Vico urged us to recognize that we can improve our ingenious capacity through proper education, the education in the liberal arts.²⁴ Rhetorical education is a matter of gaining experience by exercising one’s rhetorical capabilities, rather than a cognitive achievement.

Vico’s oration relates to law directly, but not superficially. Seen within the context of his life’s work, the oration is premised on a view of knowledge and human understanding that confronts the Cartesian critical approach at the deepest philosophical levels rather than just suggesting that different educational methodologies should be employed. Vico’s ingenious method – training students in the art of argumentation – develops the capacity of their imagination to see the world in new ways. This is not just training students to learn rhetorical tricks that can be mastered and then packed into the lawyer’s toolkit for later use. Instead, Vico’s educational program was designed to facilitate the student’s ability to enter and move about a semiotic realm by exercising their rhetorical competencies. Contemporary lawyers are particularly in need of such an education because they must negotiate the symbolic order of law through rhetorical engagement with others, a situation that became all too apparent in twentieth-century America.

3. *Llewellyn’s Realist Account of the Rhetorical Dimension of Law*

In the manner of Vico’s oration, Karl Llewellyn famously addressed the entering students at Columbia Law School in the 1920s with a lecture meant to inspire as much as to

²⁴ Michael Mooney makes this point vividly:

Ingenuity, Vico says repeatedly, is the “faculty of bringing together things that are disparate and widely separated.” It lays no claim to thoroughness or method, but is a capacity, as Petrarch had said of it, which is quick and decisive, penetrating and acute, ready and adaptive. One does not need to call on ingenuity; one either has it or does not, see connections or misses them utterly. Vico was a child of acute ingenuity, he claimed, and so, too, are children generally, if only we will recognize it and train them accordingly. For ingenuity depends on the images of fantasy, a faculty most vivid and robust in youth, and on the power of memory, fantasy’s twin, and they in turn take their start in sensations, the images of sense. But the point is more subtle than it seems, for sense and memory are not to be thought of as mere passive capacities, receiving and retaining impressions that imagination and ingenuity subsequently work through; sense, memory, imagination, and ingenuity are four virtually indistinguishable aspects of the single, prediscursive action of the mind.

. . . .
Ingenious perception is truly an invention, an assembling and arranging of images that produces a genuinely novel vision. . . . [In] oratory and law, it is a vision of how things should be, a course of action that will set things right or avoid their deterioration, a vision that joins past to future through current expectations, thus achieving plausibility, but one that does so through images that are familiar and foreign alike, thus opening to us new ways. Such images are those of metaphor, language that is sententious and acute.

MOONEY, TRADITION OF RHETORIC, *supra* note 19, at 217, 225-27.

orient. Llewellyn urged the students to immerse themselves in law not for the purpose of losing themselves to a technical discipline but so as to recognize that law addresses the entire “drama of society,” and to embrace the unity of profession, culture, and society.²⁵ A short time later, exactly two-hundred and twenty-five years after Vico’s address, Llewellyn suggested – in what appears to be a throwaway footnote, exhibiting his customary florid prose – that he is principally concerned with uncovering the rhetorical nature of legal encounter with social drama.

I still feel my wattles grow red as I recall the shock with which, as a dyed-in-the-wool commercial lawyer, I met property phases of mortgage law which left me gasping. “One system of precedent” we may have, but it works in forty different ways. Some day, someone will help the second year student orient himself. Nor does anyone bother to present to him the difference between logic and persuasion, nor what a man facing old courts is to do with a new vocabulary; in a word, the game, in framing an argument, of diagnosing the peculiar presuppositions of the hearers. I think the second year student is entitled to feel himself aggrieved. Meanwhile, while we wait upon the treading of the Angel, there is rushing in that calls for doing. Here is a start.²⁶

We can trace Llewellyn’s effort to develop an understanding of legal rhetoric principally through his writings on legal education.

The following year, Llewellyn issued a testy call for a dramatic reorganization of legal education in response to the insights generated by legal realism.²⁷ Deriding the Langdellian model because “it blinds, it stumbles, it conveyor-belts, it wastes, it mutilates, and it empties,”²⁸ Llewellyn argued that legal education must prepare students to lead a full and enriching professional life by educating them about the social context in which law operates rather than just teaching abstract rules.²⁹ Students must understand legal rules in context if lawyering is to be something other than algebraic manipulations divorced from the real-world

²⁵ K.N. LLEWELLYN, *BRAMBLE BUSH*, 141-44, 152-53 (1930).

