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VICO'S PRINCIPLE OF *SENSUS COMMUNIS*
AND FORENSIC ELOQUENCE

THORA ILIN BAYER*

INTRODUCTION

Vico's small, early work *On the Study Methods of Our Time* presents us with a complete theory of education formulated against Cartesianism. Descartes' conception of clarity and certainty in human knowledge precludes from it all those forms of thinking that are traditionally placed under the heading of civil wisdom. The humanities generally, including jurisprudence, depend upon reasoning that proceeds from common sense and tradition and provides us with well-turned probabilities, not logical certainties. The modern world and our conception of systems of education with it are Cartesian. The art of oratory, the art of memory, and the art of topics that have always been crucial for the study of jurisprudence are no longer a part of education. Is it possible to resurrect them? If it is, Vico is a key figure for so doing. In my remarks that follow I wish to focus on two questions: (1) What is Vico's conception of rhetorical speech? and (2) What implications does this conception have for education in the humanities and jurisprudence?

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I. VICO AS JURISTICAL GRAMMATICUS

For Vico, a professor of rhetoric and law, was the last of the great grammarians. . . . He read the book of universal history as the mediaeval grammarians had read the Book of Nature and the Book of God—the traditional Two Scriptures. From events, legends, traditions, etymologies, linguistic freaks, he educed patterns of eschatological significance.

—Hugh Kenner¹

There are two ways to learn pedagogy from Vico. One is to consider who Vico himself was, how he existed as a teacher and thinker. The other is to assemble into a single account his doctrine of humanistic education. My subject in this section is the first of these. The succeeding sections are concerned with the second, bringing together what Vico says in various of his works.

Giambattista Vico (1668–1744) was professor of Latin eloquence at the University of Naples, a position he held for over forty years from 1669 to 1741 (from age thirty-one to age seventy-three) when he was succeeded in his professorship by his son Gennaro. His principal duty was to prepare very young students to qualify in the law. His position also required him to deliver the oration that marked the beginning of the academic year. His abovementioned oration of 1708 on the system or method of studies was the seventh of these (in this essay I will refer to it as his seventh oration); the preceding six were also on various themes of education.² Beyond the succession of these first seven orations, Vico delivered three further inaugural university orations. In one delivered in 1713, the full text of which is lost, Vico addressed the general theme of “how to make choice and use of the sciences for eloquence.”³ In another oration delivered in 1719, the full text of which is also lost, Vico presented the argument that “[a]ll divine and human learning has three elements: knowledge, will and power, whose single principle is the mind, with reason for its eye, to which God brings the light of eternal truth.”⁴ This oration is indirectly pedagogical. Most

1. HUGH KENNER, DUBLIN'S JOYCE 324 (1956).

2. See generally GIAMBATTISTA VICO, *The Orations, in ON HUMANISTIC EDUCATION (SIX INAUGURAL ORATIONS, 1699–1707)* (Giorgio A. Pinton & Arthur W. Shippee trans., Cornell Univ. Press 1993).

3. GIAMBATTISTA VICO, *THE AUTOBIOGRAPHY OF GIAMBATTISTA VICO* 125 (Max Harold Fisch & Thomas Goddard Bergin trans., Cornell Univ. Press 1944) (1728 & 1731) [hereinafter *AUTOBIOGRAPHY*].

4. *Id.* at 156.

directly it presents the standpoint that underlies his three books of *Universal Law* that appeared in the 1720s.⁵

Vico's final university oration was delivered in 1732, entitled *De mente heroica*, or *On the Heroic Mind*.⁶ This oration is second in importance only to Vico's seventh oration of 1708. The theme of this later oration returns to that of the earlier one, and adds to it the concept of the hero which Vico had developed in the intervening years in the two versions of his *New Science* (1725 and 1730).⁷ In the development of a nation the hero is the embodiment of the virtues that form the basis of civil life. But once the age of heroes is past in the course of a nation, the heroic deeds upon which its customs are formed are no longer possible. In such a post-heroic age, an age of strictly human institutions (the age of modernity in which we and Vico live), heroism remains only as a way of thinking, as a stance of the mind, not as a form of action. Elio Gianturco, the translator of the seventh oration, considers Vico's *On the Heroic Mind* as "one of the most inspired 'invitations to learning' ever penned . . . [t]he *eros* of learning has seldom been expressed in more electrifying terms."⁸

Vico's use of "heroic" may have its source in Plato's *Cratylus*, in which it is claimed "the word 'hero' [*hērōs*] . . . has been only slightly altered from the name of love (*Erōs*), the source from which the heroes spring." Plato says a second reason they may have been called heroes was because they were clever speech-makers (*rhētores*) and were also skilled in dialectical questioning (*erōtan*).⁹ The development of these linguistic powers is the key for Vico to heroic mind as the ultimate ideal of human education. Heroic mind is to be sought in all subjects. In the last oration of his career, delivered to the Academy of Oziosi (1737), which was not one of

5. See generally Giambattista Vico, *Dissertations*, in 24 NEW VICO STUDIES 1 (John D. Schaeffer trans., 2006); Giambattista Vico, *On the Constancy of the Jurisprudent*, in 23 NEW VICO STUDIES 1 (John D. Schaeffer trans., 2005); Giambattista Vico, *On the One Principle and One End of Universal Law*, in 21 NEW VICO STUDIES 23 (John D. Schaeffer trans., 2003); Giambattista Vico, *Synopsis of Universal Law*, in 21 NEW VICO STUDIES 1 (Donald Phillip Verene trans., 2003).

6. See generally Giambattista Vico, *On the Heroic Mind*, in VICO AND CONTEMPORARY THOUGHT 228 (Giorgio Tagliacozzo, Michael Mooney & Donald Phillip Verene eds., Humanities Press 1979).

7. GIAMBATTISTA VICO, THE FIRST NEW SCIENCE (Leon Pompa ed. & trans., Cambridge Univ. Press 2002) (1725); GIAMBATTISTA VICO, THE NEW SCIENCE OF GIAMBATTISTA VICO (Thomas Goddard Bergin & Max Harold Fisch trans., Cornell Univ. Press, paperback unabr. ed. 1984) (1744) [hereinafter NEW SCIENCE].

8. Elio Gianturco, *Translator's Introduction* to GIAMBATTISTA VICO, ON THE STUDY METHODS OF OUR TIME, at xxii (Elio Gianturco trans., Cornell Univ. Press 1990) (1709) [hereinafter STUDY METHODS].

9. PLATO, *Cratylus*, in CRATYLUS, PARMENIDES, GREATER HIPPIAS, LESSER HIPPIAS 1, 57 (H.N. Fowler trans., Harvard Univ. Press 1992). All references to classical authors and their works throughout this essay are given in standard form. All such passages quoted can be found in the volumes of the Loeb Classical Library of Harvard University Press.

his university orations, Vico continues his theme of the importance of eloquence. He reaffirms the power of eloquence in human affairs, citing among other examples Cicero's speech in defense of Quintus Ligarius before Caesar at the Council. As Caesar, ruler of the known world, left the proceedings he declared, "Had Cicero not spoken so well today, Ligarius would not flee from our hands."¹⁰ The power of the law depends upon the power of rhetoric. Rhetoric is not only the key to prudence; it is the key to jurisprudence.

