

Richard K. Sherwin¹
Vico's Providence Today

How do we explain the seminal influence of the historian, philosopher, and premier cultural theorist Giambattista Vico (1668-1744)? Perhaps the most revolutionary idea of Vico's that first compelled my attention is the notion that language constitutes mind, rather than the other way around². With this insight Vico begins to assemble a set of master tools and comprehensive methods that stretch across academic disciplines, most of which did not even exist in Vico's time. Akin to the now familiar deconstructivist insights from our own time, Vico's toolkit invites us to decode the way meanings are made (and displaced) in history. These tools include: philology, linguistics, cognitive psychology, cultural anthropology, comparative mythology, the history of art and religion, cultural and media studies, to name a few.

These diverse disciplines, in conjunction with the methods they endorse, work together to help us recognize and understand the meaning making patterns and constitutive effects of disparate cultures across the long durée of history. Linking discrete forms of knowledge (discrete 'ways of knowing') to particular forms of communication stands in stark contrast to Enlightenment notions of universal knowledge³. Indeed, Vico's insight into the incessantly changing conditions of culture invites us to explore how language, or any form of communication for that matter, including art, music, film, dance, and so on, helps to constitute diverse understandings of self, other, and community. In this view, as cognitive psychologist Jerome Bruner has written, we begin to recognize how our very sense of self is distributed on currents of inherited cultural knowledge⁴.

It is difficult to grasp today the bold novelty and perspicacity of Vico's thinking. In the heyday of Cartesian rationalism, when certainty ("clear and distinct" ideas) prevailed as the standard for what counts as knowledge, Vico bore witness

1 Wallace Stevens Professor of Law, Dean for Faculty Scholarship, Director, Visual Persuasion Project New York Law School.

2 Giambattista Vico, *The New Science of Giambattista Vico* [hereinafter 'The New Science'] (trans. by Thomas Goddard Bergin and Marx Harold Fisch) ([1744]/1986) 20-21 ("In harmony with these three kinds of nature and government, three kinds of language were spoken which compose the vocabulary of this Science."). See Jerome Bruner, *Acts of Meaning* (1990) 35 (on how "narrative organizes experience").

3 See Stephen Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* (1990) 23, 80-81.

4 Jerome Bruner, *Acts of Meaning* (1990) 106.

to classical rhetorical wisdom and the efficacy of the poetic imagination⁵. Centuries before the Whorf-Sapir theory of linguistics⁶ or Nelson Goodman's work on "worldmaking"⁷, Vico intuited the crucial insight that Suzanne Langer would later express in eloquent terms: "We live in a web of ideas, a fabric of our own making"⁸. As cultural anthropologist Clifford Geertz echoed: "Man is an animal suspended in webs of significance he himself has spun"⁹.

In past work, I have pursued this notion regarding the constitutive function of language by closely analyzing discrete dialects of law over time. I discovered that dramatic shifts in legal narrative directly correlating to specific case outcomes significantly turned on whether a decision maker adopted the discrete epistemological assumptions of one of three possible legal dialects: ordinary common sense, scientific policymaking, or prudent interpretation¹⁰. Yet, I must confess, after many years of study, a certain perplexity remains.

It is difficult, if not impossible, to navigate Vico's thought without grappling with his metaphysics, particularly what he calls 'piety'. In Vico's thinking, piety is the prime source of moral authority in history. For example, in the *New Science* he writes: "Religion alone has the power to make us practice virtue... And piety sprang from religion, which properly is fear of divinity."¹¹ Simply stated, it is piety that supplies the social glue, the dynamic force that holds us together in community over time. But what did Vico mean by 'piety'?

Piety, for many contemporary scholars, certainly for most scholars of law, remains a sticking point, an enigma. In an age of secularism, whatever smacks of metaphysics is a source of acute intellectual embarrassment. It is a state of affairs that brings to mind Jean-Luc Marion's recent allusion to our intellectual

5 As Ernesto Grassi writes: "From the beginning, the Western philosophical tradition has made a basic distinction between rhetorical-pathetic and logico-rational discourse. Rhetorical discourse seeks to move souls... Rational discourse, however, is based on the human capacity to make deductions and thereby to link conclusions to premises... At the very beginning of modern philosophy, Descartes consciously excluded rhetoric... from philosophy conceived as a pure search for truth." Ernesto Grassi, *Vico and Humanism* 1 – 2 (1990). By contrast, the classical rhetorical ideal sought the "union of *logos* and *pathos*." Ernesto Grassi, *Rhetoric as Philosophy* 27 (1980).

6 See Benjamin Lee Whorf, *Language, Thought, and Reality* (1956) 162 (noting that "different languages differently 'segment' the same situation or experience"), and Edward Sapir, *Language: An Introduction to the Study of Speech* (1921) (hypothesizing that the structure of a language affects its speakers' world view or cognition).

7 Nelson Goodman, *Ways of Worldmaking* (1978) 7 ("With false hope of a firm foundation gone, with the world displaced by worlds that are but versions, with substance dissolved into function, and with the given acknowledged as taken, we face the questions how worlds are made, tested, known.")

8 Susanne K. Langer, *Philosophy in a New Key* (1964) 126.

9 Clifford Geertz, *Interpretation of Cultures* (1973) 5.

10 See Richard K. Sherwin, "Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions," *University of Pennsylvania Law Review*, vol. 136 (1988) 729-849.

11 Giambattista Vico, *The New Science of Giambattista Vico* (trans. by Thomas Goddard Bergin and Marx Harold Fisch) ([1744]/1986) 170-1. See also *Id.* at 424 ("Piety, faith and truth...are the natural foundations of justice.").

embarrassment in the face of love: “We no longer have the words to speak of it, nor the concepts to think about it, nor the strength to celebrate it.”¹² This impoverished state regarding love may be generalized to include metaphysical thinking as a whole. Thus the question arises: what cultural resources are available to us today to capture the anti-structural – simultaneously disruptive and binding – forces associated with the irruption of the transcendent in history? I have in mind here the uncanny outbreak of the sacred, the sublime, the numinous¹³.

It is well accepted that law's sovereignty points to a source of authority beyond the law itself¹⁴. As one moves from early modern emblems of the King's two bodies¹⁵ to post-Revolutionary symbols of the People's two bodies¹⁶, to digital simulations of world and subjectivity in the ‘Internet of Experience’¹⁷ it seems appropriate to ask: where do we locate law's surplus? In what narrative, visual, cognitive, and affective registers does it find expressive coherence in history? Absent any access to an understanding of the uncanny irruption of anti-structure in history, together with its metaphysical implications, we lack the means of locating and gaining insight into the source of law's sovereign authority. As a concomitant of this lack, the origin and sustaining power or binding force of foundational (i.e., core constitutive) values in society grows occluded. When we can no longer articulate what it is that binds us in community a legitimation crisis is at hand. As the brilliant, albeit illiberal jurist Carl Schmitt acutely noted, to the extent that liberalism remains wedded to value neutrality it will continue to struggle with this condition¹⁸.

In Vico's work, as in the work of postmodern deconstructivism, we witness the full blossoming of a seminal rhetorical insight (traceable to rhetors in ancient Greece, such as Gorgias) connecting the structure of language to the structure of mind¹⁹. The late modern fruits of structuralism, semiotics, linguistics, cultural

12 Jean-Luc Marion, *The Erotic Phenomenon* (2003) 1. See also Emmanuel Lévinas, *Entre Nous* (1998) 108 (“Justice comes from love [...]. Love must always watch over justice.”)