²⁶ Karl N. Llewellyn, *On Philosophy in American Law*, 82 U. PA. L. REV. 205, 205 n.* (1934).

²⁷ K.N. Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935) [hereinafter, *So-Called Legal Education*].

²⁸ *Id.* at 653. His conclusion is phrased in equally harsh terms: “Law school education, even in the best schools, is, then, so inadequate, wasteful, blind and foul that it will take twenty years of unremitting effort to make it half-way equal to its job.” *Id.* at 678.

²⁹ *Id.* at 668-71.

effects of the legal system, and it is precisely by understanding rules in context that we recognize their contingency and develop a critical perspective. “You make critique inevitable, because the human content, once introduced, will never be denied.”³⁰ Llewellyn insisted that lawyers must have a liberal education if they are to bring such critical insight to bear in legal practice. At the end of his career, Llewellyn still was calling for the study of law as a liberal art, grounded in a combination of technical proficiency and broader learning.³¹

The aim of Llewellyn’s “liberal education” is properly understood as rhetorical competence. When he supplemented his Columbia orientation lectures twenty years later, Llewellyn focused on the need to bridge the practice-theory divide. He emphasized that the craft of law “cries out for the development and teaching of its theory, as it does also for study by *doing* in the light of that theory.”³² He named this needed approach “Spokesmanship,” deriving it from the theories first developed in ancient Greece as “Rhetoric – in essence: the effective techniques of persuasion.”³³ Too often, Llewellyn argued, Spokesmanship has been cast too narrowly as the ability to add ornament to legal argument as part of advocacy.

But “Spokesmanship” has come to be for me a more significant focus than any of the above, including and profiting from the essence of each of them while also reaching out to cover such matters as the values of having buffers between contending principals or the differences between the rival goals of victory and

³⁰ *Id.* at 669.

³¹ KARL N. LLEWELLYN, *The Study of Law as a Liberal Art*, in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 375-94 (1962) (delivered in 1960) [hereinafter *Liberal Art*]. Llewellyn challenged the growing belief that preparing students to practice law was inconsistent with the research ideals of the university:

The truth, the truth which cries out, is that the good work, the most effective work, of the lawyer in practice roots in and depends on vision, range, depth, balance, and rich humanity – those things which it is the function, and frequently the fortune, of the liberal arts to introduce and indeed to induce. The truth is therefore that the best *practical* training a University can give to any lawyer who is not by choice or unendowment doomed to be hack or shyster – the best *practical* training, along with the best human training, is the study of law, within the professional school itself, as a liberal art.

Id. at 376. Llewellyn also repeated his frequent insistence that law students read broadly and deeply to acquaint themselves with the context in which law operates. *Id.* at 388-89.

³² LLEWELLYN, BRAMBLE BUSH, *supra* note 25, at 185.

³³ *Id.* Llewellyn explains:

There is a theory of advocacy, or spokespersonship, or rhetoric (which aspect lends the name its immateriality) – a theory which has formed the basis of a liberal art since classic times; a theory, moreover, which is empty and vain save as it builds on and with deep understanding of the psychological and ethical nature of cause or of client, of tribunal or other addressee, of society and of the law-governmental phase thereof.

Llewellyn, *Liberal Art*, *supra* note 31, at 382.

reconciliation or the problems and *obligations* of leadership both in the small and in the large. In a word, Spokesmanship with special attention to work on the legal side seems to me to offer the wherewithal of a full-fledged theoretical-practical discipline with cultural value equal to its professional value.³⁴

Spokesmanship is a rhetorical practice with both theoretical and practical dimensions that can equip lawyers for the challenges of their profession.