Throughout his career, Vico taught from his own textbook of institutes, *Institutiones oratoriae* (1711–1741).¹¹ The legal principles conveyed were interpretations of Roman law, the *Corpus iuris civilis*.¹² In the class session, Vico dictated a portion of the textbook in Latin to the students during the first half hour. In the second half hour the dictated material was expanded upon and explained, all in Latin. The basis of legal education in civil law required a mastery of Latin, the principles of rhetorical speech, and the application of these to Roman law. The center of legal education was to prepare students to speak in the law courts backed by a sound knowledge of jurisprudence.

Vico himself was an autodidact in all the fields of human studies, including the law. Having withdrawn from the Jesuit school in which he was enrolled in his early years, Vico briefly, but without registering for them, attended some university lectures on cannon law by Felice Aquadies and remained for two months in a privately given law course of Francesco Verde before dropping out, being dissatisfied with their minute detail. He continued his study of cannon and civil law on his own and under the tutelage of the attorney Fabrizio del Vecchio, Vico developed a grasp of practical forensics. His one experience in court was three days before his eighteenth birthday in 1686. Having petitioned for admission to the bar, Vico obtained permission to and successfully defended his father (a bookseller) in a civil action brought against him by rival bookseller Bartolomeo Moreschi. Shortly after his success in this case, Vico accepted a position as tutor to the children of the Rocca family, traveling with them to their castle at Vatolla, a three-day carriage ride south of Naples in the mountains of the Cilento. While at Vatolla, Vico read through the library of the Franciscan convent of Santa Maria della Pietà, thus completing his general education in humane letters as well as metaphysics. During the nine years he held this

10. STUDY METHODS, *supra* note 8, at 88.

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

12. DIG. 1–50 (THE DIGEST OF JUSTINIAN (Alan Watson ed. & trans. Univ. of Pennsylvania Press 1985)).

position, Vico returned on occasion with the Rocca family to Naples. Although not in regular residence at Naples, Vico matriculated at the university and received a doctorate in both laws, canon and civil.¹³

Vico's sense of eloquence extends from the practice of the law to the practice of teaching. To speak in the law courts is to orate. To speak in the classroom is also to orate. Eloquence requires one to speak fully on a subject, to present all of its aspects in a complete speech conveying to the hearers all that the speaker has conceived in his mind. At the end of his autobiography, Vico says that in his teaching he attempted to practice the ideal of the great tradition of the Humanists: to be "wisdom speaking." Vico paraphrases this Ciceronian view in the conclusion to his seventh oration.¹⁴ Eloquence requires *copia*, as it brings together many aspects of a subject, but it differs from elegance in that eloquent speech is a presentation of the whole, whereas elegant speech refers to the fineness of the phraseology used.

Vico says in his autobiography that he not only attempted to be wisdom speaking, he further lectured "as if famous men of letters had come from abroad to attend his classes and to hear him."¹⁵ There is, in fact, no other ideal that a true teacher can have. Anything less is not appropriate to learned speech. Vico says that he was always afraid of being alone in wisdom, for such solitude makes one either a god or a fool, and he says, "Though I am afraid of delivering false judgments on all subjects, I am particularly afraid of advancing erroneous views on eloquence, since I profess it."¹⁶ The antidote to being alone in wisdom, which is the risk of every original thinker, is eloquence. Eloquence allows the thinker to communicate his discoveries to an audience, to present wisdom in its proper form and to avoid simply the juggling of words.

Behind Vico as professor of Latin eloquence is Vico as *grammaticus*. Vico's eloquence is based on his practice of the art of the ancient grammarians, the attempt to ground one's thought and speech in the true meanings of words as is pursued in Plato's *Cratylus* and in Varro's *De lingua latina*. In his attack on Descartes' metaphysics in *The Most Ancient Wisdom of the Italians Unearthed from the Origins of the Latin Language*, Vico claims that the intellectual meanings of words in ancient Latin came into it from the pre-Socratic philosophers of Ionia, who were experts in

13. For a discussion of the above details of Vico's adolescence, education, and tutorship, see AUTOBIOGRAPHY, *supra* note 3, at 111–32.

14. See STUDY METHODS, *supra* note 8, at 78.

15. AUTOBIOGRAPHY, *supra* note 3, at 199.

16. STUDY METHODS, *supra* note 8, at 77, 80.

reasoning about the physical world, and from the Etruscans, who were experts in divine ideas.¹⁷ Such intellectual meanings could not be original to the speakers of old Latin, as it was primarily a language of farmers and soldiers. Vico also follows this procedure of tracing words back to their origin in his *Universal Law* and in his *New Science*. He repeatedly shows that the key terms of Roman law have etymologies that reveal the meanings of the customs out of which Roman and human society itself is generated. For example, he traces the claim to right of ownership, the *vindiciae*, found originally as a legal principle in the *Law of the Twelve Tables*, back to the custom of duels as the original means for settling disputes between two parties.¹⁸

Vico's *Universal Law* is the first version of what was to become his *New Science of the Common Nature of the Nations* (1725 and 1730/1744), the central concept of which is derived from the Roman *ius gentium*, which Vico formulates as *ius gentium naturale* or "the natural law of the peoples." In essence, *ius gentium* asserts that there is a part of the *ius civile* or private law of any nation that is held in common with every other nation. Vico transposes this legal principle into his historical principle of *storia ideale eterna*, "ideal eternal history." He does this by a *nuova arte critica*, a "new critical art" in which philosophy (with its formulation of universal principles) is applied to philology (with its concentration on the particulars of the human world). The grammatical pursuit of the original meanings of words is expanded into philology, defined by Vico as the study of all things that "depend on human choice; for example, all histories of the languages, customs, and deeds of peoples in war and peace."¹⁹ Vico's ideal eternal history conceives all nations as developing through the same general pattern—an age of gods, in which all of nature and all basic social institutions are comprehended as the presence of gods; an age of heroes, in which the virtues necessary to archaic societies are embodied in the characters and deeds of heroes; and an age of men, in which social life is governed by written law and abstract forms of thought. Vico, in his conception of "ideal eternal history," temporalizes the principle of the commonality of nations present in a static sense in the conception of *ius gentium* of Roman law. Underlying this common course of all nations is Vico's version of the *sensus communis*.

17. GIAMBATTISTA VICO, ON THE MOST ANCIENT WISDOM OF THE ITALIANS UNEARTHED FROM THE ORIGINS OF THE LATIN LANGUAGE (L.M. Palmer trans., Cornell Univ. Press 1988) (1710).

18. NEW SCIENCE, *supra* note 7, ¶ 961. Regarding *vindiciae* in the *Law of the Twelve Tables* see *The Law of the Twelve Tables*, in 3 REMAINS OF OLD LATIN 424, 509 (E.H. Warmington ed. & trans., Harvard Univ. Press 1974) (Table XII, No. 3).

19. NEW SCIENCE, *supra* note 7, ¶ 7.

II. SENSUS COMMUNIS

The expression *communis sensus* does not mean precisely the same as the phrase we have derived from it, viz. "common sense." It is rather social sense, a sense of propriety in dealing with our fellows, or what the French call *savoir faire*.

—H. Rushton Fairclough²⁰

As a philosophical, rhetorical, and literary term, *sensus communis* can be understood in four main senses. It is understood in two ways by the ancients and in two ways by the moderns.