13 See James I. Porter, *The Sublime in Antiquity* (2016)

14 Harold Berman, *Law and Revolution* (1983) 16 (“Law – in all societies – derives its authority from something outside itself”).

15 See Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (1957).

16 See Eric Santner, *The Royal Remains* (2011).

17 Recently, Mark Zuckerberg, the founder & CEO of Facebook, touted the next big thing: the Internet will soon shift from being a platform of instantly accessible information to instantly accessible *experience*. It will mean, Zuckerberg tells us, that soon we will be able to create and share whatever experience we want, with whoever we want, wherever we are. This idea offers food for thought. If experience authorizes belief, what network of beliefs do you think this new Internet of experience will bring? One wonders what this promises – especially if the current culture (and politics) of spectacle proves to be a guide to the future. Go to: http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11840709. See also <https://www.youtube.com/watch?v=bII2c2qe2B0>.

18 See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (2005).

19 See Nancy Struever, *The Language of History in the Renaissance* (1970) 11.

anthropology, and cognitive psychology, among other disciplines of mind and culture, lie seeded, inchoate in the pioneering cultural constructivism of Vico. These seminal ideas lay the groundwork for an approach to law that is simultaneously more practical, which is to say, more methodologically open, and more responsive to larger cultural patterns in the course of history. But method, no matter how sophisticated, decoupled from the affirmation of core values, can never dispel the destabilizing shadows of illegitimacy. That is why metaphysics, and in particular what Vico calls the metaphysics of piety, cannot be sidestepped. The methodological capacity for cultural deconstruction remains in need of deeper normative sources of cohesion. This goal is what drives Vico's search for larger patterns in history – a search that, for Vico, is ultimately guided by Divine Providence, the source of piety since history began.

How, then, do we make sense of piety in our time? What (if any) ideal patterns do we locate in history – signs of that divine *conatus* of which Vico spoke? How do we even know whether we have encountered such signs? And how are we to understand the way providence takes on expressive coherence at discrete moments in history? In short, how does the anti-structural force of the sacred break into history? Is it kenotic (subsisting through infinite withdrawal)²⁰; mimetic (a matter of imitation, or of spontaneous emergence in unscripted performance)²¹? Or is the irruption of inexpressible surplus knowable through symbols (erotically infused, shimmering with the excess of desire)²²? Turning to metaphysical jurisprudence, in parallel with Vico's genealogy of the three distinct ages of humankind, we may ask: is law's sovereignty expressed hieroglyphically, which is to say, in the richly poetic language of the gods? Such were the nearly mute outpourings, conveyed by the heroic poets, that Vico identifies with the first age of humanity.²³ (Think of the sound of roaring thunder that opens James Joyce's *Finnegan's Wake*.) Or perhaps we recognize anti-structure in the language of imperial force²⁴, written out in statutory mandates²⁵, and justified by reason of state. Or perhaps, marking the third cycle in Vico's ideal course of history, the sacred source of law's authority rises up from the wisdom of the people, through the light of natural reason (*aequitas naturalis*), interpretable through the democratic semiotics of shared popular cultural constructions²⁶. What is the providence of Providence?

In times of stress, amidst distinct signs of cultural decay, an encounter with disruptive forces in society should not prove surprising. Such irruptions betoken both destruction and renewal. Vico was no doubt only too familiar with a sense of

20 See Marie-Jose Mondzain, *Image, Icon, Economy: The Byzantine Origins of the Contemporary Imaginary* (2005)

21 See Mihai Sparisou (ed.), *Mimesis in Contemporary Theory* (1985).

22 See Rowan Williams, *The Tragic Imagination* (2016) 11.

23 Vico, *The New Science* at 329, 261.

24 *Ibid.*, at 338.

25 *Ibid.*, at 346.

26 *Ibid.*, at 349.

baroque fragmentation and decay in society²⁷, as we are today²⁸. Vico described the baroque world around him as an offshoot of inexhaustible appetites. In general, he associated cultural decadence with the influence of Machiavelli, Spinoza, and Hobbes. In more recent times, we recognize similar signs under the rubric of nihilism²⁹, a world of totalized and totalizing power that plays out in a dream-like world that seamlessly entangles public relations, digital simulation, reality television and its political vicissitudes³⁰.

Yet, amidst the proliferation of desymbolized ('flattened') expressive forms – the fleeting thrills and sensate distractions that digital social media and popular culture in general supply – something else, something entirely other, ultimately breaks through. An Event, witnessed obscurely, as Bruegel imagined the fall of Icarus – the event that changes everything, but unfolds almost unnoticed³¹. Bystanders look away blankly, in the posture of Bob Dylan's Mr. Jones, in *Ballad of a Thin Man* (1965), who must be told, yes, "*something is happening here, but you don't know what it is, do you, Mr. Jones?*" Anti-structure's inchoate presence precedes its conceptual articulation. It is a mighty cry, heard from afar, as if from the wilderness.

For Vico, the poetic is synonymous with the incalculable, and the nearly mute. It intimates a sublime excess that resists representation³². As poet and translator David Hinton writes, referring to the primordial symbolic language of the ancient Chinese philosophical text and augury, the *I Ching*: "Hexagrams are the first stage in that emergence of language from change, that folding of the Cosmos around onto itself to name and describe itself. They are the most ancient form of language in this sense. Part dragon language, part human, they represent the movement of change at a more fundamental level than our languages can."³³ In this sense, the inchoate stirring of the poetic sublime defies utility and disrupts conventional order. Such is the way of the irruptive impact of the sacred.

Law is hardly immune to this disruptive event, particularly at the beginning of things, when authority is young³⁴. In American and European jurisprudence the

27 See Giuseppe Mazzotta, *The New Map of the World* (1999) 5, 7 (noting that in opposition to Machiavelli, Descartes, Bacon, and Spinoza, whom Vico regarded as the chief founders of modernity, the goal of Vico's *New Science* is to overcome their shared vision of "absolute power, of simulations, dissimulations, and irony" in order "to salvage the relics and detritus of a broken world and a broken knowledges.").

28 See Richard K. Sherwin, *Visualizing Law in the Age of the Digital Baroque* (2011) at 23, 33, 88.

29 See Michael Allen Gillespie, *Nihilism before Nietzsche* (1995) xxiii ("Nihilism arises in the context of a new revelation of the world as the product not of reason but of will.").

30 Richard K. Sherwin, *Visualizing Law in the Age of the Digital Baroque* *supra* note 27.

31 See *Landscape with the fall of Icarus*, painting attributed to Bruegel c. 1558.

32 Vico, *The New Science*, 20-21 ("In harmony with these three kinds of nature and government, three kinds of language were spoken which compose the vocabulary of this Science.").

33 David Hinton, *The Book of Change* (2015) vii.

34 See, for example, Richard K. Sherwin, "Sublime Jurisprudence: On the Ethical Education of the Legal Imagination in Our Time," *Chicago-Kent Law Review*, volume 83 (2008); Richard K. Sherwin, "The Flesh of the Law," *No Foundations: An Interdisciplinary Journal of Law and Justice*, No. 11, June 2014 ("Eros is the name we give to the creative force out of which

problem of authority classically arises in the context of statutory and doctrinal interpretation. One hears of the implacable blind spot in Continental and Anglo-American law described as the linguistic gap in the text. As Francois Gény wrote at the end of the 19th century, it is that gap that takes us to “the land of mystery,”³⁵ where clear and coherent meanings become elusive³⁶.

