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Sublime Jurisprudence: On the Ethical Education of the Legal Imagination in Our Time Symposium: Recalling Vico's Lament: The Role of Prudence and Rhetoric in Law and Legal Education

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SUBLIME JURISPRUDENCE: ON THE ETHICAL EDUCATION OF THE LEGAL IMAGINATION IN OUR TIME

RICHARD K. SHERWIN*

Our chief fault is that we disregard that part of ethics which treats of human character, of its dispositions, its passions, and of the manner of adjusting these factors to public life and eloquence.

—Giambattista Vico¹

[T]he very qualities that give our human longings for sexual and intellectual joy their distinctive shape also condition the pursuit of these ecstatic states on a world of stabilizing institutions. This world provides a guard against the destructive power of the first pursuit and the possibility of collaboration and continuity in the second. Without the conventions of civilized life, our longing for sexual fulfillment would destroy us and our desire for knowledge could never take root. Together these conventions comprise the world of law and culture, whose existence is necessary to the survival of our deepest longings in their distinctive human form . . .

—Anthony Kronman²

Sublimation (elevation to the sublime) is education itself.

—Michel Deguy³

Giambattista Vico was born into a hard time for a rhetorician. In the latter half of the seventeenth century, Europe was only just emerging from a long and catastrophic war fueled by religious passions. The incompatibility of Protestant and Catholic beliefs made all too plain the elusiveness of tolerance and pluralism.⁴ The times called for shared truths about which people from diverse cultural backgrounds could be certain as well as opinions about which they could reasonably disagree. In this respect, Descartes was a man of his times. Through reason he would think his way beyond the

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1. GIAMBATTISTA VICO, *ON THE STUDY METHODS OF OUR TIME* 33 (Elio Gianturco trans., Cornell Univ. Press 1990) (1709) [hereinafter *STUDY METHODS*].

2. Anthony T. Kronman, *Rhetoric*, 67 U. CIN. L. REV. 677, 702–03 (1999).

3. Michel Deguy, *The Discourse of Exaltation: Contribution to a Rereading of Pseudo-Longinus*, in *OF THE SUBLIME: PRESENCE IN QUESTION* 5, 16 (Jeffrey S. Librett trans. 1993).

4. See STEPHEN TOULMIN, *COSMOPOLIS: THE HIDDEN AGENDA OF MODERNITY* 16–17 (Univ. of Chicago Press 1992) (1990).

theological and political crises that threatened to engulf civil society. Descartes' philosophy posited a foundation of putatively timeless, abstract concepts. No less significantly, he claimed to have disentangled thought from emotion and irrational (deceitful) carnal desires. By constructing a geometricized space in which the search for knowledge would proceed, Descartes hoped to minimize the role of subjective participation.⁵ From this vantage, the "disembodied eye" could behold the world in an eternal moment of disclosed presence.⁶ In short, Descartes' incorporation of Newtonian optics simultaneously extricated reason from the carnal body, with its erotic/affective "distortions," and from the no less deceitful entanglements of baroque visuality.⁷ Seventeenth-century baroque culture, not unlike today's digital visual culture, projected an acute awareness of the eye's creation of form, on the one hand, and form's contingent, constructed aspect on the other. Baroque art produced a phantasmagoria of endlessly shifting shapes and patterns. It was steeped in self-reflexive illusion: a hyper-awareness of illusion fueling illusion. Little wonder that the baroque tropes of mirroring and endless fragmentation in a labyrinth of form were so central to this aesthetic sensibility. In an effort to free the mind from the tricks and conjurations of baroque enchantment, and the epistemological uncertainties that they engendered, Cartesian rationality posited an objective optical order putatively based on timeless and placeless geometrical principles.⁸

Modernity was born in the forge of political and epistemological crisis. On the heels of internecine religious war, and in the face of the endlessly paradoxical deceptions and contingencies of baroque visual representation, Descartes and his contemporaries acted on the deep belief that the quest for certainty would require a clean break with medieval principles of visuality and the vagaries of the rhetorical tradition.⁹ The urgent need for a paradigm shift in conceptualizing reliable knowledge, and in the

5. See, e.g., ALLEN S. WEISS, *MIRRORS OF INFINITY* 33 (Princeton Architectural Press 1995) (1992) ("Space, for Descartes, is a projection of thought—idealized, homogeneous, isotropic, quantifiable, clear, unambiguous, beyond all point of view—where every viewpoint can be deduced or abstracted from the universal position of God, for whom all viewpoints are instantaneously accessible."); see also *id.* at 65 ("In the Cartesian quest for a *mathesis universalis*, both theology and mathematics proper are subsumed under the metaphysical position of an axiomatic rationality.").

6. MARTIN JAY, *DOWNCAST EYES: THE DENIGRATION OF VISION IN TWENTIETH-CENTURY FRENCH THOUGHT* 81 (1993).

7. Hal Foster, *Preface to VISION AND VISUALITY*, at ix (Hal Foster ed., 1988) ("Although vision suggests sight as a physical operation, and visuality sight as a social fact, the two are not opposed as nature to culture: vision is social and historical too, and visuality involves the body and the psyche.").

8. JAY, *supra* note 6, at 78–79 (describing Descartes' assumption of "a natural geometry of the mind" which he assumed was congruent with the external world).

9. See generally PETER GOODRICH, *OEDIPUS LEX* 56–63 (1995) (describing the "vehemence and passion of the antirrhetic" and the war against images).

method for attaining it, had been pressing for some time. During the late sixteenth and early seventeenth centuries, baroque culture struggled with a growing epistemological crisis, namely the breakdown of the Aristotelian “correspondence theory” of visibility. As advanced by medieval philosophy, the Aristotelian theory posited the flow of “species” from the observing eye to the object observed, thus linking the observer and the observed.¹⁰ This theory of knowledge faltered in the face of baroque perspective and the manifest illusions and optical deceits that it displayed. The old optical regime simply could not account for perspectival artifice and the deliberate manipulation of optical illusions.¹¹

10. See, e.g., Ivan Illich, *Guarding the Eye in the Age of Show* 7–13 (Penn. State Univ. Sci., Tech. & Society Stud. Working Paper, Paper No. 4, 1994), available at http://www.davidtinapple.com/illich/2001_guarding_the_eye.PDF (2001 edition) (“The eye is no longer the gate through which things enter the soul, but the instrument by which images are imprinted. . . . In the classical regime, the gaze is experienced as a trans-ocular organ. In this scopic epoch the gaze radiates from the pupil to embrace an object, to fuse with it, so that the eye is dyed its colors.”). Illich also notes historical references to the eyes’ “rays” such as the French “*jeter un coup d’oeil*” and the Greek idea of “*psycho podia*”—“the limbs of the soul.” *Id.* at 15–16.

11. The self-reflexive illusoriness within baroque painting culminates in anamorphic art. The anamorphic image remains coded—concealed in an indecipherably blurred shape which only resolves into a coherent image from a particular point of view. Perspective literally makes the image appear—or disappear. This optical illusion is paradigmatically represented in Holbein’s painting, *The Ambassadors*:



Here, overt symbols of worldly wealth, wisdom, and knowledge in the painting are inverted when, from a particular vantage, an otherwise blurred image comes into view: a skull, symbol of the vanity of all worldly things in man’s finite and fleeting existence.



This exercise of visual power was also felt in the theological and political domains at the time. For example, the counter-Reformation’s ceremonial conjurations of conjoined worldly and Papal power, manifest through mass visual spectacles, as well as other displays of public relations in behalf of Church and state, testified to the power of the visual image to awe and thereby captivate the public’s imagination and belief. See Richard K. Sherwin, *Law, Metaphysics, and the New Iconoclasm*, in 11

Descartes' method for eradicating the problem of uncertainty was to cut it off at the source: by divorcing mind from body (the origin of deceitful sensation) and by breaking with the Aristotelian and medieval belief in a "natural" connection between reality and representation. Descartes accomplished this in a single stroke: by shifting away from images to signs. Unlike "species," signs are not images caused by objects. Signs are culturally-constructed conventions for truth. Semiotics thus comes to supplant the medieval correspondence theory of representational truth.¹² Cartesian epistemology shifts attention from images to words, from the objective eye to semiotic interpretation. Signs have no direct correspondence with what caused them. Signs signify. They stand for a word. This is not a matter of sense impression, as with the flow of species. In short, Cartesian modernity subordinates *physis/themis* (nature and natural law) to *nomos* (law posited as a cognitive and cultural interpretation or convention). The classical and medieval link to the "natural" order has been broken, and the modern disenchantment of nature has begun. Truth has now become the offspring of artificial linguistic conventions. The sign, on this account, is but an arbitrary association to an object or event rather than a natural resemblance.

In the same stroke the deceit manifest in baroque representations and the anxiety associated with irreconcilable claims to privileged truth—either iconoclastically expressed (as in the Protestant eradication of sensate idols) or ceremonially enacted (as in the visual icons, rituals, and spectacles of the Catholic Church and its patron states whose legitimacy remained tied to Papal authority)—lost their sting. Rather than resembling the exterior world, sensations and perceptions were now deemed to exist in order to "inform the mind of what is beneficial or harmful for the composite of which the mind is a part."¹³ To this extent and for this purpose, sensations and perceptions may be discerned by the intervening intellect as "clear and distinct."¹⁴ Resemblance (the truth of representation as a material correspondence between observer and observed) has now fallen by the wayside. Perception has become a matter of conventional mechanics. In the Carte-

LAW TEXT CULTURE 70–105 (Andrew T. Kenyon & Peter D. Rush eds., 2007). See generally JURGIS BALTRUŠAITIS, ANAMORPHIC ART (W.J. Strachan trans., Harry N. Abrams, Inc. 1977) (1969).

12. See STUART CLARK, VANITIES OF THE EYE 336 (2007) ("For sense perceptions to inform the new natural knowledge, they had to be seen as the *signs*, not the images (*species*), of natural events—caused by them but not picturing them or having any straightforward correspondence with them, and standing in relation to them 'as the conventional sign for a word stands for the word, or as words themselves may signify objects.'").

13. *Id.* at 338.

14. *Id.* Notably, for Descartes "clear and distinct" served as the prime criterion for intellectual certainty. See RENE DESCARTES, MEDITATIONS ON FIRST PHILOSOPHY 44 (Laurence J. Lafleur trans., Bobbs-Merrill Co. 2d rev. ed. 1960) (1641).

sian account, perceiving produces a mental effect which the intellect interprets as “color,” “taste,” “sound,” “smell,” and “touch.” What the rational mind knows of the exterior world is based upon the effects of physical impacts upon the perceptual apparatus. Words are conventions that “bear no resemblance to the things they signify, and yet they make us think of these things.”¹⁵ In sum, according to Cartesian epistemology, meaning arises in the mind in the company of signs—not of things or sensations. Meaning is the byproduct of conventional, which is to say, cognitive or cultural symbolic practices—not nature, and certainly not the body. Whether it is an object in the natural world or an emotion or feeling registered by the body’s neurological system, meaning requires the intervention of intellect for the purpose of rendering an interpretation.¹⁶ As Descartes succinctly put it, “it is the soul which sees . . . and not the eye.”¹⁷ An event involving the eye is simply grist for the intellectual process of assigning a meaning in the company of signs. The mirror of nature, as true correspondence, has been shattered.¹⁸

The ensuing Cartesian dualism posits an unbridgeable gulf between the source of perception (the body’s acquisition of raw data from the world) and cognition (the mind’s construction of meaning out of that data). This philosophical move away from the correspondence theory of visuality contributed to a concomitant shift to positivism and nominalism, as Machiavelli and Hobbes, among others, would make clear.¹⁹ If meaning is a function of mind, mind (not nature) can also generate standards of “correctness” by which to assess a given interpretation of perception. Utilitarianism is one such cognitive template. On this analysis, we measure the correctness of perception in accordance with a behavioral model that teaches the practical lessons of seeking pleasure and avoiding pain.²⁰ Knowledge may require experience to set it in motion, as Kant came to realize, but knowledge remains irreducible to experience. This insight is a hallmark of modernity.²¹

15. CLARK, *supra* note 12, at 339 (quoting Descartes).

16. *Id.* at 342.

17. *Id.* (quoting Descartes).

18. *Cf.* RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 136 (2d corr. prtg. 1980) (“Descartes’ invention of the mind—his coalescence of beliefs and sensations into Lockean ideas—gave philosophers new ground to stand on.”).

19. *See* CLARK, *supra* note 12, at 344–46.

20. *Id.* at 343.

21. David Hume’s radical empiricism, and subsequently the deconstructive force of *différance* in the work of Jacques Derrida destabilize early modern Cartesian categories of knowledge in the face of an inconceivable, unknowable, and unrepresentable reality. *See, e.g.,* JACQUES DERRIDA, *DISSEMINATION* 156–57 (Barbara Johnson trans., Univ. of Chicago Press 1981) (1972) (“As soon as it comes into being and into language, play *erases itself as such*. Just as writing must erase itself as such

The domain of ethics, as Hobbes and Machiavelli would show, had now become a matter of convention. Moral terms may be treated in exactly the same manner as color terms—they are mental constructs which do not directly pertain to real and objective properties in the external world. We call “good” that which gives us pleasure; “bad” is that which causes pain. Ethics is a form of optics. This is a notion to which we will return.

To recap: the world Vico inherited was an incipient modernity. Years of war and epistemological anxiety had prompted a concentrated effort from diverse intellectual quarters to steer a path between the Scylla of theological dogmatism and the Charybdis of baroque illusion and doubt. Scientific truth, through Descartes’ rational method, provided the means of charting that middle way. All signs are a matter of interpretation. Some interpretations are “clear and distinct” and thus certain. Others remain uncertain, and debatable. A basis for tolerance regarding religious and political belief thus emerges in the form of a semiotic, positivist model for seeking and recognizing certainty (i.e., scientifically knowable truth) amid those opinions about which reasonable people may differ.

