

2017

Law and the Poetic Imagination

Richard Sherwin

New York Law School, richard.sherwin@nyls.edu

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_articles_chapters

Recommended Citation

New York Law School Law Review, Vol. 61, Issue 3-4 (2016-2017), pp. 347-368

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

RICHARD K. SHERWIN

Law and the Poetic Imagination

61 N.Y.L. SCH. L. REV. 347 (2016–2017)

ABOUT THE AUTHOR: Richard K. Sherwin is the Wallace Stevens Professor of Law, Dean for Faculty Scholarship, Director, Visual Persuasion Project, New York Law School. A version of this essay was presented at New York Law School on November 3, 2014, on the occasion of his appointment to the Wallace Stevens Chair.

Professor Sherwin adds:

I wish to dedicate this essay to the memory and example of two exceptional mentors: the poet and scholar Allen Grossman, and Jerome Bruner, renowned cognitive psychologist, humanist, educator, esteemed colleague, and friend.

“[T]he word is the making of the world”¹

Wallace Stevens was one of the greatest American poets of the twentieth century. As a longtime admirer of his work, I am especially honored to accede to an academic Chair in his name. In tribute to Stevens’ legacy as an admired and accomplished lawyer and poet, I want to address the subject of law and the poetic imagination.

I realize this is a juxtaposition that, at first blush, may seem a bit odd. My hope is that by the end of this essay you will find yourself thinking, “Law and the poetic imagination, how could it be otherwise?” But first we must deal with that initial sense of strangeness. There is, in fact, a long history behind it.²

In thinking about law and the poetic imagination, it occurred to me that I might have characterized this essay, emulating Philip Sidney’s 1595 text,³ as a “defense” of law and the poetic imagination. But in defense against what? This train of thought helped me to crystallize my objective. For I realized that I would very much like to persuade you that currently in the legal culture, there is an imbalance in the way we think about law, and that imbalance is reflected in legal education.⁴

Law sits uneasily between the social sciences and the humanities. It assimilates insights and methods from both.⁵ From this somewhat precarious perch, leaning at times toward the interpretative arts, at times toward scientific explanation, jurisprudence

1. WALLACE STEVENS, *Description Without Place*, in *SELECTED POEMS* 176, 182 (John N. Serio ed., 2009).

2. 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 pure search for truth.

3 ERNESTO GRASSI, *VICO AND HUMANISM: ESSAYS ON VICO, HEIDEGGER, AND RHETORIC* 1–2 (Donald Phillip Verene ed., 1990). By contrast, the classical rhetorical ideal sought the “union of *logos* and *pathos*.” ERNESTO GRASSI, *RHETORIC AS PHILOSOPHY: THE HUMANIST TRADITION* 27 (1980). That ideal expressed a willingness to go beyond the limits of the empirical. See GIUSEPPE MAZZOTTA, *THE NEW MAP OF THE WORLD: THE POETIC PHILOSOPHY OF GIAMBATTISTA VICO* 60 (1999).

3. PHILIP SIDNEY, *AN APOLOGIE FOR POETRIE* (London, Henry Olney 1595).

4. See generally WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (1994) (exploring the history of the legal education system and its persistent struggle to mesh with the legal profession); Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 *YALE J.L. & HUMAN.* 155, 177 (2006) (examining the fraught role of the humanities in the legal academy).

5. See generally Patricia Ewick et al., *Legacies of Legal Realism: Social Science, Social Policy, and the Law*, in *SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW* 1 (Patricia Ewick et al. eds., 1999) (discussing the relationship between social science, social policy, and the law); David Howarth, *Is Law a Humanity (or Is It More like Engineering)?*, 3 *ARTS & HUMAN. HIGHER EDUC.* 9 (2004) (discussing the interplay between legal positivism, the humanities, and social science); Dan Priel, *Jurisprudence Between Science and the Humanities*, 4 *WASH. U. JURIS. REV.* 269 (2012) (arguing that law is based in the humanities, but should evolve and incorporate the sciences); Austin Sarat et al., *On the Origins and Prospects of the Humanistic Study of Law*, in *LAW AND THE HUMANITIES* 1 (Austin Sarat et al. eds., 2010) (examining the relationship between law, the humanities, and the sciences).

maps out the basis for a sustainable social and political life. But law is no mere blueprint. It is a form of life.⁶ Law must perform the felt values that it embodies. In a word, it must constitute the *nomos*—the discrete universe of legal meaning in which we live.⁷

The poetic imagination is what brings sustainable worlds of meaning into existence.⁸ It is also what maintains or destroys or transforms them. As Vico wrote over four hundred years ago, the poetic imagination is what “entice[s] [the soul] . . . and impel[s] [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*.”⁹

In more recent times, the impressive clout of scientific rationality and utilitarian calculation in law has tended to overshadow the role and authority of stories and feelings.¹⁰ This imbalance stands in need of correction. So if the present essay is a defense of law and the poetic imagination, or of law and the humanities let us say, it is also a quest for recognition. We need to give the humanities their due. I say this not only for the sake of the humanities, but also for law’s sake, for the sake of law’s humanity perhaps. In somewhat earthier terms, my defense seeks recognition of the fact that feelings, not logic, bind us to the law.¹¹

