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The Shadow of Affectivity Inside the 'Is/Ought' Debate': Siniscalchi, Fuller, Manderson and Vico's Ghosts in the Legal Machine

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Abstract
The article reconstructs the is/ought debate in legal theory through a phenomenological reading of the concept of normality. An analysis of Siniscalchi, Fuller and Manderson looks at the issue from the perspective of law and literature, and then applies Giambattista Vico's rhetorical methodology within the contemporary debate. The question: "is Hume's law really visible within Hume's thought?" also paradoxically poses the figure of phantoms and fictions at the heart of the current theoretical debate on law. A history of the phantom placed at the centre of the history of Western institutions still remains to be written, but a comparison of very diverse and incongrous approaches such as the extended order of Hayek, the dogmatic anthropology of Legendre, the eunomics of Fuller and the new science of Vico shows how the mystery of consciousness and the mystery of institutions are inextricably entwined. It is impossible at the moment to draw a coherent doctrine from these conflicting perspectives, but their convocation is sufficient to demonstrate how the theory of law is always suspended between the unknown and the human attempt to inhabit it, moving us toward an affective turn that has yet to be fully conceived in the theory of law, following the iconic turn. The anthropological primacy of fictio and the aesthetic-legal dimension in the constitution of language is not that of a logic and separation from the body and meaning, but the exact inverse, even in the unavoidable constant tension between the two poles: logic is born through the gesture of the body that precedes it, as myth precedes the foundation of the State; the origin of the concept is affective, as Hume, and perhaps Vico himself, would have passionately affirmed.

Keywords Is/ought · Great divide · *Certum/verum* · Morality · Habit

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1 To be and Must be in the Analytical Tradition According to Siniscalchi

Hume's law can be understood, according to Grice and following Hare, as a wider freedom to choose one's own moral opinions over one's own factual opinions [17: 89, 20: 2]. Judgment concerning having to be may be deductible from a value judgment, from a statute of limitations, from another judgment concerning having to be "Ought judgement", but not from a factual judgment [17: 90]. As they point out, with their usual lucidity, for Baker and Hacker the term "the naturalistic fallacy" names a particular mode of erroneous argument in moral philosophy: the attempt to define 'good' in terms of natural or non-natural predicates. While Moore thought that this was impossible, Hare denounced "any attempt to derive norms or values from "descriptive matters of fact" as "descriptivism"" [1: 299]. If, as Wróblewski states, the relationship of the Is and the Ought – and the related naturalistic fallacy – "appears as one of the basic issues in any practical discourse and in any scientific or philosophical reflection concerning description, evaluation and regulation of human behaviour" [66: 508] in a more restricted field of legal sciences the dichotomy of the Is and the Ought to be "basic for Kelsen's normativism" [66: 509].

Within the framework of vital functions of the dichotomy within normativism and the Pure Theory of Law [66: 509] I intend exclusively to observe how dichotomy appears as "the basic weapon against natural law theories deriving some norms from the alleged factual nature of man and society" [66: 509]. Following the reconstruction of the topic of the naturalistic fallacy and the fallaciousness of Siniscalchi's naturalistic fallacy, it will be possible to identify an analogy between the use of literature in the criticism of Fuller and Siniscalchi and the idea of naturalistic fallacy that leads to the topic in Vico, trying to provide a different reading of the topic.

Siniscalchi summarized the broad debate in the philosophy of law and in Italian moral philosophy [54, 55: 62–63, 5], indicating the distinction between the position of Hume, irrationalist in morality, and that of Moore, for whom intuition has the function of linking being and having to be [58: 23].

According to Frankena, the fallacy concerns the very definition of the notion of good, rather than its derivation from the fact [8]. Siniscalchi focuses not on the notion of good, but on that of normal. In the volume *Normality of Norms,* he specifies how Kneale, starting from Moore's thesis of the indefinability of terms such as 'good', identifies a descriptive sense of the term 'normal' and a prescriptive one [59: 31, 29: 548]. On the one hand normal is what corresponds to the statistical average, resulting from a calculation and empirical observation, on the other hand it means compliance with a standard of behaviour, showing a prescriptive value. Kneale's thesis, recalled by Siniscalchi, is however that the two descriptive and prescriptive dimensions are closely linked and cannot be separated [59: 33, 29: 572]. He also points to the prescriptive scope of normality induced by theories such as those of Nietzsche and Hitler [29:574–575]. In the first place, Siniscalchi identifies in this ambiguity of the notion of normal the passage "from the *Sein* of normality to the *Sollen* of the norm" [59: 33]; secondly, he introduces a different, literary lexicon. He refers first to Kafka's narrative in

the account of metamorphosis, in which the problem is the questioning of a man "about the possibility that, for a human being, it is normal to live like an insect" [59: 34] then to Matheson's science fiction novel *I am legend* where an epidemic infects mankind by turning everyone into vampires, except for the protagonist, Robert Neville, who must record the consequent change in the concept of normality (in a statistical sense). Siniscalchi, following the novel, then asks the question of whether this normality – the habits of vampires – (but ideally also that of Kafkaesque insect men and Nazis) are *normal* [59: 36], introducing an implicit sense of normality.

After the reference to the novel, the author refers to the treatise of Perelman's argumentation, which, although it identifies how the transition from the normal to the normative is a logical error similar to the naturalistic fallacy, also notes that, in fact, this error is often made in the argumentation [59: 37–41]. Without being able to develop the entire reasoning to which I refer, the situation that is created is thus indicated by Siniscalchi: "If it is true, as I have just shown, that there is no relationship of necessary derivation between normality and normativity, it is also true that there are cases where denying that normativity finds its foundation in normality would constitute an equally serious error" [59: 41]. This observation allows us to examine Husserl's example of the warrior, in which the expression "a warrior must be valiant" means that "only a valiant warrior is a good warrior": the *eidos* or essence of the warrior is his "normal" valiant being; a non-valiant warrior would not even be a warrior [59: 41–42, 28: 57]. In this sense Siniscalchi observes how in this "eidetic" normality a fallacy of the fallacy of the normative is observed, where what normally happens (*Sein*) is also what must happen (*Sollen*): where in other words "the prescriptive sense of "normal" derives from the "descriptive" sense, understood as an idea or essence of an entity, without, for this reason, fall into the "fallacy of the normal" [59:43].

In the philosophy of law, a classical didactic example indicated to explain the problem of the distinction between being and having to be *à la* Moore and the connected one of the naturalistic fallacies, *à la* Hume, resorts to the image of the open or closed door. The nature of the (concept of) door contemplates the possibility of it being open or closed: it is one thing to describe the state of the door, another to order its opening or closing [19: 5–6]. It is logically impossible to infer a normative implication from the mere description of the concept of door.

