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Michel Foucault and the Competing Alethurgies of Law

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Abstract—Law has an epistemic dimension, contributing to the social construction of reality. Legal trials stage the constitution of knowledge, facts and other kinds of truth in accordance with specified rules of procedure and evidence. As legal cultures differ in their conceptions of fairness, of justice, and especially of the nature and depth of the truth envisaged at trial, there is a demand for analytical means that can contribute to a sophisticated comparison of legal procedures of truth production. Some new categories can be found in lectures published in part very recently by Michel Foucault, whose genealogical sketches of juridical forms of truth making have not received the attention they deserve. Foucault distinguishes between three basic forms of legal truth constitution: the test, the inquiry and the examination. As all of these practices are performed in a ritual, liturgical manner, Foucault refers to them as 'alethurgies'. The critical reconstruction of his foray into the historical stages and transformations of legal truth manifestation not only enables a reassessment of Foucault's legal thinking, but, more importantly, provides us with categorical devices that might be useful for the comparison of contemporary legal, especially procedural cultures.

Keywords: Michel Foucault, truth, evidence, legal procedures, comparative law

1. *Introduction: The Epistemic Dimension of Law*

Law plays an important role in the social construction of reality. Legal perspectives are particular views on the world, presupposing a complex and selective social epistemology in order to be operative. For instance, law disposes of (culturally and historically diversified) techniques of fabricating persons and things.[1] The constitution of legal persons is essential for legal proceedings, as it not only ascribes rights and duties but entails certain modes of causality, responsibility and attribution of action to actors, which are, however,

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[1] See A Pottage and M Mundy (eds), *Law, Anthropology, and the Constitution of the Social* (CUP 2004).

> mere constructs, semantic artifacts produced by the legal discourse itself... The densely populated world of legal persons, the plaintiffs and defendants, the judges and legislators, the parties to a contract, the corporations and the state, is an internal invention of the legal process.[2]

To be sure, flesh and blood people do appear in court, but they have to assume the roles and recognise the procedure and terminology of the law if they want to act in a comprehensible (and successful) way.

The epistemic dimension of law comes to the fore in a more narrow sense at trial, in which knowledge is constituted in accordance with specified rules of procedure and evidence—a form of legal 'truth production' that leads to 'the heart of every judicial culture'[3] by revealing underlying conceptions of fairness, justice and especially of the nature and depth of the truth envisaged during trial.[4] Thus, Clifford Geertz is right when claiming: 'The legal representation of fact is normative from the start'.[5]

Comparative law has mostly focused, in an informative way, on procedural differences between common law and civil law orders, which become especially obvious in a direct encounter and hegemonic struggle on the European and international level.[6] The aim of this article, however, is to shed new light on the different legal ways of constituting knowledge and truth with the help of newer categories. These can be found in some (partly very recently published) lectures by Michel Foucault,[7] whose writings on penal law, governmentality, the juridical form of power and normalisation have inspired many scholarly responses and commentaries; his sketches on juridical forms of truth making, on the other hand, are widely ignored. Therefore, making sense of these

[2] G Teubner, 'How the Law Thinks: Towards a Constructivist Epistemology of Law' (1989) 23 L & Soc'y Rev 727, 741.

[3] A Garapon and I Papadopoulos, *Juger en Amérique et en France* (Odile Jacob 2003) 30, my translation. This emphasis on legal truth production shall not deny the important symbolic and ritual elements of legal procedure.

[4] The term 'truth production' is not applied here to promote a relativist or anti-realist epistemology, but in order to point to the different socio-cultural and institutional procedures of 'fact'-finding, making statements that claim to be true or mechanisms that are deemed to reveal the truth. This is, as I shortly will argue below, in line with Foucault's endeavour when he speaks of the 'regimes of truth'. I won't enter into a deeper discussion of the status of legal facts in relation to philosophical theories of truth in this article. Suffice it to say that legal procedures are not unique in producing facts according to special procedures and standards of verification (and falsification)—the production of scientific knowledge and all domains in which something is proclaimed as a 'fact' structurally work the same way. That does not imply that there are no objective facts, only that the objectivity, validity and truth of statements and propositions cannot be assessed without reference to (explicit or implicit) procedural models that are accepted in a certain social field or context.

[5] C Geertz, *Local Knowledge. Further Essays in Interpretive Anthropology* (Basic Books 2000) 174.

[6] See eg the contributions in J Jackson, M Langer and P Tillers (eds), *Crime, Procedure and Evidence in a Comparative and International Context. Essays in Honour of Professor Mirjan Damaška* (Hart 2008).

[7] Especially pertinent are the following texts by Foucault: *Lectures on the Will to Know. Lectures at the Collège de France 1970–1971 with Oedipal Knowledge* (G Burchell tr, Palgrave Macmillan 2013), hereafter referred to as LWK; *Wrong-Doing, Truth-Telling. The Function of Avowal in Justice* (SW Sawyer tr, U of California Press 2014), hereafter referred to as WD; 'Truth and Juridical Forms' in M Foucault, *Power. Essential Works of Foucault 1954–1984*, vol 3 (JD Faubion ed, Penguin 2000) 1, hereafter referred to as TJF. This last text was first published in Portuguese in 1974 and in French in 1994, but has very rarely been commented on since then by social or legal theorists, see P O'Malley and M Valverde, 'Foucault, Criminal Law, and the Governmentalization of the State' in M Dubber (ed), *Foundational Texts in Modern Criminal Law* (OUP 2014) 317, 332: 'the 1973 lecture, though given pride of place in Foucault's Essential Works, is rarely used or even cited'.

lectures could be profitable in two regards: first, a thorough textual analysis of these writings complements and adjusts the common view of Foucault's legal thinking; and second, his genealogical insights can, as I will argue, provide us with categorical means that might be useful for the comparison of contemporary legal, especially procedural cultures—a cultural comparison that Foucault himself never really cared for.

For this purpose, I will briefly sketch Foucault's general approach to law before turning to his rather scattered analyses of different legal 'alethurgies'. The neologism 'alethurgy', a fusion of Greek *aletheia* (truth) with *ergon* (work or product), refers to 'rituals or forms of manifestation of truth'[8] and is therefore very suitable for the denomination of legal truth constitution, which always happens in a ritual, sometimes liturgical, fashion, which 'alethurgy' also alludes to.[9] Foucault distinguishes between three basic alethurgic forms of trial, which he scrutinises in a diachronic perspective: the test (*épreuve*), the inquiry (*enquête*) and the examination (*examen*). The inquiry, based on observation, testimony and empirical knowledge, is the form of fact-finding pertinent to modern law and other domains. But, as Foucault shows, it required a double birth in Western legal history (in classical Greece and in the European Middle Ages) to replace previous rituals of testing truth via oath-taking, ordeals and other duel-like competitions. Moreover, with the dawn of the 'disciplinary society' in the 19th century, Foucault sees a new rationality pervading penal law, focusing on prevention and the truth about the person rather than on the reconstruction of the crime.

This article is not primarily concerned with the historical and (contemporary) sociological accuracy of Foucault's findings. Those are always hard to evaluate, as Foucault is notorious for regularly changing his focal points and conceptual apparatus. Moreover, his historical studies are deliberately selective and idiosyncratic, often rushing through entire epochs and ages. This style has provoked considerable criticism by historians lamenting the philosopher's lack of rigour and refusal of causal structures.[10] While these critics are justified insofar as Foucault's historical depictions must always be treated with caution, they sometimes ignore the fact that Foucault never thought of himself as a classical historian. His genealogical approach was a method suited to his

[8] M Foucault, *On the Government of the Living. Lectures at the Collège de France 1979–1980* (G Burchell tr, Palgrave Macmillan 2014) 7. To be precise, in these lectures Foucault references the Greek grammarian Heraclitus, who used the term 'alethourges' for 'someone who speaks the truth' (ibid). Nevertheless, it seems appropriate to consider Foucault's application and resignification of the word a neologism. In *On the Government of the Living*, Foucault is not concerned with legal techniques, but with the connection of truth-stating to governing exercises of power, to leading and conducting subjects (see ibid), which he scrutinises with regard to Greek and Christian practices.

[9] Thus, this term alludes to two of the multiple dimensions of law, namely the epistemic and the symbolic/ritual dimensions. In addition, one might also look at the normative, narrative and organisational dimensions of legal cultures, see JC Suntrup, 'Das Faktum des Rechtspluralismus und die Konturen einer mehrdimensionalen kulturwissenschaftlichen Rechtsanalyse' in W Gephart and JC Suntrup (eds), *Rechtsanalyse als Kulturforschung II* (Klostermann 2015) 115.