(1) In Aristotelian psychology, *aisthesis koine* (common sense, *sensus communis*) is a faculty of the *psyche* that perceives those aspects of the external world that are not the province of one of the particular five senses. That which is not the result of the specific function of any one of the five senses are "common sensibles." Aristotle says: "[T]he common things are motion, rest, number, shape, and size, for things like that are proper to none of them but common to them all."²¹ He says that there cannot be a special sense-organ for the common sensible: "[I]t is clear that it is impossible for there to be a particular sense for any of these, say for motion, since this would just be the way we now perceive sweetness by means of sight."²² The fact that we perceive a thing by our sense of sight and also perceive it as sweet by our sense of taste is incidental to the thing, to its particular qualities. The common sensibles are properties of all perceivable things. Our five senses present us with the particular properties of particular things. Aristotle's distinction between common sensibles and the special five senses is similar to the later distinction in Galilean science between primary and secondary qualities. The primary qualities are those features of things that are mathematically measurable; the secondary qualities are subjective, dependent on and variable with the observer. But for Aristotle, both the common and the particular properties of the object are derived from the power of perception and are there as such in the object.

(2) Although *sensus communis* is the corresponding Latin term for *aisthesis koine*, the Roman Stoics developed a very different sense of it. For the Stoics, "common sense" is a rhetorical and social term. In the Aristotelian sense it is a psychological and epistemological term. Seneca, in his

20. HORACE, *Satires*, in SATIRES, EPISTLES AND ARS POETICA 4, 87 n.b (H. Rushton Fairclough trans., Harvard Univ. Press rev. ed. 1929) (editor's note).

21. ARISTOTLE, *On the Soul*, in ON THE SOUL AND ON MEMORY AND RECOLLECTION 100 (Joe Sachs trans., Green Lion Press 2001).

22. *Id.* at 126.

Epistle *On Facing the World with Confidence*, advises that hatred (*odium*) can be avoided in human affairs by never provoking anyone. But if one encounters hatred from others when it is uncalled for by one's actions toward them, "common-sense will keep you safe from it [*a qou te sensus communis tuebitur*]."²³ Common sense in this context has the sense of acting moderately and well toward others in the manner of a good and decent person. One presents oneself as someone to be respected, as someone not to be feared or hated or as a danger to others. This Stoic sense of self-possession is the basis of confidence in facing the ways of the world. Seneca's *sensus communis* as a guide to human conduct is a Stoic version of the cardinal virtue of temperance (*temperantia*), of which Cicero says: "Under this head is further included what, in Latin, may be called *decorum* (propriety); for in Greek it is called *πρέπον*. Such is its essential nature, that it is inseparable from moral goodness; for what is proper is morally right, and what is morally right is proper."²⁴ Cicero says further that *decorum* or propriety is so much a part of all virtues "that it is perfectly self-evident and does not require any abstruse process of reasoning to see it."²⁵ To learn propriety, we must observe how for the poets "every word or action is in accord with each individual character."²⁶ Cicero's *decorum* or propriety is a doctrine of prudence in human affairs, but is accompanied by eloquence in speech and thought.

Juvenal, in satirizing the pompous use of social class and pedigrees in civil affairs, says of persons who hold by these, "It's pretty rare that you'll find considerateness in people of that class [*rarus enim ferme sensus communis in illa fortuna*]."²⁷ *Sensus communis* here is a principle of thoughtful kindness derived from an awareness of the commonality all have with each other as human beings, as opposed to feelings of pomposity and superiority. Horace, in characterizing various kinds of faults committed in human relationships, speaks of someone being "quite devoid of social tact [*communi sensu plane caret inquit*]."²⁸ Seneca in his essay *On Benefits* says "[s]ocial tact should be used in bestowing a benefit [*Sit in beneficio sensus communis*]."²⁹ To have *sensus communis* is to know how to act with pro-

23. SENECA, *On Facing the World with Confidence*, in EPISTLES 93–124, at 212, 212–13 (Richard M. Gummere trans., Harvard Univ. Press 1989).

24. CICERO, DE OFFICIIS 97 (Walter Miller trans., Harvard Univ. Press 1975).

25. *Id.*

26. *Id.* at 99.

27. Juvenal, *Satire 8*, in JUVENAL AND PERSIUS 322, 328–29 (Susanna Morton Braund ed. & trans., Harvard Univ. Press 2004).

28. HORACE, *supra* note 20, at 86.

29. 3 SENECA, *De Beneficiis*, in MORAL ESSAYS 38–39 (John W. Basore trans., Harvard Univ. Press 1935).

priety in any social situation, to do what is fitting with particular conditions in bestowing a benefit, and not to interfere with the concerns or occupations of another.

Marcus Aurelius, in formulating his Stoic philosophy in his *Meditations*, coins a Greek term that Shaftesbury finds closely associated with a wider sense of *sensus communis*, and on which Gadamer comments in his discussion of the humanist tradition in *Truth and Method*.³⁰ This very attractive term is *koinonoemosune*.³¹ It has the sense of “public spirit,” of “common sensibility,” what is shared, public, and common to all people. This term, if associated with *sensus communis*, takes us beyond social tact to the idea of a shared sensibility upon which society and civility depend. It is more than a sentiment necessary for successful relationships between individuals; it is the sentiment necessary for society itself to function.

(3) Among the moderns, Descartes employs a concept of common sense that differs from that of both Aristotle and the Stoics. In the first line of his *Discourse on the Method* (1637) Descartes claims, “Good sense [*le bon sens*] is the best distributed thing in the world: for everyone thinks himself so well endowed with it that even those who are the hardest to please in everything else do not usually desire more of it than they possess.”³² Descartes’ “*le bon sens*” is the rational ability to recognize what comes before the mind as a clear and distinct idea; it is required in order to recognize first principles from which right reasoning can proceed according to his method. *Le bon sens* is not an inductive power to reason from, or hold sound opinions based on, empirical experience. It is not a way of thinking in rhetorical terms—that is, in a verisimilar, probable, or dialectical manner.

In the eighteenth century, common-sense philosophy was developed primarily by French and Scottish thinkers. Descartes’ answer to skepticism was taken up in a new way by Claude Buffier (1661–1737). For Buffier in his work of *First Truths* (translated in 1780), common sense is an unimpeachable authority that allows us to process such first truths as the exis-

30. HANS-GEORG GADAMER, *TRUTH AND METHOD* 19–30 (Joel Weinsheimer & Donald G. Marshall trans., Continuum Pub. Co. 2d rev. ed., 1989). The standard study of Vico’s conception of *sensus communis* is JOHN D. SCHAEFFER, *SENSUS COMMUNIS: VICO, RHETORIC, AND THE LIMITS OF RELATIVISM* (1990). In relation to the law, see Francis J. Mootz III, *Law in Flux: Philosophical Hermeneutics, Legal Argumentation, and the Natural Law Tradition*, 11 *YALE J.L. & HUMAN.* 311, 312–13, 319, 336, 339, 343 (1999), and Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Theory*, 6 *S. CAL. INTERDISC. L.J.* 491, 496–97, 510 (1998).

31. See MARCUS AURELIUS, *Meditations*, in MARCUS AURELIUS 2, 12–13 (C.R. Haines ed. & trans., Harvard Univ. Press rev. ed. 1930).

32. 1 RENÉ DESCARTES, *Discourse on the Method*, in *THE PHILOSOPHICAL WRITINGS OF DESCARTES* 111, 111 (John Cottingham, Robert Stoothoff & Dugald Murdoch trans., Cambridge Univ. Press 1985).

tence of the external world, that the mind is incorporeal, and that there is free will. For Buffier such truths have been acknowledged by the majority of humanity. Any who skeptically reject such truths still find themselves in their lives acting in accord with them.