Llewellyn's conception of legal rhetoric was central to his realist philosophy, although many critics badly misread him as an ivory-tower relativist who believed in law's absolute indeterminacy. In fact, Llewellyn found ample stability within the practice of law while at the same time acknowledging room for critique and reform.³⁵ Llewellyn wrote that the totality of the practice of law was one of the most "conservative and inflexible" of social phenomena, and yet every case offered the opportunity for the judge and lawyers to shift the direction of thinking.³⁶ Llewellyn anticipated the central tenet of contemporary legal hermeneutics by arguing that the meaning of a legal rule is known only in its use, and that using a rule always is a reformulation of the rule (either by expansion or contraction) even when the case feels like a simple matter of deductive reasoning.

Thus, the task of the judge is to *reformulate* the rule so that from then on the rule *undoubtedly* includes the case or *undoubtedly* excludes it. "To apply the rule" is thus a misnomer; rather, one *expands* a rule or *contracts* it. One can only "apply" a rule *after* first freely choosing either to include the instant case within it or to exclude the case from it. . . .

Matters are no different, only more sharply highlighted, when a new case is such that one first must mull over whether to include it within an existing category, or must choose which existing category to include it in . . .

For we all, lawyer not least, are mistaken about the nature of language. We regard language as if words were things with fixed content. Precisely because we apply to a new fact situation a well-known and familiar linguistic symbol, we lose the *feeling* of newness about the case; it seems long familiar

³⁴ LLEWELLYN, BRAMBLE BUSH, *supra* note 25, at 186. This is his vision of a legal education in the tradition of the liberal arts: attending to the rhetoric of lawyering in its broadest sense. Llewellyn, *Liberal Art*, *supra* note 29, at 389.

³⁵ Dennis Patterson, *Law's Practice*, 90 COLUM. L. REV. 575, 580-81, 598-99 (1990).

³⁶ KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA*, 11-12 (Paul Gewirtz ed., Michael Ansaldi trans.) (Univ. of Chicago Press, 1989) (originally published as *Präjudizienrecht und Rechtsprechung in Amerika* (1933), based on lectures delivered in Germany in 1928-29).

to us. The word hides its changed meaning from the speaker.³⁷

His message was philosophically radical, but he was no linguistic skeptic, cultural nihilist or political revolutionary. Llewellyn firmly believed that lawyers can and should be educated to move within the rhetorically-rich narratives of law.

3. *Educating Lawyers with Ingenuity and Rhetorical Sensibility*

Drawing from Vico's oration and Llewellyn's legal philosophy we can fashion a productive lens through which to view the rhetorical dimensions of law and the resulting implications for legal education. Vico wrote at a momentous time in the intellectual history of the West, and he spoke with the conviction that his lessons were not effete academic theories but instead concerned the possibility for the continued development of Western culture. Scholars of his *New Science*³⁸ might debate whether Vico was a historical determinist, but there can be no mistake that he believed firmly in the efficacy of human agency at the time he delivered *On the Study Methods of Our Time*.³⁹ Llewellyn also wrote at a momentous intellectual moment, when the juridical forces of modernity had solidified

³⁷ Id. at 74-75.

³⁸ GIAMBATTISTA VICO, *THE NEW SCIENCE* (Thomas G. Bergin and Max H. Fisch trans., Cornell Univ. Press 1968) (3rd ed. 1744).

³⁹ I concur with Mark Lilla that the *New Science* can be read as continuous with Vico's earlier oration.

If civilized Athens and mighty Rome were both undone by the "barbarism of reflection," is there any hope of nations today escaping their fate? . . . In his pre-scientific works Vico's practical political teaching is clear enough: preserve the traditions and religious customs by which divine providence directs you to the *verum*, forswearing the enticements of modern enlightenment, and you shall be like Rome. But those earlier works treat only of Rome's exemplary rise, ignoring her fall.

. . . .

By studying the collapse of Rome at the end of her historical *corso* he now hopes to unmask the forces that robbed her of those traditional strengths. Those lessons could then be applied to European societies through the *ricorso*, which puts Europe in Rome's place and reveals which of its "Roman" traditions must be defended against the new barbarization.

On this reading, the *corso-ricorso* doctrine is not a scientific doctrine. It is a prophecy, a dramatic warning to modern Europe that she stands at the edge of an abyss. No reader has come away from the final packed pages of the *New Science* without sensing their prophetic rhetorical power. Just as in *On Method*, where he once called modern Europeans to revive ancient education, Vico again seems to be calling Europe away from its modernity.

