

## Essay

---

# From Oracle to Echo: The Development of Law and Justice in Vico's *Nuova Scienza*

ALAN D. HORNSTEIN

Giambattista Vico was an eighteenth-century philosopher of history who provided a new and provocative account of the development of human institutions. His influence has been and continues to be significant. Yet, sadly, his work has been largely neglected by legal scholars. This neglect might be explained by the lack in Vico's principal work, *Nuova Scienza*, of any systematic account of the invention—or discovery—of the idea of justice. Given the scope of Vico's concern with human institutions, this failure is surprising. To be sure there are hints—more than hints—to be found throughout *The New Science*; nevertheless, his account of this important concept is fragmentary and scattered. This essay intends to demonstrate the value of Vico's work to the study of jurisprudence by tracing the roots and later development of the idea of justice as Vico might have elaborated them. [Bracketed references are to paragraph numbers in T. Bergin and M. Fisch (tr.), *The New Science of Giambattista Vico* (Cornell Univ. Press, 1968)].

For the earliest humans, there could be no such thing as justice; at most, there might be just acts. Indeed, even that characterization is doubtful, for justice is a considerable abstraction. Early humans were incapable of abstraction: Each particular thing was itself, and only real things could be comprehended. For those who perceived a change in

---

**Alan D. Hornstein** is associate dean and professor of law at the University of Maryland School of Law.

*Law and History Review* Spring 1990, Vol. 8, No. 1  
© 1990 by the Board of Trustees of the University of Illinois

facial expression as a different face [700], anything as abstract as justice would be, literally, inconceivable.

The earliest instance of justice—divine justice—began with the birth of Jove in the human mind and with the birth of language and characters, albeit entirely particular—indeed, real—language, which of necessity accompanied this awareness of Jove. Indeed, the words for law and sky and Jove are philologically related [398]. (It is interesting to note in this connection that we still speak of living *under* law.) Thus, the first laws were the divine laws of Jove [474–82], and the first voices of justice were those who could read the commands of the gods, the theological poets who interpreted the mysteries of the oracles [37].

It was the solemnity of the ceremony involved in reading the auspices that was the measure of justice in this period [938]. Even today, remnants of this practice may be found in the formalities and ceremonies of civil acts, from the swearing in of a president to the solemn oath administered to judicial witnesses. Law, then, was born with Jove. Everything was commanded by the gods [925]; indeed, everything was a god or was made or done by a god [922]. It was the solemnity of the divine ceremonies by which justice was measured [938]. It can perhaps be said that justice—to the extent one can speak of it at all at this stage—consisted in rendering appropriate obeisance to Jove [516]. Justice, then, can be seen as the fruit of law rather than its source, as we later came to regard it. First law, then justice.

If divine justice was concerned only with the proper interpretation of the auspices and hence with the relationship between humans and Jove, there was no idea of “legal” authority to mediate relationships among persons. Granted that principles defining such relationships could not yet exist, nonetheless there must have been disputes among individuals; where there are disputes, there must be methods of resolving them. In a world operating under divine justice, the will of Jove determined the resolution of private disputes.

Divine judgments during this barbarous period took the form of duels [959]. These “trials” could not have been formal or ceremonial. Barbarous humans could not have entertained abstractions so complex as to constitute a consistent or regularized process even of so relatively simple an event as the duel. Instead, these events were real judgments because they took place in the presence of the disputed object [961]. Justice between individuals consisted in not meddling in each other’s affairs [516].

Given the nature of the participants, this makes a great deal of sense. These were people, it must be recalled, who lived by the senses, without abstraction and, consequently, in the here and now. Private wrongs or

disputes would be seen immediately, not recalled or left to fester in the mind of the victim. Indeed, it is likely that only current wrongs would be perceived as such by the participants. To recall an event is a relatively complex mental process; even if these barbarous humans were capable of doing that much, the more complex process of evaluation and characterization of that remembered event as a wrong would almost certainly be beyond their capacity.

Consequently, the immediacy of the wrong would naturally result in an immediate response. If, as must often have been the case, the wrong involved some object, the duel would take place in the presence of that object with the victory going to the one favored by Jove. These real judgments revealing the will of Jove took place during the barbarous period before humans were capable of formulating judicial law. Right was measured by the fortune of victory, the favor of the gods. Remnants of this system of justice can be found in the notion of trial by battle.

