1997

Measuring justice: notes on fish, Foucault, and the law

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My paper can be described in several ways. It is an illustration of something I call rhetorical hermeneutics: the use of rhetoric to practice theory by doing history (Mailloux 1989). It is also part of a larger project on 'The Ancients and the Postmodern': an argument that much poststructuralist thought in law, critical theory, and other human sciences can be usefully understood as a contemporary reception of classical Greek rhetoric and philosophy (Shankman 1994, Mailloux 1995, Zuckert 1996). In the following remarks, I suggest how Michel Foucault's genealogical work is both derived from and employed in a reading of Plato and Aristotle on justice. Here I use rhetoric (tracing the trope of measurement) to practice a bit of legal theory (concerning neopragmatism) by doing some reception history (about the law). Specifically, I look at Foucault's genealogy of the will to truth in ancient Greek philosophy and legal practices and relate it to Stanley Fish's theoretical claims about the distinctive purpose of law as a particular social practice aiming to disengage from history to establish formal procedures for legal validity. [1]

The trope and argument I use to focus my paper are both conveniently present in a sentence from Plato's *Laws:* 'In our view it is God, not man, who is pre-eminently the "measure of all things"' (716c). The Platonic question can be stated as follows: Is the measure of justice found in some transcendental realm, beyond human community and history; or, as the Greek Sophist Protagoras had it, is humanity the measure of all things, including justice? [2] Poststructuralist theory generally and neopragmatism in particular answer with the latter, siding with Protagoras against Platonic foundationalism.

Fish (1994), for example, talks like a sophistic pragmatist when he declares that 'The Law Wishes to Have a Formal Existence'. Part of what he means

by this claim is that law in its judicial functioning aspires to establish foundations for legal justice beyond the contingent and transitory, the personal and political. Fish argues that law makes a 'general effort to disengage itself from history and assumes (in two senses) a shape that time cannot alter' (Fish 1994: 157). He sees this effort as constituting part of the law's distinctiveness as a separate practice. Law achieves its independence by 'continually creating and recreating itself out of the very materials and forces [for example, ethics and politics] it is obliged, by the very desire to be law, to push away' (Fish 1994: 156). Fish argues further that law's effort to maintain and disguise its contradictory performance is an amazing and necessary trick, which he ultimately characterises as 'the story of rhetoric, the art of constructing the (verbal) ground upon which you then confidently walk' (Fish 1994: 170). In its final pages, Fish admits that his essay's story of rhetoric is theoretical not historical.[3] In what follows, I will supply one candidate for the missing history, not by telling the tale of law directly but by telling how Foucault tells it. Ultimately, I will tie Foucault's story of Greek legal measures to Fish's story of sophistic rhetoric: in law as in everything else, humanity is the measure of all things.

My narrative about Foucault's reading of Greek Sophistry could begin in several places. For example, in the Preface to the *Folie et déraison*, Foucault associated *hybris* positively with the Sophists:

> The Greeks had a relation to something that they called *hybris*.
> This relation was not merely one of condemnation; the existence
> of Thrasymachus or of Callicles suffices to prove it, even if their
> language has reached us already enveloped in the reassuring
> dialectic of Socrates (Foucault 1965: xi).

Foucault draws a parallel between the relationship of *hybris* (excess) to *sôphrôsyne* (moderation) and that of madness to Western reason, the topics of his book. Foucault writes, 'The Reason-Madness nexus constitutes for Western culture one of the dimensions of its originality', and claims:

> European man, since the beginning of the Middle Ages, has had
> a relation to something he calls, indiscriminately Madness,
> Dementia, Insanity. Perhaps it is to this obscure presence that
> Western reason owes something of its depth, as the *sôphrôsyne* of
> the Socratic reasoners owes something to the threat of *hybris*
> (Foucault 1965: xi).