. . . .

His practical teaching is therefore relatively clear: societies wishing to maintain their perfection must learn to strengthen all that is Roman within themselves, and direct all that is Greek within them to serve these Roman virtues. Philosophy can retain a role in maintaining this equilibrium, though only as the handmaiden of science and religion. Philosophy must now choose to assist "common sense" rather than weaken it through skepticism.

MARK LILLA, G.B. VICO: THE MAKING OF AN ANTI-MODERN, 217, 225-27 (Harvard Univ. Press, 1993).

an abstract and formal approach to jurisprudence, and the nascent tremors of postmodern thinking had just begun. In periods of great intellectual crisis both thinkers displayed a sense of pragmatic urgency, working from deep philosophical insight but remaining rooted in practical questions of pedagogy.

Vico provides an ontology of legal rhetoric – an understanding of how lawyers see the world and construct the world⁴⁰ – that simultaneously recognizes human agency and rejects the hubristic claims of Enlightenment reason. Vico regards the creative insight of the rhetor as an important factor in the ongoing elevation of man out of nature, but he does not endorse a crude humanist account of subjective agency that assumes that individuals can rise above their cultural context and survey it as a geographer might. He recognizes that we exist in and through rhetorically-constructed narratives, and that there is no human subject capable of willing meaning into being. Even while warning against the hubris of seeking knowledge of things divine in an effort to become wholly self-directing, Vico insists that we are capable of achieving knowledge of human affairs and shaping them. In short, Vico propounds a rhetorical philosophy that is closely tied to civic and political engagement, and by returning to Vico we find a starting point from which we may embark on a path that avoids the Charybdis of “just playing” and the Scylla of endless self-consuming deconstruction.

Vico’s use of the metaphor of sight to describe rhetorical knowledge is an illuminating trope for thinking about educating lawyers with rhetorical sensibility. The goal of legal education should not be to instill knowledge of legal rules, or even to teach students how to “think like a lawyer.” Rather, legal education should be a formative experience through which students come to inhabit a new world in which they move about as one moves about in a physical place. The ancient topics, *loci communes*, operated literally as “common-places” in which a community resided and within which members exhibited a “common sense.” It is important not to misunderstand Vico’s metaphor by assuming that one’s senses are passive receptors of abiding stimuli; to the contrary, seeing is an active engagement with one’s surroundings, an evolving ability to move within commonplaces by exercising common sense. There is no abiding truth to be seen, but rather arguments to be taken up by uniting imagination with eloquence.

Vico argues that we can develop lawyering “sight” through the ingenious method of rhetorical instruction. By arguing both sides of a case in response to a specific problem by

⁴⁰ I certainly do not propose to resuscitate Vico’s ontology as he conceived it, which was embedded within a religious cosmology that no longer holds sway. See Willem Witteveen, “Reading Vico for the School of Law,” 83 *Chi-Kent L. Rev.* 1197, 1200 (2008). My reading is in the spirit suggested by Witteveen: “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 . . . Literalism in interpreting a classic text is often the best way of misrepresenting the views of its author.” *Id.* This is just to say that I read Vico as a legal theorist rather than approaching him historically in an effort to capture his worldview.

working within the commonplaces, students develop the capacity for the sophisticated semiotic activities of lawyering. We should conceive legal education as educating students about how to make arguments that can never meet the strictures of logical thinking, bringing to bear Aristotle's famous distinction between rhetoric and dialectic. For example, students must learn to deploy metaphors in the course of legal argumentation in order to learn how to find the available lines of argument for securing the adherence of their audience. A well-chosen metaphor leads the hearer to a conclusion directly, as if she suddenly turned her gaze to see something for the first time. In fact, of course, the conclusion immediately in front of her eyes is predicated on a complex body of tacit semiological knowledge and education that the rhetor draws upon artfully, and cannot be generated reliably by methodical manipulation. Through the practice of using metaphors in the course of a legal education, students begin to see the world differently with an aim of being able to lead others to see the world differently as well.