As these barbarous peoples began to enter the heroic age, as settlement began to become more prevalent, justice—more accurately, the idea of justice—evolved as well. It was at about this time that the “administration” of justice moved from Jove to the heroes, although its substance remained with the gods. It may be that the notion of trial by ordeal constitutes a reflection of this development. The gods (or God) bear the ultimate responsibility for the outcome or decision under procedures developed and implemented by humans.

As the fathers of gentile humanity settled in particular areas and ceased their endless wanderings through the forests, they began to exercise dominion over these areas, and with possession and dominion, came authority. Thus, the need for certainty of ownership began to emerge and with it the need of characters and names, of ways to distinguish mine from yours [483]: thus, the close relationship between the birth of characters and languages and of law [473]. It is this relationship and, perhaps, its connection to ideas of ownership and boundaries that may have been partly responsible for the later importance of absolute respect for particular words—particular boundaries—in the administration of justice in the heroic/formulaic period.

When, later, fugitive barbarians sought refuge with these settled peoples from the terrors of the world, the beginnings of society were established. Now, for the first time, a new element was added to the notion of justice. Previously, there were only Jove and humans; now, there were the gods and the fathers who established settlements—the heroes, later to become the nobles—and the second-comers to these settlements—the famuli, later to become plebs.

As might be expected, the heroes believed that the gods belonged to

them (and perhaps that they were themselves gods) and hence that the auspices too were theirs [414]. It was only the heroes who understood the auspices and who carried the laws of the gods [512]. The bestial and barbarous plebs lacked gods and thus required the mediation of the heroes to read the auspices: in effect, to administer Jove's law [414]. Thus, the heroes became the first legislators—bearers of the law from the gods.

The law of the gods was given by the heroes to the plebs in language, for without language there is no law. Thus, the nature of this early "conception" of justice was dependent on the nature of the language used to give it reality. The language was entirely particular, without abstraction. All sentences were in the singular. Law of general application—rules—were, quite literally, unthinkable. There was as yet no ability to compare or to reason [703]. Early law—more precisely, early laws—had to do only with the single instance. The only law that existed would have been that necessary to deal with a particular case. Indeed, all law would have been *ex post facto*. That is, before the event requiring the application of law, there would have been no law to apply. The conception of the law and its application were not separate from each other; they were, in fact, the same thing. There was no law, the law was not even conceived, before the happening of the acts that made the law necessary [500]. The later distinction between "law" and "fact" upon which so much now depends had not yet been conceived; it was all one.

These laws were announced—pronounced—orally, letters not yet having been invented. The speakers were themselves the living and speaking laws [521]. Consequently, just as in the theological or divine age justice was measured by the solemnity of the occasion, in the heroic age it was measured by precise words. Justice became formulaic. Civil equity was scrupulous, even superstitious, about the words in which the laws were expressed [939, 950]. Words were the measure of justice [38]. Law and justice thus proceeded from real examples to reasoned ones of logic and rhetoric [501].

It is interesting, perhaps even necessary, that this development parallels that of language itself. First, there were only real words; a thing stood for or was itself. This identity of name and thing continued with the further development of language so that the connection between the word and the thing was direct and immediate. Thus, the importance of words was equivalent to the importance of the things themselves. Humanity's lack of capacity for abstract thought gave language its fables, its poetry. "Men of limited ideas erect every particular into a

maxim" [816]; equally, "men of limited ideas take for law what the words expressly say" [319].

Early in its development, justice was the concern only of the heroes; the famuli were not yet participants [965]. To prevent disputes, quarrels, and killings, the heroes adopted as the measure of right the words of solemn verbal formulae which could not be altered by a jot or tittle. The Roman jurisconsults are an example of this sort of justice. Other reflections of it can be found in the device of compurgation, or wager of law, in which the parties to a dispute called upon a given number of witnesses to take a prescribed oath. If any witness erred by so much as a trifle in pronouncing the required formula, it was fatal to the party's claim. A later remnant of this principle can be found in the writ system in which a particular claim had to be brought within the language of a writ prescribed by and purchased from the sovereign authority. If a claimed wrong did not fit within one of these formulaic writs, there was no wrong. Here again we can see vestiges of the notion that right and justice were formulaic. Although there were clear political explanations for these devices, they nonetheless correspond remarkably with this conception of the development of justice.