Of course, there was a price to be paid—a price we are still paying—for the ensuing elevation of the scientific method (as a unitary approach to knowledge across the spectrum of intellectual disciplines) and the concomitant intellectual suppression of unruly emotions and the carnal body’s irrational desire. Traumatized by war and irreconcilable division, together with the anxiety that accompanies severe epistemological crisis (in this case, the desuetude of the Aristotelian and medieval correspondence theory of visuality), philosophers of the seventeenth century paved the way for the ongoing disenchantment of nature and language, and the subordination of poetics, rhetoric, and ethics to logic and calculative rationality. This effort would secularize politics and help to give rise to the modern nation-state. The immediate outcome was, without doubt, a boon to civilization at the time. Political and scientific progress provided a threshold for stability, civility, and the basis for material prosperity. The philosophical edifice of modernity and the political construction of the modern nation-state, to-

before truth, etc. The point is that there *is no as such* where writing or play are concerned. Having no essence, introducing difference as the condition for the presence of essence, opening up the possibility of the double, the copy, the imitation, the simulacrum—the game and the *graphē* are constantly disappearing as they go along. They cannot, in classical affirmation, be affirmed without being negated.”). As Ian Almond observes: “The place of *différance* in Derrida’s thought is important insofar as it is precisely that which makes *écriture* so uncontrollable, the elusive, never-quite-present force which forever unsettles the text, so that it in turn ‘differs from itself, defers itself, and writes itself as *différance*’.” IAN ALMOND, *SUFISM AND DECONSTRUCTION* 30 (2004) (quoting Derrida) (emphasis added); see also *id.* at 18 (“The Real, Whom no signifier can signify, Whom no sign can contain, immediately abandons any name or attribute which the philosophers attempt to nail to it, *in substantia*.”).

gether with its network of liberal rights and values, presupposed this cognitive shift toward the semiotic and the scientific. Yet, the seeds of fragmentation, alienation, and moral drift (Durkheim's "anomie") had been planted.²²

Vico's lament—the felt need to overcome a cultural repudiation of the wisdom and eloquence of the ancients—must be understood against this historical backdrop. Vico was tragically out of step with his time. His genius endowed him with a remarkably clear vision of where the rational method of Descartes must lead if it were to remain cut off from the human faculties of poetic imagination, ingenious invention, and prudent understanding. Indeed, these faculties were deemed by Vico to be the penultimate basis for generating and maintaining civil society. He believed that human nature (and the nature of the ethical in particular) are ill-suited to an exclusively scientific study, as if they could be understood the same way as material objects in the natural world. Vico understood that the intellectual agenda of modernity as promulgated by Descartes and his allies could not supplant the wisdom of the ancients. Science, for all its technological fruits, could never replicate the social and intellectual gifts provided by the poetic imagination, inventive ingenuity, and prudent understanding. Nor would Cartesian rationality change the unruly reality of human character and the dark vicissitudes of emotional conflict and deceit. The scientific method could only shunt these subjects to the intellectual sidelines or, more accurately, to the subterranean depths awaiting Marx's insights into "false consciousness" and Freud's profound decoding of the irrational symptoms of the unconscious.

Vico also understood that the Cartesian agenda for modernity did not change the need for rhetorical craftsmanship and the integration of wisdom and eloquence as the ancients and the Renaissance humanists conceived it. The art of politics, which ministers to the incessant turbulence and conflict that afflict human affairs, requires more than science to promote civility. As Vico wrote: "The soul must be enticed by corporeal images and impelled to love, for once it loves it is easily taught to believe. Once it believes and loves, the fire of passion must be infused into it so as to break its inertia and force it to *will*."²³ According to Vico, without a carefully cultivated art of eloquence, public life remains threatened with division and, if left unchecked, ultimately faces decay. The scientific method might produce subjective certainty, but it also introduces an ethos of solitude. The

22. On the subject of anomie, see generally EMILE DURKHEIM, *SUICIDE: A STUDY IN SOCIOLOGY* (John A. Spaulding & George Simpson trans., George Simpson ed., Free Press 1951) (1897).

23. *STUDY METHODS*, *supra* note 1, at 38.

behavioral template on which it relies employs a subjective measure of pleasure and pain that renders individuals incapable of civic life. Each acting "according to his own pleasure or advantage . . . recalls them from civil community to the state of solitude."²⁴ An education steeped in critical analysis, dominated by the unitary, rationalist claims of the Cartesian method, without training across a more diverse range of scholarly disciplines (history, philology, poetics, philosophy, rhetoric) leaves us cut off from the roots of wisdom and the means to convey it. Rhetorically disarmed, drained of passion, belief, and outward (other-) directed care, we are left without the necessary means to curtail "the ferocity of fools, to turn them from error through prudence, and to bring them benefit through virtue."²⁵

Without the ability to prudently manage the vicissitudes of fortune and misfortune in civil life, without the capacity to recognize and counter "simulation and dissimulation," the ever shifting conditions that serve as the basis for political, social, and historical reflectivity, human society remains vulnerable, sorely threatened by unruly impulses and the deceits of power, greed, and political ambition. As Michael Mooney observes, distilling the essential insight of the rhetorical tradition from Isocrates to Cicero to Chaïm Perelman and James Boyd White in our own time: "Eloquence without knowledge is hollow and empty; but knowledge without eloquence is mute and powerless, incapable of effect in men's lives."²⁶ As Cicero, Vico's model rhetor, concludes (alluding to the followers of Epicurus):

[L]et us dismiss these masters without comment, as they are excellent fellows satisfied in the belief in their own happiness; only let us warn them to keep to themselves as a holy secret, though it may be extremely true, their doctrine that it is not the business of a wise man to take part in politics—for if they convince us and all our best men of the truth of this, they themselves will not be able to live the life of leisure which is their ideal.²⁷

Uneasily lodged between reason and desire, jurisprudence maps out the basis for a sustainable social life. Neither the sublime gifts of freedom nor the prescriptions of law can flourish absent the scaffolding provided by

24. MICHAEL MOONEY, *VICO IN THE TRADITION OF RHETORIC* 101 (1985) (quoting Vico); see also *infra* note 59; JACQUES DERRIDA, *THE GIFT OF DEATH* 36 (David Wills trans., Univ. of Chicago Press 1996) (1992) ("Technological civilization only produces a heightening or recrudescence of the orgiastic, with the familiar effects of aestheticism and individualism that attend it, to the extent that it also produces boredom, for it 'levels' or neutralizes the mysterious or irreplaceable uniqueness of the responsible self.").

25. MOONEY, *supra* note 24, at 113 (quoting Vico).

26. *Id.* at 10 (quoting Cicero).

27. *Id.*

civic life and the social institutions that sustain it.²⁸ It is in view of this ultimate prize, in the service of human flourishing, that Vico stresses the need for educating the youth not simply or even preliminarily in the dry methods of Cartesian analysis and critique, but rather in the cultivation of poetic imagination, inventive ingenuity, and prudent understanding—the progenitors of wisdom and eloquence combined.²⁹ On this view, rather than emphasizing (as the Cartesian method does) the importance of generality and abstraction, the qualities of mind Vico is most anxious to cultivate include creativity, memory, perception (*ingegno*, or ingenuity) and prudent, context-based understanding. These capacities, Vico writes, are “all most necessary for the culture of the best humanity: [the imagination] for the art of painting, sculpture, architecture, music, poetry, and eloquence; [memory] for learning languages and history; [ingenuity] for inventions; and [understanding] for prudence.”³⁰

Vico’s sense of urgency regarding what is needed for “the culture of the best humanity” remains relevant to this day. However, it is also the case that the cultural context has shifted significantly since Vico originally recorded these enduring insights. To be sure, the trappings of an excessively Cartesian epistemology have not yet been purged from our intellectual life, or self-reflexively balanced by the wisdom of the ancients as reflected in the rhetorical tradition. Echoing Vico’s complaint three hundred years ago, our educational methods today continue to pay inadequate attention to ethics.³¹ This is evident in the social sciences and in contemporary jurisprudence in particular, where the empirical aspirations of rational choice theory, and the naïvely thin descriptions that typify the behavioral assumptions upon which economic theory relies, continue to exert significant intellectual influence. The role of chance and uncertainty and the vicissitudes of irrational desire, passion, and conflicting emotions remain inadequately represented and under-theorized (one might even say, unduly repressed) within a broad swath of the social sciences today, and in the influential law and economics movement in particular.³²

At the same time, it bears noting that the sciences, in league with the demands of the marketplace, have expanded the potency of rhetoric as

28. See Kronman, *supra* note 2, at 708 (observing that the “otherworldly satisfactions of philosophy and love . . . can be sustained only in a frame of worldly institutions”).

29. MOONEY, *supra* note 24, at 11–12.

30. *Id.* at 128 (quoting Vico).

31. See STUDY METHODS, *supra* note 1.

32. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972). But see ROMAN FRYDMAN & MICHAEL D. GOLDBERG, *IMPERFECT KNOWLEDGE ECONOMICS* (2007).

never before.³³ Not unlike the baroque enchantments that were enthusiastically enlisted by state authorities during the seventeenth century to shore up the political power of both Church and state,³⁴ today the “engineering of consent”³⁵ has attained unprecedented success—not only in advertising,³⁶ but also in politics,³⁷ religion,³⁸ and to an increasing extent law.³⁹ With respect to the latter, the proliferation of new visual technologies has ensured that the codes and content of visual storytelling in contemporary mass culture, from television dramas and news shows to advertisements, feature films, and video games, have infiltrated the courtroom.⁴⁰ Electronic screens are commonplace in legal practice today, and the cultural norms of contemporary visual storytelling help to shape and inform the way demonstrative evidence and argumentation are presented inside the courtroom. There, as elsewhere, life imitates the art of narrative construction. Fact and fiction, and information and entertainment, interpenetrate in the production of representational truth.

33. The natural sciences have also recently been exploring the possibility of universal (trans-cultural, or innate, biologically-rooted) patterns in moral thinking, what Steven Pinker has referred to as “the moral instinct.” See Steven Pinker, *The Moral Instinct*, N.Y. TIMES MAG., Jan. 13, 2008, at 32, 36 (“The idea that the moral sense is an innate part of human nature is not far-fetched. . . . Though no one has identified genes for morality, there is circumstantial evidence they exist.”). Pinker goes on to suggest that there are five spheres of universal morality: people everywhere think it’s bad to *harm* others; have a sense of *fairness*; share a sense that favors should be reciprocated, benefactors rewarded, and cheaters punished; they value loyalty to a group and conformity to its norms (*community*); they believe it is right to defer to legitimate *authorities*; and they exalt *purity*, cleanliness, and sanctity, while loathing defilement, contamination, and carnality.

34. See, e.g., JOSÉ ANTONIO MARAVALL, *CULTURE OF THE BAROQUE: ANALYSIS OF A HISTORICAL STRUCTURE* (Terry Cochran trans., Univ. of Minnesota Press 1986) (1975).

35. The phrase is attributed to Edward L. Bernays, widely recognized as the founder of the American public relations movement in the first half of the twentieth century as well as the architect of modern propaganda techniques. Bernays, the nephew of Sigmund Freud, integrated his uncle’s writings on the unconscious with insights into mass psychology and corporate and political persuasion. See STUART EWEN, *PR! A SOCIAL HISTORY OF SPIN* 6, 22 (1996).

36. See, e.g., *id.*

37. See, e.g., JOE MCGINNISS, *THE SELLING OF THE PRESIDENT* (1969).

38. See Jacques Derrida, *Faith and Knowledge: The Two Sources of ‘Religion’ at the Limits of Reason Alone*, in RELIGION 1, 46 (Jacques Derrida & Gianni Vattimo eds., Stanford Univ. Press 1998) (1996) (“Religion today allies itself with tele-technoscience, to which it reacts with all its forces. It is, on the one hand, globalization; it produces, weds, exploits the capital and knowledge of tele-mediatization; neither the trips and global spectacularizing of the Pope, nor the interstate dimensions of the ‘Rushdie affair’ [referring to the *fatwa* issued against Salmon Rushdie for his allegedly anti-Islamic novel], nor planetary terrorism would otherwise be possible . . .”).

39. See, e.g., RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* (2000).

40. See, e.g., Richard K. Sherwin, Neal Feigenson & Christina Spiescl, *Law in the Digital Age: How Visual Communication Technologies Are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. SCI. & TECH. L. 227 (2006).

By the turn of the twenty-first century, the so-called narrative or rhetorical turn in the social sciences⁴¹ and law⁴² had become a commonplace. Its successor, what W.J.T. Mitchell calls the “pictorial turn,” is now in the ascendant in the social sciences⁴³ as well as in legal scholarship.⁴⁴ In this respect, the academy is striving to keep up with the transformative impact of new mass communication technologies on the cultural, social, political, and legal construction of meaning. Law’s migration to the screen is part and parcel of the increasingly robust interdisciplinary field of visual semiotics.

The rhetorical shift toward the visual has also led to new epistemological anxieties.⁴⁵ Many participants in and observers of the legal system in particular continue to experience uneasiness with the semioticians’ wisdom that “it’s all signs.”⁴⁶ Their fear seems to be that embracing this constructivist insight would undercut confidence in the capacity of legal proceedings (paradigmatically, trials) to yield provable truths about the world.⁴⁷ An unbridgeable gap between what legal decision makers believe they need to know and what, on reflection, they seem able to know is for many a cause for real concern. Within this late modern (or postmodern) mindset, there is a heightened sense of inhabiting a universe of representations that seems to turn the urge for real-world knowledge back upon itself, as if in an endless regression, like some spectacular baroque tapestry or infinite arabesque endlessly folding in upon itself.⁴⁸

41. See, e.g., PAULINE MARIE ROSENAU, *POST-MODERNISM AND THE SOCIAL SCIENCES* (1992); Richard K. Sherwin, *Lawyering Theory: An Overview*, 37 N.Y.L. SCH. L. REV. 9 (1992).

