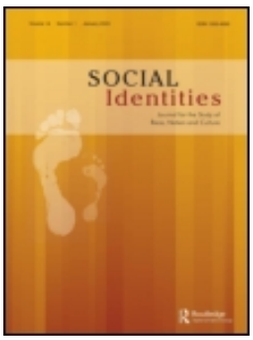

Routledge
Taylor & Francis Group

Social Identities

Journal for the Study of Race, Nation and Culture

ISSN: 1350-4630 (Print) 1363-0296 (Online) Journal homepage: https://www.tandfonline.com/loi/csid20

Truth and Juridical Forms

Michel Foucault

To cite this article: Michel Foucault (1996) Truth and Juridical Forms, Social Identities, 2:3, 327-342, DOI: 10.1080/13504639652213

To link to this article: https://doi.org/10.1080/13504639652213

Truth and Juridical Forms

MICHEL FOUCAULT
(translated by LAWRENCE WILLIAMS with CATHERINE MERLEN)
Arizona State University

TRANSLATOR'S FOREWORD: *This text was originally presented in French at a conference at the Catholic University of Rio de Janeiro in May 1973. It was subsequently translated to Portuguese by J.W. Prado for publication in the June 1974 issue of* Cardernos da PUC, *and then into French by P.W. Prado Jr, published by Gallimard, Paris, in 1994 in M. Foucault,* Dits et écrits. *This French translation was established from the Portuguese translation with the help of recordings taped during the conference. This English translation is based on the text published in 1994 by Gallimard. Footnote 1 refers to a note by the translator of this text, on the translation from the French into English. In the 1994 French translation, the translator of the Portuguese text into French indicated that the word* épreuve *was left in French in the Portuguese translation. The translator of this text has decided to keep it in French too.*

Foucault, M. (1994) `La Vérité et les formes juridiques,' in D. Defert and F. Ewald (eds) *Dits et écrits 1954–1988*, Vol. II, 1970–1975, pp. 538–646, Paris: Gallimard. This was translated from the original publication in Portuguese, M. Foucault (1974) `A verdade e as formas juridicas', Trad. J.W. Prado Jr, *Cadernos da PUC*, 1974: 16, pp. 5–133. (Discussion with M.T. Amaral, R.O. Cruz, C. Katz, L.C. Lima, R. Machado, R. Muraro, H. Pelegrino, M.J. Pinto, A.R. de Sant'Anna, at conferences at the Pontifical Catholic University of Rio de Janeiro, 21–25 May 1973.) From *Dits et écrits 1954–88*, Volume II, to be published by The New Press.

In the preceding lecture, I made reference to two forms or types of judicial resolution, litigation, contest, or dispute, present in Greek civilisation. The first form, being rather archaic, is found in Homer's writings. Two warriors confronted each other in order to know who was wrong and who was right, or who had violated the rights of the other. The task of resolving the matter led to a settled dispute, or a challenge between the two warriors. One challenged the other thus: `Are you capable of swearing under oath and in front of the gods that you have not done what I have accused you of doing?'. In such a procedure, there is neither judge, nor sentence, nor truth, nor investigation, nor testimony to find out who has told the truth. The job of deciding — not who

1350–4630/96/030327–15

was wrong, but who was right— was left to the fight, or to the challenge, or to the risks each opponent would take.

The second form is the one that unravels throughout *Oedipus the King*. In order to solve a problem which is also, in a way, the problem of criminal litigation — who killed King Laius? — a new character appears as in the old Homerian procedure: the shepherd. Deep in his cabin, yet very much an insignificant man, a slave, the shepherd saw, and because he uses this small fragment of memory, because he carries around in his discourse the account of what he saw, he is able to challenge and defeat the pride of the king or the presumption of the tyrant. The witness, the humble witness, by the sole means of the game of truth that he witnessed and enunciates, can single-handedly conquer the most powerful of them all. *Oedipus the King* is a résumé of sorts of the history of Greek law. Several of Sophocles' plays, like *Antigone* and *Electra*, are a type of theatrical ritualisation of the history of law. This dramatisation of the history of Greek law provides us with a summary of one of the great conquests of Athenian democracy: the history of the process by which the people took hold of the law of judging, killing the truth, pitting the truth against its own superiors, and judging those who governed them.

The great conquest of Greek democracy, this law of witnessing and opposing truth to power, consisted of a long process born and inaugurated definitively in Athens throughout the fifth century. This law of opposing one truth without power against a power without truth gave way to a series of great cultural forms, characteristic of Greek society.