[10] For this debate see M Foucault, 'Table ronde du 20 mai 1978' in *Dits et Ecrits II, 1976–1988* (Gallimard 2001) 839; for the wider French intellectual context of Foucault's studies see P O'Brien, 'Michel Foucault's History of Culture' in L Hunt (ed), *The New Cultural History* (U of California Press 1989) 25.

project of writing a 'history of the present', tracing the historical emergence of contemporary sociopolitical structures, techniques and institutions.[11] To this end, his studies (most notably his lectures) were conceived as a laboratory for the development of new schemes and not as exhaustive historical analyses. Against this background, if and how (legal) historians can profit from Foucault's narratives remains to be seen. In any case, I will argue that illuminating the legal techniques of test, inquiry and examination can enrich our analytical equipment in the service of a more sophisticated perspective on the singularities and common features of contemporary legal cultures.

2. *A Genealogy of Legal Truth Production*

A. *Foucault's Approach to Law*

Michel Foucault is well known for dealing with the social and historical conditions of various fields of knowledge and truth, scrutinising their institutional materialisation and 'subjectivation' effects. Nevertheless, it may not occur to people to look for the epistemic elements of law in his work, as it lacks a systematic, genealogical analysis of law or of juridical discourse. Clearly, law is far from absent in Foucault's studies, appearing repeatedly since his appointment as a professor at the Collège de France in 1970: most visibly in *Discipline and Punish*, which displays the underlying rationalities and strategies of penal law practices, and in *The Will to Knowledge*, with its reflection on the effects of 'juridical power'.[12] But the complete range of Foucault's thinking on legal issues is unveiled in his lectures at the Collège and elsewhere, allowing a better reconstruction of the genesis and depth of his studies and themes.

The notes of Foucault's first lectures at the Collège de France in 1970/71, published as late as 2011,[13] document his interest in different legal procedures of establishing 'truth', an interest that did not produce more than sketchy and tentative results. Moreover, these and further steps in this direction[14] underline that Foucault is mainly using law as a way to mark crucial developments in the history of truth that he envisages. This historiography does not consist in the collection of (context-transcendent) true assertions or statements, but in the analysis of various regimes of truth, ie the emergence of institutions, discourses and other practices regulating the production of what is considered as true or false in a certain context at a particular time and for particular

[11] For this project see D Garland, 'What is a "History of the Present"? On Foucault's Genealogies and their Critical Preconditions' (2014) 16 Punishment & Society 365.

[12] M Foucault, *Discipline and Punish. The Birth of the Prison* (A Sheridan tr, Vintage 1995), hereafter referred to as DP; *The Will to Knowledge. The History of Sexuality Vol. 1* (R Hurley tr, Pantheon 1978), hereafter referred to as WK.

[13] See LWK (n 7).

[14] Especially WD (n 7), a series of lectures held in 1981 at the University of Leuven.

purposes.[15] The formation of 'truth' in this sense involves specific *règles de jeux*—'games through which one sees certain forms of subjectivity, certain object domains, certain types of knowledge come into being'.[16] Thus, this historiography links the question of truth to political programmes and technologies, but also scrutinises the social conditions of scientific disciplines (such as psychoanalysis and other disciplines of the *sciences humaines*).

One reason Foucault is interested in legal procedures is that he regards them as catalysts for certain modes of investigation and disclosure of truth. However, he never aims for an analysis of the capacities of law as such, on which topic he frankly admits: 'I encounter law constantly without making it a particular object of investigation'.[17]

This indirect and unsystematic approach to law certainly has not made Foucault's endeavour easily accessible. Furthermore, his terminology notoriously lacks clarity, which can only be partly explained by pointing to his strategic and often not very analytic formation of concepts.[18] This conceptual ambiguity has at times provoked a certain reductionist misreading of Foucault's view on law. Especially misleading is the identification of law with the juridical type of power, an interpretation that leads to a conception of law working in a strictly repressive and interdictory fashion. Such a confusion misses Foucault's distinction between the juridical, prohibitive form of power that may operate in various (including extralegal) contexts, and law, which is not limited to juridical means.[19] Foucault is partly to blame for this misreading, especially in *The Will to Knowledge*, where he rejects the 'repression hypothesis' of power by emphasising the productive potential of power that comes to the fore in social practices that generate knowledge, subjects, institutions and the like.[20] But while refusing the historically very persistent 'repression theory' of power as a 'juridical' conception that implies false analytical devices, he contradicts, inadvertently or not, the distinction between 'the juridical' and 'law' developed

[15] Foucault defines his research interest as follows: 'c'est de savoir comment les hommes se gouvernent (eux-mêmes et les autres) à travers la production de vérité (... par production de vérité: je n'entends pas la production d'énoncés vrais, mais l'aménagement de domaines où la pratique du vrai et du faux peut être à la fois réglée et pertinente)... Je voudrais, en somme, replacer le régime de production du vrai et du faux au cœur de l'analyse historique et de la critique politique' (Foucault (n 10) 846).

[16] TJF (n 7) 4.

[17] M Foucault, 'Interview with André Berten' in WD (n 7) 235, 246.

[18] See O'Malley and Valverde (n 7) 331.

[19] For this clarification see V Tadros, 'Between Governance and Discipline: The Law and Michel Foucault' (1998) 18 OJLS 149. It must not be overlooked, however, that Foucault does not always stick to this repressive connotation of 'the juridical' in other contexts: the 'juridical forms' of truth finding certainly imply a more productive and creative capacity of the juridical when not taken as a type of representing power, as will be shown below.

[20] In WK (n 12), the display of this other side of power is targeted in an often polemical way at psychoanalysis, the effects of which cannot be understood in terms of repression. According to Foucault, the perfidiousness of psychoanalysis derives from this lack of repression, as it does not interdict, deny and command, but it does produce (via the cultural technique of confession) self-normalising subjects.

elsewhere. This becomes obvious in his representation of the juridical power type:

> From top to bottom, in its over-all decisions and its capillary interventions alike, whatever the devices or institutions on which it relies, it acts in a uniform and comprehensive manner; it operates according to the simple and endlessly reproduced mechanisms of law, taboo, and censorship: from state to family, from prince to father, from tribunal to the small change of everyday punishments, from the agencies of social domination to the structures that constitute the subject himself, one finds a general form of power, varying in scale alone. *This form is the law, with its interplay of licit and illicit, transgression and punishment.* Whether one attributes to it the form of the prince who formulates rights, of the father who forbids, of the censor who enforces silence, or of the master who states the law, in any case one schematises power in a juridical form, and one defines its effects as obedience.[21]

So, while the juridical type of power is introduced as something that pervades disparate and often non-legal social contexts, this type of power is identified here with the 'law', which seems to be essentialised to the function of setting the limits of the licit and illicit, backed by sanctions. Despite this conceptual negligence, Foucault's argumentation is generally more subtle. Thus, *Discipline and Punish* explicitly points to the productive effects of punitive mechanisms;[22] what is more, it shows how rationalities of 'discipline' infiltrate diverse social fields and institutions by forming, arranging and normalising subjects. The law, however, is not deprived of its power by this paradigmatic change,[23] but operates—according to Foucault—more and more in non-juridical forms, as it is colonised by disciplinary strategies.[24] This depiction of law is important for two reasons: first, it defies any conception of a universal legal working mode; and second, it paves the way for an analysis of the epistemic dimension of law, as the paradigmatic transformation entails a new configuration of truth at trial, which Foucault describes as examination technique (*examen*). The full significance of 'examination', however, can only be grasped by looking at its predecessors and competing alethurgic forms ('test' and 'inquiry'). Thus, for an analysis of the legal constitution of truth, a comparative view on procedural

[21] WK (n 12) 84–5, emphasis added and translation altered (Hurley translates the marked passage 'This form is the law of transgression and punishment, with its interplay of licit and illicit', which does not correspond to the French original: 'Cette forme, c'est le droit, avec le jeu du licite et de l'illicite, de la transgression et du châtiment', M Foucault, La volonté de savoir (Tel Gallimard 2004) 112).

[22] See DP (n 12) 23.

[23] Thus, the attribution to Foucault of the rather persistent thesis of an 'expulsion of law' cannot be justified. See O'Malley and Valverde (n7) 326–8.