42. See, e.g., GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* (2000); JAMES B. WHITE, *THE LEGAL IMAGINATION* (1973); *Lawyering Theory Symposium: Thinking Through the Legal Culture*, 37 N.Y.L. SCH. L. REV. 1 (1992).

43. See, e.g., W.J.T. MITCHELL, *PICTURE THEORY* 11–34 (1994).

44. Sherwin, Feigenson & Spiesel, *supra* note 40, at 227–32.

45. The material in the following two paragraphs draws from work with my co-authors in Sherwin, Feigenson & Spiesel, *supra* note 40.

46. See generally THOMAS A. SEBEOK, *SIGNS* (2d. ed. 2001).

47. See, for example, the “Received View” of trials in ROBERT P. BURNS, *A THEORY OF THE TRIAL* 10–33 (1999). See also Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985).

48. See Richard K. Sherwin, *Anti-Oedipus, Lynch: Initiatory Rites and the Ordeal of Justice*, in *LAW ON THE SCREEN* 106, 126 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2005) (“[L]ike arabesques endlessly improvising their monadic design, baroque ornamentation proliferated, dizzying, decentering, even nauseating in their spatial onslaught.”); see also GILLES DELEUZE, *THE FOLD 3* (Tom Conley trans., Univ. of Minnesota Press 1993) (1988) (“[T]he Baroque differentiates its folds in two ways, by moving along two infinities, as if infinity were composed of two stages or floors: the pleats of matter, and the folds in the soul.”); HEINRICH WÖLFFLIN, *RENAISSANCE AND BAROQUE* 34 (Kathrin Simon trans., Cornell Univ. Press 1964) (1961) (noting that the baroque seeks to stimulate the imagination through infinite figurations).

The notion that we live in a universe of endless representations is experienced by some not as a source of anxiety, but rather as an opportunity for freedom and self-realization. See, e.g., VILÉM

This vertiginous sense of a lack of grounding has intensified in the digital age. Digital technologies allow the pictures and words from which meanings are composed to be seamlessly modified and recombined in any fashion whatsoever, while the Internet allows practically anyone, anywhere, to disseminate meanings just about everywhere. The Cartesian insistence upon universal and objectivist foundations is being challenged by digital experience, which has helped to inspire an alternative model of knowledge and reality as a centerless and constantly morphing network of relations.⁴⁹

In short, contemporary cultural conditions offer a striking resemblance to the conditions to which Descartes and others of his generation were driven to respond. The disquieting deceptions of seventeenth century baroque art find their counterpart in contemporary neo-baroque deceptions of digital visuality, just as the early baroque political appeal to emotional manipulation through the proliferation of public visual displays and ceremonies find their contemporary counterpart in the engineering of consent and the art of spin through the visual power of mass communication such as television, film, and the Internet. There is, to be sure, a positive aspect to the rise of visual technologies in the representation of truth. Complex data can now obtain accurate, vivid, and readily accessible visual form on the screen. A new eloquence may be at hand as a concomitant to the new visual rhetoric

FLUSSER, *THE SHAPE OF THINGS* 65 (Anthony Mathews trans., Reaktion Books Ltd. 1999) (1993) ("What the cultural revolution now under way is all about is that we have gained the ability to set alternative worlds alongside the one taken by us as given."); ROBERT JAY LIFTON, *THE PROTEAN SELF* 1 (1993) ("We are becoming fluid and many-sided. Without quite realizing it, we have been evolving a sense of self appropriate to the restlessness and flux of our time."); see also *THE MATRIX* (Warner Studios 1999) (echoing the cyber-romantic credo that "anything is possible," we hear Neo, the film's main protagonist, announce the cyber-utopia that is to come: "I'm going to show these people what you don't want them to see. I'm going to show them a world without you, a world without rules and controls, without borders or boundaries, a world where anything is possible. Where we go from there is a choice I leave to you.").

49. See Richard Rorty, *Foreword* to GIANNI VATTIMO, *NIHILISM & EMANCIPATION: ETHICS, POLITICS, & LAW*, at xvii (Santiago Zabala ed., William McCuaig trans., Columbia Univ. Press 2004) (2003) ("[T]he Internet provides a model for things in general—thinking about the World Wide Web helps us to get away from Platonic essentialism, the quest for underlying natures, by helping us to see everything as a constantly changing network of relations."). In audio form this model may be best represented by "the Mix" (see, for example, PAUL D. MILLER, *RHYTHM SCIENCE* (2004)), and in visual form by the complex and ever-changing network of relations known as the World Wide Web. Of course, computer scientists and engineers who help make digital experience possible might share a different perspective. For them, cyberculture is enabled by technology that relies on mathematical and other scientific reasoning which may be regarded as a thoroughly Enlightenment (or Cartesian) enterprise. See, e.g., VILÉM FLUSSER, *TOWARDS A PHILOSOPHY OF PHOTOGRAPHY* 68 (Anthony Mathews trans., Reaktion Books 2000) (1983) ("[Apparatuses] are omniscient and omnipotent in their universes. For in these universes, a concept, an element of the program of the apparatus, is actually assigned to every point, every element of the universe.").

that is now helping to shape and inform contemporary culture.⁵⁰ However, we also confront new challenges created by unprecedented opportunities to visually and digitally reconstruct reality and bypass conscious reasoning. Activating subconscious meaning making processes through visual association, for example, may subvert deliberation and displace it with unconscious manipulation.⁵¹

The decision-making process of judges and lay jurors thus faces new hurdles, which may be effectively overcome through a concerted effort to provide citizens and professionals alike with adequate training in visual literacy—the self-reflexive art of constructing and construing (and of deconstructing and re-construing) visual rhetoric.⁵²

Notwithstanding the diminished, but still persisting, influence of the Cartesian mindset in the social sciences and in the legal theory and practices of our time (whether in the service of rational choice theory in the economic domain or irrational persuasion in the realm of marketing), we have also witnessed since the latter half of the twentieth century a powerful convergence of philosophical thought from diverse quarters that has significantly eroded the Cartesian foundations of modern thought. The work of Nietzsche, Heidegger, Gadamer, and Derrida in particular has done much to release the Western mind from the grip of the Cartesian meta-narrative of unchanging universal principles in conjunction with a dominant epistemological method deemed serviceable for all branches of knowledge. In the view of many social constructivists,⁵³ for example, the positivist model of scientific knowledge has increasingly given way to Nietzsche's model of rhetoric.⁵⁴ As Clifford Geertz put it, we live in webs

50. A neo-baroque world calls for a neo-baroque epistemology: "more indirect, distorted, inconclusive," as Latour puts it. BRUNO LATOUR, FROM REALPOLITIK TO DINGPOLITIK, OR HOW TO MAKE THINGS PUBLIC 20 (2005), available at <http://www.bruno-latour.fr/expositions/96-MTP-DING.pdf>; see also Bruno Latour, *What Is Iconoclasm? Or Is There a World Beyond the Image Wars?*, in ICONOCLASH: BEYOND THE IMAGE WARS IN SCIENCE, RELIGION, AND ART (Bruno Latour & Peter Weibel eds., 2002) [hereinafter Latour, *What Is Iconoclasm?*].

51. See, e.g., J. Anthony Blair, *The Possibility and Actuality of Visual Arguments*, 33 ARGUMENTATION & ADVOCACY 23, 23, 35–37 (1996); David S. Birdsell & Leo Groarke, *Toward A Theory of Visual Argument*, 33 ARGUMENTATION & ADVOCACY 1, 8 (1996); Neal Feigenson & Richard K. Sherwin, *Thinking Beyond the Shown: Implicit Inferences in Evidence and Argument*, 6 L., PROBABILITY & RISK 295 (2007). For examples of diverse forms of visual evidence and argument in current legal practice see the website of The Visual Persuasion Project (Richard K. Sherwin, Director) at New York Law School. Visual Persuasion Project Home, <http://www.nyls.edu/pages/2734.asp> (last visited Apr. 21, 2008).

52. See Richard K. Sherwin, *A Manifesto for Visual Legal Realism*, 40 LOY. L.A. L. REV. 710, 729–38 (2007).

53. The classic reference here is PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (Anchor Books 1967) (1966).

54. See, e.g., Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 213 (1979) (describing the "fundamental contradiction" of American legal culture as "that rela-

of meaning that are of our own making.⁵⁵ Every culture has its own way of imagining the real. No matter how deep you go, according to this view, it's constructions all the way down.

The erosion of Cartesian rationality in our time enhances the relevance of Vico's thought. Indeed, it is precisely the unraveling of the modernist mindset, along lines Vico presciently envisioned 300 years ago, that helps to account for his continued influence. The times we are living in today share much in common with the conditions that helped spawn the rational mindset in opposition to which Vico dedicated his intellectual life. Thirty years of slaughter in the name of religion preceded the establishment of the modern system of nation-states. That violent history bred a desperate need for epistemological certainty as well as a renewed basis for pluralism and tolerance. Descartes' epistemology, built upon a non-correspondence theory of cognitive interpretation of conventional signs, fit the bill. More recent "long wars" (against Communism in the twentieth century and against terror in the twenty-first) present a backdrop of chaos and violence comparable to the long religious wars of the seventeenth century. Thirty years of slaughter in the name of nationhood, enveloping the world in two catastrophic wars, made vivid the need for Europeans and Americans to reconceive the basis for pluralism and tolerance. Yet, as in Descartes' time, we remain afflicted by theologically-driven (as well as secular postmodern) responses to epistemological uncertainty on the one hand, and the putative deceptions of a culture industry fueled by mass marketing and the power of visual spectacle, on the other. We see this today in the rise of new religious orthodoxies across the theological spectrum and in the proliferation of the simulacrum—what Baudrillard has described as "substituting the signs of the real for the real"⁵⁶—a development that is uncannily reminiscent of the crisis of baroque visuality that Descartes and his contemporaries confronted over four centuries ago.

In the sixteenth and seventeenth centuries, Protestant iconoclasm repudiated the alleged deceptions and illusions of Catholic idols and ceremony.⁵⁷

tions with others are both necessary to and incompatible with our freedom"); and Pierre Schlag, Commentary, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1051 (2002) ("What I am after is the description of those recurrent forms that shape the creation, apprehension, and identity of law. What is at stake is an attempt to reveal the aesthetics within which American law is cast.").

55. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* 182, 232 (1983).

56. See, e.g., JEAN BAUDRILLARD, *SIMULACRA AND SIMULATION 2* (Sheila Faria Glaser trans., Univ. of Michigan Press 1994) (1981) ("It is a question of substituting the signs of the real for the real, that is to say of an operation of deterring every real process via its operational double, a programmatic, metastable, perfectly descriptive machine that offers all the signs of the real and short-circuits all its vicissitudes. Never again will the real have the chance to produce itself . . .").

57. See GOODRICH, *supra* note 9, at 51–63.

Today, Islamic fundamentalists repudiate competing religious idols, as witnessed by the Taliban smashing of the Bamiyan Buddhas in Afghanistan, while postmodern iconoclasts⁵⁸ and cultural critics⁵⁹ rail against the proliferation of simulacra and the reign in mass culture of images devoid of significance. In short, like those who lived in earlier baroque times, we too are obsessed with the endless proliferation of forms as mere projections, shadows of the real, dreams within dreams, digital “simulacra,” specters of virtual reality.

There is a discrete form of anxiety that comes with such radical contingency and de-centering fragmentation. It derives from our feared incapacity to hold onto meaning, to keep our sense of self and social meaning intact.⁶⁰ We can hear baroque anxiety whispering in our ear: What if beneath the surface of proliferating form, beneath the spectacle of production, there lies: Nothing? What if it is only a great shadow play, a collective dream?⁶¹ From Guy Debord’s *Society of the Spectacle*, to John Trow’s *Within the Context of No Context* and Jean Baudrillard’s popular writings on visual *simulacra*,⁶² which also played a role in the Wachowsky brothers’ influential neo-baroque film, *The Matrix* (1999), this repeated theme, that we are living in a dream world of illusory images—of simulacra resting on simulacra—attests to the double-edged potency of the image in our time. On the one hand, we understand that images help us to construct our world. But on the other hand, we wonder: Can images be trusted?⁶³ Must we break through the web of screen-based illusions in order to penetrate to the realm of the really real?

Descartes helped to overcome the epistemological and political crises of his time by shifting focus from the image to the sign. Today, however, the sign is in crisis, and a new epistemological paradigm is needed. As Stephen Toulmin has noted, converging conditions in culture, politics, philosophy, and technology have brought us close to our starting point at the

58. Sherwin, *supra* note 11, at 75–76.

59. See generally GUY DEBORD, *THE SOCIETY OF THE SPECTACLE* (Donald Nicholson-Smith trans., Zone Books 1995) (1967); JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* 387–89, 394 (John Wilkinson trans., Vintage Books 1964) (1954); NEIL POSTMAN, *AMUSING OURSELVES TO DEATH* 8 (1985); GEORGE W.S. TROW, *WITHIN THE CONTEXT OF NO CONTEXT* 43–51 (Atlantic Monthly Press 1997) (1981).