In the American legal culture, so-called ‘originalists’ seek to overcome this kind of textual ambiguity by insisting on a formal sense of constitutional authority – linked to the historic will of the founders or the ‘objective’ intent of the legislator who drafted the text in question. This is an oddly literalist sense of textual authority, premised on formal lineage. In this view, it is as if justice were the offspring of authority rather than the other way around³⁷. Originalism, however, while influential, is not the dominant view. More open-minded jurists allow for far greater intellectual flexibility – in recognition of the living, organic flux and flow of law in history. They allow for leeways – acts of judicial discretion and intuition – in historical, context-bound interpretation. As Cardozo put it: the judge finds moral value “through his readings of the social mind...He must put himself as best he can within the heart and mind of others, and frame his estimate of values by the truth as thus revealed.”³⁸ We hear this recognition (of the historical refraction of legal meaning) throughout the seminal, early 20th century writings of the legal realists, such as Jerome Frank, Karl Llewellyn, and U.S. Supreme Court Justice Benjamin Cardozo – whose work broadly reflected the process-oriented philosophies of their day, particularly Bergson and Whitehead³⁹.

This embrace of process-based jurisprudence resounds in the seminal United States Supreme Court decision *Griswold v. Connecticut* (1965)⁴⁰. There, Justice

political worlds are made, out of the political unconscious known as the flesh of the law. Here we find the originating impulse that is needed to invest in a world of meaning. That force surges forth in a liminal state, betwixt and between terror and enchantment. It is then that we ask, what symbolic social bond will be endorsed? What *nomos* will we inhabit? What links my body to another: what shared narrative of origin, or what collective terror?”; and Richard K. Sherwin, “What Authorizes the Image? The Visual Economy of Post-Secular Jurisprudence,” chapter in Desmond Manderson, ed., *Law and the Visual: Transitions and Transformations* (2017).

35 Francois Gény, *Méthode d'Interpretation et Sources en droit privé positif*, vol. II, (1919) 180.

36 See D. Kennedy and M.C. Bellau, “Francois Gény aux Etats Unis,” in C. Thomasset, J. Vanderlinden, and P. Jestaz (eds.) *Francois Gény, Mythe et Réalité: 1899 – 1999, centennair de méthode d'interpretation et sources en droit prove positif, essai critique*, Quebec, CAN: (2000) 312.

37 See Carl Schmitt, *Political Theology* (2005); Harold Berman, *Law and Revolution* (1985).

38 See Benjamin Cardozo, *The Paradoxes of Legal Science* (1928) 52 – 53 (“We read the quality of legal justice in the disclosures of the social mind... Value, when seemingly the most personal, is, at least in part, a social product, the product of collective life.”) Musing on the non-conceptual, affective aspect of judging, Cardozo adds: “Learning (to paraphrase what has been said of Keats) is the springboard by which imagination leaps to truth. The law has its piercing intuitions, its tense, apocalyptic moments. We gather together our principles and precedents and analogies, even at times our fictions, and summon them to yield the energy that will best attain the jural end.”

39 See Richard K. Sherwin, *Visualizing Law in the Age of the Digital Baroque* *supra* note 27, at 127-138.

40 *Griswold v. Connecticut*, 381 U.S. 479 (1965)

William O. Douglas, writing for the majority of the court, enumerated the various constitutional rights that Americans indisputably possess, but that are not explicitly stated in the Bill of Rights. They include: the freedom of association, the right of assembly, the freedom to choose public or private education, and the right of privacy. As Douglas wrote: "Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Note well this choice of language – 'penumbras', 'emanations', 'life and substance.' Nothing static here, nothing locked fast in the archives of originalist history. This is the language of flow, of historic process. And it seems to intimate a metaphysical source: the light from which constitutional guarantees emanate, creating the penumbra in which the right of privacy interstitially hovers – between the lines of the text, so to speak. So to speak: exactly so.

So how do we conceive that anti-structural, metaphysical source from which law's ultimate authority flows? By what name do we call Vico's Divine Providence through which equity flashes in great sparks of luminous moral intuition? It comes by way of the poetic imagination, through "images that dazzle the mind with their lightning and stir up human passions in the thunder and roar of their wonder," as Vico wrote, invoking the poetic power (*Enargeia*) of mythic thinking.

Is Vico's understanding of providence cognate with what Sir Edward Coke referred to as the unerring impulse underlying and driving the 'common law tradition'? Or what Cardozo referred to as the 'growth of the law'? Does it resonate with Hegel's 'cunning of Reason,' or Adam Smith's 'invisible hand'? Or Henri Bergson's *elan vital*? How do we name the impulse toward perfection that drives us beyond fear-drenched, Hobbesian survival, toward the higher reaches of justice?

More recently, I have come to think of this shared, higher drive as the impulse toward radical empathy: our capacity to understand, to enter into intellectual and emotional sympathy with others, as well as with objects and events around us. In fact, upon reflection, this might well be the purest distillation of Vico's historical dialectic of *fantasia* – the poetic imagination as a function of *Eros* – the human capacity to re-live forms of life other than our own. Cardozo describes this as the judge's ability to articulate, after entering into, the felt pressures of the social mind. Perhaps this supreme human gift is but a reflection of the capacity to grow attuned to diverse expressions and experiences of the historically heterogeneous, but ultimately unitary flow of *Eros*. In this dispensation, *Eros* sparks *mimesis*, not simply as imitation, as Plato wrote, but as performance or unscripted Event (Heidegger's '*Ereignis*'), such as we find described in the work of Erich Auerbach, Michael Taussig, Mihai Spariosu, and Richard Schechner, among others. The event of *mimesis* bears upon the compelling force of vividness – what the ancient rhetors called *Enargeia* – the persuasive (what Gorgias called the enchanting, incantational, *psychagogic*) capacity to make an image shimmer with the force of life⁴¹.

41 See Kathy Eden, *Poetic and Legal Fiction in the Aristotelian Tradition* (1986) 88-98. See also Jennifer Deger, *Shimmering Screens* (2006).

To make what we know live – to make it appear in “images that dazzle the mind,” as Vico put it, is the work of poetic imagination. *Fict-io*, or poetic making is, according to Vico, the ground of our most certain knowledge. Poetic imagination (*fantasia*) is what brings sustainable worlds of meaning into existence, including the *nomos* in which law, as a coherent, world making force, inspires collective belief. But poetic imagination is a force that not only gives birth to and maintains worlds of meaning. It also destroys extant, decaying forms, making way for new ones. In this respect, *fantasia* is the handmaiden of the transcendent, the breaking through of the sacred as a binding force, cognate to the providential force of piety in history. As Vico has written: “The poetic imagination is what entices the soul, and impels it 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”⁴².

From Vico’s time to our own, the impressive clout of scientific rationality and utilitarian calculation has tended to overshadow the epistemological importance of stories and feelings, and of the poetic imagination generally. This imbalance, reflected in the philosophical demotion of esthetics and our collective embarrassment in the face of metaphysics, stands in need of correction. In law it is essential that we give the humanities their due. I say this not for the sake of the humanities, beleaguered though they may be in our materialist, market-obsessed culture, but for law’s sake, for the sake of law’s humanity perhaps. For the plain fact is that feelings, not logic, are what bind us to the law.