During the1960s Foucault pursued further what he called in the Preface his

'archaeology'. But soon he began talk of a complementary mode of inquiry, less structuralist in its orientation toward language and more involved with the history of power/knowledge relations.[4] This genealogical project led him back to ancient Greek thought, perhaps by way of Nietzsche. In 1967 he joined Gilles Deleuze to write a general introduction and notes for a French translation of Nietzsche's *The Gay Science* (1967), and it was in sympathetic response to Deleuze's Nietzschean book, *The Logique de sens* (1969) that Foucault wrote admiringly of the Sophists. In 'Plato and the Simulacrum', Deleuze had argued concerning the Sophist:

> The final definition of the Sophist leads us to the point where we can no longer distinguish him from Socrates himself—the ironist working in private by means of brief arguments. Was it not necessary to push irony to that extreme? Was it not Plato himself who pointed out the direction for the reversal of Platonism? (Deleuze 1990: 256)

In his enthusiastic 1970 review of Deleuze's books, Foucault wrote in turn:

> What philosophy has not tried to overturn Platonism? If we defined philosophy at the limit as any attempt, regardless of its source, to reverse Platonism, then philosophy begins with Aristotle; or better yet, it begins with Plato himself, with the conclusion of the Sophist where it is impossible to distinguish Socrates from the crafty imitators; or it begins with the Sophists who were extremely vocal about the rise of Platonism and who ridiculed its future greatness with their perpetual play on words (Foucault 1977).

Foucault thus argued: 'To pervert Platonism is to side with the Sophists' spitefulness' (Foucault 1977: 168-69).

In the same year, on 2 December 1970, Foucault delivered his inaugural lecture at the Collège de France. 'The Order of Discourse' ratified Foucault's arrival at the pinnacle of French letters, but its rhetorical performance went far beyond its function as an academic ritual. The lecture skilfully wove together a summary of Foucault's past scholarship with an outline of its future direction. This transition in Foucault's thought is usually described as a move from archaeologies of discursive practices to genealogies of power/knowledge, from structuralist-like accounts of disciplinary statements to socio-political histories of subjects disciplined. Though such characterisations have been questioned, including by

Foucault himself, I would claim that 'The Order of Discourse' does mark a turn in Foucault's attitude toward knowledge, a turn that becomes a return to ancient Greek thought by way of a restaging of the Plato/Sophist debate.

For instance, in his lecture Foucault outlines various forms of exclusion that attempt to contain the power of discourse: one such exclusion is the division between the true and the false, a division 'historically constituted', he claims, in the transition between the Greek poets of the 6th century BC and the philosophers of the 4th. As a result:

> The highest truths no longer resided in what discourse was or did, but in what it said: a day came when truth was displaced from the ritualised, efficacious and just act of enunciation, towards the utterance itself, its meaning, its form, its object, its relation to its reference. Between Hesiod and Plato, a certain division was established, separating true discourse from false discourse: a new division because henceforth the true discourse is no longer precious and desirable, since it is no longer the one linked to the exercise of power. The sophist is banished (Foucault in Young 1981: 54).[5]

Foucault then declared that in his first series of lectures in 1970-71, it was this 'historical division' that he would first take up:

> I want to try to discover how this choice of truth, inside which we are caught but which we ceaselessly renew, was made—but also how it was repeated, renewed, and displaced. I will consider first the epoch of the Sophists at its beginning, with Socrates, or at least with Platonic philosophy, to see how efficacious discourse, ritual discourse, discourse loaded with powers and perils, gradually came to conform to a division between true and false discourse.