On the other hand, the case of a concept such as that of a warrior appears different: a notion that implies being valiant: a cowardly warrior is a contradiction in terms (while an open or closed door is not). The essence of the warrior is precisely to be in some valiant form, that of the door allows the opening or closing. Siniscalchi applies to the legal field the concept of "fallacy of the fallacy of the normal" or Husserlian eidetic normality taking as an example a traditional conception of Western legal culture such as the concept of "*bonus pater familias*". If the father of the family normally takes care of his children, the father of the family must take care of his children, ending up coinciding with the *bonus pater familias* Many other examples could be provided, aimed at indicating how there are cases in which there is no necessary derivation between normality and normativity, but also "eidetic" cases in which normality "prescribes" [59: 48].

What I want to note about this process is that we already find here the thesis that I intend to present in the article following Fuller and Vico: the transition from the logical to the literary, and from the literary to the rhetorical, in the development of reasoning, following Siniscalchi.

Siniscalchi moves from the analysis of the work by Hare and Moore to the analysis of the literary contributions of Kafka and Matheson, and then moves on to the rhetorical sphere of Perelman. In this article I will only highlight one passage by noting its methodological value, briefly analysing the theories of Fuller and Vico. We only note that the reasoning that Jean-Pierre Dupuy carries out about the "Mechanization of the mind" in the analysis of the continuity between the juxtaposition of cognitive sciences and the juxtaposition of cybernetics follows the same logic [7]. The moment I pose the analogy between man and machine, between machine and mind in the wake of the Hobbesian and Leibnizian "calcolemus", I am implicitly ordering man to "become a machine". Apparently the discourse is only descriptive: "the human mind functions like a machine"; implicitly an implicit eidetic prescription arises: "the human must support the robotic functioning of society". The topic of human/machine interaction follows this development today: through the rhetorical device of the affirmation concerning the novelty and extraordinary relevance of technological achievements, the injunction to man to make himself similar to the machine is communicated: so, to speak, passing from *homo homini lupus* to *homo homimi robot*. The interactions we have with machines or computer programs indicate it well: apparently technologies come to the rescue of man, but in reality, when man is replaced by the machine, it is man who becomes habituated (at least temporarily) to the machine's methods of communication. This is the classic case of replacing the "flexibility" of the telephone operator with the automated program that forces us to "adapt" only to the possibilities offered by the programmer of the device, generating that sense of impotence and incommunicability with the "operating system" that each of us feels when talking to an automated telephone switchboard or trying to complete some online procedure designed not to take into account (voluntarily or involuntarily by the designer) of all conceivable cases. The topic identified by Siniscalchi, linked to the difference between logic and story, between logic and rhetoric, is now realized by automation procedures. It is not a question of providing a judgment on this evolution, but of understanding its exact scope by freeing oneself from the myths of modernity and legal positivism (among which is the very useful "Hume's law").

2 Fuller and the Distinction Between Being and Having to be: a Juxtaposition of Law and Literature

Lon Fuller, in the volume *The right to search for himself*, moves from the distinction between natural law and legal positivism defining the latter as the legal thought that "insists on tracing a clear separation between what law *is* and what law *should be*" [9: 49], a distinction made following Kelsen's pure theory, in order to purify the notion of law from "wish-law". Natural law, on the other hand, is the point of view of those who "deny the possibility of a rigid separation between *being* and

having to be, and who tolerate their confusion within legal discussions" indicating that precisely this trait is what holds together the different schools of natural law, which borrow their conceptions of justice from different sources such as the nature of things, of man, of God [9:49–50]. We could add, identifying natural law in completely different values according to the author who formulates the doctrine, good for St. Thomas, freedom for Rousseau, is so on: "Although the natural law philosopher can admit the authority of the State to the point of attributing validity to a law that according to its principles is manifestly "unjust", it turns out in the end that he does not draw a clear and firm distinction between law and morality, and that he considers the "goodness" of his natural right to confer a kind of reality that can be temporarily obscured, but that can never be completely annulled by a reality immediately more effective than positive law" [9: 50]. If the problem that arises for the individual is how to choose between alternative ways of employing one's energies in law, the usefulness in following the "ghost" of natural law arises because "nature, unlike what the positivist very often maintains, does not manifest being and having to be as clearly separate entities" [9: 50–51].

The identification of such a distinction can serve as a legitimate end to the analytical efforts of the juspositivist, but it cannot be considered a starting point of his discourse. The theorist, we might add, must always "preach" the distinction, and not be based on its phenomenological evidence: it is discursively introduced, it is not already beautiful and ready in reality, to be grasped like an apple. The example that Fuller uses to support the point takes us into the sphere of law and literature in an even more direct way than Siniscalchi did in his reading of the problem of the dichotomy of being/having to be. For the Harvard philosopher of law, the simple fact of telling a story previously heard indicates that our telling will be "the product of two forces: [1] the story we have heard, that is, what the story *is* at the time of its first narration; [2] and our interpretation of the meaning of history, in other words, our idea of what history *should be*" [9: 51]. The fundamental point that Fuller identifies here is that the moment we judge the way the story is told for the first time, we are guided by an idea of how the story should be that cannot coincide exactly with the story. To put it in the language of the Turin philosopher of law Enrico di Robilant, we are guided by a figure, or by a prefigure of history [53]. History encompasses both the being of history and its ability to be (in our interpretation), and the two perspectives are intertwined with each other, to the point of saying that "history", as an entity, encompasses both. Looking at history "through time" builds a more complex reality:

"The meaning of history that provides it with essential unity can change with each new story. As soon as its meaning is brought more clearly to light by the ability of a new narrator, it becomes a new meaning; at some indefinite moment the story is improved to the point of becoming a new story. In the sense, therefore, that what we call "history" is not something *that is*, but something that becomes; it is not a piece of reality, but a fluid process, which is directed both by the creative impulses of men, by their interpretation of what history should be, and by the original event that released these impulses. *Having to be*, as part of the human experience, is as real as being and the line between the two melts into the common flow of telling and repeating the story, in which both flow. Exactly the same thing can be said about a

law or a sentence: they include two things, a series of words and the tension towards a goal. It is not certain that this objective was clearly expressed by the legislature or the court; this objective, as well as the meaning of an anecdote, can be grasped in a confused or clear way, it can be grasped more clearly by the recipient than by those who drafted the document. Both the law and the sentence do not constitute a portion of being, but, like the anecdote, a process in the making. By reinterpreting them they become, through subtle changes, something different from what they were originally" [9:51–52].

This long quotation effectively shows the way Fuller empties the sense of the distinction on which legal positivism is based, showing how it is fictional and not natural; preached, and not simply observed; set and not just identified. This dichotomy, with the continuation of the fallacies that it claims to derive from them, notes Fuller, forces nature into a distinction that the positivist himself has created and that is passed off as scientific and logical. On the contrary, *narration* is the starting point from which to move in analysing the topic. A law and a sentence (but also the procedural evaluation of a testimony) follow the same logic as a story, in referring to the flow of actions and their intersubjective composition in terms of social order. The subjective interpretation of the event appears unavoidable, without however implying a relativism or a subjectivism. The distinction between law and ethics or between fact and law can only be understood through *the form of the story*, which does not mean renouncing an ethically qualifiable objectivity, but this objectivity is so to speak projected into the future, linked to the evolution of the interaction between men, and the composition of their individual ends, finally to the topic of good order to which it refers. Fuller's interpreters note that his natural law is not merely thematic or ontological, but procedural: in the article *American legal philosophy at mid-century,* the Harvard philosopher of law explicitly specifies how he rejects the idea of the absolute (ethical, religious, philosophical) as, in fact, devoid of relations with the human: "I cannot think without employing relations" [10: 467]. In order to avoid the confusions inherent in the expression 'natural law', he calls his theoretical proposal Eunomics, "science, theory or study of good order and workable arrangements" [10: 477], which does not refer to ultimate ends, but to the relationship between means and ends, in particular the means available to achieve particular ends [10: 478].