60. See, e.g., STANLEY ROSEN, *HERMENEUTICS AS POLITICS* 161 (Yale Univ. Press, 2d ed. 2003) (1987) (“As the scope of hermeneutics has expanded, then, the two original sources of meaning, God and man, have vanished, taking with them the cosmos or world and leaving us with nothing but our own garrulity . . .”).

61. See JEAN ROUSSET, *LA LITTÉRATURE DE L’ÂGE BAROQUE EN FRANCE* 150–54 (1954).

62. See *supra* notes 56–59.

63. See Latour, *What Is Iconoclasm?*, *supra* note 50.

dawn of modernity.⁶⁴ Today, the visual image has ramified its presence with renewed power, and the proliferation of images has increasingly unmoored the sign from a broadly agreed upon model for interpretive truth. As postmodern theory has shown, the signifier is no longer linked to the signified. In the digital era, which has given us the nearly infinite manipulability of the sign, it is signifiers all the way down. An anxiety of the eye, comparable to the one that greeted observers steeped in baroque culture, is now upon us.⁶⁵ In this respect, it is perhaps not amiss to characterize present cultural conditions as comparable to a new (digital) baroque era. The need for a renewed first philosophy to help us re-conceive the nature of, and the appropriate methods for, cultivating knowledge, particularly ethical knowledge, remains paramount.

It is against this backdrop of historical and cultural affinity with the conditions that gave rise to Vico's life-long search for an effective alternative to Cartesian rationality that we may assess anew Vico's lament. Untimely at its origin, Vico's invitation to renew our appreciation and cultivation of the ancient understanding of the integration of eloquence and wisdom in the rhetorical tradition could hardly be more urgent. As Stephen Toulmin has written, "since the 1960s, then, both philosophy and science are back in the intellectual postures of the last generation *before* Descartes."⁶⁶ Toulmin's agenda for our era carries strongly Vichian overtones: "The task is not to build new, more comprehensive systems of theory with universal and timeless relevance, but to limit the scope of even the best-framed theories, and fight the intellectual reductionism that became entrenched during the ascendancy of rationalism."⁶⁷ Toulmin, like Vico, seeks to dissociate us from the hierarchy and rigidity, the standardization and uniformity that the Cartesian model privileged, and to posit in its stead an "ecological perspective" that emphasizes "differentiation and diversity, equity and adaptability."⁶⁸ In short, Toulmin aspires to devise anew the grounds for pluralism and tolerance. It is the same agenda that Descartes and his contemporaries had in mind as they grappled with catastrophic religious wars and epistemological uncertainty. But now, gazing across a landscape that has shown us the consequences of the Cartesian model as it has played out from early to late modernity, that agenda warrants careful reassessment. In short, we have come full circle and the renewal of the

64. TOULMIN, *supra* note 4, at 167.

65. See generally Latour, *What Is Iconoclasm?*, *supra* note 50, at 14–37.

66. TOULMIN, *supra* note 4, at 168.

67. *Id.* at 193.

68. *Id.* at 194; STUDY METHODS, *supra* note 1, at 56 (referring to the "art of equity" achieved by Roman law).

impulse that gave birth to modernity, in the face of comparable epistemological crises, now calls for a comprehensive, rhetorical perspective that complements the rigidity, standardization, and uniformity that the Cartesian scientific method has wrought.

But what does it mean to call for the renewal of the ancient rhetorical ideal today? What are we to make in our own time of the integration of wisdom and eloquence that Vico championed three centuries ago? How are we to understand the qualities of mind—most notably, inventive ingenuity, poetic imagination, and prudent understanding—concerning which Vico was so insistent upon educating our youth? To meet this challenge I believe we must revisit Descartes' epistemological shift away from Aristotle's correspondence theory of representation in favor of semiotics. Descartes' move from the image to signs opened a seemingly unbridgeable gap between mind and body. Cut off from the natural world, the Cartesian mind-set subordinated truth (and justice) to rational categories devised by human intellect. By re-encountering Vico's crucial idea concerning the sublime, and closely associated notions of self-transcendence (*ek-sistence*)⁶⁹ and mimesis (*being-as*),⁷⁰ we may acquire renewed insight into the nature and methods of poetic imagination, ingenious invention, and prudent understanding. On this path of discovery we also may find the means of overcoming the Cartesian dualism engendered by disincarnating and denaturalizing the image.⁷¹ According to this post-Cartesian paradigm, sub-

69. See Deguy, *supra* note 3, at 8 (quoting LONGINUS, ON THE SUBLIME) ("[M]an's intentness on perceiving often everywhere goes out beyond the limits of what holds him in . . ."); Maurizio Ferraris, *The Meaning of Being as a Determinate Ontic Trace*, in RELIGION, *supra* note 38, at 170, 186 ("Metaphysics is the unconditioned in man, the obscure space made possible by his self-transcendent constitution."); Philippe Lacoue-Labarthe, *Sublime Truth*, in OF THE SUBLIME: PRESENCE IN QUESTION, *supra* note 3, at 71, 94 (describing Heidegger's evocation of the sensibility of the sublime: "for the more purely the work [of art] is itself transported into the openness of the being—an openness opened by itself—the more simply does it transport us . . .").

70. Lacoue-Labarthe, *supra* note 69, at 100 (describing mimesis as the condition of the possibility of knowledge); EMMANUEL LEVINAS, TOTALITY AND INFINITY 29 (Alphonso Lingis trans., Duquesne Univ. Press 1969) (1961) ("The aspiration to radical exteriority, thus called metaphysical, the respect for this metaphysical exteriority which, above all, we must 'let be,' constitutes truth."); MICHAEL TAUSSIG, MIMESIS AND ALTERITY, at xviii, 38, 40 (1993) (adopting Walter Benjamin's understanding of the mimetic faculty as "the compulsion to become the Other" and describing sentence as taking us "outside of ourselves" in the "instantaneous" and "mystical" flash which is the "perception of similarity").

71. Cf. DONALD PHILLIP VERENE, VICO'S SCIENCE OF IMAGINATION 33 (1981) ("Images or *universali fantastici* are not, in Vico's terms, simply concepts in poetic cloaks. The image is not to be understood in relation to the concept. The image is to be understood on its own terms."). In this sense, the *universali fantastici*, or "imaginative universals," are the products of poetic imagination. In its earliest form, the product of what Vico describes as the archaic mind, the imaginative universal is conceived by Vico as "immediately experienced forces of nature, such as Jove's presence as the thunderous sky." *Id.* at 71–72. The surreal poetry of Mallarmé, the abstract expressionist painting of Rothko, and the Vichian-inspired final work of Joyce may be viewed as late modern efforts to re-encounter and instantiate the archaic imaginative universal.

lime representation restores the body and the material world as a source of truth.⁷² Unlike the pre-modern model of correspondence, however, based on the Aristotelian notion of “species” linking observer to observed, sublime representation comes to be understood as the offspring of mimesis (the faculty of representation) conceived as the natural human proclivity to transcend self in the mode of *being-as* (an Other). The kind of truth that sublime representation presents depends upon the field in which it operates. In nature, it culminates in the aesthetic sublime (the beautiful); in human affairs, it culminates in the historical sublime (Providence, or the ideal patterns of history); and in the face of the Other who stands before us, it culminates in the ethical sublime (the good). That at any rate is the claim that I shall seek to make persuasive in what follows.

For Vico the sublime marks the limit of the empirical.⁷³ It is a break with the known in the face of the unknown. Against Descartes’ rational enlightenment (embodied in a universal scientific method) and its naïve elevation of totalizing reason, Vico embraces the dark folds of history and the vicissitudes of the political (with all its chaotic passions and dissimulations). He is willing to confront the thick shadows of night, the tumult of the body, and its fits of passion. In short, he accepts the baroque world of shadows and ruin, of fragments and violence, of pain and death, the very field upon which law must operate. For him, the disembodied Cartesian sign will not suffice to ease the perturbations of violent conflict. The sublime, the wondrous, the astonishing are not so much a matter of baroque effects (i.e., public spectacles designed to shock and awe an audience and in so doing induce submission); rather, the sublime is that which “ruptures the uniformity of an undifferentiated world because it marks the perception of an alterity transcending one’s state.”⁷⁴ Wonder, then, is the Vichian category under which the poetic and the religious belong.⁷⁵ It fragments the rationalized totality of one’s world. The sublime refers to the power of

72. The primordial genesis of metaphor and fable through the archaic poetic imagination, according to Vico, presupposes the immersion of mind in the body. Reversing Descartes, it is not the soul that sees, but rather the body. *Id.* at 86 (noting that human thought began as “bodily eyes”). This is consonant with Vico’s concept of *fantasia* or poetic imagination as the process in which, as Vico notes, “likenesses taken from bodies . . . signify the operations of abstract minds.” *Id.* at 83. Again, Verene’s insight is acute: “In the fixing of sensation the meaning of the whole of the flux is found again in the single sensation. In this way a universality is achieved through the particular. An identity is made. The power of the *is*, the power of identity itself is realized.” *Id.*; see also *id.* at 173 (“The mind’s first act is a transference or bearing of meaning from sensation as placeless, momentary flux to the fixation of sensation as a god.”). Walter Benjamin’s idea of a “profane illumination” also comes to mind here. See 2 WALTER BENJAMIN, *Surrealism: The Last Snapshot of the European Intelligentsia*, in SELECTED WRITINGS 207, 209–18 (Michael W. Jennings et al., eds., Rodney Livingstone et al., trans., 1999).

73. GIUSEPPE MAZZOTTA, THE NEW MAP OF THE WORLD 60 (1999).

74. *Id.* at 105, 109.

75. *Id.*

language to create worlds out of nothing.⁷⁶ This is original *poiesis*, the heroic power of knowledge as making, constructing, poeticizing.

According to Vico, the sublime coincides with the archaic imagination during the “heroic age” of man. His prime example is Homer.⁷⁷ But our understanding of the poetic imagination (*fantasia*) can be expanded beyond Homer to include what Auerbach classically described as *mimesis*.⁷⁸ Singular historic expressions of the human inclination to transcend self (*ek-sistence*, or *Da-sein*) are manifest in historically discrete cultural representations. As a source of originary meanings (as *mythos*⁷⁹ or metaphor), *mimesis* incarnates the poetic imagination. In this view, the truth of representation, the certainty of knowledge which Descartes attributed exclusively to an act of self-directed rationality (modeled on the clarity and distinctness of the thinking self capturing itself in the act of thinking—the *cogito ergo sum*) arises from an outward-directed act of self-transcendence.⁸⁰ The mimetic experience of *being-as*—culminating ultimately in the ethical experience of *being-for*—an Other, embodies a sublime epistemology rooted in self-transcendence and the metaphysics of poetic representation. It is this natural mimetic endowment that allows humans to become one with an object (in the act of naming) or with other cultures and their associated mindsets during other times (in the act of discerning linguistic, philological, and mythic patterns throughout history). *Mimesis*, the faculty of imitation through *being-as*, is simultaneously the condition for knowledge and a basis for wonder.⁸¹

76. *Id.* at 145–46.

77. GIAMBATTISTA VICO, THE NEW SCIENCE OF GIAMBATTISTA VICO 301–28 (Thomas Goddard Bergin & Max Harold Fisch trans., Cornell Univ. Press, paperback unabridged ed. 1984) (1744).

78. ERICH AUERBACH, MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE 554–57 (Willard R. Trask trans., Princeton Univ. Press 1953) (1946). According to Paul Ricoeur, the aim of *mimesis* “is to compose an essential representation of human actions; its appropriate method is to speak the truth by means of a fiction.” Paul Ricoeur, *Between Rhetoric and Poetics*, in ESSAYS ON ARISTOTLE’S RHETORIC 324, 327 (Amélie Oksenberg Rorty ed., 1996).

79. According to Ricoeur, “The fundamental trait of *muthos* is its character of order, of organization, of arranging or grouping.” Ricoeur, *supra* note 78, at 348.

80. See ISAIAH BERLIN, VICO AND HERDER: TWO STUDIES IN THE HISTORY OF IDEAS 47 (1976) (“According to Vico, words, like ideas, are directly determined by things—the concrete circumstances in which men live—and are therefore the most reliable evidence for them.”). In the age of gods, poetic language was that of natural symbols, like thunder, through which the gods speak. In the age of heroes, man’s imagination is still in touch with nature through metaphor and simile. Only in the third age, the age of humans, does language become a merely conventional sign. See *id.* at 47–48.