-
6. See LON L. FULLER, *THE MORALITY OF LAW* 186 (rev. ed. 1969) (“Communication is something more than a means of staying alive. It is a way of being alive. . . . [Natural Law] preserve[s] the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire.”); CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167, 167–78 (1983).
 7. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983). Compare FREDERIC HARRISON, *ON JURISPRUDENCE AND THE CONFLICT OF LAWS* 24 (1919) (summarizing John Austin’s first six lectures, stating that “[l]aw is a command relating to the general conduct of the subjects, to which command such sovereign authority has given legal obligation by annexing a sanction, or penalty, in case of neglect”), and HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 61 (Anders Wedberg trans., 1945) (stating that “[l]aw is the primary norm, which stipulates the sanction”), with H.L.A. HART, *THE CONCEPT OF LAW* 7 (Paul Craig ed., 3d ed. 2012) (proffering a legal positivist explanation for how a system of valid rules differs from naked power, which is to say, from the command of the gunman writ large (that is, any order backed by threats)).
 8. See SIDNEY, *supra* note 3, at 2–7.
 9. GIAMBATTISTA VICO, *ON THE STUDY METHODS OF OUR TIME* 38 (Elio Gianturco & Donald Phillip Verene trans., 1990); see WALLACE STEVENS, *An Ordinary Evening in New Haven*, in *SELECTED POEMS*, *supra* note 1, at 248, 256 (“The poem is the cry of its occasion, [p]art of the res itself and not about it.”); WALLACE STEVENS, *The Man with the Blue Guitar*, in *SELECTED POEMS*, *supra* note 1, at 90, 101 (“Poetry is the subject of the poem.”). This, in turn, leads to Stevens’ culminating thought: “We say God and the imagination are one[.]” WALLACE STEVENS, *Final Soliloquy of the Interior Paramour*, in *SELECTED POEMS*, *supra* note 1, at 295, 295.
 10. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473 (1998). See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (Aspen Publishers 8th ed. 2011) (1973) (discussing the legal system and its interaction with non-legal behaviors).
 11. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1923) (“The life of the law has not been logic: it has been experience.”). Holmes’ pragmatic insight was developed further by jurists later identified with the Legal Realist school of thought. See, e.g., BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 4, 61 (Greenwood Press, 2d reprt. 1975) (1928).

Feelings constitute the bonding agent that holds society together, sustaining our commitment to the rule of law and to the everyday business of resolving conflicts one case at a time.¹² It is the business of the poetic imagination to crystallize and manage the way our emotions respond to others and the world around us in the process of drawing meaning from experience.¹³ In the modern age of reason, the role of the poetic imagination was downplayed. For a long time now, aesthetics has suffered a bum rap, as if it were a matter of mere style, of cheap tinsel without substance, a mere matter of taste.¹⁴ You can trace this devaluation at least to the philosophy of Descartes, and perhaps all the way back to Plato.¹⁵

I would like to contest that view. Instead, I would like to persuade you that aesthetics involves a lot more than taste. It concerns the modulation and amplification of sensorial perception. Aesthetics deals with particular ways of being in the world, our being in relation to things and others around us.¹⁶ Aesthetics involves how we engage the endlessly variable presentations and demands of others and events. It concerns how we attune ourselves to the world without necessarily reaching for a

We have sought for a formula consistent with steady advance through a continuum. The continuum does not exist. Instead there are leaps from point to point. We have been beguiled by the ideal of an harmonious progression. Centres of energy exist, of attraction and repulsion. A landing-place is found between them. . . .

. . . .

. . . A fruitful parent of injustice is the tyranny of concepts.

Id.

12. See Richard K. Sherwin, *Law in the Flesh: Tracing Legitimation's Origin to The Act of Killing?*, 11 *NO FOUND.* 38, 39 (2014).

Eros is the name we give to the creative force out of which 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?

Id.

13. See RICHARD DAWSON, *JUSTICE AS ATTUNEMENT: TRANSFORMING CONSTITUTIONS IN LAW, LITERATURE, ECONOMICS AND THE REST OF LIFE* 7–8 (2014); MARTHA C. NUSSBAUM, *POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE* 1–2 (2013).
14. See, e.g., 3 IMMANUEL KANT, *CRITIQUE OF JUDGMENT* 75 (Werner S. Pluhar trans., Hackett Publ'g Co. 1987) (1790) (“[T]he judgment is called aesthetic precisely because the basis determining it is not a concept but the feeling (of the inner sense) of that accordance in the play of the mental powers insofar as it can only be sensed.” (footnote omitted)).
15. PLATO, *Republic*, in *THE COLLECTED DIALOGUES OF PLATO INCLUDING THE LETTERS* 575, 819–25 (Edith Hamilton & Huntington Cairns eds., Lane Cooper et al. trans., 1961) (advocating the expulsion of poets from the well-governed state because they produce phantoms in the mind and the vice of sensory gratification rather than true knowledge, and thus lead the people astray).
16. See MIKEL DUFRENNE, *THE PHENOMENOLOGY OF AESTHETIC EXPERIENCE* 106, 449 (Edward S. Casey et. al. trans., Nw. Univ. Press 1973) (1953); see also Emmanuel Alloa, *Aisthesis or Why There Is No Thinking Without Images*, YOUTUBE (Sept. 8, 2012), <https://www.youtube.com/watch?v=KXurnSD-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

category or concept¹⁷ or, for that matter, a rule or a principle,¹⁸ all of which wait in the wings—on the heels of narrative, metaphor, and the visual image—ready to organize reality.

It is like Karl Llewellyn's "situation sense": the jurist's ability to grow attuned to the facts of the case,¹⁹ including the backstory. Like walking into a room and catching a vibe, a mood. In the realm of aesthetics, unbound by abstract concepts, we grow mindful of the role played by feelings in stories, images, and metaphors—the way feelings shape and amplify meaning. So the devaluation of aesthetics as a mere matter of subjective taste is part of the imbalance I would very much like to redress. Let us start, then, with the matter of feelings.