First, there was elaboration of what one could call the rational forms of proof and demonstration: how to produce the truth, under what conditions, which forms to observe, which rules to apply? These forms include philosophy, rational systems, and scientific systems. Second (and maintaining a link with the preceding forms), there developed an art of persuasion — convincing the people of the truth of what one says — and obtaining victory for the truth or, moreover, by the truth. Here we encounter the problem of Greek rhetoric. Third, there is the development of a new type of knowledge: knowledge through witnessing, through memory, through inquiry. This is a knowledge of investigation that historians like Herodotus just before Sophocles, naturalists, botanists, geographers, and Greek travellers would develop and that Aristotle would totalise and expand to encyclopedic proportions.

Hence, in Greece there was a great revolution of sorts over the course of a series of fights and political battles. This revolution resulted in the elaboration of a determined form of judicial discovery, or discovery of the truth. This forged the matrix or the model by which a series of other types of knowledge — philosophical, rhetorical, and empirical — were able to develop and characterise Greek thought.

Curiously, the story of the birth of investigation has remained forgotten and lost. However, several centuries later during the Middle Ages, this story was told again in different form.

During the European Middle Ages, we see a second birth of the inquiry, which is slower and more obscure, but which achieved much greater success than the first. The Greek method of investigation had remained stationary; it had

not succeeded in creating the foundations a rational knowledge capable of developing indefinitely. However, the investigation born in the Middle Ages would assume extraordinary dimensions. Its destiny would be coextensive practically with the culture called `European' or `Western'.

The old law that regulated litigation between individuals in Germanic societies (at the time when these societies came into contact with the Roman Empire) was very close, in a certain way and in some of its forms, to archaic Greek law. It was a system of laws in which the investigation did not exist, because this litigation between individuals was regulated by challenges and ordeals.

The former Germanic law at the time Tacitus began to analyse this curious civilisation which spread as far as the borders of the Empire is schematically characterised in the following way.

First, there is no public action, which means that there is no one (representing society, the collective group, power or the one who holds power) in charge of making accusations against individuals. In order to have a penal trial, there had to be a wrong: someone at least had to pretend to have been wronged or victimised. This alleged victim needed to point out the offender, and the victim could be the person directly offended or part of the family, thus assuming the role of parent. What characterised a penal case was always a type of duel, whether opposition between individuals, families, or groups. There was no intervention by any representative of authority. This was a matter of a claim being made by one individual regarding another, and only included the intervention of these two characters: the plaintiff and the defendant. We know of only two curious cases in which there was a sort of public action: treason and homosexuality. The community intervened, considering itself as having been wronged, and collectively demanded reparations from the individual. Consequently, the first condition for bringing a penal lawsuit in old Germanic law was the existence of two characters and not the existence of a third mediating party.

The second condition was that once the penal action was introduced, once an individual made a claim of being victimised and sought reparation from another, judicial liquidation needed to be conducted as a continuation of the fight between the individuals. A private, individual war developed and the penal procedure would only be the ritualisation of this fight between the individuals. Germanic law did not oppose war and justice, and it did not define justice and peace. On the contrary, it supposed that the law was a certain singular subject and was regulated to conduct war between individuals and produce acts of vengeance.

The law was therefore a regulated way of fighting a war. For example, when someone dies, a close relative may execute the judicial practice of vengeance, which means to vow to kill the person who in principle is the assassin. To enter into the domain of the law means killing the assassin, but doing this according to certain rules and certain forms. If the assassin has committed the crime in this manner or that, it would be necessary to kill him by cutting him into pieces or by cutting off his head and placing it on a stand at the entrance of his home.

These acts would ritualise the gesture of vengeance and characterise it as judicial vengeance. So the law was the ritual of war.

The third condition is that if it is true that there is no opposition between law and war, it is no less true that it is possible to come to an agreement, which means interrupting these regulated hostilities. Ancient Germanic law always offers the possibility of coming to an agreement or a transaction throughout this series of reciprocal, ritual vengeance. In this procedure of Germanic law, one of the two adversaries buys back his right to be at peace and to escape the possible vengeance of his adversary. He buys back his own life, and not the blood which he has shed, while thus putting an end to war. The interruption of the ritual war is the third and final act of the judicial drama in ancient Germanic law.

The system that regulates conflicts and litigations in Germanic societies of this period is thus entirely governed by fighting and transactions; it is a test of strength which can be terminated by an economic transaction. It is a procedure which does not permit intervention by a third individual, who would be placed between the two others as the neutral element searching for the truth while trying to know which one of the two has spoken the truth. This is the way in which ancient Germanic law was made up, before the invasion of the Roman Empire.

I will not spend any time on the long series of events that prompted Germanic law to enter into rivalry, competition, and sometimes complicity with the Roman law ruling in the territories occupied by the Roman Empire. Between the fifth and tenth centuries of our era, there were a series of penetrations and conflicts between these two systems of law. Upon the collapse of the Roman Empire, whenever a state emerged, each time a state-like structure came into being, the Roman law, the old law of the state, was revived. Under the reign of the Merovingians and especially during the time of the Carolingian Empire, Roman law surpassed Germanic law in a certain way. Moreover, each time that there was a dissolution of these embryos, or traces, of a State, Germanic law reappeared. When the Carolingian Empire dissolved in the tenth century, Germanic law triumphed, and Roman law fell into oblivion for several centuries, only to reappear slowly at the end of the twelfth and during the thirteenth century. Thus, feudal law was essentially like Germanic law. The former displayed no elements of the procedures of investigation nor establishment of the truth as in Greek societies or the Roman Empire.