81. In this sense, *mimesis* is far more than the mere “copying” of something in nature. *Mimesis* involves a productive interaction with the being of something other than mind. See Ricoeur, *supra* note 78, at 351 (“[I]t is only through a grave misinterpretation that the Aristotelian *mimēsis* can be confused with imitation in the sense of copy. If *mimēsis* involves an initial reference to reality, this reference signifies nothing other than the very rule of nature over all production. . . . *Mimēsis* is *poiesis*, and *poiesis* is *mimēsis*.”) (emphasis added). See also TAUSSIG, *supra* note 70, at xiii, xviii (characterizing *mimesis* as “sympathetic magic,” “the compulsion to become the Other” (through a living speech that

This repudiation of the Cartesian mind/body duality (i.e., viewing the carnal mind as cognition in touch with *Eros*) marks the emergence of a post-Cartesian optics that is consonant in crucial respects with central Vichian insights regarding the nature of history, mind and, above all, language. On this view, the key to generating an affirmative response to Vico's lament in our time depends upon our relationship to language and representation (including the generation of visual images⁸²). In Cartesian epistemology and its positivist offshoots in the writings of Hobbes and Machiavelli, language is an artifact of mind. By contrast, an optic of the sublime addresses language and representation as essential in their own right, not conventional and derivative. In Vico's view, mind and language develop together. Indeed, as Mooney states, both "are the necessary outcome of social urgency, the result of a spontaneous attempt . . . to grasp a startling experience through images that are familiar."⁸³

The heroic mind, according to Vico, comes closest to this godlike poetic faculty. Naming or originating an apt metaphor or constitutive narrative through the faculties of inventive ingenuity and poetic imagination are godlike acts of creation to the extent that they found a living reality. This is the heroic act *par excellence*. And when the poet invests it with prudent understanding and practical wisdom, that heroic act serves the core function of rendering justice. Vico refers to this as practicing equity amid the concrete vicissitudes of simulation and dissimulation in a given historical context. Harnessing the originating force of language in a creative/intuitive judgment compels the will of others through eloquence. This is not a matter of logic, or of experience, or of rhetorical training alone. To a significant extent it is a matter of inspired poetic construction, which is to say, a col-

irradiates form with originary being)). Cf. BERLIN, *supra* note 80, at 111–12 ("Vico, (influenced perhaps by 'magical' theories of becoming one with the object, widespread in the Renaissance) is one of the true fathers of the doctrine of the unity of theory and practice He believed that in principle we could re-enact in our minds—'enter' by sympathetic imagination—into what a class, a society [wanted, worked for, were after]. . . . He supposes that we can by, by a species of imaginative insight, turn every *an sich* . . . an entity observed from the outside by the agent . . . into a *für sich*, an element in, assimilated to, his purposive, 'spiritual' activity."). Compare Benjamin's "profane illumination," that flashing moment, via "bodily innervations" through which body and image interpenetrate. BENJAMIN, *supra* note 72, at 209–10. In Michael Taussig's felicitous phrase, mimesis, as an expression of self-transcendence, is "the nature culture uses to create second nature." TAUSSIG, *supra* note 70, at 252.

82. As Benjamin was prescient in seeing, whether the sublime can survive the artifice of mechanical reproduction becomes, in our own digital age, a matter of great moment. 3 WALTER BENJAMIN, *The Work of Art in the Age of Its Technological Reproducibility*, in SELECTED WRITINGS, *supra* note 72, at 101–22 (Howard Eiland & Michael W. Jennings eds., Edmund Jephcott et al., trans., 2002). See Richard K. Sherwin, *What Screen Do You Have in Mind? Contesting the Visual Context of Law and Film Studies*, in STUDIES IN LAW, POLITICS, AND SOCIETY (Austin Sarat ed., forthcoming 2008) (arguing that law on the screen gives rise to a distinct way of doing jurisprudence and that the meaning of law is informed and shaped by the kind of electronic screen that we have in mind).

83. MOONEY, *supra* note 24, at 261.

laboration with something other which calls or addresses the poet, seeking voice, image, word. The call of that which is infinitely Other, followed by our time-bound response, constitutes the source and substance of what we experience as the sublime. Contact with that which is infinite explodes reason and its yearning for certainty, totality, and systematic knowledge. The sublime is sublime to the extent that it always points to that which exceeds representation.⁸⁴

In this view, the category of the sublime represents the key to understanding what Vico refers to as poetic imagination, or *fantasia*—(“man’s unique capacity for imaginative insights and reconstruction”⁸⁵). Heidegger, among others, facilitates a way of thinking about this experience in terms of transcendence, or *Da-sein* (being-there), the natural human tendency to go beyond self. This experience of *ek-stasis* (being outside of, or beside oneself) marks our access to the infinite other-than-self that suffuses the sublime. It is in response to this encounter that mimesis leaves its finite trace. Notwithstanding its power, however, this aesthetic experience within the fields of nature and art, amidst the endless becoming of beings, risks leaving the sublime unmoored to the ethical.⁸⁶ This is where first philosophy and the thought of Emmanuel Levinas and Jacques Derrida come into view. With their help, we may learn to re-imagine human self-transcendence not simply in terms of infinite becoming, the flux of immanent being (*physis*), but also in terms of the human Other (the neighbor, the one nearby). Levinas’s notion of “otherwise than being” links self-transcendence to the ethical.⁸⁷ It renews metaphysics, re-conceiving it as first philosophy. Here we return to the idea, previously referred to, of “ethics as an optics.” In that earlier reference, the optics at issue was Cartesian. It posited an abstract, conceptual (objectified and disembodied) frame for generating the data of perception and a felicific calculus for assessing the intellect’s interpretation of their meaning. The main thrust of this calculus

84. Cf. ALMOND, *supra* note 21, at 30–37 (comparing Derrida’s notion of *différance* with Ibn ‘Arabi’s sense of the Real); DERRIDA, *supra* note 21 (on the concept of *différance*). See generally Deguy, *supra* note 3.

85. See BERLIN, *supra* note 80, at 108. Verene aptly attributes to *fantasia* the “power to give imagistic form to experience” and to form the particular as a universal. VERENE, *supra* note 71, at 81–82.

86. Heidegger aptly notes that “rapture is the basic aesthetic state without qualification.” 1 MARTIN HEIDEGGER, *NIETZSCHE* 97 (David Farrell Krell trans., Harper Collins 1991) (1961). But the ethical force that Levinas describes disturbs our aesthetic enjoyment. By confronting me with the irreducible “destituteness” of the other’s naked countenance, the ethical obligation (to pay heed) calls into question “my joyous possession of the world.” LEVINAS, *supra* note 70, at 76. Hence, the surplus shifts from the totality of contingent things (the realm of beauty) to the infinity (“the inexhaustible surplus”) of the face (the realm of the ethical). See *id.* at 207.

87. See EMMANUEL LEVINAS, *OTHERWISE THAN BEING OR BEYOND ESSENCE* (Alphonso Lingis trans., 1991) (1974); see also DERRIDA, *supra* note 24.

is to ask: does the meaning conduce to pleasure, does it avert pain? If so, its reliability is vouchsafed. By contrast, a Levinasian (“sublime”) optics shifts the frame of reference from self (the subjective experience of pleasure and pain) to Other—as presented in the self-transcending state of otherwise-than-being, which is to say, the state of *being-as* in which the infinite demands of the Other before us come to mind. This is the origin of the ethical, and of the primordial bond (of religion) that constitutes sociality. As Derrida writes, “[r]eligion is responsibility or it is nothing at all.”⁸⁸

Vico championed the poetic imagination as the means by which humans take charge of their own fate. Tempted by powerful appetites, led astray by whim and by chance, blinded by lack of virtue and prudence, humans stand in need of wise leadership. As Mooney puts it:

The sage who is to speak and thus to lead is one who must see visions in the midst of change, must find analogies between matters that lie far apart and are apparently unrelated, and must draw all things together in expressions that are both sweeping and concrete, images that are sharp and forceful, go right to the point, are never trite or repetitious, and so move men to social action.⁸⁹

Ingenuity, prudence, and the poetic imagination are endowments of mind that may (Vico would counsel, “must”) be cultivated in order to preserve civil society. This endowment is what, in Vico’s view, links man to the divine: “[M]an’s ingenuity is in the world of arts and crafts, even as nature in the universe is God’s.”⁹⁰ As Joseph Mazzeo put it (describing Teasuro’s view of the world as a “metaphysical” poem and God a “metaphysical” poet), for Teasuro ingenuity is “the faculty in man analogous to God’s creative power. It is a small particle of the divine nature, for it can create ‘being’ where there was no ‘being’ before. As God created a ‘metaphysical’ world, so the poet creates ‘metaphysical’ poems.”⁹¹ Similarly, for Vico, “a fable is the essence of things transformed in human minds.”⁹² This crucial Vichian concept echoes Benjamin’s understanding of the metaphysical nature of language itself: “The name is that *through* which, and *in* which, language itself communicates itself absolutely. In the name, the

88. DERRIDA, *supra* note 24, at 2.

89. MOONEY, *supra* note 24, at 127; *see also* Kronman, *supra* note 2, at 700 (“More than a flatterer but less than a mathematician, a molder of passions with the power to cheat and dissemble, the practitioner of [the art of rhetoric] is the builder of the middle realm in which our humanity first comes to light.”).

90. MOONEY, *supra* note 24, at 136.

91. *Id.* at 147 (quoting Joseph Anthony Mazzeo, *Metaphysical Poetry and the Poetic of Correspondence*, 14 J. HIST. IDEAS 221, 228 (1953)). *See also* Deguy, *supra* note 3, at 9 (citing Longinus: those who raise themselves to “the high” [translated as the sublime] “get a view of the ‘mortal condition’” and become like the divine).

92. Quoted in MOONEY, *supra* note 24, at 149.

mental entity that communicates itself is *language*. . . . God's creation is completed when things receive their names from man, from whom in name language alone speaks."⁹³ As Ernesto Grassi observes, according to Horace:

[P]oetry is that primary force that is able to overcome the chaos in which men originally live. It is the means by which the order of a human society develops. The poets are named *vates*, "revealers" or seers, because they see new possible human relationships in an original underived manner and give birth to these possibilities.⁹⁴

Grassi writes that "the function of art and poetry is its 'usefulness' in the construction of the human world."⁹⁵ For Vico, it is the faculty of ingenuity through which man grasps "the relationship between things in a concrete situation in order to determine their meaning."⁹⁶ This is not a logical derivation, but rather the revelation of something new through the work of creative insight, like the construction of an original image or metaphor.⁹⁷ The gift of metaphor is a gift of invention that brings a reality before our eyes. As Verene acutely notes, "[i]t is a process in which the *is* itself is made. . . . Every fable is true speech and every metaphor is 'a fable in brief.'"⁹⁸ Unlike scientific (rational) discourse, this is not a meaning that is based on reasons. Metaphoric or poetic discourse establishes a premise through its own invention. Meaning consists not in the reason given but rather in the image that is shown.⁹⁹ This, then, is the great heroic act of the ancient poet which Vico celebrates. As Grassi puts it, "The Herculean act is always a metaphorical one and every genuine metaphor is in this sense Herculean work."¹⁰⁰ In short, for Vico, as for Dante, it is the poet's task to create the meaning of reality. This task is completed only when the assignment of meaning extends to the formation of society and its future.¹⁰¹ In this Vichian dispensation, poetic wisdom originated in a metaphysics that was "not rational and abstract," but "felt and imagined."¹⁰² As Vico writes,

93. 1 WALTER BENJAMIN, *On Language as Such and on the Language of Man*, in *SELECTED WRITINGS*, *supra* note 72, at 62, 65 (Marcus Bullock & Michael W. Jennings eds., 1996).

94. ERNESTO GRASSI, *RHETORIC AS PHILOSOPHY: THE HUMANIST TRADITION* 75 (1980); *see also* Deguy, *supra* note 3, at 9 (noting that metaphor "originally brings to visibility the figure of what is not visible").

95. GRASSI, *supra* note 94, at 75.

96. *Id.* at 91.

97. *Id.* at 92.

98. VERENE, *supra* note 71, at 82–83, 95. Verene also cites Vico here as saying "that *mythos* is a *vera narratio* or true speech: 'The fables in their origin were true and severe narrations, whence *mythos*, fable, was defined as a *vera narratio*.'" *Id.* at 82.

99. GRASSI, *supra* note 94, at 97.

100. *Id.* at 7.

101. *Id.* at 97.

102. *Id.* at 7.

"luminous images," crafted by inventive fantasy, "blind the mind with lightning bolts" that "conjure up human passions in the ringing and thunder of . . . astonishment."¹⁰³

On this view, the sublime may be seen as occupying a central position in Vico's "new science." Indeed, we may describe the main task of that work as envisioning a metaphysic of the sublime.¹⁰⁴ As conceived here, sublime jurisprudence accounts for the metaphysical origin of society (or sociality) as coincident with the origin of natural law, which is to say, the law of law—or Justice. This origin is not a rational construct, as embodied in the modern concept of the social contract, or the de-ontological derivation of universal rational principles. Rather, it is an act of poetic imagination¹⁰⁵—the genesis, as Robert Cover would put it, of a *nomos*, a foundational narrative (or *mythos*) that constitutes a way of life¹⁰⁶ or, as Vico wrote, the basis for a customary practice.¹⁰⁷ Shaped and informed by the ethical sublime that *nomos* culminates in "the best humanity."¹⁰⁸

One of the singular shared affinities linking seventeenth century baroque and late twentieth, early twenty-first century neo-baroque cultures is that they both confronted a crisis of optics that also coincided with profound epistemological uncertainty. The pre-modern correspondence model of visibility had to be re-organized semiotically (as a matter of mind interpreting perception based on conventional, culturally contingent categories). In the post-modern era, the modern semiotic model has broken down, and the struggle to come up with a new basis for rendering visibility coherent continues. It is an effort that seeks to restore confidence in both truth¹⁰⁹ and in justice.¹¹⁰ In this view, the opportunity for renewed Vichian insight falls within the parameters marked out by the three-fold crisis that afflicts con-

103. *Id.*

104. Cf. VERENE, *supra* note 71, at 55 (describing Vico's new science as being based on a "metaphysical art of criticism"). See also *id.* at 56 ("Only metaphysical vision can approach the illumination of the *topos* of providence behind the *sensus communis* of the human world and grasp this world as a middle term between the divine and the natural.").

105. See *id.* at 61 ("In Vico's view society was formed neither by any single act of prudent agreement between men nor by foresight. Human rationality grew within the providential structure of history as human social action grew. This social action was not originally based on acts of reflective judgment but on the formation of the world through the powers of memory and imagination.").

106. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

107. VERENE, *supra* note 71, at 63 ("The natural law of the gentes is not an abstract principle but is present as the actual life of any society. It is true not as a rational ideal but as the actual basis of social practice.").