In this article, as Porciello effectively points out [50: 55], Fuller takes up an example, the instruction booklet for a mechanical device, which shows the narrative dimension inherent in the impossibility of separating being and having to be. The communicative effectiveness of the rules is not linked to the literal formulation, but rather to competence, and consequently to the *reading perspective* through which the individual approaches the text. Using the example of the instruction booklet, Fuller imagines that the text of the instructions was written in English by a German engineer and that there are two buyers of the device, an English grammar professor and a mechanic. The first will read the instructions literally, and will probably soon encounter insurmountable difficulties, due to a certain linguistic approximation of the text; the mechanic on the other hand, having technical competence, will probably be able to overcome the literal level, reading between the lines of the text, also grasping the ambiguous indications, and probably concluding the assembly of the

device. If you then imagine that the instructions were afflicted not only by language problems, but also contained errors related to the electrical circuit of the device, not only the professor, but also the mechanic may have encountered difficulties in completing the operation. Difficulties that instead a third buyer competent in electronics could have overcome, reaching the point of correcting incorrect instructions, and not only integrating the gaps (deliberately here I move to a general theoretical language). The author concludes, with reference to the notion of "paper rules" criticized by legal realism[1]: "The same words on paper have now produced three different effects. If we were permitted an evaluation we would have no difficulty at all in ranking these three readings in terms of their contribution toward an end shared by all concerned, namely, the proper assembly of the machine" [10: 469]. A purpose is a fact, but a fact that provides a direction for action: "a purpose is at once a fact and a standard for judging facts" (Fu: 470). A direction is the assumption that allows a judgment such as: "this is good, or it is negative; this helps, this obstacle" (in relation to that particular end): "The essential meaning of a legal rule lies in a purpose, or more commonly, in a congeries of related purposes" [10: 470]. The applicability of the distinction between being and having to be leads to the heart of the debate between natural law and legal positivism: Kelsen's entire system is aimed at treating purposes as if they were aimless, eliminating the relational and interactive dimension of finality [10: 471]. A purpose is a part of a man; the whole man "is a hugely complicated set of interrelated and interacting purposes". This system constitutes its nature, and it is to this meaning of nature that natural law refers, in search of standards to arrive at moral judgments.

[1] Let us recall how for Llewellyn the notion of "paper rule" is linked precisely to overcoming the ambiguities related to the distinction between *Is* and *Ought*: a rule can be prescriptive (what judges should do) or descriptive (what judges are currently doing) or both. The controversial point would, however, be, for Llewellyn, the lack of awareness of what is stated when speaking of prescription or decision: "And when theorists disagree, they will move from one of these meanings into another without notice, and with all and any gradations of connotations. In the particular case of rules "of law" a further ambiguity affects the word "rule": whether descriptive or prescriptive, there is little effort to make out whose action and what action is prescribed or described. The statement "this is the rule" typically means: "I find this formula of words to be authoritative" [35: 439]. Hence the idea of the opposition of paper rules and working rules, expressed in footnote 7a [35: 439]: "Refinement of terms goes some distance to avoid this confusion. "Rule" is well confined to the prescriptive sphere. "Paper rule" is a fair name for a rule to which no counterpart is, in practice, ascribed. "Working rule" indicates a rule with a counterpart in practice, or else a practice consciously normatized… "Practice" indicates an observable course of action, with no necessary ascription of conscious normatizing about it". The distinction is subsequently taken up and expanded In famous distinction between paper rule and real rules: "This concept of "real rule" has been gaining favour since it was first clarified by Holmes. "Paper rules" are what have been treated, traditionally, as rules of law: the accepted doctrine of the time and place – what the books there say "the law" is. The "real rules" and rights – "what the courts will do in a given case, and nothing more pretentious" – are then predictions. They are, I repeat, on the level of *isness* and not of *oughtness*; they seek earnestly to go no whit, in their suggestion, beyond the remedy actually available" [35:448].

It looks as impressive as the wording of the quote from p. 439 and resembles Hume's notation in the famous passage in which the "law of Hume" is formalized, where the natural lawyers pass "without realizing it" from the language of being to the language of having to be [57: 905]. For Llewellyn it is the theorists of positive law who pass "without realizing it" from the plane of the prescriptive to the plane of the descriptive.

In this finalistic perspective, which is aimed not at a content, but at the possibility of associating different individual ends within a legal and social order, consists the science of Eunomics proposed by Fuller and that he, in his work, tries to apply to the contemporary practical aspects of common law. The analysis of the practical implications of this methodology for the legal actors (for the judge, in the famous case of 'The Speluncean Explorers', for the lawyer, the law professor and for the student themself) determine the subsequent work of the Harvard philosopher. Limiting ourselves to the case of the lawyer and the student, we observe how the first is led to the overcoming of the syllogistic method to arrive at the rhetorical and topical method and the second leads to a non-positivistic configuration of legal education. For the practice of the lawyer the problem, in fact, "consists in the choice of the starting point to which to anchor one's argument" [9: 54]. This methodology brings the method of legal reasoning closer to the rhetorical method that we will mention in the concluding paragraph, in relation to Vico: the starting point of the argument is "should it be sought within the legal norms or rather in the objectives that lie behind the norms? Will you have to discuss your client's rights or the correctness of your case? Will he have to base his request on elementary conceptions of justice, using the rules contained in the codes and judgments as a secondary expression placed in support of these conceptions? Or will he have to accept the rules for themselves, as the primary realities of his legal firmament and connect them in such a way that they seem to force a decision favourable to his client?" [9: 54].

In this series of rhetorical questions Fuller exemplifies the main theories of the twentieth century. Alongside the juspositivist position of the general theory of law and human rights, we find reference to very different theories of legal science, such as natural law or even a theory not yet formulated, but which takes inspiration from the Fullerian one, Dworkin's theory,[2] aimed at identifying an ethical solution to the problem of interpretation between several possible solutions; to that proposed by the rhetorical method, up to the "cynical" developments of realism, all based on the criticism of juridical positivism and its foundation on the unsustainable and fictional division between law and fact, between being and having to be. The series of rhetorical questions is aimed at showing how the problem of the starting point is influenced by the end that the lawyer proposes, which indicates how the reintroduction of the concept of truth into law implies the taking into account arguments that are the subject of beliefs and that are placed beyond the criteria normally accepted as a criterion for legitimizing legal interpretation, understood as textual, jurisprudential, historical, doctrinal argumentation.