These days, if I were in search of authority to make a claim about "feelings" or "the imagination," I would probably be well advised to cite recent neuro-scientific studies.²⁰ To prove my point, I would show fMRIs²¹ of the brain lighting up while digesting poetry: "The imagination must be in this anatomical sector, or perhaps spread around over here and there," I might say, using arrows and colorful slides. But that is not the path I want to travel in this essay.

are appeared to). As Paul Éluard writes, "[i]mages think for me." ANNA BALAKIAN, *SURREALISM: THE ROAD TO THE ABSOLUTE* 143 (1986) (quoting 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*). See *Phantasm*, *DICTIONARY.COM*, <http://www.dictionary.com/browse/phantasm> (last visited Apr. 6, 2017). This is thinking as sensation—the pre-modern union of thinking and perceiving prior to Kant's epistemological divisions. Judgment, in this context, is a social process in which something appears in the clearing of poetic imagination.

17. See SUSANNE K. LANGER, *PHILOSOPHY IN A NEW KEY: A STUDY IN THE SYMBOLISM OF REASON, RITE, AND ART* 71–77 (3d ed. 1957); PLATO, *Greater Hippias*, in *THE COLLECTED DIALOGUES OF PLATO INCLUDING THE LETTERS*, *supra* note 15, at 1534, 1555–58.
18. Dworkin's elaboration of principles as internal to law refines, but essentially leaves intact, Hart's positivist description of law as a system of rules. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 17 (1977); HART, *supra* note 7, at 8.
19. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 121–57 (William S. Hein & Co. 1996) (1960).
20. See Ruth Leys, *The Turn to Affect: A Critique*, 37 *CRITICAL INQUIRY* 434, 434, 437–38 (2011); Richard K. Sherwin, *Too Late for Thinking: The Curious Quest for Emancipatory Potential in Meaningless Affect and Some Jurisprudential Implications*, *LAW CULTURE & HUMAN. ONLINEFIRST* 2, 9–10 (July 31, 2016), <http://journals.sagepub.com/doi/pdf/10.1177/1743872115611500>. See generally WILLIAM E. CONNOLLY, *NEUROPOLITICS: THINKING, CULTURE, SPEED* (2002) (exploring the interplay between thinking, technique, ethical judgment, cultural pluralism, speed, and cosmopolitanism).
21. Functional Magnetic Resonance Imaging (fMRI)

works by exploiting the fact that the nucleus of a hydrogen atom behaves like a small magnet. Using the phenomenon of *nuclear magnetic resonance* (NMR), the hydrogen nuclei can be manipulated so that they generate a signal that can be mapped and turned into an image. When you lay in the strong magnetic field of an MRI system all of the hydrogen nuclei in your body, most of which are in water molecules, tend to align with that magnetic field. When a radio frequency (RF) magnetic pulse is applied at the right frequency, these hydrogen nuclei absorb energy and then create a brief, faint signal ([known as the Magnetic Resonance Signal or] the MR signal) that is detected by the RF coils in the MRI system.

Like film and music, poetry is an emotional intensifier. When it works best, we feel something with great clarity. As if wistfulness, anger, longing, or love were somehow surging forth for the very first time.

In Wallace Stevens' work, poetry is often the subject of the poem.²² Through his poetry we confront what poetry does, how the poet imagines the world, and how it feels to enter into that world. The poet's feelings bind us to particular images and the experience of meaning that they evoke. As I said before, following Vico, feelings are bonding agents;²³ they hold a narrative together, even as they make it come to life. Yet, what happens to feelings in legal education?

I vividly remember, as a first year law student, how sometimes, when a classmate began to speak, in response to one of the often unanswered Socratic questions that my teachers liked to pose, she might unwittingly begin with the phrase, "I feel that..." No sooner had those words hit the ether than a thunder of professorial dismay burst forth: "Feel? You feel? Could you please try not to feel, Ms. Jones? I want you to think. In this class you will learn to think." As a longtime law teacher, I perfectly understand that kind of reaction. The professor, like so many others, then and now, was quite rightly seeking to cultivate intellectual discipline. Rigor, logic, clarity—surely that charge must be met. After all, rules must be extracted from a maze of verbiage, and students must be able to locate the rule's boundary. From what facts does it emerge? To what other kinds of facts might it apply? What sorts of differences are likely to repel comparison and beg to be distinguished?

These are hard moves to make, especially when one is starting out. They are the bread and butter of first year law school. But as I reflect back on my student days, and on my career as a lawyer and law teacher, I have come to conclude that we do a disservice to our students and to the legal tradition we champion when we leave the impression that syllogistic logic and strictly rational forms of intellectual analysis are the only, or even the best tools that lead to success in the practice of law.

If Oliver Wendell Holmes was right when he said experience, not logic is the life of the law²⁴—and I think he was right—then it is incumbent on us to follow through on the further 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

The MR image is a map of the distribution of the MR signal, and by manipulating the timing of the RF pulses and the delays before detecting the signal MRI is a sensitive tool for detecting subtle changes in brain anatomy.

What Is fMRI?, UC SAN DIEGO SCH. MED., <http://fmri.ucsd.edu/Research/whatisfmri.html> (last visited Apr. 6, 2017).

22. STEVENS, *The Man with the Blue Guitar*, *supra* note 9, at 101 ("Poetry is the subject of the poem.").

23. See Sherwin, *supra* note 12, at 39.

24. HOLMES, *supra* note 11, at 1.

and calculation, must be included in the lawyer's toolbox.²⁵ Inductive and deductive logic, and the art of analogizing and distinguishing cases, are coveted abilities in law school, but in practice they can only take a lawyer so far. For always there remains the question: What compels the rule? Indeed, what compels the case? Why should the decisionmaker 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. 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 our clients' experience, of course, but also of the experience and feelings of the decisionmakers on whose judgments we depend.