To return to our story, however, it is necessary to account for the inclusion of the plebs who would play so significant a role in the development of justice. It will be recalled that the fugitive barbarians sought to save their lives by taking refuge with the heroes from their wanderings through the forests. They were received, but were obliged as a result to sustain the heroes by cultivating their fields [258]. These early plebs, of course, had nothing even resembling rights. Justice, insofar it was relevant at all, consisted of the will of the gods incarnated in the heroes. As the gods were to the heroes, so were the heroes to the plebs. If government (in the broad sense) must conform to the nature of the men governed [246], it could not have been otherwise.

After a long period, the number of plebs increased; they aspired to be free of their servile state and revolted against the heroes [583]. If the fear of Jove—the awareness of a world in which there is a perceiver as well as the perceived—was the most important event in the development of the race, surely this plebeian revolt was the most important event in the development of a human (as opposed to a divine or heroic) society. The heroes of the cities needed the plebs of the plains to cultivate the fields. The famuli (not yet plebs) had no "ownership" rights in the fields they cultivated for the heroes who had saved them by granting them asylum [597]. They were slaves [556]. As the famuli merged to become plebs and the plebs revolted, the heroes, who still

needed the plebs to serve them, began to unite to resist the rebellious famuli [264].

Out of these events emerged two things that were to be critical to the development of society and the notion of justice. First, there came into being a more formalized relationship among the family fathers as they united to form a sovereign civil authority [491] to satisfy the famuli and reduce them to obedience; second was the recognition of the plebs as an order related to the heroes in a way different from that of, say, domestic animals.

The first commonwealths resulted from the uniting of the family fathers to resist the plebs. By uniting with others the power of the fathers was itself subjected to the new authority of the ruling orders in which they had united. The kings of this new sovereign civil authority were the most courageous, whose function it was to lead the fathers against the famuli [264]. It is in this period that we find the formulaic law of the heroic age.

We know surprisingly little about so important and extraordinary an event as this revolt of the famuli. Perhaps as the first humans began to become aware of the distinction between “me” and “not me” from which all human things were to follow, the famuli may have begun to have an awareness of an additional notion: “me,” “not me” and, for the first time, “like me.” That is, it might be that as humans began to see more than entirely different particular things, as they began to see similarities and differences, vague notions of what we might now call equality began to emerge. In a somewhat different context, we learn that the history of human ideas moves from the purely sensory to the exemplary (and, later, to the dialectic and abstract) [499]. It is only with an appreciation of similarity and difference that examples have any utility. Thus the revolt of the famuli can be viewed as the first expressions of a desire for freedom: “subject man naturally aspires to free himself from servitude” [583, 292], combined with some primitive notion of equality, or at least similarity, between heroes and plebs. For the result of the revolt was a recognition that the plebs were entitled to the protection of law. Law was the means to freedom and one of the plebs’ demands was that there should be settled laws—laws not subject to the will of the heroes.

This second consequence was at least as important to the development of justice as to the formation of the heroes’ settlements into primitive commonwealths. It was this that marked the birth of human justice. (Caveat: the birth only; we are still early in the development of the heroic commonwealth.) The heroes from their mountain cities sent embassies to the mutinous famuli establishing the first agrarian law

that conceded to the famuli a bonitary ownership in the fields. This bonitary ownership gave the famuli more than they had under the sufferance of the heroes; it gave them a right to cultivate such fields as the heroes assigned them and to the fruits of their cultivation subject to a census (tax) and an obligation of serving the heroes in war [197]. It is to be noted how little was conceded to the famuli by this law. They gained only a claim in some of their agrarian production. Quiritary ownership, maintained by arms, remained with the heroes; eminent domain or sovereign power resided with the commonwealth [266].

The famuli obtained merely some rights to land use. This was, of course, still more than they had previously enjoyed. In no event could it last longer than the lifetime of the particular pleb because of the lack of solemnized marriages and the consequent inability to transmit the fields. The absence of knowledge of kin prevented dominion beyond one's own lifetime [110].

Viewed poetically, this first agrarian law was brought down from the heavens (the heroic cities being in the mountains, the plebs cultivating the fields) by Mercury, who carried the law to the mutinous famuli in his divine rod, which is itself a real word for the divine auspices [604]. Thus, the heroes retained exclusive access to the gods through their power to read the auspices. Of crucial significance in the development of justice, this law was the first instance of human justice [713].

