
Measure For Measure:

A RESPONSE TO STEVEN MAILLOUX

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Steven Mailloux tells two stories from Foucault about the birth of Truth in the 'historical division' between an older, performative mode of truth-telling and a mode of truth based in the claim to separateness from untruth. The first story is taken from Foucault's inaugural lecture at the Collège de France, 'The Order of Discourse', the second from a summary of a lecture series published in English as 'History of Systems of Thought'. My response is focused on a conflict over the interpretation of these stories.

The argument of *The Order of Discourse* concerns a historical shift away from a truth which is a matter of the 'ritualized, efficacious and just act of enunciation' and which is embedded in a discourse 'loaded with powers and perils'. (Foucault 1981: 71). I read these phrases as referring to the performative repetitions of a religious language. Mailloux, however, reads at least the second of these stories as the narrative of a shift within philosophy, from the Sophists to Socrates (although what Foucault actually says is merely that he will 'consider first the epoch of the Sophists': not necessarily that these are his object). Further, in selectively describing the topics studied in the seminar series, Mailloux mentions only those concerned with money as an equitable measure and the search for a 'nomos', a just law of distribution; he omits the first and last of the four topics listed. The first concerns 'the practice of oaths in judicial disputes and its evolution from the oath-defiance of litigants who exposed themselves to the vengeance of the gods to the assertive oath of a witness who attests to the truth of an event in which he was involved or which he observed'. The fourth concerns 'the purification rites after a murder'. (Foucault 1977: 204) Both of these, I argue, are intrinsically religious topics.

I thus want to take issue in part with what I take to be a rationalist privi-

leging of the domain of philosophy in Mailloux's paper, and to suggest a different reading of the birth of law, extrapolated from Foucault's first story: a story about the move away from a religious practice of truth and of law. Rather than a model of struggle within philosophy, I propose a literary model, Aeschylus's *Eumenides*, the third part of the Oresteian trilogy.

The play opposes the implacable archaic law of vengeance - *a lex talionis*, measure for measure, driven by ties of blood - to the rationality represented by the casting vote of Athene - a justice based on citizenship rather than on kinship. The instrument of that blood-vengeance in the play is the Erinyes, the Furies before their transformation into the Eumenides, the kindly ones. This is the curse or spell they sing to Orestes, a performative which binds the accused man in the coils of its language:

Chorus:

Come, Furies, our resolve is set;
 Let mime and measure tread their course,
 That none who feels the maddening force
 Of our dread music may forget
 How all the varying fates that bind
 Men's lives are by our will assigned.
 (Aeschylus 1956: 158, ll. 307-12)

Without using the word *metron* ('mime and measure' translate *choron*, the dance), the passage maps out the shift from one sense of 'measure' (the tread of the foot and the measure of verse - Plato and Aristophanes use *metron* in this sense) to another, the moral sense of 'due proportion' or limit (this is the sense *metron* carries in its one occurrence in Aeschylus (1956) 1.797). The archaic law of *The Eumenides* is associated with the repetition of poetry and religious incantation, the 'maddening force' of that 'dread music'.

On this reading, the birth of law is not so much a will to truth, a foundationalist absolutism grounded in the notion of measure as a 'legal and economic historical tool', as it is a pragmatic reduction of the transcendental. This story closely resembles the one told by the Czech theologian Jan Patočka (as Derrida reports him in *The Gift of Death*) about the birth of Platonism in a revolt against the orgiastic mystery of the thaumaturgic cults. (Derrida 1995: 21-2) At the same time, Patočka's story of incorporations implies that Platonism takes over something of the religious force of archaic law in the very move by which it seeks to abolish it (this would

explain why for Plato it is God not man that is the measure of all things).

To put it this way is to refuse the singularity of 'the Law', a will-to-truth that is at all times and all places identical in its fantasy of hermeneutic mastery. Of course both Fish and Mailloux refuse this singularity, in increasingly more complex ways. For Fish, the Law is 'really' always contingent, rooted in the ethical and political soil that it seeks to denigrate; for Mailloux, contra Fish, to produce a nominalist theory of Law is not to deprive it of its effects (pseudo-unities still have consequences, and Theory is a rhetorical practice like any other). One might turn this argument around, however, by positing that any demystification of the Law as Theory (any attempt to argue that the Law is 'really' a piecemeal assemblage of institutions, practices, authorizations, discourses) is still thereby caught up in the concept of unity that it seeks to undo: however necessary and however fruitful this move may be, it still tries to tell us what the Law really is.

To lay the interpretive stress on the religious origins of the law, as I have done, can have two possible consequences. The first and less interesting would be to produce a triumphalist narrative: the cultic has been superseded by measure. The second would be an argument that the law continues to serve a religious function. By 'religious' I mean in part the management of relations between the living and the dead; hence the significance of that cryptic note of Foucault's about studying 'the purification rites after a murder'.

The law, that is to say, would continue to have, amongst its many other functions, those of exorcism and purification, the magical allaying of threat. It would function as a performative which is theatrical in its display of enunciative power. Is it not clear, for example, that such purificatory rites (and such theatre) are involved in the trial of a black man accused of the murder of his white wife which is currently drawing to a close a few miles to the south of here? When the voice of Nicole Simpson speaks from the grave to the jurors and the electronic lookers-on, isn't this precisely a summoning up of the spirits of the dead for the purposes of justice? And isn't it the case that the 'truth' that is at stake here is a truth of narrative and theatrical plausibility, a truth of cases made rather than a truth of the 'facts'? To identify a religious function is not, however, to posit an anthropological universal, nor to re-embrace a logic of the transcendental. Rather (and here I think my argument rejoins Mailloux's) it is to espouse that Nietzschean logic of the will to knowledge that Foucault summarizes so beautifully in those lecture notes: knowledge (and, we should add, the

Law) as invention; knowledge as the struggle of desires; knowledge in bondage to instinct and interest; and knowledge giving itself as truth because, like the Law, 'it produces truth through the play of a primary and always reconstituted falsification, which erects the distinction between truth and falsehood'. (Foucault 1977: 203)