Vico's teaching has gained new traction with the recent focus on research into the metaphoric structure of cognition.⁴¹ Steven Winter has applied this research to the question of legal reasoning and argumentation,⁴² arguing that it explains how legal reasoning can simultaneously be creative and constrained.⁴³ In a related vein, George Taylor extends Paul Ricoeur's detailed work on metaphors and suggests that it provides the means to address one of the most important questions in legal theory: the role of creativity.⁴⁴ The notion of metaphor as way of being – a mode of creative existence within the world that in turn gives us our world – literally “fleshes out” Vico's insights into the cultivation of creative thinking. These contemporary theorists reject the computational approach to reasoning and instead locate reasoning in the primary metaphors that develop out of our corporeal existence and

⁴¹ George Lakoff and Mark Johnson have combined to provide the most compelling combination of cognitive studies and philosophy to describe this emerging field of study. See George Lakoff & Mark Johnson, *Metaphors We Live By* (Univ. of Chicago Press, 1980); George Lakoff & Mark Johnson, *Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought* (Basic Books, 1999).

⁴² Steven L. Winter, *A Clearing in the Forest: Law, Life and Mind* (Univ. of Chicago Press, 2001).

⁴³ Winter provides a succinct summary of this point in a recent article:

In short, what our examination of these legal metaphors shows is that legal imagination and constraint are not opposed qualities they are thought to be, but a single human process. Metaphor, in other words, reintegrates us with ourselves. An appreciation of metaphorical reason paradoxically (and, from the perspective of Western philosophy, “metaphorical thought” is already paradoxical) reconciles freedom and constraint as mutually constitutive. Indeed, as Merleau-Ponty puts it, “without roots which it thrusts into the world, it would not be freedom at all.”

Steven L. Winter, “Re-Embodying Law,” 58 *Mercer L. Rev.* 869, 897 (2007) [quoting Maurice Merleau-Ponty, *Phenomenology of Perception* 456 (Colin Smith trans.) (Routledge & Kegan Paul, 1962)].

⁴⁴ George Taylor, “Law and Creativity,” in *On Philosophy in American Law* [xxx-xxx, forthcoming] (Francis J. Mootz III ed., Cambridge Univ. Press, 2009).

then, in turn, generate a complex and dynamic “body” of concepts that operate metaphorically.⁴⁵ These findings do not generate a methodology of creative thinking and argumentation, but they do explain how this capacity develops and works.⁴⁶ Vico’s suggested method of education – the cultivation of ingenuity through rhetorical argumentation – finds strong support in this contemporary work.

If there can be no methodology of metaphorical reasoning and legal creativity, where does Vico’s injunction lead us? First, it should be recalled that he does suggest an “ingenuous method,” by which he means learning the topics and engaging in argumentation. This is akin to conditioning one’s body for sports: we can deliberately fashion a plan to sharpen our natural proclivities and skills so as to permit our body to perform in creative ways in the heat of competition. In the context of legal education this same conditioning is

⁴⁵ The philosopher, Mark Johnson, explains that the computational model of reasoning is being eclipsed by new research that reveals how “our conceptualization and reasoning are grounded in our bodily experience and shaped primarily by patterns of perception and action.” Mark L. Johnson, “Mind, Metaphor, Law,” 58 Mercer L. Rev. 845, 846 (2007). We reason according to “image schemas” that arise from our embodied interaction with the environment, and therefore have “highly determinate ‘spatial’ or ‘bodily’ logics.” Once we have primary metaphors grounded in this embodied logic,

we are off and running, so to speak. Through various types of blending and composition, we develop vast coherent systems of metaphorically defined concepts. . . . All of our most impressive intellectual achievements – in physics, chemistry, biology, anthropology, sociology, mathematics, logic, philosophy, religion, and art – involve irreducible and indispensable conceptual metaphors. In other words, all of the key concepts in all of these disciplines are defined by multiple, often inconsistent, metaphors, and we reason using the internal logic of these metaphors.

Id. at 864-65. This basis for our thinking explains how we are at once grounded in the world and also capable of creatively reshaping our world.

There is a logic of our bodily experience that is imaginatively appropriated in defining our abstract concepts and reasoning with them. Imaginative processes of this sort depend on the nature of our bodies, our brains, and the patterns of our interactions with our environment. Imagination – which is the soul of human thinking – is therefore constrained and orderly, even though it can be flexible and creative in response to novel situations.