[24] This point is also made clear by Foucault in *"Society must be Defended". Lectures at the Collège de France 1975–76* (D Macey tr, Picador 2003) 38–9: 'In our day, it is the fact that power is exercised through both right and disciplines, that the techniques of discipline and discourses born of discipline are invading right, and that normalizing procedures are increasingly colonizing the procedures of the law, that might explain the overall workings of what I would call a "normalizing society"' (this text is hereafter referred to as SD). In his lectures on 'governmentality', Foucault describes how the disciplinary mechanism is itself challenged by the new paradigm of 'security' that again redefines the working mode of law. See M Foucault, *Security, Territory, Population. Lectures at the Collège de France 1977–78* (G Burchell tr, Palgrave Macmillan 2007) 19–20.

techniques, ways of producing and establishing evidence, and the fields of knowledge considered relevant to legal judgments is essential.

B. *The Legal Constitution of Truth*

(i) Juridical 'veridictions'—from 'test' to 'inquiry', part 1 (Greece)

Foucault's little genealogy of the European culture of evidence reveals different forms of legal 'veridiction',[25] of saying and stating the truth, which cannot be separated from crucial socio-political transformations. Fact-finding by means of inquiry is a 'rather characteristic form of truth in our societies'[26] and certainly persists in penal trials even if concerns of prevention and correction may have led to the introduction of examination as a competing form of truth-finding. From a historical point of view, however, inquiry appears contingent. Not only archaic legal traditions, but also whole branches of medieval law were not based on inquisitory procedures, but on rituals that Foucault calls 'tests' (*épreuve*).

To modern eyes, testing in this sense implies several peculiar features, which Foucault initially illustrates by looking at Greek legal history. It is here where the influential transition from an event-like kind of truth production via testing (*vérite-épreuve*) to a fact-oriented investigation of truth (*vérité-constat*) appears for the first time.[27] For an analysis of this change, Foucault turns to the representation of legal practices in Greek epic and drama. This is a standard tactic employed by legal historians, given the fact that, unlike in Roman law, there are no genuine juristic sources from the ancient Hellenic world. Thus, he comments on the conflict arising from the chariot race in the *Iliad*,[28] which he regards as a legal or at least pre-legal dispute.[29] After a chariot race organised by Achilles in honour of the late Patroclus, an argument develops between Antilochus and Menelaus. In spite of having the slower horses, the former has finished in front of his rival (and second, behind the winner Diomedes) because he has outmanoeuvred Menelaus with a cunning move at the post that the chariots have to turn around. In the heat of the battle, Menelaus' chariot has been damaged. While the text does not reveal whether Antilochus' manoeuvre was compliant to the rules, Menelaus accuses him of deceit in the

[25] For this term see WD (n 7) 27ff.

[26] TJF (n 7) 4.

[27] In his short text 'La maison de fous', Foucault summarises the most prominent differences as follows: 'La vérité n'y est pas de l'ordre de ce qui est, mais de ce qui arrive: événement. Elle n'est pas constatée mais suscitée: production au lieu d'apophantique. Elle ne se donne pas par la médiation d'instruments, elle se provoque par des rituels; elle est attirée par des ruses, on la saisit selon des occasions: stratégie et non pas méthode. De cet événement ainsi produit à l'individu qui le guettait et qui en est frappé, le rapport n'est pas de l'objet au sujet de connaissance, c'est un rapport ambigu, réversible, belliqueux de maîtrise, de domination, de victoire: un rapport de pouvoir' (M Foucault, 'La maison de fous' in *Dits et Ecrits I, 1954–1975* (Gallimard 2001) 1561, 1562).

[28] See Homer, *Iliad* (*Homeri Ilias*, H van Thiel ed, Olms 1996) XXIII, 262–652.

[29] See WD (n 7) 30ff; concerning the legal character of this scene see G Thür, 'Die Einheit des "Griechischen Rechts". Gedanken zum Prozessrecht in den griechischen Poleis' (2007) IX Ethics & Politics 25, 36.

presence of the whole Greek host. Menelaus invites the leaders of the Argives to render a judgment (*dikazein*) before he himself, as one of the leaders, proposes a judgment (*egon autos dikaso*) in order to solve the conflict.[30] This solution, however, does not demonstrate a kind of self-administered justice, but sticks to the traditional ritual mode of conflict resolution.

How is the conflict solved? Not by an investigation of the facts. Strikingly, there is indeed one person who was instructed by Achilles to supervise the race, namely Phoenix, a comrade of Achilles' father. Phoenix is even explicitly ordered to proclaim the truth (*aletheia*) of the race.[31] But the protagonists do not even think of relying on Phoenix's observational knowledge—in fact, he is not mentioned any more as the conflict is dealt with. Therefore, it is obvious that he was not expected to perform as a referee controlling the rule-conformity of the race, but as a chronicler of the events.[32]

Menelaus resorts to another kind of decision through evidence, corresponding to contemporary customary law (*themis*).[33] He is handed a sceptre by a herald and demands that Antilochus confirm on oath that he has not voluntarily damaged Menelaus' chariot. Due to the ritualistic formalism of the proceedings, if Antilochus now swore the oath, he would necessarily be declared the winner of the dispute, whereas his opponent would prevail if he, Antilochus, refused to swear. In any case, the conflict is resolved performatively on the spot. The oath amounts to a 'test' in Foucault's terminology as a result of the divine revenge that would occur in the case of perjury. Every oath implies a risk, as it involves a kind of autonomous, incontrollable truth. Taking an oath means adding another dimension to a conflict between human beings, because the agonistic constellation is transferred to the divine sphere. Thus, Antilochus would have prevailed over Menelaus by swearing the oath, but at the expense of a confrontation with Poseidon.[34] This unequal relation expresses itself in the opacity of the possibly hurtful divine judgment, which cannot be predicted and is thus incommensurable with human knowledge.[35]

As a result, Antilochus declines the oath, admitting to having acted wrongly. He does not confess, however, to having violated the internal rules of the race, but instead to having disturbed the meaning of the event, which cannot be understood without recognising its aforementioned commemorative function. For the race was not a fair competition among equal participants, but rather a show contest, in which the strength of the contestants' chariots and horses varied according to their social status. Consequently, the outcome of the race

[30] See Homer (n 28) XXIII, 579.
[31] See Homer (n 28) 359ff.
[32] See G Picht, *Die Fundamente der griechischen Ontologie* (Klett-Costa 1996) 119–20. The race, again, was not a mere sporting competition, but embedded in great festivities in honour of Patroclus. This is why Foucault speaks of the games as 'memorial rite' (WD (n 7) 42).
[33] See Homer (n 28) XXIII, 581.
[34] See Thür (n 29) 36.
[35] See LWK (n 7) 71ff.

and the subsequent award ceremony were predetermined, albeit disarranged by divine intervention and Antilochus' deviant behaviour that disturbed the 'true' course of action: 'The race should have, as its function, to manifest a truth that is already recognized'.[36]

At this point of his analysis, Foucault introduces the term 'alethurgy' to denote the function of the race. An alethurgy 'is a ritual procedure for bringing forth *alēthes*: that which is true'.[37] As he not only uses this word on this special occasion, but also employs it for different instances and paradigms of displaying and generating truth, it seems to be a felicitous term for the characterisation of legal procedure, the validity of which depends largely on the observance of certain ritualistic, liturgical actions. In this regard, modern law is no different from practices that today are sometimes regarded as archaic and obsolete, as Harold Berman has stated:

> Of course it is necessary in all societies that law be separated from the daily routine by ritual, by ceremony, and by belief reflected in ritual and ceremony—the belief in the power of certain words put in certain ways to bring about certain effects denominated as 'legal'. This kind of magic is necessary if law is to work.[38]

To be sure, constituting truth is not the only aim of trials, which have other functions such as conflict resolution and the stabilisation of normative expectations. But in most cases a verdict must be based on case-relevant knowledge, which is gained by strictly following the rules of procedure and evidence.[39]

In contrast to the practice of the oath-test, classical Greek law turns to another form of alethurgy when the knowledge of what has happened, ie fact-finding, becomes an integral part of legal procedure, paving the way for proceedings still important in modern law. Foucault's argumentation is, as always, not concerned with the concise reconstruction of legal history;[40] instead, its aim is a rich illustration of this new investigative practice that relies on the knowledge of witnesses. Witnesses perform in different ways, sometimes still within the alethurgic regime of testing.[41] But Foucault argues that the