While equally the choice of the starting point concerns the role and conception of legal science and the role of the law professor, it does not spare the student equally. Should his way of approaching legal knowledge "aspire to a type of professor able to present "the existing law", let's say, Thursday, April 2nd 1940 at 4 pm and who knows all the most recent cases? Or should he prefer the one capable of transmitting the knowledge of the changing moral foundation of law, a foundation with respect to which "the law that is" appears to be an accidental configuration without any

[2] On the relationship between Dworkin and Fuller, see [50: 179–192].

importance? And a similar problem of choice also concerns the way in which he should set up his studies" [9: 55] and consequently the criteria by which the teaching of law in universities is thought, precisely crystallized in knowing "the law existing on August 14, 2022 at 11.30 am" showing how the situation since the forties of the last century has remained substantially unchanged.

3 Does 'Hume's Law' Really Exist? Between Morality and Habit

Before moving from the taking into account of purpose and Eunomics to the brief examination of another new legal "science", placed at the origins of modernity by Vico and its reference to a rhetorical methodology, let's observe some problems about the foundation in Hume's theory of the same "Hume's law". The impression is that the theory of the Scottish philosopher has been interpreted in a radically opposite way or depending on the reader's starting point, finding in the text elements capable of supporting the theories supported by those who have read the *Treaty on the basis of a given purpose.*

Yalden-Thomson explicitly denounces this [67], taking up MacIntyre's critical remarks regarding Hume's 'standard interpretation' provided by the analytic philosophers, of which the reading of Grice and Edgley [17] is an example, and discussed in the volume edited by Hudson [26] of the famous passage even accepting Henze's position according to which " 'Hume's Law' is not Hume's view" [26: 91, 24].

Without wishing to provide here an interpretative solution to the complex topic of the interpretations of the famous Humian passage, we observe that different readings are possible, for example the one provided by Hayek, also attributable to the reading by Popper. The interesting point does not seem to me today to indicate the 'true' interpretation of Hume's moral theory, but to note how it has given rise to very different, if not opposite, interpretations, inserting myself into the debate and providing, after a brief analysis, a possible interpretative starting point for the topic, which they call 'affective interpretation'. Hudson succinctly identifies an argument of MacIntyre's critique of the most widespread standard interpretation, which identifies in Hume's passage the basis of the distinction between being and having to be, indicating how the Scottish philosopher was simply stating, in the well-known passage, how other theories had provided an erroneous version of what were the facts from which moral judgments could be inferred, and how one's theory was correct [26:15, 37].

The famous passage from which Hume's law is taken is found in the *Treatise on Human Nature*, at the end of the first section of the first part (virtue and vice in general) of the third book of the treatise, dedicated to morality and the identification of moral distinctions not deriving from reason. According to Lecaldano, Hume's man is mostly "made up of instincts, habits, passions, and the role and scope of reason are very little" [30:79]. As Balistreri points out, "In the Humean perspective, reason not only exists, but must remain a slave to passions, since only passions can save us from scepticism. According to Hume, moreover, reason leads us to doubt any certainty: however, not even the most elaborate and accurate rational argument is capable of extinguishing the vivacity that accompanies our ideas of the world and

the identity of the ego. When we are immersed in the 'common affairs of life' there is no room for scepticism because passions prevent philosophical delirium from becoming a disease. Even the phenomenon of morality, then, does not depend on reason, but on the feelings we feel towards the actions and qualities of the characters we evaluate. We call virtuous, moreover, those behaviours and that character which arouses pleasure in us, while we call vicious those that instead cause us pain" [2].

The topic that Hume is dealing with in the first section of the third part is therefore precisely the impossibility of deriving morality from reason, following what has already been stated about the intellect and passion in the two previous parts. According to Henze, the Scottish philosopher is analysing how only perceptions are present to the mind and how therefore moral judgments about good and evil are precisely perceptions, and how, according to his system, morality is practical and not theoretical, since it influences actions and affections while reason cannot have such influence [24: 279, 26: 905].[3] This is the point that will then be interpreted by Hayek in accordance with his system: "Since morals, therefore, have an influence on the actions and affections, it follows, that they cannot be derived from reason; and that because reason alone, as we have already proved, can never have any such influence. Morals excite passions, and produce or prevent actions. Reason of itself is utterly impotent in this particular. The rules of morality. therefore, are not conclusions of our reason" [24: 279, 27: 905, 22: 120]. According to Henze, Hume allows reason to influence conduct only by informing that there is something that is the object of passion, or by identifying a cause-and-effect relationship, while it is the passions that act [24: 280]: "As long as it is allowed, that reason has no influence on our passions and action, it is in vain to pretend, that morality is discovered only by a deduction of reason. An active principle can never be founded on an inactive" [26: 905]. Reason is perfectly inert and cannot therefore directly produce an action or affection, at most, it can be the mediated cause of an action arousing a passion. While the Humian and modern philosophy discovery is that vice and virtue, comparable to sounds and colours, are not qualities in objects but perceptions of the mind, the moral relationship does not belong to the four relationships susceptible to certainty and demonstration, resemblance, opposition, degrees of quality and proportions of quantity; but to a new relationship, which enriches the list previously given in the Treaty. In other words, the problem is to qualify what kind of relationship it is when it comes to morality. In this context Hume concludes the section, and I would add to the quote that is normally reported ("In every system of morality …") what precedes it, a statement that apparently seems to be of mere connection, but which allows us to understand that here Hume is trying to comprehend something that he says he is not able to determine, the kind of relationship not previously called into question when morality intervenes:

[3] Hume goes so far as to point out how the problem is to inculcate morality, since it has an effect on passions and actions: "If morality had naturally no influence on human passions and actions, it were in vain to take such pains to inculcate it; and nothing would be more fruitless than that multitude of rules and precepts, with which all moralists abound. Philosophy is commonly divided into speculative and practical; and as morality is always comprehended under the latter division, it is supposed to influence our passions and actions […]" [27: 905].

"I cannot forbear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality, which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surprized to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought,* or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, it is necessary that it should be observed and explained; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention would subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason" [27: 928].

According to Henze, "Hume's remarks on 'is' and 'ought' may now be understood as a re-affirmation of his earlier claim that an active principle may never be founded on an inactive one, that one's passions are not the products of one's reason, and that one's moral ideas are causally related to the passions, not to reason" [24: 280]. In his view, it is not so much a question of a logical fallacy that would prevent us from deriving being from having to be, but of the difficulty of tracing the specific relationship proper to morality: "moral distinctions, being expressive of sentiments, are not merely conclusions drawn, deduced, or inferred from factual premisses. They are, rather, encapsulated in the moral decisions we render" [24: 281]. Not all propositions must be subject to the impossibility of deriving the "ought" from the "is": for Hume the propositions that fall under the active principle, namely, those that refer to our passions, sentiments, or feelings can justify the passage: "When 'is' –propositions of this sort are among one's premisses, then one is entitled to decide moral issues on such grounds. The facts of human nature or, more precisely, the facts of human nature as exemplified by some particular moral agent, provide the grounds for our moral decisions. To use Hume's word, they explain our 'discovery' of morality" [24: 282].