108. See *supra* note 30 and accompanying text.

109. See Latour, *What Is Iconoclasm?*, *supra* note 50.

110. See Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3, 15 (Drucilla Cornell, Michel Rosenfeld & David Gray Carlson eds., 1992) (stating that "[d]econstruction is justice").

temporary thought and social practice: epistemological, aesthetic, and ethical.

Here, then, is a point of departure for revisiting Vico's key notions of poetic imagination, inventive ingenuity, and prudent understanding in our time. The poetic imagination takes us across the great Cartesian divide that separates mind and body as well as mind and nature. Human being (mind/body as a whole) exists ecstatically through self-transcendence (*Ek-sistenz* as *Ek-stasis*). Transcendence → mimesis → *phantasia* (poetic imagination) → the sublime. The sublime is a work that traces the poetic imagination at work; it puts us "in touch" (by virtue of an embodied word or image) with that which is other than mind, and otherwise than being. Through mimetic self-transcendence we encounter beings as well as the Other (human) being who stands before us.¹¹¹ Representing the former implicates the aesthetic sublime manifest in Heidegger's ontology.¹¹² Representing the latter implicates the ethical sublime manifest in Levinas's otherwise than being.¹¹³ There is also a third dimension: the historic sublime, which is manifest in Vico's representation of the providential, universal recurring patterns of human society and culture over time.¹¹⁴ Such is

111. One might suggest that what unfolds here is an attunement between two gravitational fields—between two minds, and two unconsciousnesses: the other's and the one who responds. As Santner puts it: "I want to propose that the ethics at the core of both psychoanalysis and the Judeo-Christian tradition (as interpreted by Rosenzweig) is an ethics pertaining to my *answerability to my neighbor-with-an-unconscious*." ERIC L. SANTNER, *ON THE PSYCHOTHEOLOGY OF EVERYDAY LIFE* 9 (2001). With regard to the receptive state of mind in question, Freud states: "Experience soon showed that the attitude which the analytic physician could most advantageously adopt was to surrender himself to his own unconscious mental activity, in a state of *evenly suspended attention* . . . to catch the drift of the patient's unconscious with his own unconscious." 18 SIGMUND FREUD, *Two Encyclopedia Articles*, in *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 235, 239 (James Strachey & Anna Freud trans., 1955). See also the work of contemporary cognitive scientist FRANCESCO J. VARELA, *ETHICAL KNOW-HOW: ACTION, WISDOM, AND COGNITION* 64 (Stanford Univ. Press 1999) (1992) (discussing ethics as the cultivation of a "know-how" concerning the unconscious). According to Varela, the *ek-static* state of mind (i.e., standing outside oneself in a selfless, non-intentional, non-deliberative, but active mindfulness) is what Buddhists refer to as *wu-wei*. *Id.* at 32–33. According to Santner, this responsiveness to the other lies at "the heart of our very aliveness to the world." SANTNER, *supra*, at 9. This notion of mindfulness resonates as well with Heidegger's sense of "mood" or "attunement." See 1 HEIDEGGER, *supra* note 86, at 99 (describing mood as "a way of being attuned, and letting ourselves be attuned . . . [it] is precisely the basic way in which we are *outside* ourselves.").

112. See generally MARTIN HEIDEGGER, *POETRY, LANGUAGE, THOUGHT* (Albert Hofstadter trans., 1971).

113. LEVINAS, *supra* note 87.

114. See BERLIN, *supra* note 80, at 41 ("There are, Vico declares, three incorruptible sources of true historical knowledge of man: language, mythology, antiquities; these cannot lie."). Contrary to Descartes' and Hobbes's positivism, for Vico:

[L]anguage is not a deliberate invention on the part of men who think thoughts, and then look around for a means of articulating them. Ideas, and the symbols in which they are expressed, are not, even in thought, separable. We do not merely speak or write in symbols, we think and can think only in symbols, whether words or images; the two are one.

the tripartite nature of sublime truth as representation: aesthetic, historic, and ethical. Each is a singular expression of human self-transcendence.

This, then, is how we might renew our understanding of Vico's lament in our time: (1) by overcoming the dominance of Cartesian mind/body dualism and allowing Cartesian rationality and poetic wisdom to co-exist (incarnating thought and language with passion [*Eros*] and care [*phronesis*, or prudence]); (2) by conceiving the re-integration of mind/body as a mode of self-transcendence (*ek-stasis*); (3) by re-conceptualizing the knowledge that self-transcendence avails in terms of the mimetic faculty (representations as the offshoot of *being-as* [an Other] which are simultaneously "a portrayal of human reality and an original creation"),¹¹⁵ (i.e., they are phenomenal, *not* merely ornamental); and (4) by recognizing the tripartite nature of the mimetic sublime, in its aesthetic, historic, and ethical forms of expression. On this analysis, rethinking the metaphysical basis for ethical knowledge brings new meaning to Vico's understanding of the sublime in the context of educating both the poetic and the legal imagination.

Responding to Vico's lament in this way harks back to Toulmin's essentially Vichian aspiration to find a new basis for pluralism and tolerance without succumbing to a destabilizing epistemological uncertainty and paralyzing ethical relativism on the one hand, or a totalizing dialect of knowledge/power, on the other.¹¹⁶ Moreover, rather than depending upon Christianity, Vico's preferred theological source for ethically grounding the poetic imagination, the ethical sublime offers a more ecumenical and cosmopolitan basis for an ethically informed poetic imagination. The knowledge that a sublime epistemology allows is contingent, not absolute, in that its emergence remains responsive to a concrete particularity (the Other to which it responds). The ethical sublime offers no key to system building. The incompleteness of any representation responsive to an infinite call is inevitable. Contact with the infinite can never vanquish a residual uncertainty and perplexity.¹¹⁷ Each finite representation thus requires subsequent reflection and debate; the clash of interpretations is the backdrop against which eloquent discourse (and its lesser forms) proceed.¹¹⁸

Id. at 42. As Vico writes, "minds are formed by the character of language, not language by the minds of those who speak it." *Id.*

115. Ricoeur, *supra* note 78, at 352. Ricoeur adds that mimetic representations are "faithful to things as they are." *Id.* This view is consonant with Grassi's understanding of the primary basis of metaphor (poiesis) in the production of knowledge. See GRASSI, *supra* note 94, at 75.

116. See generally MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (A.M. Sheridan Smith trans., Pantheon Books 1972) (1969); MICHEL FOUCAULT, *POWER/KNOWLEDGE* (Colin Gordon ed., Colin Gordon et al., trans., 1980).

117. See ALMOND, *supra* note 21.

118. See LEVINAS, *supra* note 87, at 191 n.2.

Taken together, this move toward naturalizing the human poetic and ethical faculties simultaneously (1) redresses the Cartesian mind/body duality and re-enchants language and representation (by re-linking mind to *Eros*), (2) renews the basis for tolerance and pluralism in our time (by repudiating universal systems and dominant dialects of knowledge/power), (3) promulgates a new model for eloquent wisdom (an ethical rhetoric) along the lines of Toulmin's cosmopolitan ecology (oriented toward correcting inequalities rather than building rigid systems), and (4) takes us beyond a crabbed and inelegant Cartesian (as well as Hobbesian/Machiavellian) positivism by relocating equity within the ethical sublime and thereby establishing a revitalized basis for justice. In stark contrast to Hobbes's "modern" response to the shift from the medieval correspondence theory of representation to positivism and nominalism, sublime jurisprudence offers an alternative to the irresistible ("monstrous") force of the Hobbesian nation-state.¹¹⁹ Instead, consistent with the model of the Internet, the current neo-baroque discourse of power/knowledge operates increasingly on a non-national level—at once locally and globally.

Uncertainty remains; our capacity to interpret, much less respond to the infinite demand of the Other is always subject to incompleteness and doubt. At the same time, however, the ethical origin of sociality and justice, manifest in the ethical sublime—our experience of an infinite obligation in response to the call of the Other before us—remains compelling. This shift from the arrogance of Cartesian rationality and systems building to the humility of the humanist's affirmation of context-bound wisdom/prudence allows us to abide with uncertainty without anxiety as we substitute for the rigidity of the Cartesian perspective an ecological view that emphasizes "differentiation and diversity, equity and adaptability."¹²⁰

For Vico law is invested with both the power and the restraint of the poetic sublime.¹²¹ Its mythic force—its constructivist, world-making aspect (in Walter Benjamin's¹²² and Robert Cover's¹²³ sense of *nomos* as "juris-generative" or "world-making"), is countered by the inherent limitations

119. See THOMAS HOBBS, *LEVIATHAN* (Liberal Arts Press 1958) (1651).

120. TOULMIN, *supra* note 4, at 194.

121. MAZZOTTA, *supra* note 73, at 167.

122. 1 BENJAMIN, *Critique of Violence*, in *SELECTED WRITINGS*, *supra* note 93, at 236, 249.

123. Nearly a quarter of a century ago, Robert Cover wrote:

We inhabit a *nomos*—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful . . . No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.

Cover, *supra* note 106, at 4–5 (citations omitted).

and uncertainties of any context-bound, historically-shaped cultural representation. The heroic function of language is thus checked and balanced by our realization of the inescapably tragic aspect of sublime knowledge. Finitude is our fate, as a matter of mortality and knowledge. "Man appears as a perpetual enigma to oneself"¹²⁴—as depicted in the reversal (*anagnoresis*) of Oedipus, the classic paradigm of tragic knowledge.

The importance of law and politics played out on the dark field of desire and deceit, as manifest in the positivist and nominalist political and jurisprudential writings of Machiavelli and Hobbes, serves as the inescapable *historical* context for the sublime. For it is, as Kronman eloquently writes, law and politics that construct and maintain the material and rhetorical conditions necessary for the flourishing of freedom and the pursuit of knowledge and justice in society.¹²⁵

The importance of culture as a commitment to the classical ideal of *paideia* lies at the very heart of Vico's lament, namely: re-educating the poetic imagination as well as the legal imagination for the sake of piety and virtue. Training the imagination today is increasingly a matter of cultivating visual literacy. On a deeper level, however, it entails an understanding of the faculty of mimesis—which is to say, the (*ek-static*) faculty of self-transcendence, the agency of the sublime.¹²⁶

Vico's understanding of the constructed aspect of society and identity (what Taussig calls our "second nature"¹²⁷) through the artifice of culture strikes contemporary ears as a familiar postmodern insight. For some, so, too, does Vico's description of a human society that has come to lack coherent ethical guidance (i.e., the integration of wisdom and eloquence). Vico calls such a society "gatherings of men [that] may appear to be societies, but amid the throng and press of their bodies there is in fact a deep isolation of souls."¹²⁸ Vico associates this state of affairs with an excess of law.¹²⁹

The goal, then, is to clarify Vico's lament by re-contextualizing our understanding of poetic imagination, inventive ingenuity, and prudent understanding. This challenge takes place against the backdrop of a contem-

124. MAZZOTTA, *supra* note 73, at 174.

125. See Kronman, *supra* note 2.

126. This is what Longinus, echoing Homer, called "divine transport," being carried beyond oneself, in the *ek-static* moment of exalted discourse and ravishment. See Deguy, *supra* note 3, at 7.

127. See TAUSSIG, *supra* note 70, at xiii.

128. MOONEY, *supra* note 24, at 188.

129. See VICO, *supra* note 1, at 57 ("Our law groans under the great bulk of its books."). Cf. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977) ("The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.").

porary crisis in epistemology (amid the proliferation of empty signs, or simulacra) and ethical theory (absent a compelling, broadly agreed upon basis for sociality). Simply stated, we need a new optics for the digital age. What Descartes' semiotic theory achieved in the face of the crisis-stricken pre-modern correspondence theory we must now strive to achieve in the face of a post-modern, crisis-stricken theory of semiotics. Vico's crucial notion of the sublime holds the key. The sublime offers a new metaphysics that takes us beyond the moribund Cartesian mind/body duality. It also opens up a means of renewing the power (*Eros*) of rhetoric to enchant the mind and move the will. Eloquence is a sublime poetic. But it also presents distinct risks. Simply aestheticizing the sublime threatens to decouple metaphysics from the ethical. This is the stark historical lesson that Nietzsche's and Heidegger's work teaches.¹³⁰ The challenge of educating the poetic imagination in general, and the legal imagination in particular in our time is the challenge of finding our way toward a sublime ethics. We need to re-conceive first philosophy in the manner of Levinas. We may begin by situating our dilemma anew:

In the face of death, and the terror that it holds for us, we encounter a pathological metaphysical temptation.¹³¹ "Sick reason," Franz Rosenzweig has written, seeks a way out of life, an escape from the terror of mortality. "Man, chilled in the full current of life, sees . . . death waiting for him. So he steps outside of life. If living means dying, he prefers not to live. He chooses death in life. He escapes from the inevitability of death into the paralysis of artificial death."¹³²

This retreat from life, this capture of the soul in the night of the Nought, lies at the heart of what Nietzsche described as the spirit of decadence, and what Freud diagnosed as the pathology of death anxiety. It is not the will to power, but rather the will to destruction. As Nietzsche wrote, "man would rather will *nothingness* than *not* will."¹³³ The fanatic exhibits a similarly decadent will. Here, too, we encounter the will to metaphysical beatitude. Rather than enter into the midst of life, the fanatic, like the nihilist, like the patient caught in denial, seeks to annihilate suffering for the sake of a world to come. The will to annihilation would rather will noth-

130. See Richard K. Sherwin, *Law's Beatitude: A Post-Nietzschean Account of Legitimacy*, 24 CARDOZO L. REV. 683 (2003).

131. The material in the following three pages draws from and builds upon my earlier argument in *Law's Beatitude*, *id.*

132. *Id.* at 687 (quoting FRANZ ROSENZWEIG, UNDERSTANDING THE SICK AND THE HEALTHY 102 (1999)).