Narrative "ascend[s] to the particular," as Karl Marx once said.²⁶ 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 aspire to the most compelling kind of verisimilitude, to lifelikeness, if you will. 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.²⁷

These different modes of cognition—argument and storytelling—may complement one another, but the one will never be reduced to the other.²⁸ Stories cohere and move us when they comport with our sense of the world, or (more rarely) when some brilliant artist—whether the young *poète maudit*²⁹ Arthur Rimbaud or the more cosmopolitan poet jurist Wallace Stevens—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 wrote: "No philosophy, no analysis, no

25. See ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW: HOW COURTS RELY ON STORYTELLING, AND HOW THEIR STORIES CHANGE THE WAYS WE UNDERSTAND THE LAW—AND OURSELVES 2–3 (2000); JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS 4 (1986); Anthony G. Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612, 612–18 (1984).

26. JEROME BRUNER, ACTS OF MEANING 60 (1990) (quoting Marx).

27. See BRUNER, *supra* note 25, at 11–43.

28. *Id.* at 11.

29. *Poète maudit* is defined as a "cursed poet: a writer dogged by misfortune and lack of recognition." *Poète maudit*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/poetemaudit> (last visited Apr. 6, 2017).

aphorism, be it ever so profound, can compare in intensity and richness of meaning with a properly narrated story.”³⁰

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 guilty. Criminal defense lawyers, on the other hand, carry a different burden. They must arouse reasonable doubt.³¹ But the best defense lawyers understand that raising doubt alone may not suffice. It is not consistent with human nature to enjoy being left in limbo. We crave certainty, narrative closure.³² What fulfills that craving when all we are left with are our reasonable doubts?

“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. How about a hero quest tale? Something like this:

As jurors you have sworn a mighty oath. Others will sorely 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 story.³³ We encounter it often, and it always makes the same moves. From *The Hunger Games*³⁴ to George Lucas’ classic film, *Star Wars*,³⁵ where the protagonist, Luke, is called to the hero’s journey, but resists. Then catastrophe strikes home (his parents are killed), and he realizes he has no choice but to take up the quest he initially deferred.

All stories are made up of recognizable elements.³⁶ Lawyers need to know what story form to use when, how, and with what effect. In the case of the criminal defense lawyer, in order to go beyond residual uncertainty—“we don’t know who done it”—the defense may turn to the hero’s quest as a counter-narrative, with its own brand of certainty and closure. This is the story of the juror-hero, who stays true to her oath.

30. HANNAH ARENDT, *MEN IN DARK TIMES* 22 (1968).

31. Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55, 64–65, 77 (1992).

32. Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 41 (1994).

33. See, e.g., JOSEPH CAMPBELL, *THE HERO WITH A THOUSAND FACES* (New World Library rev. 3d ed. 2008) (1949) (discussing the recurrent patterns in storytelling of a typical hero’s journey).

34. *THE HUNGER GAMES* (Lionsgate 2012).

35. *STAR WARS: EPISODE IV—A NEW HOPE* (Lucasfilm 1977).

36. See generally V. PROPP, *MORPHOLOGY OF THE FOLKTALE* (Louis A. Wagner ed., rev. 2d ed. 1968) (discussing how stories are composed to fit a fixed number of generic types).

No matter what temptations the state may throw in her path she will not abandon her sworn duty. Stories like this compel action, including the act of judgment—whether they narrate the past or narrate the present, which is to say, the trial itself, as when defense counsel casts jurors on a hero's quest in real time inside the courtroom. And through it all, these stories comport with our common understanding of how the world works, how certain kinds of people, in certain kinds of situations, may be expected to behave.³⁷

When the lawyer-narrator evokes these familiar forms, predictable sorts of cultural associations, memories, and feelings come to mind. These images and feelings bind us to their source. This is what verisimilitude is all about. Lifelikeness: the life-blood of the well-told tale.³⁸ So what does it mean to include this tool, the capacity to construct the right narrative at the right time for the right purpose, in the lawyer's toolkit? 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 arranged. This alerts us to one of the central tasks of the humanities: to make sense of our experience of the world and others around us. But how are we to know the meanings that matter most to 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.³⁹ This is where the integration of ethics and aesthetics matters most. Law's humanity, the core meaning that we derive for self and others and the social world we inhabit, derives from, and is sustained by, the poetic imagination. How else are we to deal with difference? How else, when we lack direct experience, may we come to understand what it means to walk in the shoes of another—whether those shoes belong to a client, or to the decisionmaker in whose hands the client's fate rests?⁴⁰

37. See RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* 41–71 (2000); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 686–88 (1994).

38. BRUNER, *supra* note 25, at 11.

39. The classic reference here might well be 1 DAVID HUME, *A TREATISE OF HUMAN NATURE: BEING AN ATTEMPT TO INTRODUCE THE EXPERIMENTAL METHOD OF REASONING INTO MORAL SUBJECTS* 151 (The Floating Press 2009) (1740) (“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.”).

40. See SHERWIN, *supra* note 37, at 60–61 (describing defense attorney Gerry Spence's efforts to have jurors identify with his client, Randy Weaver, against the violence of federal agents in Ruby Ridge, Idaho). The ability of a defense attorney to spark juror empathy toward her client at trial was popularized in HARPER LEE, *TO KILL A MOCKINGBIRD* (1960). As Atticus Finch, the legendary fictional lawyer in Lee's story, and real life defense attorneys like Gerry Spence like to put it: You have to “climb into [the client's] skin and walk around in it” to appreciate how people differ and what it is like to see things from another's point of view. GERRY SPENCE, *WIN YOUR CASE: HOW TO PRESENT, PERSUADE, AND PREVAIL—EVERY PLACE, EVERY TIME* 11 (2005); Note, *Being Atticus Finch: The Professional Role of Empathy in To Kill a Mockingbird*, 117 HARV. L. REV. 1682, 1692 (2004).