Without being able to further explore the point here, it seems to me that the very beginning of the next section, dedicated to the distinctions deriving from the moral sense, confirm this thesis. Hume seems to support the hypothesis by stating that if vice and virtue cannot be discovered with reason, the difference between one and the other derives "by means of some impression or sentiment… Morality, therefore, is more properly felt than judged of; though this feeling or sentiment is commonly so soft and gentle, that we are apt to confound it with an idea, according to our common custom of taking all things for the same, which have any near resemblance to each other." [27: 930]. Vice and virtue are understandable thanks to their arousing pleasure or pain, and the origin of the moral sense lies in feeling: "To have the sense of virtue, is nothing but to feel a satisfaction of a particular kind from the contemplation of a character. The very feeling constitutes our praise or admiration. We go no farther; nor do we enquire into the cause of the satisfaction" [27: 933].

It seems to me that Panksepp's view of the affective neurosciences [44, 45] and Damasio's thinking [6], even that which we can define with Sequeri as an affective turning point in metaphysics [57: 20] can provide a different reading of Humian theory of feeling. On the one hand, the *affective,* and not exclusively *cognitive* dimension of neuroscience developed by Panksepp, which sees a continuity between the oldest part of the nervous system, common to man and animals, and the most recent represents a premise for understanding the meaning of rooting in perception and feeling the origin of morality in Hume's theory. On the other hand, the affective turn in metaphysics of Sequeri, who intends to think of being in its relational and affective dimension, also following the works of Lévinas, rooting the sense of justice in relational feeling, seems to reopen the topic raised by Hume about which dimension of the relationship is significant to understand the phenomenon of morality. It is certainly not suggested that this is *the* reading of Hume's thinking, moreover only hinted at in his work, but that in relation to the topic of the distinction between *is* and *ought* in Hume little can be taken for granted, and that the starting point from which the text is read is of the utmost importance.

In fact, it should be noted that another very different theory of law was developed by Hayek precisely in relation to the interpretation of the Humian phrase "The rules of morality. therefore, are not conclusions of our reason" [24: 279, 27: 905, 22: 120]. Hayek dedicates to Hume an article [21] in which he understands the Humian phrase as a support for the thesis of the unintentional phenomena of man's action and to his own theory of knowledge. It is certainly a reading very far from the positivistic perspective, which underlies the theory of law precisely on the distinction between nature and Humian artifacts. Hayek also quotes the phrase that an active ingredient can never be based on an inactive principle [21] and makes the Humian quotation a real foundation of his theoretical position in the theory of perception and in the customary theory of law. Likewise, in the article *The rules of morality are not the conclusions of our reason* [23] referring to a phrase by Ferguson, he develops the link between unintended consequences of human action and the foundation of a customary legal theory that goes back to the traditions and practices embedded in the common law system and in the liberal conception of orders (language, law, market, mind). It is evident that opposite theories of law, positivistic or customary, have emerged from Hume's reading of this passage.

Precisely this last aspect concerning the Humian foundation allows us to make a brief mention of another reading of Hume's work, not referring to the topic of morality but to the habit of an author very close to Hayek, Karl Popper. Popper's theory of conjectures and refutations is the inversion of the Humian psychological theory of induction, as the author himself states: "Thus I was led by purely logical considerations to replace the psychological theory of induction by the following view. Without waiting, passively, for repetitions to impress or impose regularities upon us, we actively try to impose regularities upon the world. We try to discover similarities in it, and to interpret it in terms of laws invented by us. Without waiting for premisses we jump to conclusions. These may have to be discarded later, should observation show that they are wrong. This was a theory of trial and error—of conjectures and refutations. It made it possible to understand why our attempts to force interpretations upon the world were logically prior to the observation of similarities". [49:

60]. According to Popper, Humian psychological theory is based on three points: (a) the typical result of repetition, (b) the genesis of habits, (c) the belief in a law as an expectation of a regular succession of events [49: 57–59]. The central point, also relevant for the configuration of legal thought, is that what we call habit can be observed only after the repetition has taken place. If Hume's central idea is repetition based on similarity, his way of understanding it appears uncritical, vitiated by a regression to infinity. Hume, according to Popper, after criticizing induction, came to a compromise with common sense, allowing the re-entry of induction into the form of psychological theory. The interesting point is therefore that anticipation precedes repetition. The Humian repetitions "are repetitions only from a certain point of view. (What has the effect upon me of a repetition may not have this effect upon a spider.) But this means that, for logical reasons, there must always be a point of view – such as a system of expectations, anticipations, assumptions, or interest – before there can be any repetition; which point of view, consequently, cannot be merely the result of repetition" [49: 59].

It is no coincidence that the notion of point of view, already identified in Fuller, is reintroduced here. Named differently by Hayek (expectation) Fuller (purpose), Robilant (figure), the point is that anticipations precede repetition. Popper, in other words, seems to me to provide, in the two volumes of Open Society, adequate philosophical support for Fuller's normative position. In the first volume, Popper reads the Greek opposition between nature and convention in terms of a critical dualism between facts and norms [48: 94] that prevents us from reducing decisions or norms to facts [48: 98]. In a certain sense, here Popper seems to take up the position concerning the separation between being and having to be, when he notes "it is impossible to deduce an assertion that enunciates a norm or a decision or a proposal for a policy from an assertion that enunciates a fact; which is equivalent to saying that it is impossible to deduce norms or decisions or *proposals* from facts" [48: 100] The theoretical proposal must however be understood in relation to the previous statement with which Popper claims to intend to overturn the relationship between repetition and habit on the basis of the idea of anticipation, on the one hand, and on the other hand, to present a radical critique of the widespread myth according to which proceeding by definitions is a scientific procedure and helps to clarify the terms of the problems. In the second volume of *Open Society*, in fact, Popper points out that one of the prejudices we owe to Aristotle is "that language can be made more precise by the use of definitions" [48: 28]. If in fact deduction leads the problem of truth to the taking into account of the premises, the definition brings the problem back to the meaning of the defining terms, which however are "just as vague and confused, as the starting terms" [48: 29], introducing that regression to infinity typical of the attempt to solve problems on the basis of analysis of language. Popper extends his criticism to Hobbes [48: footnote 33, p. 382] and to the definition of Husserlian essences [48, note 44: 386] and precisely to Moore: "Essentialism and the theory of definition have led to a disconcerting development of Ethics, characterized by increasing abstraction and loss of contact with the basis of all ethics, that is, with the practical moral problems that must be solved by us *hic et nunc* … Such an analysis can only lead to the replacement of a moral problem by a verbal problem" [48, note 49, 3: 390]. If Moore was therefore right in maintaining that the moral good could

not be defined in materialistic terms, nevertheless the definitory method led him not to solve the problem already inherent in the Humian theory, which he had, despite his indecision indicated in the famous passage in which analytical thought would have pretended to found the distinction between being and having to be, he undoubtedly had the merit of "having broken this uncritical identification of questions of fact – *quid facti*? – and questions of justification or validity – *quid iuris*? (Po: it 82) "to break this uncritical identification of the question of fact – *quid facti*?—and the question of justification or validity – *quid juris*?" [49: 61].