It is the chief function of the poetic imagination to crystallize feeling and manage the way emotions orchestrate our response to others and the world around us in the process of drawing meaning from experience⁴³. For too long within the Western philosophical tradition, aesthetics has been pushed to the sidelines of epistemological, ontological, and normative inquiry, as if it were a matter of mere style, of cheap tinsel or ornamentation without substance, a mere matter of taste. We can trace this devaluation all the way back to Plato, an inclination reaffirmed in modern times by Kant, among others. But aesthetics involves a great deal more than taste. It concerns the modulation and amplification of sensorial perception⁴⁴.

42 Giambattista Vico, *On the Study Methods of Our Time* (1990) 38.

43 See Richard K. Sherwin, “Too Late for Thinking,” *Law, Culture & the Humanities* 1 – 13 (2015) (critiquing Brian Massumi’s notion that “affective intensity is a value in itself.”)

44 See, for example, Mikel Dufrenne, *The Phenomenology of Aesthetic Experience* (1973); see also Emmanuel Alloa, “Aisthesis, Why There Is No Thinking Without the Image” <https://www.youtube.com/watch?v=KXursnSD-mU> (examining poetic imagination as ‘phantasia’: that which makes something appear, that presents the world – that which appears to us, or [paraphrasing Rimbaud’s famous line, “I is another”] that which we are appeared to. As Eluard writes: “Images think for me.” Paul Éluard, *Défense de Savoir* (1928). In this sense, the poet is being thought by the originary image that appears. Poetic imagination is the staging area for that which affects us (*phantasmata*). This is thinking as sensation – the pre-modern union of thinking and perceiving prior to Kant’s epistemological divisions. Judgment, in this context, is the social process in which we deliberate collectively on what appears in the clearing of poetic imagination.

As Heidegger has said about mood⁴⁵, aesthetics deals with particular ways of being in the world, our being in relation to things and others around us. And this includes our capacity for belief, and for intensity, which recalls once more the evidentiary, performative vividness of *Enargeia*.

Aesthetics involves how we engage the endlessly variable presentations and demands of others and events around us. It addresses how we attune ourselves to the world without necessarily reaching for a category or concept or, for that matter, a rule or a principle, all of which wait in the wings, ready to organize reality, including the legal order, the *nomos* itself⁴⁶.

Let us take a closer look then at the subject of feelings and the law. These days, if I were in search of authority to make a claim about “affect” or “feeling” or “emotion”, I would most likely be referred by the experts to recent neuroscientific studies. With these scientific methods and tools at hand, I might most persuasively demonstrate my point by showing you fMRIs (functional magnetic resonance imaging) of the brain lighting up while digesting poetry⁴⁷. The imagination must be here, in this anatomical sector, or perhaps spread around here and there, I might say, with arrows and colorful slides. But that is not the path I want to travel here.

Let's consider instead a poem, a wonderful poem by Wallace Stevens. Alongside our reading of this poem, I would like us to consider states of feeling. Like film, theater, and music, poetry is an emotional intensifier. When it works at its best, we feel something with unusual clarity and power. As if wistfulness, anger, longing, or love were somehow surging forth for the very first time. Of course, such forms of expressivity are also a means of emotional arrangement, as well as an emotional filter – this reflects the task of the poet as DJ whose musical choices construct a world thematically built around a shared mood, a common template of associations, a way of being, perhaps even a *nomos*.

If the great American jurist, Oliver Wendell Holmes was right when he said that experience, not logic is the life of the law⁴⁸, and I think he was right, then it is incumbent on us to follow through on the implications of that insight. There are important epistemological and cognitive ramifications. If experience must be mined for categorical knowledge as well as the affective knowledge of felt reality, different tools, tools other than logic and calculation, must be included in the lawyer's toolbox. Inductive and deductive logic, and the art of analogizing and distinguishing cases, are coveted abilities in law school, but they can only take you

45 See Martin Heidegger, *An Introduction to Metaphysics?* (1961) 2-3.

46 See P. Pucci, *Hesiod and the Language of Poetry* (1977) 2-25 (“Unrestricted by an Aristotelian principle forbidding contradiction, the mythical thought builds its meaning through polarities which are contiguous and which elicit meaningful correspondences.”).

47 See, for example, William E. Connolly, *Neuropolitics* (2002); Ruth Leys, “The Turn to Affect,” *Critical Inquiry*, vol. 37 437 – 8 (2011); and Richard K. Sherwin, “Too Late for Thinking,” note 41, *supra*.

48 See Oliver Wendell Holmes, Jr. *The Common Law* 1 (1881) (“The Life of the law has not been logic. It has been experience.”) Holmes' pragmatic insight was developed further by jurists identified with the ensuing Legal Realist school of thought.

so far in practice. For always there remains the question: what compels the rule that is being proffered by a particular party as dispositive of the outcome of a given case? Indeed, what compels the case? Why should the decision maker really care?

To answer questions like these, logic alone will not do. For, ultimately, what compels attention, and motivates judgment, is the sense we make of the situation before us. And that is a matter not of logic but of narrative and feeling⁴⁹. If we are to deal effectively with the messy business of making sense of human behavior, the kind of mess lawyers so often confront, we are going to have to extend ourselves, and enter into the diverse and often unfamiliar experiences and feelings of others. I speak of the lawyer's clients' experience, of course, but also of the experience and feelings of the decision makers on whose judgments legal advocates depend.

Narrative ascends to the particular, as Jerome Bruner has written⁵⁰. By contrast, conceptual thinking is abstract and general. This distinction between general and particular, between abstract conceptualization on the one hand, and particularistic narratives on the other, points to two completely different modes of thought. Each organizes the world and orders experience in its own way. A good story and a well-formed argument are different sorts of creatures. They embody different ways of knowing and being. Arguments are modeled upon science and mathematics; they aspire to proof, or verification. They seek empirical data that instantiate the rule or verify (or falsify) the hypothesis. Stories, on the other hand, including visual storytelling, aspire to the most compelling kind of verisimilitude, to lifelikeness, if you will⁵¹. They are authorized by ordinary common sense, by our gut, our intuition, our trained (and often unconscious) susceptibility to certain ways of feeling, and of constructing meaning.

These different modes of cognition – argument and storytelling – may complement one another, but the one will never be reduced to the other. Stories cohere and move us when they comport with our sense of the world, or (more rarely) when some brilliant thinker, like Vico, or some brilliant artist, like Wallace Stevens perhaps, imagines something new, perhaps something transformational, and compels us to live it as if it were our very own experience of reality. As Hannah Arendt has written: “No philosophy, no analysis, no aphorism, be it ever so profound, can compare in intensity and richness of meaning with a properly narrated story.”⁵²

Of course, legal advocates in practice take advantage of both modes. For example, on occasion, lawyers might want to activate the logic of necessity. Prosecutors, say, in solving a murder mystery in court, want to prove ‘whodunit’ in order to compel the jury to reach a verdict of guilt. Criminal defense lawyers, on the other hand, carry a different burden. They must arouse reasonable doubt. But the best defense lawyers understand that raising doubt alone may not suffice. It is not con-

49 The classic reference here might well be David Hume, *Treatise on Human Nature* ([1739-40]/1969) 153 (“When I give the preference to one set of arguments above another, I do nothing but decide from my feeling concerning the superiority of their influence.”).