Thomas Reid's *An Inquiry into the Human Mind on the Principles of Common Sense* (1764) founded the Scottish Common Sense School.³³ Reid thought the truths of common sense to be evident in ordinary language. Reid claimed that although such truths cannot be made evident by deductive proof, when philosophers attempt to reason against them, their language fails to make good sense. For Descartes, common sense as "good sense" lets us recognize rational first truths when we encounter them. For Reid, common sense acts as a corrective when we pursue reason to the point of holding incoherent views. Descartes and Reid in their different ways anticipate the generally modern view that common sense is an epistemic power, a way of knowing what is proto-scientific. This proto-scientific sense is captured in the German expression for common sense—*gesunder Menschenverstand*, "sound or healthy human understanding." As *gesunder Menschenverstand*, our common-sense view of the world is a more loosely organized form of knowledge than that of science. Scientific reasoning, on this view, takes common-sense understanding as a beginning point and develops a more precise account of the world through observation, experiment, and theoretical formulations.

(4) At odds with the distinctively modern view of common sense—whether that found in Descartes' rationalism or Reid's empiricism—is Shaftesbury's view in the second treatise of his *Characteristiks: Sensus Communis; An Essay on the Freedom of Wit and Humour* (1709).³⁴ Shaftesbury wishes to revive the social and moral sense of *sensus communis* found among the Latin writers and the Stoics. Shaftesbury portrays a conversation among friends concerning morality and religion, and raises the question of how differences of opinion could be resolved in these matters. It is suggested that such differences could be settled by an appeal to common sense, which leads one participant to the question of what common sense is. But differences in religion and morality appear to be present in any attempt to say what constitutes common sense. Shaftesbury says:

33. For a modern edition of Reid's major work, see THOMAS REID, *AN INQUIRY INTO THE HUMAN MIND: ON THE PRINCIPLES OF COMMON SENSE* (Derek R. Brookes ed., Pennsylvania State Univ. Press 1997) (1764).

34. See generally 1 ANTHONY, THIRD EARL OF SHAFTESBURY, *Sensus Communis; An Essay on the Freedom of Wit and Humour*, in *CHARACTERISTICKS OF MEN, MANNERS, OPINIONS, TIMES* 37 (Liberty Fund 2001) (1709).

If by the word *Sense* we were to understand Opinion and Judgment, and by the word *common* the Generality or any considerable part of Mankind; 'twou'd be hard, he said, to discover where the Subject of common Sense cou'd lie. For that which was according to the Sense of one part of Mankind, was against the Sense of another.³⁵

Shaftesbury draws on the Latin poets and on the Stoics to revive a view of the moral or social sense of common sense. As mentioned above, he is particularly impressed with the coining of *koinonoemosune* by Marcus Aurelius—the sense of “public spirit.” Shaftesbury advocates:

[The] *Sense* of *Publik Weal*, and of the *Common Interest*; Love of the *Community* or *Society*, natural Affection, Humanity, Obligingness, or that sort of *Civility* which rises from a just *Sense* of the *common Rights* of Mankind, and the *natural Equality* there is among those of the same Species.³⁶

Shaftesbury understands common sense as a universal sentiment upon which civil society itself depends, and thus a sentiment that cuts across the diversity of religions, moralities, and societies. He says: “A publick Spirit can come only from a social Feeling or *Sense of Partnership* with human Kind.”³⁷ Shaftesbury intends his common sense to be the original sentiment from which human society itself arises, and to stand in opposition to the natural-law theory of a “state of nature.” We arrive at this principle of public spiritedness or common fellowship after realizing that no principle of commonality can be advanced through the abstractions of philosophical reasoning. Shaftesbury’s principle of common sense is close to Hume’s principle of “common life” of the third book of *A Treatise of Human Nature*.³⁸ For Hume, the unsuccessful pursuit of an accord among philosophical doctrines that leads to skepticism leads further to the realization of the importance of common life that underlies all civility and makes the human world possible.

Vico’s conception of *sensus communis* contains elements of all four conceptions delineated above. The twelfth axiom of Vico’s *New Science* (1730/1744) defines his conception: “Common sense [*il senso comune*] is judgment without reflection, shared by an entire class, an entire people, an entire nation, or the entire human race.”³⁹ This definition extends and clarifies Vico’s remarks on *sensus communis* in the third section of his seventh

35. *Id.* at 50.

36. *Id.* at 66.

37. *Id.* at 67.

38. For the phrase “common life” see 3 DAVID HUME, *A TREATISE OF HUMAN NATURE* 455 (L.A. Selby-Bigge ed., Oxford Clarendon Press 1888) (1739 & 1740).

39. *NEW SCIENCE*, *supra* note 7, ¶ 142.

oration.⁴⁰ Vico's *senso comune* does not embody Aristotle's conception of a faculty of common sense, but it is in accord with Aristotle in understanding common sense to derive from sensation. As will be discussed in the next section on topics, Vico's conception of common sense is grounded in his conception of "sensory topics." Vico incorporates the Latin conception of common sense as "social tact" into his view that common sense can be something shared by a class, a people, or a nation. Thus common sense can vary from class to class, people to people, or nation to nation, but every such social order requires its version of common sense to attain its own particular identity. Descartes' *bon sens* and Reid's "common sense," understood as epistemic conceptions of *sensus communis*, are involved in Vico's definition in the phrase "judgment without reflection." But for Vico common sense is a standard and means for forming judgments—a kind of knowledge, but one that is not based on reflection as scientific or theoretical judgments are.

Shaftesbury's principle of common sense is perhaps closest to Vico's, in that Vico's common sense is "communal sense" that can extend to "the entire human race." In Italian, a municipality was originally called a *comune*, and is still referred to as such. Shaftesbury limits his conception of the commonality inherent in *sensus communis* to ethical or social terms. Vico's *senso comune* is ethical and social, but it is also metaphysical. Vico further explains his sense of common in his thirteenth axiom: "Uniform ideas originating among entire peoples unknown to each other must have a common ground of truth [*un motivo comune di vero*]."⁴¹ This axiom reflects the sense of "common" in Vico's full title of his *New Science—Principles of New Science Concerning the Common [Comune] Nature of the Nations*. What is common to the nations is the "natural law of the gentes [*il diritto natural delle genti*]," which Vico bases on the Roman *ius gentium* as discussed above. From the common nature of the nations, there "issues the mental dictionary [*il dizionario mentale*] for assigning origins to all the diverse articulated languages. It is by means of this dictionary that the ideal eternal history is conceived, which gives us the histories in time of all nations."⁴² The understanding of this dictionary takes us back to the connection between eloquence and *sensus communis* that Vico claims in the seventh oration, the key to which is Vico's insistence on the importance of *ars topica* for both human education and human knowledge. The mental dictionary is tied to law and legal education, as it is the ultimate source

40. See STUDY METHODS, *supra* note 8, at 13.

41. NEW SCIENCE, *supra* note 7, ¶ 144.

42. *Id.* ¶ 145.

from which meanings can be drawn to plead a case or interpret the law in a legal proceeding.

III. ARS TOPICA, ARS MEMORIAE

Every systematic treatment of argumentation has two branches, one concerned with invention of arguments and the other with judgment of their validity.

—Cicero⁴³

The art of topics makes minds inventive in the art of reasoning. The art of criticism makes them exact. The art of topics cannot be separated from the art of memory. The two greatest Latin writers on rhetoric, Cicero and Quintilian, relate the following concerning the interconnection of memory and places (*topoi, loci*).