133. FRIEDRICH NIETZSCHE, *On the Genealogy of Morals*, in ON THE GENEALOGY OF MORALS AND ECCE HOMO 97, 163 (Walter Kaufman ed., Walter Kaufmann & R.J. Hollingdale trans., 1969).

ingness than not to will at all. Thus, the fanatic says "No" to life that is corrupt, stained with suffering and injustice.¹³⁴

Nietzsche well understood the fanatic will. "Love of *one*," he wrote, "is a barbarism: for it is exercised at the expense of all else."¹³⁵ The ecstasy of evil relieves intolerable suffering at the highest cost, the cost of death and sacrifice, the cost of a sublime cruelty. This is, as Henry Birault writes:

[T]he price of an excess of suffering, a suffering "more profound, more inward, more poisonous, more deadly[""]—but calming, reassuring, redemptive in spite of everything, because through it the primal pain of life is finally interpreted, justified, systematized, ordered, put into perspective: into the perspective of fault The pain henceforth had a cause, a reason, an end, a why, and this *meaning* allowed the *essential* to be saved—that is, the will, at least a certain will, that which wills the meaning of suffering because first it considers suffering an accident, a stumbling block, something that is but should not be and that elsewhere, in another world, another life, another nature, would *not* be. This will, avid for meaning, we see, is at bottom a will for annihilation, a will that begins by saying "no" to existence, to our meaningless, immoral, unreasonable existence.¹³⁶

Metaphysical beatitude in this sense is "only a death instinct."¹³⁷ Call it revolt, or call it the undeadness that comes of unresolved death anxiety. It is, at its core, the pathological spirit of resentment (what Nietzsche called *ressentiment*¹³⁸), a turning away from life, from civility, and from the institutions of law and culture that sustain it.

The violent fantasies fueled by metaphysical beatitude—including the promise of metaphysical beatitude in the form of a final reckoning between eternal foes—take us down an inhuman path. We may fight to defend our way of life, but we cannot fight to root out fear and suffering. As Rosenzweig observed, "All that is mortal lives in [the] fear of death; every new birth augments the fear by one new reason, for it augments what is mortal."¹³⁹ Or as Kronman puts it: "We long for ecstasy, for release from loneliness and ignorance, for a consummation that lies beyond the

134. See 1 BENJAMIN, *supra* note 122, at 251 ("If I do not kill, I shall never establish the world dominion of justice . . . that is the argument of the intelligent terrorist.").

135. Henri Birault, *Beatitude in Nietzsche*, in THE NEW NIETZSCHE: CONTEMPORARY STYLES OF INTERPRETATION 219, 221 (David B. Allison ed., MIT Press 1985) (1977) (quoting Nietzsche).

136. *Id.* at 225–26.

137. *Id.* at 222.

138. See FRIEDRICH NIETZSCHE, THE WILL TO POWER ¶ 179, at 108–09 (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., Vintage Books 1968) (1967) (describing as the "Master-stroke" of *ressentiment* its need "to deny and condemn the drive whose expression one is, continually to display, by word and deed, the antithesis of this drive").

139. FRANZ ROSENZWEIG, THE STAR OF REDEMPTION 3 (William W. Hallo trans., Beacon Press 1972) (1964).

world But we are always disappointed in this longing, and our disappointment is as much a part of human nature as the longing itself.”¹⁴⁰

Only when the bond to pathological metaphysics has been cut, or at least manageably attenuated, may we learn to tarry with anxiety rather than take flight into a ghostly nothingness. Here is the gate through which we enter more deeply into life, and into civic life in particular. But by what force are we impelled to cross over? What source of willpower leads death-bound subjectivity to forge meaning in the very midst of life? But what is this very force if not the sublime?

Here lies the catalyst for supreme poetic affirmation of this life from creative moment to creative moment. It is here that we encounter the deep aesthetic joy of Nietzsche’s beatitude, the same impulse that activates the poetic imagination. The healthy will, the will to power, as an act of life affirmation, is the will not to nothingness, but to more life. It is the will that wills its own growth and vitality. It is the will to surpass itself, to be more. All things are “entangled, ensnared, enamored,” Nietzsche tells us.¹⁴¹ And all joy “wants everything eternally the same.”¹⁴² “To impose upon becoming the character of being to preserve a world of that which is, which abides That *everything recurs* is the closest *approximation of a world of becoming to a world of being*. . . .”¹⁴³ This is the impulse of the mimetic function: to capture reality, to hold the infinite in a finite representation. Impossibility is both the condition and the paradoxical power of a sublime aesthetic.

It is with good reason that Birault credits Heidegger’s observation that “[t]he Will to Power is, in its essence and according to its internal possibility, the eternal return of the same.”¹⁴⁴ Birault is also perspicacious in noting that Nietzsche’s beatitude is the source, the beginning, rather than the goal, the phantasmal promised land, of creative thought and action. As Birault aptly puts it, “The blissful man has made his peace with reality.”¹⁴⁵ He has no need of, and no desire for the beyond, the unconditioned absolute. Rather than dissolve pain and suffering in some life beyond life, Nietzsche’s tragic narrative affirms this life with all its suffering and vicissitudes.

140. Kronman, *supra* note 2, at 705.

141. FRIEDRICH NIETZSCHE, *Thus Spoke Zarathustra*, in THE PORTABLE NIETZSCHE 115, 435 (Walter Kaufmann trans., 1954).

142. *Id.* at 434.

143. NIETZSCHE, *supra* note 138, ¶ 617, at 330.

144. Birault, *supra* note 135, at 220.

145. *Id.* at 229.

The will to power culminates in the eternal return out of an excess of creative vitality and joy. Its affirmation is a thanking and a blessing. As Birault writes, it:

proceeds from love, and love only, from an immense gratitude for what is, a gratitude that seeks to impress the seal of eternity on what is and what, for Nietzsche, is always only in becoming. . . . It is then that the will becomes love, without ceasing to be will and Will to Power. It is then that this love becomes the love of the necessary, "*amor fati*," without ceasing to be love and will for the contingency of the most contingent things.¹⁴⁶

Born of mortality, as if at the moment of perishing,¹⁴⁷ the sublime seizes us, manifesting an infinite call of a beautiful and ungraspable disorder (con-fusion).¹⁴⁸ This is the inescapable paradox of the sublime: it allows us momentarily to grasp the presence of that which remains impossible to grasp. It is sublime to the extent that it brings to mind, and indeed consists in, that impossibility, the impossible condition of its existence in any form of stable representation, presenting yet somehow overcoming the paradox of presence and re-presentation.¹⁴⁹

Mimesis, or imitation, speaks of this relation (of inclusion/exclusion) from the *logos* (or living word) which adds *techne* (artificial technique or method) to what exists in nature (*physis*).¹⁵⁰ What Vico describes as the inventive ingenuity of poetic imagination, of finding an apt image, a fitting metaphor, of inventing a foundational narrative or myth, emerges out of this sublime condition in which disorder (*a-logos*) enters a *logos* (representation).¹⁵¹ The sublime forcefulness of representation (eloquence) consists in the dissimulation of the artifice (*logos*) by which what is (*physis*) comes to appear. The paradox of sublime knowledge is that there must be a loss of knowledge (of the means of its production) in order for the thing itself to appear in its brilliance (as it is).¹⁵²

146. *Id.* at 230.

147. See Deguy, *supra* note 3, at 9; see also BLAISE PASCAL, *PENSÉES* 19 (A.J. Krailsheimer trans., Penguin Books 1995) (1670) ("When I consider the brief span of my life absorbed into the eternity which comes before and after—as the remembrance of a guest that tarrieth but a day—the small space I occupy and which I see swallowed up in the infinite immensity of spaces of which I know nothing and which know nothing of me, I take fright and am amazed to see myself here rather than there: there is no reason for me to be here rather than there, now rather than then.").

148. See ALMOND, *supra* note 21, at 39–62.

149. See generally Deguy, *supra* note 3.

150. *Id.* at 22.

151. *Id.*

152. In a related sense, Ricoeur describes the "double tension" of mimesis in terms of "submission to reality and fabulous invention, unflinching representation and ennobling elevation." Ricoeur, *supra* note 78, at 352.

If the temptation of a pathological metaphysic risks subordinating life to the death principle, the similarly totalizing temptation of a wholly rationalized or aestheticized will to power risks subordinating the ethical to human freedom.¹⁵³ Like Heidegger's affirmation of poetic dwelling,¹⁵⁴ the aesthetic letting be of what is risks a totalizing of being.¹⁵⁵ This is the danger of an unchecked aesthetic sublime: a poetic moment that knows, and cares to know, nothing of justice.

By contrast, justice, offspring of a first philosophy of originary ethical attunement, comes about only when the mimetic faculty of self-transcendence attunes itself to the Other who stands before us, the one nearby, the neighbor. This is akin to Vico's understanding of prudent understanding—viz., the capacity to bring intuition and inventive ingenuity to the complex particularities of a concrete situation, a situation entangled in human drama and complexity, a drama not without shadows and deceit, the inescapable vicissitudes of the human condition. In Vico's view, justice is not a matter of laws endlessly ramified, but of the common good concretely imagined in a discrete historical and cultural context.¹⁵⁶ The creative power of the archaic mind, what Vico discerns in Homer's heroic poetic imagination, provides the model for constructing a living *nomos*, a mythic narrative that sustains civic life. However, as a wholly aesthetic act, the positing of a heroic *mythos* risks giving form to the sublime divorced from the ethical. Its sublime animus, endlessly ramified in a sequence of heroic acts lacking direction beyond the glorification of self, raises the danger of remaining outside the scope of binding sociality.

Justice speaks otherwise. It occurs in the presence of, and in response to, the infinite demand of the Other. This response, and the unremitting responsibility to which it leads, marks the origin of sociality. Justice in this sense finds its model in the ethical sublime: the human capacity, rooted in the self-transcendence of poetic imagination, to let beings and Others be. Levinas describes this as the primary ethical moment in which I respond to

153. See LEVINAS, *supra* note 70, at 85, 193, 302–03; LEVINAS, *supra* note 87, at 116 (“Responsibility for the other, this way of answering without a prior commitment, is human fraternity itself, and it is prior to freedom.”).

154. HEIDEGGER, *supra* note 112, at 145–61.

155. Here we encounter the risk of aestheticizing politics: as Heidegger's tragic dalliance with the mythic discourse of Nazism made all too plain. Cf. BERLIN, *supra* note 80, at 112 (on the danger of misunderstanding “Vico's sense of the realities of human development in contrast with patriotic and other fantasies about it”). Berlin had in mind here “some modern irrationalist thinkers” (e.g., James Joyce and Norman O. Brown) who pushed Vico's notion of the mythicizing imagination to an extreme—annihilating any order in history beyond the mind's making. This would, of course, ignore Vico's insight into the “universal, unalterable, eternal, cyclical character of the stages of man's history.” *Id.* at 113.

156. See STUDY METHODS, *supra* note 1; MOONEY, *supra* note 24, at 166–67.

the Other's being as an infinite call.¹⁵⁷ My responsiveness constitutes an originary responsibility. I am responsible for the demand of the Other's being in the world. Face to face with another, in the sublime state of otherwise than being, being-as becomes a being-for (the Other). This response, this experience of primary responsibility, marks the origin of ethics.

First philosophy thus emerges mimetically and metaphysically from the ethical sublime. Responsibility for the Other, and the third, who dwells beside the one I face, generates the bond on the basis of which society is held together.¹⁵⁸ Mimetically expressed, the ethical sublime is the jurisgenerative force behind the institutions of law and culture that sustain sociality, justice, and civic life as a whole. Constraining the aesthetic impulse or, perhaps better put, bending its sublime generative force toward the gravitational field of the Other, checks the jurispathic force of unconstrained *Eros*, about which Kronman justly warns,¹⁵⁹ while also making the disappointments of human finitude bearable. Vico's tragic wisdom teaches that uncertainty and error are inescapably embedded within the human condition. However, by virtue of the endlessly generative power of poetic imagination, sublime affirmation, of beings and ultimately of the Other we face, bequeaths to humankind the gift and the promise of civility. It is a gift born of mortality¹⁶⁰ and sustained, paradoxically, by the impossibility of its full realization.

If eloquence is wisdom speaking,¹⁶¹ and wisdom is the ethical *par excellence*, eloquence arises in otherwise than being: a sublime self-transcendence in the face of, and in our response to—our taking responsibility for—the Other. Here we see the Vichian faculties of poetic imagination, inventive ingenuity, and prudent understanding operating in unison. Ramified by our knowledge of the third, ethical responsibility develops into the civic discourse of justice. The driving (jurisgenerative) force of this ethical grounding in the sublime is the work of the mimetic faculty—the human capacity for self-transcendence and being-as. In the field of aesthetics, being-as culminates in sublime representations of what is (capturing lasting expressions of *physis*, the infinite becoming of nature, or the Real).¹⁶² In the field of social and cultural practices, being-as culminates in

157. See LEVINAS, *supra* note 87, at 160–61.

158. *Id.*; see DERRIDA, *supra* note 24, at 68.

159. Kronman, *supra* note 2.

160. See generally DERRIDA, *supra* note 24.

161. GIAMBATTISTA VICO, *The Academies and the Relation Between Philosophy and Eloquence*, in STUDY METHODS, *supra* note 1, at 89 (translated by Donald Phillip Verene).