Logic alone will not convey the situation sense of the client's case or its proper outcome. For that, we need a compelling story, a fitting image, an apt metaphor.⁴¹ These are the agencies of creative imagination, the agencies that compel belief and inspire the feelings that bind us to the insights and judgments they bring to mind. Not because they so skillfully make things up. I am not speaking here of the staginess, the theatricality or artifice of narrative—or of any form of communication, for that matter. Rather, I have in mind those forms of expression that flow from our immersion in, or attunement to, the situation at hand.

In making this distinction between artifice and authenticity, I want to push craft away from “craftiness” and toward lived experience. If you do not feel the power of lived experience when you compose your words or images, others are unlikely to feel it when they read or watch or listen. Without the vitality and the inexhaustible excess of lived experience pulsing through your 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 is when the sour taste of craftiness takes over. If you immerse yourself deeply in the facts, the story you tell will remain anchored. The deeper your attunement, the more likely the whole will resound beyond its parts.

Insight, understanding, and mindfulness are capacities that operate within aesthetic registers. They are capable of endowing knowledge with eloquence. This is the proper domain of meaningful experience.⁴² 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.⁴³ This is also why for so many centuries law was considered the “queen of the liberal arts.”⁴⁴ Law constitutes and maintains the core narratives that allow a society

-
41. The classic reference here is Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 *CARDOZO L. REV.* 519, 542 (1991). See also ROBERT P. BURNS, *A THEORY OF THE TRIAL* 222 (1999) (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” (footnote omitted)).
42. On the understanding of “eloquence” in the classical rhetorical tradition, see MAZZOTTA, *supra* note 2, at 58, 232, describing how the rhetorician, by virtue of her gift of eloquence, in images of wonder and terror humanizes creatures otherwise lost in sensate confusion. See also RICHARD K. SHERWIN, *VISUALIZING LAW IN THE AGE OF THE DIGITAL BAROQUE* 183 (2011).
43. See *THE NEW SCIENCE OF GIAMBATTISTA VICO* 19, 63–65 (Thomas Goddard Bergin & Marx Harold Fisch trans., Cornell Univ. Press 1948) (1744).
44. Robert F. Blomquist, *Overinterpreting Law*, 116 *PENN ST. L. REV.* 1081, 1085 (2012); see Thomas O. Sloane, *Preface* to 1 *ENCYCLOPEDIA OF RHETORIC*, at ix (Thomas O. Sloane ed., 2001); see also DONALD R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* 236 (1990) (“To jurisprudence,” as Vico pointed out in a seminal passage, “the Romans gave the same name as the Greeks had given to wisdom, “the knowledge of things divine and human.”” (citation omitted)).

to cohere and flourish. It curtails “the ferocity of fools,” as Vico put it, “turn[ing] them from error through prudence, and . . . bring[ing] them benefit through virtue.”⁴⁵

That is what it is like for the ethical and the aesthetic to merge. It is the old rhetorical ideal, expressed in the oft-quoted adage: “Eloquence without knowledge is hollow and empty; but knowledge without eloquence is mute and powerless”⁴⁶ It is with this aspiration in mind that education in general, and legal education in particular, most urgently needs the humanities. For it is not in logic or calculation, but rather in the interpretive arts of the humanities that we learn to cultivate imagination, memory, and perceptual attunement.⁴⁷

These are the most necessary capacities for music, film, poetry, and eloquence. They are the capacities most necessary to weave together the ethical and the aesthetic, harnessing eloquence in the service of virtue.⁴⁸ What jurists call the quest for justice.⁴⁹ 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 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, responsible for the other who stands before us in her need.⁵⁰

45. MICHAEL MOONEY, *VICO IN THE TRADITION OF RHETORIC* 113 (1985) (citation omitted); *see also* THE NEW SCIENCE OF GIAMBATTISTA VICO, *supra* note 43, at 302.

46. MOONEY, *supra* note 45, at 10 (describing Vico’s belief that societies fall apart when wisdom and eloquence are disjoined); *see* 2 CICERO IN TWENTY-EIGHT VOLUMES: DE INVENTIONE DE OPTIMO GENERE ORATORUM 3 (H.M. Hubbell trans., 1976) (“[W]isdom without eloquence does too little for the good of states, but . . . eloquence without wisdom is generally highly disadvantageous and is never helpful.”); *see also* NANCY S. STRUEVER, *THE LANGUAGE OF HISTORY IN THE RENAISSANCE: RHETORIC AND HISTORICAL CONSCIOUSNESS IN FLORENTINE HUMANISM* 21 (1970).

47. *See* Richard K. Sherwin, *Sublime Jurisprudence: On the Ethical Education of the Legal Imagination in Our Time*, 83 CHI.-KENT L. REV. 1157, 1163, 1180–81 (2008) (describing the ethical and aesthetic sublime and the humanist ideals of visual imagination, ingenious invention, and prudent understanding).

48. *See* Richard K. Sherwin, *Introduction to LAW, CULTURE AND VISUAL STUDIES*, at xi (Anne Wagner & Richard K. Sherwin eds., 2014); SHERWIN, *supra* note 42, at 19–21.