It also, however, established the plebs as a separate cognizable group with their own interests, which were different from that of the nobles. Moreover, the interests of the plebs could be furthered by law; the nobles' interests depended upon their natural (lawless) liberty [293]. The weak want laws; the strong seek to withhold them [282]. Thus, the nobles desired to retain their monopoly of law, gained by their unique ability to read the divine auspices; the plebs, now trained in war and increased in numbers, desired their own laws—and they had the strength to demand them [293].

In the next stage in the development of justice, exemplified by Rome, the plebs demanded a more certain claim to the fields they cultivated. It is through this second agrarian law, the Law of the Twelve Tables, that the plebs obtain quiritary, or civil, ownership [109]. This in turn led to demands for the *connubium* of the nobles, the right to solemnized marriages, so that the fields could be transmitted to descendants. But this solemnization required taking the auspices, which previously only the nobles could do [110]. It was through the solemnization of marriage and the participation in the auspices, ceremonies that made the plebs "human," which eventually led to popular commonwealths. It was in these commonwealths that the plebs, who came to know themselves

and to know who their children were, began to share power with the nobles [415].

It is noteworthy that as the plebs were given access to the auspices, they were given access to the law that had been the exclusive province of the nobles. The Law of the Twelve Tables, for example, was the first law to be inscribed on a public tablet [422]. As law became public, language too was necessarily developing. It was in the vulgar languages that the laws came to be written and published [953]. Indeed, these apparently separate, though connected, events may simply be different manifestations of the same phenomenon. For as universals became intelligible, it was recognized that an essential element of law is that it be universal [501].

What is critical for our purposes is that the multitude's understanding of the laws make the powerful and the weak equal before it. All could now participate in the meaning of justice; now the formulaic aspect of the law began to lose its importance. With universal accessibility of law—and written law—the precise words, which in heroic times were critical, lose their importance. As humanity enters the stage of human jurisprudence, the rule of law is bent to the requirements of natural equity—the equity of the facts of particular cases [940]. In effect, the rule is treated as a particular manifestation of the wider principle of justice and equity. Thus, just as earlier the movement was from the single instance to a more general rule, so now the rule was itself treated as a reified principle. The parallel movement, then, is from particular rule to abstract principle, whose application is determined by the facts and circumstances of the individual case. The rule, once the formulaic criterion of justice is reified into its own particularity, is superseded by application of a wider principle.

This distinction between concrete rules and abstract principles is a familiar one in legal reasoning. The principle, unlike the rule, is not automatically applicable; rather, considerable thought and effort is required to determine how the abstract principle is to be justly applied. Consequently, in human judgments, “the governing consideration is the truth of the facts, to which, according to the dictates of conscience, the laws benignly give aid when needed in everything demanded by the equal utility of causes” [974]. This is the inevitable result of empowering the multitude, who are capable of only natural reason. Natural reason is heavily dependent on facts and attends to the smallest considerations of justice when they are themselves involved [951].

This development of the idea of justice moves it from the certain to the true [941], for the greater the rise toward the universal, the closer we come to truth, while the deeper we descend to particulars, the more



we approach certainty [219]. It is a movement from the particular to the abstract—from rule to principle—and requires a similar movement in human consciousness. As the ability to abstract increases, the number of particulars subsumed by a proposition also increases. Thus, two particulars become equal when viewed in the abstract (at least with respect to the quality giving rise to the abstraction). As humans gain the notion of “man” as an abstraction, equality among men becomes more real. [This idea may support the legitimacy of much of the feminist critique of apparently neutral language. For the word “man” none too subtly suggests a different and narrower concept than the word “human,” and the exclusion of women from the concept helps to sustain the inequality inherent in separateness.] With this increasing awareness of equality, there emerges a notion of justice that requires judgment about the facts giving rise to a conflict rather than the status of those engaged in it.

Thus what requires us to think in abstractions in one dimension requires that we look with care at certain, particular events to achieve justice. The achievement of justice through law in a developed society involves the application of general principles to particular facts. In Vician terms, we are engaged in the process of integrating the true and the certain, and it is precisely this integration that Vico claims as the hallmark of his “New Science” [140].

#### ACKNOWLEDGMENT

I wish to express my gratitude to Howard Fisher of St. John’s College, Annapolis, Maryland and Linda Hansen of St. John’s University, Collegeville, Minnesota, for their helpful comments and suggestions. I alone am responsible for any errors.