The poet Simonides of Ceos, who is said to be the first to charge for the composition of poetry, was commissioned by a prosperous nobleman called Scopas to present an epinicion for a victorious boxer at a banquet for which he was the host. Simonides chanted his poem to the banqueters, which included a substantial digression singing the praises of the beloved brothers, Castor and Pollux. His digression was not wholly inappropriate, as Pollux (or Polydeuces) was famous as a boxer. Scopas, displeased by the digression, meanly withheld half of Simonides' fee, saying that he could seek the other half from these sons of Tyndareus (king of Sparta) since he had devoted an equal share of his poem to praising them, taking attention away from the praise due him as host.

During the banquet, a message was brought to Simonides saying that there were two young men outside the hall who urgently demanded to speak with him. Simonides exited the hall to respond to their call but found no one. Just as he crossed the threshold, the hall collapsed, crushing to death Scopas and all the guests. They were so badly crushed that when their relatives came the next day to bury them, the relatives were unable to tell the bodies apart for individual burial. Simonides, however, was able to assist the relatives by recalling the place where each had reclined at the table. This procedure prompted his discovery of the connection between places and memory, making him the founder of mnemonics. He had indeed been rewarded by Castor and Pollux.⁴⁴

43. CICERO, *Topica*, in *DE INVENTIONE, DE OPTIMO GENERE ORATORUM, TOPICA* 382, 387 (H.M. Hubbell trans., Harvard Univ. Press 1949).

44. *See* 1 CICERO, *DE ORATORE* 465–67 (E.W. Sutton trans., Harvard Univ. Press two vol. ed. 1942) (recounting the described incident at Simonides' dinner); *see also* 5 QUINTILIAN, *THE ORATOR'S*

Simonides' discovery of the connection between places and memory resulted in the technique of "artificial memory."⁴⁵ This technique is not artificial in the sense of something false, but in the sense of an artifice, something made. The orator in preparing a speech impresses on his mind the scenes or images of a series of places, for example rooms in a private villa or public building. Moving from room to room he associates the first major point of his speech with the first room, the second with the second room, and so forth. It is desirable that the rooms or places employed have different characters, shapes, or furnishings so that they form distinct impressions on the imagination. To deliver the speech the orator recalls each of the rooms or places in order. The recall of each reminds him of the next point he wishes to make in his speech. This technique of artificial memory provides the orator with an inner writing, an invisible text present in his memory from which he can call forth each of his themes and sub-themes and expand upon them in an apparently extemporaneous manner. The key to his eloquence is his pre-established system of *topoi* or *loci*, which guide every step of his treatment of his subject. These places, once well-committed to memory, can be used and reused as a master series of images upon which the points of other speeches are placed and delivered.

In contrast to this ancient technique of the artificial memory, which applies to standard forms of oratory, is the Renaissance conception of the "theatre of memory." The greatest example of this is put forth by Giulio Camillo in his little treatise *L'idea del teatro* (1550). The theatre of memory is a part of the larger tradition of the *theatrum mundi*, "the theatre of the world"—the theatre as a microcosm of the world, and the world, especially the human world, as theatre in which each person plays a role.⁴⁶ The theatre of memory is closely associated with Vico's common mental dictionary, as will be explained shortly. Camillo's theatre, which was actually constructed in France and in Italy, is a metaphysics based on a system of memory-places connected to the rhetorical principles of oratory. The spec-

EDUCATION 63–67 (Donald A. Russell ed. & trans., Harvard Univ. Press 2001) (same); FRANCES A. YATES, *THE ART OF MEMORY* 1–2 (1966) (same). On Castor and Pollux, see Hesiod, *The Catalogues of Women and the Eoiae*, in HESIOD, *THE HOMERIC HYMNS AND HOMERICA* 154, 191–203 (Hugh G. Evelyn-White trans., Harvard Univ. Press 1914); Homer, *To the Dioscuri*, in HESIOD, *THE HOMERIC HYMNS AND HOMERICA*, *supra*, at 285, 441. On Simonides charging for poetry, see ARISTOTLE, *THE NICOMACHEAN ETHICS* 197 (H. Rackham trans., Harvard Univ. Press rev. ed. 1934). On Simonides, see 3 GREEK LYRIC 330, 347–51 (David A. Campbell ed. & trans., Harvard Univ. Press 1991) (containing the testimonia and text of Simonides).

45. For a full description of artificial memory see YATES, *supra* note 44, at 1–27. For her discussion of the passage from Quintilian, see *id.* at 22–23.

46. For a description of Camillo's theatre, see *id.* at 129–60; see also LINA BOLZONI, *IL TEATRO DELLA MEMORIA: STUDI SU GIULIO CAMILLO* 27–56 (1984). On the "theatre of the world," see Richard Bernheimer, *Theatrum Mundi*, 38 ART BULL. 225, 225–47 (1956).

tator or practitioner of the system of the theatre entered on the stage facing an audience of images, or *pittura*, depicting figures and elements of Greco-Roman and Judeo-Christian mythology arranged as seven grades intersected by seven gangways.

These are the master images from which the human world has made or drawn forth itself. They are joined with a system of places whereby the spectator may commit or recommit them to memory. The technique required is like that of artificial memory, except unlike the places of artificial memory, these places are not arbitrary. They are the formations natural to the human mind itself, understood as reflection of the divine *mens*. They are archetypes from which the human world arises, and to which it constantly returns in all of its activity. In the theatre were coffers or drawers containing manuscripts of Cicero and other ancients, suggesting that the spectator, once he passively mastered the retention in memory of the *pittura*, could actively compose the complete speech of humanity. This speech would result in a rhetorically-based metaphysics.

In similarity with any metaphysics, this speech would purport to be complete in principle but would not include every detail of experience. It would be logical in the sense that, as Aristotle claims in the first sentence of his *Rhetoric*, "Rhetoric is a counterpart of Dialectic."⁴⁷ It would not be a metaphysics logically deduced from self-evident first principles. In this sense, it would be a metaphysics opposite in its conception to that advocated by Descartes. The "first principles" of the metaphysics of memory are the commonplaces of humanity. Yet from these commonplaces can be drawn a total account of the interconnections of the natural, civil, and divine worlds, since these interconnections are what are formed within the forces and structures of each of the master images of the theatre. Ultimately, the theatre fulfills the aim of self-knowledge of Socratic philosophy, for in it the individual is offered a device to confront his own nature writ large. All that we are as human beings lies in memory. What we require is a means to recall it. Camillo's theatre purports to provide us with the places necessary for the ultimate eloquence, to be "wisdom speaking," putting the whole of things into words by drawing the whole of human wisdom forth from its origins, its original expressions in the myths.

Ars topica in artificial memory is based on places that exist for other purposes than their use in producing an inner writing for oration. In the *ars topica* of the theatre of memory, the system of places is the result of the system of images they govern. Both of these types of memory employ top-

47. ARISTOTLE, THE "ART" OF RHETORIC 3 (John Henry Freese trans., Harvard Univ. Press 1926).

ics as physical places. The art of topics, as presented by Aristotle in his logical treatise on *Topics* and in his *Rhetoric*⁴⁸ and by Cicero in his short text *Topica*, does not involve topics as physical places. Topics in this sense are mental places or common places that are universal forms or types of propositions from which specific lines of argumentation can be invented depending upon what sort of issue or question has been raised. There are general forms of argument employed in probable reasoning, as distinguished from demonstrative or deductive reasoning, that proceed from self-evident principles. *Topos* is akin to the Greek *topazein*, “to aim at or guess.”