49. *See* FULLER, *supra* note 6, at 233–34 (“[T]he crucial quality that serves to distinguish law from managerial direction, or military command, or sheer power, is itself infected with a moral element”); OTTO GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY, 1500 TO 1800*, at 226 (Ernest Barker trans., The Lawbook Exch., Ltd. 2001) (1950) (“[T]he internal experience which affirms the living force of Law is derived from an idea of Right which is innate in humanity[.]”).

50. As Levinas has said:

To approach the Other in conversation is to welcome his expression, in which at each instant he overflows the idea a thought would carry away from it. It is therefore to

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.⁵¹ Through aesthetic modes of attunement we learn the demotion of self in fealty to the actual.⁵² That is the path to the ethical, the endless call of incalculable justice.⁵³ Through the poetic imagination we learn to immerse ourselves in the facts of the case. And from this immersion we learn to intuit the living speech of the law.⁵⁴

What does it mean to say that speech “lives”? In his poem, *Of Modern Poetry*, Wallace Stevens writes:

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.⁵⁵

receive from the Other beyond the capacity of the I

. . . .
. . . . The relation with the face in fraternity, where in his turn the Other appears in solidarity with all the others, constitutes the social order

EMMANUEL LEVINAS, *TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY* 51, 280 (Alphonso Lingis trans., 1979).

51. This classic “mind-body” dualism is closely associated with the philosophy of René Descartes. According to Descartes:
- [T]here is a great difference between a mind and a body in that a body, by its very nature, is always divisible. On the other hand, the mind is utterly indivisible. . . . For when I consider the mind . . . myself insofar as I am only a thinking thing, I cannot distinguish any parts within me Although the entire mind seems to be united to the entire body, nevertheless, were a foot or an arm or any other bodily part to be amputated, I know that nothing has been taken away from the mind
- RENÉ DESCARTES, *DISCOURSE ON METHOD AND MEDITATIONS ON FIRST PHILOSOPHY* 100–01 (Donald A. Cress trans., Hackett Publ’g Co. 4th ed. 1998) (1641). In this view, mind is a nonphysical—and therefore, nonspatial—substance; body, by contrast, exists as a physical entity, which means that it is extended in space. See *Dualism*, STAN. ENCYCLOPEDIA PHIL. (Feb. 29, 2016), <http://plato.stanford.edu/entries/dualism>.
52. SHERWIN, *supra* note 42, at 20–21, 186. See generally DUFRENNE, *supra* note 16, at 335–79 (discussing the aesthetics of attunement).
53. Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 3, 22 (Drucilla Cornell et al. eds., 1992) (discussing the infinite, incalculable nature of justice in the work of Levinas); see also EMMANUEL LEVINAS, *ENTRE NOUS: THINKING-OF-THE-OTHER* 108 (Michael B. Smith & Barbara Harshav trans., 1998) (“Justice comes from love. . . . Love must always watch over justice.”).
54. CARDOZO, *supra* note 11, at 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:
- [L]earning (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.
- Id.* at 60 (footnote omitted).
55. WALLACE STEVENS, *Of Modern Poetry*, in *SELECTED POEMS*, *supra* note 1, at 135, 135.

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.”⁵⁶ 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”⁵⁷: a meaning that will suffice—a meaning that “wholly [c]ontain[s] the mind.”⁵⁸ This “sudden rightness,” again quoting Stevens, is something “below which [the mind] cannot descend/Beyond which it has no will to rise.”⁵⁹ Not a bad description of eloquence. 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 her own—the construction of a shared world and of a self that feels at home in that 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 new vitality: in times of revolution, civil war, historic outbursts of social transformation and political liberation, manifest perhaps in new forms of constitutional reconstruction. When, as Bruce Ackerman has written, the various branches of government align, 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 Depression.⁶⁰

The poetic imagination gives life to shared values, on a macro level, when political and social upheavals are at hand, and also on a micro level, every day, one law case at a time. These individual and collective acts of meaning reconstruct our humanity. They 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 gun, but from an act of discourse—an act of persuasion,⁶¹ which presupposes, by definition, the freedom and the power to say yes or no, to accept rules or decisions or clusters of core values because they are right or just or fair. Because they make sense. Because I can live

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 89, 103–08, 266, 282–85 (1991).

61. See JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW*, at x (1985) (describing “constitutive rhetoric” as “the art of constituting character, community, and culture in language”).

with myself and with others in such a world without despair. "I accept." That is the keynote of legitimate, as opposed to naked power.⁶²

Law's humanity, then, is an act of collective imagination. 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 Co.*, for example, which was composed by one of the great American masters of legal rhetoric, Benjamin Cardozo.⁶³ The legal challenge in that case was plain. Can we say that a train company is responsible for injuring a passenger who chooses to leave the car he is in, while it is perched high on a bridge, at night?⁶⁴ 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.⁶⁵ That the train company is liable for carelessly creating the conditions that led to the cousin's death is beyond debate. But did the company also cause plaintiff's injuries, 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 that this passenger 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. "[P]eril and rescue must be in substance one transaction," Cardozo writes.⁶⁶ "[T]he sight of the one must have aroused the impulse to the other . . ."⁶⁷ Impulse, mind you—not deliberate reflection. "The emergency begets the man," Cardozo writes.⁶⁸ As if the brevity of the sentence emulates the quickness of the very impulse at issue. "The human mind . . . acts with celerity which it is sometimes impossible to measure," says Cardozo.⁶⁹ We must, then, look at the circumstances, for, as Cardozo puts it, the act is "the child of the occasion."⁷⁰

Note again the key theme of necessity, impulse, quickness—as opposed to deliberation, the pause that might break the chain of causation. "Danger invites

62. HART, *supra* note 7, at 203. Even legal positivist H.L.A. Hart conceded, "a necessary condition of the existence of coercive power is that some at least must voluntarily co-operate in the system and accept its rules." *Id.* See generally Richard K. Sherwin, *Opening Hart's Concept of Law*, 20 VAL. U. L. REV. 385 (1986) (discussing the notion of acceptance of law's authority).