50 Jerome Bruner, *Acts of Meaning* note 3 *supra* at 60.

51 Jerome Bruner, *Actual Minds, Possible Worlds* (1986).

52 Hannah Arendt, *Men in Dark Times* (1970) 22.

sistent with human nature to enjoy being left in limbo. We crave certainty, narrative closure⁵³. What fulfills that craving when all that's left is reasonable doubt? A defense attorney might say in closing argument, "Someone killed Mrs. Jones, but we don't know who. All I can tell you is, it wasn't my client." Fine. But what will resolve the juror's nagging sense of disorder that the defense has now left behind? Perhaps at this point another kind of story is called for. Perhaps it will be a hero quest tale, something that goes like this:

As jurors you have sworn a mighty oath. Others will tempt you to discard it. They will tell you to convict and go on your way. But the oath you swore requires more. It requires courage and dedication to our highest values, an unyielding dedication to liberty and justice. If you can accept that responsibility, if you have the courage to do your duty, you will acquit in the face of reasonable doubt.

This is a classic example of the hero quest story⁵⁴. We encounter it often, and it always makes the same moves, from *The Hunger Games* to George Lucas' classic *Star Wars* film series. Recall, for example, the first installment in the latter series. It begins as do all stock hero quest stories with the main protagonist being summoned to the hero's quest. But, of course, he resists the call. Then catastrophe strikes. (In *Star Wars* Luke's parents are killed and he is left homeless.) Now, the protagonist realizes that he really has no choice but to take up the fateful quest he initially deferred. Following this pattern, in the notorious O.J. Simpson double homicide trial, for example, defense lawyer Johnnie Cochran was not content simply to undercut the prosecution's narrative in order to sow "reasonable doubt." In addition, he went on to conjure a counter-narrative, a story of heroic jurors whose verdict would send a message that could counter police brutality in the future. "Only you police the police," was Cochran's insistent message to jurors during his summation. In this way, the juror is cast in the role of the hero upon whom the fate of the narrative depends. To fulfill the expectation of the hero narrative is to make the world a place in which heroic action may succeed, but only if the heroic juror takes the right action, which is to say, only if the juror votes to acquit. The juror as hero is the person who stays true to her sworn duty not to convict if there is reasonable doubt, no matter how the state may sorely tempt her to abandon her oath. This is what Jerome Bruner calls a 'subjunctive' story: one that is completed by the action of others, in the context of a criminal case, by the decision maker whose judgment completes the narrative with his or her own heroic intervention.

All stories are made up of recognizable elements⁵⁵. We learn these genres from our immersion in the culture around us, and unconsciously we come to expect their formal unfolding. For example, a Quentin Tarantino film like *Pulp Fiction* (1994) simply won't work if the viewer cannot see the formal elements

53 See Richard K. Sherwin, "Law Frames," *Stanford Law Review* Vol. 47, No. 1 (Nov., 1994), pp. 39 – 83.

54 See generally Joseph Campbell, *The Hero with a Thousand Faces* (1949).

55 See Vladimir Propp, *Morphology of the Folk Tale* (1968).

of the particular genre that he is mocking in the service of parody. Cognitive psychology studies have made clear that decision makers (whether judges or lay jurors) piece together discrete facts by knitting the particulars into an overall narrative pattern of some sort⁵⁶. It is essential, therefore, for trial lawyers to know what story form to use when, how to set it up, and how to make effective use of it for a particular effect or outcome. When the lawyer-narrator succeeds in this, predictable sorts of cultural associations, memories, and feelings come to the decision maker's mind. These images and feelings bind judgment and belief to their source. This is what verisimilitude is all about: life-likeness, the life-blood of the well-told tale.

So what does it mean to include this tool in the lawyer's toolkit, the capacity to construct the right narrative at the right time for the right purpose? This is the road that leads through the disorderly, but not incoherent realm of human emotions. The poetic imagination is the main instrument by which feelings are illuminated, amplified, and arranged⁵⁷. This alerts us to one of the central tasks of the humanities: to teach us how to make sense of our experience. My tears interpolate the scene of suffering before me; so, too, my pounding heart's anger, or the quickened pulse of excitement also tell me the nature of the circumstances in which I find myself. How I feel is an important antecedent to how I am to act. This underscores the epistemological significance of the emotions.

But how are we to know which affect-inflected meaning matters most to a choice of action or a conflict's proper resolution? We know in part by the intensity of our commitment, which is to say, by the intensity of our beliefs, the intensity of our feelings. This is where the integration of ethics and aesthetics matters most, at the intersection of vividness and the critical capacity for reflection. The latter without the former remains inert, the former without the latter lacks any moral or veridical compass. This, of course, simply recapitulates the classic formulation of ancient rhetorical wisdom. As Isocrates taught two and half millennia ago in ancient Greece: eloquence without wisdom is blind, but wisdom without eloquence remains mute⁵⁸.

Law's humanity, the core meaning that we derive for self and others and the social world that we inhabit, comes from, and is sustained by, the poetic imagination.

56 The classic reference here is Nancy Pennington & Reid Hastie, "A Cognitive Theory of Juror Decision Making: The Story Model," 13 *Cardozo Law Review* 519, 542 (1991). See also Robert P. Burns, *A Theory of the Trial* (1999) 222 (citing literary theorists, historians, and philosophers who share the view that "narrative forms the deep structure of human action" and asserting that "the bedrock of human events is not a mere sequence upon which narrative is imposed but a configured sequence that has a narrative character all the way down.").

57 See, for example, Martha Nussbaum, *Political Emotions* (2013); Richard Dawson, *Justice as Attunement* (2014).

58 See Nancy Struever, *The Language of History in the Renaissance: Rhetorical and Historical Consciousness in Florentine Humanism* (1970) 21; cf Marcus Tullius Cicero, *The Orations of Marcus Tullius Cicero* Book 1 (C.D. Yonge trans., 1888), available at <http://classicpersuasion.org/pw/cicero/dnvl-l.htm> ("[W]isdom without eloquence is but of little advantage to states, but eloquence without wisdom is often most mischievous, and is never advantageous to them.").

How else are we to deal with difference, with otherness? How else, when we lack direct experience, may we come to understand what it means to walk in the shoes of someone else – whether those shoes belong to a client or to the decision maker in whose hands the client's fate rests? Logic alone will not convey the situation sense of the client's case or its proper outcome. For that, you need a compelling story, a fitting image, an apt metaphor. These are the *enargeic* agencies of creative imagination, the agencies that compel belief by vividly attuning us to the situation at hand. Without the vitality and the inexhaustible excess of lived experience pulsing through our words and images, craft has dramatically less to work with. What we are left with is craft working craft – a reflexive process that wearies us with its emptiness. That's when the sour taste of craftiness takes over.

Trial lawyers who immerse themselves deeply in the facts of the case remain anchored to the story that must be told. The deeper one's attunement to the particulars, the more likely the whole will resound beyond its parts. This integrated heart/mind immersion is an essential prerequisite to eloquence, the force that animates and compels judgment⁵⁹. In short, attunement generates affective motivation. It is what flips the narrative switch on and makes the story go. After all, stories, like rules, are not self-operative. Without the animus of a motivating attachment it is hard to influence a decision maker's judgment. The trial story is what gives the decision maker traction upon a potentially operative narrative or rule. This is what Vico meant when he wrote about “what entices the soul, and impels it to love”: activating the imagination teaches one's audience to believe.