This sense of topics is at the basis of forensic or juridical oratory. Given the specific cause raised, the forensic orator can go in his mind to one or more of the universal forms of argumentation that applies and find a guideline to the specific argument required to defend or prosecute a case. As Aristotle says in the first sentence of the *Topics*, the purpose of the study of topics is “to discover a method by which we shall be able to reason from generally accepted opinions about any problem set before us and shall ourselves, when sustaining an argument, avoid saying anything self-contradictory.”⁴⁹ Cicero says:

It is easy to find things that are hidden if the hiding place is pointed out and marked; similarly if we wish to track down some argument we ought to know the places or topics: for that is the name given by Aristotle to the “regions” [*sedes*], as it were, from which arguments are drawn.⁵⁰

The list of topics found in Aristotle and Cicero differ. Cicero, although he refers to Aristotle, may not have been working from Aristotle’s actual text. Cicero presents his list of topics in a way that is closest to that of Vico in his abovementioned textbook on rhetoric. This may be because Cicero’s list is specifically developed in relation to legal reasoning, using examples from Roman law.

Cicero discusses “definition, partition, etymology, conjugates, genus, species, similarity, difference, contraries, adjuncts, consequents, antecedents, contradictions, causes, effects, and comparison of things greater, less and equal.”⁵¹ He says that in inverting an argument, more than one of these topics may be required, but the use of all of them in constructing a single argument is never likely to occur. It is not my purpose to summarize what each of these topics is, but it is not difficult to comprehend how they work.

48. *See id.* at 265–73.

49. ARISTOTLE, *Topica*, in *POSTERIOR ANALYTICS, TOPICA* 272, 273 (Hugh Tredennick & E.S. Forster eds. & trans., Harvard Univ. Press 1960).

50. CICERO, *supra* note 43, at 387.

51. *Id.* at 437.

If we are faced with an argument or case that depends upon a certain definition, then it is important to know in advance the general principles or rules of definition and employ them to confront the specific issue. The same can be said of knowing in advance of a specific issue what an antecedent or consequent argument is, or in regard to causes, knowing the difference between a remote and a proximate cause or the nature of contrariety versus contradiction, and so forth. By knowing the topics in this sense, one knows in advance all the possible forms an argument can take regardless of the specific subject. Once the relevant universal form is found, a mental place is present from which to produce a specific line of reasoning pro and con.

Aristotle, at the close of his *Topics*, draws a parallel between topics as categories in which arguments fall and places from which things can be remembered. He says:

[I]n arguments [as in geometry and arithmetic] it is important to be prompt about first principles and to know your premisses by heart. For just as to a trained memory the mere reference to the places in which they occur causes the things themselves to be remembered, so the above rules will make a man a better reasoner, because he sees the premisses defined and numbered. A premiss of general application should be committed to memory rather than an argument⁵²

By “premiss” here Aristotle means that which is first, the general form or presupposition on which the argument in question is based. As with the artificial memory, the places studied in advance guide the oration so that with forensic oration or reasoning the topics studied in advance guide the argumentation.

In the seventh oration, Vico extends the *ars topica* to the art of securing the middle term (*terminus medius*). The middle term is that upon which eloquence depends in forensic speech. Vico says:

Traditional “topics” is the art of finding “the *medium*,” i.e., the middle term: in the conventional language of scholasticism, “medium” indicates what the Latins call *argumentum*. Those who know all the *loci*, i.e., the lines of argument to be used, are able (by an operation not unlike reading the printed characters on a page) to grasp extemporaneously the elements of persuasion inherent in any question or case.⁵³

The middle term is that which appears in both the major and the minor premises of the syllogism. By connecting each of the two terms of the conclusion to the same middle term, the syllogism claims their connection as the subject and predicate terms in the conclusion. The middle term, it is

52. ARISTOTLE, *supra* note 49, at 735–37.

53. STUDY METHODS, *supra* note 8, at 15; see also MICHAEL MOONEY, *VICO IN THE TRADITION OF RHETORIC* 129–35 (1985).

clear, makes possible the syllogism. Without the middle term, the propositions of the conclusion can be stated, but there is no argument for it. In the *Prior Analytics* Aristotle says:

For we have stated the general principle that we shall never have any syllogism proving that one term is predicated of another unless some middle term is assumed which is related in some way by predication to each of the other two.⁵⁴

In inventing a syllogism by applying the rules of the topics to a particular case, the middle term must be sought out and from it the two extremes that become the terms connected in the conclusion must, so to speak, be drawn forth from it.

In the *Posterior Analytics*, Aristotle says: "It is clear, then, that in all our inquiries we are trying to find a middle term."⁵⁵ The connection of the subject and predicate terms of the conclusion is that of which the speaker tries to persuade his audience. To do this he must find a commonplace that his audience shares with him. This *topos* is the middle term. If his audience accepts the meaning of the middle term, then he must show that the other two terms are implied within it, that they can be drawn forth from it, and that they are naturally part of its meaning. The more common or fundamental a commonplace is, the more successful the argument. This may require the speaker not simply to advance one single syllogism, but regressively to construct a *sorites* or series of incomplete but interlocking syllogisms. This series of syllogisms leads back to a middle term that captures a meaning that the audience adheres to simply as part of their understanding of themselves, as part of what they share as "an entire class, an entire people, an entire nation, or the entire human race," to use Vico's words, quoted above, which describe his conception of common or communal sense.

In the *New Science*, Vico offers a prime example of such a topic—in fact, it is the *topos* of *topoi*. He says that the minds of the first men "began to hew out topics, which is an art of regulating well the primary operation of our mind by noting the commonplaces that must all be run over in order to know all there is in a thing that one desires to know well; that is, completely."⁵⁶ Thus, as Vico describes them, commonplaces are at the basis of eloquence, for eloquence is to capture in speech the whole of a subject. These original topics or commonplaces are the first thoughts. Vico says: "The first founders of humanity applied themselves to a sensory topics, by which they brought together those properties or qualities or relations of

54. ARISTOTLE, *Prior Analytics*, in THE CATEGORIES, ON INTERPRETATION, PRIOR ANALYTICS 198, 319 (Harold P. Cooke & Hugh Tredennick trans., Harvard Univ. Press 1938).

55. ARISTOTLE, *Posterior Analytics*, in POSTERIOR ANALYTICS, TOPICA, *supra* note 49, at 24, 181.

56. NEW SCIENCE, *supra* note 7, ¶ 497.

individuals and species which were, so to speak, concrete, and from these created their poetic genera."⁵⁷ Poetic genera are what Vico elsewhere calls "imaginative universals" or "poetic characters."⁵⁸ From the experience of thunder, the first men formed the thunderous sky as Jove. Jove was a "sensory *topos*." The sky becomes a place separate from earth and a god separate from men, from themselves. Vico's conception of sensory topics is dependent on his new science of the common nature of the nations. It is not to be found in standard rhetorical theory.

Sensory topics are at the basis of Vico's conception of a common mental dictionary. This mental dictionary contains all the middle terms out of which the human world is generated. It is analogous to Camillo's theatre of memory, for in it are all the poetic genera that stand behind the words of all natural languages. The mental dictionary is not itself written down, but all languages are particular attempts explicitly to express the meanings therein. This etymologicon is connected to Vico's discovery of the science of blazonry. Vico regards the first language to be a language of mute signs, coupled with a law of force used by the first families to maintain themselves. These mute meanings were later recorded on coats of arms, military insignias, heraldry, and finally appear on coins and medals. This law of force was based on the power of the fathers of the first families to take the auspices of Jove and govern by their perceptions of divine law.