[36] WD (n 7) 39.
[37] WD (n 7).
[38] HJ Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Harvard UP 1983) 59. For the liturgical elements of trial see W Gephart, 'Memory, Tribunals and the Sacred' in W Gephart, J Brokoff, A Schütte and JC Suntrup (eds), *Tribunale. Literarische Darstellung und juridische Aufarbeitung von Kriegsverbrechen im globalen Kontext* (Klostermann 2014) 39, 47ff.
[39] In the case of the 'test', however, there is no verdict by a third side (a judge), as the passing or failing of the test includes the decision, instantaneously revealing the truth.
[40] Otherwise, he should have included references to the Babylonian and Assyrian influence on Greek law: see Thür (n 29) 39–40. But, again, it is quite clear in general that Foucault's genealogical approach does not adhere to the rigorous methodology of legal history, nor does it pretend to.
[41] Foucault shows in his first lectures at the Collège de France that jurisdiction in the Cretan *polis* Gortyn was in the hands of a judge or magistrate (*dikastas*), whose verdict was bound to the testimony of witnesses. These witnesses, however, were not summoned in order to contribute to fact-finding in a legal case by way of their observational knowledge; their only function was to express solidarity with one of the parties, joining this party in taking the oath. Thus, winning the trial depended on assembling the demanded number of co-swearers. As in

importance of witnessing by eye is on the rise. He analyses Sophocles' tragedy *Oedipus Rex*, written at the beginning of the classical period (5th century BC), on several occasions, considering it a representation of contemporary legal practices.[42] The piece does not depict a genuine trial, but a criminal case the investigation of which is undertaken in legal forms. The search for the truth is not a cumulative process, leading to the final disclosure of the facts. On the contrary, the tragedy of the play consists in the fact that the whole truth is stated very early, but is not accepted by Oedipus, who suspects a political conspiracy behind this truth. It is only at the end of the play that he is convinced by the delivered proof.

Sophocles' tragedy exhibits competing forms of 'veridiction', of which one testimonial version finally prevails: the statements of eyewitnesses who speak out about what they have seen. The starting point of *Oedipus Rex* is a curse haunting the kingdom of Thebes. Oedipus sends his brother-in-law, Creon, to Delphi to consult the famous oracle, whereupon Creon reports Apollo's answer: the kingdom shall be purified by banishing or killing the murderers of former king Laius. As Apollo does not name the actual culprits (in fact, he only passes on the false rumour that Laius was slain by robbers), Oedipus asks the blind seer Tiresias, who is a human equivalent to Apollo, praised by the chorus as a 'godlike prophet, the only man in whom truth lives'.[43] When Tiresias refuses to give testimony, not wanting to accuse Oedipus, he is forced by the latter to testify, eventually giving away that Oedipus himself is the 'accursed defiler', having—albeit ignorantly—killed his father and living in an incestuous relation (with his mother Jocasta).

At this moment, the whole truth has already been stated. Nevertheless, it remains deficient because it lacks a certain form of validation by observational knowledge, and not by prescription or prophecy: 'Missing is the evidence of what really came to pass',[44] calling for a retrospective and not prophetic perspective. Oedipus, sensing in the seer's words a political conspiracy in favour of Creon, tries to discredit his testimony by pointing at his blindness: 'Night, endless night has you in her keeping, so that you can never hurt me, or any man that sees the light of the sun'.[45] The seer, in return, invokes the power

pre-classical Greek law, an agonistic trial structure dominated, setting a forum for the competition between social groups. Sometimes, in fact, the *dikastai* could decide at their own discretion (so that *krinein* replaced the ritually bound judgment of *dikazein*). In such a case, the *dikastas* was himself obliged to swear an oath to vouch for the correctness of his decision, thus exposing himself to the possible revenge of the gods. Nevertheless, these judgments transcended the alethurgy of test by relying on a comprehensive form of knowledge—knowledge of the *nomos* and the *dikaion*, not codified law, but the ethical order of the *polis* and the *kosmos* (see LWK (n 7) 83ff).

[42] See WD (n 7) 81. B Knox, *Oedipus at Thebes. Sophocles' Tragic Hero and His Time* (Yale UP 1998) 78ff, has shown in detail how the protagonists' actions and speech acts refer to contemporary Attic legal proceedings.

[43] Sophocles, *Oedipus Tyrannus* (R Jebb ed, CUP 1887) 299.

[44] TJF (n 7) 20.

[45] Sophocles (n 54) 374–5.

of truth (*aletheias sthenos*),[46] yet this convinces neither Oedipus nor the chorus, which functions as a reflective authority. Afterwards, Jocasta is eager to exonerate Oedipus. First, she states that Laius abandoned his own son as a small child to prevent him from killing his father, which the oracle predicted; and, secondly, she reminds Oedipus of the assumed fact, already confirmed beforehand by Creon, that Laius was killed by robbers at a road junction.[47] This is when Oedipus gets second thoughts about his own innocence, remembering having once killed a man at such a junction. Nonetheless, neither is the oracle's prophecy fulfilled nor is the seer's testimony verified unless Oedipus is proven to be Laius' son.

In the end, the missing pieces of evidence are provided by two witnesses. First, a shepherd brings the message of Polybius' death. Oedipus believes Polybius to be his father, given the fact that he was raised in his house. The messenger, however, clarifies that he handed Oedipus over to Polybius after having received the small child from another shepherd, which makes Polybius only Oedipus' stepfather. When a second shepherd finally arrives and confesses reluctantly to having confounded Laius' order to abandon Oedipus, confirming the testimony of the first shepherd, Oedipus acknowledges his fate and the truth of the prophecy.

Foucault sees a double revolution in this piece: the gods' or prophets' magical and religious knowledge is no longer sufficient, but has to be complemented and validated by the empirical knowledge of witnesses; moreover, this procedural and epistemic revolution implies a social revolution, as the witnesses originate from the lowest social stratum of servants and slaves. Now they are in the position of speaking truth to power, symbolising in an innovative fashion an antinomy of pure truth versus ignorant and obscure power that became very influential in the history of Western thought.[48]

According to Foucault, the reliance on eyewitnesses marks the passage from the alethurgy of test to truth-finding by inquiry, which became a general method outside the legal domain as well.[49] The legal constitution of truth was taken to another level, even if we recognise that these testimonies were mainly restricted to the pre-trial stage, while the main trial was dominated by the agonistic, rhetorical competition of the parties.[50] Practices of testing, however, were still relied on in legal history, so that a 'second birth of the inquiry'[51] became necessary during the Middle Ages.

[46] Sophocles (n 54) 369.
[47] Sophocles (n 54) 707ff.
[48] See TJF (n 7) 30ff.
[49] Inquiry implies innovations as to research, argumentation and demonstration in philosophy or science: see TJF (n 7) 33–34.
[50] See G Thür, 'The Role of the Witness in Athenian Law' in M Gagarin and D Cohen (eds), *The Cambridge Companion to Ancient Greek Law* (CUP 2005) 146.
[51] TJF (n 7) 34.

(ii) Juridical 'veridictions'—from 'test' to 'inquiry', part 2 (Middle Ages)

The complex legal history of medieval Europe, which can be approached here only in a very sketchy way, provides ample evidence that the introduction of the inquiry and legal procedures of truth-finding in general did not come about in a teleological and linear manner.[52] With the waning of the ancient world, the practice of inquiry was no longer resorted to in many parts of Europe. In the Middle Ages, there were three main legal cultures with different procedural aims and techniques—Roman law, canon law and Germanic law.

Germanic law resembled in many regards the 'test' of ancient Greek Law. First of all, there was no public authority bringing accusations against individuals for a breach of law. Germanic law until the 11th century was tribal and local, the basic legal unit being the household, without interference of the royal or ecclesiastical authorities in the legal domain.[53] The consequence was that a penal action usually took the form of

> a duel, an opposition between individuals, families, or groups; there was no intervention by any representative of authority. It was a matter of a complaint made by one individual to another, involving only these two parties, the defendant and the accuser.[54]

There were indeed public assemblies (moots) to hear and decide disputes, but their decision depended on the approval of the parties (apart from two major offences: treason and homosexuality).[55] In any case, early Germanic law did not amount to a pacifying mode of conflict resolution, but was rather 'the ritual form of war',[56] prolonging revenge and the blood feud in a 'legally' legitimate manner.