Insight, understanding, mindfulness, belief – all of these capacities are aesthetic in nature. They are capable of endowing knowledge with eloquence. This is the proper domain of meaningful experience. And this, too, is precisely where poetic imagination builds a home for us to dwell in, nudging us away from solitude, into the shared life of civil society. This is how Vico defended poetry and the creative imagination: in the service of shared images, shared stories, and ultimately shared values. This is also why for so many centuries law was considered the Queen of the arts and sciences: because law constitutes and maintains the core narratives that make society cohere and live. It curtails “the ferocity of fools,” as Vico put it⁶⁰, turning them from error through prudence, and bringing them benefit through virtue. That is also what it is like for the ethical and the aesthetic to grow entangled. And it is with this aspiration in mind that education in general, and legal education in particular, most urgently needs the humanities⁶¹. For it is not in logic or calculation, but rather in the interpretive arts of the humanities that we learn to cultivate creativity, memory, imagination, and vivid perception. These are the most necessary capacities for our appreciation of music, film, poetry, and literature. They are the capacities we need to weave together

59 See Piyel Haldar, “The Tongue and the eye: eloquence and office in renaissance emblems,” in Peter Goodrich and Valerie Hayaert, eds., *Genealogies of Legal Vision* 2015.

60 Michael Mooney, *Vico in the Tradition of Rhetoric* (1985) 113 (quoting Vico).

61 See Giambattista Vico, *On the Study Methods of Our Time* (1708-9/1990) 77.

the ethical and the aesthetic, harnessing eloquence, harmony, and beauty in the service of virtue – which jurists describe as the quest for justice.

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 individual calculations of maximized pleasure and minimized pain, eloquence in the hands of advertising and propaganda, divorced from knowledge and the situational demands of the ethical, lies at the mercy of totalizing ambitions. These ambitions may be hyper-erotic or hyper-rational, driven either by messianic fervor or by the cold bureaucratic calculations of the totalized state.

Beauty and justice are vital allies against such totalizing forces. Beauty enchants us by the expressive force of eloquence, while justice compels us by the unsurpassable, un-totalizable force of its ethical demands, the sense of being obliged by, or responsible for the world as it unfolds around us, and for the other who stands close by (the ‘neighbor’) in her need. The poetic imagination takes us across the great Cartesian divide that separates mind and body as well as mind and nature, or nature and sign. Through aesthetic modes of attunement we learn the demotion of self in fealty to the actual. That is the path to the ethical, the endless call of incalculable justice. Through the poetic imagination lawyers and decision makers learn to immerse themselves in the facts of the case. And from this immersion they learn to intuit the living speech and sublime images that constitute and authorize the law’s rules and judgments.

What does it mean to say that the image or that speech ‘lives’? Wallace Stevens writes in his poem, “Of Modern Poetry”:

It has to be living, to learn the speech of the place.
It has to face the men of the time and to meet
The women of the time. It has to think about war
And it has to find what will suffice.⁶²

Not clichés, not hackneyed terms from an old familiar script, but rather something that arises from what is real, what is before us, what the attuned mind allows to emerge. As Stevens writes: “the poem of the mind in the act of finding what will suffice.”

What will suffice? Words that suffice describe the emergence of meaning from lived experience. This is what provokes, as Stevens puts it, a sense of “sudden rightness:” a meaning that will suffice – a meaning that “wholly contains the mind.” This sense of rightness (again quoting Stevens) is something “below which the mind cannot descend, beyond which it has no will to rise.”⁶³ Not a bad description of eloquence.

62 Wallace Stevens, *Selected Poems* (ed. by John N. Serio) (2009) 135.

63 *Ibid.*

The capacity to harmonize signifier and signified so that a greater excess resounds; this is an uncanny excess – because the meaning it conveys remains irreducible to the form that creates it. Can jurists dare to seek, much less find such satisfaction as this? The satisfaction of experiencing a sudden rightness? The satisfaction of encountering a meaning that wholly contains the mind? A satisfaction in the art of expression that creates the very stage on which it performs? These are the conditions of ethical persuasion: the moment when the other accepts a proffered meaning as his or her own – the construction of a shared world and of a self that feels at home in the world.

This is the most important creative act that law and the poetic imagination perform. But can law poeticize? It can, it does, and it must. For that is the very source of law's humanity.

We witness this more palpably at critical moments in history when a set of values attains vitality anew: in times of revolution, civil war, and historic outbursts of social transformation and political liberation, manifest perhaps in new forms of constitutional reconstruction. For example, in the political history of the United States, as Bruce Ackerman has written, there are moments when the various branches of the federal government aligned, finding new meaning in a shared cluster of values – like the era of the New Deal, which gave form and purpose to a middle class that might emerge from the devastating loss and suffering of the Great Depression⁶⁴.

In a similar kind of distillation or convergence, the poetic imagination gives life to a particular take on shared values. This occurs on a macro level, when political and social upheavals exert the peculiar pressures of the social imaginary, and also on a micro level, every day, one law case at a time. It is through these individual and collective acts of meaning that we reconstruct our humanity in history. These acts tell us what it means to be human, now, in this place, in this time. This kind of meaning comes not from the barrel of a gun⁶⁵, but from an act of discourse – an act of persuasion, which presupposes, by definition, the freedom (and the power) to say yes or no, to accept a rule or a decision or a cluster of core values because they are right or just or fair. Because they make sense. Because I can live with myself and with others in such a world without despair. "I accept." That is the keynote of legitimate as opposed to naked power. It is how the other experiences the force of law cut off from consent to or acceptance of its authority⁶⁶.

Law's humanity, then, is an act of collective imagination – shared poetic imagination. We encounter it on the great stage of history, and also in smaller dramas, that play out one case at a time. Cases like *Wagner v. International Railway*⁶⁷, for

64 Bruce Ackerman, *We the People: Foundations* (1991).

65 See H.L.A. Hart, *The Concept of Law* (1979) 7.

66 See Emile Durkheim, *The Elementary Forms of Religious Life* (1912) (describing the collective effervescence generated by assembled social groups harnessing and bonding people's passions to the symbolic order of society)

67 *Wagner v International Railway Co.*, 232 N.Y. 176, 133 N.E. 437, 1921 N.Y. 490, 19 A.L.R. 1 (1921).

example, which was a seminal decision composed by one of the great American masters of legal rhetoric, Judge Benjamin Cardozo.

The legal challenge before Judge Cardozo in that case was plain: Can we say that a train company is responsible for the death of a passenger who chooses to leave the car he is in, while it is perched high on a bridge, at night? The passenger decides to descend onto the tracks in search of his cousin who, minutes earlier, had been thrown out of an open train door. That the train company is liable for carelessly creating the conditions that led to the cousin's death is beyond debate. But did they also cause plaintiff's death when he fell from the tracks on a deliberate mission of rescue? How we define proximate cause is the question, expressed at its simplest.

But the artistry with which Cardozo answers this question is anything but simple. How are we to think about this rescuer's action? Is it the train company's fault if he decided to bear the risks of rescue under such obviously dangerous conditions? Is this not an intervening, superseding cause that cuts off the train company's liability? Not according to Cardozo, whose judgment vividly embodies the power and authority of law when it is seamlessly united with the poetic imagination. "Peril and rescue must be in substance one transaction," Cardozo writes. "The sight of the one must have aroused the impulse to the other." Impulse, mind you – not deliberate reflection. "The emergency begets the man," Cardozo writes. Which is to say, it is not a matter of plaintiff's volitional intervention.