The art of topics is the art whereby meaning was first established in the world. Dialectical reasoning requires the finding of persuasive arguments. Persuasion in argumentation is based on finding the appropriate middle term. The middle term is found through an art of memory that allows us to recall the commonalities out of which the mind of the audience itself has arisen. These commonalities presuppose the common mental dictionary that underlies all natural language. The orator needs to know not only topics in the sense of the universal forms of argumentation (that is, definition, partition, and so forth), but topics in the sense of the memory-places out of which the civil world itself is formed. To speak in the law courts and convince a judge and jury requires that the speaker has command of a whole education so that he can take his hearers if needed back to meanings they all share in the back of their minds and bring his specific arguments forward from these meanings, from the mental dictionary of humanity.

57. *Id.* at ¶ 495.

58. *Id.* ¶¶ 204–10.

IV. THE IDEAL ORATOR

I am proposing to educate the perfect orator, who cannot exist except in the person of a good man. We therefore demand of him not only exceptional powers of speech, but all the virtues of character as well. I cannot agree that the principles of upright and honorable living should, as some have held, be left to the philosophers.

—Quintilian⁵⁹

The orator is, so to speak, the “middle term” that provides for the connection between the audience and the subject or cause at issue. The agenda of Western philosophy has been to attribute the origin of rhetoric to the Sophists and to separate rhetoric from the pursuit of truth, claiming it to be no more than an art of words, an activity of persuasion, and in so doing to appeal to the emotions. The tale taught to all students in introductory philosophy is that the Sophists were experts in making the worse appear the better case, and that they even sought payment to teach others their techniques for doing this. Socrates appears as the counter to the Sophists, advocating the pure pursuit of truth, wherever his dialectical questioning leads, regardless of its effect on his hearers. Furthermore, Socrates charges his hearers and interlocutors no fee for any instruction they may require. The principal document of this battleground is Plato’s *Gorgias*, in which the Platonic-Socrates confronts the venerable Gorgias, famed throughout Greece for his powers of ingenuity and eloquence, and his supporter Polus, the author of an important treatise on rhetoric. The issue is who can know what is just and who can teach it to others—the philosopher or the rhetorician.⁶⁰

The issue of the teachability of virtue is raised further in the *Protagoras*. Protagoras, the great sophist, with two other famous sophists in attendance, Hippias and Prodicus, claims before Socrates that he can teach young men how to deliberate and how to become good citizens. He claims that, as a sophist, an expert in the use of words, he can impart the civil wisdom that is necessary for the art of citizenship.⁶¹ The dialogue remains inconclusive, with Socrates uncharacteristically denying that virtue is

59. 1 QUINTILIAN, *supra* note 44, at 57.

60. See PLATO, *Gorgias*, in LYSIS, SYMPOSIUM, GORGAS 247, 307–09 (W.R.M. Lamb trans., Harvard Univ. Press 1925). Socrates’ disciple Isocrates accuses the sophists of practicing a debased form of dialectic that he calls “eristic.” Eristic is debate about issues in ethics done for its own sake, a display of ingenuity not aimed at producing a true doctrine of moral goodness. See 2 ISOCRATES, *Against the Sophists*, in ISOCRATES 160, 164–65 (George Norlin trans., Harvard Univ. Press 1929); 2 ISOCRATES, *Antidosis*, in ISOCRATES, *supra*, at 181, 329–31.

61. See PLATO, *Protagoras*, in LACHES, PROTAGORAS, MENO, EUTHYDEMUS 85, 121–53 (W.R.M. Lamb trans., Harvard Univ. Press 1924).

teachable, and Protagoras denying that virtue is wisdom because various virtues, especially courage, are not based on a kind of rational expertise.

In both of these dialogues, the character of the sophist and rhetoric are presented in a much more complicated way than that the sophist is simply an unscrupulous teacher that makes the worse appear the better case, and that rhetoric is in itself defective or bad. What Socrates shows is that the sophist, like the poet as presented in *Republic X*, cannot offer a coherent account of what virtue is. The sophist cannot give a coherent speech that justifies the aim of the principles of speech that he teaches, just as the poets portray the gods or men as performing virtuous actions at one time and acting badly and without virtue on another occasion. The issue of the sophist charging for his teaching is also not a telling difference with Socrates. Socrates does not need to charge for his conversations, as he is informally but comfortably supported by the charity of his prominent followers, such as the businessman Crito and the aristocrat Plato.

A close look at the relevant dialogues of Plato shows that the philosopher requires the use of words and the ability to persuade, as does the sophist or rhetorician. Philosophy is done through words. It can only occur as a kind of dialectical oration. We see this in the *Phaedrus*, in which Socrates claims that the Athenian statesman "Pericles is the most perfect orator in existence."⁶² The issue of the relation of ethics to rhetoric involves the question of the *ethos* (moral character) of the speaker; this question is raised in Aristotle's *Rhetoric*, and pursued in Cicero's *The Orator* and Quintilian's *Institutes*, which will be discussed below. In the *Phaedrus*, Socrates speaks of the sense in which the philosopher's search for truth is intertwined with the rhetorical mastery of words. Truth can only be joined to persuasion through the art of speaking.⁶³ Socrates says that we must persuade young Phaedrus "that unless he pay proper attention to philosophy he will never be able to speak properly about anything." Socrates continues: "Is not rhetoric in its entire nature an art which leads the soul by means of words, not only in law courts and the various other public assemblages, but in private companies as well?"⁶⁴

Rhetoric, Socrates claims, requires a knowledge of the soul (*psyche*). He says: "Since it is the function of speech to lead souls by persuasion, he who is to be a rhetorician must know the various forms of soul."⁶⁵ Socrates

62. PLATO, *Phaedrus*, in EUTHYPHRO, APOLOGY, CRITO, PHAEDO, PHAEDRUS 405, 547 (Harold North Fowler trans., Harvard Univ. Press 1914).

63. *Id.* at 517.

64. *Id.* at 517–19.

65. *Id.* at 553.

says that it is generally held that the rhetorician need not be concerned with what is true, just, and good: "For in the courts, they say, nobody cares for truth about these matters, but for that which is convincing; and that is probability, so that he who is to be an artist in speech must fix his attention upon probability."⁶⁶ Socrates is not an enemy of probable speech, for the *elenchos*, the method of the question and answer that he practices, is dialectic in the sense of reasoning from common opinions on a subject to seek the truth.