At a later stage, when the legal proceedings of Germanic and feudal law adopted the form of a trial, ritual testing dominated. The trial was based on the principle of the accusation of one party by another. The sole task of the 'court' was to determine the procedure, while a consideration and pondering of evidence was not needed. As the means of evidence were purely formalistic, they directly disclosed the 'truth' in a performative manner, thereby deciding the duel. The trial was not differentiated into fact-finding through evaluation of

[52] For a more detailed picture of the evolution of medieval legal procedures see K Pennington, 'Law, Criminal Procedure' in WC Jordan (ed): *Dictionary of the Middle Ages, Supplement 1* (Scribner 2004) 309; RC van Caenegem, *Legal History. A European Perspective* (Hambledon 1991) 71–113; M Vallerani, *Medieval Public Justice* (Catholic U of America Press 2012); R Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Clarendon Press 1986); M Schmoeckel, *Humanität und Staatsraison. Die Abschaffung der Folter in Europa und die Entwicklung des gemeinen Strafprozess- und Beweisrechts seit dem hohen Mittelalter* (Böhlau 2000); L Kéry, *Gottesfurcht und irdische Strafe. Der Beitrag des mittelalterlichen Kirchenrechts zur Entstehung des öffentlichen Strafrechts* (Böhlau 2006); KB Shoemaker, 'Criminal Procedure in Medieval European Law. A Comparison between English and Roman-Canonical Developments after the IV Lateran Council' (1999) 85 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung 174.

[53] See Berman (n 38) 52.

[54] TJF (n 7) 35.

[55] See TJF (n 7) 35; Berman (n 38) 56.

[56] TJF (n 7) 35.

evidence on the one hand and application of the law on the other, but was condensed into the event of the test.

While the trial was based on accusation, it was not, unlike modern law, the accuser who carried the burden of proof, but the accused who had to prove his innocence by purgation, thus restoring his honour. There were three ways of proving one's innocence by test: oath-taking, physical competition and ordeal. The logic of oath has already been presented in the analysis of the dispute between Menelaus and Antilochus: what was meant as an act of purgation became a kind of self-cursing in case the testimony of the oath-taker turned out to be false. Oath-taking at this time clearly deserved the label of 'alethurgy' in a strong sense because the procedure of swearing was strictly liturgical. If an oath was not taken flawlessly, the test was not passed: 'A grammatical error, a word alteration would invalidate the formula, regardless of the truth of what one asserted'.[57] The difference to the paradigm of inquiry becomes even more distinct when recalling the function of witnesses in the process of oath-taking. These were not summoned to tell what they knew about a certain deed or offence, but performed as oath-helpers or 'compurgators', their solidarity being proof of the social importance of a defendant.[58]

One alternative to conflict resolution by oath was the duel in the form of a physical fight (as a legally accepted solution), while ordeals constituted another version of testing. In ordeals, the gods were held to speak through the body of the person undergoing the test. The trial by fire demanded that the subject walk over red-hot ploughshares or carry burning irons, the proper (and often disputed) healing of the resultant injuries leading to exoneration. There were also ordeals of water and many other variants, all of them very painful, not applied as punishment but as a ritual form of evidence.[59] The passing or failing of the test exposed the truth so that the ordeals worked as 'primitive lie detectors'.[60]

The church had an ambivalent relationship with these pagan practices. For a long time, 'Christianity supported the Germanic legal institutions of ordeal and compurgation by reinforcing the Germanic concept of divine immanence that underlay them',[61] before turning later to the conception of a more transcendent God. Nevertheless, ordeals could be reconciled neither with the biblical text nor with canon law, so that the majority of popes rejected the pagan rites. This did not prevent many priests from participating in ordeals for pecuniary reasons, however, getting paid for their function as observer of the ritual proceedings.[62] Not until the 4th Lateran Council in 1215 were ordeals strictly forbidden, though this did not lead to the immediate abandonment of these

[57] TJF (n 7) 37.
[58] See TJF (n 7) 37.
[59] See Berman (n 38) 57; for the larger context and many examples see P Dinzelbacher, *Das fremde Mittelalter. Gottesurteil und Tierprozess* (Magnus 2006) 27–102.
[60] Berman (n 38) 57.
[61] Berman (n 38) 64.
[62] See Dinzelbacher (n 59) 58–68.

alethurgic practices.[63] This explicit abolishment of ordeals cannot be understood as an isolated event, but must be seen as the pinnacle of a revolution of legal procedure already going on for several decades. Not only was the theological rebellion against ordeals, often considered as a *temptatio Dei*, becoming much more vehement in the 12th century,[64] but also church courts had almost completely abandoned such practices as means of proof at this time. The rediscovery of Roman law fostered the emergence of learned law, with the *ordo iudiciarius* (the Romano-canonical process) becoming the norm for ecclesiastical and secular courts on the European continent.[65]

The paradigmatic change expressed by the Christian abolishment of ordeals becomes even more obvious with regard to the obligation to confess, which was also introduced at the 4th Lateran Council; this was part of a progressive 'juridification by sacramentalization',[66] as the relationship between man and God was now a judicial one. Furthermore, confession and penitence installed a structure of dependence and subjection between confessing Christians and priests, expressing an effect that Foucault has described as 'pastoral power' in his lectures on governmentality.[67]

While ordeals of truth marked the body, now truth should arise from interiority, from the 'soul' of the believers. Furthermore, confession was not only theologically enhanced, but became the preferred evidentiary means of the *ius commune*. As a crime was first and foremost a violation of the divine order, the legal confession not only served as a clarification of fact in a criminal trial, but also as a reconciliatory act leading to the reintegration of the culprit into society and the Christian community.[68] Nevertheless, there were also pragmatic reasons that explained the importance of confession. The learned procedural law of *ius commune* restricted the judges' options as regards discretion in a very sensitive way, strictly demanding the presentation of certain pieces of evidence (eg the testimony of two eyewitnesses) in order to convict a defendant. In case of non-sufficient evidence, confession became the last resort, sometimes even violently generated by torture,[69] although it is inadmissible to regard the latter as a constitutive element of the inquisition process.[70] Torture constitutes, in Foucault's categories, a hybrid of test and inquiry. Certainly, torture was somehow aimed at the 'true' confession of the tortured, but even more it

[63] See Schmoeckel (n 52) 281ff, who points not only to the local persistence of ordeals after the council, but also to the flexibility of the *ius commune* to incorporate 'heterogeneous' practices such as ordeals into its procedural law. See also van Caenegem (n 52) 85ff for the regional variations of legislating and practicing ordeals in medieval Europe.

[64] See van Caenegem (n 52) 85.

[65] See Pennington (n 52).

[66] WD (n 7) 187.

[67] See M Foucault, *Security, Territory, Population* (n 24) lectures 5–8.

[68] See Schmoeckel (n 52) 205–6.

[69] See Schmoeckel (n 52) 237ff.

[70] See W Trusen, 'Der Inquisitionsprozeß. Seine historischen Grundlagen und frühen Formen' (1988) 74 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung 168, 230.

constituted a brutal and unequal duel for victory between the torturer and his victim. A non-confession implied the defeat of the prosecutor.[71]

The ecclesiastical turn to the alethurgic technique of inquisition under Pope Innocent III (1198–1215) was part of a

> program to identify heresy and clerical misconduct, and to consistently punish them. The ordeal was unruly and entirely unreliable as a tool for the consistent enforcement of institutional norms through judicial processes. The jurists of the twelfth and thirteenth centuries had put considerable energy into constructing an inquisitorial system of judgment that relied upon literate judges and a system of non-supernatural proofs, and it was this system that the papacy embraced at precisely the moment it abandoned the ordeal.[72]

While defendants threatened with the loss of their good name in ecclesiastical processes of infamy originally could resort to the oath of purgation, the means of inquisition paved the way for a public inquiry of the truth of the *fama*, which enabled the courts to start an investigation independently of the former accusatory procedure (in which one party pursued another). Though initially being more an instrument of disciplining clerics than of penal law, the method of inquisition suggested the emergence of a demand for public prosecution.[73] Thus, it paralleled the development in the secular domain, where the advent of the inquiry was assisted by changing political structures. Legal testing worked as a means of conflict resolution between two persons or groups, but the emergence of monarchies and proto-states entailed the need for the public prosecution of crimes, as Foucault argues. First, legal disputes no longer take the form of a duel, but are of a tripartite structure, with a new superior authority determining norms and procedures. Secondly, there is the new figure of the prosecutor, who investigates crimes as representative of the sovereign. This role, thirdly, was invented since any offence was now considered an infraction of the sovereign order, a harm done not only to another party but also to the ruler and the general legal order. And fourthly, when someone was declared guilty, he owed compensation not only to the damaged party, but also to the sovereign.[74]

Ignoring the various regional developments, there were now two main approaches to judicial inquiry in Europe.[75] In England, trial by jury was part of a system of indirect rule (installed by the Normans), as the jurors provided precious knowledge about social relations and circumstances at the local level. While the jury's judgment initially relied on the evaluation of the personality

[71] See WD (n 7) 205.