In feudal law, litigation between two individuals was settled by the system of the *épreuve*,[1] the burden of proof. When an individual presented himself as the plaintiff bearing a claim or a dispute by accusing someone else of having killed or stolen, the litigation between the two was resolved by a series of tasks, accepted by both parties and to which they were both subject. This system was a way of proving not the truth, but the strength or weight or importance of the plaintiff.

First, there were social *épreuves*, which were *épreuves* of the social importance of an individual. In old Burgundy law of the eleventh century, when someone was accused of murder, the accused could perfectly establish his innocence by gathering twelve witnesses on his side. These witnesses would swear that he had not committed the murder. The testimony was not based on the fact that

they would have seen the alleged victim in person, nor was it based on an alibi for the alleged murderer. In order to testify as a witness that an individual had not killed anyone, it was necessary to be a relative of the accused. It was necessary to have a social relationship of kinship with the person, which guaranteed not his innocence, but rather his social importance. This displayed the support that any individual had the power to obtain — his weight, his influence, the importance of the group to which he belonged — and the persons prepared to support him in a battle or a conflict. The proof of innocence, that he did not commit the act in question, was not at issue in the testimony.

Second, there were types of verbal *épreuve*. When an individual was accused of something (robbery or murder), he had to respond to that accusation by a certain number of formulae, guaranteeing that he had not committed the murder or the robbery. By enunciating these formulae, he could fail or succeed. In certain cases, the formula was enunciated, but the accused lost. This loss was not due to having said something false nor because it was proved to be a lie, but because the formula was not enunciated as it was supposed to have been. A grammatical error or a change of words invalidated the formula, not the truth trying to be established. Confirmation of the fact that at the level of the *épreuve* it was only a matter of a verbal game is found in the case of minors, women and priests. In such cases the accused could be replaced by another person. This other person, who would later become known in the history of law as the lawyer, was the one who would pronounce the formulae in place of the accused. If this person committed an error in the enunciation, the one he represented lost the case.

Third, there were old magical-religious *épreuves* of taking oath. The accused was asked to take the oath and if he did not dare or hesitated, he lost the case.

Finally, there were the famous physical *épreuves* — called ordeals — which consisted of submitting a person to a sort of game or fight with his own body, in order to observe whether the person would succeed or fail. For example, at the time of the Carolingian Empire, there was a popular *épreuve* imposed on the person accused of murder in certain regions of the North of France. The accused was supposed to walk on coals and, two days later, if he still had scars, he lost the case. There were yet other *épreuves* like the ordeal by water, which consisted of tying a person's right hand to his left foot before throwing him into the water. If the person did not drown, he lost the trial, because the water itself did not accept him well; and if the person drowned, he won the trial, since the water had not rejected him. All of these confrontations between the individual or his body and natural elements are a symbolic transposition of the actual fight of individuals among themselves, the semantics of which should be studied. Actually, it is always a matter of a battle and knowing who is the strongest. In old Germanic law, the trial was simply the regulated, ritualised continuation of war.

I could have given more convincing examples, such as the fights between adversaries throughout a trial, physical fights, or the famous judgments of God. When two individuals confronted each other concerning ownership of goods or murder, it was always possible for them — if they were in agreement — to fight. They needed to observe the pre-determined rules — length of the fight,

types of weapons — in front of an audience present only to ensure the legality of what occurred. The winner of the combat won the trial, without having been given the chance to tell the truth or, rather, without having been asked to prove the truth of his claim.

In the system of the feudal judicial *épreuve*, it was a matter not of looking for the truth, but a binary structured game or test. The individual accepts the *épreuve* or relinquishes. If he relinquishes and does not want to attempt the *épreuve*, he loses the trial in advance. If the *épreuve* is undertaken, he succeeds or fails: there are no other possibilities. The binary form is the first characteristic of the truth.

The second characteristic is that the *épreuve* ends with victory or defeat. There is always someone who wins and someone who loses; the stronger one and the weaker one; a favourable or unfavourable ending. At no time does anything like a sentence appear, as emerges at the end of the twelfth century and the beginning of the thirteenth. The sentence consists in the declaration — by a third party — that a certain person, having spoken the truth, is right; another, having spoken a lie, is wrong. Consequently, sentencing does not exist in feudal law: distinguishing between individuals in terms of truth and error plays no such role; there is simply victory or defeat.