In Cardozo's prose, it is as if the brevity of his sentences emulates the quickness of the very impulse at issue. "The human mind acts with a celerity which it is sometimes impossible to measure," says Cardozo. We must, then, look at the circumstances, for, as Cardozo puts it, the act is "the child of the occasion." Note again the key theme of necessity, impulse, quickness – as opposed to deliberation, the reflective pause that might break the chain of causation. "Danger invites rescue." The very sentence, both in its swiftness and its substance, dictates the proper outcome: the railroad company created the conditions that impelled the act in question. Accordingly, they own both cause and consequence. But Cardozo does more. He captures our belief by vividly evoking how the rescuer must have felt, alone, at night, up there in the dark, on those narrow, precipitous tracks. Cardozo humanizes the rescuer – first, by naming his cousin, naming him in a most personal way, not formally, by his surname, but by his given name: Herbert. It is in search of cousin Herbert that our rescuer sets out.

We are meant to enter into the plight of rescue under the very circumstances in which it occurred. And with that in mind, listen to how Cardozo describes the penultimate scene, just before the plaintiff-rescuer, like cousin Herbert before him, precipitously falls to the ground below. Cardozo writes as follows:

The car went on across the bridge, and stopped near the foot of the incline. Night and darkness had come on. Plaintiff walked along the trestle, a distance of four hundred and forty five feet, until he arrived at the bridge, where he thought to find his cousin's body... Several other persons, instead of ascending the trestle, went beneath it, and discovered under the bridge the body they were seeking. As they stood there, the

plaintiff's body struck the ground beside them. Reaching the bridge, he had found upon a beam his cousin's hat, but nothing else. About him, there was darkness. He missed his footing and fell.⁶⁸

Talk about "the mind in the act of finding what will suffice." Just consider, for a moment, what is going on in this judicial text. For example, how one of the facts central to the legal issue, the fact that plaintiff deliberately chose to walk the length of a football field (445 feet) to reach the site of his cousin's fall, is reduced here to a mere subordinate clause – a rather minor detail in a much larger drama. And what a drama it is. We can picture it: night, and darkness have come on. The rescuer searches, expecting to find his cousin, but what does he see? "A hat upon a beam and nothing else." "And nothing else" – such a stark image, jolting the reader into vicariously experiencing the rescuer's own intensity of feeling. The shock of it. The terrifying aloneness at the moment of realizing what has occurred.

And did you note the narrative construction that Cardozo uses here? He gives us the rescuer's fall twice. First, plaintiff's body falls among those who had gathered beneath the trestle. And then we encounter a veritable replay: plaintiff finds "his cousin's hat upon a beam, and nothing else, misses his footing, and falls." What do you know? It's a flashback! Now why in the world would Cardozo produce a flashback? Why present the death twice, and in this particular fashion? What is going on here? Having already fallen among the crowd below, the reader must experience the replay of that fall as inevitable. There is a name for the dramatic technique in play here. It is the genre of suspense. Like in a Hitchcock film: the audience already knows what is going to happen. The victim's death is imminent and inevitable. The movie viewer, but not the victim, sees the madman with his knife raised, ready to strike the unwitting victim as she enters the shower.⁶⁹ "Don't go in!" we want to cry out. But, of course, she does.

Our knowledge of the inevitable, suspended briefly in time, provides an opportunity to build and intensify our response to what we know must occur. This drawn out moment in anticipation of the future perfect, this temporal suspension in the face of what must be (for it has already happened!), is the essence of the suspense genre, as its very name reveals. Suspense is designed to amplify emotion. I believe that Cardozo flashes back, replaying the story of Herbert Wagner's fall from the bridge, precisely in order to intensify the reader's emotional response. The emotional intensity with which we greet Herbert's fall commingles with its inevitability. And inevitability is, after all, the essence of Cardozo's legal argument here. Danger invites rescue. The act is born of the event. It is an impulsive act, the child of its occasion.

In short, plaintiff's fall was bound to happen as soon as the negligent condition for its occasion preceded it. Cousin Herbert's careless ejection from defendant's train and his ensuing fall from the bridge fatefully commenced a string

68 *Ibid.*

69 The infamous, quick-paced, blood-spattered shower scene in Hitchcock's *Psycho* (1960) is but one example of the director's mastery of the suspense genre.

of events that culminated in plaintiff's attempted rescue. Having carelessly created the occasion, the train company can hardly disown the consequences of the failed rescue that followed.

A legal decision written with such liveliness, with such poetic imagination, reconstitutes the world, and compels our acceptance. These are words that suffice, words that attune us to the facts of the case – because the attention of the writer is so focused, so immersed, so thoroughly enfolded in this very drama that we are led to experience it for ourselves. It is as if we were all seated together, in a darkened theater of the mind, just as in Stevens' poem. There we are, the audience, listening (as Stevens writes): "Not to the play, but to itself, expressed In an emotion as of two people, as of two Emotions becoming one."⁷⁰ In this sense, Cardozo and Stevens may be seen as engaged in a similar venture. The poem of the mind, like the narrative of the case, in the act of joining us together, in words of sudden rightness, words that suffice, and in so doing make law a living reality, a reality that defines us, and that helps to constitute the world in which we live.

Why does the law poeticize? Because eloquence and feelings bind us most surely to the authority of law. Law's essential narratives constitute the collectivity in which we live. And they do this, not by force of command, not by fear of repercussions alone, but even more effectively by the power of belief, of acceptance – that it is right and good and just for law to act as it does. This is what even so prominent a legal positivist as H.L.A. Hart ultimately realized: just because positive law has the power to command our obedience, that doesn't mean we want to obey. Positive law can obligate us to do or refrain from doing certain things – as from the barrel of a gun. But that doesn't mean we feel obliged to act in that way. It is our acceptance of the right to rule that ultimately legitimates what the rule tells us to do.

This shift from command to acceptance correlates with the shift from the formal power or validity of positive law to the eloquence and persuasiveness of law that legitimates its authority in proximity to justice. This corresponds with a shift from the imperious logic of explanation to the creative felicity of the poetic imagination. That felicity is the offshoot of words that suffice, words that carry and induce a sense of sudden rightness. These are words that arise from the jurist's attunement to what the facts demand.

Authoritative discourse, the discourse of foundational law, is, as Joseph Vining once wrote, "the act of making values come alive."⁷¹ This is not the work of logic. It is the work of poetic imagination. We experience it in the resonance of an uncanny excess. This is what ultimately compels us in all great works of art – whether it is beauty in painting, harmony in music, or eloquence in speech. When the union of signifier and signified is more than the sum of its parts we encounter meanings that will suffice. Law is founded and maintained, and sometimes transformed by such meanings. These are meanings that bind us with great intensity, with feelings that simultaneously clarify and enact the values they embody.

70 Stevens, *Selected Poetry*, *supra* note 59, at 135.

71 *Ibid.*

In the end, the only alternative to founding states based on Hobbesian fear in the face of the naked power of the state is to recurrently inspire collective belief and affirmation in the rightness of law's authority. Feelings that sustain such affirmation may be generated by the words of poets, whom the poet Shelley called the unacknowledged legislators of the world. They also may proceed from the poet-lawyer-statesman. Such individuals may not be common, but as Cardozo – and Robert Cover, and James Boyd White, and many others besides, have written: these are the individuals who help us hold our universe of meaning together, by which I mean, the *nomos* or legal community in which we live among others in civil peace under the rule of law. To say law poeticizes, then, is simply to say this is how law begins, and how it may, if we are lucky, continue to flourish. When meanings suffice.

So in the end we return to where we began: with law's stories and images, the stories and images that bind us by intensities of feeling generated by the poetic imagination. If this is so, then surely we must care about cultivating the poetic imagination – the inventiveness and binding force of *fantasia*. We must nurture it, in the service of virtue, as Vico wrote so many years ago. And we must seek to understand it anew in every generation, in words on the page as well as through images, sounds, and embodied actions in ceremonies and rituals of cultural significance.