We do not find Socrates establishing a point by deductive reasoning from self-evident principles, as aspired to by the Scholastics or Cartesian rationalism. Dialectic educates and perfects the soul by directing it toward what is ultimate; it forms the *ethos* of the speaker. Socrates thus holds with Aristotle the claim that dialectic must be joined with rhetoric. Socrates says it is a noble activity to tell stories about justice and associated ethical subjects, but adds:

[S]erious discourse about them is far nobler, when one employs the dialectic method and plants and sows in a fitting soul intelligent words which are able to help themselves and him who planted them, which are not fruitless, but yield seed from which there spring up in other minds other words capable of continuing the process for ever, and which make their possessor happy, to the farthest possible limit of human happiness [*eudaimonia*].⁶⁷

From these views Socrates puts forth, it does not emerge that philosophy requires the abandonment of the art of rhetoric that the sophist teaches, but that rhetoric requires philosophy in order to ground the eloquent use of words and their power to persuade. And, in reverse, the philosopher must himself be eloquent. The Socrates of the Latins, who are much closer in time to him than we are, is a master of eloquence, not an enemy of it. Cicero, in *The Orator*, asks: "What of Critias? and Alcibiades? [T]hese though not benefactors of their fellow-citizens were undoubtedly learned and eloquent; and did they not owe their training to the discussions of Socrates?"⁶⁸ Cicero says that it was the verdict of all of Greece that Socrates came out on top in any debate, not only because of his wisdom and subtlety but also due "to his eloquence."⁶⁹

Quintilian says that Socrates, in his dispute with Gorgias, silences him with the claim that the "rhetorical man must be just, and the just man must

66. *Id.* at 557.

67. *Id.* at 569–71.

68. CICERO, *De Oratore*, in DE ORATORE: BOOK III, DE FATO, PARADOXA STOICORUM, DE PARTITIONE ORATORIA 2, 109–11 (H. Rackham trans., Harvard Univ. Press 1942).

69. *Id.* at 49.

wish to do just things.”⁷⁰ Quintilian adds that it is made “even clearer in the *Phaedrus* that this art cannot be perfect without a knowledge of justice.”⁷¹ He says that he agrees with this, and that his answer to the view that oratory in the courts is concerned only with what is probable or a semblance of truth, not the truth itself, is that those who hold this claim must make their own justification. Quintilian concludes: “What I have undertaken is to fashion the perfect orator, and my first requirement is that he should be a good man [*esse virum bonum*].”⁷²

Quintilian’s insistence on the perfect orator being a good man echoes Aristotle’s abovementioned claims concerning the importance of *ethos* in oratory. This moral character is the key to Aristotle’s conception of a first kind of proof in a speech: “The orator persuades by moral character when his speech is delivered in such a manner as to render him worthy of confidence.”⁷³ And he adds: “[T]his confidence must be due to the speech itself, not to any preconceived idea of the speaker’s character.”⁷⁴ In the narrative of a forensic speech in which the facts are related, “[o]ne thing is to make clear our moral purpose; for as is the moral purpose, so is the character, and as is the end, so is the moral purpose.”⁷⁵ Quintilian adds to this sense of purpose that “everything within this sphere of ethics is a subject for the orator,” and that “[t]he *ethos* which I mean, and which I want to see in a speaker, will be that which is recommended primarily by goodness: not only mild and calm, but usually attractive and polite, and pleasing and delightful to the listeners.”⁷⁶ This approach is in accord with what Cicero advocates as the cardinal virtue of temperance, and is connected to his doctrine of *decorum*, his doctrine of prudence, that was mentioned earlier.

Today the view is widespread that rhetoric is simply the power to use words to appeal to the emotions, and thus persuade without regard to reason or truth.⁷⁷ Forensic or judicial speech, the speech of the courtroom and of lawyers generally, is seen as sophistic. This view is characterized not so much in the ancient terms of making the worse appear the better case as in

70. 1 QUINTILIAN, *supra* note 44, at 363.

71. *Id.* at 365.

72. *Id.* at 367.

73. ARISTOTLE, *supra* note 47, at 17.

74. *Id.*

75. *Id.* at 447.

76. 3 QUINTILIAN, *supra* note 44, at 51.

77. The major exponent of the opposite of the above view of rhetoric is ERNESTO GRASSI, *RHETORIC AS PHILOSOPHY: THE HUMANIST TRADITION* (1980). Grassi connects rhetoric to the power of human speech to originate the starting points or *archai* from which dialectical reasoning can proceed. Philosophy, to accomplish its ends, presupposes the rhetorical power of the word and begins from it. On Grassi’s full position, see generally EBERHARD BONS, *DER PHILOSOPH ERNESTO GRASSI: INTEGRATIVES DENKEN, ANTIRATIONALISMUS, VICO-INTERPRETATION* (1990).

terms that the law can be whatever it can be made out to be to suit a given purpose. This sense of making the law out to be whatever one can has always been part of legal proceedings, but today, as the French philosopher of technological society Jacques Ellul (himself the author of an important work on the history of jurisprudence) claims, law has become simply an instrument of social order.⁷⁸ Law and order means law is order, but not order in a profound sense that Socrates or Vico would recognize—as the embodiment of justice and human virtue and wisdom itself.

Most of the law in modern practice would not be recognized by the Greeks, the Latins, or Vico, who saw the law as a system of civil wisdom to be studied to achieve the distinctively human goal of self-knowledge; for Vico, the law is the key to what a human being is meant to be as a social and rational animal, and as practiced it is to be tied to speaking in the public forum of the law courts. Instead, most law is practiced behind closed doors, with great similarity to an elaborate technical procedure. In public, the law is apprehended often as a matter of securing social justice—as if social justice were justice. But justice is the ultimate virtue that is tied to wisdom as a knowledge of things human and divine, and is that to which society must answer. Social justice is not something universal; it is a claim to a right or rights of a particular person or class of persons related to private law. Justice, like *ius*, is universal. It is the highest of the four cardinal virtues that stands as a principle above any society or condition, and to which all that is human must answer to remain human.

For Vico, the purpose of legal education was (as it was for the Ancients and the Italian Humanists) not only to learn the law, but to learn how to speak in the law courts. Learning the law was not simply training in analyzing cases and understanding particular laws and their place in bodies of statutes; its foundation was the full study of jurisprudence as a form of human wisdom. The Cartesian method so important for grounding the new science of nature, as Vico realized, offered no guidance, no theory of knowledge for the conduct of human affairs. Cartesianism, in this sense, is uncivil. No sense of prudence or decorum can be derived from it.

What we have lost in the modern world is the perception behind Vico's assertion in the *New Science* that "all ancient Roman law was a serious poem, represented by the Romans in the forum, and ancient jurisprudence was a severe poetry."⁷⁹ The idea that jurisprudence was *una sev-*

78. See generally JACQUES ELLUL, THE TECHNOLOGICAL SOCIETY 251–54 (John Wilkinson trans., 1964).

79. NEW SCIENCE, *supra* note 7, ¶ 1037.

era poesia is lost to us.⁸⁰ On this view, the law is apprehended as alive, as a sacred precinct to which mortals must answer. What presides over this precinct is philosophy in concert with eloquence.

Vico says, “[P]hilosophy should make the virtues understood in their idea. . . . And from the philosophies providence permitted eloquence to arise.”⁸¹ He says further: “[T]he reasoned maxims of the philosophers concerning virtue are of use only when employed by a good eloquence for kindling the feelings to do the duties of virtue.”⁸² Plato holds that most men are asleep; his philosophy is a call for the sleepers to awaken. Vico can say the same specifically in relation to the study and practice of jurisprudence. When an activity, form of thought, or institution becomes thin and tired, the only way to revive or resurrect it is to return to its origin and attempt a palingenesis of its spirit and its original role in human education.

80. An exception to this lack of grasping this aspect of the law is JAMES BOYD WHITE, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, in HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 107–09 (1985); JAMES BOYD WHITE, *Reading Law and Reading Literature: Law as Language*, in HERACLES' BOW, *supra*, at 77–106.

81. NEW SCIENCE, *supra* note 7, ¶ 1101.

82. *Id.* ¶ 1110.