The third characteristic is that the *épreuve* is automatic. A third party is not necessary to observe the two adversaries. It is the balance of strength, luck, vigour, physical resistance, and intellectual agility that sets the individuals apart, according to a mechanism which is developed automatically. Authority intervenes only as a witness to the legality of the procedure. When judicial *épreuves* are developed, someone is present bearing the title of judge — the political sovereign or someone designated with the mutual consent of the two adversaries — in order simply to see that the fight is carried out according to the rules. The judge has no testimony concerning the truth, only concerning the legality of the procedure.

The fourth characteristic is that within this mechanism the *épreuve* does not name or localise the one who told the truth. Rather it establishes that the strongest one is, at the same time, the one who is right. In a war or a non-judicial *épreuve*, one of the two is always the stronger, but that does not prove that he is right. The judicial *épreuve* is a way of ritualising war or transposing it symbolically. It is a way of giving it a certain number of derived, theatrical forms so that the stronger one will be designated, by this fact, as the one who is right. The *épreuve* operationalises the law, a switch of force into the law — a type of shifter[2] which allows the passage from force to law. The *épreuve* does not have an apophantic function; it does not have the function of showing the truth, contesting the truth, or revealing it. It is an operator of the law and not an operator of truth nor an apophantic operator. This is what the *épreuve* consisted of in ancient feudal law.

This system of judicial practice disappears at the end of the twelfth century and during the thirteenth. During the entire second half of the Middle Ages, we witness the transformation of these old practices and the invention of new forms of justice, new forms of practice and judicial procedures. Forms which are absolutely capital for the history of Europe and the history of the entire world,

in so much as Europe violently imposed her yoke across the world. What was invented during this re-elaboration of law is something that does not concern the content so much as the forms and conditions of possibility of knowing, a determined way of knowing. Invented in law at that time was a determined way of knowing, or a condition of the possibility of knowing, the destiny of which would become pre-eminent in the Western world. This form of knowing is the inquiry, which appeared for the first time in Greece and remained dissimulated for many centuries after the fall of the Roman Empire. The inquiry, which resurged during the twelfth and thirteenth centuries, however, is of a rather different type from the example we found in *Oedipus the King*.

I have presented you with some fundamental traits of the old judicial form. Why does the old judicial form [...] disappear at that time? One can say, schematically, that a fundamental trait of Western European feudal society is that the circulation of goods is relatively unassured by commerce. Circulation is assured by mechanisms of heritage or testamentary transmission and, especially, by bellicose, military, extra-judicial, or judicial disputing. One of the most important means of insuring the circulation of goods in the early Middle Ages was war — the plundering and occupation of land, a castle, or a city. We are at the shifting boundary between law and war, in so much as law is a certain way of continuing war. For example, someone uses armed force to occupy land, a forest, any kind of property, and at that time enforces the validation of his rights. He begins a long dispute at the end of which the one who does not possess armed force and wants to recover his land obtains the departure of the invader only by means of a payment. This agreement is situated at the border between the judiciary and war; it is also one of the most frequent ways for someone to become wealthy. In most cases, the process of acquiring wealth, the circulation and exchange of goods, and bankruptcies occurred at the beginning of the feudal period according to this mechanical process.

It is interesting, by the way, to compare feudal society in Europe and the so-called `primitive' societies presently studied by ethnologists. In the latter, the exchange of goods takes place through dispute and rivalry, presented especially in the form of prestige, with manifestations and signs. In feudal society, the circulation of goods is also effected in the form of rivalry and dispute. However, the rivalry and dispute are a matter of prestige, though they are rather bellicose. In so-called `primitive' societies, riches are exchanged in performances of rivalry because they are not only goods, but also signs. In feudal societies, riches are exchanged not only because they are goods and signs, but because they are goods, signs, and arms. Wealth is the means by which one can exercise violence as well as the power over life or death of others. War, judicial litigation, and the circulation of goods throughout the Middle Ages are part of a great unique and fluctuating process.

There is, therefore, a double tendency characteristic of feudal society. In one way, there is a concentration of arms in the hands of the most powerful, who tend to prevent their use by the least powerful. To conquer someone is to take away his arms, leading to a concentration of armed power, which — in feudal states — gave more strength to the powerful and, ultimately, to the most

powerful of all: the monarch. In another way, and simultaneously, there were judicial actions and litigation which were a way of making goods circulate. It is thus understood why the most powerful sought to control judicial litigation, preventing these disputes from developing spontaneously between individuals. This is also why the most powerful tried to take over the judicial and litigious circulation of goods. This implied the concentration of arms and judicial power, which was forming at the time in the hands of these individuals.