By what intensities are we bound, or forced apart? To what acts of meaning do we say yes or no? And in so saying, whom do we become, what kind of community or society do we create? In a moral society we learn not only how to think and feel, but also to ask what it means to think and feel in particular ways under particular circumstances.

In this way, we come closer to knowing the living reality of law. And perhaps, by the same course, we also come closer to the source of law's trust – its bond both to the past and to the future. This is something neuroscience will never adequately convey. For in order to feel bound to something larger than ourselves we need to experience the intensity of that bond. This is what the poetic imagination is for: to live beyond fear and violence, in the realm of meaning, bound by words and images that suffice.

The great American jurist Karl Llewellyn once urged his students to love the law⁷². The poetic imagination tells us why. For if we look deeply enough, listen closely enough, in law's poetic quest for justice we may discern the very movement of love itself. On this view, *Eros* conceived as a sublime, anti-structural impulse impels us toward self- and collective coherence and renewal, and (again, if we are fortunate) the deepening of providential wisdom. This uncanny animus, in the service of an entangled ethical and esthetic coherence, is one way in which we may gain renewed traction on Vico's vital conception of Divine Providence as piety. In this dispensation, the law is an erotic bond constantly refracted through the prism of historical particularity, casting anew its net of libidinal attachment.

72 According to Paula Franzese, in his address to the first graduating of class of NYU Law School, Justice Cardozo urged the new lawyers to "love the law." <http://shorthappyguide.com/2014/10/20/seton-hall-law-celebrates-loving-the-law/>.

I began with the question: how are we to think about Vico's Providence today? But upon reflection, what is the history of culture if not multiple refractions of that mysterious spark that we call the spirit of the time? Each refraction of that light, each emanation from that potentially unitary spirit, captures the felt necessities, feelings, aspirations, and expressive possibilities of a given moment in history. Taken together, these refractions constitute the history of culture. Their concatenation, viewed from a sufficient distance, form recurring patterns that we may recognize and assess, compare and contrast across the long *durée* of highly disparate, but conceptually familiar historical recurrences. Such is the way of Vico's providence of history.

Providence expresses itself through human culture over time. If the ultimate goal of history remains speculative, with the proper tools and methods, larger patterns within it may yet be discerned. And like the moving lines in the hexagrams of the *I Ching*, patterns lead on to other patterns, inaugurating what is to come. The ethical genius, like the artistic genius, through an uncanny exercise of creative imagination, intuits through the manifold signs of his or her time what a given moment (or a given controversy) demands, and offers. With that creative intuition in hand, judgment may give eloquent expression to what equity compels it to express. Thus does eloquence bound to wisdom found the *nomos* anew: in fealty to the living spirit of community in which we are most at home. In my view, this is the kernel of Vico's foundational sense of poetic wisdom in law and politics. The poetic form, in whatever expressive medium that it may occur – word, image, voice, music – simultaneously enchants and collectively binds us. For as Plato and Bruno and, more recently, Eric Santner and Jean-Luc Marion, insistently tell us: the bond of *Eros* is the strongest bond of all.

If radical empathy cuts to the heart of Vico's *fantasia*, we might also say it cuts to the heart of the synthesis of the ethical and the aesthetic. Attunement, the capacity to experience otherness, opens the pages (and images) of history to the incessant human quest for meaning. It also opens the way to our experience of the one closest by, the neighbor. Is such attunement possible? The work of the poetic imagination throughout history testifies that it is. No writer, painter, composer, director, or choreographer would venture forth were this not the case. The incipient arc of communication that faithfully launches every expressive work testifies to the deep entanglement of the ethical and the aesthetic. It teaches us that seeking recognition of the irreducible otherness that the work addresses is fundamentally an act of ethical affirmation, deeming the subject as well as the viewer/reader not only worthy of address, capable of being met in heart and mind, but also fundamentally free to make up his or her own heart and mind in response to the spirit of inquiry, the impetus that addresses her and calls her into account.

This phenomenon of ethical and aesthetic entanglement constitutes the very possibility of art as well as politics and law. Each is a handmaiden of *fantasia*, poetic imagination, and the incessant aspiration toward ethical attunement. Confronted by the uncertain vicissitudes of unruly passions and deceits, on the one hand, and the tyranny of totalized rational systems of knowledge, or perhaps the tyranny of a similarly totalizing intensity of affect, on the other, the wise lawyer-poet-statesman

seeks the means to make civic life both secure and just. Whether we in our time, or our offspring in theirs, will enjoy the fruits of such a civil union between ethical wisdom and poetic eloquence remains hidden in the quickening folds of providence.

Conclusion

What is Vico's providence today? What does Vico provide? When we speak of providence we speak, at least in part, of providing for the future. Vico's thinking is, in this sense, both anticipatory and preparatory. Properly instructed, we may prepare for what is to come. Providence thus implicates prudence: making proper arrangements. It is providence that makes possible the wisdom we need for self-governance, in respect to both public economy and private domestic management (*oikonomia*).

But there is also a higher providence that outstrips human understanding and the all too human impulse toward mastery and totalization. According to Vico, it is piety, the way divine providence breaks into fractured time that teaches the ideal patterns of history. Today, we stand in need of a post-secular, metaphysical framework for this Vichian insight in order to counter the nihilist impulse that has swept through late modernity. Vico had already identified nihilism as the dark secret of Cartesianism. Indeed, it is the historical vicissitudes of that dark secret for which he presciently sought to prepare us. Piety finds its roots in something beyond the subject, beyond the will. It is that disruptive, ineffable force that resists the impulse toward totality (the will to power) in whatever historic form it may take: from the totalizing mechanics of Hobbes' Leviathan state to the totalizing algorithmic programming that covertly constructs and drives today's digital social media and the so-called 'Internet of Experience.'

The essential wisdom to be found in Vico's critique of Cartesian rationality insists upon the human capacity to respond to otherness: the otherness of self (*Eros*) and the otherness of history (Divine Providence). Vico's piety comports with an attitude of humble attentiveness rather than totalizing mastery. We witness this in the attunement of poetic imagination to the historic recurrence of the sacred and the sublime, which always exceed the limits of expressive representation. This ineffable excess is the key to curtailing the "ferocity of fools"⁷³ who insist upon mastery, the totalization of the will.

History, like the Vichian toolkit that decodes it, is preparatory. From its recurrent patterns we may discern where we have been, where we are now, and where we seem to be heading. This preparatory work is one of the great legacies of Vico's thought. It is incumbent upon us to remember what that toolkit is for, and to dedicate ourselves to keeping it supplied with tools that are adequate to the shifting historical challenges that confront us. The hope for our current post-secular age lies in our renewed capacity to recognize the signs and pres-

73 Michael Mooney, *Vico in the Tradition of Rhetoric* (1985) 113 (quoting Vico).

ence of anti-structure, so that we may learn new ways to approach the sacred, the sublime, the erotic, the numinous – so that we may cultivate new rites and liturgies of the tragic imagination⁷⁴ in law, religion, and every other constitutive agency of social bonding. Here, then, in the metaphysical domain of piety newly conceived, lies the providential truth of Vico's Providence, what it gives by way of what is given: a perennial source of wisdom, aided by tools and methods designed for prudent preparation, in the face of the vicissitudes of the past, and the future perfect, between which we are suspended – held in a precarious now that, in some ineffable sense, has already occurred.

74 See Rowan Williams, *The Tragic Imagination* (2016) 10-11.