Id. at 846.

⁴⁶ During a roundtable discussion about the metaphoric basis of legal reasoning, Mark Johnson emphasized this point:

. . . it is very popular to have what I call the miracle theory of creativity. It just happens, and there is no explaining it. Some people just do this. But for the most part, what you are doing concerns something that Mark Turner and Gilles Fauconnier have argued extensively in their book, *The Way We Think*, which is about conceptual blending. They show you a number of different patterns by which people routinely can create creative conceptual blends. And you do make use of these cognitive resources that you have. I want to urge that it is not that you can predict when something creative can come about, but it is an appropriation of something and seeing how it, or some certain structures, can apply to some other domain.

That is not an explanation of how to be creative, but at least it suggests that it’s not a miracle.

It is not [that] this act is, like Richard Rorty would say, just a radical rupture.

Id. at 864-65.

at work. The goal of legal education should not be to fashion a rigorous and computational mindset but rather to lead students to exercise their creative thinking in ways that permits them to begin practicing and accumulating the experience that further cultivates their ingenuity. A law student who memorizes material and takes multiple choice tests is likely to feel as if she is placed at the starting line of a marathon without having so much as jogged around the block during the previous three years.

Additionally, we can rethink the project of legal education along the lines of Llewellyn's more concrete proposals. Llewellyn recognized the centrality of rhetoric to law, and called for a liberal arts education in law to equip students with the training necessary to practice law successfully. But Llewellyn also was a hard-nosed realist who understood the institutional and historical realities of legal practice that could not be overcome by rhetorical theories. "A liberal art can be as liberal as you please, and it should be – *any* liberal art should be, including law. But one thing, I repeat, sits firm: any man who proposes to *practice* a liberal art must be *technically competent*." The lawyer must know more than dexterity with Socratic dialogue: she must understand the world and how it works; she must appreciate the depth and complexity of the problems facing individuals and entities that is only later summarized in a few pages of the description of the "facts" in an appellate opinion; she must appreciate that one of the "law-jobs" identified by Llewellyn is counseling one's client, and that this is different from serving as a legal mouthpiece; she must understand the background social mores against which people invoke formal legal doctrine, appreciating the meaning of a handshake or the filing of a lawsuit beyond their legally cognizable meaning; and the list continues.

Llewellyn was ahead of his time in arguing that legal education should eschew a wholly cognitive approach and instead embrace clinical education and post-graduate apprenticeships. Even when discussing the education that occurs within the four walls of the law school, he insisted on the need to develop more realistic teaching materials that deepened the superficial world of the appellate opinion by adding context, background and critical understanding. Legal education should break away from its exclusive focus on the conceptual analysis of cases, Llewellyn believed, and address more broadly the skills required of practicing lawyers.

He posits that the first goal of educational reform is to learn what lawyers actually do, thereby revealing the capacities that should be developed in law school.⁴⁷ Recognizing that many lawyers play important roles in political and civic life leads Llewellyn to cast the

⁴⁷ Llewellyn, *So-Called Legal Education*, *supra* note 27, at 653-56.

question broadly, asking “For Decent politics, what training do our law schools offer?”⁴⁸ Even those who devote their full professional life to practicing law do far more than apply settled rules: “*Not rules, but doing, is what we seek to train men for.*”⁴⁹ After the first year of Socratic dialogue about case law, Llewellyn urged that coursework should involve detailed examinations of legal problems in their full complexity, even at the cost of not covering the ever-expanding universe of legal doctrine. Class materials should bring together rich and diverse materials for assessment and debate, guided by Llewellyn’s emphatic rule: “*better less, with real understanding, than more of the ununderstood . . .* The upshot seems to be that, within our [three year] time-limitation, we either integrate the background of social and economic fact and policy, course by course, or fail of our job.”⁵⁰

As with Vico, contemporary scholars have rediscovered Llewellyn’s message and seek to revive this thinking with a “new legal realism.”⁵¹ The original realists had focused on a realistic approach to appellate case law, showing that the deductive model described in law school classrooms did not match with reality. Just as Llewellyn looked beyond caselaw, scholars of new legal realism seek to prepare students for the complex social world they will inhabit as legal professionals.⁵² These initiatives promise to revive Llewellyn’s insight into

⁴⁸ *Id.* at 656.