The existence of executive, legislative, and judicial power appears to be rather an old idea in constitutional law. Actually, it is a recent idea dating from the time of Montesquieu. What interests us here, however, is seeing how something like judicial power was formed. In the early Middle Ages, there was no judicial power. Liquidation was done between individuals. One asked the most powerful person (or the one who exercised sovereignty) not to carry out justice, but to observe — according to his political, magical, and judicial powers — the legality of the procedure. There was no autonomous judicial power, nor was there even judicial power in the hands of the one who held control of power with arms or political force. Insofar as it insured the circulation of goods, the right to command and control the judicial dispute — because it was a means of accumulating wealth — was usurped by the wealthiest and the most powerful.

The accumulation of wealth and power of arms and the constitution of judicial power in the hands of a few people are the same processes prevalent in the early Middle Ages and reached its fruition at the time of the formation of the first great medieval monarchy, in the middle or at the end of the twelfth century. At that time things appear that are totally new in regard to feudal society, the Carolingian Empire, and the old rules or Roman law.

1. It is a justice that is no longer a dispute between individuals and free acceptance by them of a certain number of rules of liquidation, but which, to the contrary, would be imposed from the top on individuals, on adversaries during challenges. Hereafter, individuals will no longer have the right — regularly or irregularly — to resolve their litigation; they will have to submit themselves to an exterior power, which is imposed as judicial power and political power.

2. A totally new character appears, without precedent in Roman law: the public prosecutor. This curious character, who appears in Europe around the twelfth century, will be introduced as the representative of the sovereign — the king or master. When there is a crime, an offence, or a dispute between two individuals, the state prosecutor presents himself as the representative of a power wronged by the sole fact that an offence or crime took place. The state prosecutor speaks for the victim, backing up the one who is bound to lodge the complaint by saying, `If it is true that this man has wronged another, I, representative of the sovereign, can affirm that the sovereign, his power, the order he enforces, and the law he has established have been equally wronged by him. Thus, I too place myself against him'. The sovereign and the political power in this way reinforce and, little by little, replace the victim. This phenomenon, which is absolutely new, will permit the political power to

control judicial proceedings. The state prosecutor, therefore, is introduced as the representative of the sovereign injured by wrongdoing.

3. An absolutely new notion appears: infraction. While the judicial drama was taking place between two individuals — the victim and the accused — it was a matter of wrong that an individual had done to the other. It was a question of knowing, where there had been a wrongdoing, who was right. The moment the sovereign or his representative, the state prosecutor, says, `I too have been wronged by the offence', it signifies that the wrongdoing is not only an offence of one individual against another but also an offence by one individual against the state (the sovereign as the representative of the state), or an attack not against the individual but against the law of the state itself. Thus, the notion of crime or the old notion of wrong is replaced by that of infraction. Infraction is not a wrong committed by an individual against another; it is an offence or injury of an individual against the order, the state, society, sovereignty, or the sovereign. Infraction is one of the great inventions of medieval thought. We thus see how state-controlled power confiscates the entire judicial procedure, the entire mechanism by which inter-individual litigation is liquidated in the early Middle Ages.

4. There is one final discovery or final invention as diabolical as the state prosecutor and the infraction: the state, or better yet, the sovereign (since one cannot speak of the state at this time). The sovereign is not only the injured party, but the one who demands reparation. When an individual loses a trial, he is declared guilty and still owes reparation to his victim. However, this reparation is absolutely not like that of ancient feudal law or ancient Germanic law. It is no longer a question of buying peace by giving money to one's adversary. The guilty party will be forced not only to make reparations to the individual for the offence committed, but also to the sovereign, the state, and the law. Thus appears, with the mechanism of fines, the massive mechanism of confiscation. Confiscation of goods is for the great, newly-born monarchies one of the major ways of becoming rich and expanding properties. Western monarchies were founded on the appropriation of justice, which allowed them to apply these mechanisms of confiscation. This is the political background of this transformation.

It is now necessary to explain the establishment of the sentence and how one arrives at the end of a procedure where one of the main characters is the state prosecutor. If the main victim of an infraction is the king and if it is the state prosecutor who first lodges a complaint, one understands that judicial resolution can no longer be obtained by the mechanisms of the *épreuve*. The king and his representative — the prosecutor — cannot risk their own lives or their own goods each time a crime is committed. The state prosecutor and the accused do not meet on equal terms as in the case of a fight between two individuals. It is necessary to find a new mechanism, in order to know if someone is guilty or not, which is no longer like the *épreuve* nor like the fight between two adversaries. The bellicose model cannot be applied.

Which model will thus be adopted? This is one of the great moments in the history of the West. There were two models for solving the problem. First, there

was an intra-judicial model. In feudal law and ancient Germanic law, there was a case where the collectivity, in its totality, could intervene, accuse someone, and obtain conviction: this was called deliberate offence — where an individual was surprised at the exact moment of committing the crime. At that moment, the people who surprised him had the right to take him to the sovereign — the holder of political power — and say, `We have seen him doing a certain thing and, consequently, he must be punished or made to make reparation'. Thus, in the very sphere of the law, there was a model of collective intervention and authoritative decision-making for the liquidation of judicial litigation. This was the case of the deliberate offence, when the crime was discovered while in progress. This model, obviously, could not be used when the individual was not surprised during the act of crime, which is most frequently the case. The problem, therefore, was knowing under which conditions one could generalise the model of deliberate offence and use it in this new system of law which was being born and entirely commanded by the political sovereign and by his representative.