162. This view supports the suggestion that there might well be “an underlying relationship between ‘signifying active reality’ and speaking out *physis*.” Ricoeur, *supra* note 78, at 354. In this respect, I am in fundamental agreement with Ricoeur when he writes, “The truth of imagination, poetry’s

sublime representations of the ideal forms of history (capturing lasting expressions of providence, as evidenced in the Vichian *ricorsos*). In its ethical form, being-as culminates in a sublime jurisprudence, originating the bond of sociality in being-for the Other (capturing the endlessly regenerated forms and institutions of law and culture that sustain and protect civic life). The mimetic genius of poetic imagination consists in allowing nature, history, and the neighbor to speak.

I submit that sublime jurisprudence points the way beyond the impasse created by a crisis-stricken semiotic theory of visibility. It offers ethical certainty (without totality) and wisdom (without arrogance). The sublime marks our encounter with the infinite—in the form of the Real (aesthetics), the social (history), and the Other (ethics). Truth in each of these fields is the offspring of poetic imagination. But because what we know always falls short of the infinite that calls forth the word and the image, human knowledge can never leave the shadow of uncertainty, error, and incompleteness.

In this dispensation, mimesis is the condition of the possibility of knowledge.¹⁶³ In our response to the call of Being (beauty), history (providence), and the Other (the good), mimesis configures the tripartite structure of a post-Cartesian optics, a sublimely embodied visibility that takes us from the pre-modern understanding of truth as correspondence and the modern semiotic view of truth as conventional signification, to the post-modern paradigm of truth as sublime representation. This shift marks the ascendance of a new metaphysics: the metaphysics Levinas describes as the self-transcending state of otherwise than being. In this way, we repudiate Plato's repudiation of mimesis as a "falsifying" mediation as well as Descartes' embrace of the "artifice" of semiotic mediation (the offspring of his mind/body duality). The sublime describes the condition of making human knowledge possible while the human faculty of mimesis describes the means of making the representation of knowledge compelling. This formulation offers a way of expressing the eloquence of wisdom in our time.

Vico's lament, as recounted in this new configuration, should become our own—but not as a lament; rather, as a call to ethical renewal. The wisdom of the ancients, embodied in the ideal of an ethically informed art of rhetoric, was for Vico, and remains for us, the ark of civic life. Throughout history, totalized systems, whether rationalized (as in the Cartesian ideal) or hyper-eroticized (as in the fundamentalist temptation of metaphysical

power to make contact with being as such—this is what I personally see in Aristotle's *mimēsis*." *Id.* at 355.

163. Lacoue-Labarthe, *supra* note 69, at 100.

beatitude), have produced storms of catastrophic proportion. The story of Babel, of God's blasting to rubble the tower forged by Nimrod's arrogant ambition to impose a totalized dialect upon all humankind, serves as a providential parable about the recurring dream of total knowledge.¹⁶⁴ By teaching us the rhetorical capacity to actively engage in civil society through a multiplicity of discourses,¹⁶⁵ eloquent wisdom, dogged by uncertainty, shows a way to escape self-destruction. Just as the fanatic's embrace of metaphysical beatitude subordinates the life principle to a death instinct, just as Nietzsche's totalization of the aesthetic sublime subordinates justice to human freedom, so too does the idealization of rational knowledge risk the tyranny of unconstrained erotic longing. For no less a reason than this we must, as Vico urged, educate our youth "[a]t the very outset" so that "their common sense should be strengthened" and "so that they can grow in prudence and eloquence."¹⁶⁶

Ethical discourse remains irreducible to any single rational system or rhetorical style. It is inescapably localized and historically varied. Its wisdom consists in the confidence that the mimetic faculty will represent what is needed in the moment, in truth and in justice. As Vico wrote: "[W]hen the subject is well conceived, words will follow on spontaneously," because of the natural bond by which we claim language and heart to be held fast together, for to every idea its proper voice stands naturally attached. Thus, eloquence is none other than wisdom speaking."¹⁶⁷

Our hope is that, if we are sufficiently trained in the way of wisdom speaking, the Real may avail itself of civilized forms of expression through which society holds together, secure and flourishing. As Derrida observes, history is a problem that remains open, never to be resolved,¹⁶⁸ and yet it is this very openness, this extra-historical undecidedness, that remains tied to responsibility, faith, and the gift of death. For the risk that inheres in the "ordeal of the undecidable" comes from the same Pascalian abyss out of

164. See ALMOND, *supra* note 21, at 52 ("The Shemites' sin is the desire for *meaning* itself, pure, unambiguous, repeatable meaning, not to be at the mercy of contexts, or adrift in alien situations."). Seeking to universalize their own idiom, the Shemites brought down upon them God's wrath, foiling their "imperialist intentions, confounding their architects and scattering their armies, disempowering them physically as well as semantically." *Id.* at 53.

165. See generally Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729 (1988).

166. STUDY METHODS, *supra* note 1, at 19.

167. STUDY METHODS, *supra* note 161, at 89.

168. Jacques Derrida, *I Have a Taste for the Secret*, in JACQUES DERRIDA & MAURIZIO FERRARIS, *A TASTE FOR THE SECRET* 1, 20 (Giacomo Donis & David Webb eds., Giacomo Donis trans., Polity Press 2001) (1997) ("The appeal of the future . . . overflows everything that is and that is present, the entire field of being and beings, and the entire field of history—is committed to a promise or an appeal that goes beyond being and history.").

which originates our infinite responsibility to the Other, our faith in the power of sublime representation, and the fear and trembling that accompanies our sense of singularity in the face of mortality. The mortal gift of which Derrida writes coincides with the power of the sublime to seize us, and allow justice to speak.¹⁶⁹ It is in this context that we may be permitted to speak of Vico's piety. Piety checks decadence and tyranny by maintaining the community's transcendental ties to sociality: the ethical bond that holds the community together. Piety thus returns us to the ethical sublime, not as the exclusive agent of one particular system or theology or body of belief, but rather as a cosmopolitan aspiration.¹⁷⁰

Legal theory has endured too long the anemic understanding of human nature upon which rational theories of agency, economics, and instrumental calculation rely in order to prop up their investment in an exclusive, totalizing rationality. The eclipse in contemporary legal theory of passion, *Eros*, eloquence, and the metaphysical roots of sociality and justice has darkened its capacity for wisdom.

A timely response to Vico's lament calls for the ethical education of the legal imagination through a retrieval of sublime jurisprudence. This entails two key moves:

(1) An explicit refocus upon rhetorical craft (visual literacy in particular) and its engagement with neo-baroque eloquence in the digital age. More than a concern with words alone, this requires greater literacy in the construction, deconstruction, and reconstruction of visual evidence and argument, the production and cross-examination of visual persuasion, and the monitoring and placing of proper checks upon non-deliberative forms of visual manipulation; and

(2) A return to first philosophy: ethical wisdom—a renewed encounter with justice grounded in the mimetic faculty, as a function of the poetic imagination and the condition of possible knowledge, namely, the sublime, by which we encounter anew the ethical origin of sociality. This requires a sublime jurisprudence in which metaphysics, reconceived as the Levinasian otherwise than being, renews and advances by re-contextualizing Vico's understanding of piety. This approach enlists diverse cognitive and cultural insights in developing a deeper understanding of (i) mimesis as the natural human faculty of self-transcendence (being-as); (ii) justice, sociality, and ethics understood in terms of being-for (i.e., the transformation of being-as

169. See DERRIDA, *supra* note 24, at 5–6.

170. See generally TOULMIN, *supra* note 4. See also JACQUES DERRIDA, ON COSMOPOLITANISM AND FORGIVENESS (Mark Dooley & Michael Hughes trans., Routledge 2001) (1997); GIUSEPPE MAZZOTTA, COSMOPOLITANISM: THE RENAISSANCE EXPERIMENT (2001).

into being-for within the gravitational field of the Other before us); and (iii) the threefold configuration of sublime knowledge (depending upon its field of operation) in the form of aesthetic, historic, and ethical truth.

CONCLUSION

A crucial challenge for contemporary jurisprudence consists in learning how best to cultivate, and ultimately conjoin, the aesthetics of poetic imagination and the wisdom of ethical knowledge. This retrieval of the high art of rhetoric is not simply a matter of style or of eloquence per se, but rather of the eloquence of wisdom. The synthesis in our time of ethics and eloquence requires a new philosophical conceptualization and new forms of social engagement so that the promise of rhetoric may persuasively dispel the calumny that it will never rise above sophistry.

Plainly, the Platonic tradition cannot guide us here, with its stunted understanding of the poet's role and its cheapened depiction of the mimetic faculty for the sake of a putatively purer (which is to say, unmediated) metaphysical ideal of pure reason. At the same time, however, we can ill-afford risking the opposing danger of rhetorical excess, as in Nietzsche's totalized aesthetic of the eternal recurrence of the same, or Heidegger's mystical eloquence in his philosophy of Being. These more recent thinkers teach us much about what the Platonic tradition, and the Cartesian mindset in particular, repress (to our detriment), but far too little about the ethical which importunes us to care for the Other whose naked countenance stands exposed and vulnerable before our eyes. In this sense, Vico's lament regarding our chronic lack of concern for and study of the broad cultural, historical, and cognitive dimensions of the ethical has never been more timely.

Eloquence uprooted from wisdom, eloquence let loose in an unruly material world driven by passion, greed, deceit, and the urge to dominate others, a world governed by markets bound solely by calculations of maximum pleasure and minimal pain, eloquence divorced from knowledge of the ethical and thus at the mercy of totalizing (hyper-erotic or hyper-rational) ambitions, produces a distorted and unstable understanding of justice and civility. Civic life cannot prosper, and indeed is at risk of decay, under prolonged conditions of epistemological and ethical uncertainty. To counter such a reality requires a poetic faculty grounded in the ethical sublime.

In this view, one of the core responsibilities of jurisprudence is to educate the poetic imagination that authors the *nomos* (the living narrative and communal institutions of law) so that its aesthetic representations compel-

lingly manifest, and in so doing authorize, the lawmaker's knowledge of the ethical.

Vico's crucial notion of the sublime provides the key to this challenge. His vision of the sublime revives piety in the face of Cartesian disenchantment. Like Benjamin, Vico rummages amid the debris of past cultures in order to locate a firmer grounding for his philosophy of origins.¹⁷¹ But he finds no ideal culture. As in Auerbach's cultural exploration of mimesis, Vico discovers that each culture constitutes a historical unity unto itself. The endless cycle of historical patterns, in which cultures rise, blossom, decay, and fall, takes the place of any single overarching totality. And against the clarity and distinctness of Descartes' rational method, Vico embraces a world of shadows and obscurity.¹⁷² To properly construe such a world requires multiple resources, including history, philology, anthropology, psychology, and philosophy. The sovereignty of reason alone, with its rigid, totalizing classifications and its resistance to the generative force of poetic grace, is ill-suited to this task.¹⁷³

Vico's understanding of wisdom begins where power and knowledge find their limit: power as the insatiable desire of the (libertine) body tragically set on an impossible and dangerous totality, and knowledge as the totalization of Cartesian rationality tragically exclusive of the acknowledgement of different viewpoints.¹⁷⁴ Put differently, Vico's wisdom begins with humility. In this, his poetic wisdom may be allied with the metaphysics of Levinas—against totality (as the path to war) and inclined toward the infinite (beyond being) as the basis for a first philosophy of ethics. Here then is one possible response to Vico's lament in our time: to renew intercourse between knowledge and aesthetics by conceiving anew the Vichian *paideia*. Educating the poetic and legal imagination in our time requires a renewed encounter with the basis for ethical knowledge and eloquence combined—which is to say, it calls for the ethical sublime.

Eloquent wisdom provides the scaffolding for civil society.¹⁷⁵ Civic education, as a counterforce to Machiavellian *Realpolitik*, begins here. As interpreter of the hidden discourses of myths and law, the lawyer-poet-statesman, trained in history, rhetoric, and ethics as well as law, sets out to

171. See MAZZOTTA, *supra* note 73, at 241.

172. Cf. ALMOND, *supra* note 21, at 95–96, 114 (describing Jacques Derrida's work on the "abysality of signifying" and what Derrida calls "the abyss of representation"). The crucial baroque notion of endless folds or repetitions, as in a hall of mirrors, also plays a significant role throughout Derrida's work, particularly in reference to the infinite folds of the text. See *id.* at 20, 22, 78.

173. See STUDY METHODS, *supra* note 1, at 41 ("Poetical genius is a gift from heaven.").

174. Cf. MAZZOTTA, *supra* note 73, at 52.

175. See Kronman, *supra* note 2.

civilize the monstrousness of political power. Civics, politics, aesthetics, and the ethical are manifestly entangled. Wisdom consists in according each its proper scope, value, and application, and in allowing each to appropriately shape and inform and, when need be, check and balance the other.

In the way death humbles the soul, the death of civic order humbles the community. In the face of death comes metaphysical temptation as well as sublime affirmation. One leads to death in life, the other to more life. In the same way the aesthetic sublime brings the soul deeper into life, the ethical sublime brings the community deeper into civic life. The hero, acting in the face of death, exercises poetic imagination to found a way of life. The desuetude of the modern Cartesian mindset has made possible—indeed, it compels—new leaps of poetic imagination. Just as the poetic imagination seeks renewal mimetically, through the re-creation of culture, so too the legal imagination seeks renewal in pursuit of a sublime jurisprudence.

Law is neither exempt from the historical process of decay, nor is it incapable of subsequent acts of renewal. The wise lawyer-poet-statesman, acting in the face of unruly passions and deceptions, on the one hand, and the tyranny of totalized rational systems of knowledge or the similarly totalizing, irrational impulse of pathological metaphysics, on the other, finds the means to make civic life both secure and just. Whether we in our time, or our offspring in theirs, shall enjoy the fruits of such a civil union between the poetic eloquence and ethical wisdom of sublime jurisprudence remains hidden in the quickening folds of providence.