

Vico's "Ingenious Method" and Legal Education

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In conclusion: whosoever intends to devote his efforts, not to physics or mechanics, but to a political career, whether as a civil servant or as a member of the legal profession or of the judiciary, a political speaker or a pulpit orator, should not waste too much time, in his adolescence, on those subjects which are taught by abstract geometry. Let him, instead, cultivate his mind with an ingenious method; let him study topics, and defend both sides of a controversy, be it on nature, man, or politics, in a freer and brighter style of expression. Let him not spurn reasons that wear a semblance of probability and verisimilitude. Let our efforts not be directed towards achieving superiority over the Ancients merely in the field of science, while they surpass us in wisdom; let us not be merely more exact and more true than the Ancients, while allowing them to be more eloquent than we are; let us equal the Ancients in the fields of wisdom and eloquence as we excel them in the domain of science.

– Giambattista Vico, "On the Study Methods of Our Time"**,

Beginning with Anthony Kronman's, *The Lost Lawyer: Failing Ideals of the Legal Profession*, and quickly joined by Mary Ann Glendon's, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society*, and Sol Linowitz's *The Betrayed Profession: Lawyering at the End of the Twentieth Century*, a new genre arose that chronicles the degradation of legal professionalism and charts the resulting trauma for both lawyers and American society.¹ We live in an age in which the word "profession" has come to be synonymous with "job," and lawyering is regarded as a set of related tasks that one

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** GIAMBATTISTA VICO, ON THE STUDY METHODS OF OUR TIME 41 (Elio Gianturco trans.) (Ithaca: Cornell Univ. Press, 1990) (trans. orig. publ. 1965) (1709).

¹ See ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993), MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994), and SOL M. LINOWITZ, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994). Recent additions to this literature include DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2001) and JEAN STEFANCIC AND RICHARD DELGADO, *HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS* (2005).

undertakes primarily to make a living. Many law firms today are sprawling commercial enterprises with a global presence, making it virtually impossible for their members to draw from a community *ethos* even if they wished to do so. Just as the neighborhood dry goods store has been replaced by Wal Mart, the “lawyer in town” has been replaced by a vast legal bureaucracy. Many lawyers practice alone or in small firms,² just as many businesses are small closely-held companies,³ but there can be no doubt that the emergence of large, far-flung enterprises have indelibly stamped both the business of lawyering and the business of selling goods. This gives rise to the question that these authors find most troubling: is the profession of law following this course because there really is no difference between practicing law and selling goods? To put the question more pointedly: Is upholding the ideal of the “lawyer-statesman” no more intelligible than celebrating the “capitalist-statesman?”

These books approach this question in a variety of ways, focusing on a number of related topics that include the economics of modern law practice, the lawyer’s loss of independence from her client’s (often venal) objectives, the loss of public-mindedness in law practice, and the loss of collegiality among lawyers. In this essay I address a single issue raised by these critiques by posing two questions that are designed to open a much broader inquiry. The issue that I discuss is the very nature of legal professionalism. The questions raised by this issue are: (1) What skills and virtues are necessary for one to embody legal professionalism, and (2) Can these skills and virtues be taught? I bring focus to this impossibly broad agenda by attending to the occasion giving rise to this symposium. I contend that Vico’s famous oration, *On the Study Methods of Our Time*, is a productive lens through which we may view contemporary legal practice, assess the charge that legal professionalism is waning, and think creatively about what might be done.

Looking to Vico in this context makes sense for a number of reasons. His address was delivered to University students, many of them studying law, and his purpose was to urge them to pursue their studies in a manner that would foster the intellectual virtues and practical skills necessary for them to contribute to society. It is not entirely fanciful, therefore, to explore his address from the perspective of modern legal education. Moreover, Vico studied and wrote about law, and law and legal practice were of special interest to him. Most important, Vico displayed an incredible scope of thought that ranged from the Ancient Greeks to the emerging modern science of his day, and his *New Science* was a bold and

² In 2004, approximately 9.5% of all lawyers practiced in firms of 6 or fewer lawyers and 45% of all lawyers practiced in firms of 33 lawyers or fewer, but 27% of all lawyers practiced in firms of 225 or more lawyers. George P. Baker and Rachel Parkin, “The Changing Structure of the Legal Services Industry and the Careers of Lawyers,” 84 No. CAR. L. REV. 1635, 1663 (2006) (Data represented in Figure 3).