A second model was preferred. This was an extra-judicial model, which — in its own right — is subdivided into two parts. Better yet, it had a double existence or insertion during this period. It is a model of inquiry that had existed at the time of the Carolingian Empire. When representatives of the sovereign had to resolve a problem of law, power, or a matter of taxes, mores, landed wealth, or property, one proceeded to something perfectly ritualised or regulated: the *inquisitio* or inquiry. The representative of power called the persons considered apt to be familiar with mores, the law, or titles of property. He gathered these persons — making them swear to tell the truth, what they knew, what they had seen, or what they knew from having heard it said. Then, left alone, these persons deliberated. At the end of their deliberations, they were asked for the solution to the problem.

This was a method of administrative management, which the employees of the Carolingian Empire practised regularly. It was still used after its dissolution by William the Conqueror in England. In 1066, the Norman conquerors occupied England; they seized Anglo-Saxon goods and entered into litigation with the native population and among themselves concerning the possession of those goods. William the Conqueror, in order to put everything in order and integrate the new Norman population with the old Anglo-Saxon population, had a large inquiry into the state of property, taxes, land income, etc. Hence, the famous Domesday Book, which remains the only global example of an old administrative practice of the Carolingian emperors.

This procedure of administrative inquiry has some important characteristics:

1. political power is the essential component;

2 power is exercised first by asking questions and interrogating. It does not know the truth and looks for it;

3. power — in order to determine the truth — is for notables and those considered likely to know, given their situation, age, wealth, notoriety, etc;

4. contrary to what is seen at the end of *Oedipus the King*, the king consults notable people without forcing them to tell the truth through the use of violence, pressure, or torture. They are asked to assemble freely and render a collective opinion. They are allowed collectively to say what they esteem to be the truth. We thus have a way of establishing the truth which is totally linked to administrative management of the first major state-like form known in the West. The inquiry procedures, however, were forgotten during the tenth and eleventh centuries in Europe — during the early Middle Ages — and would have been totally forgotten had the Church not used them in the management of its own goods. The analysis, however, becomes a little more complicated. For if the Church once again used the Carolingian method of inquiry, it is because it already had practised it before the Carolingian Empire for reasons more spiritual than administrative.

Actually, there was a practice of inquiry in the Church of the early Middle Ages — the Merovingian and Carolingian Church. This method was called *visitatio* and consisted of the visit the bishop was required to make statutorily — by going everywhere in the diocese. This method was then adopted by the major monastic orders. Upon arriving at a determined place, the bishop first instituted the *inquisitio generalis* — the general inquisition — by questioning the elderly and the notable people who were the most virtuous and knowledgeable. They were supposed to know and be familiar with what had happened during his absence, especially if there had been a mistake, crime, etc. If this inquiry concluded with an affirmative response, the bishop continued to the second stage, called the *inquisitio specialis,* or special inquisition, which consisted of looking for who had done what and truthfully determining the nature and the perpetrator of the act. Finally, a third element should be noted: the confession of the guilty party could interrupt the inquisition at any stage of its general or special forms. The one who had committed the crime could identify himself and proclaim publicly, `Yes, a crime has been committed. It consists of such and such. I am the offender'.

This spiritual, essentially religious, form of the ecclesiastical inquiry survived throughout the Middle Ages, having acquired administrative and economic functions. When the Church became the sole coherent economic-political body in Europe during the tenth, eleventh, and twelfth centuries, the ecclesiastical inquiry was simultaneously a spiritual inquiry of sins, mistakes, and crimes committed and an administrative inquiry into the manner in which the goods of the Church were administered and profits were collected, gathered, distributed, etc. This model of the inquiry — both religious and administrative — survived until the twelfth century, when the state which was being born, or rather the emerging figure of the sovereign as the source of power, began confiscating judicial procedures. These judicial procedures can no longer function according to the system of trial by ordeal. In what way, then, will the state prosecutor establish whether someone is or is not guilty? The spiritual and administrative model — religious and political — the way of directing, surveying, and controlling souls is found in the Church: the inquiry was considered a look into goods and wealth as well as hearts, acts, and intentions. It is this model which would be re-used in judicial proceedings. The state

prosecutor would do the same thing that the ecclesiastical visitors did in their parishes, dioceses, and communities. He would attempt to establish by *inquisitio* (by inquiry) whether there was a crime, which one, and who committed it.