[72] K Shoemaker, 'Regarding Untimeliness: Medieval Legal History and Modern Law' (2015) 2 Critical Analysis of Law 199, 203.

[73] See Schmoeckel (n 52) 244ff. Trusen (n 70) 208 points to the fact that the oath of purgation was not abandoned at this time, but was restricted to a secondary means of decision when an *inquisitio veritatis* was not successful.

[74] See TJF (n 7) 42–3.

[75] This is not to deny processes of adaptation. The common law of the 14th century bears marks of the *ius commune* and shows some resemblances to the continental programme of public inquiry. See Pennington (n 52).

and character of the defendant, it was later based more and more on actual facts about alleged offences.[76] On the continent, however, the model of inquiry by a learned investigating judge prevailed for political reasons, as the occasional arbitrariness of indirect rule was not tolerated. For the sake of control and surveillance, the sovereign obliged his subordinates to stick to transparent procedural and penological rules, the violation of which incriminated the judges, leading to their persecution. But not only had the judge to abide by strict rules of evidence, he was also expected to convict the defendants in the case of their guilt. Thus, a non-conviction could be interpreted as a failure of the judge's inquisitorial duties. This demonstrates how high the demands were that the judge had to meet in the inquisitorial system, fostering the reliance on torture. The judge's professed neutrality turned into prejudice against the accused, as the former became the opponent of the latter.[77] Hence, the procedure of inquiry retained elements of the test and the duel.

Irrespective of this impurity of the new alethurgic practices, Foucault does not regard these transformations of the rules of evidence as marking the progress of rationality,[78] but as one part of a comprehensive 'dispositive' of government in a large, partly but not only political, sense:

> It is customary to contrast the old tests of barbarian law with the new rational inquiry procedure ... I don't believe, however, that the latter was simply the result of a kind of progress of rationality. The inquiry was not arrived at by rationalizing judicial procedures. The use of that procedure in the judicial domain was made not only possible but necessary by a whole political transformation, a new political structure. In medieval Europe, the inquiry was primarily a governmental process, an administrative technique, a managing method—in other words, it was a particular way of exercising power.[79]

This managing method consists in discovering the truth by asking questions. The officials of the Carolingian Empire applied it,[80] as did the Normans after the conquest of England. Furthermore, a precursor to this administrative technique could be found in the Church of the early Middle Ages, which adopted procedures of inquiry to survey the spiritual state of its congregations. Foucault reports on bishops regularly travelling (*visitatio*) through their

[76] See L Rosen, *Law as Culture. An Invitation* (Princeton UP 2008) 75ff; van Caenegem (n 52) 95. Shoemaker (n 52) 199 sees here a vital difference to the continual model not only with regard to legal procedure, but also as to the general concept of law and lawfulness: 'Jury practice remained intimately tied to the community in regard to both the factual instances the jury informed themselves of and the normative judgments the jury rendered. Lawfulness, in this view, cannot be strictly identified with the mere observance of rules. Rather, lawfulness was a status that was presumed to exist and develop over time as one lived relationally in the community.'

[77] See Schmoeckel (n 52) 246ff.

[78] RM Fraher, 'Conviction According to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof' (1989) 7 LHR 23, 63 has argued in a similar vein against the inclination of 'interpreting legal change as the unfolding of a reasoned ordering of rules and procedures' by underlining the pragmatic effects of procedures that were seeking answers to new pressing societal needs and problems.

[79] TJF (n 7) 47–8.

[80] See van Caenegem (n 52) 81.

dioceses, registering transgressions and crimes by way of an *inquisitio generalis*, which was followed by a more thorough fact-finding about the nature and author of an offence via an *inquisitio specialis*.[81] Thus, when prosecutors and judges resorted to judicial fact-finding by inquiry, they followed these non-judicial techniques. On the other hand, the establishment of the new alethurgic procedures of law helped to catalyse scientific methods of investigation and research in other domains.[82] In a similar vein, Barbara Shapiro has analysed how a comprehensive 'culture of fact' emanated from legal techniques in England from the beginning of the early modern era.[83] Instead of pursuing these insights into the complex history of science here, the genesis of an alternative investigative programme shall now be discussed—the advent of examination.

(iii) The emergence of examen

Discipline and Punish is not only focused on the development of punitive measures. Foucault does not just illustrate how the opulent public martyrdom directed to the factual and symbolic destruction of the culprit's body was incrementally replaced by the birth of prison, which constituted just one element in the network of multiple disciplinary institutions: he links that evolution to the emergence of a new '"epistemologico-juridical" formation'.[84] As a consequence, 'knowledge' is no longer resorted to in a criminal trial just to reconstruct the justiciable course of events by means of 'inquiry', but to understand the cause of the crime by thoroughly screening the criminal. Foucault demonstrates this important shift by pointing to an arsenal of new questions that are now regarded as pertinent in trial:

> Ever since the Middle Ages slowly and painfully built up the great procedure of investigation, to judge was to establish the truth of a crime, it was to determine its author and to apply a legal punishment. Knowledge of the offence, knowledge of the offender, knowledge of the law: these three conditions made it possible to ground a judgement in truth. But now a quite different question of truth is inscribed in the course of the penal judgement. The question is no longer simply: 'Has the act been established and is it punishable?' But also: 'What *is* this act, what is this act of violence or this murder? To what level or to what field of reality does it belong? Is it a phantasy, a psychotic reaction, a delusional episode, a perverse action?' It is no longer simply: 'Who committed it?' But: 'How can we assign the causal process that produced it? Where did it originate in the author himself? Instinct, unconscious, environment, heredity?' It is no longer simply: 'What law punishes this offence?' But: 'What would be the most appropriate measures to take? How do we see the future development of the offender? What would be the best way of rehabilitating him?'[85]

[81] See TJF (n 7) 45–6. See also Kéry (n 52) 65ff.
[82] See TJF (n 7) 49ff.
[83] B Shapiro, *A Culture of Fact. England, 1550–1720* (Ithaca 2000).
[84] DP (n 12) 23.
[85] DP (n 12) 19 (emphasis by M Foucault).

This change brings about a new 'system of truth'[86] (*regime de la vérité*), which transcends the boundaries of the legal field. The judge's verdict still concludes the court case, but there is now a plurality of judging that precedes and often prejudices this verdict. What is asserted is not only the defendant's guilt or innocence in a penological sense. The trial becomes a forum for a whole series of assessments, diagnoses, prognoses and corrective suggestions—in the terminology of systems theory, the code 'legal/illegal' is irritated or even supplanted by the code 'normal/pathologic'. In *Discipline and Punish,* Foucault dwells only briefly on the consequences of this reprogramming of the legal proceedings. By focusing more on the 'soul'[87] of the criminal than on the crime, all kinds of expert opinions from the human sciences invade the trial. The result is a constellation of 'epistemic competition'[88] between the legal and the scientific discourse. But what status do these 'scientific' assertions have when claiming validity at trial? And how can we make sense of the various instances in which the 'essential affiliation between stating the truth and the practice of justice'[89] becomes visible, an affiliation that Foucault perceives as a fundamental presupposition of Western judicial and political discourse?

One answer is that expert opinions from psychiatry and related fields are not juridified, but presented as extralegal, purely scientific pieces of evidence in order to exculpate the judge from the burden of judgment: the judge's verdict depends on the 'natural', scientifically discovered truth about the defendant.[90] This reflection, however, is not entirely convincing. While strategies of blame-avoidance in judging might well be involved, expert knowledge will necessarily be made juridical in some form when stated in a court of law. The consequences of a scientific, eg medical, diagnosis depend largely on the discursive and institutional context in which it is uttered. Hence, any statement that is aimed at becoming operative and effective in law must assume a legally 'utilisable' form.