⁴⁹ *Id.* at 654.

⁵⁰ *Id.* at 671. At the end of his career, Llewellyn was sounding the same theme:

To achieve the values of policy discussion in a modern context, the student needs enough information about the particular rule under inquiry so that he can think instead of merely palaver or emote. Off-the-cuff, bald of information, is not policy-discussion, it is vapping. . . . This inescapably results in cutting, relentless cutting, of the doctrinal material covered. It means highly intensified treatment of a vastly smaller body of rules. Cut down thus on scope of the material, and your class-hours do indeed suffice to do the job of technical training, they suffice also to enrich it with exploration of meaning, they suffice to go on into the arts of policy-evaluation, of imagining curative measures, and of documentary and legislative drafting: all merging in the pursuit of a true liberal art.

Llewellyn, *Liberal Art*, *supra* note 31, at 385. As Llewellyn wryly reminds us, “I have never heard that Socrates was seriously worried over ‘coverage in class.’” *Id.* at 387.

⁵¹ The “New Legal Realism” effort began with a conference at the University of Wisconsin in 2004 dedicated to extending the “law and society” thesis that legal studies should be grounded in empirical reality rather than just conceptual rigor. Stewart Macaulay describes a two-pronged research agenda: describing “law in action” (how law really works on the ground) and “living law” (social constraints in addition to legal prescription). Stewart Macaulay, “The New Versus the Old Legal Realism: ‘Things Ain’t What They Used to Be’,” 2005 Wisc. L. Rev. 365, 385-86.

⁵² The Foreword to the Wisconsin symposium provides a detailed description of the need to rethink legal education as part of the new legal realism.

What, then, would a new legal realist approach to teaching look like? Ultimately it implies a call for sociolegal scholars to take the everyday practice of law seriously, and for legal education to take seriously the fact that lawyers need to be able to systematically analyze the real world in which they operate. Legal doctrine as reflected in statutes and case

the need for radical reforms of legal education.

The adherents of the new legal realism acknowledge that focusing on the “empirical reality” of law and legal practice has the potential to devolve into a reductionist empiricism.⁵³ This is where Llewellyn’s legacy can prove most helpful. Llewellyn’s realism called for the rejection of conceptual abstraction and the recovery of “reality,” but he recognized that the reality of legal practice is a web of interlocking discourses rather than a schema that could be described and then mastered. He was far more pragmatic in outlook than many of his fellow realists – who tended to place too much faith in the power of sociology, psychology and economics – and he rejected the stereotypical realist view that law should be subsumed into the social science departments of research universities.⁵⁴

In short, he favoured a commonsense strategy for research, based on a realistic appraisal of the obstacles in the way of quick advance, such as the cost, the lack of glamour in much of the work, and the shortage of personnel with appropriate training. . . . [His] was a pragmatic and sensible approach which

law is essential to lawyering and must be at the core of what is taught in law school. But, in teaching these materials, there is a tendency to treat law as a closed, logical system; students are often essentially taught – if only by implication – to set aside their understanding of the real world as they learn to “think like a lawyer.”

A new legal realist approach to legal education would agree that the central focus of legal education should be rigorous, analytic thinking, but would broaden what is included in the substance of that analysis – not because it is interesting or ‘enriching,’ but because it is core to the practice of law. It would merge theory and practice, teaching students to think rigorously and systematically about the problems and situations they will encounter in the practice of law. Traditional legal material is necessary but not sufficient for this project. Decades of sociolegal scholarship have established that law is a social institution that does not operate in a vacuum. Law is an open system, legal rules are not self-enforcing, and informal processes often carry the day; thus, to practice law effectively, lawyers combine their understanding of the law with their understanding of the real world.

. . . A new legal realist approach to legal education would take seriously the fact that lawyers are continually engaged in what amount to mini research projects; they take in data about the world around them, both experientially and from the reports of other people, and process those data to come up with ideas about how things work and what consequences flow from what actions.

Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse & David Wilkins, *Foreword: Is it Time for a New Legal Realism?*, 2005 WISC. L. REV. 335, 359-60.