In the aforementioned *American Legal Philosophy at Mid-Century*, Fuller indicates how Plato and Aristotle would not have understood the reasons for the distinction between being and having to be, established with Kant [10: 469].[4] Instead, he grasps how Popper's position consists in rejecting the standard of man's nature, while ideally accepting Eunomics and the problem of the good order of institutions. The question Fuller asks is how one can maintain this position: "If there are constancies and regularities that persist through a change in social forms these must in the nature of man himself. It is at this point that the subject I have called Eunomics reaches common ground with the natural theory of the ethical judgement" [10: 481]. The problem that Fuller poses to the theories of Popper (but also of Hayek) remains a central question: namely what is the guarantee of maintaining a 'good' order.

4 For a Literary Rhetorical Reading of the Great Division.

The question concerning the relationship between law and morality, between good order and legal reality, probably remains unresolved and insolvent, but the interest of the discourse conducted in reference to Fuller lies in the search for a starting point for the analysis and understanding of the centrality of the concept of purpose and its evolution in legal thought.

The thesis that the article proposes is that the role of the story, of *the humanities*, of the rhetorical methodology in the juridical consists precisely in this: in trying to hold together dialogically irreconcilable opposites. It has been noted that Fuller proposed a narrative model to overcome the distinction between facts and values, but the point applies to two famous, not particularly fruitful, controversies that Fuller entertained with Nagel [41, 42] and, subsequently, with Hart on the topics of the separation between law and morality. While the second is so well-known that it need not even be mentioned (except for the recent debate on the subject at the beginning of the twenty-first century:4].[5] The first moves from an article by Fuller, Human Purpose and Natural Law [11] which specifies the thesis of the convergence between

[4] For the reconstruction of the modern story of the topic [51].

[5] We limit ourselves to quoting Porciello's comment: "Hart, in his review, almost ironizes on Fuller's "love" for the concept of *Purpose* and Fuller, for his part, criticizes positivism precisely because of the contrary defect, that of completely ignoring such a dimension" [50: 158]. Something very similar could be said about the debate with Nagel [41, 42]. Even were it to be moved to the level of language and definition. In the article we argue that the critical position on the scientific value of the Popperian definition allows us to understand the debate differently.

being and having to be, starting from the famous example of the game of dice in Wittgenstein's Philosophical Researches (later taken up in the volume The Morality of Law, which he reads in relation to his idea of purpose [11:71]. The debate (like that between Hart and Fuller), recalled by Winston [65], is more like a dialogue between the deaf than a scientific confrontation [41, 42, 12, 65]. What interests us therefore is not so much to take up the topics, but to indicate how, in the folds of the reading of Fuller's position, an interpretation that moves from the centrality of the story and rhetoric to understand the debate can find a place.

As Manderson effectively points out in his attempt to hold together the positions of the famous debate between Fuller and Hart through literature, the interesting object of the dispute is the relationship between the two positions. While Schauer narrows down the scope of the controversy by noting how there are significant points of contact and how Fuller's position is somehow "internal" to positivism [55: 290; 50: 118], Manderson instead reads the debate from the point of view of law and literature, showing how a dialectical position is necessary to hold the two positions together, irreconcilable, but both necessary, so as not to forget the phantasmic sense of legal interpretation.

"Even on their own terms, the Hart – Fuller debate does not leave one side victorious. But neither can we compromise or balance the two positions, since the commitment they demand is absolute: there is no such thing as positivism or purposivism 'now and then' since it is precisely the problem of where to start that is at stake. Nor is a synthesis possible since if we have one we necessarily do not have the other. We need both positions to make sense of law, but it is impossible to acknowledge them both at once. Instead, we experience an 'oscillation' from one incommensurable language and approach to the other. The positions they represent are mutually contradictory, and equally necessary. This is the paradox which Derrida discusses in *Force of Law* "[36: 200].

According to Manderson, Derrida's position unites Fuller and Henry James, recalling "the ghost of the undecidable" [36: 208] to indicate how justice influences decisions even if they are not formulable in terms of rules, if not immeasurable with them. If neither Fuller nor Hart are right, Manderson recognizes that law inevitably requires a combination of the two theories: "[…] the antagonism between them, and the anxiety that disagreement forges, captures the unique virtue of legal interpretation, for ever caught between simultaneous, contradictory and uncompromisable goals to be faithful to the rules before them and to the promise behind them. Henry James offers us a literature which preserves the tension between different readings and refuses to defuse it. Of recent writers, Derrida has most consistently explored the nature and productivity of such insoluble antagonisms" [36: 214]. If in law at some point it is still necessary to decide, it is necessary for the judge to decide and the law to be interpreted, and yet the awareness of the phantasmic character of conscience is necessary, and the oscillation between fidelity to Fuller's law and the textual law required by Hart show the ghost that hosts, at the same time, interpretation and conscience. Manderson, through the filter of James' ghost story, comes to connect the ghost of the Derridian law with the Hegelian spirit: "The ghost that haunts the law (let us call it, with Hegel, law's *Geist*; at once its ghost, spirit, and essence) is an interpretative model with which Fuller seems highly sympathetic" [36: 215],

although then, in Manderson's vision, the Harvard philosopher ends up falling into an attempt at systematization that does not do justice to his ambition.

Manderson's interpretation, which opens the debate to the field of law and literature and law and humanities, seems to me to be based on the same vision of Fuller, who recognizes, as we have seen, the impossibility of eliminating the narrative trait of uniting the plane of being with that of having to be. In this sense, taking Manderson's position even further, it seems to me that affective neuroscience [44, 45] and the affective turning point in metaphysics [57] can identify how the separation between habits and Humian repetition, inherent in that passage in which Hume maintains openness towards an answer that he realises he is not able to provide about the specific character of the relationship between facts and values, represent the very essence of the eternal debate. In this sense, none of the positions presented, of the attempts at response provided, by Popper as by Putnam, succeed in coming to terms with the mystery of consciousness, of the ghost inherent in the dichotomy. Moving from the recognition of the unavoidable ghost that dwells at the same time in the conscience, the law, the institutions, in the awareness that a justice is perceived, is felt, seems to me to authorize an aesthetic reading of the great separation, based on the anthropological ghost of the call to justice beyond the law, and the need for a formalization and actualization, always finite and contingent, of this instance. Here Manderson reaches, it seems to me, at the same time Milgram (and Putnam who quotes him), with his need that I like to compare to the iconic turning point[6] in Hume, but also other authors, such as Legendre, with his "*schize"* placed at the centre of the European legal order [34],[7] even Hayek, with his "Humian" unintended

[6] "Contents must be, roughly, pictures of what they represent. ('Roughly', because we have other modalities of perception than the visual; we hear, taste, smell, and feel. So not all ideas are literally pictorial.) Because thought is the mental manipulation of contents, Hume's understanding of thinking in general, and deductive thinking in particular, is shaped and constrained by his pictorial theory of content, just as ours is presumably shaped and constrained by our propositional theory of content" [39, 51].