In his lectures on the 'abnormal', Foucault has underlined the epistemic transformations accompanying this juridification by exposing statements from the human sciences *in law* as elements of a 'grotesque cog in the mechanism of power'.[91] Referring to contemporary forensic expert opinions in his lectures, Foucault demonstrates that the discourse of forensic psychiatry fails to comply with the scientific standards of psychiatry and medical science and, moreover, with legal categories. While it is neither disturbing not surprising that forensic psychiatry is constituted by 'new rules of formation'[92] alien to the scientific

[86] DP (n 12) 23.
[87] DP (n 12) 16–19.
[88] Teubner (n 2) 749.
[89] M Foucault, *Abnormal. Lectures at the Collège de France 1974–1975* (G Burchell tr, Verso 2003) 11. This text is hereafter referred to as A.
[90] See DP (n 12) 22.
[91] A (n 89) 12.
[92] A (n 89) 24.

discourses, Foucault debunks the grotesque character of a discursive genre that no serious scientist could identify with, but which is nonetheless legally effective (sometimes with lethal consequences) as *scientific* evidence. The role of the experts is accompanied by the attribution of a scientific status that adds authority to their reports, masking the power effects of the latter.[93]

Of course, the judge is not bound by these opinions, but he may be inclined to trust them, in which case the 'psychiatrist really becomes a judge; he really undertakes an investigation, and not at the level of an individual's legal responsibility, but of his or her real guilt'.[94] This constitutes the second grotesque feature of this discourse which, according to Foucault, does not stick to traditional legal semantics but constitutes 'a psychologico-ethical double of the offense' which is not treated primarily as a legal offence, but as 'an irregularity in relation to certain rules, which may be physiological, psychological, or moral, et cetera'.[95] It is not the penological responsibility of a defendant which is to be judged at trial, but the profile of a potentially delinquent individual, determined by means of a dubious examination of the individual's character or personality.[96]

Foucault's focus on the discourse of forensic psychiatry arises from his general diagnosis of societal 'normalisation', which can be amply illustrated with regard to this discipline. But in addition, this instance of grotesque juridification leads to the more fundamental question of how modern law deals with scientific knowledge.[97] Gunther Teubner has depicted how law is eager to access legally relevant knowledge from other social fields to avoid an 'epistemic trap'.[98] But this incorporation strategy should not be regarded as a rationalisation or even enlightenment of law: 'It does not solve the conflict between juridical and scientific realities, but adds a new reality that is neither a purely juridical construction nor a purely scientific construction'.[99] Whether we are talking about the performance of forensic psychiatry or the constructs of 'sociological jurisprudence', 'legal economics' and 'legal politology', the intrusion of social scientific knowledge into law brings about 'hybrid artifacts with ambiguous epistemic status and unknown social consequences'.[100]

Yet Foucault is not primarily interested in the autonomy or heteronomy of social systems, describing instead more comprehensive structures of knowledge formation pursuant to dynamic regimes or paradigms of truth. Just as with

[93] In another lecture, Foucault accordingly speaks of a kind of 'knowledge that has been rendered neutral because its scientificity has become sacred': SD (n 7) 39.

[94] A (n 89) 23.

[95] A (n 89) 16.

[96] C Schauer, *Aufforderung zum Spiel. Foucault und das Recht* (Böhlau 2006) 130–1 has affirmed Foucault's characterisation of forensic psychiatry with regard to the Swiss case.

[97] For the epistemological difficulties of assessing the worth of expert evidence see S Haack, 'The Expert Witness: Lessons from the U.S. Experience' (2015) 28 Humana. Mente: Journal of Philosophical Studies 39.

[98] Teubner (n 2) 742.

[99] Teubner (n 2) 750.

[100] Teubner (n 2) 747.

regard to inquiry, one of his strong theses is that law is not just a part of these regimes, but, at least historically, works as a trailblazer for certain techniques of discovery and investigation. Hence, the special analytic procedure of 'examination' emerged in the context of new legal and especially penal problems, fostering the ascent of new scientific disciplines, such as sociology, psychology and criminology.[101] The remainder of this article, however, does not enter into a discussion of this far-reaching claim, but instead aims to answer the question of how we can make use of Foucault's view on law for contemporary legal studies.

3. *Judicial Fact-Finding: The Quest for Historical and Cultural Comparison*

Foucault never intended to write a general theory of law, but highlighted in a genealogical manner different foci and modes of operation of law which were strongly related to their political and socio-cultural environment. Giving important historical insights into the development of ritually saturated procedures of law, Foucault's lectures not only demonstrate the variety of procedural cultures, but also their connection to changing conceptions of truth, fusing in specific forms of legal 'veridiction'. The triad of test, inquiry and examination does not follows a teleological path, nor can the procedural law of a country or community always be subsumed under just one of these labels. Instead, it could be argued that these paradigms can serve as ideal types,[102] providing useful categories for the historical and cultural comparison of legal procedures and evidentiary techniques beyond the European legal orders Foucault focuses on.

To be more precise, not all legal operations and not even all kinds of trial are concerned with issues of truth and are suited to alethurgic considerations. Thus, penal law is usually much more concerned with fact-finding than are civil or private law trials, in which there is often no demand for a public investigation of the facts due to the principle of party disposition. Moreover, from anthropological studies we know that some communities generally do not give much weight to the establishment of the facts, preferring prospective pragmatic conflict resolution and the restoration of the social order over the retrospective reconstruction of what actually happened.[103]

Keeping this in mind, the application of Foucault's categories to different rules of procedures and evidence might be rewarding, complementing and

[101] See TJF (n 7) 5.

[102] To be sure, Foucault never conceived of his categories as ideal types in the Weberian fashion for the sake of scientific analysis, but as real programmes and technologies: see Foucault (n 10) 846ff.

[103] See eg Laura Nader's observations on the legal procedures of a small Mexican community: L Nader, 'Styles of Court Procedure: To Make the Balance' in L Nader (ed), *Law in Culture and Society* (U of California Press 1997) 69.

sometimes calling into question conventional schemes, eg the tendency to concentrate on the contrast of inquisitorial and adversarial procedures in civil law and common law countries. As useful as this distinction might be, test, inquiry and examination are alethurgic models which cross this divide and which, moreover, can be searched for in any legal culture. Inquiry is certainly a technique of investigation which generally pervades fact-finding in modern law. A search for elements of test and examination, however, might illuminate not only political and epistemic variations among different procedures of inquiry, but also the (albeit transformed) persistence of ancient practices deemed obsolete by 'rational' methods.

To begin with, it is not easy to assess how far the focus of examination has altered the functioning of the law. Foucault himself soon corrected his characterisation of contemporary modern society as a 'disciplinary society'[104] by distinguishing between different layers and rationalities in his governmentality studies. All in all, penal law procedures and sanctions are without doubt too diverse (and sometimes too banal) to subsume them under one category.[105] Nevertheless, it is obvious that the core of truth by examination—to discover not if individuals had transgressed the law but to understand the cause of the crimes and to foresee what these individuals 'might do, what they were capable of doing, what they were liable to do, what they were imminently about to do'[106]—has in some legal and political domains brought about sensitive transformations. Sex offenders are not only judged on the basis of crimes actually committed, but are evaluated for the risk of relapse (based on expert knowledge). Moreover, in the wake of the 'war on terror', there is—depending on the respective national context—a whole catalogue of preventive measures that are based on the calculation of future behaviour. Furthermore, and not only in penal law, the increasing number of cultural issues and conflicts the law is confronted with calls for an even greater recourse to extralegal knowledge, leading to the problematic epistemic institution of 'cultural expertise' operating through examination, often stipulating what someone is and not what they have done.[107]

But techniques of examination also depend on the shape of the underlying political culture, which is a factor that Foucault often neglects. Hence, the admissibility of character evidence[108] in criminal trials is rather alien to common law countries (due to the overriding principle of fairness), but a

[104] See TJF (n 7) 52 for this thesis.

[105] This point is underlined by O'Malley and Valverde (n 7) 329–30, who strongly advise against an uncritical criminological appropriation of Foucault's categories and diagnoses by arguing, for example, that for a long time fines have constituted a much larger part of criminal justice than corrective and secluding measures.

[106] TJF (n 7) 57.

[107] See L Holden (ed), *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives* (Routledge/Glass House 2011).