This is the hypothesis I would like to develop. The inquiry had a double origin: an administrative origin linked to the emergence of the state during the Carolingian era, and a religious or ecclesiastical origin present throughout the Middle Ages. It is this procedure of inquiry that the state or crown prosecutor — the new-born monarchical justice — used to fill the function of the deliberate offence, which I have discussed previously. The problem was knowing how to extend the *flagrante delicto* to crimes that were not in the domain of current events; the problem was also knowing how the crown prosecutor could bring the guilty party before a judicial proceeding which exercised power if he did not know who was guilty, since there had been no deliberate offence. The inquiry would substitute for the deliberate offence. If one actually were able to assemble persons who could, under oath, guarantee that they had seen, knew, and were aware of the situation; if it were possible to establish through them that something actually took place, there would indirectly be — through the intermediate inquiry of the persons who knew — the equivalent of a deliberate offence. Moreover, one would be able to deal with gestures, acts, offences, and crimes, which were no longer a matter of current events, as if they were apprehended during a deliberate offence. Here we have a new way of prolonging the present events and transferring them from one time to another and having them seen and known, as if these events were still present or current. This insertion of the inquiry's procedure that made the events up-to-date, contemporary, sensitive, immediate, and true as though one were present at the actual time constitutes a major discovery.

We can draw some conclusions from this analysis.

1. It is common to oppose the old ordeals of barbaric law to the new, rational procedure of inquiry. I have previously evoked the different ways by which one tried to establish who was right in the early Middle Ages. We have the impression that they are barbaric, archaic, irrational systems. We remain impressed by the fact that we had to wait until the twelfth century in order finally to reach, with the procedure of inquiry, a rational system of establishing the truth. I do not believe, however, that the procedure of inquiry is simply the result of progress of rationality. It is not through rationalising judicial procedures that one reaches the procedure of inquiry. It is an entire political transformation, a new political structure, that rendered not only possible but necessary the use of this procedure in the judicial domain. Inquiry in Medieval Europe is above all a process of government, a technique of administration, or a mode of management; in other words, the inquiry is a determined way of exercising power. We would be mistaken if we saw the inquiry as the natural result of a reason which acts by itself, is elaborated, and makes its own progress. We would be mistaken also if we thought that what was being elaborated was an effect of knowledge or a subject of knowledge.

   No account of history presented in terms of the progress of reason or refinement of knowledge can account for the acquisition of the rationality of

inquiry. Its emergence is a complex political phenomenon. It is the analysis of political transformations in medieval society that explains how, why, and at what time we witness this way of establishing the truth based on completely different judicial procedures. No reference to a subject of knowledge and an internal history could account for it. It is only the analysis of the political force at play here and relationships of power that can explain the emergence of the inquiry.

2. The inquiry is derived from a certain type of power relation and a way of exercising power. It is introduced into law by the Church and, consequently, it is impregnated with religious categories. In the conception of the early Middle Ages, the wrong committed was essential, or what happened between the two individuals; there was no fault or infraction. Fault, or sin, or moral guilt did not intervene whatsoever. The problem was knowing if there had been an offence, who had committed it, and whether the alleged victim was capable of enduring the *épreuve* he proposed to his adversary. There was no fault, or guilt, or relationship with sin. However, from the time the inquiry was introduced into the judicial practice, it brought with it the important notion of infraction. When an individual wrongs another, there is always, *a fortiori*, a wrong committed against sovereignty, the law, and power. In addition, given all the religious implications and connotations of the inquiry, a wrong will be a moral fault, almost religious or with religious connotations. Around the twelfth century, we thus have a strange conjunction between the breach of the law and religious fault. To offend the sovereign and commit a sin are two things that begin to converge. They will be profoundly united in classical law. We are not yet totally delivered from this conjunction.

3. The inquiry, which appears in the twelfth century as a consequence of this transformation within political structures and relationships of power, has entirely re-organised (caused the re-organisation of) all the judicial practices of the Middle Ages, the classical period, and even those of the modern era. More generally, this judicial inquiry was diffused through many other domains of social and economic practice and many domains of knowledge. It is from these judicial inquiries conducted by prosecutors of the crown that a series of inquiry procedures was established starting in the thirteenth century.

Some of these procedures were mainly administrative or economic. Thus, thanks to inquiries concerning the population, the level of wealth, the quality of money and resources, royal agents insured, established, and augmented royal power. In this way a comprehensive knowledge of economics and economic administration of states was accumulated at the end of the Middle Ages and during the seventeenth and eighteenth centuries. From that time forward, a regular form of state administration, transmission, and continuity of political power was established, as well as sciences such as political economy and statistics.

These techniques of inquiry were equally diffused throughout domains not directly linked to exercising political power: the domains of knowledge or wisdom in the traditional sense of the word.