³ According to the most recent census data relating to 2004, 77% of all firms in the United States are “nonemployer” firms (i.e., sole proprietorships), and an additional 18% of all firms have fewer than 20 employees. Only 3,534 firms (.014%) have 2,500 or more employees. These statistics are based on data that is posted at <http://www.census.gov/epcd/www/smallbus.html#EmpSize> (Last visited on January 7, 2008).

creative attempt to chronicle the emergence of humanity from the natural world and to chart its development through the ages. More than almost any other thinker, Vico's incredibly ambitious work lends itself to elaboration within new and varied contexts.

At the same time, it is important to recognize the inherent limitations of looking for answers to a contemporary question in an address delivered three hundred years ago. One runs the risk of stripping Vico from his intellectual, cultural and social milieu before crudely employing a caricature of his thought to make points in contemporary debates about law and legal education. Vico envisioned his work in the broadest terms and he is widely acknowledged as embodying the culmination of Italian Humanism; it would be doing him an injustice to bend his thinking wholly to today's relatively fleeting concerns. Consequently, it is necessary to acknowledge the scope of Vico's audacious vision if we are to find points of reference for today's questions without compromising the integrity of Vico's project.

My thesis is that Vico's oration is as pertinent to the "study methods" of our time as it was to the methods of his time. Vico challenged the emerging Cartesian critical method and defended the ancient wisdom of rhetoric in a manner that rings true today. His spirited defense of rhetoric against abstract intellectualism and methodologism is particularly insightful in an age when law is viewed instrumentally, as something to be strategically manipulated to achieve desired ends. Because law inherently is oriented toward the development of rhetorical knowledge, our ability to understand law has declined as the fate of rhetoric has worsened since Vico's oration was delivered. The contemporary belief that rhetoric refers only to non-epistemic ornamentation that threatens to distract us from the truth of the matter makes it difficult, but all the more important, to understand the cause for Vico's lament.

I have organized this article in three parts. First, I develop one strand of the contemporary literature that alleges that legal professionalism has waned. Using Kronman's famous call for a reinvigoration of the "lawyer-statesman" ideal as an introductory framing device, I discuss two specific critiques of legal education: Karl Llewellyn's short essay on the topic from the 1930s and the 2007 Report of the Carnegie Foundation's "Preparation for the Professions" series. My purpose in this brief discussion is to elaborate a particular critique of legal professionalism rather than to provide a comprehensive review of the literature. At its core, this critique charges that lawyers have lost the capacity to exercise certain forms of reasoning and judgment that are required if they are to be more than legal mechanics and thereby serve their social roles as lawyers.

Second, I describe in detail how Vico's oration is responsive to the contemporary critique of legal professionalism. Although I am concerned principally with his oration, I situate it within the broader context of his work in order to appreciate his critical themes fully. Vico's call for the recuperation of rhetoric provides a persuasive response to the critics

of legal practice and connects that response to the obligations of legal education. Although it is not possible to develop wisdom, prudence and ingenuity through application of an educational methodology, Vico's reflections on education provide signposts for a theoretically-grounded and practically-effective approach to educating lawyers.

I conclude the essay by arguing that Vico's lament has been ignored for far too long, and that legal scholars ought to heed his counsel. Legal educators should ensure that lawyers are capable of generating and disseminating rhetorical knowledge, and legal institutions and practices should be designed to maximize the development of rhetorical knowledge. This requires that we cultivate elements of our intellectual tradition that have been suppressed and elided over the centuries, for, as Vico insistently reminds us, ". . . even if you know more than the Ancients in some fields, you should not accept knowing less in others."⁴

[This is the draft of the introduction to an essay that will be published in a Symposium issue of the Chicago-Kent Law Review for which I am serving as Special Editor. The Symposium is *Recalling Vico's Lament: The Role of Prudence and Rhetoric in Law and Legal Education.*]

⁴ VICO, *supra* note **, at 5.