However, in the first lecture series at the College de France, called 'La volonté de savoir', Foucault did not end up focusing on the conflict between Plato and the Sophists. Rather, for what he calls contrasting 'theoretical models of the will to knowledge', he replaced Plato and the Sophists with Aristotle and Nietzsche (Foucault 1977: 199-204).[6]

Why the switch? We might conjecture that Foucault's reading of 'measure' in Athenian legal practices and philosophical texts had something to do with the change. Did Foucault see that 'measure' began as a legal and eco-

nomic historical tool and then within Plato and Aristotle became first an ideal standard beyond history (God as measure) and then a paradigm of actors who achieve their essential nature, which remains unchanged throughout history (good man as measure)? That is, does Foucault's reading demonstrate the historical validity of Fish's theoretical claim about law's ahistorical, foundationalist aspirations?

Perhaps. In his retrospective summary of the first lecture series, Foucault mentions that his 'analysis of the Aristotelian model essentially derived from a study of the *Metaphysics,* the *Nicomachean Ethics,* and *De Anima',* texts in which the trope of 'measure' plays a prominent role in Aristotle's argument.[7] Foucault characterises that argument as one in which the association of truth, pleasure, and sensation provides the framework for privileging the visual sense, which prepares the way for the ultimate pleasure of theoretical knowledge above and beyond the realm of mere human utility. Foucault asserts that Aristotle makes the link between sensation and pleasure independent of 'the vital utility that might derive from sensation' and uses visual perception as an illustration of this independence. In the only explicit citation of a specific passage, Foucault's course summary refers to the beginning of Aristotle's *Metaphysics,* which reads:

> All men naturally desire knowledge. An indication of this is our esteem for the senses; for apart from their use we esteem them for their own sake, and most of all the sense of sight. Not only with a view to action, but even when no action is contemplated, we prefer sight, generally speaking, to all the other senses. The reason of this is that of all the senses sight best helps us to know things, and reveals many distinctions (Aristotle 1933: 980a).

Foucault comments:

> The desire for knowledge, given at the beginning of the *Metaphysics* as universal and natural, is based on the initial adherence already manifested by sensation; and it assures a smooth passage from this first type of knowledge to the ultimate knowledge that is formulated in philosophy. The intrinsic desire for knowledge in Aristotle relies upon and transposes a prior relationship between knowledge, truth, and pleasure (Foucault 1977: 202).

Foucault contrasts these Aristotelian notions to Nietzsche's in *The Gay Science:* in Aristotle's model of the will to truth, we have harmony, disin-

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terestedness, and the pleasure of pure knowledge; in Nietzsche's, we have conflict, self-interest, and power/knowledge shaping subjects' pleasures.

Foucault then uses the Nietzschean model to explain the emergence of the Aristotelian model, history to account for theory, in a move I am duplicating here as I use a speculative history of Foucault's reading to 'explain' Fish's theoretical claim about law. Foucault applied the Nietzschean genealogical method and its model of the will to knowledge in analysing the history and institutions of ancient Greece, specifically the 'evolution' of the 'domain of justice' from the 7th to the 5th century BC (Foucault 1977: 203). He lists among his topics:

— the search for an equitable measure (not only in commercial exchanges but in the social relationships within a city) through the institution of money;

— the search for a 'nomos', for a just law of distribution to guarantee order within the city, in establishing an order that is the order of the world (Foucault 1977: 204).

Foucault would have found much historical evidence for his story of 'measures' in the Aristotelian texts he read. For example, in a discussion of corrective justice, Aristotle notes that in men's private transactions 'all commodities exchanged must be able to be compared in some way. It is to meet this requirement that men have introduced money; money constitutes in a manner a middle term, for it is a measure of all things' (Aristotle *Nicomachean Ethics*: 1133a).

Foucault's genealogical argument is that these legal and monetary practices involved 'the distribution of justice' in 'important political struggles' and that, among other things, these 'struggles ultimately created a form of justice linked to a form of knowledge which presupposes that truth is visible, ascertainable, and measurable'. Furthermore, this truth 'responds to laws similar to those which register the order of the world'. Foucault declares that this 'type of affirmation of truth becomes fundamental in the history of Western knowledge' (Foucault 1977: 204).