[108] The admission of character evidence and the evaluation of the 'person' and his social background in trial is a rewarding task for cultural comparison. See Rosen (n 76) 99–100, who highlights the importance of 'background' and personal knowledge in Islamic law.

common feature in civil legal orders which try to lay all the facts on the table. Moreover, Foucault's home country ironically stands out in this regard. A very instructive ethnographic study by Stewart Field on the procedures at the French Cour d'Assises—the court dealing with the most serious crimes—gives astonishing insights into the 'collection' of facts. Field shows how the defendant is subjected to a whole series of penetrating and detailed investigations, backed by numerous witnesses, before the trial and in court, investigations not only into the deed itself, but also into the social relations, the hobbies, the career—in short: the whole life of the defendant:

> The aim seemed to be to find out in detail who did what, when, how, and why within the context of a set of general norms about the life of an ordinary French citizen. These assumptions seemed to be part of a set of reciprocal expectations between the individual on the one hand and the state and community on the other. During the exchanges, weaknesses in state education, social aid, and vocational training, inadequacies in the support of family structures as well as the failings of the accused were routinely discussed. The effect was that one had the impression of not just judging the offence but also the life according to a positive and fairly developed notion of what a French citizen ought to be.[109]

This coheres with the French legal maxim: 'On juge l'homme, pas les faits'.[110] The purpose of this intensive examination is not only to enable an individually just decision to be reached, but the reproduction of the model of a good republican citizen. Accordingly, the expectations at trial show symbolic and ritual features, when repentance is demanded from the defendant—the trial becomes a ritual of purification that tries to bring the straying sheep back into the fold and thus exerts 'pastoral power' in Foucault's terms. Thus, this example of character evidence not only underlines the alethurgic features of trial once again, but also points to the formation of subjectivities that are implied when law searches for the truth of the person.

As to the procedure of test, it seems at first glance to be an archaic practice of giving evidence which today is found only by anthropologists describing the normative orders of certain 'primitive' communities. Taking a closer look, however, there are remnants of test in modern law. In private law matters, many legal cultures (eg those resorting to the French Code Civil) allow particular legal questions to be resolved by a decisive oath; while it is usually not the whole case that is decided this way (like the legal dispute between Antilochos and Menelaus), certain disputed facts are established based on the swearing or renouncing of an oath. Furthermore, when Harold Berman describes ordeals, as seen above, as primitive lie detectors, one can hardly elide the fact that in many legal orders the polygraph is used as a dubious

[109] S Field, 'State, Citizen, and Character in French Criminal Process' (2006) 33 Journal of Law and Society 522, 523–4.
[110] ibid, 536.

investigative tool. In the related, but even more extreme, practice of phallometry, that tries to determine the inclinations of sex offenders,[111] test and examination fuse in a very problematic manner.

Beyond particular instruments of test, the whole criminal trial style of common law countries, especially the United States, stands apart in its combination of inquisitive and testing methods, differing in many regards (foremost as to conceptions of justice and truth) from so-called inquisitorial systems developed in continental Europe. Usually, common law trials are much more antagonistic and openly competitive than trials in civil law orders: they are dominated by the parties and not by the presiding judge, who has a reputation for neutrality. The adversarial style evidently reflects the duel-like constellation Foucault considered typical of the test. Perhaps in European countries like Germany, the *idée fixe* of a correct and right decision reached by an impartial judge sometimes still holds, whereas US legal culture accepts the field of law as a battlefield that requires strict rules of the game to make the competition fair. Consequently, Elisabetta Grande has contrasted a model of 'justice as truth' with the competing model of 'justice as fairness'.[112] The underlying conceptions of truth display cultural presuppositions that largely transcend the legal sphere, as Lawrence Rosen has argued:

> In common-law countries one talks about how 'truth emerges from adversity', an image that has deep reverberations in religious ideas, educational models, political campaigns, sporting events, and one-on-one narratives of personal heroism. The adversarial trial, as a story told about the human situation, is thus a reaffirmation of—indeed a vital contributor to—a vision of the nature of truth and the human condition.[113]

Inquisitorial regimes tend to tie justice to the discovery of the substantive, ontological truth,[114] being the objective reconstruction of 'reality'. By setting the substantive or 'material' truth as the primary goal of a criminal trial in contrast to the mere 'formalised' truth,[115] they completely ignore the normative and procedural character of any fact established in legal proceedings. The opposite supposition, as articulated in common law, discards such longings for neutrality and substantive truth, with far-reaching consequences for the nature of evidence. Pieces of evidence such as witness testimony are appropriated by one party ('my witness') and not accepted as a neutral source of information to discover the truth. In addition, this 'proprietary concept of

[111] See AS Balmer and R Sandland, 'Making Monsters: The Polygraph, the Plethysmograph, and Other Practices for the Performance of Abnormal Sexuality' (2012) 39 Journal of Law and Society 593.
[112] See E Grande, 'Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth' in Jackson, Langer and Tillers (n 5) 145.
[113] Rosen (n 76) 149.
[114] See Grande (n 112) 47.
[115] See eg R Grunewald, 'Comparing Injustices: Truth, Justice, and the System' (2013/14) 77 Alb L Rev 1139, 1161, being typical of ontological and epistemological assumptions of many German jurists.

evidence'[116] does not leave the status of expert knowledge untouched. As experts are not invited by the court to give an objective opinion, but are instead presented by the parties, a 'battle of experts' is often the result.[117] Finally, this partisan conception of evidence engenders a more rigorous and openly competitive style of proof-testing by the other side, as is most notably obvious in the practice of cross-examination, which Garapon and Papadopoulos rightly call a 'test de la vérité',[118] often alien and disturbing to witnesses and trial observers from other legal traditions.[119]

Hence, a cultural comparison of legal procedures and their underlying truth conceptions can profit from the application of Foucault's categories, unfolding specific forms of blending test, inquiry and examination that are often ignored in the conventional schemes of comparative law. These categories call for being utilised beyond the context of European and US law, but this is not within the scope of this article.

4. *Conclusions*

Without ever analysing law as an independent subject and without conceiving anything resembling a legal theory, Foucault's foray into the history of truth gives precious insights for Foucault scholars as well as for research into the law. As to the former, his findings once again refute the allegation still sometimes addressed to him that he considers law to work solely through repression and denial. While this allegation has always been superficial (even with regard to *Discipline and Punish*), being disproved by Foucault's repeated look at the polymorphic working modes of law, the lectures discussed in this article add more complexity to the analysis of law's capacities and of the interaction of law with other social fields and developments. Foucault's investigation of trial procedures vividly reveals the constructive, world-making force of law. The comparative view on legal epistemology not only discloses minor variations in the rules of procedure and evidence, but a plurality of legal 'veridictions', of legitimately stating and constituting 'truth' itself. In other words, there are not only different procedural ways of getting to the 'truth', but also competing

[116] M Damaška, 'The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments' (1997) 45 Am J Comp L 839, 845.

[117] See R Shaham, *The Expert Witness in Islamic Courts* (U of Chicago Press 2010) 14–5.

[118] Garapon and Papadopoulos (n 3) 129. See Damaška (n 116) 846–7: 'Since witnesses called by one litigant appear to the other side as members of the former's team, the challenge to their testimony cannot be expected to be mild, focusing mainly on gaps and possible inconsistencies. Instead, testing easily escalates into a general assault on the witness' trustworthiness. This habit explains why observers from Anglo-American countries are struck by the absence of elaborate means of challenging witness' credibility in continental civil proceedings. So important indeed to common law lawyers is the opportunity for the vigorous attack on evidence, that testimony obtained from a witness on direct examination can in some circumstances be rejected when and if he becomes unavailable for cross-examination. Lawyers accustomed to officially controlled factfinding methods find this practice hard to understand.'

[119] For evidence from international and 'hybrid' criminal tribunals, in which multi-faced cultural conflicts came to the fore, see J Almqvist, 'The Impact of Cultural Diversity on International Criminal Proceedings' (2006) 4 JICJ 745, 757–8.

assumptions about the nature of truth in general and the aims and the potential of legal proceedings in particular. Moreover, by focusing on legal 'alethurgies', Foucault points to the pre-eminent importance of the ritual and even liturgical features of trial that engender legal validity and consolidate the established truth—not just in ancient times, but also in contemporary law. This insight might not be new for legal sociology, but tends to be forgotten in large parts of legal scholarship, which often loses sight of epistemological issues or tackles them with inadequate categories (such as with the distinction between substantive and formalised truth).

The triad of test, inquiry and examination that Foucault applies not only qualifies for diachronic comparison, but also seems useful as a way of illuminating contemporary 'procedural cultures' of law. While the previous section could supply little more than an allusion to the persistence of all three paradigms in the legal world of today, a more rigorous cultural comparison, with and certainly also beyond Foucault, could contribute to a better understanding of the deeper presuppositions of legal proceedings, thus providing a safeguard against naive conceptions of legal uniformity and making us sensitive to the conflicts arising from the interaction of legal traditions.