[7] In relation to the concept of "Symbolic Machines" or "*Figuralia*" or nomograms, Legendre develops a theory in which the institutional is the middle term between the imaginal and the concept [33: 162]. The *Figuralia*, an expression borrowed from the *Decretum Gratiani*, are the system of figures that manifest the dimension of the imaginary and have the function of veiling the mystery. The notion of figure can be traced back to the Greek word *Schema*, and to the Latin verb *Fingo* [33: 162]: they are what gives shape and model, "*l'écriture est à comprendre parmi les figuralia, les figurations symboliques: c'est-à-dire, comme quelque chose qui vient donner forme à ce que au nom de quoi un signe est un signe*" [32:60] and again: "*Form*, (*abstraitement forme du mot, du syllogisme, géométrique*), *maintien, postures,* the *Figures* ou le *pas de danse*the *manière* et aussi l'*Habit. À noter en passant que, das la tradition byzantine, l'expression prendre l'habit de moine est strictly identique à l'expression prendre la forme (schèma): cela renvoie au jeu des images instituées, à travers le quelle l'humain installe sa demeure*" [33: 162–63]. The study of textuality, dance, emblems and rituality opens the comparative field of *Figuralia* as a phenomenon of writing, which Legendre calls *nomogramm*i [32: 60]: "*Le Phénomène d'écriture ne peut plus être défini seulement par le critère d'historien ou ethnologique d'un support matériel durable qui en garde la trace, mais dans la perspective de l'institution du signe et de la legalité de répétition du signe et de la légalité, qui fait des manifestations que nous appelons graphiques des production essentiellement symboliques, relevant donc de la construction sociale du Tiers, construction d'essence normative… Ainsi nous avons affaire, en chaque système culturel, entendu comme système normatif, à un système de nomogrammes, diversifiés mais dominés par la représentation du Tiers fondateur, unificateur des productions d'écriture*" (32: 62–63). According to Legendre's theory, the analysis of the history of the Western legal system, following the complex relations between Roman Law and Christianity, starting with the pontifical revolution of the interpreter, reveals a fracture, a fault line, a cleft: "*Le système normatif est fendu en*

consequences of human actions; finally, *Scienza Nuova* by Vico, with its rhetorical and fictional methodology placed at the origin of the juridical in the interpretation of the juridical. A history of the phantom placed at the centre of the history of Western institutions perhaps still remains to be written, but very different and irreconcilable knowledge such as the extended order of Hayek[8] [22: 54], the dogmatic anthropology of Legendre [33], the eunomics of Fuller and the new science of Vico [63, 61] show how the mystery of consciousness and the mystery of institutions are inextricably linked and entwined. It is impossible to draw a coherent doctrine from these and different and contrasting approaches, but their convocation is sufficient to indicate how the theory of law is always suspended between the unknown and the human attempt to inhabit it.

In this complex framework, we will limit ourselves to a few concluding references to Vico's theory, which more directly refers to the need for a humanistic approach to legal issues.

The recourse to rhetoric and its reference to the classical tradition, of Aristotle, and in particular of Cicero, allows Vico to derive some certainties, which Giuliani effectively summarizes in three points: the purpose of rhetoric is the search for truth; it should be a methodology for the exact application of words to things and deeds, but "of things and facts that can be changed by human choice" [16:143]. Finally, the relationship between rhetoric and truth is the reflection of a natural disposition for truth called by Aristotle *nous* and the Latin *intellectus.* Rhetoric and dialectics, permeated with legality, indicate a connection between truth and justice, in which truth shows not only a logical, but also an axiological value. The metaphor is thus attributed a cognitive value, and tropes and figures are considered in their value for thought, and not only for the beauty and persuasiveness of the expressive form.

We could argue that for Vico the very subject of rhetoric shows from its origins an ethical value: "*materia rhetoricae est quecumque res quae sub disceptationem cadit, an sit agenda*" (the subject of rhetoric is any matter that falls under discussion, whether it is to be done or not." [62: 17]. Rhetoric is therefore a practical undertaking. While the traditional version, for example that of Pietro Ramo, is that dialectics is the art of good discussion and rhetoric of good speech, the Cartesians oppose rhetorical knowledge considered contrary to the certainty of reason, Vico is interested in rhetoric as a form of *argumentation and* thought for man [40: 79]. The figures of speech, in other words, are not only ornaments of speech, but real mental processes, which also help us to know the very genesis of human thought and its distinction from the animal [16, 40]. The speaker's task is to adapt the law to the fact, seeking

Footnote 7 (continued)
deux: d'un côte, le discours de légitimité: de l'autre, la vie des concepts dans la casuistique des règles" [34: 23]. The manifestation of this cleft is still the contrast between Fuller and Hart, identified by Manderson.

[8] "[…] it is important to avoid from the beginning an idea that comes from what I call the "fatal presumption": the idea that the ability to acquire skills comes from our reason: because it is just the opposite: our reason is the result of a process of evolutionary selection as is our morality… It is not our intellect that created our morality; rather, human interactions governed by our morality make possible the growth of reason and the capacities associated with it" [22: 54–55].

the linguistic bridge between fact and law recognized as the most suitable (*prepon)* [40: 111]. If language is the *guardian* of society and culture, it is precisely on custom – understood as a set of etymologies, synonyms, common structures of thought and discourse – that the speaker must find his foundation in arguing:

"A criminal trial, says Vico, is almost literally a face-to-face battle between two human beings – an accuser and an accused – which shows, albeit unintentionally (or reluctantly) a common social framework: the accuser claims that the accused has committed a crime; the accused rejects the accusation, either by denying that he committed the act, or by denying that he has committed what the accuser asserts against him, or finally by denying that what he has committed was illegal or incorrect. Beyond these three possible objections, the question on which the entire juridical oratory is concerned emerges: the factual question of whether the accused has committed what he is accused of (*an fecerit*); the conceptual question of what he has committed (*quid fecerit*); and the normative question of whether what he has done is illegal or incorrect (*an jure ac recte fecerit)*" [40: 109–110]. The same *loci* or arguments can be acquired by both parties and each can draw the conclusion that best supports its own position: the words of a law alone are insufficient "and they need the living voice of society to be said what, in this instance, they mean" [40: 112]. In Vico's conception there is no basis for the separation between language and thought, between words and things: "facts always need to be defined, and the same definitions are always revised and corrected within a social context; in the same way, the right taken for itself is fundamentally mute, and needs a voice to become agile and effective; beyond the words of the law there is their meaning, and beyond every law there is equity, mistress of "civil reason" [40:113].