63. 133 N.E. 437 (N.Y. 1921).

64. *Id.* at 437–38.

65. *Id.* at 437.

66. *Id.* at 438.

67. *Id.*

68. *Id.*

69. *Id.* (quoting *People v. Majone*, 91 N.Y. 211, 212 (1883)).

70. *Id.*

rescue.”⁷¹ 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, it owns 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 proper name: Herbert.⁷² It is in search of cousin Herbert that our rescuer sets out.⁷³ 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, falls onto 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 445 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.⁷⁴

Talk about “the mind in the act of finding/What will suffice.”⁷⁵ 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 farther than the length of a football field, 445 feet, to reach the site of his cousin's demise, 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 but nothing else.⁷⁶ “[B]ut 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 happened.

And did you catch the narrative construction Cardozo is using 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, when plaintiff finds

71. *Id.* at 437.

72. *Id.*; see 1 WALTER BENJAMIN, *On Language as Such and on the Language of Man*, in *SELECTED WRITINGS*, 1913–1926, at 62, 69 (Marcus Bullock & Michael W. Jennings eds., 1996) (“The theory of proper names is the theory of the frontier between finite and infinite language. Of all beings, man is the only one who names his own kind, as he is the only one whom God did not name.”).

73. *Wagner*, 133 N.E. at 437.

74. *Id.*

75. STEVENS, *supra* note 55, at 135.

76. *Wagner*, 133 N.E. at 437.

“upon a beam his cousin’s hat, but nothing else,” misses his footing, and falls.⁷⁷ What do you know? It’s a flashback! Now why in the world would Cardozo produce a flashback? Why present the fall twice, and in this particular fashion?

Having already fallen among the crowd below, the reader must experience the replay of that fall as inevitable. There is a name for this dramatic technique. It is called “suspense.” Like in a Hitchcock film, the audience already knows what is going to happen. The victim’s fall 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.⁷⁸ “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 of anticipation or temporal suspension is the essence of the suspense genre, as its very name reveals.

Suspense stories are designed to amplify emotion. They create an exquisite tension between the present and the future perfect, between the apparent openness of an ever unfolding now and the unyielding imperative of what must be. We find ourselves stretched on the tightrope of time, balanced between freedom and fate. But no matter with what intensity we may yearn, in hope and desire, for the possibility of change, nothing can avail against the fatality of what already will have happened. The future perfect is like a meditation on mortality: it enhances longing. The genre of suspense is a machine designed for the production of desire.⁷⁹ It tells us what must be, and therefore all else that cannot.

I believe that Cardozo flashes back, in a replay of the plaintiff-rescuer’s fall, precisely in order to intensify the terror of its ineluctability. The emotional intensity with which we greet that fall intermingles with our felt sense of the fatefulness of plaintiff’s rescue in the first place. After all, the mood of inevitability lies at the heart of Cardozo’s decisive narrative.

As Cardozo repeats in one rhetorical refrain after another: “Danger invites rescue.”⁸⁰ “The risk . . . is born of the occasion.”⁸¹ “The emergency begets the man.”⁸² Plainly, plaintiff’s act of rescue is meant to be viewed as a logical and natural offshoot of the train company’s carelessness. For it is carelessness that indisputably sent cousin Herbert flying out the open train doors. The imperative of rescue manifestly lacks the power to break the chain of causation. Indeed, if the act of rescue is but the child of its occasion, there is no basis upon which a superseding, intervening cause could be found. If plaintiff’s rescue, and the accompanying risk of death, was bound to the

77. *Id.*

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

79. Cf. JEAN-PIERRE DUPUY, *THE MARK OF THE SACRED 1* (M.B. DeBevoise trans., Bd. of Trs. of the Leland Stanford Junior Univ. 2013) (2008) (“[O]ur societies are machines for manufacturing gods.”).

80. *Wagner*, 133 N.E. at 437.

81. *Id.* at 438.

82. *Id.*

danger inherent in its occasion, rescue and the rescuer's ensuing fall must be the future perfect of the defendant train company's negligent present.

In sum, plaintiff's fate was sealed when cousin Herbert fell. Having carelessly created the condition of a call to rescue, the train company can hardly disown the injurious consequence of what followed. Plaintiff's fate is but the future perfect of his cousin's. Their respective fates were bound together in the bosom of time occasioned by defendant's negligence. It is as if defendant wound the clock of inevitable rescue and events unfurled to reveal the future's perfection. That is what we experience on the tightrope of suspense. And that tightrope is precisely where Cardozo wants us to be.

A legal decision written with such liveliness, with such poetic imagination, re-constitutes the world with a degree of eloquence that compels our acceptance. Eloquence consists of 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:

Not to the play, but to itself, expressed
In an emotion as of two people, as of two
Emotions becoming one.⁸³

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 entangling us 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. And having said as much, the occasion of my conclusion is at hand.

Why does the law poeticize? Because eloquence and feelings bind us most surely. Law's essential narratives constitute the collectivity in which we live. And they do this, not by sheer force of command,⁸⁴ nor by fear of repercussions alone, but rather 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 does not 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 do so. It is our acceptance of the right to rule that ultimately legitimates what the rule asks of us.⁸⁵

This shift from command to acceptance correlates with the shift from the *formal* authority of positive law to the eloquence and persuasiveness of law in proximity to justice. It corresponds with the 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

83. STEVENS, *supra* note 55, at 135.

84. On the theory of law as the command of the sovereign, see JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 18–22, 173 (London, John Murray 1832).