From the fourteenth and fifteenth centuries on, there appear types of inquiry that attempt to establish the truth from a certain number of accounts carefully gathered in areas such as geography, astronomy, and meteorology. In particular, there appeared a technique of travelling — a political enterprise of exercising power and an enterprise of curiosity and acquisition of knowledge — that ultimately led to the discovery of the Americas. All the great inquiries that dominated at the end of the Middle Ages are, actually, the unfolding and dispersion of this first form or matrix which was born in the twelfth century.

Even areas such as medicine, botany, and zoology are — as of the sixteenth and seventeenth centuries — irradiations of this process. The whole great cultural movement, that after the twelfth century begins to prepare for the Renaissance, can be defined for the most part as one of developing and expanding the inquiry as a general form of knowledge.

While the inquiry was developed as a general form of knowledge from which the Renaissance would open up, the *épreuve* tends to disappear. There are only traces left of the *épreuve*, specifically in the famous form of torture already linked to the preoccupation with obtaining a confession, that is, the verification ordeal.

One can make a whole story out of torture by situating it between the procedures of the *épreuve* and the inquiry. The *épreuve* tends to disappear in judicial practice; it also disappears from the domains of knowledge. One could point out two examples.

First, there is alchemy. Alchemy is a science which uses the ordeal as a model. It is a matter of holding an inquiry in order to know what is happening or to know the truth. It is essentially a confrontation between two forces: that of the alchemist who is searching and that of nature which is dissimulating its secrets; darkness and light; good and evil; Satan and God. The alchemist takes part in a fight in which he is both spectator — the one who will watch the unravelling of the combat — and one of the combatants, which means he can either win or lose. One can say that alchemy is a chemical and naturalistic form of *épreuve*. We have confirmation that alchemistic knowledge is essentially something acquired through the fact that it is absolutely not transmitted or accumulated as the result of inquiries that would have uncovered the truth. Alchemistic knowledge is transmitted only in the form of secret or public rules of procedures: this is how it must be done, this is how to act, here are some principles to respect, which prayers to say, which texts to read, and which codes must be present. Alchemy essentially constitutes a body of judicial rules and procedures. The disappearance of alchemy and the fact that a new type of knowledge is comprised of things totally outside its domain is owed to having taken the matrix of the inquiry as a model. All knowledge from inquiry — naturalistic, botanical, mineralogical, and philological — is absolutely foreign to alchemistic knowledge which respects the judicial model of *épreuve*.

Second, the medieval university at the end of the Middle Ages can also be analysed in terms of the opposition between the inquiry and *épreuve*. In medieval universities, knowledge was manifested, transmitted, and authentic-

ated through determined rituals, of which the most famous and well-known was the *disputatio*, or the dispute. This was a confrontation between two adversaries who used verbal weapons: rhetorical procedures and demonstrations essentially based on appeal to authority. One did not call on witnesses of the truth, but on witnesses of strength. In the *disputatio*, the more `authors' one of the participants had on his side, the more he could invoke witnesses of authority, strength, and gravity — and not witnesses of the truth — the greater chance he would have of coming out victorious. The *disputatio* is a form of proof, a manifestation of knowledge and authentification of knowledge that respects the general scheme of the *épreuve*. Medieval knowledge, and especially the encyclopedic knowledge of the Renaissance (like that of Pico del la Mirandola) which clashes with the medieval form of the university, would ultimately become a type of knowledge similar to that derived from the inquiry. Having seen and read the texts, and knowing what has actually been said; knowing what has been said as well as the nature of the subject spoken about; verifying what the authors said by observing nature; using the authors no longer as authority, but rather as witnesses — all this would constitute one of the great revolutions in the form of transmitting knowledge. The disappearance of alchemy and the *disputatio*, or rather the fact that the latter was regulated by completely decaying university forms and as of the sixteenth century no longer presented any current events, actuality, or effectiveness in real forms of authenticating knowledge, is one of the numerous signs of conflict between inquiry and *épreuve* and of the triumph of the inquiry over the *épreuve* at the end of the Middle Ages.

In conclusion, we could say the inquiry is not a question of content, but rather a form of knowledge which is at the intersection of a type of power and a certain number of contents of knowledge. Those who try to establish a relationship between knowledge and the political, social, or economic structures in which this knowledge is embedded are used to establish this relationship through the intermediary of conscience or the subject of knowledge. It seems to me that the true intersection between the politico-economic processes and the conflicts of knowledge could be found in these forms which are at the same time modalities or ways of exercising power and ways of acquiring and transmitting knowledge. The inquiry is precisely a political form, a form of management and exercising power which — through the judicial institution — has become a way in Western culture of authenticating truth, acquiring things which will be true, and transmitting those things. The inquiry is a form of power-knowledge. It is the analysis of these forms which must lead us to the strictest analysis of the relationships between the conflicts of knowledge and their politico-economic determination.

Notes

1. The *épreuve* is a trial by ordeal.
2. In English in the French text.