For this reason, Giuliani can argue that the tension between letter and spirit is for Vico a constant and unavoidable fact and the departure from *normal* use (let's go back to what Siniscalchi and Kneale observed) must be justified by the argumentative situation: "Vico is not a victim – like the moderns – of the so-called descriptive fallacy, as he has the awareness that the descriptive use of language does not exhaust the area of its functions. Figurative language has a prescriptive, normative function: on it depends the human world, and its institutions" [16: 149]. The iconic turn in philosophy stands as a necessary critique of the great division, and the affective turn, in metaphysics as in neuroscience, [41, 60] seeks an answer to the Humian need to qualify the specific name of the relationship between values and facts. While the activity of defining appears to be the most significant manifestation of the activity of jurists, it is clear to Vico that "the problem of definition in argumentation is linked to that of the social operations of the human mind:

(1) The definition supposes the existence of topical agreements, of *loci communes*;
(2) the definition aims to establish a relationship with common sense:
(3) the definition is the result of evidentiary proceedings (which are of justification and refutation) in a situation of dispute" [16: 153]

While for Vico the problem of definition is located outside the real and nominal definition, like the dialectic it is linked to opinion, referable to the field of law,

politics and morality. For this reason, rhetoric is linked to the topic of truth, to a moral philosophy of human conduct, in which passions do not appear at all blind to values: a trait that allows a reading of them in terms of affective change, in the sense that what anticipates perception, or habit and repetition, appears to have a sense that rationality is not able to take into account.

As Gualtieri [18: 166] points out, rhetoric for Vico is useful for the achievement of the *certum*, in its dimension of elusiveness: it allows us to understand the mental processes of the first men, but also the historical fact. The *certum* (the scope of reality, we could perhaps simplify approximately) appears elusive, as it is always particular and individual [47: 18]. The origin of the *certum,* in comparison with the *verum*, consists, as we have seen, in the *certainty* of families, the first institution in which the roles and relationships are *certain* (father, mother, children are identifiable, where in prehuman animals this institutional dimension does not appear). Certainty of roles on the basis of which the practice of burying the dead can be explained, has always been the first element of natural law: "*certi essent patres, certi filii, certae uxores, inter ipsos necessario humanitas primum nata, quae ab "humandis mortuis" dicta est*" (having made certain fathers, certain children, certain wives, it was necessary that humanity be born among those peoples, which was said to be "from the unclean dead." [61: 120–121].

The change of state from wandering, nomadic savages to inhabitants of stable settlements, in caves, certifies the origin of family practices and institutions, including the habit of burying the dead. As always for Vico, beyond the validity of etymologies, the origin of civilization is based on law as the ability to make relationships stable: "it is precisely this *certum* that transforms human situations and relationships by changing them from simple situations and factual or forceful relationships into legal situations or relationships, precisely into dependable situations and relationships, secure, lasting, orderly, peaceful insofar as guaranteed, protected, protected normatively" [47: 39]. In some ways we have returned to the concept, to a literary and historical theme of normality of which Siniscalchi wrote, and to his good family man (*bonus pater familias*). Aa subversive reference, in this cultural congeries: but the relevant trait is not the – fictional – concept of father – *pater semper incertus* – but that a *normality*, a *sense of order* be given. If the *verum* is a philosophical concept, the *certum* is a juridical concept, which presupposes the first as "an inner moment of formation, that is, the logical judgment which is at the same time, a value judgment, the final idea of the juridical order and of juridical action" [47: 43]. Between *verum,* understood as a logical value having relevance for moral topics and the *certum* as normative volition, there is a relationship of complex implication (despite Scarpelli, in which there are three constitutive elements: the factual one of force, the imperative one of *certum* and the axiological one of *verum*. Between the three terms there is not only a dialectical relationship whereby one can think only abstractly of one of them without referring to the others, but there is also "a mutual tension whereby the prevalence of one term over the other determines a different historical, specific, peculiar form of law" [47: 47]. In this sense Vico joins Fuller, or rather Fuller joins Vico: *verum* is the subtle idea of legal activity and that separation between law and morality that Thomasius and later Kant would eventually achieve; it appears to the Neapolitan philosopher, "not only unsustainable but inconceivable."

[47: 52.]. Thus, "those other very fine academic speculations on the subject which, by dint of distinguishing more and more deeply between law and morality, have led – and could only lead – to a separation with the obvious consequence that, once the dialectical relationship between law and morality has been broken, the relationship between law and truth cannot be coherently shattered. In this regard, it must be remembered that Vico feels all the enormous importance of the passions and their reflection on the problem of law and on the relationship between law and morality" [47: 52] would have seemed sterile to him. If the *verum* "is born of the conformity of the mind with the order of things, the certain arises from the conscience that admits no doubt" [62: 34, 35; 47: 54], it corresponds to a first human activity devoid of the awareness of its rational action: "the *certum* is accepted as an undisputed and indisputable fact and, therefore, not subject, on the part of those to whom it is imposed and who welcome it, to an intrinsic rational justification" [47: 61]. If Hobbes, Spinoza, Machiavelli, Grotius, were wrong in reducing the right to force or utility or will, Vico instead believes that the law is not resolved "in that of the only moment of *verum,* that is, of ideal justice, of the ideal right, nor, on the other hand, in that of *certum*, of force, of authority, of positive law, of simple being. Here lies the drama and, therefore, the eternal tension, the bipolar opposition of the moments and values constitutive of law, in particular, and of human history, in general" [47: 59].

This conception of law (and language) denies the very possibility of a distinction between the plane of having to be and of being (of the true and the certain) and recognizes a decisive space for passions. Vico seems here to anticipate some features of the affective turning point to which reference has been made previously; in particular, the articulation between the affective and original art of the human and the most recent cognitive component, aimed at privileging rationality. I do not intend to argue here that the entire Vichian conception anticipated the contents developed by Damasio in neuroscience or by Sequeri in theology; however, some elements of his theory seem to me to be interpretable in this sense. The certain and the true in Vico play a role in some ways analogous to that configurable between being and having to be, but without a doubt their complex historical link cannot be described in the sense of separation; on the contrary, it is precisely the complex series of relationships between these two principles that attests to their irreducible connection.

From the linguistic point of view, the dogmatic trait of the certain refers, as Vitiello specifies, to the language of real words, of things acted, to language as a gesture that holds together the word and the body, the individual language that opposes the abstract language of reason and concept: "An example, among the many that could be adduced: when King Darius III threatened to go to war, the Scythian king Idanthyrsus replied by sending him a frog, a mouse, a bird, a ploughshare and a bow, to signify that he was born in that land, in it he had built his own roof, under its sky he venerated the gods and drew auspices, he had ploughed his fields, but he would defend it with arms" [64: 31, 60: 37–59]. The language of the certain "speaks real words: his is the concrete language of things, of *pragmata*, it is the individual language of religious ceremonies and weapons, the word-gesture of the priest who raises the sacrificial victim by praying to his God, the scream of the warrior who threw the javelin" [64: 33]. The language of the certain is individual, in continuous tension with the true (logical), dominated

by the language of logic, which arises "from the separation of the content of saying – of the spoken word, of meaning – from the bodily gesture of saying, from the praxis of saying" [64:33].

Now it is a question of saying that the anthropological primacy is not that of a logic and separation from the body and meaning, but the exact inverse, even in the unavoidable constant tension between the two poles: logic is born through the gesture of the body that precedes it, as the myth precedes the foundation of the State; the origin of the concept is affective, as Hume, and perhaps Vico himself, would have passionately stated.

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