85. See HART, *supra* note 7, at 197–98.

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."⁸⁶

This is not the work of logic. It is the work of poetic imagination. We experience it in the resonance of 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. In the end, the only alternative to founding states based on Hobbesian fear is to recurrently inspire such collective belief and collective affirmation.⁸⁷

Feelings that sustain such affirmation may be generated by the words of poets, whom the poet Percy Bysshe Shelley called, "the unacknowledged legislators of the world."⁸⁸ They also may proceed from the poet-lawyer-statesman.⁸⁹ Such individuals may be rare, but as Benjamin Cardozo, Robert Cover, James Boyd White, and many others 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 we end as we began, with law's stories—stories that bind us by intensities of feeling—that are generated by the poetic imagination.

Now, if I have persuaded you to entertain this insight as worthy of belief, I hope you will also agree that we can ill-afford to leave the poetic imagination out of legal education. We must care about its cultivation. We must nurture it, in the service of virtue, as Vico recommended so many years ago.⁹⁰ We must seek to understand it anew in every generation—in words on the page as well as images on the screen. By what intensities are we bound, or forced apart? To what acts of meaning do we say yes or no? And in so saying, who do we become, and 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.⁹¹ It is in

86. JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* 179 (1986).

87. See EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* 208–16 (Karen E. Fields trans., 1995) (describing the collective effervescence generated by assembled social groups harnessing and bonding people's passions to the symbolic order of society).

88. PERCY BYSSHE SHELLEY, *A DEFENCE OF POETRY* 90 (Mrs. Shelley ed., 1904) ("Poets are the unacknowledged legislators of the world.").

89. SHERWIN, *supra* note 42, at 188.

90. See *THE NEW SCIENCE OF GIAMBATTISTA VICO*, *supra* note 43, at 90–115; Vico, *supra* note 9, at 33–41.

91. See NUSSBAUM, *supra* note 13, at 3.

this spirit of reflective affirmation that we may affirm the virtue of poeticizing. The poetic imagination helps us attune ourselves to the world and others around us. It invites us to experience empathy with otherness, what Cardozo has described as the “reading[] of the social mind”⁹²—the judge’s ability to “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.”⁹³ Here we come close to the core ethical nature of poetry and narrative itself. Writing, conversation, legal argumentation, the act of persuasion and of expressive communication as a whole all presuppose a desire to share a certain urgency within a given historical context—together with the concomitant belief that we want to know and are capable, at least to some extent, of entering into otherness for the sake of some shared meaning. That very effort may indeed constitute the ethical key, for it is not necessarily full understanding that we seek. As Richard Schechner puts it, “[a] person performing recovers his own self by going out of himself and meeting the others”⁹⁴ Such a capacious performative or dialogic attunement to harmony and difference allows us to sustain a robust pluralism. Which means it serves society as a stable platform for meaningful freedom.⁹⁵

In this way we come closer to grasping the living reality of law, and perhaps also the source of law’s trust—its bond both to the past and to the future.⁹⁶ Something neuroscience will never adequately convey.⁹⁷ For in order to be bound to something larger than ourselves, something that seems to align itself with the spirit of justice, we need not only to experience the intensity of that bond, but also to be able to persuasively articulate the wisdom of our choice. What binds us: what intensity, in the name of what shared value, to what end, and with what effect upon others?

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.⁹⁸ Years ago, the great

92. CARDOZO, *supra* note 11, at 54.

93. *Id.* at 55.

94. RICHARD SCHECHNER, *BETWEEN THEATER & ANTHROPOLOGY* 112 (1985).

95. See Anthony T. Kronman, *Rhetoric*, 67 U. CIN. L. REV. 677, 690–94, 707 (1999); *id.* at 698–99 (“[T]he institutions of civilization provide the stage on which humanity appears, and outside their sheltering space there can be no expression or recognition of the special being we possess. There can be no human life.” *Id.* at 698).

96. See DUPUY, *supra* note 79, at 62 (“Native American wisdom has handed down a very fine maxim: ‘The Earth is loaned to us by our children.’”).

97. See generally Sherwin, *supra* note 20 (discussing challenges to law and the humanities and neuroscience’s place in addressing them).

98. See MAZZOTTA, *supra* note 2, at 4–7 (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,” *id.* at 7, in order “to salvage the relics and detritus of a broken world and a broken knowledge,” *id.* at 5).

LAW AND THE POETIC IMAGINATION

American jurist Benjamin Cardozo urged graduating students to “love the law.”⁹⁹ Reflecting on law and 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.¹⁰⁰

-
99. According to Professor Paula Franzese, in Justice Cardozo’s address to NYU Law School’s first graduating class, he urged the new lawyers to “[l]ove the law.” *Seton Hall Law Celebrates ‘Loving the Law,’* SHORTHAPPYGUIDE.COM, <http://shorthappyguide.com/2014/10/20/seton-hall-law-celebrates-loving-the-law> (last visited Apr. 6, 2017).
100. PAUL TILlich, LOVE, POWER, AND JUSTICE 82 (1954) (noting that “love shows what is just in the concrete situation”); see also Jean-Luc Marion, *From the Other to the Individual*, in TRANSCENDENCE: PHILOSOPHY, LITERATURE, AND THEOLOGY APPROACH THE BEYOND 43, 53–54 (Regina Schwartz ed., 2004) (“[L]ove tends over justice.” *Id.* at 54 (quoting Levinas)).

NEW YORK LAW SCHOOL LAW REVIEW