Foucault's late 1960s, early 1970s readings of classical Greek thought illustrate one poststructuralist reversal of Platonism in favour of its significant other, Sophistry. More specifically, Foucault suggests that the Platonic-Aristotelian will to knowledge is associated with a particular form of justice, both of which are foundationalist and anti-sophistic.[8] This

Foucauldian account coincides with certain neopragmatist arguments about the relation of rhetoric and philosophy in that same tradition. For example, Richard Rorty claims:

> Philosophers have often wished that Aristotle had never fallen in with Plato's talk of universals and his spectator theory of knowledge.... The metaphor of knowing general truths by internalising universals, just as the eye of the body knows particulars by internalising their individual colours and shapes, was, once suggested, sufficiently powerful to become the intellectual's substitute for the peasant's belief in life among the shades (Rorty 1979: 41).

Rorty argues for replacing the visual trope of traditional Epistemology with the aural figure of conversation in a post-Philosophical culture.

Martin Jay, a reader of both Foucault and Rorty, expands on such claims when he writes:

> Once the battle against Sophism, which defended rhetoric and the ear, was won, Greek philosophy could elevate a visually defined notion of disinterested, monologic, epistemic truth over mere opinion or doxa .... The Greek privileging of vision meant more than relegating the other senses to subordinate positions; it could also lead to the denigration of language in several respects. outside of the often maligned tradition of Sophism, language was deemed inferior to sight as the royal road to the truth. It was the realm, as we have noted, of mere doxa (opinion) instead. Rhetoric was thus banished from genuine philosophy (Jay 1993: 26, 186-87).

Still another way of putting this is to follow Edward Schiappa (1991), Thomas Cole (1991), and other historians of rhetoric and argue that Plato, in coining the term *rhêtorikê* in the *Gorgias,* separated for the first time two activities—rhetoric and philosophy—which the Older Greek Sophists like Protagoras had kept united and equal under the single study of logos.

Stanley Fish follows Rorty, Jay, Schiappa, and Cole not in specific historical detail but in general when he writes about the ongoing conflict between rhetoric and philosophy, between anti-foundationalism and foundationalism, between Protagoras and Plato (Fish 1989: 471-502). Fish's 'story of rhetoric' in the law is part of his anti-foundationalist argument about Theory in general, including his assertion that since Theory can

never do what it claims—establish measures outside history to rule over practice—Theory has no consequences.[9]

For Fish, philosophy of law reflects the impossible social desire to place law beyond history; for Foucault, this desire has its Western origins in the ancient Greek attempt to measure justice. At least some of what Fish says in neopragmatist theory, Foucault argues in genealogical history. Does this mean Fish's theoretical claims for law are explained by Foucault's story of law's origin? Or is it better to say that the two are more closely related as poststructuralist extensions of each other? Fish's sophistic rhetoricism is an historical reversal of the moment Foucault narrates, the banishment of sophistry and the Platonising of Law, the establishment of a legal system based on the will to truth, which takes a particular foundationalist form in legal theory. For Fish and Foucault, human practices measure justice rhetorically through theoretical appeal to a standard that these same practices claim measures them. Or to put this otherwise, humans are most ironically the measure of all things when they are in the theoretical business of denying the rhetorical process that makes them so.

REFERENCES

Aristotle 1933 *The Metaphysics* Books I-IX (ed.) and trans. Tredennick H Harvard UP and William Heinemann Cambridge and London

- *Nicomachean Ethics* - no reference provided

Bell V 1993 *Interrogating Incest: Feminism, Foucault and the Law* Routledge London and New York

Cole T 1991 *The Origins of Rhetoric in Ancient Greece* Johns Hopkins University Press Baltimore and London

Deleuze G 1969 *Logique du sens* Les Editions de Minuit Paris

- 1990 *The Logic of Sense* (ed.) Boundas CV Trans. Lester M Columbia UP New York