⁵³ See Macaulay, *supra* note 51, at 395-96; Stewart Macaulay, “Contracts, New legal Realism, and Improving the Navigation of The Yellow Submarine,” 80 Tulane L. Rev. 1161, 1189 (2006).

⁵⁴ Llewellyn, *supra* note 36, at 375-94; Michael Ansaldi, *The German Llewellyn*, 58 BROOKLYN L. REV. 705, 711 (1992).

could form the basis for a rounded strategy for developing the subject, giving due regard both to the importance of theory and to likely practical difficulties.⁵⁵

But simply accepting a chastened view of empirical studies is insufficient. Llewellyn had made this point against some of his fellow realists, but he understood that deeper questions were implicated and made a more far-reaching philosophical point.

Dennis Patterson suggests that the substance of Llewellyn's philosophical views anticipated Wittgenstein's later work: Llewellyn firmly believed that philosophy leaves legal practice as it is, but that nevertheless there is important work to be done within the practice.⁵⁶

Like Wittgenstein, Llewellyn believed that we can never escape the realm of linguistic understanding. What this means for the critique of law is that the ground of critique must be internal to legal practice itself. The impossibility of transcending the (linguistic) limits of the practice and reaching a point outside the practice from which to critique it leaves only those within the practice as sources – and evaluators – of criticism.⁵⁷

It is precisely this philosophical disposition that brought Llewellyn to the rhetorical tradition and aligns his work with the message of Vico's oration. We must attend to the reality of law and its social setting, and social scientific inquiry is a necessary part of this endeavor; however, the "reality" of law can never be captured solely by empirical measurement any more than by logical-deductive analysis.

4. Conclusion

The instrumental consciousness forged by contemporary legal practice will assert itself with a vengeance against this article: "What is the solution?," and even more urgently, "What, exactly, is the problem?" "Legal education is designed to prepare students to be lawyers, not philosophers or rhetoricians," many might argue. This response demonstrates the problem that this article seeks to engage.

⁵⁵ William Twining, *Karl Llewellyn and the Realist Movement 196* (Norman: Univ. of Oklahoma Press, 1985) (1973). In light of the tremendous strides made by the social sciences in the intervening years, Twining does ask whether Llewellyn's cautious approach had, by the end of his career, become "complacent and unambitious in relation to the possibilities and the needs." *Ibid.*

⁵⁶ Patterson, *supra* note 35, at 577-79.

⁵⁷ *Ibid.* at 599-600.

Legal education must expand its scope not because it answers an instrumental need, but because such an expansion will undermine the instrumental ideology that pervades contemporary legal practice. An expansion of scope in this respect means only to embrace the full complexity of the practices that are reduced to caricatures of formal reasoning and deductive logic that everyone recognizes hold no explanatory power or normative power. Maurice Merleau-Ponty's account of how we encounter the world generally rings especially true for the experience of participating in legal practice. "The world is not what I think, but what I live through. I am open to the world. I have no doubt that I am in communication with it, but I do not possess it; it is inexhaustible."⁵⁸ We cannot grasp legal reality and then dispense it to students in carefully measured doses. Law is one modality of participating in social reality, and that participation is complex and dynamic. Legal education should begin to initiate students into this reality with a measure of self-understanding and self-criticism rather than half-heartedly acknowledging the implausibility of the standard accounts of legal reasoning but then reinscribing them every day in the classroom.

Ironically, by escaping from the narrow and artificial conception of legal education fostered by an instrumental view of the law we will find that this new understanding better serves students in their goal to be effective practitioners. Llewellyn's call for legal education as a liberal art is similar to an undergraduate liberal arts education: advocates tout it as being intrinsically non-instrumental but then also claim that students are better prepared to deal with the world in all its complexities – as a citizen, economic agent, and member of society – as a result of their education. Vico's rhetorical philosophy and Llewellyn's rhetorical conception of law and legal education point the way toward a re-orientation of legal education and a re-conceptualization legal practice that revive elements of ancient wisdom while also boldly addressing the needs of contemporary society. By following this path, legal education can avoid failing its students.

⁵⁸ Maurice Merleau-Ponty, *Phenomenology of Perception* xvi-xvii (Colin Smith trans.) (London: Routledge & Kegan Paul, 1962).