Dreyfus H L and Rabinow P 1983 *Michel Foucault: Beyond Structuralism and Hermeneutics* U of Chicago P Chicago (2nd edn)

Fish S 1989 *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* Duke University Press Durham

- 1994 *There's No Such Thing as Free Speech and It's a Good Thing, Too* Oxford UP New York and Oxford

Foucault M 1965 *Madness and Civilisation: A History of Insanity in the Age of Reason* Trans. Howard R Pantheon New York

- 1977 *Language, Counter-Memory, Practice: Selected Essays and Interviews by Michel Foucault* (ed.) Bouchard & Trans. Bouchard DF trans. Simon S Cornell UP Ithaca

Hunt A and Wickham G 1994 *Foucault and Law: Towards a Sociology of Law as*

Governance Pluto Press London and Boulder

Jay M 1993 *Downcast Eyes: The Denigration of Vision in Twentieth-Century French Thought* University of California Press Berkeley

Macey D 1993 *The Lives of Michel Foucault: A Biography* Pantheon New York

Mailloux S 1989 *Rhetorical Power* Cornell UP

- (ed.) 1995 *Rhetoric, Sophistry, Pragmatism* Cambridge UP Cambridge

- forthcoming, *Reception Histories*

Nietzsche F 1967 *Le Gai Savoir* Fragments posthumes (1881-1882) (eds.) Colli G and Montinari M Trans. Klossowski P Gallimard Paris

Rorty R 1979 *Philosophy and the Mirror of Nature* Princeton UP Princeton

Schiappa E 1991 *Protagoras and Logos: A Study in Greek Philosophy and Rhetoric*, University of South Carolina Press Columbia

Shankman S ed. 1994, *Plato and Postmodernism* (PA: Aldine P) Glenside

Smart C 1989 *Feminism and the Power of the Law* Routledge London and New York

Young R ed. 1981 *Untying the Text* Routledge & Kegan Paul Boston and London

Zuckert C H 1996 *Postmodern Platos: Nietzsche, Heidegger, Gadamer, Strauss, Derrida,* University of Chicago Press Chicago

Notes

1 Still another way to describe this paper: a work very much in progress. I am attempting to expand my history of Foucault's reading of Aristotle in his first lecture series at the College de France. So far I have not been able to locate any transcripts or notes for these 1970-71 lectures. None are held at the Centre Michel Foucault in Paris, according to M. Dominique Franche (private communication). I am currently trying to contact students who attended the lectures. Any suggestions from my readers would be greatly appreciated (sjmaillo@uci.edu).

2 According to Protagoras, 'Humans are the measure of all things, of those that are that they are; and of those that are not, that they are not' (Plato *Theaetetus:* 152).

3 What Fish actually writes is that 'there is a sense in which the present essay is not historical; it doesn't do historical work; that is, it does not chart in any detail any of the differently contingent courses the law has taken in the areas it has marked out for its own' (Fish 1994: 178).

4 For a fuller discussion of this shift in Foucault's work, see Hubert L. Dreyfus and Paul Rabinow (1983).

5 Later in the address, Foucault argues that 'ever since the sophists' tricks and influence were excluded and since their paradoxes have been more or less safely muzzled, it seems that Western thought has taken care to ensure that discourse should occupy the smallest possible space between thought and speech' (Foucault in Young 1981: 65).

6 The lecture series summary is translated into English as 'History of Systems of Thought'.

7 See, for example, *Metaphysics,* 1053a-b, 1062b-1063a; and *Nicomachean Ethics,* 1113a33, 1176a18.

8 For more wide-ranging discussions of Foucault and the law, focused primarily on his work of the seventies and eighties, see Carol Smart (1989), Vikki Bell (1993), and Alan Hunt and Gary Wickham (1994).

9 That is, foundationalist Theory has no theoretical consequences. For clarification and an argument for the rhetorical consequences of Theory, see my *Rhetorical Power* ch 6.